Through the Looking Glass of Constitutional Interpretation

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Abstract

The United States Supreme Court is increasingly forsaking its role as legal interpreter for the role of legal author due to a transformation in Constitutional interpretation. In interpreting the Constitution in a manner inconsistent with the original intent of the Constitution, the rule of law is circumvented. In order to maintain a separation of powers necessary for governance according to rule of law principles, the U.S. Supreme Court must return to its correct role as interpreter of law. The Supreme Court's interpretation of the Establishment Clause illustrates the current difficulties surrounding the lack of a standard of interpretation. This thesis suggests that the only solution for the relative basis of Constitutional meaning is to abandon a relative view of the Constitution as a living document and to consider once again the original intent of the framers of the Constitution.

Through the Looking Glass of Constitutional Interpretation

The United States Supreme Court is increasingly forsaking its role as legal interpreter for the role of legal author due to a transformation in constitutional interpretation. Because the Constitution is interpreted in a manner inconsistent with its original intent, the rule of law is circumvented. In order to maintain a separation of powers necessary for governance according to rule of law principles, the U.S. Supreme Court must return to its correct role as interpreter of law.

Though the British system of government from which the Americans declared independence was based upon an unwritten system of Common Law, the United States of America would be built upon a different foundation — a written constitution. The U.S. Constitution would serve as the legal foundation of American government. While few, if any, will deny that America's Constitution is in fact the supreme law of the land, many will debate exactly what that supreme law means.

This thesis addresses the meaning of the U.S. Constitution as interpreted by the Supreme Court. Section II will compare interpretivist and noninterpretivist methods of adjudication such as textualism, originalism, modernism, and pragmatism. Section III will briefly review the history of constitutional interpretation. Section IV will examine how the current High Court is slowly removing America from her shelter of protection under the rule of law by increasingly interpreting the U.S. Constitution apart from its original design. In order to examine this changing interpretation, Section IV will provide an in depth analysis of the difficulties created by the High Court's transformation of the Establishment Clause's meaning and present various interpretations of that clause.

Finally, Section V will consider the interpretative method of originalism as a remedy for the relativity pervading constitutional adjudication in America today.

Different Methods of Interpretation

While there are numerous approaches that judges may take when interpreting the U.S. Constitution, there are primarily two categories of constitutional interpretation. One constitutional law text describes these two differing approaches as interpretivism and noninterpretivism.[1] These categories divide judges based upon their view of the Constitution as static or evolutionary in nature.[2] This section will examine both approaches, including some of the benefits and difficulties of each method.

Interpretivist Approaches

Interpretivists argue either that the text of the Constitution itself and/or the original intent of its authors should serve as the sole authority in constitutional interpretation.[3] Interpretivists hold that judges may not exceed the limits of the text and its intention when discovering its meaning.[4] Interpretivists fall into primarily one of two categories: textualists or originalists.[5] A third but rather uncommon category of interpretivists focuses upon the principles enshrined in the Constitution rather than strictly the text or the original intent.[6]

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[1] Otis H. Stevens, Jr. & John M. Scheb II, American Constitutional Law: Sources of Power and Restraint 48-9 (2008).

[2] Id.

[3] Gary L. McDowell, Interpretivism and Noninterpretivsm, in The Oxford Companion to the Supreme Court of the United States 436, 437 (Kermit L. Hall ed., 1992).

[4] Id. at 436.

[5] Id.

[6] Steven D. Smith, What Does Constitutional Interpretation Interpret? in Expounding the Constitution: Essays in Constitutional Theory 21, 32 (Grant Huscroft ed., 2008).

Textualist approach. One interpretivist approach to interpreting the U.S. Constitution is textualism, whereby the objective meaning of the words themselves in their historical context serves as the standard of interpretation.[7] Textualists would hold that if a word's meaning within its historical context means *A*, even if the intention of the framer was *B*, *A*'s meaning should prevail.[8] So, if a letter was discovered detailing the intention of one of the Constitution's drafters, that intention would be irrelevant to the textualist who is only concerned with the historically consistent meaning of the words themselves.[9] Occasionally, textualists will consider other outside sources in order to "scope out common patterns of word usage in earlier historical periods."[10] Additionally, textualists evaluate the overall constitutional structure in order to discern the meaning of the passage.[11] However, there is no consensus embracing textual meaning as the legitimate source of constitutional interpretation.[12] Furthermore, simply considering the text of the Constitution alone rarely provides sufficient answers to difficult cases that reach the Supreme Court.[13] In order to solve most judicial questions, something else must be considered beyond the text.[14]

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[7] Id. at 27.

[8] Id.

[9] Robert H. Bork, The Tempting of America: The Political Seduction of the Law 144 (1990).

[10] Daniel A. Farber & Suzanna Sherry, Judgment Calls: Principles and Politics in Constitutional Law 28 (2009).

[11] Id.

[12] Antonin Scalia, Review of Steven D. Smith's Law's Quandary, 55 Cath. U.L. Rev. 687, 692-3 (2006).

[13] Christopher N. May & Allan Ides, Constitutional Law National Power and Federalism: Examples And Explanations 36 (2007).

[14] Id.

Originalist approach. The interpretivist method of originalism is similar to textualism in that it focuses upon the actual text of the Constitution. However, originalists also consider the historical meaning of the Constitution in order to discover the meaning of its words. [15] The principles that the drafters of the Constitution included in that text also serve as a source of consideration.[16] Moreover, those holding to an originalist interpretivist approach place a value upon historical documents delineating the drafters' understanding of its meaning.[17] According to Associate Supreme Court Justice Antonin Scalia, "It is essential to originalism, as it is not to so-called ‘evolutionary constitutional jurisprudence,’ to know the original meaning of constitutional provisions."[18] Originalism, simply put, seeks to discover what the original authors of the Constitution intended when they penned it.[19]

Originalism finds its strength in its proposed objectivity as well as security under the rule of law that it affords.[20] However, one of the problems that opponents of originalism often raise is the difficulty of knowing the actual intent of the founders.[21] Nonetheless, by consulting the numerous writings of the founders and their early

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[15] Farber, supra note 10, at 27.

[16] Keith Whittington, How to Read the Constitution: Self-Government and the Jurisprudence of Originalism (2006), http://www.heritage.org/research/reports/2006/05/how-to-read-the-constitution-self-government-and-the-jurisprudence-of-originalism.

[17] Id.

[18] Antonin Scalia, Scalia Defends Originalism as Best Methodology for Judging Law (April 30, 2010), http://www.law.virginia.edu/html/news/2010_spr/scalia.htm

[19] Steven G. Calabresi, Originalism: A Quarter-Century of Debate 152 (2007).

[20] Id.

[21] Alan Brownstein, The Reasons Why Originalism Provides a Weak Foundation for Interpreting Constitutional Provisions Relating to Religion, 2009 Cardozo L. Rev. De Novo 196, 216 (2009).

constitutional convention debates, the question of what they intended can be properly ascertained.[22] Additionally, some critics of originalism assert that its judicial proponents are not consistent in applying original intent to decisions they make.[23] Steven Smith states, "Even committed 'originalists' may concede that [free] speech decisions cannot or should not rest on interpretations of original intentions or understandings."[24] Therefore, these critics argue, originalism is not a coherent doctrine consistently held by those who espouse it. However, such an argument does not address the validity of the approach; it simply criticizes adherents of the originalist approach.

One of the preeminent problems with the originalist approach is, according to its critics, that "the modern scope of judicial review is rigorously circumscribed by original intentionalism because the eighteenth-century framers had few, if any, clear intentions about our twentieth century problems."[25] Such skeptics ask whether changed conditions should not demand a different understanding of constitutional principles.[26] Nevertheless, originalism does not require asking "what *would* Madison do in such a situation, or even what *did* Madison do in such a situation, but what does the principle that Madison and his fellows wrote into the Constitution require in such a situation."[27] Thus, as originalist Robert Bork has argued, even though the framers of the Fourth Amendment's prohibition

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[22] David Barton, Original Intent: The Courts, the Constitution, & Religion 21 (1996).

[23] Brownstein, supra note 21, at 216.

[24] Smith, supra note 6, at 27.

[25] Phillip Bobbitt, Constitutional Fate: Theory of the Constitution, 94 (3) Ethics 501, 502 (1984).

[26] Brownstein, supra note 21, at 216.

[27] Id. (emphasis added).

of unreasonable searches and seizures could not have had electronic eavesdropping in mind, the prohibition logically extends that far.[28]

Further, Smith proposes that while considering original intent as a valid normative interpretive approach, it is not a descriptive presentation of how judges currently interpret the Constitution. Smith concludes, "Whatever its virtues or deficiencies, the enactors' intentions answer cannot provide a satisfactory overall *descriptive* account of constitutional interpretation as we know it and practice it."[29] Though this paper does not suggest that originalism provides a descriptive account of the current method utilized by the majority of Supreme Court Justices, it does suggest that originalism provides a valid alternative to the current methods utilized by the Court. In conclusion, while there are some difficulties in practically applying the originalist method, originalism offers an objective approach to interpreting the Constitution.

Constitutional principles approach. Finally, the last method in the category of interpretivist approaches is one that takes into consideration the principles embodied in the Constitution. However, this method of interpretation, while appealing, requires knowledge of the complicated process of identifying and interpreting the principles enshrined in the text of the Constitution.[30] Proponents of the 'Constitution-as-principles' position contend that the object of constitutional interpretation is the identification of some set of political-moral facts that the Constitution somehow references.[31] The principles approach is an attractive one, as most individuals favor prioritizing virtues

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[28] McDowell, supra note 3, at 437.

[29] Smith, supra note 6, at 27 (emphasis added).

[30] Id. at 29.

[31] Id. at 30.

such as goodness, justice, or morality.[32] Once again, the same difficulties that arise with the methods of textualism and originalism arise with the principles approach — how does one know what principles are in fact a legitimate bases for interpreting the Constitution? There seems to be no consensus among judges as to which principles are proper to use as an interpretive basis. The principles method is another standard that is more of a reform proposal than a descriptive explanation of what is actually happening in the arena of constitutional interpretation.[33] Many individuals do not hold to one view exclusively. Occasionally, numerous readings or a hybrid reading can be seen even within one judicial opinion.

Noninterpretivist Approaches

In addition to these preceding interpretivist methods of adjudication, there are a few methods characterized as noninterpretivist, two of which are instrumentalism and pragmatism.[34] The difference between these noninterpretivist approaches lies in their reliance upon the intentions of the founders as justification.

Modernist approach. Modernists, also called instrumentalists, claim that the intent of the framers of the Constitution actually necessitates a noninterpretivist approach.[35] Modernists suggest that the authors of the U.S. Constitution were deliberately vague, with no declaration of how judges should interpret it, and who are therefore free to engage the document in accordance with the changing necessities of

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[32] Id.

[33] Id. at 32.

[34] McDowell, supra note 3, at 437.

[35] Edward Sidlow & Beth Henschen, America at Odds 337 (2007).

time.[36] Thomas Jefferson could be seen as endorsing a sort of modernism when he stated:

> I am certainly not an advocate for frequent and untried changes in laws and constitutions . . . But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times . . .[37]

Hence, modernists, or instrumentalists, treat the Constitution as a living document that adapts to the changing needs of society and interpret it as if it were ratified today.[38]

Pragmatic approach. Pragmatists, on the other hand, do not rely upon the intention of the framers to justify their noninterpretive approach.[39] They claim that the changing needs of society require flexible interpretations informed by precedent, statutes, and the Constitution rather than upon the intention of the Constitution's authors.[40] Numerous Supreme Court Justices fall within the category of "pragmatists," including Holmes, Brandeis, Frankfurter, Jackson, Douglas, Brennan, Powell, Stevens, White, and

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[36] Id.

[37] Gottfried Dietze, In Defense of Property 258 (1995).

[38] R. Randall Kelso, Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making, 25 Pepp. L. Rev. 37, 57 (1997). Trop v. Dulles provides a great illustration of an instrumentalist reading of the Constitution. In Trop v. Dulles, then Chief Justice Warren established what would become a dominant basis for future Supreme Court decisions. In the case, Justice Warren made the bold declaration in reference to the Eighth Amendment, "The [Constitutional] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). Chief Justice Warren's decision to declare a constitutional Amendment bound to the changing preferences of society set the Court upon a dangerous trail leading even farther away from the original meaning of the Constitution.

[39] Robert Justin Lipkin, Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism 126-7 (2000).

[40] Richard A. Posner, Pragmatic Adjudication, 18 Cardozo L. Rev. 1, 5 (1996).

now Breyer.[41] Nevertheless, without reference to the text or the intentions of the framers, the only source of interpretive justification is precedent. Some of these judges, including the renowned judge Richard Posner, however, do not even believe that it is necessary to rely upon precedent; rather, these "pragmatist" judges simply ask the question of results: what decision will bring about the most good in society or promote stability?[42] Thus, the pragmatist noninterpretivists have no final standard other than utilitarianism with which to legitimize their decisions.

Consequences of utilizing a noninterpretivist approach. Despite the differences among the various noninterpretivist approaches, noninterpretivist adherents are united by their rejection of interpretivists' claim that "noninterpretivism would either require or permit courts to ignore the written Constitution and its authoritative effect."[43] However, Michael Perry, a noninterpretivist, concludes that decisions reached utilizing such an approach have "no plausible textual or historical justification."[44] Perry further acknowledges that there is "no way to avoid the conclusion that noninterpretive review, whether state or federal action, cannot be justified by reference either to the text or to the intentions of the framers of the Constitution."[45] Without reference to the text itself or the intentions of the framers, noninterpretivists must rely upon their own judgment as to what

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[41] Id.at 2.

[42] Michael C. Dorf, Create Your Own Constitutional Theory, 87 Calif. L. Rev. 593, 596 (1999); Richard A. Posner, Against Constitutional Theory, 73 N.Y.U. L. Rev. 1, 11-12 (1998).

[43] Richard B. Saphire, Making Noninterpretivism Respectable: Michael J. Perry's Contributions to Constitutional Theory, 81 (4) Mich. Law Rev. 782, 785 (1983).

[44] Michael J. Perry,The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary 11 (1982).

[45] Id. at 24.

the changing demands of society require. Oliver Wendell Holmes summarizes the noninterpretivist method:

> The life of the law has not been logic, it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices judges share with their fellow-men have a good deal more to do than the syllogism in determining the rules by which men should be governed.[46]

Therefore, by reinterpreting the Constitution in a manner that changes its meaning rather than following the established process for amending the Constitution, noninterpretivists render the Court a continuing constitutional convention.

History of Constitutional Interpretation

In order to understand what the drafters of the Constitution actually intended when they penned the supreme law of the land, one must first determine whose intentions should be included in such an analysis and what their intentions actually were.[47] The intentions of the convention delegates who ratified the Constitution must be considered.[48] The opinions of those who influenced the drafters of the Constitution and the interpretive positions of the early Supreme Court should be considered as well. This section will provide a brief summary of such a history of constitutional interpretation. Following this is an examination of the major changes in the Supreme Court's method of constitutional interpretation.

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[46] Oliver Wendell Holmes, Jr., The Common Law 1 (1881).

[47] William Anderson, The Intention of the Framers: A Note on Constitutional Interpretation, Vol, 49, No. 2 The American Political Science Review 340, 342 (1955).

[48] Id.

Early Intentions

For centuries, judicial decision-making simply relied upon interpreting the law. Robin West asserted, "That adjudication consists primarily of the interpretation of texts is a very old claim — its roots lie in Blackstone's insistence that adjudication is primarily the discovery, not the creation of law."[49] According to Blackstone,[50] the spirit and reason of the law must be taken into consideration when applying debatable law to particular cases: "But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it. For when this reason ceases, the laws itself ought likewise to cease with it."[51] It is significant that Blackstone held firmly to the belief that adjudication requires interpretation in light of the motivation of the law's author because:

> It was from Blackstone that most Americans, including John Marshall, acquired their knowledge of natural law . . . Blackstone remained the standard manual of law until the publication of the *Commentaries on American Law* (1826-1830) of Chancellor James Kent of New York..[52]

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[49] Robin L. West, Adjudication Is Not Interpretation: Some Reservations About The Law-As-Literature Movement, 54 Tenn. L. Rev. 203, 205 (1986).

[50] Many consider Blackstone's *Commentaries* the best exposition of English Common Law. James McClellan, Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government 33 (2000). Constitutional scholar Donald Lutz stated that, "A trenchant reference to Blackstone could quickly end an argument." Donald Lutz, The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought 78 The American Political Science Review 189, 196 (1984).

[51] William Blackstone, Blackstone's Commentaries on the Laws of England 61 (1765), http://avalon.law.yale.edu/18th_century/blackstone_intro.asp#1.

[52] Robert K. Dorman & Csaba Vedlick Jr., Judicial Supremacy: The Supreme Court on Trial 10 (1986).

Blackstone was so influential in America that Edmund Burke stated, "They have sold as many of *Blackstone's Commentaries* in America as in England."[53] If Blackstone, the legal authority during the time of the Constitution's formulation, asserted that adjudication relies upon interpreting legal texts in light of the intention of the text's author, it is reasonable to presume that the drafters of the Constitution, being highly influenced by Blackstone, held to a similar belief.[54]

Throughout the history of Anglo-American jurisprudence, interpretation of the law was presumed to be the legitimate province of judges. However, with the creation of the United States Constitution in 1787, a new type of law appeared on the scene of history — a written constitution. Beginning with the Mayflower Compact (1620) and the Fundamental Orders of Connecticut (1639), both states as well as the federal government would establish a form of government based upon written laws that would serve to govern both rulers and those ruled. America's unique rule of law tradition, built upon British charters such as the Magna Carta (1215) and the English Bill of Rights (1689), would serve as a subsequent model for the rest of the world. Today, written constitutions epitomize what it means to be an independent state in the contemporary world.[55]

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[53] Barton, supra note 22, at 216.

[54] According to Donald Lutz's analysis of European writers upon Americans during the founding era, "Blackstone is the second most prominent secular writer [cited] during the founding era." Donald Lutz, The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought 78 The American Political Science Review 189, 193 (1984). Most of the delegates to the Convention were well versed in English Common Law, and their legal perspectives were highly influenced by English Common Law. James McClellan, Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government 32-33 (2000).

[55] Martin Edelman, Issues Facing The Judiciary: Written Constitutions, Democracy And Judicial Interpretation: The Hobgoblin Of Judicial Activism, 68 Alb. L. Rev. 585, 586 (2005).

While the founders of the United States would have the benefit of the writings of men such as Blackstone, they would not model government strictly after any other system. Instead, they would create a government wholly unique — built upon a written Constitution. In May 1787, the Constitutional Convention met in order to draft what would become the Constitution of the United States of America, which incorporated the intentions of the fifty-five men who constituted the Convention and, later, ninety more who debated the Bill of Rights.[56] The writings of these men are highly informative relative to this discussion on constitutional interpretation.

In order to ensure the government of the United States would remain within its jurisdiction, the founders created a written Constitution. James Madison, known as the father of the Constitution, stated the following:

> What is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[57]

Regarding the importance of a written constitution and its construction, Thomas Jefferson reflected, "I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless. Our particular security is in a written Constitution. Let us not make it a blank paper by

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[56] Barton, supra note 22, at 6.

[57] James Madison, The Federalist No. 51 319-20 (Clinton Rossiter ed., 1961).

construction."[58] Evidenced by the preceding historical accounts, early influential Americans perceived the construction of America's written Constitution as involving a certain amount of governmental restraint.

If a written constitution is to serve the function of keeping government within its lawful bounds, then there must be some check to guarantee that the government is actually obeying the law. As Chief Justice Marshall enunciated in 1803 shortly after the creation of the U.S. Constitution, "it is emphatically the province and duty of the judicial department to say what law is."[59] Prior to the monumental decision of Marbury v. Madison, the judicial branch had not exercised the function of judicial review. Nevertheless, Alexander Hamilton, in Federalist 78 in 1788, only one year after the Constitution's drafting, enunciated:

> It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents. [60]

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[58] Thomas Jefferson, Letter to Wilson C. Nicholas, in Thomas Jefferson: Letters and Addresses 154, 154 (William B. Parker and Jonas Viles eds., 1908).

[59] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[60] Alexander Hamilton, The Federalist No. 78: The Judiciary (1788), http://www.constitution.org/fed/federa78.htm

Thus, the drafters of the Constitution, or at the very least certain drafters, foresaw the role of the judicial branch as interpreting the Constitution and statutes, and preferring the former when in conflict with the latter.

Early Interpretive Approach Utilized by the Supreme Court

In addition to perspectives of European legal scholars such as Blackstone on constitutional interpretation, the early Supreme Court justices' perspectives on constitutional interpretation provide further evidence as to the method of interpretation envisioned by the drafters of the U.S. Constitution. The early Court's approach was presumably influenced by the founders' own perspective on constitutional interpretation. Justice Felix Frankfurter summarized the early Court's approach in Wallace v. Jaffree: "What governs is the Constitution, and not what we have written about it."[61] The case of Chisholm v. Georgia (1793) also illustrates the early Supreme Court's rationale, which relied upon the original intent of the drafters. In reaching their decision, Justice Iredell,[62] deliberated, "The framers of the Constitution, I presume, must have meant one of two things . . ."[63] Such commentary indicates how some of the first Supreme Court justices viewed the intention of the founders as extremely relevant in determining the meaning and application of the law to the cases at hand.

Another early Supreme Court decision that relied upon the intention of the founders in its rationale is the Church of the Holy Trinity v. U.S. decision. In this case, a

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[61] John Eidsmoe, Christianity and the Constitution 397 (1987), quoting Justice Felix Frankfurter, Wallace v. Jaffree 472 U.S. 38 (1985).

[62] Justice James Iredell of North Carolina was a prominent American lawyer who received his legal education in England; Iredell was also a delegate to the Federal Convention. James McClellan, Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government 33 (2000).

[63] Chisholm v. Georgia, 2 U.S. 419, 432 (1793).

church in New York was being prosecuted for violating a statute enacted for the purpose of preventing the importation of foreign labor to build western railroads. The church was accused of violating the law by hiring an English clergyman. The Court, however, reasoned:

> It is a familiar rule that a thing may be within the letter of the statute and not within the statute, because not within its spirit, *not within the intention of its makers* . . . Frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, *makes it unreasonable to believe that the legislator intended* to include the particular act.[64]

Thus, the Court in the Holy Trinity case relied heavily upon the intention of the legislator in reaching its decision.

Similarly, in Marbury v. Madison, which established the legitimacy of judicial review, Chief Justice Marshall clearly relies upon a textual or historical basis of constitutional interpretation as the basis for judicial review:

> 'No person,' says the constitution, 'shall be convicted of treason unless on the testimony of two witnesses to the fame overt act, or on confession in open court.' Here *the language of the constitution* is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act? From these, and many other selections which might be made, it is apparent, that *the framers of the constitution contemplated* that instrument, as a rule for the government of courts, as well as of the legislature.[65]

Marshall, in addition to the preceding cases, further demonstrates that the early Supreme Court relied upon the meaning of the Constitution's words as well as the intention of its

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[64] Church of the Holy Trinity v. U.S., 143 U.S. 457, 459 (1892) quoted in David Barton, Original Intent: The Courts, the Constitution, and Religion 147 (1996) (emphasis added).

[65] Marbury, 5 U.S. at 179-80 (emphasis added).

authors. In short, while justices did not always claim to be certain of the intention of the Constitution's drafters, they did seek to discern their intent.

Moving Away From Early Intentions

The court did not embrace any idea of "living constitutionalism" until much later in U.S. history.[66] It was not until the prevailing positivism of the 1870s when Christopher Columbus Langdell introduced the case-law study method that constitutional adjudication began to markedly change.[67] This new approach focused upon judicial decisions rather than the Constitution itself.[68] The case-law approach viewed the intentions of the founders as irrelevant and even a hindrance to the "successful evolution of society."[69]

Numerous legal theorists throughout the 1900s began espousing similar views of legal positivism.[70] John Dewey, a leading relativist of the time, clearly articulates the change in legal philosophy from Blackstone's traditional approach to Langdell's positivist

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[66] Barton, supra note 22, at 228. Living constitutionalism is a theory of jurisprudence "in which constitutional provisions are unmoored from their originalist grounding and interpreted to meet present societal needs." Adam Winkler, A Revolution Too Soon: Woman Suffragists and The "Living Constitution," 76 N.Y.U.L. Rev. 1456, 1457.

[67] Barton, supra note 22, at 228. Harvard Law School Dean Christopher Columbus Langdell is most famous for his efforts as a law professor, substituting the study of cases for the previously used lectures and textbooks. William Schofield, Christopher Columbus Langdell, 55 The American Law Register 273, 273, 278.

[68] Barton, supra note 22, at 228.

[69] Id.

[70] Id. Constitutional scholar and law professor John Eidsmoe describes legal positivism as possessing five major claims: "(1) There are no objective, God-given standards of law, or if there are, they are irrelevant to the modern legal system. (2) Since God is not the author of law, the author of law must be man; in other words, the law is law simply because the highest human authority, the state, has said it is law and is able to back it up. (3) Since man and society evolve, therefore law must evolve as well. (4) Judges, through their decisions, guide the evolution of law. (4) Judges, through their decisions, guide the evolution of law. (5) To study law, get at the original sources of law--the decisions of judges." Barton, supra note 22, at 227.

approach, "The belief in political fixity, of the sanctity of some form of state consecrated by the efforts of our fathers and hallowed by tradition, is one of the stumbling-blocks in the way of orderly and directed change."[71] Oliver Wendell Holmes, Jr.[72] echoed a similar pronouncement in 1902: "The justification of a law for us cannot be found in the fact that our fathers always have followed it. It must be found in some help which the law brings toward reaching a social end."[73] The scientific approach to the law brought with it a sense that the law should change with the evolving needs of society.

The influence of positivist philosophy increased following Langdell's case-law method, and positivist philosophy continues to inspire legal theorists to this day. Justice Cardozo stated in 1921, "I take judge-made law as one of the existing realities of life."[74] Additionally, Justice Charles Evans Hughes emphatically stated, "We are under a Constitution, but the Constitution is what the judge says it is."[75] This changing perspective of constitutional adjudication began to influence not only the thinking of legal scholars, but the methods of judicial decision-making in America's courts.

It was not until 1958 that such evolutionary legal reasoning would make its way into a U.S. Supreme Court case. That case was Trop v. Dulles, which declared it "cruel

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[71] John Dewey, The Public and Its Problems 34 (1927).

[72] Oliver Wendell Holmes Jr. served as associate Justice to the U.S. Supreme Court from 1902 until 1932. Holmes also served as an Associate Justice and as Chief Justice on the Massachusetts Supreme Judicial Court. Additionally, he was a law professor at Harvard. Sophie W. Littlefield & William M. Wiecek, Oliver Wendell Holmes Jr.: The Supreme Court and American Legal Thought 5 (2005).

[73] Oliver Wendell Holmes, Jr., The Law in Science--Science in Law, in Collected Legal Papers 225, 225 (1920).

[74] Benjamin Cardozo, The Nature of the Judicial Process 10 (1921).

[75] Charles Evans Hughes, Speech at Elmira on May 3, 1907, in The Autobiographical Notes of Charles Evans Hughes 144 (1973).

and unusual punishment" to revoke the citizenship of a U.S. citizen as a form of punishment.[76] In Trop v. Dulles, then Chief Justice Warren established what would become a dominant basis for future Supreme Court decisions by boldly declaring that the Eighth Amendment "must draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society."[77] Chief Justice Warren's decision to declare a Constitutional Amendment bound to the changing preferences of society set the Court upon a dangerous path leading even farther away from the original meaning of the Constitution.

Today, the Supreme Court has shifted even farther from the original understanding of the Constitution by discovering in the "emanations of the penumbras of the Constitution" everything from a Constitutional right to privacy[78] to a right to pursue an occupation.[79] Such rights, while not explicitly mentioned in the Constitution are, according to Justice Douglas, necessary in order to give substance to the rights enumerated. Douglas asserts, "The foregoing cases suggest that specific guarantees in the Bill of Rights have *penumbras*, formed by *emanations from those guarantees* that help give them life and substance."[80] In sum, the Court's reasoning not only relies upon the specific enumeration of rights in the Constitution but also upon whatever additional rights the Justices deem necessary to grant those enumerated rights "life and substance."[81]

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[76] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[77] Id.

[78] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[79] Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 239 (1957).

[80] Griswold, 381 U.S. at 484 (emphasis added).

[81] Id.

The next section of this paper will examine one specific example where the result of interpreting the Constitution without a standard has created conflicting law. This example illustrates the current need for an established standard of interpretation to ensure that the law provides stability and certainty for those who live under its authority.

Interpreting Without a Standard: Separation of Church and State

Recently, a school in Giles County, VA received a letter from an attorney informing them that their display of the Ten Commandments is unconstitutional and urging the school to remove their "unconstitutional" display.[82] The school board promptly removed the display of the Ten Commandments.[83] However, negative responses from concerned parents eventually prompted the school board to return the Ten Commandments to their original place in the school.[84] This is just one example illustrating the difficulty of constitutional interpretation. One side was adamant that the display was unconstitutional, while the other, with equal vehemence, declared the display wholly constitutional. Nonetheless, the Constitution does not explicitly address the question of religious displays in public schools. In order to make a judgment regarding the question of such displays, the Supreme Court must interpret the Establishment Clause of the First Amendment.

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[82] Holly Pietrzak, Updated: Ten Commandments Goes Back up in Giles County Schools, WDBJ7.com, January 21, 2001, ¶ 20, http://www.wdbj7.com/news/wdbj-removal-of-the-ten-commandment-01202011,0,6946882.story.

[83] Id.at ¶ 3.

[84] Id. at ¶ 16.

The First Amendment, states simply, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."[85] Hence, in deciding a specific case involving a "separation of church and state" question, the court must ascertain the meaning and legal application of the Establishment Clause. The difficulties with the Supreme Court's doctrine of "separation of church and state" clearly present the need for an interpretive standard. In order to examine the current difficulties surrounding the lack of such a standard, this section will examine the original intent of the Establishment Clause and how the Court initially interpreted it, followed by an examination of the Court's changing interpretations of the Clause based upon contradictory standards and conflicting judgments. Lastly, this section will examine the current Establishment Clause confusion created and the conflicting results reached due to an absent standard of interpretation.

The Original Meaning of the Establishment Clause

The case that first introduced the phrase "separation of church and state" into the rhetoric of the Supreme Court was the 1947 Everson v. Board of Education case.[86] In this case, the Court emphatically declared, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[87] Yet, the phrase "separation of church and state" is found nowhere in the Constitution. Whether the original intent of the Establishment Clause was

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[85] U.S. Const. amend. 1. The Establishment Clause refers to the portion of the First Amendment which states, "Congress shall make no law respecting an establishment of religion. . ." The Free Exercise Clause states, "or prohibiting the free exercise thereof. . ." James Q. Wilson, American Government: Brief Version 40 (9th ed., 2009).

[86] David Barton, The Myth of Separation 16 (1991).

[87] Everson v. Board of Education, 330 U.S. 1, 18 (1947).

to "erect a wall between church and state" can be ascertained by examining documents and debates written during the Constitution's construction and adoption.

First, the original purpose of the Bill of Rights should inform any understanding of the original intent of the Establishment Clause. The Bill of Rights was essentially a concession to certain anti-federalists who were wary of adopting the Constitution.[88] The anti-federalists feared that the national government would become so powerful that it would interfere with the people's free exercise of religion; the Bill of rights was never originally intended to be directed against the states.[89] The Establishment Clause specifically states that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."[90] The fact that seven states had established religions at the time the Constitution was adopted further evidences the assertion that it was Congress' authority — and not the states' authority — that was directly limited by the Establishment Clause.[91]

Second, the intention of the Establishment Clause was to promote the Free Exercise Clause, not hinder it.[92] The intention of the Establishment Clause was not to prevent the national government from interfering in religious affairs entirely, as there are

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[88] Robert G. Natelson, The Original Meaning of the Establishment Clause, 14 Wm. & Mary Bill Rts. J. 73, 79 (2005).

[89] Barron v. Baltimore 32 U.S. 243, 247-51 (1833). In this case, then Supreme Court Justice Marshall stated, "In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government — not against those of the local governments." Id. at 250.

[90] U.S. Const. Amend. 1.

[91] Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 122 (2nd ed., 1836).

[92] Natelson, supra note 88, at 129. The free exercise clause states simply, "or prohibiting the free exercise thereof . . ."

numerous early examples of the government even "promoting" theism specifically.[93] The Establishment Clause, along with the Free Exercise Clause, was intended to promote liberty of conscience, a right that the founders of the United States of America valued highly. James Madison, in his *Memorial and Remonstrance against Religious Assessments* (1785), asserted:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men.[94]

Thomas Jefferson echoed a similar pronouncement:

> But our rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg.[95]

Another influential early American, Rector of Yale College Elisha Williams, stated regarding liberty of conscience,

> Every man has an equal right to follow the dictates of his own conscience in the affairs of religion. Every one is under an indispensable obligation to search the scripture for himself (which contains the whole of it) and to make the best use of it he can for his own information in the will of God, the nature and duties of Christianity. And as every Christian is so bound; so he has an unalienable right to

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[93] See 1 Annals of Cong. 914 (Joseph Gales ed., 1834).

[94] James Madison, *Memorial and Remonstrance against Religious Assessments (1785), quoted in*, The American Constitutional Experience: Selected Readings and Supreme Court Opinions 150 (James A. Curry, Richard B. Riley, Richard M Battistoni & John C. Blakeman eds., 2000).

[95] Thomas Jefferson, The Writings of Thomas Jefferson: Being his Autobiography, Correspondence, Reports, Messages, Addresses, And Other Writings, Official and Private 400 (H.A. Washington ed., 1854).

> judge of the sense and meaning of it, and to follow his judgment wherever it leads him; even an equal right with any rulers be they civil or ecclesiastical.[96]

Thus, the Establishment Clause was adopted to prevent Congress from instituting a national religion, and more broadly to prohibit the government from favoring or promoting one religion to the detriment of another which would have also violated liberty of conscience.[97] The original understanding of the Establishment Clause encompassed principles of liberty of conscience, freedom of religious expression, religious pluralism and equality, and separation of church from state.[98] Later interpretations of the Establishment Clause failed to consider its complete original understanding; rather, separation of church from state became the sole focus of Establishment Clause decisions.[99]

The Current Meaning of the Establishment Clause

In recent decades, the Supreme Court has been interpreting the Establishment Clause in a manner inconsistent with and, in some cases, contrary to its original purpose. Such decisions resulted from shaky interpretative grounds. For example, the Supreme Court ruled in Marsh v. Chambers that it is constitutional for chaplains in Congress to pray,[100] while twenty-one years earlier in Engel v. Vitale the Court held that it is unconstitutional for students to recite similar prayers in schools.[101] Moreover, in 1992

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[96] Elisha Williams, (1744) quoted in Religion and the Constitution 47 (Michael W. McConnell, John H. Garvey, Thomas C. Berg eds., 2002).

[97] Natelson, supra note 88, at 138.

[98] John Witte Jr., Religion and the American Constitutional Experiment 185 (2005).

[99] Id.

[100] Marsh v. Chambers, 463 U.S. 783 (1983).

[101] Engel v. Vitale , 370 U.S. 421 (1962).

the Court decided that it was unconstitutional for students to hear prayers in public meetings.[102] The Supreme Court held in 1984 that a crèche in a shopping center may constitutionally be displayed,[103] but in 1989, the Court held that such a display of a crèche in a courthouse is unconstitutional.[104]

Additionally, the Court decided in Stone v. Graham that it was unconstitutional to display the Ten Commandments in schools, arguing that: "If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."[105] In Stone v. Graham the Court utilized the previously established Lemon test to determine whether the display was constitutional.[106] The Court ruled that the display did not pass constitutional muster because it violated the first prong of the Lemon test, which requires statutes to have a "secular legislative purpose."[107] The Court also declared in McCreary v. ACLU that the display of the Ten Commandments in the Kentucky County Courthouse was unconstitutional because the objective of the display was "predominantly religious,"[108] and thus, failed to pass the secular legislative purpose prong of the Lemon test as well as the neutrality test instituted in Everson v. Board of Ed. of Ewing.[109]

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[102] Lee v. Weisman, 505 U.S. 577 (1992).

[103] Lynch v. Donnelly, 465 U.S. 668, 669-70 (1985).

[104] Allegheny v. ACLU, 492 U.S. 573, 621 (1989).

[105] Stone v. Graham, 449 U.S. 39, 42 (1980).

[106] Lemon v. Kurtzman , 403 U.S. 602 (1971).

[107] Id. at 612.

[108] McCreary County v. ACLU, 545 U.S. 844, 881 (2005).

[109] Id. at 874.

However, the Court held in Van Orden v. Perry that the Ten Commandments could be constitutionally displayed on public property if the purpose of the display is based on its historical meaning and passive use.[110] The Court concluded that the Establishment Clause requires "that we neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage."[111] Van Orden declared in respect to the religious nature of the Commandments that, "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[112] Distinguishing the display in this case from the displays in public school settings in Stone, Schempp, and Engel, the Court held that the display in the legislative chamber was representative of Texas' legal and political history, and thus, not violative of the Establishment Clause.[113]

What can explain the Court's various interpretations of the Establishment Clause? Most certainly, the words of the Constitution and the original intent of men long deceased has not changed. Therefore, the change must be a result of the changing interpretation of the Constitution's words. As evidenced by the preceding cases, failure to base judicial decisions upon the original intent of the Constitution results in a Constitution whose meaning changes with each judge's relative perspective.

Based upon the preceding cases, it is clear why the Giles County School Board was uncertain as to the constitutionality of their display of the Ten Commandments.

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[110] Van Orden v. Perry, 545 U.S. 677, 691-2 (2005).

[111] Id. at 684.

[112] Id. at 690.

[113] Id. at 691.

Ultimately, there is precedent to support either side of the debate. However, if the basis for the decision is the original intent of the Establishment Clause, the result is much more certain. Ultimately, basing such constitutional decisions upon original intent allows judges to rely upon a standard which surpasses their own opinion.

Justice Antonin Scalia's dissent in Lee v. Weisman demonstrates how an originalist rationale was employed to reach a conclusion in an Establishment Clause case.[114] Scalia demonstrates the importance of relying upon a foundation that supersedes the changing philosophies of judges.[115] He states, "Today's opinion shows more forcefully than volumes of argumentation why our Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people."[116] Scalia's also cites Justice Brennan's concurrence in School Dist. of Abington v. Schempp stating, "The line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."[117] In order to reach such a conclusion, Scalia considers the original purpose of the Establishment Clause, citing early cases that demonstrate the founders' opinions on its purpose. In reaching his conclusion, Scalia argues:

> Thus, while I have no quarrel with the Court's general proposition that the Establishment Clause 'guarantees that government may not coerce anyone to

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[114] Lee, 505 U.S. at 631-646.

[115] Id. at 632.

[116] Id.

[117] School Dist. of Abington v. Schempp, 374 U.S. 203, 294 (1963).

> support or participate in religion or its exercise,'[118] I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty -- a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud. The Framers were indeed opposed to coercion of religious worship by the National Government; but, as their own sponsorship of nonsectarian prayer in public events demonstrates, they understood that 'speech is not coercive; the listener may do as he likes.'[119]

Scalia bases his reasoning upon the original intent of the drafters of the Establishment Clause. In determining the founders' intentions, he consults the Constitution itself, the Declaration of Independence, as well as early writings and cases that interpreted the Establishment Clause.[120] While consulting the original intent is not without its faults, at the very minimum, it provides an interpretive foundation for judicial decision-making.

Establishment Clause decisions that ignore the original intent of the Constitution often reach conclusions diametrically opposed to the framers' original purpose for the Establishment Clause. Justice Kennedy's majority opinion in Lee v. Weisman demonstrates this very problem, as his conclusion opposed the very purpose for which that provision was written:

> The lessons of the First Amendment are as urgent in the modern world as in the 18th century when it was written. One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people. To compromise that principle today would be to deny our own tradition and forfeit our standing to urge others to secure the protections of that tradition for themselves.[121]

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[118] Lee, 505 U.S. at 587.

[119] Lee, 505 U.S. at 642, citing American Jewish Congress v. Chicago, 827 F.2d 120, 132 (1987).

[120] Lee, 505 U.S. at 577.

[121] Id. at 592.

Though he appears to rely upon a long-standing historical tradition, this is simply not the case.

In 1864, Mr. Meacham, of the House Committee on the Judiciary, made the following pronouncement: "What is an establishment of religion? It must have a creed, defining what a man must believe; it must have ministers of defined qualifications, to teach the doctrines and administer the rites; it must have tests for the submissive and penalties for the non-conformist. There never was an established religion without all these . . ."[122] While this is a rather narrow view of the Establishment Clause, even a broader view allowed numerous religious "activities" to continue.[123] The early broader view of the Establishment Clause simply required government impartiality concerning religion.[124] Kennedy's conclusion that a constitutional provision written to prevent Congress from establishing a religion, and more broadly, from favoring one religion over another prevents a non-sectarian prayer from being offered at a public high-school graduation ceremony is without merit. Kennedy may reach this conclusion based upon prior precedent,[125] or upon the evolving standards of society, but not upon original intent.

The contradictory decisions reached by the Supreme Court speak to the need for a consistent standard of interpretation. Rule of law depends upon the ability of citizens to

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[122] B.F. Morris, The Christian Life and Character of the Civil Institutions of the United States 317 (1864).

[123] It was not until 1962 that the Supreme Court found prayers (offered in public places) to violate the Establishment Clause of the Constitution. Engel v. Vitale, 370 U.S. 421, 436 (1962).

[124] Natelson, supra note 88, at 138.

[125] The earliest precedent to support Kennedy's conclusion dates from 1962 (Engel, 370 U.S. at 436). The early understanding of the Establishment Clause did not include such proscriptions, and cannot be relied upon for them. See Section IV discussion on early understandings of the Establishment Clause.

know and understand the laws that govern them.[126] As the Supreme Court's decisions increasingly create new law rather than interpret a stable, established law that individuals can understand and follow, the people of the United States of America are moving further away from the protection afforded by the rule of law.

Analysis

The Constitution of the United States is so cherished for its ability to protect against the tyrannical rule of men; yet, if it is built upon nothing more than subjective opinions of that law, those opinions will supersede the Constitution itself. Supreme Court Justice Antonin Scalia stated in an interview to NPR news:

> If you somehow adopt a philosophy that the Constitution itself is not static, but rather it morphs from age to age to say whatever it ought to say — which is probably whatever the people would want it to say — you eliminate the whole purpose of a Constitution. And that is essentially what the so-called living Constitution leaves you with.[127]

This paper suggests that judges should treat the Constitution as a written document with fixed meaning. Judicial review and other critical Supreme Court doctrines should find their authority in the "writtenness" of the Constitution:

> The Constitution is, among other things, a legal document, and it is on the Constitution's status as written law that justification of the practice of judicial review has largely rested. As Edwin Corwin once wrote, 'The first and most obvious fact about the Constitution of the United States is that it is a document.' Justice Black began his lectures on constitutional interpretation by saying, 'It is of paramount importance to me that our country has a written constitution.' With words like these, contemporary constitutional interpreters hark back to John Marshall's original argument for judicial review in Marbury v. Madison, an argument permeated with reliance on the 'writtenness' of the Constitution.[128]

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[126] ABA Division for Public Education, Part 1: What is the Rule of Law 4.

[127] Antonin Scalia, quoted in Ari Shapiro, Conservatives Have 'Originalism'; Liberals Have ... ? (2009), http://www.npr.org/templates/story/story.php?storyId=105439966.

[128] Thomas C. Grey, The Constitution as Scripture, 37 Stan. L. Rev. 1, 14 (1984).

As a letter written to a friend contains words with specific meanings organized to articulate a specific message, so the Constitution contains words carefully chosen to convey a particular meaning.

The emphasis upon the Constitution as a written document lends much support to the interpretive approach of originalism. While recognizing certain difficulties that arise with utilizing this interpretive method, this paper suggests that originalism provides the clearest lens through which to read the Constitution. Furthermore, in consideration of the history of constitutional interpretation, it is clear that the initial idea of constitutional interpretation included a consideration of the intention of the framers of the Constitution.

Finally, the current difficulties created by the Supreme Court's reliance upon numerous alternative interpretive, or noninterpretive, methods of adjudication illustrate the need for a consistent standard of interpretation to ensure the Constitution continues to maintain its place as the supreme law of the land. Attorney General Edwin Meese stated, regarding the current shift in constitutional interpretation:

> It was not so long ago when constitutional interpretation was understood to move between roles of 'strict construction' and 'loose construction.' Today, it is argued that constitutional interpretation moves between 'interpretive review' and 'non-interpretive review.' As one observer has pointed out, under the old system the question was *how* to read the Constitution; under the new approach, the question is *whether* to read the Constitution. The result is that some judges and academics feel free to roam at large in the trackless fields of their own imaginations.[129]

Without a consistent meaning, the Constitution becomes whatever the judges say it is. Such construction of the Supreme Law of the Land renders the Constitution meaningless and erodes the stability the Constitution was intended to provide.

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[129] Edwin Meese, III, Address to American Bar Association (1985) quoted in, John Eidsmoe, Christianity and the Constitution 398 (1987) (emphasis added).

Conclusion

In view of the history of the American judicial system and the current difficulties created by the Supreme Court's shift away from considering the original intent of the Constitution, this paper suggests that the only solution is to abandon the relativism of a "living Constitution" and to consider once again the original intent of the Constitution's framers. What began as an experiment in written constitutionalism has become a standard for nations throughout the world today. In order to preserve the unique American constitutional order and system, this paper urges America's courts to return to an objective standard of interpretation when deciding cases. In Lewis Carroll's *Through the Looking Glass,* Humpty Dumpty has a conversation with Alice where the meaning of words is purely subjective, "'When I use a word, 'Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean -- neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.'"[130] Will America's courts continue to follow the precedent set by Humpty Dumpty, or will they instead return to considering the objective meaning of the Constitution?

[130] Lewis Carroll, Through the Looking Glass, and What Alice Found There 132 (1893).

BIBLIOGRAPHY

ABA Division for Public Education, Part 1: What is the Rule of Law 4.

Adam Winkler, A Revolution Too Soon: Woman Suffragists and The "Living Constitution," 76 N.Y.U.L. Rev. 1456, 1457.

Alan Brownstein, The Reasons Why Originalism Provides a Weak Foundation for Interpreting Constitutional Provisions Relating to Religion, 2009 Cardozo L. Rev. De Novo 196, 216 (2009).

Alexander Hamilton, The Federalist No. 78: The Judiciary (1788), http://www.constitution.org/fed/federa78.htm

Allegheny v. ACLU, 106 L. Ed. 2d 472, 475 (1989).

American Jewish Congress v. Chicago, 827 F.2d 120, 132 (1987).

1 Annals of Cong. 914 (Joseph Gales ed., 1834).

Antonin Scalia, Review of Steven D. Smith's Law's Quandary, 55 Cath. U.L. Rev. 687, 692-3 (2006).

_____, Scalia Defends Originalism as Best Methodology for Judging Law (April 30, 2010), http://www.law.virginia.edu/html/news/2010_spr/scalia.htm

_____, quoted in Ari Shapiro, Conservatives Have 'Originalism'; Liberals Have ... ? (2009), http://www.npr.org/templates/story/story.php?storyId=105439966.

Benjamin Cardozo, The Nature of the Judicial Process 10 (1921).

B.F. Morris, The Christian Life and Character of the Civil Institutions of the United States 317 (1864).

Bogden v. Doty, 598 F. 2d 1110 (1979).

Charles Evans Hughes, Speech at Elmira on May 3, 1907, in The Autobiographical Notes of Charles Evans Hughes 144 (1973).

Chisholm v. Georgia, 2 U.S. 419, 432 (1793).

Christopher N. May & Allan Ides, Constitutional Law National Power and Federalism: Examples And Explanations 36 (2007).

Church of the Holy Trinity v. U.S., 143 U.S. 457, 459 (1892).

Daniel A. Farber & Suzanna Sherry, Judgment Calls: Principles and Politics in Constitutional Law 28 (2009).

David Barton, Original Intent: The Courts, the Constitution, & Religion 21 (1996).

_____, The Myth of Separation 16 (1991).

Edward Sidlow & Beth Henschen, America at Odds 337 (2007).

Edwin Meese, III, Address to American Bar Association (1985) quoted in, John Eidsmoe, Christianity and the Constitution 398 (1987).

Elisha Williams, (1744) quoted in Religion and the Constitution 47 (Michael W. McConnell, John H. Garvey, Thomas C. Berg eds., 2002).

Engel v. Vitale, 370 U.S. 421, 436 (1962).

Everson v. Board of Education, 330 U.S. 1, 18 (1947).

Gary L. McDowell, Interpretivism and Noninterpretivsm, in The Oxford Companion to the Supreme Court of the United States 436, 437 (Kermit L. Hall ed., 1992).

Gottfried Dietze, In Defense of Property 258 (1995).

Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

Holly Pietrzak, Updated: Ten Commandments Goes Back up in Giles County Schools, WDBJ7.com, January 21, 2001, ¶ 20, http://www.wdbj7.com/news/wdbj-removal-of-the-ten-commandment-01202011,0,6946882.story.

James Madison, *Memorial and Remonstrance against Religious Assessments (1785), quoted in,* The American Constitutional Experience: Selected Readings and Supreme Court Opinions 150 (James A. Curry, Richard B. Riley, Richard M Battistoni & John C. Blakeman eds., 2000).

James Madison, The Federalist No. 51 319-20 (Clinton Rossiter ed., 1961).

James McClellan, Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government 33 (2000).

John Dewey, The Public and Its Problems 34 (1927).

Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 122 (2nd ed., 1836).

John Witte Jr., Religion and the American Constitutional Experiment 185 (2005).

Keith Whittington, How to Read the Constitution: Self-Government and the Jurisprudence of Originalism (2006), http://www.heritage.org/research/reports/2006/05/how-to-read-the-constitution-self-government-and-the-jurisprudence-of-originalism.

Lee v. Weisman, 120 L. Ed. 2d 467 (1992).

Lewis Carroll, Through the Looking Glass, and What Alice Found There 132 (1893).

Lynch v. Donnelly, 465 U.S. 668, 669-70 (1985).

Marbury v. Madison, 5 U.S. 137, 177 (1803).

Marsh v. Chambers, 463 U.S. 783 (1983).

Martin Edelman, Issues Facing The Judiciary: Written Constitutions, Democracy And Judicial Interpretation: The Hobgoblin Of Judicial Activism, 68 Alb. L. Rev. 585, 586 (2005).

Michael C. Dorf, Create Your Own Constitutional Theory, 87 Calif. L. Rev. 593, 596 (1999); Richard A. Posner, Against Constitutional Theory, 73 N.Y.U. L. Rev. 1, 11-12 (1998).

Michael J. Perry,The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary 11 (1982).

Oliver Wendell Holmes, Jr., The Common Law 1 (1881).

_____, The Law in Science--Science in Law, in Collected Legal Papers 225, 225 (1920).

Otis H. Stevens, Jr. & John M. Scheb II, American Constitutional Law: Sources of Power and Restraint 48-9 (2008).

Phillip Bobbitt, Constitutional Fate: Theory of the Constitution, 94 (3) Ethics 501, 502 (1984).

Richard A. Posner, Pragmatic Adjudication, 18 Cardozo L. Rev. 1, 5 (1996).

Richard B. Saphire, Making Noninterpretivism Respectable: Michael J. Perry's Contributions to Constitutional Theory, 81 (4) Mich. Law Rev. 782, 785 (1983).

Robert G. Natelson, The Original Meaning of the Establishment Clause, 14 Wm. & Mary Bill Rts. J. 73, 79 (2005).

Robert H. Bork, The Tempting of America: The Political Seduction of the Law 144 (1990).

Robert Justin Lipkin, Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism 126-7 (2000).

Robert K. Dorman & Csaba Vedlick Jr., Judicial Supremacy: The Supreme Court on Trial 10 (1986).

Robin L. West, Adjudication Is Not Interpretation: Some Reservations About The Law-As-Literature Movement, 54 Tenn. L. Rev. 203, 205 (1986).

R. Randall Kelso, Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making, 25 Pepp. L. Rev. 37, 57 (1997).

School Dist. of Abington v. Schempp, 374 U.S. 203, 294 (1963).

Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 239 (1957).

Sophie W. Littlefield & William M. Wiecek, Oliver Wendell Holmes Jr.: The Supreme Court and American Legal Thought 5 (2005).

State Board of Education v. Board of Education of Netcong, 262 A. 2d 21 (Sup. Ct. NJ 1970).

Steven D. Smith, What Does Constitutional Interpretation Interpret? in Expounding the Constitution: Essays in Constitutional Theory 21, 32 (Grant Huscroft ed., 2008).

Steven G. Calabresi, Originalism: A Quarter-Century of Debate 152 (2007).

Stone v. Graham, 449 U.S. 39, 42 (1980).

Thomas C. Grey, The Constitution as Scripture, 37 Stan. L. Rev. 1, 14 (1984).

Thomas Jefferson, Letter to Wilson C. Nicholas, in Thomas Jefferson: Letters and Addresses 154, 154 (William B. Parker and Jonas Viles eds., 1908).

Thomas Jefferson, The Writings of Thomas Jefferson: Being his Autobiography, Correspondence, Reports, Messages, Addresses, And Other Writings, Official and Private 400 (H.A. Washington ed., 1854).

Trop v. Dulles, 356 U.S. 86, 101 (1958).

U.S. Const. Amend. 1.

Van Orden v. Perry, 545 U.S. 677, 691-2 (2005).

William Anderson, The Intention of the Framers: A Note on Constitutional Interpretation, Vol, 49, No. 2 The American Political Science Review 340, 342 (1955).

William Blackstone, Blackstone's Commentaries on the Laws of England 61 (1765), http://avalon.law.yale.edu/18th_century/blackstone_intro.asp#1.

William Schofield, Christopher Columbus Langdell, 55 The American Law Register 273, 273, 278.