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The Paradigm-Case Method

There are three fundamental topics in constitutional law: doctrine, interpretation, and legitimacy. Doctrine concerns the law as it is or should be in any particular constitutional field. Interpretation concerns the methods judges do or should deploy in deciding what the Constitution means. Legitimacy concerns the claims of authority that constitutional law—a body of law rendered by unelected judges supposedly on the basis of a two-hundred-year-old text—can make to justify its legal supremacy in a society that calls itself self-governing.

Most constitutional scholars devote their careers to one of these topics. Some make contributions to two of them. Remarkably, Akhil Amar has changed the way we think about all three—and he has done so again in *America's Constitution: A Biography*.[1] Popular sovereignty is Amar's paradigm of political legitimacy; a mixture of intratextualism and originalism are his interpretive lodestars. The intriguing insights he delivers for constitutional doctrine can be found on page after page of his book.

The ideal account of American constitutional law, if there were such a thing, would integrate these three topics in a seamless whole. It would be at once, inextricably, an exercise in political theory, hermeneutics, and legal analysis. From a theory of the legitimate role of constitutional law in a democracy, an overarching methodology of interpretation would emerge, and from that methodology would follow concrete results for a wide array of hotly disputed doctrinal issues. This kind of integrated account, pipe-dream though it may be, has been the goal I have lumbered toward in my own constitutional scholarship. *Revolution by Judiciary: The Structure of American Constitutional Law* completes this project.[2]

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1. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005).

2. JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW (2005).

In fact, Professor Amar and I are both "popular sovereigntists." That is, we both take seriously the idea that the Constitution must be seen and read as a product of democratic self-lawgiving. This "must" not only purports to be a descriptively accurate reflection of what it was that Americans understood themselves to be trying to do at the various times when they made and remade their Constitution. This "must" also derives from considerations of legitimacy. Both Professor Amar and I believe that constitutional law can justify its foundational status in our legal-political order only to the extent that it can make good on its claim to being law made by the American people to govern themselves.

As a result, in many ways, Professor Amar and I are more alike than we are different. We both believe in the aspiration of popular self-government through a democratically self-given constitution. We both believe that this aspiration should suffuse the entire business of constitutional interpretation as well as every field of constitutional doctrine. And we both have been led by these commitments to take the Constitution's text and its historical meaning much more seriously than do many other constitutional scholars.

Anyone who recognizes text and historical meaning as bearing special importance in constitutional interpretation ought to make it his business to know the Constitution's text and history. That is what Akhil Amar has done. He has amassed over the years and now deploys a comprehensive knowledge—unsurpassed by any living scholar I know of—of the Constitution's genesis, its historical meaning, and the complex interrelationships among its provisions.

But behind text and history there must always be an anterior account—of constitutional and democratic theory, of interpretive method—that assigns text and historical meaning their proper place in constitutional law. For myself, I have been more preoccupied with this anterior picture. At issue here are the foundational premises of the whole enterprise of constitutional self-government. How do we make sense of the peculiar conjunction of institutions we see in modern democracies, in which a seemingly undemocratic, highly judicialized body of constitutional law holds itself out as superior to the will of the governed as expressed through elections or elected representatives? This is the question with which Bickel and Ely began; it is the question with which I begin as well. From their answers to this question, Bickel and Ely sought to motivate an account of constitutional interpretation as a whole and of the broad contours of constitutional doctrine. I give a different answer to the foundational question than did either Bickel or Ely; as a result, I am led to a different picture of constitutional interpretation and of constitutional doctrine as well.

Trying to fill in this picture—trying to work out the proper theory of constitutional interpretation and draw out the implications for the great sweep

of constitutional doctrine—is the goal of *Revolution by Judiciary*. The twentieth century saw one revolution after another in constitutional interpretation: the rise of *Lochner*,[3] the advent of modern free speech jurisprudence, the great triumph of *Brown*,[4] the explosion of Congress's commerce power, and the birth of the modern right of privacy. These revolutionary developments are sometimes revered, sometimes reviled, sometimes merely puzzled over, sometimes taken for granted. But these revolutions by judiciary have been and remain today a central part of American constitutional law; perhaps another one is taking place even now. The great problem is that constitutional law has absolutely no account explaining or justifying them. Constitutional law—I am not speaking of constitutional theorizing, but of the law itself—has no account of when judges have the legitimate authority to announce constitutional doctrines that break radically from past and present meaning alike, or of what judges should be doing when they introduce such revolutionary change in the doctrine, or of how such radical changes in constitutional meaning are to be evaluated.

This is the gap *Revolution by Judiciary* is meant to fill. The book essentially makes two big arguments about constitutional interpretation. One is purely descriptive and positive, the other theoretical and normative. The first argument concerns a surprisingly consistent pattern that runs throughout actual American constitutional doctrine; the second is about the justifiability of this pattern. In Parts I and II of this Introduction, respectively, I'll summarize the main lines of both these arguments.

I. THE INTERPRETIVE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW

On the descriptive front, I claim to have identified a basic interpretive structure underlying all American constitutional law. The fundamental idea is pretty simple. It has to do with the role of historical meaning in constitutional law and hence with the undying topic of "judicial activism."

Modern constitutional law is notoriously ahistorical. In field after field, on matters of considerable importance, today's doctrine defies original understandings. This is famously true, for example, of modern equal protection law, both in its condemnation of racial segregation and in its protections against sex discrimination. *Brown v. Board of Education*,[5] the most

3. Lochner v. New York, 198 U.S. 45 (1905).

4. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

5. *Id.*

luminous of twentieth-century constitutional cases, plainly violated original understandings[6]—despite the Sisyphean efforts of originalists to show the contrary.[7] *Miranda v. Arizona*[8] is another utterly ahistorical modern case. Today's Commerce Clause allows Congress to regulate the terms and conditions of labor wholly within states;[9] this would have astounded the Framers, who thought they had kept in-state labor relations—i.e., slavery—out of Congress's legislative jurisdiction.[10] Modern regulatory takings law plainly

6. To repeat the most salient point of the well-known evidence: The very Congress that framed the Fourteenth Amendment maintained segregated public schools in the nation's capital. John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U. L.Q. 421, 460-62. In addition, eight ratifying, non-Confederate states either provided for or permitted segregated public schools in 1868. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 633-34 (1976). Nor should it be imagined that the original understanding was "separate but equal": Far from providing black children with tangibly equal facilities, five more non-Confederate states excluded black children altogether from public education. *Id*.

7. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 75-76 (1990). Here, Bork simultaneously conceded the "inescapable fact" "that those who ratified the [fourteenth] amendment did not think it outlawed segregated education or segregation in any aspect of life," yet asserts that *Brown* "is consistent with, indeed compelled by, the original understanding." How? As follows: "[E]quality and segregation were mutually inconsistent, though the ratifiers did not understand that"; faced with the choice, judges "must choose equality," which was the "purpose that brought the fourteenth amendment into being . . . [and] was written into the text." *Id*. at 82. Good try, but this move—essentially a shift from specific intentions to general purposes, joined to an assertion that the general purpose was "inconsistent" with the specific intention—surrenders all the results originalists demand elsewhere in constitutional law. The ratifiers believed that the death penalty was constitutional? So what? Capital punishment and the prohibition on cruel and unusual punishment "were mutually inconsistent, though the ratifiers did not understand that"; faced with the choice between them, judges must choose abolishing cruel and unusual punishment, which was the "purpose that brought the [eighth] amendment into being" and "was written into the text." *Roe v. Wade* is un-originalist? Not any more: "equality and [banning abortion] were mutually inconsistent, though the ratifiers did not understand that" either. *See* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 178-79 (2001). For another heroic attempt to make *Brown* safe for originalism, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). For a careful, decisive response to McConnell, see Michael J. Klarman, Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995).

8. 384 U.S. 436 (1966).

9. *See, e.g.*, Kimel v. Florida Bd. of Regents, 528 U.S. 62, 78-79 (2000) (acknowledging that the Age Discrimination Act falls within Congress's commerce power); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act).

10. *See* Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J.L. & HUMAN. 413, 443-44 (2001). As Professor Finkelman put it, "it would not be possible to

violates the original understanding, which saw compensable takings only when government physically dispossessed owners or divested them of title.[11]

Some decry (or purport to decry) the flouting of original meaning in modern constitutional law. Others celebrate it. In the debate over originalism, however, a peculiar fact seems to have gone unobserved: For all its ahistoricity, constitutional law almost inviolably adheres to one particular kind of original understanding, even while departing from original understandings that fall outside this set. When this pattern is brought to light, an overarching approach to constitutional interpretation as a whole also comes into view. In brief, American constitutional law adheres systematically to one kind of original understanding (which I call "foundational Application Understandings"), while routinely discarding all other original understanding (which I call "No Application Understandings"). Or so I claim in my book.

When I show this pattern to people, and bring out its underlying logic, they usually find it surprising—and, at least at first, odd. There are two reasons, I believe, for this. First, although constitutional theorists—originalists, proceduralist, moralists, and so on—may have their own favored and fairly determinate interpretive methods, constitutional law itself appears on its face to have no such method. Modern constitutional case law essentially lacks any articulate account of what judges are supposed to do when called on to interpret the constitutional text. So, the idea that there is in fact a fairly determinate interpretive structure underlying the case law comes as a surprise.

Second, the pattern I am about to describe involves the idea that some original understandings require interpretive deference while others do not, and this idea runs against the grain. Whether pro- or anti-originalist, nearly everybody believes there's something wrong with judges who pick and choose among original understandings; judges who attend to history selectively are cheating.[12] In other words, most of us accept the premise that all original

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imagine the modern interpretation of the Commerce Clause as long as slavery existed." *Id.* at 444.

11. *See, e.g.*, John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1133, 1148, 1156 (2000).

12. The presumed pathologies of selective exploitation of historical understandings are the nub of every objection to "law-office history." *See, e.g.*, Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 554 (1995); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13. An exception to the usual view can be found in Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765 (1997). In this interesting and carefully reasoned article, Professor Dorf argued for an explicitly selective "heroic originalism" that would reject original understandings "too distasteful to count." *Id.*

understandings should, methodologically speaking, be treated equally. They should all be given the same interpretive weight, whether a lot or a little or none at all. On this view, judges who act as if some original meanings "tie their hands," while ignoring others, are lying either to themselves or to the rest of us. They have obviously arrived at their decisions on other grounds, invoking history only when it suits their goals.

If I am right, however, we need to revise this conventional way of thinking. Constitutional law turns out to be structured around the idea that one species of original understanding is different from all the others. One set of historical meanings demands categorical interpretive deference; all others can be ignored without much compunction.

To make this pattern visible, I need first to distinguish between two different kinds of specific understandings that people can have about how a legal provision will or will not apply to particular sets of facts. In fact, the distinction is, precisely, between understandings that the provision will apply to particular sets of facts and understandings that the provision will not apply to particular sets of facts.

Take free speech. We can distinguish, in the simplest possible terms, between two analytically different kinds of specific understandings of the First Amendment's prohibition against abridging the freedom of speech. On the one hand, there are particular measures—say, laws banning nonobscene pornography—that we believe to fall within the ambit of this constitutional prohibition. That is, the constitutional prohibition applies to such laws: The prohibition is triggered; the laws are prohibited. On the other hand, there are particular measures—say, perjury laws—that we believe to fall outside the ambit of the provision. The prohibition does not apply in such cases; the laws are not prohibited. I call the former "Application Understandings" and the latter "No Application Understandings." Pretty clunky terms: I wish I had better ones, but there they are.

Now make a further distinction. For a particular constitutional provision, some Application Understandings may have played a special, central, definitive role at the time of enactment. Many of our constitutional rights were enacted with a core, specific original purpose: to abolish particular laws or practices deemed intolerable (I will name a few in a moment). In such cases, we have what I call "foundational Application Understandings": Application Understandings that were widely shared at the time of enactment, by

at 1810. By contrast, the pattern I am about to describe does not distinguish among original understandings on their moral merits.

supporters and opponents alike, and that played a special, animating role in getting the provision enacted.

As a matter of historical fact, there are exceedingly few foundational Application Understandings. The prohibition of prior restraints was almost certainly a foundational Application Understanding for the freedom of speech (a term I use to include both the freedom of speech and of the press).[13] The prohibition of at least some seditious libel laws was probably another.[14] After that, it gets pretty hard to say what, specifically, the freedom of speech was definitively understood to prohibit.

By contrast, the No Application Understandings of our constitutional rights were and are virtually limitless. No Application Understandings can refer to anything the right does not prohibit. Thus, the freedom of speech was and is understood not to prohibit criminal trials without a jury, the sale of flour in ten-pound bags, and ordinary trespass laws.

My descriptive claims are founded on the distinction between Application and No Application Understandings. The initial thesis is this: Despite all the years that have passed, and despite its radical nonoriginalism on many dimensions, constitutional law today still adheres to virtually every single foundational Application Understanding. For example, freedom of speech still emphatically prohibits prior restraints[15] and seditious libel laws;[16] the

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13. *See* WILLIAM BLACKSTONE, 4 COMMENTARIES *151-52 ("The liberty of the press . . . consists in laying no previous restraints upon publication . . . ."); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS, at xii-xv (1985). As late as 1907, the Supreme Court could still suggest that the freedom of speech might prohibit only prior restraints. *See* Patterson v. Colorado, 205 U.S. 454, 462 (1907).

14. *See* ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 21 (1941) (arguing, in part on the basis of the celebrated Zenger trial, that the First Amendment was enacted to "wipe out the common law of sedition, and make further prosecutions for criticism of the government . . . forever impossible"); William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984).

15. *See, e.g.*, Doe v. Dep't of Pub. Safety *ex rel.* Lee, 271 F.3d 38, 50 n.17 (2d Cir. 2001) (calling prior restraints "'the most serious and the least tolerable infringement on First Amendment rights'" (quoting Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976))).

16. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *New York Times* overruled those early-twentieth-century cases, such as *Debs v. United States*, 249 U.S. 211 (1919), in which the Court upheld prosecutions under the Espionage Act of 1917 brought against persons who essentially had dared to protest the country's involvement in the First World War. A century earlier, some federal courts had upheld prosecutions under the Alien and Sedition Acts of 1798. If the understanding that the First Amendment prohibited sedition laws was not solidly established in 1798, it became so with Jefferson's presidential victory in 1800. *See* LEVY, *supra* note 13, at 282-308. As I explain at greater length in my book, historical Application Understandings can become foundational even if not so held at the time of the founding. *See* RUBENFELD, *supra* note 2, at 120-24. In *New York Times*, the Court recognized

Establishment Clause still prohibits a national church;[17] the Fourth Amendment still prohibits general warrants;[18] the Fifth Amendment still prohibits uncompensated acts of eminent domain;[19] and the Fourteenth Amendment still prohibits Black Codes.[20]

By contrast, modern constitutional law violates a great many original No Application Understandings—some of which were, as a historical matter, extremely important. For example, as noted above, it is as certain as such things can be that the Fourteenth Amendment was originally understood not to prohibit racial segregation of public schools or of most other public facilities. *Brown* jettisoned that No Application Understanding. Similarly, the Equal Protection Clause was originally understood not to prohibit at least some, and perhaps most, of what we today call sex discrimination.[21] Today, that No Application Understanding is history. The First Amendment, on the original understanding, did not prohibit blasphemy laws.[22] Today it does. To generalize: The historical understandings rejected by modern constitutional law are, almost exclusively, No Application Understandings.

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the Sedition Act of 1798 as a paradigmatic violation of the First Amendment. 376 U.S. at 273-74; *see also* Lee v. Weisman, 505 U.S. 577, 626 (1992) (Souter, J., concurring) (observing that the Sedition Act would be "patently unconstitutional by modern standards").

17. Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947).

18. Payton v. New York, 445 U.S. 573, 583 (1980).

19. Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).

20. It does so through the rule that laws employing racial classifications are subjected to strict scrutiny, *see, e.g.*, Gratz v. Bollinger, 539 U.S. 244 (2003), and through the principle that laws enacted to further "White Supremacy" are plainly unconstitutional, *see* Loving v. Virginia, 388 U.S. 1, 7-12 (1967).

21. *See, e.g.*, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (upholding a state statute excluding women from the practice of law); ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES 146-48 (1975).

22. As late as 1921, courts upheld blasphemy convictions. *See, e.g.*, State v. Mockus, 113 A. 39 (Me. 1921). Early-nineteenth-century judges, including some of the most respected, had no difficulty rejecting challenges to blasphemy laws—even those specifically protecting Christianity from impugnment—under state constitutional guarantees. See, for example, *People v. Ruggles*, 8 Johns. 290, 295 (N.Y. 1811), in which Chief Judge Kent stated:

> Nor are we bound, by any expressions in the constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of *Mahomet* or of the grand *Lama*; and for this plain reason, that the case assumes that we are a christian people, and the morality of the country is deeply ingrafted upon christianity, and not upon the doctrines or worship of those impostors.

Needless to say, Kent's remarks do not reflect the law of the land today. *See, e.g.*, State v. West, 263 A.2d 602, 605 (Md. Ct. Spec. App. 1970).

This asymmetry causes peculiar, seemingly contradictory assertions to crop up in the case law on the significance of original meaning. When judges deal with a foundational Application Understanding, they unabashedly refer to and rely on historical meaning. For example, when explaining the unconstitutionality of prior restraints, modern Justices emphasize that the "elimination of prior restraints was a 'leading purpose' in the adoption of the First Amendment," and that a "[p]rior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment."[23] Similarly, when explaining the unconstitutionality of an insufficiently particularized search warrant, today's judges refer without embarrassment to original understandings: "It is familiar history that . . . 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment."[24] Yet in many cases where there is a pertinent No Application Understanding—such as the understanding that the Equal Protection Clause would not prohibit racial segregation or sex discrimination—the Court has little or no compunction about ignoring historical meaning. History, in such cases, simply drops off the radar screen.

Such contrasting treatment of historical meaning can look like outcome-driven, inconsistent hypocrisy. And it may have been just that some or much of the time. But the fact remains that the Court's inconsistent treatment of historical meaning has its own kind of consistency, with a precise logic, structure, and method. Systematically and almost without exception—with respect to both constitutional rights and constitutional powers—modern doctrine adheres to historical Application Understandings even while it frequently disregards historical No Application Understandings. I document this pattern in greater detail in Part I of my book.

If this structure holds throughout constitutional law, as I try to show it does, it is really quite remarkable. Most of us believe that historicism in constitutional law—the view that constitutional interpretation should be faithful to historical meaning—can't be entirely right, yet most of us also believe it can't be entirely wrong. Hence we have debated for decades the proper place of original meaning in constitutional law. But it turns out that all along, constitutional law has offered its own distinctive answer to this debate, an answer that we have failed to grasp. The original Application Understandings are binding; the No Application Understandings are not.

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23. Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 181 & n.5 (1968).

24. United States v. Bridges, 344 F.3d 1010, 1014 (9th Cir. 2003) (internal quotation marks omitted).

Indeed, I would argue that all Application Understandings—even those that develop long after the Founding—are in general firmer, harder to dislodge, than No Application Understandings. This is just another way of saying that it is easier for the Supreme Court to announce a new right than to take away a right already established. But the special bindingness I've been referring to so far belongs only to a special class of Application Understandings. For any particular constitutional provision, some Application Understandings may have played a special, central, definitive role at the time of enactment. Many of our constitutional rights were enacted with core original purposes. These foundational Application Understandings are the ones I have been referring to so far. And they not only are intact in contemporary constitutional law. They have, more significantly, served as paradigm cases, shaping the doctrine as exemplary holdings around which the rest of the case law is organized.

Consider, for example, the Self-Incrimination Clause. The core Application Understanding of this Clause is well-known: It prohibited the kind of interrogation practice found in certain seventeenth-century English courts such as the Star Chamber,[25] where an individual was placed under oath, asked if he was guilty of a crime, and subject to severe punishment for refusing to answer. In seventeenth- and eighteenth-century thought, this practice put guilty defendants in a tight spot. They faced three unattractive options: incriminate themselves and go to jail; lie and condemn themselves to hell as perjurers; or, refuse to answer and go to jail anyway.[26] Confirming the systematic interpretive structure described above, constitutional law today expressly adheres to this historical Application Understanding: "At its core, the privilege reflects our fierce unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt that defined the operation of the Star Chamber."[27]

But the prohibition of the "cruel trilemma" is not only still in force in modern self-incrimination doctrine. To use the words just quoted, it is recognized as the "core" application of the guarantee. It serves a paradigmatic function definitive of meaning, shaping modern doctrine even as that doctrine expands far beyond the original understanding. Take *Miranda*. This famous case, as noted earlier, plainly violates specific original understandings.

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25. *See* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1074 (1994).

26. *See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 134-35 (1968); *see also* JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2250 (John T. McNaughton ed., rev. ed. 1961).

27. Pennsylvania v. Muniz, 496 U.S. 582, 596 (1990) (internal quotation marks omitted); *see also* Michigan v. Tucker, 417 U.S. 433, 440 (1974).

Historically, the "cruel trilemma" was thought to exist only when the accused was under oath.[28] Hence, the self-incrimination guarantee, as originally understood, would not have applied to the *Miranda* situation, in which an unsworn individual is questioned by the police. *Miranda* therefore violates a historical No Application Understanding. At the same time, however, *Miranda* builds on the historical Application Understanding. According to the Supreme Court, the *Miranda* doctrine rests on the recognition that the same kind of "cruel dilemma" the Self-Incrimination Clause was enacted to prohibit can exist even when an individual is questioned outside the sworn-testimony context.[29] In the Court's view, a guilty individual interrogated in police custody, if unwarned of his right to remain silent, will face a "modern-day analog" of the "historic trilemma."[30] We can agree or disagree with this reasoning, but it vividly demonstrates how core Application Understandings serve as paradigm cases, anchoring and shaping the development of future doctrine even as the doctrine comes to reject historical No Application Understandings.

The examples could be multiplied. Everyone knows that the concepts of "suspect class" and "suspect classification" figure centrally in modern equal protection doctrine. These concepts, in turn, draw their strength and core meaning not from an abstract philosophy or from legal definitions but from a paradigm case: the unconstitutionality of the nineteenth-century Black Codes, the abolition of which was a central purpose—perhaps the central purpose—behind the Fourteenth Amendment.[31] This simple insight opens up a clear view

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28. *Cf.* Langbein, *supra* note 25, at 1048-73, 1080 n.142; Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1100 (1994).

29. *See* Pennsylvania v. Muniz, 496 U.S. at 596; *cf.* Escobedo v. Illinois, 378 U.S. 478, 485 (1964).

30. As the Court put it in *Muniz*:

> Because the privilege was designed primarily to prevent "a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality," *Ullmann v. United States*, 350 U.S. 422, 428 (1956), it is evident that a suspect is "compelled . . . to be a witness against himself" at least whenever he must face the modern-day analog of the historic trilemma—either during a criminal trial where a sworn witness faces the identical three choices, or during custodial interrogation where, as we explained in *Miranda*, the choices are analogous and hence raise similar concerns.

496 U.S. at 596.

31. *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 198-205, 257 (1988); Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 64-65 (2000).

of *Brown*'s relationship to historical meaning. As far back as 1879, the Court had begun the process of paradigm-case reasoning: of interpreting the Fourteenth Amendment in light of the paradigmatic unconstitutionality of the Black Codes. Thus, in *Strauder v. West Virginia*, the Court extrapolated from this paradigm case the principle that states could no longer pass hostile and discriminating legislation against blacks, legislation singling out blacks and branding them with a stamp of "inferiority."[32] In *Brown* and the cases that followed, the Court simply, and at long last, applied this principle to the nation's racial separation laws. Yes, *Brown* violated original No Application Understandings, but it rests plausibly and compellingly on an interpretation of the Fourteenth Amendment seeking to do justice to that amendment in light of its paradigm case.

To summarize: Modern American constitutional law may lack an articulate account of its own interpretive method, but it appears to embody such a method all the same. Generally speaking, American constitutional interpretation is structured by paradigm-case reasoning, in which the paradigm cases are given by historical Application Understandings. The law treats these understandings as definitive of core meaning and builds doctrine around them. The task of building up doctrine from paradigm cases is of course an open-ended one—quite familiar to judges in a common law system—that necessarily involves normative judgment. That is why I refer to the effort to "do justice" to a constitutional provision in light of its paradigm cases. But this much is certain: In the process of constructing doctrine around the historical Application Understandings, judges in our system frequently jettison historical No Application Understandings, including No Application Understandings fundamentally important to Americans of an earlier generation.

So much for description. Now for the theoretical claim.

II. COMMITMENTS, INTENTIONS, AND THE PARADIGM-CASE METHOD

The question, of course, is why. Is there any reason to distinguish Application from No Application Understandings in constitutional interpretation? My answer to this question, given in the second part of the book, is pretty long and a little complicated. It's a lot harder to summarize briefly. But in essence, I try to connect constitutional law's asymmetric

32. 100 U.S. 303, 307-08 (1879).

treatment of historical meaning to the theory of self-government over time, which I have tried to develop at length elsewhere.[33]

The idea of self-government over time is to be contrasted with a widespread, conventional conception of present-oriented, or "presentist," self-government. The presentist conception holds that self-government ideally consists of government by the self's own present will. An agent is maximally self-governing, on this view, to the extent he follows his own voice, his own present will or preferences, in the here and now. Very generally speaking, governance by the self's present will is the prevailing conception of self-government throughout modern political science, economics, political philosophy, and constitutional theory.[34]

The idea of self-government over time takes a different view. It holds that self-government requires an effort to hold the self to commitments—self-given ends, principles, or courses of action—over time, even when holding the self to those commitments runs contrary to present will or preference. Laurence Tribe gave this Kantian thought powerful expression thirty years ago:

> To be free is not simply to follow our ever-changing wants wherever they might lead. To be free is to choose what we shall want, what we shall value, and therefore what we shall be. But to make such choices without losing the thread of continuity that integrates us over time and imparts a sense of our wholeness in history, we must be able to . . . choose in terms of commitments we have made . . . .[35]

Note that both the presentist and temporally extended conceptions of self-government might be logically admissible and even correct, but limited to different domains. For example, the presentist conception may correctly offer the best account of freedom for a being with no self-understanding as a temporally extended identity. The presentist conception might therefore offer the correct account of freedom for many animals. A dog is maximally free, on this view, just to the extent that it can do what it wants to do here and now.

For human beings, however, the presentist conception of self-government appears to leave out something fundamental. People have a capacity for

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33. *See* RUBENFELD, *supra* note 7.

34. *See id.* at 17-73 (demonstrating that this conception of self-government underlies the work of political philosophers from Rousseau to Habermas, political scientists such as Robert Dahl and Jon Elster, and American constitutional theorists from Jefferson to Alexander Bickel and John Hart Ely).

35. Laurence H. Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1326-27 (1974) (footnotes omitted).

autonomy—for self-lawgiving—that most other animals do not. People have the capacity to give themselves enduring commitments—whether to institutions, to principles, to other human beings, or to some wholly trivial course of action—and to live out those commitments over time, even when doing so runs contrary to their then-present preferences.

I try to build up a conception of constitutional self-government organized around this idea of making and following commitments. I call this the "commitment-based" or "commitmentarian" conception of self-government, and I try to show that this conception makes the best sense of the project of American constitutionalism. For purposes of this summary, only one thought is crucial to this commitment-based conception of self-government: American constitutional law is to be understood as a project of temporally extended, democratic self-government.[36] In other words, constitutional law aspires to be the institution through which this nation seeks to lay down and hold itself to its own fundamental legal and political commitments over time. Constitutional law is not a check on democracy. Nor is it merely a protector of democracy, as for example by protecting the rights necessary for democratic politics. Nor is it a vehicle of democracy, as for example by guaranteeing a set of processes through which the present will of the governed can be expressed and effectuated. No: Constitutional law *is* democracy—over time. Or at least it is supposed to be. That is its promise and its aspiration.

But I am not going to rehearse here the arguments I make to try to establish this view of American constitutionalism. Instead I want to move straight to the final—and, in *Revolution by Judiciary*, the most important—piece of the puzzle. If you assume that American constitutionalism rests on and embodies a commitment-based conception of self-government, you can actually make sense of the distinction between Application and No Application Understandings in constitutional law.

To show how, I ask readers to follow me in (1) a careful analysis of the distinction between intentions and commitments; and (2) a set of arguments designed to explicate how and why we, as individuals, will often regard the Application Understandings of our commitments as bearing a special weight that our No Application Understandings cannot claim.

A. Distinguishing Commitments from Intentions

There is a clear phenomenological distinction between commitment and intentions. Commitments oblige. Mere intentions do not.

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36. *See* RUBENFELD, *supra* note 2, at 89-98; RUBENFELD, *supra* note 7, at 91-103, 145-77.

An intention formed at time one is not usually regarded as binding at time two. If at nine o'clock this morning, I had the intention of leaving the office today at five, this intention does not somehow impose an obligation on me to leave at five. When five o'clock comes, I may feel differently. If so, I will stay on without compunction.

To be sure, I may have had a good reason for intending to leave at five. Perhaps I have to pick up my children at that time. That reason may impose an obligation on me. But the mere fact that I formed an intention does not. My nine o'clock intention was based on my nine o'clock preferences. If my preferences have changed by five, I need no special justification to depart from my morning intention. I feel differently now, and that's the end of it. An intention does not give the agent an additional reason to act—a new reason, independent of the reasons the agent had for forming the intention in the first place.

Commitments are different. The whole point of a commitment is to impose an obligation. If I commit myself to do *X* at some future time, I'm obliging myself to *X* when that time comes. Thus commitments do create—or at any rate, their point is to create—new reasons to act. Say that at nine this morning, for some reason, I did not merely intend to leave the office today at five, but *committed* myself to doing so. Now it is a very different thing if I happen to "feel differently" when five o'clock come. I might prefer to stay on, but I committed myself to leaving. I probably anticipated that I would feel differently later; that's why I made the commitment. The point of a commitment is to impose a future obligation on the self to take (or not take) some action even if doing so runs contrary to later preferences.

It is actually a problem of considerable intricacy to explain how a commitment made at time one could in fact create new reasons to act at time two. The problem is easy to solve if we have in mind cases in which the person making the commitment at time one deploys some external mechanism—tying himself to the mast, giving to someone else the keys to his liquor cabinet, entering into a contract—that alters the feasibility, costs, or benefits of his time-two options. But I am speaking here of situations in which the agent deploys no such precommitment mechanisms. He merely commits himself; he merely gives his word—and he gives it not necessarily to others, but rather to himself. How can I "commit" myself this way? Hobbes, for one, thought it could not be done: "[H]e that is bound to himself only, is not bound."[37] A sizeable philosophical literature exists on this problem, but I am not going to

37. THOMAS HOBBES, LEVIATHAN 204 (Richard Tuck ed., Cambridge Univ. Press rev. student ed. 1996) (1651).

discuss here that literature or my solution to the problem.[38] Instead I am going to take it, as most of us do, that we can make commitments, even to ourselves, and that these commitments do impose obligations on us. The decisive question is this: If an agent is obliged to keep his commitments, what is the status of his No Application Understandings of those commitments? Are his original No Application Understandings commitments in themselves and therefore binding on him?

B. Are No Application Understandings Commitments?

Suppose I make a commitment never again to deliberately run over small animals with my car. At the time, I have any number of No Application Understandings of this commitment. For example, I understand that this commitment does not prohibit me from smuggling drugs into the country with my car (except, perhaps, in the rare case in which I could do so only by running over small animals). What is the status of this No Application Understanding?

Does it mean that I am committed to drug-smuggling? Of course not. My No Application Understanding means only that my small-animal commitment has No Application to drug-smuggling. It does not somehow commit me to drug-smuggling. If I refused to smuggle drugs into the country, I would not have violated my commitment

But does my No Application Understanding at least demonstrate that I am somehow committed to my being free, insofar as my own values and resolutions are concerned, to smuggle drugs into the country with my car? Of course not: I may view drug-smuggling as completely forbidden, without believing that it is forbidden by my small-animal commitment. On the day I made my small-animal commitment, perhaps I already had another commitment prohibiting me from smuggling drugs. Or, if not, I could later enter into an international agreement prohibiting me from drug-smuggling, without in any sense having violated my small-animal commitment.

In other words, it is quite obvious that my small-animal commitment, even when combined with my No Application Understanding of it, represents no kind of commitment at all with respect to drug-smuggling—neither a commitment in favor of it, nor against it, nor to my being free to engage in it.

I realize I have said nothing that ought to surprise anyone. Yet what I have said is already enough to make out the fundamental point that No Application Understandings are not themselves commitments. They are at most mere intentions. They are not binding.

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38. *See also* RUBENFELD, *supra* note 2, at 71-98; RUBENFELD, *supra* note 7, at 99-144.

Take the original understanding that the Equal Protection Clause would not prohibit racially segregated state public schools. Obviously, that understanding did not commit anyone or any states to racially segregating their public schools. States could of course desegregate without violating the Equal Protection Clause. But more than this, if what I said in the preceding paragraphs is right (which, I think, it controvertibly is), then the original No Application Understanding did not, by itself, commit anyone to leaving states free to have racially segregated public schools.

The Equal Protection Clause, as originally understood, did not prohibit racially segregated public schools. The intention, presumably, was that it would not prohibit racial segregation in public schools. But it made no commitment with respect to racially segregated state public schools. A prohibitory commitment is a commitment to prohibit certain things. Whatever the commitment does not prohibit, it makes no commitment toward. Whatever falls outside the domain of the commitment's application is not an object of the commitment. A separate, independent commitment is required if the agent making the prohibitory commitment wishes to commit himself to the further proposition that something he understands to be permitted—to fall outside the scope of his prohibition—will remain permitted. In short, a No Application Understanding of a commitment is never itself a commitment. There may well have been an original intention that the Equal Protection Clause would not prohibit racial segregation in state schools, but intentions are not commitments.

If, therefore, we accept the idea of commitment-based constitutionalism—and with it the idea that the fundamental business of constitutional interpretation is to adhere to the nation's constitutional commitments—we have a reason explaining why judges are not required to adhere to historical No Application Understandings. These understandings are not commitments. They are therefore not binding on judges who consider only the nation's constitutional commitments to command adherence.

C. How Application Understandings Can Be Commitments

Turn now to foundational Application Understandings. Sometimes, when we make a commitment, we are brought to it because we underwent some episode from which we drew, as a kind of lesson, a conviction that we ought never to engage in a certain course of action again. Even if we want to. Or especially if we want to. Barring ourselves from engaging in this course of action is the very reason, the core purpose, behind our commitment.

Suppose Odette commits herself never again to deceive Swann, her husband. Shortly thereafter, the handsome Duke proposes to Odette that he

and she spend a night together. Odette wants to say yes. On the other hand, she also wants to honor her commitment. She doesn't have to honor it, of course, but that's what she wants to do. She means to be faithful to her commitment. So she has to decide whether spending a night with Duke would count as an act of deceiving Swann.

It occurs to Odette to reason as follows. "To deceive means affirmatively to misrepresent something, not merely to fail to tell something. Therefore, spending a night with Duke will not be an act of deceiving Swann so long as I never affirmatively lie about it." On this basis, Odette says yes to Duke and tells herself she is not violating her commitment to Swann.

This interpretation of Odette's commitment is not illogical or impossible. But consider the following additional fact. When Odette made her commitment, the reason she did so was that she had just spent the night with the handsome Duke, without telling Swann about it. She wanted to impose an obligation on herself never to repeat this act. That's why she committed herself not to deceive Swann again.

In other words, Odette's commitment had a foundational Application Understanding. And it so happens that this foundational Application Understanding dealt with the very same course of action she has now "interpreted" her commitment to permit. Once we know this additional fact, it becomes fair to say that Odette has pulled a sleight of hand with her interpretation. She has not really interpreted her commitment at all. She has violated it under the guise of interpreting it.

What allows us to say so? When we make a commitment with a foundational Application Understanding, we are actually making not one, but two commitments—one specific, and one general. Odette was committing herself never again to sleep with Duke by and through her more general commitment never again to deceive Swann. If, we might say, she was committing herself to anything, she was committing herself not to do *that* again. A foundational Application Understanding is thus a commitment in its own right.

I am not saying that all commitments must have specific, foundational Application Understandings of this kind. The point is only that this normative structure—in which we make a more general commitment that includes, definitively, a more specific commitment as an Application Understanding thereof—is possible and more or less familiar. In other words, foundational Application Understandings can be commitments in their own right, made by and through the more general commitment of which they are specific understandings; No Application Understandings never are.

If, therefore, American constitutional law is best understood through the lens of commitmentarianism, there is an excellent reason for judges to

distinguish between Application and No Application Understandings. When our constitutional provisions have foundational Application Understandings, these Application Understandings are commitments, and commitment-based interpreters are bound to adhere to them. By contrast, No Application Understandings are not commitments, and judges may freely depart from them.

Observe that what I have said applies even to the most clearly established, widely held No Application Understandings, even to a No Application Understanding without which a given constitutional provision might never have been enacted. Conceivably, had the Fourteenth Amendment been originally understood to abolish racial segregation in public facilities, or to prohibit sex discrimination, it would never have been enacted. All the same, these No Application Understandings remained at most intentions, not commitments, and later judges are not required to stick to them.

But can judges claim to be faithfully interpreting a commitment if they interpret it to require something that its original makers intended it not to require? Certainly. Commitments are often like that: They turn out, if we really want to do them justice, to require considerably more of us than we may originally have thought. A person who has children, for example, or a person who resolves to become a great pianist, makes a commitment that can easily prove to require far more than he originally intended.

How does interpretation work when an interpreter finds that it applies to some action not originally considered to be within its scope? Consider another Odette, who also makes a commitment never to deceive another Swann, this time not her husband. Our new Odette also has a new foundational Application Understanding: This time, it was a lie she told Swann. At the time she makes the commitment, she specifically and clearly thinks to herself, "I'm still free to hide things from Swann, so long as I don't affirmatively lie to him. This commitment has No Application to mere omissions."

Shortly thereafter, Swann says something to Odette indicating that he believes she intends to marry him. In fact, she doesn't, but she knows that if she remains silent, Swann will read her silence as assent. She wonders if she's obliged to speak up and disabuse him. She remembers her commitment; she also remembers her No Application Understanding.

If Odette were an originalist, her job would be easy. She would invoke her original understanding, and the case would be closed. But if she takes a commitment-based view of interpretation, her task is harder.

She made a commitment not to deceive Swann. She made no commitment in favor of omissions. True, she understood her commitment not to apply to omissions, but that No Application Understanding is not itself a commitment, and is not therefore binding on her. Instead, she has to reflect, as best she can,

on what it means to deceive. In particular, she will think about her foundational Application Understanding: What was the lie she had told Swann, and what was it about this lie that made it so reprehensible? Is it possible that she would be perpetrating the very same kind of misconduct if she permits herself to remain silent after Swann's declarations, knowing that Swann will take her silence for assent? Is it possible that her original understanding was wrong—that in some situations, omissions can deceive? Of course it's possible. While she's not required to do so, it would be entirely legitimate for Odette to interpret her antideception commitment to prohibit her from remaining silent in these circumstances.

Similarly, and through precisely the same kind of reasoning, it was entirely legitimate for the Supreme Court to interpret the Fourteenth Amendment to prohibit racial segregation and sex discrimination. Honoring a commitment may well involve rejecting original No Application Understandings. This is not a prescription for ahistorical constitutional law. It is a prescription for historical anchoring. Constitutional interpretation, when it distinguishes between Application and No Application Understandings, treating the former as paradigmatic and the latter as nonbinding, remains deeply anchored in the nation's core constitutional commitments: elaborating these commitments, doing justice to them, even when that means recognizing in these commitments requirements extending beyond the confines of what was originally contemplated.

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I have now said more than enough by way of introduction. The best way to make more concrete my approach to constitutional law, my claims about revolutions in interpretation, and the relationship of my work to Professor Amar's, will be for the two of us to engage in a more direct exchange. Before we get to that, I just want to add only one more thing: my thanks to the editors of *The Yale Law Journal* for their incredible dedication, patience, intelligence, and creativity in making this happen.

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