Selected Theories of Constitutional Interpretation

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Summary

The United States Constitution, as amended, is a complex legal document which sets out the structure of the federal government, the legal authorities of that government (and, to a lesser extent, state governments), and, finally, a series of legal disabilities on the exercise of those authorities (such as protections for individual rights). The document also addresses the complicated legal relationship between the federal government, state governments, and the persons subject to their respective jurisdictions. Judicial interpretation of some of the Constitution's provisions, however, has varied over the last two centuries, leading to concerns regarding the ultimate validity of these decisions.

Whether it is necessary to have a unified method of constitutional interpretation to analyze all aspects of the Constitution is itself a matter of debate. For instance, there would appear to be some constitutional questions that, because of the clear meaning of the text, do not require the application of a sophisticated theory of constitutional interpretation in order to reach a conclusion. On the other hand, there are provisions of the Constitution where the text itself is so abstract or ambiguous, such as the Fourteenth Amendment clause requiring due process or equal protection, that analysis of information from outside of the constitutional text, such as an examination of the history, structure, purpose, and intent of the relevant provision, is necessary.

The use of historical documents contemporaneous with the drafting and ratification of the Constitution to help inform constitutional doctrine is sometimes referred to as "originalism." Various other theories of constitutional interpretation seem to diverge from originalism when reference is made to documents or sources outside of these "original" documents. In essence, the separation between "originalist" and other theories of constitutional interpretation appears to arise in those cases where, at least according to some commentators, the reference sources cited by originalists do not provide sufficient clarity as to the meaning of a particular constitutional provision, or even whether such terms were intended to be decided based on contemporaneous sources. These situations most often arise where the constitutional provision in question (e.g., "equal protection") is, by its nature, subject to varying levels of generality. For this reason, the problem of where to set the level of generality can have significant impact on constitutional interpretation.

As there are many commentators who have proposed various refinements of theories of constitutional interpretation, this report will limit itself to selected originalist theories and some major theories that have arisen to address perceived problems with originalism. This report will first examine the historical basis for theories of constitutional interpretation, and will consider two schools of originalism—"original intent" and "original meaning"—along with criticism of those schools. The report will then consider the role of judicial precedent and pragmatism in constitutional interpretation. Finally, the report will consider theories relating to the identification and justification of heightened constitutional protections for fundamental rights.

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Introduction

The United States Constitution, as amended, is a complex legal document which sets out the structure of the federal government, the legal authorities of that government (and, to a lesser extent, state governments), and, finally, a series of legal disabilities on the exercise of those authorities (such as a law that would infringe on individual rights).[1] The document also addresses the complex legal relationship between the federal government, state governments, and the persons subject to their respective jurisdictions.[2] Judicial interpretation of some of the Constitution's provisions, however, has varied over the last two centuries, leading to concerns regarding the ultimate validity of these decisions.

Theories of constitutional interpretation generally address how the meaning of the Constitution should be discerned, thus allowing the application of substantive constitutional law to a particular set of facts or issues. Whether it is necessary to have a unified theory of constitutional interpretation to analyze all aspects of the Constitution is itself a matter of debate. For instance, there would appear to be some constitutional questions, such as whether a President may run for three full terms of office (he may not),[3] that, because of the clear meaning of the text, do not require the application of a sophisticated theory of constitutional interpretation in order to reach a conclusion.

On the other hand, there are provisions of the Constitution where the text itself is so abstract or ambiguous, such as the Fourteenth Amendment clause requiring "due process" or "equal protection,"[4] that analysis of information from outside of the constitutional text, such as an examination of the history, structure, purpose, and intent of the relevant provision, is necessary. Based on this argument, methods of constitutional analysis that would be appropriate for some provisions of the Constitution may not be necessary or sufficient for others.[5] In fact, some scholars have argued that the formulation of a unified constitutional interpretive theory would obscure external considerations, such as social or political pressures, that might be influential on a court's decision making.[6]

While constitutional theory has attracted significant levels of judicial and academic attention,[7] there appears to be no definitive list of constitutional theories, nor is there agreement on how such

[1] For an analysis of Supreme Court case law relevant to specific provisions of the Constitution, see Congressional Research Service, *United States Constitution: Analysis and Interpretation*, by Kenneth R. Thomas.

[2] *See* CRS Report RL30315, *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, by Kenneth R. Thomas.

[3] *See* U.S. Const. Amend. XXII ("No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once....").

[4] U.S. Const. Amend. XIV, Sec. 1 ("No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

[5] For instance, Professor Richard Fallon has identified five separate tools of constitutional interpretation that judges are likely to use in different combinations: arguments from the plain or historical meaning of the constitutional text; arguments regarding the intent of the framers; doctrinal arguments based on the hypothetical purpose of one or more constitutional provisions; arguments based on judicial precedent; and value arguments based on justice and social policy. Richard H. Fallon Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189, 1189-90 (1987).

[6] *See* Mark Kelman, A GUIDE TO CRITICAL LEGAL STUDIES (Harvard University Press, 1987).

[7] *See* Gerard J. Clark, *An Introduction to Constitutional Interpretation*, 34 Suffolk U. L. Rev. 485 (2001).

theories should be applied.[8] Further, judges or justices do not generally limit themselves to one mode of analysis, but, rather, select tools of interpretation based on the nature of the issue at hand. Finally, even where the same method of constitutional theory is being applied by different judges or Supreme Court justices, the end result of such analysis may differ dramatically.[9]

For purposes of this report, it is presumed that all judges, justices, and commentators would be comfortable allowing the plain meaning of the text to govern when analyzing certain constitutional provisions. It is further presumed that all judges, justices, and academic commentators would be comfortable utilizing historical documents contemporaneous with the drafting and ratification of the Constitution to help inform constitutional doctrine.[10] While reference to such documents is most often associated with the doctrine known as "originalism," there does not seem to be any theory of constitutional interpretation that rejects the use of such documents. Similarly, while the use of other contemporaneous historical sources to ascertain the meaning of provisions of particular constitutional provisions (such as dictionaries) is also associated with originalism, there appear to be no theories of constitutional interpretation that would suggest that these sources can never be relevant to constitutional interpretation.

Various theories of constitutional interpretation seem to diverge from originalism when reference is made to documents or sources outside of these "original" documents. For instance, one of the more controversial references to sources outside of the Constitution is the use of foreign law to help elucidate the meaning of constitutional terms, such as the term "cruel and unusual punishment" under the Eighth Amendment.[11] While it does not appear that such references have served as a primary interpretative tool in particular cases, the fact that any reference is made to such documents has been characterized by some as moving beyond legitimate sources for constitutional interpretation.[12]

In essence, the separation between "originalist" and other theories of constitutional interpretation appears to arise in those cases where, at least according to some commentators, the reference sources cited by originalists do not provide sufficient clarity as to the contemporaneous meaning of a particular constitutional provision, or even whether such terms were intended to be decided based on contemporaneous sources. These situations most often occur where the constitutional provision in question (e.g., the Equal Protection Clause) is, by its nature, subject to varying levels of generality. For this reason, the problem of setting the level of generality may have significant impact on constitutional interpretation.

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[8] The suggestion has been made, for instance, that the originalist school now includes a number of disparate interpretive theories that, in application, can yield dramatically different legal outcomes. *See* Thomas B. Colby and Peter J. Smith, *Living Originalism*, 59 Duke L.J. 239, 253 (2009) (noting that one form of "objective meaning" originalism empowers the judiciary to aggressively protect individual rights from democratic infringement, while other forms would limit the scope of judicial power to interfere with the decisions of democratically elected decision makers).

[9] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008) (majority and dissenting opinions reached different conclusions about the original intent of the Second Amendment).

[10] The weight and relevance of such documents are, on the other hand, of some dispute. *See* Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U.L. Rev. 801 (2007).

[11] Graham v. Florida, 130 S. Ct. 2033-34 (2010) (referencing precepts of international and foreign law to determine that imposing a sentence for nonhomicide crimes of life in prison without the possibility of parole for an 18-year-old violated the Eighth Amendment).

[12] *See* Atkins v. Virginia, 536 U.S. 304, 324-325 (2002) (Rehnquist, C. J., dissenting) (disputing relevance of foreign law to the question of whether, under the Eighth Amendment, criminals who are mentally retarded may be executed).

For instance, the Supreme Court has held in a variety of cases that an individual's decisions regarding procreation and child-rearing are "fundamental rights" that receive a high level of protection under the Due Process Clause of the Fourteenth Amendment. However, in the case of *Michael H. v. Gerald D.*,[13] the biological father of a girl whose mother was married to another man was denied visitation rights under a California law that presumed conclusively that a child born into a marriage was the offspring of both parents of that marriage. In a plurality opinion, Justice Scalia rejected the assertion that the plaintiff had a constitutionally protected liberty interest in his relationship with the child, finding that providing such a right to an adulterous father was not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[14] In dissent, Justice Brennan noted that when deciding cases regarding family relationships arising under the Due Process Clause, the Court had traditionally used a more generalized articulation of a liberty interest, such as "family relationships."[15] Justice Scalia explicitly advocated that the Court, when confronted with a claimed liberty interest, should "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[16]

The separation between orginalism and other forms of constitutional theory can also increase when the nature of the judicial process is taken into consideration. The Anglo-American system of law places a high value on prior judicial precedent, generally using it as the starting point for analyzing the application of legal doctrine. For this reason, the concept of *stare decisis* often plays an extremely important role in constitutional analysis. On the other hand, the Supreme Court has found that the value of legal precedent, including the Court's own, may be outweighed by other considerations, necessitating the overturning of long-held decisions.[17] When to overturn precedent, however, is itself the object of considerable debate.[18]

Finally, constitutional theorists must contend with a large body of federal court cases that seem not to be linked to originalist doctrine, but appear most closely related to theories that find constitutional significance in historically based moral values. These "fundamental rights" theories are most often concerned with explaining why certain due process rights, not textually specified, are to be considered under a higher level of scrutiny than other less-valued rights. For instance, rights such as free speech and freedom of religion are not textually applicable to states, but have been applied to the states by "incorporation" through the Fourteenth Amendment. Or, liberty interests under the Fourteenth Amendment, such as the right to terminate a pregnancy,[19] are also not specified in the Constitution. Thus the protection of these rights must be justified on theories other than originalism.

[13] 491 U.S. 110 (1989).

[14] 491 U.S. at 124-126.

[15] 491 U.S. at 139.

[16] 491 U.S. at 127 n6.

[17] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008) (overturning long-standing precedent holding that the Second Amendment does not apply to the states). For further discussion of this case, see CRS Report R40137, *District of Columbia v. Heller: The Supreme Court and the Second Amendment*, by Vivian S. Chu.

[18] *Compare* Planned Parenthood v. Casey, 505 U.S. 833, 854-855 (1992) (joint opinion of Justices O'Connor, Kennedy, and Souter) (articulating a "reliance" standard for when a constitutional decision should be overturned) and *id.* at 954-966 (Rehnquist, J., dissenting) (disputing application of a reliance standard to uphold cases protecting the right to terminate pregnancies).

[19] Roe v. Wade, 410 U.S. 113 (1973).

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The Founding Fathers

An initial concern with constitutional interpretation is discerning whether the drafters and ratifiers of the Constitution intended a particular mode of interpretation. There is no express provision in the Constitution mandating the principles on which it is to be interpreted, nor is there a strong indication that one method of constitutional interpretation was universally agreed on or favored by the Founding Fathers. One problem with determining the preference of the drafters and ratifiers regarding methods of constitutional interpretation was that interpretation of a singular, written national Constitution was a relatively unique endeavor,[20] and the prevailing doctrines of legal analysis offered varying templates for interpretation.

It appears that at least two methods of doctrinal interpretation were prominent at the time of the passage of the Constitution, differentiated principally by how much reliance was to be placed on precedence. The first was the Protestant tradition of biblical interpretation, which emphasized the importance of textual interpretation, as opposed to reliance on previous interpretations.[21] This tradition of strict textual interpretation is likely to have influenced the Founding Fathers, resulting in a natural hostility to the idea that interpretations of a written text should be given more credence than the text itself.[22]

However, the second method of doctrinal interpretation, with which the Founders would have been most familiar, was based on the traditions of English common law, which to an extent stand in opposition to strict textual interpretation. Under this interpretive tradition, the most common principle to be used in analyzing text would be to discern the intent underlying a particular text.[23] However, because of the complex history of the ratification of the Constitution, this principle does not always have a ready application. For instance, there could well be variations between the intent of the drafters of the Constitution and the intent of the attendees of the state ratification convention. Even more difficult to discern (and perhaps less justifiably relied upon) would be the intent of the states[24] which would be included in this new federal structure. And, finally, one

[20] While reference to historical documents was part of constitutional debate in common law England, the innovation of United States constitutional law was to rely on a single written document, rather than an extensive historical tradition. It does seem, however, that the drafters at the Constitutional Convention understood that having a single written document would allow constitutional law to be developed using traditional processes of legal interpretation. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 902 (1985).

[21] One of the central themes of the Protestant Reformation of the sixteenth century was summed up in the slogan "sola Scriptura" (scripture only). *Id.* at 889.

[22] *Id.* at 893.

[23] *Id.* at 894.

[24] Although it is generally agreed that the Articles of Confederation was a compact among the several states, THE FEDERALIST No. 15 (A. Hamilton), the approval of the Constitution by state conventions (rather then by state (continued...)

might even consider the intent of the "People" of the United States, who, under the terms of the preamble to the Constitution,[25] would arguably be the most relevant source from which to discern intent.

Part of this problem is alleviated if one refines the concept of intent to distinguish between the "subjective intent" of the individuals involved in the drafting and ratification of the Constitution, and the discernible or "objective intent" that is conveyed by the language. The modern practice of discerning legislative intent by reference to the expressed intent of legislative committees or individual legislators was apparently almost nonexistent at the time of the Constitution, and judges generally considered themselves bound by the "express words" of a legislature.[26] Thus, the Founding Fathers would probably have been most comfortable with allowing the objective intent of constitutional text to control.

However, as was noted previously, the United States Constitution represented a relative novelty in legal interpretation at the time. While the Founding Fathers would have been familiar with the common law's objective intent method of discerning meaning, the framers may not have considered strict adherence to text as the proper stance of future interpreters. The framers were aware that unforeseen situations would arise, and they apparently accepted the need to allow for judicial construction of particular text.[27]

During the process of ratification, the issue of how the Constitution would be interpreted became a topic of significant debate. These disputes arose most often in the debate between Federalists and Anti-Federalists regarding the nature of the proposed relationship between the states and the federal government.[28] A significant element of the Anti-Federalist campaign to prevent ratification of the Constitution was the argument that the Constitution would be the object of interpretation and that judges and legislators would create new doctrines from text by "construction."[29] The Anti-Federalists maintained that the broad language of the Constitution

(...continued)

legislatures) was considered to be a departure from this model. THE FEDERALIST No. 18 (J. Madison) (comparing the Articles to confederations of the past).

[25] U.S. Const. Preamble ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America").

[26] Political and legal scholars in both Britain and the American colonies generally viewed strict adherence to the text as a constitutional necessity, because statutory law could be altered only by legislatures, not the courts. H. Jefferson Powell, *supra* note 20, at 894-96.

[27] *See, e.g.*, J. Madison, JOURNAL OF THE FEDERAL CONVENTION 617 (proceedings of May 31, 1787) (E.H. Scott ed.1893) (presuming that the Supreme Court jurisdiction would be "constructively" limited to cases of a judicial nature).

[28] The Federalists maintained that the Constitution contained few limits on state power, while the Anti-Federalists countered that the supremacy clause and other expansive congressional powers would reduce the states to insignificance. *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (ELLIOT DEBATES) 159 (J. Elliot ed. 1830) (reporting the first North Carolina convention, in which Timothy Bloodworth claimed that these provisions would "produce an abolition of the state governments").

[29] *See, e.g.*, The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania To Their Constituents, Pennsylvania Packet and Daily Advertiser, December 18, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 154-57 (H. Storing ed. 1981) (criticizing the Constitution for permitting Congress to assume effectively unlimited powers by construction, and suggesting that it would allow self-aggrandizement by the federal judiciary).

gave the Supreme Court too much power of interpretation, and would thus allow the federal government the power to subvert the power of the states and individuals.[30]

The Federalists, in contrast, argued that the document was not too broadly worded, as the terms would be evaluated under the common law practice of discerning intent.[31] Further, according to the Federalists, the intent of the document would not be based on the subjective intent of the drafters at the Constitutional Convention, but would instead be based on the intent of the people, as represented by the state conventions.[32] In essence, the Federalists argued that the Constitution would be interpreted in line with its "common sense" meaning,[33] and "simple inferences from the obvious operation of things."[34] Finally, Federalists argued the Constitution's indeterminacy was necessary, as "no compositions which men can pen, could be formed, but wh[ich] would be liable to the same charge [of ambiguity]."[35]

Originalism

Original Intent (Subjective Intent)

Many of the issues explored during ratification continue to be debated today. For instance, the issue of interpreting the Constitution by considering the intent behind its provisions has been recast in modern times as the theory of originalism. One of the early assertions of this doctrine was known as "intentionalism," or original intent, a theory which envisioned that all laws should be applied based on the subjective intent of the Constitution's authors.[36] Thus, for instance, since the authors of the Constitution would be the Founding Fathers who drafted it, intentionalism theory would involve studying the writings of those men at the Philadelphia Convention and their relevant outside writing.

One of the early proponents of intentionalism was Judge Robert Bork, a former judge on the United States Court of Appeals for the District of Columbia Circuit. Judge Bork recognized that the application of an original intent standard would not always be easy. For instance, as noted previously, the application of any theory of constitutional intent must deal with the problem of generality. Judge Bork recognized that the framers, because they were using terms that could have broad application, could not have anticipated all possible fact situations in which a particular constitutional provision could be applied. Thus, Judge Bork suggested that the task of an

[30] *See, e.g.*, J. Madison, *supra* note 27, at 562 (proceedings of August 20, 1787) (necessary and proper clause is criticized as too vague in respect to Congress's power to establish federal offices); *id.* at 614 (August 27, 1787) (provision concerning impeachment and removal of President in case of "disability" is criticized as too vague).

[31] H. Jefferson Powell, *supra* note 20, at 908.

[32] THE FEDERALIST No. 40 (J. Madison).

[33] *See* 3 ELLIOT DEBATES, *supra* note 28, at 71 (remarks of Archibald Maclaine at the first North Carolina convention).

[34] *Id.* at 255 (remarks of John Jay at the New York convention).

[35] THE FEDERALIST No. 37 (J. Madison).

[36] *See* William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 694-97 (1976) (providing that courts should follow the "language and intent" of the "framers of the Constitution"); Raoul Berger, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 364 (Harvard University Press, 1977) (any constitutional interpretive theory other than one grounded in "original intention" would result in a "judicial power to revise the Constitution."). Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 San Diego L. Rev. 823, 823 (1986) (suggesting that "original intent is the only legitimate basis for constitutional decision making.")

intentionalist judge is not to determine what the Founding Fathers would have felt about a particular application of the Constitution. Rather, a court seeking to interpret a constitutional provision would need to "state[] a core value [major premise] that the framers intended to protect," and then supply the minor premise necessary to protect the constitutional freedom at issue.[37] In this manner, a judge can apply the Constitution to unforeseen facts without forgoing adherence to the intended constitutional intent of the subject provision.

One such example is determining the meaning of the term "equal protection" as found in the Fourteenth Amendment. An originalist could easily ascertain that the intention of the Fourteenth Amendment, based on the expressed intent of the drafters, was to protect black citizens from having a state limit or deny their individual rights. However, most people would agree that this would be an unnecessarily limited view of the use of the broad term "equal protection." Thus, according to Judge Bork, a court should apply the amendment "neutrally," so as to enforce the core idea of racial equality, regardless of which race is being discriminated against.[38] Thus, if one were to extend Judge Bork's reasoning,[39] it could be argued that the decision in a case such as *Grutter v. Bollinger*,[40] which upheld the affirmative action admissions policy of the University of Michigan Law School, was wrongly decided. According to Justice Bork's theory, such a decision would be based, not on policy preferences, but on purely judicial grounds.

That leaves the problem, however, of just how high the level of generality for the term "equal protection" should be set. For instance, the Supreme Court has held that, in some cases, it is a violation of the Constitution for the government to discriminate based on gender.[41] Judge Bork argues that the drafters of the Fourteenth Amendment did not intend that the Equal Protection Clause would extend to laws which treated women differently from men, and that there is no other legitimate basis on which to extend such constitutional protections beyond race and ethnicity.[42] Judge Bork admits that the language of the Fourteenth Amendment, broadly written to prevent a state from "deny[ing] any person within its jurisdiction the equal protection of the law," does not explicitly contain such a limitation. However, he points to a failure of the Court to adequately explain why some groups beyond race and ethnic groups would be included, while others would be denied.[43] According to Judge Bork (and echoed years later by Justice Scalia), the problem of levels of generality is solved by choosing a level of generality no higher than that which interpretation of the words, structure, and history of the Constitution fairly support.[44]

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[37] Robert Bork, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 162-63 (1989).

[38] Thus, Judge Bork suggests that the Supreme Court was correct in applying the protections of the Amendment to other ethnicities, such as the Chinese. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[39] See also Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Indiana Law Journal 1, 14-15 (1971) (discussing affirmative actions).

[40] 539 U.S. 306 (2003).

[41] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (disparity of treatment between men and women regarding military spousal benefits violated equal protection). In *Craig v. Boren*, 429 U.S. 190 (1976), the Supreme Court indicated that in order for a law that treats women differently than men to pass constitutional muster, it "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197.

[42] Robert Bork, *supra* note 37, at 169-70, 329-30 (claiming that modern privacy rights and sex discrimination jurisprudence are inconsistent with the original understanding);

[43] For instance, one might note that the disabled, although arguably a discriminated against minority, appear to have not been afforded highly protected status. Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 366-67 (2001).

[44] Robert H. Bork, *supra* note 36, at 826.

The theory of original intent, however, quickly came under critical scrutiny by other commentators.[45] The first criticism was that the Constitution was drafted after a good deal of political compromise, so that it would be nearly impossible to ascertain a single collective intent of a large group of individuals, each of whom may have had different intentions.[46] Second, as discussed above, historical evidence could be viewed as suggesting that the framers in fact intended for future generations not to interpret the Constitution according to their intent, but according to the "common sense meaning" of the document.[47] Thus, for instance, the framers' desire to keep the records of the proceedings of the Convention secret could be seen as intended to prevent those proceedings from being used in interpretation.[48]

Original Meaning (Objective Intent)

The criticisms directed at the doctrine of original intent led to a modification of the doctrine. Originalist judges and commentators suggested that, rather than seeking to discern the subjective intent of the drafters of the Constitution, that the focus should be on seeking the objective meaning of the terms used.[49] As explained by Justice Scalia, who was involved in providing the theoretical basis for this shift, constitutional analysis needs to be directed at "the original meaning of the text, not what the original draftsmen intended."[50]

This doctrine of objective "original meaning" emphasizes how the text of the Constitution would have been understood by a reasonable person in the historical period during which the Constitution was proposed, ratified, and first implemented. For example, phrases like "due process" and "freedom of the press" had a long established meaning in English law, even before they were put into the Constitution of the United States. Thus, while the doctrine of original meaning does not reject the use of documents related to the drafting and ratification of the Constitution, the kinds of documents to be examined would be extended to studying contemporaneous dictionaries and other sources of legal interpretation relied on at the time.[51]

Although the theory of original meaning seems inclined to consider more documentary sources than does the theory of original intent, objective meaning is arguably a theory that would provide for even less flexibility in interpreting the Constitution. As stated by Justice Scalia:

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[45] *See, e.g.*, H. Jefferson Powell, *supra* note 20.

[46] Thomas B. Colby and Peter J. Smith, *supra* note 8, at 248; Gerard J. Clark, *supra* note 7, at 488-489.

[47] Raoul Berger, *Reflections on Constitutional Interpretation*, 1997 B.Y.U.L. Rev. 517, 524-25 (1997).

[48] Most of the Founders did not leave discussions of their intent in 1787, and there is reason to question whether those that did left accurate reflections of the intent of all participants at the Convention. *See* Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 7 B.U.L. Rev. 801 (2007).

[49] Thomas B. Colby and Peter J. Smith, *supra* note 8, at 250-51. Thus, the meaning of constitutional language is to be discerned in "what the original language actually meant to those who used the terms in question." Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Barnett*, 103 Mich. L. Rev. 1081, 1081 (2005).

[50] Antonin Scalia, A MATTER OF INTERPRETATION 38 (Amy Gutmann ed. 1998).

[51] Such sources might include, for example BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND. *See* Thomas B. Colby and Peter J. Smith, *supra* note 8, at 302 n295. It should be noted, however, that relying on both sources that are indicative of "subjective" intent and sources that are indicative of "objective" intent appears to conflate the basis for the two theories. *Id.* at 302-303.

> The theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because as I say I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.[52]

Thus, in application, the original meaning doctrine appears to more closely link constitutional interpretation to the historical era in which it was passed, rather than allowing for the possibility that the Founding Fathers expected the doctrine to evolve. Take the example of whether the death penalty should be considered "cruel and unusual punishment." Under an original meaning analysis, the prevalence of capital punishment in common law, statutory law of the time, and in the Constitution,[53] leads to the conclusion that public understanding of the phrase at the time of ratification would not include capital punishment. Even if it were established that the Founding Fathers used the term "cruel and unusual punishment" in order to provide a flexible standard which might change over time, the dictates of objective meaning would require that the meaning of the term remain historically fixed.

This latter point, however, appears to create a dilemma: what if the apparent objective meaning of a constitutional phrase were to create a flexible standard which might change over time? As noted previously, there are important phrases in the text that are so broadly written that it may be argued that they were intended to be interpreted at a high level of generality. At least one commentator has suggested that certain phrases associated with governmental limitations (such as the Privileges or Immunities Clause)[54] are so general that they should be read to require a "presumption of liberty."[55] Thus, unlike theories of original intent, which tend to find more limited individual rights and a presumption in favor of the power of the majority, this form of originalism would presume the primacy of individual rights.

The Role of Judicial Precedent and Pragmatic Considerations

Yet another ambiguity of constitutional interpretation is whether it was intended that constitutional provisions be interpreted afresh each time, or whether judicial interpretations of the Constitution would become part of the fabric of constitutional law. As noted previously, there were competing models of legal interpretation (strict textualism versus common law traditions) available to the Founding Fathers to support each of these theories. However, it is clear that the English courts on which the federal courts were modeled operated under the common law

[52] Antonin Scalia, *A Theory of Constitution Interpretation*, Remarks at The Catholic University (October 18, 1996) (http://web.archive.org/web/19980119172058/www.courttv.com/library/rights/scalia.html).

[53] *See, e.g.*, U.S. Const. Amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury").

[54] U.S. Const. Amendment XIV, Sec. 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States....").

[55] Randy Barnett, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 253-69 (2004). *See* Randy Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. Cin. L. Rev. 7, 23 (2006).

tradition of analyzing an existing body of case law, and deciding only the narrow case which was before the court.[56] Under this system of analysis, doctrine takes shape over time, and is the product of the work of many minds. It also has the virtue of allowing for consistent legal interpretation and advancing social stability and continuity.

It is not clear that the historical practice of *stare decisis* is strictly compatible with theories of originalism. It is true that at the Supreme Court level, the system of precedent allows for the narrowing and overruling of precedent, which the Court has been willing to do.[57] However, under originalist theory, the proximity of constitutional case law to the earliest Congress would influence the strength of that doctrine. In practice, litigants before the Supreme Court generally address themselves to the most recent constitutional precedent, not to the most dated. While it is true that the length and depth of constitutional precedence for a recent case appears to increase its constitutional stature, an older case that has had little modern application may be most vulnerable to distinction or to being overturned.

Some commentators have suggested that there are also pragmatic reasons for a tension between theories of originalism and the tradition of *stare decisis*. Under this argument, whenever a constitutional provision is interpreted, it can cause readjustments in the interpretation of other parts of the Constitution, and can also affect the function of other parts of the government.[58] Under certain theories of originalism, a judge might ignore such developments and look solely to the original constitutional "blueprint," even if it no longer resembles its structure today. Under a more pragmatic theory, the Constitution's original understanding should be used as a starting point, but the courts should also recognize how generations of constitutional interpretation and application have been used to accommodate new fact situations and government attempts to address those situations.

Perhaps one of the best examples of this is the Fourteenth Amendment, passed in the aftermath of the Civil War, that was intended by its drafters to impose significant limitations on how states could treat their own citizens, especially newly freed slaves. There is significant scholarly agreement that the provision in this Amendment which was intended to protect state citizens' rights was the Privileges or Immunities Clause.[59] However, this provision was soon rendered nearly meaningless in the *Slaughterhouse Cases*,[60] and the protection of substantive individual rights against state encroachment was instead developed under the Due Process Clause. While theories of originalism would suggest that a reexamination of these two clauses should take place, the Supreme Court appears unlikely to revitalize the former doctrine or revisit the long and contentious case law that has been developed under the latter.[61] The failure of the Court to have revisited this debate, however, leads to one of the major challenges of originalism—how to account for fundamental rights analysis in the Constitution.

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[56] Gerard J. Clark, *supra* note 7, at 492-93.

[57] According to one analysis, the Supreme Court has overruled previous Supreme Court precedent 233 times. Congressional Research Service, *supra* note 1, Appendix (2010 Cum Supp.) (to be published in March 2011).

[58] Larry Kramer, *Originalism and Pragmatism: Two (More) Problems with Originalism*, 31 Harv. J.L & Pub. Policy 907, 912-915 (2002).

[59] Akhil Reed Amar, *The Supreme Court, 1999 Term, Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 123 n327 (2000).

[60] 83 U.S. 36 (1873).

[61] *See, e.g.*, McDonald v. City Chicago, 128 S. Ct. 2783 (2008) (despite Justice Thomas's concurring opinion holding application of Second Amendment to states through the Privileges or Immunities Clause, plurality declines to revisit precedent, and instead considers case under the Due Process Clause).

Fundamental Rights Analysis

One of the more complex and controversial areas of constitutional law relates to the protection of "fundamental rights" under the Bill of Rights and the Fourteenth Amendment. Many of the doctrines and distinctions that have been developed under these provisions do not have a clear basis in constitutional text, and in general are not strongly supported by theories of originalism. The concept has come to include disparate lines of cases, and various labels have been applied to the rights protected, including "fundamental rights," "privacy rights," "liberty interests" and "incorporated rights." The binding principle of these cases is that they involve rights so fundamental that the courts must subject any legislation infringing on them to close scrutiny. This analysis, criticized by some for being based on extra-constitutional precepts of natural law,[62] serves as the basis for some of the most significant constitutional holdings of our time.[63]

Fundamental rights theories often posit relatively specific sets of values that are of constitutional significance. Under these theories, there are certain attributes of personhood that are so valued by individuals as to give them constitutional significance.[64] For instance, the freedom of "intimate association," such as with a marriage or other family relationships, is deemed so fundamental that to discriminate against it raises questions of not just due process, but also equal protection.[65] These kinds of theories are most often associated with the "privacy" doctrine, under which intrusions upon marriage, procreation and other intimate relationships are closely scrutinized.[66]

The constitutional justifications for fundamental rights analysis are varied.[67] Some commentators focus on the issue of consensus and of conventional morality theories. This line of adjudication most closely resembles common law statutory adjudication, where the underlying language of the Constitution is considered in the context of principles derived from a common public morality.[68] While this process arguably resembles the tasks associated with the legislative branches, the theory is that the process of case-by-case judicial evaluation and adherence to precedence is more likely to result in an appropriate distillation of the principles to be applied in constitutional interpretation. Thus, rather than following a tradition of strict adherence to text, the development of case law under fundamental rights analysis appears to more closely resemble the processes associated with common law. In this manner, this theory of analysis seems to differ significantly from originalism.

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[62] *See, e.g.*, Raoul Berger, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (Cambridge: 1977).

[63] For instance, the application of the Bill of Rights to the states, seemingly uncontroversial today, is based not on constitutional text, but on the "incorporation" of fundamental rights. *See* Congressional Research Service, *supra* note 1, at 1001-08. Other due process holdings, however, such as the cases establishing the right of a woman to have an abortion, e.g. *Roe v. Wade*, 410 U.S. 113 (1973), remain controversial.

[64] Lawrence Tribe, AMERICAN CONSTITUTIONAL LAW 886-990 (1978).

[65] Kenneth Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 663 (1980).

[66] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (right of married couples to obtain contraceptives).

[67] *See* Paul Brest, *The "Fundamental Rights" Controversy*, 90 Yale Law Journal 1063 (1981).

[68] *See* Harry Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes of Adjudications*, 85 Yale L.J. 221, 244 (1973).

Conclusion

As noted above, it is unclear whether it is possible to have a unified theory of constitutional interpretation which accounts for the full range of existing constitutional law. In part, this is because different portions of the Constitution, due to their varying levels of generality, may not be amenable to the same tools of interpretation. Further, because the Anglo-American system of *stare decisis* makes it less likely that constitutional issues will be constantly reevaluated, different constitutional issues may, for pragmatic reasons, appear to depart from historical understandings. Certain tools of interpretation, such as examining documents relevant to the era in which the Constitution was drafted, may be strongly persuasive in some cases. However, in other cases, where it is less clear that the meaning of the constitutional term in question was contemplated or intended to be fixed in time, the value of such historical documents may be questioned.

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