

## INTERPRETATION AND CONSTRUCTION: ORIGINALISM AND ITS DISCONTENTS

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Does originalism always provide judges with the path to a correct decision in a constitutional case? Before trying to answer this question, consider why someone would ask it. The motivation is relatively straightforward: It is a concern about the legitimacy of judicial decisions. The question arises because originalism, as a method of deciding cases, is supposed to give judicial decisions a particular sort of legitimacy. “This is a controversial decision as a policy matter,” an originalist might say, “but it was not made by the judges who rendered the opinion. It was made by the Constitution—by the People, with a capital ‘P’, who ratified the Constitution.” Alexander Hamilton made just this argument in support of judicial review in *Federalist No. 78*, writing that the practice does not “by any means suppose a superiority of the Judicial to the Legislative power” but only “that the power of the people is superior to both.”<sup>1</sup> John Marshall echoed the argument in *Marbury v. Madison*, reasoning that denying judicial review “would be giving to the legislature a practical and real omnipotence”<sup>2</sup> in defiance of the “original and supreme will”<sup>3</sup> of the People.

This People- or ratifier-derived legitimacy is usually contrasted with the awful specter of judicial activism, loosely defined as judges deciding cases based on their own views of wise policy.<sup>4</sup> Activist judges make decisions. Originalist judges merely implement the decisions made by the People.

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1. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

2. 5 U.S. (1 Cranch) 137, 178 (1803).

3. *Id.* at 176.

4. For further discussion of judicial activism, see generally KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS (2006).

The very idea of constitutional construction,<sup>5</sup> however, is threatening to the originalist view of judicial decisionmaking because it adds a step between the decision of the People and the decision of the judge. As Professors Barnett and Nelson have observed, construction requires more of the judge than merely effectuating a decision that the People have already made.<sup>6</sup> And so the question arises whether originalist interpretation combined with construction still has the legitimacy described above. Thus, originalists, or at least some of them, worry about construction, or think that our task should be to place constraints on the process of construction in order to ensure that it does not open the door to activism.<sup>7</sup>

My thesis here is that originalism is not tarnished by construction, and originalists should not fear it. For one thing, fear is useless: Even if there were reason to be afraid, construction cannot be avoided, as Professors Barnett and Nelson argue.<sup>8</sup> The more important reason not to fear construction, however, is different from the reasons given by Professors Barnett and Nelson. The more important reason is that the vision of legitimacy-through-originalism set out above is at best deceptive and probably better described as false. Such a vision distorts the consequences of a sensible originalism and misrepresents the whole history of judicial practice. Neither originalism nor judicial practice allows a judge to claim that the results he reaches are always the product of decisions made by some long-ago ratifiers.

Beginning with originalism and setting aside construction, suppose that the meaning of the Constitution is fully adequate to decide a case. Can a judge necessarily say that she is simply enforcing a decision already made by the ratifiers?

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5. The phrase “constitutional construction” is typically associated with the work of Keith Whittington. See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999). This Essay builds off of a particular understanding of construction that may not be identical to Whittington’s.

6. See Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 67–69 (2010); Caleb Nelson, Remarks at the Twenty-Ninth Annual Federalist Society National Student Symposium, held at the University of Pennsylvania Law School (Feb. 26–27, 2010).

7. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23 (Amy Gutmann ed., 1997).

8. See Barnett, *supra* note 6, at 67–69; Nelson, *supra* note 6.

The answer is no, not necessarily, because it is quite possible to write a constitutional provision that directs different results as times change.<sup>9</sup> My favorite example is a fictional constitutional clause providing that senators, while engaged in debate, shall wear “the latest Fashions.”<sup>10</sup> Let us grant, as originalists claim, that this clause has a particular meaning, which was fixed at the time of enactment. Nevertheless, the applications of this meaning will change over time. Clothing that was fashionable in 1789 will not be fashionable in later times. Judges will have to decide, based on contemporary standards, whether particular dress meets the constitutional requirement.

Is such a decision the dreaded Living Constitution in disguise?<sup>11</sup> It is not. This decision is an example of a constitutional provision with a fixed meaning that is understood and intended to direct different applications as circumstances change. It is perfectly legitimate for drafters and ratifiers to devise such a system.<sup>12</sup> And if your purpose is to ensure that Senators are fashionably dressed, this is the kind of provision you would want to write. So against a charge that this is the Living Constitution, there is a defense. In fact, the same defense the originalist judge is supposed to have: Do not blame me, blame the People. They are the ones who wrote and ratified a provision that has changing applications.<sup>13</sup>

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9. As a theoretical point, this strikes me as both obvious and undeniable. It has been made repeatedly in the academic literature. *See, e.g.*, RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 93–94 (2004); Jack M. Balkin, *Abortion and Original Meaning*, 24 *CONST. COMMENT.* 291, 292 (2007); Ronald Dworkin, *Comment*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 115, 116–19 (Amy Gutmann ed., 1997); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 *GEO. L.J.* 569, 570–71 (1998). In scholarship, the point is generally conceded by originalists. *See* Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 *CONST. COMMENT.* 383, 384–87 (2007) (pointing out examples of such concession). Oddly, however, the point is rarely conceded in originalist judicial decisions. Originalist judges tend to fall back on the argument that if a particular application of a constitutional provision was not anticipated by its ratifiers, then such application is illegitimate. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 568–69 (1996) (Scalia, J., dissenting) (arguing that tradition of all-male education should protect the Virginia Military Institute from an equal protection challenge).

10. *See* ROOSEVELT, *supra* note 4, at 51–52.

11. *See* Tara Smith, *Originalism’s Misplaced Fidelity: “Original” Meaning Is Not Objective*, 26 *CONST. COMMENT.* 1, 5 n.21 (2009) (doubting that the Author is an originalist and suggesting that his is “[t]he type of view that Originalists seek to defeat”).

12. *See* ROOSEVELT, *supra* note 4, at 47–58.

13. *See id.*

But did they? These kinds of provisions are possible, but whether we have any similar provisions in the real Constitution is a separate question. A full answer to that question would require an elaborate historical analysis, and the focus of this Essay is theory rather than history. This Essay will assume for the purposes of demonstration that we do have such provisions and that the Equal Protection Clause is one.<sup>14</sup> The Essay will make two brief points in support of that assumption, and then invite the reader to look at the history and decide for himself.<sup>15</sup>

First, if you want to make sure that a minority of states do not get out of step with what a national majority thinks is reasonable, you would want a clause with fixed meaning but a floating set of applications. That is a good general description of the spirit behind the Equal Protection Clause. The nation had just fought a war against a minority of states, and the Reconstruction Congresses sought to end discrimination deemed appropriate by that minority but not by the national majority.<sup>16</sup> Congress could have limited its equality demand to race, as it did in the Fifteenth Amendment,<sup>17</sup> or it could have limited the demand to equality in the area of civil rights, but it chose neither of these paths. So it seems reasonable to suppose that Congress intended this sort of flexible, adjusting constraint. At any rate, this is a good description of how the Court has in fact applied the Equal Protection Clause: It has generally used the Clause to bring states that are outliers from a national consen-

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14. The scholarship on this point is voluminous. For a start, one might look at WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 143–45 (1988).

15. It is a bit of a scandal that the originalist Justices who helped transform Equal Protection doctrine into its current incarnation as a colorblindness doctrine in cases such as *Richmond v. Croson*, 488 U.S. 469 (1989), and *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), paid so little attention to history, which squarely forecloses the colorblindness reading. It is about as plain as such things can be, for instance, that the ratifiers of the Equal Protection Clause did not think it would immediately create a right to interracial marriage, which the colorblindness approach does. See, e.g., R. Carter Pittman, *The Fourteenth Amendment: Its Intended Effect on Anti-Miscegenation Laws*, 43 N.C. L. REV. 92, 107–08 (1964).

16. See generally Thomas C. Mackey, “An Inestimable Jewel”: *The Civil War Era Constitutional Amendments and Their Continued Relevance*, 3 ALB. GOV’T L. REV. 676 (2010).

17. U.S. CONST. amend. XV, § 1.

sus back into the fold.<sup>18</sup> It is, at its heart, not so much a counter-majoritarian as an antifederalist provision.

Second, the drafters and ratifiers of a provision written in general terms and explained using abstract notions of fairness versus invidious discrimination<sup>19</sup> were almost certainly aware that future judges would not try to divine what the drafters and ratifiers thought was fair but rather would be affected by the nation's contemporary standards of fairness.

So if such provisions do exist, then originalism by itself, leaving aside the question of construction, will not always allow a judge to say that the result in a particular case was ordained or contemplated by the ratifiers. A judge may well have to ask, for instance, whether a particular practice is out of step with current views about equality.

Let us turn now from originalism to construction. If "construction" is the creation of what we might call doctrine, the rules that courts apply to decide cases,<sup>20</sup> what does construction do in practice? What is it supposed to do? Consider decisions involving the Equal Protection Clause. In most recent judicial opinions where the Court has purported to apply the Equal Protection Clause, the actual words of the Clause—"equal protection of the laws"<sup>21</sup>—will not be found, at least not in a prominent place.<sup>22</sup> The decision will be all about applying

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18. For instance, *Loving v. Virginia*, 388 U.S. 1 (1967), and *Lawrence v. Texas*, 539 U.S. 558 (2003), both struck down state statutes (bans on interracial marriage and same-sex intimacy, respectively) that had already been repealed or struck down under state constitutions in a majority of states. *Lawrence*, admittedly, did so under the Due Process Clause, but its equality undertones are relatively clear. See 539 U.S. at 579–85 (O'Connor, J., concurring) (arguing that Equal Protection Clause provides the proper grounds for resolution).

19. See NELSON, *supra* note 14, at 114–17 (noting Reconstruction Republican descriptions of Fourteenth Amendment as device to prevent arbitrary distinctions and class legislation). For a discussion of the idea of class legislation, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 61–99 (1993) (examining class conflict in the period following the Civil War).

20. See ROOSEVELT, *supra* note 4, at 19–20. Mitchell Berman has described doctrines that stipulate the meaning of a constitutional provision as "constitutional operative propositions" and doctrines that tell courts how to determine whether a constitutional operative provision has been satisfied as "constitutional decision rules." Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004).

21. U.S. CONST. amend. XIV, § 1.

22. In the 176 pages of the *Parents Involved* decision, for instance, the phrase "equal protection of the laws" appears only twice: once in an early footnote and

one of the tiers of scrutiny—rational basis review, intermediate scrutiny, or strict scrutiny.<sup>23</sup> What do these different tests do?

One might think that the tests are designed to help the Court reach the correct answer in the particular case at bar—that these tiers of scrutiny are more precise specifications of the meaning of the Equal Protection Clause. But a moment's reflection should reveal how implausible this is. It is wildly unrealistic to suppose that the drafters or ratifiers of the Equal Protection Clause understood that they were creating the complex and multi-tiered system that the Supreme Court continues to refine almost a hundred and fifty years later.<sup>24</sup> What then is this doctrine for?

Let us suppose for the moment that the meaning of the Equal Protection Clause is something like “do not discriminate without an adequate justification.”<sup>25</sup> Such a meaning would create a general prohibition on what the Court sometimes calls “invidious” discrimination.<sup>26</sup> But how would the Court decide whether discrimination was unjustified? The Court would have to do something like weigh the costs of discrimination against the benefits.<sup>27</sup> That is a legislative judgment—a policy decision. The Supreme Court feels uncomfortable making overtly policy-

once in a quotation from an earlier case. *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 714 n.4, 743 (2007).

23. See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (discussing the three levels of scrutiny).

24. What, then, did they think they were creating? Richard Fallon offers three explanations: a prohibition of racial discrimination; a prohibition of discrimination on grounds that tend, like race, to subordinate; or a prohibition of all invidious discrimination. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1272 (1987). Given the breadth of the constitutional text, I tend toward the last of these.

25. See, e.g., Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1215 (1978) (suggesting that equal protection means that “[a] state may treat persons differently only when it is fair to do so”).

26. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963) (“Statutes create many classifications which do not deny equal protection; it is only ‘invidious discrimination’ which offends the Constitution.”); *Barbier v. Connolly*, 113 U.S. 27, 30 (1885) (upholding legislation after finding “no invidious discrimination”). A more elaborate exposition can be found in *Strauder v. West Virginia*, 100 U.S. 303, 306, 308 (1879) (focusing on “dislike,” “jealousy,” and attempts to attach a “brand” of “inferiority”).

27. This, of course, is not the only method for determining what constitutes unjustified discrimination. One might instead ask whether the law at issue contributes to a caste system or has a stigmatic social meaning or arises from a failure to treat all affected persons with equal concern and respect. In each case, I would maintain as I do in the text that this judgment should ordinarily be left to the legislature.

based decisions or second-guessing legislative assessments of costs and benefits.<sup>28</sup> That, in a nutshell, is the sin of *Lochner*—judges saying that they know better than legislatures what is in the public interest.<sup>29</sup> And so in most cases the Court has decided it will adopt a deferential, hands-off posture. This is rational basis review. It essentially says to the legislature, “Unless you have done something clearly crazy, we leave it up to you to decide whether this discrimination is justified.”<sup>30</sup>

Sometimes, however, for various reasons, the Court thinks hands-off review would be bad. Perhaps the Justices think there are structural features in the political process that will make legislators unlikely to give proper weight to the interests of some people—out-of-staters, noncitizens, or racial minorities.<sup>31</sup> Maybe the Justices think history shows that certain kinds of discrimination tend to be used to oppress rather than for legitimate reasons.<sup>32</sup> Or perhaps for some reason they want to skew their error distribution to ensure that invidious discrimination does not survive, even at the cost of striking down some legitimate statutes.<sup>33</sup> In such circumstances the Justices might adopt a non-

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28. See Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 991 (2006) (describing perceived illegitimacy of the *Lochner*-era Court’s substitution of “its policy preferences for those of the legislature”).

29. See *id.* at 988–92 (describing the *Lochner* era).

30. See James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans with Disabilities Act After Seminole Tribe and Flores*, 41 ARIZ. L. REV. 651, 685 (1999) (“The presumption of regularity that underlies rational basis review . . . reflects an admission by the judiciary of institutional incompetence to make complicated social and economic decisions.”).

31. John Hart Ely famously drew his process theory from footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75–77 (1981). As the *Carolene Products* majority acknowledged, the theory is in cases as early as *McCulloch v. Maryland*, where Chief Justice Marshall set out several factors that, when applied, would justify showing substantial deference to Congress’s assessment that it has the power to charter a bank but would give less deference to Maryland’s belief that it has power to tax the bank. See *Carolene Products*, 304 U.S. at 153 n.4 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819)); *McCulloch*, 17 U.S. (4 Wheat.) at 401 (deference to Congress); *id.* at 428 (no deference to Maryland).

32. See ROOSEVELT, *supra* note 4, at 22–31 (describing factors that could be weighed to determine the proper level of judicial deference).

33. Cf. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 283 (1990) (noting that standards of proof allocate risk of error).

deferential posture, like strict scrutiny.<sup>34</sup> With strict scrutiny, the Justices essentially tell the legislature, "If this discrimination is going to survive our review, it is not enough to justify it in terms of costs and benefits. You must show us that the discrimination is necessary to serve a compelling state interest."<sup>35</sup>

What is important about these rules, for present purposes, is that they are not designed to get each individual case right. They are not attempts to decide all these cases in the way the ratifiers expected or in the way the meaning of the Constitution directs, even leaving to one side the question of applications changing over time.<sup>36</sup> They are rules that courts design with the understanding that they are only one set of institutional players, that all government actors have obligations to consider constitutional issues, and that the judgments of these other actors might deserve more or less deference in particular kinds of cases.<sup>37</sup>

So the idea that construction should be limited somehow to prevent it from squandering the legitimacy of originalism is mistaken. First, even originalism without construction does not create the kind of legitimacy people are hoping for, of which it can be said, "This decision was made by the ratifiers, not the judges." Second, the creation of doctrine is not solely or primarily driven by a desire to devise rules that get the right answers—the ratifier-approved answers—in individual cases. Rather, the creation of doctrine is driven by a host of factors, including concerns about institutional competence, concerns about the political process, concerns about history, and concerns about the creation of rules that lower courts can administer. In short, the process is con-

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34. See Stacey D. Blayer, Note, *But Names Will Never Hurt Me: HIV Surveillance and Mandatory Reporting*, 39 B.C. L. REV. 1175, 1195–97 (1998) (noting instances where the Supreme Court has employed nondeferential approaches, including intermediate scrutiny when gender is at issue and strict scrutiny when race is at issue).

35. See *id.* at 1196 ("[T]he Supreme Court [has] held that racial classifications are subject to strict scrutiny and must be necessary to the accomplishment of compelling governmental interests.").

36. See Roosevelt, *supra* note 28, at 996–1001 (suggesting Equal Protection Clause jurisprudence and Due Process Clause jurisprudence are linked and the goal is to promote government's obligation to further public interest, not identify a right as "fundamental" under the Constitution's text).

37. To put the point more simply: While the Equal Protection Clause gives us a single standard, the Court does not use that standard to decide cases. It has substituted several different rules, knowing full well that these rules will in practice be overinclusive and underinclusive, as rules always are.



cerned with many issues beyond getting the right answer.<sup>38</sup> The idea that the purpose of construction has to be limited to getting answers that are correct from an originalist perspective is simply contrary to our American judicial practice. Seeking out right answers in that way is not what judges have done in the past, nor anything they are likely to do in the future.

Indeed, no judge, not even the most ardent originalist, has seriously maintained that the sole purpose of doctrine is to get the answers right from an originalist perspective. For instance, doctrine underenforces some rights, either because the Court trusts other actors to make better decisions, or because it cannot come up with administrable rules. This proposition leads, as stated perhaps most famously by James Bradley Thayer, to the result that a legislator who had voted against a law as unconstitutional might, if placed on the bench, “there find it his duty, although he has in no degree changed his opinion, to declare it constitutional.”<sup>39</sup> And there are more recent echoes of this proposition. Consider the following dissenting statement by Justice Scalia in *Troxel v. Granville*:

[W]hile I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.<sup>40</sup>

Justice Scalia returned to this theme in *Vieth v. Jubelirer*,<sup>41</sup> observing that a lack of judicially manageable standards might place a right beyond judicial enforcement.<sup>42</sup>

Sometimes, on the other hand, the Court overenforces rights because the Court has decided that a prophylactic rule is a

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38. See Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1658–67 (2005) (noting different factors going into the creation of doctrine).

39. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

40. *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting).

41. 541 U.S. 267 (2004).

42. *Id.* at 277 (plurality opinion) (“Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.”).

good idea. That description may bring *Miranda*<sup>43</sup> to mind and obviously the name *Miranda* raises hackles in some quarters. It did with Justice Scalia when he was given the opportunity to revisit *Miranda* in *Dickerson*,<sup>44</sup> “That is an immense and frightening antidemocratic power,” he wrote of prophylaxis, “and it does not exist.”<sup>45</sup> But who endorses this view when the name *Miranda* is taken away? Who has written, with apparent approval, that the procedure the Court set out in *Anders v. California*<sup>46</sup> for appointed attorneys to follow when declining to file an appeal, “is not ‘an independent constitutional command,’ but rather is just ‘a prophylactic framework’ that we established to vindicate the constitutional right to appellate counsel”?<sup>47</sup> None other than Justice Thomas, joined by Justice Scalia, in a lesser-known case from 2000, *Smith v. Robbins*.<sup>48</sup>

Judges are not simply oracles speaking the preordained decisions of the ratifiers. They never have been, they never will be, and essentially no one, not even the current originalists on the Supreme Court, really thinks they should be. That vision of originalism is fatally flawed both in theory and in practice, and the legitimacy it seems to offer is illusory. And therefore originalists do not need to worry about construction. A threat to an illusory legitimacy is itself a mirage.

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43. *Miranda v. Arizona*, 384 U.S. 436 (1966).

44. *Dickerson v. United States*, 530 U.S. 428 (2000).

45. *Id.* at 446 (Scalia, J., dissenting). Justice Scalia’s dissent was joined by Justice Thomas. *Id.* at 444.

46. 386 U.S. 738 (1967).

47. *Smith v. Robbins*, 528 U.S. 259, 273 (2000) (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)).

48. *Id.* at 273.