

and rarely to contain the only (or even the most) plausible rendering of the Constitution. Yet there is also a profound irrelevance to such a criticism. Not only does it assume the existence of a privileged discourse that allows me to dismiss Marshall as "untruthful" rather than merely different, it also ignores the fundamental fact that John Marshall is as much a "founder" of the American legal system as those who wrote the Constitution he purported to interpret. He is, perhaps, the great Nietzschean judge of our tradition.

## D. ORIGINAL INTENT

### PAUL BREST, THE MISCONCEIVED QUEST FOR THE ORIGINAL UNDERSTANDING

60 B.U.L.Rev. 204, 204-09, 214-24, 231-34 (1980).

By "originalism" I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.<sup>1</sup> At least since *Marbury*, in which Chief Justice Marshall emphasized the significance of our Constitution's being a written document, originalism in one form or another has been a major theme in the American constitutional tradition. The most widely accepted justification for originalism is simply that the Constitution is the supreme law of the land. The Constitution manifests the will of the sovereign citizens of the United States—"we the people" assembled in the conventions and legislatures that ratified the Constitution and its amendments. The interpreter's task is to ascertain their will. Originalism may be supported by more instrumental rationales as well: Adherence to the text and original understanding arguably constrains the discretion of decisionmakers and assures that the Constitution will be interpreted consistently over time.

The most extreme forms of originalism are "strict textualism" (or literalism) and "strict intentionalism." A strict textualist purports to construe words and phrases very narrowly and precisely. For the strict intentionalist, "the whole aim of construction, as applied to a provision of the Constitution, is \* \* \* to ascertain and give effect to the intent of its framers and the people who adopted it."<sup>2</sup>

Much of American constitutional interpretation rejects strict originalism in favor of what I shall call "moderate originalism." The text of

61. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (invocation of American nationalism).

1. John Ely uses the term "interpretivism" to describe essentially the same concept. J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, chs. 1-2 (1980). At the cost of proliferating neologisms I have decided to stick with "originalism." Virtually all modes of constitutional decisionmaking, including those endorsed by

Professor Ely, require interpretation. The differences lie in what is being interpreted, and I use the term "originalism" to describe the interpretation of text and original history as distinguished, for example, from the interpretation of precedents and social values.

2. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting).

the Constitution is authoritative, but many of its provisions are treated as inherently open-textured. The original understanding is also important, but judges are more concerned with the adopters' general purposes than with their intentions in a very precise sense.

Some central doctrines of American constitutional law cannot be derived even by moderate originalist interpretation, but depend, instead, on what I shall call "nonoriginalism." The modes of nonoriginalist adjudication defended in this article accord the text and original history presumptive weight, but do not treat them as authoritative or binding. The presumption is defeasible over time in the light of changing experiences and perceptions.

\* \* \*

PART ONE: THE CONCEPTS AND METHODS OF ORIGINALISM

\* \* \*

I. *Textualism*

Textualism takes the language of a legal provision as the primary or exclusive source of law (a) because of some definitional or supralegal principle that only a written text can impose constitutional obligations, or (b) because the adopters intended that the Constitution be interpreted according to a textualist canon, or (c) because the text of a provision is the surest guide to the adopters' intentions. The last of these, probably the central rationale for an originalist-based textualism, is sometimes stated as a preamble to textualist canons. For example:

It is a cardinal rule in the interpretation of constitutions that the instrument must be so construed as to give effect to the intention of the people, who adopted it. This intention is to be sought in the Constitution itself, and the apparent meaning of the words employed is to be taken as expressing it, except in cases where that assumption would lead to absurdity, ambiguity, or contradiction.<sup>8</sup>

Implicit in the preceding quotation is a canon of interpretation paradigmatic of textualism—the so-called "plain meaning rule." Chief Justice Marshall invoked this canon in *Sturges v. Crowningshield*:

[A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words \* \* \*. [I]f, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.<sup>9</sup>

8. H. Black, *Handbook on the Construction and Interpretation of the Laws* 20 (1911).

9. 17 U.S. (4 Wheat.) 202–03 (1819).

The plain meaning of a text is the meaning that it would have for a "normal speaker of English" under the circumstances in which it is used. Two kinds of circumstances seem relevant: the linguistic and the social contexts. The linguistic context refers to vocabulary and syntax. The social context refers to a shared understanding of the purposes the provision might plausibly serve.

A tenable version of the plain meaning rule must take account of both of these contexts. The alternative, of applying a provision according to the literal meanings of its component words, misconceives the conventions that govern the use of language. Chief Justice Marshall argued this point eloquently and, I think, persuasively, in *McCulloch v. Maryland*,<sup>13</sup> decided the same year that he invoked the plain meaning rule in *Sturges*. The state had argued that the necessary and proper clause authorized only legislation "indispensable" to executing the enumerated powers. Marshall responded with the observation that the word "necessary," as used "in the common affairs of the world, or in approved authors, \* \* \* frequently imports no more than that one thing is convenient, or useful, or essential to another."<sup>14</sup> He continued:

Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies \* \* \*. This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.<sup>15</sup>

As Marshall implied, to attempt to read a provision without regard to its linguistic and social contexts will either yield unresolvable indeterminacies of language or just nonsense. Without taking account of the possible purposes of the provisions, an interpreter could not, for example, decide whether singing, flag-waving, flag-burning, picketing, and criminal conspiracy are within the protected ambit of the first amendment's "freedom of speech," or whether the "writings" protected by the copyright clause include photographs, paintings, sculptures, performances, and the contents of phonograph records. She would not know whether the phrase, "No person except a natural born Citizen \* \* \* shall be eligible to the Office of President," disqualified persons born abroad or those born by Caesarian section. We understand the range of plausible meanings of provisions only because we know that some interpretations respond to the kinds of concerns that the adopters' society might have while others do not.

13. 17 U.S. (4 Wheat.) 316 (1819).

15. *Id.* at 414-15.

14. *Id.* at 413.

That an interpreter must read a text in the light of its social as well as linguistic context does not destroy the boundary between textualism and intentionalism. Just as the textualist is not concerned with the adopters' idiosyncratic use of language, she is not concerned with their subjective purposes. Rather, she seeks to discern the purposes that a member of the adopters' society would understand the provision to encompass.

Suppose that phrases such as "commerce among the several states," or "freedom of speech," or "equal protection of the laws," have quite different meanings today than when they were adopted. An originalist would hold that, because interpretation is designed to capture the original understanding, the text must be understood in the contexts of the society that adopted it: "The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."<sup>21</sup>

When a provision is interpreted roughly contemporaneously with its adoption, an interpreter unconsciously places the provision in its linguistic and social contexts, which she has internalized simply because she is of that society. But she cannot assume that a provision adopted one or two hundred years ago has the same meaning as it had for the adopters' society today. She must immerse herself in their society to understand the text as they understood it. Although many provisions of the Constitution may pose no serious interpretive problems in this respect, the textualist interpreter cannot be sure of this without first understanding the ordinary usage at the time of adoption. Did "commerce" include manufacture as well as trade? Did the power to "regulate" commerce imply the power to prohibit it? Did the power to "regulate commerce among the several states" include the power to regulate intrastate transactions which affected interstate commerce? With what absoluteness did 18th century Americans understand the prohibitions against "impairing" contractual obligations and "abridging the freedom of speech?" What did the words "privileges," "immunities," "due process," "equal protection of the laws," "citizen," and "person" mean to those who adopted the fourteenth amendment in 1868?

Despite the differences between textualism and intentionalism, placing a constitutional provision in its original contexts calls for a historical inquiry quite similar to the intentionalist interpreter's. \* \* \*

## II. *Intentionalism*

By contrast to the textualist, the intentionalist interprets a provision by ascertaining the intentions of those who adopted it. The text of the provision is often a useful guide to the adopters' intentions, but the text does not enjoy a favored status over other sources. \* \* \*

\* \* \*

21. T.M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of The*

*American Union* 124 (Carrington's 8th ed. 1927) (n.p. 1868). \* \* \*

### 1. *Who Are the Adopters?*

The adopters of the Constitution of 1787 were some portion of the delegates to the Philadelphia Convention and majorities or supermajorities of the participants in the ratifying conventions in nine states. For all but one amendment to the Constitution,<sup>35</sup> the adopters were two-thirds or more of the members of each House of Congress and at least a majority of the legislators in [three-fourths] of the state legislatures.

For a textual provision to become part of the Constitution, the requisite number of persons in each of these bodies must have assented to it. Likewise, an intention can only become binding—only become an institutional intention—when it is shared by at least the same number and distribution of adopters. (Hereafter, I shall refer to this number and distribution as the “adopters.”)

If the only way a judge could ascertain institutional intent were to count individual intention-votes, her task would be impossible even with respect to a single multimember law-making body, and a fortiori where the assent of several such bodies were required. Therefore, an intentionalist must necessarily use circumstantial evidence to educe a collective or general intent.

Interpreters often treat the writings or statements of the framers of a provision as evidence of the adopters' intent. This is a justifiable strategy for the moderate originalist who is concerned with the framers' intent on a relatively abstract level of generality—abstract enough to permit the inference that it reflects a broad social consensus rather than notions peculiar to a handful of the adopters. It is a problematic strategy for the strict originalist.

As the process of adoption moves from the actual framers of a constitutional amendment to the members of Congress who proposed it to the state legislators who ratified it, the amount of thought given the provision surely diminishes—especially if it is relatively technical or uncontroversial, or one of several of disparate provisions (*e.g.*, the Bill of Rights) adopted simultaneously. This suggests that there may be instances where a framer had a determinate intent but other adopters had no intent or an indeterminate intent. For example, suppose that the framers of the commerce clause considered the possibility that economic transactions taking place within the confines of a state might nonetheless affect interstate commerce in such a way as to come within the clause, and that they intended the clause to cover such transactions. But suppose that most of the delegates to the ratifying conventions did not conceive of this possibility and that either they “did not intend” that the clause encompass such transactions or else their intentions were indeterminate. Under these circumstances, what is the institutional intent, *i.e.*, the intent of the provision?

If the intent of the framers is to be attributed to the provision, it must be because the other adopters have in effect delegated their

35. The twenty-first amendment was ratified by state conventions.

Garvey, *Mod. Const. Theory* 3E—6

intention-votes to the framers. Leaving aside the question whether the adopters-at-large had any thoughts at all concerning this issue of delegation, consider what they might have desired if they had thought about it. Would they have wanted the framers' intentions to govern without knowing what those intentions were? The answers might well differ depending on whether the adopters had "no intent" or "indeterminate intent."

A delegate to a ratifying convention might well want his absence of intention (*i.e.*, "no-intent") regarding wholly intrastate transactions to be treated as a vote against the clause's encompassing such transactions (*i.e.*, "intent-not"): Since no-intent is the intentionalist equivalent of no-text, to accede to the framers' unknown intentions would be tantamount to blindly delegating to them the authority to insert textual provisions in the Constitution.

Where the framers intend that the activity be covered by the clause, and the adopters' intentions are merely indeterminate, the institutional intent is ambiguous. One adopter might wish his indeterminate intent to be treated as "no intent." Another adopter might wish to delegate his intention-vote to those whose intent is determinate. Yet another might wish to delegate authority to decisionmakers charged with applying the provision in the future. Without knowing more about the mindsets of the actual adopters of particular constitutional provisions, one would be hard-pressed to choose among these.

### 2. *The Adopters' Interpretive Intent*

The intentionalist interpreters' first task must be to determine the interpretive intentions of the adopters of the provision before her—that is the canons by which the adopters intended their provisions to be interpreted. The practice of statutory interpretation from the 18th through at least the mid-19th century suggests that the adopters assumed—if they assumed anything at all—a mode of interpretation that was more textualist than intentionalist. The plain meaning rule was frequently invoked: judicial recourse to legislative debates was virtually unknown and generally considered improper. Even after references to extrinsic sources became common, courts and commentators frequently asserted that the plain meaning of the text was the surest guide to the intent of the adopters.

This poses obvious difficulties for an intentionalist whose very enterprise is premised on fidelity to the original understanding.

### 3. *The Intended Specificity of a Provision*

I now turn to an issue that lies at the intersection of what I have called interpretive and substantive intent: How much discretion did an adopter intend to delegate to those charged with applying a provision? Consider, for example, the possible intentions of the adopters of the cruel and unusual punishment clause of the eighth amendment. They might have intended that the language serve only as a shorthand for the Stuart tortures which were their exemplary applications of the clause. Somewhat more broadly, they might have intended the clause to be under-

stood to incorporate the principle of *ejusdem generis*—to include their exemplary applications and other punishments that they found or would have found equally repugnant.<sup>41</sup>

What of instances where the adopters' substantive intent was indeterminate—where even if they had adverted to a proposed application they would not have been certain how the clause should apply? Here it is plausible that—if they *had* a determinate interpretive intent—they intended to delegate to future decisionmakers the authority to apply the clause in light of the general principles underlying it. To use Ronald Dworkin's terms, the adopters would have intended future interpreters to develop their own "conceptions" of cruel and unusual punishment within the framework of the adopters' general "concept" of such punishments.<sup>42</sup>

What of a case where the adopters viewed a certain punishment as not cruel and unusual? This is not the same as saying that the adopters "intended not to prohibit the punishment." For even if they expected their laws to be interpreted by intentionalist canons, the adopters may have intended that their own views not always govern. Like parents who attempt to instill values in their child by both articulating and applying a moral principle, they may have accepted, or even invited, the eventuality that the principle would be applied in ways that diverge from their own views.<sup>43</sup> The adopters may have understood that, even as to instances to which they believe the clause ought or ought not to apply, further thought by themselves or others committed to its underlying principle might lead them to change their minds. Not believing in their own omniscience or infallibility, they delegated the decision to those charged with interpreting the provision. If such a motivation is plausible with respect to applications of the clause in the adopters' contemporary society, it is even more likely with respect to its application by future interpreters, whose understanding of the clause will be affected by changing knowledge, technology, and forms of society.

The extent to which a clause may be properly interpreted to reach outcomes different from those actually contemplated by the adopters depends on the relationship between a general principle and its exemplary applications. 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.

\* \* \*

41. On a rather restrictive view, "would have found" means that, although the adopters did not advert to a punishment, they nonetheless intended that it be prohibited.

42. R. Dworkin, *Taking Rights Seriously* 135 (1977).

43. See *id.* at 134.

#### IV. *The Interpreter-Historian's Task*

The interpreter's task as historian can be divided into three stages or categories. First, she must immerse herself in the world of the adopters to try to understand constitutional concepts and values from their perspective. Second, at least the intentionalist must ascertain the adopters' interpretive intent and the intended scope of the provision in question. Third, she must often "translate" the adopters' concepts and intentions into our time and apply them to situations that the adopters did not foresee.

The first stage is common to originalists of all persuasions. Although the textualist's aim is to understand and apply the language of a constitutional provision, she must locate the text in the linguistic and social contexts in which it was adopted. \* \* \* The intentionalist would ideally count the intention-votes of the individual adopters. In practice, she can at best hope to discover a consensus of the adopters as manifested in the text of the provision itself, the history surrounding its adoption, and the ideologies and practices of the time.

The essential difficulty posed by the distance that separates the modern interpreter from the objects of her interpretation has been succinctly stated by Quentin Skinner in addressing the analogous problem facing historians of political theory:<sup>52</sup>

[I]t will never in fact be possible simply to study what any given classic writer has *said* \* \* \* without bringing to bear some of one's own expectations about what he must have been saying \* \* \*. [T]hese models and preconceptions in terms of which we unavoidably organize and adjust our perceptions and thoughts will themselves tend to act as determinants of what we think or perceive. We must classify in order to understand, and we can only classify the unfamiliar in terms of the familiar. The perpetual danger, in our attempts to enlarge our historical understanding, is thus that our expectations about what someone must be saying or doing will themselves determine that we understand the agent to be doing something which he would not—or even could not—himself have accepted as an account of what he *was* doing.

To illustrate the problem of doing original history with even a single example would consume more space than I wish to here. Instead, I suggest that a reader who wants to get a sense of the elusiveness of the original understanding study some specific areas of constitutional history, reading both works that have been well received,<sup>54</sup> and also the controversy surrounding some of those that have not.<sup>55</sup>

52. Skinner, *Meaning and Understanding in the History of Ideas*, 8 *Hist. & Theory* 3[1, 6] (1969). \* \* \*

54. See, e.g., C. Fairman, *Reconstruction and Reunion, 1864-88*, Pt. 1 (1971); L. Levy, *Origins of the Fifth Amendment* (1968); L. Levy, *Legacy of Suppression* (1960). See also I. Brandt, *The Life of*

James Madison (1941-61); G. Wood, *The Creation of the American Republic, 1776-87* (1969).

55. A recent example is Raoul Berger's *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977), which argues that almost of all the



The intentionalist interpreter must next ascertain the adopters' interpretive intent and the intended breadth of their provisions. That is, she must determine what the adopters intended future interpreters to make of their substantive views. Even if she can learn how the adopters intended contemporary interpreters to construe the Constitution, she cannot assume they intended the same canons to apply one or two hundred years later. Perhaps they wanted to bind the future as closely as possible to their own notions. Perhaps they intended a particular provision to be interpreted with increasing breadth as time went on. Or—more likely than not—the adopters may have had no intentions at all concerning these matters.<sup>57</sup>

For purposes of analytic clarity I have distinguished between (1) the adopters' interpretive intent and the intended scope of a provision and (2) their substantive intent concerning the application of the provision. If interpretive intent and intended scope can be ascertained at all, they may instruct the interpreter to adopt different canons of interpretation than she would prefer. Under these circumstances, the intentionalist interpreter may wish to ignore these intentions and limit her inquiry to the adopters' substantive intentions. Leaving aside the normative difficulty of such selective infidelity, this is a problematic strategy: To be a coherent theory of interpretation, intentionalism must distinguish between the adopters' personal *views* about an issue and their *intentions* concerning its constitutional resolution. And it is only by reference to their interpretive intent and the intended scope of a provision that this distinction can be drawn.

The interpreter's final task is to translate the adopters' intentions into the present in order to apply them to the question at issue. Consider, for example, whether the cruel and unusual punishment clause of the eighth amendment prohibits the imposition of the death penalty today. The adopters of the clause apparently never doubted that the death penalty was constitutional. But was death the same event for inhabitants of the American colonies in the late 18th century as it is two centuries later? Death was not only a much more routine and public phenomenon then, but the fear of death was more effectively contained within a system of religious belief.<sup>60</sup> Twentieth-century Americans have a more secular cast of mind and seem less willing to accept this dreadful, forbidden, solitary, and shameful event.<sup>61</sup> The interpreter must there-

Supreme Court's decisions under the fourteenth amendment are incorrect. See, e.g., Kutler, *Raoul Berger's Fourteenth Amendment: A History or Ahistorical*, 6 *Hastings Const.L.Q.* 511 (1979); Murphy, Book Review, 87 *Yale L.J.* 1752 (1978); Soifer, Review Essay, 54 *N.Y.U.L.Rev.* 651 (1979). But see Perry, Book Review, 78 *Colum.L.Rev.* 685 (1978).

57. In any case, the adopters' sense of time and change—of the relationship between present and future—was almost certainly not the same as ours, which has been

affected by such phenomena as the industrial revolution, theories of evolution, relativity and quantum mechanics, and the possibility of annihilation.

60. See P. Aries, *Western Attitudes Toward Death* 11–13 (1974); D. Stannard, *The Puritan Way of Death* 93 (1977).

61. See *Death in American Experience* 102 (A. Mack ed. 1973); P. Aries, *supra* note 60, at 85–86.

fore determine whether we view the death penalty with the same attitude—whether of disgust or ambivalence—that the adopters viewed their core examples of cruel and unusual punishment.<sup>62</sup>

Intentionalist interpretation frequently requires translations of this sort. For example, to determine whether the commerce clause applies to transactions taking place wholly within the boundaries of one state, or whether the first amendment protects the mass media, the interpreter must abstract the adopters' concepts of federalism and freedom of expression in order to find their analogue in our contemporary society with its different technology, economy, and systems of communication. The alternative would be to limit the application of constitutional provisions to the particular events and transactions with which the adopters were familiar. Even if such an approach were coherent, however, it would produce results that even a strict intentionalist would likely reject: Congress could not regulate any item of commerce or any mode of transportation that did not exist in 1789; the first amendment would not protect any means of communication not then known.

However difficult the earlier stages of her work, the interpreter was only trying to understand the past. The act of translation required here is different in kind, for it involves the counterfactual and imaginary act of projecting the adopters' concepts and attitudes into a future they probably could not have envisioned. When the interpreter engages in this sort of projection, she is in a fantasy world more of her own than of the adopters' making.

\* \* \*

Even when the interpreter performs the more conventional historian's role, one may wonder whether the task is possible. There is a hermeneutic tradition, of which Hans-George Gadamer is the leading modern proponent, which holds that we can never understand the past in its own terms, free from our prejudices or preconceptions.<sup>65</sup> We are hopelessly imprisoned in our own world-views; we can shed some preconceptions only to adopt others, with no reason to believe that they are the conceptions of the different society that we are trying to understand. One need not embrace this essentially solipsistic view of historical knowledge to appreciate the indeterminate and contingent nature of the historical understanding that an originalist historian seeks to achieve.

None of this is to disparage doing history and other interpretive social science. It suggests, however, that the originalist constitutional historian may be questing after a chimera. The defense that "We're doing the best we can" is no less available to constitutional interpreters

62. See Granucci, "Nor Cruel and Unusual Punishment Inflicted": *The Original Meaning*, 57 Calif.L.Rev. 839 (1969).

65. See Hans-Georg Gadamer, *Truth and Method* (Eng. trans. 1975). See also P. Winch, *The Idea of a Social Science and its*

*Relation to Philosophy* (1958); Taylor, *Interpretation and the Sciences of Man*, 25 *Rev. of Metaphysics* 3 (1971). For a sharply critical review of Gadamer's work, see E.D. Hirsch, *Validity in Interpretation* 245 (1967).

than to anyone else. But the best is not always good enough. The interpreter's understanding of the original understanding may be so indeterminate as to undermine the rationale for originalism. Although the origins of some constitutional doctrines are almost certainly established, the historical grounding of many others is quite controversial. It seems peculiar, to say the least, that the legitimacy of a current doctrine should turn on the historian's judgment that it seems "more likely than not," or even "rather likely," that the adopters intended it some one or two centuries ago.

#### V. *Two Types of Originalism*

The originalist interpreter can approach her task with different attitudes about the precision with which the object of interpretation—the text [or] intentions \* \* \*—should be understood. In this section I describe the attitudes of "strict" and "moderate" originalism—two areas, not points, on a spectrum—and briefly survey the practices of American constitutional decisionmaking in terms of them.

I have devoted very little attention to the most extreme form of strict textualism—literalism. A thorough-going literalist understands a text to encompass all those and only those instances that come within its words read without regard to its social or perhaps even its linguistic context. Because literalism poorly matches the ways in which we speak and write, it is unable to handle the ambiguity, vagueness, and figurative usage that pervade natural languages, and produces embarrassingly silly results.

Strict intentionalism requires the interpreter to determine how the adopters would have applied a provision to a given situation, and to apply it accordingly. The enterprise rests on the questionable assumption that the adopters of constitutional provisions intended them to be applied in this manner. But even if this were true, the interpreter confronts historiographic difficulties of such magnitude as to make the aim practicably unattainable.

Strict textualism and intentionalism are not synergistic, but rather mutually antagonistic approaches to interpretation. The reader need only consider the strict textualist's and intentionalist's views of the first amendment protection of pornographic literature. By contrast, moderate textualism and intentionalism closely resemble each other in methodology and results.

A moderate textualist takes account of the open-textured quality of language and reads the language of provisions in their social and linguistic contexts. A moderate intentionalist applies a provision consistent with the adopters' intent at a relatively high level of generality, consistent with what is sometimes called the "purpose of the provision." Where the strict intentionalist tries to determine the adopters' actual subjective purposes, the moderate intentionalist attempts to understand what the adopters' purposes might plausibly have been, an aim far more

readily achieved than a precise understanding of the adopters' intentions.

\* \* \*

Strict originalism cannot accommodate most modern decisions under the Bill of Rights and the fourteenth amendment, or the virtually plenary scope of congressional power under the commerce clause. Although moderate originalism is far more expansive, some major constitutional doctrines lie beyond its pale as well.

A moderate textualist would treat almost all contemporary free speech and equal protection decisions as within the permissible ambit of these clauses, though not necessarily entailed by them. Because of our uncertainty about the original understanding, it is harder to assess the legitimacy of these doctrines from the viewpoint of a moderate intentionalist. For example, the proper scope of the first amendment depends on whether its adopters were only pursuing "representation reinforcing" goals,<sup>70</sup> or were more broadly concerned to promote a free marketplace of ideas or individual autonomy.<sup>71</sup> The level of generality on which the adopters conceived of the equal protection clause presents a similar uncertainty, but whether or not a moderate intentionalist could accept all of the "new" or "newer" equal protection,<sup>72</sup> she could read the clause to protect "discrete and insular minorities" besides blacks.

On the other hand, a moderate originalist, whether of textualist or intentionalist persuasion, would have serious difficulties justifying (1) the incorporation of the principle of equal protection into the fifth amendment,<sup>73</sup> (2) the incorporation of provisions of the Bill of Rights into the fourteenth amendment,<sup>74</sup> (3) the more general notion of substantive due process, including the minimal rational relationship standard,<sup>75</sup> and (4) the practice of judicial review of congressional legislation established by *Marbury v. Madison*.<sup>76</sup> \* \* \*

\* \* \*

70. See J.H. Ely, *supra* note 1, at chs. 4-6. See also *Mills v. Alabama*, 384 U.S. 214, 218-20 (1966) \* \* \*.

71. See, e.g., J.S. Mill, *On Liberty* (1859); Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U.Pa.L.Rev. 45 (1974); Scanlon, *A Theory of Free Expression*, 1 Phil. & Pub. Affairs 204 (1972).

72. See generally, [P. Brest, *Processes of Constitutional Decisionmaking* 809-93 (1975)]; Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv.L.Rev. 1 (1972).

73. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Bolling v. Sharpe*, 347 U.S. 497 (1954); Linde, *Judges, Critics, and the Realist Tradition*, 82 Yale L.J. 227, 233-34 (1972).

74. Compare Justice Black's and Justice Frankfurter's views in *Adamson v. California*, 332 U.S. 46 (1947). See also L. Levy, *The Fourteenth Amendment and the Bill of Rights in Judgments: Essays on American Constitutional History* 64 (1972); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan.L.Rev. 5 (1949); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 Stan.L.Rev. 140 (1949).

75. See, e.g., R. Berger, *supra* note 55; C. Fairman, *supra*, note 54, at 1207 \* \* \*.

76. See L. Boudin, *Government by Judiciary* (1932); A. Westin, *Introduction and Historical Bibliography to C. Beard, The Supreme Court and the Constitution* (1912); *Judicial Review and the Supreme*

Moderate originalism is a perfectly sensible strategy of constitutional decisionmaking. But its constraints are illusory and counterproductive. Contrary to the moderate originalist's faith, the text and original understanding have contributed little to the development of many doctrines she accepts as legitimate. Consider the relationship between the original understanding of the fourteenth amendment and current doctrines prohibiting gender-based classifications<sup>103</sup> and discriminations in the political process.<sup>104</sup> For the moderate originalist these may be legitimately premised on the equal protection clause. But to what extent have originalist sources *guided* the evolution of these doctrines? The text is wholly open-ended; and if the adopters had any intentions at all about these issues, their resolution was probably contrary to the Court's. At most, the Court can claim guidance from the general notion of equal treatment reflected in the provision. I use the word "reflected" advisedly, however, for the equal protection clause does not establish a principle of equality; it only articulates and symbolizes a principle defined by our conventional public morality. Indeed, because of its indeterminacy, the clause does not offer much guidance even in resolving particular issues of discrimination based on race.<sup>105</sup>

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In sum, if you consider the evolution of doctrines in just about any extensively-adjudicated area of constitutional law—whether "under" the commerce, free speech, due process, or equal protection clauses—explicit reliance on originalist sources has played a very small role compared to the elaboration of the Court's own precedents. It is rather like having a remote ancestor who came over on the Mayflower.

#### RICHARD S. KAY, ADHERENCE TO THE ORIGINAL INTENTIONS IN CONSTITUTIONAL ADJUDICATION: THREE OBJECTIONS AND RESPONSES

82 Nw.U.L.Rev. 226, 228-30, 236, 242-57, 259, 284-92 (1988).

This essay will critically examine the reasons given by modern scholars for rejecting the conventional norm of judicial review—adherence to the original intentions of the Constitution's enactors. While variously phrased, their reasons may be subsumed under three general objections: 1) Adherence to the original intentions is impossible; 2) It is self-contradictory; and 3) It is wrong.

While there is some force in each of these objections, I conclude that the first two are unconvincing and the third depends on personal

Court 1-12 (Levy ed. 1967). *But see* R. Berger, *Congress v. The Supreme Court* (1969); E. Corwin, *Court Over Constitution* (1938); Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 Mich. L.Rev. 538 (1914) \* \* \*.

103. *E.g.*, *Craig v. Boren*, 429 U.S. 190 (1976).

104. *E.g.*, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

105. *See* *Brown v. Board of Educ.*, 347 U.S. 483, 489-91 (1954); Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv.L.Rev. 1 (1955); Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 Mich.L.Rev. 1049 (1956).