SAMUEL FREEMAN

# Original Meaning, Democratic Interpretation, and the Constitution

The Supreme Court's role in our constitution has always been in dispute. Jefferson saw judicial review as "judicial supremacy," the abolition of separation of powers and usurpation of democratic rule. Debate now centers on different issues, but similar criticisms remain. The most frequent argument against the controversial decisions of the Warren Court era (often raised by dissenting judges) is that the Court did not interpret the Constitution, but relied on judges' personal moral views to create rights without bases in it.

This criticism has acquired a peculiar legitimacy among many legal scholars. There are, it is often said, two approaches to the Constitution. The first, "interpretivism," involves deciding constitutional issues by enforcing norms explicitly stated or clearly implied in the written constitution. The second, "non-interpretivism," goes beyond these references to enforce norms that cannot be discovered within the "four corners of the document."[1] On what is seen as the purest interpretivist view, judges are to expound the Constitution by the plain meaning of its terms, and when these meanings are controversial, they are to settle them by original meanings. Original meaning is discovered, some hold, by looking to the intentions of the framers; others say it is found by examining the common understanding of constitutional terms at the time provisions were ratified. Again, some argue that specific intentions and understandings

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1. I rely on John Ely's definitions in *Democracy and Distrust* (Cambridge, Mass.: Harvard University Press, 1980), pp. 1–2.

are what count, while others say courts should enforce the abstract political principles the Constitution was originally meant to establish, which might run contrary to political practices accepted then.[2] But whatever their differences, all true originalists agree that appeal to anything other than facts in the distant past to resolve disputed constitutional provisions distorts the text's meaning.

The interpretivism/non-interpretivism distinction presents a false dichotomy. No conscientious judge would acknowledge that he is doing anything other than interpreting the Constitution, and no lawyer would ask a court to do otherwise. This distinction puts debate about the meaning of the Constitution on the wrong plane. It suggests that the issue is a theoretical dispute about the nature of language and interpretation, ultimately to be resolved by literary or semantic theory, hermeneutics, or the philosophy of language. But at their deepest level these debates turn on political questions regarding the nature of democracy, the place of a written constitution within it, and the role of judicial review in a democratic constitution. Depending on how these questions are resolved, there are good and bad ways to interpret the Constitution. It does not advance debate to insist that some are engaged in a different enterprise altogether.

One of the primary reasons originalists cite to support their doctrine is that any other approach is inconsistent with democracy.[3] The thought

2. Robert Bork once argued for framers' intentions ("Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 [1971]: 1–35). He now says that the ordinary meanings of words at the time of enactment should govern interpretation. These meanings should be decided by looking to "what the ratifiers understood themselves to be enacting" (*The Tempting of America* [New York: Free Press, 1990], p. 144). Bork still appeals to framers' intentions to help decide original meanings. Also, he contends that the subjective or counterfactual intentions of framers (how they would respond to contemporary issues) is not controlling. What is important is the "principle or stated value that the ratifiers wanted to protect against hostile legislation" (*Tempting*, pp. 162–63, 167–70). For example, though the ratifiers of the equal protection clause did not aim to desegregate public schools, they intended a principle of racial equality that requires it. They did not enact a principle requiring other kinds of equality (pp. 74–84).

3. Bork says that "to oppose original understanding and judicial nominees who insist upon it [is] profoundly undemocratic, and it is dangerous to the long-term health of the American Republic" (*Tempting*, p. 178; also pp. 6, 143). William Rehnquist says that "judicial review has basically antidemocratic and antimajoritarian facets"; he rejects any "end run around popular government" by the Court, and cannot judicially endorse rights not "within the four corners" of the Constitution ("The Notion of a Living Constitution," *Texas Law Review* 54 [1976]: 699, 706). Antonin Scalia says: "Originalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system" (Origi-

here is that judicial review is an undemocratic institution, since it gives power to officials who are not electorally accountable to overrule decisions made by those who are. For originalists, this does not mean that judicial review is illegitimate, since it is sometimes needed to enforce the Constitution.[4] But for judges to do that in a manner compatible with the democratic scheme this document sets in place requires that they enforce the meanings of constitutional terms at the time they were accepted by the people's elected representatives. When judges overrule laws by appealing to reasons of justice and fundamental rights not mentioned explicitly in the Constitution, they enforce values with no basis in popular will as exercised through legitimate constitutional procedures.

More than anything else, this appeal to democracy accounts for originalism's apparent plausibility. Yet this argument has received little attention from its critics. I shall argue that originalism is incompatible with a democratic constitution. Originalists commonly define democracy in procedural terms, as (to use Robert Bork's phrase) "complete majoritarianism." It is a governmental procedure for making laws by which citizens are afforded (fair) rights of representation, and decisions are made according to (bare) majority rule. There is a more substantive conception of a democratic constitution. According to the democratic social contract tradition of Locke, Rousseau, Kant, and Rawls, democracy is not just a form of government; more elementally it is a kind of sovereignty based in the equal freedom and independence of all citizens. This conception of democracy is, I believe, more compatible with our history, our institutions, and our self-conception as democratic citizens. My aim here is to trace the consequences of democratic contract theory for constitutional interpretation and the role of the courts in judicial review. On this conception of democracy, originalism turns out to be a profoundly undemocratic view.

## I. Two Perspectives on the Constitution

All accounts of constitutional interpretation must confront the question of what role we are to assign to the written document called "the Consti-

nalism: The Lesser Evil," *University of Cincinnati Law Review* 57 [1989]: 862). Other proponents of originalism (e.g., Raoul Berger and Edwin Meese) make similar declarations.

4. See Raoul Berger, *Government by Judiciary* (Cambridge, Mass.: Harvard University Press, 1976), chap. 19. He argues that judicial review is legitimate only because it was intended by the framers.

tution of the United States" within our constitution. This might seem a peculiar question, especially to lawyers.[5] For what else could our constitution be but a text, and what could constitutional interpretation be other than deciphering the meaning of this text in the way lawyers normally do? There is, however, a sense of the term "constitution" that designates an institution, and that must be presupposed by any written constitution. In its institutional sense, the political constitution of any regime is that system of publicly recognized and commonly accepted rules for making and applying those social rules that are laws. This system of highest-order rules constitutes a political system in that it defines offices and positions of political authority, with their respective qualifications, rights, powers, duties, immunities, liabilities, and so on, and the procedures officials are to observe for making, applying, and enforcing valid laws.[6] As such, the constitution itself cannot be law in an ordinary sense, for what is law within the legal system is ultimately identified by reference to its constitution.[7] It requires, then, a very different kind of foundation. Identifying the constitution is the first task of constitutional interpretation.

Every political system has a constitution in the institutional sense, whether or not its scheme of highest-order rules has been textually proclaimed or clarified. A (once) distinctive feature of the American constitution is that it is accompanied by a document that is called "the Constitution." For us U.S. citizens, a primary question of interpretation must then be establishing the character of this text within our constitution. This is a neglected issue in constitutional debate. The simple fact that this document is called "the Constitution" does not determine its role, or even give us reason to look to it to decide our constitution; for nothing can make *itself* a constitution self-referentially. Whatever significance this text has within the constitution must be established on grounds independent of that document, by considerations of a different order.

The Constitution is not, because no text can be, the constitution of our political system. This is not to deny this document's central role within our constitutional scheme. For it is a convention of political discourse

5. See Bork, *Tempting*, p. 147. Bork says that without a written constitution, "the very concept of unconstitutionality would be meaningless."

6. I rely here on John Rawls's account of institutions, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), secs. 10, 36.

7. Contrast Bork's claim that the Constitution is law, and should be interpreted "like all other law," because it *says* it is "Law" in Article VI (the supremacy clause) (*Tempting*, pp. 145–46).

and legal practice in our nation that we are to look to this document, the Constitution, to determine the role, powers, and procedures of government, and the basic rights of citizens. But this convention is not sufficient to establish the role of the Constitution in our constitution. This is true if for no other reason than that this text is not an explicit and exhaustive statement of the basic principles and procedures of our political system. It is an institutional fact that there are many significant practices, institutions, and procedures that are part of our constitution—because they are publicly recognized, followed, and enforced—that are not set forth in the document bearing the name "the Constitution." Judicial review, the final authority assumed by the courts to interpret the constitution along with ordinary laws, is primary among these unwritten constitutional procedures.

Within our constitution the practice of referring to the Constitution is of greatest significance in judicial review. In exercising the institutional authority of definitively propounding the constitution, the Supreme Court looks to the Constitution, as a matter of judicial practice, for purposes of identifying constitutional requirements. Indeed it is largely because of the unwritten procedure of judicial review that the practice of referring to this text has the significance it does within the American constitution. Without judicial review, the Constitution would not have nearly the recognition and respect it has within government and in public life.[8] The danger lies in misconstruing the character of this document and exaggerating about what it can do.

In judicial review, the Supreme Court's activity of interpretation has never consisted in simply looking to the Constitution and deciphering it by its literal meanings, original understandings, or any other formula. Instead, the text has been but one aspect of an ongoing process of interpretation, an activity that goes on in any regime, with or without the assistance of a written constitution. The Court constantly reorchestrates precedents and extends principles to develop new meanings for constitutional provisions. Originalists maintain, however, that constitutional interpretation ought always to rely on original meanings; for the Court to do otherwise is inconsistent with our democratic constitution, and perhaps even undermines the purpose of a written constitution.

In holding this view originalists import a revisionary norm from out-

8. Contrast the relatively minor role of the French constitution in government and public life.

side the constitution as both document and institution. Where does this norm come from?[9] I have said that the most plausible argument for originalism stems from a conception of the rule of law in a democracy. To appreciate this conception, consider the following originalist reply to standard objections to their view:

> Granted, there may be difficulties in ascertaining the collective intentions of the framers, or the original understanding of constitutional terms. Granted also, the intentions and understandings of the framers and their contemporaries may even sometimes be undecidable, because too few of them held any particular intention or understanding to make it common to the group as a whole. Some of these difficulties can be overcome by diligent historical inquiry, and the creation of legal devices that deal with indeterminacy of meaning when it arises. But even if difficulties remain, still, it *must* be that where original intentions are clear, they are binding and dispositive, furnishing the conditions and limits for interpretation. For where else could we look in a democracy to settle the meanings of obscure constitutional provisions? We can at least assume that in ratifying the Constitution the people accepted the intentions of those who designed it. For the courts to appeal to anything other than original meanings would be undemocratic, and contrary to the document itself, since it would require reliance on reasons that have not been democratically accepted. If, as some contend, it makes no sense to look to original meanings, what follows is not some other method of interpretation, but that the Supreme Court's practice of looking to the Constitution is itself without justification. In that case we should give up the pretense of referring to this document for our constitution, and along with it judicial review. For the very practice of attempting to adhere to a written constitution would then be inconsistent with democracy.

Originalists have made this kind of argument for original meanings, though they have not drawn this specific conclusion.[10] They question

9. Proponents commonly argue that originalism derives its force from canons of construction used in interpreting statutes, or contracts and wills (Bork, *Tempting*, pp. 144–46; Berger, *Government by Judiciary*, pp. 365–66, 368). But this will not do, since the Constitution is not law or a legal document, but the condition of law, ordinary canons of construction, and the legal system.

10. Bork does say that if originalism is fatally defective, the only legitimate solution is to

most existing conventions of interpretation; one convention they do not challenge, but take as essential, is the Court's looking to the Constitution to determine constitutional requirements. Whatever appeal originalist arguments have depends on our also taking the Constitution for granted. Still, because the case for original meaning is built on claims about the nature of democracy, originalists suggest a deeper question they do not choose to raise: Why should we, in a democracy, look to a document referred to as "the Constitution"? We need to confront this question to see how misguided originalists are when they appeal to democracy to support their view.

To put this question into focus, consider the following argument, which replies to the argument for original meaning just recited:

> The Constitution is a document written, ratified, and imposed upon us by people in the distant past. Even if it had been democratically accepted by them (it was not because of exclusion of blacks, women, and so on from the franchise), *we* have not actually approved it. And surely we cannot be bound by the commitments and agreements of people long since dead, and much less so by their intentions and implicit understandings. Why, then, should we be led at all by the intentions of those who wrote or ratified the Constitution, when it is not clear what *democratic* grounds we have for looking to that document in the first place?[11]

I am not sure what reply originalists would give to this objection. They might appeal to Burkean tradition to justify looking to the Constitution.[12] But that would not support exclusive reliance on original meanings,

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abandon judicial review, and "let democratic majorities rule, because there is no law superior to theirs" (*Tempting*, pp. 166–67; cf. p. 147).

11. Jefferson raised this objection in a letter to Madison, 6 Sept. 1789. No generation has a right to bind another, he says, so "every constitution . . . naturally expires at the end of 19 years." In a letter to Samuel Kercheval, 12 July 1816, he suggested periodic plebiscites and conventions, so each generation could reassess and revise the Constitution (*Jefferson: Writings*, ed. Merrill Peterson [New York: Library of America, 1984], pp. 963, 1402). Jon Elster calls the issue raised here "the paradox of democracy." See his *Ulysses and the Sirens* (Cambridge: Cambridge University Press, 1984), pp. 93–96. For an engaging discussion, see Stephen Holmes, "Precommitment and the Paradox of Democracy," in *Constitutionalism and Democracy*, ed. Jon Elster and Rune Slagstad (Cambridge: Cambridge University Press, 1988), pp. 195–240.

12. Cf. Bork: the Constitution is law because the "people of this nation" have "always treated the Constitution as law" (*Tempting*, pp. 173–74).

since there *is* no interpretive tradition like that. Also, Burkean arguments only obscure the deeper issue here. What is asked for is a *reason*, consistent with democracy, for adhering to a tradition of relying on the Constitution to interpret the constitution. The mere fact that we are guided by this document, this convention, cannot by itself suffice—surely not for originalists, who call into question all other interpretive conventions.

One standard reply to the objection relies on the amendment process and tacit consent:

> Though we have not expressly ratified the Constitution, our ancestors did, and they provided a way to revise it. Our existing convention of looking to this document is justified since we could change it by amendment. That we have not suggests that we have actually accepted it, tacitly at least, along with its original meanings. The Constitution is ours because we have not collectively chosen to disavow it, and we are completely and exclusively bound by it and the intentions of those who designed it, until we indicate our constitutional intentions to the contrary.

The argument proves too much: in fact we *have* indicated our contrary intentions.[13] We have, just as tacitly, recognized and accepted a long history of judicial interpretation antithetical to originalist doctrine. We could change, by amendment, fifty years of Court rulings originalists so object to. That we have not suggests that, in tacitly accepting the Constitution, we have tacitly rejected original meanings and accepted a good deal more as part of our constitution, including judicial review and the Court's authority to broadly construe constitutional rights. The argument from tacit consent, then, might be used to establish the constitutional validity of the very practices originalists call into question.

Originalists will object that this response confuses implied acceptance with forced acquiescence;[14] sizable majorities have been compelled to acquiesce in the Court's unpopular rulings only because of the great dif-

13. I ignore here the problem that the reply begs the question: it relies on provisions in the Constitution itself—the Article V amendment process—to prove tacit acceptance of that same document.

14. See Bork, *Tempting*, p. 173. Berger argues that popular acquiescence in judicial rulings does not justify them, since inertia does not justify usurpation (*Government by Judiciary*, p. 353).

ficulty in amending the Constitution. But this argument cuts both ways; it also applies to our acceptance of the Constitution. Approval by three fourths of the states was initially required to ratify the Constitution, and three fourths are required to amend it. This means "tacit acceptance" of the Constitution exists, according to originalists' criteria, so long as anything more than one fourth of the states (and perhaps a much smaller fraction of the population) refuse amendment. For the argument from tacit consent to work, it seems that the burden of numbers should be the other way. The point is, given the great difficulty it takes to amend the Constitution, it appears that we are still bound by our ancestors' agreements, even though the great majority of us might disagree. It may be that tacit consent figures into an account of why the present is bound by ordinary laws enacted in the distant past (e.g., the Civil Rights Act of 1866). Since ordinary legislation can be altered by a bare majority, present majorities may be deemed to have assented by their inactivity to past laws enacted by a bare majority. Whether or not this is a good argument (I take no position), it cannot credibly be applied to the Constitution.

The amendment process and tacit consent are not, then, effective to justify on *democratic* grounds continued reliance on the Constitution, and, *a fortiori*, original meanings—especially if democracy is conceived of as majoritarianism. But they appear to be the best arguments originalists have mustered to support their radical claim that democracy requires that we accept the Constitution as written, look exclusively to original meanings, and throw out most other interpretive traditions.

## II. Democratic Sovereignty and the Public Charter

Let us now consider a different approach to the question of why we in a democracy should affirm convention and look to the Constitution. Originalists argue that an active judiciary is incompatible with democracy. Their argument depends on construing democracy as a form of government: it is a scheme of institutions where the authority to make ordinary laws is held by the people's elected representatives, with elections and the enactment of laws determined by (bare) majority rule. Clearly, our form of government involves a kind of representative democratic procedure for making laws. However, owing to geographic representation in the Senate, the executive veto, and judicial review, it is not a procedure that neatly embodies the principle of bare majority rule. But let us as-

sume that this procedural description is true enough of ordinary legislative authority in our system. Still, it does not explain the deeper sense in which our constitution itself is democratic. The constitution grounding our democratic government is democratic because it is represented (in the Preamble, in public life, and in modern democratic thought) as established by the sovereign people in the exercise of their original political jurisdiction: the people, conceived as free, equal, and independent, exercise their *constituent power* to create the constitution.[15] In employing this power, they institute a form of government that is representative and democratic, and entrust it with the *ordinary* powers to make, apply, and enforce ordinary laws. Government's ordinary powers are held in trust, and are to be exercised for the common good. Democracy, so conceived, is not simply our form of government; more fundamentally, it is our form of sovereignty.[16]

Originalists present us with a different account. They maintain that the constitution is democratic because it was established by our forebears in the supermajoritarian procedure that ratified the Constitution. But democratic sovereignty does not reside in some of the ancestors of some living Americans. It resides in the present body of citizens. Any account of constitutional interpretation must show why *existing* people, conceived of as free, equal, and independent, should *accept and endorse* the inherited Constitution. As argued in the previous section, originalists have no plausible account here.

What answer does the democratic social contract view offer to our opening question? It may appear, after all, that any inherited restriction on the power of the sovereign people to act now on their perception of the common good through majorities in representative institutions is an illegitimate limitation of their sovereignty. For this reason Jefferson said "no society can make a perpetual constitution."[17] Jefferson here misses,

15. The notion of constituent power held by the body of citizens is an idea from Locke's *Second Treatise*. Locke says: "The People alone can appoint the form of the Commonwealth, which is by Constituting the Legislative, and appointing in whose hands that shall be" (*Second Treatise*, ed. Peter Laslett [Cambridge: Cambridge University Press, 1988], p. 362 [sec. 141]; see also pp. 354–58 [secs. 132–35], p. 373 [sec. 157]).

16. The distinction between democracy as government and as sovereignty is found in Rousseau's *Social Contract*, and in Kant, *Perpetual Peace and Other Essays* (Indianapolis: Hackett, 1983), pp. 113–15, and *The Metaphysical Elements of Justice*, trans. John Ladd (Indianapolis: Bobbs-Merrill, 1965), pp. 110, 113.

17. *Jefferson: Writings*, p. 963.

however, the role that a constitution has as an *instrument* of democratic sovereignty. A democratic constitution does not just define procedures for making and applying laws; it organizes and qualifies these ordinary government procedures in order to prevent the usurpation of the people's sovereignty by public or private institutions. Far from contravening democratic authority, a democratic constitution (1) defines the body politic and specifies the powers and procedures through which citizens collectively exercise their constituent authority; (2) designates the set of rights that enable citizens to maintain their sovereign freedom and independence; and (3) creates offices and defines channels for making and administering ordinary laws in ways that constrain governmental agents from undermining citizens' sovereign rights and authority. (This will be discussed further in Section V.)

Now in the American constitution the Constitution occupies a strategic position in securing this instrument of democratic sovereignty. Originalists represent the Constitution as a legal document for lawyers to argue over and decipher in ordinary ways. But, far from being a purely legal document, the Constitution is in the first instance a political document: it is the public expression on the part of democratic citizens of the general understanding of and commitment to the basic terms of their political association. As such, it publicly represents the concepts and principles that supply the primary basis for civic justification.

For laws to be valid and effective, they must be publicly promulgated through recognized procedures. This is a requirement of the rule of law. In a democracy this publicity requirement extends further, to government procedures for making and applying laws. They are to be publicly open; also, legislative procedures are to be informed by civic debate and criticism, and allow for the airing of grievances.[18] But if we are to conceive of democracy as a form of sovereignty, then publicity must go still further, to the foundation of government and its laws. Appeals to authority, even the authority of public deliberations with majority decision, can have but a derivative place in a democracy, for there is no more ultimate political authority than those principles and institutions each citizen could freely accept in agreement with others. A written constitution makes these provisions publicly available, providing citizens with a com-

18. The public nature of its procedures is one of the traditional arguments for democratic government. See, e.g., John Stuart Mill, *On Representative Government* (Indianapolis: Bobbs-Merrill, 1958), chap. 5, p. 81.

mon basis for assessing and justifying government's and citizens' activities on terms all can accept.

Granted, none of us actually agreed to constitutional forms or to the Constitution; they were set in place by our forebears. When it is said in civics classes, public discourse, political campaigns, and Supreme Court opinions that "the people are sovereign," we all know that. What this slogan expresses is the conviction that everyone can *reasonably* accept the Constitution whatever his situation—that is, we all *could* agree to its terms in our capacity as free and equal sovereign citizens, if we were given the opportunity, our judgments were informed, and we freely and publicly exercised our reason. The fundamental significance of a written document called "the Constitution" is that it serves as a public representation and reminder, there for all to see, of this covenant among sovereign citizens to terms of political association all could reasonably accept, consistent with their freedom and equal political jurisdiction.

So it is as the *public charter*, expressing democratic citizens' common comprehension of and commitment to principles and procedures mutually acceptable and advantageous to everyone, that a written constitution forms an integral part of a democratic constitution. As the public charter, a written constitution informs public judgment and provides the framework that guides debate on laws and constitutional requirements. Citizens refer to it to assess, justify, and criticize government action, as well as the demands citizens themselves place upon the government trust. A democratic constitution embodies a conception of the legitimate demands citizens may place upon each other through laws, and the rightful expectations they may have with respect to one another's and government's conduct. As the publicly recognized statement of these terms, the Constitution serves as the basis for civic reasoning and agreement.

In emphasizing the Constitution's political role as public charter, I do not mean to slight its role *within* government, in guiding the decisions of officials as they exercise their ordinary political powers. Each office of government has a duty to interpret the Constitution in executing its assigned powers and duties, to insure against infringement upon constitutional rights and procedures. Here a written constitution serves to implement the constitutional framework sovereign citizens have set in place. By supplying governmental agents with explicit common grounds for interpreting their powers and duties, citizens stabilize the constitution, increasing the likelihood that government will observe its condi-

tions and constraints. But this strategic role of a written constitution is secondary to its role as public charter. For government and its officials are agents of the people; government's powers are fiduciary, and officials' duty is to execute the public will. And the purest expression of the public will is sovereign citizens' constitutional agreement. Here they publicly commit themselves to instruct their agents to act only in ways that respect citizens' equal sovereignty and promote the common good. To maintain its role as the public charter manifesting this commitment, government is to construe the Constitution only in ways that can be justified among sovereign citizens.

To summarize the argument thus far: On the conception of democracy as sovereignty, a constitution, rather than contravening democracy, is the vehicle of democratic authority when it is designed to express and maintain citizens' sovereign rights and powers. Though enacted in the past, such a constitution is democratically justified since citizens could freely accept and agree to its terms from a position of equal right. To carry out their (hypothetical) agreement on the constitution, sovereign citizens could agree to accept a written constitution as the public representation of their covenant (a) to provide themselves with a basis for civic justification, evidence of their constitutional commitments to one another, and (b) to implement constitutional arrangements, by providing their governmental agents with explicit grounds for interpreting their fiduciary powers and procedures.

Clarification of the contractarian bases of these claims will be provided later (in Sections IV and V). But enough has been said to make the essential point: if we take the primary role of a written constitution in a democracy to be its role as the public charter among sovereign citizens, providing terms for civic justification that they could reasonably accept and agree to, then straightaway we are confronted with a puzzle as to why the *only* kinds of considerations that are relevant to deciding what that document requires should be the intentions and understandings of those who wrote or ratified it. Indeed, it is not clear why *their* intentions and beliefs should carry any weight at all. Even if tacit consent could justify our being bound by the Constitution, it cannot establish our acceptance of original meanings. Democratic citizens cannot give their consent, express or tacit, or commit themselves to what they have no knowledge of, and no publicly agreed upon way of ascertaining. Because knowledge of past intentions must be unduly esoteric (when it can exist

at all), our being bound by founders' intentions is incompatible with the publicity requirement on a democratic constitution.

Nor are we bound by founders' intentions, even if they were especially wise people we now revere. Even were founders' intentions always definite and discernible, there is no principle of *democratic* thought that would enjoin or even permit sovereign citizens to look to the purposes or moral values of others, long since dead, to determine what is now required by the fundamental terms of political association. Such a principle might be suitable in religious associations for deciphering sacred texts. Indeed, there is among originalists a good deal of rhetoric about the Constitution as a "sacred text," and a "civil religion" built around it.[19] But sacred objects require faith, reverence, a suspension of critical reflection, and acceptance of fundamentals imposed by an external authority believed to be benevolent toward us. These attitudes toward the Constitution are incompatible with democratic sovereignty. The Constitution, though it may be inherited, is not imposed upon us by anyone; it has a democratic foundation, not a religious, aristocratic, or patriarchal one. While the framers and ratifiers created the Constitution, its ultimate justification, and what now sustains it, is the mutual acknowledgment and common commitment of sovereign citizens. To take the intentions of the framers and ratifiers as binding and dispositive in interpretation borders on a kind of ancestor-worship that is inconsistent with the free and public use of our democratic reason as sovereign citizens.

This is not to deny the significance of precedent in constitutional practice; that is a different issue (one dealt with in Sections III and IV). Nor do I deny that the framers' writings on the Constitution are of significance in establishing a sense of continuity and tradition especially instrumental to democratic education. We might even look to the framers for advice on construing the Constitution, as one source among others. But to assign to the framers' thoughts and intentions advisory or educational significance is not the same as to make them binding and dispositive of constitutional meanings. Their intentions cannot obligate us or settle anything.

The Constitution, then, is not to be construed by the preferences,

19. See Bork, *Tempting*, p. 153, on the Constitution as a "civil religion." Bork also says that constitutional law, like theology, rests on a "sacred text" ("Tradition and Morality in Constitutional Law," *The Boyer Lectures* [Washington, D.C.: American Enterprise Institute, 1984], p. 10).

judgments, values, or principles the framers or ratifiers intended, but by the principles *we* could reasonably intend in endorsing it as our public charter. More precisely, given that the Constitution serves as the locus for civic justification within our constitutional scheme, it is subject to a requirement of *democratic interpretability*: it must answer to our public conception of ourselves as democratic citizens, and the intentions we have as such citizens in affirming the Constitution as binding on us. This implies that the Constitution's meaning is to be decided by principles that everyone, in their status as equal citizens, *could* now freely accept and reasonably endorse as interpretive of its provisions by the public use of reason.[20] Public reason requires, at a minimum, that the Constitution's meaning be comprehensible and affirmable without appeals to external authority. The absence of others' authority (that of our ancestors, of God, or of anyone else) follows from democratic sovereignty. Therefore, affirming the Constitution as sovereign citizens, and not as subjects of someone else's will, requires that we reject the doctrine of original meaning.[21]

## III. Original Meaning and Constitutional Practice

My argument against original meaning is not inconsistent with constitutional practice.[22] The Court occasionally invokes framers' intentions,

20. The notion of "public reason" is in Rousseau's "Discourse on Political Economy," in *Rousseau's Political Writings* (New York: Norton, 1988), pp. 60, 64. He distinguishes public reason from one's "own reason," and uses it to expound the general will. The phrase "public use of reason" comes from Kant's "What Is Enlightenment?" See *Perpetual Peace and Other Essays*, pp. 41–48. For an illuminating account of Kant's usage, see Onora O'Neill, "The Public Use of Reason," *Political Theory* 14 (1986): 523–51. John Rawls elaborates on the similar concept of "the free use of public reason" in "The Idea of an Overlapping Consensus," *Oxford Journal of Legal Studies* 7 (1987): 8, 20, and "The Domain of the Political and Overlapping Consensus," *NYU Law Review* 64 (1989): 233–55. For an account of how this idea fits within the social contract tradition, see below, and my "Reason and Agreement in Social Contract Views," *Philosophy & Public Affairs* 19, no. 2 (Spring 1990): 122–57.

21. Could democratic citizens agree now to be bound by the discernible intentions of the founders? Is this not a legitimate exercise of their democratic sovereignty? For reasons I explain in Sections IV through VI, they could not. What is wrong with it is the same thing that is wrong with citizens' agreeing to be bound by the writings of, say, Edmund Burke, or the Bible, or a random-selection device in interpreting the Constitution. In each case they alienate their powers of deliberation, judgment, and democratic reason, thereby abandoning a part of their sovereignty.

22. Cf. Home Building & Loan Assoc. v. Blaisdell, 290 U.S. 398 (1934): "If by the state-

often for rhetorical purposes, sometimes to support a principled limitation on the reach of prior holdings, or to provide evidence to confirm an interpretation whose basis is located in independent principles.[23] Rarely does the Court regard the framers as providing an original source for constitutional principles, and even when they do provide this, it is but one source among many. Original intention, then, functions as a subsidiary aspect of existing interpretive conventions, a practice that gains its sense against the framework of principles, practices, and canons of interpretation from which the Court normally proceeds. Originalists seek to extract this subsidiary practice from its moorings in the network of conventions that give it sense, and make it the foundation for interpretation and all constitutional practice. This completely alters the point of the practice of invoking framers' intent.

Here it helps to distinguish between a theory of constitutional interpretation and a theory of constitutional adjudication.[24] A theory of interpretation is a normative account of what a constitution is and the role of a written constitution within it. As part of such a theory I have argued that if we are to take seriously the idea that the constitution (and not simply the laws) is democratic, then the Constitution must be taken as the public charter, affirmable by existing citizens, and construed in light of principles that could be publicly justified among free and equal sovereign persons.

In addition to an account of the role of a written constitution, a theory of interpretation must say who is to have institutional authority to finally interpret the constitution. Herein lies the traditional problem of justifying judicial review: Why should the courts, and not some other institution, have the authority of constitutional review? Only if that issue is decided in the courts' favor—an issue I address in Section VI—do we need a theory of constitutional adjudication, as part of a general account

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ment that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers . . . would have placed upon them, the statement carries its own refutation."

23. I am indebted here to Douglas Lind's Ph.D. dissertation, "Externality and Internality in Constitutional Adjudication" (University of Pennsylvania, 1990), chap. 5.

24. David Lyons draws this helpful distinction, though I apply it somewhat differently. See his "Constitutional Interpretation and Original Meaning," *Social Philosophy and Policy* 4 (1986): 76, 88–91.

of interpretation. A theory of adjudication describes how the courts should exercise their interpretive authority as they apply the Constitution to adjudicate particular issues. This is the place for arguments over the scope of judicial review, and the kinds of reasons courts should take into account in adjudicating the constitution.[25]

The Court's appeals to original meanings can be accounted for by a theory of adjudication. Appeals to original meanings serve as an adjudicative device—one among many employed by the Court—used in this case to provide confirming evidence for decisions reached on the basis of independent principles, and show the continuity of the constitution over time. Framers' intent is then standardly invoked as the result of a *conclusion* of analysis; it is not a principle providing independent and sufficient reasons of its own.[26] Originalists seek to elevate this adjudicative device to define a theory of constitutional interpretation: the Constitution *is* just what our ancestors intended it to be.[27] But the implication of ancestral sovereignty that this claim carries has no place in a constitutional democracy. It is contrary to the way the Constitution is conceived of within existing practice; and it is wholly irreconcilable with democratic sovereignty and the role of a written democratic constitution.

25. A primary question here is, When should courts defer to legislative interpretations rather than enforcing their own best judgment of the meaning of the Constitution? James B. Thayer's famous deferential doctrine addresses this adjudicative question, not the question of the Constitution's "true meaning." See his "The Origin and Scope of the American Doctrine of Constitutional Law," *Harvard Law Review* 7 (1893): 150. On this see Lyons, "Constitutional Interpretation," pp. 88–89. The "political question" doctrine is one adjudicative device the Court uses to excuse itself from deciding certain matters affecting the powers of other branches of government. On this and other "passive virtues" of judicial review see Alexander M. Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962), chap. 4.

26. I do not deny that the Court sometimes relies on original understandings to explain why government action violates constitutional principles: e.g., Cramer v. United States, 325 U.S. 1 (1945) (interpreting the "overt act" requirement of Article III to overturn treason conviction); Wesberry v. Sanders, 376 U.S. 1 (1964) (Georgia's congressional districting held unconstitutional on "one man, one vote" grounds); Powell v. McCormack, 395 U.S. 486 (1969) (Congress is powerless to exclude a member who meets the requirements of Article I, sec. 2). Still, the Court argues from the *reasons* the founders had for their intentions. It is these reasons, I believe, not the *fact* that the founders believed or willed something, that provides the ultimate justification in these cases.

27. For the contention that the Constitution means just what those who enacted it intended it to mean, see Bork, *Tempting*, pp. 145, 176. See also Berger, *Government by Judiciary*, chap. 20: "Intention is as good as written into the text" (p. 368).

## IV. Democratic Interpretation and the Constitution

Against originalism's proposal that the Constitution be interpreted by asking what values or principles our ancestors intended, I have suggested an alternative inquiry: What principles could we, as sovereign citizens, mutually acknowledge as interpretive of the Constitution in the free and public use of democratic reason? An originalist would argue that, faced with the actual task of constitutional adjudication, this standard is too vague to provide definite results and give judges "neutral" criteria for constitutional interpretation. The originalist thus sees my requirement of democratic interpretability as an open invitation to judges to appeal surreptitiously to their own personal moral values in deciding constitutional issues.

Two issues must be distinguished here: definiteness, and neutrality of interpretive principles. One reason some are attracted to originalism is that it is thought to be the only method that can provide definite resolution to constitutional issues, and thereby limit judges' inclination to appeal to their personal views. Inquiry into the framers' concrete intentions tells us how they specifically applied, or would have applied, constitutional provisions, and yields precise answers to current disputes. As critics have persuasively argued, indeterminacy of these methods is unavoidable; often there is no fact of the matter to be discovered in asking after the founders' actual or counterfactual intentions.[28] Conceding these problems, originalists like Bork say we should look, not to the specific applications intended, but to the "principle or stated value the ratifiers wanted to protect."[29] But here we encounter the same problems that affect other views: deciding the level of generality at which to state constitutional principles, vagueness of terms, and extracting these principles' implications to resolve disputes. On either version of originalism, there is as much room for judges' personal views to influence outcomes as on non-originalist views. The definiteness issue is a red herring. There is no algorithm for judicial decision-making.[30] The real problem is to de-

28. See Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), chap. 2, and *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), pp. 317–27, 359–79. See also Lyons, "Constitutional Interpretation," and Paul Brest, "The Misconceived Quest for Original Understanding," *Boston University Law Review* 60 (1980): 204.

29. Bork, *Tempting*, pp. 162–63.

30. As Bork recognizes: conceding that two judges equally devoted to originalist methods

marcate the sorts of considerations that should enter into constitutional adjudication. All sides agree that judges should not appeal to their personal views, but should neutrally interpret the Constitution. But what does this come to?

Originalists contend that only original meanings can provide "neutral" criteria of interpretation.[31] Original sources are said to be neutral because (as Bork says) they provide a judge with criteria independent of his "personal value preferences"; consequently, "He need not . . . make unguided value judgments of his own."[32] This is a very thin account of "neutral principles"; in effect it prevents judges from appealing to their own "value preferences" (Bork's term) only by requiring them to consult someone else's (namely, the framers'). What is needed is a genuinely impartial interpretive standpoint, one that abstracts, not just from judges', but from the framers' and everyone else's particular values and personal moral beliefs, and relies on interests common to everyone. It remains to be shown (here and in the next section) that the standard of democratic interpretability I have suggested can be developed so as to provide such a standpoint, one that incorporates democratic sovereignty.

Doing this requires first distinguishing between two kinds of reasons, public and particular. I shall eventually argue that judges should not rely on anyone's particular reasons in interpreting the constitution, but only on public reasons. The problem is to specify the public reasons they should rely on, so that they are both compatible with democratic sovereignty and sufficiently definite to give guidance in judicial review. Here I appeal to the framework provided by democratic contract views. I propose in this section a neutral perspective from which the Constitution is to be construed, in light of the public reasons of justice that relate to sovereign citizens' common interests in their freedom and equal status. Since these are the considerations that count in civic justification in a

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may arrive at different results, he says, "We must not expect too much of the search for original understanding. . . . it is simply the best we can do" (ibid., p. 163).

31. Original understanding is, Bork argues, the *only* method of interpretation consistent with democracy that can constrain judges from appealing to their personal moral views (ibid., pp. 33, 146–55, 178, 352, and chap. 12). Scalia says that originalism, because "it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself," prevents the "personalization" of constitutional law that afflicts nonoriginalist views ("Originalism: The Lesser Evil," pp. 862–64).

32. Bork, *Tempting*, p. 146.

democracy, they provide the basis for what I shall call democratic interpretation of the Constitution.

The contractarian distinction between democracy as a form of government and as a form of sovereignty parallels a distinction between the particular reasons we have as individuals and the public reasons we can commonly endorse in our capacity as democratic citizens. These distinctions are clarified by differentiating two practical points of view. The particular reasons we have are ascertained from our individual perspectives, where we see ourselves as single agents with fixed (final) ends facing a range of options from which we must choose. These reasons are ultimately based in our particular ends, as given by our private, sectarian, and group interests. They are determined by clarifying these aims, ranking their priority and making them consistent, and then deciding the most effective (expedient, probable, inclusive, and so on) means for realizing them. Some degree of idealization is needed to describe a person's particular reasons; I assume the idea is familiar enough from standard accounts of practical rationality to go without further comment.[33] The important point is that, since they are decided from the point of view of the individual, and our ends and situations differ, our particular reasons and interests will often conflict, even under the best conditions.

For better or for worse, ordinary democratic legislation, as we know it, is often but a competition and compromise among particular interests. But few would publicly argue that the constitution or its interpretation should be grounded in reasons and interests peculiar to individuals or sectarian groups, even if held by a majority. It is a convention of democracy that the constitution (if not ordinary laws) is to reflect interests common to all citizens. We must look to something besides the collection of individual perspectives and the sum of particular interests to make sense of this convention. It remains to explicate the notion of public reasons and related ideas.

There is a general expectation among members of society that individuals regulate the pursuit of their particular interests by certain commonly accepted norms and constraints. These serve as standards we ap-

33. A distinction should be drawn between subjective and objective reasons one has as an individual. The former are the considerations that actually motivate individuals to act, while the latter depend on an account of what one would want after due reflection on his ends and the means for realizing them, with some prescribed level of information. Philosophical accounts of rationality are normally of the latter sort.

peal to when we publicly judge a person's conduct unreasonable, or his demands and expectations extravagant. As such they are a primary source of what I call "public reasons." Public reasons are the considerations we commonly accept and invoke in public argument as the basis for assessing one another's actions and interests, and the demands people make in pursuit of their ends. They provide the framework for justification and association among persons moved by different particular reasons and interests.[34] Now in political contexts, there is an order of public reasons to which members of society appeal as a basis for assessing laws and social institutions. They supply the basis for public *political* justification among citizens. In this sense I have claimed that the Constitution provides the locus for civic justification. The particular interests and claims commonly expressed in ordinary legislative procedures are constrained by the public reasons of justice expressed by the Constitution. Certain reasons and interests—for example, that certain speech and practices are blasphemous and offend the major religions—are not seen under the Constitution as providing legitimate reasons for enacting laws at all. The Constitution, then, restricts not only the kinds of laws that can be enacted, but also the kinds of arguments that can be given in support of ordinary laws.

Now, we need a basis—some perspective or series of perspectives—for ascertaining the public political reasons that apply in a constitutional democracy. Since it is their role to *monitor* the particular reasons and given interests that set members of society apart, public reasons cannot be drawn up from any individual perspective, or from the perspective of any sectarian group. What is required is a common point of view that abstracts from these differences, and invokes interests not peculiar to anyone. The problem is to define this impartial perspective consistent with democratic sovereignty and the requirements of public reasoning in a

34. Because of their place in public justification, public reasons normally occupy a special position in individual practical reasoning: rather than being balanced off against considerations about what best promotes given purposes, they are appealed to to assess the permissibility of one's means and the legitimacy of one's ends. They then regulate the range of considerations a person accepts as particular reasons, and monitor his decisions about what there is reason to do. See my "Contractualism, Moral Motivation, and Practical Reason," *Journal of Philosophy* 88 (1991): 281–304. Here I note that my use of "public reasons" differs somewhat from Rawls's use of "public reason." See note 20 above. His phrase refers to a developed *capacity* for public justification. I mean to refer to the kinds of *considerations* that engage this capacity in democratic reasoning.

democracy. The democratic theory of the social contract holds that if reasons are to serve a justificatory (as opposed to an obfuscating or ideological) role in a democracy, they must ultimately be compatible with principles that would be mutually acceptable to everyone from a *public point of view*.[35] Like the point of view of the individual defining the particular reasons any person has, this public perspective is an idealization—in this case, of the process of public deliberation in a democracy. It is a position of equal right and equal political jurisdiction, where free persons abstract from their individual perspectives and the reasons and interests that set them apart, and reflect upon measures that realize their basic interests as democratic citizens. As democratic citizens they have a basic interest in securing their freedom to decide their particular reasons and interests, and to pursue the scheme of ends that is their good. Moreover, all have a joint interest in securing their equal status as sovereign citizens. To realize these common interests they all would agree, from the public perspective, to principles designed to maintain social and political conditions (certain institutional procedures, rights, and so on) enabling each to freely pursue his or her good in a manner that maintains each citizen's equal status and independence.[36]

According to democratic contract views, the principles agreed to from this public point of view are the ultimate articulation of democratic sovereignty. They supply the criteria for a just democratic constitution. Because of their role in public justification, these principles should regulate individuals' particular reasons and interests, thereby governing their expectations and the claims they advance in democratic decision procedures. In this way, public reasons of justice come to constrain the outcomes of all governmental procedures in a well-ordered democracy.

35. Public reasons, like particular reasons, can be subjectively and objectively defined. Subjective public reasons are the conventionally accepted reasons that regulate public deliberation in a society. Objective public reasons are those reasons that would be accepted by free and equal democratic citizens, compatible with the principles all would accept from the public point of view.

36. For these basic interests, see Rousseau, who defines the "greatest good" of democratic citizens as liberty and equality, the end of all legislation (*Social Contract*, bk. II, chap. 11, para. 1). Rawls defines the "highest-order" interests of democratic citizens as the exercise and development of the moral powers by virtue of which they conceive of themselves as free and equal (the capacity for a sense of justice, and the capacity to rationally determine one's good); the needs based in these interests are the primary social goods ("Social Unity and Primary Goods," in *Utilitarianism and Beyond*, ed. Amartya Sen and Bernard Williams [Cambridge: Cambridge University Press, 1982], pp. 159–86).

To return to the question of interpretation, what do these idealizations have to do with *our* written constitution? Earlier I said that given its role in civic justification, the Constitution must be interpretable, not from any individual perspective, but by us as sovereign citizens. This means that *if* we are to preserve our sovereignty, the Constitution must reflect our equal status, not just in its principles, but in the *act of interpretation* itself. There must, then, be an attitude *analogous* to the public point of view we can adopt in our judgments to construe the Constitution. Call this second perspective "the constitutional perspective of democratic reason." Unlike the public point of view, its object is not principles of justice, but the basic meaning of the Constitution, expounded by its essential principles. As in the public perspective, in the constitutional perspective we subordinate our particular reasons and interests, and conceive of ourselves as sovereign citizens moved by the same basic interests in preserving our freedom and equal status. Then, taking into account our historical circumstances, we are to construe the Constitution so that its essential requirements could be justified to and accepted by everyone from this common point of view. From this perspective, judgments about the text and its meanings are informed by what we, as equal citizens, can accept as good reasons in civic justification at this time in our history. This process of *democratic interpretation* requires distancing ourselves from our particular reasons and interests in deliberation on the Constitution. Thus it not only rules out reasons of self-interest and unsupported likes and dislikes, it also suspends reliance on reasons whose sole basis is religion or metaphysics, and even particular moral doctrines and values (e.g., natural law, or self-realization views). None of these kinds of reasons are publicly acceptable among free citizens with different and conflicting interests. The only considerations that *will* count in citizens' deliberation on essential constitutional principles are public reasons that relate to and advance the basic interests of citizens in their freedom to pursue their good, their equal status, and their individual independence.

This still leaves plenty of room for disagreement. Constitutional provisions are often ambiguous or vague no matter how impartially construed (e.g., due process, equal protection, cruel and unusual punishment), and the public reasons we invoke to interpret them often conflict. Moreover, even though we agree on relevant public reasons, the weight we assign to them will differ (e.g., balancing people's interest in the integrity of

their person and security of their homes and possessions, and states' interest in promoting public security, in construing the Fourth and Fifth Amendments). Different judgments regarding essential principles—their content, relative priority, level of generality, and scope and limits—can be made even under ideal conditions. We cannot agree on all essentials, even from the common perspective defined. Some final criterion must, then, be incorporated to guide and arbitrate between the judgments reached from the constitutional perspective of democratic reason. A *reasonable construction* of constitutional provisions I define as one that *could* be justified to and accepted by free persons equally positioned from this perspective, where their interpretive judgments (regarding the rights, principles, procedures, and so on in the Constitution) take into account and are made compatible with the general principles of justice that *would* be mutually acceptable to everyone from the public point of view.

The constitutional perspective of democratic reason is, in the first instance, the common standpoint to be invoked by citizens in arguing and interpreting the constitutional bases of their relations in a democracy. That the Constitution and its essential meaning be accessible to citizens and interpretable by them follows from its primary role as the public charter. The constitutional perspective provides this means of access, consistent with our status as sovereign equal citizens. It is a hypothetical construct we can adopt in our judgments to decide what basic rights and interests are protected by the Constitution and assess their relative weight when they conflict, to test the legitimacy of laws and governmental decisions (*including* the principles affirmed in judicial review), and ultimately to decide whether we can affirm the Constitution so understood.

Because of the Constitution's primary role as the public charter, the constitutional perspective is integral to a theory of interpretation, as I have defined it. But what significance should this perspective have in judicial review? As a way of reasoning about essential principles, it works at too abstract a level to meet judicial requirements. Adjudication has its own methods, stemming from the necessity of formulating constitutional rules that apply general principles to interpret ordinary laws in order to resolve disputed claims. These rules must be drawn up in light of knowledge of existing laws and (often esoteric) legal doctrine, as well as facts of legal disputes not available to citizens occupying the constitutional

perspective. The primary judicial method for formulating these rules is *stare decisis*. Consider now a third ideal perspective. This adjudicative standpoint is familiar enough: it is that of an impartial individual with complete knowledge of the circumstances that give rise to constitutional disputes, applying precedent, law, and familiar methods of judicial reasoning to formulate rules (often more general principles) designed to resolve particular cases or controversies. This is but an idealization of constitutional adjudication as we know it, and it is from this perspective that the Constitution is to receive its authoritative interpretation for institutional purposes.

My contention is that the constitutional rules and principles that are *evoked* by ordinary methods of judicial reasoning for resolving specific issues must be compatible with the principles that could be accepted by equal citizens from the constitutional perspective of democratic reason. As conclusions on principles of justice reached from the public point of view constrain deliberations within the constitutional perspective, similarly conclusions within the constitutional perspective regulate deliberation within the adjudicative perspective. The constitutional perspective, then, supplies the standards with which to assess the legitimacy of constitutional rules and principles yielded by adjudicative practice; moreover, when controlling legal principles conflict or are in doubt, judges may occupy the constitutional perspective in order to resolve conflicts and ambiguities by reference to essential requirements of the Constitution.[37] That judges in adjudicating constitutional issues may be required to occupy this perspective does not follow from the demands of judicial practice and the rule of law as ordinarily understood; it stems from the Constitution's extraordinary role as the basis for civic justification among sovereign citizens, the public criterion of all legitimate law. The Constitution in its essentials consists of principles that free citizens equally situated could agree are implicit in its provisions, on the basis of public reasons of justice all accept, and after checking them against the basic principles of justice that would be agreed to from the public point of

37. This requirement includes legal interpretive principles. For example, *stare decisis* has a central place among adjudicative principles, for it embodies the formal principle of justice, to treat like cases alike. As a principle of adjudication, *stare decisis* is a subordinate principle that must give way when it requires decisions that conflict with citizens' substantive rights.

view. Only standards of adjudication meeting these requirements preserve citizens' sovereignty.

The constitutional perspective of democratic reason requires further elaboration; later I will say something about the principles that inform this point of view. But enough has been said for immediate purposes of contrast. For originalists argue, in effect, that interpretation is to proceed from a different perspective, the historically specific point of view of our ancestors. We are to imagine ourselves in the framers' or ratifiers' situation, endowed with their particular interests and partial concerns, and ask, What values and principles are understood to be implicit in the Constitution from *this* position?[38] My claim is, whether we conceive of originalism as a theory of interpretation or of adjudication—as a claim about what the Constitution is, or an adjudicative device to be applied only by the courts (in the interests, say, of deferring to majority rule)—this ancestral attitude is ruled out by democratic interpretation of the Constitution. It subordinates the permanent and shared interests of democratic citizens in their freedom and equal status to someone else's parochial interests, loyalties, and personal moral values. That these particular interests belong to the founders is irrelevant. For, assessed from the constitutional perspective, the mere *fact* that the founders understood or willed certain principles or practices is of no interpretive significance. To defer to their intentions because they initiated the Constitution, or for whatever reason, is to forfeit democratic for ancestral sovereignty. This does not mean we cannot be influenced by the *reasons* the founders had for constitutional provisions; but when we are, it cannot be because *they* held them, but because these considerations impress us as good reasons anyone could accept in his or her capacity as equal citizen. The democratic reason of sovereign citizens, not original meaning, provides the basis for constitutional interpretation, and is the final arbiter in judicial review.[39]

38. As Scalia says, originalism "requires immersing oneself in the political and intellectual atmosphere of the time . . . and putting on beliefs, attitudes, philosophies, prejudices, and loyalties that are not those of our day" ("Originalism: The Lesser Evil," pp. 856–57). And Bork: "It is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they know, apply to the world we know. . . . Judges must never hesitate to apply old values to new circumstances" (*Tempting*, pp. 168–69).

39. If originalism commits us to ancestral sovereignty, why does judicial review itself not commit us to aristocratic sovereignty? It does not so long as (1) judicial review is a demo-

So, to respond to the neutrality problem I began with: How are judges to avoid relying on their personal values in constitutional construction? Originalists would prevent judges from appealing to their particular reasons, interests, and moral views only by having them consult the particular interests and sectarian moral values of the founders. In this sense, there is nothing genuinely "neutral" about the criteria originalists offer at all, no matter how "principled" it is made to be.[40] "Neutral" interpretation in a democracy must abstract from all such particular reasons and interests—whether they be judges', our forebears', even those expressed by current majoritarian consensus—and proceed from an impartial position that represents us as equals and takes into account the basic interests shared by democratic citizens. The constitutional perspective of democratic reason, not the point of view of our ancestors, is neutral in this strong sense. It provides access to the fixed Constitution originalists seek, without forsaking democratic sovereignty. Let us look briefly at some examples of how this approach is applied to interpret the Constitution.

## V. Public Reason and the Rights of Democratic Sovereignty

Originalism is not part of American constitutional law; it is a revisionary thesis that relies on philosophical claims regarding the nature of democracy and the character of a written constitution. My argument against originalism is also normative and philosophical. I have not claimed that democratic interpretation, or social contract theory, is implicit in American legal practice.[41] That would require detailed analysis of constitu-

cratically legitimate institution (an issue I address in Section VI), and (2) judges exercise this power in a manner consistent with the essential principles that could be democratically accepted from the constitutional perspective of democratic reason.

40. Ronald Dworkin argues that once originalists, such as Bork, advocate looking to the abstract principles the founders intended, originalism becomes empty; there is nothing to distinguish it from many other views ("Bork's Jurisprudence," *Chicago Law Review* 57 [1990]: 670–74). See also Lawrence Solum, "Originalism as Transformative Politics," *Tulane Law Review* 63 (1989): 1599. But as against democratic interpretation (and I think too Dworkin's view), principled originalism says we are to decide what principles the founders accepted by looking to their particular values and moral views. Cf. the quotes from Bork and Scalia in note 38.

41. Cf. David Richards, *Foundations of American Constitutionalism* (Oxford: Oxford University Press, 1989). Richards argues (meeting originalists on their own playing field) that the founders were contractarians. While Richards' case may be sound, it is irrelevant

tional law. Still, it remains to be seen whether the idea of democratic interpretation and the constitutional perspective that defines it can be put to a more positive use, and applied to American constitutional law. This raises complicated issues. Here I only indicate some broad features of the approach I advocate.

Democratic sovereignty is based in the equal freedom, independence, and original political jurisdiction of democratic citizens. These ideas require some sort of principled articulation. Otherwise, however central they are to democratic awareness, they have insufficient content for institutional purposes. The democratic social contract tradition holds that primary among the principles that express citizens' sovereignty are certain equal basic rights. Democratic freedom and independence are, as it were, *articulated* by equal rights and liberties. These are the rights that would be agreed to by sovereign persons (from the public point of view) to secure their basic interests in their freedom and equal status. As such, these equal rights are a part of democratic sovereignty.

A democratic constitution is to be understood against this background: it is, I have said, an instrument of democratic sovereignty, created and sustained by the sovereign people to provide for conditions enabling them to effectively exercise these basic rights. At the level of constitutional choice, they give institutional expression to their sovereign freedom by constitutionally specifying (in a bill of rights) their basic rights and liberties, by setting up governmental procedures (majority legislative rule, and so on) that effectually provide for them, and by retaining the power to amend the constitution in case government fails to promote the exercise of their basic liberties. The constitution that best provides for the free and effectual employment by all citizens of their basic rights and liberties is the most suitable arrangement for a particular regime. On this conception of democracy, constitutional rights are construed as a *specification* of the equal basic rights and liberties that articulate democratic sovereignty. As such, constitutional rights are the highest political value expressed in a democratic constitution.

Among the basic freedoms of democratic sovereignty are the equal rights of political jurisdiction that underlie agreement on the constitution. Democratic citizens retain these rights in ordinary legislative pro-

for purposes of my argument. For a review of Richards, see my "Contractarianism and the Founding of the Constitution," *Law and Philosophy* 10 (1991).

cedures. They provide the basis for equal rights to vote, hold office, and organize political activity; fair legislative representation; and majority rule. But equal political rights are not the only articulation of democratic freedom. Other basic liberties are just as essential: freedom of conscience; freedom of thought; freedom to act on one's convictions and pursue one's interests in a manner consistent with a just constitution; freedom of association and of occupation; the rights needed to protect persons' physical and mental integrity; and the rights defining the rule of law.[42] These basic rights and liberties are as much a part of democratic sovereignty as equal political rights. So a democratic constitution must protect these rights too. For the reasons we have for affirming equal political rights and majority rule are the same reasons that justify these other basic rights and liberties.

On this interpretation democracy is not a government procedure devised to aggregate the greater balance of unconstrained preferences through majority rule.[43] It is a system of institutions that secures conditions of freedom, equality, and independence among all citizens. Democratic legislative procedures designed for deliberation on the public good and the promotion of democratic justice are primary among these institutions. Their purpose is to enact laws enabling all citizens to be independent and effectually exercise their equal basic rights as they pursue their legitimate interests in free association. Judicial review (as I shall argue in Section VI) is to be understood against this background. Now to apply these remarks to our Constitution.

I have argued that the Constitution is the locus for civic justification, and for us to affirm it as binding requires that it incorporate reasons we can publicly endorse in our capacity as sovereign citizens, that is, from the constitutional perspective of democratic reason. From this position the basic rights that articulate equal sovereignty are primary among the public reasons of justice we could acknowledge for interpreting the public charter and its essential principles. Because these rights answer to

42. For this list of basic liberties, and the idea that constitutional rights in a democracy are a specification of these liberties, I rely on John Rawls, "The Basic Liberties and Their Priority," *The Tanner Lectures on Human Values* (Salt Lake City: University of Utah Press, 1982), 3:1–87. A similar list is argued for by Mill on purportedly utilitarian grounds in *On Liberty*, chap. 1.

43. For this reading of democracy and majority rule, see Bork, *Tempting*, pp. 257–59, and "Neutral Principles," pp. 9–10: "Equality of human gratifications, where the [Constitution] does not impose a hierarchy, is an essential part of constitutional doctrine."

the interest of democratic citizens in their equal freedom and independence, they should govern all other public reasons invoked to interpret the Constitution. The implication for interpretation is that the provisions of the Constitution are in the end to be construed, so far as possible, as working out the requirements of the equal basic rights that articulate democratic sovereignty.

To illustrate, take the First Amendment religion clause. Some people might advocate religious toleration on theological grounds: uncoerced religious belief is necessary for true faith and salvation. Others might advocate it on prudential grounds: toleration maximizes the opportunities for their sect to spread its message. These are not, however, reasons available from the constitutional perspective of democratic reason, a perspective in which individuals may not argue from their particular reasons and individual conceptions of the good. Free exercise of religion and the prohibition of an established religion are affirmed in public reasoning to maintain the integrity of judgment in citizens' conscientious formation of their convictions about basic questions of value and the purposes of their existence. The religion clause is, then, to be construed as a specification of the liberty of conscience that is part of democratic sovereignty. The arguments democratic citizens would present from the constitutional perspective to support free exercise and non-establishment reveal a broader commitment to toleration, not just of religions, but also of diverse philosophical and ethical views. While the religion clause may not, on its face, command such general tolerance, democratic citizens can understand and affirm it in no other way. This approximates the way the religion clause has been interpreted; it may even conform with founders' intent.[44]

Take, then, a more difficult case: freedom of speech. It may be, as some argue, that the founders intended only to protect political speech.[45] And it is certainly true that freedom of speech (along with free press and assembly) is necessary for rational and informed public deliberation on laws. Indeed, free speech is vital to the formation and exercise of demo-

44. See Lemon v. Kurtzman, 403 U.S. 602 (1971). On the founders' views, see Leonard Levy, *Original Intent and the Framers' Constitution* (New York: Macmillan, 1989), chap. 9. Contrast Rehnquist's dicta in Wallace v. Jaffree, 472 U.S. 38, 110 (1985): "The Establishment Clause did not require governmental neutrality between religion and irreligion."

45. See Levy, *Original Intent*, chap. 10. Bork argues in "Neutral Principles," pp. 20–35, that the First Amendment protects *only* "explicitly political speech."

cratic reason itself, and our coming to agreement on essentials of the Constitution. But freedom of speech and expression also have equally vital nonpolitical purposes: they are primary among the liberties free citizens must rely on to deliberate on their interests and rationally decide the pursuits that realize their good. These First Amendment rights are derivative, not just from political rights, but also from the basic freedom of thought that comes to be articulated by a just constitution. Democratic reason thus understands the speech and press clauses to embrace freedom of thought, inquiry, and communication on all subjects, nonpolitical as well as political.

These claims require elaboration; here they simply illustrate how to begin applying the constitutional perspective described in the previous section to interpret specific provisions. The Constitution is the documented statement of the rights and procedures that, at particular times in our history, have been seen as especially needed to delineate and maintain the more abstract rights of democratic sovereignty. Seeing the Constitution in this historical context, we have no reason to accept its enumerated rights as a complete specification of basic rights and liberties. To do so would surrender our sovereignty to our forebears' needs and understandings. But the framers were aware of this; for this reason they included the Ninth Amendment. Understanding the Constitution as the public charter among sovereign citizens, the Ninth Amendment just says that this text's enumeration of rights is not an exclusive specification of the sovereign rights that articulate democratic freedom.[46] This amendment, along with other provisions, textually supports the unenumerated rights the Court has found implicit in the Constitution (freedom of association, freedom of movement or the right to travel, the right of "privacy," and so on). These rights and others, I believe, could be justified as among essential principles from the constitutional perspective of democratic reason.

It must not be thought, however, that just any seriously alleged right can be justified in this way. For example, one could not justify a laissez-faire conception of property and exchange as implicit in the Takings and Contract clauses.[47] We know from experience that absolute property

46. The Ninth Amendment says: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

47. As argued for by Richard Epstein in *Takings* (Cambridge, Mass.: Harvard University Press, 1985).

privileges with rights of unlimited accumulation and unregulated exchange worsen, over time, the economic condition of the disadvantaged, depriving them of individual independence. These rights create social conditions that render many people's sovereign rights useless or of little significance. Arguments that the founders of the Takings and Contract clauses nonetheless intended laissez-faire are simply irrelevant here. Absolute property and contract rights could not be democratically justified to *everyone* on the basis of public reasons from the constitutional perspective.

What now of more specific constitutional provisions, for example, the requirement that the president be at least thirty-five years of age, or the Twenty-second Amendment limiting presidents to two terms in office? Democratic interpretation requires that the Constitution be construed in ways that *could*—not would—be acceptable to free citizens equally positioned from the constitutional perspective of democratic reason. The modal qualification implies that there is more than one way amenable to democratic reason to work out details of many constitutional procedures. Institutions within this permitted range are equally justifiable and acceptable to sovereign citizens. That each could be accepted means each is compatible with public reason and democratic justice. Clearly, some age limitation is needed to ensure that the executive has sufficient experience and political wisdom to administer the laws and propose legislative programs carrying great weight in Congress. The term constraint provides periodic change in programs proposed, and ensures that no single person acquires so much influence as to undermine democratic lawmaking processes. Different age and term limitations might serve these purposes equally well. But so long as textual provisions are within the permitted range, there is a conclusive presumption in their favor since they provide a justifiable conventional standard, and there is a need that constitutional procedures be publicly set, stable, and continuous over time.

Similar considerations apply to the Article V amendment procedure. To rephrase the issue raised in Section I, why should not sovereign citizens acting through ordinary political channels be able to revise the Constitution? My position relies on a sharp distinction between citizens' constituent authority and government's ordinary powers. But under the Constitution both powers are delegated, and can be exercised by the

same representative bodies (Congress and state legislatures) sitting in different capacities, and voting according to different rules. So, to rephrase the question (and leaving aside Rousseau's objections to citizens' delegation of sovereign authority), what justifies these special voting rules in the case of amendment? Democracy is not majoritarianism. On democratic contract views, bare majority rule is justified for ordinary laws *not* because it is an effective way to decide the greater balance of particular interests but because it is the most effective way, consistent with citizens' equal political rights, to respond to issues requiring prompt attention that are of public concern.[48] Now actual majorities, especially bare majorities, do not always speak with the voice of democratic reason. Too often, rather than focusing on citizens' common interests, they are but compromised expressions of a majority's particular interests, insensitive to the effects on losers' sovereign rights or their good. And the likelihood that majority agreements express particular interests becomes greater the smaller the majority required. To better maintain the sovereign rights and powers of each citizen, democratic citizens would agree to *some* extraordinary procedure requiring special majorities to amend the constitution. Article V is within the range of permissible procedures that could be agreed to. Because of its conventional status and salience as part of the public charter, it is justified for reasons of publicity, stability, and continuity mentioned above.

Most specific constitutional provisions could be accepted by democratic reason in this way. The slavery provisions in the original Constitution could not. And there is a problem with the provision by Article I for geographic representation in the Senate. At first appearance it runs counter to *equal* rights of political jurisdiction. Suppose it cannot be shown reasonably acceptable among equals. Then it would be inconsistent with constitutional democracy, the ideal of political relations that infuses our constitution. It is, however, a separate issue whether it is for the courts (rather than the citizens) to declare this provision in the Constitution invalid.[49]

48. See Rousseau, *Social Contract*, bk. IV, chap. 2 ("On Voting"), last para.

49. Cf. Reynolds v. Sims, 377 U.S. 533, 573–74 (1964), holding that state legislatures had to be apportioned on a population basis so that each vote has equal weight, but that this requirement did not apply to the U.S. Constitution because the federal system was "conceived out of compromise and concession."

## VI. The Role of the Court in Judicial Review

To see why, we must consider the democratic justification of constitutional review. This is a complicated topic I have addressed elsewhere; here I simply assert the main idea.[50] Judicial review, like geographic representation, also limits citizens' equal political rights, but in a different way: it constrains the range of decisions citizens can make in ordinary lawmaking procedures. (So it is held "antidemocratic.") To justify this restriction on citizens' political authority, it must be shown that some institution is needed to maintain citizens' *equal constitutional status* in the workings and outcomes of majoritarian and other government processes. Under conditions where public understanding of the requirements of democratic sovereignty is obscured or in conflict, or where citizens' commitment to their equal status vacillates or is weak, it is likely that democratic legislation often will violate the sovereign rights of (at least some) citizens. Then it would be rational for sovereign citizens, in exercising their constituent power at the level of constitutional choice, to vest authority in an independent body whose role is to prevent citizens' compromising their basic interests in freedom and equality for the sake of a majority's particular interests. By this act of sovereign self-restraint, they tie themselves into equal relations and the provisions of a just democratic constitution. Constitutional review is, then, construed as a shared precommitment among sovereign citizens to secure their equal status as they exercise political authority in ordinary government procedures.

So conceived, constitutional review is justifiable under certain conditions on strategic grounds in a democracy, in order to minimize the risk that majorities will enact laws that infringe on the rights that secure citizens' sovereignty and equal status. It is one among several procedural mechanisms that may be used to this end. There are different ways to design constitutional review. In our constitution this extraordinary power is held by the judiciary, and the Court exercises review only in conjunction with discharging its ordinary duties of interpreting the laws and resolving adjudicative disputes. (That is why it is "judicial" review.) The

50. For a detailed statement of the argument summarized in this and the next paragraph, see my "Constitutional Democracy and the Legitimacy of Judicial Review," *Law and Philosophy* 9 (1990): 327–70.

Court's function is not to sit as a constitutional review panel with authority to examine laws immediately upon enactment; it is to construe the Constitution only upon enforcement and subsequent challenge in "cases or controversies." We might see this kind of review as designed to interfere minimally with ordinary democratic decision-making, by allowing elected officials to interpret, resolve, and refine constitutional issues first, before the judiciary exercises final institutional authority.

Let us now return to the issue at hand, the proper attitude of the judiciary toward constitutional provisions that are not acceptable from the constitutional perspective of democratic reason. In the American constitution, judicial review has a further special purpose owing to the distinct role of our Constitution as the public charter. This text, I argued in Section II, is the locus for civic justification in our system; it provides the common basis for citizens' reasoning about their political relations. The Court's primary duty in judicial review is to resolve conflicts and ambiguities in public reasoning itself regarding *just this basis*, consistent with citizens' sovereignty. It is not the Court's role to question directly the Constitution's provisions in this process. To do so would cloud citizens' comprehension of the Constitution's role as public charter, undermining its central place in civic justification, and eventually defeat both the Constitution's and the Court's strategic positions within the constitution. In the American constitution, the judiciary's strategic role in conserving the conditions of democratic sovereignty is, then, circumscribed by the terms of the public charter itself. So when the inherited Constitution contains provisions deviating from equal sovereignty, the Court is in no position to contravene it by declaring them invalid.

This does not mean that things could not have been arranged differently. Under certain conditions there may be a place in a democracy for a body with powers to directly examine legislation as enacted, and perhaps even, in rare circumstances, to review citizens' exercise of their powers of amendment of the constitution. Rousseau envisioned such an institution,[51] and it currently exists in the German constitution. So there is no theoretical problem with a body entrusted with such powers in a constitutional democracy. But that is not the way constitutional review is implemented in the American constitution.

51. *Social Contract*, bk. IV, chap. 5 ("The Tribunate").

## VII. Comparisons

It may be helpful briefly to compare my conception of democratic interpretation with two other approaches, both of which are critical of originalism, and which also base interpretation in a view of the Constitution's primary commitment to democracy. My purpose in discussing John Ely and Bruce Ackerman is simply to clarify my own view; a more serious examination of these important accounts must be postponed to an occasion permitting fuller discussion.

According to Ely's "participation-oriented, representation-reinforcing, process-perfecting" account of judicial review,[52] the Constitution is principally concerned not with substantive rights and benefits but with setting up fair procedures.[53] Primary among procedures are those that encourage equal (electoral) participation, and fair representation and responsiveness in the majoritarian processes that decide questions of substantive value.[54] The Court's primary duty is to maintain the integrity of these procedures, without infringing on democratic authority to decide matters of substance. Now my account does not deny that the Constitution, like any constitution, is a procedural arrangement. But it does not accept ordinary majoritarian procedures as sufficiently incorporating democratic authority or adequately expressing democratic values and ideals. We cannot even define what ordinary democratic procedures are without first settling their purposes, conditions, and limits—what kinds of interests they are to promote, and what kinds of desires they are to register and exclude in deliberative consideration. This requires substantive decision on the rights and ends of justice implicit in the Constitution.[55] They define the constraints on government's ordinary decision-making, and so are needed to specify its procedures. In order to decide these constraints, social contract views appeal to the idea of democracy as sovereignty.

One might think that Bruce Ackerman captures the contract distinction between democratic government and sovereignty in his account of

52. Ely, *Democracy and Distrust*, p. 87.

53. Ibid., pp. 100–101.

54. Ibid., pp. 116ff.

55. Ronald Dworkin makes a similar point in *A Matter of Principle*, chap. 2, as does Laurence Tribe in *Constitutional Choices* (Cambridge, Mass.: Harvard University Press, 1985), chap. 2.

"dualist democracy in our constitution."[56] But his view is, I believe, still a procedural view. Ackerman distinguishes dualist from "monistic" views (like Ely's), which identify democracy with ordinary lawmaking by elected representatives. By contrast, our "constitution establishes a two-track law-making system," providing also for "decision by the American People."[57] A "higher lawmaking system" is embedded in Article V, which Ackerman liberally interprets to allow for a nonformal, four-stage "structural amendment" process that works through the electoral system.[58] By this process, our Constitution has been amended by the people (most notably during the New Deal) to incorporate rights and powers not explicitly mentioned in it.[59]

Ackerman's account of dualist democracy has a limited purpose: to provide a way to decide those occasions in the past when citizens have *actually* amended the Constitution.[60] It provides the materials—the unwritten amendments to the Constitution—from which his account of interpretation as "comprehensive legal dialogue" proceeds. He explicitly rejects, as methods of interpretation, ideal deliberations and hypothetical agreements, appeal to "some . . . original position to serve as a constitutional platform from which to pass judgment" on the Constitution.[61] Against this, Ackerman sees the Constitution as a product of "historically rooted tradition of theory and practice" to be interpreted through "legal conversation" among actual persons, including "conversation between generations."[62]

56. Ackerman himself does not make this claim. See his "Constitutional Politics/Constitutional Law," *Yale Law Journal* 99 (1989): 453–547, and "The Storrs Lectures: Discovering the Constitution," *Yale Law Journal* 93 (1984): 1013–72. Ackerman's developed view is to appear in his book *We the People* (Cambridge, Mass.: Harvard University Press, 1991).

57. Ackerman, "Constitutional Politics/Constitutional Law," pp. 464, 461.

58. Ibid., pp. 507–15.

59. The Lochner era, which Ackerman claims accurately interpreted the then-existing Constitution, ended with the 1936 electoral mandate favoring New Deal representatives and programs. This mandate by the people in the face of Supreme Court rejections of the New Deal, together with Roosevelt's subsequent challenge to the Supreme Court and its eventual self-reform, resulted in a series of "transformative opinions" with the weight of Article V amendments, all of which constitutionalized an activist national government and the welfare state (Ackerman, "Constitutional Politics/Constitutional Law," p. 514).

60. Dualist democracy "points in a particular direction—toward a reflective study of the past to determine when the People have spoken with a higher lawmaking voice" (ibid., p. 472).

61. Ibid., p. 477.

62. Ibid., p. 478.

Ackerman's account of interpretation is an application of his account of "neutral dialogue": "rational conversation within neutral constraints."[63] Again, there are some resemblances between dialogue and contract views. Both describe standpoints for deliberation and justification that rule out certain kinds of reasons in arguments for principles. Still, neutral dialogue models two-person discourse (which in Ackerman's account of interpretation represents "legal disputation" and legal reasoning).[64] But what is justifiable between two persons (or groups) may not be so among persons generally. In contrast, democratic contractarianism idealizes *public* deliberation and justification in a democratic society. Its idealization—a unanimous agreement among *all* citizens—emphasizes that principles (here, essential constitutional principles) must be justifiable to *everyone*, whatever their legitimate ends and social status, on the basis of reasons everyone can publicly affirm as free and equal. Thus, unlike constitutional dialogue, democratic interpretation directly incorporates a notion of citizens' equal sovereignty into the act of interpretation itself. Furthermore, rather than modeling legal "dialogue" and argument, democratic interpretation implies that ordinary methods of legal reasoning (*stare decisis*, and so on), and the constitutional standards they generate, also stand in need of democratic justification, that is, need to be shown to be compatible with essential principles all could agree to from the constitutional perspective of democratic reason. This follows from the premise that the Constitution's function as a legal document is secondary to its primary role as the public charter among sovereign citizens.

A more telling difference between my account and Ackerman's comes

63. *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980), chap. 1; "Why Dialogue," *Journal of Philosophy* 86 (1989): 5–22; and *Reconstructing American Law* (Cambridge, Mass.: Harvard University Press, 1984), pp. 93–104, where Ackerman contrasts "hypothetical social contracts" with "comprehensive legal dialogue," which grows out of "the process of legal disputation." His neutrality constraint (*Social Justice*, p. 11; *Reconstructing American Law*, pp. 98–100) excludes assertions of (1) "insight into the moral universe intrinsically superior to" others', and (2) intrinsic superiority of oneself. Though Ackerman rejects hypothetical agreements as methods of "transcendence" ("Why Dialogue," pp. 15–16), he must concede that his constrained conversations are themselves idealizations. The real disagreement he has with contract views concerns the kind and extent of constraints imposed on ideal deliberation. Whereas he takes people's particular desires and interests as a basis for deliberation in (hypothetical) dialogue, contract views rule out appeal to these kinds of interests and the reasons they provide. Cf. Rawls on the veil of ignorance (*A Theory of Justice*, pp. 18–19, 21).

64. See Ackerman, *Reconstructing American Law*, pp. 96–97; cf. Ackerman, *Social Justice*, p. 17, and "Constitutional Politics/Constitutional Law," pp. 477–78.

with his distinction between dualist democracy and views that rely upon "nondemocratic principles"[65] to argue for fundamental rights implicit in the Constitution.[66] That the Constitution is not "rights-foundationalist" is clear, he says, since it does not have entrenchment mechanisms (like the German Basic Laws) preventing repeal of constitutional rights. Nothing precludes repeal of the religion clauses by an amendment declaring Christianity the state religion; and if enacted, it would clearly be judges' duty to enforce it.[67]

The absence of entrenchment provisions in the Bill of Rights is not such a "very great embarrassment" for a democratic contract view. We can imagine several constitutional arrangements that are both just and feasible in that they are likely (none are ever certain) to effectively realize citizens' sovereign rights. Which of these is most appropriate for a society depends upon its traditions, history, and existing social and economic arrangements. Assume that the American, British, and German constitutions are all just (or nearly enough so). It may be that in our system (as opposed to Germany's) an entrenchment mechanism is not called for. Given our history (very unlike Germany's), it is unnecessary to guarantee democratic rights and citizens' equal status, just as judicial review, and even a written constitution, may be unnecessary in the British constitution for these purposes.

The most instructive contrast between my account and Ackerman's is his distinction between dualist democracy and fundamental rights,[68] and his tentative suggestion that nothing in the Constitution may prevent "the repeal of dualist democracy itself" by the people.[69] Here Ackerman seems to endorse a procedural account of democracy at the level of constitutional choice: whatever the people *actually* will is democratically legitimate. Drawing on democratic contract theory, I have suggested a more substantive account, where equal basic rights are not distinct from democracy (an add-on, as in Ackerman's view), but are needed to define the idea of democratic sovereignty. Since these rights provide the basis

65. "Constitutional Politics/Constitutional Law," p. 468.

66. By "non-democratic principles" Ackerman means principles that have not, through formal or nonformal amendment, actually been enacted into the Constitution at some time in the past.

67. Ackerman, "Constitutional Politics/Constitutional Law," pp. 469–70.

68. "The dualist's Constitution is democratic first, rights-protecting second. For the committed foundationalist, this priority is reversed" (ibid., p. 468). I suggest below that this is a false dichotomy.

69. Ibid., pp. 470–71n.

for public reasoning and interpretation in a well-ordered democracy, they are inalienable.[70] Suppose now that a special majority sought to repeal democratic procedures and everyone's free expression, assembly, and voting rights, or liberty of conscience and free exercise rights. It may be that there is no mechanism within our constitution that would (or could) prevent their *de facto* alienation by amendment, but that is beside the real point: that the democratic revocation of the sovereign rights that define a democratic constitution is *constitutional breakdown*. The bases for civic justification and the free exercise of democratic reason are subverted, along with everyone's sovereignty. Under these conditions the question "What does a democratic constitution require?" can have no answer.

## VIII. Conclusion

I began with a fundamental problem in democratic theory: How can citizens in a democracy be bound by their ancestors' agreements as embodied in a written constitution? Jefferson was aware of this problem. His solution was to hold a constitutional convention each generation. There must be a more feasible way. Originalists do not provide it: they aggravate the problem by arguing that we are bound not just by our forebears' written agreement but by their intentions as to its content. I have argued that, rather than being bound by agreements we have not made, we inherit the Constitution as the public charter; the task is to construe it in a manner consistent with democratic sovereignty. Here we look to democratic reason: the process of civic justification and what count as reasons in public argument in a democratic society. Idealizing democratic deliberation, we arrive at a perspective for constitutional reasoning: the position of democratic citizens who subordinate their particular interests to their shared interest in their freedom and equal status, and construe the Constitution according to reasons all can publicly accept, to arrive at the essential principles of the Constitution. Since ultimate constitutional authority resides in democratic citizens, this idealization provides the final test of the principles arrived at through judicial review.

70. As democratic contract theorists all contend. As Rousseau says, "Renouncing one's liberty is renouncing one's dignity as a man, the rights of humanity, and even its duties. There is no possible compensation for anyone who renounces everything" (*Social Contract*, bk. I, chap. 4, para. 6).