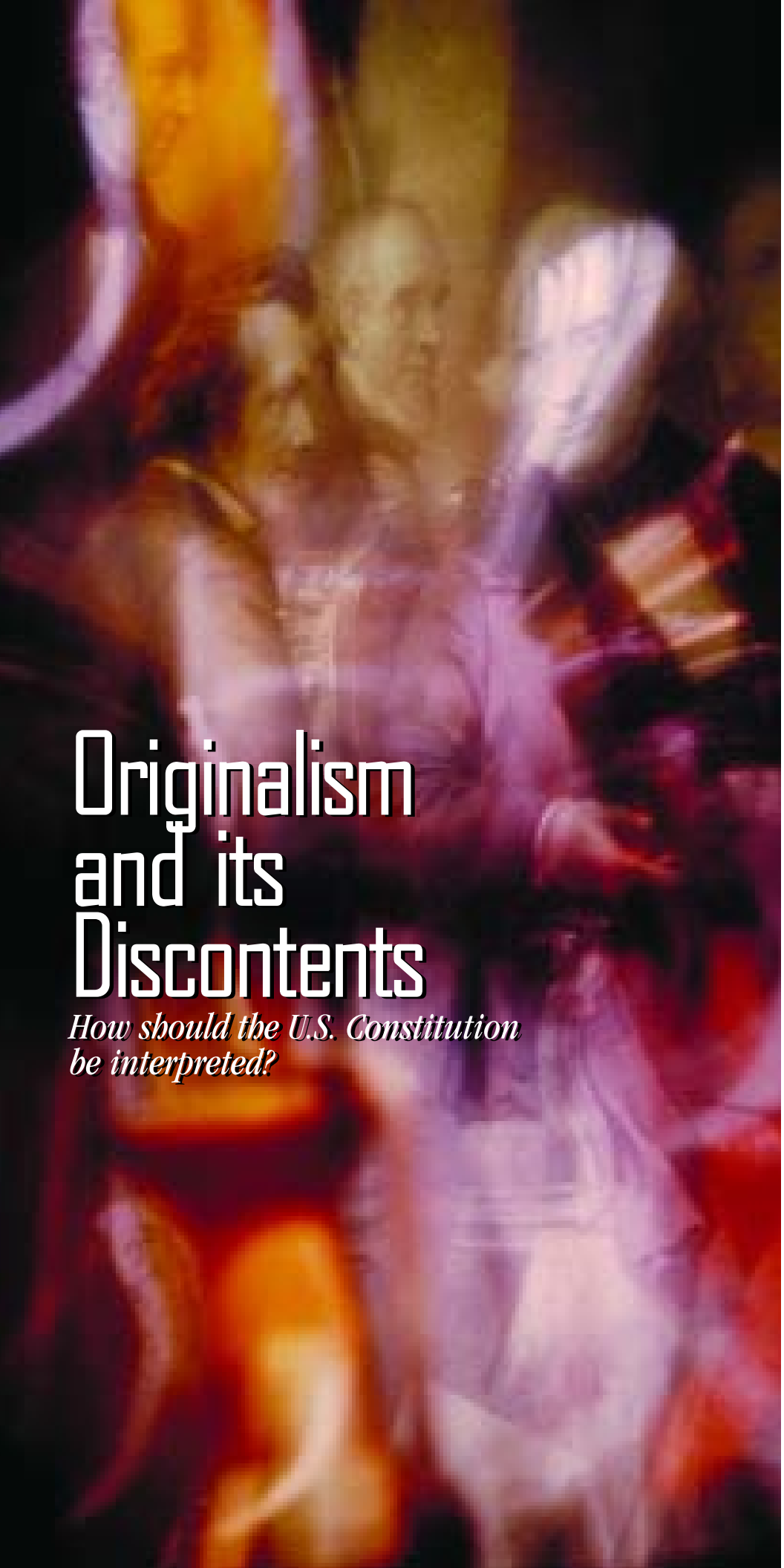

Originalism and its Discontents

How should the U.S. Constitution be interpreted?

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SPECIAL FEATURE

by Chris Arledge and Todd Green

It is again time for Supreme Court nominations and confirmations. Politicians and interest groups are battling, and the public is taking notice. Issues like judicial philosophy—usually relegated to the relatively unread pages of law reviews—are now bandied about on *CNN* and the *Wall Street Journal*. Most of this discussion centers on how potential nominees would interpret the United States Constitution. This article intends to highlight the primary argument on this subject, the one between originalists—those who hold that the Constitution has a fixed meaning that does not change over time—and non-originalists, who view original understanding as an historical starting-point, but not the only or even the primary source of the Constitution's meaning. Non-originalists believe in the common-law method of constitutional interpretation, which takes precedent as its baseline, articulates unifying and rationalizing principles that explain these precedents, and extends them along logical lines. In this article, two practitioners debate the strengths and weaknesses of originalism.

The Case for Originalism

by Chris Arledge

Originalism asserts that the Constitution has a fixed meaning. In deciding controversies over constitutional provisions, the judge's role—from an originalist perspective—is simply to determine what the constitutional provision meant when it was ratified and apply that meaning in the case at hand.

Generally, originalists do not claim that their philosophy is easier than other methods of interpreting the Constitution, nor do they justify their philosophy by arguing that it achieves desired results. An originalist holds only that this philosophy is the most *legitimate* manner of interpreting the Constitution. This argu-

ment rests on the belief that all legitimate political power belongs to the people, who act through their elected representatives. The people are free, of course, to adopt self-imposed limitations on that power—for example, by ratifying the Eighth Amendment's prohibition on cruel and unusual punishment. But absent such a self-imposed limitation, the people are free to act as they see fit, and no judge has a right to stand in the way.

Thus, a judge's job is to decide whether any constitutional provision establishes a self-imposed limitation on the people's ability to act through their elected representatives. If so, the courts must enforce that limitation. If the judge fails to enforce that limitation, the will of the people is thwarted because their own self-imposed limitation has been set aside. At the same time, a judge can never go beyond the specific self-imposed limitation approved by the people because, in so doing, the judge illegitimately limits the people's freedom to act when the people have not chosen to limit themselves at all. Originalists, then, strive merely to discern what a constitutional provision meant when the people ratified it, so they can impose that meaning on the people and their representatives. Non-originalism, by contrast, would permit judges to modify the people's original self-imposed limitations as the judges themselves see fit. But by thus acting apart from any grant of authority by the people, judges illegitimately exercise authority that does not belong to them.

The Supreme Court is Bound by the Lawfully Enacted Will of the People

The United States Constitution is both a democratic and undemocratic document. That is, it establishes a representative democracy but also sets limits on the power of the majority. The Bill of Rights, for example, constitutes a series of countermajoritarian checks, bounds beyond which the people's representatives cannot step. Much of the debate on constitutional questions concerns finding the right balance between letting the people exercise their right to sovereignty and imposing the Constitution's countermajoritarian checks to stop the people from acting in a prohibited manner. But it is critical to this debate that we understand where these countermajoritarian checks come from and why they are binding on us. And the answer, simply put, is because the people said so. The Constitution is positive law, binding because it was enacted by the people. Some of its provisions may be based on shared beliefs, even truths that we all find "self-evident." But it is not authoritative because it is *right*; it is authoritative because it was *properly passed*. Hence, the First Amendment is binding because a particular group of people, operating through the democratic process, got a supermajority of the people's representatives to ratify it. The Equal Rights Amendment, which may or may not be equally "right" or socially useful, is not binding because a supermajority of the people did not ratify it. Constitutional provisions like the First Amendment are therefore binding countermajoritarian checks on the people and their representatives only because the people themselves made them binding.

Hence, when we say that the United States Supreme Court must act to enforce the Bill of Rights against governmental action, what we are saying is that the Court must uphold the people's own validly enacted countermajoritarian check. In other words, the people are precluded from acting in contravention to a provision of the Bill of Rights because the people previously agreed that they would not do so. The Supreme Court, of course, is simply a creature of the people's will and their adopted Constitution. It is the authority of the Constitution, specifically its Article III, that gives authority to the Supreme Court. Thus, the Supreme Court is not an independent check on the power of the people; the Supreme Court is a creation of the people, created to exercise certain powers granted by the people, and without authority ever to act outside the people's grant of authority.

Because the Supreme Court is only empowered to enforce the will of the people, the Supreme Court's task in interpreting the Constitution—which is the ultimate expression of the people's will—truly is *interpretive*. Simply put, it is not the Court's job to determine what the Constitution *should* say. The Court's only job is to discern what the people *actually said*—that is, what the words of the Constitution were intended to mean. The Court can neither add nor subtract from the people's constitutional enactments. The Court can only interpret a constitutional provision in order to understand what the people intended and then apply it.

Non-originalists Seek to Expand the Court's Power Beyond Any Grant of Authority from the People

Many non-originalists reject the idea that the Court should enforce only the specific limitations on governmental power intended by those who ratified the Constitution. Constitutional provisions, they say, are merely the opinions of a relatively small group of dead, white guys, passed when women, minorities and others had no ability to participate in the political process; and they were enacted when the world was a very different place and this nation had very different needs. But this argument—whatever its merits—is not an argument about *originalism*. It is, rather, an argument against *any* method of interpreting the Constitution, for it is a rejection of the very authority of the document. If the Constitution is somehow illegitimate, then all of the constitutional provisions that the Supreme Court seeks to interpret and apply with the force of law are themselves illegitimate. In fact, the United States Supreme Court itself, being merely a creature of that illegitimate Constitution, is itself illegitimate. Those nine justices would have no greater authority to promulgate binding rules than would any reader of this article. Thus, any argument based on the illegitimacy of being bound by the people who passed the Constitution undercuts *any* system of interpreting the Constitution, not just originalism.

Likewise, there is no merit to the common non-originalist argument that we cannot know what a constitutional provision was intended to mean. True, some provisions are more difficult than others. But in most cases it is not only possible to discern what the document means, it is easy. And where it is easy, the Court's task is to enforce the intended meaning, even if the Court believes the provision unwise. For example, it is clear that those who ratified the Constitution intended the president to serve for a four-year term. Nobody could seriously argue that the relevant constitutional provision is ambiguous. Nor could any judge legitimately decide that a five-year term is more appropriate—even if the judge truly believed, for example, that a longer term would have been written into the original Constitution had women and minorities simply been consulted at the time, or even if the judge believed that changed circumstances make a five-year term far more appropriate.

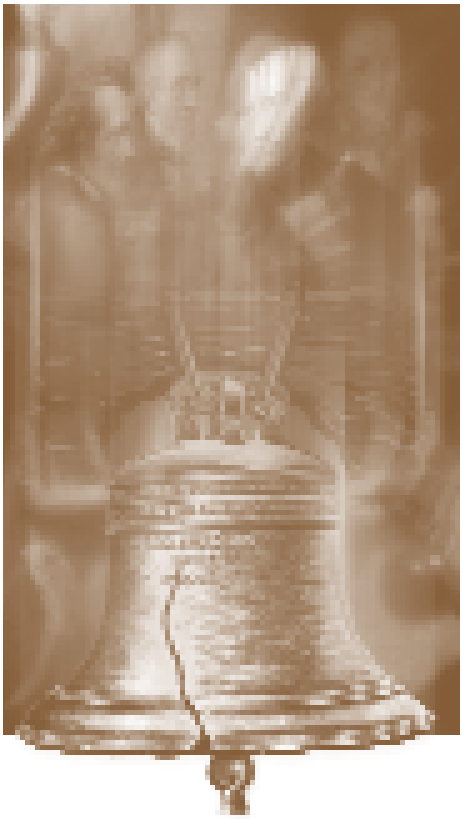
Of course, it is impossible to imagine a judge trying to write a five-year presidential term into the Constitution. The sheer lunacy of the suggestion demonstrates two truths about constitutional interpretation: it is often possible to know what the ratifiers of a constitutional provi-

sion intended, and where it is possible to know what they intended by their language, a court has no right to impose any other rule.

Those who oppose originalism tend to argue that constitutional provisions evolve over time, that they gain new meanings and shed old ones in order to keep up with us. But this argument is merely another way of saying that the Constitution, while clearly setting forth a four-year presidential term initially, may now mandate a five-year term. And if the Constitution can so change, somebody must have the authority to change it—or at least tell us what this ever-changing document means. But who? The Court certainly lacks the power to change the Constitution to suit its tastes. The Court cannot change the president's term to five years, and it cannot because the Supreme Court has no *independent* authority to promulgate rules. The Court's job is merely to enforce those rules adopted by the people. If the Court acts outside this narrow grant of authority, it has overstepped its bounds and its act is, by definition, illegitimate.

Thus, even though many critics assert that the Supreme Court often "interprets" constitutional provisions to suit the justices' own preferences, such "interpretations" should universally be seen as illegitimate. And, nor surprisingly, very few non-originalists are willing to concede that the Court should have free rein to impose its preferences on us, using the constitutional text as mere pretext for its policymaking. Rather, most non-originalists base their view of a changing Constitution on a different ground: the Constitution evolves as our nation evolves. That is, it changes to suit the people, not the Court. As the Court frequently states in its Eighth Amendment rulings, the Constitution changes over time to conform to "the evolving standards of decency that mark the progress of a maturing society."

But this basis for an evolving Constitution is also problematic. If the Court holds that the Constitution has changed such that although it once meant A it now means B, what the Court is really saying is that the people once properly enacted A but now the Court intends, for some reason of its own, to enforce B. But what could possibly justify such a change? It cannot be that a majority of the people simply find B preferable and wish to ignore their previous enactment of A; this would be a clear violation of the social compact the Constitution was meant to create. Imagine, for example, that five people were interested in starting a new, democratic state, but that two of the people—concerned that the majority might trample a particular right they hold dear—insisted that the majority be prohibited from taking a particular course of action without at least a four-fifths vote in favor of it. All other courses of conduct are expressly left to majority rule. It simply cannot be that, after entering into this compact, and to suit its desire for change, the majority can just ignore the agreed-upon limit on its authority and undertake the prohibited action. At the same time, nor could the other two members of the new state, having agreed to join the state on the basis of a mutual understanding as to what the majority



could and could not do, demand that the group's original charter be read to further limit the majority's authority to act in ways the group never before discussed.

Where constitutional provisions are free to morph into new and different provisions, the people's original will is necessarily thwarted. Discarding a provision can result in a particular tyranny of the majority that everybody agreed should not take place. For example, the Bill of Rights is meant to be a check on the power of the majority to take away certain rights. If the Bill of Rights evolves to suit the ever-changing views of the majority of people—as it does when we decide that the provisions must change to suit our new conditions—the Bill of Rights ceases to be an effective check on the majority and leads to *overly democratic* government. Likewise, reading new content into a counter-majoritarian check like the Bill of Rights can lead to a tyranny of the minority, where the majority is unfairly deprived of its right to make the decisions that were supposed to be left to majority vote. In this incarnation, an evolving Constitution leads to unacceptably *undemocratic* government.

Aspirational Provisions Provide No Exception to the Rule

The power of the Court to change clear provisions of the Constitution—to change a presidential term from four to five years—is beyond dispute. Thus, these provisions are not the focus of the debate over originalism. The debate turns on those provisions of the Constitution that are less concrete and more aspirational—such as the Fourteenth Amendment's "nor shall any State deprive any person of life, liberty, or property, without due process of law." To non-originalists, such open-ended language is an invitation to let judges find new meanings over time.

But the non-originalist position is no more persuasive when applied to these aspirational provisions than it is when applied to the length of a presidential term. Non-originalists argue that it is often impossible to discern what those who ratified an aspirational provision meant by it, and thus originalism is unworkable. Originalists are skeptical of this argument. Certainly, non-originalists cannot mean that the constitutional language has no discernible meaning. If the language had no meaning—if it were little more than an inkblot—there would be no purpose in interpreting it at all. We would be better off throwing up our hands and dealing only with those provisions that have meaning.

But this is not what non-originalists mean when they say the original understanding is impossible to discern. What they really mean is that the language is so open-ended, so aspirational, that it can have innumerable meanings and can truly be understood by different people as applying differently to a particular situation. But this renders the non-originalist position troubling. Take this hot-button question: does the word "liberty" encompass the right to a late-term abortion? Needless to say, two intelligent people can give very different answers to this question. But the answer is difficult *not* because it is difficult to know what the people in 1789 were thinking. The problem of discerning the mean-

ing of the term "liberty" to the ratifiers in 1789 is the same as the problem of discerning the meaning of the term for people in 2005. Simply put, if "liberty" is so open-ended that it is difficult to discern what those who ratified it intended it to mean in the abortion context, it is so only because the language itself is not readily susceptible to any definite application in that context.

The fundamental issue, then, is that the Constitution is in some places little more than a skeleton. And where the Constitution contains an open-ended term like "liberty," somebody is going to have to put flesh on that bone; the only question is who. Non-originalists would give judges the authority to flesh out these provisions without any regard (or at least much regard) to how the provisions were intended by those who ratified the Constitution. They generally argue for this position under the theory that the Constitution needs to adapt to suit changing circumstances. But if the Constitution needs to adapt to suit the needs of the current majority—rather than the "old, dead white guys" who wrote it—then why are judges the proper body for doing the adapting? Legislatures are more responsive to the public; the people can at least vote legislators out of office, and legislative decisions are easier to change, making more frequent change possible. And there is no reason to believe that three years of law school and some time on an appellate court make a person any better suited to make sweeping moral judgments on issues like gay rights, abortion or affirmative action. If an individual judge is able to make the "right" moral call on those issues, it is certainly not because of his or her legal training.

More importantly, judges have no particular right to make these moral judgments for all of us. In reality, non-originalists do not want judges to flesh out the aspirational language of the Constitution because judges are better able to divine the will of the people. Non-originalists want judges to make these determinations because it keeps the decision *away* from the people. Litigants ask judges to overturn legislative bans on same-sex marriage, not because the people's will is poorly reflected by such measures, but simply because the people's expressed will is seen as wrong. But from where does a judge get the authority to make this determination? If not from a self-imposed limitation enacted by the people, the judge has no authority to bind the people at all. And once non-originalists concede—as they must—that judges are putting flesh on constitutional provisions because the provisions lack flesh, they concede that the judges are creating law because the people did not. This means that the judge is necessarily overstepping his or her bounds of simply enforcing the self-imposed limitations enacted by the people. Not content to enforce only the people's self-imposed limitations, the Court has assumed the task of crafting new limitations on the people because the Court thinks those limitations are right.

No judicial body—including the United States Supreme Court—can legitimately exercise such power. For originalists, where the people have not enacted a provision that limits the power of the people's representatives, the people's representatives are free to act. Debates about whether abortion should be legal, for example, are not debates about the Constitution at all. Being that no provision of the Constitution was intended either to allow or prohibit abortion, the issue is one for political bodies. Courts simply are not free to impose their own policy guidelines on all of us through the guise of open-ended constitutional terms—terms that are open to wildly different interpretations and clearly were never intended to reach the issue at all.

If Not Originalism, then What?

Non-originalists sometimes challenge originalism on grounds of practicality. Originalism is too hard—indeed impossible—they say. I have explained above why I think this objection is both wrong and irrelevant. But, in addition, the non-originalist position simply raises another issue: if originalism is not the answer, what is? For most non-originalists, poking holes in originalism is the vocation; articulating a viable alternative to it is the hobby that they're too busy to try. Thus, they leave us merely with an assertion that judges must update the Constitution for us, apparently without any clear limitations on judges' discretion and no persuasive justification for why judges should have the authority to make all of our major decisions for us. We are simply to accept that judges shall decide when a human life begins; that judges shall decide when the government can dole out benefits or detriments based on race; and that judges shall decide when two people can or cannot enter into marriage. But for a free people, simply accepting these edicts from on high is not an option.

The Case Against Originalism

by Todd Green

As a Practical Matter, Originalism is Unworkable and Indeterminate

Originalism is not just hard. It is, on any important question, impossible. Or rather, originalism will not yield fixed, determinate, predictable results. While seductive in theory, in application originalism raises many more questions than it answers. If courts are to apply the original understanding of the words in the Constitution, *whose* understanding should they apply? That of the drafters? The ratifiers? The "people?" And if it is the understanding of the "people," which people? And why *those* people? And how do we figure out what their understanding of a particular provision (to the extent they had any) was in any event? What if there were many disparate, understandings of a term? And what level of generality or abstraction are we to employ to the terms?

An Inadequate Historical Record and Intentionally Vague Language

Whose original understanding is a court to apply? Year 1787 was a long time ago. And the Philadelphia convention did not have the authority to make laws. Rather, the Constitution that was drafted in Philadelphia had to be ratified by the several states—or more precisely, by certain people within those states. How do we go about reconstructing their understanding of the various provisions? Some originalist judges have turned to dictionaries from the period. Others have consulted records from the Philadelphia convention, records of ratifying conventions, contemporaneous newspaper accounts, the *Federalist Papers*, the congressional record of early congresses, and early judicial opinions.

Resort to these sources is highly unsatisfying for several reasons. First, there is not much there. The records of the debates of the ratifying conventions are almost nonexistent. And as to some of the most important provisions of the Constitution—the First Amendment right to free speech and the Fifth Amendment right to due process—these sources shed almost no light. Second, what record does exist evidences a good deal of confusion and debate about the meaning of the Constitution's provisions. For

example, does the First Amendment's mandate that Congress make "no law . . . abridging the freedom of speech" mean that any federal libel law (and, through the Fourteenth Amendment's incorporation of the Bill of Rights, any state libel law) would be unconstitutional, or merely that there can be no prior restraint on speech? What little record does exist on this topic shows disagreement, but not resolution.

Perhaps it is a mistake even to seek a single, authoritative "original" meaning of phrases such as "Privileges and Immunities" (Art. I V, sec. 2), "due process" (5th Amendment), "public use" (5th Amendment), and "cruel and unusual punishments" (8th Amendment). These terms are somewhat vague. And that likely is by design. By using language that is broad and susceptible of many meanings, it may have been possible for the framers and the ratifiers to paper over real differences of opinion and create a document that could be ratified—precisely *because* it can mean different things to different people. Most everyone can agree that the federal government should not inflict cruel and unusual punishment, even if they cannot agree on what qualifies as cruel or unusual (let alone both cruel *and* unusual). The Constitution's most grandiose, aspirational terms may have never had a single, generally agreed upon meaning. Or , more precisely, these provisions may have been clear in concept, but unresolved in application.

What Level of Generality to Apply

Even where the original meaning of a constitutional provision can be ascertained, one would then need to decide what level of generality to apply to this constitutional directive. The original meaning of the term "cruel and unusual" may be ascertainable. But, even if it is, it does not necessarily follow that any specific punishment that was not considered cruel and unusual in 1787 cannot be cruel and unusual now. Similarly, the general meaning of section 1 of the Fourteenth Amendment was likely to ban invidious classifications in general. Still, this does not necessarily mean that the ratifiers' view(s) of what qualified as an invidious discrimination must control. For example, it is likely true that most of the ratifiers of the Fourteenth Amendment did not believe that this Amendment banned the practice of segregation. But if we have come to realize that segregation does constitute an invidious classification, the Fourteenth Amendment's prohibition against invidious classifications would seem to mandate a finding that the practice is unconstitutional. It is not clear whether, under originalism, we are to be bound not just by the concepts articulated by the ratifiers, but also by their own specific application of those concepts. So, under originalism, ascertaining the meaning of the Constitution's provisions would be just part of the analysis. One would then need to determine the level of generality to apply to these provisions.

The Problem of Multiple, Disparate Understandings

Undoubtedly, some of the Constitution's provisions were understood differently by different people—even by various ratifiers at the time of ratification. So what meaning is an originalist to

apply to a provision that meant one thing in New Hampshire and something else in South Carolina? Do we resort to the lowest common denominator and accord these provisions only the meaning that we can determine was accepted by a large enough majority to ratify? There is no clear answer.

Originalism is Not, and Never Has Been, the Way that the Court Actually Determines Questions of Constitutionality

To advocate for a return to originalism is to advocate for a return to a place we've never been. Actual constitutional practice—as revealed by the reasoning in the Court's opinions—has *never* been originalist. Most opinions reflect a conventional, common-law approach to constitutional adjudication, one that evolves over time, builds upon precedent, and reflects current societal values and norms. From the earliest judicial opinions onward, the Court has looked beyond the original understanding for unwritten values to guide judicial review. What the Court has rarely done, and never consistently, is what originalists advocate it do now. Despite claims by originalists that anything but originalism is horribly problematic, what we have had for the past two hundred and fifteen years has been anything but originalism.

Originalism is incompatible with the doctrine of *stare decisis*. Under originalism, what matters is not what some earlier Court thinks a provision means, but what it in fact means. Thus, precedents, particularly precedents that were not the result of an originalist interpretation (and an accurate interpretation at that) would have no predictive value. This would create a lot more uncertainty than exists under the common-law approach. But no professed originalist really advocates for a complete abandonment of precedent. Justice Scalia, for example, suggests that the decision whether to adhere to a past deviation from a provision's original meaning should depend upon whether the deviation has "succeeded in producing a settled body of law." Of course, whether it has or has not may depend upon how one feels about the body of law that it has produced. In any event, virtually all originalists propose some adherence to stare decisis. But these concepts are fundamentally incompatible. Any originalist who accepts existing precedent and goes from there will find that there is precious little left to be originalist about.

At times, originalists criticize nonoriginalism as being excessively democratic. The argument goes something like this: The Constitution is a check on the tyranny of the majority. It protects certain individual rights. If the courts are free to write the Constitution anew, they will right it the way that the majority wants, thereby trampling upon the Bill of Rights. Of course, this ignores the historical reality that common-law constitutionalism has resulted in an expansion, rather than a reduction, of individual rights. But more importantly, it gives judges too little credit. It is precisely because they are somewhat removed from the political arena that judges are likely to protect individual rights from the tyranny of the majority rather than rewrite the Constitution the way that the majority wants.

At other times, originalists attack nonoriginalist adjudication as being undemocratic. Scalia, for example, in matters relating to cruel and unusual punishment or to equal protection claims related to sexual preference, will often accuse nonoriginalist judges of substituting their own preferences—that of society's (mostly liberal) law-trained elite—into the Constitution. Of course, even if this were true, it would simply mean that the preference of a modern minority (society's liberal law-trained elite) is being substituted for the preferences of an earlier minority (the dead white propertied males who drafted and ratified the Constitution). It is hard to see how this is any less democratic. Indeed, the modern judges, at the least, are recent appointees of a duly elected executive and have been confirmed by a majority of duly elected Senators.

Originalism Would Create Some Unpopular Results and Would Overturn Much of Modern Government

A devout originalist will tell you that he or she will follow the method wherever it leads. That said, originalists tend to get a bit squeamish when discussing certain judicial opinions that are both: a) widely popular; and b) probably not supportable under an originalist interpretation of the constitution. There is no better example than *Brown v. Board of Education*.

In 1954, the Warren Court, overturning *Plessy v. Ferguson* (which was handed down just 28 years after the enactment of the Fourteenth Amendment), held that segregation in public schools violated the equal protection clause of the Fourteenth Amendment. Now public schools were not unheard of in 1868, when the Fourteenth Amendment was ratified. And, in most states, these schools were segregated. The historical record does not suggest that the majority of the ratifiers of the Fourteenth Amendment understood it to prohibit segregation in public schools. Indeed, the framers of the Fourteenth Amendment assured their constituents that it did not even confer on blacks the right to vote (a right that was not conferred on blacks until two years later, when the Fifteenth Amendment was ratified, and that was not conferred on women until 1920, when the Nineteenth Amendment was ratified), let alone the right to attend the same schools as their children. Yet, eighty-six years after its enactment, the Supreme Court held that the equal protection clause of the Fourteenth Amendment prohibited segregation in public schools. This opinion has formed the cornerstone of modern equal protection jurisprudence. And whatever one thinks of the extension of equal protection jurisprudence since then, the great majority of Americans consider *Brown,* from a policy standpoint, a good thing.

The fact that originalism cannot be squared with *Brown* is not a complete condemnation of originalism. There are many good social policies that are not compelled by our Constitution. (Indeed, there is at least one abhorrent social policy—slavery—that is embraced, if awkwardly, in our Constitution.) But what is telling is how few professed originalists are willing to *concede* that an originalist interpretation of the Fourteenth Amendment cannot get you to *Brown*. This suggests something about originalists, if not originalism: For all their bluster about the virtues of originalism and their willingness to follow it wherever it leads, most originalists prefer originalism because, by and large, it yields substantive results of which they approve. This is to say that most originalists are socially, politically and economically conservative. And, happily for them, most of the time originalism tends to lead them exactly where they want to go. But when originalist interpretation yields an unpleasant result (like segregation may not be unconstitutional) then originalists are not so comfortable. Perhaps this means that results matter. When a method of interpretation, even one that is internally sound, yields results that are consistently unpopular or unpalatable (drawing and quartering, anyone?) maybe that method is not so good.

It is not just modern Fourteenth Amendment jurisprudence that would be radically altered by an originalist interpretation of the Constitution. Much of our modern system of government would find little support in, or would flatly contradict, the original meaning of the Constitution. The administrative state would likely violate separation of powers. Many of the laws necessary to create a national economy would be found to be beyond the power granted by the interstate commerce clause. Originalism simply does not describe what our courts have been doing for any of the past two hundred and fifteen years and cannot account for (or even accommodate) the shape of our modern federal government.

Originalism Has No Claim to Moral Superiority

Originalism is premised on the assumption that the originators intended the provisions of the Constitution to have fixed meanings and not to evolve over time and also that the originators had the legitimate authority to adopt binding constitutional rules. Advocates of applying the original understanding of the ratifiers claim that this is authoritative because it represents the will of the people. But it is important to note that the people of 1787 are not the people of today in many important ways. America is no longer a white, pre-industrial agrarian society where the fastest mode of transportation is horseback. It is a heterogeneous postindustrial world superpower. Things have changed. And the Constitution's continued vitality, and perhaps its legitimacy, is conditioned on its ability to change with us.

Moreover, the "people" who had the right to ratify the Constitution were, even in 1787, a narrow subset of the people. Only propertied white males were permitted to vote. Indeed, any amendment enacted before 1870 reflects the will of a "people" that did not include blacks; and any amendment enacted before 1920 reflected the will of a "people" that did not include women. Thus, originalism, as to any provision enacted prior to 1920, would simply impose the will of some past minority that ratified the provision upon the present majority. If the Constitution were merely a statute, which could be easily amended, this would not be so problematic. But amending the Constitution is a far more cumbersome process and requires more than a simple majority. Indeed, the difficulty of amending the Constitution is one of the things (another being its supremacy over other laws) that sets it apart from ordinary laws. In sum, the "people" who adopted the Constitution are not the people of today and they were only a minority of the people at the time the Constitution was adopted. And while the people of today are bound by the Constitution, it is far from obvious that they should be bound by the understanding (assuming it can be discerned) of a markedly different "people" living in a markedly different world.

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