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### Originalism is Bunk

Mitchell N. Berman

*University of Pennsylvania Carey Law School*

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# NEW YORK UNIVERSITY LAW REVIEW

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VOLUME 84

APRIL 2009

NUMBER 1

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## ARTICLES

### ORIGINALISM IS BUNK

MITCHELL N. BERMAN\*

*Critical analysis of originalism should start by confronting a modest puzzle: Most commentators suppose that originalism is deeply controversial, while others complain that it means too many things to mean anything at all. Is one of these views false? If not, how can we square the term's ambiguity with the sense that it captures a subject of genuine debate? Perhaps self-professed originalists champion a version of originalism that their critics don't reject, while the critics challenge a version that proponents don't maintain.*

*Contemporary originalists disagree about many things: which feature of the Constitution's original character demands fidelity (framers' intent, ratifiers' understanding, or public meaning); why such fidelity is required; and whether this interpretive obligation binds judges alone or citizens, legislators, and executive officials too. But on one dimension of potential variability—the dimension of strength—originalists are mostly united: They believe that those who follow some aspect of a provision's original character must give that original aspect priority over all other considerations (with a possible exception for continued adherence to non-originalist judicial precedents). That is, when the original meaning (or intent, etc.) is adequately discernible, the interpreter must follow it. This is the thesis that self-professed originalists maintain and that their critics (the non-originalists) deny.*

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\* Copyright © 2009 by Mitchell N. Berman, Richard Dale Endowed Chair in Law, the University of Texas at Austin. For helpful comments on earlier drafts, I am grateful to Larry Alexander, Dan Coenen, Dick Fallon, Rick Garnett, Jonathan Gingerich, Les Green, Jeff Goldsworthy, Stephen Griffin, Mark Greenberg, Alon Harel, Don Herzog, Scott Keller, Brian Leiter, David McGowan, Michael Rappaport, Lawrence Rosenthal, Neil Siegel, Peter Smith, Jane Stapleton, and Ben Zipursky, and to participants at faculty workshops at the law schools of the University of Texas, the University of Pennsylvania, the University of San Diego, the University of Georgia, and Columbia University. I am especially indebted to Larry Solum for sharing with me his manuscript, "Semantic Originalism," which contained detailed and penetrating critiques of this Article, and for productive exchanges by email. David Bernard and Don Long provided excellent research assistance.

*Non-originalists have challenged this thesis on varied wholesale grounds, which include: that the target of the originalist search is undiscoverable or nonexistent; that originalism is self-refuting because the framers intended that the Constitution not be interpreted in an originalist vein; and that originalism yields bad outcomes. This Article proceeds differently. Instead of mounting a global objection—one purporting to hold true regardless of the particular arguments on which proponents of originalism rely—I endeavor to catalogue and critically assess the varied arguments proffered in originalism’s defense.*

*Those arguments are of two broad types—hard and soft. Originalism is “hard” when grounded on reasons that purport to render it (in some sense) inescapably true; it is “soft” when predicated on contingent and contestable weighings of its costs and benefits relative to other interpretive approaches. That is, hard arguments seek to show that originalism reflects some sort of conceptual truth or follows logically from premises the interlocutor already can be expected to accept; soft arguments aim to persuade others to revise their judgments of value or their empirical or predictive assessments. The most common hard arguments contend that originalism is entailed either by intentionalism or by binding constitutionalism. Soft arguments claim that originalist interpretation best serves diverse values like democracy and the rule of law. I seek to show that the hard arguments for originalism are false and that the soft arguments are implausible.*

*The upshot is not that constitutional interpretation should disregard framers’ intentions, ratifiers’ understandings, or original public meanings. Of course we should care about these things. But originalism is a demanding thesis. We can take the original character of the Constitution seriously without treating it as dispositive. That original intents and meanings matter is not enough to render originalism true.*

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INTRODUCTION

In his 1989 essay, *The Originalism Debate: A Guide for the Perplexed*,<sup>1</sup> Daniel Farber provided students of constitutional theory a valuable service. Because the literature about originalism had become “so voluminous,” Farber observed that “understanding the current status of the debate ha[d] become a formidable task.”<sup>2</sup> His goal, accordingly, was “to offer a tourist guide” to the debate<sup>3</sup>—sketching the principal arguments advanced for originalism along with the most trenchant objections.

Much has changed over the ensuing twenty years. To start, the literature has grown many times larger, fueled both by the emergence of powerful new scholarly defenders of originalism and by the fact that the current composition of the Supreme Court, most notably Justices Scalia and Thomas, gives originalist arguments a ready and important audience. Moreover, these arguments have been trans-

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<sup>1</sup> Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

<sup>2</sup> *Id.* at 1085.

<sup>3</sup> *Id.*

formed, as many self-described originalists have shifted their allegiance from original intent to original public meaning. For these reasons (and perhaps for others), originalists can claim with some plausibility that, despite its apparent refutation in the 1980s, “[o]riginalism is now the prevailing approach to constitutional interpretation.”<sup>4</sup>

*Plus ça change, plus c’est la même chose.* While proponents declare originalism to be dominant, indeed inescapable, critics marvel that anyone takes it seriously.<sup>5</sup> Newcomers to the debate, therefore, are still likely to arrive perplexed. Indeed, given frequent complaints that the originalist label is ambiguous and malleable,<sup>6</sup> the uninitiated might wonder whether any true controversy exists. It could be that self-professed originalists champion a version of originalism that their critics don’t reject, and that the critics challenge a version the proponents don’t maintain.

The time might seem ripe, then, for an updated version of Farber’s *Guide*.<sup>7</sup> As originalism comes closer to “working itself pure,”<sup>8</sup> however, we can better assess its progress. And that progress, I believe, must be counted a disappointment. Notwithstanding their enviable energy and commitment to the cause, advocates of originalism have not made good on its core claim. Moreover, dispassionate analysis suggests that the prospects for greater success are slim indeed. Or so I will argue.

This argument unfolds in three parts. Part I specifies originalism’s core claim and situates it within a network of possibilities. The importance of this ground clearing can hardly be overstated given that failure to carefully distinguish among the various forms of

<sup>4</sup> Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 613 (1999). For a sampling of commentators who share this assessment, see Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation, and Parking Tickets*, 60 *OKLA. L. REV.* 1, 4 n.13 (2007).

<sup>5</sup> See, e.g., ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 155–56 (2d ed. 2005) (characterizing “[t]he widespread attraction of ‘originalism’ [a]s one of the main puzzles about theories of constitutional interpretation,” and declaring it “quite a mystery why originalism still has the scholarly (and judicial) support that it does”).

<sup>6</sup> See, e.g., *id.* at 155 (“[O]riginalism’ is not the title of one particular theory of constitutional interpretation but rather the name of a family of diverse ideas, some of which are actually at odds with each other.”); GREGORY BASSHAM, *ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY* 36 (1992) (“[I]t is difficult to state with precision just what originalism asserts, since commentators have characterized the theory in varying and often inconsistent ways.”).

<sup>7</sup> In the latest edition of his co-authored textbook, Farber’s *Guide for the Perplexed*, see *supra* note 1, appears largely unchanged. See DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* ch. 14 (2d ed. 2005).

<sup>8</sup> Vasana Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 *GEO. L.J.* 1113, 1139 (2003).

originalism “has tended to confuse fruitful discussion of the doctrine and frequently caused interlocutors to talk past each other.”<sup>9</sup> Because “[t]he originalist debate has progressed without a clear statement of the doctrine itself or an adequate account of the different versions in which it can manifest itself,”<sup>10</sup> Part I starts by revealing several distinct dimensions on which versions of originalism can and do vary. Although assigning any particularistic content to originalism *simpliciter* will be contestable, I argue that the core originalist contention—the contention that most fairly lays claim to the term “originalism” when used without modification—is a strong thesis. As a first pass—one that will require some clarification and qualification—originalism maintains that courts ought to interpret constitutional provisions *solely* in accordance with some feature of those provisions’ original character.

To better appreciate this claim, observe that originalism is sometimes described as the theory that judges “should be guided by” the Constitution’s original meaning (or the framers’ intent, or the like).<sup>11</sup> A critical claim of Part I is that this captures contemporary originalism only if taken to mean that judicial interpretation of the Constitution *must follow*, or is *bound by*, the original meaning (or intent, etc.). If the notion of guidance at work is looser and more advisory—directing, for example, that judicial constitutional interpretation need only take the Constitution’s original meaning “seriously”—then this characterization fails to capture the form of originalism most commonly espoused by self-described originalists and most vigorously contested by their self-described opponents.

The feature of the original character that is said to demand this strong judicial solicitude varies across originalist theories. That is, self-professed originalists may focus on framers’ intent, ratifiers’ intent, the dominant understanding of framers and ratifiers combined, or the public meaning of the text. However, for purposes of evaluating contemporary originalism, this particular dimension of variability—variability with respect to the *object* of originalist concern—is of secondary, even tertiary, importance. More illuminating is the distinction between varieties of originalism based on the character or status of the arguments advanced in originalism’s support. I will dis-

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<sup>9</sup> Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 257 (2002); see also David Couzens Hoy, *A Hermeneutical Critique of the Originalism/Nonoriginalism Distinction*, 15 N. KY. L. REV. 479, 479–80 (1988) (expressing similar view).

<sup>10</sup> Kavanagh, *supra* note 9, at 257.

<sup>11</sup> *E.g.*, *id.* at 255; Earl Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773, 773.

tinguish between two such varieties, what I will call “hard originalism” and “soft originalism.”

Briefly, originalism is “hard” when justified by reasons that purport to render it (in some sense) ineluctably true; it is “soft” when predicated on contingent and contestable weighings of the costs and benefits of originalism relative to other interpretive approaches. This is an admittedly loose distinction. But the basic idea is this: Once we define originalism with sufficient precision to permit confidence that it is controversial, we can consider what resources originalists might employ to convert opponents and skeptics. Hard arguments contend that originalism reflects some sort of conceptual truth or follows logically from premises the interlocutor presumably already accepts; soft arguments aim to persuade readers to revise their judgments of value or their empirical or predictive assessments. Theorists who maintain that interpreters “have no choice but to respect the original meaning of [the Constitution’s] text”<sup>12</sup> are hard originalists.

The arguments for hard originalism most commonly advanced today depend upon particular views either about what it means to interpret a text or about what it means to treat a constitution as authoritative. They are canvassed and rejected in Part II. Virtually all remaining arguments—those sounding in democracy, the rule of law, the cabining of judicial discretion, and the like—are better understood, I suggest, as soft. That is not to deny that these arguments are frequently *presented* as hard.<sup>13</sup> But if we treat such arguments as hard, their implausibility becomes evident on little reflection. It is therefore more charitable to their proponents, as well as more fruitful, to reimagine them as soft. They are critically assessed in Part III. Together, these parts conclude that the arguments for hard originalism are based on faulty logic or erroneous premises and that even the best case for soft originalism is extremely implausible.

That’s the brief summary of what this Article hopes to accomplish and how it proceeds. Let me emphasize three limitations on its scope and ambition.

First, it does not provide an encyclopedic review of the originalism debate. The literature on originalism is vast, and a thorough survey would fill books.<sup>14</sup> Because this Article is partially

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<sup>12</sup> Barnett, *supra* note 4, at 635.

<sup>13</sup> See *infra* Part III.A.

<sup>14</sup> Among the best are BASSHAM, *supra* note 6; DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* (2005); JOHNATHAN O’NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (2005); and KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999).

intended, like Farber's, to serve as an accessible introduction to the debate—albeit an introduction with an attitude—exhaustiveness cannot be attempted. Over the years, originalism's critics have argued, among other things: that the target of the originalist search—be it intent, understanding, or public meaning—is undiscoverable or (in the case of intent) nonexistent; that originalism is self-refuting because the original intent or understanding was that the Constitution ought not to be interpreted in an originalist vein; and that originalism yields substantively bad outcomes. Seeking to rebut these charges, originalists have contended: that the originalist object is frequently discoverable; that original intentions regarding how the Constitution ought to be interpreted either support originalism or are irrelevant; and that the bad outcomes laid at originalism's door have no bearing on the proper interpretive method or follow from misreadings of the history. Although each of these argumentative lines has been vibrant at one time,<sup>15</sup> I believe that they are now largely spent and, therefore, are omitted or touched on only in passing. In short, although I hope to offer a broad survey of the landscape, the analysis to follow is not fully comprehensive, nor does it plumb to uniform depth. Arguments by originalists or their opponents that have already been repeatedly and adequately rebutted are treated more cursorily than those that still warrant careful attention. In places, exhaustiveness is sacrificed for digestibility.

Second, just as the descriptive aspect of this Article falls short of comprehensiveness, its argumentative aspect cannot claim to be conclusive. I have already remarked that the argument of Part III does not purport to present a logically inescapable case against soft originalism. Furthermore, I don't expect that the intentionalists I take on in Part II will think themselves entirely without argumentative room to maneuver. The debate over intentionalism—in law, literary theory, and philosophy of language—has progressed for too long to instill optimism that one side will soon, perhaps ever, believe itself fully vanquished. What I offer is an outline of the argument against originalism, fleshed out in substantial detail in places, more tentative or promissory in others. Even if I fail to convince you that originalism is ultimately untenable, I will consider my efforts largely successful to the extent you accept: first, that the form of originalism that most of its present-day proponents champion, and that most of its critics resist,

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<sup>15</sup> For a nice overview in addition to Farber, *supra* note 1, see generally Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988). Much less comprehensive, but more recent, is Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).



is an exceedingly demanding thesis; and second, that the arguments that the proponents have thus far advanced are inadequate.

Third, I do not propose or defend any particular normative theory of constitutional interpretation. My more modest aim is to facilitate more constructive argumentation about constitutional jurisprudence by dislodging a prominent interpretive theory that does not warrant the fidelity of its many enthusiasts. I hope to show that we can all care about framers' intentions, ratifiers' understandings, and original public meaning without being originalists.

Moreover—to put all my cards on the table—I think originalism (of the form that I challenge) is not merely false but pernicious as well. It is pernicious because of its tendency to be deployed in the public square—on the campaign trail, on talk radio, in Senate confirmation hearings, even in Supreme Court opinions—to bolster the popular fable that constitutional adjudication can be practiced in something close to an objective and mechanical fashion. To be entirely clear, I suspect that this is a fable to which few academic originalists subscribe; indeed, many have denounced it. But there is little doubt that originalism is often used outside the academy to pander to that American populist taste for simple answers to complex questions. By thus nourishing skepticism, even demonization, of judicial reasoning that cannot be reduced to sound bite, originalism threatens to undermine the judiciary's unique and essential role in our system of government.

## I

### WHAT ORIGINALISM IS

Originalism comes in many flavors; varied distinct theses are fairly described as “originalist” in tighter or looser senses. Yet, as Francis Bacon urged 400 years ago, “[I]t is almost necessary, in all controversies and disputations, to imitate the wisdom of the mathematicians, in setting down in the very beginning the definitions of our words and terms, that others may know how we accept and understand them, and whether they concur with us or no.”<sup>16</sup> Accordingly, the challenge for those who would evaluate the truth of originalism as a thesis concerning how the U.S. Constitution ought to be interpreted<sup>17</sup> is to identify with greater specificity the claim under consideration, and to do so in a manner neither arbitrary nor idiosyncratic.

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<sup>16</sup> FRANCIS BACON, *The Proficiency and Advancement of Learning, Divine and Human*, in 1 THE WORKS OF FRANCIS BACON 211 (Philadelphia, A. Hart 1871) (1605), quoted in BASSHAM, *supra* note 6, at 17.

<sup>17</sup> The “ought” in this sentence suggests that originalism is a normative thesis, and to a substantial extent it is. Still, when it comes to constitutional theories, a neat divide

## A. Originalist Logical Space

### 1. Object

The most common way to categorize the varieties of originalism tracks a familiar narrative.<sup>18</sup> The first wave of contemporary originalists, led in the 1970s by then-Professor Robert Bork and Raoul Berger, reacted against what they viewed as unjustifiable Warren (and Burger) Court activism by advocating that courts focus on the original intent of the framers. By the mid-1980s, however, criticism of intent-based interpretive theories, along with recognition that it was by virtue of ratification that the Constitution became law, pushed many in the growing originalist camp away from the framers in favor of the ratifiers—and thus away from “intentions” and toward “understandings.” Yet it was not obvious that this move avoids all, or even any, of the objections arising from skepticism that collective intentions exist. Accordingly, the most prominent trend in originalist scholarship—one perhaps datable to a 1986 speech by then-Judge Scalia<sup>19</sup> and embraced widely by originalists over the past decade—has been to emphasize the original public meaning of constitutional provisions instead of anything in the minds of specific persons.<sup>20</sup> Consistent with this story, commentators frequently distinguish three types of originalism: framers’ intent originalism, ratifiers’ understanding originalism, and original public meaning originalism. This is a possibly useful classifi-

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between the normative and purely descriptive is usually elusive. See, e.g., Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765 (1997); Richard H. Fallon, Jr., *How To Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 540–41 (1999); see also *infra* Part I.C.4 (discussing denial by some originalists that they mean to express normative claims).

<sup>18</sup> A good history appears in Kesavan & Paulsen, *supra* note 8, at 1134–48. See also Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 257 n.4 (2005) (endorsing account of Kesavan and Paulsen, *supra* note 8). For similar tellings of the tale, see generally John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL’Y 83 (2003), and Whittington, *supra* note 15.

<sup>19</sup> Antonin Scalia, Address Before the Attorney General’s Conference on Economic Liberties (June 14, 1986), in OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK app. C (1987) [hereinafter DOJ SOURCEBOOK]. The shift from original intent originalism to original public meaning originalism is traced to Justice Scalia’s address by Kesavan and Paulsen, *supra* note 8, at 1139, 1140 & n.90, and by Gary Lawson and Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 & n.10 (2006).

<sup>20</sup> In 1990, Bork himself endorsed this shift, explaining that his earlier references to ratifiers’ understanding were merely “a shorthand formulation” for original public meaning. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990); see also *id.* at 218 (characterizing originalism as “seek[ing] . . . the objective meaning that constitutional language had when it was adopted”).

catory schema. But however familiar, it is neither the only possible way to distinguish among originalist theses nor the most important.

## 2. *Strength*

If these three forms of originalism differ from one another with respect to the *object* or *focus* of their inquiry, originalist theses can be distinguished as well on what we might call the dimension of *strength*. At the weakest end of the spectrum lies the view that the originalist focus (framers' intent, ratifiers' understanding, original public meaning, etc.) ought not to be excluded from the interpretive endeavor. This view—what we might call “weak originalism”—maintains merely that the proper originalist object (whatever it may be) should count among the data that interpreters treat as relevant.<sup>21</sup> At a polar extreme from weak originalism rest views that I will collectively label “strong originalism.”<sup>22</sup>

Strong originalism, as I will use the term, comprises two distinct subsets. Probably the most immediately recognizable originalist thesis holds that, whatever may be put forth as the proper focus of interpretive inquiry (framers' intent, ratifiers' understanding, or public meaning), that object should be the sole interpretive target or touchstone. Call this subtype of strong originalism “exclusive originalism.” It can be distinguished from a sibling view that is a shade less strong—viz., that interpreters must accord original meaning (or intent or understanding) lexical priority when interpreting the Constitution but may search for other forms of meaning (contemporary meaning, best meaning, etc.) when the original meaning cannot be ascertained with sufficient confidence. Call this marginally more modest variant of strong originalism “lexical originalism.”<sup>23</sup>

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<sup>21</sup> I believe that weak originalism properly claims a spot in originalist logical space because the position it contests—“exclusive non-originalism” or “anti-originalism”—is imaginable. Because that latter position is not a live competitor in contemporary debates, however, readers might fairly doubt that weak originalism falls within the range of positions that anyone has in mind when employing the originalist label. As I will explain shortly, I agree. For that reason, I will reject weak originalism as a candidate for the meaning of originalism *simpliciter*. But that is not enough, I think, to eject it from the space we are exploring. In any event, nothing about my argument depends upon including weak originalism as a true subset of the class of views properly deemed originalist. If you wish to exclude it at this early stage, feel free.

<sup>22</sup> Stephen Griffin calls this same concept “exclusive originalism” and shares my assessment of its importance to contemporary debates. See Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1187, 1197. Griffin's article is especially valuable for its insightful and persuasive critique of originalists for embracing “history without historicism”—for failing, in short, to adequately accommodate relevant changes in historical context.

<sup>23</sup> To be sure, exclusive originalists recognize that, for some constitutional provisions, the original meaning (intent or understanding) cannot be identified to the requisite degree

Together, weak originalism and strong originalism define a broad terrain. Lying between these poles are theses maintaining, say, that “ordinarily” or “presumptively” the contemporary interpreter ought to follow the originalist object, even though that object is not lexically prior to all other objects of inquiry, let alone that it should be pursued to the exclusion of other objects. Call the class of theses in this space “moderate originalism.”<sup>24</sup>

In the language of reasons, then, distinguishing originalist theses on the dimension of strength produces a four-part classification. According to weak originalism, that the originalist focus was *X* is a *reason* to interpret the Constitution to mean *X*; according to moderate originalism, that the originalist focus was *X* is a *weighty reason* to interpret the Constitution to mean *X*; according to lexical originalism, that the originalist focus was *X* is a *conclusive reason* to interpret the Constitution to mean *X*; and according to exclusive originalism, that the originalist focus was *X* is an *exclusive reason* to

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of confidence (whatever that might be) or that, even if the original object can be identified, it is too vague or ambiguous to resolve a dispute. To put the point another way, for some constitutional questions, no sufficiently determinate original meaning (intent or understanding) of the Constitution can be identified. Exclusive originalists prescribe two different courses in such cases. Some advise that courts should conclude, in the name of majoritarianism, that the Constitution permits the governmental action in question. *See, e.g., BORK, supra* note 20, at 166; Lino A. Graglia, “*Interpreting the Constitution: Posner on Bork*,” 44 *STAN. L. REV.* 1019, 1044 (1992); Michael Stokes Paulsen, *How To Interpret the Constitution (and How Not To)*, 115 *YALE L.J.* 2037, 2057 (2006). Others would permit courts to announce more determinate constitutional meaning with the proviso that, in so doing, they would create new meaning for purposes of constitutional law but would not be engaged in interpreting constitutional meaning. *See, e.g., Barnett, supra* note 4, at 645–46; Stanley Fish, *There Is No Textualist Position*, 42 *SAN DIEGO L. REV.* 629, 640 (2005). Lexical originalists permit courts to announce constitutional meaning when the originalist object is not discoverable and do not insist that, in such cases, courts are necessarily engaged in something other than constitutional interpretation.

<sup>24</sup> The term “moderate originalism” appears frequently in the literature. My use is, I think, consistent with Farber’s, but not with others’. *See* Farber, *supra* note 1, at 1086 (“A moderate originalist might well view . . . factors [other than original intent] as potentially important, particularly when the evidence of intent is unclear.”). To Paul Brest, for example, “moderate originalism” is not the view that original meaning has some form of priority over non-original meaning short of true lexical priority. It is the view that interpreters should inquire into framers’ intent conceived at a relatively high level of generality. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. REV.* 204, 222–23 (1980). Yet more confusingly, what Brest calls “moderate originalism,” Cass Sunstein calls “soft originalism,” a term I will attach to an entirely different concept. *See* Cass R. Sunstein, *Five Theses on Originalism*, 19 *HARV. J.L. & PUB. POL’Y* 311, 313 (1996) (“[T]he soft originalist will take the Framers’ understanding at a certain level of abstraction of generality.”). (And for a third meaning of “soft originalism” that differs from both Sunstein’s and mine, see *GOLDFORD, supra* note 14, at 9, which uses the term to denote the ratifiers’ understanding originalism, specifically in contrast to the framers’ intent originalism.) In short, to avoid confusion, readers well versed in the originalism literature are especially cautioned to attend to my stipulated definitions.

interpret the Constitution to mean *X*. To repeat, I propose to treat lexical originalism and exclusive originalism as two variants of strong originalism.<sup>25</sup>

### 3. *Status*

Of course, *object* and *strength* represent only two of the potentially vast number of dimensions in originalist logical space. Originalist theses are also distinguishable, for example, on the basis of what I call logical *status*. To see this, we could consider any thesis describable on dimensions of object and strength. Take, for example, lexical original intent originalism (the thesis that the Constitution must be interpreted in accordance with the original intentions of the framers in any case where that original intention is discoverable, to some specified subjective confidence level). What, we might ask, is the basis or grounding of this claim?

The proponent of this view could believe, merely, that such an interpretive posture or rule is contingently optimal—that it produces a better overall state of affairs, given current (and, perhaps, foreseeable) conditions, than any alternative. Any originalist thesis grounded in this way, I call “soft originalism.”<sup>26</sup> But the claim could be grounded much more deeply: It could be maintained, to take an extreme, that lexical original intent originalism is conceptually necessary, that matters could not be otherwise. Or, if not conceptually necessary, it could be defended as logically necessary given a set of premises that, while not themselves necessary, are in fact noncontroversial. Each of these latter two views, let us say, is a variant of “hard originalism.”<sup>27</sup> (My observation that “hard” originalism is grounded more deeply than are soft arguments suggests an alternative nomenclature: The soft/hard distinction could be captured just as well by the terms “shallow” and “deep.” I will employ the labels “soft” and “hard” in this Article, but I invite readers who find the alternative

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<sup>25</sup> David Hoy employs the labels *weak*, *moderate*, and *strong* originalism to distinguish among theories that treat original intent as, respectively, necessary to support a judgment of unconstitutionality, sufficient, and both necessary and sufficient. Hoy, *supra* note 9, at 483–85.

<sup>26</sup> It follows that the particular originalist thesis under consideration would be soft lexical original intent originalism.

<sup>27</sup> The hard/soft distinction is cousin to Aileen Kavanagh’s proposed distinction between “direct” and “indirect” arguments for originalism. See Kavanagh, *supra* note 9, at 259 (defining “direct” arguments for originalism as “establish[ing] a positive link between Framers’ intent and proper interpretation” and “indirect” arguments as “merely show[ing] that originalism is one of the possible ways of answering to a difficulty which afflicts all methods of interpretation”).

vocabulary more evocative or illuminating to think and speak in terms of “shallow” and “deep” originalism.)

Like strong originalism, hard originalism is a robust thesis, just as soft originalism and weak originalism are modest. But because they are robust in different senses, a few words about the difference seem warranted. Relative to strong, weak, and moderate originalism, hard and soft originalism are meta-level theses. Strong originalism is a thesis about the reasons that should guide interpretations of what the Constitution means. Hard originalism is a thesis about the reasons that make true a particular interpretive thesis (i.e., a thesis about the reasons that should guide interpretations of what the Constitution means). So hard strong originalism holds not only that an exclusive (or lexical) focus on original meaning (or intent, etc.) is a good interpretive posture to adopt but that it is, in some sense, the only posture we *can* adopt. Such a thesis is *doubly* robust.

Soft and hard originalism provide different answers to the question of whether, or to what extent, the originalist claim is subject to empirical investigation and to reasonable disagreement about the shape and strength of competing values. If the claim is understood as hostage to empirics and evaluative disagreement (as per soft originalism), then, given the most plausible accounts of our present state of knowledge about the relevant facts and of the prospects for consensus about matters of value, it seems to follow that soft originalist theses will be far more provisional and tentative than hard originalist theses.

I hope that the worth of this particular distinction—a distinction that might be less sharp than I here suggest and almost certainly could benefit from further refinement—will emerge more fully over the course of this Article.<sup>28</sup> For now, let me note that its significance is as much ethical as epistemological. The rhetoric surrounding originalism is often heated. Strong originalists frequently speak as though their opponents were either fools or knaves, as though all departures from original intentions or meanings are unprincipled.<sup>29</sup> This is not, in general, a nice way to proceed. But it would be easier to understand and

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<sup>28</sup> But even if my hope proves unrealized in your case—even if you’re left doubting that there is a coherent or useful distinction to be drawn in this vicinity—my core arguments remain unaffected. The hard/soft distinction is advanced to facilitate our assessment of the extant arguments for strong originalism. Yet, however we classify those arguments, the question of fundamental importance is whether they are successful.

<sup>29</sup> For a not wholly atypical rant, see Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL’Y 283, 287 (1996): “The hypocrisy of many of the nonoriginalists’ arguments, the deliberate masking of their real agenda, the lack of candor, the absence of respect for (or even acknowledgment of) law as a constraint—all of these features exert a corrupting influence on . . . the very idea of law itself.”

perhaps to defend if strong originalism were rationally inescapable. If it is not, then strong originalism could be plausible, even true, but because we lack privileged access to the facts (including value facts) by virtue of which it would be true, we might still expect its proponents and opponents to agree to disagree. Put another way, we can reasonably demand that theorists who contend that we have “no choice” but to adopt a particular interpretive posture be prepared with hard arguments. And we can expect that those not armed with hard arguments will not make hard claims.

#### 4. *Subject*

Consider one additional dimension of variability. We started by distinguishing originalist theses depending on their disparate *objects*—original intent, understanding, and meaning. We might also attend to variations in the *subjects* of the theses. Many originalist theses concern only how judges should act; they are agnostic regarding how other readers should interpret the Constitution. Other theses are broader: They concern how all governmental officials should interpret the Constitution or even how all citizens or all persons should undertake the interpretive task.<sup>30</sup> On the dimension of *subject*, then, we confront the possibilities of, at the least, “judicial originalism,” “official originalism,” and “universal originalism.”

#### 5. *Summary*

On just this rough and partial sketch, and embracing the simplifying assumption that these four classificatory dimensions (*object*, *strength*, *status*, and *subject*) are wholly independent of one another, originalist logical space can be represented by a  $3 \times 4 \times 2 \times 3$  matrix, thus consisting of 72 distinct theses.<sup>31</sup>

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<sup>30</sup> This distinction, generally overlooked, is noted in BASSHAM, *supra* note 6, at 19–21.

<sup>31</sup> (framers’ intent vs. ratifiers’ understanding vs. public meaning) x (weak vs. moderate vs. lexical vs. exclusive) x (hard vs. soft) x (judicial vs. official vs. universal).

Dimension	Meaning	Sample Variants
<i>Object</i>	The target of interpretation	<b>Framers'</b> (semantic) <b>intentions</b> <b>Ratifiers' understandings</b> <b>Original public meaning</b>
<i>Strength</i>	The weight that the originalist target plays in the interpretive theory	<b>Strong</b> - Exclusive - Lexical <b>Moderate</b> <b>Weak</b>
<i>Status</i>	The character of the reasons invoked to support the claimed strength of the originalist target	<b>Hard</b> (supposed conceptual truths or logical entailments of uncontroversial premises) <b>Soft</b> (contingent on contested empirical, predictive, and/or evaluative premises)
<i>Subject</i>	The contemporary interpreters who are claimed to be obligated to follow the originalist interpretive theory	<b>Judicial</b> (judges alone) <b>Official</b> (all public officials) <b>Universal</b> (all citizens or all persons)

In fact, though, we are still just scratching the surface of potential diversity. To start, when discussing these four dimensions of variability, I have often collapsed into two or three categories differences that could be articulated with greater granularity.<sup>32</sup> Furthermore, there exist additional dimensions of distinction that I have not yet introduced at all. (Consider, e.g., the dimension of scope: Perhaps an interpreter ought to attend differently to the originalist object on structural questions than on rights questions, or differently to provisions of the 1787 Constitution that were voted up or down as a complete package than to later amendments.<sup>33</sup>) Once we recognize more possible positions with respect to the dimensions already discussed, and then add additional multivariable dimensions, it becomes

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<sup>32</sup> For example, I have lumped together as “moderate originalism” all theses that would assign a presumption to the originalist focus of any weight greater than ordinary but short of conclusive. This is to recognize fewer differences than the law often feels comfortable in distinguishing. (Equal Protection doctrine, to take one salient example, subdivides weighty state interests between the “important” and the “compelling.”) We could, therefore, replace moderate originalism with the subvarieties “medium weight originalism” and “heavy weight originalism,” where even the latter is weaker than either of the two variants of strong originalism. And many more subtle distinctions might helpfully emerge once self-professed originalists abandon strong originalism and focus their formidable energies and intellects on the presently undertheorized space of moderate originalism. I have also noted that hard originalism comes in what we might call “ordinary hard” and “super hard” variants. Similarly, original intent originalism could be broken into two variants: those that focus on the intent of the text’s actual authors and those that focus on the collective intent of all persons at the Philadelphia Convention.

<sup>33</sup> See *infra* note 202.



apparent that literally thousands of discrete theses can plausibly claim to be originalist.<sup>34</sup>

To be sure, some of these possibilities will be ruled out because the combinations are logically impossible or because there will be no remotely plausible argument for them. Yet I would bet that the existing literature contains exemplars of a surprisingly large portion of the possible. As a view about American constitutional interpretation, originalism is not a single thesis but a large family of theses that encompasses even greater potential variability than is generally appreciated. A fuller investigation of this potential variability—a more complete exploration of originalist logical space—might someday be useful. At present, we can limit attention to the four dimensions already addressed and to the dimensions of strength and status most especially.

### B. *Originalism Unmodified*

With this background in mind, return to the fundamental empirical fact that all of us—constitutional scholars, judges, lawyers—speak comfortably about “originalism” but rarely of “originalisms,” despite the diversity of theses that might plausibly be denominated as “originalist.” We say things like “originalism is now the prevailing approach to constitutional interpretation,”<sup>35</sup> or “originalism is a lousy theory,”<sup>36</sup> usually without pausing to specify the thesis or group of theses in mind. Indeed, commentators’ frequent failure to disambiguate the claims under consideration has caused critics to question the term’s usefulness. As one student of the literature has complained, “If ever a term muddled as much as it clarified, ‘originalism’ is it.”<sup>37</sup>

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<sup>34</sup> For a particularly revealing display of some of the dimensions on which originalisms can differ, and to illustrate how these differences can easily escape our attention, compare the slight differences in definition across two editions of the Farber & Sherry constitutional history textbook already cited. The initial 1990 edition announces that “[o]riginalists are committed to the view that original intent is not only relevant but authoritative, that we are in some sense obligated to follow the intent of the framers.” DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 374 (1st ed. 1990). In subtle contrast, the 2005 second edition describes originalists as “committed to the view that the historical perspective is not only relevant but at least sometimes authoritative, that contemporary judges are in some sense obligated to follow the views of the framers.” FARBER & SHERRY, *supra* note 7, at 526. On the dimension of *object*, the authors have shifted from a position that emphasizes original intent toward one that is agnostic among the competing candidates; on the dimension of *subject*, they shift from universal originalism (marked by “we”) to judicial originalism; and on the dimension of *strength*, they have effected a modest equivocation by inserting the qualifier “at least sometimes.”

<sup>35</sup> Barnett, *supra* note 4, at 613.

<sup>36</sup> Christopher L. Eisgruber, *Early Interpretations & Original Sins*, 95 MICH. L. REV. 2005, 2013 (1997).

<sup>37</sup> Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1812 (1996).

One possible lesson to draw is that we should retire the term, treating unmodified references to originalism as essentially meaningless. But this might be overkill, for it is possible that most people (or most theorists) who speak of originalism employ the term to denote a (more or less) identifiable region within originalist logical space. Of course, if we choose to retain the term in unmodified form, we must define it clearly. Moreover, to adjudicate contemporary debates over originalism, the meaning we ascribe to it cannot be arbitrary or merely stipulative. By supplying both a vocabulary and a (partial) matrix of possibilities, the attention we have given to the varieties of originalism will help us specify what we should take originalism, unmodified, to mean. It will also help us assess the truth of originalism, so defined.

### 1. *Originalism Is Strong*

For economy of expression, let us denote originalism *simpliciter*—what might be called “originalism unmodified,” or “originalism in the strict sense,” or “originalism proper”—by capitalization. The principal question can thus be reformulated: Which of the various possible forms of originalism, or which particular thesis or group of theses in originalist logical space, does the relevant scholarly community mean by “Originalism”?

Two possible meanings can be dismissed straight out. The debate over Originalism does not concern whether *all* of those theses are true, for many are mutually contradictory. Nor does it concern whether *any* is true, for it is difficult to see any basis for rejecting even the most modest among them, e.g., soft weak judicial originalism. Discussions of Originalism therefore have a narrower focus, be it a single unique position or a more limited area within originalist logical space.

But where? Again, one possibility can be ruled out. Originalism is not the name for the family of theses that share a position on the dimension of interpretive *object*. Original intent originalists and original public meaning originalists do not take their disagreement to be one between originalists and non-originalists, but rather as an intramural debate within originalism. As Justice Scalia observed in a much-quoted passage, “[T]he Great Divide with regard to constitutional interpretation is not that between framers’ intent and objective meaning, but rather that between *original* meaning (whether derived from framers’ intent or not) and *current* meaning.”<sup>38</sup>

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<sup>38</sup> ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., 1997). I agree with those who urge that distinguishing original intent from original meaning is less significant than often claimed. See, e.g., Caleb Nelson,

Scalia is surely right about what does *not* define Originalism—viz., any particular position on the dimension of interpretive *object*. But his remark is ambiguous regarding precisely what *does* define Originalism. By failing to specify the attitudes that theorists or interpreters on either side of the Great Divide take toward original meaning and current meaning, respectively, Scalia does not identify just where that divide is located. Does it lie between those who care only about original meaning and those who care only about current meaning (in which case, everybody who cares about both resides precariously on the divide itself)? Or between those who privilege original meaning as the default and those who privilege current meaning? Or between those who attend exclusively to original meaning and those who attend to current meaning too? Or between those who attend at least partially to original meaning and those who attend exclusively to current meaning? Or someplace else entirely? Scalia's highlighting of the distinction "between original meaning . . . and current meaning" is too elliptical to supply the definition we seek.

Because of this ambiguity, however, Scalia's formulation of the Great Divide points us in a promising direction. It suggests that if Originalism has distinctive content, it will lie on what I have called the dimension of *strength*.<sup>39</sup> In fact, this is a common scholarly view. As Dennis Goldford contended in his recent book-length examination of

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*Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 549 n.133 (2003). Indeed, I suspect that originalists who extol original meaning as a solvent are subject to embarrassment as it becomes increasingly clear that many of the most difficult problems of contemporary constitutional jurisprudence involve the resolution of neither word-level ambiguity nor disputes over the semantics of discrete constitutional clauses or sentences.

As others have argued, and as recent cases involving the war on terror reinforce, whatever value originalism will have for horizontal separation of power controversies is more likely to come from inquiries into original purposes or intentions than from original public meaning. See, e.g., Flaherty, *supra* note 37, at 1812–13. But see, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994) (arguing that original public meaning originalism presents overwhelming case for unitary executive). The same is true of vertical separation of powers disputes, as the Court has belatedly appreciated the importance of the Necessary and Proper Clause for cases it had previously conceived of as involving the Commerce Clause alone. Compare, e.g., *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (discussing third category of Commerce Clause power without even mentioning Necessary and Proper Clause), and *Pierce County v. Guillen*, 537 U.S. 129, 147 n.9 (2003) (upholding federal law that regulated intrastate activities for purpose of protecting instrumentalities of interstate commerce, while expressly disavowing reliance on Necessary and Proper Clause), with *Gonzalez v. Raich*, 545 U.S. 1, 22 (2005) (emphasizing that regulation of intrastate activities must depend upon Necessary and Proper Clause). It is implausible that proper resolution of cases of this sort will turn on the original public meaning of the word "proper."

<sup>39</sup> Larry Solum thinks that I misread Scalia. According to Solum, Scalia is pointing out merely that Originalists, unlike their opponents, believe that the *semantic* meaning of the Constitution does not change; he is saying nothing about the Constitution's *legal* meaning. See Lawrence B. Solum, *Semantic Originalism* 11 n.31 (Ill. Pub. Law & Legal Theory

the originalism debate, what distinguishes originalism from non-originalism is the claim “that the original understanding of the constitutional text *always trumps* any contrary understanding of that text in succeeding generations.”<sup>40</sup> Self-described originalists differ regarding countless details: whether the proper interpretive focus is framers’ intent, ratifiers’ understanding, or original public meaning; whether the best reasons for originalism concern what it means to interpret a text, or what must be presupposed in treating a Constitution as binding, or how best to constrain judges and provide stability and predictability; whether extrajudicial constitutional interpretation is subject to the same constraints as is judicial constitutional interpretation; and so on. But the contention urged consistently—from originalist icons Raoul Berger and Robert Bork<sup>41</sup> to younger standard bearers like Randy Barnett, Steven Calabresi, Gary Lawson, John McGinnis, Michael Paulsen, Sai Prakash, and Michael Rappaport<sup>42</sup>—is that (put-

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Research Papers Series No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244>. I believe that Solum is mistaken. See *infra* Part I.C.4.

<sup>40</sup> GOLDFORD, *supra* note 14, at 139 (emphasis added).

<sup>41</sup> See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 3 (1977) (“[T]he ‘original intention’ of the Framers . . . is binding on the Court . . . .”); BORK, *supra* note 20, at 5 (arguing that judges are “bound by the only thing that can be called law, the principles of the text, whether Constitution or statute, as generally understood at the enactment”); see also, e.g., DOJ SOURCEBOOK, *supra* note 19, at 2 (“[C]ourts must construe the Constitution according to its original meaning.”).

<sup>42</sup> I have included here only a tiny sample of these scholars’ characterizations of Originalism. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 4 (2004) (“[B]y committing ourselves to a written constitution, we commit ourselves to adhere to the original meaning of the text and any later amendments.”); Calabresi & Prakash, *supra* note 38, at 551–52 (“[T]he text of the Constitution, as originally understood by the people who ratified it, is the fundamental law of the land. . . . The meaning of all . . . legal writings depends on their texts, as they were objectively understood by the people who enacted or ratified them. Originalists do not give priority to the plain dictionary meaning of the Constitution’s text because they like grammar more than history. They give priority to it because they believe that it and it alone is law.” (footnotes omitted)); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1250 (1994) (“[O]riginalist interpretivism is not simply one method of interpretation among many—it is the only method that is suited to discovering the actual meaning of the relevant text.”); John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 374 (2007) (“[Originalism] requires that judges interpret the document based only on its original meaning.”); Kesavan & Paulsen, *supra* note 8, at 1142 (“[O]riginal meaning textualism is the only method of interpreting the Constitution.”); Saikrishna B. Prakash, *Unoriginalism’s Law Without Meaning*, 15 CONST. COMMENT. 529, 544 (1998) (“When we accept some text as law, we also commit to the law’s original meanings. . . . Indeed, to embrace the legitimacy of words as law without their original, ordinary meanings is to embrace nothing.”); see also, e.g., MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 32 (1994) (“The constitutional text as *originally understood* should be deemed authoritative for purposes of constitutional adjudication.”).

ting aside, for the moment, the special problem of continued adherence to non-originalist judicial precedent<sup>43</sup>) judges should interpret the Constitution *solely* in accordance with some feature of the original character of the constitutional provision at issue. Thus do originalists frequently contend that interpreters owe “fidelity” to the original meaning.<sup>44</sup> Such fidelity is not satisfied by a disposition on the part of interpreters to, shall we say, take original meanings and principles “seriously,” or pay them substantial regard. “Fidelity” is consistently defined to entail *strict, exact, or unfailing* adherence to a standard or duty.<sup>45</sup>

Understandably, then, this is how Originalism is generally understood both by its critics<sup>46</sup> and by commentators purporting neither to praise nor to bury.<sup>47</sup> Translated into my proposed terminology and shorthand: Originalism is strong originalism. The Great Divide, to complete Scalia’s observation, lies between those who attend exclusively to the original object and those who attend to changed meanings too.

This is not, I emphasize, a conceptual or normative claim. It is descriptive. Moreover, it is a descriptive generalization. Surely, it is

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<sup>43</sup> See *infra* Part I.C.5.

<sup>44</sup> See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295 (2007) (“Constitutional interpretation by judges requires fidelity to the Constitution as law. Fidelity to the Constitution as law means fidelity to the words of the text, understood in terms of their original meaning, and to the principles that underlie the text.”).

<sup>45</sup> AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 655–56 (4th ed. 2000) (defining fidelity as “[e]xact correspondence with fact or with a given quality, condition, or event” and explaining that “fidelity implies the unfailing fulfillment of one’s duties and obligations and strict adherence to vows or promises”); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 845 (1993) (“Fidelity implies strict and continuing faithfulness as to an obligation, trust, or duty.”).

<sup>46</sup> See, e.g., Brest, *supra* note 24, at 204 (describing Originalism as theory that “accords binding authority to the text of the Constitution or the intentions of its adopters”); James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 7 (1991) (noting diversity of originalist views, but identifying as core premise of Originalism that “the role of judges in constitutional cases is simply and exclusively to discover and give effect to the meaning of the Constitution as embodied in the constitutional text and the original intentions of the founders”).

<sup>47</sup> In what is possibly the only book-length investigation of the historical development of originalist jurisprudence, Johnathan O’Neill characterizes Originalism as comprising “several closely related claims about the authoritative source of American constitutional law,” among them an “insist[ence] that interpreters be bound by the meaning the document had for those who gave it legal authority.” O’NEILL, *supra* note 14, at 1–2 (2005); see also, e.g., JOHN H. GARVEY, T. ALEXANDER ALEINIKOFF & DANIEL A. FARBER, *MODERN CONSTITUTIONAL THEORY: A READER* 91 (5th ed. 2004) (describing Originalism as view “that the original intent of the framers ought to control constitutional interpretation”); Peter J. Smith, *The Marshall Court and the Originalist’s Dilemma*, 90 MINN. L. REV. 612, 619 (2006) (“Originalism is a theory of constitutional interpretation that assigns dispositive weight to the original understanding of the Constitution or the constitutional provision at issue.”).

false that when commentators refer to originalism without modification (i.e., when they refer to Originalism) they invariably mean strong originalism. I claim only that it is frequently true—frequently enough to permit us to use the term without modification, and to treat it as meaningful.<sup>48</sup>

To be absolutely clear, then, Originalism is not the view that some feature of the original character of the U.S. Constitution—the intent of the framers, the understanding of the ratifiers, the text’s original public meaning, or an amalgam of these things—“matters” or “is relevant” to proper constitutional interpretation. So understood, Originalism would be a trivial thesis without dissenters. Nor is Originalism the slightly stronger thesis that courts should “generally” or “presumptively” interpret the Constitution in accord with its original character. True, this position, unlike the first, is modestly controversial. It is also of considerable interest; indeed, a major reason to defeat strong originalism is to thereby spur greater scholarly attention to the challenge of articulating and defending usefully distinct forms of moderate originalism. But it is not what the majority of self-

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<sup>48</sup> Admittedly, I am not sure how to prove this claim to those who remain skeptical notwithstanding the supportive quotations I have already presented and those I will marshal later in the Article. So any reader who doubts my rendering of Originalism as strong originalism—because she believes, for example, that most references to Originalism mean something else (say, moderate originalism) or that usage is so variable as to render any generalization false—ought to read the term Originalism in this Article to mean strong originalism by stipulation. For example, the title of this Article would become “Strong Originalism is Bunk.” Any reader who thinks that so few originalists defend strong originalism as to make its repudiation uninteresting should probably stop reading now.

Even readers who accept that a sufficiently large percentage of scholarly and judicial advocates for originalism *simpliciter* (including a sufficiently large number of the most prominent among them) mean thereby to endorse strong originalism—enough to justify their critics in likewise treating originalism *simpliciter* to mean strong originalism—might still question whether that is the more desirable course. That is, even if I am justified in equating Originalism with strong originalism, one might prefer to retire the term originalism, when used without modification, and speak instead of more narrowly and particularly defined neighborhoods within originalist space.

This proposal has much to recommend it. It likely would facilitate greater clarity of thought and a greater likelihood of successful communication between writer and reader. However, I do not embrace that advice here—the title does, after all, promise a critique of “originalism” and not of “strong originalism”—only because for a critic of strong originalism to take that first step would amount to something like unilateral disarmament: Persons who become aware of the Article’s existence but who don’t read it (a class that, however small, will nonetheless dwarf the class of persons who do read it) are apt to suppose that it targets a (perhaps minor) variant of originalism, leaving the core of originalism unscathed. If and when self-described originalists make clear to their readers either that the form of originalism they defend is “strong originalism,” and not something that can meaningfully be rendered as originalism proper or originalism *simpliciter*, or (even better!) that they disavow strong originalism in favor of something more modest, then I will happily announce that the concept of originalism proper has no usable meaning, least of all that it should be construed as strong originalism.

professed originalists endorse. Neither weak originalism nor moderate originalism warrants the title Originalism, unmodified. Put somewhat differently, contemporary Originalism is not merely a “sensitivity” or “orientation.”

Originalism proper is strong originalism—the thesis that original meaning either is the *only* proper target of judicial constitutional interpretation or that it has at least lexical priority over any other candidate meanings the text might bear (again, contrary judicial precedents possibly excepted).<sup>49</sup> It entails (but is not equivalent to) the thesis that nothing that transpires after ratification of a particular constitutional provision, save a subsequent constitutional amendment, has operative (as opposed to evidential) bearing on what courts ought to identify as constitutional meaning. As the Supreme Court put it a century ago in a much-quoted passage, “The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now.”<sup>50</sup> To the same effect are Chief Justice Taney’s words in *Dred Scott*:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, . . . should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning . . . ; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States.<sup>51</sup>

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<sup>49</sup> For the remainder of this Article, for expositional ease, I will generally refer only to original *meaning*, with the understanding that my comments also apply to original intent and original understanding (or any other possible originalist object) unless the context makes clear otherwise. Likewise, I will generally omit the parenthetical qualification about judicial precedent. In doing so, I will not mean to deny the empirical fact that contemporary Originalists divide over the propriety of judges adhering to judicial precedents that they now believe to be inconsistent with original meanings. I will, however, raise some doubts about whether Originalists who recognize this one exception to strong originalism have good arguments for going this far but no farther. See *infra* Part I.C.5.

<sup>50</sup> *South Carolina v. United States*, 199 U.S. 437, 448 (1905).

<sup>51</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 426 (1856). Given the universal opprobrium that attaches to *Dred Scott*, it is unsurprising that Originalists would seek to disavow it. Some argue, accordingly, that Taney got the original meaning of the relevant constitutional provisions wrong. BORK, *supra* note 20, at 30; Michael W. McConnell, *The*

*Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 LOY. L.A. L. REV. 1159, 1172–74 (1992). This could be correct; I quote from *Dred Scott* because it contains a particularly clear and forceful statement of strong originalism, not to defeat Originalism by showing that it *compelled* the result in *Dred Scott*.

In a most shameless display of the adage that the best defense is a good offense, however, Originalists have frequently sought to turn tables on their opponents by laying *Dred Scott* at the feet of the non-originalists, as when then-Justice Rehnquist described it as “[t]he apogee of the living Constitution doctrine during the nineteenth century.” William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 700 (1976). (For an astute assessment and criticism, see generally Christopher L. Eisgruber, *Dred Again: Originalism’s Forgotten Past*, 10 CONST. COMMENT. 37 (1993).) Representative is the contention of the Meese Justice Department that, although Taney “paid lip service” to originalism, in fact the decision “was plainly the result of [non-originalism].” DOJ SOURCEBOOK, *supra* note 19, at 58. This extraordinary contention rests on the claim that “Taney’s opinion . . . relies, not on the original meaning of the due process clause, but on the extraconstitutional notion of substantive due process.” *Id.* at 58–59.

This argument is doubly unpersuasive. First and more significantly, although Taney did conclude that the Missouri Compromise violated slaveholders’ due process rights, the passage quoted above serves an entirely different conclusion—namely, that black persons could not avail themselves of federal diversity jurisdiction because they could not be “citizens” of the United States within the original meaning of Article III, Section 2. That constitutional ruling was independently sufficient to drive the result in *Dred Scott* and occupied a far more central role in Taney’s opinion. Moreover, it is one that many historians believe Taney got right—even if he plainly overreached in asserting that free blacks had not been recognized as citizens in any states at any time. For a careful discussion, see Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 294–302 (1997). To be sure, others are unpersuaded. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 266 (1985) (“Taney’s arguments against the citizenship of free blacks . . . left a good deal to be desired.”). But for an Originalist to claim, as Michael McConnell has, that “*Dred Scott* was wrong, plainly wrong, not just as a moral matter, but as a legal decision,” McConnell, *supra*, at 1174, is more than Originalist premises can support.

Second, although Originalists routinely denounce substantive due process as perhaps the plainest of non-originalist sins, the history is far more complicated than they let on. Here, again, is the DOJ Sourcebook:

At a minimum, original meaning jurisprudence limits the range of acceptable choices. The precise original meaning of the due process clause, for example, might be difficult to determine, but at the very least we should be able to agree that the clause is limited to *process*, and does not entitle courts to conduct a *substantive* review of the wisdom of legislation.

DOJ SOURCEBOOK, *supra* note 19, at 7–8. That’s a reasonable conclusion for a *textualist* to reach, but not one that an Originalist ought to take too quickly for granted given the plausible contentions that the framing generation treated “due process of law” as a legal term of art roughly synonymous with the Magna Carta’s prohibition on certain deprivations except by “the law of the land” and that both phrases had substantive as well as procedural content. See generally John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 542–55 (1997) (concluding that whether Due Process Clauses were generally understood this way in 1791 or 1868 remains open question); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941 (concluding that educated persons in 1791 probably would have understood Due Process Clause to impose both substantive and procedural limitations on state action).



## 2. *Non-originalism Is Modest*

It follows, of course, that Originalism's opponents need merely deny that courts *must* interpret the Constitution in accordance with its original meaning, even when that meaning is discoverable. Such a position is commonly called, seemingly interchangeably, both non-originalism and living constitutionalism. For reasons set out in the margin, however, the terms are best viewed as nonidentical.<sup>52</sup> The former is more apt and is the one I will adopt. Non-originalism,<sup>53</sup> in other words, is the thesis that facts that occur after ratification or amendment can properly bear—constitutively, not just evidentially—on how courts should interpret the Constitution (even when the original meaning is sufficiently clear).<sup>54</sup> It does *not* hold that original meaning, when discoverable, should be *irrelevant* to judicial interpretation, or even that its relevance should be slight.<sup>55</sup> Non-originalism is simply the denial of strong originalism; it is not the denial of all forms of originalism.

I belabor this point because we cannot intelligently assess the “debate over originalism” without grasping just what separates self-proclaimed originalists from their self-proclaimed opponents. Not a single self-identifying non-originalist of whom I’m aware argues that original meaning has no bearing on proper judicial constitutional

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<sup>52</sup> Living constitutionalism is frequently characterized, by proponents and critics, as the view that, at least with respect to constitutional provisions centrally concerned with moral values like liberty and equality, courts *ought to* follow evolving or contemporary norms. See generally GOLDFORD, *supra* note 14, at 57–61. Thus one respected commentator presents constitutional interpreters as faced with a simple binary choice: “whether American constitutionalism . . . obligates interpreters to base decisions on what the framers had in mind when they wrote the Constitution or whether it obligates interpreters to adapt general constitutional principles to changing circumstances or more enlightened sensibilities.” Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the “Living Constitution” in the Course of American State-Building*, 11 *STUD. AM. POL. DEV.* 191, 192 (1997). If, as Gillman plausibly claims, the latter option represents living constitutionalism, then its nonidentity with non-originalism is clear, for non-originalists *qua* non-originalists need not recognize a general obligation to endorse updated or “enlightened” constitutional interpretations; though they necessarily reject the obligation that strong originalists embrace, they need not replace it with some form of competing obligation.

<sup>53</sup> Consistency would dictate that the opponents of Originalism be called “non-originalists.” In this Article, though, I bow to convention and simplicity by omitting the capitalization.

<sup>54</sup> See, e.g., Farber, *supra* note 1, at 1086 (defining non-originalists as those who “do not find original intent dispositive of contemporary constitutional questions”); Kesavan & Paulsen, *supra* note 8, at 1126 (defining non-originalists as “theorists who believe that constitutional interpretation should not be limited by the intentions of the Framers, the understandings of the Ratifiers, or evidence of the original meaning of the words and phrases of the text”).

<sup>55</sup> This observation is far from novel, see, e.g., Farber, *supra* note 1, at 1086; Kavanagh, *supra* note 9, at 256, but warrants repetition nonetheless.

interpretation. To the contrary, even those scholars most closely identified with non-originalism—Paul Brest, David Strauss, Laurence Tribe, for example—explicitly assign original meaning or intentions a significant role in the interpretive enterprise.<sup>56</sup>

### 3. *Originalism and the Fallacy of Equivocation*

Emphasizing the boldness of Originalism and the concomitant modesty of non-originalism also facilitates a critical evaluation of some of originalists' favorite argumentative maneuvers. To start, Originalists routinely set forth the Originalist thesis in the strong form—that is, they advocate Originalism—but provide arguments that only support some type of moderate originalism. We will see examples of this sleight of hand in Parts II and III.<sup>57</sup>

Originalists also trade on the ambiguity of the originalist label in a second way—by castigating opponents for hypocrisy on the grounds that they (the critics) also pay attention to original meaning.<sup>58</sup> Yet arguments of this sort commit the fallacy of equivocation: The originalism that the critic rejects is originalism unmodified, i.e., strong originalism; the originalism she endorses is either weak or moderate originalism.

Even a thinker as careful and precise as Mark Greenberg falls into this trap. In an important article that first set forth with care the now well-appreciated distinction between the original meanings of a

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<sup>56</sup> See, e.g., Brest, *supra* note 24, at 237 & n.124 (observing that “[t]he nonoriginalist treats the text and original history as presumptively binding and limiting, but as neither a necessary nor sufficient condition for constitutional decisionmaking” and adding that “there are some instances in which the nonoriginalist presumption of fidelity to the text and original understanding is very unlikely to be rebutted”); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 881 (1996) (observing that “[v]irtually everyone agrees that the specific intentions of the Framers count for something” and seeming to approve of practice in which they count “for something but not everything”); Laurence H. Tribe, *Comment, in SCALIA, supra* note 38, at 93 (agreeing that many constitutional provisions fairly conceived as architectural “probably must be taken to have a fixed meaning that it is the task of the faithful interpreter, whether a judge or anyone else, to identify and preserve”).

Perhaps relying on sentiments such as these, one commentator has recently observed that “[i]t is common ground amongst originalists and non-originalists alike that the Constitution means what the Framers intended it to mean.” Kavanagh, *supra* note 9, at 274; cf. GOLDFORD, *supra* note 14, at 77, 78 (“[N]onoriginalists tacitly accept the originalist premise that [‘the constitutional text’] and [‘the original understanding of the constitutional text’] are equivalent . . .”). I find this not only mistaken but truly inexplicable.

<sup>57</sup> See *infra* Parts II.B.1, III.B.2.

<sup>58</sup> See, e.g., Barnett, *supra* note 4, at 615–17; Jonathan R. Macey, *Originalism as an “Ism,”* 19 HARV. J.L. & PUB. POL’Y 301, 301 (1996) (“[T]he very constitutional scholars who decry originalism most loudly rush to use originalist arguments when they serve their purposes.”).

text and its originally expected or intended applications,<sup>59</sup> Greenberg and Harry Litman argued:

Despite originalism's apparent problem in accounting for the evident invalidity of particular traditional practices, the doctrine's core notion—that the Constitution must be interpreted in accordance with its original meaning—is difficult to challenge. Some version of the position seems to follow from the very idea of a written constitution, which is designed “to be an anchor in the past.” Indeed, nonoriginalists tend to recognize the substantial force of the basic argument for originalism, and often emphasize the importance that they too accord to original meaning.<sup>60</sup>

To see the equivocation clearly, notice that the referent of the words “the position” in the second sentence is originalism. If one makes that mental substitution, then the three sentences can be briefly summarized as follows: (1) originalism is hard to challenge, (2) because some version of originalism seems to follow from the Constitution's writtenness, (3) as evidenced by the fact that even non-originalists recognize the force of the argument for originalism.

The problem is that this single word “originalism” changes meaning from sentence one to sentence three. The originalism meant in the first sentence is the thesis that “the Constitution *must* be interpreted in accordance with its original meaning,” and therefore is strong originalism.<sup>61</sup> But that's not the sense of originalism meant in the third sentence. In attributing significance to original meaning, non-originalists are acknowledging, at most, the force of arguments for moderate originalism. What about the second sentence? Well, if non-originalists' endorsement of moderate originalism is all the evidence that Greenberg and Litman muster to support the claim that some form of originalism follows from the writtenness of a constitution, then sentence two is speaking of moderate originalism and does not support the contention of the first sentence that strong originalism is difficult to challenge. Alternatively, if Greenberg and Litman mean to claim in sentence two that some version of strong originalism (strong original intent originalism? strong original meaning

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<sup>59</sup> See *infra* Part I.C.2.

<sup>60</sup> Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 571 (1998) (citation omitted).

<sup>61</sup> To escape the fallacy, one might propose that the originalism Greenberg and Litman have in mind in the first sentence cannot be strong originalism, for otherwise they would speak of, for example, the “doctrine's contention,” rather than its “core notion.” That is, the qualifier *core* might suggest that originalism, in the first sentence, is broader than strong originalism. And if so, then the originalism in the first sentence might be the same as it is in the third, namely moderate originalism. This route out of the fallacy won't work, for it depends on the odd claim that “the core notion of moderate originalism is strong originalism.”

originalism? soft strong originalism?) seems to follow from the writtenness of a constitution, then the argument for that is absent; it is not supplied by the fact that even non-originalists acknowledge moderate originalism.

### C. *Qualifications and Clarifications*

#### 1. *Universal Originalism*

I understand Originalism to address what courts must do, not what all interpreters must do. *This* thesis (but not all positions in originalist logical space) would allow other actors—legislators, citizens, executive officials—to interpret the Constitution in a way that departs from original meaning. Put another way, Originalism is agnostic with respect to the range of possibilities on the dimension of interpretive *subject*. To be sure, some forms of Originalism are justified on grounds that rule out even extrajudicial non-originalist interpretation. But I do not treat extrajudicial originalism to be a necessary component of Originalism.<sup>62</sup>

Although I do not elaborate on the distinction between judicial and universal originalism here, I have elsewhere explained why it might be important.<sup>63</sup> Very briefly, few doubt that the Constitution plays a significant nonlegal role in our culture. It has meaning and exerts power outside the courts in helping shape political-legal debate and even national identity. Presumably, elaborations of, and arguments about, constitutional meaning will not proceed on wholly separate tracks inside and outside the courts.<sup>64</sup> Accordingly, proponents of judicial Originalism who rely on arguments that would not themselves support universal Originalism (intentionalists being the most obvious counterexample) must explain how such cross-fertilization can proceed when different interpreters are entitled to rely on significantly different interpretive methodologies or, alternatively, why

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<sup>62</sup> Reaching the same conclusion is BASSHAM, *supra* note 6, at 21.

<sup>63</sup> See generally Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383 (2007).

<sup>64</sup> The literature exploring how social movements affect constitutional change has exploded in recent years, propelled by the work of scholars such as Jack Balkin, Bill Eskridge, Willy Forbath, Robert Post, and Reva Siegel. For a recent discussion, see *The Brennan Center Jorde Symposium on Constitutional Law*, 94 CAL. L. REV. 1323 (2006). Copious citation to the burgeoning scholarship can be found in the lead lecture of that symposium, Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1328 n.13 (2006). For my money, it is in the descriptive analysis and normative theorizing of the two-way interaction between judicial and popular constitutional understanding, and not in its focus on extrajudicial constitutional understandings alone, that the trend toward “popular constitutionalism” is likely to prove most interesting and profitable.

there should be—even how there could be—something closer to acoustic separation between judicial and extrajudicial constitutional exegesis.<sup>65</sup>

## 2. *Application Originalism*

Some commentators believe that Originalism directs that interpreters owe fidelity to the framers' (or ratifiers') originally expected applications of the constitutional text, not as evidence (sometimes powerful) of original intent or meaning, but as controlling in themselves.<sup>66</sup> On this view (to take an example frequently pressed by Justice Scalia), the fact that the framers and ratifiers did not expect capital punishment to violate the Constitution entails that it cannot now constitute "cruel and unusual punishment" in violation of the Eighth Amendment. Others have persuasively critiqued this position.<sup>67</sup> For our purposes, though, it is enough to note that (with the partial exception of Justice Scalia) the only commentators who take it seriously are those aiming to attack it.<sup>68</sup> Leading originalists have unambiguously repudiated it for years. As (now-Judge) Michael McConnell insisted a decade ago:

[N]o reputable originalist, with the possible exception of Raoul Berger, takes the view that the Framers' "assumptions and expectations about the correct application" of their principles is [sic] controlling. . . . Mainstream originalists recognize that the Framers' analysis of particular applications could be wrong, or that circumstances could have changed and made them wrong.<sup>69</sup>

Application originalism is a bad view, but one to which not even originalists subscribe.<sup>70</sup>

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<sup>65</sup> On "acoustic separation," see generally Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

<sup>66</sup> See Balkin, *supra* note 44, at 292, 338; see also, e.g., KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* 47–52 (2006); Kavanagh, *supra* note 9, at 265.

<sup>67</sup> See Greenberg & Litman, *supra* note 60.

<sup>68</sup> This argument is elaborated in Berman, *supra* note 63, at 384–85.

<sup>69</sup> Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1284 (1997).

<sup>70</sup> Possibly the one partial exception to the latter assertion is Jed Rubenfeld, who has long urged that judges *are* obligated to follow originally intended applications of constitutional provisions, but asymmetrically. If the original purpose or understanding of a provision was to apply to some particular set of facts, he argues, then judges must abide by those foundational "Application Understandings." In contrast, if the original understanding was that a provision would not apply to some particular set of facts, such foundational "No-Application Understandings" can be freely disregarded. See generally JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* (2005). For example, because a foundational Application Understanding behind the First

### 3. *Levels of Generality and the Concretization of Original Meaning*

Some theorists have sought to marry an evolutionary or progressive sensibility to originalist dogma by urging that interpreters should follow the original meaning, construed at high generality. Ronald Dworkin reflected this approach when opining that “[t]he important question for constitutional theory is not whether the intention of those who made the Constitution should count, but rather what should count as that intention.”<sup>71</sup> It follows that “[w]e are all originalists now”<sup>72</sup>—but that some of us read the original intentions broadly, and others read them narrowly.

This seems mistaken.<sup>73</sup> As Originalists have urged for some time, their interpretive methodology requires meaning to be rendered at the

Amendment was to prohibit prior restraints, that particular expectation demands our continued fidelity. But that a No-Application Understanding might have been that the First Amendment did not protect nude dancing imposes no demand on contemporary constitutional interpreters. Although I am not ultimately persuaded that *strong* deference is owed even to Application Understandings, I emphatically exempt Rubinfeld’s intriguing and provocative theory from my “bad view” verdict.

<sup>71</sup> RONALD DWORKIN, *A MATTER OF PRINCIPLE* 57 (1985).

<sup>72</sup> This is Tribe’s paraphrase of Dworkin. See Tribe, *supra* note 56, at 67. It is a widely expressed sentiment, see, e.g., Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL’Y 495, 496 (1996) (“[W]e are all originalists.”); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 718 (1991) (“[W]e are all originalists now—or should be.”), but one that should provoke concern. As Gregory Bassham observed, “In any important debate, whenever one side declares ‘We are all *x* now,’ it is a pretty safe bet that the debate has taken a wrong turn—or that someone is trying to pull a fast one.” Gregory Bassham, *Justice Scalia’s Equitable Constitution*, 33 J.C. & U.L. 143, 154 (2006).

In my view, the “we are all originalists” claim takes several wrong turns, the most common being the failure to recognize the signal importance of what I have called the dimension of strength. See, e.g., Jeffrey Rosen, *Originalist Sin*, NEW REPUBLIC, May 5, 1997, at 26 (reviewing JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996), and SCALIA, *supra* note 38) (“We are all originalists now. That is to say, most judges and legal scholars who want to remain within the boundaries of respectable constitutional discourse agree that the original meaning of the Constitution and its amendments has *some* degree of pertinence to the question of what the Constitution means today.”). If I’m right that what its advocates mean by “originalism” is strong originalism, then weak and moderate originalists are not originalists, in the relevant sense.

<sup>73</sup> The issue I address here should not be confused with the related but distinct problem that arises when bona fide intentions turn out to conflict with each other. Consider Bork’s famously unpersuasive effort to establish that *Brown v. Board of Education* is consistent with originalism. That argument claims that the original intent or understanding of the Equal Protection Clause incorporated the principle of “equality,” or “equality before the law,” and that the ratifiers intended to preserve racial segregation given their (mistaken) belief that it furnished such equality. BORK, *supra* note 20, at 81–83. This situation too might be said to present judges with a choice about which intent—the specific or the general—to privilege. In fact, I think cases such as this present a conflict between intended meaning and intended or expected applications and that all or almost all originalists are

level of generality originally intended or publicly understood.<sup>74</sup> Suppose, for example, that the original meaning and intent of “equal protection” had involved some strictly formal sense of legal equality. A judge who finds this conception of equality morally unattractive might be tempted to interpret the Equal Protection Clause to advance something closer to a norm of antisubordination. And, if she believes that levels of interpretive generality or abstraction are up for grabs, she might reason that such an interpretation reflects the intent of the framers of the Fourteenth Amendment to constitutionalize the concept of equality. Such an interpretation might or might not be defensible, all things considered. But the judge who would effect it is not, *pace* Dworkin, an Originalist.

That said, some constitutional provisions might have been originally understood at a level of generality too high to permit effective resolution of disputes. If, for example, the original understanding of “equal protection” had been nothing more determinate than the bare concept of equality, then it is not obviously antithetical to Originalism for judges to interpret the clause to refer to some presently favored conception of equality. As noted earlier, Originalists differ regarding whether contemporary interpreters are permitted to concretize constitutional meaning in this fashion or, instead, must uphold any challenged governmental action so long as it conforms to *any* plausible conception of the concept.<sup>75</sup>

It is even possible that the original understanding or intent of a provision was to delegate to future interpreters the power to concretize underdeterminate meaning—either once and for all (in which case the meaning would become “fixed”)<sup>76</sup> or in a continually changing or evolving fashion. Suppose that the Equal Protection Clause was originally intended or understood to delegate authority to future interpreters to select an appropriate conception of equality. It

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committed to the former. In any event, this type of situation is distinct from that in which an interpreter might wish to interpret some constitutional concept or principle at a level of abstraction different from what was originally meant or intended. I am focusing on the latter situation.

<sup>74</sup> See, e.g., BORK, *supra* note 20, at 149 (“The role of a judge committed to the philosophy of original understanding is not to ‘choose a level of abstraction.’ . . . [A] judge should state the principle at the level of generality that the text and historical evidence warrant.”); WHITTINGTON, *supra* note 14, at 187 (“[T]he search for intention must be guided by the historical evidence itself. The level of generality at which terms were defined is not an a priori theoretical question but a contextualized historical one.”).

<sup>75</sup> See *supra* note 23 and accompanying text.

<sup>76</sup> See generally Nelson, *supra* note 38, at 547 (“[M]embers of the founding generation do not seem to have anticipated constant reinterpretation of the Constitution. . . . [T]hey expected subsequent practice to liquidate the indeterminacy and to produce a fixed meaning for the future.”).

would then be appropriate for courts to adjudge challenged state action as constitutional or not depending upon its conformity with the judges' best understanding of what equality demands—or with their best understanding of what society believes equality demands. Strong originalism allows for this.<sup>77</sup> The meaning of the Equal Protection Clause would remain, as it had originally been, that no state shall deny to any person what contemporary society deems equality to demand.<sup>78</sup>

It follows that Originalism is not disproved by the fact, if true, that some constitutional provisions were intended or understood to have an evolving character. Yet if there are many such provisions (or even a small number of provisions that are especially fertile as generators of litigation), then some of Originalism's supposed benefits, such as its constraining effect on judicial subjectivity and its concomitant ability to promote rule of law values like predictability and stability, are likely to prove rather more modest than its proponents often claim.<sup>79</sup>

#### 4. *Non-normative Originalism*

I have described Originalism as a thesis regarding what courts ought to do: They ought to follow the Constitution's original meaning. Most Originalists advance a view of just this sort, expressly employing deontic language like "should," "ought," "obligated," "required," and "bound." Yet some theorists whose Originalist credentials are otherwise impeccable expressly deny that they mean to advance any normative claims.<sup>80</sup> Does this view cause any significant difficulty for our working definition of Originalism?

I think it does not. When contending that a judge should or must (endeavor to) interpret the Constitution in accordance with its orig-

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<sup>77</sup> See, e.g., Whittington, *supra* note 15, at 611 ("[I]t is entirely possible that the principles that the founders meant to embody in the text were fairly abstract. It is also possible that the founders merely meant to delegate discretion to future decisionmakers to act on a given subject matter with very little guidance . . ."). In correspondence, Dick Fallon questions whether all Originalists need accept this possibility. That they might not, he offers, suggests another dimension of variability within originalist logical space. E-mail from Richard H. Fallon, Jr., Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School, to author (Feb. 5, 2008, 15:24 CST) (on file with the *New York University Law Review*).

<sup>78</sup> Cf. Rosenthal, *supra* note 4, at 2 (arguing that original understanding of Due Process Clause was as directive for courts to evolve common law of requisite procedures for deprivation of liberty and property interests).

<sup>79</sup> Still, it is an overstatement to conclude that "[t]his move from specific intentions to general principles . . . eliminates any meaningful distinction between originalism and nonoriginalism." Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT. 411, 432 (1998).

<sup>80</sup> Gary Lawson is perhaps the best example. See generally, e.g., Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997).



inal meaning, Originalists are essentially telescoping two claims: first, that judges should say what the (constitutional) law is; and second, that what the constitutional law is, is what its original meaning was. When Originalists disclaim a position about what judges should do, they mean, I think, to recognize that they are not advancing any *argument* for this first claim. But because it is not in fact controversial in the contemporary debates over American constitutional interpretation that judges should enforce the law, the non-normative variant of Originalism is not interestingly distinct, for our purposes, from its more common, avowedly normative, cousin. Put another way, we can think of the putatively non-normative variant as at least contingently normative: Insofar as judges ought to follow the law, they should follow the Constitution's original meaning.

There is, however, at least one other way to think about non-normative Originalists. In a monumental work in progress,<sup>81</sup> Larry Solum carves the Originalist salami one slice thinner than I have just done, distinguishing not only between what the law is and what judges should do but also between the Constitution's *semantic* meaning or content and its *legal* meaning or content. On his view, the original meaning determines the former but only "contributes" to the latter, without fully determining it.

I cannot fully address Solum's complex and challenging arguments in this already long Article. For present purposes, suffice it to say that whether Solum's theory is Originalist or moderate originalist (hence non-originalist) depends on whether it permits non-originalist contributions (other than judicial precedent) ever to override the (original) semantic content in the production or determination of constitutional law, i.e., of the Constitution's legal content. This is a question that the most recent draft I have read of Solum's *Semantic Originalism* does not, to my eyes, unequivocally answer. As an empirical matter, I submit, the debate over originalism is principally about what judges should do or, at a minimum, about what the constitutional law is, properly understood. It is not about what the Constitution's semantic meaning is if we understand semantic meaning to be only an ingredient (even a substantial ingredient) in its legal meaning. Accordingly, if the semantic content of the Constitution does not firmly constrain legal content—if, in other words, it is permissible, on Solum's account, for constitutional law to be incompatible with the text's (original) semantic content, even putting aside any possible contribution of non-originalist judicial precedents—then his theory might be entirely acceptable. It just wouldn't be Originalism as that theory

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<sup>81</sup> Solum, *supra* note 39.

is broadly understood and deployed today. On the other hand (and as I think is significantly more likely), if Solum's "contribution thesis" allows non-originalist elements merely to supplement underdeterminate (original) semantic meaning—as by reducing vagueness or by choosing among ambiguous meanings—thus producing legal content that must always be consistent with the (original) semantic content, then his theory is Originalist. But this robust form of the contribution thesis will require more argumentation than Solum has yet supplied for it.

### 5. *Originalism and Stare Decisis*

I have already acknowledged that some contemporary theorists and jurists who purport to be Originalists—Justice Scalia most famously or notoriously<sup>82</sup>—would permit judges to continue to abide by judicial precedents that depart from original constitutional meaning. Let us call this form of Originalism, if otherwise strong, "one-exception strong originalism": Always follow original meaning except when (a) the relevant judicial precedents depart from original meaning, and (b) the reasons to adhere to those particular precedents outweigh the reasons not to.<sup>83</sup> Because I employ the Originalist label as shorthand for the thesis that is presently contested between self-described proponents of "originalism" and their self-described opponents, Originalism is not fully reducible to strong originalism. Rather, to make more explicit what was intimated in Part I.B.1, Originalism comprises both true strong originalism and one-exception strong originalism. This is, to reiterate, a descriptive claim. The more interesting question, much debated in recent years,<sup>84</sup> is whether one-exception strong originalism is a tenable position. The challenge for its proponents, of course, is to muster principled and persuasive grounds for modifying strong originalism to permit courts to interpret

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<sup>82</sup> See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

<sup>83</sup> Condition (b) is required by the fact that everybody recognizes that stare decisis is not an inexorable command, especially in constitutional cases. For Scalia's views of constitutional stare decisis, see, for example, *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 982–83 (1992) (Scalia, J., concurring in judgment in part and dissenting in part), and *Walton v. Arizona*, 497 U.S. 639, 672–73 (1990) (Scalia, J., concurring in part and concurring in judgment).

<sup>84</sup> See, e.g., *Can Originalism Be Reconciled with Precedent? A Symposium on Stare Decisis*, 22 CONST. COMMENT. 257 (2005). The argument that many judicial constitutional precedents are irreversible and that stare decisis thus presents a challenge to originalism was perhaps first pressed in Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988). It was contested in Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

the Constitution in line with judicial precedents that departed from the original meaning without thereby recognizing grounds for other exceptions, and thereby devolving into a more catholic form of moderate originalism.

To be clear, one who is skeptical that one-exception strong originalism describes a stable position need not conclude that to accept this one exception or adjustment to Originalism necessarily throws us into all-things-considered balancing in every case. The doubt, rather, is that the rule commentators often discern in Scalia's writings—something like “follow original meaning always, except when judicial precedent departs from the original meaning, and the reasons for adhering to that judicial precedent appear, on balance, good”—is likely to be *the optimal* interpretive rule among all possibilities.

Why an exception to strong originalism for (some!) non-originalist judicial decisions would be both a consequentially good adjustment to Originalism and the *only* consequentially good adjustment is, at first blush, mysterious. After all, nonjudicial precedents have significantly shaped American politics and culture, including many never subjected to legal challenge, hence never passed on by a federal court. For example, in 1803 it was vigorously debated whether the federal government had constitutional authority to acquire territory without a constitutional amendment.<sup>85</sup> If a self-proclaimed Originalist is willing to accommodate *stare decisis* for reasons of stability and predictability, it is hard to fathom the grounds she might have for utterly ignoring the precedential significance of the Louisiana Purchase, as well as any subsequent territorial expansions, were there no *judicial* precedent on point.

Strikingly, support for the skeptical position comes from an unlikely source—Justice Scalia himself. Most commentators, I'd venture, would identify him as a one-exception strong originalist.<sup>86</sup> But the accuracy of the designation is uncertain. Although he seems to encourage that view in his widely read 1997 book,<sup>87</sup> he acknowledged

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<sup>85</sup> The classic study is EVERETT SOMERVILLE BROWN, *THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE: 1803–1812* (1920). For a recent argument (challenging conventional wisdom) that Jefferson's own doubts on this score were well founded, see generally Robert Knowles, *The Balance of Forces and the Empire of Liberty: States' Rights and the Louisiana Purchase*, 88 *IOWA L. REV.* 343 (2003).

<sup>86</sup> See, e.g., James E. Ryan, *Does It Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 *STAN. L. REV.* 1623, 1628 n.31, 1631 (2006) (intimating that Scalia views *stare decisis* as only exception to Originalism).

<sup>87</sup> See SCALIA, *supra* note 38, at 138–40 (acknowledging that some judicial precedents “are effectively irreversible,” and urging that “*stare decisis* is not *part of* [his] originalist philosophy; it is a pragmatic *exception* to it”).

in an earlier article that “*stare decisis* alone is not enough to prevent originalism from being what many would consider too bitter a pill.”<sup>88</sup> Most self-described originalists, he asserted, would temper originalism with some deference to social changes other than judicial precedent. And he strongly intimated that he would too.<sup>89</sup> By his own (implicit) admission, then, Justice Scalia is neither a true strong originalist nor a one-exception strong originalist; he is (in our terms) a moderate originalist.<sup>90</sup> Put another way, Scalian “faint-hearted” originalism is not identical to one-exception strong originalism: It is a more moderate view. To be sure, Scalia is almost certainly on the stronger end of moderate originalism than are most academic commentators and any of his fellow Justices, Thomas excepted. However, to paraphrase George Bernard Shaw, now we’re just haggling over the price. Of course, price matters. But (to pursue the metaphor), arguments that something ought to be valued more (or less) highly are very different in texture from arguments that the same thing is inalienable or nontransferable.

That’s the short take on why Originalism and *stare decisis* make for an unhappy marriage. Let me now offer a thumbnail sketch of one way the marriage might be saved, along with brief thoughts about the risks that the escape route confronts.

As others have noted, there are (at least) two distinct ways to conceptualize a tempering of strong originalism with *stare decisis*.<sup>91</sup> First, we might urge that the Constitution should be interpreted “in light of” non-originalist judicial precedent. This is the possibility we have just been pursuing. As we have seen, it provokes the question of why the Constitution should not also be interpreted in light of other considerations, such as changed social norms or practices of the political branches. An alternative conception maintains (with true strong originalism) that the Constitution ought to be interpreted solely in accordance with its original meaning but denies that the constitutional text is the sole source of constitutional law. On this view, judicial

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<sup>88</sup> Scalia, *supra* note 82, at 861.

<sup>89</sup> *See id.*

<sup>90</sup> As Randy Barnett notes, Scalia “proves unfaithful to the original meaning of the text” in yet a third way: “[H]e is willing to ignore the original meaning of those portions of the Constitution that do not meet his criteria of the rule of law as the law of rules.” Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 13 (2006). Barnett is surely right that, when original meaning is not sufficiently rule-like to suit his tastes, Scalia often abandons the former in favor of more rule-like doctrine that better constrains judges in future cases. However, I’m disposed to treat this fact, not as a qualification to, or modification of, his basal commitment to Originalism, but as evidence that, at root, Scalia is not truly an Originalist but rather a rulist.

<sup>91</sup> *See, e.g.*, Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1132 (2008).

precedents interpreting (or purporting to interpret) the Constitution are not, as one-exception strong originalism would have it, interpretive considerations; instead, they are independent sources of law.

Surely there is something to this view: In a common law system, judicial decisions are unquestionably sources of law just like, for example, constitutions, statutes, and regulations. But that can't be the end of the story. To see why, consider what Mark Greenberg has helpfully dubbed "[t]he Standard Picture of law."<sup>92</sup> That picture has many elements, but for our purposes two stand out: First, "it is the linguistic content of an authoritative pronouncement that becomes a legal norm";<sup>93</sup> second, "in the explanation of why the law has the total content it does, we appeal to individual legal norms; but in the explanation of an individual legal norm, we do not appeal to the content of the law, except to individual legal norms vertically above the norm in question."<sup>94</sup> Given this standard hierarchical conception of law, the Originalist who would accommodate non-originalist judicial precedents as sources of law must, I think, meet two challenges: first, to explain why, as sources, judicial decisions are superior to the written Constitution or even co-equal; and second, to defend a theory that explains which other texts or phenomena are sources of law too. (To return to a previous example, if *Marbury* is a source of law, we need to know whether the Louisiana Purchase—understood at the time to be the more momentous constitutional event of 1803<sup>95</sup>—is too, and if not, why not.) Proposed answers to these questions will almost certainly rely heavily on Article III's conferral of "[t]he judicial [p]ower."<sup>96</sup> I cannot pursue this possibility any further here. I'll merely confess my doubt that persuasive answers can be derived from this spare text that are consistent with Originalist premises, especially premises that would tether us tightly to original public meanings (even including established technical meanings, including technical legal meanings) while denying independent relevance to, e.g., framers' purposes or expectations.<sup>97</sup>

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<sup>92</sup> Mark Greenberg, *The Standard Picture and Its Discontents* 5 (UCLA Sch. of Law Research Paper No. 08-07, 2008), available at <http://ssrn.com/abstract=1103569>.

<sup>93</sup> *Id.* at 8.

<sup>94</sup> *Id.* at 10.

<sup>95</sup> This is an observation made frequently by my colleague Sandy Levinson. See, e.g., Sanford Levinson, *Why Professor Lynch Asks the Right Questions*, 31 SETON HALL L. REV. 45, 48 (2000).

<sup>96</sup> U.S. CONST. art. III, § 1.

<sup>97</sup> On Greenberg's view, incidentally, the standard picture is a naive oversimplification. Rather, he would view the content of law as a complex function of, or operation upon, legal sources. Determining what the law is, then, depends upon the successful completion of at least three fairly discrete tasks: identifying legal sources; interpreting these sources to ascertain their meanings; and combining or integrating these meanings, or these sources, to

## 6. *Originalism and Transtemporal Integration*

Naturally, the original meaning of a provision, *P*, that was not part of the originally ratified Constitution has the meaning it bore at the time it was adopted, say  $t_2$ . It is possible, however, that the full meaning of *P*—or the full significance of the ratification of *P*—might include a transformation of a provision, *R*, adopted at the earlier time  $t_1$ . It is an interesting question whether, from the perspective of time  $t_3$ , “the original meaning” of *R* is its meaning at  $t_1$  or  $t_2$ . Suppose, for example, that the original meaning of the term “persons” in the Equal Protection Clause limited its application to persons *born alive*, but that a subsequent amendment were to confer some specified rights on fetuses—say, it prohibits abortion. The meaning of that amendment might be thought to reverberate back to expand the meaning of the word “persons” in the Equal Protection Clause. I do not have an answer to the puzzle of diachronic synthetic constitutional meanings or to whether the correct answer will require that my definition of Originalism be modified.<sup>98</sup>

## II

### HARD ORIGINALISM

Defenders of Originalism (i.e., defenders of strong originalism) have advanced a great many more-or-less distinct arguments in its defense. Two sets of arguments—those based on the *nature of inter-*

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constitute the law. On this jurisprudential account, there is no one-to-one relationship between a legal text and the law, thereby (it seems to me) problematizing the very concept of *constitutional* law. That is, constitutional law is distinguished from other forms of law, not in the simple way that it is the meaning (semantic, linguistic, or legal) of the Constitution, but in a more functional sense as being the supreme law. Though I won't pursue the issue further, it seems plain to me that to adopt this view would make the Originalist case harder not easier. Surely one who extols Originalism as a means to limit judicial subjectivity is not likely to smile on a theory that recognizes multiple sources of constitutional law.

<sup>98</sup> Cf. Barnett, *supra* note 4, at 650; Farber, *supra* note 1, at 1097 (“[A]n originalist might take into account not only judicial precedents but also the changing views of those adopting later constitutional provisions. For example, those who ratified the fourteenth amendment’s due process clause may have had a broader concept of the meaning of due process than their predecessors who adopted the fifth amendment’s due process clause. Yet it would be incongruous to give the two due process clauses different interpretations today.”); Tribe, *supra* note 56, at 86–87.

One recently proposed solution that I do feel confident in rejecting is that the original meaning of a constitutional amendment is constituted by the hypothetical understandings of a reasonable person at the time of ratification of the 1787 Constitution. See Lawson & Seidman, *supra* note 19, at 75–76 (“Though the matter is hardly free of doubt, we offer the suggestion that the reasonable person of 1788—the original ‘We the People of the United States’—is the reference point for all interpretative issues until the document itself otherwise specifies.”).

pretation and on the nature of constitutional authority—are advanced to support hard Originalism and will be considered here. The remaining arguments for Originalism appeal to a diversity of values—democratic self-governance, the rule of law, stability, predictability, efficiency, and substantive goodness among them—and might seem, therefore, to amount to a disconnected hodge podge of considerations. In fact, though, I believe such arguments are best viewed as grounded in the proposition that Originalism produces *better consequences* than its competitors.<sup>99</sup> Such arguments from good consequences seem to support soft Originalism at most and will be addressed in Part III.

### A. *Intentionalism and the Meaning of Interpretation*

We have assumed thus far that federal judges—Supreme Court Justices most especially—are, and should be, engaged in the activity of interpreting the Constitution, understood as the process of deriving or divining law (or “legal meaning” or “legal content”) from the constitutional text.<sup>100</sup> They are engaged, that is, in a particular type or form

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<sup>99</sup> This strikes me as a fair characterization of extant arguments for Originalism. I do not want to insist, though, that there is no possible room for arguments that are not most fairly classified as consequentialist and yet that are more perspicuously viewed as soft than as hard. See *infra* note 198 and accompanying text. And keep in mind that the hard/soft distinction is advanced only as a potentially useful classificatory tool. The core argument of this Article—that existing arguments for Originalism are extremely unpersuasive and that the likelihood of ultimately successful arguments is remote—does not depend upon it. See *supra* note 28.

<sup>100</sup> Many theorists have conceived of constitutional adjudication as consisting of two distinct steps, both prior to the application of law to facts to reach a case-specific holding. Originalists like Keith Whittington and Randy Barnett, for example, argue that when constitutional interpretation produces meaning that is vague or ambiguous, other legal actors, including judges, can make the law more determinate through a process of “constitutional construction.” See generally KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION (1999); Barnett, *supra* note 4. Kim Roosevelt and I have argued that courts often (and permissibly) craft “decision rules” that facilitate the case-by-case application of court-interpreted constitutional meaning by minimizing some of the costs produced by the fact that constitutional law is judicially enforced. See ROOSEVELT, *supra* note 66, at ch. 2; Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); see also Mitchell N. Berman, *Aspirational Rights and the Two-Output Thesis*, 119 HARV. L. REV. F. 220, 221 (2006), <http://www.harvardlawreview.org/forum/issues/119/march06/berman.pdf> (“[J]udicial review requires devices that direct courts how to decide whether [judge-determined constitutional] meaning is met.”). Dick Fallon, Henry Monaghan, and Larry Sager have advanced broadly similar accounts of how courts refine or supplement constitutional norms or propositions. See RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 1–12, 76–77 (2001) (distinguishing constitutional norms from implementing doctrine); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 30–31 (1975) (distinguishing “constitutional common law” from “*Marbury*-shielded constitutional exegesis”); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213–14 (1978) (distinguishing judge-announced “[institutional] constructs” from “consti-

of interpretation. So, what *is* interpretation? Unfortunately, this is a much vexed question.<sup>101</sup> To better understand intentionalism, it will be useful to first posit a definition of interpretation that least commits us to a contested position in the debates between intentionalists and their opponents. Following the standard view, let us say that interpretation is the activity of assigning or attributing meaning to a text.

Intentionalism is the theory that the meaning properly attributed in a successful interpretation is the meaning(s) intended by the text's author(s), and therefore that the activity of interpreting a text is an effort to identify the authorially intended meaning(s). This thesis can be supported in either of two ways, which intentionalists do not always clearly distinguish. One can maintain either that authorially intended meaning is the only coherent meaning of a given text or that, although a text may possess diverse types of meaning, authorially intended meaning is the only appropriate target of the activity of interpretation.<sup>102</sup> By either route, intentionalism is a theory of interpretation generally, not a theory of *constitutional* interpretation in particular. Intentionalists contend that the interpretation of *any* text—a poem, a novel, a musical score, an architectural blueprint, a sign, a contract, a will, a statute, or a constitution, among innumerable other things—is necessarily a search for the intentions of the text's author(s). As explained by Steven Knapp and Walter Benn Michaels, the literary theorists who have championed intentionalism most vigorously over the past quarter century, “the meaning of a text is simply identical to the author's intended meaning.”<sup>103</sup> Stanley Fish, the literary theorist and Milton scholar turned law professor, likewise contends that “[i]nterpretation is the act of trying to figure out what the

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tutional norms”). All such accounts, I believe, recognize two conceptually distinct stages of constitutional adjudication (even if the courts rarely expressly distinguish the two in the course of their opinions). When I speak of constitutional “interpretation,” I am referring to the initial and conceptually distinct step of deriving legal meaning or legal content from the constitutional text.

<sup>101</sup> For a compact and reasonably accessible overview of debates over interpretation in philosophy and literary theory, see GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* ch. 2 (2000). See also Symposium, *Interpretation*, 58 S. CAL. L. REV. 1 (1985). An excellent electronic source is the Johns Hopkins Online Guide to Literary Theory and Criticism, <http://litguide.press.jhu.edu/> (last visited Feb. 22, 2009).

<sup>102</sup> See *infra* note 103.

<sup>103</sup> Steven Knapp & Walter Benn Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723, 724 (1982). As this passage suggests, Knapp and Michaels are best read to take the first position identified in the text accompanying *supra* note 102. See also generally Steven Knapp & Walter Benn Michaels, *A Reply to Our Critics*, 9 CRITICAL INQUIRY 790 (1983) (further developing this position). In doing so, they part ways with their intentionalist predecessor E.D. Hirsch who, they say, adopts the second. See generally E.D. HIRSCH, JR., *VALIDITY IN INTERPRETATION* (1967).



author, not the dictionary, meant by his or her (or their) words.”<sup>104</sup> As a consequence, “[a]n interpreter cannot disregard [the author’s] intention and still be said to be interpreting.”<sup>105</sup>

There are many paths to Originalism as a theory of constitutional interpretation. One can be an Originalist with respect to how the courts should interpret the Constitution without being an intentionalist with respect to how everybody should interpret everything. But the converse is less clearly true.<sup>106</sup> For if one embraces intentionalism, then Originalism might come to appear as an incontrovertible, even fairly uninteresting, application of this more general theory of interpretation. It is no surprise, then, that some of today’s most prominent constitutional Originalists defend that view on straightforwardly intentionalist premises. As Lino Graglia has put it in a representative passage, “[I]nterpreting a document *means* to attempt to discern the intent of the author; there is no other ‘interpretive methodology’ properly so called.”<sup>107</sup> It follows that the application of intentionalism to constitutional theory ordinarily results in a particular form of Originalism: one whose focus or object is intentions rather than public meaning,<sup>108</sup> and whose status is hard.<sup>109</sup>

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<sup>104</sup> Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law*, 29 *CARDOZO L. REV.* 1109, 1127 (2008).

<sup>105</sup> *Id.* at 1122. Oddly, Fish’s greatest fame as a literary theorist derives from his role as a proponent of reader-response criticism, which is usually understood to be firmly anti-intentionalist. In a postscript to a recent French edition of his famous collection of essays, *Is There a Text in This Class?*, however, Fish explains that his earlier work erroneously conflated descriptive and normative accounts of interpretation. See STANLEY EUGENE FISH, *Postscript to QUAND LIRE C’EST FAIRE: L’AUTORITÉ DES COMMUNAUTÉS INTERPRÉTATIVES [IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES]* (Étienne Dobenesque trans., 2007). His present view is that interpretive communities do drive what is taken as a successful interpretation in any given time and place but that the true or correct interpretation is always and necessarily the meaning that the author intended. See *id.*

<sup>106</sup> I don’t describe the converse as necessarily false only because intentionalism does not itself have anything to say about whether and when somebody *should* endeavor to interpret a text. A constitutional theorist who embraces intentionalism but who rejects the view (common though it is) that the appropriate relationship between court-announced constitutional law and the constitutional text is properly described as involving interpretation need not be an Originalist. See *infra* note 109.

<sup>107</sup> Graglia, *supra* note 23, at 1024; see also, e.g., *id.* at 1029; Paul Campos, *Three Mistakes About Interpretation*, 92 *MICH. L. REV.* 388, 397 (1993) (“[T]he meaning of a text is always what its authors intended it to mean . . .”).

<sup>108</sup> Although intentionalists necessarily focus on the intentions of the text’s authors and therefore favor intent over public meaning, it does not necessarily follow that they urge inquiry into the intent of the framers as opposed to that of the ratifiers. It all depends on whom we identify as the Constitution’s authors. If we conceive of the author as the ratifiers, then intentionalism can support original ratifiers’ intent originalism. See, e.g., Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions* [hereinafter Alexander, *All or Nothing at All?*], in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 357, 363 (Andrei Marmor ed., 1995) [hereinafter *LAW AND*

This Section aims to assess intentionalism. First, though, let us clear away one possible misconception. A favorite tactic of intentionalists, especially intentionalist-Originalists, is to appeal to their readers' pre-theoretical intuitions that, in a range of everyday contexts, interpreters ought to search for authorially intended meaning. Thus does Paul Campos suggest that intentionalism's truth is bolstered by recognizing that you interpret the grocery list given you by your spouse by trying to ascertain the meaning she intended to convey.<sup>110</sup> That's a sound intuition, and acting on it will likely make

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INTERPRETATION] (arguing that meaning intended by *authorities* who author legal text should control); Steven Knapp & Walter Benn Michaels, *Not a Matter of Interpretation*, 42 SAN DIEGO L. REV. 651, 667 (2005) (“[N]othing in the logic of interpretation itself can tell us which of those stages [of drafting, ratification, and judicial review] should count as the one that confers on the text the meaning we are trying to interpret . . .”). *But see* Larry Alexander, *Originalism, or Who Is Fred?*, 19 HARV. J.L. & PUB. POL’Y 321, 325–26 (1996) (seeming to endorse possibility that persons whose intentions count for purposes of constitutional interpretation could be neither framers nor ratifiers but rather average speakers of English in 1787). This point will bear greater significance later.

In any event, whether the “authors” whose intentions intentionalist-Originalists seek to discover are the framers or the ratifiers (or somebody else), intentionalist-Originalists focus on subjective intentions, not objective public meanings. Yet, surprisingly, one prominent Originalist seems to deny precisely that. Michael Paulsen has recently protested that it is “a caricature of originalism” to portray it as “a version of crude intentionalism that focuses on the specific subjective intentions or expectations of individuals as to how a provision might be applied.” Instead, he says, originalists “focus[] on the objective linguistic meaning of the words of a text (taken in historical context).” Paulsen, *supra* note 23, at 2059.

This is a false dichotomy. As I have already suggested, *see supra* Part I.C.2, Paulsen is right to deny that contemporary originalists focus on the subjectively intended or expected *applications* of the text. But he is wrong to suggest that it follows that contemporary originalism is focused exclusively on public meaning and not subjective intentions. It does not follow because authors can have intentions about applications and intentions about meaning, and these need not be the same thing. *See generally* BASSHAM, *supra* note 6, at 29 (distinguishing among an author’s scope beliefs, counterfactual scope beliefs, and semantic intentions); McConnell, *supra* note 69, at 1284–85 (criticizing Dworkin for failing to distinguish between framers’ “expectations about specific applications” and “moral and political principles they intended to express”). Not only does the conclusion not logically follow, it is empirically false. *See, e.g.*, Lawson & Seidman, *supra* note 19, at 49 n.12 (recognizing that “[t]here are notable dissenters who continue to focus on concrete historical intentions” rather than public meaning).

<sup>109</sup> To be sure, this view does not present originalism as inescapable, full stop. It is not internal to an intentionalist theory of constitutional interpretation that courts engaging in constitutional adjudication must engage in constitutional interpretation. The possibility remains, for example, that constitutional adjudication ought to proceed without regard for the Constitution’s meaning, that we could have constitutional adjudication without constitutional interpretation. A view of this sort still qualifies as a form of hard originalism, however, for I have defined that term to encompass, in addition to the (super hard) view that originalist interpretation follows from either necessary or conceptual truths, the (ordinary hard) possibility that such interpretation is logically necessary given a set of premises that, while not themselves necessary, are in fact noncontroversial.

<sup>110</sup> Paul F. Campos, *A Text Is Just a Text*, 19 HARV. J.L. & PUB. POL’Y 327, 327–28 (1996); *see also, e.g.*, STEVEN D. SMITH, *LAW’S QUANDARY* 106–07 (2004) (discussing inter-

you a better husband or wife, but the example does not directly address the relevant question, for nobody denies that intended meaning is both a valid form of meaning and the frequently appropriate target of interpretation.<sup>111</sup> All nonintentionalism denies that interpretation must be a search for intended meaning in all interpretive contexts, and with respect to all types of texts—poems and statutes as much as grocery lists, invitations, and instruction manuals. Nonintentionalism as a general theory of interpretation is no more *anti-intentionalism* than non-originalism as a theory of constitutional interpretation is *anti-originalism*.<sup>112</sup> Accordingly, the question is not what can be said in favor of interpreting a text in accordance with presumed authorial intentions. The question concerns what can be said for *always* interpreting *all* texts solely in accordance with presumed authorial intent.

This Section examines that question in several steps. Part II.A.1 sets the table by introducing terms and by providing some reasons to doubt that authorially intended meaning—what I will call “utterer’s meaning”—is the sole coherent meaning of a text or the sole proper target of interpretation. Part II.A.2 identifies and rebuts one argument frequently advanced against nonintentionalist interpretation, namely, that intentionalist interpretation follows from the fact that the act of interpretation presupposes an author. Part II.A.3 identifies what I understand to be the strongest argument for intentionalism—what we can call the argument from rationality—and disambiguates it into two variants. Part II.A.4 argues that neither variant is persuasive. Part II.A.5 is more constructive, although also more exploratory and less essential to the burden of this Article. It sketches the contours of a more pluralist theory of interpretation and draws forth one implication for debates about constitutional interpretation.

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pretation of recipe); Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 975 (2004) (discussing interpretation of order in restaurant).

<sup>111</sup> This point is forcefully emphasized in, for example, Walter Sinnott-Armstrong, *Word Meaning in Legal Interpretation*, 42 SAN DIEGO L. REV. 465, 468 (2005). Even the New Critics who launched the assault on intentionalism in the first half of the last century were arguing about how to interpret literary works. They acknowledged that many texts ought to be interpreted in accordance with the apparent intent of their authors. *See, e.g.*, BINDER & WEISBERG, *supra* note 101, at 117. As the prominent New Critic Monroe Beardsley emphasized:

No one can deny that there are many practical occasions on which our task is precisely to try to discover authorial meaning, or intention: . . . . When there is a difficulty in reading a will or a love letter, or in grasping an oral promise or instruction, our primary concern is with authorial meaning.

MONROE C. BEARDSLEY, *THE POSSIBILITY OF CRITICISM* 31 (1970).

<sup>112</sup> *See supra* Part I.B.2.

## 1. Preliminaries

A text or an utterance is a particular instance or token of expression. Before we analyze whether, as intentionalists contend, the author's intended meaning determines or constitutes the true or correct meaning of her utterance, and thus the proper target of interpretation, we should get clear on what the alternatives might be. Unfortunately, literary critics, linguists, and philosophers of art and of language have reached no consensus on the number of distinct and plausible candidate meanings that an utterance might have: They employ a large number of different terms even when seeming to refer to the same concept.<sup>113</sup> So any brief statement of the state of contemporary understanding is necessarily both simplified and contestable. That said, here's one useful way to describe the range of possible meanings of an utterance:

*Word-sequence meaning:* "the meaning (or, usually, meanings) attachable to a sequence of words taken in the abstract in virtue of the operative syntactic and semantic (including connotative) rules of the specific, time-indexed, language in which those words are taken to occur."

*Utterer's meaning:* "the meaning an intentional agent (speaker, writer) has in mind or in view to convey by the use of a given verbal vehicle."

*Utterance meaning:* "the meaning that such a vehicle ends up conveying in its context of utterance—which context includes its being uttered by such-and-such agent."

*Ludic meaning:* "any meanings that can be attributed to either a brute text (a word sequence in a language), or a text-as-utterance, in virtue of interpretive play constrained by only the loosest requirements of plausibility, intelligibility, or interest."<sup>114</sup>

Some theorists, Knapp and Michaels most notably, appear to collapse word-sequence meaning and utterance meaning and to deny that they are distinct from utterer's meaning. On this view, language has no meaning apart from or prior to its use by a speaker or author on a

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<sup>113</sup> The most familiar distinction, initially proposed by Paul Grice half a century ago, lies between speaker's meaning and sentence meaning. See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* chs. 5–6 (1989). Yet theorists continue to debate exactly how Grice meant to distinguish these two types of meaning and whether the distinction, as Grice is best understood to have drawn it, can be defended. See generally Stephen Neale, *Paul Grice and the Philosophy of Language*, 15 *LINGUISTICS & PHIL.* 509 (1992). I will eschew the terms "speaker's meaning" and "sentence meaning" to try to reduce the risk that I be understood to incorporate aspects of the Gricean intentionalist apparatus.

<sup>114</sup> Jerrold Levinson, *Intention and Interpretation: A Last Look*, in *INTENTION AND INTERPRETATION* 221, 222–23 (Gary Iseminger ed., 1992).

given occasion. For well-rehearsed reasons, however, this is an extremely implausible position.

First, words must have meaning prior to their deployment by a particular speaker in a particular context, because the speaker must have a reason to select particular words (or signs or marks), rather than others, as the vehicle for conveying his intended meaning (aside, of course, from cases in which the speaker self-consciously coins new words). For example, if, wanting the whitish mineral that enhances a food's flavor, I know to ask you to "please pass the salt" and not to "please pass the gas" (let alone, to "flymx groppo hurplebinger"), that's because "salt" means the thing I have in mind antecedent to my choice to use it in this context, and "gas" doesn't.<sup>115</sup> Likewise, you know that my utterance of the word "salt" in this context is evidence of my wanting salt because of the meaning conventionally assigned to the word prior to my usage. Indeed, because intentions are states with semantic content, their content cannot be reduced to intentions on pain of infinite regress.<sup>116</sup>

Second, we need some notion of word or sentence meanings that are nonidentical to the author's intended meanings just to express the mundane idea that a speaker has misspoken or in some other way erred in use of language. We know that "'meaning' and 'authorial intention' are not conceptually identical . . . by the mere fact that we can meaningfully ask whether a given text really conveys the author's intention."<sup>117</sup> If I do ask you to "pass the gas" when I really want the salt, and then I complain about the consequences, we know that I have erred in my use of language. I erred precisely because "gas" does not mean "salt"—not because saltiness is naturally excluded from

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<sup>115</sup> As Fred Schauer has put the point:

Yet if language is [intentionalist] in this sense, it is hard to imagine why a word or a phrase is a piece of evidence of one intention rather than another intention. . . . Then, for language to be evidence of "something" rather than "something else," it must have some independent capacity without circular reference to the subject of which it is evidence. To put it somewhat more simply, the ability of language to be evidence of something presupposes that language, according to rules of language or according to conventions of language, can carry meaning.

If language itself can carry meaning, however, then it turns out that as a descriptive account of language, [intentionalism] is not plausible.

Frederick Schauer, *Defining Originalism*, 19 HARV. J.L. & PUB. POL'Y 343, 344 (1996).

<sup>116</sup> See, e.g., Colin Lyas, *Wittgensteinian Intentions*, in INTENTION AND INTERPRETATION, *supra* note 114, at 132, 146–47. For the qualification that this argument works only when (as is usually the case) the author's intentions are linguistic in character, see George Dickie & W. Kent Wilson, *The Intentional Fallacy: Defending Beardsley*, 53 J. AESTHETICS & ART CRITICISM 233, 237–38 (1995).

<sup>117</sup> Richard Shusterman, *Interpreting with Pragmatist Intentions*, in INTENTION AND INTERPRETATION, *supra* note 114, at 167, 168.

the combination of sounds or markings that constitute “gas,” but because of common usage and understandings. The simple idea that I misspoke is close to inexpressible if the only meaning of *meaning* is utterer’s meaning. For in that event, “gas” does mean salt. So, again, there must be conventional word meanings that are external and prior to the intent of an author. Because both of these arguments apply as well for conventional rules of grammar, it seems to follow that a given utterance has a word-sequence meaning that may or may not be the same as its utterer’s meaning.

We can make this discussion more concrete with an example, what I’ll call *Announcement*. Suppose that a radio station is giving away tickets to a concert on the Rolling Stones’ farewell tour (or, more realistically, the Stones’ *latest* “farewell tour”). The station offers free tickets to the first ten persons who correctly answer a set of trivia questions, with the caveat, specified in the contest announcement, that “no submissions will be eligible for consideration if received before 12:00 a.m. Thursday.” Suppose further that the author or promulgator of the announcement mistakenly believed that “12:00 a.m.” means noon and therefore intended to provide that applications are ineligible for consideration if received before midday Thursday. Nonetheless, the dictionary meaning of “12:00 a.m.” is midnight. Therefore, the word-sequence meaning of the announcement provides that applications are eligible for consideration if received any time on Thursday (or any day thereafter). In contrast, according to the utterer’s meaning of the announcement, some of these submissions are premature and thus ineligible for the tickets.

What about utterance meaning? The short answer is that it depends upon further information about the context of utterance. For example, if submissions had to be hand delivered during regular business hours, then the audience might infer that the speaker had misspoken and had intended to require that applications be submitted after Thursday noon. So too, perhaps, if the radio station had commonly followed a practice of commencing contests at noon. In circumstances such as these, the utterance meaning of the announcement would likely depart from the word-sequence meaning and correspond to the utterer’s meaning. But the context could be otherwise. Absent any contextual clues that might serve to undermine the word-sequence meaning—if, among other things, for example, entries could be submitted by email or fax—then the utterance meaning—what the announcement is taken to mean by the audience—would likely track the word-sequence meaning and differ from the utterer’s meaning. Let us suppose that this is the case in *Announcement*.

Suppose, finally, that a dispute arises. The contest organizer decides to exclude the handful of correct entries submitted between 12:00 a.m. and 12:00 p.m. Thursday on the grounds that they did not comply with the announcement, as interpreted in accordance with its utterer's meaning. The disappointed contestants, let us imagine, do not challenge the veracity of the radio station's assertion that, by "12:00 a.m.," the announcement's author had meant noon. But, they insist, that's not what the announcement means. In this context, the meaning of the utterance is its utterance meaning, not its utterer's meaning, and *that* meaning is midnight not noon. So, they conclude, the disputed entries are eligible under the contest rules, as set forth in the announcement. Who's right?

Nonintentionalists are apt to side with the disappointed contestants. Although it is often most sensible to interpret a text in accordance with its presumed utterer's meaning, in this case a host of arguments militate in favor of an interpretation that accords with utterance meaning. Not only is this the most equitable resolution, because a contrary interpretation would unfairly disappoint the contestants' reasonable expectations, but it is most consistent with the functions that public announcements are designed to serve—to provide clear notice and certainty, without requiring the addressees to inquire deeply beyond the face of the document. Intentionalists would seem to differ.<sup>118</sup> The meaning of the announcement, they say,

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<sup>118</sup> I say "seem" because, in correspondence, Jonathan Gingerich has argued that this example doesn't rebut intentionalism because the reasons for interpreting a text in any given context rest on the author's intention. E-mail from Jonathan Gingerich, J.D. Candidate, Harvard Law School, to author (Jan. 19, 2008, 20:38:00 EST) (on file with the *New York University Law Review*). In particular, we interpret the announcement to mean midnight instead of noon only because its author intended the text to mean whatever a competent speaker of the language would ordinarily understand it to mean. First and foremost, Gingerich supposes, she intended to put people on notice, and while she may also have intended that "12:00 a.m." mean "noon," the former intention was more important to her than the latter. If she were to read the text after it had been published, she would probably agree that it meant *midnight*. So, the intentionalist could say, when we ascribe the utterance meaning to a text, we're doing so because we've decided that the author of the text intended it to have whatever meaning it would ordinarily be given by a competent speaker of the language, and that this intention was more important to the author than other, possibly conflicting, intentions about the meaning of particular words.

I think this effort to avoid a conflict between intentionalists and their opponents does not succeed because it is an entirely contingent question whether the author of the announcement did intend the text to mean "whatever a competent speaker of the language would ordinarily understand it to mean." That could be, but I don't think that it must be, and I believe that our disposition to interpret the text to mean midnight doesn't depend on whether the author did in fact have the intention Gingerich posits. If the author (perhaps unreasonably) continues to insist that the announcement ought to be interpreted and enforced in accordance with utterer's meaning, I maintain that most of us would just respond that, actually, the announcement means midnight, and be done with it—without

is just the meaning intended by its author, which, by hypothesis, is that entries are ineligible if received prior to Thursday noon. Of course, they may hasten to add, that does not mean that we must enforce the announcement against the entrants. Whatever reasons nonintentionalists put forth for assigning to the announcement its utterance meaning intentionalists could (but need not) recognize as reasons for reforming the rules or choosing not to enforce them according to their meaning. Still, they say, the station manager is right, and the disappointed contestants wrong, about what the announcement means. It means its utterer's meaning, not its word-sequence meaning or its utterance meaning.

I submit that the nonintentionalist position is far more plausible. It seems to me, first, that the contestants should prevail and, second, that they should do so, not because we choose for reasons of fairness or otherwise not to enforce the meaning of the announcement, but because the contestants are right about what the announcement means. Of course, this is more assertion than argument. But at this early stage of the dialectic, my modest goal is simply to establish the strong *prima facie* grounds for believing that the author's intended meaning is not the only possible meaning, hence not the only possible target of interpretation, and therefore (to speak loosely) that the argumentative burden appropriately falls upon the intentionalists.

## 2. *One Bad Argument for Intentionalism*

An early gambit in the intentionalist offensive is to attack the idea that meaning could simply "inhere" in a text.<sup>119</sup> If the drippings from a stalactite make impressions on the ground that resemble the English word "dogs," it does not follow that the impressions constitute a text with the same meaning as the English word. The markings have no meaning precisely because they were not intended by an author to mean something. Similarly, if my toddler's scribbles resemble the English word "dogs," it does not follow that the "text" has the same meaning as do the same markings in the sentence "my daughter is very fond of our neighbor's dogs." Now, *that* sentence does mean something because I intend it to do so. But *what* it means (say the intentionalists) depends on my intention—whether I intended to convey my daughter's liking for our neighbor's two Irish Setters or for our neighbor's delicate and well-pedicured feet. Again, if I report that

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bothering to reconcile this fact with any other intentions the author might (or might not) have had.

<sup>119</sup> For a representative argument that proceeds along the following lines, see Alexander & Prakash, *supra* note 110, at 974–82.



“my daughter is very fond of our neighbor’s canards,” the meaning of the utterance depends on whether I intend, with that last word, to be speaking English or French. As Fish summarizes:

[L]exical items and grammatical structures by themselves will yield no meaning—will not even be seen as lexical items and grammatical structures—until they are seen as having been produced by some intentional agent. A text whose meaning seems perspicuous and obvious right off the bat is a text for which an intentional context has already been assumed . . . . It is the specification or assumption of intention that comes first; the fact of a text with meaning comes second. The text, in short, has no independence; it is an entirely derivative entity—something else (an animating intention) must be in place before it can emerge, *as* text—and as a derivative entity it cannot be said to be the source or location of meaning.<sup>120</sup>

Alexander and Prakash are more succinct: “[I]ntention free interpretation is an impossibility.”<sup>121</sup>

To this general line of argument, however, nonintentionalists have a ready rejoinder, for they need not contend that meaning simply inheres in shapes or sounds or even in lexical items fashioned around grammatical structures. Some nonintentionalists deny that we need to assume authorial intentions at all. For them, nonhuman artifacts can have semantic meaning.<sup>122</sup> But we need not go quite that far to rebut intentionalism, either generally or as applied to the Constitution. Even granting *arguendo* that fully intention-free interpretation is impossible, that doesn’t get the intentionalists where they want to go. We could agree that the intention of an agent to convey meaning is necessary for the text thereby produced to bear meaning—we can even agree that the text’s meaning depends upon the language that the author intended to employ and that it must even be sensitive to the category of utterance she intended to make (a poem, a law, an advertisement, etc.)—without agreeing that the meaning that the text thereby bears must be the meaning that its author intended.<sup>123</sup> As already noted, utterance meaning does depend upon context and convention; it just does not depend upon the particular meaning the speaker intended to convey. We might say, in other words, that some

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<sup>120</sup> Fish, *supra* note 23, at 635.

<sup>121</sup> Alexander & Prakash, *supra* note 110, at 967.

<sup>122</sup> See, e.g., Michael S. Moore, *Interpreting Interpretation*, in *LAW AND INTERPRETATION*, *supra* note 108, at 1, 8; Sinnott-Armstrong, *supra* note 111, at 474–77.

<sup>123</sup> See, e.g., Jeffrey Goldsworthy, *Moderate Versus Strong Intentionalism: Knapp and Michaels Revisited*, 42 *SAN DIEGO L. REV.* 669, 670 (2005) (arguing that authorial intention to convey meaning is necessary for text to have meaning but not sufficient to establish what that meaning is); Levinson, *supra* note 114, at 232 (distinguishing semantic from categorial intentions).

authorial intentions (to communicate and to use a particular language, for example, and perhaps also to create a text of a particular type or category) could be *preconditions* to interpretation (if they are even that), without any such intentions necessarily serving as the *targets* of interpretation. The fact (if true) that an interpreter must necessarily have “assumed an intention”<sup>124</sup> does not entail that interpretation must be a search for utterer’s meaning—it does not, that is, entail intentionalism. The question, therefore, remains: Is it a conceptual truth that interpretation is just a search for the author’s intended meanings, or could it be, *at least in some contexts*, an effort to discern or discover other meanings?

### 3. *Intentionalism and the Argument(s) from Rationality*

To support their negative answer, the intentionalists require an additional argument. Here, again, is Fish:

When there is no credible information about the intent of the author, you abandon interpretation, which *is* the effort to determine that intent and try something else. Trying something else, like putting a fictive intention in the place of the one you were unable to specify, might be just what the situation requires—you have to do *something*—but just don’t call it interpretation.<sup>125</sup>

If Fish’s insistence that you not call the something in which you’re engaged “interpretation” looks stipulative to you, you’re not alone. As Fish acknowledges:

At this point someone always objects, why not? And who are you to say what is and is not interpretive? Aren’t you just foisting (or attempting to foist) a stipulative definition on us? It is certainly true that if you want to call something (including flipping a coin for that matter) interpretation, I can’t stop you. And, as a matter of fact, I don’t have a strong stake in the *word* interpretation; it’s the rationality of the activity, by whatever name, that I am interested in, so let me rephrase: if what you’re trying to do is figure out what somebody meant by something, asking what somebody else might have meant by it is not going to get you there . . . .<sup>126</sup>

Much in this passage is distracting. Surely Fish is right to disavow any claims of *linguistic necessity*—views about what the *word* “interpretation” must mean—but none of his opponents thinks otherwise. He’s

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<sup>124</sup> See Fish, *supra* note 23, at 632–33 (“Words alone, without an animating intention, do not have power, do not have semantic shape, and are not yet language; and when someone tells you (as a textualist always will) that he or she is able to construe words apart from intention and then proceeds (triumphantly) to do it, what he or she will really have done is assumed an intention without being aware of having done so.” (italics in original omitted)).

<sup>125</sup> Fish, *supra* note 104, at 1129.

<sup>126</sup> *Id.* at 1133.

also right that *if* we're trying to figure out what somebody meant by something, then what we should ask about is, well, what that somebody meant. Again, this is not controversial. The contested question is whether we *should* be trying to figure out what somebody meant by something. And Fish's answer to that question is yes: We take interpretation to be a rational activity, and it can be rational only if it is a search for utterer's meaning. As he elaborates:

For interpretation to be a rational activity and not a form of what H.L.A. Hart calls "scorer's discretion," there must be an object prior to and independent of the interpreter's activities, an object in relation to which you can marshal and assess evidence and measure progress. The text cannot be that object because until an intention has been posited for it, it is radically unstable, it doesn't stand still. The desire of the interpreter cannot be that object because it is a moving and ever changing target; it doesn't stand still. The only object of interpretation that makes it a rational activity rather than a free-for-all is the intention of the author.<sup>127</sup>

Similarly, the literary theorists Knapp and Michaels explain that "the main point of intentionalism" is that "we can only make sense of what people are doing when they disagree with each other about the meaning of a text if we suppose that they regard the text as meaning what its author actually (and not just apparently) intended."<sup>128</sup>

This intentionalist argument should look very familiar, for Originalists of all stripes—those who do, and those who don't, embrace intentionalism—frequently contend that constitutional interpreters face just two choices: either to search for the original object or

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<sup>127</sup> *Id.* at 1138 n.98 (citation omitted). Although the passage above recognizes only three possible interpretive objects—authorial intention, inherent textual meaning, and the interpreter's desires—elsewhere Fish has contemplated a somewhat richer menu of alternatives: "Nor," he added (in that earlier formulation),

does a text mean what is specified by the conventions of the day because conventions do not have intentions and they do not author texts. Nor does it mean what the ordinary or ideal or reasonable interpreter would mean by the words because none of those authored the text either, and declaring any one of them the author by fiat would amount to rewriting, not interpreting.

Fish, *supra* note 23, at 644–45.

But these arguments for rejecting, as the target of interpretation, the meanings that conventions and hypothetical reasonable interpreters (or speakers) seem to direct are circular: That conventions do not have intentions and do not author texts is a reason why a text does not mean what the conventions prescribe only on the assumption that authorial intentions are the key to meaning. That one who would identify a text's meaning as what would be meant by an ordinary or ideal or reasonable interpreter effectively declares one of them the author by fiat and assumes that the meaning must come from the author and nowhere else. But both assumptions capture precisely what is in dispute.

<sup>128</sup> Knapp & Michaels, *supra* note 108, at 664. This is the overarching theme of HIRSCH, *supra* note 103.

simply to give effect to their own personal preferences.<sup>129</sup> Here, the intentionalists seem to be making the similar but broader claim that if we aren't searching for the authorially intended meaning, we're just making it all up, and whatever interpretation *is*, one thing it's clearly *not* is *that*. I believe that we have reached the fulcrum of the intentionalist argument and therefore that it warrants being parsed more carefully.

As I read them, passages of this sort can be parsed into two distinct but related arguments, relying on two distinct major premises about the nature of interpretation. The weaker version maintains (as I will put it) that some claimed interpretations of a text must, in principle, be excludable. Call this the exclusion premise. Stated differently, interpretation must proceed on principles that preserve a limited range of possible mappings of meanings onto texts and that ensure that a change in text at least has the potential to dictate a change in the set of permissible interpretations. Otherwise, putative interpretation is an unconstrained exercise in wish fulfillment. The stronger version maintains not merely that some meanings must be invalid as interpretations of a text but that a single meaning is uniquely correct, or that candidate interpretations must be capable of being true. Call this the truth premise. (Of course, the truth premise entails the exclusion premise, but not vice versa.) In both versions, this general premise about the nature of interpretation is married to a claim that the relevant conceptual constraint on the nature of interpretation can be satisfied if but only if the correct interpretation, and thus the target of the activity of interpretation, is the authorially intended meaning. The arguments can be formalized as follows:

*Argument for intentionalism—weak version*

W1: It is a conceptual truth about an act of interpretation that some putative interpretations are excluded. (The exclusion premise)

W2: The only way that some putative interpretations can be excluded is if interpretation is a search for the meaning intended by the text's author.

W3: Therefore, interpretation is a search for the meaning intended by the text's author.

*Argument for intentionalism—strong version*

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<sup>129</sup> See, e.g., DOJ SOURCEBOOK, *supra* note 19, at 4 (“[I]f the courts go beyond the original meaning of the Constitution . . . [t]hey transform our constitutional democracy into a judicial aristocracy, and abandon the rule of law based on a judge’s subjective notions of what is best for society.”); Barnett, *supra* note 4, at 651 (presenting strong originalism as only alternative to allowing government officials to give meaning to Constitution “in their unfettered discretion”).

S1: It is a conceptual truth about any act of interpretation that only one among the non-excluded interpretations is true or correct. (The truth premise)

S2: The only way that some putative interpretations can be rendered true or correct is if interpretation is a search for the meaning intended by the text's author.

S3: Therefore, interpretation is a search for the meaning intended by the text's author.

Two things make these formalizations attractive as alternative renditions of the intentionalist position. First, each presents intentionalism as, in essence, a conceptual claim, not a normative one, which is how intentionalists argue. Second, each presents the conceptual claim as the result of an *argument*, not merely as an assertion. I'll explain. One difficulty with assessing intentionalism is that, for those sympathetic to it, it's close to bedrock. Much like retributivists regarding criminal punishment find it hard to persuade skeptics because their arguments often so closely approximate the bare assertion that wrongdoers simply deserve to suffer, intentionalists' premises often look much like the conclusion that interpretation just is the search for intended meaning. Insofar as intentionalists' arguments proceed along the preceding lines, they can satisfy the requirement that their conclusion is nonidentical to their premises.

#### 4. *Nonintentionalism, Rationality, and Truth*

Because the two arguments for intentionalism just sketched are valid, nonintentionalists can rebut the conclusion only by challenging the premises—either the conceptual desiderata reflected in premises W1 or S1 or the contention (captured in premises W2 and S2) that intentionalism provides the only way to satisfy them.

The weak version need not detain us long, for it is pretty clear that W2 is false. Consider again *Announcement*. I can interpret that utterance to mean that entries are acceptable if received anytime Thursday or thereafter even if I don't intend to apply, indeed have no stake in the answer. And I can continue to believe that is the better interpretation even after I learn that the author meant to require that applications be submitted no earlier than twelve hours later. That's what she meant, I'll say, but that's not what the announcement means. I understand that intentionalists disagree. But disagreement is not argument. And insofar as their argument depends upon the view that my contrary position would render interpretation irrational because my efforts would lack "point and sense,"<sup>130</sup> or because, once we

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<sup>130</sup> Fish, *supra* note 23, at 644.

untether meaning from authorial intention, a text can mean just anything at all, their position is plainly mistaken. In short, the choice set that the intentionalist offers—interpretation is either a search for the authorially intended meaning or is utterly unconstrained—represents a false dichotomy. Utterance meaning is not ludic meaning. It is substantially constrained by conventions.

The strong version of the intentionalist argument is not quite as quickly dismissed. Even if interpretation of a text in accordance with its utterance meaning can satisfy the exclusion premise, intentionalists might argue, that does not satisfy the truth premise, because to recognize appropriate interpretive targets or touchstones *in addition to* utterer's meaning leaves us without a basis for selecting the correct meaning. Because nonintentionalists don't deny that utterer's meaning is frequently the correct meaning of a text—as in most conversational and reportorial contexts—then utterance meaning cannot *generally* supply the correct or true interpretation of a text. Only by privileging utterer's meaning as the correct meaning of a text can we ensure that interpretations can be validated across interpretive contexts. And if this is so, then to assign utterance meaning as the meaning of a text when it departs from utterer's meaning is to misinterpret it.

For two independent reasons, though, this strong argument is not persuasive. First, it is not obvious that there must be a true or correct interpretation in all cases. Many commentators seem to accept S1 as almost axiomatic. But as Joseph Margolis has observed, “[N]o one has *shown* why nonconverging interpretations cannot be legitimately defended.”<sup>131</sup> And it might be, he has further suggested, that—at least in the case of certain types of texts, like artworks—interpretations are more reasonably assessed, not as true or false, but as more or less plausible, where “criteria of critical plausibility . . . entail (1) compatibility with the describable features of given [texts] and (2) conformability with relativized canons of interpretation that themselves fall within the tolerance of an historically continuous tradition of interpretation.”<sup>132</sup> If something like this is right—and I am tentatively sympathetic—then S1 is false and S3 unsupported.

Second and alternatively, S2 is itself highly doubtful because it rests on the puzzling assumption that the truth conditions that validate one interpretation must be the same as those that validate all interpretations. Yet there's another possibility: The truth conditions for an

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<sup>131</sup> Joseph Margolis, *Robust Relativism*, in INTENTION AND INTERPRETATION, *supra* note 114, at 41.

<sup>132</sup> *Id.* at 48.

interpretation could vary across categories of utterance; what makes the interpretation of a personal letter or a grocery list true might not be the same as what makes the interpretation of a poem true, or an announcement, or a statute, or a constitution.<sup>133</sup> There are many deeper accounts of interpretation that would yield a heterogeneity of interpretive truth conditions. I couldn't possibly identify, let alone assay, them all. Nor can I elaborate and defend any particular theory in an already lengthy article whose main aim is critical, not constructive. Still, for purposes of illustration if nothing else, here's the skeleton of one account of interpretation that fits the bill: Interpretation might be understood as an effort to attribute to a text the meaning that would best serve a hypothetical reasonable interpreter's reasons for engaging in the activity of interpretation or would best serve her (possibly inchoate or not wholly conscious) criteria for success. And if the reasons that our hypothetical reasonable interpreter has for interpreting a particular text are varied, then so will be her criteria of success. The best or correct interpretation will thus be a complex function involving disparate desiderata all satisfied to varying degrees.<sup>134</sup>

To put the claim more simply, our reasons for interpreting the text at all might themselves provide reasons for or against the different interpretive targets. Attending to the reasons for engaging in the activity of interpretation in a given context can help us resolve when to interpret in accordance with utterance meaning, utterer's meaning, or something else. This "pluralist" claim is not, as one Originalist has suggested dismissively,<sup>135</sup> that using utterer's meaning is good enough for insignificant texts but that we should pursue a dif-

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<sup>133</sup> Some texts might occupy more than one category of utterance—either by virtue of an author's multiple categorial intentions or perhaps given needs of different audiences. An expatriate poet working as a spy might pen verse that is intended to function both as an elegy and as a report about the enemy's munitions capacity. As a clandestine report, the text's meaning is utterer's meaning; as a poem, its meaning might be something else.

<sup>134</sup> This view bears some similarity to Andrei Marmor's, the principal difference being that he would describe interpretations that do not seek to attribute to a text the meaning actually intended by its author as attributions of counterfactual intentions to fictitious or stipulated authors. See MARMOR, *supra* note 5, at 21–25. A kindred view has been advanced under the caption "hypothetical intentionalism" in Levinson, *supra* note 114. See also Daniel O. Nathan, *Irony, Metaphor, and the Problem of Intention*, in INTENTION AND INTERPRETATION, *supra* note 114, at 183, 202 n.29 (citing works); William E. Tolhurst, *On What a Text Is and How It Means*, 19 BRIT. J. AESTHETICS 3, 11–12 (1979). As I understand it, Marmor's approach and others like it preserve the structure or "grammar" of intentionalism but abandon its substance. I am weakly disposed to find the fictitious author device unnecessary and potentially misleading. But hypothetical intentionalism is enough to defeat Originalism.

<sup>135</sup> Cf. Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors Are Wrong for America*, 106 COLUM. L. REV. 2207, 2224 (2006) ("If we have

ferent meaning when it comes to texts that are, in some sense, important. Rather, the claim is that our object or target of interpretation should be sensitive to our reasons for engaging in the activity of interpretation. When interpreting the grocery list, aim for the author's intended meaning because he or she had knowledge, which you lack, that is relevant to your reasons for interpreting the document. Interpret the announcement in pursuit of utterance meaning because doing so best advances the values that surround and inform the use of announcements—to promote shared understandings, notice, fairness. And so on.<sup>136</sup>

On either of these alternative views—(a) that it need not be the case for all interpretations that there exists a truth of the matter, and (b) that proposed interpretations of a text are always truth-apt but that the truth conditions vary across utterance types—the proper target of interpretation can be sensitive to the type of text at issue and to the types of reasons for interpreting it (either the reasons that motivate an actual interpreter or those that would motivate the hypothetical reasonable interpreter). This would explain why we *can* make sense of disagreement about meaning (in the way, I am willing to suppose, that we cannot make sense of disagreements over which is tastier—chocolate or vanilla) without the subject of that disagreement necessarily having anything to do with authorial intentions: We can sensibly argue both about what our goals should be and about how they will be best served. When the reader's purpose in interpreting a text is to coordinate with the author or to glean information from him, she will rarely have any reason to engage in nonintentionalist interpretation. Or if she does have any such reason, her reasons to seek the authorially intended meaning will clearly dominate. But not all communication is designed to effect coordination or convey information. Constitutions, to take one salient example, might be designed—and, in any event, might be understood and valued—in part to secure good outcomes within broad constraints. Thus, the standards that determine whether a given interpretation is true (or, on Margolis's approach, more or less plausible) would not be determined by conceptual truths standing wholly apart from our reasons for engaging in interpretive activity. Rather, our reasons for engaging in interpretation (understood as *activity*) would partly determine the standards by which interpretations (understood now as the *output* of the activity) are measured.

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identified some method of finding meaning in inconsequential documents, we can apply the same method to finding meaning in consequential documents.”).

<sup>136</sup> I note in passing that utterance meaning and ludic meaning together describe a broad terrain that might, with profit, be more finely subdivided.



## 5. *Interpretation and Living Constitutionalism*

The immediately preceding analysis successfully counters the argument that intentionalism is demanded on the grounds that it alone can satisfy the critical conceptual premises regarding what interpretation is. Because we already saw that the other principal intentionalist arguments are insufficient (those relying on our untutored intuitions about the frequent propriety of intentionalist interpretation and on the proposition that meaning depends upon some sort of authorial intentions), that is enough to throw intentionalism into grave doubt. This final subsection briefly highlights one consequence of the rather general view of interpretation roughly sketched in Part II.A.4 as it bears on the subject of legal interpretation.

If you interpret a poem, or even a novel, your interpretation is essentially private. It is not an essential part of the nature of your activity that you can gain adherents to your view. This is *not* to say that you feel free to embrace, even just for yourself, any interpretation at all. Because we are already enmeshed in a set of cultural understandings that treat interpreting a text and authoring it as nonidentical (even if the precise nature or contours of the difference are not clear), you are likely not free, psychologically or phenomenologically, to offer interpretations that would serve to efface, for you, the interpretation/authorship distinction. (This is why the account of interpretation that I'm floating would not count as a genuine interpretation a reading motivated just to advance the putative interpreter's narrow self-interest. The reader can *claim* to be interpreting the text, but saying does not make it so.) My point, rather, is that it is no obvious threat to your project that you and your friends and neighbors might each come to interpret the poem differently.

Things are different when it comes to legal texts, whose interpretation has a public or shared aspect. And things are vastly different when it comes to the interpretation of legal texts by judges in legal cultures broadly like ours. It is surely part of their criteria for success for engaging in the activity of legal interpretation not only that the interpretation reached fits the judge's own (probably inchoate) sense of what distinguishes interpretation from authorship but also *that it has the capacity to win public acceptance as an interpretation*. Success on this count requires a grasp of the contemporary society's argumentative culture—i.e., it requires awareness of the sorts of arguments that might persuade in the relevant context. And while there exists no comprehensive or authoritative guidebook to, or restatement of, the society's argumentative norms, nobody doubts that such norms exist

and constitute only a fraction of the arguments that are possible.<sup>137</sup> This fact imposes additional constraints on the judicial interpretive enterprise and helps explain why, as Jefferson Powell observed two decades ago, “American constitutional discourse is not and has never been a free wheeling debate over personal political views, notwithstanding the almost hysterical claim of some contemporary originalists that this is what it has become.”<sup>138</sup>

The fact that acceptance-as-interpretation is likely to be a significant judicial criterion of success also helps make sense of several aspects of contemporary judicial, academic, and political practice. First, it helps explain why some Originalists, even those with little skill or training in the essentially philosophical questions concerning the nature of interpretation generally, would press their case so fiercely in the public square. The reason is not that intentionalism *is* true but that a sufficient change in popular understandings could, at least in principle, render nonintentionalist judicial interpretations substantially less eligible.

Second, it partially explains why judges are so often influenced by evolving popular understandings. Suppose, for example, that the meaning of the phrase “freedom of the press” originally intended by the authors and ratifiers of the First Amendment was “freedom from prior restraints,” or that the original meaning of “freedom of speech” was something like “freedom of political discussion,” or that “free exercise [of religion]” was originally understood to refer only to choices regarding which religious practices to exercise and excluded any supposed freedom to refrain from religious practice entirely. Today, however, all these phrases mean something much broader—inside the courts and on the streets. Precisely what they are generally taken to mean today is not essential to the present argument. The

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<sup>137</sup> Compare Gerald Postema’s explanation of how “the collaborative nature of” the common law disciplines analogical reasoning:

While it is always individuals who participate in analogical reasoning in law, they proceed with a keen sense that they deliberate, as Hart put it, not each for his own part only, but as members of a larger whole. . . . This capacity for reflective judgment is a social capacity, the ability to reason from a body of supposed shared experiences to solutions to new practical problems, to judge what one has good reason to believe others in the community would also regard as reasonable and fitting. These judgments can be made with confidence, not because one is a good predictor of other’s behaviour, but because one understands at a concrete level the common life in which they all participate.

Gerald J. Postema, *Philosophy of the Common Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 588, 607 (Jules Coleman & Scott Shapiro eds., 2002) (citation omitted). I am making a broadly similar claim about the interpretation of legal texts.

<sup>138</sup> H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 697 (1987).

important point is twofold. First, we should expect judges to treat conformity with present extrajudicial constitutional understandings as relevant to their interpretive project. Second, to the extent that is so, the intentionalists' fear that nonintentionalist interpretation must devolve into simple wish fulfillment is again undermined. It is possible for an interpreter to give effect to the contemporary meaning (or one among competing contemporary meanings) without it being that interpreter's personal preference. Therefore, to the extent that judges are influenced by popular (though contested) understandings of the Constitution, Fish's assertion that the intention of the author is "[t]he *only* object of interpretation that makes it a rational activity rather than a free-for-all"<sup>139</sup> is rendered false. And without that premise, his insistence that "[a]n interpreter cannot disregard [the author's] intention and still be said to be interpreting" is just ipse dixit.<sup>140</sup>

One could try to rehabilitate intentionalism in the face of this particular challenge (but not against the arguments advanced in the previous subsection) by contending that the interpretive community (although not individual interpreters) is, in some sense, the author of the interpreted text. Because some constitutional provisions are widely understood to mean something different from what their original authors intended (whether the authors are understood as framers or as ratifiers), we might explain that change on the grounds that, once a nonintentionalist meaning becomes sufficiently widely and strongly held, it amounts to the substitute of a new text for the old one. This is a counterintuitive idea, for in the most obvious sense, the text has not changed. But, Knapp and Michaels might say, it all depends on what you mean by "text." A "text" can "mean a string of

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<sup>139</sup> Fish, *supra* note 104, at 1138 n.98 (emphasis added).

<sup>140</sup> *Id.* at 1122. To this, the intentionalist might reply that even if some interpreters (like judges) might possibly be searching for the understandings of a text held by some other community of interpreters, members of *that* community must themselves be searching for some meanings, and *those* meanings cannot be contemporary meanings without circularity. And if the members of the community whose understandings judges seek are themselves aiming for the originally intended meanings, then, even if judicial interpreters can possibly be searching for popular understanding, they are properly described as searching for beliefs about intentionalist meanings. On this account, intentionalist meanings remain essential, though they are filtered, or provide meaning at one remove. See, e.g., Campos, *supra* note 107, at 391–92.

This argument fails, for nonjudicial interpreters might not be searching for original meanings, let alone original intentions about meaning. They might, e.g., be self-consciously constructing meaning. Or they might naively believe that language "just has" meaning. Or they might be searching for what a contemporary community with which they affiliate or identify takes the Constitution to mean. In short, the community need not have a theory at all. They might have only customs and patterns of practice. "I know it when I see it" might make for bad constitutional doctrine but need not be a false description of how ordinary people evaluate a proffered interpretation of a text's meaning.

signifiers (just the marks without their meanings) [or] a string of signs (the marks and their meanings combined).”<sup>141</sup> It is in the first sense that the text has not changed. In the second sense, it may well have. And if so, the community that has changed the meanings that attach to the constitutional signifiers has created a new text (in the second sense). Of course, because the change in signs occurred while the signifiers remained constant, and because even the change in signs is likely to occur slowly over time by imperceptible increments (much as a person grows old or goes bald), we will probably be unable to identify the moment at which the new text is authored. But it is unclear why that fact should be dispositive. Indeed, I think it possible that Knapp and Michaels might try to save intentionalism against this worry by relocating the author from the text’s initial writers and ratifiers to later interpretive communities.<sup>142</sup>

I am skeptical that this is a felicitous conceptualization. I am disposed to think that nonintentionalists have the more perspicuous account of how constitutional meaning changes and how searches for such changed meaning qualify as the “rational activity” of interpretation. But I needn’t engage that battle here. My beef is with Originalism, not with intentionalism. Even assuming *arguendo* that intentionalism could be preserved by recasting contemporary publics as the authors of new texts, the cost would be to sacrifice Originalism.

### B. *The Entailments of Authority*

Given the failure of intentionalism, the question becomes why judicial constitutional interpreters should *not* engage in the “rational activity” of seeking a meaning affected by post-ratification developments. Enter now the arguments grounded in the nature of constitutionalism. Like the intentionalists’ arguments about the concepts of meaning or of interpretation, these are arguments for hard Originalism. Unlike the former, though, they do not depend upon the meaning of “meaning” or the meaning of “interpretation” generally, but upon the interpretation of specifically legal texts, and (in some tellings) of constitutions in particular. On this view, to treat a consti-

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<sup>141</sup> Knapp & Michaels, *supra* note 108, at 666 n.37.

<sup>142</sup> *See id.* at 667 (“Legal texts are often the products of multiple stages of drafting and ratification, not to mention the revision that some say occurs in judicial review. But nothing in the logic of interpretation itself can tell us which of those stages should count as the one that confers on the text the meaning we are trying to interpret when we try to obey the law or to adjudicate it.”). I don’t see any obvious basis for allowing judicial decisions purporting to interpret the Constitution to count as a re-authoring of the text while categorically excluding purported constitutional interpretations that occur outside the courts—whether in the halls of Congress, the op-ed pages of the nation’s newspapers, or the coffee shops and Internet chatrooms frequented by the American public. *See supra* Part I.C.5.

tution as binding or authoritative entails that what we treat as binding is the original meaning. It is the original meaning of the Constitution that confers upon the Constitution its authoritative character, the fact that we take ourselves to be bound by it. This is among the most elusive of the arguments for Originalism and needs the most fleshing out.<sup>143</sup>

### 1. *Whittington and Writtleness*

The most sophisticated and influential argument along these lines has been presented by Keith Whittington. In its basic and familiar form, Whittington explains, the claim from authority “is that the practice of judicial review derives from the Court’s claim to be enforcing the supreme law of the sovereign people, which in turn requires an originalist approach.”<sup>144</sup> Unfortunately, he (rightly) observes, most originalists who have advanced this view have done so as mere assertion, not as argument.

In order to establish the persuasiveness of this justificatory argument, however, its advocates must be able to demonstrate that the enforcement of the Constitution as supreme law of the sovereign people requires an originalist interpretive method. In emphasizing that the enforcement of the Constitution as written requires the enforcement of the original intentions of those who wrote it, the originalists have largely begged the question of whether the two are in fact linked.<sup>145</sup>

According to Whittington, that link is supplied by textualism or by the writtleness of the Constitution.

Precisely why the writtleness of the Constitution dictates Originalist interpretation is not obvious. Originalists had placed heavy weight on writtleness long before Whittington.<sup>146</sup> But, as others have observed, they overwhelmingly tended to simply assume or to assert a false equivalence between the bindingness of “the con-

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<sup>143</sup> Arguments from authority often appear intermingled with arguments from legitimacy. See, e.g., Barnett, *supra* note 4, pts. 1–3; Kay, *supra* note 15, at 228, 232–34. Little needs to be said about the legitimacy-based arguments. If sociological legitimacy is at issue, then whether non-originalist interpretation enjoys legitimacy, and how much, are empirical questions—in fact, empirical questions the answers to which originalist scholarship does more to (try to?) effect than to resolve. If the theorists mean that non-originalist interpretation lacks normative legitimacy then it is a conclusion, not an argument. Presumably, the argument that would support such a conclusion sounds in authority, good consequences, or some combination of the two.

<sup>144</sup> WHITTINGTON, *supra* note 14, at 46.

<sup>145</sup> *Id.*

<sup>146</sup> Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 14–15 (1984).

stitutional text” and the bindingness of “the original understanding of the constitutional text.”<sup>147</sup>

In Whittington’s telling, however, the equivalence depends on “three broad and interrelated arguments.” Somewhat simplified, they are: (1) that the newly independent Americans were self-consciously reacting against a British tradition seen to poorly protect liberty precisely because the limits on governmental authority were unwritten and therefore weak and unstable; (2) that a clear text was thought necessary to enable the courts to enforce the Constitution as law; and (3) that writings, especially legal writings, are frequently employed to convey authorial intent. It follows from these arguments, Whittington concludes, that “a written constitution requires an originalist interpretation.”<sup>148</sup> Put another way, written constitutionalism “entails originalism.”<sup>149</sup> Like the defense of Originalism built on the concept of interpretation, then, the argument from authority treats Originalism as inescapable—so long as we treat the Constitution as authoritative.<sup>150</sup> Whittington’s originalism is hard and strong.<sup>151</sup>

I do not believe that Whittington’s arguments, alone or in combination, support strong originalism. To see why they do not, we need not go beyond Whittington himself. For if he is the best expositor and defender of the authority-based argument for Originalism, he is also the author of an especially clear and persuasive rebuttal.

After presenting his subtle argument that to treat our written Constitution as binding demands “an originalist judiciary,” Whittington promptly acknowledges that “[t]he originalist approach is not the only possible conception of the significance of a written text.”<sup>152</sup> In particular, “the nature of the constitutional text can be

<sup>147</sup> GOLDFORD, *supra* note 14, at 77.

<sup>148</sup> WHITTINGTON, *supra* note 14, at 50.

<sup>149</sup> *Id.* at 49.

<sup>150</sup> Whittington also provides extensive argument, grounded in the nature of popular sovereignty, to support the proposition that we should treat the Constitution as binding. *See id.* at 128–35. For the most part, we can safely put that aspect of his argument aside, careful and illuminating as it is, because no parties to the academic or judicial debate seem to disagree. *See, e.g.,* GOLDFORD, *supra* note 14, at 74–75; Larry Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 606 (1985). What does warrant mention, however, is the conclusion to Whittington’s analysis, where he moves from arguing that respect for popular sovereignty justifies our treating the Constitution as authoritative to contending that it also requires originalism as the proper method of constitutional interpretation. *See* WHITTINGTON, *supra* note 14, at 152–59. I discuss that argument *infra* Part III.A.1.

<sup>151</sup> *See also, e.g.,* Barnett, *supra* note 4, at 636 (“We are bound [to respect the original meaning of the Constitution] because we *today* . . . profess our commitment to a written constitution, and original meaning interpretation follows inexorably from that commitment.”).

<sup>152</sup> WHITTINGTON, *supra* note 14, at 61.

conceived of as a fixed referent for political debate, a promissory note, or as essentially indeterminate.”<sup>153</sup> Although each of these possibilities is interesting and repays attention, the first alone suffices to show that Whittington’s argument for Originalism fails.

The vision of a written constitution as a fixed referent for political debate, and thus not as a document demanding originalist interpretation, starts from premises that are hard to controvert. Far from being “simply a supreme legal guidebook addressed to judges,” Whittington observes, the U.S. Constitution is “essentially political.” Specifically, “[t]he citizenry necessarily formulate their own interpretations of the document and apply those understandings in their own political activities.” Conceived politically,

the constitutional text does not stress any reference to the original intent of the framers or recourse to the judges whom the originalists charge with discovering and applying that intent. As a political referent, the primary value of the written Constitution is not that its terms are fixed for judicial inquiry but that they are universally known, readily available to the average citizen [who can be mobilized to employ those terms in political debate].

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. . . Having reduced political principles to writing, the founders provided relatively clear guidelines for normal political practice. . . .

The letters of the document became living through their constant use in normal political discourse . . . . Becoming so ingrained in the political community, however, the text also loses its particular meaning. It can be appropriated for divergent and alien purposes, for the functioning of a political symbol rests on its utility in gaining support and inspiring action, not on its accuracy to historical detail. As the text is carried forth by many hands and into many debates, competence and inclination to elucidate original intentions decline. The Constitution ceases to be a means of communicating between the founders and the government and becomes a means by which the current citizenry communicate among themselves.<sup>154</sup>

I take as plausible and attractive this “political referent” picture of how we could accord significance to the writtenness of our Constitution without demanding judicial Originalism. To be sure, this account does not by itself dictate what interpretive posture judges should adopt. But if we conceive of the judge as a participant in this national discussion, albeit one with a particularized role, we might suppose that she should be armed with a large toolbox and possess the wisdom and good judgment to deploy her tools with sensitivity to vari-

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<sup>153</sup> *Id.* at 61–62.

<sup>154</sup> *Id.* at 62–65.

ations in issue and context. Sometimes she might play a stabilizing or constraining function by tethering her interpretation of constitutional meaning to original understandings; sometimes she should act in accordance with what she deems compelling demands of political justice; and sometimes she should, as would a good sports referee, just let the contending forces “play on” by deferring to whatever meaning comes to achieve widespread and stable popular acceptance.

Although Whittington does not expressly contemplate the vision of appropriate constitutional judging that I have just sketched, he does, as I have said, provide a fully imagined and sympathetic picture of the “political referent” conception of a written constitution from which my non-originalist vision is itself derived. Given that possible conception, and given the evident compatibility between that conception and judicial non-originalism, what about the writtenness of our Constitution compels Originalism?

Whittington’s answer is brief: “The idea of the constitutional text as a fixed referent in the general political discourse is . . . easily assimilated into originalism” by recognizing that “different interpretive strategies [are] appropriate to different constitutional interpreters.” Thus is introduced Whittington’s well-known distinction between “constitutional interpretation” and “constitutional construction.” The former is undertaken by judges and must be Originalist; the latter is a political activity and is limited only by its “dependen[ce] on a fixed text that can carry only a limited range of meanings.”<sup>155</sup>

The problem with this response is not that it’s wrong, precisely—not, in other words, that Originalism is incapable of coexisting with a conception of the text that serves as political referent for non-originalist extrajudicial constitutional discourse. The problem is that it’s inadequate to the task that Whittington (properly) sets for himself. The burden for one who contends “that originalism *is required* by the nature of a written constitution”<sup>156</sup> is to establish not merely that different proposed functions of writtenness can be “assimilated” into or “accommodated” by Originalism but that the proposed alternatives *cannot work*—that they are incoherent or internally contradictory, produce absurd consequences, violate moral principles that we endorse on reflection, or the like. Whittington argues that there not only is “a right answer to the construction of an interpretive standard but also that that answer is fixed in the essential forms of the Constitution and does not change.”<sup>157</sup> Unless and until Whittington

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<sup>155</sup> *Id.* at 78–79.

<sup>156</sup> *Id.* at 15 (emphasis added).

<sup>157</sup> *Id.*



demonstrates either that it is error to assign a “political referent” function to the writtenness of our Constitution or that non-originalist judicial interpretation is incompatible with such an assignation, the claim that Originalism is “fixed in the essential forms of the Constitution” cannot be maintained. The writtenness of a binding constitution might support Originalism, but nothing in Whittington’s argument establishes that it must, nor even that, all things considered, it should.

## 2. *Goldsworthy and the Go-Around*

While Whittington grounds Originalism in the authority of the Constitution, the distinguished Australian constitutional theorist Jeffrey Goldsworthy sees Originalism as necessarily entailed by the grant, to a majority or supermajority of the contemporary populace, of exclusive lawful power to amend the Constitution. Both the American and Australian Constitutions dictate the methods by which they can be amended, either stating or strongly implying that the procedures they specify constitute the exclusive method of altering the constitutional text.<sup>158</sup> Originalism, says Goldsworthy, is necessary

to ensure that [the amenders’] authority is not usurped by a small group of unelected judges, who are authorised only to interpret the *Constitution* and not to change it. It is concerned to ensure that if the *Constitution* is to be changed, the consent of a majority of the electors must first be directly and expressly obtained, and not taken for granted by a presumptuous elite purporting to read their minds or speak on their behalf.<sup>159</sup>

Non-originalist constitutional interpretation, in short, constitutes an unlawful evasion, or go-around, of the Constitution’s grant of an exclusive power to others. Originalism, on this view, is not only legally clear but also “morally compelling.”<sup>160</sup>

Notice that the concept of authority marshaled by Goldsworthy is wholly different from that relied upon by Whittington: Here it means not *bindingness* (of the Constitution itself) but *prerogatives* (of the contemporary amenders). But however the argument is most

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<sup>158</sup> Compare AUSTL. CONST. ch. VIII, § 128 (“The Constitution shall not be altered except in the following manner . . . .”), with U.S. CONST. art. V (specifying methods to propose and ratify amendments, implying but not stating that these methods are exhaustive).

<sup>159</sup> Jeffrey Goldsworthy, *Interpreting the Constitution in Its Second Century*, 24 MELB. U. L. REV. 677, 683 (2000) [hereinafter Goldsworthy, *Interpreting the Constitution*]. This is just the kernel of Goldsworthy’s more elaborate and sophisticated argument. Interested readers should also consult Jeffrey Goldsworthy, *Raz on Constitutional Interpretation*, 22 LAW & PHIL. 167 (2003), and Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 FED. L. REV. 1 (1997).

<sup>160</sup> Goldsworthy, *Interpreting the Constitution*, *supra* note 159, at 684.

illuminatingly classified, it runs into this obvious objection: The grant of an exclusive power to change the constitutional text is logically compatible with a practice in which the text's meaning can change over time. Judicial power to engage in non-originalist constitutional interpretation is simply not tantamount to a judicial power of textual amendment.

To be sure, if interpretive norms allowed "interpreters" to give the constitutional text "any meaning at all," then it would follow, as Goldsworthy argues, that the "'interpreters' would have unlimited power to change [constitutional] meaning at any time and in any way they should please." And that, we can agree with him, "would be absurd."<sup>161</sup> But that is simply not our world, by which I mean not only that it is not how judges act but also that our concept and practice of interpretation do not sanction the attribution to a text of "any meaning at all."

I think that Goldsworthy understands that the rejection of Originalist interpretation does not logically entail the endorsement of unbridled creativity under the guise of interpretation and that, in fact, non-originalists rarely if ever go to what Goldsworthy aptly deems "the extreme." Non-originalists, he says,

must agree that a constitution must have *some* meaning that cannot be changed except by the prescribed process of amendment. But in their view, that unchanging meaning has minimal content, stripped of all evidence of the founders' intentions and purposes other than what their words mean according to current rules of written English. The Constitution can then be interpreted in any way that is consistent with a current standard English dictionary.<sup>162</sup>

Now, I am no expert on Australian debates over constitutional interpretation. Perhaps Australian non-originalists are as dim as Goldsworthy makes them out to be. But I think it more likely that Goldsworthy himself fails to appreciate fully the nature of the constraints under which non-originalists understand themselves to operate.

Goldsworthy's basic error, in my view, is to suppose (in his first sentence) that the only (or even best) way to avoid the absurdity of allowing constitutional interpretation to be functionally equivalent to constitutional authorship is to insist that there be some core of constitutional meaning impervious to change. Indeed, that this was a mistake is strongly suggested by the remainder of the passage, for the conclusion Goldsworthy attributes to his non-originalist opponents—

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<sup>161</sup> *Id.* at 684–85.

<sup>162</sup> *Id.* at 685.

that the Constitution can be validly interpreted in any way so long as it is consistent with current English usage—does not obey the desideratum or inescapable criterion that he thinks they recognize. That is, to maintain that contemporary dictionaries supply the sole constraint on interpretation is to deny, not to affirm, that a constitution must have some meaning that cannot be changed except by amendment.

Non-originalists escape the “extreme” and “absurd” conclusion that interpreters (judicial or otherwise) may attribute any meaning at all to the Constitution, not by trying to isolate some unchanging core of meaning, but by recognizing (as Part II.A argued) that interpretation is constrained by the argumentative norms of a culture and of a practice.<sup>163</sup> An interpreter who advances a non-originalist interpretation must be prepared to give reasons both for the strength (or relative weakness) of the presumption she accords originalist aspects of the text (such as its original public meaning and the original intentions of its drafters or ratifiers) and for the worth of departing from those original aspects in the given case. Furthermore, these reasons are subject to evaluation, not only on their own terms, but also for consistency across cases. That is, she is answerable to the demand that the reasons she offers in a given case cohere with the arguments she has advanced and the results she has reached in other cases. These argumentative norms will be more or less constraining in different times and places. But nowhere are they so lax as to afford non-originalist interpreters anything close to the breadth of law-influencing authority they would enjoy were they invested with amendment power. The *value* of an exclusive power to amend the constitutional text might be greater in an Originalist world. But that is very different from claiming, as Goldsworthy appears to do, that the existence or intelligibility of an exclusive amendment power is threatened by non-originalism. That claim, I have just explained, is false.

### 3. *Raz and Reasons*

To be sure, that Whittington’s and Goldsworthy’s arguments fail does not establish that Originalism could not possibly be grounded in a compelling account of authority. If it’s unclear what such an argu-

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<sup>163</sup> This claim is developed further in DANIEL A. FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW* (2009). Elsewhere, I have put forth the tentative view that law in general can be fruitfully conceived of in terms of practice-constrained argumentation. See Mitchell N. Berman, *Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law*, in *THE U.S. CONSTITUTION AND THE RULE OF RECOGNITION* (Matthew D. Adler & Kenneth Einar Himma eds., forthcoming 2009).

ment would look like, however, we might seek guidance from the work of the doyen of authority theorists, Joseph Raz.

According to Raz's famous and influential account, a practical authority resolves disputes over what to do by issuing a directive that reflects and preempts the underlying reasons.<sup>164</sup> A purported authority is a real authority if persons subject to the authority would act in greater conformity with the actual reasons that bear on their situation by following the authority's advice than by trying to attend directly to the underlying reasons. It is a conceptual truth about law, says Raz, that it claims moral authority over its subjects and is capable, in principle, of having such authority. Because a directive, legal or otherwise, can possess authority only derived from the authority of a person (or persons), it might seem to follow that the Constitution's authors have authority, and that the Constitution can be authoritative, only if we defer to the meaning or message that the authors intended to convey to us. There is no other way, one might suppose, for the text to have practical authority.

But Raz himself argues against this conclusion.<sup>165</sup> Constitutions are usually designed to last a long time. Surely the U.S. Constitution was, and has. People's foresight, however, is limited. As circumstances change, it is implausible that what the Constitution's framers believed or intended could remain authoritative for the contemporary populace or for the contemporary officials. The Constitution can retain its practical authority, Raz concludes, only if updated by interpreters who vest the interpreted meanings with their own expertise, creating authoritative meanings by dint of their own authority.

Larry Alexander considers this possibility of "[a] legal system in which one group of authorities had the role of choosing the words . . . of legal norms but a second group then assigned *its* meaning to the words" only to dismiss it on the bare grounds that such a system would be "decidedly weird."<sup>166</sup> Frankly, I wish that he had favored us with more argument, for his intuition of weirdness might depend, more than he and his readers realize, on a nuanced understanding of the word "then." Dictionaries define the word to connote immediacy of temporal sequence—"[n]ext in time, space, or order; immediately

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<sup>164</sup> See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* pt. I (1986).

<sup>165</sup> See generally Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 152 (Larry Alexander ed., 1998).

<sup>166</sup> Alexander, *All or Nothing at All?*, *supra* note 108, at 382. A similar argument appears in PERRY, *supra* note 42, at 48.

afterward.”<sup>167</sup> So if Alexander is imagining a system in which one group authors a text and a second group immediately or very shortly thereafter assigns meaning to that text, then I agree with his verdict of weirdness. But few would disagree; non-originalists routinely emphasize that courts should presumptively treat original meanings of relatively newly adopted provisions as dispositive.<sup>168</sup>

So suppose that we replace Alexander’s freighted “then” with words that do not so strongly connote temporal immediacy. If the system provides that one group choose the words but a second group, *at some subsequent time*, can assign the meanings to those words that conventions will permit, the weirdness is very far from obvious. Indeed, the fact that this is the orthodox understanding in some contemporary constitutional regimes—Canada, most conspicuously—suggests that such a system is both intelligible and possibly attractive.<sup>169</sup> And the reason why a system like this might prove attractive is not hard to fathom. As we will discuss shortly, it might sensibly realize a good balance of stability and flexibility. Allowing a second and changing group to assign meaning (not just *any* meaning, mind you) to the text furthers flexibility, which means that it promotes the likelihood of interpretations that make for substantively good law. But putting the second group in the position of interpreters of a previously written text, and not of text-writers, constrains that latter group’s range of possible choices, thereby promoting stability and predictability.

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<sup>167</sup> AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 45, at 1793; *see also, e.g.*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 45, at 2370 (defining “then” as “soon after that : immediately after that”).

<sup>168</sup> *See, e.g.*, Farber, *supra* note 1, at 1105 (“[T]ext and original understanding exert the strongest claims when they are contemporary and thus likely to reflect current values and beliefs, or simply the expressed will of a current majority . . .”) (quoting Brest, *supra* note 24, at 229)); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482, 1537 (1985) (“The strength of arguments against the Court’s deviating from originalist interpretation of amendments decreases with the passage of time.”).

<sup>169</sup> The highest judicial tribunals in Canada have, since 1930, consistently interpreted Canada’s Constitution (and, later, its Charter of Rights) as “a living tree capable of growth and expansion.” *Edwards v. Att’y Gen. for Can.*, [1930] A.C. 124, 136 (P.C.) (appeal taken from Can.); *see also* Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 2004 SCC 79, ¶ 22 (Can.), available at <http://www.canlii.org/en/ca/scc/doc/2004/2004scc79/2004scc79.pdf>. The South African Constitution provides by its own terms that it can be interpreted in accordance with contemporary international norms. *See* S. AFR. CONST. 1996 ch. II, § 39(1). Of course, the judgment “possibly attractive” is intended to withhold a verdict. For sober criticism of the Canadian jurisprudence, *see* generally Grant Huscroft, *A Constitutional “Work in Progress”? The Charter and the Limits of Progressive Interpretation*, 23 SUP. CT. L. REV. 2D 413 (2004).

### III SOFT ORIGINALISM

Thus far, we have investigated just two of the many arguments for strong originalism—intentionalism and arguments from authority. We have yet to reach some of the most familiar—those sounding in democracy and popular sovereignty, the rule of law, separation of powers, predictability, stability, and the cabining of judicial discretion. Although this list is long, the number of truly discrete arguments is small, for the overlap among them is large. This Part proceeds as follows. Part III.A briefly considers and rejects efforts to channel some of these concerns into arguments for hard strong originalism. Part III.B explains why the laundry list of considerations upon which originalists rely cannot support the contention that an originalist interpretation will always be preferable to a non-originalist one. That is, soft strong originalism cannot be defended from an *act-consequentialist* posture. If, from such a perspective, some form of moderate originalism will always dominate strong originalism, however, the question remains whether there exists a convincing *rule-consequentialist* case for strong originalism. In fact, the oft-voiced originalist cry that “it takes a theory to beat a theory” can be understood as precisely such a claim. This cry is evaluated, and found wanting, in Part III.C.

#### A. *Soft Originalism Disguised as Hard Originalism*

The arguments that I now aim to assess under the heading of soft Originalism are frequently couched in hard terms.

##### 1. *Democracy and Popular Sovereignty*

Judge Bork has insisted that “only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy.”<sup>170</sup> Here, democracy (or democratic legitimacy) is thought to undergird hard strong originalism in much the same way as does, for Whittington, the bindingness of our written Constitution: Once we are committed to democracy, strong originalism follows necessarily.

Of course, as I have just stated it, this is mere assertion, not argument. To assess the view intelligently, many details will have to be filled in. Without focusing too heavily on individual strands, however, we can profitably distinguish two broad forms of argument. The first, which I take to be both more common and more easily dismissed, con-

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<sup>170</sup> BORK, *supra* note 20, at 143.

tends that Originalism is required by that synchronic conception of democracy that emphasizes rule by the contemporary people. On this account—which I will call the majoritarian argument—it is impermissible to override the policy preferences of contemporary electoral majorities *unless* in furtherance of the will of past (super) majorities. The second form of argument describes Originalism as entailed by a diachronic regard for the rule of the sovereign people over time. This view—which I will call the argument from popular sovereignty—insists that proper respect for democratic self-governance requires that courts give effect to embedded constitutional norms, interpreted in accordance with the understandings of the enacting (super) majorities.

Although these two versions of the democratic argument for Originalism have much in common, they are importantly distinct when presented in their purer and more stylized forms. The fundamental norm of the majoritarian variant is that courts should respect the will of contemporary majorities. By foregrounding majoritarianism and backgrounding constitutionalism, the norm does not itself supply affirmative reasons for courts to enforce the Constitution. Rather, it permits the Constitution to serve as a constraint on majoritarian preferences—but only when interpreted in accordance with original meaning. The popular sovereignty variant, in contrast, foregrounds constitutionalism and backgrounds ordinary majoritarianism. While providing no particular affirmative reason why ordinary politics should be guided by majoritarian norms, it justifies constitutionalism as a means to effectuate the people’s sovereign will over time, and it maintains that the sovereign will is respected only through originalist interpretation. We might say that the majoritarian impulse generates a *negative* version of Originalism: It does not provide reasons why, in all cases, the Constitution must be interpreted in an Originalist vein. Its more modest contention is that contemporary majoritarian preferences may not be overridden *except* in accordance with a superior majoritarian preference—a constitutional norm interpreted in accord with the ratifiers’ intent or understanding. The popular sovereignty impulse generates a *positive* version of Originalism: It provides an affirmative reason for Originalist interpretation in all cases.<sup>171</sup>

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<sup>171</sup> Although these arguments frequently appear under the heading of “social contract” theories, I eschew that term because it is variously deployed to capture each of the two variants I have now distinguished. Compare, e.g., Dorf, *supra* note 17, at 1766, 1771 (describing social contractarianism as justification for displacement of legislative action by unelected judiciary), with R. George Wright, *Dependence and Hierarchy Among Constitu-*

To see the difference more clearly, notice that the majoritarian argument says nothing about how the courts ought to interpret the Constitution when *not* striking down state action reflective of majoritarian preferences or judgments. So in a case that implicates the horizontal separation of powers, and thus presents parties on both sides of the dispute (Congress and the President) who can claim with some plausibility to be speaking for the people, it is not at all clear that majoritarianism demands that the courts enforce the Constitution in an Originalist vein. Similarly, when some law or policy *X* plainly does enjoy majoritarian support, it is not clear that majoritarianism precludes courts from *rejecting* a constitutional challenge, thus upholding *X*, by adopting a non-originalist constitutional interpretation. In contrast, the argument from popular sovereignty dictates Originalism in each of these sorts of cases.

The two strands or variants of democratic argument thus clarified, it should be plain that a hard argument for strong originalism cannot plausibly be fashioned from majoritarianism. Very generally, we might describe democracy as rule by the people.<sup>172</sup> But as “the people” do not rule directly in any large society, their judgments and preferences can be realized in laws and policies only indirectly. And the bare concept of democracy contains no specific blueprint for what the transmission mechanisms should be and how much friction is permissible. Under the American regime, the transmission mechanisms are complex and the obstacles to populist rule substantial: the simple fact of representation, bicameralism, the unavailability of popular referenda at the national level, the rejection of citizens’ “right to instruct” their representatives, enormous disparities of wealth and access, the electoral college, a massive federal bureaucracy that includes independent agencies, and others. Though none of these structures is immune from criticism, few people argue that these elements render our system *undemocratic*. Democracy is more flexible than that. As Judge Posner rightly observed: “The question posed by an originalist versus an activist or pragmatic judiciary is not one of democracy or no democracy. It may not even be a question of more

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*tional Theories*, 70 BROOK. L. REV. 141, 178 & n.248 (2004) (presenting social contractarianism as basis for requirement that original understanding be adhered to).

<sup>172</sup> This is a political conception of democracy. The conception of democracy that Tocqueville emphasized was social—it referred to social conditions, not political institutions. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835).



or less democracy . . . . It is a question of the *kind* of democracy we want.”<sup>173</sup>

In short, then, the majoritarian argument for hard strong originalism—that democracy entails respect for majority rule and that majority rule can be restricted only in furtherance of an originalist interpretation—rings false. And the argument isn’t salvaged by introducing the related concept of democratic *legitimacy*. The American citizenry might well view non-originalist judicial interpretation as legitimate.

The argument from popular sovereignty is more complicated but ultimately no more compelling. To see this, turn, once again, to Keith Whittington, who presents the argument in its best light. The argument is lengthy, and I cannot capture all its complexity. But reduced to its core, Whittington’s formulation of the argument from popular sovereignty is:

By enforcing the original terms of the constitutional contract as articulated by its authors, an originalist Court ensures that the efforts of the sovereign are not in vain, that its will is effectuated in its absence. Self-governance becomes an empty phrase if the intentions of authoritative popular bodies can be disregarded. From another angle, originalism secures the effectiveness of a future expression of the popular will. By maintaining the principle that constitutional meaning is determined by its authors, originalism provides the basis for future constitutional deliberation by the people. Present and future generations can only expect their own constitutional will to be effectuated if they are willing to give effect to prior such expressions.<sup>174</sup>

Considerations of this sort will often constitute powerful reasons for a court to adopt an originalist interpretation in a given case. But in an effort to channel these considerations into an argument for originalism both hard and strong, Whittington overstates his case.

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<sup>173</sup> Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1370 (1990). For a powerful and nuanced argument that judicial review promotes democracy, properly understood, see LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 194–221 (2004), in which the author argues that constitutional adjudication embodies and furthers democratic values by affording each member of the political community a fair and equal right to participate in rights contestation. See also Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB. AFF. 3, 14, 25, 28 (1992) (emphasizing Constitution’s political role as public charter expressing values and terms of political association that democratic citizens could reasonably accept, and arguing that democratic values are best respected when these fundamental terms of association are contested through public deliberation, not by appeal to original meanings).

<sup>174</sup> WHITTINGTON, *supra* note 14, at 156. This argument broadly parallels Goldsworthy’s argument in *supra* Part II.B.2.

To start, Whittington's quasi-Ackermanian suggestion<sup>175</sup> that the popular sovereign is present when drafting and ratifying constitutional amendments, but "absen[t]" otherwise, ignores another possibility: that the sovereign people might also be present in a meaningful sense that deserves our respect when they debate the proper interpretation of amendments passed in previous generations. Suppose, for example, that a substantial majority of the citizenry now understands a particular century-old constitutional provision, *P*, to stand for principle *X*, and that legislatures have adopted laws that are consistent with *X* but not with some other candidate interpretation of *P*, *Y*.<sup>176</sup> If the ratifiers, now all dead, intended *P* to mean *Y*, it is not obvious that *popular sovereignty* demands that the judiciary interpret *P* to mean *Y* instead of *X*. And such a claim would be especially doubtful given the greatly expanded scope of popular enfranchisement from the founding to the present.<sup>177</sup>

Nevertheless, Whittington claims that it is true, and for reasons both conceptual and consequentialist. But neither persuades, because each category rests on an overly binary picture of the relevant possibilities. To see that this is so, focus on Whittington's claim that "[s]elf-governance becomes an empty phrase if the intentions of authoritative popular bodies can be disregarded."<sup>178</sup> We can agree that self-governance requires that the text that the sovereign enacts into law is treated as legally valid. But the contention that self-governance is reduced to "an empty phrase" if the *intentions* of ratifying bodies are disregarded seems to rest on the uncertain premise that law necessarily embodies, or is constituted by, the intentions of its makers.

Furthermore, use of the verb *disregard* suggests an uncharitable and, I think, inaccurate picture of the most likely alternatives to Originalism. "Disregard" has two meanings: to pay no attention to,

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<sup>175</sup> Cf. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6–7 (1991) (advancing "dualist" conception of American democracy, pursuant to which "the People" govern only during periodic moments of "constitutional politics," with their government governing during ordinary times).

<sup>176</sup> One might be tempted to rejoin that, if a supermajority of Americans both understand *P* to stand for *X*, and prefer *X* to *Y*, then the supermajority can be expected to constitutionalize *X* in the form of a new constitutional amendment, so a judicial refusal to interpret *P* to mean *X* incurs no cost in the currency of popular sovereignty. This is unsound: A supermajority could favor *X* to an extent sufficient to implicate democratic values even if it is not quite large enough or sufficiently well-distributed geographically to secure a constitutional amendment.

<sup>177</sup> This reply to the popular sovereignty/social contractarian argument for Originalism is developed at greater length in Simon, *supra* note 168, at 1495–505.

<sup>178</sup> See *supra* quoted text accompanying note 174.

to ignore; and to fail to pay proper respect or attention to.<sup>179</sup> Vanishingly few non-originalists, if any, argue that the intentions of ratifying bodies should be disregarded in the first sense, i.e., ignored. The most common non-originalist position, rather, is that other considerations count *in addition* to the original public meanings of the constitutional text and the original intentions of the text's framers or ratifiers. Presumably, then, Whittington must be contending that non-originalism disregards the intentions of authoritative bodies in the second sense, i.e., pays it insufficient respect. Yet we have seen that all non-originalism is committed to is that original intentions (or meanings) need not be accorded *conclusive* significance in the interpretive enterprise. This being so, Whittington's argument appears to be that self-governance becomes an empty phrase if the intentions of authoritative bodies are not given conclusive weight, i.e., if they are even *sometimes* overridden by competing considerations. And that, in turn, seems to rest on the view that self-governance is empty, or illusory, if not total. Yet surely that is too stringent. Consider the non-originalist view that original intentions are entitled to substantial respect and should be departed from only for compelling reason and after the passage of generations. Whatever might be said of other positions that might be classified as non-originalist, it strikes me as implausible to argue that a view such as this renders self-governance a nullity.

Whittington's consequentialist argument for deducing Originalism from a commitment to popular sovereignty is that present and future generations can only expect their own constitutional will to be effectuated if they are willing to give effect to the intentions of prior ratifying or amending generations. Yet here again, the implicit picture that Whittington paints is overly dichotomous. A generation that witnesses, and participates in, a *consistent* failure to give effect to the intentions underlying prior constitutional acts might well think it pointless to take up the project of constitutional amendment itself.<sup>180</sup> But what if past meanings and intentions are accorded significant weight short of conclusiveness? I see no reason to think that a judicial practice of this sort would cause popular majorities to conclude that it would be pointless for them to entertain and attempt constitutional reform, especially if departures from a clear original understanding garner support only after the passage of long periods of time. After all, the fact that most of our projects (political and otherwise) face

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<sup>179</sup> AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 45, at 522.

<sup>180</sup> That is not the same thing as saying that they will think it pointless to engage in "constitutional deliberation." This is essentially the upshot of the first objection I registered.

uncertain prospects has not bred chronic apathy or inactivity. For example, many people expend great effort to elect their preferred candidates, even when they know that, as officeholders, those candidates will effectuate the preferences and values of their constituents and backers only sometimes, not always. Additionally, it's not clear that present supermajorities need much care if a judicial commitment to enforce original meanings wanes over time. What supermajorities care most about is entrenching norms against change in the present and foreseeable future. People discount the future when making most decisions; it's not clear why they wouldn't do so as well when ratifying and amending constitutions (even if they employ different discount rates).<sup>181</sup>

For all these reasons, Whittington's conclusion—"Given the need for judicial interpretation of the Constitution, popular sovereignty . . . dictates the adoption of an originalist method of interpretation"<sup>182</sup>—is unwarranted.

## 2. *Rule of Law and Separation of Powers*

If the democratic arguments for hard Originalism rest on excessively restrictive visions of what majoritarianism and popular sovereignty require, similar things can be said about recurrent efforts to ground hard Originalism in the rule of law,<sup>183</sup> for the rule of law is capacious and flexible in much the same way that democracy is.<sup>184</sup> Even granting arguendo that some of the values that flesh out the rule of law ideal—predictability, stability, publicity, prospectivity, procedural regularity, principled adjudication, and the like—are better promoted by judicial adherence to original meaning, that does not entail that an interpretive posture of, say, moderate originalism is *inconsistent* with the rule of law. Consider by analogy that, although many theorists have contended over the years that statutory law promotes this congeries of values better than common law does, very few would conclude that a commitment to the rule of law thereby forecloses common law adjudication.<sup>185</sup>

The common law likewise contradicts another common Originalist claim, namely that the principle of separation of powers

<sup>181</sup> I am grateful to Peter Smith for this point.

<sup>182</sup> WHITTINGTON, *supra* note 14, at 154.

<sup>183</sup> See, e.g., Saikrishna B. Prakash, *Overcoming the Constitution*, 91 GEO. L.J. 407, 432 (2003) (reviewing FALLON, *supra* note 100) ("[P]rominent originalists claim that only originalism can safeguard the rule of law . . .").

<sup>184</sup> An excellent analysis of the ideal, and its interrelated themes, is BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004).

<sup>185</sup> For a more extensive reply to rule of law arguments for Originalism, see Simon, *supra* note 168, at 1519–35.

compels Originalism because it forbids judges from making law.<sup>186</sup> To start, the idea that non-originalist judicial interpretation necessarily amounts to *lawmaking* appears to rest upon the implausible intentionalist tenet that interpretation *just is* a search for authorial intent.<sup>187</sup> But even waiving that objection, the argument rests upon an even more naive understanding of what separation of powers means. As Justice Jackson taught, “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”<sup>188</sup> The idea that lawmaking by judges cannot be squared with the principle of separation of powers relies, then, upon a brittle conception of that principle that is inconsistent with our entire national experience, conspicuously including the rampant lawmaking engaged in by the executive branch after the demise of the nondelegation doctrine.

The point could be driven home from a different direction. Consider that even originalism’s strongest defenders have acknowledged that we have never had a resolutely Originalist Supreme Court Justice, let alone an Originalist Supreme Court.<sup>189</sup> If either the rule of law or the principle of separation of powers *requires* Originalism, then it must follow that the United States has never respected the rule of law or the principle of separation of powers—conclusions that I hope will strike even Originalists as *reductions*. This should come as no surprise, for arguments that strong originalism is entailed by any of these principles, values, or ideals (or kindred others) routinely rely on the erroneous assumption that they can be realized only fully or not at all. They fail to appreciate that an interpretive approach, just like any feature of the system of constitutional governance, can satisfy or embody these values to greater or lesser degrees.<sup>190</sup>

To conclude that non-originalism is not *incompatible* with democracy or popular sovereignty, the rule of law, or separation of powers is

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<sup>186</sup> See, e.g., Graglia, *supra* note 23, at 1020 (describing Originalism as “almost self-evidently correct . . . a virtual axiom of our legal-political system, necessary to distinguish the judicial from the legislative function”).

<sup>187</sup> We have seen that this is Graglia’s view. See *supra* note 107 and accompanying text. So his claim that non-originalist judicial constitutional interpretation violates the principle of separation of powers is parasitic upon the proposition that nonintentionalist interpretation is self-contradictory.

<sup>188</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

<sup>189</sup> See, e.g., Posner, *supra* note 173, at 1381 (discussing Bork’s apparent view of matter); Scalia, *supra* note 82, at 852.

<sup>190</sup> Cf. Dorf, *supra* note 17, at 1772 (making same point about Originalist appeals to “legitimacy”).

to say that we cannot simply deduce strong originalism from such premises as that we accept one or another of these principles or values. It is to say, in other words, that these ideals do not feature into a hard argument for strong originalism. That does not mean, of course, that our commitment to ideals such as these has no bearing on the debate. They might yet support soft strong originalism, on the supposition that strong originalism would promote the values that underlie these ideals better than would any alternative.

### B. *Soft Originalism as Act-Consequentialism*

Yes, they might. To assess whether they do, let us start by imagining (as seems actual) that judges are able to select between originalist and non-originalist interpretations on a case-by-case basis. On this assumption, soft strong originalism would be vindicated if it would be preferable, *on each occasion*, for the judge to adopt the original meaning as her interpretation, either because one of these values is lexically prior to all others and is *always* best served by the originalist interpretation or because, although the ordering of relevant values is nonlexical, it just so happens that an originalist interpretation always optimizes their collective realization.

#### I. *A First Pass*

I suspect that, once the soft Originalist position is put in this way, most readers will find it so implausible on its face as to render a painstaking rebuttal unnecessary. But if its implausibility does not strike you, let me give you a flavor of how the fuller argument would go.

Consider the “democratic” arguments for Originalism. Although, as we have seen, such arguments take varied forms, perhaps the most common claim is that originalist interpretations lead to fewer government actions being held unconstitutional than do non-originalist ones, thereby leaving greater room for policy judgments made by the people either directly (through referenda) or, more commonly, through their elected representatives.<sup>191</sup> But as an army of commentators (Originalists conspicuous among them) have pointed out, it’s a contingent question whether an originalist approach will dictate that challenged actions be upheld or struck down.<sup>192</sup> In fact, Justices have

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<sup>191</sup> See, e.g., Graglia, *supra* note 23, at 1026 (arguing that democracy “is served when judge-restraining originalism permits the results of the democratic political process to stand”).

<sup>192</sup> See, e.g., WHITTINGTON, *supra* note 14, at 44 (“[J]udicial restraint . . . may not be consistent with . . . originalism per se.”); Maltz, *supra* note 11, at 775 (arguing that abstract constitutional guarantee of rights and courts’ enforcement of such rights are “two separate inquiries”).

often invoked originalist arguments to strike down action that their colleagues, relying more on non-originalist considerations, have upheld.<sup>193</sup>

The same is true about the supposed originalist values of predictability and stability, for original meanings and intentions are often very far from transparent. Any time some relevant actors (the general public, legislators, regulated entities, practiced litigators) assume that constitutional provision *P* means *X*, while a careful study of the history might reveal that the original meaning of *P* was *Y*, interests in the predictability of judicial decisions and the stability of the law would be better served by judicial adoption of the non-originalist interpretation.<sup>194</sup>

Indeed, the difficulty of the inquiry that Originalism mandates is meaningful for another, but related, reason. In praising Chief Justice Taft's examination into the original meaning of the presidential removal power in *Myers v. United States*,<sup>195</sup> Justice Scalia concluded that "[i]t is easy to understand why this would take almost three years and seventy pages. . . . [D]one perfectly it might well take thirty years and 7000 pages."<sup>196</sup> That would be no mark against Originalism if such resources as time and energy were unlimited. In the real world, though, a rigorous insistence on fidelity to the original meaning—a commitment to Originalism, in other words—might well translate into

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<sup>193</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (Thomas, J., concurring) (invoking purported original understanding of Commerce Clause to strike down congressional legislation, in contrast to dissenters who, emphasizing non-originalist arguments, would uphold legislation); *United States v. Lopez*, 514 U.S. 549 (1995) (same); *Maryland v. Craig*, 497 U.S. 836, 860–61 (1990) (Scalia, J., dissenting) (relying on purported original meaning of Confrontation Clause to advocate invalidation of state procedures allowing testimony of young children in sexual abuse cases by closed-circuit television); *Morrison v. Olson*, 487 U.S. 654, 697–99 (1987) (Scalia, J., dissenting) (arguing that original understanding of executive power renders Independent Counsel Act unconstitutional); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 568–72, 581–83 (1985) (Powell, J., dissenting) (relying on purported original understanding of Tenth Amendment to argue for striking down congressional legislation that majority upheld); *INS v. Chadha*, 462 U.S. 919, 946–51, 967–68 (1983) (relying on purported original understanding of presentment, bicameralism, and separation of powers to strike down one-House veto legislation, over non-originalist dissent); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 449, 453–54 (1934) (Sutherland, J., dissenting) (relying on original understanding of Contracts Clause to contend that state legislation upheld by majority is unconstitutional).

<sup>194</sup> Cf. 1 F.A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 116 (1973) (“[J]udicial decisions may in fact be more predictable if the judge is also bound by generally held views of what is just, even when they are not supported by the letter of the law, than when he is restricted to deriving his decisions only from those among accepted beliefs which have found expression in the written law.”).

<sup>195</sup> 272 U.S. 52, 136 (1926).

<sup>196</sup> See Scalia, *supra* note 82, at 852.

a yet greater reduction in the Supreme Court caseload, which itself would translate into less clarity and less uniformity in our law.

In sum, even if we focus on just the limited number of values that Originalists most doggedly invoke, it is false that the originalist interpretation will always dominate all non-originalist interpretations.

## 2. *A Second Pass*

But the case for soft strong originalism is even weaker, for we have thus far ignored Raz's helpful distinction between merit reasons and nonmerit reasons for changing a Constitution or for interpreting it in a particular way. A "merit reason" to interpret a constitutional provision to mean *X* bears on the value, or merit, of living under a Constitution with that meaning. It contrasts with reasons for an interpretation "that do not derive from the good of being subject to" a norm with that particular meaning.<sup>197</sup> The arguments for originalist interpretation that we have addressed thus far all depend upon nonmerit reasons: We should interpret provision *P* to mean *X* because that was the original meaning and because following the original meaning promotes, say, predictability or greater latitude for popular sovereignty, *not* because, all else being equal, meaning *X* would be better for the community than would meaning *Y*.

To be clear, observing that the standard arguments for Originalism rely on nonmerit reasons is not pejorative; a merit reason for one interpretation need not outweigh a nonmerit reason against it. But the observation does suggest an obvious consideration for choosing not to adhere to the original meaning—namely, that the non-originalist interpretation *Y* is supported by merit reasons and that the balance of merit and nonmerit reasons combined favors interpretation *Y*. In short, even insofar as an originalist interpretation in a given case better promotes stability, predictability, and democracy, a non-originalist interpretation might be substantively better—"better" not by reference to substantive values that Originalists contest but by reference to widely accepted values like welfare, preference-satisfaction, security, liberty, equality, and justice, and even by reference to widely accepted conceptions of these values.

The distinction between merit reasons and nonmerit reasons lends support to the oft-expressed view that non-originalism better accommodates the tradeoff between stability and flexibility than Originalism does,<sup>198</sup> for it clarifies the notion that, in some nontrivial number of cases, originalism produces less good results. In a recent

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<sup>197</sup> Raz, *supra* note 165, at 174.

<sup>198</sup> See, e.g., GOLDFORD, *supra* note 14, at 88–89; Raz, *supra* note 165, at 186.



article, however, John McGinnis and Michael Rappaport challenge this idea by urging that Originalism can be defended on “pragmatic” or consequentialist grounds.<sup>199</sup> Now, a pragmatic defense is not entirely novel. It is plausible, I think, that all arguments for soft originalism are, in essence, pragmatic:<sup>200</sup> They rest on the idea that certain values are better served by Originalism, even if these values are not the goodness of the particular results reached but rather the goodness that is realized by virtue of how they are reached. If, as they claim, McGinnis and Rappaport “have mapped out a new field of engagement,”<sup>201</sup> it is by contending that Originalism produces substantively good decisions, i.e., that the balance of merit reasons supports originalist interpretation.

Put in a very small nutshell, they maintain that constitutional provisions are likely to produce substantively good results when read in line with their original public meaning because they were enacted under supermajority voting requirements. Fleshed out in slightly greater detail, their argument appears to rest heavily on the premises (1) that all else equal, the substantive goodness of a decision is likely to be proportional to the size of the majority that endorsed it, and (2) that ratification of the Constitution, or of a constitutional amendment, is a (supermajoritarian) decision not merely to enact a rule but to enact a rule with the meaning that the decisionmakers understood it to have. For these reasons, perhaps conjoined to others, the consequences of adhering to that rule at some later time are likely to be particularly good if and only if that rule is construed in accord with its original meaning.

I suspect that McGinnis and Rappaport oversell the extent to which the supermajoritarian genesis of the constitutional text con-

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<sup>199</sup> John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 Nw. U. L. REV. 383, 383 (2007).

<sup>200</sup> Others have argued that consequences broadly conceived supply the touchstone for evaluating any theory of legal interpretation. See, e.g., Posner, *supra* note 173, at 1373, 1379 & n.76; Simon, *supra* note 150, at 613–14; Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 COLUM. L. REV. 2234, 2238 (2006). I am disposed to think this is correct because I think it implausible that any single interpretive approach would be the subject of a deontological obligation or is entailed by the right understanding of concepts such as *law*, *meaning*, or *interpretation*. If the claim is true, however, it can only be so if we conceive the consequences potentially at issue broadly enough to encompass not only the value of the particular holdings that a given theory reaches (or is likely to reach) but also all the long-term and indirect effects that different interpretive postures and methods produce. Moreover, I would hope that a comparative consequentialist evaluation of different interpretive theories could take into account qualities attaching to the act of interpretation itself—as, for example, whether it exemplifies a judicial virtue or vice. But I am open to being persuaded otherwise. (I am grateful to David Bernard and Ben Zipursky for provoking my doubts on this score.)

<sup>201</sup> McGinnis & Rappaport, *supra* note 199, at 396.

duces toward original meanings not only that are substantively good at the time of ratification but that also remain desirable for generations.<sup>202</sup> But the core defect of their pragmatic defense of Originalism—much like the defect at the heart of Whittington’s argument from authority—runs much deeper: The arguments don’t support the conclusion. Even if we grant McGinnis and Rappaport that “the passage of entrenchments under supermajority rules would . . . produce *on average* good entrenchments,”<sup>203</sup> or that “appropriate supermajority rules *tend* to produce desirable entrenchments,”<sup>204</sup> that is a country mile from establishing that courts always ought to follow the original meaning of those entrenchments, which is precisely what Originalism maintains and what McGinnis and Rappaport expressly contend.<sup>205</sup>

Admittedly, the authors are not wholly unaware of this argumentative gap. But to bridge it they offer only the fairly tepid opinion that, while Originalism is not ideal, “it is likely to have better consequences than competing approaches.”<sup>206</sup> Conceivably so. Yet the argument they supply for this judgment is both dishearteningly brief and much too heavily focused on the radically ad hoc alternative of “case-by-case pragmatism.”<sup>207</sup> What about, say, the moderate originalist alternative that judges should abide by the original meaning except when they are confident that an entrenchment’s original meaning is quite bad and that a majority of the citizenry shares that

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<sup>202</sup> Most notably, it seems to me that McGinnis and Rappaport’s interesting analysis goes more toward establishing (a) that entrenchments are more likely to be good if adopted via supermajoritarian procedures than if adopted via merely majoritarian procedures, than (b) that the expected consequences of the original meaning are likely to be better than the expected consequences of some other candidate meaning when measured at the time of interpretation. Secondly, and independently, I worry that the authors are insufficiently sensitive to the fact that the 1789 Constitution was ratified as a whole, not provision by provision. This fact would seem to mitigate very substantially the extent to which its supermajoritarian passage bears on the goodness of any given part of the text, making their argument as a whole much less persuasive with respect to judicial interpretation of the articles than with respect to the amendments. Finally, I am not wholly persuaded by the authors’ efforts, *see id.* at 394–95, to rebut the objection that the heuristic value of the supermajoritarian process is diminished by the exclusion of large segments of the population (most notably women and blacks, but also unpropertied white males) from participating in the drafting or ratifying of most of the text. Some of these objections, and others as well, are elaborated in Ethan J. Leib, *Why Supermajoritarianism Does Not Illuminate the Interpretive Debate Between Originalists and Non-originalists*, 101 Nw. U. L. REV. 1905 (2007).

<sup>203</sup> McGinnis & Rappaport, *supra* note 199, at 386 (emphasis added).

<sup>204</sup> *Id.* at 385 (emphasis added).

<sup>205</sup> *Id.* (explaining that their argument “requires that judges interpret the document based only on its original meaning”).

<sup>206</sup> *Id.* at 391.

<sup>207</sup> *Id.* at 391 n.37.

view? Unless and until they comparatively assess this and a multitude of other possible interpretive approaches, McGinnis and Rappaport are not entitled to their conclusion. They have shown, at most, only that adherence to original meaning is likely to produce better and more just public policy than is sometimes supposed. They have not made the case for strong originalism.

### 3. *Summary*

This Section has observed, following Raz, that there exist both merit and nonmerit reasons to favor (or disfavor) competing interpretations of the constitutional text. It has argued that, in any given case, any one of these reasons (or values) might weigh in favor of one or more non-originalist interpretations against the Originalist interpretation. And it has concluded from this that the balance of reasons will sometimes favor a non-originalist interpretation. To be sure, it has *not* argued that, in the aggregate or over the mine run of cases, non-originalist interpretations are likely to serve the range of relevant values (popular sovereignty, predictability and stability, welfare, justice, etc.) better than do interpretations that adhere to the supposed original meaning. But that is not to the present point. Recall that the choice the debate over Originalism presents is not between following the original understanding always or following it never. It is between following the original understanding always and following it sometimes (perhaps very often, perhaps not). It seems to follow, then, that a Supreme Court Justice who is not legally bound to interpret the Constitution always in accord with its original meaning and is sensitive to the wide variety of values that large numbers of commentators have identified as relevant to the choice among competing interpretations would at least *sometimes* endorse non-original meanings. She would, that is, reject strong originalism. Put another way, once we fully appreciate that genuine alternatives to strong originalism include interpretive postures that give substantial, albeit not conclusive, weight to the original meaning, that soft arguments can be mustered to prefer strong originalism to all positions that fall within moderate originalism does not seem remotely plausible.

#### C. *Soft Originalism as Rule-Consequentialism*

The conclusion of the preceding Section ought not to be controversial once we disabuse ourselves of the hard Originalist contentions that interpretation just is a search for authorial intent or that Originalism is entailed by a commitment to the bindingness of the Constitution. If correct, it suggests that the soft arguments marshaled

in support of strong originalism are more apt to support something quite different—perhaps something as ill-defined as the instruction that judges should “follow original meaning except when the balance of considerations strongly suggests otherwise.” This is a form of moderate originalism, hence (if you’ll excuse the appearance of contradiction) a form of non-originalism.

The most promising objection to this conclusion challenges the premise with which the preceding Section started. That premise, recall, was that judges are free to choose between originalist and non-originalist interpretations on a case-by-case basis. But because we are not (uniformly?) blessed with Solomonic judges, one might conclude that they ought *not* be free to select between originalist and non-originalist interpretations based only on their views as to what makes most sense in a particular situation. Instead, the argument would run, they should proceed by means of an articulable *rule*; and the form of moderate originalism just proposed that might be conceded to dominate Originalism is insufficiently rule-like.

Precisely why judicial interpreters of the Constitution should proceed by means of an interpretive rule, and not a standard, is rarely spelled out with the specificity one might hope for, even if the conviction that they should emerges frequently and clearly enough. The task of this final Section, accordingly, is to assess whether a convincing case for that proposition can be maintained. For if it cannot, then we will be left with the conclusion that some form of moderate originalism dominates strong originalism, which is enough to vindicate non-originalism against Originalism. Very possibly, the position under scrutiny appears most familiarly in the Originalists’ frequent appeal to the slogan that “it takes a theory to beat a theory.”<sup>208</sup> So in considering the rule-consequentialist version of soft Originalism, that’s where we will start.

### *1. Does It Take a Theory?*

Broadly speaking, we might distinguish two ways to defeat a theory. Sometimes we do so by offering a competing theory that looks better by reference to various epistemic criteria. Other times, however, we attack it, let us say, “directly,” by demonstrating that it rests on unsound premises or invalid reasoning, or by falsifying it empirically. In one of the most important sets of astronomical observations, for example, Tycho Brahe observed that the path of the great comet of 1577, when reconstructed using entirely conventional techniques for constructing planetary orbits from parallax observations,

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<sup>208</sup> Barnett, *supra* note 4, at 617; see also Farber, *supra* note 1, at 1102–03.

cut through the supposedly solid spheres that defined the planetary orbits. From these observations, he rightly concluded that the Ptolemaic model of solid spheres was mistaken—a conclusion that soon won widespread acceptance—even though Tycho did not then have a competing theory of the planetary system and in fact rejected the Copernican theory.<sup>209</sup> Closer to home, I suppose that many students of jurisprudence accept Hart’s critique of Austin’s command theory of law without accepting Hartian positivism and even while remaining agnostic about any of the presently reigning competitors.<sup>210</sup> If the arguments thus far presented against Originalism are persuasive, then that should be enough to defeat it—even without a fully developed competing theory and, indeed, even without a partially articulated one.

To be sure, judging is a practical enterprise whereas understanding the solar system or what law is are theoretical inquiries. One might suppose, therefore, that the fact that astronomers and general jurists are entitled to reject a candidate theory without embracing an alternative does not entail that jurists may simply reject originalism without articulating and defending a substitute. While the distinction between theoretical and practical endeavors might be meaningful for other reasons, the conclusion that judges or legal theorists must settle on an interpretive theory or approach rests on a confusion—a confusion that emerges clearly if we attend carefully to Scalia’s formulation of the “it takes a theory” objection. As Scalia puts it:

“You can’t beat somebody with nobody.” It is not enough to demonstrate that the other fellow’s candidate (originalism) is no good; one must also agree upon another candidate to replace him. Just as it is not very meaningful for a voter to vote “non-Reagan,” it is not very helpful to tell a judge to be a “non-originalist.” If the law is to make any attempt at consistency and predictability, surely there must be general agreement not only that judges reject one exegetical approach (originalism), but that they adopt another. And it is hard to discern any emerging consensus among the nonoriginalists as to what this might be.<sup>211</sup>

A court’s job in a constitutional case is to decide cases agreeably to the Constitution. In carrying out that responsibility, it is reasonable to suppose, at least as a first pass, that the Supreme Court must decide what the Constitution means or which meaning, among plausible candidates, to endorse. In fact, non-originalist Justices typically do select

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<sup>209</sup> I am grateful to Larry Laudan for suggesting this example.

<sup>210</sup> I criticize Hart’s account in Berman, *supra* note 163.

<sup>211</sup> Scalia, *supra* note 82, at 855.

a meaning. Or, to be more precise, there is nothing about non-originalism *qua* non-originalism that prevents them from selecting a meaning.<sup>212</sup> What Scalia chastises them for is not selecting or articulating a theory or decision procedure *for selecting that meaning*.

But why should they be required to do *that*? The voter (to return to Scalia's analogy) need not decide on a test for deciding on a candidate. Admittedly, she *could*. She could always vote for the Democrat, or for the Republican, or based on alphabetic priority. Yet we'd not criticize her were she to decide for or against Reagan based on an all-things-considered judgment that takes into account each candidate's experience, party affiliation, character, policy proposals, and many more factors. Indeed, her decisionmaking strategy for all elections could be: Vote for the incumbent unless persuaded, all things considered, that the challenger would be significantly better. The moderate originalist is in no worse position than this hypothetical voter, for it is far from self-evident that constitutional interpreters need a more determinate and spelled-out theory in selecting meaning than the voter needs in selecting a candidate.<sup>213</sup> Thus, Scalia's example actually cuts in precisely the opposite direction of his desired conclusion.

In short, those who would defend Originalism on the ground that opponents haven't proposed something determinate in its stead and that "it takes a theory" might be confusing the need to select a meaning with the need to select a protocol for selecting that meaning. To hope for the latter is human nature; to demand it is simply unreasonable. Understanding what law is is hard. So too is articulating a fully satisfactory normative account of judicial constitutional interpretation. This is not to gainsay that non-originalists likely would win greater success in the public square if they could coordinate an interpretive approach better suited to sloganeering. But the point of this Article is neither to persuade the general public nor to predict the path of popular attitudes.<sup>214</sup> My aim is to persuade a scholarly audi-

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<sup>212</sup> The point of this more precise formulation is to recognize that a non-originalist judge of a more minimalist bent might announce a bottom-line conclusion or might craft implementing judicial doctrine, both without announcing an understanding of constitutional meaning. Cf. *supra* note 100 (discussing various carvings of meaning/doctrine distinction).

<sup>213</sup> That is not to deny, of course, that the judge must have *reasons* for her interpretation and also an obligation to provide them publicly, in her opinion. But one can recognize considerations as reasons without having endorsed a more comprehensive set of general principles—a *theory*—from which those reasons follow.

<sup>214</sup> I take no position on whether other works that *are* designed to persuade a general audience to reject Originalism are properly criticized for failing to offer a clear, easily digested alternative. For such a criticism, see Ryan, *supra* note 86, at 1627, criticizing recent books by Justice Breyer and by Cass Sunstein on precisely this ground. For recent ruminations on the Right's largely successful deployment of Originalism to mobilize con-

ence—an audience which, even if it can't correct popular misunderstandings, might at least refrain from exacerbating them.

So, of what am I trying to persuade you? That, once we reject strong originalism, there can be no plausible and attractive account of constitutional interpretation that looks more theory-like? No, not quite. My point here is only to acknowledge that that might be our fate and, if it is, that we can live with it. On this score, consider the words of Laurence Tribe:

To prevent th[e] interpretive task from degenerating into the imposition of one's personal preferences or values under the guise of constitutional exegesis, one must concede how difficult the task is; avoid all pretense that it can be reduced to a passive process of *discovering* rather than *constructing* an interpretation; and replace such pretense with a forthright account, incomplete and inconclusive though it might be, of why one deems his or her proposed construction of the text to be worthy of acceptance, in light of the Constitution as a whole and the history of its interpretation.<sup>215</sup>

Tribe recognizes that such a posture leaves him exposed “to the charge that [he has] no genuine ‘theory’ of [his] own (at least no global, unified theory that can be reduced to a sound bite) defining precisely how the task of textual interpretation *should* proceed.” But he concludes that that might be because no “defensible set of ultimate ‘rules’ exists. Insights and perspectives, yes; rules, no.”<sup>216</sup>

Of course, Tribe might be wrong. But it is surely worthy of note that radically nonalgorithmic views of this general sort, sometimes dubbed “pluralism”<sup>217</sup> or “eclecticism,”<sup>218</sup> have been put forth by many of our most sophisticated constitutional thinkers, operating from diverse points on the political spectrum. As Farber put it:

We may have to be content with an approach to constitutional law that leaves some room for judicial discretion while attempting to channel that discretion. In other words, the real problem may not be that originalism is less desirable than some other global theory of constitutional law, but that no global theory can work. . . . Perhaps, in other words, constitutional interpretation is best thought of as an activity that one can do well or poorly, rather than as an application of some explicit general theory.

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servative politics, see generally Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitutionalism*, 75 *FORDHAM L. REV.* 545 (2006), and Jamal Greene, *Selling Originalism* (Sept. 29, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1273640>.

<sup>215</sup> Tribe, *supra* note 56, at 71–72.

<sup>216</sup> *Id.* at 72–73.

<sup>217</sup> See, e.g., Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 *TEX. L. REV.* 1753 (1994).

<sup>218</sup> See, e.g., Dorf, *supra* note 17, at 1787–96.

...  
 . . . Purists may be dismayed that this process is so unstructured, but that may simply be the nature of the beast.<sup>219</sup>

Even Michael McConnell—the law professor turned judge whom Whittington has called “undoubtedly the most prominent new originalist”<sup>220</sup>—approves of some sort of eclecticism (albeit one with a notably heavy dose of original understanding) when actually *rejecting* strong originalism. Denying that “the ‘original understanding’ exhausts the resources available to the interpreter,” McConnell has elaborated his belief

that the constitutional text, historically understood, has reference to a slowly evolving, common law understanding of rights, and that the people who instituted the Constitution expected that their traditional rights and privileges would continue to evolve—not by judicial fiat, but by decentralized processes of legal and cultural change. . . .

...  
 All of the various constraints on judicial discretion can be understood as means of tempering judicial arrogance by forcing judges to confront, and take into account, the opinions of others—whether they be the Framers of the Constitution (text and original understanding), the representatives of the people (the presumption of constitutionality), the decentralized contributors to longstanding practice (tradition), or judges in earlier cases (precedent). In hard cases, these sources of wisdom conflict, and sometimes judges may have no choice but to allow their own convictions and moral intuitions to guide the selection of which course to follow.<sup>221</sup>

The mind that craves greater certainty or specificity is apt to be disappointed. But one’s disappointment is not a reliable indicator that the account is false.

## 2. *Pragmatic Rule-Consequentialism*

The upshot so far is that the “it takes a theory” argument for Originalism fails insofar as it is understood to have logical or conceptual force. Further theorizing might well help us choose among the vastly many competitors that remain once Originalism is swept away. But we don’t need any more theory than we already have merely to reject Originalism, and thus to affirm non-originalism.

Let us not, however, place too much weight on the word *theory*. Perhaps what the “it takes a theory” crowd really hungers after is not

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<sup>219</sup> Farber, *supra* note 1, at 1103–04.

<sup>220</sup> Whittington, *supra* note 15, at 608. Of course, I’m claiming that Whittington’s characterization of McConnell is mistaken.

<sup>221</sup> McConnell, *supra* note 69, at 1292.



a theory, but simply a rule—a crisp and clear statement of the proper object of judicial constitutional interpretation. Of course, Scalia’s example of the voter who chooses among presidential candidates demonstrates that we don’t always need to proceed according to rule. So the challenge for Originalists is to explain why it is of overriding importance that judges follow the (more or less) sharp-edged rule that Originalism supplies for selecting among candidates for constitutional meaning. This final Section considers three distinct arguments that might seem to furnish what Originalists need.

The first argument is suggested by Justice Scalia’s “[y]ou can’t beat somebody with nobody” passage quoted above: We need agreement on interpretive approach, and only Originalism offers this. Non-originalism fails on this view, not only because it is too amorphous, but also because its radically nonalgorithmic nature results in a multiplicity of idiosyncratic variations. The problem, in other words, is not that a hard-to-specify interpretive approach is ipso facto undesirable but that we are unlikely to reach agreement on hard-to-specify approaches, and it is the absence of agreement that is undesirable.<sup>222</sup>

Unfortunately, though, Scalia’s stated reason why agreement about interpretive methodologies is important—that such agreement is a necessary precondition for any measure of consistency and predictability—has grounding in neither logic nor experience. The conservative critics of the Warren Court who birthed modern Originalism were not complaining that Supreme Court decisions were too unpredictable but rather that they realized the majority’s all-too-predictable liberal political preferences. More generally, predictability is possible because we can observe judges’ behaviors, thereby allowing us to attend not only to what they *say* (about their interpretive theories) but also to what they *do* (in resolving concrete cases).

A second and more common view focuses on the need to cabin judicial discretion to reduce judges’ ability to read their own subjec-

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<sup>222</sup> See Scalia, *supra* note 82, at 862–63 (“[T]he central practical defect of nonoriginalism is fundamental and irreparable: the impossibility of achieving any consensus on what, precisely, is to replace original meaning, once that is abandoned.”). As Larry Solum has pointed out, this analysis betrays a double standard in suggesting that consensus on a single non-originalist approach is impossible without considering the possibility of achieving consensus on a single Originalist approach. Both are possible; neither is easy. Lawrence B. Solum, *Constitutional Possibilities*, 83 *IND. L.J.* 307, 334–35 (2008); see also Thomas B. Colby & Peter J. Smith, *Living Originalism* 1 (July 28, 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1090282> (noting that proponents of Originalism assume “that ‘originalism’ represents a single, coherent constitutional theory, against which are arrayed the disparate non-originalist alternatives”). This double standard is a staple in the Originalist literature. See, e.g., McGinnis & Rappaport, *supra* note 199, at 391 n.36 (defending Originalism in part because “judges of various ideologies cannot be expected to reach agreement on any alternative method”).

tive policy preferences into constitutional law. Recall the moderate originalist, i.e., non-originalist, directive that judges should “follow original meaning except when the balance of considerations strongly suggests otherwise.” Without endorsing this approach against all other non-originalist competitors, I have suggested that it does dominate Originalism. One soft argument for Originalism, then, is that the “except” clause is just an invitation to unbridled subjectivity.

Over the years, Originalists have represented Originalism’s constraining power in extravagant terms.<sup>223</sup> This was always naive. Given the fragmentariness and contestability of the historical record, the Originalist judge has substantial discretion, a point at which professional historians have long hammered.<sup>224</sup> Few Originalists today make such breathless claims. Representative of the more measured approach is Jonathan Macey, who observes that “originalism is not nearly so determinate as its most vocal proponents would suggest” and concludes that “originalism is defensible not because it restrains judges completely, or even well, but because it restrains judges better than alternative methods of judging.”<sup>225</sup> And from this he further concludes that “originalism is defensible because, despite its myriad imperfections, it is vastly superior to alternative methods for deciding constitutional cases in a constitutional system of divided, and separated powers.”<sup>226</sup>

Now, it is not clear to me whether the originalism that Macey champions is strong originalism—which fact itself lends support to the view that unmodified references to “originalism” are best avoided.<sup>227</sup> But if it is, it should be obvious that Macey’s second conclusion does not follow from his first. Because limiting judicial discretion is not the supreme value of our system, enjoying lexical priority over all others,

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<sup>223</sup> See, e.g., BERGER, *supra* note 41, at 314–15 (noting that employment of non-originalist interpretations “reduces the Constitution to an empty shell into which each shifting judicial majority pours its own preferences”); BORK, *supra* note 20, at 155 (“No other method of constitutional adjudication [besides ‘the approach of original understanding’] can confine courts to a defined sphere of authority . . . .”); SCALIA, *supra* note 38, at 46 (“The originalist, if he does not have all the answers, has many of them. . . . For the evolutionist, on the other hand, every question is an open question . . . .”); Rehnquist, *supra* note 51, at 698 (“Once we have abandoned the idea that the authority of the courts to declare laws unconstitutional is somehow tied to the language of the Constitution . . . . [j]udges [become] . . . a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers . . . .”).

<sup>224</sup> See, e.g., RAKOVE, *supra* note 72, at 6–7, 340; Gordon S. Wood, *Ideology and the Origins of Liberal America*, 44 WM. & MARY Q. 628, 632–33 (1987).

<sup>225</sup> Macey, *supra* note 58, at 302, 304.

<sup>226</sup> *Id.* at 302.

<sup>227</sup> For a discussion of this view, see *supra* note 48.

we cannot conclude that Originalism is all-things-considered superior from the fact (if true) that it is more constraining of judges.

The third and most interesting possible reason to prefer rule-like strong originalism to a more standard-like moderate originalism rests on the perceived inevitability, or at least the substantial likelihood, of drift or slippage from the announced interpretive method to the method actually practiced. The cause of slippage should be clear. At least under present practice, interpretive rules are given by judges to themselves. There is no authoritative external promulgator or enforcer of the interpretive rules.<sup>228</sup> Therefore, that Originalism produces better consequences on balance than any of its competitors is a *reason* for judges (say, the Justices of the Supreme Court) to embrace Originalism only on the assumption that courts should be guided in their decisionmaking by the goal of realizing best consequences (by whatever metric of value the consequences might be measured). But if judges should be guided by such a goal, then there will, inevitably, arise cases in which they are quite confident that departing from the original meaning, on that occasion, would produce better consequences than would following it. And this could be so even when they account for whatever marginal negative effect nonconformity with the interpretive rule on the occasion in question might have on future conformity with the rule, by themselves or by others. In short, the pragmatic case for Originalism runs up against all the usual objections to rule-consequentialism.

This might look like an argument against strong originalism. But on the Originalist argument I have in mind, it amounts to just the opposite. If strong originalism is, so to speak, the law in the books, the Originalist admits, it will reduce in practice to some form of (in my terms) moderate originalism. But if moderate originalism is the law in the books, the Originalist continues, we should expect it also to become something else in practice—a weaker moderate originalism, perhaps, but perhaps mere wish fulfillment or what Fish calls, following Hart, “scorer’s discretion.”<sup>229</sup> This final argument for preaching Originalism even while knowing that it cannot be successfully defended against all forms of non-originalism, then, would be that the *theoretically* better alternative of a genuine moderate originalism—one in which Justices do not believe themselves to be

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<sup>228</sup> To be sure, Originalists might be trying to create external enforcement by nominating or confirming as Justices only those persons who proclaim fidelity to strong originalism, or even by threatening to impeach Justices who depart from strong originalism. Until impeachment on such a basis becomes a genuine weapon, however, the point in text remains.

<sup>229</sup> See *supra* note 127 and accompanying text.

firmly tied to original meaning yet act in accordance with constraints (even if hard to articulate) that mark out a real difference between the constitutional law they produce and their personally favored views of political morality—is not practically attainable. If we want some checking of pure judicial subjectivity, we need to forcefully avow strong originalism—we might even need to avow hard strong originalism—even if we will tolerate, indeed prefer, some unacknowledged departures from such strong medicine.<sup>230</sup>

This variant of the Noble Lie is, I think, likely the best argument for the ideology of strong originalism. But we should be skeptical that it's good enough.

As Scalia himself insists, “[T]he American people are not fools.”<sup>231</sup> They can see and understand dishonesty. And while most Americans expect it from members of the political branches, they probably demand better from the courts. If so, judicial dishonesty might be especially likely to have a corrosive effect on public acceptance of the judicial role and a corrupting influence on the Justices themselves.<sup>232</sup> Thus does my Originalist colleague Lino Graglia rightly proclaim “that honesty is the best policy, particularly for public officials and even more particularly for judges.”<sup>233</sup> And many of his fellow partisans in the interpretive debates claim to agree, for one frequently finds Originalism championed as the theory of integrity, honesty, and candor.<sup>234</sup>

It is cause for concern, then, how often commentators conclude that the self-proclaimed Originalists abandon Originalism to advance what seem to be their political preferences.<sup>235</sup> My own favorite examples of this abandonment are the recent affirmative action cases *Grutter* and *Gratz*, along with the Court's rejection, in *Seattle School District*, of any effort to take account of race in student assignment

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<sup>230</sup> A position of this sort is loosely suggested by arguments in Gary Lawson, *A Farewell to Principles*, 82 IOWA L. REV. 893, 897–903 (1997).

<sup>231</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1000 (1992) (Scalia, J., concurring in part and dissenting in part).

<sup>232</sup> Macey, *supra* note 58, at 304 (emphasizing indeterminacy of originalism and acknowledging that “there is something much worse about willful originalism than other sorts of outcome-oriented judging . . . because other sorts of outcome-oriented judging are more honest”).

<sup>233</sup> Graglia, *supra* note 23, at 1031.

<sup>234</sup> See, e.g., BeVier, *supra* note 29, at 286–87 (“Integrity characterizes a judicial process based on originalism and its lack is one of the chief deficiencies of its alternatives. Many proponents of originalism bemoan the discrepancy between what the Court does—and what its nonoriginalist cheerleaders urge it to do—and what it *says* it does. The originalists urge upon the Court the simple virtue of candor.”).

<sup>235</sup> Several examples are provided in William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1229–32 (2002).

plans.<sup>236</sup> While Justice Scalia proclaimed that “the Constitution proscribes government discrimination on the basis of race,”<sup>237</sup> Justice Thomas quoted and requoted the first Justice Harlan’s famous declaration that “[o]ur Constitution is color-blind.”<sup>238</sup> Yet the basis for these assertions was and is mysterious—at least for an announced (and proselytizing) Originalist. Not only does the constitutional text say no such thing, making it radically implausible to suppose that “no racial classifications at all” was the original public meaning, but the best evidence of the original intentions is that the framers did not intend to constitutionalize a principle of strict colorblindness.<sup>239</sup>

To be sure, this needn’t stop *living constitutionalists* from embracing colorblindness as a constitutional principle. But it should be a massive impediment—indeed an insurmountable one—for Thomas and Scalia. Perhaps Thomas and Scalia’s refusal to sanction any race-based affirmative action policies simply illustrates what Scalia admits is his own faintheartedness. But less charitable characterizations also spring to mind. This is hardly an isolated example. I reckon that relatively few Court-watchers would be much surprised by the conclusion of one recent empirical study that “Justices might speak about following an ‘originalist’ jurisprudence, but they only appear to do so when arguments about text and intent coincide with the ideological position that they prefer.”<sup>240</sup>

Admittedly, past performance is no *guarantee* of future results. But it generally is the best single predictor. Agreeing with Judge Posner that “[o]riginalism is the legal profession’s orthodox mode of

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<sup>236</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768–88 (2007) (Thomas, J., concurring); *Grutter v. Bollinger*, 539 U.S. 306, 346–49 (2003) (Scalia, J., concurring in part and dissenting in part); *id.* at 349–78 (Thomas, J., concurring in part and dissenting in part); *Gratz v. Bollinger*, 539 U.S. 244, 281 (2003) (Thomas, J., concurring).

<sup>237</sup> *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part).

<sup>238</sup> *Id.* at 378 (Thomas, J., concurring in part and dissenting in part); *Seattle Sch. Dist.*, 127 S. Ct. at 2782, 2787–88 (Thomas, J., concurring) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

<sup>239</sup> See, e.g., ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 82 (1992) (“Bingham’s preference—shared by the Thirty-ninth Congress and by most of our government authorities, most of the time since—was to retain the discretion to discriminate by race as appropriate.”); Jed Rubenfeld, *Affirmative Action*, 107 *YALE L.J.* 427, 430–31 (1997) (providing examples of Reconstruction Era federal statutes that made special provision for “colored” poor and for “colored” soldiers and sailors); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 *VA. L. REV.* 753, 789 (1985) (noting that “[t]he contemporaneous creation of the race-conscious Freedman’s Bureau programs and the [F]ourteenth [A]mendment illuminates the amendment’s meaning” as allowing race-conscious policies).

<sup>240</sup> Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 *LAW & SOC’Y REV.* 113, 133 (2002) (describing authors’ conclusion after analyzing 895 cases over eight Supreme Court terms from 1979 through 1994).

justification,” Originalist Lillian BeVier urges that “the Court should align its practice with its preaching.”<sup>241</sup> But both armchair theorizing and empirical investigation suggest that the practice is unlikely ever to accord with Originalist dogma. If so, BeVier might have things backward: The virtue of candor would be better served were the Court to align its preaching with its practice.

### CONCLUSION

Any evaluation of contemporary originalism should start by confronting a modest puzzle: While many commentators believe that the truth of originalism is the subject of live controversy, a comparable number bemoan that originalism means so many different things that no single meaning can be nonarbitrarily isolated. Is one of these views false? And if not, how can we square the ambiguity of the term originalism with the sense that it refers to some matter of genuine debate?

This Article has observed that contemporary originalists do disagree among themselves over more aspects of their creed than is generally recognized: not only over which particular feature of the Constitution’s original character demands fidelity (framers’ intent, ratifiers’ understanding, public meaning, or the like), but also over the nature of the reasons why such fidelity is required and over whether the obligation of fidelity they recognize binds unelected judges alone or citizens, legislators, and executive officials as well. But, it has argued, on at least one dimension of potential variability—what I have called the dimension of strength—self-professed originalists are largely united: They believe that those interpreters who ought to follow some aspect of a ratified provision’s original character (regardless of whether that set be limited to judges) ought to give that original aspect priority over any other consideration. When the original meaning (or intent, or understanding, or the like) is discernible (to some generally unspecified subjective confidence level), courts (and possibly other interpreters too) must always follow it when purporting to engage in constitutional interpretation, with the sole exception (for some) that judges may act lawfully in continuing to abide by “wrong” judicial precedents. In short, the form of originalism that is most vigorously contested by self-professed originalists and their critics (the nonoriginalists)—the form that answers to the descriptions “originalism proper,” or “originalism unmodified,” or, for economy of

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<sup>241</sup> BeVier, *supra* note 29, at 287 (quoting RICHARD A. POSNER, *OVERCOMING LAW* 245 (1995)).

exposition, “Originalism”—is strong originalism (with or without an exception for *stare decisis*).

Originalism of this form is predicated on a wide variety of arguments. This Article has sought to demonstrate that the arguments for Originalism based on the very nature of interpretation or on what is entailed by a commitment to binding constitutionalism are fallacious. As to the pragmatic arguments, however, it has concluded only that such arguments are to this point woefully underdeveloped and unpersuasive. To be sure, more has been said on both sides of the pragmatic question and still more could be said. Although I think that the balance of pragmatic arguments is extraordinarily unlikely to support Originalism, especially given well-grounded skepticism about rule-consequentialism, I cheerfully acknowledge not to have proven that Originalism is *incapable* of being superior to all competitors. I don’t have an impossibility theorem up my sleeve.

In light of that fact, a final point warrants emphasis. If the arguments of this Article are correct, then Originalism must be grounded, if at all, on the fact that such an interpretive posture yields better consequences than any alternative.<sup>242</sup> Such an argument is necessarily contingent on contestable judgments of fact and value and is therefore provisional. Originalism (i.e., strong originalism) must be soft. Indeed, the most thoughtful of originalists have long recognized this truth. As Richard Kay observed nearly twenty years ago in a much-cited article, “[t]he outstanding characteristic of original intentions adjudication, for good or ill, is that it is, compared with the alternative methods, most likely to produce relatively clear and stable rules for lawful government activity.”<sup>243</sup> But, he acknowledged, that fact, even if true, provides “merely a counter-weight” to the values that non-originalism (in one guise or another) might reasonably be thought to advance. Whether Originalism is desirable on balance, Kay concluded, therefore

depends on an evaluation of the relative importance of the competing values: the value of flexibility and adaptability on the one hand, and the value of predictability and stability on the other.

Moreover, in specific cases, these concerns cannot be considered in isolation. How we view their competing advantages will be influenced by the substantive content of the constitutional rules at issue, and our regard for the individuals who, as judges, will undertake whatever revisions are allowed. Our enthusiasm for stable rules will be reduced if we think the rules protected are oppressive and unfair. Our taste for responsive and up-to-date rules will be

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<sup>242</sup> See *supra* notes 99 and 200.

<sup>243</sup> Kay, *supra* note 15, at 288.

diminished if we know they will be “improved” by people we regard as ignorant or immoral. Thus the preconstitutional decision [of what interpretive posture to adopt] must be largely empirical, depending on facts that may be disputed and it must, therefore, be only provisional.<sup>244</sup>

These are wise sentiments. Unfortunately, no reader of the recent originalism literature can fail to be struck by the extent to which Kay’s measured assessment of the basis on which Originalism must be predicated contrasts with the overwhelming (but not universal) tenor of contemporary defenses of Originalism. Seduced by the false belief that Originalism can be grounded in arguments about the bare concept of interpretation or about the nature or logical entailments of binding constitutionalism, democracy, or the rule of law, too many originalists contend that Originalism follows necessarily from premises that virtually all participants to the debate accept—such as that judges should engage in “interpretation” not “making-it-all-up” and that we do and should treat the Constitution as binding. In short, too much Originalism is hard.<sup>245</sup> Preaching with the fundamentalist fervor of their frequent political allies,<sup>246</sup> Originalists are far too prone to declaim that “original meaning textualism is the only

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<sup>244</sup> *Id.* at 291–92. For a similarly restrained defense of Originalism that appeared at just about the same time, see Earl M. Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENT. 43 (1987). For a non-originalist argument that emphasizes how a clear-eyed assessment of who our judges are, or are likely to be, should bear on the choice of constitutional theory, see Fallon, *supra* note 17, at 562–72.

<sup>245</sup> Fred Schauer diagnosed this problem a decade ago. Because “nothing about originalism is obligatory as a matter of language or necessary to the very idea of having something that we call a constitution,” Schauer explained, “it turns out that we are then engaged in a range of political, moral, social, and institutional design questions to which there is more than one answer.” Schauer, *supra* note 115, at 345. Originalists, he continued, have therefore failed to heed the teachings of legal realism:

[O]ne of the lessons of legal realism is a continuing skepticism about the tendency of legal actors, lawyers, judges, and legal scholars to disguise in the language of necessity what are in fact political, social, moral, economic, philosophical, or policy choices.

Nowhere is this tendency more apparent than in the many discussions of originalism. This tendency is due, in part, to the fall of both the proponents and opponents of originalism into the trap that the legal realists have warned us against. Opponents argue that originalism is impossible. Proponents argue that originalism is necessary. In this continuing battle between impossibility and necessity there is far less discussion than there ought to be about originalism as a contingent feature of institutional design, which may or may not, at certain times and in certain places, based upon certain particular political, moral, and philosophical presuppositions, be desirable.

*Id.* at 345–46.

<sup>246</sup> *Cf.* Posner, *supra* note 173, at 1368–69 (criticizing Bork’s defense of Originalism for its “militance and dogmatism,” and viewing his frequent use of religious imagery as symptom of desire “to place the issue outside the boundaries of rational debate”).



method of interpreting the Constitution”;<sup>247</sup> or that “originalist interpretivism is not simply one method of interpretation among many—it is the only method that is suited to discovering the actual meaning of the relevant text”;<sup>248</sup> or that “only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy”;<sup>249</sup> or that Originalism “supplies the one, true interpretive method” and that any other method is “absurd.”<sup>250</sup> That such assertions are obnoxious would be more easily forgiven were they not, in addition, false.

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<sup>247</sup> Kesavan & Paulsen, *supra* note 8, at 1142.

<sup>248</sup> Lawson, *supra* note 42, at 1250.

<sup>249</sup> BORK, *supra* note 20, at 143.

<sup>250</sup> Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 529–31 (1998).