THE FAILURE OF ATTACKS ON CONSTITUTIONAL ORIGINALISM

*Earl M. Maltz**

In assessing the importance of any particular theory to a field of study, one might well use a combination of two techniques. The most obvious technique would be to count the number of adherents which the theory commands and assess their prominence. As more scholars—particularly well-known scholars—profess allegiance to a given mode of analysis, it perforce assumes greater importance. In addition, however, one might focus on the frequency and vehemence with which the relevant theory is attacked. Typically critics simply ignore those opposing positions that they consider trivial. Thus the mere fact that opponents often take the time to attempt to refute a position is important evidence of its significance.

One's evaluation of originalism—the theory that in constitutional adjudication judges should be bound by the intent of the framers[1]—will vary greatly depending upon which of these techniques one employs. Only a very small minority of constitutional theorists claim to be originalists.[2] Taken alone, this might suggest that originalism is only a minor theme in the overall development of constitutional theory. But if an observer focuses on the frequency and vehemence with which the approach is criticized, originalism emerges as one of the most important constitutional theories. For the proposition that judges should adhere to the intent of the framers generates unceasing, often vitriolic attacks from those who advocate other modes of constitutional analysis. Indeed, virtually every nonoriginalist theorist begins his analysis with an extensive discussion of the perceived flaws in the originalist approach.

How does one explain the pervasive fear of the looming specter of originalism? It may very well reflect at least an implicit under-

* Professor of Law, Rutgers (Camden). The author gratefully acknowledges the assistance of Rudy Peritz.

1. The term "originalism" is Paul Brest's. *See* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980). Others refer to the same theory as "interpretivism." *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST (1980); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 702 (1975).

2. *See* Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 378 (1982) (originalism is "increasingly without defenders, at least in the academic community").

standing that the justifications for originalist theory are far more powerful than those which are normally put forth. For far from being based on a simplistic appeal to the concept of democracy (the most common refuge of originalist theorists)[3] originalism rests on a variety of complex basic premises. These premises reflect fundamental conceptions of the nature of the judicial process and the proper allocation of authority between the courts and other branches of government.[4] These conceptions are rarely if ever fully and clearly articulated; further, their correctness cannot be rigorously demonstrated. Nonetheless the concepts embodied in originalism rather plainly reflect views on the nature of judging which have a strong intuitive appeal to many Americans.

The strength of this appeal is reflected in the structure of judicial opinions. Even results which are patently inconsistent with originalism are often couched in rhetoric about the intent of the framers. Moreover, one cannot read a broad range of constitutional cases without reaching the conclusion that originalism has in fact been an important influence on the development of constitutional doctrine (although admittedly not the only influence). Thus in order to forego originalist analysis one must also be willing to abandon a major part of the American judicial tradition.

It is against this background that the attacks on originalism must be evaluated. Basically, these attacks can be divided into two categories, "comparative" and "absolute." Comparative arguments evaluate the putative results generated by originalism with those which would be produced by some alternative mode of constitutional analysis. Such arguments typically conclude that since the alternative mode would generate better results, originalism should be abandoned.[5] Absolute arguments, by contrast, do not depend on demonstrating the superiority of some specific alternative; instead, focusing only on the originalist position itself, these arguments conclude that the basic structure of that position is inherently flawed.

I have argued elsewhere that in making their comparative arguments, nonoriginalists have both overstated the advantages of alternative approaches and understated the costs associated with such

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3. *See, e.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2-4 (1971); Monaghan, *Our Perfect Constitution*, 56 N.Y.U.L. REV. 353, 371-72 (1981); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704-06 (1976).

4. *See* Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U.L. REV. 811, 831-36 (1983) [hereinafter cited as Maltz, *New Thoughts*]; Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 997-1000 (1985) [hereinafter cited as Maltz, *Dark Side*].

5. For classic examples of comparative argument, see M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); Grey, *supra* note 1, at 710-14.

approaches.[6] In any event, comparative arguments are by their nature inconclusive. First, both originalist and nonoriginalist positions typically rest on controversial fundamental premises regarding the appropriate nature of the basic structure of government. For example, while originalists typically argue that aggressive judicial review is difficult to reconcile with the concept of democracy, nonoriginalists often contend that an activist judiciary is vital to American democracy.[7] Stripped of the reference to the emotionally-charged term "democracy," in essence the originalists are arguing that a pure majoritarian system is intrinsically superior, while the nonoriginalists are rejecting the pure majoritarian ethic. Neither premise is susceptible to objective proof; one can adopt either without fear of conclusive refutation.

A second problem with comparative arguments is that they often rest on unprovable assumptions about the tangible effects of the adoption of a particular nonoriginalist approach. In this respect discussions of Dean John Hart Ely's representation-reinforcement analysis are typical. Ely himself would limit fundamental rights to those that help to purify the democratic political process.[8] By contrast, others have argued that Ely's representation-reinforcement approach necessarily implies that other rights should also be given special judicial solicitude; among those most often proposed are a right to welfare and a right to a public education.[9] To some, the choice between Ely's approach and originalism might turn on the resolution of this controversy.

The result of these uncertainties is that in purely comparative terms neither originalists nor nonoriginalists can ultimately win the argument over judicial review. Instead, resolution of the political debate will turn on the question of which side has the burden of proof. Perhaps because of these difficulties, in recent years nonoriginalists have increasingly turned to absolute arguments in their attempts to incontrovertibly discredit originalism. The absolute attacks generally take one of three forms. Linguistic arguments claim that the originalist position does not adequately specify the methodology which judges are to follow in constitutional cases. Certainty-based arguments, by contrast, posit a definite originalist

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6. *See* Maltz, *New Thoughts*, *supra* note 4; Maltz, *Dark Side*, *id.*

7. *Compare* sources cited note 1 *supra with*, e.g., Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482 (1985). For an evaluation of the originalist argument on this point, see n. 4 and accompanying text, *infra*.

8. *See* J. ELY, *supra* note 1, at 73-104.

9. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 62-63 (1973) (Brennan, J., dissenting); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659.

structure but contend that the results generated by that structure are so uncertain as to be intolerable. Finally, some argue that no defensible political or moral theory supports originalism.

In much the same way in which they deal with comparative arguments, originalists typically respond to absolute arguments in terms which are equally absolute. With respect to important issues, they argue that the historical evidence is perfectly clear and incontrovertible.[10] Further, they often contend that the originalist mode of interpretation is the only methodology consistent with a coherent "objective" concept of law[11] or with democratic theory.[12] Thus originalists conclude that originalism is the only methodology that provides a principled mode of constitutional interpretation.

Phrased in such stark terms, the originalist arguments are quite weak. Rather plainly, the historical evidence is uncertain on some points.[13] Further, one need only consult the nonoriginalist literature itself to discover carefully wrought theories of law which do not proceed from originalist premises. Finally, originalist theory itself creates tensions with even the most simplistic concept of democracy.[14]

The weakness of the standard formulations of the originalist arguments makes the absolutist contentions seem stronger than they actually are. For to refute the absolutist counterarguments, one need not demonstrate that originalism is the *only* conceivable approach to constitutional adjudication. It suffices to show that references to the framers' intent may be tenable.

THE LINGUISTIC ARGUMENT

To understand the linguistic argument, one must first focus on the structure of the originalist position. In its simplest terms, that position may be stated as follows: "In constitutional adjudication, the duty of the court is to interpret the constitutional text. The proper mode of interpreting a legal text is to determine the intent of the drafter or drafters of that text and to apply that intent to the case before the court. Therefore, in constitutional cases the court should apply the intent of the framers." The originalist position

10. *See, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY (1977).

11. *See, e.g., id.* at 283-300; Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1, 18-20 (1981).

12. *See, e.g.*, Bork, *supra* note 3, at 2-4; Rehnquist, *supra* note 3, at 702-04.

13. For example, on the issue of whether the framers of the fourteenth amendment intended to make the Bill of Rights applicable to the states, *compare* R. BERGER, *supra* note 10, at 134-47 *with* Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237 (1982).

14. *See* notes 1-3 and accompanying text.

plainly rests on two premises: first, that the proper function of the Court is to interpret the Constitution and second, that the proper mode of interpretation is determination of the intent of the framers.

Even nonoriginalists typically accept the premise that the role of courts is to interpret the Constitution.[15] They attack the remainder of the originalist argument with a number of linguistic contentions. Some nonoriginalists say that interpretation does not necessarily imply inquiry into the intent of the framers; they note, for example, that literary critics and philosophers quite often view the interpretation of language as a process entirely independent of the determination of the intent of the author of the relevant words.[16] More commonly, nonoriginalists turn their linguistic analysis on the concept of the "intent of the framers." First, they note that even where a document has a single drafter, the use of particular words may reflect a variety of intentions, each of which may be defined quite narrowly or broadly.[17] In addition, nonoriginalists rely heavily on the fact that constitutions are the product of many institutions and many drafters, each of whom may have a different intent.[18]

The common thread which connects the various linguistic arguments is the perception of the indeterminacy of the originalist position. Focusing on the variety of meanings which can be given to both interpretation and intent, nonoriginalist linguistic analysts contend that one of two conclusions is inevitable: either originalism is inherently incapable of providing a meaningful standard to guide judges, or almost any mode of constitutional adjudication can appropriately be viewed as fitting within the originalist formulation. Thus the linguistic analysts argue that the search for "the" intent of the framers is inevitably a fruitless task. They conclude that therefore some nonoriginalist theory of constitutional adjudication must be adopted.

In analyzing nonoriginalist linguistic arguments, one must first recognize the broad scope of the contentions which the arguments

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15. *See, e.g.*, Richards, *Interpretation and Historiography*, 58 S. CAL. L. REV. 489 (1985); Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603 (1985).

16. For a good sampling of the nonoriginalist arguments on this point, see two recent symposia devoted entirely to discussions of the concept of interpretation in judicial reasoning. 58 S. CAL. L. REV. 1-725 (1985); 60 TEX. L. REV. 373-586 (1982).

17. *See, e.g.*, Dworkin, *The Forum of Principle*, 56 N.Y.U.L. REV. 469, 483-97 (1981); Munzer & Nickel, *Does The Constitution Mean What It Always Meant?*, 77 COL. L. REV. 1029, 1030-32 (1977); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 798-99 (1983).

18. *See, e.g.*, Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 459-60 (1984); Brest, *supra* note 1, at 212-13; Dworkin, *supra* note 17, at 482-84, 487-88; Levinson, *supra* note 2, at 379.

are said to support. Certainly one can agree that terms such as "interpretation" and "intent of the framers" can be defined in a variety of ways. But one still must choose among the various potential meanings; and since the meaning chosen serves to define the proper function of the courts—part of the government—such a choice is most plausibly based on political considerations.[19] Thus if the only point of linguistic arguments is to demonstrate the *possibility* of alternative definitions, such arguments merely lead us back to the political and moral critiques of the originalist position; independently, the linguistic approach does not add significantly to the strength of the nonoriginalist position.

In order to be independently significant, linguistic arguments must go further and demonstrate either that originalists assign no particular meaning to the relevant terms or that adoption of the meanings assigned would not significantly constrain the courts. The linguistic attack on the originalist conception of "interpretation" satisfies neither of these criteria. The originalist does not argue that reference to the intent of the framers is the only possible definition of interpretation; only that the proper role of the courts is interpretation and that by interpretation she means reference to the framers' intent. Thus in the originalist lexicon use of the term interpretation becomes simply a method for referring to the duty of the courts to act in accord with the intent of the framers. In linguistic terms, the argument therefore turns on an evaluation of the originalist use of the latter concept.

On their face, the nonoriginalist arguments that focus directly on the language of the intent term seem quite plausible. Unlike the concept of interpretation, the originalist formulation contains no direct referent for the intent term. There is no apparent barrier to adopting any of a number of plausible concepts of intent—either in terms of the breadth of the intent to be analyzed or the identity of the persons whose intent is deemed important. If one concept of intent is as good as another, the originalist position crumbles.

Is the concept of intent, as used by originalists, hopelessly indeterminate? To answer this question, let us begin by distinguishing carefully between the content of an idea and the language used to describe that idea. A person begins by developing a concept in his mind. At some stage he decides to attempt to communicate that concept to others. At that point the relevant concept may be fully formed and specific or underdeveloped and vague. But in any event, the communicator must choose the language which he believes will best express his idea.

19. *See* Richards, *supra* note 15, at 499.

Even assuming that he has developed the relevant concept with great precision, he may face a variety of problems in this process. First, if the idea is to be disseminated widely, the communicator must recognize that people may differ widely in their understanding of the meaning of particular words. Thus, he must remember that his own understanding of the meaning of a word is not dispositive; instead, he must employ language which will effectively convey his meaning to others. Further, even if he chooses his mode of expression with great care, some are likely to misunderstand the message.

The use of terms such as "democracy" and "democratic theory" in the debate over judicial review illustrates this point. Virtually all participants in the debate agree that an appeal to democratic theory connotes a general belief in the principle of political equality. At times, however, democracy is defined to embrace additional values as well. For example, some suggest "true" democracy requires a certain measure of equality in the distribution of wealth.[20] The result is that when one refers to an idea as grounded in democratic theory, different listeners may attach different implications to that reference.

The mere fact that an idea may be expressed imperfectly or ambiguously does not, however, suggest that the communicator has not developed a fully-formed, concrete theory. For example, when Dean Ely refers to the concept of democracy, he is basically concerned only with equal access to the political process; by contrast, Professor Richard Parker includes economic equality within his definition of democracy. In each case the content of the relevant concept itself is relatively clear; it is only the language used to convey the concept which is ambiguous.

The linguistic attacks on originalist theory are vulnerable to a similar analysis. Admittedly, on its face the intent term is subject to diverse interpretations. Yet originalists themselves clearly intend the term to convey a fairly precisely defined concept of the proper functioning of the judicial process. This concept embodies both a specific definition of intent and an established hierarchy among the intents of those who participated in the drafting process.

Originalists clearly define intent narrowly rather than broadly. The term refers to the contemporaneously expected impact of relevant provisions instead of the general motivations of those involved in the drafting. While the hierarchy of drafters is discussed less often, a number of principles emerge from the literature. With respect to section one of the fourteenth amendment, for example, dis-

20. *See, e.g.*, Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981).

cussions of the intentions of Congress rather than of the ratifying states predominate. Within Congress, the most important opinions are generally perceived to be those of John Bingham, the drafter of the specific language, and Thaddeus Stevens and Jacob Howard, who made the official presentations of the views of the Joint Committee on Reconstruction, which developed the fourteenth amendment. The views of Republican supporters in the 39th Congress typically are also accorded significant weight. Other evidence is largely tangential.

Nonoriginalist linguistic analysts therefore do not show that the basic concept of originalism itself cannot give effective guidance to judges in constitutional adjudication; at most nonoriginalists can contend that the intent term generally used to describe the concept is insufficiently specific. This hardly seems a telling criticism of the basic theory. If insufficient specificity is the problem, the solution is to make the language more specific rather than to abandon originalism entirely.

Moreover, an attack on the specificity of the intent term would be overstated in any event. The use of the term is a clear reference to the intent of the legislature. In that context the courts have developed a relatively clear set of conventions which largely resolve any ambiguities generated by the use of the concept of intent. The same conventions can be easily adapted to the resolution of similar problems encountered in the constitutional context.

Indeed, when it suits their purposes nonoriginalists themselves have little difficulty in giving content to the intent term. One of the major political arguments against originalist theory is that its adoption would force the courts to abandon "good" decisions such as *Brown v. Board of Education* and *Griswold v. Connecticut*.[21] Nonoriginalists could hardly make such an assertion if they did not have a clear understanding of what the use of the intent term entails.

THE ARGUMENT FROM UNCERTAINTY

Assuming arguendo that the intent term can be viewed as a single, well-defined, concrete entity, nonoriginalists often base part of their attack on the difficulty of ascertaining historical "facts" such as the intent of the framers. Typically the arguments focus on such factors as the necessary incompleteness of the evidence and the difficulty of placing oneself within the worldview of those who lived

21. *See, e.g.*, M. PERRY, *supra* note 5, at 1-2; Gerety, *Doing Without Privacy*, 42 OHIO ST. L.J. 143 (1981).

one or two centuries ago. The uncertainty generated by these factors is viewed as a fatal flaw in the originalist argument.[22]

Nonoriginalists are correct in asserting that one can rarely determine the actual intent of the framers with absolute certainty. The key question is whether such uncertainty should be viewed as a dispositive objection to originalism. On this point two different types of argument might be made.

First one might argue that certainty of result is the most important attribute of any system of judicial review.[23] By this criterion, the important question is not whether the results which would be generated by the adoption of a particular theory are uncertain. Instead the key issue is whether the degree of uncertainty inherent in the application of the challenged theory is greater than that of competing approaches.

Measured against this standard, the originalist approach fares quite well. The intent of the framers is no more difficult to ascertain than conventional morality,[24] the requirement of representation-reinforcement analysis,[25] or the decision that will best advance the cause of socialism.[26] In a comparative perspective, the argument from the need for certainty is not fatal to originalist theory.

More commonly, nonoriginalists argue that originalism *specifically* requires that clear, noncontroversial answers be derivable from a search for the intent of the framers.[27] This contention, however, misapprehends the essential nature of originalism. Obviously certainty is a value which enhances the appeal of any legal theory. Originalist theory, however, is primarily concerned with addressing far more fundamental concerns. It is not the results generated by reference to the intent of the framers—clear or unclear, concrete or vague—which provide the core of originalism's appeal. Instead, the appeal derives from a particular conception of law, which in turn requires the use of a specific judicial reasoning process. The process

22. *See, e.g.*, Brest, *supra* note 1, at 218-22; Tushnet, *supra* note 17, at 796-804.

This argument should be distinguished carefully from that which holds that the intent of the framers can be determined definitively, and that the requisite intent was to create an "open-ended" constitutional order. *See, e.g.*, J. ELY, *supra* note 1, at 11-41; Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 126-37 (1983). *Cf.* Bryden, *Politics, the Constitution, and the New Formalism*, 3 CONST. COMM. 415, 427 (1986).

23. *See* Brest, *supra* note 1, at 222 (by implication).

24. *E.g.*, Perry, *Abortion, The Public Morals and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

25. J. ELY, *supra* notes 1 & 8 and accompanying text.

26. Tushnet, *The Dilemmas of Liberal Constitutionalism*, 43 OHIO ST. L.J. 411 (1981).

27. *See* Tushnet, *supra* note 17, at 793.

does not require judges to perform the impossible task of divorcing themselves from the political, historical, and cultural context in which they function; instead, all that is required is that judges apply the conventions inherent in originalist theory to make their best estimate of the "framers' intent."

POLITICAL AND MORAL THEORY

Of course, the concept of law embodied by originalism is itself a manifestation of a particular political or moral worldview. If one could prove that this worldview is totally indefensible, then the argument for originalism would also be refuted.

The nonoriginalist argument based on political and moral theory begins with the assumption that any defensible approach to constitutional adjudication must be derivable from some coherent political or moral theory. Nonoriginalists argue that it is impossible to construct such a theory which supports a requirement that the courts be bound by the intent of the framers.[28] In taking this position, they focus primarily on the two arguments upon which originalists themselves rely most heavily: the appeal to democratic theory[29] and the appeal to the concept of law itself.[30]

Although it is probably the most popular defense of originalism, the appeal to democratic theory is also the easiest to dismiss. The Constitution itself plainly establishes rights which are inconsistent with the basic concept of majoritarian rule. The existence of these rights cannot be reconciled with "democracy" by pointing out that the Constitution itself was adopted through a democratic process; clearly, the principle of majority rule must refer to contemporary majorities, not those which existed in 1787.[31] Thus, the appeal to democratic theory is best understood as "a conceptually muddled groping for judicial restraint."[32]

Moreover, in some circumstances democratic theory would support nonoriginalist activism. For example, the framers plainly intended that the states retain a large measure of autonomy in determining the structure of their respective governments. Accordingly, from an originalist perspective the reapportionment cases probably were wrongly decided.[33] But from the standpoint of *dem-*

28. *E.g.*, Bennett, *The Mission of Moral Reasoning in Constitutional Law*, 58 S. CAL. L. REV. 647 (1985); Simon, *supra* note 7.

29. *See, e.g.*, J. ELY, *supra* note 1, at 1-9; Bennett, *supra* note 28, at 648.

30. *See* Dworkin, *supra* note 17, at 474-75; Simon, *supra* note 7.

31. *See* Maltz, *New Thoughts*, *supra* note 4, at 821-22; Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U.L. REV. 417, 443-45 (1981).

32. Bennett, *supra* note 28, at 648.

33. *See, e.g.*, R. BERGER, *supra* note 10, at 69-98; Maltz, *The Fourteenth Amendment as*

ocratic theory "one person, one vote" is preferable to the framers' intentions. In this context, originalist theory thus leads to a (good or bad) antidemocratic result.

The originalist position is not grounded on democracy. It is grounded on the concept of law. On this point Professor Ronald Dworkin aptly summarizes the essence of the nonoriginalist attack: "[n]one of the standing philosophical theories of law supplies the necessary arguments [to justify the adoption of originalism]."[34] Obviously, even if correct this statement alone does not discredit originalism; if originalism can be viewed as a product of *some* coherent theory of law, it matters little that the theory is different from that espoused by (for example) Bentham, Austin, Kelsen or Hart. Nonoriginalists, however, go further, arguing that it is impossible to construct the necessary philosophical theory.[35] And so, they conclude, originalism must be abandoned.

In order properly to evaluate this claim, one must first focus on the nature and limits of the concept of philosophical proof itself. Philosophers sometimes analogize their approach to the scientific method. But the two disciplines differ in at least one important respect. The ultimate test of any scientific theory is the extent to which the model generated by the theory coincides with observable physical reality; if proven inconsistent with that reality, any theory—no matter how elegant—must be abandoned or modified.

Moral and political philosophers, by contrast, have no tangible baseline against which to measure their normative theories. The question of whether an approach is valid or not is determined solely by reference to a group of abstract rules which establish guidelines by which various attempts at "proof" are evaluated. Typically, legal philosophers adopt a set of principles which might be described as "syllogistic" or "Aristotelian." These rules require that the philosopher first describe a set of basic axioms—premises—which are to be taken as givens in his system of thought. From these established premises, the philosopher is to apply the rules of deductive logic to generate other guidelines—conclusions. The validity of a particular approach is determined by the extent to which the philosopher has followed the logical rules in generating his conclusions from his premises.

Political Compromise—Section One in the Joint Committee on Reconstruction, 45 OHIO ST. L.J. 933, 969-70 (1984). For contrary views, see J. ELY, *supra* note 1, at 118-19; Van Alstyne, *The Fourteenth Amendment, The "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33.

34. Dworkin, *supra* note 17, at 474.

35. *See, e.g.*, Richards, *supra* note 15, at 506 (defenses of originalism rest on "bad" philosophy); Simon, *supra* note 7.

One can of course reject entirely the theory that the rules of syllogistic philosophical argument should govern one's view of various approaches to constitutional analysis. But even if one accepts the basic theory, its utility as an analytic tool is limited. For by its nature Aristotelian logic can only be applied to *deductions* from basic premises. If the premises themselves are based on assertions regarding the nature of observable phenomena, the assertions can be checked against the actual state of the real world. The axioms of originalism, however, are based instead on fundamental notions regarding the nature of justice. One can of course disagree with such premises; but one cannot use logic to prove them wrong.

To illustrate this point in a limited context, assume that the members of two different religious groups are arguing over an issue of constitutional law. Members of each group believe as a matter of faith that a particular book contains the revealed word of God and that the contents of that book should guide judges in constitutional cases. They differ in the identity of the book which they consider authoritative. One group—the Traditional Men's Church (TMC)—believes in the Book of Falwell, which states clearly that women are to remain subordinate both in the home and in society generally. The other group—the Women's Progressive Temple (WPT)—adheres to the Book of Smeal, which insists on sexual equality.

Obviously, on sex discrimination issues the TMC members would advocate a different judicial posture than would members of WPT. But neither group could be accused of taking illogical positions in the formal sense. Each would simply be following its respective basic premises in an entirely consistent manner.

Like the respective teachings of the Books of Falwell and Smeal, originalist theory defines its own internal logic. The theory establishes a hierarchy of premises which judges are expected to follow in order to reach decisions in constitutional cases. Each of these premises (as well as their respective places in the hierarchy) reflects a value judgment rather than a deduction from other premises. It is this set of value judgments which forms the body of the originalist approach. One can disagree with the approach; but since its elements are not derived from other premises, originalism cannot effectively be refuted by a charge of logical inconsistency.

If the premises of originalism were foreign to the fundamental political conceptions of American society one might well argue that originalist theory could be summarily dismissed. One can of course adopt whatever premises he chooses, but some are sufficiently farfetched that they can be safely ignored. Professor Mark Tushnet's

suggestion that courts decide cases in the fashion best calculated to advance socialism may well fit this description. The basic underpinnings of originalism, however, hardly fall into this category.

Originalism embodies two basic, related ideas on the appropriate structure of the governing process. First, the theory rests on the mundane observation that even in constitutional litigation the power of judges derives from the fact that they are sitting as judges in courts. Typically, this power is viewed as bounded by a variety of legal conventions, some of which (such as respect for precedent) are often articulated, but many of which are so basic that they generally remain unstated. Originalists claim quite simply that analogous conventions should be applicable in the constitutional context.

The second observation on which originalist theory rests is that in constitutional cases judges are relying on a written source of authority—a constitution. For this reason, say the originalists, judges should adopt legal conventions analogous to those which govern the interpretation of other authoritative documents such as contracts and (especially) statutes. It is these conventions which are embodied in the common use of the intent term.

These basic concepts reflect values which are widely shared in American society. One can of course disagree with these values or argue that in some circumstances they should be subordinated to other concerns. But disagreement does not demonstrate that the originalist mode of analysis is untenable; only that—like every other constitutional theory—it is controversial and likely to remain so.

A nonoriginalist might still claim to have proved his point by noting that while he is unable to totally discredit originalism, any defense of originalism is likely to be equally inconclusive. The nonoriginalist would argue that in the absence of such a conclusive defense, a judge should not adopt a mode of analysis which prevents her from reaching results which she believes to be desirable.

Here the issue turns on the burden of persuasion. The nonoriginalist would focus on the fact that restrictions placed on the judiciary by originalism force judges to eschew decisions they would otherwise desire. Surely, she would argue, such restrictions require cogent justification. By contrast, the originalist would note that he is simply asking that judges remain within their normal role. He would contend that the person asking judges to step outside that role—the nonoriginalist—should bear the burden of demonstrating the clear superiority of her argument. Neither contention is facially absurd; one's view of the proper resolution of the burden of proof dispute is likely to track closely his view of originalism generally. Thus, a nonoriginalist relying on this argument would demonstrate

only that a rejection of originalism is plausible. He would not have proven the claim that reliance on the intention of the framers is totally insupportable.

Of course, the failure of the absolute arguments to conclusively discredit originalism does not prove that it is preferable to other modes of constitutional analysis. The failure does, however, have important implications for the terms of the debate. For if the discussion must be in comparative terms, then almost inevitably political arguments will predominate—arguments which must consider not only specific results, but also the appropriate structure of government generally. And on the latter issue, originalists necessarily start with a built-in advantage. For the originalist position embodies more widely-held views of the appropriate function of judges generally in a well-ordered society.