1992

Republican Revival/Interpretive Turn

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The civic republican revival and the interpretive turn are two leading movements in constitutional jurisprudence. Civic republicanism emphasizes that citizens belong to a political community where they participate in a dialogue about the common good. Interpretivism, meanwhile, holds that all of our practices, including constitutional adjudication, are interpretive; we are always situated within interpretative communities and traditions that simultaneously constrain and enable understanding. Civic republicanism and interpretivism, however, both face serious challenges. Critics of the republican revival charge that it invites oppression and silencing of divergent voices because it emphasizes the community and the common good. Opponents of the interpretive turn charge that it lacks the critical bite that we need to evaluate judicial decisions. Republicanism and interpretivism, though, can be synthesized into a single theory of constitutional jurisprudence and political action—republican interpretivism—that can withstand the charges being leveled against each independent theory. Republican interpretivism has critical bite because it focuses on the common good: a constitutional decision as well as any other political action should be evaluated by asking whether it promotes the common good. But the common good is not an objective foundation for constitutional adjudication or political action, but an interpretive concept. As such, its meaning, while determinate in concrete contexts, remains open to questioning and to dialogue.

INTRODUCTION

Pluralism has dominated American political and constitutional thought since shortly after the Second World War. Drawing on Lockean liberalism for theoretical support, pluralists conceive of politics as a conflict amongst free and atomistic individuals who struggle to maximize the satisfaction of their preexisting private interests. The relativity of values is sacrosanct: the only standard of political conduct is whether one's personal viewpoint is acceptable in the political arena. In the
1980s, however, constitutional theorists rediscovered the republican roots of American political thought.\(^2\) The nascent "republican revival"\(^3\)—currently one of the most significant movements in constitutional jurisprudence—emphasizes that citizens, rather than being isolated and independent, belong to and participate in a political community. Within that community, the dominant activity is not to aggrandize political power, but to deliberate—to partake in a political dialogue that ideally ends in the pursuit of a common or public good, not the mere satisfaction of private interests.\(^4\)

Meanwhile, another movement is simultaneously progressing in constitutional theory. The "interpretive turn"\(^3\) in jurisprudence owes its historical development in part to the pluralism of the postwar era. Since the legislative process is viewed in pluralistic theory as a largely unprincipled clash of private interests, constitutional scholars have reasoned that the Supreme Court should exercise judicial review to inject principles and ethical values, which would otherwise be lacking, into our governmental

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R. Macey, Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism, 76 VA. L. REV. 265 (1990). Gary Becker writes: "The economic approach to political behavior assumes that actual political choices are determined by the efforts of individuals and groups to further their own interests." Gary S. Becker, A Theory of Competition Among Pressure Groups for Political Influence, 98 Q.J. ECON. 371, 371 (1983). Becker adds: "Just as managers of firms are hired to further the interests of owners, so too are politicians and bureaucrats assumed to be hired to further the collective interests of pressure groups, who fire or repudiate them by elections and impeachment when they deviate excessively from these interests." Id. at 396; accord Sam Peltzman, Toward a More General Theory of Regulation, 19 J.L. & ECON. 211, 212 (1976).


5. See, e.g., INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux eds., 1988); Interpretation Symposium, 58 S. CAL. L. REV. 1 (1985); Symposium: Law as Literature, 60 TEX. L. REV. 373 (1982).
6. The Court, however, must ultimately derive those principles and values from an interpretation of the Constitution—the Justices must not merely impose their private preferences upon society. Consequently, constitutional scholars eventually focused on the process of interpretation itself—how it occurs and how it is constrained. These scholars discovered that an extensive body of literature on interpretation had been developing in many other fields, ranging from literary criticism to the history of science. As the constitutional scholars realized that they could apply the insights from these other fields to interpretive problems in constitutional law, the interpretive turn arrived in jurisprudence. Interpretivists now argue that all of our practices, including constitutional adjudication, are interpretive: we are always situated within interpretive communities and traditions that simultaneously constrain and enable our understanding of texts and text-analogues.

Both of these leading movements in constitutional jurisprudence—the republican revival and the interpretive turn—currently face serious challenges. Critics of the republican revival charge that republicanism, by emphasizing the community and a common good, invites the oppression and silencing of divergent voices within society. Individual interests might be sacrificed to a coercive societal consensus bordering on authoritarianism. Critics of the interpretive turn, in the meantime, charge that interpretivism lacks the standards necessary for the criticism of judicial decisions. Interpretivism, in short, lacks critical bite and thus threatens to corrupt our understanding of the judicial process.

The purpose of this Article is first to identify and to highlight significant yet previously unrecognized intertwining threads of the republican revival and the interpretive turn. Then, by strengthening these already existing threads of commonality, the two movements are woven together into a whole—a republican interpretivism. Republican interpretivism is both a republican and an interpretive theory: its interpretive


7. See e.g., Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703 (1975).


component responds to the critical charges leveled against other republican theories, while its republican component responds to the charges brought against most other interpretivist theories. More specifically, in the context of American politics and constitutional jurisprudence, the common good of republicanism provides the standard or critical bite otherwise lacking in interpretivist theory, but interpretivism reveals that the common good is an interpretive concept that invites dialogue and the opening, not the closing, of the community to divergent voices.  

Part I of this Article traces the development of the republican revival, while Part II explores the emergence of the interpretive turn. Part III identifies and explores the overlaps between republicanism and interpretivism and then argues that the two movements can be combined in a manner so that each will enrich the other. Part III concludes with a discussion of the recent dispute over flag desecration to illustrate how republican interpretivism might operate as a theory of constitutional adjudication and political action.

I. Republican Revival

Two different and opposed narratives potentially explain the dominance that pluralism has enjoyed in American political theory since World War II. The first narrative, which pluralists themselves typically offer, derives pluralism directly from the political thought of the framers, particularly their supposed commitment to Lockean liberalism. The second narrative explains pluralism instead as a historical phenomenon rooted more strongly in the development of twentieth century intellectual thought than in the framers’ political thought. According to this latter explanation, as developed in this Section, pluralism represents a contingent political manifestation of the modern commitment to scientific

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12. I do not claim that the common good can provide a criterion for judgment in contexts other than American politics and constitutional jurisprudence. For example, in literature, one probably would not evaluate competing interpretations of a Shakespearean sonnet by asking which reading promotes the common good. See generally Charles Fried, Sonnet LXV and the “Black Ink” of the Framers’ Intention, 100 Harv. L. Rev. 751 (1987) (on how to interpret Shakespeare). But the republican revival persuasively argues that the common good is, in the context of American constitutional jurisprudence and political action, the proper criterion of judgment. See infra text accompanying notes 18-136 (on republican revival); cf. Steven D. Smith, Law Without Mind, 88 Mich. L. Rev. 104, 110-11 (1989) (what matters is not merely having some constraint on interpretation, but having the proper kind of constraint).

15. See infra text accompanying notes 201-02.
17. See infra text accompanying notes 229-67.
empiricism and ethical relativism. Contrary to the pluralists’ claims, the framers were influenced by many diverse political thinkers—not only Locke but also the seminal republican theorists, Aristotle and Machiavelli. The republican revival arises from the recognition of the republican underpinnings of American constitutional thought and the related historical deconstruction of the privileged position long occupied by pluralism.

To understand the location of pluralism in twentieth century thought, one must begin with the dramatic transformation of intellectual thought that unfolded during the early twentieth century. The late nineteenth century had been dominated by formalism—an unshakable acceptance of the powers of logic, abstraction, and deduction as the means to understanding society and its parts. In jurisprudence, the preeminence of formalism was manifest in the prestige of the classical orthodoxy of Langdell and his followers. According to classical orthodoxy, legal science is a means to the logical discovery of objective and absolute legal rules and principles. The entire legal system is neatly ordered into a conceptual framework resembling a pyramid, with a few axiomatic and abstract principles at the apex and more precise and numerous rules at the base of the pyramid. The lower-level rules are derived from the top-level principles through a process of non-controversial deductive reasoning.

In the early twentieth century, however, a mounting emphasis on empiricism, particularism, and functionalism besieged the dominance of formalism, in law as well as in other fields. By the 1920s and 1930s, the increasingly important social sciences had rejected formal reasoning, conceptual frameworks, and abstract theorizing as means to knowledge; social scientists turned instead to the empirical study of particular or concrete human actions and how those actions served certain functions within society. Human behavior no longer appeared to result from rational choice, rather people seemed more idiosyncratic, controlled by obscure forces such as the unconscious and the economic structures of society.

18. See Morton White, Social Thought in America (1976).
19. See id. at 11.

21. See Edward A. Purcell, Jr., The Crisis of Democratic Theory (1973); White, supra note 18.
22. See Purcell, supra note 21, at 3-73; White, supra note 18. Purcell summarizes the attitudes of the new social and behavioral scientists in the phrase, “scientific naturalism.” See Purcell, supra note 21, at 3-12.
A growing ethical and cultural relativism accompanied this rise of the empirical social sciences. The collapse of formalism meant that values could no longer be derived from abstract reasoning and that ethics could no longer be grounded on absolute principles. Values appeared instead to arise out of the concrete and particular vagaries of human experiences. By the 1930s, intellectuals found it difficult to justify any set of moral values or cultural tenets over any others. All values and cultures had equal claims to validity (and invalidity).

In jurisprudence, the American legal realism of the 1920s and 1930s starkly illustrated the related rises of empiricism and ethical relativism. The classical orthodox claims to the logical discovery of absolute legal principles yielded to the realist charges that legal principles are "transcendental nonsense." According to the realists, judges decide cases based on intuitive hunches, not abstract reasoning, and judges' hunches are influenced by arbitrary yet concrete factors such as the hair color of a witness, the nasal twang of an attorney, or the breakfast the judge happened to eat that morning. Thus, only empirical studies that focus on the observable behavior of legal actors lead to any legitimate understanding of the legal system.

The rise of ethical and cultural relativism presented a serious challenge to democratic theory in the 1930s. Intellectuals questioned the ability of the public to discuss and to decide political issues rationally: if illegitimate prejudices and demagogic symbols sway most people, then from a political standpoint, most citizens act irrationally. Politics, consequently, becomes a matter of raw power since political decisions result from no more than the interplay of interests in the particular and

23. Purcell, supra note 21, at 40-42.
24. See id. at 69-73.
25. See id. at 74-94.
29. See Karl Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222 (1931). A scientific wing of American legal realism sought to describe legal institutions through the methods of social science. Legal rules and principles might be irrelevant to judicial decision making, but, according to these realists, careful observation would reveal other stimuli that cause predictable judicial responses. See, e.g., Underhill Moore & Gilbert Sussman, Legal and Institutional Methods Applied to the Debiting of Direct Discounts—III: The Connecticut Studies, 40 Yale L.J. 752 (1931).
30. See Purcell, supra note 21, at 112-14.
concrete circumstances. Moreover, the international ascent of totalitarianism towards the end of the decade raised this challenge to democratic theory to the level of a crisis. The events of the world rendered a firm belief in democracy a necessity, yet developments in intellectual thought over the previous decades had severely weakened the theoretical supports of free government. The common good of classical republicanism plainly could not sustain democracy: theorists perceived the common good to be an absolute and objective value. In a relativist world, acceptance of the concept of the common good was thus impossible, and some even equated the common good with the authoritarianism of the Nazis. Intellectuals were forced to ask the definitive question: if all values are relative, then what justifies a preference for democracy over totalitarianism?

Intellectuals responded to this crisis in the 1940s and 1950s by developing the theory of American pluralism. While only a few years earlier, the relativity of values threatened to disarm democracy, the same relativism now became the theoretical foundation for free government. A society must constantly choose what substantive values to endorse and thus what ends to pursue. But since values are relative, the pluralists argued, then the only legitimate method for choosing amongst disparate values is the democratic process. Society cannot appeal to an Archimedean point to confirm its choices because no such ultimate criterion exists. In short, there is no standard of validity higher than acceptance by the people in the political arena.

Pluralists therefore viewed the political process as a legitimate battle between competing interest groups, all of whom bring preexisting and

31. See id. at 96.

32. See, e.g., JOSEPH ALOIS SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 250 (3d ed. 1950). Schumpeter wrote: "This common good implies definite answers to all questions so that every social fact and every measure taken or to be taken can unequivocally be classed as 'good' or 'bad.'" Id.

33. See PURCELL, supra note 21, at 202. Joseph Schumpeter wrote: There is . . . no such thing as a uniquely determined common good that all people could agree on or be made to agree on by the force of rational argument. This is due not primarily to the fact that some people may want things other than the common good but to the much more fundamental fact that to different individuals and groups the common good is bound to mean different things.

SCHUMPETER, supra note 32, at 251.

34. See PURCELL, supra note 21, at 138.


36. Cf. SCHUMPETER, supra note 32, at 242 (emphasizing that democracy is a means for arriving at decisions).
largely irrational values to the political arena. Interest groups attempt to form coalitions, to compromise, and otherwise to gather political support in an unprincipled struggle to satisfy their own desires by influencing or controlling legislators. Individuals, interest groups, and legislators never consider a community interest or common good; Robert Dahl typified this perspective when he wrote, "If unrestrained by external checks, any given individual or group of individuals will tyrannize over others." The results of political battles therefore matter less than the process itself: the process legitimates the results. Values are relative, but democracy must continue.

Nevertheless, many pluralists believed that—despite the relativity of values—a basic cultural agreement or consensus is necessary for democracy to operate. Although various individuals and interest groups might clash in political struggles, they must agree on certain elementary cultural norms to prevent the society from splintering into embittered fragments. However relative those cultural norms might be, pluralists saw an American society fundamentally and harmoniously

37. See, e.g., SCHUMPETER, supra note 32, at 250-64 (questioning the independence and rationality of individuals). Schumpeter wrote that politics is a "competitive struggle for political power." Id. at 283; accord id. at 269.

38. See, e.g., V.O. KEY, POLITICS, PARTIES, AND PRESSURE GROUPS (4th ed. 1958) (emphasizing politics as the exercise of power, and discussing the role played by pressure groups in that exercise of power); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS (1951) (extensive study of the functioning and influence of political interest groups); see also BERNARD R. BERELSON ET AL., VOTING (1954) (social group identification and its influence on voting); ANGUS CAMPBELL ET AL., THE AMERICAN VOTER (1960) (study of the dynamics of social groups and the influence of group identification on American voters).

39. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 6 (1956).

40. This emphasis on governmental processes was especially strong in jurisprudence during the 1950s and 1960s in the legal process school, which was spearheaded by Henry Hart and Albert Sacks. HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (Tentative ed. 1958). For a discussion of the transition from realism to legal process, see G. Edward White, The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change, in PATTERNS OF AMERICAN LEGAL THOUGHT 136 (1978).

41. See PURCELL, supra note 21, at 254-72. Benjamin Barber defines pluralism as follows: "[P]luralist democracy resolves public conflict in the absence of an independent ground through bargaining and exchange among free and equal individuals and groups, which pursue their private interests in a market setting governed by the social contract." BARBER, supra note 37, at 143 (emphasis omitted).

42. See PURCELL, supra note 21, at 231, 252-56.

43. See, e.g., SCHUMPETER, supra note 32, at 290 (democracy thrives in only particular social situations).
joined in a cultural consensus celebrating individual liberty and freedom. Democracy is possible in the American culture because all agree that individuals should have the freedom to express diverse viewpoints. The uncertainty of values and the tentativeness of truth allow democracy to flourish in America because compromise and "unreflective practicality" become prerequisites to the very possibility of political action.

Thus, the dominance of pluralism is explained through this historical narrative of intellectual thought during the twentieth century. In summary, early in this century, formalism came under heavy attack until it succumbed to empiricism and its corollary, ethical relativism. Ethical relativism, together with the ascent of totalitarianism, created a crisis for democratic theory. The resolution of this crisis in the postwar era came in the form of a relativist theory of democracy—namely, pluralism. Of course, this historical explanation for the rise of pluralism was not the justification that the pluralists themselves offered when they defended their theory and its dominance. The political theorists instead justified pluralism by rooting it in the thought of the framers and the framers' supposed embrace of Lockean liberalism.

Louis Hartz, in particular, most vigorously argued that the American society and Constitution are Lockean. In fact, according to Hartz, the most distinctive quality of American constitutionalism is its unmitigated devotion to Lockean principles. Hartz argued that the fundamental assumption of both Lockean and American constitutional thought is that free and atomistic individuals existing in a state of nature join together to form a political community for the protection of their preexisting rights. And the foremost preexisting right is liberty. From this vision of the

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44. For example, Robert Dahl wrote: "To assume that this country has remained democratic because of its Constitution seems to me an obvious reversal of the relation; it is much more plausible to suppose that the Constitution has remained because our society is essentially democratic." Dahl, supra note 39, at 143. Likewise, Louis Hartz argued that America was marked by a moral unanimity that simultaneously allowed or included conflict. Louis Hartz, The Liberal Tradition in America 14-20 (1955). That unanimity, according to Hartz, allowed Americans to see certain norms as self-evident. See id. at 58-59, 85-86, 134. To Hartz, the "master assumption of American political thought . . . [was] the reality of atomistic social freedom." Id. at 62.

45. Purcell, supra note 21, at 253.

46. See id. at 235-66.

47. Hartz succinctly captured his vision of the cultural tradition of America in his statement: "Burke equaled Locke in America . . . ." Hartz, supra note 44, at 156. This view of America as being ultimately rooted in Lockean liberalism remains in vogue with many current commentators. See, e.g., Richard A. Epstein, Takings (1985); Thomas L. Pangle, The Spirit of Modern Republicanism (1988).

origins of the Constitution, postwar theorists saw pluralism as the inevitable descriptive and prescriptive picture of American politics. If society is inherently individualistic, then politics should be no more than the pursuit of the satisfaction of one's own desires.\(^4^9\)

Two major difficulties critically weaken this defense of pluralism. First, Locke's political thought is more complex than the pluralists acknowledged, and second, many political theorists other than Locke influenced the framers as they constructed our constitutional government. With regard to Locke, the pluralists correctly characterized his state of nature as individualistic. Locke argued that each individual enjoys "perfect freedom"\(^5^0\) in the state of nature, an "uncontrollable liberty to dispose of his person or possessions."\(^5^1\) Despite this freedom, the state of nature entails fear and uncertainty,\(^5^2\) and individuals therefore consent\(^5^3\) to join political society for the "mutual preservation" of property,\(^5^4\) where property means one's natural right to "life, liberty, and estate."\(^5^5\) Locke continued, however, by declaring repeatedly that the end of government is the "public good"\(^5^6\) or "common good."\(^5^7\)

Moreover, Locke added that seeking to satisfy one's "private ends" is the opposite of acting for the public good.\(^5^8\) Hence, while the pluralists accurately found in Locke strong doses of individualism and natural rights preexisting the state—the hallmarks of liberalism—they overlooked a perhaps equally strong measure of the republican common good.\(^5^9\) Locke

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49. Attributing the axioms of the framers' constitutional thought even more to Hobbes than to Locke, Robert Dahl wrote that the framers believed the following:

> Men are instruments of their desires. They pursue their desires to satiation if given the opportunity. One such desire is the desire for power over other individuals, for not only is power directly satisfying but it also has great instrumental value because a wide variety of satisfactions depend upon it.

Dahl, supra note 39, at 8.


51. Id. at 5; accord id. at 123-24.

52. See id. at 48; accord id. at 71, 98-99.

53. See id. at 8, 50, 63-64, 73, 75, 76, 81-83, 88-95, 112-13, 118, 124-25, 136.

54. Id. at 54.

55. Id. at 71; accord id. at 123-24.

56. See id. at 54-55, 65.

57. Id. at 48; accord id. at 124-25, 136.

58. Id. at 92; accord id. at 112.

59. See, e.g., Hartz, supra note 44, at 46 (abruptly dismissing the importance of republican theory to American revolutionaries); cf. Stephen Holmes, The Secret History of Self-Interest, in Beyond Self-Interest 285 (Jane J. Mansbridge ed., 1990) (According to Locke, "Proper interests are those that are compatible with 'the general Good' of all.").
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does not support a political theory that encourages an unprincipled struggle to gratify one's own desires.

Furthermore, Locke was but one of many political theorists who influenced the framers' constitutional thought. From the perspective of the republican revival, the most important theorists were Aristotle and Machiavelli, who provided the definitive statements of classical and Renaissance republican thought. According to Aristotle's political writings, the good of the political community and the good of the individual are inseparable. The telos or natural end of human life is eudaimonia or happiness, and one achieves happiness by living a life in accordance with virtue. Since Aristotle emphasized that "man is by nature a political animal"—that is, the state or political community stands prior to the individual—one cannot live virtuously unless living and acting prudently and sagaciously within a political community. Aristotle wrote that in "the best regime, [the citizen] is one who is capable of and intentionally chooses being ruled and ruling with a view to the life in accordance with virtue." Furthermore, regardless of what form of government exists—whether a government of the one, the few, or the many—the best government, according to Aristotle, is the one that seeks the common interest or good, not private interests. And at least in aristocratic and constitutional governments—that is, respectively, governments of the few and the many that pursue the common good—the

60. See POCOCK, supra note 4. The influences of Aristotle, Machiavelli and Locke were not always direct; sometimes the framers read other theorists who had interpreted the more seminal thinkers. See POCOCK, supra note 4; MORTON WHITE, PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION (1987). Moreover, I do not mean to suggest that Aristotle, Machiavelli and Locke were the only seminal theorists to influence the framers. For example, Montesquieu's thought on separation of powers was important, see MONTEESQUEU, THE SPIRIT OF THE LAWS at bk. XI, ch. 6 (Anne M. Cohler et al. trans. and ed., 1989), as was Hume's thought on how factions arise most easily in smaller republics, see DAVID HUME, Of Parties in General, in ESSAYS: MORAL, POLITICAL AND LITERARY 54 (1963).


62. See ARISTOTLE, NICOMACHEAN ETHICS, supra note 61, at bk. I.


64. ARISTOTLE, NICOMACHEAN ETHICS, supra note 61, at bk. VI, ch. 1-3; ARISTOTLE, THE POLITICS, supra note 61, at bk. I, ch. 2.


66. Id. at bk. III, ch. 7.
common interest is determined through deliberation or community dialogue.\(^6\) In short, a political community is not a mere alliance of individuals that facilitates private economic exchanges and provides security, rather the political community exists to allow citizens to live virtuously.\(^6\)

Although Aristotle claimed that politics is a practical science,\(^6\) his writings reveal an important undercurrent of universalism or objectivism.\(^7\) For example, Aristotle wrote that the greatest of virtues in political society is justice,\(^7\) and justice is in part natural, "that which everywhere has the same force and does not exist by people's thinking this or that."\(^7\) This undercurrent occasionally surfaces in potentially oppressive forms. Aristotle argued, for instance, that a political community is a partnership of individuals who share a certain perception of the good life or the common interests of the community.\(^7\) This picture of a community defined by a shared consensus of the good life suggests that some individuals—at least those who do not share in the consensus—are not entitled to participate in political deliberations. And indeed, Aristotle argued that some individuals are by nature "marked out for subjection, others for rule."\(^7\) Thus, unsurprisingly, Aristotle believed that the best regime is the aristocracy—a government of the few in the pursuit of the common good.\(^7\)


\(^8\) See ARISTOTLE, NICOMACHEAN ETHICS, supra note 61, at bk. I, ch. 3.

\(^9\) See POCOCK, supra note 4, at 21-22 (1975).

\(^10\) ARISTOTLE, NICOMACHEAN ETHICS, supra note 61, at bk. V, ch. 1.

\(^11\) Id. at bk. V, ch. 7.

\(^12\) Aristotle wrote: "For it is peculiar to man as compared to the other animals that he alone has a perception of good and bad and just and unjust and other things [of this sort]; and partnership in these things is what makes a household and a city." ARISTOTLE, THE POLITICS, supra note 61, at bk. I, ch. 2.


\(^14\) See ARISTOTLE, THE POLITICS, supra note 61, at bk. VII-VIII. Moreover, according to Aristotle, some can be so completely excluded that they can be justifiably enslaved. See id. at bk. I, ch. 5.
Machiavelli continued many of the themes from Aristotelian thought, but added a hard, cynical tone. As was true of Aristotle, Machiavelli believed that politics is an eminently practical topic and that the best governments, regardless of their forms, seek the common good, not private interests. Machiavelli, however, preferred a republic over a monarchy—he suggested that the people can best maintain a political order—but he nonetheless also stated that humans are ignoble by nature. Consequently, according to Machiavelli, human nature together with sheer fortune doom all forms of government to eventual ruin. The tension between political order and fortune—and the resultant struggle to maintain the fragile political community—was a constant theme for Machiavelli: he redefined virtue as the (at least temporary) overcoming of fortune. Virtue thus became for Machiavelli the "judicious alternation" of Aristotelian virtue and vice: the political leader, for example, must at times exercise liberality with money, but at other times must exercise miserliness; the political leader must at times display compassion, but at other times must act cruelly; and so on. According to Machiavelli, a political leader's most important goal must be the


77. Thus, the theme of The Prince was how a prince can maintain a state through the use of any available means. See Machiavelli, The Prince, supra note 76.

78. See Machiavelli, Discourses, supra note 76, at bk. I, ch. 2.

79. Machiavelli argued that a republic is likely to be more resilient than a princedom because the republic can draw more readily upon the diversity of its citizens. Id. at bk. I, ch. 9; see id. at bk. I, ch. 20, 59; cf. id. at bk. I, ch. 2 (the best government is a mixture of government by the one, the few, and the many).

80. Machiavelli wrote that people are by nature bad or vicious. See, e.g., Machiavelli, The Prince, supra note 76, at ch. 18; Machiavelli, Discourses, supra note 76, at bk. I, ch. 3. Thus, according to Machiavelli, a prince is better to be feared than loved. See Machiavelli, The Prince, supra note 76, at ch. 17.

81. See Machiavelli, Discourses, supra note 76, at bk. I, ch. 2.

82. Fortune stands for the random changes of the world that are, for the most part, beyond human control. See Machiavelli, The Prince, supra note 76, at chs. 7, 25.

83. Strauss, supra note 76, at 301.

84. See Machiavelli, The Prince, supra note 76, at chs. 15-19.
preservation of the state or political community, and that overarching goal justifies the use of any means necessary.85

The constitutional thought of the framers resonated with republican tones that emanated from Aristotle and Machiavelli.86 Most important, the framers emphasized repeatedly that the purpose of government is to pursue the public or common good of the political community.87 And according to the framers, that public good might, at times, be inconsistent with the private interests of individual citizens and governmental officials.88 Furthermore, in The Federalist, Publius mentioned—but did not emphasize—that Americans possess sufficient virtue to maintain self-government89 and that our governmental leaders should be imbued with

85. Machiavelli wrote that "the end justifies the means." NICCOLO MACHIAVELLI, THE PRINCE (Luigi Ricci and E. R. P. Vincent trans.), reprinted in SOCIAL AND POLITICAL PHILOSOPHY: READINGS FROM PLATO TO GHANDI 123 (John Somerville & Ronald E. Santoni eds., 1963). Allan Gilbert translates the same passage as follows: "As to the actions of all men and especially those of princes, against whom charges cannot be brought in court, everybody looks at their result." MACHIAVELLI, THE PRINCE, supra note 76, at ch. 18.

86. Even more so than for either Aristotle or Machiavelli, political thinking was a practical enterprise for the framers; they were, after all, writing an actual constitution.


[T]he public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object. Were the plan of the convention adverse to the public happiness, my voice would be, Reject the plan. THE FEDERALIST No. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961).


The constitutional text states that the Constitution and the government should promote and provide for the "general welfare." U.S. CONST. pmbl; U.S. CONST. art. I, § 8, cl. 1; see also THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776) (laws for the "public good").


89. See THE FEDERALIST No. 55, at 346 (James Madison) (Clinton Rossiter ed., 1961); see also WHITE, supra note 60, at 91-99.
civic virtue so that they will naturally pursue the public good. This form of virtue is Aristotelian in nature: one must act prudently, sagaciously, and for the good of one’s political community. The framers, moreover, believed themselves to be exercising civic virtue as they deliberated—as Aristotle had recommended—about the common good of America and how that common good should be embodied and protected in a constitution.

While Aristotelian virtue is but a peripheral theme for the framers, echoes of a more Machiavellian virtue sound more strongly in constitutional thought. Despite acknowledging that Americans are virtuous enough to have self-government, Publius often characterized humans as base and greedy creatures who tend to band into factions that constantly threaten the ends and security of republican government. The purpose of the Constitution, consequently, became the structuring of a stable government that would act for the public good despite the ignobleness of human nature and the resultant fragility of the republic. Just as Machiavelli had emphasized a tension between political order and fortune, the framers emphasized a tension between political order and faction—where a faction was any group, whether a minority or a majority,


91. See The Federalist No. 37, at 231 (James Madison) (Clinton Rossiter ed., 1961). Herbert Storing wrote:

The Constitution of the United States was viewed by the founding generation as distinctive, even unique, in the extent to which it was the product of deliberation. Most previous foundings seemed to have been the result of chance or the edict of one all-powerful man. But the United States Constitution was framed by a numerous and diverse body of statesmen, sitting for over three months; it was widely, fully, and vigorously debated in the country at large; and it was adopted by (all things considered) a remarkably open and representative procedure.

92. See Pocock, supra note 4, at 462-552.


95. See The Federalist No. 10 (James Madison) (Clinton Rossiter ed., 1961); The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("Ambition must be made to counteract ambition.").
that opposed the public good. 96 Madison's simultaneous expressions of hope and distrust in *The Federalist, Number 57*, captured the cynicism of Machiavellian virtue:

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust. 97

Hence, the framers were often concerned with traditional republican themes—the political community, the common good within that community, deliberation about the common good, and virtue—and therefore unsurprisingly, some disturbing aspects of earlier republican thought also surfaced in American constitutional thinking. In particular, the undercurrent of objectivism that appeared in Aristotelian theory becomes stronger and clearer in the framers' thought, reflecting the firm epistemological belief in objectivity that typified the eighteenth century. 98 The framers thus conceived of the common good as objective—as the "true interest" 99 of the people that was somehow "out there" 100 yet knowable, external yet perceptible to individual minds. 101 In *The Federalist, Number 10*, Madison consequently equates the common good with "the permanent and aggregate interests of the community." 102

96. THE FEDERALIST No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961); see THE FEDERALIST No. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Madison wrote: "To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed." THE FEDERALIST No. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961). See generally POCOCK, supra note 4, at 545-46 (the "Machiavellian moment" in American constitutional thought).


100. WHITE, supra note 60, at 120.

101. See PANGLE, supra note 47, at 29; WHITE, supra note 60, at 118-20, 189.

102. THE FEDERALIST No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added); accord THE FEDERALIST No. 63, at 383 (probably James Madison) (Clinton Rossiter ed., 1961) (equates public good with the "collective and permanent welfare" of the country); letter from James Madison to Thomas Jefferson (Oct. 24, 1787) reprinted in 1 THE FOUNDERS' CONSTITUTION 647 (Philip B. Kurland & Ralph Lerner ed., 1987) (contrasting private interests with "the general and permanent good of the
The concept of an objective common good led to elitist and conservative strains in the framers' constitutional thought. Publius occasionally suggested that certain individuals are more capable than others of perceiving the true interests of the people—the objective common good—and those most virtuous people ideally should be elected to governmental offices. Then, pushing this argument even further, Publius reasoned that some groups of people—namely, women and African-American slaves—are so incapable of perceiving the public good that they can be justifiably excluded from the deliberations within the political community. Once these diverse voices were politically silenced, Publius could observe that the (remaining) American people were unusually homogeneous. This vision of a political community distinguished by consensus amongst members and closure to all others further reflected the Aristotelian roots of American constitutional thought.

The modern republican revival in constitutional jurisprudence evolves largely from the recognition that the roots of American constitutional thought range at least as deeply into republicanism as they extend into Lockean liberalism. Moreover, the foregoing narrative of twentieth century intellectual thought reinforces a renewed interest in republicanism: if pluralism is understood as a unique historical phenomenon of twentieth

whole”).


104. See The Federalist No. 54, at 336-41 (James Madison) (Clinton Rossiter ed., 1961); cf. White, Philosophy, supra note 103, at 266-67 (elitism was important element leading to disenfranchisement of many groups in Constitution).


106. But cf. Pangle, supra note 47, at 46-47 (arguing that Publius rejected the pressure to conform that typified classical republicanism).


Political scientists and economists also are challenging with empirical evidence the current manifestation of pluralism, public choice theory. See Farber & Frickey, supra note 1, at 895-901; see, e.g., Joseph P. Kalt & Mark A. Zupan, Capture and Ideology in the Economic Theory of Politics, 74 Am. Econ. Rev. 279 (1984) (the altruistic and publicly interested goals of political actors are empirically important to governmental processes). For a collection of essays rejecting the view that humans are always motivated by self-interest, see Beyond Self-Interest (Jane J. Mansbridge ed., 1990). For a discussion of public choice theory, see supra note 1.

Some pluralists occasionally acknowledged the importance of republican themes to constitutional thought. See Schumpeter, supra note 32, at 267.
century thought flowing from a rejection of formalism and the related rises of empiricism and relativism, then the appeal of republicanism heightens as the luster of pluralism fades. The Constitution can best be understood as an uncertain blend of republicanism and liberalism; however, pluralism ignores the important republican component of the American union.\textsuperscript{108} The key figures in the modern republican movement—including Cass Sunstein,\textsuperscript{109} Bruce Ackerman,\textsuperscript{110} Frank Michelman,\textsuperscript{111} and Owen Fiss\textsuperscript{112}—consequently stress the republican

\textsuperscript{108} It is also important, however, not to ignore the liberal roots of American constitutional thought. For example, Madison expressly refused to sacrifice individual liberty in his quest to prevent faction. See \textit{The Federalist} No. 10, at 78-80 (James Madison) (Clinton Rossiter ed., 1961); see also \textit{The Federalist} No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (judicial review should protect individual rights). The new republican theorists generally acknowledge the importance of liberalism. See, e.g., Cass R. Sunstein, \textit{Preferences and Politics}, 20 \textit{Phil. \& Pub. Aff.} 3 (1991) [hereinafter Sunstein, \textit{Preferences and Politics}]; Cass R. Sunstein, \textit{Beyond the Republican Revival}, 97 \textit{Yale L.J.} 1539 (1988) [hereinafter Sunstein, \textit{Beyond}] (combining liberalism and republicanism).

Herbert Storing argues that the Anti-federalists also attempted to combine liberalism and republicanism, while Gordon Wood more strongly characterized the Anti-federalists as believing in a pure classical republicanism. Compare STORING, supra note 90 with WOOD, supra note 4. More recently, Wood has argued that modern theorists often attempt to force a categorical dichotomy between liberalism and republicanism onto the framers, but the framers did not so sharply distinguish the two modes of political thought. The categorical distinction between liberalism and republicanism, in other words, is more characteristic of twentieth century thought than the framers' thought. Gordon S. Wood, \textit{The Virtues and the Interests}, \textit{New Republic}, Feb. 11, 1991, at 32-35.


For a criticism of Sunstein's position from an interpretivist perspective, see Feldman, \textit{Exposing}, supra note 2.


\textsuperscript{112} See Owen M. Fiss, \textit{The Death of the Law?}, 72 \textit{Cornell L. Rev.} 1 (1986) [hereinafter Fiss, \textit{Death}]; Owen M. Fiss, \textit{Foreword: The Forms of Justice}, 93 \textit{Harv. L. Rev.} 1 (1979) [hereinafter Fiss, \textit{Foreword}]. Of the four theorists mentioned in the text, Fiss is perhaps the one who would be least likely to identify himself categorically as a new republican. Nonetheless, he clearly pursues republican themes in his work, and I therefore follow Mark Tushnet's lead by characterizing Fiss as a republican theorist. See
elements of American constitutionalism and the ramifications of those elements for our understanding of the Constitution. 113

While these republican theorists differ on specific details of how republicanism should be manifested in constitutional law, they all agree on the importance of certain traditional republican themes. All four theorists emphasize that citizens should not be envisioned as free and atomistic individuals who merely seek to satisfy their own interests, rather citizens must always be understood to exist within a political community. 114 The central political activity within that community is dialogue: politics, for the republicans, becomes a deliberative process, not an unprincipled battle for raw power. 115 And the goal of dialogue within the political community is to identify the common good. 116 Indeed, the overarching distinction between pluralistic and republican political theories lies in their respective visions of the purpose of government. For pluralism, the purpose of government is the satisfaction of private interests, while for republicanism, the purpose is the pursuit of the common good.

Interestingly, the traditional republican theme of virtue is at most a peripheral issue for the new republican theorists—this de-emphasis was


113. Other theorists who are sympathetic to the republican revival include Sanford Levinson, see SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); Mark Tushnet, see TUSHNET, supra note 112, at 17, 187; and Suzanna Sherry, see Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543 (1986).


115. See, e.g., Ackerman, Constitutional Politics, supra note 110, at 455, 525; Fiss, Death, supra note 112, at 8; Fiss, Foreword, supra note 112, at 12-13; Michelman, Foreword, supra note 111, at 33-36, 75-76; Michelman, Law's Republic, supra note 111, at 1524; Sunstein, Naked Preferences, supra note 109, at 1694; Sunstein, Beyond, supra note 108, at 1548-51.

116. See, e.g., Ackerman, Storrs Lectures, supra note 110, at 1022, 1033; Sunstein, supra note 107, at 31-32, 58; Sunstein, Naked Preferences, supra note 109, at 1690-91.
also true of the framers' treatment of at least Aristotelian virtue. The new republican theorists rarely discuss virtue as a definitive ingredient of modern republicanism. While for traditional republican theories, virtue was prerequisite to the pursuit of the common good, for the modern theorists, dialogue within the political community is essential. Although an Aristotelian type of virtue might facilitate the pursuit of the common good, to the modern theorist, the promotion of virtue often appears to be little more than a possible outcome flowing from the pursuit of a republican form of government. No theorist suggests, however, that virtue is harmful, rather virtue is simply not an overriding consideration.

Although Sunstein, Ackerman, Michelman, and Fiss agree on these basic republican themes, they differ in their respective reactions to the weaknesses that have typified previous forms of republicanism. Thus, while they all agree that the dialogical pursuit of the common good is central to republican government, they disagree about who are the principal participants in the dialogue. Sunstein argues that the legislators are principal; Michelman and Fiss argue that the courts are primary, and Ackerman argues that all of the people participate, though only at special times of constitutional awareness.

117. As discussed above, Machiavellian virtue played a more important role in the framers' thought, although they did not expressly discuss it. See supra text accompanying notes 92-97.

118. Sunstein writes:

[C]ivic virtue should play a role in political life. There is no mystery to this claim; it refers simply to the understanding that in their capacity as political actors, citizens and representatives are not supposed to ask only what is in their private interest, but also what will best serve the community in general . . . .

Sunstein, Beyond, supra note 108, at 1550.

Michelman, more so than the other republican theorists, focuses somewhat on virtue. See Michelman, Foreword, supra note 111, at 55-73.

119. See Kahn, supra note 114, at 18-43; Michelman, Foreword, supra note 111, at 58-60.

120. See, e.g., Sunstein, Naked Preferences, supra note 109, at 1699 (legislators should pursue the public good; the courts police the legislative process to ensure that legislators do so).

121. See Fiss, Death, supra note 112, at 8; Michelman, Foreward, supra note 111, at 65, 74. Michelman, however, has subsequently suggested that the political dialogue should occur in many forums, not just the courts. See Frank I. Michelman, Bringing the Law to Life: A Plea for Disenchantment, 74 CORNELL L. REV. 256, 266 (1989) (discussing political dialogue in the legislatures); Michelman, Law's Republic, supra note 111, at 1531 (identifying many "arenas of potentially transformative dialogue").

122. See Ackerman, Constitutional Politics, supra note 110, at 401; Ackerman, Storrs Lectures, supra note 110.
Furthermore, all four theorists avoid giving significant content to the concept of the common good, yet an unmistakable undercurrent of objectivism flows through the thought of at least Sunstein and Fiss. Sunstein argues that courts should police the legislative process to ensure that legislators pursue the common good, not "naked preferences." Naked preferences, according to Sunstein, are "preexisting private interests," exogenous to social influences and autonomously chosen by individuals. To Sunstein then, naked preferences provide neutral and objective Archimedean points for constitutional adjudication: supposedly, courts can easily identify naked preferences because they are raw, simple, and obvious. Without these naked preferences to ground constitutional decision, Sunstein fears that courts will have "no alternative position from which to decide cases."

Fiss argues that the courts must give meaning to our public values—especially constitutional values—by engaging in "a special kind of dialogue." Fiss insists, however, that the judicial dialogue is so closely constrained that judges are, in fact, objective; judges cannot


125. Sunstein, Naked Preferences, supra note 109. Sunstein defines the common good as "any justification for government action that goes beyond the exercise of raw political power"—that is, anything other than a naked preference. Id. at 1694.

126. Id. at 1716.

127. Sunstein, supra note 107, at 31; Sunstein, Legal Interference, supra note 109; see Sunstein, Naked Preferences, supra note 109, at 1689.

128. Sunstein, Lochner's Legacy, supra note 109, at 905. Sunstein also discusses universalism as an aspect of his form of republicanism. Sunstein, Beyond, supra note 108, at 1554-55. For a critique of Sunstein's position, see Feldman, Exposing, supra note 2.

129. See Fiss, Death, supra note 112, at 8; Fiss, Foreword, supra note 112, at 1-2, 11, 14, 28-32.

130. Fiss, Death, supra note 112, at 8.
merely express "personal beliefs." In particular, according to Fiss, certain "disciplining rules" constrain constitutional interpretation and provide standards for criticizing judicial decisions. Judges can ignore these rules—for example, by not listening properly to all parties, by not articulating an opinion, or by not applying neutral principles—but then, Fiss argues, law no longer differs from politics.

These aspects of modern republican theories—the uncertainty about who participates in the political dialogue, and the undercurrent of objectivism—lead critics of the republican revival to refocus our attention on the traditional problems of republicanism. If politics is the pursuit of the common good, then we must be genuinely concerned that the interests of some individuals might be ignored for the supposed good of the community. To facilitate reaching a consensus about the common good, in other words, some voices might be silenced—especially the voices of minorities and others who sometimes tend to experience and to perceive the world differently from the majority. In effect, the political community will be closed: some will not fully participate in the all-important dialogue. This fear is especially pronounced when the undercurrent of objectivism surfaces. If the common good can be found to be objective, then once it has been identified, the dialogue might as well end—dissenting voices, according to this view, inevitably belong only to those who are unable or unwilling to understand the truth. Thus, modern


132. Owen M. Fiss, Conventionalism, 58 S. Cal. L. Rev. 177, 184-96 (1985) [hereinafter Fiss, Conventionalism]; Fiss, Objectivity, supra note 131, at 744-46.

133. See Fiss, Conventionalism, supra note 132, at 194-96; Fiss, Objectivity, supra note 131, at 754-55.


135. Cf. Fitts, supra note 124, at 1613 n.147 (questioning the extent to which the new republicans endorse objective morality).
Republican theorists face some of the same grave charges that justifiably plagued earlier republicans from Aristotle to the framers.\footnote{See Feldman, Whose Common Good?, supra note 2 (racism can undermine the communal dialogue about the common good); Robin West, Foreword: Taking Freedom Seriously, 104 HARV. L. REV. 43, 62-63 (1990) (despite the new republicans' claims to the contrary, civic republicanism does not protect individuals from the pressure of community homogeneity and conformism). Even some new republican theorists criticize other new republicans for encouraging elitist, authoritarian or conservative constitutionalism. See, e.g., TUSHNET, supra note 112, at 164-66; Michelman, Law's Republic, supra note 111, at 1520 (criticizing Ackerman); James G. Pope, Republican Moments: The Role of Direct Popular Power in the American Constitutional Order, 139 U. PA. L. REV. 287, 295-304 (1990).}

II. INTERPRETIVE TURN

A historical narrative describing the interpretive turn in jurisprudence must embark from postwar pluralism. In particular, much modern constitutional theory originates with Alexander Bickel, whose early constitutional thought developed in the 1950s and 1960s.\footnote{See BICKEL, supra note 6.} Bickel, echoing the dominant pluralistic political theory of his era, argued that the legislative process is a wide-open clash of interests, open to everyone and controlled by shifting majorities. Legislative actions are largely unprincipled and, at best, reflect the most expedient means for solving problems and attaining goals.\footnote{Id. at 24-25, 225-26; see ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 37 & n.* (1978).}

If, as Bickel argued, the legislative role is to allow the free play of democracy, then the judicial role is to inject principles into government. To Bickel, the central commitment of our constitutional government is democracy. Legislative actions are legitimate because they are democratic: they theoretically represent the will of the majority of the people.\footnote{See BICKEL, supra note 6, at 20, 27.} On the other hand, a judicial decision striking down a legislative act as unconstitutional supposedly defeats the democratic will. To overcome this "counter-majoritarian difficulty,"\footnote{Id. at 16.} judicial review must be justified, according to Bickel, by adding something to government that is otherwise lacking. Since Bickel believed that the legislative process is pluralistic—and hence unprincipled—he argued that constitutional adjudication should add principles or ethical values to our system. Consistent with pluralistic political theory, Bickel saw an American
society agreeing on basic cultural norms; the Supreme Court's function thus is to enunciate and to apply those "enduring values of our society."¹¹¹

Based on Bickel's definitive vision of constitutional adjudication, the "problem" of judicial review became the delineation of our enduring values or, at a minimum, the identification of a method to guide the Court in its quest for those values.¹¹² Constitutional scholars argued that if the Court can defeat the democratic will in the name of enduring societal values, those values must be grounded on some objective source and not reflect the mere personal preferences of the Justices. Otherwise, the democratic core of American constitutional government is emptied of significance, and society is subject to judicial tyranny.¹¹³

By the late 1970s, two fundamentally different approaches to the problem of judicial review had developed: interpretivism and noninterpretivism.¹¹⁴ Interpretivists argued that only the constitutional text and the intent of the framers can legitimately ground constitutional decisions; the Court can strike a legislative act as unconstitutional only if it is inconsistent with "norms that are stated or clearly implicit in the

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¹¹¹ Id. at 58. Bickel wrote:
Our point of departure, like Mr. Wechsler's, has been that judicial review is the principled process of enunciating and applying certain enduring values of our society. These values must, of course, have general significance and even-handed application. When values conflict—as they often will—the Court must proclaim one as overriding, or find an accommodation among them. The result is a principle, or a new value, if you will, or an amalgam of values, or a compromise of values; it must in any event also have general significance and even-handed application. For, again, the root idea is that the process is justified only if it injects into representative government something that is not already there; and that is principle, standards of action that derive their worth from a long view of society's spiritual as well as material needs and that command adherence whether or not the immediate outcome is expedient or agreeable. It follows, and I take it Mr. Wechsler suggests, that once the Court has arrived at a principle, it must apply that principle without compromise. Therefore, the Court should not rest judgment on a "principle" which may be incapable of uniform application.

Id. (citing Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959)).


¹¹⁴ See Grey, supra note 7, at 705-07.
written Constitution."\textsuperscript{145} Noninterpretivists, on the other hand, argued that the text and the intent of the framers are hopelessly ambiguous and incomplete and must therefore be supplemented by some other source or sources, such as natural law, tradition, or societal consensus.\textsuperscript{146} According to a natural law proponent, for example, the Court can theoretically hold a legislative act unconstitutional if the act is inconsistent with natural rights or justice.\textsuperscript{147} Interpretivists responded by arguing that noninterpretivism merely provides a pretext for bypassing the Constitution. Constitutional objectivity can come only from the text and the intent of the framers: if we go beyond those sources, constitutional adjudication lacks standards and hence cannot be critically evaluated.\textsuperscript{148}

As Bickel eventually realized and as John Hart Ely so eloquently stated, ethical relativism—which had spawned the accepted pluralistic political theory—undermined any vision of judicial review grounded on a supposedly objective source, whether it be the written text, natural law, or anything else.\textsuperscript{149} Ely argued that interpretivism as well as the most commonly accepted forms of noninterpretivism are all indeterminate: they fail to satisfy their self-imposed mission of providing an objective source to ground judicial review.\textsuperscript{150} Ely's pointed criticism of natural law applies equally to other noninterpretivist as well as interpretivist approaches: "The advantage . . . is that you can invoke natural law to support anything you want. The disadvantage is that everybody understands that."\textsuperscript{151} Interpretivism and noninterpretivism, in Ely's hands, always sink into a maelstrom of subjectivity: the Supreme Court

\textsuperscript{145} JOHN H. ELY, DEMOCRACY AND DISTRUST 1 (1980); see, e.g., BERGER, supra note 143, at 247-418. The theory is that judicial review is legitimate when the Constitution is clear because the Constitution represents, in a sense, the permanent will of the majority and thus legitimately overrides the temporary will of the majority represented by ordinary legislative actions. See BERGER, supra note 143, at 45, 363-72; ELY, supra, at 8-9.

This form of interpretivism is not the same as the thoroughgoing interpretivism that took hold after the interpretive turn. See infra text accompanying notes 157-99.

\textsuperscript{146} For a summary of various noninterpretivist positions, see ELY, supra note 145, at 43-72.

\textsuperscript{147} See, e.g., Grey, supra note 7; Thomas C. Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 STAN. L. REV. 843 (1978).


\textsuperscript{149} See BICKEL, supra note 138, at 99, 165 (questions the possibility of finding neutral principles); ELY, supra note 145, at 1-73.

\textsuperscript{150} See ELY, supra note 145, at 1-73. For example, Ely argues that interpretivists are stymied by historical evidence showing that the framers included several provisions in the Constitution that suggest that the Court should go beyond the text and the intent of the framers. See id. at 12-14.

\textsuperscript{151} Id. at 50.
Justices inevitably seem to impose their personal values on society. This subjectivism also renders impossible the evaluation of constitutional decisions: if all values are relative, how can we legitimately criticize a Supreme Court decision?

Ely, of course, presented his own solution to the problem of judicial review: the theory of representation-reinforcement. According to this theory, the Court is forbidden from choosing substantive values for our society. The Court is instead limited to policing the processes of democratic representation and thus can overturn a congressional action as unconstitutional only if it resulted from a malfunctioning or defective democratic process.152 The attraction of representation-reinforcement is that it at least appears to remain doggedly consistent with pluralistic political theory. If all ethical values are relative, then the Court cannot possibly find some objective source to ground constitutional adjudication. Consequently, all substantive value choices in our society should be left to the legislatures, so long as they strictly follow democratic principles—allowing all citizens a fair opportunity to voice their equally subjective and relative values. The Court’s only legitimate function, then, is to insure that the legislatures follow those democratic principles.153

Ely himself did not escape the same criticism that he had leveled against others: representation-reinforcement theory was, in the end, indeterminate. Thus, it neither could constrain constitutional adjudication nor provide critical standards for evaluating Supreme Court decisions.154 For example, Ely argued that the Court can police the democratic process by “facilitating the representation of minorities.”155 The determination, however, of which societal groups constitute minorities deserving of judicial protection and which groups are simply losers in the democratic battleground is problematic. The categorization of groups as protected minorities requires the Court to engage in exactly those unconstrained substantive value choices that representation-reinforcement theory is supposed to forbid.156

Facing the apparent indeterminacy of all theories, constitutional scholars took a different tack. They began to argue that the initial

152. See id. at 73-183; cf. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) (the role of the Supreme Court in judicial review revolves around the functioning of the democratic political process).
153. See ELY, supra note 145, at 49-183.
155. ELY, supra note 145, at 135.
156. See Brest, supra note 154, at 140; see generally Feldman, Weber's Theory of Law, supra note 2 (process-based constitutional jurisprudence is likely to lead to a continuing failure to satisfy the substantive needs and values of minorities).
distinction between interpretivism and noninterpretivism may have been misleading; even supposed noninterpretivists always claimed to be interpreting the Constitution.  

Perhaps, the argument continued, constitutional adjudication—and indeed, all other adjudication as well—is always a matter of interpretation. And if adjudication is always an interpretive enterprise, then the most promising path for constitutional and other legal theorists was to investigate the process of interpretation itself. Consequently, a new central question emerged in jurisprudence: how does interpretation occur? Jurisprudence thus began its interpretive turn.

Pursuit of an answer to this overriding question of interpretation led constitutional theorists into fields far outside the legal academy. They discovered that scholars such as Stanley Fish, a literary critic, and Hans-Georg Gadamer, a continental philosopher, had already devel-


159. Fred Schauer wrote: "What does it mean to 'interpret' a constitutional provision? What do we mean when we say that a constitutional provision 'means' something? . . . Indeed, answers to these questions underlie any theory of constitutional adjudication . . . ." Frederick Schauer, An Essay on Constitutional Language, 29 U.C.L.A. L. REV. 797, 799 (1982).


161. See FISH, supra note 8; see, e.g., Fiss, Objectivity, supra note 131 (relying on Fish to develop views on law and interpretation); Sanford Levinson, Law as Literature, 60 TEX. L. REV. 373 (1982) (same). But see Stanley Fish, Fish v. Fiss, 36 STAN. L. REV. 1325 (1984) [hereinafter Fish, Fish v. Fiss] (criticizing how Fiss had interpreted Fish's works); Stanley Fish, Interpretation and the Pluralist Vision, 60 TEX. L. REV. 495 (1982) (criticizing how Levinson had interpreted Fish's works).

162. See HANS-GEORG GADAMER, TRUTH AND METHOD (Joel Weinsheimer & Donald Marshall trans., 2d rev. ed. 1989) [hereinafter GADAMER, TRUTH AND METHOD] (originally published in German in 1960; the first English translation was HANS GEOR GADAMER, TRUTH AND METHOD (W. Glen-Doepel trans., 1975)). For excellent analyses of Gadamer's philosophical hermeneutics, see GEORGIA WARNKE, GADAMER: HERMENEUTICS, TRADITION, AND REASON (1987); JOEL C. WEINSHEIMER, GADAMER'S HERMENEUTICS: A READING OF TRUTH AND METHOD (1985). More and more legal scholars have been relying explicitly upon Gadamer as they attempt to analyze legal interpretation. See, e.g., William N. Eskridge, Jr., Gadamer/Statutory Interpretation, 90 COLUM. L. REV.
oped sophisticated theories of interpretation. And most important, these interpretivist (or hermeneutic) theories promised to resolve or, perhaps, to dissolve the problem of judicial review. Constitutional theory seemed locked into a dilemma: the problem of judicial review, as defined by Bickel, demanded that constitutional adjudication be based on some objective foundation, yet every possible foundational theory appeared to degenerate into a subjective relativism that left adjudication unconstrained and impossible to criticize. Legal scholars discovered that interpretivism in other fields had originated from an effort to overcome various formulations of this same dilemma—either we have objective knowledge grounded on some Archimedean point, or we have unconstrained and subjective relativism. Interpretivism, in short, had rejected this either/or of objectivity or subjectivity.163

Interpretivism acknowledges that there is no objective foundation or Archimedean point to ground interpretation. Neither the text, the author's intent, nor anything else exists as brute data or, in other words, as an uninterpreted source of meaning.164 To a thoroughgoing interpretivist,


163. Paul Rabinow and William M. Sullivan write of the interpretive turn:

The interpretive turn refocuses attention on the concrete varieties of cultural meaning, in their particularity and complex texture, but without falling into the traps of historicism or cultural relativism in their classical forms. For the human sciences both the object of investigation—the web of language, symbol, and institutions that constitutes signification—and the tools by which investigation is carried out share inescapably the same pervasive context that is the human world. All this is by no means to exalt "subjective" awareness over a presumed detached scientific objectivity, in the manner of nineteenth-century Romanticism. Quite the contrary, the interpretive approach denies and overcomes the almost de rigueur opposition of subjectivity and objectivity.


164. Stanley Fish writes:

[There is no such thing as literal meaning, if by literal meaning one means a meaning that is perspicuous no matter what the context and no matter what is in the speaker's or hearer's mind, a meaning that because it is prior to interpretation can serve as a constraint on interpretation.]

Stanley Fish, Introduction: Going Down the Anti-Formalist Road, in DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 4 (1989); see DWORKIN, supra note 158, at 359-63; Stanley Fish, With the Compliments of the Author: Reflections on Austin and Derrida, 8 CRITICAL INQUIRY 693, 700 (1982). Many constitutional scholars have rejected the possibility of grounding constitutional interpretation on the intent of the framers. See, e.g., H. Jefferson Powell, The Original Understanding of Original Intent, 98 HARV. L. REV. 885 (1985); Terrance
all experience, perception, and understanding are interpretive; no matter what we do, we are always and already interpreting.\textsuperscript{165} Hence, no uninterpreted source of meaning ever stands outside of or prior to an interpretive act. As Gadamer writes: "[O]ur perception is never a simple reflection of what is presented to the senses."\textsuperscript{166}

Nonetheless, interpretivists insist that this rejection of objectivity does not force us into pure subjectivity. Interpretivists instead argue that the reader (or interpreter) is never an independent and autonomous subject who freely or arbitrarily imposes meaning on a text (or text-analogue).\textsuperscript{167} To the contrary, the interpreter is always situated in a "tradition"\textsuperscript{168} or, in Fish's words, in an "interpretive community,"\textsuperscript{169} from which we inherit prejudices and interests that constrain and direct our understandings of texts.\textsuperscript{170} One's life within a community necessar-

\textsuperscript{165} For discussions of the universality of hermeneutics, see Richard J. Bernstein, \textit{From Hermeneutics to Praxis}, in Philosophical Profiles: Essays in a Pragmatic Mode 94, 96 (1986); Hans-Georg Gadamer, \textit{The Universality of the Hermeneutical Problem}, in Josef Bleicher, Contemporary Hermeneutics 128 (1980).

\textsuperscript{166} Gadamer, \textit{Truth and Method}, supra note 162, at 90.

\textsuperscript{167} A text-analogue is any meaningful thing, event, or action that can be understood or read as if it were a text. See Clifford Geertz, \textit{Deep Play: Notes on the Balinese Cockfight}, in The Interpretation of Cultures 412, 448-49 (1973); Paul Ricoeur, \textit{The Model of the Text: Meaningful Action Considered as a Text}, in Interpretive Social Science—A Reader 81 (Paul Rabinow & William M. Sullivan eds., 1979).

\textsuperscript{168} Gadamer writes: "[W]e are always situated within traditions, and this is no objectifying process—i.e., we do not conceive of what tradition says as something other, something alien. It is always part of us, a model or exemplar . . . ." Gadamer, \textit{Truth and Method}, supra note 162, at 282. Gadamer adds: "Our historical consciousness is always filled with a variety of voices in which the echo of the past is heard. Only in the multifariousness of such voices does it exist: this constitutes the nature of the tradition in which we want to share and have a part." Id. at 284.

\textsuperscript{169} Stanley Fish writes:

[Communication or understanding is possible not] because he and I share a language, in the sense of knowing the meanings of individual words and the rules for combining them, but because a way of thinking, a form of life, shares us, and implicates us in a world of already-in-place objects, purposes, goals, procedures, values, and so on; and it is to the features of that world that any words we utter will be heard as necessarily referring. Stanley Fish, \textit{Is There a Text in This Class?}, in \textit{Is There a Text in This Class?} 303-04 (1980) [hereinafter Fish, \textit{Is There a Text}]; accord Stanley Fish, \textit{Change}, 86 S. Atlantic Q. 423, 423-24 (1987) [hereinafter Fish, \textit{Change}].

\textsuperscript{170} The concept of prejudices is from Gadamer, who writes: "[T]he historicity of our existence entails that prejudices, in the literal sense of the word, constitute the initial directedness of our whole ability to experience. Prejudices are biases of our openness to the world." Gadamer, \textit{supra} note 165, at 133. Jürgen Habermas, in his early
ily limits one's range of vision—what one can possibly see or understand in a text.\textsuperscript{171} Thus, James Boyd White, a legal and literary scholar, states that reading is always a "communal activity."\textsuperscript{172}

A crucial element of interpretivism is the recognition that although community and the concomitant prejudices constrain our possibilities for understanding, they simultaneously enable us to communicate and to understand. Our prejudices and interests actually open us to meaning, understanding, and truth.\textsuperscript{173} Gadamer writes:

This formulation certainly does not mean that we are enclosed within a wall of prejudices and only let through the narrow portals those things that can pro-

\textsuperscript{171} Gadamer uses the metaphor of the "horizon" to communicate the notion that one's possibilities for understanding are limited. The horizon is "the range of vision that includes everything that can be seen from a particular vantage point." Gadamer, \textit{Truth and Method}, supra note 162, at 302; see id. at 306.

\textsuperscript{172} James Boyd White, Law as Language: Reading Law and Reading Literature, 60 TEx. L. Rev. 415, 415 (1982) [hereinafter White, \textit{Law as Language}]; see JAMES BOYD WHITE, \textit{WHEN WORDS LOSE THEIR MEANING} (1984) [hereinafter WHITE, \textit{WHEN WORDS}].

\textsuperscript{173} Fish writes that "already-in-place interpretive constructs are a condition of consciousness." Fish, \textit{Dennis Martinez}, supra note 170, at 1795; see Fish, \textit{Change}, supra note 169, at 424, 433.

\textsuperscript{171} Fish writes that "already-in-place interpretive constructs are a condition of consciousness." Stanley Fish, \textit{Dennis Martinez and the Uses of Theory}, 96 YALE L.J. 1773, 1795 (1987) [hereinafter Fish, \textit{Dennis Martinez}]; see Fish, \textit{Change}, supra note 169, at 424, 433.
duce a pass saying, 'Nothing new will be said here.' Instead we welcome just that guest who promises something new to our curiosity. But how do we know the guest whom we admit is one who has something new to say to us? Is not our expectation and our readiness to hear the new also necessarily determined by the old that has already taken possession of us?\(^{174}\)

Thus, truth, knowledge, and understanding are possible—though not in the traditional objective sense—because we participate in the tradition of an interpretive community.

Critics charge, however, that interpretivism is no more than a sophisticated form of subjectivism, a "disguised" idealism or cultural relativism.\(^{175}\) If, as the argument goes, the interpretivists cannot ground meaning on some fixed and objective foundation, then meaning must be imposed by the interpreter or, at best, by the interpretive community itself. The meaning of a text must therefore be uncertain and changing as the person or the community of the interpreter changes; the interpretivists, despite their claims to the contrary, have relegated truth, knowledge, and understanding to the emptiness of a subjective relativism. In short, truth that is indeterminate is no truth at all.\(^{176}\)

The weakness of this criticism lies in its failure to recognize that interpretation is always a practical or concrete activity.\(^{177}\) Fish argues, for example, that a text appears to have a plurality of meanings only if we take the text out of its context, only if we imagine the text in the abstract. But, as Fish reminds us repeatedly, we are always situated in a concrete context: we never interpret a text in the abstract.\(^{178}\) And situated in a

\(^{174}\) Gadamer, supra note 165, at 133.

\(^{175}\) Moore, supra note 11, at 957; see id. at 874, 892; Hirsch, supra note 164, at 41-44. Habermas has criticized Gadamer for being an idealist. See Jürgen Habermas, A Review of Gadamer’s Truth and Method, in UNDERSTANDING AND SOCIAL INQUIRY 335, 359-60 (Fred R. Dallmayr & Thomas A. McCarthy eds., 1977).

\(^{176}\) See ROBERT BORK, THE TEMPTING OF AMERICA 242, 257 (1990); RICHARD POSNER, LAW AND LITERATURE 217 (1988); Fried, supra note 12, at 756-57; Moore, supra note 11.

\(^{177}\) Another way to view this criticism is that it warps interpretivism by forcing it into the traditional categories of the either/or of objectivity and subjectivity. The charge reduces to the standard claim that if we do not have objectivity, then we must have subjectivity. One response (though an incomplete one) to this criticism is that these critics refuse to open themselves to the possibility of overcoming the subject/object dichotomy.

\(^{178}\) Fish writes:

A sentence is never apprehended independently of the context in which it is perceived, and therefore we never know a sentence except in the stabilized form a context has already conferred. But since a sentence can appear in more than one context, its stabilized form will not always be the same.
context—in an interpretive community—a text always has a determinate meaning, though that meaning can change as the context changes. Moreover, our traditions and prejudices themselves are not abstract ideas and words, rather they arise from and are constituted by concrete experiences that are mediated through language. Gadamer writes: "Language is the fundamental mode of operation of our being-in-the-world and the all embracing form of the constitution of the world." Yet the use of language itself is a practical activity; language is communicated through practical experiences and activities.

For instance, a child learns through a multitude of social interactions the definition of being a police officer in our society. The child might watch police officers performing duties on the street, or perhaps, the child might be in a car that an officer stops for a traffic violation. Over time, the child thus acquires the meaning of being a police officer through the accumulation of these experiences, although the meaning is always mediated through language. That is, these social experiences gain meaningful shape only through linguistic concepts already existing in the community. Thus, the child eventually learns that an officer wears a certain type of uniform, carries a gun, drives a special car, and performs certain tasks. The child, in effect, carries these characteristics as prejudices that shape the child's conception of the role of police officers.


179. James Boyd White also argues that interpretation is a practical activity, see White, *Law as Language*, supra note 172, at 441, 444, and Gadamer similarly argues that interpretation, understanding, and application are all part of "one unified [hermeneutic] process." GADAMER, *TRUTH AND METHOD*, supra note 162, at 308. The concreteness of Gadamer's vision of interpretation is underscored by his heavy reliance on Heidegger, who was an existential phenomenologist. That is, Heidegger insisted that we can understand Being-in-the-world only by focusing on practical and everyday activities. *See* Feldman, *supra* note 9, at 695-90; *see also* HABERMAS, *KNOWLEDGE*, *supra* note 170, at 128-29 (discussing Peirce's pragmatism); MCCARTHY, *supra* note 170, at 91, 184.

180. *See supra* note 179.


182. James Boyd White writes: Our acts of language are actions in the world, not just in our minds. Even when we think we are simply communicating information, or being rigorously and exclusively intellectual, or just talking, we are in fact engaged in performances, in relation to others, that are ethical and political in character and that can be judged as such.

JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* at ix (1990); *see* Patterson, *supra* note 9, at 973-80 (law is a practice, and all understanding occurs through language).
in the community. The child does not acquire these prejudices in some ideal world of abstractions; instead the child has concretely experienced officers.¹⁸³

Since we always live within an interpretive community, interpretivism further holds that we never approach any text or text-analogue without some "fore-understanding" derived from our traditions, prejudices, and interests.¹⁸⁴ One's fore-understanding, however, does not undermine the interpretive process by predetermining meaning: rather interpretation consists of a dialogical "play" between the interpreter and the text in which the meaning of the text dialectically comes into being.¹⁸⁵ Interpretation is, in effect, dialogue: it requires one to question the text, to probe for its meaning, to ask new questions, to listen to the answers, and to continue in this dialogical process as if in a conversation.¹⁸⁶ One's fore-understanding "is constantly revised in terms of what emerges as [the interpreter] penetrates into the meaning [of the text]."¹⁸⁷ Thus, the dialectical process of understanding assures that one's answer often changes as meaning emerges even though one already expects a certain answer as soon as interpretation begins.

Gadamer's description of the so-called hermeneutic circle captures the dialogical nature of interpretation. In its simplest form, the hermeneutic circle underscores a relationship between a text and its constituent parts: an interpreter can understand a whole text only by understanding its parts, yet an interpreter can understand the parts only by anticipating an understanding of the whole.¹⁸⁸ An elaborated hermeneutic circle, however, brings within its scope the complex interactions between interpreter, text, and tradition (or interpretive community). Interpretation has two sides: on the one side, tradition limits the vision of the interpreter as he or she approaches the text, yet on the other side, tradition does


¹⁸⁴. Gadamer, Truth and Method, supra note 162, at 332; see White, Law as Language, supra note 172, at 428 ("[T]he individual always sees from a particular point of view and functions from a particular set of concerns.").

¹⁸⁵. See Gadamer, Truth and Method, supra note 162, at 101-69.

¹⁸⁶. See id. at 362-79; cf. White, supra note 158, at 836, 867 (law constitutes community through conversation).


¹⁸⁸. See id. at 291; Hans-Georg Gadamer, The Problem of Historical Consciousness, in Interpretive Social Science: A Reader 103, 146 (Paul Rabinow & William M. Sullivan eds., 1979); Rabinow & Sullivan, supra note 163, at 6-7.
not exist unless people constantly create and recreate it through the interpretive process itself.\textsuperscript{189} The latter side emphasizes that tradition is created as an ever new meaning of the text comes into being.\textsuperscript{190} As we participate in tradition by interpreting texts, we transform and reconstitute that tradition. The two sides of interpretation are not separate and do not function independently, rather they are simultaneous and interrelated. They resonate together as meaning comes into being within the hermeneutic circle.\textsuperscript{191}

Gadamer's elaborated concept of the hermeneutic circle and Fish's emphasis on "interpretive communities" underscore that we are historical beings who live in tradition, just as we live in a community: tradition is not a thing of the past, rather it is something we constantly participate in. "Tradition is not simply a permanent precondition; rather, we produce it ourselves inasmuch as we understand, participate in the evolution of tradition, and hence further determine it ourselves."\textsuperscript{192} In other words, we constantly constitute and reconstitute our tradition, our culture, and our community as we engage in the dialogical understanding of texts.\textsuperscript{193} Moreover, this constant reconstitution always is simultaneously constructive and destructive. It is constructive in the sense that we constantly build new traditions and communities, constantly adding to our already existing traditions and communities through interpretation and understanding, thus including new concepts, interests, prejudices, and significantly, participants. Yet the reconstitution is also destructive insofar as we

\textsuperscript{189.} See Gadamer, Truth and Method, supra note 162, at 281; see also White, Law as Language, supra note 172, at 420; James Boyd White, Introduction: Is Cultural Criticism Possible?, 84 Mich. L. Rev. 1373, 1380-82 (1986). Habermas writes:

Every new situation appears in a lifeworld composed of a cultural stock of knowledge that is "always already" familiar. Communicative actors can no more take up an extramundane position in relation to their lifeworld than they can in relation to language as the medium for the processes of reaching understanding through which their lifeworld maintains itself. In drawing upon a cultural tradition, they also continue it.


\textsuperscript{190.} Gadamer writes: "Even the most genuine and pure tradition does not persist because of the inertia of what once existed. It needs to be affirmed, embraced, cultivated." Gadamer, Truth and Method, supra note 162, at 281; cf. Fredrick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 419 (1985) (rules of language are made and remade by society).

\textsuperscript{191.} Clifford Geertz writes: "Without men, no culture, certainly; but equally, and more significantly, without culture, no men." Clifford Geertz, The Impact of the Concept of Culture on the Concept of Man, in The Interpretation of Cultures 49 (1973).

\textsuperscript{192.} Gadamer, Truth and Method, supra note 162, at 293.

\textsuperscript{193.} See White, When Words, supra note 172; White, supra note 158, at 867.
weaken or eliminate previously existing traditions and communities and exclude concepts, interests, prejudices, and participants.\textsuperscript{194}

Thus, interpretivists argue that we can understand the meanings of texts because our traditions and prejudices open us to the possibility of knowledge, yet our traditions and prejudices constantly change as they reconstitute through the interpretive process itself. The meaning of a text is therefore determinate, but not static; knowledge and understanding exist, yet they are not absolute or objective.\textsuperscript{195} This paradoxical quality of interpretivism\textsuperscript{196} leads to its most serious challenge: a concern that, in the end, interpretivism fails to achieve its initial project. As the historical narrative reveals, legal scholars initially took the interpretive turn in an effort to transcend the problem of judicial review: interpretivism promised to overcome the dichotomy between objectivity and subjectivity while preserving the possibility of truth, knowledge, and understanding in constitutional jurisprudence. Antagonists charge, however, that interpretivism lacks critical bite: interpretivists cannot tell us how to evaluate competing interpretations of a text. If two interpreters disagree about how they understand the same text—or even if one interpreter understands a text in two different ways —there is no way to determine which interpretation is correct.\textsuperscript{197} Interpretivists, according

\textsuperscript{194} See MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans. 1977); JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE 60-67 (Geoff Bennington & Brian Massumi trans. 1984). In law, Robert Cover most clearly focused on the destructiveness or violence of the interpretive process. Cover, \textit{supra} note 114; see SANFORD LEVINSON, CONSTITUTIONAL FAITH 17 (1988) (whenever a community rests upon an authoritative text, different modes of interpretation are likely to splinter that community); Richard Delgado, \textit{Storytelling For Oppositionists and Others: A Plea For Narrative}, 87 MICH. L. REV. 2411, 2414-15 (1989) (storytelling both builds and destroys community); Smith, \textit{supra} note 134, at 323, 328-29 (to achieve a "fully encompassing community" is impossible); see also THOMPSON, \textit{supra} note 170, at 66 (an antimony between participation in and alienation from tradition). Habermas emphasizes an authoritarian element within interpretation. He writes: "The fundamental function of world-maintaining interpretive systems is the avoidance of chaos, that is, the overcoming of contingency. The legitimation of orders of authority and basic norms can be understood as a specialization of this 'meaning-giving' function." JÜRGEN HABERMAS, LEGITIMATION CRISIS 118 (Thomas McCarthy trans., Beacon Press, 1975) (1973).

\textsuperscript{195} Gadamer writes that "[e]very age has to understand a transmitted text in its own way." GADAMER, TRUTH AND METHOD, \textit{supra} note 162, at 296.

\textsuperscript{196} Fish writes: "Paradoxically . . . words can [not] mean anything one likes, but . . . they always and only mean one thing, although that one thing is not always the same." Fish, \textit{Normal Circumstances}, \textit{supra} note 178, at 249.

\textsuperscript{197} See BORK, \textit{supra} note 176, at 251-52, 256-57; POSNER, \textit{supra} note 176, at 315; Moore, \textit{supra} note 11, at 926; Robin L. West, \textit{Adjudication is not Interpretation: Some Reservations About the Law-as-Literature Movement}, 54 TENN. L. REV. 203, 207-09 (1987). Philosophers and social theorists have attacked Gadamer's interpretivism on this same ground. See, e.g., BERNSTEIN, \textit{supra} note 165, at 105-09; Jürgen Habermas, \textit{The Hermeneutic Claim to Universality} (1971), in JOSEF BLEICHER, CONTEMPORARY
to this argument, can respond only by acknowledging that the meaning of
the text changes with its context and with the prejudices and interests of
the individual interpreter. Thus, despite the protestations of
interpretivists, the critics conclude that interpretivism ultimately is a form
of subjective relativism and thus renders meaning indeterminate. If
this charge is true, interpretivism may indeed be, as one of its antagonists
has asserted, "a turn for the worse."

III. REPUBLICAN INTERPRETIVISM

A. Synthesis

The republican revival and the interpretive turn currently stand as
two of the leading movements in constitutional jurisprudence, but each
faces a critical challenge that threatens its vitality. Critics of republican-
ism charge that its pursuit of the common good encourages closure of the
political community and the oppression of divergent voices. This
criticism becomes especially severe when the common good is cast as a
foundation for objective political and constitutional decision making.
Meanwhile, critics of interpretivism charge that it fails to provide the
standards necessary to evaluate competing interpretations of the constitu-
tional text. The thesis of this section is that republicanism and
interpretivism can be synthesized into a single theory—republican
interpretivism—which can withstand the critical challenges that threaten
to unravel each theory as it stands alone. The interpretive elements
of this synthesis respond to the charge that the republican pursuit of the common good threatens oppression and closure, while the republican elements of the synthesis respond to the charge that interpretivism lacks critical bite.

Important threads of commonality that run between republicanism and interpretivism initially suggest the prospect of weaving the two theories together into a single, stronger fabric. In particular, republicanism and interpretivism both emphasize the concepts of community and dialogue. Republicanism insists that citizens exist within a political community where the central activity is a dialogue that seeks the common good. Politics, therefore, is a communal and deliberative process, not an unprincipled battle for raw power. Interpretivism, meanwhile, holds that the community and its traditions instill in us prejudices and interests that open us to the very possibility of truth and understanding. The meaning of a text emerges, in effect, through a dialogue between the interpreter, the community, and the text. The interpreter, starting with a fore-understanding derived from his or her prejudices (and hence from the community), must question the text, listen for its answer, ask new questions, and continue to probe the text in this dialogical manner until its meaning comes into being.

Republicanism and interpretivism thus connect through their shared emphases on community and dialogue. This ready connection then facilitates the further integration of the two theories into a republican interpretivism. The core of this new theory of American constitutional jurisprudence and political action is the concept of the common good. The common good of republicanism can be added to interpretivism to provide a critical standard for interpreting the Constitution. Thus, competing interpretations of the Constitution are evaluated by asking which interpretation best promotes the common good. Interpretivism, on the other hand, can enrich republicanism by revealing that the common good is an interpretive concept. That is, the common good is not an objective foundation on which to ground constitutional adjudication, rather it is a concept that remains always open to interpretation—open to the dialogical questioning of the interpretive process.

The common good of republican interpretivism provides critical bite for constitutional interpretation, not by furnishing an objective foundation for decision, but by supplying a focal point for critical constitutional discussion. The common good focuses the interpretive dialogue by directing and generating our questioning of the constitutional text as its answers and its meaning emerge. When we interpret the Constitution, we typically concentrate on one provision or clause—whether it be the Equal

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201. See supra text accompanying notes 18-136.
202. See supra text accompanying notes 137-99.
Protective Clause, the Due Process Clause, the Establishment Clause, or any other provision or clause—but we should not forget that the Constitution is a whole document, despite its many parts. If, as Gadamer argues, a text must be understood as an answer to a question, then the Constitution answers the question, "What is the common good?" Each constitutional provision should be read as reflecting, in the words of Publius, the "whole tenor" of the Constitution: each provision somehow contributes to the overarching goal of the common good. To evaluate competing interpretations of the same clause, we must ask which interpretation best advances the common good. In short, the common good of republican interpretivism is the interest (or prejudice) that makes constitutional knowledge possible.

Although the common good provides the critical bite that interpretivism may otherwise be lacking, the common good of republican interpretivism, unlike that of traditional republicanism, is not vulnerable to objectivist readings. Rather, the common good of republican interpretivism is interpretive through and through. Because it is a form of interpretivism, republican interpretivism rejects the subject/object dichotomy: the common good neither provides an objective foundation for constitutional adjudication nor is it an empty concept, waiting for free and atomistic interpreters to impose their personal meanings. Instead, as an interpretive concept, the common good bears a determinate meaning in each concrete context, yet its meaning changes as the community and traditions change. The meaning of the common good, like all meaning, emerges through the interpretive dialogue of text, interpreter, and community. At the same time, the common good itself stands as an interest or prejudice derived from the tradition of the American constitutional community. Hence, the common good, like all interests and prejudices, constrains yet enables interpretation—in particular, constitutional interpretation. Moreover, as part of tradition, the common good is not static, rather it is constantly constituted and reconstituted through the dialogue of the interpretive process.

203. *See Gadamer, Truth and Method*, *supra* note 162, at 374.
205. *Cf.* Patterson, *supra* note 9, at 953 (the meaning of a legal rule is a function of its point or purpose).
206. It is important to underscore that my argument is that interpretivism reveals that the common good is an interpretive concept, not that interpretivism changes the common good into an interpretive concept. True interpretivism holds that all concepts are interpretive; we are always and already interpreting whenever we turn to a text or text-analogue. Thus, one cannot choose to make the common good into an objective or subjective concept instead of an interpretive concept. One can never be free of the constraints of the interpretive community and its traditions. Thus, as Stanley Fish has
Interpretivism supports and enriches republicanism in additional ways, beyond revealing that the common good is an interpretive concept. Republicanism rejects the atomistic individual that underlies pluralistic theory and asserts instead that the citizen must be conceived within the political community. Interpretivism explains why the free and isolated individual of pluralism is a myth: each person is always situated within a community and its traditions, which simultaneously enable yet constrain one's ability to understand the meaning of a text or any other meaningful event (text-analogue).\textsuperscript{207} Yet, interpretivism also insists that the community or the state does not stand prior to the individual citizen as in Aristotelian republicanism. Instead, the community and its traditions must constantly be constituted and reconstituted through concrete and individual acts of interpretation. Moreover, interpretivism undermines pluralism, the chief rival of republicanism. Pluralism developed because of a prior commitment to ethical relativism, yet interpretivists persuasively argue that truth and knowledge are possible. If interpretivism therefore defeats relativism, then pluralism loses its theoretical support and republicanism becomes even more appealing.\textsuperscript{208}

Republican interpretivism is inherently a critical, not a conservative, constitutional theory. Casting the republican common good as an interpretive concept explains how constitutional knowledge and hence

\argued, Fish, \textit{Fish v. Fiss}, supra note 161, Owen Fiss misconstrues interpretivism when he asserts that a judge can ignore or mistakenly apply what Fiss calls the disciplining rules of the legal (interpretive) community. \textit{See supra} text accompanying notes 132-33. I do argue, however, that whether or not one is aware that all concepts, including the common good, are interpretive may affect one's political and interpretive commitments and actions. \textit{But cf.} Fish, \textit{Fish v. Fiss}, supra note 161, at 1347 (one's account of adjudication and interpretation does not affect one's practices). In short, we all interpret, but we are not all interpretivists. To be a true interpretivist, one must self-consciously recognize that we are always and already interpreting, that we constantly search for and create meaning. \textit{See} Feldman, \textit{Exposing}, supra note 2, at 1349-56.


\textsuperscript{208} At the same time, republicanism reinforces interpretivism by helping to refute further the charge of idealism or subjectivism. \textit{See supra} text accompanying notes 175-83. Republicanism suggests that dialogue is necessarily a political activity, a process that occurs in a political community. Thus, the dialogue of interpretation—where text, interpreter, and community all meet—is inherently political: the search for and the constitution of meaning is also a search for and a constitution of (political) values. \textit{See} \textit{The Politics of Interpretation} (W.J.T. Mitchell ed., 1983) (essays discussing the question of whether interpretation is political). Without politics, community does not exist, and without community, understanding and interpretation do not occur. As republican theorists, going back to Aristotle, have emphasized, political dialogue is a practical or concrete activity, and hence the dialogue of interpretation is likewise practical and concrete, not idealistic.
criticism are possible: our tradition of the common good enables us to understand the truth of the Constitution. That is, the common good opens us to constitutional meaning and consequently opens us also to the constructive reconstitution of our tradition of the common good. And as we reconstitute the meaning of the common good through interpretation, we can open its meaning and hence our community to new interests and participants.209

Nonetheless, to acknowledge the common good as interpretive underscores how it, like all aspects of tradition, constrains constitutional interpretation. Our already existing interests and prejudices, derived in part from our constitutional tradition of the common good, necessarily exclude potential constitutional meanings and render some voices silent or unheard. Moreover, as the common good is reconstituted through interpretation to include certain interests, prejudices, and participants within the communal dialogue, we necessarily and simultaneously exclude or deny other interests, prejudices, and participants. In these senses, then, constitutional interpretation that focuses on the common good is violent and destructive—though all interpretation inherently suffers from this same fate.210

Yet, by recognizing the potential violence and destructiveness of the interpretive common good, we can reinforce the critical elements of republican interpretivism. Interpretivism reveals that understanding is always, in part, a struggle. We must struggle to stretch our vision to the limits imposed by our interests and prejudices so that we can see potentially novel meanings in old and new texts. And we must struggle to reconstitute tradition and community, to include and to exclude previously accepted and rejected interests and participants. Thus,

209. Thus, although republican interpretivism is opposed to pluralism as a political theory, it is not opposed to cultural pluralism. Rather, republican interpretivism is consistent with and supports a cultural pluralism that recognizes and celebrates the many subcultures that constitute American society. Cf. GADAMER, TRUTH AND METHOD, supra note 162, at 305 ("To acquire a horizon means that one learns to look beyond what is close at hand—not in order to look away from it but to see it better, within a larger whole and in truer proportion."); Robert A. Burt, Constitutional Law and the Teaching of the Parables, 93 YALE L.J. 455, 487 (1984) ("Through discourse, the antagonists may thus discover or uncover or rediscover their common humanity, ties that truly bind them together notwithstanding their divisive conflicts.").

210. See supra note 194 and accompanying text; cf. ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 11 (1988) ("the narrative task itself generally involves participation in conflict," and there is a "necessary place of conflict within traditions"). Although all interpretation is in part inherently violent, an official legal interpretation certainly may have more direct and violent social consequences than, say, a scholar’s interpretation of a literary text. See Robert M. Cover, Violence and the Word, 95 YALE L.J. 1601 (1986).
Republican interpretivism necessarily envisions politics as struggle or conflict.\textsuperscript{211} Whereas other forms of republicanism threaten to suffocate diverse voices under the cover of forced consensus and stifling conformity, republican interpretivism acknowledges that even a politics of the common good involves conflict.

Unlike, however, the political conflict of pluralism, which leads only to the satisfaction of the selfish interests of the victors (while the losers lament their misfortune), the political conflict of republican interpretivism potentially leads us to open ourselves to new meanings of the common good and to open our communities to different voices. Although all interpretation is, in part, violent and destructive, not all interpretation is equally so. That is, all interpretation rests on tradition and community, and all traditions and communities inherently include some interests and participants while excluding others, but some traditions and communities are more open and inclusive than others. Republican interpretivism can help to transform our political community so that it strives to be as open and inclusive as possible.

Republican interpretivism can serve this transformative role because it emphasizes that the meaning of the common good remains always in question, open to the communal dialogue. By self-consciously recognizing the common good as an interpretive concept, we generate dialogue within the political community. While the interpretive common good always has a determinate meaning in each concrete situation, there is no mechanical process or method to reveal that meaning.\textsuperscript{212} Instead, its meaning must come into being through the interpretive dialogue between constitutional text, interpreter, and community. The political dialogue, according to republican interpretivism, should never end. The political community should strain towards openness as it struggles to find the truth.

\textsuperscript{211} Cf. Barber, supra note 37, at 128 (conflict is central to all politics). Rousseau wrote: "If there were no different interests, the common interest, which would never encounter any obstacle, would scarcely be felt. Everything would proceed on its own and politics would cease being an art." J. J. Rousseau, On the Social Contract at bk. II, ch. 3, reprinted in Basic Political Writings 139, 156 n.2 (Donald A. Cress trans. and ed., 1987). Focusing on the fight against racial discrimination, Kimberlé Crenshaw writes: "The struggle, it seems, is to maintain a contextualized, specified world view that reflects the experience of Blacks." Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1349 (1988).

\textsuperscript{212} Gadamer intended the title of his major work, Truth and Method, to be ironic. He argued for the possibility of truth, but through the interpretive process and not through method. See Gadamer, Truth and Method, supra note 162, at xxi, 295, 309.
of the common good in the Constitution. Every claim to fix the definition of the common good is suspect. Even our fundamental commitment to the common good of republicanism must always remain open to question; the interpretation of the Constitution is never finished.

Political dialogue over the meaning of the interpretive common good opens us to recognize the bonds of tradition within the community, the common interests that we already share. But we also recognize the true conflicts that exist—we hear the disparate voices and their diverse interests—and hence we recognize the difficult moral and constitutional issues that we, as a community, must decide. Republican interpretivism tells us, however, that the path to decision is always dialogue: to decide even the most difficult issues, we need to openly discuss the common good. Certainly, decisions must be made and actions must be taken—and many individuals and groups often suffer because of these decisions and actions, which may be coercive and violent—yet republican interpretivism proclaims that the dialogue should never close,

213. My notion of the open political community that republican interpretivism struggles towards loosely resembles Habermas's vision of politics in his "ideal speech situation." Habermas writes:

Discourse can be understood as that form of communication that is removed from contexts of experience and action and whose structure assures us: that the bracketed validity claims of assertions, recommendations, or warnings are the exclusive object of discussion; that participants, themes and contributions are not restricted except with reference to the goal of testing the validity claims in questions; that no force except that of the better argument is exercised; and that, as a result, all motives except that of the cooperative search for truth are excluded. If under these conditions a consensus about the recommendation to accept a norm arises argumentatively, that is, on the basis of hypothetically proposed alternative justifications, then this consensus expresses a "rational will." Since all those affected have, in principle, at least the chance to participate in the practical deliberation, the "rationality" of the discursively formed will consists in the fact that the reciprocal behavioral expectations raised to normative status afford validity to a common interest ascertained without deception. The interest is common because the constraint-free consensus permits only what all can want; it is free of deception because even the interpretations of needs in which each individual must be able to recognize what he wants become the object of discursive will-formation. The discursively formed will may be called "rational" because the formal properties of discourse and of the deliberative situation sufficiently guarantee that a consensus can arise only through appropriately interpreted, generalizable interests, by which I mean needs that can be communicatively shared.

HABERMAS, supra note 194, at 107-08 (emphasis in original). I disagree, however, with Habermas's argument that communication can ever be removed from contexts of experience, even in an ideal or theoretical sense.

214. Cf. CAROL GILLIGAN, IN A DIFFERENT VOICE 90-109 (1982) (an ethic of caring is based on creating and maintaining relationships, and thus many ethical questions create difficult problems because possible resolutions may harm others).

the decision should never be final, so long as anyone wishes to question the meaning of the common good. Oppression, from this viewpoint, is to silence other voices, to ignore divergent interests, and in its extreme, to crush the imagination necessary for others even to have a different voice. But so long as individuals and groups are not oppressed, the political dialogue can generate new communal bonds and shared interests, as the community and its traditions are reconstituted through the interpretive process.

Furthermore, the devastating material consequences that flow from political oppression should never be overlooked or diminished in importance, but even those consequences are meaningful only as they are interpreted through the medium of language. See supra note 165 and accompanying text (on the universality of hermeneutics). A difficulty for republican interpretivism is that a material consequence such as poverty is likely to disable an individual (or group) from fully participating in any public dialogue over the common good. One enmeshed in the despair of poverty is more likely to be concerned about life's essentials—food, shelter and clothing—than about any common good. Nonetheless, pluralism is even less likely than republican interpretivism to solve this problem. In the pluralist world, impoverished individuals are unlikely to have the resources needed to battle effectively in the political arena in order to maximize the satisfaction of their self-interest. Moreover, significant social change is more likely to occur if all were to seek the common good as opposed to their own self-interest. See Feldman, Whose Common Good?, supra note 2.

Republican interpretivism is, of course, not the only political or constitutional theory that argues for opening the political dialogue and community. For related viewpoints, see Burt, supra note 209 (Supreme Court adjudication allows us to generate communal bonds despite sharp disagreements); Delgado, supra note 194 (the advantage of storytelling is that it allows oppositionist voices or perspectives to be heard); Lynne N. Henderson, Legality and Empathy, 85 MICH. L. REV. 1574 (1987) (adjudication should include the understanding of others); Michelman, Law's Republic, supra note 111, at 1527-37 (republicanism suggests that we should try to keep our communal dialogue open); Martha Minow, Foreword: Justice Engendered, 101 HARV. L. REV. 10 (1987) (Supreme Court justices should try to place themselves in the positions of others); Robin West, Relativism, Objectivity, and Law, 99 YALE L.J. 1473, 1482-83 (1990) (urging the inclusion of previously excluded voices and interests). For a discussion of several interesting means of increasing the likelihood of open political dialogue, see Barber, supra note 37, at 261-311.
Although republican interpretivism is, in a sense, a theory of judicial review, it does not speak solely to the courts. As already discussed, each provision of the Constitution must be read as part of the whole document, as somehow contributing to the overall purpose of the common good.\textsuperscript{218} Even the structural provisions of the Constitution, delineating the roles and powers of the three governmental branches, should be read as pursuing the common good. Thus, for example, when Congress acts pursuant to its powers under Article I, Section 8 of the Constitution,\textsuperscript{219} it theoretically should seek to achieve the common good. And when citizens vote for their representatives, the citizens theoretically should be concerned about the common good.\textsuperscript{220} Moreover, since interpretation is universal—we are always and already interpreting whenever we turn to a text or other meaningful event (text-analogue)\textsuperscript{221}—all citizens and institutions within society are potential participants in the interpretive dialogue over the common good. The Supreme Court does not bestow on the constitutional common good a definitive meaning, which then serves as an object that others can merely grasp. Instead, Congress, the President, other public officials, citizens, and any other persons, groups, and institutions that are concerned with public issues all participate in the political dialogue over the common good, provided that their voices are heard and respected by the other participants.\textsuperscript{222}

Thus, republican interpretivism envisions a political process where citizens vote to elect governmental officials who are most likely to pursue successfully the common good, not most likely to maximize the satisfaction of the citizens’ personal interests. Legislators then enact laws to achieve the common good, not to maximize the likelihood of their reelection, and the executive similarly administers the laws in pursuit of the common good. Finally, in judicial review, the courts must determine whether legislation and other governmental actions correspond with the common good as embodied in the Constitution. It must be remembered, however, that the common good never has an objective meaning: the common good is always an interpretive concept whose meaning emerges only through the dialogue of question and answer. The meaning of the

\textsuperscript{218} See supra text accompanying note 204.
\textsuperscript{219} U.S. Const. art. I, \S 8.
\textsuperscript{220} U.S. Const. art. I, \S 2, cl. 1.
\textsuperscript{221} See supra note 165 and accompanying text.
\textsuperscript{222} Thus, the interpretive component of republican interpretivism reveals the error of those new republicans who seek to limit the dialogue over the common good to some segment of the political community such as Congress or the courts. See supra text accompanying notes 119-22. Habermas argues that politics needs to include a debate over those (public) values that make life meaningful. See HABERMAS, supra note 194; Anthony Giddens, Jürgen Habermas, in THE RETURN OF GRAND THEORY IN THE HUMAN SCIENCES 121, 134 (Quentin Skinner ed., 1985).
common good remains always open to dialogue; it is not a question that others can defer to the Supreme Court.  

Although citizens and governmental officials do sometimes pursue the common good, republican interpretivism does not naively believe that they always do so. Many often fail to achieve or even to seek the common good. Nonetheless, republican interpretivism presents the common good as a critical standard, a norm that allows us to evaluate political actions and constitutional decisions. Quite simply, regardless of

223. Cass Sunstein has summarized several recent events in which the Court was merely one participant in a dialogue over public issues. Sunstein writes:

Consider . . . a striking set of recent events: the passage of the most important law in history protecting handicapped people, the Americans With Disabilities Act, enacted in the face of Supreme Court decisions refusing to use the Constitution in this area; the extraordinary citizen response to Supreme Court decisions restricting the abortion right, a response that has dramatically energized the women’s movement; the new Clean Air Act, in the face of Supreme Court decisions taking a relatively passive role in protecting the environment; and the likely passage, soon, of a new civil rights bill broader than anything that the Supreme Court might have required. Whatever the merits of any one of these developments, they attest to the enormous potential of moral and political and sometimes even constitutional discussion outside the courtroom.

Cass Sunstein, The Spirit of the Laws, NEW REPUBLIC, March 11, 1991, at 36; cf. ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 1 (1989) (meaning of the Constitution is not just from judicial opinions, but also from “the institutions, behaviors, and understandings that form the general political culture”); LEVINSON, supra note 194, at 47-50 (each institution and individual must decide constitutional issues); Paul Brest, Constitutional Citizenship, 34 CLEV. ST. L. REV. 175 (1986) (citizens and governmental institutions other than the Supreme Court should decide constitutional questions); Stephen M. Griffin, What is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition, 62 S. CAL. L. REV. 493, 515-18 (1989) (Supreme Court is but one arena of political struggle); Robin West, Progressive and Conservative Constitutionalism, 88 MICH. L. REV. 641, 650-51, 713-21 (1990) (progressives should aim their constitutional arguments at Congress and other citizens, not at the courts). Thus, republican interpretivism contravenes the charge that republicanism requires legislators largely to be insulated so that they can pursue the common good without feeling political pressure. See, e.g., Farber & Frickey, supra note 1, at 876-78; Fitts, supra note 124. See generally NANCY L. SCHWARTZ, THE BLUE GUITAR: POLITICAL REPRESENTATION AND COMMUNITY (1988) (representatives do not simply act on behalf of constituents or act directly on constituent directions, rather the representative interacts with constituents, who also interact amongst themselves, in the formation of political community).

224. See supra note 107. For example, according to public choice theory, see supra note 1, a rational person acting in his or her self-interest should never vote, yet many individuals nonetheless do. See Mansbridge, supra note 35, at 14-15.

their occasional or frequent failings, political and constitutional decision makers should strive to follow the common good. The historical narrative of the republican revival suggests, moreover, that the framers envisioned just such a constitutional government: one that would act for the common good despite the human propensities for greed and selfishness. The framers, in other words, were keenly aware of the Machiavellian tension between the virtues of the common good and the vices of factionalism.

Consequently, if a congressional majority enacts legislation that does not reflect the common good, then citizens should question the action and the congressional opposition should seek to reverse the decision. If the constitutionality of the law is challenged in the judiciary, then the courts should hold it unconstitutional. But the common good is never a fixed and certain object, rather it is an interpretive concept that is constantly open to question. Further dialogue, whether in one’s home, the halls of Congress, or a courtroom, may lead the participants in a dispute to understand a new meaning for the common good in that situation. Interpretivism reveals that the meaning of the common good becomes determinate only in a concrete context: although the common good is a critical standard, it is not a foundation for objective political and constitutional decision making. Thus, a dispute over legislation and its constitutionality generates political dialogue, and through that dialogue, we reconstitute our traditions, our community, and the meaning of the common good.

226. Many actions, however, are likely to result from an uncertain mix of self-interest and a pursuit of the common good. See Mansbridge, supra note 35, at 20-22.

227. See supra text accompanying notes 92-97. This tension between the pursuit of the common good and the pursuit of one’s personal interests is evident in the framing of the Constitution itself. See, e.g., Charles A. Beard, An Economic Interpretation of the Constitution of the United States (1913) (the Constitution reflects the property interests of the framers); Essays on the Making of the Constitution (Leonard W. Levy ed., 2d ed. 1987) (essays reacting to Beard’s thesis). Thus, I do not mean to engage in the Constitution worship that suggests the motives of the framers were always pure; their failure to prohibit slavery provides tangible evidence to the contrary. Nevertheless, I read the Constitution as a whole as pursing the common good and as creating a government to pursue the common good, even if the framers themselves did not always live up to this standard.

228. Recent empirical studies suggest that dialogue can increase group identity, which in turn increases cooperative behavior. See Mansbridge, supra note 35, at 17; see, e.g., Robyn M. Dawes et al., Cooperation for the Benefit of Us—Not Me, or My Conscience, in Beyond Self-Interest 97 (Jane J. Mansbridge ed., 1990).
B. Application: Flag Desecration

The recent dispute over flag desecration illustrates the applicability of republican interpretivism. Several themes of republican interpretivism emerged during the dispute and influenced its outcome. In particular, the concepts of dialogue, community, and the common good all played a part in the unfolding drama—though the importance of their respective roles varied. Nevertheless, a full recognition and acceptance of republican interpretivism would have transformed the discussion and its resolution. By more self-consciously focusing on the common good, the community would have generated a political dialogue that might have more effectively opened us to diverse voices and interests.

One of the most striking aspects of the dispute over flag desecration was its development as a public dialogue. At the outset of the dialogue, forty-eight states and the federal government had enacted laws to prohibit the desecration of the flag. At the Republican National Convention in Dallas during 1984, Gregory Lee Johnson burned an American flag to protest policies of both the Reagan administration and certain Dallas-based corporations. Johnson was convicted for violating the Texas law prohibiting the desecration of a venerated object. On June 21, 1989, in Texas v. Johnson, the Supreme Court held that Johnson's symbolic conduct was protected under the free speech clause of the First Amendment and that his conviction was therefore unconstitutional. The Supreme Court's interpretation of the First Amendment thus effectively rendered invalid all of the flag desecration statutes.

Johnson generated a heated public dialogue over the meaning of free speech and the symbolic importance of the American flag. The dialogue, which took place in Congress, law reviews, and popular me-

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230. Johnson, 491 U.S. at 400.
centered on whether Congress should respond to Johnson either by enacting a new federal statute that might pass constitutional muster or by proposing a constitutional amendment to allow the prohibition of flag desecration. Diverse viewpoints emerged from this communal dialogue. Some argued that amending the Constitution was the only sure method to guarantee protection of the flag, and such protection was demanded because the flag symbolized national unity. Others argued for a constitutional amendment, but only as the lesser of two evils. They believed that Congress would inevitably take one of the two suggested actions, either proposing an amendment or enacting a statute. If Congress passed a statute, the argument continued, then the Court might significantly alter First Amendment jurisprudence in order to find the new law constitutional. This feared shift in the Supreme Court’s approach was considered to threaten free speech more seriously than a constitutional amendment, which would create a narrow exception to the First Amendment, limited only to flag desecration.

Others argued that a statute, not a constitutional amendment, would be the lesser of two evils. They believed that Congress could carefully draft a narrow and precise law that would pass constitutional muster without the Court changing its free speech jurisprudence. This route was considered less threatening to free speech than an amendment that would directly change the Bill of Rights. Others argued vehemently that the nation should resist the urge either to amend the Constitution or to enact a new flag desecration statute, while still others added that the entire dispute was wasteful and symptomatic of increasing political demagoguery.

In October of 1989, Congress finally enacted the Flag Protection Act and thus temporarily halted the call for a constitutional amend-
When the constitutionality of the Act was immediately challenged in *United States v. Eichman*, the dialogue shifted again to the Supreme Court. *Eichman*, like *Johnson*, involved the burning of a flag as part of a political protest, and on June 11, 1990, the Court held that the Act, like the Texas statute in *Johnson*, was constitutionally invalid. Once more, many reacted by demanding a constitutional amendment, and the public dialogue continued, with the focus returning again to Congress. Within less than a month, however, Congress rejected a proposed constitutional amendment.

The wide participation in the public debate over flag desecration and the varied responses of different institutions and individuals reflect the important dialogical quality of republican interpretivism. Moreover, the various Supreme Court opinions in *Johnson* and *Eichman* often recognize the importance of dialogue as a means to political action. For example, in *Johnson*, Justice Brennan wrote for the majority that "our toleration of criticism . . . is a sign and source of our strength." Brennan added that the means for convincing others of the importance of the flag was through persuasion, not punishment. In *Eichman*, Justice Stevens—even in dissent—recognized a societal interest in hearing voices that are often ignored. Furthermore, Stevens implicitly recognized that the Court was, in effect, an important participant in a communal dialogue over the value of the flag and flag burning. Stevens wrote that the "Court's decision to place its stamp of approval on the act of flag burning" transformed the meaning of flag burning itself. In other words, Stevens acknowledged that when the Court interprets the Constitution, it reconstitutes tradition and the community.
The flag desecration dispute also raised the concept of community, another important theme of republican interpretivism. The debate revealed a community that was, in effect, struggling with and questioning its own values and traditions, especially its constitutional tradition of free speech. Once again, the statements of the Supreme Court Justices are illustrative. In Johnson, Justice Brennan wrote that, contrary to the claims of the dissenters, the constitutional protection of flag desecrators would strengthen the place of the flag "in our community."252 The Court's holding, according to Brennan, would reaffirm "the principles of freedom and inclusiveness that the flag best reflects."253 Meanwhile, in dissent, Chief Justice Rehnquist emphasized that the meanings of the flag and flag burning arose, not from governmental fiat, but from the history or tradition of the American community.254

Finally, the theme of the common good emerged in several different ways during the public dialogue over flag desecration. For example, the mere fact that a majority of senators and representatives twice rejected a constitutional amendment suggests that our legislators sometimes consider the common good, not just their own interests in being reelected. Whereas little or no political advantage was likely to be gained from opposing an amendment, favoring an amendment was likely to yield ample political profits.255 Moreover, the Supreme Court's decisions in Johnson and Eichman suggest that the Justices also at least considered the common good: the somewhat liberal free speech holdings were, to no small degree, surprising in light of the largely conservative makeup of the current Court. Plus, many of the arguments that were made throughout the public dialogue touched on the common good. Diverse arguments ranging from one extreme—the flag must be protected as a symbol of national unity256—to the other extreme—"the flag burner charges the nation with betraying its ideals"257—can all be interpreted as attempts to define the common good in the context of the flag dispute.

Although the concepts of dialogue, community, and the common good all played a role in the dispute over flag desecration, the dispute

252. Johnson, 491 U.S. at 419.
253. Id. (emphasis added).
254. Id. at 434 (Rehnquist, C.J., dissenting); accord id. at 436-37 (Stevens, J., dissenting).
255. Some politicians may have believed that they could score political points by protecting the integrity of the Constitution, but the public dialogue suggested that far more believed that the greatest political advantage would come from favoring a constitutional amendment. See Kinsley, supra note 241.
256. See, e.g., Johnson, 491 U.S. at 410 (Texas argued that this interest justified its flag desecration statute).
257. Michelman, supra note 234, at 1362; see also Eichman, 110 S. Ct. at 2410 (punishing the flag burner "dilutes the very freedom that makes this emblem so revered, and worth revering").
might have been transformed if the themes of republican interpretivism had been featured more prominently. A full acceptance of republican interpretivism would have underscored that the public dialogue should have focused on the common good. The overriding questions should have been how does the free speech clause of the First Amendment manifest our understanding of the common good, and how does flag desecration—its punishment or protection—relate to free speech. In this manner, republican interpretivism would have provided a common ground for debate or, in other words, a focal point for dialogue. With the dialogue more focused, we might have been more likely to recognize our shared or similar concerns and interests as well as our points of disagreement. Perhaps most important, instead of being tempted to condemn the entire dialogue as symptomatic of political demagogy,\textsuperscript{258} we might have recognized the value of the dialogue in itself—as an opportunity for the political community to question its traditions and to reconstitute the meaning of the common good as it is embedded in the First Amendment. And as we reconstitute the meaning of the common good, we reconstitute tradition and our community, which in turn open us to the understanding of future texts and events. While flag burning may be "ultimately a matter of secondary importance,"\textsuperscript{259} its power to generate dialogue about the meaning of free speech was profoundly important.

If the Supreme Court had emphasized these themes, several important aspects of the Court’s opinions may have been altered. For example, whereas Chief Justice Rehnquist recognized the important role that tradition or history plays in generating meaning within the community,\textsuperscript{260} he failed to realize that to understand the Constitution or any other text or text-analogue, we must question tradition, not merely accept it. Interpretation is a dialogue between text, interpreter, and community that requires us constantly to reconstitute our community and its traditions. Likewise, Justice Stevens recognized a societal interest in hearing voices that are often ignored,\textsuperscript{261} but he characterized that interest as of only secondary importance. The societal interest merely "buttressed"\textsuperscript{262} a predominant concern for an individual’s right to choose how to express oneself. Republican interpretivism suggests, however, that the interests of the individual and the community are not so easily separated and prioritized. The community cannot survive without the participation of individuals in the political dialogue, yet individuals participate and communicate only because of the prejudices and interests that they derive from their community and its traditions. Thus, the communal interest in

\textsuperscript{258} See supra text accompanying note 241.
\textsuperscript{259} Stone, supra note 234, at 124.
\textsuperscript{260} See supra note 254.
\textsuperscript{261} See supra text accompanying note 249.
\textsuperscript{262} Eichman, 110 S. Ct. at 2412 (Stevens, J., dissenting).
hearing diverse voices is paramount: those diverse voices open the community as it reconstitutes its traditions, which enable individuals to communicate in the first place.

The most significant potential influence of republican interpretivism may be in how it can change our attitude towards the flag burners themselves. Consistent with popular sentiment, even those Justices who favored constitutional protection for flag desecration distanced themselves from the expressive conduct by denigrating the defendants and their political speech. In Johnson, for instance, the majority wrote: "[W]e submit that nobody can suppose that this one gesture of an unknown man will change our Nation's attitude towards its flag." In his concurrence, Justice Kennedy questioned whether the defendant was able to understand the significance of his own actions. And in Eichman, the majority analogized flag burning to "virulent ethnic and religious epithets.

Republican interpretivism, however—because of its emphasis on a communal dialogue over the common good—suggests that the expressive conduct of the flag burners should have been celebrated, not excoriated. Their mere participation in a political discussion or protest should have been encouraged, for dialogue is crucial to the life of the political community, and their underlying political messages should have been heard and discussed. Furthermore, these participants in the communal dialogue attracted an unusual amount of attention and therefore generated significant and beneficial dialogue because they chose to express themselves through the controversial means of flag burning. They, in effect, attempted to force the community to open itself, to hear voices that many would prefer not to hear. They emphatically declared that some individuals were dissatisfied with the political community, with its traditions, with its closure to potential participants and their interests. They tried to remind us that the common good is not static, that the dialogue should never end, and that the community should never close. In short,


264. Johnson, 491 U.S. at 421 (Kennedy, J., concurring).

the flag burners were willing to risk themselves in the political conflict of republican interpretivism.266

Thus, republican interpretivism suggests that the Supreme Court correctly decided to protect flag desecration and that Congress correctly decided not to amend the Constitution, but the public condemnation of the flag burners was misplaced. The meaning of the common good, as it emerges through the free speech clause, encourages us to protect the most controversial means of participating in the communal dialogue. Because of their controversial nature, these means of expression—whether they be flag burning, draft card burning,267 or anything else—are especially likely to generate the kind of dialogue that challenges us to question our traditions, to open our community, to include participants and interests in an ever-continuing political dialogue over the common good. And through this constant political dialogue, we reconstitute our traditions, our community, and ourselves.

CONCLUSION

The republican revival and the interpretive turn are two of the leading movements in constitutional jurisprudence. Civic republicanism emphasizes that citizens belong to and participate in a political community. Within that community, the dominant activity is political dialogue that ideally ends in the pursuit of the common good. Interpretivism, meanwhile, holds that all of our practices, including constitutional adjudication, are interpretive: we are always situated within interpretive communities and traditions that simultaneously constrain and enable our understanding of texts and text-analogues.

Republicanism and interpretivism, however, both face serious challenges. Critics of the republican revival charge that it invites oppression and the silencing of divergent voices because it emphasizes the community and the common good. Opponents of the interpretive turn charge that it lacks the critical bite that we need to evaluate judicial decisions. Republicanism and interpretivism, though, can be synthesized

266. Cf. SHIFFRIN, supra note 134 (dissent is key element of American tradition). See generally KAI T. ERICKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEFIANCE 10-13 (1966) (the deviant actor helps a community to define and highlight its shifting boundaries).

I do not mean to suggest that all controversial speech should be protected merely because it is controversial. For example, whereas the speakers in the flag-burning cases were challenging a dominant political group or outlook, the Nazis who wished to march in Skokie, Illinois, sought to inflict emotional harm on an already oppressed religious group. That is, the Nazis sought to close the community to a group that already was at the margins. See Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), aff'g 477 F. Supp. 676 (N.D. Ill. 1978).

into a single theory, republican interpretivism, that can withstand the charges being leveled against each independent theory. As a theory of American constitutional jurisprudence and political action, republican interpretivism has critical bite because it focuses on the common good: a constitutional decision as well as any other political action should be evaluated by asking whether it promotes the common good. But the common good is not an objective foundation for constitutional adjudication or political action, rather it is an interpretive concept. As such, its meaning, while determinate in concrete contexts, always remains open to questioning and to dialogue.