The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be

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I think it is important to distinguish between things taken for granted, and things up for grabs. Things taken for granted can be used in an argument, in a sense, without argument; things up for grabs must be defended. One can question things taken for granted, but the questions (ordinarily) don't get one far. One can assert things up for grabs, but what is said (usually) feels as if it is simply being asserted. It feels, that is, as if it is just one view among many—respectable, but not compelling.

There is much taken for granted in Professor Dorf's article—extraordinary in its richness and reach—and there is also an argument treated as up for grabs. But now I am trapped by my own distinction. For I find myself disagreeing with what Dorf takes for granted, and wondering how anyone could doubt what he treats as up for grabs.

The things taken for granted are ideas about the nature of constitutional theory. I think all of them are wrong. They include the idea that a practice (such as "originalism" or constitutional law) has theories (such as social contract theory) which "underlie" them.[1] I don't think theories underlie (in any interesting or determinative sense) practices. They also include the notion that originalism can't explain most of our constitutional past.[2] I think we haven't done enough with "originalism" to know whether it could "explain," (in a properly limited sense) our constitutional past. If we did a little more, my sense is, it could do much more.

The thing up for grabs is a picture of what a successful theory of our Constitution would look like. Roughly put, the idea is this: That to have a theory of the Constitution that fits and justifies our constitutional past, we need a theory that shows how readings of the Constitution can change without formal amendment. Dorf gives us such a theory; he calls it a form of eclecticism. I think his eclecticism is really just a form of originalism,[3] and more originalism than eclecticism. That's not a criticism; I'm a big fan of theorists who work to wrest a theory of constitutional fidelity from the hands of mindless originalists. Dorf's originalism is not theirs, and that's all the world to recommend it. But it is, I want to argue, originalism nonetheless, and a kind of originalism that

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1. Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory*, 85 GEO. L.J. 1765 (1997).

2. Dorf, *supra* note 1, at 1767.

3. He seems to say as much, *see* Dorf, *supra* note 1, at 1787, but it is not clear whether he would accept my characterization completely.

I can't understand how anyone could doubt. Or put more precisely, in the limited way that any theory of constitutional law should be understood, obviously what Dorf says is right.

Believing that what everyone takes for granted is false, and thinking obvious what everyone treats as up for grabs, makes me (at the very least) an outsider. And so I will play my outsider's role through. My aim in this short essay is to rail against these things taken for granted, as a way to agree, ultimately, with what Dorf works so hard to assert. More strongly, as a way to argue that obviously, a theory like Dorf's would be correct, at least if we understood what a proper theory would be.

What is a constitutional theory for? Robert Bork told us long ago that we had to have a theory in constitutional law; that if we didn't, our constitutional law would be unprincipled; and that the aim of constitutional law (at least circa 1970) should be to fix on a theory and apply it consistently.[4]

I wonder why we ever believed Bork. For the picture he presses is as dated (and as silly) as bellbottom jeans. It comes from an era that we should have long passed—from an era when the idea was that a practice only has merit to the extent that it rests upon a theory; and that the aim of the very best (the Theorists) is to articulate this theory. Balls bounce, and behind them is a theory of physics.[5] Words communicate, and behind them is a theory of meaning.[6] Cases get decided, and behind them is a theory of constitutional law.

I think this picture of practice, and its relation to theory, is just wrongheaded. I agree that there is a place for theory in constitutional law. But the idea that constitutional law or constitutional practice rests upon theory, in the way that my coffee-table rests upon the floor, is just wrong. Theory relates to practice not as the floor relates to the table, but as the hammer or saw relates to the table. Theory is a tool for making sense of the practice, when the practice needs making sense of. It's a tool for cutting off senseless parts, when parts of the practice become senseless.[7] It's even a tool for revealing the senseless in a practice when the senseless is otherwise unseen. Theory is just another move in the game of constitutional law. It is an important and useful move when kept low down, near the data. It is useful, that is, when it doesn't try to do too much.

In the recent past, it has done too much. The language of constitutional theory

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4. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1 (1971) (arguing that "a persistently disturbing aspect of constitutional law is its lack of theory" and arguing for "the necessity for theory"). *Compare* Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. (1997). It is therefore somewhat odd to see Dworkin attack Bork for his lack of theory. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 265, 267, 273 (1996).

5. *But see* JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE (1987) (discussing chaos theory).

6. *But see* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1953) (challenging just this conception of a theory of meaning).

7. One might ask how we know whether a part has become senseless. That's an excellent question, a complete answer to which I can't offer. I do believe, however, that what we don't need is a theory to give us that answer. Or at least, a theory in the sense of a grounding theory.

is now unspeakable by practitioners of constitutional law—unspeakable both in the sense of not being understood and in the sense of not contributing to real debates about constitutional law.[8] It has become removed from the practice and this, I suggest, is in part because of the way we've come to think of what theory is—as grand, or complete, or unifying, or grounding; as a way to reveal the true sense of the practice, or what is really going on.[9]

This sense of theory is just bad theory. We should reject it. But in rejecting it, we are not left without theory. This is the strength, I believe, of Cass Sunstein's push to consider incompletely theorized agreements as a model for theory.[10] The claim about incompletely theorized agreements is not negative; it's not a way of criticizing all theory. The claim about incompletely theorized agreements is rather positive—it's an affirmative recommendation about what theory should be. We should use theory, the argument goes, to rise enough to find agreements among differing views; and at times, we should use theory to rise enough to show reasons to reform differing views. But we should not start with the aim to find a theory that rises so high as to explain all differences, or all views. For theory becomes useless. It no longer does any work. It is the rod disconnected from the piston.

Some might find this surprising, coming from a theorist such as I. For from my Mac, I have felled whole forests in the quest to describe a "theory" of constitutional fidelity that I call "translation." Article after article has been dedicated to showing that yet another area of constitutional law is susceptible to the translator's power.

One might well view all this translation stuff as just another way of grounding constitutional law. One might think it just the kind of theory that in this essay I attack. It might have been at one time, but I now think that use of translation theory is quite useless. Translation is useful when it is much more directed (others might say limited). And this more directed and limited use suggests the place for useful constitutional theory.

Fidelity as translation aims first at making sense of a practice of constitu-

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8. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 42-57 (1992).

9. Consider the preface to the first edition of Professor Tribe's (extraordinary) treatise on Constitutional Law:

> This treatise ventures a unified analysis of constitutional law. . . . [O]nly a systematic treatment, rooted in but not confined to the cases, sensitive to but not centered on social and political theory, can offer a clear perspective on how the doctrines and themes of our constitutional law have been shaped, what they mean, how they interconnect, and where they are moving. I also think only such a treatment can provide a coherent foundation for an active, continuing, and openly avowed effort to construct a more just constitutional order.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW vii (2d ed. 1988). *See also* Geoffrey P. Miller, *The President's Power of Interpretation: Implications of Unified Theory of Constitutional Law*, 56 LAW & CONTEMP. PROB. 35 (1993).

10. *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735-36 (1995).

tional law that claims "fidelity" as its objective. What fidelity is no one really knows, nor is there a general answer to a request for a definition. Fidelity is what we all now do. It is comprised by a set of practices that get bounced about by decisions of a Court, and by understandings about those decisions. These practices are the expressions of fidelity; our urge is to understand just how.

In this ongoing discussion, I understand translation theory to be making two small points. The first is to dislodge what at one time seemed a dominant view about what fidelity meant: dominant both in a political and a normative sense (political, in that there were many people of power who held this view; normative, in that it seemed to express what fidelity should mean). This was the argument of the first originalists—that our aim must be to return to what the Founders would have said and follow that.

This urge of fidelity as return is constant and repeated in a wide range of interpretive contexts. It is Protestantism in Christianity; it is the work of the Karaites in Judaism.[11] It is an urge that entails obvious suspicions: If fidelity means doing what the Framers would have done, then each time there is a change from what was done, there is a question of fidelity raised. If fidelity means doing the same thing, then doing something different is presumptively infidelity. Changed readings are suspect; constancy is the norm.

This conception of fidelity is mindless. It can't be that fidelity means this, at least if what we mean by fidelity is something like preserving constitutional meaning over time. Showing the mindlessness of this picture of fidelity was the first, and negative aim, of fidelity as translation. Its aim was to dislodge this picture, and it executed its task with ideas that should be obvious.

The execution followed much the same track as Dorf does at the end of his article.[12] It is that meaning is contextual; words are selected to do certain things, given a particular context; the meaning they produce in that context is, therefore, hostage to that context; the context could change in a way that makes the meaning different. When the context changes to render the meaning different, the interpreter or reader must make a choice: whether to continue to read in the same way, and to allow the meaning to change; or to read the text in a different way, to preserve the original meaning.

This means that some changed readings accommodate these changes in context; that some, that is, are changes that preserve original meaning, given a change in context. And that therefore, any rule of constitutional interpretation that either says that first readings must stick, or that changed readings are suspect—a practice I have elsewhere called one-step originalism—is not a practice directed by fidelity.[13]

One-step originalism was the original target of translation theory. Its weapon

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11. *See* H.L. STRACK & G. STEMBERGER, INTRODUCTION TO THE TALMUD AND MIDRASH 233 (1992).

12. Dorf, *supra* note 1, at 1796-1800.

13. I don't think the founders of the originalist school (Thayer, for example) were as much concerned with fidelity as with judicial constraint. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135-38 (1893).

was an analytic about meaning—a hammer to dislodge an argument with an obvious and self-righteous appeal; a tool to remove the moral certainty that mindless originalism had brought to constitutional law.

But this argument was never made solely as an argument from philosophy. It was never purely analytical. Instead, I made it in the context of examples—examples of changed readings from our constitutional past which fit the form of changes of translation. These were to be examples of changes of fidelity, which a one-step originalist might mistake for examples of infidelity. But this procedure led to an obvious rut. It led to a question—how much of our constitutional past might be said to fit this form?—and to the multiplication of examples that were said to fit it.

One could carry this enterprise on, and thereby develop just the sort of theory that I attack here. That is, one might develop such a theory as a model of how constitutional law has evolved, as if judges could be trained to follow this model when they decided cases. But this, I suggest, is an unhelpful way to proceed. For, again, I don't think there is a theory that can underlie the interpretive practice of judges deciding cases of constitutional law, and I don't think one is needed.

So why then my practice of deforestation? Because I think that there is a second reason to collect examples, to make the examples comprehensive, and to line them up in a row. The reason is not to find what underlies a practice; rather the reason is to see whether something might be missing from an account of a practice.[14] The method asks a counterfactual question: if we imagined that judges follow a practice of translation, would there be times when what they did was inconsistent with this practical translation? And if so, is there a pattern to these inconsistencies?

I think one can ask this question without believing that a model of translation underlies anything.[15] For the aim of this exercise is to locate other aspects of our interpretive practice that we might have missed. This use of translation (like my first and negative use) aims at uncovering something that might be moving in the background. It, too, is a way of revealing this background. But it does this uncovering as a way of being critical about this unconscious, not as a way of grounding practice.

This exercise focuses what Dorf focuses on in his consideration of my work—the place of contestability in constitutional thought. My argument is that we must think about (as I started my essay here) the distinction between the contested and the uncontested—about how that distinction may have mattered to our constitutional past, and about how it might matter to constitutional law.

The conclusion I draw is that it has mattered, and that it makes sense that it

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14. Technically speaking, the search is not for an equation that explains lots, but for independent variables whose role in the equation is significant. *See generally* RICHARD A. POSNER, OVERCOMING LAW 430 (1995).

15. *Id.*

matters. Where a discourse becomes uncontestable, judges quite heavily, if unconsciously, rely upon it. But where a discourse becomes contestable, judges shy away from it. Contestability, I argue, is one of the moving parts in a description about how constitutional law has developed. And my claim is that any theory of constitutional law must take this contestability into account.

I have described this pattern as the *Erie*-effect.[16] It has two moments: one is a change in contestability that renders a discourse problematic; the other is a change in a legal practice to reduce or accommodate the rhetorical cost of that problematic. The first moment gets the process going; the second is its response.

Dorf describes my argument with great charity. And he fairly points to an implication that does seem to follow. If, as I argue, contestability has led to judicial deference in the range of cases that I had collected, does this mean that examples of judicial activism in the face of contestability—for example, *Brown v. Board of Education*,[17] *Planned Parenthood v. Casey*,[18] or *Romer v. Evans*[19]—are illegitimate? Or, as someone much less charitably put it, is this a theory that explains none of the significant changes in constitutional law in the past fifty years?[20]

I don't think the implication follows. And while it is beyond this essay to argue the point fully, the key is to understand the place that contestability occupies in any particular conflict. If contestability goes to the ground for judicial action, then it has yielded—I have argued—passivism.[21] But sometimes contestability goes not to the ground for judicial action, but to the defense against judicial action. Sometimes it goes not to the reason to act, but to the reason to defer. When it does this, how it matters differs. When it goes to the ground for resisting judicial action, contestability yields more judicial action.

Gay and lesbian rights are the most obvious examples here. Laws treat gays differently in all sorts of ways. But laws treat lots of groups differently in all sorts of ways. Different treatment alone doesn't establish an *unconstitutional* difference in treatment. Unjustified differences in treatment do.

It should be plain that in this formulation of the question, contestability can matter in two very different ways. Contestability can undermine not only the grounds for judicial action, but also the justification for differences in treatment. What at one time seemed a perfectly adequate justification, given the constellation of uncontestables at that time, may now seem quite incomplete or questionable. What before was taken for granted can become contestable. And the consequence of this contestability may be to increase judicial activism in the

16. *See, e.g.*, Lawrence Lessig, Erie-*effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785 (1997).

17. 347 U.S. 483 (1954).

18. 505 U.S. 833 (1992).

19. 116 S. Ct. 1620 (1996).

20. *See* Michael J. Klarman, *Anti-Fidelity* 44 UCLA L. REV. (1997).

21. *See* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 426-38 (1995) [hereinafter Lessig, *Fidelity and Theory*]; *see also* Lessig, *supra* note 17, at 1800-01.

name of equality, not to decrease it. Or again: to the extent contestability weakens the reasons for deference, it strengthens the reasons for activism.

This dynamic makes understandable the recent rise in equality claims by gays and lesbians. Or more precisely, this dynamic makes understandable the increasing success of equality claims by gays and lesbians. Not so long ago, I would argue,[22] the grounds for discrimination against homosexuals were relatively uncontestable. Wrong, but uncontestable.[23] But the grounds for these earlier views have been eroded—by shifts in science, and medicine, and society.[24] This erosion, in turn, has undermined the reasons not to recognize equality claims by gays. *Romer* is just the beginning of this new recognition.

The point is to understand the source of the realignment, or to make this source understandable. For it points to just why changed readings occur, and it forces us to articulate reasons why we should, or should not, recognize such changes as changes of fidelity. So again, the focus gives us a tool for understanding a certain kind of change, and a way of talking about whether this kind of change should be justified within our constitutional practice. More directly, it points to why (with equal protection claims, at least) readings of the Constitution will shift, but why this shift is perfectly justifiable.

That is the effect created by contestability. My claim is that constitutional theory must account for this effect. But the opposite effect must also be reckoned: cases in which the uncontestable changes. There too I argue that changes in contestability matter to justified changed readings. How they matter, however, is different. Changes in uncontested discourses constrain translation. They make certain otherwise faithful translations unavailable. Judges can't offer a translation that seems inconsistent with these discourses. Judges can't, as it were, spit in the wind of what we all know is true.

My sense is that Dorf is describing these same phenomena, though in different terms. These shifts reflect, he wants to say, differences in "expertise"[25] or our learning that earlier views were grounded in stereotype.[26] Because we reject "inexpert" or "stereotyped" views, we can reject these as well.

Here Dorf offers an extremely helpful example—of a state that would today prohibit the practice of law by women.[27] Such a law would be plainly unconstitutional. But things were, at one time, different. At one time, such a law *was* constitutional. After the framing of the Fourteenth Amendment, in the case of *Bradwell v. Illinois*,[28] the Court held that the protections of equality within that

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22. *See* Lawrence Lessig, *Fidelity and Theory*, *supra* note 21, at 415-19.

23. In the 1960s, for example, even liberals such as Justice Douglas had this view. *See* Boutillier v. INS, 387 U.S. 118, 127 (Douglas, J., dissenting).

24. I discuss some of these in Lessig, *Fidelity and Theory*, *supra* note 21, at 417-19.

25. Dorf, *supra* note 1, at 1809.

26. *Id.*

27. *Id.* at 1808.

28. 83 U.S. (16 Wall.) 130, 141 (1872).

amendment did not trouble this legal restriction on women. Why? The language here is extraordinary, but more extraordinary is to remember that this language was not, at the time, extraordinary. Here's what Justice Bradley said:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.[29]

Dorf wants to dismiss this language, and the holding that rests upon it, by arguing that it grew out of some sort of mistake. "When intervening developments reveal that the Framers lacked expertise," he writes, "we may discount their views."[30] We know they lacked expertise, because their views were the "product and producer of gender-stereotyped thinking."[31] Their views are "so incredible as to persuade the jury that the facts are contrary to what the witness asserts."[32] Believing that the Constitution means what they said it means makes it, Dorf argues, "flawed or distasteful."[33] The Constitution therefore "means the opposite."[34]

Notice the form of this rhetoric. We are justified, he argues, in doing something different because the Framers were "mistaken": they got "the facts" wrong, and because they got "the facts" wrong, the Constitution they enforced was "distasteful." But in my view, it doesn't make sense to talk about them getting "the facts" wrong, as if there are facts out there independent of some ideological view. Given the world the Framers wanted to construct, their views were perfectly correct. To keep women in their place, to keep social hierarchies as they were (at least with respect to sex), these old ways of looking at the world would have to survive. Of course, we reject this vision of how the world ought to be, but we are rejecting a value, not a fact. It belittles the work of those activists to suggest that what they did was simply show us that we had gotten our sums wrong.

This form of argument is common in constitutional rhetoric. It's the kind of argument that leads our leading constitutional jurist, Ronald Dworkin, to believe that he can write a book about abortion that argues that anti-abortionists are simply "mistaken" about an analytic truth.[35] It's a rhetoric that tries to shift value choices to judgments of fact, or logic. It's a view that believes everything

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29. *Id.*

30. Dorf, *supra* note 1, at 1809.

31. *Id.* (quoting Michael C. Dorf, *A Nonoriginalist Perspective on the Lessons of History,* 19 HARV. J. L. & PUB. POL'Y 351, 356-58 (1996)).

32. *Id.*

33. *Id.*

34. *Id.*

35. *See generally* RONALD DWORKIN, LIFE'S DOMINION: AN ESSAY ON ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993); *see also Ronald Dworkin et al., Assisted Suicide: The Philosophers' Brief,* 44 N.Y. REV. OF BOOKS, Mar. 27, 1997, at 41.

is in the foreground, and a foreground determination that "this is a fact" and "this fact is mistaken" *makes* the Constitution read differently from how it was read before these views were established.

Behind this rhetoric is a view held in common both by those who advance "updating" arguments of this sort, and by those who reject them. The view goes something like this: if it were really "just a value" that was at stake, then democratic action would have to change it. The idea is that values are for democrats; facts are for courts. So about the Fourteenth Amendment—if it is a change in values that justifies the changed reading of the Fourteenth Amendment, then, the view is, we need to find democratic ratification for this change in constitutional values. But if it is a fact, then judges may correct a mistake.

There's a confusion in this common view that goes to the core of constitutional thought. It is a conflation of "fact" with the idea of the uncontestable, and of "value" with the idea of "up for grabs." "Facts," this view implies, "are the sorts of things we all must acknowledge; if the Constitution was wrong about a fact, then judges can change it to fix that mistake." "But values," it continues, "are the sorts of things that are chosen. They are up for grabs. So if the Constitution was wrong about a value, we must amend it to change it."

This view is mistaken, though there is something real here that it is trying to track. Facts are not all uncontested, and neither are all values contested. There are facts that are up for grabs, as well as values that are, as it were, off the table.[36] Thus, rather than a rhetoric that tracks ontological categories, like fact and value, and that allows changes in constitutional law when we can identify a view grounded on facts,[37] we should follow a rhetoric that tracks "up for grab-ness," or "off the table-ness," and recognize changes based on them. There *are* changes that a court must recognize, fidelity notwithstanding; these changes are changes in this category of the uncontestable.

Justice Scalia offers a picture of this sort of rhetoric. Said Justice Scalia, in his lone dissent to one of the most significant sex discrimination cases of this decade,

> Much of the Court's opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education. Closed-minded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable. The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the

36. *See generally* RENFORD BAMBROUGH, MORAL SKEPTICISM AND MORAL KNOWLEDGE (1979) (aiming to reorder our institutions about the objectivity of morals and subjectivity of facts).

37. It may be that constructing a rule that made it seem as if judges were arguing just about facts may be the best way to track this uncontestability, since "fact" will predicate most easily of those things that are, in a particular context, treated as uncontestable. This, I think, is the thrust of Judge Posner's theory of interpretation. *See generally* POSNER, *supra* note 14, at 171-255.

> smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: they left us free to change.[38]

Here Justice Scalia points to the category of thought that I want to argue is central—to the "undebatable," or as I've called it, the uncontestable. Plainly Justice Scalia can't mean that ideas of sex equality were unheard of, or unspoken. Myra Bradwell spoke of them, and they were plainly debated before the Supreme Court. Instead, what "debatable" must mean is debatable by reasonable sorts—by normal or ordinary sorts at a given time. Certainly lunatics and extremists ("militants" we would call them today, with just about as much injustice) held these views about women at that time, but they were not the views of integrated sorts. They were the views of outsiders, and it is this that made them "undebatable."

The undebatables change. They can change in at least two ways. They can change first by becoming debatable. Or they can change by becoming undebatable, but with the opposite sign. Views about the place of woman, for example, can become debatable (some arguing for equality, some arguing for inequality), or views about the place of women can become undebatable, but different from how they were at the time of the Fourteenth Amendment (undebatable that the place of women is to be equal). The question constitutional theory must answer is how to treat these two *different* changes. When a view that was once undebatable becomes debatable, how should a court react? And when a view that was undebatable becomes undebatable in another, how should a court respond?

Justice Scalia's theory is that when a view is dislodged from the originally undebatable position, it thereafter is without the Constitution's scope. It is thereafter a matter for democratic politics. But one could as well have a different cut on this shift in modality. One could say that when the view becomes debatable, then judges should not take sides on that view; but when the view again becomes undebatable—but in a different way—then judges must incorporate the newly undebatable view, regardless of the position of the Framers.

This is the dynamic that Dorf is describing. It is the shift we experience when we confront a view that is, for us, uncontestable. Judges are constrained by the reasonable, and no reasonable person could take the view (today) that Justice Bradley took in 1872. The reasonable is defined by this set of uncontestable views; judges must track them, *whether the Framers thought the same or not.* The presently uncontestable, *whether a value or a fact*, constrains this practice of interpretive fidelity, just as, as I argued above, the presently contestable, whether a fact or a value, constrains this practice of interpretive fidelity in a different way. About the contestable, judges can say nothing; about the uncon-

38. United States v. Virginia, 116 S.Ct. 2264, 2291-92 (1996) (Scalia, J., dissenting).

tested, judges can say only one thing. These are the modalities (of contestable and uncontestable) that constrain a practice of interpretation—not truths about ontology.

These two tools, then—translation, and its constraints (where contestability and uncontestability are the constraints)—sit in a box called "tools for justifying changed readings." They are ways to make sense of changed readings, and arguments for why changed readings need not be infidelity. But they are not, nor should they be, foundations for a full account of our constitutional past. They are not theories upon which our constitutional practice rests. They are ways to speak about our past; ways of understanding it, and making it make sense. And they are ways of dislodging arguments about how we should go on.

In the end, this way of talking about our constitutional past does not place me far from the position that Dorf describes, unless Dorf insists that his eclecticism serve the ends of foundational theory. I agree that our practice is shot through with originalist-like arguments; indeed, I believe a more sophisticated originalism would show that a much larger proportion of our constitutional past is grounded in originalist-like arguments. And I agree with Dorf's description of the specific values he sees in "ancestral" and "heroic" originalism. But if he means to deduce from this structure of eclecticism the values, or set of values, implicit, or inherent, or permanent, or grounding our constitutional tradition,[39] then it is here that I get off the boat. For what constitutional theory does not need is a general account—a specification of the values that constitutional law is to serve. It doesn't need a general formula, or equation, from which we are to deduce particular cases. To the extent that eclecticism yields just such an account, I reject eclecticism.

We need theory to help us work around interpretive puzzles. We need it as a way to make sense of our practice at particularly difficult times. We need it to help work around views now "up for grabs." And we need it to dislodge a view that has come to be taken for granted, but which is, no doubt, wrong. We need it for all these different reasons, or for this collection of reasons. We need it for all the unspecified reasons for which one needs any set of tools. But one reason we don't need theory is to ground a constitutional practice. In other fields of social thought, that use of theory is, thankfully, long gone. Constitutionalists should send it away as well. We should, like they have, put our bellbottoms away.

39. Dorf does suggest this meaning. *See, e.g.*, Dorf, *supra* note 1, at 1822.