To Legal Theory Workshop participants:

The draft chapter that is up for discussion on Tuesday, February 18 is chapter 3. I would welcome not only questions and your own points of view, but also references to any readings you think would be valuable. I’ve also included Chapter 1 to provide a sense of my overall approach for those who are interested and have time, and I would be grateful for any responses to that as well.

Thanks,

Kent
Constitutional Interpretation

Chapter 3

Original Understanding:

What Is Relevant and How Much Does It Count?

(Rough Draft)

I. Introduction

Following the previous chapter's account of why original understanding is so hard to discern and why it would not make sense for courts to rely exclusively on this understanding, this chapter tackles a range of more specific issues. It urges that more than one kind of original understanding matters, that the significance of that understanding diminishes over time, and that the precise kind that counts most also changes with the passage of years. These inquiries strongly reinforce the basic claim that factors other than original understanding inevitably will, and should, play important roles in constitutional interpretation. The latter half of the chapter is
dedicated to a poignant illustration -- a controversy over the meaning of the Establishment Clause of the First Amendment.

II. Original Understanding

As prior chapters indicate, the form, or forms, of original understanding that carry weight could make a difference. At least in principle, one can distinguish between how a reader would understand the constitutional text from what the enactors intended it to convey, and the exact kinds of readers or enactors who count also matters. Readers might be ordinary or well informed, and among the enactors, those who were particularly influential or perceived basic principles more deeply could be especially determinative, an approach defended in this chapter. Further, as the prior chapters indicate, we can differentiate conceived applications of specific provisions from the semantic meaning of their words and the general principles they embody.

The questions about what should count, and for how much, track ones about the original sense of statutes,¹ but the best answers differ for a number of reasons. In

¹ See Kent Greenawalt, 2 Statutory and Common Law Interpretation (New York, Oxford University Press 2013), Chapters 2 and 3.
addition to perceptions of substantive coverage are the original ideas about interpretive techniques. As the last chapter suggests, these could include conceived flexibility over time, ultimate assignments to nonjudicial officials, or degrees of deference that courts should afford political bodies.

Whether or not they assign it overarching importance, everyone agrees that the original meaning of a constitutional provision is relevant for its interpretation, but that recognition does not by itself tell us what constitutes that meaning. To try to answer this question, we need to explore the significance of the chosen language, the understandings of the proposers and ratifiers, the levels of intention that may matter, and the place, if any, for hypothetical intentions. A fundamental claim of the book is that what does and should count depends on the provision at issue and on how much time has passed since its enactment.

A. Understanding of Language and Intent of Enactors

As with statutory interpretation, central issues for considering constitutional content are how much the intent of the enactors should count in relation to the message sent by their enacted language and the level at which the intent or message should be understood.\(^2\) In contrast to

\(^2\) These matters are explored in id.

3 Greenawalt_CI Ch3_6.11.13
prominent originalist claims some decades ago that concentrated on enactors' intent,\(^3\) most originalists now focus on reader understanding and, at least in theory, on semantic understanding as contrasted with expected application.\(^4\)

Because the language of authoritative texts affects how people react, its relevance is undeniable, but for a number of reasons, discernible intents should also matter. When the implications of statutory and constitutional language are unclear, or obviously inapt for a particular situation, or the actual intent is to interfere with the rights of citizens less than the enacted language suggests, judges have substantial reasons to assign importance to the enactors' aims. Further, as the volume on statutory interpretation develops in detail,\(^5\) focusing on how readers understand language does not itself eliminate the significance of enactors' intent. Because listeners and readers generally understand language in the context of what they believe speakers and writers are trying to say, they will also perceive authoritative communications in that way, barring some extraordinary reason to block that aspect from their minds. All these


factors bear on the respective places of language and intent for the original meaning of both statutes\textsuperscript{6} and constitutional provisions. For the latter, additional factors play a role, and certain distinctive nuances touch the original Constitution of the United States.

Even though certain claims about the Constitution's original meaning are straightforward, any comprehensive approach must take account of understood strategies of interpretation as well as practices the provisions embraced. But the answers to these inquiries need not coalesce so neatly. If the original view about interpretation concentrated on the broad meaning of its terms, it sanctioned shifts in understood content. Then, genuine faithfulness to the most fundamental original understanding would include evolving applications of particular provisions. If someone did reach this conclusion, he may nevertheless favor adherence to original expected applications as necessary to curb judicial latitude, but that would render him less than fully faithful to original understanding.

In regard to the central issue, whether what matters is enactor intent or reader understanding, the Constitution proposed in 1787 presents a peculiar problem as to who count as the relevant enactors and readers. A simple modern assumption is that both the proposers and

\textsuperscript{6} Id.
ratifiers of the Constitution enacted it, just as the members of one legislative house may propose a statute and the other approve it. Interestingly, that may well depart from the original view.

Influential members of the drafting Philadelphia Convention suggested that all they did was offer a proposal of no legal force, that the genuine enactors of the Constitution were the ratifiers in state conventions representing the people. In the Federalist, James Madison wrote that the Convention's "powers were merely advisory and recommendatory," that it "proposed a Constitution which is to be of no more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed."7 In a later speech within Congress, Madison rejected approaches relying on the intentions of the Framers, saying, "As the instrument came from them, it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions." To reach beyond "the face of the instrument," one needed to "look for it, not in the general convention, which proposed, but in the state conventions, which . . . ratified . . ."8 This approach was reflected in Chief Justice Marshall's opinion for the

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Court in the central case of *McCulloch v. Maryland* on the basic power of Congress and the

"Necessary and Proper Clause," in which he wrote that the Philadelphia Convention had made a

"mere proposal," that the "whole authority" of the Constitution comes from the state ratifying

c abventions representing the people. This restrictive sense of the interpretive significance of

views at the Philadelphia Convention receives powerful support from the fact that no records of

the convention were made available until well after ratification. (An alternate explanation of this

is that members of the convention feared use of the records by opponents.)

This rhetoric reads as if the members of the Philadelphia Convention were proposing a

document in the sense that a private group might propose a bill for Congress to adopt. What

would matter then would be the views of lawmakers, not those of the group’s members. From a

modern perspective, this analogy is deeply flawed. After all, the drafted Constitution itself set

the terms that would count as a ratification and the ratifiers, unlike legislative bodies, had no

authority to alter the wording of the document; they had to vote "yes" or "no."
One wonders whether related political factors influenced minimization of the

Convention's role. It had vastly exceeded its designated authority to revise the Articles of the

Confederation; it proposed a process of ratification that was radically different from the

unanimous approval of state legislatures necessary to revise the Articles; and ratification by state

conventions was portrayed as "The Consent of the People." 12 All these reasons might well have

led its delegates to downplay their own role in relation to that of ratifiers. Whatever the

underlying bases, Philadelphia delegates hesitated to rely publicly on their knowledge of internal

debates and adjustments. And early courts, as well as other officials, tended instead to refer to

what happened at the ratifying conventions. 13

The status of these conventions also raises the question whether the understanding of

delegates counted for itself, as a form of enactor intent, or as a likely reflection of what general

readers understood. At least some of the formulations of James Madison sound as if the

ratifiers' understanding was critical because they represented the people, which could be taken to

12 The Federalist No. 22, at 139 (Hamilton), note 7 supra.
13 When President George Washington rejected House of Representatives involvement in treaty making
partly on the basis of the position of the Convention, Madison urged that neither Congress nor the
Supreme Court had relied on the sense of the Convention. See H. Jefferson Powell, "The Original
infer that this constituted their authority or that what really mattered is what "the people" understood.\textsuperscript{14} Whether this formal difference would actually affect interpretive practice depends largely the degrees of knowledge and positions in society one attributes to the readers.

Exactly what “readers” should be imagined? When textualists such as Justice Scalia refer to “ordinary readers” and turn to dictionaries of the time to discern what words and phrases then meant, the crucial reader seems straightforward. But that is far from the truth. Consider the modern reader of no special capacity. He will not grasp the meaning of most words in an authoritative dictionary;\textsuperscript{15} more particularly, the key words in technical statutes will be well beyond him. For such language, a sensible response is that the people whose work is in the relevant field are the ones who should count. For constitutional provisions, it may matter not only how well informed are the conceived original readers, but what positions they occupied.

The original Constitution does not contain a large number of completely unfamiliar technical words, but it does explicitly and implicitly refer to political structures, practices, and

\textsuperscript{14} See references to the passage from the Federalist and later speech, note 7, supra.
\textsuperscript{15} Linguists have noted that studies of vocabulary size based on dictionary sampling face many methodological problems. In an attempt to overcome those problems, three linguists estimate “well educated native speakers have a vocabulary of around 17,000 base words.” Robin Goulden, Paul Nation, & John Read, “How Large Can A Receptive Vocabulary Be?,” 11 \textit{Applied Linguistics}, 341 (1990). The authors used the largest non-historical dictionary available to conclude there were 58,000 base words and that the majority of those base words “are unknown to most native speakers of English.” Id. at 356.
rights that would have been grasped by only a small percentage of the population. Modern Americans by and large understand relatively little about political and legal subtleties, and we have no reason to think most citizens were better informed centuries ago.\textsuperscript{16} For judges to be actually "bound to follow" what the average citizen took the words of the Constitution to accomplish would be absurd. To render the reader approach attractive, one needs to hypothesize a very well informed reader.\textsuperscript{17} Are we then thinking of people of the time who were informed or what an ordinary person would have perceived if he became so informed? This could matter, since at any time most of those actually familiar with political and legal processes may have different values and outlooks than ordinary people.\textsuperscript{18} Whereas many statutes are directed at private citizens and businesses and their lawyers, many constitutional provisions, as Chapter 1 notes, mainly guide officials. For these, perhaps judges should take higher officials as the most relevant readers, ones whose understanding would have tracked that of delegates to the ratifying conventions.

\textsuperscript{17} See e.g., Gary Lawson and Guy Seidman, "Originalism as a Legal Enterprise," 23 \textit{Constitutional Comment} 47, 72-73 (2006).
\textsuperscript{18} Somin, note supra 16, at 109.
In respect to which readers should count, individual rights guarantees may differ from allocations of government authority. For these, what private citizens understood would be highly significant because they deservedly wanted to be able to act in the manner they took as protected. This would be particularly true if, as Justice Scalia claimed about the Second Amendment, a provision embraced a widely understood “pre-existing” right.

In this sorting out of enactors’ intent and readers’ understanding, the place of The Federalist, written anonymously by Alexander Hamilton, James Madison, and John Jay, is something of a puzzle. Although other writings may have been equally influential during the ratification process itself, The Federalist became cited with increasing frequency over time. Its essays reflect the understanding of leading delegates to the Convention, they are evidence of what the ratifiers, for whom they were written, understood, and they may also suggest what general, very well informed, readers assumed. According to Chief Justice Marshall, The Federalist’s “intrinsic merit entitles it to this high rank (as a commentary on the Constitution);

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19 When the right is not designed to protect and influence initial behavior, but to avoid unjust consequences after the fact, such as the ban on “cruel and unusual punishment,” the analysis would be somewhat different. One might then treat what well informed officials would grasp as more relevant than it is for rights on which people rely directly.
20 See Rakove, note 8 supra, at 132-34; Introduction at x.
21 Id. at xv-xvi; Clinton, note 10 supra, at 1215-19.
and the part two of its authors performed in framing the constitution, put it very much in their
power to explain the views with which it was framed." That does not tell exactly why the
Federalist account carries authority.

When we reflect on what judges should take as the comparative authority of reader
understanding as compared with enactor intent, perhaps changes in social circumstances should
make a difference. During the late eighteenth century reliable records of how statutes and the
Constitution were enacted were rarely available. Judges lacking an ability to discern intents
with accuracy would have a strong reason to concentrate on texts. When historical records
became more complete and available, judges may have had reason to pay more attention to the
aims of enactors than they previously had done.

Of course, modern originalists broadly accept textualism despite the availability of
committee reports and legislative debates. By disregarding intent, they decidedly depart
from genuine originalism about interpretive methods, because during many modern decades

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22 Cohens v. Virginia, 19 U.S. (6 Wheat.), 264, 418 (1821). Two years earlier, see note 9 supra, Marshall
had implied that the views of the Framers were not directly a basis for construing the Constitution.
21 However, Hans Baade, note 13 supra, at 1008-12, indicates that when, in 1769, Justice Willles of the
Court of Kings Bench in Millar v. Taylor, 4 Burr. 2303, 2332, 98 Eng. Rep. 201, 217 (K.B. 1769) wrote
that legislative history "was not known to the other house, or to the Sovereign," he was referring not to
availability but to judicial relevance.
enactors and informed readers assumed that statutes and Constitutional amendments were to be interpreted in light of what legislators aimed to achieve. This reliance was then taken for granted, given the Supreme Court’s consistent references to legislative intent.

The Fourteenth Amendment, and its relation to the original Bill of Rights, raises some distinctive issues about intent, text, and relevant enactors. Whether or not the Fourteenth Amendment should be taken to have made virtually all the Bill of Rights applicable against the states, a subject taken up in a later chapter, it was universally understood to place significant new restraints on state governments. As with other amendments, “enactors” would certainly have included Congress as well as the ratifying state legislatures, since Congressional approval was the initial stage of an adoption process specified by the Constitution itself.24 Indeed, in practical terms, the understanding of those who drafted and approved the amendment in Congress would inevitably carry more authority than the perception of the ratifiers, since assembling an overall sense of ratifying legislatures is so difficult, and since southern states were effectively compelled to ratify the amendment in order to retrieve representation in Congress. By the time of the Fourteenth Amendment, courts were also paying more attention to the intent of those who

24 See U.S. Const., art. VII.
proposed and ratified the original Constitution and the following Bill of Rights than had judges after 1789. To summarize a far from simple record, "intent" then counted for a good deal more in relation to reader understanding than it had earlier. According to Jefferson Powell, "[b]y the outbreak of the Civil War, intentionalism in the modern sense reigned supreme in the rhetoric of constitutional interpretation."25 This would mean that a completely faithful originalist would interpret the Fourteenth Amendment somewhat differently than the original Bill of Rights. Thus, even where the Fourteenth Amendment protects the same basic right as one of the Bill of Rights, not only might the later provision protect practices the earlier amendment failed to do, the very process of interpreting could vary. A pure originalist might well have to conclude that the federal government is entirely free to restrict behavior, such as forms of speech, that is beyond state regulation.

The preceding analysis reveals clearly how a completely faithful and systematic originalist approach is radically at odds with practical realities. The reasons are extremely strong for courts to treat what are essentially the same provisions similarly for the state and federal governments, and to use interpretive strategies that do not depend completely on the exact date a

25 Powell, note 13 supra, at 947.
particular provision entered the Constitution. Reasonable interpretive strategies cannot be unqualifiedly originalist.

Final puzzles about original understanding, whether of enactors or readers, are how open-ended provisions should be treated and what is the relevance of broader purposes underlying the specific provisions and the whole Constitution? Leading figures at the time of the Constitution, such as Madison, foresaw a fairly significant range of judicial development of unresolved and unperceived questions. They did not regard particular provisions as highly precise, providing a clear answer to virtually every problem. In The Federalist Madison wrote, “[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”26 Jack Rakove has summarized the view of defenders of the Constitution that if “reasonable explanations and predictions of meaning,” were proved false by events or “ambiguities demanded resolution, intervening experience would provide the foundation for determining the course that the interpretation or revision of the Constitution should then take.”27

26 The Federalist No. 37, at 226 (Madison), note 7 supra.
27 Rakove, note 8 supra, at 160.
According to Gordon Wood, within the colonies, "judicial discretion . . . abounded." 28

Jefferson Powell has noted that the delegates to the Philadelphia Convention assumed a traditional process of interpretation in which judges, rather than being highly literalist, employed the "artificial reason and judgment of law." 29 When references were then made to the "intent" of a legal document, that was the "product of the interpretive process and not some fixed meaning that the author locks into the document's text at the outset." 30 Another reason why framers and ratifiers may not have seen terms as having a coverage that was already fully determined was that many "were themselves decidedly empirical in their approach to politics;" 31 and as far as the Bill of Rights was concerned, beliefs in natural rights may have had a similar effect. 32

30 Id. at 910. The Marshall Supreme Court employed this conventional view of statutory construction. Id. at 942-43.
31 Rakove, note 8 supra, at xv.
32 Cf. Chester James Antieau, "Natural Rights and the Founding Fathers—the Virginians," 17 Washington & Lee Law Review 43, 48-49 (1960) (noting "[t]here is ample evidence that the Founding Fathers were aware of the ontological basis of our natural rights. It is because we are rational, intellectual, social, spiritual, and political beings that we naturally have rights to develop our intellect, to hear appeals made to reason that can make clearer the proper means to our ordained end, rights to assemble with our fellow men to discuss more effective political social groupings better suited for the development of our faculties and the protection of our basic rights . . . .") For the proposition that the Framers thought inherent rights would be defended by courts beyond what the Constitution provided, see Daniel A. Farber, "The Originalism Debate: A Guide for the Perplexed," 49 Ohio State Law Journal, 1085, 1092-93 (1989). A contrary view is taken by John F. Hart, "Human Law, Higher Law, and Property Rights: Judicial Review in the Federal Courts, 1789-1835," 45 San Diego Law Review 823, 830-32 (2008).
In respect to the question whether specific content or broader purposes and the aims of the entire Constitution should be afforded greater weight, Madison had written in The Federalist that less important parts of an expression “should give way to the more important part[s]; the means should be sacrificed to the end, rather than the end to the means.”\(^{33}\) In noting in 1819 that the Constitution permitted the creation of a national bank, Chief Justice Marshall carried forward this approach in *McCulloch v. Maryland*, writing “we must never forget that it is a constitution we are expounding,” “intended to endure for ages to come;” “a fair construction of the whole instrument” focuses on its important objects.\(^ {34}\)

Exactly what was conceived in the founding era about language that has since been treated as highly open ended, such as “cruel and unusual punishment,” is less apparent. Were enactors and readers taking as central contemplated application or semantic meaning, and if the latter, was it the general meaning of such a phrase or what is plausibly meant as a constitutional constraint? Even if some people in 1789 regarded that phrase as referring to specific understood penalties rather than inviting later courts to respond to more modern sentiments, most enactors

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33 The Federalist No. 40, at 248 (Madison), note 7 supra.
and informed readers at the time of the Fourteenth Amendment may have embraced a more expansive view.

Whether one focuses on the enactors "intent" or reader understanding at the time, it is hard to pin down what exactly were perceived as the right methods of interpreting constitutional provisions whose scope was not clear. Generally, given influential documents like The Federalist Papers, distinguishing what very able readers understood from what was agreed upon at the Convention is nearly impossible, though some unclear textual language may reflect specific compromises the Framers reached. Although prevailing interpretive strategies and expressed views do indicate that actual subjective intentions did not occupy a central place, the textual provisions certainly do not reveal any settled, relatively uniform sense of how they should be understood. Professor Rakove has emphasized how complicated the inquiry about original understanding is, given "a bewildering array of intentions and expectations, hopes and fears, genuine compromises and agreements to disagree."35 And Gordon Wood has noted that from the beginning, "contrasting meanings" were ascribed to the Constitution.36

35 Rakove, note 8 supra, at 6.
In addition to all of the difficulties of discerning any precise original sense of how constitutional interpretation should take place, the novelty of the United States Constitution and its enduring significance over centuries would render it a grave mistake for judges and other officials to be held strictly to a conception of interpretation shared at that time, even were one discernable.

Preceding chapters have suggested independent reasons not to rely completely on original understanding and not to take that understanding as based entirely either on reader's perception of the text or enactors' intent. Much of the rest of this chapter pursues these topics in further depth.

As Chapter One has emphasized, a critical difference between most statutes and many constitutions, including that of the United States, involves time. Statutes mainly operate within a constrained space of time after their enactment. Barring a sharp shift in technology or social values, the “readers” will not have changed greatly. But we have little reason to suppose that a reader of 1789 had the same sense of a constitutional provision as does a reader of 2014. Given that one basic reason to rely on reader understanding is to credit how people will actually react
to authoritative instructions, the readers that should count most would be those now living.\textsuperscript{37} A textual originalist may respond, "No, the ordinary civilian, or expert, reader sets the original understanding of authoritative texts and that simply constitutes their meaning." Absent a persuasive justification, that view strikes one as simply arbitrary dictation.

Although the practical relevance of this conclusion is limited, given the difficulty of distinguishing early reader understanding from enactor intent, the long life of the federal constitutional provisions in the United States, and the shifting sense of readers over time constitute reasons to afford the intent of enactors more weight in discerning original meaning than it carries in statutory interpretation.\textsuperscript{38}

The importance of leaders (or key figures) in a voting body, as compared with other voters, is an important issue when judges consider the Constitution. Of course, the intentions of

\textsuperscript{37} See Dorf, note 4, supra, at 2041.

\textsuperscript{38} A claim made by some that statutory interpretation should give extra weight to those whose acceptance is critical to passage has little relevance for constitutional interpretation. On the statutory issue, see Greenawalt, \textit{Statutory and Common Law Interpretation}, note 1 supra, at 71-72. The basic idea is that if enactors might have voted the other way with different language (and the measure would then have lost), what the actual language entails should largely depend on their view. In the cited chapter, I find this view largely unpersuasive. Most language in amendments is not tailored to win particular doubtful voters, and compromises in language are no longer possible when an amendment is up for ratification. Id. at 71. As with statutory interpretation, the understanding of those who vote against approval should not simply be written off. Individuals who vote against a measure may agree with much that a particular provision contains and may even have influenced its formation. Id. Their understanding should not be disregarded because they opposed another element strongly enough to vote against the complete package.
those centrally involved in the drafting and adoption of language will almost inevitably carry
special weight, since their expressed views inform others voting and are likely to be considered
by informed readers as broadly representative. On the other hand, the notion that general
members consciously delegate the meaning of a legislative text to those who developed its
language has much less force for constitutional provisions than for technical statutes. Since the
language is not especially complex or esoteric, all members have a genuine opportunity to
develop their own understandings.

The comparative weakness of the delegation concept does not itself resolve the intrinsic
importance of leaders and followers, especially as affected by the passage of time. Perhaps
their conclusions are likely to be better if judges follow the understandings of those who have
thought carefully about a fundamental constitutional subject and worked on it extensively. The
last half of this chapter urges that for constitutional provisions like the Establishment Clause, the
passage of time renders original understanding less central to interpretation; it also means that
the original understanding that should count most becomes increasingly that of those with the
clearest and deepest sense of what they were doing. The next section addresses a question tied
to these issues, namely how far should conceived specific applications of particular provisions dominate their broader semantic sense and underlying general principles, including the overall import of the Constitution?

B. Specific Applications or General Principles as Guides

A central question about the original understanding of many fundamental constitutional provisions is whether what should be taken to matter most is particular applications or more general principles. This is not an issue with regard to highly specific constitutional language, such as the granting of two Senate seats to each state,\(^{39}\) whose meaning and what it requires have not shifted over time, whatever the strength or weakness of contemporary reasons to protect smaller states.\(^{40}\)

Provisions formulated more broadly raise the issue of specific applications versus the general sense of words and underlying principles. The original constitution provides that no

\(^{39}\) U.S. Const. art. I, § 3. cl. 1. This right cannot be altered by constitutional amendment without the state’s consent.

\(^{40}\) We could imagine some disagreement over exactly what counts as a state—if the District of Columbia or Puerto Rico became essentially self-governing, without Congressional oversight, would each be a state even if not formally labeled as such? We could also imagine a dispute over what is valid state consent, if the federal government or larger states put intense pressure on smaller states to surrender equal representation. But the basic notion of a state’s entitlement to equal representation is not a serious constitutional question.
state shall pass any "Law impairing the Obligation of Contracts." The First Amendment dictates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press…" The Fourth Amendment precludes "unreasonable searches and seizures."

How are such provisions to be understood if one gives priority to original meaning? This issue is sometimes cast as either-or—either applications understood at the time or what fits the language under modern conditions. Of course, assessing with confidence what specific applications were understood at the time is often impossible. Beyond this practical obstacle, we can identify different levels of generality and how these relate to originally conceived applications. Statutes (or executive rules) may authorize: (1) behavior that is at odds with specific applications assumed at the time; (2) novel behavior so closely resembling intended applications that people of any era would see the provision's language as covering it, and that obviously should be treated similarly (for example, what Justice Scalia assumes in Heller about weapons not in existence in the late 18th century, or what would be the response to a novel, extremely horrendous, punishment by torture); (3) behavior not then imagined but which would

41 U.S. Const., article I, § 10, cl. 1.
be protected by the general attitudes that gave rise to the prohibitions; and (4) impositions that
would then have been accepted but that we now regard as at odds with the basic concept. An
illustration of the last point would be capital punishment for a wide variety of crimes not
involving the death of any human victim, such as counterfeiting, a practice widely accepted
when the Bill of Rights itself was adopted.\textsuperscript{42}

As I have suggested, a "pure originalist" position would follow the level of original
meaning according to the interpretive strategy that the enactors intended or readers then
perceived. Given that courts had not then construed statutory language as restricted to
applications that legislators probably had in mind, and that Madison and other key figures in the
adoption of the Constitution recognized the ambiguities and incompleteness of any drafted
language, this approach would not yield the conclusion that provisions were sharply restricted to
specific applications then assumed. Whatever interpretive approach was most widely accepted
in 1789, the difficulty of amendments, the endurance of the Constitution, and changes in social
facts and values support the view that courts should now take original understanding of broad

\textsuperscript{42} This topic is addressed in more detail in Chapter 6.
provisions at a general level, or, alternatively, should refer to whatever aspect of original understanding makes the most sense and is most just. Of course, when, as frequently, Supreme Court Justices are unable to decipher a persuasive argument that original understanding points in one direction or another, they must rely on other criteria to resolve an issue, whether they acknowledge that or conclude (honestly or not) that their judgment fits the original understanding.

Two narrower questions about the force of original understanding are whether courts can appropriately approve novel exercises of power that limit rather than expand the range of protected rights, and whether evolving applications should ever contradict the constitutional terms. One opinion by the Warren Court suggested that under the Fourteenth Amendment individual rights could be expanded but not cut back. Whether one focuses on original

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44 One could view specifications of federal power vis-à-vis states as somewhat similar, i.e. as protecting state domains of authority.

45 Katzenbach v. Morgan, 384 U.S. 641, 651, 651 n.10 (1966) ("Correctly viewed § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment. . . . [i]t does not grant Congress power to exercise discretion in the other direction . . . ").
understanding or desirable development, any broad generalization of this position to all constitutional rights lacks a persuasive defense. Social changes may indicate that certain individual rights need to expand, others to be more limited. For example, the original Constitution bars state impairments of the obligation of contracts. As Supreme Court cases have implicitly recognized, modern debtors may need forms of relief that would have been regarded as unacceptable restrictions on contractual rights when that provision was adopted. We cannot simply assume that all individual rights may warrant further expansion but not narrowing.

Capital punishment sharply poses the trickier issue of possible contradiction of original terms. The Due Process Clause of the Fifth Amendment and an identical clause in the Fourteenth prohibit depriving a person of “life, liberty, or property, without due process of law”; that language unmistakably recognizes capital punishment as an acceptable penalty. Could it be consistent with this original understanding to bar capital punishment within states as

46 If one focused on original understanding, rather than desirable development over time, one could posit such a one sided development only by concluding that at the time of enactment people recognized and approved development that was in one direction, say toward greater equality or less severe punishments, but disapproved all backtracking. That is unlikely.
47 See, e.g., Home Bldg. & Loan Ass’n. v. Blaisdell, 290 U.S. 398, 428 (1934) (acknowledging the constitutional prohibition against impairment of obligation of contracts “is not an absolute one and is not to be read with literal exactness like a mathematical formula”).
unconstitutional? This inquiry, explored in greater depth in Chapter 6, turns out to be far from simple. So long as the original understanding embraced some development over time of impermissible punishments, it fits with decisions that the range of acceptable capital punishment may differ now from what it was 220 or 150 years ago. But that conclusion does not resolve the possible acceptability of judicial elimination of all capital punishment. If the Constitution stated, “Capital punishment will be the (or a) penalty for murder,” that could well be taken to represent an understanding that only an amendment could make its imposition always unconstitutional. The actual language is not quite so direct. If only two states retained capital punishment as a matter of legislative choice, and even in those the death penalty was rarely inflicted, and then always on members of disadvantaged groups, it could easily seem “cruel and unusual” or violative of due process or equal protection by a modern standard. Thus, the constitutional language does not absolutely preclude a resolution that all death penalties could be unacceptable; but it does make it much harder to argue that such a ruling would be in line with

48 Since a state is involved, the understanding at the time of the Fourteenth Amendment should matter more that that in 1791.
49 As Chapter 6 indicates, numerous Supreme Court decisions embody that view.
50 The theory could be that it is now cruel and unusual or violates due process.
51 In that event, it would be hard to contend that forbidding capital punishment fit with what the enactors saw as acceptable applications of “cruel and unusual punishment.”
the original understanding so long as the federal government and most states still retain the penalty.

A final question about levels of generality concerns whether one focuses on specific provisions or the constitutional as a whole. Chief Justice Marshall's opinion in *McCulloch v. Maryland* includes a famous articulation of attention to the broad document and its purposes.\(^{52}\) Exactly how far attention should be given to the broader constitutional document depends on the particular issue involved. Two arguments in favor of overarching attention to the specific provision of statutes -- that such language commonly represents compromises and that the judicial discretion that reliance on broad purposes entails needs to be cabined\(^{53}\) -- have much less power for most constitutional provisions. Specific language does not commonly represent a compromise at odds with the Constitution's broader principles.\(^{54}\) And if the primary concern in respect to statutes is distrust of judges freely formulating broad purposes, it hardly adds much discretion for judges who are already considering the underlying purposes of a general phrase such as "abridging the freedom of speech" to attend to the overall values of the Constitution.

\(^{52}\) See note 31 supra and accompanying text.
\(^{54}\) However, compromise was the ground for the various treatments of slavery in the original document, and compromise also played a critical role in the equal state votes in the Senate.
C. Hypothetical Intentions and Understandings

A question about original understanding touched on in the last chapter is how far hypothetical intentions or understandings should figure into interpretation. One usually thinks of hypothetical intentions as just that: What would someone have intended if they had addressed an issue they did not actually perceive? But the same question can arise with reader understanding: How would readers have conceived applications if they had considered problems that did not actually occur to them?

In two different respects, the line between actual and hypothetical intentions (and understandings) is less than sharp. The first respect concerns the closeness of an unperceived possible application is to perceived applications. If a particular form of torture was plainly unacceptable, so also is its infliction by controlled electricity, a technology people of the time had not yet imagined. When the novel practice departs further from actually conceived applications, the issue of hypothetical intentions becomes more serious. Thus, one might ask whether people in 1791 would have regarded capital punishment as cruel and unusual if they had been aware of the infrequency with which it is now imposed and of changing perspectives on the preservation of life.
If hypothetical intentions should count (and it is hard to rule them out altogether), it becomes a fundamental question just how judges should conceive the earlier people. As Chapter Two suggests, one might ask, “If we provided these people with specific facts about the future, what would they have concluded?” or “What would people of their general outlook believe if they had lived in modern times?” The latter inquiry entertains more opportunity for changing outlooks, and in form requires more creative thinking by the modern judge. That the two inquiries could lead to different outcomes is strongly suggested by the facts of an actual Supreme Court case. A southerner whose language indicated that he was a moderate about race relations set up a park that was only for white persons. Roughly a century later, such parks were held unconstitutional. Would the man who donated the park have preferred that the park be closed or integrated? Given his actual convictions about racial separation, he might, even if informed about changes in overall attitudes, have opted for closure. But if we asked what would a person with his overall feelings about the races who was living in modern times prefer, that would almost certainly be integration. Of course, the more that modern judges rely on the broader

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55 The treatment, at the end of Chapter 2, of how the Second Amendment should be understood in relation to new weapons whose ordinary possession is unrelated to military needs, illustrates this point.
outlooks of people of earlier times, rather than their more specific convictions, the harder it is for them to detach estimates of hypothetical intentions from their own normative evaluations.

III. Reflections on Madison and Jefferson and the Establishment Clause

The remainder of this chapter uses a familiar example to illustrate many of the complexities we have identified and to support certain proposed resolutions. Among the questions are these. How should Justices assess the original understanding of the Establishment Clause; how should the Clause apply, if at all, to state and local laws through the Fourteenth Amendment; and should the standards and significance of original understanding alter as time passes?

In *Everson v. Board of Education* the Supreme Court unanimously decided that the Establishment Clause of the First Amendment did apply to states under the Fourteenth Amendment’s Due Process Clause.\(^57\) The Justices were also united in adopting a stringent conception of the restraints that clause sets, partly captured by the phrase “separation of church and state.” The Justices divided 5-4 on the precise issue, whether New Jersey could pay for the bus transportation of students attending parochial schools, the majority ruling that such

\(^{57}\) 330 U.S. 1 (1947).
assistance did not significantly aid religious education. Scholars and subsequent Supreme Court Justices have variously characterized the reasons why the majority of the Court was willing to uphold that practice -- and indeed passages in Justice Black's opinion for the Court do point in different directions. But a central explanation is captured by his comment that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Since the opinion goes on the acknowledge that the New Jersey law approached the "verge" of state power, a reader can only infer that for Justice Black more direct and substantial aid would not have been acceptable.

The related issues we shall examine are: 1) the basic idea of whether the Establishment Clause should apply to the states; 2) the heavy reliance on the views of Thomas Jefferson and James Madison; 3) the strict concept of nonestablishment, including the idea of "separation of church and state"; 4) what relevantly should count as the original sense of a provision as time from enactment elapses; 5) and how much the "original understanding" should now matter.

58 Id. at 16.
59 Id. It does not follow that each of the other four Justices joining the opinion took the same view, since Justices often accept language in majority opinions that does not reflect their precise views. Of course, the four dissenting Justices in Everson would also have regarded more substantial aid as forbidden.
A. Incorporation of the Establishment Clause

_Everson_'s majority opinion assumes without analysis that the Establishment Clause applies against the states as well as the federal government. That proposition is now solidly settled, despite occasional expressed doubts by individual Justices.\(^{60}\) But the virtual certainty that the Supreme Court will not back away from this ruling has not eliminated scholarly debate over its soundness.

The decision that the Fourteenth Amendment makes the Establishment Clause applicable against the states depends on the more general proposition that the Due Process Clause of the Fourteenth Amendment renders the fundamental provisions of the Bill of Rights restrictive of state laws. By 1947, the time of _Everson_, the Free Speech and Free Exercise Clauses had already been held to limit states.\(^{61}\) Thus, it might have seemed a simple extension to hold that the rest of the First Amendment, which begins "Congress shall make no law," warrants similar treatment. A subsequent chapter will outline differing views over whether those adopting the

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Fourteenth Amendment really intended that most of the Bill of Rights apply to the states.\textsuperscript{62} The focus here is on special questions about the Establishment Clause.

Two basic arguments against applying this clause to the states are that it was essentially jurisdictional, reserving power to the states, and that its concerns are institutional, rather than related to the scope of individual rights.\textsuperscript{63} The jurisdictional argument is that since the clause kept the federal government out of state business, it should never have been turned upside down to constrain states. When the Bill of Rights was ratified in 1791, roughly half the states favored religion in ways now regarded as at least weak establishments. Some influential members of Congress, most notably James Madison, who drafted the Bill of Rights, definitely opposed establishments in principle; other members, and many ratifiers within state legislatures, were undoubtedly comfortable with the degrees to which their own states favored one or more religions. Thus, the argument goes, we should understand the Establishment Clause as an assurance that the federal government would not create a national church or otherwise interfere

\textsuperscript{62} Those who did have such an intent probably conceived the Privileges and Immunities Clause, not the Due Process Clause, as doing the work, but that clause had earlier received a very narrow construction. See The Slaughter House Cases, 83 U.S. (1 Wall.) 36 (1872).

with state decisions whether or not to establish religion.\textsuperscript{64} It follows that the Court was paradoxically wrongheaded to rely on the clause to restrict states.

This jurisdictional argument against incorporation is demonstrably unconvincing.\textsuperscript{65} Although the clause was \textit{partly} jurisdictional at the outset, leaving states free to establish religions, its language that “Congress shall make no law respecting an establishment of religion...” also has clear implications for federal domains that were \textit{not} subject to state authority. These included United States embassies abroad, the about-to-be implemented federal enclave of the District of Columbia, and fairly extensive federal territories. The national government could not have created a federal established church, such as England’s Anglican Church, for these areas. By the time that the Fourteenth Amendment was proposed and ratified, no state retained an established religion. Most state constitutions themselves had “no establishment” language. Thus, by 1868, “no establishment” was regarded primarily as a basic

\textsuperscript{64} See, e.g., Akhil Reed Amar, \textit{The Bill of Rights: Creation and Reconstruction} 32-42 (New Haven, Yale University Press 1998) (“The establishment clause did more than prohibit Congress from establishing a national church. Its mandate... also prohibited the national legislature from interfering with, or trying to disestablish, churches established by state and local governments.”); Philip Hamburger, \textit{Separation of Church and State} 101-07 (Cambridge, Mass. Harvard University Press 2002).

\textsuperscript{65} This response is developed in detail in Kent Greenawalt, “Common Sense About Original and Subsequent Understandings of the Religion Clauses,” \textit{8 University of Pennsylvania Journal of Constitutional Law} 479 (2006) and is summarized in Greenawalt, \textit{2 Religion and the Constitution}, note 57, at 42-44.
principle of government, not an allocation between different levels of authority. If, as is

extremely likely, the federal clause was then understood to embody such a principle, no special
jurisdictional feature precluded its coverage extending to states.

The more tenable argument against incorporation is based on the clause’s institutional
color. If the Establishment Clause is essentially about relations between civil government
and institutional religion, how can the Due Process Clause, a provision that protects individual
rights, encompass it?

The answer is that supporters of nonestablishment have always perceived it as closely
related to free exercise. Further, a central basis for nonestablishment is an ideal of
nonpreference among adherents of different religions, an equality that might well be
encompassed by both the Free Exercise Clause and the Equal Protection Clause. Had the
Supreme Court ruled that the Establishment Clause did not apply to the states, courts would have
needed to determine whether particular state measures that the Establishment Clause forbade to

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66 No doubt, a country with an established religion can allow a substantial degree of free exercise, but
“through the eighteenth century, most countries and principalities with established religions did not grant
full privileges to nonadherents.” Kent Greenawalt, Some Reflections on Fundamental Questions about the
Original Understanding of the Establishment Clause in No Establishment of Religion: America’s Original
67 A disfavoring of someone’s religion can easily be seen as an impediment to free exercise.
68 One can regard favoring by the government on the basis of religion as a kind of suspect classification.
Congress violated the Free Exercise or the Equal Protection Clause. That approach would greatly multiply the complexities of review of state laws favoring religion, with very limited practical consequences. Acknowledgement that the Establishment Clause itself bears a sufficient connection to individual rights to be applied against states greatly simplifies judicial administration, a broad objective that has almost certainly influenced the Court’s handling of the Fourteenth Amendment more generally.

B. Reliance on the Views of Thomas Jefferson and James Madison

Justice Black’s opinion in Everson, as well as subsequent discussions of nonestablishment, relied heavily on the views of James Madison and Thomas Jefferson, a concentration that has been strongly criticized.\(^6^9\) Just how far the conceptions of these two leaders should influence our present sense of the Establishment Clause raises crucial questions about the sort of original understanding that should matter for general constitutional clauses of the founding and post-Civil War eras.

Why might the views of Madison and Jefferson carry particular weight? Madison, of course, was the original drafter of the Bill of Rights, which was adopted two years after the Constitution partly in response to concerns expressed by Anti-Federalists during the ratification process that the original document did not sufficiently restrict federal power. A key development toward nonestablishment had been Virginia’s earlier rejection of a state tax to support religions, followed by its adoption of Thomas Jefferson’s Bill for Religious Freedom, which, among other things, forbade requiring people to support any ministry. Madison had led the fight against the tax, and his *Memorial and Remonstrance* was the clearest, most eloquent public statement of principles of nonestablishment.\(^{70}\) Jefferson, representing our government in France when the Bill of Rights was drafted, was the strictest separationist among the early Presidents, and in a now famous (but then obscure) 1802 letter to the Baptists in Danbury, Connecticut, he opined that the Establishment Clause built “a wall of separation between church and state.”\(^{71}\) Scholars disagree somewhat about exactly what Madison and Jefferson regarded as

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\(^{70}\) Memorial and Remonstrance Against Religious Assessments, To The Honorable The General Assembly of the Commonwealth of Virginia from James Madison (1785) *in II Writings of James Madison* 183 (Gaillard Hunt, ed.) (New York, G.P. Putnam’s Sons 1900-1910). Dissenters in the *Everson* case included this historic essay in an appendix. 330 U.S. 1, 28, 63 (Rutledge, J., dissenting) (1947).

\(^{71}\) Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins, & Stephen S. Nelson, a committee of the Danbury Baptist Association in the state of Connecticut (Jan. 1, 1802).
acceptable, but the fundamental issue here is the significance their particular views should carry.

Three questions present themselves: (1) should judges give primary attention to the actual (subjective) intentions of those who voted to enact or ratify the Bill of Rights, to what a reasonable participant in that process would have understood, or to the sense of readers of the time? (2) should judges relying on those sources be guided mainly by originally understood concrete applications or more basic principles? and (3) should judges assume that widely held original understandings should determine semantic meaning and specific applications, or should they make present evaluative judgments about what fulfills basic principles in a just and desirable way?

Standard contentions, and the first part of the chapter, concentrate mainly on the first two questions. Whether one concentrates on most enactors or most readers, giving huge weight to the views of Jefferson and Madison to interpret the original Establishment Clause is not

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72 See e.g., David E. Steinberg, "Thomas Jefferson’s Establishment Clause Federalism," 4 Hastings Constitutional Law Quarterly 277, 277-78 (2013) (arguing "[t]he mainstream treatment of Jefferson’s views on the Establishment Clause is virtually the polar opposite of Jefferson’s actual position.")
warranted. With seven states retaining forms of substantial aid to religions, and approval of
the First Amendment by two-thirds of each house of Congress and majorities in three quarters
of state legislatures, many of those voting in favor did not embrace the outlooks of the two
strongest proponents of strict separation.

Questions about “specific applications” versus “abstract purpose” do connect to what
weight the particular views of Madison and Jefferson should receive. An example of when a
choice between foreseen applications and general principles could be critical would be a
challenge to a modern law that criminalized blasphemy according to Christian conceptions while

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73 In reaching this conclusion, Donald L. Drakeman, “Everson v. Board of Education and the Quest for
the Historical Establishment Clause,” 49 American Journal of Legal History 119 (2007) refers to other
relevant influences. For a balanced account of attitudes during the era of the Bill of Rights, see John
Witte, Jr. Religion and the American Constitutional Experiment 21-105 (2d ed. Boulder, Colorado,

74 This judgment might be countered in one of two ways. Perhaps members of Congress and
state legislators did advocate a very strict version of nonestablishment for the federal government
within federal domains. As far as I am aware, there is virtually no evidence precisely what kind of
nonestablishment such legislators understood the Establishment Clause to enact.

The second type of countervailing evidence would be wide publicity that the Establishment
Clause embraced the sense of nonestablishment that Jefferson and Madison favored. Regrettably, the
Bill of Rights, as important to American liberties as it has become, was approved by Congress and
ratified by state legislatures in a fairly cursory fashion. Since the precise language of “no law respecting
an establishment of religion” was novel, not only in the United States but in the world, it is hard to
know what exactly a reasonable reader, whether legally trained or not, would have made of it, except
to understand that at a minimum a government church, along the lines of the Church of England, was
forbidden. Witte, note 73 supra, at 71-105, describes the origins of the religion clauses. Even a reader
aware of the preceding Virginia controversy and Madison’s position could not have been confident
whether Madison’s own opinions had succeeded within Congress or whether the differences between
Madison and others had been compromised, or papered over without resolution. In short, whether one
focuses on the subjective intent of most adopters, on how a reasonable adopter would have understood the
language, or on what a reasonable reader would have understood, there is little basis simply to accept as
decisive the favored positions of Madison and Jefferson.
permitting what other religions would regard as blasphemy. Such a law would violate basic
notions of nonestablishment, even if those in the founding era failed to recognize that
implication. Given that Madison and Jefferson were stricter than most contemporaries about
both applications of nonestablishment and its broader principles, the status of their views may
not seem closely related to the appropriate level of generality; but two grounds point in the
contrary direction.

One relates closely to the premise of "incorporation." By the time of the Fourteenth
Amendment, the idea of “establishment of religion” had developed. Insofar as that
amendment’s proposers and ratifiers were influenced by views held in 1791, abstract principles
almost certainly counted for more than the founders’ generation’s reactions to particular
practices. Since by the 1860’s, all states had long since abandoned formal establishments\(^75\) and
most had nonestablishment constitutional clauses, enactors and readers of the Fourteenth
Amendment were surely more consistently antiestablishment than officials and citizens had been
when the Bill of Rights was approved. Because Jefferson’s and Madison’s general views were

\(^75\) Massachusetts was the last state to do so in 1833 See William H. Marnell, *The First Amendment: The
better known than those of most of the founders, they might well have influenced those who
adopted and read the post-Civil-War amendments and had a sense that the Fourteenth embraced
key aspects of the Bill of Rights.\(^{76}\)

Apart from the import of the later amendment lies an interpretive issue with deeper
significance. Should judges treat the relevant abstract principles as simply strict or less-than-
strict nonestablishment, or should they ask themselves what constitutes their best conception?
According to this latter approach, not only may our modern understanding entail particular
consequences that would not have been broadly conceived at the time of adoption, the relevant
underlying principles might now look different.

Here is an illustration. Suppose that most of those who voted for the Bill of Rights and
readers of the time did not think the government should support any particular church but that it
was free to sponsor particular religious opinions, by, for example, engaging in specifically
Christian public prayers, forbidding Christian blasphemy, and using the King James version of
the Bible in all government ceremonies and in public schools (once these developed).\(^{77}\) The

\(^{76}\) Even if they did not assume this, those founders' views might have affected their judgments if they
were asked the hypothetical question how the Establishment Clause should be understood if it was
applicable to the states.

\(^{77}\) Public schools did not develop until early in the nineteenth century.
accepted underlying abstract principles, let us assume, were that although nonestablishment 
entailed that American governments should not favor any specific church, they could, as 
representations of a Protestant Christian nation, properly reflect that outlook in many of their 
own actions. 78 A modern understanding of nonestablishment rejects the idea that the 
government properly sponsors Protestant Christianity and perceives a closer connection between 
government expressions of religious ideas and the government’s favoring of particular groups. 

After all, if government formally expresses particular opinions about religion, this amounts to an 
implicit, indirect favoring of the religious institutions that embrace these outlooks. 

If a Justice believes that the focus should be on an understanding of abstract principles 
that represents the soundest grasp of a basic concept, she might well turn to Madison and 
Jefferson as having a truer sense of nonestablishment than did most of their contemporaries. 

Any approach of this sort, accepting the sense of original abstract principles that most fully 
realizes the true dimensions of a fundamental concept, can be challenged as no longer really 
relying on original intent at all. Before attempting to answer that challenge directly and asking

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78 For some Justices and scholars, that is sufficient to condemn the present, stricter, approach. They 
may offer in its stead an interpretation of nonestablishment limited to a bar on preferences for particular 
churches, or at least a standard more flexible in regard to practices it allows.
how much original intent should now matter for provisions like the Establishment Clause, I
briefly consider objections to the whole concept of “separation.”

C. Strict Disestablishment and Conceptualization

In the Everson opinions, closely connected with the reliance on Jefferson and Madison, is
the conclusion that disestablishment is strict, signaled by the use of Jefferson’s phrase, a “wall of
separation between church and state.”79 Powerful objections have been raised not only to the
idea that the limits on government practices are this stringent but to the very terminology of
“separation,” a concept that some assert is quite different from “disestablishment.”80

In practice, the Supreme Court has retained a “strict” approach in some domains but
not all. For decades the Court carried forward the implications of Everson about financial
assistance to parochial education, striking down assistance that might genuinely aid religious
education while approving fringe forms of assistance, such as the loan of secular texts and
payment for implementation of government tests. But that approach shifted radically with the
Court’s approval in 2002 of a voucher plan in Cleveland, according to which parochial as well

79 See Letter from Thomas Jefferson to Nehemiah Dodge, supra note 71.
80 See Hamburger, note 64, supra.
as other private nonprofit schools received very substantial financial aid for the education of
children from relatively poor families.\textsuperscript{81} Although no longer imposing stringent restraints on
financial aid to religions schools,\textsuperscript{82} the Court has carried forward Everson's underlying theme
in regard to government sponsorship of religious beliefs and public school exercises.\textsuperscript{83} Notably,
public schools cannot engage in prayers and devotional Bible readings in classes and graduation
ceremonies, they cannot post the Ten Commandments in all classrooms, and they may not teach
"creation science" as an alternative to evolution. Similarly, cities and towns cannot erect crèches
in a manner that endorses Christianity. Thus, governments, with very limited exceptions,\textsuperscript{84} may
not themselves endorse or sponsor religious ideas.\textsuperscript{85}

\textsuperscript{81} Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
\textsuperscript{82} In fact aid to other religious institutions besides schools that serve secular purposes, such as hospitals, adoption agencies, and social service providers had been widely accepted before the Supreme Court's 2002 decision.
\textsuperscript{83} This broad subject is treated in Greenawalt, 2 Religion and the Constitution: Establishment and Fairness, note 63 supra, at 57-121.
\textsuperscript{84} One exception is chaplains for military establishments and prisons, the idea being that in environments in which government controls all of life, it may appropriately provide opportunities to worship and receive ministerial assistance. Another exception is legislative chaplains, held to be justified because they were clearly accepted at the time of the Bill of Rights.
\textsuperscript{85} Justices have strained to explain that "In God We Trust" on coins and "under God" in the Pledge of Allegiance do not really have religious significance, but rather are understood as a reference to historical tradition. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 29-30 (2004). At least with respect to "under God," said by young children in school classrooms, such an explanation is wholly lacking in plausibility. A minority of Justices have proposed that it is entirely appropriate for governments to acknowledge a benign Supreme Being, a belief shared by Christians, Jews, and Muslims. See, e.g., Engel v. Vitale, 370 U.S. 421, 444 (1962) (Stewart, J., dissenting).
Philip Hamburger has strongly urged that the founders did not think of "nonestablishment" as "separation," that the growth of the latter idea has skewed interpretation of the Establishment Clause in a way that both departs from its roots and is unfortunate.\textsuperscript{86} That critique substantially overstates the significance of this change in conceptualization.\textsuperscript{87} To begin, no one has ever conceived a genuinely absolute notion of separation. Churches receive protection from police and firefighters, are subject to regulations about the safety of buildings, and benefit hugely from exemptions from property taxes and tax deductions for donations.

"Wall of separation" must be understood to mean a sharp divide only in certain crucial respects. More broadly, the attack on "separation" underestimates the commonness of conceptual shifts and overestimates the practical force of this one. The ways in which the members of societies conceptualize their experiences and their worlds constantly alter through time. These changes almost always involve some adjustment of perspective, but the degree of adjustment varies greatly.

\textsuperscript{86} Hamburger, note 64, supra.
A different realm of constitutional law provides an illustration.\(^88\) No one talked about a "right of privacy" in the late eighteenth century. The Fourth Amendment provided a protection of persons, houses, and papers against unreasonable searches and seizures; the Fifth Amendment protected people from being witnesses against themselves in criminal cases. Both provisions protect against the government's gathering information about one's life that one would prefer to keep secret. The idea that both protections involve a more general right of privacy connected the two provisions in an illuminating way, but has had only a limited effect on what exactly those two provisions were thought to cover.\(^89\) By contrast, in some more modern conceptions, a "right of privacy" has been extended to a right to have an abortion, engage privately in sexual relations with other consenting adults, and possess pornography in one's home.\(^90\) So conceived, the right includes engaging in a particular behavior, as well as limiting how officials acquire information. "Privacy" in this sense lies very close to "autonomy," carrying much broader implications than a mere restraint on information gathering.

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\(^{88}\) This illustration by itself proves almost nothing—it could be a peculiar anomaly in social and legal discourse—but it provides a sense of the distinction that is important.

\(^{89}\) In *Boyd v. U.S.* 116 U.S. 616 (1886) the interaction did appear to significantly influence coverage, but that effect has diminished since then. See, e.g., *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967). This connection is treated in Chapter 11.

Does the concept of "separation of church and state" radically alter the meaning of "disestablishment" or "nonestablishment"? Although eighteenth century ideas of nonestablishment were more limited than modern ones, this comparison alone tells us little about the particular influence of the concept of "separation." The coverage of "nonestablishment" would have changed over time even if that had remained the exclusive concept for analysis.\(^91\)

To try to develop a sense of the particular significance of "separation," we must estimate how "nonestablishment" would otherwise have developed. For aid given on a neutral basis to religious institutions performing secular functions, "separation" may well have greater bite than "nonestablishment;" but, as we have seen, the Court has moved away from powerful limits on such aid. When one thinks about school prayers or crèches in state buildings, the idea that government should not establish religion seems to have just as much force as the notion of separate spheres; the same is true for most other issues involving the state's relation to religion.\(^92\)

That the metaphor of "separation" has itself made a great difference in what the Supreme Court has decided until now is doubtful.

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\(^{91}\) To draw just two analogies, the ambits of freedom of speech and equal protection have undergone very great adjustments without any substitution of a new terminology for the basic principles they embody.\(^92\) At this stage in history, it is certainly possible that, if the Supreme Court wholly abandons the separation metaphor, the abandonment will accompany greater permissiveness about what governments may do; but this need not be because of the differential implications of "separation" and "disestablishment."
D. What Original Intent Should Count and for How Much?

What remains is reflection on how reliance on Madison and Jefferson relates to what should count as the crucial original understanding and its weight. For some critics, it is sufficient to condemn the Supreme Court's antiestablishment doctrine that 1) the heavy reliance on the views of Jefferson and Madison fails to represent the broad range of original positions and 2) modern doctrine is more rigorously antiestablishment than were prevailing original views. These two conclusions are better seen as the beginning rather than the end of inquiry about what original understanding should now matter and what force it should carry.

As previously suggested, original intent can be important for reasons of political authority, continuity, and wisdom. As time passes in a constitution's life, the force of the political authority reason fades. For basic constitutional rights, understanding of abstract principles should count for more than beliefs about specific applications, and for a constitution that is difficult to amend, judges should treat original understanding with diminishing force.

The following analysis puts to one side the reality that if they followed a strict originalist jurisprudence, judges passing on state laws restricting rights would have to ask how matters were
viewed at the time of the Fourteenth Amendment, not 1791. As I have mentioned, we rarely see this attention, even when originalist Justices are writing opinions. This is partly because of a focus on the original enactors and readers; but the more basic reason may be that any constant splitting of hairs about what a freedom means vis-à-vis the federal government and what it means vis-à-vis the states would be awkward and confusing, if not unmanageable. Elaborating separate bodies of Bill of Rights law for the federal government and the states would further complicate the already arduous task of deciding controversies over fundamental rights, and citizens might feel a sense of injustice that what amounted to an infringement by one political authority would be acceptable coming from another.

The crucial question of whose original understanding counts must be addressed not only by proclaimed "originalists" but also by everyone who takes original understanding as a

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93 Justice Thomas, in Elk Grove, said he would not apply the Establishment Clause against the states, but that is because he is persuaded it should not be regarded as incorporated. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 (2004).

94 The Supreme Court has refrained from developing two separate bodies of Bill of Rights law for the same sorts of reason that led it to conclude that the federal government could not maintain racially segregated schools once the states were forbidden to do so—although the original Bill of Rights had no Equal Protection Clause and the founders, having accepted slavery in the original Constitution, had no objection to school segregation.
significant component of constitutional interpretation. Lying between the adopters' subjective intentions and reader understanding is how a "reasonable" enactor would understand the language of a statute or constitutional provision. This device appears to focus on legislative intent, but what it actually takes into account may fall closer to a knowledgeable reader's understanding, since such a reader would usually understand a piece of legislation as would a "reasonable" legislator. For most of the issues treated in the rest of this chapter, it is not crucial whether one emphasizes adopter intent or reader understanding.

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95 As we have seen, the idea that the most important understanding is that of those with authority to adopt a legal rule competes with the view that what is crucial is reader understanding. Reinforcing the focus on reader understanding is a concern that group intents do not exist (an implausible position in its most extreme form, since sometimes virtually all members of a group do have a common intent) or are rarely present and are nearly impossible to discern, and thus their "investigation" leads judges to implement their own opinions about what is right and just.

96 Chapter 3 of Statutory and Common Law Interpretation, supra note 1, suggests that this will not always be true.

97 In any event, for both the Bill of Rights and the Fourteenth Amendment, we have little basis to distinguish one from the other. There is slight evidence in the internal debates of the two Congresses about what provisions of the Bill of Rights meant; although we do have alterations of wordings of the Establishment Clause, it is difficult to know exactly why changes were made. In any event, half of the process of adoption was ratification within the states. We have little basis to determine what state legislators thought the proposed clauses meant—if they thought about their meaning—apart from what reasonably well informed people of the time would have understood. In short, the evidence for what those legislators intended would be essentially the same as the evidence we would need to comb were we to estimate reader understanding.
In respect to what those who adopted or read the Bill of Rights assumed about the comparative importance of understood applications and broad principles, one guide is the choice of general language. Of course, drafters would not have cluttered a constitution with every specific practice they wished to forbid, but had Madison or others wanted only to reach specific practices, they could have made more direct references to historical arrangements. Instead of language about laws “respecting an establishment of religion,” they could have referred to “established churches,” and perhaps to other specific forms of establishment. As we have seen, key enactors of the Constitution recognized that authoritative language definitely could not itself resolve all potential issues, and they were aware that interpretation of statutes tended to be fairly flexible. Knowing that the amendment process was not easy, adopters and readers of the Bill of Rights could not have contemplated a formal addition with every development in views about the right applications of the general concepts. Apart from its bearing on probable initial understanding, the difficulty of amendment, as Chapter One stresses,

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98 Of course, to some extent, one discerns abstract principles through conceived applications and one discerns views about specific applications through a sense of the abstract principles thought to govern; but it still can matter greatly if later judges give their primary focus to understood applications or abstract principles, to whether the adopters of the Establishment Clause believed a prohibition of blasphemy (limited to Christian blasphemy) was acceptable for the federal District of Columbia or whether such a prohibition does involve a significant promotion of one religion over others.
has independent significance. If a constitution endures over time, and it serves as a unifying force for a society, and it is difficult to amend, and it would lose some of its symbolic value if frequent amendments made it much longer and less coherent, judges have reasons to pay attention to more abstract principles.

Evident problems with sticking entirely, or mainly, to contemplated applications involve technological advances, other changes in the external world, and deep shifts in social values. The relevance of technical advances and undisputed changes in social practices is obvious. The adopters of the First, Fourth, and Eighth Amendments did not conceive of electronic media, electronic surveillance, or torture by electric shocks; and in respect to the Second Amendment, they were not considering radical changes in what constitutes the military. The relevance of changes in value, such as perceptions about the death penalty, is understandably more debatable.

In respect to religion and the state, we can perceive an alteration of both social circumstances and attitudes. Among other changes from 1791 are these. The choice of what religion to follow is now regarded much more as an autonomous choice for each individual. The number of Roman Catholics has increased dramatically (it is now the largest single denomination
in the United States) and, partly because of changes within the Catholic Church itself, most
Protestants now view it as one among many Christian groups, not as a distinctive embodiment of
evil or source of tyranny. The number of Jewish, Muslim, Hindu, and Buddhist practitioners has
become substantial;\textsuperscript{99} and, although religion within the United States has failed to fade away as
many social scientists once assumed, nevertheless the percentage of citizens who profess atheism
or agnosticism has risen.

Although pinning down ways in which the original understanding of free exercise and
nonestablishment of religion fails to correspond with present conceptions is difficult, most
citizens do not now think governments should teach Protestant Christianity as true; the Supreme
Court has declared that religious tests of office within states violate the federal Establishment
Clause;\textsuperscript{100} and a prohibition of Christian blasphemy alone would now be regarded as an
establishment.\textsuperscript{101} If we value the extension of the Constitution over time, we have strong reasons
to conclude that constitutional rights formulated in general language may now reach beyond

\textsuperscript{99} Religions dominant in Asia are bound to increase as our immigration laws continue not to impose the
decisive discrimination that long favored residents of Europe.
\textsuperscript{100} See Torcaso v. Watkins, 367 U.S. 488 (1961). The original federal Constitution provided that no
religious test could be imposed for federal office holders.
\textsuperscript{101} Very likely, any prohibition of blasphemy, however broad, would be thought to violate the Free
Exercise and Free Speech Clauses.
originally conceived applications. 102

As the prior chapters suggest, the premise that the political authority of the original adopters of the Constitution constitutes a strong reason to follow original understanding is itself unpersuasive. The enacting bodies that performed more than 220 years ago did not represent us, and had only the faintest glimmer of what we would be like. Moreover, the country within which the Bill of Rights was adopted had widespread slavery, subjected women to substantial legal disabilities, and had citizens who dominantly accepted some version of Protestant Christianity. Although one can fairly say that the actual written Constitution became and remains the foundation of our liberal democracy, and that it enjoys political authority as a consequence, that alone does not tell us how it should be interpreted. On matters not clear from the text itself, modern citizens, with only the vaguest ideas about original conceptions, are more likely to be aware of recent and prominent Supreme Court decisions. Although some of those remain controversial, many such as Equal Protection rights for women, have been widely and

102 A contrary argument, that when judges depart form historically conceived applications they have too much discretion, is not nearly strong enough to outweigh all the disadvantages of precluding changes of applications of general principles over time. And for many rights, the injunction to stick with understood applications of 1791 or 1868, if followed, would not greatly curb discretionary judgment, because it is so hard now to figure out what were the historically understood applications.
quickly accepted despite lacking support in original understanding. If it is the Constitution as a
document and as interpreted in modern times that now has political authority, we can conclude
that the original understanding should carry much less importance than it once did. In sum, the
political authority argument for following that understanding weakens greatly as time passes,
most especially for issues as to which the adopters would not have fairly represented large
swaths of the modern population. That leaves interpreters greater latitude both to focus on what
aspects of original intent should be given greater weight and to move beyond original
understanding to other considerations.

A different possible reason to pay attention to original intent is continuity. If that intent
figured prominently in the development of the substance of basic concepts and their prior legal
interpretations, that constitutes a basis to maintain its significance. Michael Dorf has referred
to this ground as ancestral originalism.\footnote{Michael C. Dorf, Integrating Normative and Deceptive Constitutional Theory: The Case of Original Meaning, 85 Georgetown Law Review, 1765, 1800-01 (1997).} Also, if a court applies a constitutional provision
differently from earlier cases, the judges' ability to show that they are corresponding with the
broad principles envisioned by the adopters can be somewhat reassuring. A qualification about
this kind of continuity recognizes that the main practical reassurance may come from a rhetoric of respect for original intent, which can vary from actual reliance.\textsuperscript{104} Another more crucial qualification, explored further in the next chapter, is the continuity of legal doctrine for which judges aim within common law systems.\textsuperscript{105} Although the Justices of the Supreme Court do regard themselves as freer to depart from prior constitutional case law than prior statutory case law (which is subject to relatively simple legislative "correction"), they nonetheless care about the continuity of following precedents, even when earlier decisions are seen to depart from original intent.

Wisdom, which Dorf calls "heroic originalism,"\textsuperscript{106} also is a possible basis for paying attention to original intent. The founders, so the argument goes, were an extremely gifted generation. They bequeathed to us structures of government that were uniquely suited for American democracy. We can trust the resolutions of these men more than our own less profound judgments. The force of this argument is seriously contested, and it certainly must

\textsuperscript{104} Sometimes judges are fully aware of their actual bases of judgment and decide not to reveal them. At other times, their rhetoric persuades themselves.

\textsuperscript{105} In the context of the common law itself, this means minimizing radical departures from previously decided cases. In the law of statutory interpretation, it entails following earlier decisions about statutory meaning.

\textsuperscript{106} Dorf, note 103, supra, at 1803-05.
be narrowed or qualified; but it has important implications for whose original understanding matters.

If one focuses on the wisdom of the adopters of the Bill of Rights, what they had in mind then should matter more than how a typical reader would have understood their language (if these differed). Moreover, when one talks about the wisdom of the founders, one is thinking mainly of political leaders, not ordinary members of the population or representatives in state legislatures.\textsuperscript{107} This assessment can support giving extra weight to the leaders' views.\textsuperscript{108}

Among the American founders, James Madison's \textit{Memorial and Remonstrance} provided the fullest account of the values of nonestablishment. Madison went well beyond John Locke, whose ideas about natural rights were influential among the colonists. In contrast to Locke, who developed a voluntary conception of religion and religious liberty that could well point toward nonestablishment, but who did not actually reach that conclusion, Madison did, providing a persuasive explanation of how nonestablishment implements the ideal of religious liberty.

\textsuperscript{107} No doubt, one could conceive that virtually all members of society in the early republic had a wisdom we lack today, but that seems a highly implausible hypothesis in respect to subjects of political organization and fundamental legal rights. Indeed, one core assumption at the Philadelphia Convention was that state governments under the Articles of Confederation were functioning poorly.

\textsuperscript{108} By extra weight, I mean beyond what a simple political authority version, which ascribes equal weight to all those with equal formal authority, would assign.
Especially since Madison was the main author of the Bill of Rights, drawing heavily from his understanding makes sense—even if for a standard political authority version of intent, one would have to consider all those who accepted his language but did not share his understanding.

This brings us to a critical aspect of the "wisdom" theory that shows it is only partially originalist. No one today would think the founders made correct judgments about all major subjects. Their views about relations of men and women, about the significance of racial differences, and about appropriate political rights for people who do not hold property, are far out of line with dominant opinion today, not only within the United States but also within all liberal democracies. To conclude that the founders' intent should count because of their wisdom, one needs to do some initial screening, a screening that cannot itself rest on original intent.

Conceding all this, one may still believe that the main proponents of the Establishment Clause were deeply perceptive, not only in wanting to keep the federal government away from establishment, but also in believing that nonestablishment was healthy within states. One may believe, further, that they were wiser in their general ideas than in respect to a practice that even
they may have accepted out of habit, without adequate reflection on its conformity with

fundamental general principles. One may also conclude that their wisdom about general ideas

has more relevant application to modern conditions than their sense of acceptable practices in

their particular time and place. With all these (contestable) assumptions, we can conclude that it

is entirely appropriate to give a place of prominence to the broad ideas of Madison and Jefferson

in interpreting and applying the Establishment Clause.

Under this account, is original understanding really counting for anything, or are Justices,

relying partly on widely shared modern views or developed normative accounts by modern

thinkers, basically deciding first what are sound principles and then ascribing them to some

“wise” founder? The answer to this concern is fourfold. If a Justice can find no actual support

in original understanding for what she believes are the soundest principles, she cannot honestly

rely on support from that source. Further, a Justice may well think it matters for a final outcome

whether such support exists. And an aspect of that support may not be only whether someone

then expressed the “wise” view but also whether the holder of such a view was influential in

adoption or understanding of the provision. Finally, for judges who do not have fully developed

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views about how a subject should be treated, they might find in writings like those of Madison an explanation that actually persuades them about what is the best conception. Thus, this “wisdom” approach still renders original understanding as genuinely relevant.

A summary of this section might be cast in the following way. A political authority basis to accord great significance to original intent fades over time, especially with a constitution designed to last, difficult to amend, and possessed of heavy symbolic significance. The wisdom of the adopters may constitute a reason to follow their intent, but a conclusion about wisdom requires a nonoriginalist judgment about who was wise and about what subjects. Some focus on intent or original understanding may help provide a measure of continuity, but in many instances continuity of constitutional decisions points away from a continuity that emphasizes original intent.

This analysis suggests that for the Establishment Clause, and other general formulations of restrictions on government adopted long ago, interpretations should give some weight, but not

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109 Richard A. Primas, When Should Original Meanings Matter?, 107 Michigan Law Review 165 (2008), provides a powerful argument for diminished significance that leads him to afford even less weight to the original understanding of previous adopted long ago than I have suggested here. He claims, id. at 167, that in some cases "consideration of original meaning should not be a factor in the content of constitutional decisions."
overwhelming weight, to original understanding, and the understanding that should mainly count is composed of the general principles of those who were influential and most fully grasped the underlying values involved.

Conclusion

We have surveyed a range of questions about original understanding, attempting to develop an analysis that reveals how complex and debatable are many issues that are often treated by advocates as straightforward and one-sided. The fundamental positions offered here about the Bill of Rights and the Fourteenth Amendment are that original understandings matter but are not determinative, that the political authority and continuity reasons to follow original understanding diminish over time, that what counts for basic provisions of the Bill of Rights are the abstract principles and wisdom of those who adopted them, not the precise applications then conceived by most enactors and readers. According to this approach, giving great weight to the understandings of Jefferson and Madison is warranted for the Establishment Clause, even if those reached beyond broadly shared conceptions at the time.
Constitutional Interpretation

Chapter One

The Nature of Constitutions: Basic Questions about Their Interpretation

(Rough Draft)

I. Introduction

How should a constitution be interpreted? This book aims to provide an account that will prove interesting both to those who wish to learn about constitutional interpretation and those already familiar with major competing positions. Any thoughtful approach to how constitutions should be interpreted depends significantly on their very nature. Beginning with that inquiry, this chapter then sketches various interpretive techniques and how one may evaluate them. Subsequent chapters undertake a deeper exploration of strategies of interpretation and their applications to a range of constitutional topics.
Although employing a few notable examples, the five chapters of Part I are basically concerned with general questions about how courts should interpret constitutions. The main focus is on the Federal Constitution of the United States, with occasional comparisons to the constitutions of individual states and other countries.

Using a parable about the meaning and force of authoritative personal instructions, Chapter 2 initially suggests that multiple criteria figure in decisions about a person’s responsibility to follow instructions. Recognizing significant differences between moral responsibilities and legal constraints, the chapter claims, nonetheless, that no single standard is appropriate for interpretive constitutional decisions carrying practical consequences. Chapter 3 explores the relevance of original understanding: how far what counts is text or intent, and specific coverage or underlying principles; and whether the weight of various factors changes over time. The answer offered is that all this depends significantly on the particular provision involved, that how one should determine original understanding does change over time, and that the basic importance of original understanding diminishes as the decades roll by. Chapter 4 treats other standards of
interpretation, including precedents, modern understanding of the text, canons of
interpretation, estimations of consequences, and adjustments to changing social
conditions and fundamental values. Crosscutting these standards for courts are questions
about how far the officials in other branches should employ standards of interpretation
that differ from those apt for judges, and when judges should avoid decisions of issues
altogether or afford substantial deference to the determinations of the political branches.
Chapter 5 tackles complex puzzles about how far judges can rely on "neutral principles"
or "objective" standards, concluding that these play a central role but cannot totally
determine decisions in the most difficult cases. In all these chapters, the inquiries are
primarily normative—what is a sensible, desirable approach?—but no account of how
judges and other officials should interpret can divorce itself from how they do interpret
and how they are capable of interpreting.

The reminder of the book tests the conclusions of these chapters against specific
constitutional issues that have arisen across a range of areas. The examination not only
confirms generalizations made earlier, it demonstrates just how greatly interpretations
of various provisions should and do differ from one another. Part II consists of a single chapter devoted to the significance of the ban on "cruel and unusual punishment" in the Eighth Amendment. That term, and its application over time, raises sharply and clearly a number of fundamental questions about how courts should interpret provisions that seem open-ended.

Part III addresses limits on the authority of particular government bodies. Chapter 7 considers allocations of power between the legislative and executive branches of the federal government, and the troubling questions of how far courts should involve themselves when one branch acquiesces to exercises of power by the other or when disputes arise between the two branches. Chapter 8 addresses the distribution of power between the federal and state governments. It focuses mainly on the national government's power under the Commerce Clause, the Taxing and Spending Clause, and the Necessary and Proper Clause, paying particular attention to the 5-4 division on the Supreme Court over the status of the "Obama" health care law. That chapter also looks briefly at limits on state authority under the Commerce Clause and the Contracts Clause.
Part IV turns to various individual rights. Chapter 9 initially inquires whether “incorporation” of most of the Bill of Rights against the states is justified and then looks specifically at the part of the First Amendment dealing with freedom of speech and of the press. Chapter 10 discusses free exercise and nonestablishment of religion. Chapter 11 tackles aspects of constitutional protections connected to the criminal process besides cruel and unusual punishment, including the right to counsel, the prohibition of unreasonable searches, and the privilege against self-incrimination. Chapter 12 addresses equal protection.

Although the general theme in the chapters dealing with particular provisions is how the Supreme Court has and should approach their interpretation, I also analyze the soundness of certain competing positions about the range of substantive protections. Based partly on more extensive treatments in earlier articles and books, the account here is offered primarily to illustrate the urgent need for interpretation that is tethered to context and that varies depending on what subjects are invoked. The discussion also reveals just how difficult and controversial are the resolution of many constitutional
issues. Moreover, it provides readers a basis to reflect on how their own assessment of desirable outcomes and interpretive standards compares with those defended here. Much, much more could be said, and indeed has been said about the topics of these chapters;¹ but they should assist readers to develop a reflective view of what forms of constitutional interpretation make good sense in a variety of contexts.

II. Constitutions Distinguished from Statutes

Although lawyers for many centuries have referred to an unwritten British constitution that influences what members of Parliament do and judges decide,² in modern times we typically think of constitutions as being written. Such a constitution,

¹ About most of the provisions protecting individual rights covered here, I have written myself. Since those articles and books were done over a span of years, they may not represent completely the positions taken in this book; but they could give an interested reader a more detailed explanation of many of my positions. For those interested, the relevant books are *Speech, Crime, and the Uses of Language* (New York, Oxford University Press, 1992); *Religion and the Constitution: Volume 1: Free Exercise and Fairness* (Princeton, Princeton University Press, 2006); *Religion and the Constitution: Volume 2: Establishment and Fairness* (Princeton, Princeton University Press 2008).

like a statute, is an authoritative text, one designed to guide and constrain legislators,

executive officials, and judges.\(^3\) That judges are construing a document issued by higher

authority distinguishes constitutional interpretation from common law interpretation,

which is mainly based on decisions previously rendered by judges themselves and, to a

lesser extent, on customary practices. The similarity of statutes and constitutions does

not entail that whatever represents sound statutory interpretation applies to interpreting

a constitution. Any such equation would be deeply mistaken. Many theories and

arguments about each kind of interpreting resemble each other, and what is accepted in

one domain can influence how the other is regarded; nevertheless, crucial differences

render implausible any simple correlation.\(^4\)

Key variations between statutes and constitutions concern (1) subject matters, (2)

open-endedness of concepts, (3) the need for balancing, (4) difficulties of revision,

\(^3\) However, there have been written constitutions about which it was understood that judges could

not overturn what the political branches resolved. A modern example is the constitution of New

Zealand, discussed in Jeremy Waldron, "The Core of the Case Against Judicial Review," 115

*Yale Law Journal* 1346 (2006). Some constitutions, including Canada’s, provide for interpretive

judicial decisions but allow legislatures to take special votes to override the effect of those

decisions. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982,

*being* Schedule B to the Canada Act 1982, c. 11 § 33 (U.K.); see also Nicholas Stephanopoulos,

"The Case for the Legislative Override," Comment, 10 *UCLA Journal of International Law and

Foreign Affairs* 250 (2005) listing Israel as the other country that has adopted the override.

\(^4\) See, e.g., Kevin M. Stack, "The Divergence of Constitutional and Statutory Interpretation," 75

(5) symbolic significance, (6) the primary addressees, and (7) different allocations of interpretive responsibilities. Each of these, briefly explained here, figures importantly in this book.\textsuperscript{5}

A. Subject Matter

Constitutions have limited subject matters. Modern statutes cover the whole range of government involvements with citizens (including in most of the United States the entire scope of the criminal law),\textsuperscript{6} and the common law deals with a wide variety of interactions between citizens. The typical constitution addresses two basic subjects—the structures of government and the core rights of citizens. At the time of the Bill of Rights of the Federal Constitution, these rights were conceived almost entirely as negative, restrictions on government intrusions on the lives of its citizens.\textsuperscript{7} In modern times, equality in

\textsuperscript{5} They are also helpful in understanding the relation between this book and the previous two volumes. See Kent Greenawalt, Statutory and Common Law Interpretation (New York, Oxford University Press 2013); Legal Interpretation: Perspectives from Other Disciplines and Private Texts (New York, Oxford University Press 2010). Among other relations, the insights from non-legal forms of interpretations generally have more relevance for open-ended constitutional standards than typical statutes or private texts. Id. at 5.

\textsuperscript{6} Common Law courts were once free in the United States, as well as Great Britain, to develop new crimes, but constitutions and statutes have now abolished common law crimes for the federal government and many states. See 1 Wayne R. Lafave, Substantive Criminal Law § 2.1 (2d. ed. 2012). For an overview of the status of common law crimes in the states, see Paul H. Robinson, “Notice and Fair Adjudication: Two Kinds of Legality,” 154 University of Pennsylvania Law Review 355, 339-40 (2005).

crucial respects has become a central constitutional theme about how governments
should treat people. Modern constitutions may also require that governments guarantee
certain minimal benefits to their citizens and assure that private businesses and persons
do not engage in forms of discrimination, but these matters are largely left to legislative
decision in the United States.

The nature of the basic subject matters of constitutions affects desirable interpretive
techniques. For many structures of government, a fundamental inquiry is whether
courts are well placed to guarantee that other organs are observing their proper roles. A
conceptual aspect of the inquiry is whether courts determining such questions fit well
with premises of democratic government. For many issues, a related question is whether
what would otherwise comprise an ideal standard of evaluation involves a balancing of
factors that courts are ill equipped to undertake.

Rights Norms to Inform Constitutional Interpretation,” 34 UCLA Law Review 1195, 1228-29
9 See, e.g., Paul Nolette, “Lessons Learned from the South African Constitutional Court: Toward
a Third Way of Judicial Enforcement of Socio-Economic Rights,” 12 Michigan State Journal
of International Law 91 (2003). On the value of positive rights, compare Susan Bandes, “The
Negative Constitution: A Critique,” 88 Michigan Law Review 2271 (1990), with Frank B. Cross,
of minimal benefits are difficult for courts to enforce because it is very often hard to gauge
what is feasible for the government. Insofar as the U.S. Constitution bars “cruel and unusual
punishment,” it may require minimally acceptable prison conditions, requiring judgments not so
In the United States, as contrasted with most other countries, the inquiry about the judicial role has special dimensions because of what is commonly, if imprecisely, termed the separation of powers and because of federalism. The separation of powers entails that the legislature cannot trespass on executive responsibilities and vice-versa, issues that do not often arise in parliamentary, cabinet systems in which the executive is directly responsible to the legislature. Courts must face the difficult question of how far they should assess claims of unwarranted intrusions or leave it to the political branches to work out disputes about borders of authority.

The federal system confers on the central government, as well as each state, only limited authority. One might believe that the fact that Congress is composed of representatives of states provides a sufficient protection of state interests, and that courts need not worry much whether the federal government is overstepping its limitations. By contrast, some centralized constraint is definitely required against states trespassing on federal concerns and the powers of sister states. For this reason, it hardly surprising that the original Constitution established federal law as supreme and provided explicitly for

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10 U.S. Const. art. VI, cl. 2.
federal judicial review of cases arising in states that involve claimed violations of that law.\textsuperscript{11}

When we turn to individual rights, the considerations look different. A crucial reason why constitutions enumerate individual rights is the concern that the political sway of the moment or concentration on tactics to enforce the law may not adequately protect them. Executive officers may not be sufficiently attentive to rights if they believe strategies, such as illegal searches, will help catch ordinary criminals or terrorists. And, when those asserting various basic rights are widely regarded as dangerous or detestable, judicial review may be needed to overturn legislative actions that fail to respect their rights.

B. Open-ended Provisions

Constitutions contain a combination of highly specific and open-ended concepts. The rules that the U.S. Senate includes two members from each state,\textsuperscript{12} and that a person must be at least thirty-five years old to be President,\textsuperscript{13} contrast with the Eighth Amendment’s bar on “cruel and unusual punishment” and the First Amendment’s ban on Congress

\textsuperscript{11} U.S. Const. art. III, § 2, cls. 1 & 2.
\textsuperscript{12} U.S. Const. art. I, § 3.
\textsuperscript{13} U.S. Const. art. I, § 5.
“prohibiting the free exercise” of religion, or “abridging the freedom of speech, or of the press.” The degree and kind of discretion apparently open-ended constitutional provisions confer on courts are central concerns of constitutional interpretation.\(^{14}\)

Those questions resemble ones raised about statutes cast in highly general terms. When legislators adopt statutory language that is not precise, interpreters can construe it in various ways. The highly open-ended language of the Sherman Antitrust Act, for example, has been taken as conferring on courts an interpretive authority similar to what they possess in the common law—allowing more flexible judicial responses than would be appropriate for most statutes.\(^{15}\) Though not usually conferring quite as much latitude on its interpreters as the Sherman Act, much modern legislation does create wide-ranging authority for administrative agencies to interpret and implement general statutory directions.

C. The Need for Balancing

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\(^{14}\) The “apparently” is in this sentence because one may think that the original understanding reached only well recognized specific examples, and that courts should subsequently have gone no further. Later chapters take up this possible approach.

\(^{15}\) See Greenawalt, *Statutory and Common Law Interpretation*, note 5 supra, at 112, 125, 225.
Many common law doctrines and statutory formulations call for some balancing of the interests involved. What would otherwise be a prohibited degree of pollution may not be if the cost of stopping it would be excessive.\(^\text{16}\) What counts as “negligence” in the common law of torts depends on what may be gained by someone taking the risk that is involved. Speeding that would be negligent if you are heading to a party would not be if you are carrying a severely injured person to a hospital. The formulations of “cruel” punishment and “unreasonable search and seizure” appear to call for similar assessments. The propriety of such an approach is less obvious with “abridging the freedom of speech,” but everyone agrees that while publishing true factual information is nearly always protected, one cannot reveal the exact, otherwise secret, movement of United States troops in the middle of a war.

Balancing can take two different forms. One is that what would otherwise be a practical exercise of a right can be overcome in particular instances by strong competing considerations. The other approach is to assess the range of contrary interests in defining the basic right, which, once determined, cannot be trumped.

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Many modern constitutions, including Germany's and Canada's, include explicit standards for balancing. How far American courts in constitutional cases should undertake such assessments is a central issue. Even if balancing strikes one as an intrinsically sensible approach, one may doubt how far courts can do that accurately and persuasively in individual cases. If Supreme Court Justices doubt the wisdom of undertaking such a balancing, they may defer to what a political branch of government has decided or set out restrictive standards that are more straightforward in application.

When individual rights are at issue, the usual supposition is that acceding to balancing will entail a reduction of the content of these rights. That indeed was the assumption in District of Columbia v. Heller, in which the majority declared a personal right to possess handguns in one's home, rejecting Justice Breyer's dissenting argument for balancing. But on occasion the Supreme Court's regarding of balancing as intrinsically

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17 See, e.g., Alec Stone Sweet & Jud Mathews, “Proportionality Balancing and Global Constitutionalism,” 47 Columbia Journal of Transnational Law 72 (2008). In Canada, for example, Section 1 of its constitution guarantees rights and freedoms “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, c. 11 § 1 (U.K).
19 Id. at 634-635.
inappropriate or too difficult, can actually narrow rights. A notable example involved
the “free exercise of religion” in the 1990 case of Employment Division v. Smith.\textsuperscript{20}

Faced with previous decisions ruling that interferences with exercises of religion are
unconstitutional unless the government has a compelling interest that cannot be achieved
by less restrictive means, Justice Scalia, for the Court, relied partly on the impossibility
of this balancing endeavor to conclude that the constitutional protection simply did not
reach forms of religious exercise that were at odds with prohibitions not themselves
aimed at religion. Thus, the Court held the members of a Native American church
enjoyed no constitutional protection to ingest peyote as the central aspect of their worship
service, a practice that a fair balance of values would have protected.

D. Difficulties of Revision

Whereas statutes and the common law can be changed by the ordinary legislative
process, constitutions may be difficult or easy to amend, depending both on the formal
processes of revision and on political realities. The United States Constitution is very
hard to alter. Doing so requires a complex process and typically needs heavy support

\textsuperscript{20} 494 U.S. 872 (1990).
within Congress and three fourths of the states.\textsuperscript{21} One powerful argument for flexible interpretation of key parts of the Federal Constitution is that with drastic changes in technology, social organization, and social norms, such flexibility is needed to keep the Constitution up to date—indeed, in some respects at least, to keep it workable.\textsuperscript{22} A simple counter to this argument is that the amendment processes are specified; if things get bad enough, they can be used for reform. Another concern has to do with courts, and especially the Supreme Court. No single body can override what the Supreme Court has resolved about the Constitution. If Justices believe they have the authority to interpret the document in a flexible manner, this confers huge authority on a majority of the Court, five unelected officials, an authority some regard as unacceptable in a modern liberal democracy, whatever the difficulties of formal amendment.

E. **Symbolic Significance**

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\textsuperscript{21} An alternative procedure for amendment requires Congress, upon application of two thirds of state legislatures, to call a convention to propose amendments. U.S. Const. art. V. But this method has yet to be used.

Constitutions, especially those that have maintained themselves over time, may take on substantial symbolic significance, becoming part of what citizens rely on to identify the nature of their government and their society. Unless a person thinks the constitution is deeply flawed,\textsuperscript{23} she will regard this effect as overall healthy.\textsuperscript{24}

The value of symbolic significance can be undercut by great length and specificity, by frequent changes in provisions, and by periodic replacements of one constitution by another. The main reasons why the U.S. Federal Constitution now carries more symbolic significance than individual state constitutions are because federal power has become dominant and most people see themselves primarily as national citizens; but the length of state constitutions, the comparative ease of their amendment, and their replacements over time have also mattered. Some judicial flexibility may help to maintain the symbolism of the Federal Constitution by making continuous amendment, or complete replacement, unnecessary. However, it is also true that too frequent judicial alterations, especially by a sharply divided Supreme Court, can reduce the power of constitutional symbolism by

\textsuperscript{23} Anyone opposed to slavery would have conceived the original U.S. Constitution as deeply flawed in the crucial respect of recognizing and indeed protecting slavery.

\textsuperscript{24} Max Lerner, "Constitution and Court as Symbols," 46 Yale Law Journal 1290 (1937); Sanford Levinson, "The Constitution in American Civil Religion," 1979 Supreme Court Review 123.
making observers feel that so much turns on the political preferences of particular judges.

Not surprisingly, many people take a divided view, accepting the symbolism in many domains, but attributing decisions they sharply oppose to misguided judicial arbitrariness.

F. Primary Addressees

Who count as the primary addresses of various legal norms? More precisely, who is meant to respond and in what respect? The common law and many statutes are largely designed to affect the behavior of ordinary people and businesses, letting them know what they should and should not do. Some statutes are mainly addressed to agencies, instructing them to set the standards private parties will observe. Still other statutes tell executive officials how they should behave, for example, what latitude they have to investigate whether terrorists are planning attacks. Although constitutions are created partly for public understanding, and citizens do, of course, claim constitutional rights, the provisions are directed mainly at public officials, telling them how to organize the government, carry out their responsibilities, and avoid infringing rights.
That the immediate subjects of most constitutional norms are legislative and executive officials does not by itself tell us who should be the main interpreters. In relation to courts, especially ones not authorized to issue advisory opinions, other officials come first in time. A legislature imposing a punishment needs to decide (implicitly at least) that it is not “cruel and unusual,” a police officer that a search is not “unreasonable.” Courts may later review these judgments. Even when provisions are mainly designed to influence the actions of nonjudicial officials, courts can become the dominant interpreters by making final decisions about what the Constitution requires.

The next section sketches the difference between these two aspects, and its vital significance for constitutional interpretation.

G. Allocations of Responsibilities and Degrees of Deference

A crucial issue for constitutional interpretation is how much deference courts should give to the explicit or implicit interpretations of legislatures and executive officials. Within a federal system, an added complexity is that judges should grant less deference than they afford national officials when they consider whether officials in
state governments have impaired the rights of citizens of other states. When the judicial
officials and political officials whose actions are challenged are both at the national
level, two simple and competing possibilities are these. The U.S. Federal Constitution
is directed mainly at Congress; its interpretive judgments should predominate, and
judges should override them only when constitutional violations are clear and extreme.25
The opposite view is that interpretation is really the courts’ business; they are both the
ultimate and the most important interpreters. More persuasive than either of these simple
approaches is a nuanced position that relies on variations among different constitutional
provisions. For some, substantial deference to legislative, or executive, interpretations is
warranted, either because the two political branches are largely to be trusted or because
careful judicial review is impractical. Other provisions that courts are well suited to
implement occupy a place in the Constitution precisely because the political branches
need a genuine check. For these deference is not called for. On such a basis an observer
may comfortably accept the prevailing judicial doctrines that Congress has much more

25 An account along these lines that was once highly influential is James B. Thayer, "The Origin
latitude to exercise its authority to regulate interstate commerce than to impinge on
expressions of opinion. The broad question of degrees of deference is central for judicial
interpretation of all constitutions.

III. Competing Strategies of Interpretation

How the U.S. Constitution should be interpreted is highly controversial in many
respects. Individual Justices of the Supreme Court represent different outlooks, and
prevailing views have shifted significantly over time. This book’s primary aspiration is
not to resolve debates about particular controversies of the moment, although some serve
as fascinating examples, but to provide perspectives for understanding how and why
approaches evolve and for assessing what approaches are sound. Understandably, most
citizens, and even most lawyers, are inclined to judge the Supreme Court by whether
particular results fit their own political predispositions. No one offering views about
constitutional interpretation can avoid judgments of political philosophy, because so
much depends on a person’s sense of desirable political structures and fundamental rights.
Detaching one’s stance on contemporary political controversies is also difficult, but the
effort here is to do this as far as possible.
Engaging in such an effort does assume that one’s endorsement of particular approaches to constitutional interpretation should not rest on whether at a given point in time, with particular Supreme Court Justices sitting, those approaches will yield political results one favors. Frederick Schauer has raised the question whether it may not be sensible to use one’s political convictions about socially desirable outcomes to guide whether one presently approves or disapproves forms of interpretation.\textsuperscript{26} For a variety of reasons discussed further in Chapter 5, this hardly seems promising. Were Supreme Court Justices to acknowledge in opinions that they reached important decisions on the basis of simple political preferences, they would compromise the Court’s status. Were a scholar candidly to advocate that position, she would either need to accept a large degree of deception in judicial opinions or recommend a radical change in how opinions are written. Given these core difficulties, judges and scholars should both aim for approaches to interpretation that they think should survive short-term shifts in politics and membership on the Supreme Court.

The remainder of this chapter introduces various strategies of constitutional interpretation. The notion that these compete radically with one another fits the rhetoric of much debate about the legitimacy of what Supreme Court Justices do. But the realities of actual and sound practice are that Justices employ elements of different approaches in combination, in ways that may or may not be clear. As they relate to practical decisions, the serious normative and empirical questions one can ask about most competing strategies of interpretation are not “either-or” but “more or less.”

The distinctions sketched here and examined in more depth in chapters to follow are: (1) original understanding v. evolving application; (2) text v. intent; (3) specific meaning of a provision v. broader principles; (4) avoidance and deference v. independent judgment; (5) great weight to precedents or new appraisals; (6) judges’ reliance on community morality or their own political and moral judgments; (7) development of open-ended standards or clear rules. Reserving for later chapters careful assessment of accounts of how judges should proceed in constitutional cases, the aims here are to clarify basic criteria judges may use and to offer some preliminary evaluations. All of
these criteria do have counterparts in statutory interpretation, but the striking variations between statutes and constitutions yield sharp differences in the wisdom of analogous strategies.

A. Original Understanding v. Evolutionary Application

Whether they rely on the text or the intentions of the enactors, judges could determine the meaning of provisions and their applications on the basis of original understanding. The core notion, as with statutes, is that because certain people had authority to enact, what they enacted is determined by what they did, as this was understood at the time.\textsuperscript{27}

As with statutes, no one denies that original understanding is relevant, but arguments that it carries overarching importance are considerably weaker when the Constitution is involved.

Here are the reasons. As time passes, reconstructing a convincing original understanding becomes harder and harder. Further, social conditions and values change radically as centuries pass; thus, any assumption that the original understanding will

\textsuperscript{27} See discussion in Chapters 3 and 4 of Greenawalt, \textit{Statutory and Common Law Interpretation}, note 5, supra.
apply sensibly and justly is much less warranted than with recent statutes. The difficulty of constitutional amendment makes enacting needed changes very hard when rulings that stick with original understanding ill fit modern society; further, the symbolic character of the Constitution makes frequent amendments undesirable. With recent statutes, the legislators represent those to whom the statutes apply. The long departed enactors of constitutional provisions do not directly represent modern citizens. And, for certain provisions, they did not fairly represent even the population of the time. When the original Constitution and the Bill of Rights were adopted, women were unable to vote, most blacks in the country were severely oppressed slaves treated like chattel; and often only property holders and taxpayers had voting rights. When the key amendments were adopted in the 1860s after the Civil War, women were still unable to vote and some male citizens remained unqualified. A critic might respond that, despite these factors, we have maintained what these unrepresentative but wise officials did, so that should continue to control. However, most of the early Constitution has survived partly because of the difficulty of amendment, partly because abandoning it would be disruptive, and partly
because the Supreme Court has departed from original understanding in many important ways. These realities strongly suggest that a degree of interpretive evolution over time is needed.\(^{28}\) The serious questions arise over when that is desirable and what kinds of approaches contemporary justices should take.

A possible way to reconcile the original understanding of enactors and readers with evolutionary interpretation is by a determination that the original sense of a provision, such as the bar on "unreasonable searches," was designedly open-ended to take account of changes in values and social conditions. Absent such reconciliation, the broad sense of such terms may be taken as central even if those in 1791 saw the provision as mainly about specific applications.\(^{29}\) So understood, such language authorizes courts to determine that novel practices fit within its terms, and that even practices once widely accepted, such as the death sentence for many crimes, may become unconstitutional.

Such a position might be supportable by a version of original understanding claiming that


at that time relatively flexible interpretive techniques were accepted, ones that might even allow later judges dealing with more specific provisions not to adhere to original views about particular practices.

B. Text v. Intent

What matters? Is it what the text of the document signifies to readers, or the intent of those who enacted it, or both? For statutes and constitutions, "textualist" Justices and scholars have emphasized reader understanding, but the distinction between that and enactor intent is much less sharp than it first appears.30 This is even truer about the Constitution than in respect to statutes. The basic point, one no one now denies, is that people understand language in context. A crucial aspect of context is what those on the receiving end believe speakers or writers are trying to communicate. Thus, an informed reader of the Constitution would be aware of the historical context behind provisions and the problems those with enacting authority aimed to address. The simplest and surest way to understand what people are communicating is what they tell you they are trying

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30 See Chapters 3 and 4 of Greenawalt, Statutory and Common Law Interpretation, note 5 supra, for analysis in regard to statutes.
to do. Thus, even if one focuses overwhelmingly on how a reader understands a legal text, the communicated intentions of those who enacted the text will come in through the back door, unless a special reason excludes them. Of course, if communications to the public about intentions are lacking, as was initially true about the debates at the Philadelphia Convention that led to the proposed U.S. Constitution, readers will have to draw inferences based mainly on the text and its setting.

Are there plausible grounds to exclude reference to subjective intentions as a matter of principle? One argument against using legislative history in statutory interpretation is that the structure of the Constitution precludes it. Unconvincing about statutes, that particular argument is even less plausible in relation to the Constitution itself. Its drafters were assigned the authority to amend the Articles of Confederation. Given very serious concerns about how the country was functioning under the Articles, they decided something more radical was needed, so they exceeded their conferred authority, proposed abandoning the Articles, drafted a constitution, and specified a process of ratification.

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31 I here pass over arguments that one cannot usefully combine subjective intentions or that actual intentions are too difficult to discern. See id.
32 Id.
None of this itself would foreclose consideration of their subjective intentions. And
documents like the Federalist Papers did indirectly convey to potential ratifiers in the
states and to ordinary citizens ideas of what the Framers were trying to accomplish.
Two stronger claims that actual intentions of the Framers are not crucial for the original
Constitution rely on their treating their deliberations as confidential\textsuperscript{33} and on the nonuse
of legislative history for statutory interpretation in England and in the newly independent
states. One may infer from these facts an emphasis on text, as contrasted with subjective
intent.

What should a focus on the Constitution's text entail? Because the Constitution is
mainly directed at government officials, perhaps the relevant reader for most purposes
should be a well-informed official rather than an ordinary citizen. Most structural
provisions of the original Constitution are explicit, as are the words of typical statutes.
But to understand much of the soon-to-follow Bill of Rights, one would need to be aware
of the concerns about abuses in England and new states that gave rise to its protections.

\textsuperscript{33} This approach does not itself rule out the intentions of those at the ratifying conventions, whose
deliberations were not secret but were not reported in detail.
For guarantees of rights, the reading of nonofficials would be critical, but such readers could have a solid sense of what forms of search are "unreasonable" only by knowing what searches the enactors were likely to regard as unacceptable. This reality renders the line between reader understanding and probable enactors' intent so thin it is nearly nonexistent.\(^{34}\)

A central question about focusing on the text is what counts as the decisive time of understanding. For most statutes, one reason to rely on ordinary reader understanding is that, at least initially, that will reflect how people conceive the law that affects them. This reason carries somewhat less significance if the document is directed mainly at officials. More important, original reader understanding represents a poor guide to how people now conceive a text. Perhaps present reader understanding should carry greater weight than what people happened to assume over two hundred years ago. Of course, if one focuses on modern readers, they will commonly be influenced more by what the Supreme Court has decided than by what the text itself conveys. Despite objections to

\(^{34}\) Of course, for the Bill of Rights, enacted by an already specified amendment process, a person could argue that certain forms of expression during the process of enactment are precluded from consideration. That argument is unconvincing in respect to ordinary legislative history for statutes, see id., Chapters 3 and 4, and is even more so for the Bill of Rights.
controversial rulings, a kind of acceptance often grows that the text effectively includes what has been authoritatively decided. Few now doubt that the Equal Protection Clause gives significant protections to women, although that was neither the original intent nor how readers would then have grasped the text.

When we turn to the significance of subjective intentions undergirding constitutional provisions, some special difficulties arise that are not typical for statutes. The most obvious is what significance to accord proposers in relation to ratifiers. Whether we are talking about members of the original Philadelphia Convention or members of Congress who have proposed amendments, how much should their intent count in relation to those who performed ratification within the states? These officials with different roles complicate concerns about possibly different intentions and undisclosed intentions. More particularly, the special status of the Philadelphia Convention might lead one to different conclusions than one would reach about Congresses that proposed amendments.35

A somewhat different issue is whether the priority of different levels of intentions and their relation to the text should develop over time. A standard view of intentions

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35 This is a problem explored in Chapter Three.
focuses on original understanding. If, as proposed in Chapter Three, the significance of
original reader understanding should diminish as time passes, original intentions become
a more important component of the original meaning that should count. And, if one
aspect of a standard originalism that focuses on intentions is that the key is what most
adopters (or key voters) perceived,\textsuperscript{36} we have solid reasons, after a century or two, to give
greater emphasis to what influential enactors with a deeper grasp of basic issues intended.
(Chapter 3 explores this particular issue in respect to the views of Madison and Jefferson
about the religion clauses.)

For the U.S. Constitution, we can disregard a conceivable nonoriginalist variety
of intentionalism that would ask what those with the ability would now enact. That
approach for statutes is vulnerable to the criticisms that present legislators were not the
actual enactors and that discerning just what they would do is too hard.\textsuperscript{37} Any similar
approach to the Federal Constitution is wholly implausible, given the obstacles to
achieving amendments, the multiple bodies involved, and the impossibility of pinning

\textsuperscript{36} One would need to include here any sense of delegation to others, such as committee members, about what obscure provisions entail. See Chapter 4 of Greenawalt, \textit{Statutory and Common Law Interpretation}, note 5 supra.

\textsuperscript{37} See id., Ch. 5.
down just what this combination of groups of legislators would now be willing and able
to enact.

Whether one attends to reader understanding or enactor intent, one needs to
remember that much more is involved than what they perceived as the coverage of a
particular provision. For then, as now, three crucial questions are the relevance of a
provision's overall purpose, the extent to which the objectives of the entire constitution
should count, and what are seen as desirable interpretive strategies judges and other
officials should employ.

C. **Specific Meaning v. Broader Principles**

A critical question, whether one focuses on original text or intent, or on what are
now seen as acceptable practices, is the manner in which provisions are best understood
when their coverage is at issue. Some provisions obviously convey, as intended, highly
explicit standards. A thirty-three-year-old is not allowed to become president, however
mature he or she, and others of the same age, might be. But some provisions in the
Bill of Rights, as well as the Equal Protection Clause of the Fourteenth Amendment,
could be regarded as general and open-ended, not only now but also when enacted,
inviting changing applications over time. With respect to such provisions, it makes a big
difference whether what is taken as crucial for the original text is its semantic meaning
or its perceived applications.\textsuperscript{38} For provisions regarded as open-ended from the start,
at least one form of evolutionary interpretation conforms with an approach to original
understanding.\textsuperscript{39}

A related point about specificity and generality concerns the relevance of the whole
document. The specific provision on which a case turns matters greatly, but some
theorists believe that with a constitution, perhaps even more than with statutes, the text of
the whole document is important, that one provision should be interpreted in a way that
fulfills the objectives of the whole.

D. Avoidance and Deference v. Independent Judgment

Just how far courts should actually determine constitutional issues is not
simple. Demands of standing and ripeness familiar to lawyers limit who can bring a

\textsuperscript{38} See Dorf, note 28 supra at 2017-24 (distinguishing "expected-application" from "semantic"
originalism).
\textsuperscript{39} See Smith, note 29 supra.
constitutional claim and in what circumstances. But even when a plaintiff meets those ordinary requirements, the Supreme Court has declined to adjudicate certain kinds of issues. It is not always easy to discern whether the Court has ruled that the range of what other officials can do is simply unlimited, and therefore any act is constitutionally permissible, or the Court is genuinely declining to make a decision about constitutional acceptability.  

40 But for some “political questions,” the Court has clearly determined that it will not resolve whether a constitutional violation has taken place. About some matters, this approach is grounded in a textual assignment of responsibility to another branch, but for other subjects what matters is the exceptional sensitivity or unmanageability of necessary inquiries.  

41 Just how far this doctrine now extends is uncertain and its proper range is debatable. A much more common concern arises when courts will make a final resolution: How much deference should judges afford the constitutional interpretations of other branches of the federal government? Although one

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41 One summary of the variety of underlying reasons for the doctrine is in Baker v. Carr, 369 U.S. 186, 217 (1962), in which the Court declined to follow the political question doctrine for issues of apportionment.
might ask this question in general terms, it is better understood with respect to specific constitutional provisions.  

E. What Weight to Precedents?

As with other cases they decide in the United States and other common law countries, judges must assess how much weight to give constitutional precedents when they face substantial arguments for overruling or distinguishing what has been previously resolved. If one were an unstinting originalist, one might claim that precedents should carry no more weight than their persuasive power entails; but no one is this kind of unstinting originalist. Indeed, one might defend reliance on precedents partly by referring to their assumed authority in 1789. The practical question is whether precedents should carry somewhat less weight in constitutional cases than in other cases, given that no one is in a position to correct “mistakes” in the manner that legislatures can respond to perceived errors of statutory interpretation and can alter aspects of the common law that displease

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42 The issues of deference are especially important when courts consider the allocation of power to political branches, treated in Chapters 7 and 8.
them.\textsuperscript{43} The constitutional amendment process is too complicated and difficult to regard
potential amenders as occupying anything like a comparable position.

Giving weight to precedents occupies a dual position in respect to evolutionary
interpretations. On the one hand, once a precedent is in place, it supplants or reduces
the significance of original understanding about the coverage of the text, and represents
a basic feature of evolutionary development. On the other hand, if courts become
rigorously faithful to constitutional precedents, that can actually preclude otherwise
healthy changes from the time the precedent is laid down. Any defense of an
evolutionary approach to constitutional interpretation needs to explain how prior judicial
precedents should be treated.

One must recognize in this context a sharp difference between the U.S. Supreme
Court and lower federal courts, along with a similar difference between the highest courts
of states and those below them. The prevailing assumption is that lower courts should

\textsuperscript{43} See, e.g., Richard H. Fallon, Jr., "Stare Decisis and the Constitution: An Essay on
of precedent in statutory and common law, see Greenawalt, \textit{Statutory and Common Law
Interpretation}, note 5 supra, at 125-27; 193-215.
always follow clear, recent, precedents of the courts above them,\textsuperscript{44} leaving to the higher courts the responsibility to follow or not follow what they have previously decided.

F. Reliance on Common Morality or One’s Reflective Political and Moral Judgment?

Because constitutional cases, particularly those that reach the Supreme Court, raise deep political and moral issues much more often than do statutory and common law cases, the problem of how far judges should try to ascertain and rely on community sentiments, rather than implement their own reflective judgments about those issues, takes on special importance.\textsuperscript{45} Of course, in discerning what the law explicitly provides and what it implies, judges must do their own assessments. But unless, like Ronald Dworkin, one takes a very broad view of what “the law provides” (one that for him actually includes independent moral judgments),\textsuperscript{46} some crucial constitutional cases cannot be settled by reference to existing law. The argument that judges should not


\textsuperscript{45} Greenawalt, Statutory and Common Law Interpretation, note 5 supra, at 250-88 explores this question in respect to common law interpretation.

then undertake to rely overwhelmingly on community morality is especially strong for guarantees that are designed to be a check on legislators and executive officials, who may well be responding to majoritarian points of view antagonistic to unpopular minorities.

For judges, unlike individuals deciding what is morally right in their own lives, one crucial criterion is whether they believe that conclusions they reach will have persuasive power for other judges who are resolving similar legal disputes.

G. Open-ended Standards or Precise Rules?

Even if one sees some standards in the constitution as substantially open-ended, part of the task for interpreting courts may be to set precise rules that executive officials and other judges can follow. Although, as with the concept of “negligence” in common law, some operating constitutional standards can be open-ended, allowing a sensitive evaluation of particular circumstances in individual cases, judges may often conclude that more specific guidance is badly needed. An example of this approach is the “Miranda warning” in criminal investigations.47 Since those approving the Fifth Amendment and original readers did not even have police interrogation in mind, and the text of the

privilege against self-incrimination—that no one "shall be compelled in any criminal case to be a witness against himself"48—hardly sets out explicit restraints on police inquiries, the Miranda decision involves an undeniably flexible interpretation of that provision. But the rule the Court announces is highly precise, telling police and courts what the police must do and when. In the decades that have followed Miranda, the strictness of the rule’s application during criminal trials has been relaxed to a degree, but the point here is that Justices may think both that a constitutional provision itself should be treated as somewhat open-ended and that the Court should lay down a very specific rule or rules.49

In the following chapter, we shall first explore a kind of parable involving private instructions. Its point is to suggest just how common it is in life to employ multiple criteria for discerning the "meaning" of instructions and the practical duties they impose. The second half of the chapter urges that despite very significant differences, the proper treatment of constitutional norms is similar in this respect.

48 U.S. Const. art. V.