

# A HISTORY OF THE AMERICAN CONSTITUTION

Second Edition

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## CHAPTER FOURTEEN

### The Originalism Debate

#### INTRODUCTION

The role of historical evidence in constitutional law has always been of interest to scholars, but the issue began to become more prominent in the 1970s. Warren Court opinions on topics such as reapportionment and desegregation were difficult to connect to the specific views of the framers. Liberal scholars attempted to justify these decisions by arguing that courts must adapt constitutional interpretations to changing times. This liberal theory of the "living Constitution" was met by conservative demands for a return to the original understanding of the Constitution. Although initially simply a dispute among scholars, the debate became politically prominent during the Reagan Administration, following calls by Reagan's Attorney General for a jurisprudence of original intent.<sup>1</sup> Reagan unsuccessfully attempted to appoint one leading originalist, Robert Bork, to the Supreme Court, but later succeeded with another, Antonin Scalia. Scalia was later joined by fellow originalist Clarence Thomas. At that point, originalism was no longer merely an academic question.

By now, the debate over originalism has spanned more than two decades. Many of the major arguments were made early in the debate and have not changed much since. One development has been in political alignments. Although originalism is still a position predominantly held among conservatives, variants of originalism have been endorsed by some liberal scholars. Originalism has also been rejected by some conservatives who place more emphasis on precedent and tradition.

Another significant development has been in the formulation of originalism. Early originalists tended to stress the original "intent" of the framers of the Constitution. Today, many academic originalists prefer instead to rely on the original "understanding" of the Constitution. Or, alternatively, some originalists today ask "not what the Framers or Ratifiers meant or understood subjectively, but what their words would have meant objectively—how they would have been understood by an ordinary, reasonably well-informed user of the language, in context, at the time, within the relevant political community that adopted them."<sup>2</sup> Thus, the major difference in these forms of originalism is between an author-centered approach and an audience-centered one.

A literary analogy may be helpful in understanding this distinction. In considering a play like *Hamlet*, we might ask what Shakespeare had in mind when he wrote a particular passage. This corresponds to the search for original *intent*. On the other hand, we might ask how the Elizabethan audience understood the meaning of *Hamlet*. This corresponds to the search for the original *understanding*. A refinement would be to ask what the meaning of the play would have been to a reasonable, well-informed Elizabethan who read the play very carefully; on this view, the actual understanding of the audience is not controlling but is only evidence of the correct Elizabethan interpretation of the play. Thus, the audience-centered approach could ask what the Elizabethan audience actually did understand, or it could posit an idealized Elizabethan audience that was able to identify the "objective meaning" of the play. Some originalists themselves doubt the practical importance of these distinctions. In any event, we will try to avoid getting too immersed in these complexities.

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. Almost no one believes that the original understanding is wholly irrelevant to modern-day constitutional interpretation. Most opponents of originalism also claim to be "interpreting" the Constitution; they simply have a different view of the appropriate methods of doing so. Non-originalists do not find historical evidence dispositive of contemporary constitutional questions. The difference between originalists and non-originalists is that originalists are committed to the view that the historical perspective is not only relevant but at least sometimes authoritative, that contemporary judges are in some sense obligated to follow the views of the framers.

Among originalists, we can distinguish various shades of belief about the binding effect of history and about how to define "intent." A strong originalist might believe that the sole relevant factor should be the historical evidence. Under this view, precedent and practical considerations would be irrelevant. A moderate originalist might well

view other factors as potentially important, particularly when evidence of intent is unclear. The minimum originalist view would be that clear historical evidence is controlling on any "open" question of constitutional law; that is, any question that has not already been decisively resolved by entrenched Supreme Court doctrine.<sup>3</sup>

Originalists also differ about the level of generality at which they investigate history. Those who focus on the framers' general principles are quite different from those who emphasize the framers' views of particular governmental practices. (This form of originalism is found among some liberal scholars.)

Moderate originalists may be difficult to distinguish from non-originalists, as an early commentator on the debate explained:

The only difference between moderate originalism and non-originalist 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 non-originalist, 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.<sup>4</sup>

Similar divisions can be drawn among non-originalists based on the degree of deference they are inclined to give historical intent. Non-originalists have in common 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 is 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. For example, in interpreting the equal protection clause, they might ask what theory of equality provides the best foundation for constitutional analysis. Others trace their lineage to Edmund Burke, placing their faith in evolving traditions and time-tested institutions rather than abstract theories. They would seek to know how views of equality have evolved in the courts and in society in general. This is a position that has had some popularity with conservatives as well as with liberal advocates of a living Constitution. And some judges and scholars, of course, combine both of these non-originalist approaches.

In considering the originalism debate discussed in the remainder of this chapter, it is important to keep these distinctions in mind. When reading a particular argument against originalism, you should always ask: Which form of originalism is most vulnerable to this criticism? If this criticism is valid, what form of non-originalism does it support?

We will begin in the next section by asking whether originalism is workable. Can we actually identify the views of the framers with the necessary confidence and precision to make originalism work? Then we will consider originalism's normative basis. Even assuming we can identify the views of the framers, should their views control our own interpretations of the Constitution?

#### Methodological Problems

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

The framers of various provisions often failed to discuss the issues that interest us today. Recall the discussions of the executive branch in chapter 4. 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 the power to remove subordinate officers. Similarly, as we observed in chapter 11, the debates about the Fourteenth Amendment focused on the now forgotten sections 2 and 3, which were of immediate concern in the context of the Reconstruction era 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 cursory attention on the floor of Congress and in the ratification debates. 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, historian James Hutson concluded that any alterations were not significant. But Hutson points out that Madison gave only a highly abbreviated account of the proceedings:

Madison's notes 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 different 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.<sup>6</sup>

There is also some reason to suspect Madison's accounts of his own speeches; he may have improved them somewhat in writing after he had already delivered them orally.

Hutson points out even more severe 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." 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.<sup>7</sup>

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."<sup>8</sup> 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 does 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 is 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 their knowledge of the culture and politics of the period. Credibility judgments must also be made to determine which of the 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.<sup>9</sup>

The difficulty of determining the plausibility of a historical interpretation is increased by the need to interpret the views of a diverse group of individuals. These individuals may not have agreed with each other on the interpretation of a provision. Some may have voted for a package such as the Constitution or Bill of Rights having approved of some portions but having no particular view about the meaning or desirability of other parts. How can we aggregate the 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, discerning that consensus may require extensive knowledge of a historical period, which may be beyond the reach of anyone but historians specializing in the period. Whether these difficulties can be avoided by seeking the objective meaning of a provision rather than its subjective understanding is not at all clear.

The problems of reconstructing historical viewpoints do not prove that the task is impossible or unimportant. They do suggest, however, that determining the original meaning of a provision may be a much more difficult task than some originalists assume. According to Justice Scalia, one of the basic purposes of originalism is to reduce judicial discretion, thereby limiting the likelihood that judges will read their own values into the Constitution.<sup>10</sup> But methodological problems may make originalism sufficiently flexible to be influenced by a judge's values.

#### Was Originalism the Original Understanding?

The question of originalism can itself be approached from an originalist perspective, by asking whether the framers expected their views to control subsequent interpretation of the Constitution. Although earlier scholars had mentioned this problem, it was investigated in the greatest detail in an influential 1985 article by Professor H. Jefferson Powell.<sup>11</sup>

Powell began by exploring the common law's methods of interpreting various documents such as statutes, wills, and contracts. He argued 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.<sup>12</sup>

Thus, the framing generation would have been more likely to adopt an original understanding approach than an original intent approach. But the methods they would have used to determine the original understanding may not have been settled.

Because the common law adopted 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 Powell, the Federalists took the position that the text would be interpreted like a statute, i.e. on the basis of what the words would mean to a reasonable reader. (This is something like the "original public meaning" variant of originalism today.) Even after the Constitution was in effect, according to Powell, references to historical evidence 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 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 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 not least in value were the records of the Philadelphia convention.<sup>13</sup>

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.

Powell's historical evidence was carefully examined by Professor Charles Lofgren. Lofgren agreed with him about the nature of common law interpretative methods and about Madison's position.<sup>14</sup> The crux of the disagreement between these two scholars relates to timing. Powell believed that the view of interpretation adopted by Madison did not become prevalent until well after ratification. Lofgren argued, 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 agreed that the Convention debates themselves were not considered to have any authority as a source of meaning. Later work by Jack Rakove suggests that Madison's reference to the views of the ratifiers was an innovation forced on him by political circumstances rather than a reflection of his earlier views or of a consensus among the framers about methods of interpretation.<sup>15</sup> Madison also turned to post-enactment practices on occasion to help "fix" the meaning of ambiguous constitutional provisions.

A fair conclusion is that the founding generation did not have a consensus about what methods applied to constitutional interpretation and in particular about the relevance of the debates at the Convention and during ratification. They may not have agreed which canons of interpretation to apply when resolving ambiguity. As one originalist has recently explained, the absence of such a consensus poses a problem because such methods of interpretation "form part of the background against which laws are drafted and understood, and they can greatly affect what a law is taken to say."<sup>16</sup>

The Convention debates have at best a dubious claim as an authoritative source of constitutional interpretation. As we saw earlier in this book, one important concern of the framers was that they had exceeded their authority in proposing such radical constitutional change. Partly in response, they developed the theory that 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 in principle 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, the debates also serve as strong evidence of a reasonable reader's understanding at the time. But even in the framers' own views, the Convention debates were probably not considered authoritative.

However, even when assuming that only the views of the ratifiers count, and taking into account the defective historical record concerning those views, some areas remain 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, originalism might be able to provide *some* answers. That originalism might be difficult to apply in some circumstances does not make it irrelevant in those situations when it can yield more definite answers.

#### Anti-Originalist Clauses

Another argument against originalism, related to that considered in the previous section, 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.

Contrary to the views held by most lawyers today about judicial decision-making, 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.<sup>17</sup>

Chapters 1 and 3 indicate that natural rights theories persisted into the 1780s. Indeed, as we saw in chapter 9, belief in the existence of an unwritten “higher law” continued well into the nineteenth century. Some writers argue that the framers accepted natural law as a judicially enforceable restriction on governmental power.<sup>18</sup>

Recall that the Federalists argued during the ratification debates that a Bill of Rights was unnecessary. This may suggest that the powers granted in Article I carry implicit limitations. Consider, for example, the grant of general legislative authority over the seat of government (now Washington, D.C.). If taken at face value, this grant of power would presumably include the right to establish an official religion in D.C. or allow the use there of torture or Star Chamber proceedings. How could the Federalists argue otherwise, unless they thought the power of general legislation over the district had implicit limitations? If enumerated powers precluded such abuses, it could only mean that those powers themselves had built-in limitations. The framers may well have expected these grants of power to be read against the background of accepted assumptions about natural rights. Thus, the grant of power to Congress to govern the District of Columbia (or other grants, such as the power to regulate interstate commerce) might have been understood to be subject to inherent limitations based on natural law or the law of nations. Such an interpretation may underlie the Federalist argument against the need for a Bill of Rights. Indeed, some of the Federalist arguments rested explicitly on natural rights as inherent limitations.

Chapter 8 shows that the Federalist argument was not considered wholly convincing. One response was the move to add a Bill of Rights immediately after ratification. As chapter 8 also shows, many seemed to view the Bill of Rights as unnecessary. Moreover, one of its provisions lends itself naturally to non-originalist judicial review: the Ninth Amendment. On one interpretation, the Ninth Amendment is a response to widespread concerns that an enumeration of rights might be taken as exclusive. Thus, the Ninth Amendment can be plausibly read as reaffirming the existence of natural rights as checks on governmental powers. To be sure, other readings of the Ninth Amendment are possible. It can be read as a clone of the Tenth Amendment, protecting against the existence of implied federal powers, or as a means of rebutting any argument that the federal Constitution somehow abolished existing statutory or common-law rights. Thus, whether the Ninth Amendment is originalist or anti-originalist is itself a difficult exercise in historical interpretation.

The privileges or immunities clause of the Fourteenth Amendment is another possible source of unenumerated rights. Perhaps the leading spokesman for this argument was Dean John Ely:

[T]he legislative history argument [about the clause] is one neither side can win. It really shouldn't 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 argued that: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” was 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; however there is none at all suggesting that was the only thing 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 after language could have been found had that been the only content intended.<sup>19</sup>

If Ely's historical interpretation was correct, then at least some clauses of the Constitution seem to require judges to protect rights that are not themselves listed in the Constitution. (Another possibility is that the reference to “liberty” in the due process clause provides a basis for protecting non-enumerated rights.) Even if correct, however, that conclusion would leave open an important question: Should these unenumerated rights be limited to the specific natural rights understood at the time, or should evolving notions of human rights play a role? And at what level of generalization should we interpret discussions of natural rights in the framing period? If we look to the understandings of the times to find out precisely what rights were then considered fundamental (and therefore presumably protected by the Ninth Amendment or the privileges or immunities clause), we presumably would not find abortion or homosexual conduct on that list. Yet we might also find broader statements about autonomy or human dignity that could be reinterpreted in light of current social values.

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 the unwritten fundamental rights were static or subject to change.<sup>20</sup> 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. If the Constitution was understood to

embody the higher law, then originalism needs to provide an interpretation of the higher law as well as of specific text. Yet the original understanding of the higher law may be even more elusive than that of specific constitutional language.

#### Levels of Generality

One difficulty of implementing originalism is deciding exactly what level of abstraction to use in interpreting the historical record. At its simplest level, we might consider the "original intent" to be a kind of true-false examination administered to the drafts or to their audience, 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 which would have been given by the framers, for the reasons discussed in the preceding sections. Moreover, some fact-patterns today involve situations that the framers could not have conceivably considered. 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 Internet 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 vulnerable to another 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 out of which a provision arose, the more difficult we may find the task of projecting its meaning into the contemporary world.<sup>21</sup> Hamilton and Madison were not merely modern Americans who suffered from strange spelling and bad plumbing. They had their own set of intellectual assumptions, which were not necessarily identical to our own.

The question of whether the death penalty is a form of cruel and unusual punishment exemplifies some of the problems. Consider the following criticism of the work of Raoul Berger, one of the founders of originalism:

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.<sup>22</sup>

These different approaches to history have potential significance when 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?<sup>23</sup>

Thus, examined 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 lead to a contrary conclusion. It may not necessarily be true "that knowing specific intentions allows one to predict the intenders' values or process of decision over time, even as applied to phenomena very similar to the subjects of the specific intentions."<sup>24</sup>

A crucial question for originalists, then, is to determine the proper level of generality. Does the Eighth Amendment require judges to apply some general concept of "cruel and unusual"? Or does it address only what specific punishments the framers meant to forbid? One answer might be to determine the framers' views about the appropriate level of generality. For example, we might investigate whether the framers expected judges to rely on the general concepts or the specific examples discussed in the debates. But the reality is that the framers probably 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 [originalist] interpreter falls the

unenviable task of ascertaining, for each provision, how much more or less.<sup>25</sup>

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 originalist solution is to specify a non-historical rule for determining the proper level of abstraction. For example, Judge Robert Bork suggested 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."<sup>26</sup> But it is far from clear how this test would be applied or what basis we have for picking the lowest feasible level of generality rather than the highest one.

This problem is a familiar one for lawyers. A judicial opinion deals with the facts of a particular case, but also contains general statements about the law. Knowing how far to take the general statements beyond the facts of the particular case is often far from obvious. Similarly, knowing how far to take the framers' general views beyond the specific settings to which they were addressed can also be difficult.

#### 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. Originalism is unworkable, then, even if the original intent can be reliably determined, because it would make the Constitution itself unworkable. According to Justice 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 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.<sup>27</sup>

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, non-originalists argue that there is only a shaky originalist basis for doctrines such as the application of the Bill of Rights to the states and that the potential impacts of originalism 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.<sup>28</sup>

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 in this chapter, history is often unclear, and originalist arguments can be found for Supreme Court rulings that did not themselves purport to rely on history. So the originalist may be able in good conscience to uphold the correctness of some current constitutional doctrines.

Second, originalism may be tempered by an appreciation of the importance of stability in the law, so that an originalist who finds many current doctrines to be mistaken might nonetheless oppose overruling them. As one originalist said:

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 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. . . . [I]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 analysis. . . .<sup>29</sup>

Except for radicals who want to discard the current fabric of constitutional doctrine completely, devising a workable theory of how

much to respect existing precedents is one of the biggest challenges facing originalists.

Third, an originalist might take into account not only judicial precedents, but also the changing views of those adopting later constitutional provisions. For example, the people who ratified the Fourteenth Amendment's due process clause may well 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. For the Supreme Court to once again change its mind might be considered a form of "bait and switch." 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 under the equal protection clause. After the equal rights amendment failed to obtain ratification, it seems dubious that the Court would feel free to abandon the positions on which the public relied.<sup>30</sup> As with the originalists' treatment of precedent, however, these points could be conceded without abandoning originalism as a general principle.

Non-originalists also argue that interpretation of the Constitution must be flexible to keep constitutional law in tune with changing social needs. 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 whether the courts' performance of constitutional review is the appropriate place to accommodate social change. If people today have broader views of individual rights than 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.

## NORMATIVE ARGUMENTS FOR ORIGINALISM

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 justified in overruling one majority decision only on the basis of another, even more authoritative, majority decision. In exercising judicial review, a judge is merely carrying out 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 historic meaning of its terms. The third argument is that there is no principled alternative to originalism. We will consider these arguments in turn.

### Majoritarianism

Majoritarianism is one of the fundamental underpinnings of originalism. Reduced to its essence, the argument is this: If judges derive authority from the Constitution, and the Constitution derives authority from the majority vote of the ratifiers, then the role of the judge is to carry out the will of the ratifiers.

The late John Ely was not an originalist, but he gave 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 it 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 rights for protection. . . . Thus the judges do not check the people, the Constitution does, which means the people are ultimately checking themselves.<sup>31</sup>

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. We will consider these in turn.

**Democracy as a "Master Norm."** While acknowledging the importance of democracy, a non-originalist might question the status of democracy as the *sole* fundamental norm of our society. Since this response leads to far-reaching inquiries into political theory, we will not pursue it in detail here, but the general argument 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? In this view, individual rights should not be viewed as conflicting with democracy. Rather, majority rule and individual rights are both part of a harmonious vision of democratic government.

Furthermore, some non-originalists argue, 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."<sup>32</sup> Thus, majority-approved policies that deprive some citizens of their right or ability to participate in governance are contrary to the ideal of democracy. On this view, democracy consists of majority rule within a structure of individual rights.

Such a structure is reflected in the Constitution itself (mostly in the Bill of Rights and other amendments). As Justice 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.<sup>33</sup>

Those who recognize that the Constitution does not establish unmodified majoritarianism sometimes talk about the "counter-majoritarian premise" of the Constitution (countering the more

common phrase that judicial rule involves a "counter-majoritarian difficulty.")

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 "pure" majoritarianism may not provide a firm basis to rule out judicial enforcement of human rights beyond the specific understandings of the framers.

**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 population as a whole.<sup>34</sup>

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."<sup>35</sup>

Thus, in seeking a majoritarian source of legitimacy, we perhaps should look not to the vote of the ratifiers but rather to the popular support of the Constitution today. Since most people aren't 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 historical pedigree but also because they think it is a good Constitution and therefore one worthy of continuing support. 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 tied to its origins but one that also makes it worthy of continuing allegiance.

**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 unelected federal judges—the

so-called counter-majoritarian difficulty. 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 in 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. Other aspects of the judicial system may also be conducive to principled decision-making. Examples include the use of multimember appellate courts, trial records compiled with elaborate evidentiary rules, and the limitation of judicial power to deciding concrete disputes. 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 on judges to do so for them. Recall from part 1 of the book that various framers expected other branches of government, the Senate and the executive, to take the long view. Query whether those expectations have been fulfilled.

Although a great deal has been written about these issues, the conclusions seem fairly clear. Federal courts are not as unresponsive to the public as they first appear, but they are still less democratic than the other branches. Thus originalists are wrong to paint too stark a contrast between courts and the other branches, while some non-originalists are wrong to downplay the contrast too much. Similarly, federal courts have some advantage as forums in which to decide matters of principle relating to individual rights, but perhaps not as many as people generally believe. So non-originalists may be wrong to paint too stark a contrast on this basis, while originalists may underestimate the advantages of courts. On balance, courts probably offer some gain in principled decision-making at the expense of some loss of responsiveness to the political process. 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 the issue, 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 non-originalists' replies are not insubstantial.

### Textualism

Originalism can also be based on a broader theory of interpretation, one that 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.<sup>36</sup>

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.

Still, while the Constitution is a text, it is a very special kind of text.<sup>37</sup> Unlike most texts, it was written by one group of people for adoption by another, and then amended over two centuries by yet other groups. Furthermore, as we have seen, its various authors and adopters may perhaps have intended that the text refer to norms outside itself. All of this makes it more difficult to identify a specific set of authors or a specific audience whose viewpoint should control. More fundamentally, the Constitution plays a unique role in our culture, not only giving a set of instructions but literally constituting our national identity. Given that unique role, a special approach to constitutional interpretation could well be appropriate.

Moreover, it would be a mistake to assume that we have a well-established general theory of meaning that can be deployed here. 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 our present purpose. Indeed, the complexity and subtlety of the debate caution against any expectation that general theories of interpretation will provide simple means of resolving the dispute about originalism.

As in many debates, one of the most difficult problems of assessing originalism is deciding just what is in dispute. What kind of meaning are originalists searching for? Increasingly, advocates of originalism

maintain that what they seek is not the subjective understanding of the framers:

[A leading non-originalist] 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.<sup>38</sup>

Yet, the author of this passage champions the “attempt to understand the Constitution according to the intention of those who conceived it.”<sup>39</sup> But at this point, the precise meaning of originalism becomes a bit murky.

Some originalists insist that the point of interpretation is simply to understand the objective meaning of the words in their surrounding context. But the idea of the “objective meaning of words in their surrounding context” is not exactly clear, which is why theories of interpretation are so heavily debated. Moreover, it is unclear whether this form of textualism remains originalist in any important way, except in the unusual case where the meaning of a word has changed completely. Indeed, as one advocate of this form of interpretation has said, “[t]he originalist part of textualism . . . is likely to be of limited importance for a reason that is so basic that it is easy to forget: the English language has not changed much during the history of the United States. . . . Madison did not live in our time, but he did speak our language.”<sup>40</sup> At this point, originalism seems to have become secondary to the theory of interpretation.

#### 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 we can only touch on them 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:

“[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.<sup>41</sup>

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 promote the democratic process falters in the light of the lack of agreement on any precise understanding of democracy.

As one commentator 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 choices 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.<sup>42</sup>

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.”

Both originalists and non-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.

## ENDNOTES

1. See, e.g., Murray Dry, *Federalism and the Constitution: The Founders' Design and Contemporary Constitutional Law*, 4 *Constit. Commentary* 233, 233-34 (1987). For a summary of the arguments for originalism, see Ead M. Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 *Constit. Commentary* 43 (1987).
2. Vasan Kesavan and Michael Stokes Paulsen, *The Interpretative Force of the Constitution's Secret Drafting History*, 91 *Geo. L.J.* 1113, 1144 (2003). For another version of this position, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *Loyola L. Rev.* 611 (1999).
3. An even looser use of the term "originalist" might include anyone who believes that the starting point of analysis should always be historical but that historical evidence 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 many non-originalists.
4. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. Rev.* 204, 229 (1980) [*Misconceived Quest*].
5. Ruth Bader Ginsburg, *Limiting Judicial Activism*, 15 *Ga. L. Rev.* 539, 546 (1981).
6. James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 *Tex. L. Rev.* 1, 33-34 (1986).
7. *Id.* at 22-24.
8. *Id.* at 36.
9. William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 *Va. L. Rev.* 1237, 1250-51 (1986).
10. For an overview of Scalia's approach, see Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997).
11. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *Harv. L. Rev.* 885 (1985).
12. *Id.* at 895-98.
13. *Id.* at 937-38.
14. Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 *Constit. Commentary* 77 (1988).
15. See Jack N. Rakove, *The Original Intention of Original Understanding*, 13 *Constit. Comm.* 159 (1996).
16. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 *U. Chi. L. Rev.* 519, 520 (2003).
17. Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 *U. Chi. L. Rev.* 1127, 1145-46 (1987).
18. See *id.*; Thomas C. Grey, *The Original Understanding and the Unwritten Constitution*, in Neil L. York, ed., *Toward A More Perfect Union: Six Essays on the Constitution* 145 (1988).
19. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 27-28 (1980) (emphasis in original) [*Democracy and Distrust*].
20. See Henry P. Monaghan, *Our Perfect Constitution*, 56 *N.Y.U. L. Rev.* 353, 367 (1981) [*Perfect Constitution*].
21. 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." Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretation and Neutral Principles*, 96 *Harv. L. Rev.* 781, 798 (1983).
22. David A. J. Richards, *Interpretation and Historiography*, 58 *S. Cal. L. Rev.* 489, 513-14 (1985).
23. *Id.* at 514-15.
24. Robert W. Bennett, *Objectivity in Constitutional Law*, 132 *U. Pa. L. Rev.* 445, 463 (1984).
25. Brest, *Misconceived Quest*, at 217.
26. Robert Bork, *The Constitution, Original Intent, and Economic Rights*, 23 *San Diego L. Rev.* 823, 828 (1986).
27. William Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 *S. Tex. L. Rev.* 433, 438 (1986) [*Contemporary Ratification*]. For the contrasting view of another justice, see William H. Rehnquist, *The Idea of a Living Constitution*, 54 *Tex. L. Rev.* 693 (1976).
28. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *Stan. L. Rev.* 703, 711-14 (1975) (emphasis in original).
29. Monaghan, *Perfect Constitution*, at 382.
30. For some other illustrations, see Akhil R. Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 *Yale L. J.* 281, 291-92 (1987).
31. Ely, *Democracy and Distrust*, at 5-8.
32. Amy Gutmann, *Democratic Education*, at xi (1987).
33. *West Virginia Board of Educ. v. Barnette*, 319 *U.S.* 624, 638 (1943).
34. Brest, *Misconceived Quest*, at 230.
35. *Id.* at 225.
36. Ely, *Democracy and Distrust*, at 3.
37. See Stephen R. Munzer & James W. Nickel, *Does the Constitution*

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- Mean What It Always Meant?*, 77 Colum. L. Rev. 1029, 1044 (1977).
38. Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 Harv. L. Rev. 751, 758-59 (1987).
39. *Id.* at 756.
40. John Harrison, *Law and Truth: Panel II: Originalism and Historical Truth*, 26 Harv. J.L. & Pub. Pol'y 83 (2003).
41. Ely, *Democracy and Distrust*, at 50-58 (emphasis in original).
42. Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L. J. 1063, 1096 (1981).