The Meaning of Equality and the Interpretive Turn

Robin West
Georgetown University Law Center, west@law.georgetown.edu

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66 Chi.-Kent. L. Rev. 451 (1990)

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THE MEANING OF EQUALITY AND THE INTERPRETIVE TURN

ROBIN WEST*

I. INTRODUCTION

The turn to hermeneutics and interpretation in contemporary legal theory has contributed at least two central ideas to modern jurisprudential thought: first, that the "meaning" of a text is invariably indeterminate—what might be called the indeterminacy claim—and second, that the unavoidably malleable essence of texts—their essential inessentiality—entails that interpreting a text is a necessary part of the process of creating the text's meaning.¹ These insights have generated both considerable angst, and considerable excitement among traditional constitutional scholars,² primarily because at least on first blush these two claims seem to inescapably imply a third: that the interpreter of a text creates rather than discovers the text's meaning. A text's meaning cannot constrain an interpreter, for the simple reason that there is no single meaning embedded in a text to do the constraining; at best an interpreter must therefore choose from a range of possible meanings, and at worst the interpreter creates the meaning in the name of discovery or interpretation. In the constitutional context, the insistence that an uninterpreted, pure, or original legal text (like any text) cannot constrain in any way its subsequent interpretation seems to imply that the judge operates not in the realm of law but in the realm of arbitrary power.³ This suggests that judges interpreting the Constitution are essentially creating its meaning, and are therefore freed of any "textual"—and hence legal—constraints on their power. The judicial interpreter becomes the constitutionmaker; each case potentially occasions a rewriting. If the judge is not constrained by the singular meaning of the constitutional text, he must be free to basically do as he pleases. Constitutional adjudication thereby

* Professor of Law, University of Maryland.

1. For a general introduction to these claims see S. Fish, IS THERE A TEXT IN THIS CLASS? (1980). For an introduction to the legal literature, see INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (S. Levinson and S. Mailloux ed. 1988).


becomes, for better or for worse, an exercise of power rather than an exercise in law.

As widespread as this belief is, however, the reaction of constitutional scholars to the two fundamental insights of the "interpretive turn" in modern philosophy may be misguided. Constitutional scholars who are alarmed by the interpretive turn in jurisprudence assume that judicial freedom from the constraints of the univocal, imperative meaning of "the" constitutional text implies judicial lawlessness. But the conclusion of lawlessness from hermeneutic insights simply does not follow. That judges may be free of the constraining influence of an illusion—the illusion that a text has a singular meaning, either original or "plain," awaiting proper discovery—by no means implies that they are therefore free; it only means that the text does not operate as a constraint, at least to the degree or in the manner traditionally thought. But it does not follow that the judge is unconstrained. He may well be constrained, even if not by the singular, original, or plain meaning of the text. Thus, even the judge who is free (and feels free) of the illusion that the text has a single, imperative meaning may nevertheless be "bound" by—and feel bound by—any number of other constraints, stemming from his professional role, his sense of ethics, his class interests, the expectations of a range of various "communities," or, as I shall discuss in greater detail in the bulk of this paper, his jurisprudential identity, and the social and moral role in society that identity entails. That the judge is not bound by the intended or plain meaning of the Constitution, as of any legal text, implies next to nothing about the degree of freedom or constraint with which he decides cases.

In fact, as I shall discuss in more detail in Part II below, most scholars who draw heavily upon hermeneutic insights, or who accept in some fashion the basic interpretivist claims outlined above, insist quite strenuously that the judge is bound, or constrained, by some set of forces. Indeed, if anything, descriptions of the judicial process which deny the existence of an objective and singular meaning of legal texts more often vest the judge with too little discretion, not too much. The judge emerges from some of these depictions as so utterly at the mercy of forces over which he has little or no control, that the adjudication depicted by interpretivists often appears to be ultimately as "mechanical" as that portrayed by the formalists, intentionalists, and plain meaning theorists they set out to decry.

Nevertheless, it is not difficult to see why the misperception persists

4. For a lengthy argument to this effect, see Fish, *Fiss v. Fish*, 36 STAN. L. REV. 1325 (1984).
that the new "interpretivism" in the context of legal and constitutional studies implies judicial freedom, and hence judicial lawlessness. There are two reasons. The first is that interpretivists have not paid as close attention as they should to the nature of the constraints on judicial interpretation—whether they be textual or nontextual. Debate has centered instead around the claim that the intended or plain meaning of a legal text cannot control its subsequent interpretation. The result is that there has simply been inadequate attention given to the identification of nonintentionalist and non-plain-meaning constraints on the judge's decision. The impression, or misimpression, this neglect has fostered is the all-or-nothing claim that if neither authorial intention nor plain meaning controls judicial discretion, then nothing does. The judge is either, in this misguided dilemma, bound by the text's intended or plain meaning, or is free to do as she pleases.

The second and somewhat more complex reason that interpretivism seems to imply judicial lawlessness is that the constraints that interpretivists have identified are not constraints that satisfy the ethical and legalistic imperatives that drive traditional constitutional theorists toward intentionalist and plain-meaning theories of meaning. That the judge who is unbound by a discoverable meaning of the constitutional text may nevertheless be bound by dominant class interests, culturally embedded constructs, unconscious bias, or even community morality, will hardly be consolation to the theorist who sees in "law" the possibility of protecting the individual against those very forces—the ravages of class, the ignorance or idiocy of dominant culture, the meanness or viciousness of mainstream bias, and bigotry. To the degree that the traditionalist sees law as a bulwark against arbitrary, random or whimsical judgment, the interpretivists' identification of nontextual constraints on interpretation might provide some solace. But to the degree that the traditional constitutionalist's insistence on a discoverable constitutional meaning is grounded in the faith or hope that the power of law can protect us against malevolent nonlegal forces—such as communal xenophobia or class oppression—the interpretivists' identification of precisely those forces as the relevant non-legal constraints on judicial discretion is very likely to exacerbate rather than alleviate the traditionalist's anxiety.

The first purpose of this article is simply to expand discussion of nontextual constraints on judicial interpretation beyond its present contours. I will assume the interpretivists' major premise—that judicial interpretation of the Constitution does not and cannot consist of

5. See infra notes 19 to 26 and accompanying text.
ascertaining and applying either the plain meaning or the originally intended meaning of its authors. I will also urge, however, that the two forces interpretivists have unambiguously identified as major constraints on the judicial process—communal constraints on interpretive meaning and class interest—whether or not correct, are certainly not exhaustive. There is no reason to think that judges are not also constrained by other forces, and that they do not retain some residual degree of freedom to act against those influences as well.

I then want to explore the ramifications of one particular constraint on constitutional interpretation which seems both incontrovertible and politically unobjectionable, but which nevertheless (or perhaps for that reason) has been underexamined in the constitutional and interpretive literature. The meaning of the judicially discovered or interpreted Constitution, I will argue, is determined in part by the identification throughout the legal culture, and to a lesser degree by the mainstream culture of the Constitution as a legal rather than political document, and as a law for judicial, rather than legislative application. To the degree that we identify the Constitution as a source of adjudicative law, judicial interpretation of the Constitutional text is constrained not only by the original or plain meaning, as is insisted by intentionalists and textualists respectively, and not only by the ethical constructs, interpretive rules, class interests, and ideological forces identified by interpretivists, but also by jurisprudential conceptions of the nature of law. Obviously, if the Constitution is law, then it is not only a Constitution we are expounding, but law we are expounding as well. Consequently, judicial understanding of what the Constitution means is heavily influenced by judges’ conceptions of the nature of law—law is the general category of which the Constitution is an instance.

For this jurisprudential reason alone, in the hands of other nonlegal interpreters in the political arena, the Constitution could take on, and has taken on, very different meanings. Legislators and citizens, unlike courts, are not constrained by the need to interpret, apply and enforce the Constitution as a legal document. Whatever constitutional meanings derive from constraints that owe their origin to the judicial forum to some degree lose their force when the Constitution is interpreted in other nonlegal fora. It is thus not surprising that the Constitution and its general phrases mean one thing to the Court and courts, and oftentimes something very different to other sectors of the community. The Second Amendment, to take an obvious example, clearly means something quite
different to large sectors of the public than it means to the courts. Likewise, the constitutional "right to privacy" has a different constitutional status outside the Court than inside.

These differences may reflect differences in degrees of expertise. But they also reflect differing institutional and jurisprudential responsibilities. Citizens and legislators have different interests in the Constitution and its phrases than do courts, and accordingly operate under different constraints. One of those differences is surely that for the Court and the courts, the Constitution is law, and must be interpreted, enforced, and applied as such—that is, after all, what courts do. This constraint does not operate in anywhere near the same way upon citizens or legislators. Consequently, citizens and legislators not bound by the duty of enforcing and applying the legal Constitution may see very different meanings in its general phrases.

In the first section below, I will quickly outline two "interpretivist" descriptions of the adjudicative process which stem in different ways from the basic interpretive claims sketched above. The first is that of a group of interpretive scholars whom I will call the "postmodernists"—by which I mean the neo-pragmatic and postmodern theorists most influenced by or responsible for the interpretive turn in constitutional theory. I will take Stanley Fish as representative of postmodernism. The second description comes from the Critical Legal Studies movement, and here I will take Mark Kelman's work as somewhat representative. Critical scholars no less than postmodernists are heavily influenced by the interpretive turn, but they have used it for very different purposes than those of the postmodern critics.

As different as they are, I will argue, these two groups have much in common. First, neither of them posit the bogeyman feared by the traditional critics of interpretivism: the untethered judge, unconstrained by a binding legal text, deciding cases according to whim. Although both accept the major premise that the legal text does not possess a pre-interpreted, objective meaning there for the finding, both also describe the judge as heavily bound by external forces. Neither the Fishian nor the Kelmanesque judge decides cases according to "whim." I will then argue that both Fish's and Kelman's descriptions constitute only partial truths. Their descriptions are valuable, but they err in their implicit assumption that they have in some sense described the panoply of extratextual determinants of the judicial decision.

In Part II, I argue that, in addition to the nontextual constraints identified by Fish and Kelman, the role of the judge places peculiarly *jurisprudential* constraints on the interpretation of the constitutional text. In Part III, I apply the argument to one particular constitutional text: the fourteenth amendment’s guarantee of equal protection.

II. THE INTERPRETIVE TURN

Both critical legal scholars⁷ and postmodern legal theorists⁸ embrace the basic interpretive insights sketched above—that texts have no pure, uninterpreted meaning, and that the interpreter of the text consequently endows the text with meaning, rather than discovers its meaning. Furthermore, both have offered descriptions of adjudication that depict a far more constrained process than the kind of account most often ascribed to them. The constraints on legal interpretation which they have identified, however, are strikingly different.

Let me begin with the postmodern theorists. In sharp contrast to most critical legal scholars, postmodern theorists typically insist that the basic interpretivist claim—that the original text does not control its subsequent interpretation—does *not* imply, in the legal and especially the constitutional context, a pernicious politicization of the bench. For the post-modernist, there is indeed no discoverable, pre-interpretive, original, or intended meaning to any text, notably including the constitutional text. And, it is indeed the process of interpretation that confers meaning upon texts, and judges are undoubtedly in the business of interpretation. However, it does not follow that judges create constitutional meaning. Judges are quite fully constrained. They couldn’t possibly, even if they set out to, decide cases on the basis of their own political whim. The reason why goes to the heart of the “interpretive turn” itself.

The reason legal indeterminacy does not imply judicial activism, according to postmodernists, inchoes in the nature of *texts* and in the nature of interpretation. Texts, to repeat a by now well-worn trope, come “always already” interpreted.⁹ A “text,” according to the post modernists, is not simply the recorded intention of its authors—here, the fram-

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⁸ See generally S. Fish supra note 1, and S. Fish, Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies (1989). But see Levinson, Law as Literature, in Interpreting Law and Literature: A Hermeneutic Reader supra note 1, at 155, for a very different, and more political, understanding of the hermeneutic tradition and its consequences for legal interpretation.

⁹ S. Fish, supra note 1, at 303-71.
Nor does it contain a plain—meaning pre-interpreted—meaning. Rather, a "text" is, definitionally, the embodiment of the stories, traditions, interests, desires and aspirations of the communities that have produced and interpreted it, and this is as true of the constitutional text as of any other. Even if the plain or originally intended meaning of a text does not constrain judges, then, this fully, always already interpreted text clearly does; the judge cannot help but read the text in a constrained way if he is going to read the text at all.

Thus, contrary to the fears of intentionalist and plain meaning advocates, the postmodernists fully agree with the traditionalists that the constitutional text constrains interpretation. The nature of the constraint, however, is markedly different than that seen by traditionalists in the plain meaning or original intent of the constitutional document. The text does indeed constrain, but the "text" that does the constraining, for the postmodern theorist, is only partly (if that) a product of its plain meaning or the intention of its author. The text that constrains is the "interpreted text," not the pure text, or the plain text, or the intended text, or the text as put forward by its originators. This constitutional text is always already interpreted; as such, it is always already a product of the changing and evolving stories, constructs, narratives, interests, desires and aspirations of the communities that receive, use and live under it. Those stories, constructs, narratives, interests, desires and aspirations, therefore, are what constrain interpretation, and thus control judicial discretion. The judge is decidedly free of the original or plain meaning of the constitutional text. But it by no means follows that he is free.

It bears emphasizing, however, that the postmodernists also agree with the radical wing of the Critical Legal Studies movement that neither intent nor plain meaning can possibly control judicial interpretation, and hence judicial meaning. But they disagree over the consequences. To somewhat reverse the point made above: even assuming, along with the critical scholar, that the interpreter is not constrained by the originally intended or singular meaning of a text—because no such thing exists—it doesn’t follow that the interpreter is not constrained by the "text." Rather, the text that guides judgment is the "interpreted text": the text as endowed with meaning by its community of interpreters. It is only that text which can be read, or applied, or, in the case of law, enforced. In the constitutional context, this means that the judge is indeed constrained by the constitutional text, but the text is not, and could not be, the originally intended text or even the plain meaning text. It is the interpreted constitutional text that constrains.

The postmodernists’ insistence that the text is "always already" in-
terpreted implies a very different sort of answer than that propounded by critical scholars to the spectre of unconstrained judicial activism that traditionalists fear is implied by the interpretivists' major premise that texts lack a discoverable or even coherent original, intended meaning. The postmodern theorist agrees with the traditionalist that the judge is constrained by the text, but disagrees that this binds the judge to a singular and originally intended meaning. On the other hand, the postmodernist agrees with the critical scholar that the originally intended text cannot operate as a constraint on the judge, but disagrees that it follows that the judge operates in the realm of pure and arbitrary power rather than law. The judge, according to the postmodernists, is in a uniquely "mid-way" position: vis-à-vis the original, or intended, or "pure" constitutional text, he is free, but vis-à-vis the interpreted text, given meaning by the interpretive community in which it is located, he is quite fully bound. As he is a member of the "interpretive community," he cannot help but remain true to the "text's" meaning, where the text is thus understood. The judge is both bound by the constitutional text, where text definitionally includes the meanings ascribed it by the community of its interpreters, and freed from the illusory binding imperatives of the Constitution's plain meaning or its original drafters.

Thus, by insisting on the already interpreted text, the postmodernists remain true to the basic interpretive insights outlined above—that the identity of the interpreter affects the interpretation, that texts do not possess a singular, originally intended meaning, and that the interpretation of a text is what creates its meaning—while avoiding the apparently inescapable conclusion that the interpreter (here, the judge) no less than the original author, thereby has a hand in the creation of meaning. Interpretation does indeed bestow meaning on texts, but this has no implications for the separation of powers: the constitutional text is always already interpreted. The judge deals with, and ultimately decides under an already interpreted text. Stanley Fish explains:

[R]eaders and texts are never in a state of independence such that they would need to be "disciplined" by some external rule. Since readers are already and always thinking within the norms, standards, criteria of evidence, purposes, and goals of a shared enterprise, the meanings available to them have been preselected by their professional training; they are thus never in the position of confronting a text that has not already been "given" a meaning by the interested perceptions they have developed. More generally, whereas Fiss thinks that readers and texts are in need of constraints, I would say that they are structures of constraint, at once components of and agents in the larger structure of a field of practices, practices that are the content of whatever "rules" one
might identify as belonging to the enterprise.\textsuperscript{10}

The result in the constitutional context is a more sophisticated understanding of the complexity of the constitutional text, but a nevertheless utterly conventional account of the judge's role in applying it: the judge applies the law. Interpretivism thus understood by no means implies that we are on the brink of judicial anarchism; quite the opposite. Stanley Fish's comments here (as is often the case) are representative:

On my analysis, the Constitution cannot be drained of meaning, because it is not a repository of meaning; rather, meaning is always being conferred on it by the very political and institutional forces Fiss sees as threats. Nor can these forces be described as "mere," because their shape and exercise are constrained by the very principles they supposedly endanger. And, since the operation of these forces is indeed principled, the fact that they determine (for a time) what will be thought of as "public values" is not something to be lamented, but simply a reflection of the even more basic fact that values derive from the political and social visions that are always competing with one another for control of the state's machinery.\textsuperscript{11}

Critical legal scholars draw quite different implications from the basic indeterminacy claim that texts lack a single, identifiable, pure, uninterpreted, or pre-interpreted meaning. Here, it is helpful to distinguish two rather different critical positions. For some critical scholars, notably Duncan Kennedy, the absence of a textually generated pure meaning does imply that judges have considerable freedom to decide cases in line with their political convictions—and hence considerable responsibility for the moral value of the decisions they render.\textsuperscript{12} For these critics, the interpretive turn does seem to imply that there is essentially no weighty difference between the institutional roles of judge and legislator, of law maker and law interpreter.\textsuperscript{13} But this position is not particularly representative of critical scholars generally.\textsuperscript{14}

\textsuperscript{10} Fish, supra note 4, at 1339.
\textsuperscript{11} Id. at 1346.
\textsuperscript{12} In one passage Kennedy describes that freedom in this way:
The judge cannot, any more than the analyst, avoid the moment of truth in which one simply shifts modes. In place of the apparatus of rule making and rule application, with its attendant premises and attitudes, we come suddenly on a gap, a balancing test, a good faith standard, a fake or incoherent rule, or the enthusiastic adoption of a train of reasoning all know will be ignored in the next case. In terms of individualism, the judge has suddenly begun to act in bad faith. In terms of altruism, she has found herself. The only thing that counts is this change in attitude, but it is hard to imagine anything more elusive of analysis.


\textsuperscript{13} See Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563, 564-65 (1982).

\textsuperscript{14} See M. Tushnet, supra note 2.
For others, and I think for most critical scholars, judicial construal of legal texts is not determined by the original or plain meaning of texts, but it is nevertheless heavily constrained. For these critical scholars, judicial construction of texts is heavily influenced by pretextual "interpretive constructs" that shape the way we read, and what we read into, texts. The impression that we have reached the only textually permissible result in even an easy case is a result of our embrace, either conscious or unconscious, of an "interpretive construct" that narrows our interpretive options when we confront the text. Kelman's description of his own critical method in criminal law is illustrative:

By interpretive construction, I refer ... both to the way we construe a factual situation and to the way we frame the possible rules to handle the situation ... .

... These constructs are sometimes unconscious techniques of sorting out legal material and are sometimes consciously held political or philosophical beliefs, although even the consciously held beliefs function so that the users seem unaware of them ... . [A] legal-sounding argument can be made only after a situation is characterized nonrationally, so that the advocate seems able to deduce a single result on principle ...

... Legal argument can be made only after a fact pattern is characterized by interpretive constructs. Once these constructs operate, a single legal result seems inevitable, a result seemingly deduced on general principle. 15

Although nowhere fully explicated, Kelman's "interpretive constructs" are markedly different from the constraints imposed by Fish's "interpretive community." The constructs that predetermine interpretation for Kelman are nonprincipled, arational or irrational, grounded typically in class interest, unacknowledged, often unrecognized by those that employ them, and are generally pernicious. They undercut what purports to be a rational, fair, and principled practice: the application of general rules under a Rule of Law regime. Fish's interpretive community, by contrast, imposes constraints drawn from its openly acknowledged institutional and professional identity. Fish's constraints are as principled and rational as the practice itself, grounded in the practice's stated aspirations, openly acknowledged (although only when brought to mind) and generally strikingly benign in their operation. For Fish, there is "no need to worry": the interpretive turn is no threat to the values of legalism, for the simple reason that even though "law" does not control

power in the sense hoped by intentionalists, the nontextual institutional, cultural and professional forces that constrain legal interpretation emanate from our principles; indeed they are indistinguishable from our principles. For Kelman, unlike Fish, the indeterminacy claim seriously compromises the ideals and principles that define legal and judicial practice.

As different as they are, however, Fish's and Kelman's descriptions of legal reasoning have two things in common. First, neither account matches the nightmare vision of the whimsical judge that traditional constitutionalists fear from the interpretive movement. Neither posits a conscious, freely choosing, untethered judge, making decisions in any way she wills. Second, and perhaps more significantly, both Kelman's and Fish's descriptions resolve what seems to be a major problem with the indeterminacy critique: why it is that the process of adjudication is often felt to be determinate if it's true that the text from which it proceeds is inevitably indeterminate. Both accounts, in very different ways and with widely divergent political consequences, account for the perception of determinacy in the face of the reality of indeterminacy in a structurally similar way. They do so by denying not so much the ultimate determinacy of adjudication—for both, again, adjudication is determined, albeit not by law—but rather, by challenging the authenticity of the consciousness of judging: on both accounts the judge is more unaware than aware of the true determinants of her reasoning. It is thus possible for the legal text to be radically indeterminate, yet for the process of adjudication to feel quite determinate. The judge correctly perceives her decision as bound, and may sincerely believe the law to be that which binds her. She is correct in her self-perception of her decision as determined. She is wrong, though, to think that it is determined by the singular, originally intended meaning of the pre-interpreted text. Her decision is determined, but it is determined not by law (at least as conventionally understood) but rather by forces of which she is largely unaware.

The third feature these two accounts share is more troubling. For both Fish and Kelman the act of judging is so fully determined that the judge herself becomes oddly de minimus—even irrelevant. Thus, for Fish, the judge is not just "controlled by" but indeed "constituted by" interpretive constructs and communitarian texts, and although the "text" here is understood to include far more than the text's authors' original intentions, it is nevertheless the communally construed text that is paramount. Neither writer nor reader exercise much power under this view; it is the interpretive community, always already interpreting always already interpreted texts, which is the active agent in the process of creat-
ing meaning, through interpretation. On Fish's account, the judge, as reader, simply disappears:

\[ \text{[I]t is interpretive communities, rather than either the text or the reader, that produce meanings . . . . Interpretive communities are made up of those who share interpretive strategies not for reading but for writing texts, for constituting their properties . . .} \]

\[ \text{. . . [S]ince the thoughts an individual can think and the mental operations he can perform have their source in some or other interpretive community, he is as much a product of that community (acting as an extension of it) as the meanings it enables him to produce.}^{16} \]

Strangely and somewhat dissatisfyingly, on Kelman's account no less than on Fish's, the judge's role is also peculiarly diminished, although for very different reasons, and with far less complacent results. While for Fish the judge-as-reader is bound by the relatively benign interpretive predispositions of the institutional, cultural and professional interpretive communities that endow the text with meaning, for Kelman, the judge-as-reader is bound by relatively malign interpretive constructs that either reinforce (if not emanate from) class status, or alternatively, randomly mediate experience into some sort of articulable and disingenuously rational whole. Either way, though, the judge is at the mercy of larger forces over which he has little or no control. His purportedly objective, deductive and rational interpretations of texts are either doing the bidding of the dominant class, or reflecting nonrational filters he has no power to dispose of. He is not bound by a singular textual meaning, but he is bound by interpretive, and for the most part, irrational constructs of which he is only dimly, if that, aware:

\[ \text{[P]articular interpretive construct[s] . . . [may] manifest a simple class conflict between those protecting the position that the legal system routinely allows them from sudden, incidental disruption, and those disfavored by the routine distortion of benefits that the legal system generates. Naturally, those disfavored by the ordinary legal distributions of economic power are most prone to use means generally considered criminal.} \]

Interpretive construction could play very distinct roles in this class conflict. It is possible that each construction might correspond to the political program of a social class . . . . Alternatively, each legal result could correspond to the political program of a social group . . . . Finally, it may be that maintaining the appearance of . . . legal argument is a significant political program of any dominant social class, so that making formal arguments which do not refer to the unexplainable interpretations that actually ground the arguments may sometimes be

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more vital than maintaining either the construction or particular results.

\[\text{\ldots }\]

\[\text{\ldots }\text{[Alternatively], interpretive constructs \ldots [may not be] politically meaningful at all, but simply inexplicably unpatterned mediators of experience, the inevitably nonrational filters we need to be able to perceive or talk at all \ldots . I speak on behalf of those who no longer like to listen to people making arguments that mask a hidden structure of \text{"nonarguments"} with insistent, false rigor.}^{17}\]

There are two major problems with this radical diminution of the judge's power in both the postmodern and critical account of interpretation. The first is ethical. The judge whose understanding of the meaning of the law is determined by communal (Fish) or class (Kelman) constructs is a peculiarly unthinking and non-responsible judge. The judge can hardly take credit, blame or responsibility for his interpretation of the constitutional text if the text comes always already interpreted. Nor can the judge be blamed for skewing meaning in the direction of the status quo if he does so by employing constructs which are by definition unconscious.

The second, perhaps more serious problem is that both descriptions seem belied by judicial experience. Adjudication is often felt (or, perhaps, always to some degree felt) to be determinate, and Kelman and Fish have provided explanations of why this might be so, even in the face of the radical indeterminacy of legal texts: judicial decisions are indeed determined, just not by the pre-interpretive original meaning of legal texts. But their explanations may have overshot the target. The judges Kelman and Fish posit may be more "determined" than actual judges feel themselves to be; although judging is felt to be somewhat determined, it is also felt to be somewhat free. The commonsensical account of judging, in other words, may indeed be the correct one: the judge may be somewhat bound by "law" as understood by intentionalists, somewhat bound by legal texts as interpreted by interpretive communities, and somewhat bound by those texts as interpreted by dominant class interests and cultural constructs, but he may also be somewhat free and feel himself to be. The judge may at any point have the freedom, if she is sufficiently self-conscious, to break free of these constraints and render an authentic or novel reading. That judges describe themselves as at least on occasion possessed of this freedom, and aware of it, is surely some evidence that they have it. If so, then there is something wrong with any identification of a constraint on interpretation that describes itself as ex-

haustive—there are no others—and global—the decision is totally, and not just somewhat, constrained.

However, both problems—that the interpretivists’ descriptions do violence to both the ethics and experience of judging—are somewhat cured if we view Fish’s and Kelman’s descriptions as partial descriptions, rather than global accounts, of adjudicatory practice. Judges may indeed be partly constrained by the dominant interpretations bestowed upon texts by their community, as well as by the interests and desires of dominant classes and cultures. They may also, however, have some degree of freedom from those constraints—as well as from the constraint of “law”—to insist upon deviant interpretations, to author novel interpretations, and to break out of class or culture based patterns of thought. Furthermore, only if they have such freedom can we fault them for failing to exercise it in an ethically responsible way.

And, read as partial rather than global descriptions, both accounts are underscored rather than undercut by judicial accounts of the experience of judging, and even the appearance of judging. Both postmodernists and critical scholars, like legal realists before them, have made it relatively easy for us to identify examples of decisions that purport to be driven by the original, pure, pre-interpreted, intended or plain meaning of a legal text—whether the Constitution, a statute, or a legal precedent—but which are in fact driven by other forces—dominant communal meanings or dominant societal and class interests. But it is also possible to identify judicial decisions that markedly break free of dominant interpretive strategies, interests and desires. That such decisions are rare speaks to the power of the constraining forces that postmodernists and critical scholars have identified. But that they exist at all belies the claim that those forces cannot be overcome. When they are, the decision is all the more exemplary—whether of courage or lawlessness is another question. But their existence makes clear that in judging as in a range of other deliberative practices, the genuinely free decision is always a possibility.

Finally, if we read Kelman’s and Fish’s descriptions as partial rather than global, we are free to further the projects they have begun: the identification and exploration of the constraints upon judicial interpretation of legal documents. Interpretive pluralism, in other words, may be the most pragmatically sensible scholarly agenda, at least at this point in our exploration of the consequences of the interpretive turn in legal and con-

stitutional studies. It may be that judges are partly constrained by the interpretive understandings of the communities of which they are a part and partly constrained by the interests and desires of dominant social and cultural classes. But even if that's true, they may also be partly constrained by other sorts of forces as well—ethical and professional expectations, for example, or, as I shall argue in the next section, jurisprudential aspirations stemming from definitional accounts of the Rule of Law. We should be wary on pragmatic grounds, no less than on experiential and ethical ones, of adopting accounts of the judicial decision that foreclose those possibilities.

III. JURISPRUDENTIAL CONSTRAINTS

In addition to the insights recited above, interpretivists in literary theory have put forward a third postulate that has not received as much attention in legal circles: that the way a text is identified will go a long way toward determining its audience, and consequently a long way toward determining its meanings. Inversely, the audience a text captures will to some degree determine its identity, and hence to some degree its meaning. This is as true within genres as between them. Thus, to use an overused example, if we think of Agatha Christie's stories as detective stories we will tend to ascribe to them meanings which are consistent with their purpose: to amuse. And, if the audience of Agatha Christie's novels are for the most part casual readers in search of amusement, we will tend to think of them as detective stories. On the other hand, if they attract a more "serious" philosophical audience, we may come to think of them as fictionalized philosophical treatments of death and mortality, and if so, we will find in them very different sorts of meanings. Similarly, if the audience of children's television consists of children who need or want to be entertained, we will think of a children's television cartoon as entertainment and we will accordingly inscribe one set of meanings; if the audience is children-consumers, we see the text as advertising, and we will inscribe a very different set of meanings. The point is a simple one: the audience of a text—the community of potential "interpreters" who receives the text—brings to the text a set of needs, desires, and interests; those needs, desires and interests will determine at least to

19. See, e.g., BARBARA H. SMITH, CONTINGENCIES OF VALUE: ALTERNATIVE PERSPECTIVES FOR CRITICAL THEORY (1988) for a complete argument to this effect.
some degree how we categorize it (advertisement, cartoon, detective story, high literature), and how we categorize it will determine its meanings.

Surely the same is true of legal texts, and surely the same is true of the constitutional text. That the Constitution is received for the most part by judges and lawyers who need to apply and enforce it in courts of law under established rules of legal procedure, determines to some degree its identity as a legal text, and that identity determines to some degree its meaning. Conversely, that the Constitution is now conceived as law partly determines its professionalized legal and judicial audience. Lawyers and judges have a fairly well-developed sense of the necessary and sufficient jurisprudential conditions of legalism: what a text must be, in order to be "law." If the Constitution is identified as law, then it too, no less than statutes and case law, must meet those minimums. Its interpretive meanings, then, will reflect those jurisprudential constraints.

Courts themselves, and particularly the Supreme Court, make frequent reference to prudential constraints imposed by legalism on their constitutional decisionmaking. Yet, neither traditional nor interpretivist constitutionalists, nor the justices themselves, have focused on the jurisprudential constraints on constitutionalism imposed by legalism. Why the neglect? At least for traditionalists, and to some degree for interpretivists as well, this may be because inquiry has focused instead on the peculiarity of constitutional thought and reasoning within the legal genre.21 Thus, the standard understanding of Marshall’s declaration that "it is a Constitution we are expounding,"22 surely has been that we should understand the uniqueness, the peculiarity, and the differentness of the Constitution within the universe of law. That it is a Constitution, rather than a statute or some other more ordinary form of law, undoubtedly imposes constraints on constitutional reasoning that are unique: constitutional interpretation, unlike other forms of legal interpretation, must meet enhanced needs for permanence, coherence, integrity and flexibility, simply because we are dealing with a fundamental charter not made for easy amendment. Perhaps even more important, the uniquely foundational status of the Constitution has engendered a peculiarly reverential attitude toward it that is not directed toward other legal entities. Scholarship has, perhaps appropriately, focused on these unique qualities, the unique needs they reflect within a system of constitutional governance, and the meanings the Constitution has acquired because of

Somewhat more surprisingly, postmodern and critical theorists, no less than traditionalists, also have generally not pursued the possibility that the philosophical dictates of legalism, rather than prudential constraints, political commitments, class interest, or community understandings, may determine constitutional meaning, although for different reasons. For postmodernists, the reason may have to do with interdisciplinary politics: postmodern legal theorists, heavily influenced by critical literary theory, may view their work as an alternative to traditional jurisprudential inquiry, and for that awkward reason alone may be unlikely to see traditional jurisprudence as a constraint on interpretation. For critical theorists, the reason undoubtedly has to do with politics more simply defined: critical scholars are committed—perhaps overcommitted—to the claim that there is no meaningful difference between legal and political discourse. For both reasons, critics and postmodernists will be disinclined to seek out jurisprudential constraints on constitutional interpretation.

Another reason for the neglect, though, may be that traditional, postmodern, and critical legal theorists, like the lawyers and judges about whom they theorize, are insiders to the practice of adjudication. It is far more difficult to "see" the constraints that define as well as limit one's own vision than to see constraints on practices that are external to one's identity. To take a roughly analogous case, a reader who absorbed only novels would have little reason to consider the definition of the "novel" as a significant determinant of a particular novel's meaning—although such a reader may be struck by the definitional constraints of the particularities of the "romance novel" or the "nineteenth-century novel." The constraints imposed by the novel form itself may—like background noise—simply become invisible. Likewise, the purely legalist constraints on the Constitution's meaning may have become similarly invisible, or faded in contrast to the striking peculiarity and uniqueness of constitutional legalism, to those of us accustomed to viewing the Constitution as


24. It is often assumed, at least in casual conversation about the consequences of critical legal theory, that the lack of a distinction between law and politics follows from the indeterminacy claim alone. It is part of the purpose of this article to show that it does not. From the premise that the text or original intent of a law lacks a determinate meaning, and hence cannot bind interpretation, it doesn't follow that nothing binds interpretation. Nor does it follow that legal and political discourses are not distinguishable on grounds other than the determinacy of the former.
a source of law, and accustomed to (if not "constituted by") the mores and constraints of the legal universe.

But the differences between the Constitution and other forms of law should not obscure their family resemblances. The Constitution, because it is judicially applied law, shares in the general qualities and attributes of legality. Some of its meaning is accordingly a function of that identification. In the next section, I will examine in detail one example of constitutional interpretation that seems heavily determined by jurisprudential constraints. There are surely others, however, beyond the contours of this paper, that could be fruitfully explored.

Judicially interpreted and applied law, for example, for the most part aspires toward a corrective model of justice: it identifies unjustifiable wrongs, violated rights, and sets remedies to restore, or correct the status quo. Courts, as interpreters of law, understand it in such a way as to make it consonant with this model: a legal norm must specify a wrong and a right, and provide a remedy accordingly. There is no reason to think that anything different occurs when the law being read is a Constitution. Surely the "state action" requirement in fourteenth amendment jurisprudence, as well as the "intent" requirement in equality law, stem in part from a jurisprudentially motivated need to homogenize the fourteenth amendment with our general conception of the nature of law: both the state action requirement and the intent requirement may be driven by the jurisprudential need to insure that a "wrong" has indeed been committed. Similarly, the belabored and apparently "unprincipled" justiciability requirements—standing, case or controversy, and mootness—might all stem from jurisprudential rather than textual or political constraints: they may all be aimed toward insuring that a right exists and has been violated. The source of that impulse might be jurisprudential, rather than political: if the Constitution is law, it must be applied in such a way as to rectify violated rights and deter wrongdoing. Thus, at least the state action, intent, and case or controversy requirements might reflect jurisprudential, rather than political or communal constraints on interpretation.

More generally, and as I have argued elsewhere, the jurisprudential constraints on constitutional interpretation might make radically redistributive understandings of constitutional phrases difficult, and "conservative" readings—readings that restore or conserve the status


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quo—seem all the more imperative. The source of this impulse may indeed be, to some degree, a political orientation toward political conservatism, as critical scholars suggest, or alternatively, the dictates of dominant understandings of the relevant communities, as postmodernists urge. It might also, however, be rooted in the Court’s and courts’ institutional identity as interpreters of law. The vast majority of legal actors understand law as jurisprudentially requiring, by definition, the identification of rights, wrongs and remedies, applied in a way that restores the pre-injury, or pre-wrong status quo. Most areas of judicially created law fit this model, and those that clearly do not are for that reason widely regarded as problematic. Law, at least judicially created and applied law, is thus itself inherently conservative. There is no reason to think that we would abandon these understandings of the requirements of law when faced with the Constitution.

IV. THE MEANING OF THE EQUAL PROTECTION CLAUSE

Modern courts and commentators have identified two dramatically different meanings the equal protection clause of the fourteenth amendment might have: a substantive meaning (or “substantive equality”) and a formal meaning (or “formal equality”). The formal meaning of equality, or of “equal protection,” is that legislators must treat like groups alike, and the laws they make must reflect this mandate by being “rational.”27 Thus, if two groups are alike in some relevant respect, a law may not prescribe different treatment of them. Put somewhat differently, to meet the formal criterion of equality, the distinctions a law creates must be rationally related not only to a legitimate end but also to pre-existing differences between the affected groups. If a law fails to meet this standard, then the state has denied “equal protection of the law.”

The substantive meaning of equality, or of equal protection, is that legislators must use law to insure that no social group, such as whites or men, wrongfully subordinates another social group, such as blacks or women.28 Thus, if one group wrongfully dominates another—whether economically, physically, socially or sexually—then the legislature must at least attempt to use legal means to bring an end to that wrongful relation.


of domination and subordination. For a state to fail to do so is to "deny" the subordinated group "equal protection of the law."

As numerous commentators have now shown,29 these two very different meanings of equal protection imply drastically divergent results in particular cases.30 Most notably, they imply different results in the major affirmative action cases of the last few years, from Regents of the University of California v. Bakke31 through City of Richmond v. J.A. Croson Company.32 Under the formal definition, any state differentiation between whites and blacks is prima facie irrational—the two groups are "alike" for legal purposes and therefore should be treated alike. Race can't "make a difference." Benign distinctions between races are no more rational than malicious distinctions. Therefore, and as the Court clearly held in Croson, affirmative action policies will often be unconstitutional, absent a strong showing of identified past discrimination that would constitute a difference between the two groups, and hence provide a justification for differential treatment.33 Under a substantive definition, however, affirmative action policies are surely permissible and may even be required.34 Whites generally are dominant in this society, blacks are generally subordinate, and the Equal Protection Clause's antisubordination mandate requires that states undertake affirmative obligations to equalize the two. Thus, what is clearly prohibited under one interpretation of the Equal Protection Clause is clearly permitted and perhaps required under another.

As commentators have also now pointed out, the Supreme Court's interpretation of the Equal Protection Clause over the last few decades has moved fairly consistently away from a substantive definition and toward a formal definition.35 Thus, Brown v. Board of Education36 can readily be read, perhaps must be read, as embracing a substantive account of the Equal Protection Clause: separate and unequal educational facilities produce unequal educational opportunities, contributing di-

30. I discuss this contrast in greater detail in West, supra note 26.
33. Id. at 492-93 (opinion of O'Connor, J.).
34. See Strauss, Taming of Brown, supra note 29.
35. See supra note 29.
rectly to the subordination of blacks and dominance of whites in an already white-dominated society. By Bakke, however, the meaning of both the Equal Protection Clause and Brown had changed dramatically. At least according to Justice Powell, the Equal Protection Clause does not require an end to subordination, but rather, requires that likes be treated alike. Furthermore, blacks and whites are, for all purposes that matter, alike, and any segregatory scheme—whether “equal” or “unequal,” and whatever its impact on the dominance or subordination of one race vis-à-vis the other—treats the two groups differently and is hence presumptively unconstitutional. Such a rule includes, although is not limited to, benign affirmative action plans as well as maliciously segregated school systems. Thus, by Bakke, the substantive, antisubordinationist meaning of Brown had begun to erode as it came to be possible to read the clause as conveying only a formal, antidiscrimination meaning. By Croson, the transformation was complete. Far from requiring race-conscious dismantling of institutional and social subordination of blacks, a more united as well as more conservative Court held that the fourteenth amendment presumptively prohibits most race-conscious decision-making, absent strong evidentiary showings of past discrimination. Affirmative action aimed at ending subordination is not only not required by the fourteenth amendment, it is prohibited by it.

How did the modern Croson Court arrive at this interpretation not only of Brown, but of the fourteenth amendment as well? Was the Court free, either at the time of Croson or earlier, to simply choose between formal or substantive meanings of equality? Does the transition from the substantive interpretation at least arguably embraced by Brown to the rejection of substantive equality and embrace of formalism in Croson reflect nothing but the changing political views of the changing personnel on the Court?

There are at least four answers to that question worth exploring. The later Croson Court might have been “bound by law” in the way meant by traditionalists: the fourteenth amendment’s Equal Protection Clause has some discoverable original or plain meaning which either permits, requires or prohibits affirmative action. If so, then the earlier substantive interpretation of the clause was simply “wrong,” and the modern formal interpretation is “right” (or vice versa). Second, the

37. See Strauss, Taming of Brown, supra note 29.
38. 438 U.S. at 315-20.
39. 488 U.S. at 493.
40. For a similar argument to this effect from an intentionalist perspective, see Knapp & Michaels, Intention, Identity and the Constitution: A Response to David Hoy (unpublished manu-
Court might have been (and might be) genuinely free to choose between them. If so, then the formal interpretation now governing the clause is not so much "right" or "wrong," as a "good" or "bad" political choice, and the justices' decision to adopt it should be evaluated accordingly. And third, as the postmodernists and critical scholars might contend, it might be that the "law"—the text, the history and the intent of the drafters of the clause—is indeed too indeterminate to mandate either a substantive or a formal interpretation. On this account the justices moved toward a formal definition and away from a substantive account because of the constraints identified by interpretivists: the interpretive habits of the relevant communities and the interests and desires of dominant social groups. The fourth possibility, and the one for which I will argue, is that the move toward formalism in equal protection doctrine, whether or not it represents class interest or communal morality, also reflects constraints on interpretation that stem from the legal status of the Constitution itself.

As for the first choice, and as interpretivists (both new pragmatists and critical scholars) would surely insist, the "law," understood as either the plain meaning or the originally intended meaning of a legal text, at least in this context, did not determine outcome. The plain meaning of the text of the Equal Protection Clause provides no help; either of these interpretations are linguistically permissible understandings of the phrase "equal protection of the law." Nor does the history of the fourteenth amendment yield a clear choice in favor of one or the other of these two radically conflicting interpretations, for two reasons. First, both may have been within the original intent of the drafters. It may have been understood that the way to achieve substantive equality between the races was to insist upon formal equality from state legislators. The two meanings may not have been perceived as in tension, so that the possibility of their coming into conflict (or even being truly differentiated) and thus requiring a choice may never have been raised. Second, the history of the clause's application in fourteenth amendment doctrine provides ample precedential authority for the Court to adopt either interpretation. Although the formal meaning of equality has tended to dominate, the Court from time to time has embraced the contrasting substantive

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41. Mark Tushnet remains the best critical constitutional scholar from this theoretical perspective. See M. TUSHNET, supra note 2, at 70-107.
42. A good short treatment of both the history of the amendments and their judicial interpretation as supportive of an antisubordination or anti-subjugation principle can be found in L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-21 (2d ed. 1988).
understanding of the Constitution's mandate. As interpretivists would insist, then, at least with respect to fourteenth amendment jurisprudence, neither the text itself nor its authors' intent nor the history of its application provide any absolute constraint on judicial interpretation. The Court could embrace either a formal or substantive understanding of equality, striking or upholding affirmative action plans accordingly, and be well within the accepted boundaries of its own discretion. The "law," as conventionally understood, provides no answer. If we understand "law" as meaning constraints imposed upon judicial decisions through the intended, historical or plain meanings of legal texts, then the "law" of the fourteenth amendment's equal protection clause truly is indeterminate. Whatever does constrain the decision, if anything, it is not "law."

Second, the indeterminacy of the phrase might of course imply that the judge is free to simply choose, on the basis of "his own values," his own politics, whim, or any other variant of subjective desire, whichever interpretation he pleases. If so, then, as traditionalists fear, those opinions reflecting a substantive interpretation of the phrase stem from their authors' desire, for whatever reason, to promote the substantive equality of blacks and whites, and those reflecting a formal interpretation stem from their authors' desire, again for whatever reason, to promote only a formal equality, and often at the expense of meaningful progress toward substantive racial justice. In Croson, the Rehnquist Court unsurprisingly chose to promote formal equality; in Brown, the Warren Court chose to promote substantive equality. Evaluation and criticism of both decisions, on this account, should proceed on the basis of whether the Court in each instance chose wisely, not whether it decided correctly.

There is, though, at least one problem with this account. The degree of freedom it posits is wildly at odds with the language of the decisions themselves, and presumably with the experience of judging as well. Virtually none of the significant cases marking the transition from substantive to formal interpretations of equality reads as though they derive from unfettered choice. Whatever the outcome and whatever the judge, the decisions are written in the language of obligation and necessity, not in the language of free choice. To take just two examples, Justice Scalia, in Croson, first explains the ethical or political basis of his choice for


formal over substantive equality. He then quickly proceeds, however, to
describe his decision in obligatory terms:

The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected. The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution to the first problem that aggravates the second is no solution at all. I share the view expressed by Alexander Bickel that "the lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."45

Justice O'Connor, reaching the same result, but with very different reasoning, also ultimately employs language of obligation:

That Congress may identify and redress the effects of society-wide discrimination does not mean that, a fortiori, the States and their political subdivisions are free to decide that such remedies are appropriate . . . . To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions . . . . We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations.46

The justices themselves, if we can take the language of the opinions seriously, understand the interpretive task as requiring a correct outcome in the equality cases as in others, and not as requiring a wise political or personal choice.

The third possibility, of course, is that although the text of the fourteenth amendment itself as well as its history is indeterminate, the modern Court is nevertheless "bound" to the formal interpretation, but it is bound not by law, but by extra-textual influences. The question, then, is what those influences might be. One possibility, presumably that of the post-modernists, is that the contemporary Court's adoption of the formal interpretation of equal protection was determined by the pre-existing habits, interests, values and desires of the most powerful forces within the "interpretive community" that imbued the text with meaning. A sec-

45. 488 U.S. at 520-21 (Scalia, J., concurring) (citations omitted) (emphasis added).
46. Id. at 490-91 (emphasis added).
ond possibility, presumably that of the critical scholars, is that the Court's adoption of the formal interpretation was determined by pre-existing "interpretive constructs" which emanate from the Court's—and the social sectors' of which it is representative—willingness to tolerate institutional and unconscious racism.47

Both explanations have considerable merit. Indeed, the use in Croson of the fourteenth amendment to strike state and municipal action intended to aid minorities goes a long way toward vindicating the long-standing critical claim, first made by Alan Freeman, that the main function of "antidiscrimination law" in this culture is to legitimate through formalism the deep-seated and impenetrable substantive racism of the dominant white race.48 In Croson, and more ambiguously in Bakke before it, the main tool of antidiscrimination law—the Equal Protection Clause of the Fourteenth Amendment—was used quite explicitly to invalidate substantive measures taken to ameliorate the effects of racial subordination. Indeed the Court's explicit holding—that for purposes of the fourteenth amendment, the eradication of the effects of racial subordination is not a compelling state goal—is virtually an explicit avowal of the subconscious or unconscious legitimating motive ascribed by Freeman to the entire body of antidiscrimination law.

Postmodernist explanations of judicial interpretation also have some appeal in this context. It seems entirely fair to say that the Court in Croson embraced the interpretation of the fourteenth amendment that currently dominates in the legal and nonlegal culture. To be sure, there are competing interpretations of equality and of equal protection currently circulating from which the Court could have drawn.49 But if it is true, as the postmodernists claim, that the text comes always already interpreted, there's little doubt that at this point in our history of race relations, the interpretation in which it comes always already embedded is that of formal equality—a colorblind and mechanistic aspiration that if the states are rigorously neutral in their lawmaking, and we simply let the economic, political and cultural chips fall where they may, racial fairness will be the outcome.

Even if the decision in Croson to definitively embrace formal equality at the cost of substantive equality was partly determined by interest and community, however, there surely may have been other constraining determinants as well. Specifically, there may have been jurisprudential

48. Id.
49. See supra note 29.
constraints on the Court that made the formal interpretation of equality more palatable than the substantive. Not just the politics, but also the aspiration of the formal equality the Court mandated in *Croson* readily converges with the Court’s peculiarly jurisprudential identity, in a way in which the aspiration of substantive equality does not. The Supreme Court, like all appellate courts, aspires toward formal justice in the cases that come before it. The Court, like any court exercising its appellate power, must decide whether the case facing it is sufficiently like an earlier case that the outcome should be identical, or whether it can be rationally distinguished. Appellate jurisprudence is almost entirely concerned with doing formal justice to litigants: like cases should be treated alike; like individuals should be treated alike. If the case can be closely analogized to an earlier case or line of cases, then its outcome should be subsumed under a general principle that rationalizes both. This jurisprudential and ethical goal—like treatment of like cases—defines the justice toward which appellate courts aim, thereby defines the reasoning they employ, and finally, given the prominence of appellate cases in legal education, defines the essence of legal thinking itself.

It is not unreasonable to speculate that the centrality of the task of defining or discovering “likeness” or “difference” to the traditional judicial role has influenced the definition judicially accorded the constitutional mandate and ethical aspiration of “equal protection.” To be treated equally by an appellate court means, simply, that one is treated the same as those who are relevantly similar, and differently from those who are different. To a considerable degree, then, the word “equal,” to use the language of the postmodernists, comes always already interpreted to the legally trained mind as meaning the like treatment of like cases, and the disparate treatment of the relevantly different. The interpretive constraint derives not so much from competing cultural meanings as from jurisprudential identity: courts exist to assure “equality before the law.” The equality thereby assured is rigorously formal: likes will be treated alike.

It is not surprising then that the “equality” mandated by the Equal Protection Clause has ultimately come to be understood by the Supreme Court as requiring a formal rather than substantive interpretation. The formal meaning of equal protection embraced by the Court in *Croson* is simply the “equal justice” mandate applied to the legislative treatment of groups, rather than the judicial treatment of individuals. Legislators, under the Court’s reading of equal protection, must treat like groups alike, just as courts, in their appellate function, must assure that laws are applied in such a way as to treat similarly situated individuals similarly.
If two groups are substantially or relevantly the same, then they must be treated the same; any law that differentiates between them is presumptively irrational. Blacks and whites are "the same" with respect to their innate entitlement to government largesse. A law that differentiates between races is therefore as irrational as a court that draws an unjustified distinction between cases. Furthermore, given our history of malicious discrimination, such irrationality is, in turn, presumptively maliciously—rather than randomly or whimsically—motivated.

As the Court has itself from time to time acknowledged—most notably in *Washington v. Davis* 50—a formal rather than substantive reading of the Equal Protection Clause is in part mandated by the prudential constraints on the Court's jurisprudential role. A substantive definition of equal protection requires, the Court has argued, more judicial intervention into the private, social and cultural spheres than is feasible. But a formal reading of the Equal Protection Clause converges not only with the Court's sense of its own prudential limits, but also with its sense of its *aspirational* jurisprudential function. Through their appellate work, courts assure rational application of laws. The Equal Protection Clause, read formally rather than substantively, requires the same rationality of legislatures with respect to groups that the mandate of formal justice requires of courts with respect to individuals. A formal reading of the Equal Protection Clause thus meets the Court's peculiarly jurisprudential, ethical and aspirational goals, as well as its prudential interests and conservative politics.

If the Court's reading of equal protection as requiring formal rather than substantive equality stems in part from ethical constraints with their origins in jurisprudence, then it also seems reasonable to assume that other political or legal actors, not constrained in the same way, might read the clause in a very different way. History to some extent bears this out: in its sole major interpretation of the fourteenth amendment, the nineteenth-century Civil Rights Act, 51 Congress interpreted its provisions substantively rather than formally, reading it to prohibit acts of private subordination by whites of blacks, and mandating that law be used in some fashion to end such subordination. 52 This sharp difference between the congressional interpretation and the interpretation insisted

50. 426 U.S. 229, 247-48 (1976) (prudential constraints on Court's powers of enforcement make implausible an expansive reading of equal protection clause that would invalidate state action with adverse impact on suspect class).
upon by the Supreme Court at the time\textsuperscript{53} undoubtedly reflected the differing political commitments of the two bodies. But it may also have reflected, then and now, different institutional aspirations. Congress, as the originator of legal change, is not constrained by jurisprudential, compensatory, corrective or formal norms of justice; its role is not to apply laws equally to groups or individuals before it. It is logical to assume, then, that its interpretations of the constitutional provisions that control its deliberations will not reflect those constraints. Congressional interpretation of the Constitution is, though, constrained by distributive and substantive norms of justice: the laws it enacts should distribute resources fairly among the citizenry. Its understanding of the “equality,” then, which the Equal Protection Clause guarantees and which it is directed to ensure under section five of the fourteenth amendment, should be informed by a distributive and substantive ethical ideal, rather than a corrective and formal one.

Were Congress to once again take up its section five responsibilities under the fourteenth amendment, and enact legislation for the purpose of ensuring that the states provide equal protection of the laws, it would have to first interpret the meaning of that phrase. The interpretive turn, if it has done nothing else, has reaffirmed the legal realists’ basic insight that the application or enforcement of a text necessarily first requires its interpretation. If the preceding analysis is correct, it would seem sensible to predict that congressional interpretation of the Equal Protection Clause, grounded in Congressional rather than judicial needs, interests, and institutional aspirations, would be quite different than that of the Supreme Court. It would minimally be freed of the constraint of jurisprudential ethics that at least in part dictates a formal rather than substantive reading of the Equal Protection Clause. It would instead, presumably, operate under a constraint of distributive rather than compensatory justice. Such a constraint might, in turn, render a substantive, rather than formal, interpretation of equality considerably more likely.

As various commentators have argued, and as I have discussed at length elsewhere,\textsuperscript{54} such a reading would support not only federal affirmative action plans such as that sustained in \textit{Fullilove},\textsuperscript{55} but an array of other “equality-promoting” legislative proposals as well, including, for example, child care funding and comparable worth legislation as protective of substantive gender equality, and greater funding for education,

\textsuperscript{53} See Civil Rights Act Cases, 109 U.S. 3 (1883).
\textsuperscript{54} See West, supra note 26.
\textsuperscript{55} Fullilove v. Klutznick, 448 U.S. 448 (1980).
social services and law enforcement in inner cities as protective of substantive race equality. Whether the Supreme Court would uphold such legislation against attacks grounded in formal interpretations of the Equal Protection Clause is of course a separate question.\(^5\) But congressional grounding of equality-promoting legislation in a substantive, congressional interpretation of the Equal Protection Clause, rather than in the now standard commerce clause guise, would at least help to clarify the ethical and aspirational purpose of congressional action.

V. Conclusion

The interpretive turn in legal philosophy has sensitized legal scholars to the malleability of texts and the consequent inevitability of interpretation. Because of insights garnered from interpretive and hermeneutic disciplines, we are more aware of the difficulty of locating constraints on legal interpretation of texts in their plain meaning or the original intent of their authors. Unfortunately, however, the political dimension of the interpretive turn in legal studies has truncated its value: because of the apparent consequences of the indeterminacy claim for our commitment to the separation of powers, debate in constitutional scholarship over the importance of the interpretive turn has centered on the basic question of whether the plain meaning or the originally intended meaning of a text can constrain later application of the legal text. The follow-up question—what additional constraints might consist of, and what the implications might be of those constraining influences for constitutional meanings—has received relatively short shrift.

Hermeneutic scholars in other disciplines, however, have as much to say about the second question as about the first. Two such additional constraints on all interpretation is the identity of the text—what sort of text it is—and the identity of the interpreter—with what sort of interests, desires, needs and aspirations. Although legal theorists have not given as much attention to these constraints as have literary theorists, they are of obvious relevance to legal interpretation. The Constitution is a legal text interpreted by judges, and as such, it acquires meanings quite different than those it might have were it understood as a political text interpreted by legislators, or a moral and aspirational text interpreted by citizens. First, as the Court itself has from time to time noted, its meaning must be compatible with prudential constraints on adjudication—what sorts of remedies are available to judges, what sorts of cases can be heard, etc. But second, and perhaps more importantly, its meaning must also reso-

nate with the aspirational goals of adjudication, as well as with the pru-
dential constraints of adjudicative forums. One such aspirational goal is
surely the goal of legal justice. Courts seek to do formal justice—to treat
like cases alike—in virtually every case that comes before them. All
law—common, statutory and constitutional—must be applied in such a
way that litigants similarly situated are similarly treated, and those dif-
ferently situated are rationally distinguished.

Since the Constitution is also a form of law, this aspirational goal
has undoubtedly influenced the Court's understanding of its substantive
provisions, including the Equal Protection Clause. A formal interpre-
tation of the Equal Protection Clause resonates deeply with the Court's, as
with any court's, ethical commitment to legal justice: the clause requires
legislators to treat like groups alike and courts to oversee, in a quasi-
appellate manner, their performance in doing so. A substantive inter-
tation of the Equal Protection Clause, by contrast, does not, and may be
felt as conflicting with legal justice aspirations. It does not follow, how-
ever, that the formal interpretation of equality is right and the substan-
tive interpretation wrong. It only follows that so long as the Court
remains the exclusive, as well as ultimate, interpreter of constitutional
meaning, substantive interpretations of the equality clause will continue
to run against the grain.

There is no reason, however, for the Court to become, to be, or to
remain the exclusive as well as ultimate interpreter of the fourteenth
amendment. The amendment itself directs Congress to play an active
role in bringing its guarantees to fruition. If the interpretive turn has
taught us anything, it has taught us that the implementation of a legal
text invariably requires its interpretation. The question is not, then,
whether Congress should interpret as well as enforce fourteenth amend-
ment guarantees; if it is to enforce, it must interpret. The only question
is how it will do so. To answer that question, two facts are worth noting.
First, as at least the Court often acknowledges, Congress operates under
dramatically different prudential constraints than the Supreme Court.
But second, it also operates under dramatically different aspirational con-
straints: it seeks to do distributive rather than legal justice; it prioritizes
the "good" over the right; it seeks to enact laws wisely rather than apply
them correctly. Those aspirations, no less than prudential and political
constraints on its decisions, would undoubtedly affect the meaning of
whatever constitutional provisions Congress sets out to interpret. There-
fore, when and if Congress takes up again its section five obligations
under the fourteenth amendment, we can expect to see a dramatically
different meaning of equality emerge from its efforts.