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The Originalism Debate: A Guide for the Perplexed

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I. INTRODUCTION

Because the literature about the issue of “original intent” is now so voluminous, understanding the current status of the debate has become a formidable task. My purpose in this essay is to offer a tourist guide, which may lack some of the accuracy of a detailed topographic map but will be more useful to inexperienced travelers in this domain.

The role of historical evidence in constitutional law has always been of interest to scholars. Recently, however, it has become a matter of more pressing concern. Scholars began to question whether some crucial constitutional decisions could be justified on the basis of original intent. Those scholars who support the Court’s rulings on abortion, integration, and reapportionment began to look for alternative constitutional theories.¹ This debate, as Professor Murray Dry explains, soon extended beyond academics to include judges and other government officials:

This important debate came out of the academic closet in 1985, when Attorney General Edwin Meese gave public addresses on constitutional jurisprudence. In one, after noting that the new terms replaced the older ones of strict versus loose construction, he quipped, “Under the old system the question was *how* to read the Constitution; under the new approach, the question is *whether* to read the Constitution.” He called for a return to a “jurisprudence of original intention,” (a clearer term for interpretivism). Acting on that principle, he said the Justice Department stood prepared to challenge the incorporation doctrine, according to which nearly all of the provisions of the original Bill of Rights have been applied against the states under the fourteenth amendment. This drew from Justice Brennan a defense of an activist approach to individual rights and a twentieth-century reading of the Constitution. For Justice Brennan and his supporters, the choice is between being ruled by the dead hand of the past or the living present; for Attorney General Meese and his supporters, the choice is between courts that say what the law is, which is their job, and courts that make law and policy, which is the job of legislatures.²

This debate about constitutional interpretation is the subject of this essay. Part II will discuss the arguments that have been made about whether originalism is workable. Part III will consider the normative arguments in favor of originalism and some of the main attacks on those arguments. Finally, Part IV will give a brief statement of my own views about how to resolve the originalism debate.

Before examining the arguments about originalism, it is useful to clarify some terms. Instead of using the term “interpretivism,” I will call supporters of Meese’s

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1. Dry, *Federalism and the Constitution: The Founders’ Design and Contemporary Constitutional Law*, 4 CONST. COMMENTARY 233, 233–34 (1987).

2. *Id.* at 234. For a good recent presentation of the originalist position, see Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV 226 (1988).

position "originalists." The latter term is found more frequently in current writings on the subject because it emphasizes that the issue is the role of *original* intent in constitutional interpretation. Most opponents of originalism also claim to be interpreting the Constitution; they simply have a different view of the appropriate methods of interpretation. I will call them "non-originalists" because they do not find original intent dispositive of contemporary constitutional questions.

A great deal of ink has been spilled over the question of originalism. It is important to realize, however, that the area of dispute is narrow (though important). Almost no one believes that the original understanding is wholly irrelevant to modern-day constitutional interpretation. For example, here are the views of Professor Michael Perry, a leading non-originalist:

Given the nonauthoritative status of the original (the ratifiers') understanding of particular textual provisions, is the Court's frequent reference to the original understanding merely a self-protective formality?

Of course not. The ratifiers and their polity were participants in the tradition too. In their day, they were the stewards of the tradition. The ways in which they shaped and responded to the aspiration of the tradition may well shed light on how we should shape and respond to those aspirations. Why assume we have nothing to learn from our past? The Court is right to consult the ratifiers' normative judgments.

To consult their judgments is one thing, but to accord them authoritative status is something else. As Alexander Bickel observed, "as time passes, fewer and fewer relevantly decisive choices are to be divined out of the tradition of our founding. Our problems have grown radically different from those known to the Framers, and we have had to make value choices that are effectively new, while maintaining continuity with tradition."³

It is the final paragraph of this passage that distinguishes originalists from non-originalists. Originalists are committed to the view that original intent is not only relevant but authoritative, that we are in some sense obligated to follow the intent of the framers.

Originalists have various shades of belief about the binding effect of original intent and about how to define "intent." The extreme view is that the *only* relevant factor is original intent; whichever side has the best historical evidence should always win. A moderate originalist might well view other factors as potentially important, particularly when the evidence of intent is unclear. At the very least, an originalist must believe that *clear* evidence of original intent is controlling on any "open" question of constitutional law; that is, any question that has not already been decisively resolved by the Supreme Court.⁴ Originalists also differ about the level of

3. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 551, 569-70 (1985). Perry's views do not seem radically different from those of moderate originalists such as Professor Ronald Rotunda. See Rotunda, *Original Intent, the View of the Framers, and the Role of Ratifiers*, 41 VAND. L. REV. 507, 508-09 (1988). On the "dialectic" between originalism and non-originalism, see Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773, 805.

4. Originalists may give binding authority to Supreme Court precedent. See Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988). An even looser use of the term "originalist" might include anyone who believes that the starting point of analysis should always be original intent but that original intent is not necessarily controlling even when it is clear. At this point, however, it becomes difficult to tell the difference between an originalist of this school and a non-originalist like Michael Perry.

generality at which they define original intent. Those who focus on the framers'⁵ general principles are quite different from those who emphasize the framers' views of particular governmental practices. Moderate originalists may be difficult to distinguish from non-originalists, as Dean Paul Brest explains:

The only difference between moderate originalism and nonoriginalist adjudication is one of attitude toward the text and original understanding. For the moderate originalist, these sources are conclusive when they speak clearly. For the nonoriginalists, they are important but not determinative. Like an established line of precedent at common law, they create a strong presumption, but one which is defeasible in the light of changing public values.⁶

Similar divisions can be drawn among non-originalists based on the degree of deference they are inclined to give historical intent. Non-originalists share a rejection of the binding authority of original intent, but this leaves room for considerable disagreement about how much weight to give intent in comparison with other factors. Another important ground of distinction among non-originalists relates to how they supplement consideration of original intent. Some non-originalists trace their intellectual lineage to Enlightenment rationalists. They seek general theories that will provide logical answers in particular cases. Others trace their lineage to Burke, placing their faith on evolving traditions and time-tested institutions rather than abstract theories. And some, of course, combine both approaches.

II. IS ORIGINALISM WORKABLE?

Before we worry about whether originalism is *in principle* the right approach to constitutional interpretation, we have to consider a variety of arguments about whether it can work in practice. It may be, for example, that the original understanding of some or all of the Constitution is unknowable. Or perhaps originalism is inherently self-contradictory because the original intent was that judges would *not* use originalism. Or perhaps the Supreme Court has gone too far down the non-originalist path to make a return to originalism feasible. These and other objections to the workability of originalism are considered in this Part.

A. Methodological Problems

One initial problem is whether we can determine the original intent with any confidence. Various methodological problems may make it difficult to do so, and of course, if we cannot determine original intent, we cannot make it the basis for interpretation.

One problem is that the framers of various provisions often failed to discuss the issues in which we are interested today. Much time was spent discussing how the executive would be appointed, what the term of office would be, and so forth. Little thought was given to questions that today hold greater interest, such as the President's power to send troops into combat without congressional approval or his power to

5. In this essay, I will capitalize Framers when referring to the drafters of the original Constitution. Ratifiers of the original Constitution as well as ratifiers and drafters of amendments will be called "framers" or "adopters."

6. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 229 (1980).

remove subordinate officers. Similarly, the debates about the fourteenth amendment focused on the now forgotten sections 2 and 3, which were of immediate concern in the context of Reconstruction but had no lasting importance. Section 1 of the amendment, which today looms larger in judicial application than any other provision of the Constitution, received only the most cursory attention. This is not to say that the record is wholly silent on these issues. Indeed, even the conspicuous lack of attention given to these questions may itself carry a message about the original understanding, although it may also indicate a failure to consider or contemplate particular issues. But the originalist task would certainly be easier if the framers had addressed these issues in detail.

Another question is whether the documentary evidence we do have is reliable. There have been recurring charges that Madison significantly altered his notes at a later date, perhaps to reflect his own changing views of the meaning of the Constitution. After a careful recent investigation, based on matters such as the watermarks on Madison's paper, James Hutson concludes that any alterations were not significant. But Hutson points out that Madison gave only a highly abbreviated account of the proceedings:

Madison's notes, then, stand alone as the key to the Framers' intentions. If his notes on any given day are compared to the fragmentary records of debates left by other delegates that Farrand printed or that have been discovered more recently, a rough approximation between the accounts is evident—demonstrating that Madison was not inventing dialogue, but was trying to capture what was said. Still, there is an enigma about Madison's note-taking methods . . .

If read aloud Madison's notes for any particular day consume only a few minutes, suggesting that he may have recorded only a small part of each day's proceedings . . . Madison averaged 2,740 words per session in June. Because sessions lasted five hours . . . he averaged 548 words per hour, a figure which can be rounded up to 600 words per hour to simplify calculations. At this rate Madison recorded only 600 of a possible 8,400 words per hour, or seven percent of each hour's proceedings. Even if the possible words per hour are reduced to 6,000, Madison recorded only ten percent of each hour's proceedings.⁷

There is also some reason to be suspicious of Madison's accounts of his own speeches; he may have improved them somewhat when he later reduced them to written form.

Hutson points out even greater problems with other parts of the documentary record. He concludes that the records of the ratification debates are "too corrupt . . . [to] be relied upon to reveal the intentions of the Framers."⁸ For example, the Pennsylvania and Maryland debates were recorded by ardent Federalist Thomas Lloyd, who was paid by the Federalists to delete all the Anti-Federalist speeches. He reported only selective Federalist speeches and even those seem to have been significantly revised.⁹

7. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 33-34 (1986).

8. *Id.* at 24.

9. *Id.* at 22-23.

The same Thomas Lloyd was responsible for the *Annals of Congress* volume covering the Bill of Rights. "Far from improving by 1789, Lloyd's technical skills had become dulled by excessive drinking."¹⁰ And the *Annals* cover only the House debates, because the Senate did not permit its proceedings to be reported.

The potential unreliability of parts of the historical record do not mean that historical investigation is hopeless. If historians were reduced to studying impeccably documented events, they would have little to do with their time. But a significant part of a professional historian's training consists of learning how to assess the validity of various documents. Historians learn to make sophisticated credibility judgments based not only on the documents themselves and their drafting, but also on a knowledge of the culture and politics of the period. Credibility judgments must also be made to determine which of various possible interpretations of the historical record is the most plausible. But judges may be ill-prepared to make such judgments:

[J]udicial judgments about the credibility of various accounts of the constitutional past may be idiosyncratic and otherwise unsound. While judges have fulsome experience in regard to the behavioral patterns of the sorts of people who typically appear before them, they know little about how people behaved in the distant past. Thus they may reason anachronistically when they use their present-day behavioral assumptions to assess the accuracy of a particular interpretation of the past.

After all, judges are not selected for office because they have special skill in reconstructing the intentions of individuals in the past . . . [A] judge who decides constitutional cases on the basis of credibility is likely to mislead both himself and his audience as to the ultimate basis of his decisions.¹¹

The difficulty of determining the plausibility of a historical interpretation is increased by the need to interpret the collective views of a diverse group of individuals. These individuals may not have agreed with each other on their interpretation of a provision. Some may have voted for a package such as the Constitution or Bill of Rights because they approved of some portions but had no particular view about the meaning or desirability of other parts. How can we aggregate the varying views of a diverse group in order to determine a collective intent? Of course, the framers were not randomly drawn from different societies or even different segments of the same society. Their shared common culture should be reflected in some degree of consensus about the meaning of texts. Even where this is true, however, discerning that consensus may require a deep knowledge of a historical period, which may be beyond the reach of anyone but historians specializing in the period.

The problems of reconstructing original intent do not prove that the task is impossible or unimportant. They do suggest, however, that determining the original understanding may be a much more difficult task than many originalists assume.

B. Was Originalism the Original Understanding?

The question of originalism can itself be approached from an originalist perspective, by asking whether the framers themselves expected their own intentions

10. *Id.* at 36.

11. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1250-51 (1986).

to control subsequent interpretation of the Constitution. Although earlier scholars had mentioned this problem, it is investigated in the greatest detail in an influential 1985 article by Professor H. Jefferson Powell.¹²

Professor Powell begins by exploring the common law's methods of interpreting various documents such as statutes, wills, and contracts. He argues that "intent" generally referred to the objective meaning of the language used in the document, not the subjective intentions of the authors:

At common law, then, the "intent" of the maker of a legal document and the "intent" of the document itself were one and the same; "intent" did not depend upon the subjective purposes of the author. The late eighteenth century common lawyer conceived an instrument's "intent"—and therefore its meaning—not as what the drafters meant by their words but rather as what judges, employing the "artificial reason and judgment of law," understood "the reasonable and legal meaning" of those words to be.

. . . .

The courts likewise looked to "rules of law" and to "common understanding" when interpreting statutes. The modern practice of interpreting a law by reference to its legislative history was almost wholly nonexistent, and English judges professed themselves bound to honor the true import of the "express words" of Parliament. The "intent of the act" and the "intent of the legislature" were interchangeable terms; neither term implied that the interpreter looked at any evidence concerning that "intent" other than the words of the text and the common law background of the statute. . . .

The common law tradition did admit the propriety of looking beyond the statute's wording where the text was defective on its face. In such situations judges were free to substitute coherence for gibberish. A more serious interpretive problem occurred when the statute's wording was ambiguous, rather than clear but in conflict with its apparent intent. It was generally agreed that such *ambiguitas patens* could not be resolved by extrinsic evidence as to Parliament's purpose. . . .¹³

Because the common law adopted somewhat different methods of interpretation for different kinds of documents, however, interpretation of the new Constitution posed something of a problem. To interpret it, the eighteenth-century lawyer first had to determine what kind of document it was. In the debates over ratification, according to Professor Powell, the Federalists took the position that the text would be interpreted like a statute, on the basis of the meaning of its words to a reasonable reader.

Even after the Constitution was in effect, according to Professor Powell, references to history were viewed with some suspicion as an innovation in methods of interpretation. A newer approach to interpretation, based on the understandings of the ratifiers, was ultimately crystallized by Madison:

The text itself, of course, was the primary source from which that intention was to be gathered, but Madison's awareness of the imperfect nature of human communication led him to concede that the text's import would frequently be unclear. Madison thought it proper to engage in structural inference in the classic contractual mode of the Virginia and Kentucky Resolutions, and to consult the direct expressions of state intention available in the resolutions of the ratifying conventions. He regarded the debates in those conventions to be of real yet limited value for the interpreter: evidentiary problems with the surviving records

12. Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

13. *Id.* at 895-98.

and Madison's insistence on distinguishing the binding public intention of the state from the private opinions of any individual or group of individuals, including those gathered at a state convention, led him to conclude that the state debates could bear no more than indirect and corroborative witness to the meaning of the Constitution . . . Last and least in value were the records of the Philadelphia convention.¹⁴

Madison's objection to reliance on the convention debates was based on two factors: the possible defects in the historical record and the status of the ratifiers as the true sources of the Constitution's authority.

Professor Powell's historical evidence has been carefully examined by Professor Charles Lofgren. Professor Lofgren agrees with him about the nature of common law interpretative methods and about Madison's ultimate position.¹⁵ The crux of the disagreement between these two scholars relates to timing. Professor Powell believes that the view of interpretation ultimately adopted by Madison did not become prevalent until well after ratification. Professor Lofgren argues, however, that this theory of interpretation based on the ratifiers' intent was adopted earlier, by the time the Constitution was ratified or soon thereafter. Both scholars agree that the convention debates themselves were not considered to have any authoritative status as a source of meaning because the Constitution took its authority from its adoption by the sovereign People: "We, the People" referred to the ratifiers, not the members of the Convention. Given this understanding, the Framers themselves were merely scribes, drafting a document for possible use by others—little different from staff members in Congress who help draft legislation for Congress to consider. It seems somewhat unlikely that the intent of the scribes was thought to be binding on the ratifiers, especially when the Framers were so careful to keep the proceedings of the Convention secret from the ratifiers themselves.

Of course, even if it is correct, this conclusion would not mean that the Convention debates should be disregarded. Besides their intrinsic interest, they are also strong evidence of the understanding of reasonable readers of the period. But even in the Framers' own views, the Convention debates were probably not considered authoritative.

Assuming, however, that only the intent of the ratifiers is dispositive, and taking into account the defective historical record concerning that intent, some area remains in which original intent might be decisive. For example, it might well be possible to establish that no intelligent eighteenth-century reader would have thought that the phrase "cruel and unusual punishment" included execution by hanging, or that no mid-nineteenth-century reader would have thought that "equal protection of the laws" had anything to do with the right to vote. Thus, the problems with originalism considered above are not fatal to the originalist thesis that original intent controls where it can be determined.

14. *Id.* at 937–38.

15. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77 (1988).

C. *Anti-Originalist Clauses*

Another argument against originalism, which is related to that considered in the previous Part, is that the Framers anticipated that the courts would defend human rights beyond those expressly listed in the Bill of Rights. The basis for this enforcement of unwritten rights might either be natural law or certain "open-ended" clauses of the Constitution.

As one writer has recently explained, natural law was considered a legitimate basis for judicial decision in the period leading up to the framing of the Constitution:

[F]or American judges in the late eighteenth century, the sources of fundamental law were as open-ended as they were in English opposition theory. The colonists inherited a tradition that provided not only a justification for judicial review but also guidelines for its exercise. As Bolingbroke proposed in theory and the new American states translated into action, judges were to look to natural law and the inherent rights of man, as well as to the written constitution, in determining the validity of a statute. Where the written constitution affirmatively addressed a problem—most often in governmental structure cases . . . but even in cases . . . where the constitution provided clear protection of individual rights—it was dispositive, but in other cases, judges looked outside the written constitution.¹⁶

The historical evidence suggests that natural rights theories persisted into the 1780s. Indeed, belief in the existence of an unwritten "higher law" continued until well into the nineteenth century. Some writers argue that the Framers accepted natural law as a judicially enforceable restriction on governmental power.¹⁷

The ninth amendment can easily be read as embodying unspecified natural rights. The privileges and immunities clause of the fourteenth amendment is another possible source of unenumerated rights. Perhaps the leading spokesman for this argument is Dean John Ely.¹⁸ If Ely's historical interpretation is correct, then at least some clauses of the Constitution seem to require judges to protect rights that are not themselves listed in the Constitution. Even if correct, however, that conclusion is not necessarily fatal to originalism. For it may still be possible to give an originalist reading to these unenumerated rights themselves. For example, we might look to the understandings of the times to find out precisely what rights were considered

16. Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1145-46 (1987).

17. See *id.*; Grey, *The Original Understanding and the Unwritten Constitution* (unpublished manuscript on file with the Ohio State Law Journal).

18. Dean Ely argues that:

[T]he legislative history argument is one neither side can win. It really should not be critical, however. What is most important here, as it has to be everywhere, is the actual language of the provision that was proposed and ratified. On that score Justice Black surely has a point: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" *does* seem an "eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States." . . . There is another edge to this, and that is that nothing in the material that has been discussed supports Justice Black's *limitation* of the fourteenth amendment's privileges or immunities clause to the function of incorporating the Bill of Rights. There is some legislative history suggesting an intention to incorporate the Bill of Rights; there is none at all suggesting that was *all* the privileges or immunities clause was designed to do, and indeed Howard's speech, which is Black's strongest proof of incorporation, is quite explicitly against him on the limitation point. The words of the clause *are* an "eminently reasonable" way of applying the Bill of Rights to the states, but much more reasonable words could have been found had that been the *only* content intended. (emphasis in original).

J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 27-28 (1980). Ely's views are challenged in Berger, *Ely's "Theory of Judicial Review,"* 42 OHIO ST. L.J. 87, 98-110 (1981).

fundamental (and therefore presumably protected by the ninth amendment or the privileges and immunities clause).

Neither those who discussed the need for a bill of rights in the late eighteenth century, nor those who framed the fourteenth amendment seventy years later, seem to have spent much time worrying about whether unwritten fundamental rights were static or subject to change.¹⁹ Thus, an originalist interpretation of these provisions might be limited to the specific fundamental rights of the time, or it might require an evolving list of rights. The original understanding of the "higher law" may be even more elusive than that of more specific constitutional language. Nevertheless, it might be possible to establish with some degree of confidence, for instance, that abortion was not considered a fundamental right in 1866 and that the list of fundamental rights was considered static. The question would then remain whether that historical understanding is binding today.

D. The Ambiguity of Intent

Determining the level of intent we are interested in is one difficulty inherent in implementing originalism. At its simplest level, we might consider the "original intent" to be a kind of multiple choice examination to be administered to the framers, in which all the questions look like this: "Constitutional provision X covers fact-pattern Y. True or false?"

One problem with this approach is that it may be very difficult to find out the answers, for the reasons discussed in the preceding sections. Moreover, some fact-patterns will involve situations that the framers could not directly consider. For example, the framers had no occasion to consider whether the fourth amendment applied to electronic eavesdropping, whether electrocution was cruel and unusual punishment, or whether the manufacture of computer chips is part of interstate commerce. If we seek to address these issues in terms of original intent, we will have to define our inquiry at a higher level of generality.

The view of original intent as a sort of checklist of specific prohibitions is also vulnerable to another sort of attack. Presumably, the checklist is not entirely arbitrary; it reflects some underlying beliefs or values of the framers. But this underlying belief system may be more complex than the checklist indicates, and in particular may contain some inner tensions or inconsistencies. Ignoring these complexities may fail to do justice to the original understanding. Yet, the more we understand the intellectual and cultural matrix in which a provision arose, the more difficult we may find the task of projecting its meaning into the contemporary world.²⁰

19. See Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 367 (1981).

20. In this hermeneutic approach to history, "[t]he historian must enter the minds of his or her subjects, see the world as they saw it, and understand it in their own terms." Tushnet, *Following the Rules Laid Down*, 96 HARV. L. REV. 781, 798 (1983). As Professor Tushnet explains, hermeneutics has potentially important implications for constitutional interpretation:

The intellectual world of the framers is one that bears some resemblance, which is more than merely genetic, to ours. A hermeneutic interpretivism would force us to think about the social contexts of the resemblances and dissimilarities. It would lead us not to despair over the gulf that separates the framers' world from ours, but

The question of whether the death penalty is a form of cruel and unusual punishment exemplifies some of the problems. As Professor David Richards explains in criticizing the work of Raoul Berger, a leading originalist:

The nature of the historiographical distortion in Berger's approach is brought out by comparing . . . Berger's *Death Penalties* [and] John McManners' *Death and the Enlightenment*, a study of changing attitudes toward death (including natural deaths, executions, and suicides) in eighteenth century France For McManners, the historiography of death in eighteenth-century France requires the broadest integration of diverse sources and perspectives bearing on deep shifts in the moral and human sensibilities surrounding death in its various forms. The consequence is remarkable: McManners, writing of France with no particular focus on legal issues, enables us to understand the moral norms implicit in the eighth amendment in exhaustive depth in a way that Berger does not remotely approximate.²¹

As Professor Richards explains, these different approaches to history have potential significance in terms of applying the eighth amendment today:

If the Enlightenment thought the death penalty acceptable in certain cases, the period was more historically remarkable in its skepticism about the extent and forms of the penalty's use and in its special concern with abuse of the death penalty for terroristic degradation. Berger's "meaning" of the eighth amendment therefore is not the eighteenth century's meaning Why, then, should it be our meaning on the issue of the death penalty when many of the eighteenth century's grounds for skepticism, implicit in the principles of the eighth amendment, may, given the contemporary context with shifts in many relevant features (alternative ways of securing deterrence, the greater value of life, etc.), dictate a complete repudiation of the death penalty? Thus, seen at a higher level of generality, the Framers' views about what is cruel and unusual punishment might lead to a rejection of the death penalty today, while their more specific views are to the contrary.²²

Thus, as Dean Robert Bennett suggests, it may not be true "that knowing specific intentions allows one to project the intenders' values or process of decision over time, even as applied to phenomena very similar to the subjects of the specific intentions."²³

A crucial question for originalists, then, is to determine the proper level of generality. Should we view the eighth amendment as requiring judges to apply some general concept of what is "cruel and unusual"? Or should they ask only what specific punishments the framers meant to forbid? One possible answer is to try to determine the framers' own views on the appropriate level of generality. For

rather to the crafting of creative links between their ideals and our own. But in recognizing the magnitude of the creative component, we inevitably lose faith in the ability of interpretivism to provide the constraints on judges that liberal constitutional theory demands.

. . . We can gain an interpretive understanding of the past by working from commonalities in the use of large abstractions to reach the unfamiliar particulars of what those abstractions really meant in the past. The commonalities are what make the past *our* past; they are the links between two segments of a single community that extends over time Interpretivism goes wrong in thinking that the commonalities are greater than they really are, but we would go equally wrong if we denied that they exist. (emphasis in original).

Id. at 803-04. I question whether continuity with the past derives from "large abstractions" alone. Often, it is the particularities of past life that seem the most familiar.

21. Richards, *Interpretation and Historiography*, 58 S. CAL. L. REV. 489, 514-15 (1985).

22. *Id.* A philosophical argument in favor of this variety of broad interpretation is found in R. DWORKIN, *LAW'S EMPIRE* 359-63 (1986).

23. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 463 (1984). See also Bennett, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 355 (1988) [hereinafter *Originalist Theories*].

example, we might investigate whether the framers expected judges to rely on the general concepts or the specific examples discussed in the debates. As Dean Paul Brest explains, the reality is that the framers probably would have intended that both their general principles and their specific examples be given some weight:

A principle does not exist wholly independently of its author's subjective, or his society's conventional exemplary applications, and is always limited to some extent by the applications they found conceivable. Within these fairly broad limits, however, the adopters may have intended their examples to constrain more or less. To the intentionalist interpreter falls the unenviable task of ascertaining, for each provision, how much more or less.²⁴

The difficulties of this historical inquiry are obvious, since the framers are unlikely to have discussed the precise balance between general principles and specific examples.

Another possible originalist solution is to specify a nonhistorical rule for determining the proper level of abstraction. For example, Judge Robert Bork suggests that "the problem of levels of generality may be solved by choosing no level of generality higher than that which interpretation of the words, structure, and history of the Constitution fairly support."²⁵ His argument for adopting this rule is that higher levels of generality give judges increasing amounts of leeway in deciding cases, so the presumption should be in favor of specificity rather than generality. Unlike the approach discussed by Dean Brest, this approach does not look to the framers in order to establish their view about the proper level of generality. Rather than looking to history, Judge Bork looks to his own political theory to answer this question.

Judge Bork's test for the proper level of generality is quite vague and may prove very difficult to apply. Moreover, since the ultimate question before a court is the extent to which a constitutional provision limits majority rule, Judge Bork's test amounts to a presumption that all limits on governmental power should be read narrowly. But this is a rather far-reaching principle of interpretation for which Judge Bork provides no support, historical or otherwise, so his analysis at least must be considered somewhat incomplete.

E. *The Problem of Change*

Probably the most prevalent argument against originalism is that it is too static, and thereby disregards the need to keep the Constitution up to date with changing times. Originalism is unworkable, then, even if the original intent can be reliably determined, because originalism would make the Constitution itself unworkable. Thus, according to Justice William Brennan, the judicial approach to interpretation must be non-originalist:

Current Justices read the Constitution in the only way we can: as twentieth-century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in

24. Brest, *supra* note 6, at 217.

25. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 828 (1986).

a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be the measure of the vision of our time.²⁶

Non-originalists argue that the Supreme Court has always functioned this way, and that it is now too late to change the "rules of the game." For example, Professor Thomas Grey argues that there is only a shaky originalist basis for basic doctrines such as the application of the Bill of Rights to the states and the prohibition on racial discrimination by the federal government.²⁷ Indeed, Professor Grey suggests, the potential implications are even broader:

[T]here is serious question how much of the law prohibiting state racial discrimination can survive honest application of the interpretive model. It is clear that the equal protection clause was meant to prohibit *some* forms of state racial discrimination, most obviously those enacted in the Black Codes. It is equally clear from the legislative history that the clause was *not* intended to guarantee equal political rights, such as the right to vote or to run for office, and perhaps including the right to serve on juries.

It is at least doubtful whether the clause can fairly be read as intending to bar any form of state-imposed racial segregation, so long as equal facilities are made available

While one might disagree with this rough catalogue on points of detail, it should be clear that an extraordinarily radical purge of established constitutional doctrine would be required if we candidly and consistently applied the pure interpretive model. Surely that makes out at least a *prima facie* practical case against the model.²⁸

Some originalists may be undismayed or even pleased by the thought of such a radical uprooting of current doctrine. Originalism need not, however, require such radical doctrinal change. First, for all the reasons we have explored previously in this article, history is rarely clear, and many of Professor Grey's specific conclusions are subject to dispute. So the originalist may be able in good conscience to uphold the correctness of many current constitutional doctrines.

Second, originalism may be tempered by an appreciation of the importance of stability in the law, so that an originalist who agrees with Professor Grey's list of mistaken doctrines might nonetheless oppose overruling them. Thus, Professor Henry Monaghan says:

I accept as a premise that the illustrations cited are not consistent with original intent The expectations so long generated by this body of constitutional law render unacceptable a full return to original intent theory in any pure, unalloyed form. While original intent may constitute the starting point for constitutional interpretation, it cannot now be recognized as the only legitimate mode of constitutional reasoning. To my mind, some theory of *stare decisis*

26. Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L.J. 433, 438 (1986). The primary line of response available to originalists is to agree that changing times must be accommodated somewhere in the system of government, but to ask why the courts' performance of constitutional review is the appropriate place. If people today have broader views of individual rights than those held by those who drafted the fourteenth amendment, they can prevail upon their legislators to recognize those rights. The Supreme Court's function, the originalist can maintain, is limited to enforcing the original understanding; social change simply must find its expression elsewhere. For a sophisticated discussion of the allocation of constitutional decision-making authority, see Komesar, *Back to the Future—An Institutional View of Making and Interpreting Constitutions*, 81 NW. U.L. REV. 191 (1987).

27. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 712-13 (1975).

28. *Id.*

is necessary to confine its reach. Of course, this is to accord an authoritative status to tradition in "supplementing or derogating from" the constitutional text, at least if that "tradition" has worked its way into judicial opinions. But a stare decisis theory has its limits, at least for those who take original intent seriously [T]his concession to reality would not be taken to entail, also in the name of reality, the further concession that our constitutional law now sanctions the general, nontextual mode of constitutional analysis²⁹

Third, an originalist might take into account not only judicial precedents but also the changing views of those adopting later constitutional provisions. For example, those who ratified the fourteenth amendment's due process clause may have had a broader concept of the meaning of due process than their predecessors who adopted the fifth amendment's due process clause. Yet it would be incongruous to give the two due process clauses different interpretations today.

Even defeated constitutional amendments may count for something. For example, an amendment to allow Congress to regulate child labor failed to obtain ratification because it became clear that the Supreme Court had changed its mind on this issue. Or, to take another example, one argument against the proposed equal rights amendment was that it was unnecessary because the Supreme Court was already attacking sex discrimination by using the equal protection clause. After these amendments failed to obtain ratification, it seems dubious that the Court should feel free to abandon the positions on which the public relied.³⁰ As with Professor Monaghan's treatment of precedent, however, these points could be conceded without abandoning originalism as a general principle.

III. THE NORMATIVE ARGUMENTS FOR ORIGINALISM

Assuming that some form of originalism would be a feasible approach to constitutional interpretation, the question of whether it would be a desirable approach remains. There are three basic normative arguments in favor of originalism. The first is that legitimate authority in a democracy must be based on majority rule. Hence, a court is only justified in overruling one majority decision on the basis of another, even more authoritative, majority decision. In exercising judicial review, a judge is merely doing the will of the majority as contained in the Constitution, and the judge's job is simply to understand that majority will. The second argument is more general: that the job of the judge is to interpret legal documents like the Constitution, and that interpreting *any* document is simply a matter of determining the author's intentions. The third argument is that there is no principled alternative to originalism. I will discuss these arguments in turn.

A. Majoritarianism

As Attorney General Meese explained, majoritarianism is one of the fundamental underpinnings of originalism:

29. Monaghan, *supra* note 19, at 382. For an argument that the framers viewed settled interpretations of a text as part of its "official meaning or intent," see Powell, Book Review, 54 U. CHI. L. REV. 1513, 1536-38 (1987).

30. For some other illustrations, see Amar, *Our Forgotten Constitution*, 97 YALE L.J. 281, 291-92 (1987).

The Constitution represents the consent of the governed to the structures and powers of the government. The Constitution is the fundamental will of the people; that is the reason the Constitution is the fundamental law. To allow the courts to govern simply by what it views at the time as fair and decent, is a scheme of government no longer popular; the idea of democracy has suffered.³¹

Reduced to its essence, the argument is this: If judges get their authority from the Constitution, and the Constitution gets its authority from the majority vote of the ratifiers, then the role of the judge is to carry out the will of the ratifiers.

Although Dean John Ely is not an originalist, he has given one of the best explanations of the majoritarian basis of originalism:

We have as a society from the beginning, and now almost instinctively, accepted the notion that a representative democracy must be our form of government. The very process of adopting the Constitution was designed to be, and in some respects was, more democratic than any that had preceded it. . . . All this belabors the obvious part: whatever the explanation, and granting the qualifications, rule in accord with the consent of a majority of those governed is the core of the American governmental system. Just as obviously, however, that cannot be the whole story, since a majority with untrammelled power to set governmental policy is in a position to deal itself benefits at the expense of the remaining minority

. . . Of course, [the originalists] would answer, the majority can tyrannize the minority, and that is precisely the reason that in the Bill of Rights and elsewhere the Constitution designates certain rules for protection Thus the judges do not check the people, the Constitution does, which means the people are ultimately checking themselves.³²

The majoritarian argument for originalism has three premises: that our society's "master norm" is democracy; that the Constitution gets its legitimacy solely from the majority will as expressed at the time of enactment; and that judicial decisions are less "democratic" than those of the elected branches of government.

1. *Democracy as a "Master Norm"*

A non-originalist might question the status of democracy as a uniquely fundamental norm of our society. Since this response leads to far-reaching inquiries into political theory, I will not pursue it in detail here, but the general concept can be easily sketched. Why, one might ask, do we believe in democracy? Isn't it because of underlying beliefs in human dignity and equality, beliefs that are also the bases for judicial protection of individual rights? On this view, the individual rights should not be viewed as conflicting with democracy. Rather, majority rule and individual rights are both part of a harmonious vision of government.

Perhaps identifying democracy with unlimited majority rule is too simplistic. Instead, as one political theorist has put it, democracy may mean creating and maintaining "a society whose adult members are, and continue to be, equipped by their education and authorized by political structures to share in ruling."³³ Thus

31. Meese, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L.J. 455, 465 (1986).

32. J. ELY, *supra* note 18, at 5-8.

33. A. GUTMAN, *DEMOCRATIC EDUCATION* xi (1987).

majority-approved policies that deprive some citizens of their right or ability to participate in governance are contrary to the ideal of democracy.

This structure of constrained majoritarianism is reflected in the Constitution itself (mostly in the Bill of Rights and other amendments). As Justice Robert Jackson recognized: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."³⁴ Those who recognize that the Constitution does not establish unmodified majoritarianism often talk about the "counter-majoritarian premise" of the Constitution.

Of course, the mere existence of a counter-majoritarian premise does not specify how it is to be applied, and originalists argue that it should be limited to the specific rights protected by the amendments. However, the existence of a counter-majoritarian premise, coupled with the political theory of democracy, suggests that the originalist reliance on "pure" majoritarianism as a reason for their position may not work.

2. *The Basis of Constitutional Legitimacy*

Non-originalists can also question the claim that majority ratification in the past is a valid source of majoritarian legitimacy in the present. After all, the adoption process had defects that today would be considered fatal to legitimacy:

The drafting, adopting, or amending of the Constitution may itself have suffered from defects of democratic process which detract from its moral claims. To take an obvious example, the interests of black Americans were not adequately represented in the adoption of the Constitution of 1787 or the fourteenth amendment. Whatever moral consensus the Civil War Amendments embodied was among white male property-holders and not the populations as a whole.³⁵

In addition, the ratifiers had no claim at all to represent those of us alive today, so it is unclear how their majority vote can override the will of current majorities: "We did not adopt the Constitution, and those who did are dead and gone."³⁶

Thus, in seeking a majoritarian source of legitimacy, we perhaps should look not to the vote of the drafters but rather to the popular support of the Constitution today. Since most people are not historians, that popular support may be based on the current legal understanding of the Constitution rather than on its original understanding. This assumes, of course, that the populace knows something about current constitutional judicial doctrines.

Even if part of the Constitution's legitimacy does rest on the fact that it was adopted by past majorities, this may not be the only source of its current authority. Individuals today may accept the Constitution partly because of its pedigree but partly because they think it is a *good* Constitution and therefore one worthy of continuing

34. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

35. Brest, *supra* note 6, at 230.

36. *Id.* at 225.

support. To the extent this is true, this additional source of legitimacy may not mandate abandonment of original intent, but it does support some degree of supplementation: we would want to give the Constitution a reading that is tied to its origins but that also makes it worthy of continuing allegiance.

3. Majority Rule and the Judicial Branch

The crux of the majoritarian argument is the incongruity in a democratic society of having major societal decisions made by non-elected officials like federal judges. In response, some non-originalists downplay the undemocratic nature of the judiciary. Federal judges, as a practical matter, are not removable from office, but they are subject to subtler influence by public opinion. Also, over time, new appointments tend to bring the courts into line with public opinion. As a last resort, there is the possibility of constitutional amendment. While these factors do tend to limit the divergence between public opinion and the courts, it is still clear that courts are less democratically responsive than other branches of government.

Non-originalists also point out special attributes of the judicial role that may give judges a comparative advantage in dealing with questions of principle. Among these traits are relative isolation from immediate public pressure, the requirement that all decisions be explained with reasoned opinions, and the utility of the adversary process in giving both sides a fair hearing. It is hard to assess the cumulative significance of these points, especially given the possibility that our elected officials would give more thought to matters of constitutional principle if they did not rely so much on judges to do so for them.

Although a great deal has been written about these issues, the conclusions seem fairly simple: federal courts are not as unresponsive to the public as they first appear, but they are still less democratic than other branches; and federal courts have some advantage as forums in which to decide matters of principle relating to individual rights, but perhaps not so much as many people believe. Whether the gain in principled decision-making is worth the cost in democratic responsiveness is a question not susceptible to proof one way or the other.

The majoritarianism issue, then, proves to be much more subtle than it initially appears. Fully resolving it, if such a resolution is possible, would require a fairly complete theory of democratic legitimacy. Perhaps the best we can say without such a theory is that majoritarianism provides originalists with a powerful argument, but the anti-originalists' replies are not insubstantial.

B. Intentionalism

Originalism can also be based on a broader theory of interpretation, one which has strong roots in our legal culture:

[Originalism] fits our usual conceptions of what law is and the way it works. In interpreting a statute, in order to decide whether certain private behavior is authorized or whether (and this is closer to the constitutional review situation) it conflicts with another statute, a court obviously will limit itself to a determination of the purposes and prohibitions expressed by or implicit in its language. Were a judge to announce in such a situation that he was not

content with those references and intended additionally to enforce, in the name of the statute in question, those fundamental values he believed America had always stood for, we would conclude that he was not doing his job, and might even consider a call to the lunacy commission.³⁷

Thus, originalism is closely linked to the Constitution's status as a legal text, and that status itself has been an important part of the argument for judicial review:

The Constitution is, among other things, a legal document, and it is on the Constitution's status as written law that justification of the practice of judicial review has largely rested. As Edwin Corwin once wrote, "The first and most obvious fact about the Constitution of the United States is that it is a document." Justice Black began his lectures on constitutional interpretation by saying, "It is of paramount importance to me that our country has a written constitution." With words like these, contemporary constitutional interpreters hark back to John Marshall's original argument for judicial review in *Marbury v. Madison*, an argument permeated with reliance on the "writtenness" of the Constitution.³⁸

Since people often think of a document's meaning as consisting of the author's intentions in writing it, this stress on the Constitution's status as a written text provides strong support for originalism.

Still, while the Constitution is a text, it is a very special kind of text.³⁹ Unlike most texts, it was written by one group of people for adoption by another, then amended over two centuries by yet other groups. Moreover, its various authors and adopters may perhaps have intended that parts of the text incorporate various norms outside of itself. All of this makes it more difficult to identify a specific set of authors whose intent controls. More fundamentally, the Constitution plays a unique role in our culture, being not only a set of instructions but literally constitutive of our national identity. Given that unique role, a special approach to interpretation could well be appropriate.

Moreover, it is not clear that the meaning even of ordinary texts is to be located in the author's intent as opposed to the reader's understanding. Theories of interpretation are presently the subject of hot dispute among philosophers and literary theorists, and to enter into this debate would be far beyond my present purpose. Indeed, the complexity and subtlety of the debate caution against any expectation that general theories of interpretation will provide any simple means of resolving the dispute about originalism.

37. J. ELY, *supra* note 18, at 3. See also, Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 353 (1988) ("This is the essence of communication. It is for the writer to explain what his words mean . . .").

38. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 14 (1984). Grey continues with a description of *Marbury*, 5 U.S. 137 (1803):

Marshall began by noting that the people had not only created institutions of government, but had also placed limits on their power. He continued: "and that those limits may not be mistaken or forgotten, the constitution is *written*. To what purpose are powers limited, and to what purpose is that limitation *committed to writing*, if these limits may, at any time, be passed by those intended to be restrained?" He added that those who frame "*written constitutions*" act on the theory that legislation repugnant to the constitution is void; indeed, "[t]his theory is essentially attached to a *written constitution*." This point alone would suffice to establish judicial review "in America, where *written constitutions* have been viewed with so much reverence."

Id., at 14-15.

39. See Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1044 (1977).

As in many debates, one of the most difficult problems with assessing originalism is deciding just what is in dispute. Some advocates of originalism make it clear that the original intent they have in mind does not consist of a psychological state of the framers:

Dworkin is scornful, and I think properly so, of the notion that in interpreting poetry or the Constitution we should seek to discern authorial intent as a mental fact of some sort. As to poetry, his argument rightly holds that we would not consider an account of Shakespeare's mental state at the time he wrote a sonnet to be a more complete or better account of the sonnet than the sonnet itself. Dworkin would certainly disagree, as would I, with the notion that when we consider the Constitution we are really interested in the mental state of each of the persons who drew it up and ratified it. In this view, which we both reject, the texts of a sonnet or of the Constitution would be a kind of second-best; we would prefer to take the top off the heads of authors and framers—like soft-boiled eggs—to look inside for the truest account of their brain states at the moment that the texts were created.⁴⁰

Yet, the author of this passage claims to champion the “attempt to understand the Constitution according to the intention of those who conceived it”⁴¹ But at this point, the precise meaning of originalism becomes a bit murky.

On the whole, the earlier, majoritarian argument for originalism seems stronger than the argument based on the primacy of authorial intent. The problem is not just that the primacy of intent is disputable, but that even attempting to define precisely what we mean by authorial intent is very difficult, even apart from the special problems of attributing a unified authorial intention to a document like the Constitution.

Moreover, even a successful theory of authorial intent might not be enough to justify originalism. After all, a general theory of interpretation must work equally well for interpreting a sonnet, the Constitution, the Bible, and a grocery list. It seems unlikely that such a theory would have decisive implications regarding the relatively subtle differences that separate originalism and anti-originalism. After all, the dispute between originalists and anti-originalists is not over the relevance of intent, on which both agree, but on specific rules for considering intent in deciding constitutional cases. There is no reason to think that the same specific rules about intent will apply to all written documents.

C. Are There Principled Alternatives?

One important normative argument in favor of originalism is the difficulty of specifying another principled basis for deciding cases. The literature on the alternatives to originalism is as large as that on originalism itself—indeed, the two overlap substantially—and I can only touch on these problems here.

One suggested alternative looks to natural law or moral philosophy as a basis for judicial enforcement of individual rights. The difficulty is that our culture has no consensus on these matters:

40. Fried, *Sonnet LXV and the “Black Ink” of the Framers’ Intention*, 100 HARV. L. REV. 751, 758–59 (1987).

41. *Id.* at 756.

"[A]ll theories of natural law have a singular vagueness which is both an advantage and disadvantage in the application of the theories." The advantage, one gathers, is that you can invoke natural law to support anything you want. The disadvantage is that everybody understands that.

....

The constitutional literature that has dominated the past thirty years has often insisted that judges, in seeking constitutional value judgments, should employ, in Alexander Bickel's words, "the method of reason familiar to the discourse of moral philosophy."

....

... The error here is one of assuming that something exists called "the method of moral philosophy" whose contours sensitive experts will agree on That is not the way things are. Some moral philosophers think utilitarianism is the answer; others feel just as strongly it is not. Some regard enforced economic redistribution as a moral imperative; others find it morally censurable. . . . There simply does not exist *a* method of moral philosophy.⁴²

Similar attacks can be made on attempts to use tradition or consensus as the basis of decision-making. The American tradition is diverse, and contemporary American society contains an enormous variety of groups with strikingly different views of the world. Even the argument that the Constitution should be construed to promote the functioning of the democratic process falters in the light of the lack of agreement on any precise understanding of democracy.

As Dean Brest points out, these criticisms of non-originalist approaches are all rather similar, and all reminiscent of the attacks on originalism:

My point so far is not that any of these theories are untenable, but that all are vulnerable to similar criticisms based on their indeterminacy, manipulability, and, ultimately, their reliance on judicial value judgments that cannot be "objectively" derived from text, history, consensus, natural rights, or any other source. No theory of constitutional adjudication can defend itself against self-scrutiny. Each critic's assessment of the alternative theories seems rather like an aesthetic judgment issued from the Warsaw Palace of Culture.⁴³

A footnote then recounts a joke from Poland: "Why is the best view of Warsaw from the Palace of Culture?" "Because that's the only place in Warsaw where you can't see the Palace of Culture."

Thus, both originalists and anti-originalists seem to be highly effective in critiquing each others' theories. Perhaps the lesson is that the standards they set are inherently unattainable. The real problem may be that both sides have demanded too much. We may have to be content with an approach to constitutional law that leaves some room for judicial discretion while attempting to channel that discretion. In other words, the real problem may not be that originalism is less desirable than some other global theory of constitutional law, but that no global theory can work. If so, we might do better to abandon the attempt to create a theory of constitutional interpretation, and get on with the business of actually interpreting the Constitution. Perhaps, in other words, constitutional interpretation is best thought of as an activity that one can do well or poorly, rather than as an application of some explicit general theory.

42. J. ELY, *supra* note 18, at 50-58.

43. Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1096 (1981).

IV. CONCLUSION

It is not my purpose in this essay to convert readers to my own view about originalism. But it seems only fair to give the reader some idea of where I stand on an issue as fundamental as the proper relationship between original intent and modern constitutional law.

The strongest form of originalism—that all constitutional issues should be decided on the basis of original intent—seems particularly untenable. As we have seen, the original intent is often hard to ascertain because of blanks in the historical record (particularly concerning the views of the ratifiers of constitutional provisions), the divergent views of those involved in making crucial decisions, and the usual difficulties of interpreting any text (particularly texts of ancient vintage). Beyond these practical problems is the question of just what kind of intent to look for. For example, do we look for the framers' philosophical theory of equality, their general views of racial discrimination, their (possibly non-existent) specific views about affirmative action, or the views they would have had about affirmative action if they had thought about it then or if they were alive today? And more fundamentally, why is the intent of the long-dead authors of the Constitution binding on present-day Americans, many of whom would have been disenfranchised in 1789 or 1866 anyway? None of these arguments is individually devastating, nor do they demonstrate that original intent is irrelevant. Cumulatively, however, they make it highly unlikely that original intent can provide an adequate basis for *all* constitutional decisions.

Inevitably, I think, other considerations will have to enter into many constitutional decisions. To resolve many issues in constitutional law, judges will have to obtain guidance from other sources such as judicial precedents, American traditions, and contemporary social values. Purists may be dismayed that this process is so unstructured, but that may simply be the nature of the beast. This pragmatic approach is typical not just of constitutional law but also of judicial decision-making in general. As a famous passage by Justice Holmes explains:

It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.⁴⁴

44. O. HOLMES, *THE COMMON LAW* 1-2 (1881).

This blend of principle and policy, of tradition and innovation, is the essence of pragmatic constitutionalism.⁴⁵

This process may seem disturbingly open-ended. Yet, it is not clear that originalism could provide more coherent or predictable results. Originalist judges would be as likely to differ in their interpretations of the historical records as professional historians themselves. Rather than debating the virtues and vices of affirmative action, they would debate the proper interpretation of the debates on the Freedman's Bureau.⁴⁶ Not only would the results be likely to reflect political predispositions, but the real values at stake would be concealed beneath historiographic debates.

The distinctions between pragmatic constitutionalism and originalism are real, but should not be exaggerated. Thoughtful originalists like Professor Monaghan concede that factors other than original intent must be given some weight in decisions. In turn, pragmatic constitutionalism leaves open the possibility that clear evidence of intent will sometimes prove decisive.

In this respect, pragmatic constitutionalism differs only in degree from the minimal version of originalism, under which clear original intent is binding in open cases. Although this would not be the invariable result under pragmatic constitutionalism, it might well happen, for any of three reasons. First, in dealing with an old constitutional provision, an "open" case may be open precisely because no relevant developments (such as judicial precedents or entrenched governmental practices) have arisen in the meantime. Thus, original intent may recommend itself as a basis for decision simply because there is little other basis for deciding the case.

Second, intent may be clear in some cases that are otherwise difficult to decide because the other factors are evenly balanced. Even judges who do not accept evidence of intent as totally binding on them may often be inclined to give it heavy weight, and nothing in pragmatic constitutionalism precludes them from doing so.

Third, the question may be open because the provision in question is relatively new, and few questions about it have had time to be settled. Most of the arguments against originalism, however, assume that some substantial amount of time has passed since an enactment. When dealing with a relatively new enactment, original intent should weigh much more heavily. For anti-originalists, the "text and original understanding exert the strongest claims when they are contemporary and thus likely to reflect current values and beliefs, or simply the expressed will of a current majority . . ."⁴⁷ Otherwise, new amendments might be discouraged because of fears that their judicial interpretations will be unpredictable.⁴⁸ Indeed, this was one of the arguments made against the equal rights amendment. Thus, originalism may under some circumstances make good pragmatic sense.

45. For further discussion of the role of pragmatism in constitutional law, see Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988).

46. See Belz, *The Civil War Amendments to the Constitution: The Relevance of Original Intent*, 5 CONST. COMMENTARY 115, 133-41 (1988).

47. Brest, *supra* note 6, at 229. See also Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482, 1537 (1985).

48. It seems much less likely, however, that anyone would vote against an amendment because of fears that, over the course of a century or two, it would become subject to novel interpretations.

Pragmatic constitutionalism will only sometimes give history decisive weight, but that does not mean that history will be ignored in the remaining cases. While pragmatic constitutionalism does not, unlike originalism, make modern constitutional interpretation subservient to original intent, neither is it blind to the views of those who adopted constitutional provisions. We can learn much from history. The framers' views define much of the tradition in which modern judges locate themselves. By rediscovering old ideas (such as republicanism), we can find new directions for future development. By identifying flaws in the framers' views (such as the influence of the institution of slavery on various parts of the Constitution), we understand better where our tradition has been led astray.

It is a truism—but true nonetheless—that to decide where we should be going, we must first know where we have already been.