



## ORIGINALISM AND STARE DECISIS IN THE LOWER COURTS

**Josh Blackman \***

### INTRODUCTION

The tension between originalism and stare decisis is well known. Many of the Supreme Court's most significant constitutional decisions are completely unmoored from the original public understanding of the Constitution. A Supreme Court Justice may recognize that a given precedent is non-originalist but follow it anyway because of the doctrine of stare decisis. Or, a Supreme Court Justice may decide to deviate from stare decisis because that precedent is non-originalist. The unique status of the Supreme Court, perched atop our judiciary, affords its members the leeway to make either decision.

Lower court judges, however, do not have that sort of discretion. Consider a judge on a federal circuit court of appeals. First, she is

---

\* Associate Professor, South Texas College of Law Houston. I received helpful comments and feedback from Randy E. Barnett, William Baude, Judge Stephen A. Higginson, Associate Chief Justice Thomas Rex Lee, Judge William H. Pryor, Jr., Richard Re, Judge Amul Thapar, and Ryan Williams.

bound by Supreme Court precedents interpreting the Constitution, regardless of whether those precedents are originalist or not. No matter how *wrong* a given Supreme Court case is from an originalist perspective, the precedent must be followed. Second, she is bound by circuit precedent interpreting the Constitution, regardless of whether that precedent is originalist or not. Generally, only an *en banc* majority can reverse circuit precedent, and those proceedings are quite rare.<sup>1</sup>

An originalist circuit judge has free jurisprudential rein only in the rare case of first impression, where neither the Supreme Court nor the circuit court has considered the constitutional question. Even then, she would still be at a comparative disadvantage. Circuit courts seldom receive the wealth of originalist briefs that are directed to the Supreme Court. Here, the circuit judge will often have to do all of her own originalist research – the proverbial law office history report – without the benefit of the adversarial process.

In short, it's tough for a lower-court judge to be a constitutional originalist. But it can be done. Part I explains *when* a lower-court judge can be an originalist. Part II explains *how* a lower-court judge can be an originalist.

### I. WHEN CAN A LOWER-COURT JUDGE BE AN ORIGINALIST?

Originalism operates differently on the Supreme Court and on the lower courts. The Justices are constrained, but not bound by, stare decisis, and can reverse a non-originalist precedent. Circuit court judges are bound by Supreme Court precedent, no matter how

---

<sup>1</sup> Some circuits do provide an alternate procedure to reverse a panel precedent. See, e.g., *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708, 718 & n. 6 (7th Cir. 2010). State Supreme Court Justices, however, do not face such internal constraints. Indeed, state courts “may grant its citizens broader protection than the Federal Constitution requires . . . by judicial interpretation of its own Constitution.” *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008). Consider Jeffrey Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (Oxford 2018). This essay, however, will focus on the federal constitution.

flawed those cases are.<sup>2</sup> Lower court judges will generally have jurisprudential free rein only in the rare case of first impression, where there is no Supreme Court or circuit precedent on point.<sup>3</sup> In the overwhelming majority of constitutional cases, lower court judges have to contend with precedents that cannot be supported by the Constitution's original public meaning.<sup>4</sup>

The originalist lower court judge still has some discretion. Recently, Justices Thomas and Gorsuch articulated one possible framework in *Garza v. Idaho*: if there is "little available evidence suggest[ing] that" certain precedents are "correct as an original matter, the Court should tread carefully *before extending our precedents* in this area."<sup>5</sup> Lower court judges cannot be quite so bold as even a "little evidence" that a Supreme Court decision is supported by original meaning carries some weight. However, the lower court judge can still decline to *extend* a constitutional rule to brand new circumstances, if the binding precedent is completely unmoored from the Constitution's original public meaning.

---

<sup>2</sup> See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 258 n. 170 (1985) ("Current rules of precedent are thus governed not by any inherent judicial hierarchy in the structure of the Constitution or by the natural 'supremacy' of the Supreme Court . . . but by the mechanisms of review that Congress provides for: state courts are currently bound to follow Supreme Court precedent because of the simple fact that if they do not, they can be reversed.")

<sup>3</sup> See *United States v. Johnson*, 921 F.3d 991, 1001 (11th Cir. 2019) (Pryor) (en banc) ("We also have determined the original meaning of other constitutional provisions to resolve questions of first impression."); Compare *id.* at 1010 (Jordan dissenting) ("But accepting *Terry* does not require extending its reach on an issue of first impression.")

<sup>4</sup> See also *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam) ("But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.")

<sup>5</sup> 139 S. Ct. 738, 756 (2019) (Thomas dissenting) (emphasis added).

A. ORIGINALISM ON THE SUPREME COURT, AND IN THE  
LOWER COURTS

Most discussions about originalism and stare decisis are SCOTUS-focused. That is, the Supreme Court established some non-originalist precedent in the past, and now some Justices are considering whether to reverse that precedent.<sup>6</sup> For example, Justice Thomas will often announce that he is willing to revisit a non-originalist precedent “in an appropriate case.”<sup>7</sup> He once remarked that stare decisis is “not enough to keep me from going to the Constitution.”<sup>8</sup> That position, which is idiosyncratic even on the Supreme Court, would be inappropriate for the lower courts. Circuit judges are bound by Supreme Court precedent, no matter how erroneous that precedent may be.<sup>9</sup>

---

<sup>6</sup> See *Gamble v. United States*, 139 S. Ct. 1960, 1986 (2019) (Thomas concurring) (“[A] subsequent court may nonetheless conclude that an incorrect precedent should be abandoned, even if the precedent might fall within the range of permissible interpretations.”)

<sup>7</sup> Josh Blackman, *Justice Thomas “In an appropriate case”* (Josh Blackman’s Blog, June 29, 2016), archived at <https://perma.cc/75Z3-6WMM>.

<sup>8</sup> Adam Liptak, *Precedent, Meet Clarence Thomas. You May Not Get Along.*, (N.Y. Times, Mar. 4, 2019), archived at <https://perma.cc/8PDJ-LEAA>.

<sup>9</sup> At least one prominent jurist is skeptical of this view. *Gamble v. United States*, 139 S. Ct. 1960, 1981 n.2 (2019) (Thomas concurring) (“I make no claim about any obligation of ‘inferior’ federal courts, U. S. Const., Art. III, §1, or state courts to follow Supreme Court precedent.”) Some scholars contend that the lower courts are not bound by Supreme Court precedent that is inconsistent with the Constitution. Rather, they take an oath to the Constitution, and not to the Supreme Court. See Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused*, 7 J. L. & Religion 33, 85 (1990) (“while it might be thought a breach of decorum for an inferior court to repudiate a precedent of a superior tribunal, such conduct is not constitutionally insubordinate, and is surely not categorically improper.”); *id.* at 82–83 (“[T]he judge’s obligation, by oath, is to the Constitution, not to Supreme Court interpretations of the Constitution. There is nothing morally disingenuous in taking the oath and disobeying ‘controlling’ precedent.” (citations omitted)). See Gary Lawson, *The Constitutional Case Against Precedent*, 17 Harv. J. L. & Pub. Pol. 23 (1994) (“the practice of following [a court’s own] precedent is not merely nonobligatory or a

Indeed, the Supreme Court has ordered the lower courts to continue following a precedent, even if that precedent rests on other abrogated precedents.<sup>10</sup> This rule holds even when the Supreme Court agrees that the precedent should be reversed.<sup>11</sup> A circuit court judge cannot overrule a Supreme Court precedent.<sup>12</sup> But she can write a concurring opinion that articulates why the precedent is flawed as an original matter.<sup>13</sup> But these judges do not have

---

bad idea; it is affirmatively inconsistent with the federal Constitution.”) The Constitution describes these courts as inferior in rank, not subordinate in ability.

<sup>10</sup> *Rodriguez de Quijas v. Shearson/American Express Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court [*Wilko*] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”); *Hohn v. United States*, 524 U.S. 236, 252–53 (1998) (“Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.”)

<sup>11</sup> *Rodriguez de Quijas*, 490 U.S. at 484. (“We now conclude that *Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions.”)

<sup>12</sup> *Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958) (“the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land”). Compare Josh Blackman, *The Irrepressible Myth of Cooper v. Aaron*, 107 Geo. L. J. 1135 (2019) (“the Court acknowledged that it had never before claimed power over supremacy and universality but was in fact breaking new ground.”) See also *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 868 (1992) (“[T]he Court [is] invested with the authority to decide [its] constitutional cases and speak before all others for their constitutional ideals.”); *United States v. Nixon*, 418 U.S. 683, 704 (1974) (“Deciding whether a matter has in any measure been committed by the Constitution to another branch of government . . . is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.”), quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962); *Powell v. McCormack*, 395 U.S. 486, 549 (1969) (“it is the responsibility of this Court to act as the ultimate interpreter of the Constitution.”); compare with *United States v. Johnson*, 921 F.3d 991, 1002 (11th Cir. 2019) (Pryor) (en banc) (“And we cannot use a halfway theory of judicial precedent to cut back on *Terry* while faithfully adhering to the exclusionary rule. As an ‘inferior’ court, U.S. Const. Art. III, § 1, we have no such authority”).

<sup>13</sup> See, e.g., *Morgan v. Fairfield County, Ohio*, 903 F.3d 553, 575 (6th Cir. 2018) (Thapar concurring in part and dissenting in part) (“While I believe it is time for the courts to

unlimited time to prepare separate writings. Judicial economy demands that the courts quickly and fairly resolve cases. They lack the resources to write about legal issues that do not decide present disputes. Yet when time permits, a concurrence that casts doubt on a non-originalist precedent has its place. In particular, judges should focus on those precedents which have been questioned by judges and scholars of all stripes, so they are not writing on a blank slate. These concurrences are most effective when the author also joins the majority opinion, which comports with the non-originalist precedent. This practice demonstrates that judges follow precedents, even where they disagree with that precedent.

Outside these concurrences, the inferior courts are stuck with Supreme Court rulings on the Constitution, no matter how wrong those cases are.<sup>14</sup> This simple premise shines a light on the misguided nature of judicial confirmation hearings. Senators routinely ask circuit court nominees whether a decision is right or wrong, or whether they would overturn that precedent.<sup>15</sup> The only feasible answer to these questions is stunningly simple: “Senator, as a lower court judge, I would not have the ability to overrule a precedent of the Supreme Court.” A circuit court judge could no more overrule *Brown v. Board of Education*<sup>16</sup> or *Roe v. Wade*<sup>17</sup> than she could decide cases by flipping a coin.

Of course, Senators are not actually asking about whether the nominee would overrule a precedent. What they really want to know is how the nominee will treat a precedent. And not just any

---

be more faithful to the Fourth Amendment's text, I am duty-bound to apply Supreme Court precedent.”)

<sup>14</sup> *Johnson*, 921 F.3d at 1011 (Jordan dissenting) (“We are bound by directly controlling Supreme Court precedent to recognize and apply the exclusionary rule – whatever its originalist pedigree – in the context of *Terry* pat-downs.”)

<sup>15</sup> See, e.g., Ellis Kim, *This Trump judicial nominee wouldn't say if she agreed with Brown v. Board of Education* (PBS New Hour, Apr. 12, 2018), archived at <https://perma.cc/4QZF-ACDB>.

<sup>16</sup> 347 U.S. 483 (1954).

<sup>17</sup> 410 U.S. 113 (1973).

precedent—in particular, the precedent that the Senator likes. Republican senators ask about *District of Columbia v. Heller*.<sup>18</sup> Democratic senators ask about *Roe*. Nominees across the spectrum give the same evasive answers.<sup>19</sup> Yet, shibboleths like “settled law”<sup>20</sup> and “super-duper” precedents<sup>21</sup> are meaningless. Senators should ask a far more precise questions: would the nominee *extend* a precedent to a new set of circumstances, or limit that precedent to the facts in which the case originally arose?<sup>22</sup> This inquiry is far more meaningful than asking about the *rightness* or *wrongness* of a particular precedent.

Following Neomi Rao’s nomination to the D.C. Circuit Court of Appeals, Senator Josh Hawley (R-MO) articulated this premise:

And I’m not going to vote for any nominee who would *expand* [substantive due process]. Lower-court judges are of course bound by Supreme Court precedents, including the bad ones. They don’t have any choice. But anybody willing

---

<sup>18</sup> 554 U.S. 570 (2008).

<sup>19</sup> Randy E. Barnett and Josh Blackman, *Restoring the Lost Confirmation* (National Affairs, Fall 2016), archived at <https://perma.cc/RL5M-U ELF> (noting that judicial “candidates have learned to adopt three rhetorical ‘moves’ that allow them to skate away from questions about results. These moves have rendered the confirmation hearing all but pointless.”)

<sup>20</sup> Randy E. Barnett and Josh Blackman, *The Next Justices* (The Weekly Standard, Sept. 14, 2015), archived at <https://perma.cc/W589-W9A7> (“Indeed, less than a year after then-judge Sotomayor testified that *Heller* was ‘settled law,’ she voted in *McDonald* to jettison the precedent.”)

<sup>21</sup> Jeffery Rosen, *So, Do You Believe in ‘Superprecedent’?*, (N.Y. Times, Oct. 30, 2005), archived at <https://perma.cc/7BVP-4YR5> (Senator Arlen Specter asked then-Judge John G. Roberts if certain cases became “super-duper” precedents).

<sup>22</sup> See *DIRECTV v. Utah State Tax Commission*, 364 P.3d 1036, 1049 (Utah 2015) (A.C.J. Lee) (emphasis added) (“we are reluctant to *extend dormant Commerce Clause precedent in new directions not yet endorsed by that court*. . . . The principle of dormant commerce, after all, is not rooted in a clause, but in a negative implication of one; so there is a dearth of any textual or historical foundation for a court to look to.”)

to *expand* substantive due process won't have my support for the federal bench.<sup>23</sup>

Senator Hawley's framework avoids the familiar routine in which a nominee is asked if she thinks *Brown* was correctly decided, or whether she would vote to overrule *Roe*. Of course, the nominee could not ethically make such a promise. Rather, Hawley's question focuses on whether the nominee would *extend* those precedents.

How should an originalist circuit court nominee respond? First, a judge should only extend a Supreme Court precedent if the original meaning of the Constitution can support that extension. Critically, this approach *only* works if the Supreme Court precedent, "faithfully" construed, fails to resolve a particular dispute.<sup>24</sup> Of course, judges can always draw razor-thin distinctions and contend that a particular issue is not governed by a non-originalist precedent.<sup>25</sup> But judges should resist this temptation. This sort of chicanery will only undermine the persuasiveness of originalism in the long run.

Second, if the original meaning of the Constitution cannot support that extension, then the question should be returned to the democratic process. This approach would not require the nominee to discuss any particular issue – whether substantive due process or the Second Amendment. Rather, this framework provides an across-the-

---

<sup>23</sup> Josh Hawley, *Why I Won't Stop Asking Judicial Nominees If They Will Follow The Constitution* (The Federalist, Feb. 27, 2019), archived at <https://perma.cc/XW3F-SDEC>.

<sup>24</sup> See *United States v. Johnson*, 921 F.3d 991, 1001 (11th Cir. 2019) (Pryor) (en banc) ("Although Johnson argues that *Terry* is inconsistent with the original meaning of the Fourth Amendment and that we should apply it narrowly to 'limit[] the damage,' we must apply Supreme Court precedent neither narrowly nor liberally – only *faithfully*." (emphasis added)).

<sup>25</sup> In a related context, the Supreme Court summarily reversed the Montana Supreme Court, which "fail[ed] to meaningfully distinguish" a recent Supreme Court precedent, *Citizens United v. Federal Election Commission*. See *American Tradition Partnership, Inc. v. Bullock*, 567 U.S. 516 (2012) (per curiam).



board jurisprudence for lower court judges. Indeed, two high-profile originalists endorsed a similar approach.

B. JUSTICE THOMAS AND JUSTICE GORSUCH'S  
FRAMEWORK IN *GARZA V. IDAHO*

*Garza v. Idaho* considered whether an attorney provided ineffective assistance of counsel.<sup>26</sup> The case turned on the application of the Court's leading Sixth Amendment precedent, *Strickland v. Washington*.<sup>27</sup> *Garza* split 7-2. The majority held that *Roe v. Flores-Ortega*,<sup>28</sup> and other ineffective-assistance of counsel precedents, provided the defendant with relief.<sup>29</sup> Justice Thomas, joined by Justice Gorsuch, disagreed.<sup>30</sup> As a threshold matter, they argued that the majority opinion had "no basis in *Roe v. Flores-Ortega*" or the Court's "other ineffective-assistance precedents."<sup>31</sup> Therefore, there was "no persuasive reason to depart from an ordinary *Strickland* analysis in cases involving an attorney's decision to honor his client's agreement to waive his appeal rights."<sup>32</sup>

But the duo did not stop with that precedential argument. They also contended that the majority opinion "certainly [has] no basis in the original meaning of the Sixth Amendment." Part III of the dissent charted a roadmap for lower-court originalist judges. Justice Thomas observed that the majority opinion "break[s] from this Court's precedent" and "moves the Court another step further from the original meaning of the Sixth Amendment."<sup>33</sup> First, he reiterated Justice Scalia's analysis from *Padilla v. Kentucky*: the Sixth Amendment, "'as originally understood and ratified meant only that

---

<sup>26</sup> 139 S. Ct. 738 (2019).

<sup>27</sup> 466 U.S. 668, 687 (1984).

<sup>28</sup> 528 U.S. 470 (2000).

<sup>29</sup> *Garza*, 139 S. Ct. at 747.

<sup>30</sup> *Id.* at 750-59 (Thomas dissenting).

<sup>31</sup> *Id.* at 750.

<sup>32</sup> *Id.* at 755.

<sup>33</sup> *Garza*, 139 S. Ct. at 756.

a defendant had a right to employ counsel, or to use volunteered services of counsel.”<sup>34</sup> The Sixth Amendment did not guarantee a right to have *effective* counsel. *Strickland v. Washington* was decided, Justice Thomas wrote, “[w]ithout discussing the original meaning of the Sixth Amendment.”<sup>35</sup>

Second, he reasoned that because of these non-originalist precedents, “convicted criminals can relitigate their trial and appellate claims through collateral challenges couched as ineffective-assistance-of-counsel claims.”<sup>36</sup> In practice, Justice Thomas continued, the Court has “created an increasing number of *per se* rules in lieu of applying *Strickland’s* fact-specific inquiry, thereby departing even further from the original meaning of the Sixth Amendment.”<sup>37</sup>

Justice Thomas’s third point was the most significant. He concluded that “[b]ecause little available evidence suggests that this reading is correct as an original matter, the Court should tread carefully *before extending our precedents* in this area.”<sup>38</sup> Rather, he sought to cabin the Court’s ineffective-assistance jurisprudence to the contexts in which they arose, and only those contexts.

The dissent did not call to overrule *Strickland* and its progeny. To be sure, Justice Thomas is no shrinking violet with respect to stare decisis. Indeed, one week earlier, Justice Thomas suggested that the Supreme Court should “reconsider” *New York Times v. Sullivan*, a landmark and well-entrenched First Amendment precedent.<sup>39</sup> *Garza*, however, was different. Justices Thomas, perhaps with the nudging of Justice Gorsuch, used *Garza* as a more moderate vehicle to advance originalism in the federal courts.

---

<sup>34</sup> *Id.*, quoting *Padilla v. Kentucky*, 559 U.S. 356, 389 (2010) (Scalia dissenting).

<sup>35</sup> *Garza*, 139 S. Ct. at 758.

<sup>36</sup> *Id.* at 756.

<sup>37</sup> *Id.* at 758.

<sup>38</sup> *Id.* at 756 (emphasis added).

<sup>39</sup> *McKee v. Cosby*, 139 S. Ct. 675, 682 (2019) (Thomas concurring in denial of certiorari).

Consider a familiar torts hypothetical. There is a row of three adjoined townhouses, and the first house is on fire. To prevent the third house from burning down, the state demolishes the second house. Justice Thomas's *Garza* approach operates in a similar fashion. He confines the constitutional conflagration and prevents further collateral damage to other aspects of our polity. "Even if we adhere to this line of precedents," he wrote, "our dubious authority in this area should give us pause before we extend these precedents further."<sup>40</sup> In other words, this far, but no farther.<sup>41</sup>

### C. APPLYING THE GARZA FRAMEWORK IN THE LOWER COURTS

*Garza* provides a general framework that originalist judges can employ to decide cases that implicate non-originalist precedents. With certain tweaks, this approach can be tailored for the lower courts: if a Supreme Court precedent is unequivocally wrong "as an original matter, a lower court should "should tread carefully before extending" that precedent to a novel context. This process can be operationalized in three steps.

First, a circuit judge should determine whether a given Supreme Court precedent is completely unmoored from the original understanding of the Constitution. This standard should be deferential. A *mixed* Supreme Court decision that relies on both originalist and non-originalist justifications would not suffice.<sup>42</sup> For

---

<sup>40</sup> *Garza*, 139 S. Ct. at 759.

<sup>41</sup> See Randy E. Barnett, *Gravitational Force of Originalism*, 82 Fordham L. Rev. 411, 430 (2013) ("All of this missed, first, the possibility that the Rehnquist Court's New Federalism represented an alternate constitutional gestalt of 'this far and no farther' without a justification that would undermine the enumerated powers scheme and, second, that there might still be five Justices on the Court who subscribed to this gestalt.") (emphasis added).

<sup>42</sup> *Gamble v. United States*, 139 S. Ct. 1960, 1986 (2019) (Thomas concurring) ("Although precedent does not supersede the original meaning of a legal text, it may remain relevant when it is not demonstrably erroneous.")

example, in *McKee v. Cosby*, Justice Thomas described *New York Times v. Sullivan* and its progeny as “policy-driven decisions masquerading as constitutional law.”<sup>43</sup> To be sure, the “actual malice” standard from *Sullivan* was generated in a common-law fashion.<sup>44</sup> But the constitutional objections to the Sedition Act of 1798 provide some originalist basis to impose a higher bar for libel suits filed by government officials.<sup>45</sup> Moreover, many landmark decisions rely on originalism as the “law,” whether they admit it or not.<sup>46</sup> The circuit judge should only apply the *Garza* framework if she can demonstrate in a written opinion that a given constitutional rule was fabricated out of whole cloth. It is a hard standard to satisfy, but there are cases that fit the bill.

Second, a circuit judge must decide if the instant case requires an *extension* of the non-originalist precedent. Again, this standard should be deferential. In almost all litigation, the Plaintiff will argue that her position is squarely supported by long-standing circuit, or even Supreme Court precedent. The Defendant will counter that the Plaintiff seeks a radical departure from long-standing precedent. If the judge determines that the Plaintiff is correct, then the court must follow the non-originalist precedent. If the judge decides that it is unclear whether the Plaintiff or Defendant is correct, here too, the non-originalist precedent provides the rule of decision. For example,

---

<sup>43</sup> *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas concurring in denial of certiorari.).

<sup>44</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”)

<sup>45</sup> *Id.* at 276 (“Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”); see also David B. Rivkin Jr. and Andrew M. Grossman, *An Originalist Libel Defense* (Wall Street Journal, July 31, 2019), archived at <https://perma.cc/GJX4-C4PT> (“Modern originalism is young, and answers to these questions of original meaning often involve some doubt. Yet the Sullivan court might have stumbled onto a standard that comports with the Constitution.”)

<sup>46</sup> Consider William Baude, *Is Originalism Our Law?*, 115 Columbia L. Rev. 2529 (2016).

where a given non-originalist precedent becomes “liquidated,”<sup>47</sup> *stare decisis* has greater effect.<sup>48</sup>

However, “[l]iquidating’ indeterminacies in written laws is far removed from *expanding* or altering them.”<sup>49</sup> If the Defendant is unequivocally correct—for example, the Plaintiff openly advocates for an extension of a non-originalist precedent—then *Garza* applies. That is, the judge should decline to extend the precedent, by its own force, to the Plaintiff’s novel claim. In other words, the originalist circuit judge should constrain the constitutional conflagration. A Supreme Court precedent with no basis in the Constitution has only one value: it is a Supreme Court precedent. And that precedent should be given all of its due weight, but nothing more.

Third, after the non-originalist precedent has been cabined, the circuit judge should consider the question presented from an originalist perspective. Is the Plaintiff’s novel claim based on a persuasive originalist case, divorced from precedent? Or does the original understanding of the Constitution foreclose the Plaintiff’s claim? The originalist circuit judge would then decide which side is

---

<sup>47</sup> Federalist 37 (Madison), in the Federalist 224, 229 (New American Library 1961) (Clinton Rossiter, ed. (“All new laws . . . are considered as more or less obscure and equivocal, until their meaning be *liquidated* and ascertained by a series of particular discussions and adjudications.”) (emphasis added). See William Baude, *Constitutional Liquidation*, 71 Stanford L. Rev. 1 (2019) (“Liquidation was a specific way of looking at post-Founding practice to settle constitutional disputes, and it can be used today to make historical practice in constitutional law less slippery, less capacious, and more precise.”) See also Josh Blackman, *Defiance and Surrender*, 59 S. Tex. L. Rev. 157, 158 (2018) (“Disputed assertions of power by Washington and his successors in the Early Republic are more probative about the scope of the Foreign Emoluments Clause than voluntary acquiescence by Jackson and post-Jackson presidencies.”)

<sup>48</sup> *Gamble*, 139 S. Ct. at 1986 (Thomas concurring) (“It is within that range of permissible interpretations that precedent is relevant. If, for example, the meaning of a statute has been ‘liquidated’ in a way that is not demonstrably erroneous (*i.e.*, not an impermissible interpretation of the text), the judicial policy of *stare decisis* permits courts to constitutionally adhere to that interpretation, even if a later court might have ruled another way as a matter of first impression.”)

<sup>49</sup> *Id.* at 1987 (emphasis added).

stronger, as a matter of first principles, unencumbered by the non-originalist precedent. Where the original meaning of the Constitution does not support the Plaintiff's novel claim, the Court should defer to "the States and the Federal Government [that] are capable of making the policy determinations necessary to" resolve the question.<sup>50</sup>

Some scholars and judges may object to the intrinsic unfairness of this approach. Litigants may stand to lose a constitutional remedy if the lower courts adhere to the original meaning of the Constitution. But that purported unfairness is premised on an important assumption: judges have a general power to develop constitutional law to promote fairness. Some scholars and judges may favor that sort of common-law framework.<sup>51</sup> I do not. In some cases, the law, as written, does promote fairness; and in other cases, the "law is a[n] ass."<sup>52</sup> Even the Constitution. When possible, originalist judges should restore the correct – albeit unpopular – understanding of the Constitution. And they can do so by following *Garza's* three-step framework.

## II. HOW CAN A LOWER-COURT JUDGE BE AN ORIGINALIST?

In an ideal world, all advocates would develop originalist arguments in all constitutional cases. Even progressives, who are generally skeptical about originalism, would fine-tune their briefs to persuade originalists to cross the jurisprudential divide. For example, progressive groups now craft originalist *Gorsuch Briefs* to garner Justice Gorsuch's vote in certain cases.<sup>53</sup> That strategy makes

---

<sup>50</sup> *Garza*, 139 S. Ct. at 759.

<sup>51</sup> Consider David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996).

<sup>52</sup> Gary Martin, *The Law is an Ass*, (The Phrase Finder, 2019), archived at <https://perma.cc/A9ST-H6LA>.

<sup>53</sup> See Mark Joseph Stern, *The Gorsuch Brief* (Slate, Oct. 11, 2018), archived at <https://perma.cc/6N9Q-K2XG> ("While the Kennedy brief went extinct upon his retirement, it may now be replaced by the *Gorsuch brief*, which replaces florid encomia

sense at the Supreme Court, where there are few votes in play. But, given the current status quo, advocates in the lower courts are unlikely to invest the time and resources to generate meaningful originalist arguments. More often than not, the effort is not worth the candle. At the Supreme Court, all high-profile cases attract a phalanx of originalist amicus briefs on both sides of the “v.” In the lower courts, originalist friends are far and few between.

Lower court judges can remedy this deficiency. They should request supplemental briefing to determine whether a given Supreme Court precedent is supported by original meaning, and whether that precedent can be extended. These requests can be made on an ad hoc basis, or through a standing order. Either way, judges can ensure that originalism is tested through the adversarial process. And through this process, judges can ensure that their originalist opinions are of the highest quality, and persuasiveness.

#### A. THE CURRENT LACK OF ORIGINALIST BRIEFING IN THE LOWER COURTS

An absence of originalist briefing will invariably lead circuit judges to perform their own research, likely aided by law clerks—the proverbial *law office history*. This approach is commendable, but problematic. First, the rigor of this research varies wildly. Most attorneys—from judges to law clerks—simply lack the training to develop originalist research. I do not mean to criticize the judges. Only a tiny percentage of their docket implicates original meaning; they do not have sufficient time to learn the appropriate methodologies. Additionally, this inadequacy reflects a general failure of legal education. Most law students are exposed to originalism, if at all, briefly during the first-year constitutional law

---

to freedom with highly technical textualist arguments. The American Civil Liberties Union tested this strategy in a major immigrant-detention case this week. Gorsuch’s questions indicate it just might have worked.”) (emphasis added).

course. Law schools do not offer intensive upper-level classes on originalism.

As originalism continues to gain greater acceptance, however, this situation will likely change. Consider programs such as the Originalism Summer Seminar at the Georgetown Center for the Constitution. The so-called “boot camp” provides intensive and rigorous training for incoming law clerks.<sup>54</sup> Judges should encourage their future clerks to apply to such programs.

Second, the go-it-alone approach may generate errors. Increasingly, the critical mass of originalist circuit judges can help to identify mistakes internally. That is, one judge on a panel can check another judge’s work. However, without this check, the federal reporters will become filled with erroneous constitutional adjudications. Such errors would set back the cause of originalism.

Third, and perhaps most importantly, this sort of internal research is not vetted through the adversarial process. Indeed, lawyers may receive an adverse judgment based on a flawed historical analysis that they did not have the chance to address during the briefing process, or during oral argument. It is unfair to the parties when a judge bases her decision on arguments that were not briefed. This unfairness is in no sense limited to originalist opinions, but it is particularly acute in the constitutional context.

The answer, though, is not to avoid originalism. Rather, the answer is to promote *adversarial* originalism.

#### B. LOWER COURTS SHOULD REQUEST ORIGINALIST BRIEFING

In the short term, courts should request originalist briefing on an *ad hoc* basis. Consider a hypothetical case, along the lines of *Garza*. The Plaintiff asks the court to recognize a new type of Sixth Amendment violation. The panel can specifically ask the parties to brief how that extension of precedent is justified by the original

---

<sup>54</sup> See *Originalism Summer Seminar* (Georgetown Center for the Constitution), archived at <https://perma.cc/WD9Y-EF8Y>.



understanding of the Sixth Amendment. Ideally, this request could be made at the outset of the appeal, when the initial scheduling order is issued. Indeed, judges and law clerks can screen cases for possible originalist issues that warrant supplemental briefing.

This orderly process ensures that the parties have adequate time to address these issues, and counsel will be prepared to answer any originalist questions during oral arguments. Critically, originalist arguments on both sides of the “v.” would be subject to the adversarial process. The plaintiff can criticize the defendant’s originalist arguments, and the defendant can criticize the plaintiff’s originalist arguments. At that point, all members of the court, originalists and non-originalists alike, would be presented with a full airing of positions and can rule accordingly.

Alternatively, if the court finds that the party briefing is inadequate—a distinct possibility because most attorneys are not trained to develop originalist arguments—an *amicus curiae* can be invited to participate in the proceedings. The *amicus* could be a scholar who has an expertise in a particular area, or even an attorney in private practice who has the requisite qualifications to make originalist arguments. Moreover, other *amici* should be given leave to file replies, so that all perspectives can be heard.

### C. AN EXEMPLAR REQUEST FOR ORIGINALIST BRIEFING

A recent case from the Sixth Circuit Court of Appeals provides an exemplary request for originalist briefing. In 2016, William Wright, “filed a [pro se] petition for a writ of habeas corpus in the District Court . . . to challenge his mandatory sentence enhancement under a new case of statutory interpretation.”<sup>55</sup> Wright relied on a new Sixth Circuit precedent, *Hill v. Masters*, which permits prisoners to challenge sentences in specific circumstances.<sup>56</sup> The District Court

---

<sup>55</sup> Appellant’s Brief, *Wright v. Spaulding*, No. 17-4257, \*x (6th Cir. filed Nov. 20, 2018), ECF No. 19, archived at <https://perma.cc/RRP4-B32T>.

<sup>56</sup> 836 F.3d 591 (6th Cir. 2016).

ruled against Wright.<sup>57</sup> He filed a pro se appeal. The panel – Circuit Judges Siler, Thapar, and District Judge Hood – appointed counsel,<sup>58</sup> and heard oral argument on April 15, 2019.<sup>59</sup> Six weeks later, the panel requested supplemental briefing on four issues:

1. What is the original meaning of the Article III Cases or Controversies requirement?
2. How does the corpus help inform that determination?
  - a. See <https://lcl.byu.edu/projects/cofea/>
3. How does that original meaning relate to the distinction between holding and dicta?
4. How does that ultimate determination relate to which test in *Hill* should govern?

The parties shall simultaneously file their briefs within 21 days. The briefs are not to exceed 25 pages.<sup>60</sup>

The opening round of briefs did not address any of these issues. It would have been unfair to decide these difficult questions on a blank slate. As a result, the Court *wisely* asked for supplemental briefing following oral argument. The Department of Justice filed a thorough brief. The respondents reviewed the Corpus of Founding Era American English (COFEA), which is sponsored by Brigham Young University.<sup>61</sup> The government found that “[t]he corpus confirms [its] reading of the Cases or Controversies requirement by demonstrating the Founding Era understanding that cases and

---

<sup>57</sup> *Wright v. Merlack*, 4:17-CV-2097, 2017 WL 6805687 (N.D. Ohio Nov. 14, 2017).

<sup>58</sup> Letter, *Wright v. Spaulding*, No. 17-4257, \*1 (6th Cir. filed May 24, 2018), ECF No. 10, archived at <https://perma.cc/Z93Y-M76F>.

<sup>59</sup> Order, *Wright v. Spaulding*, No. 17-4257, \*1 (6th Cir. filed Apr. 15, 2019), ECF No. 43, archived at <https://perma.cc/6RW9-BTP8>.

<sup>60</sup> Letter, *Wright v. Spaulding*, No. 17-4257, \*1 (6th Cir. filed May 28, 2019), ECF No. 44, archived at <https://perma.cc/C6K7-ZGWF>.

<sup>61</sup> *Corpus of Founding Era American English* (BYU Law), archived at <https://perma.cc/SR76-6ETY>.

controversies were cognizable only so far as they presented, for solemn deliberation in a court of law, disputed claims to vindicate rights or redress wrongs.”<sup>62</sup> In contrast, the Petitioner wrote that “Brigham Young’s Corpus of Founding Era American English, while potentially helpful to answer other legal questions, has limited utility here.”<sup>63</sup> Indeed, the brief made only a few fleeting references to originalism, and failed to address the specific meaning of “cases” and “controversies.” Now, the panel was fully equipped to address these questions, with the full input of the parties.

#### D. A STANDING ORDER TO REQUEST ORIGINALIST BRIEFING

There is much to praise about the 6th Circuit panel’s order. But this sort of ad hoc approach does have problems. Specifically, the fact that *only* one panel made such a request, while many others did not, could send an unfortunate message to the bar: only some judges are interested in constitutional originalism.

This ad hoc approach may be suitable as a pilot program, but it is not sustainable in the long run. Rather, courts should consider a macro approach: adopt a standing order for originalist briefing that applies to *all* constitutional cases. The language could be straightforward:

“In any case that implicates an extension of a constitutional precedent, all party briefs shall explain how the original public meaning of the Constitution supports or forecloses that extension. *Amici Curiae* are invited to seek leave to submit briefs that discuss how this Court should interpret

---

<sup>62</sup> Respondent Brief, *Wright v. Spaulding*, 17–4257, \* 2 (6th Cir. filed July 18, 2019), ECF No. 50, archived at <https://perma.cc/Y76B-3E24>.

<sup>63</sup> Petitioner Brief, *Wright v. Spaulding*, 17–4257, \* 9, (6th Cir. filed July 18, 2019), ECF No. 49, archived at <https://perma.cc/8TRG-EJMK> (citing Michael C. Dorf, *Dicta and the Original Meaning of Article III*, (DORF ON LAW, June 3, 2019), archived at <https://perma.cc/79MQ-QRZX>).

the original public meaning of the Constitution in such a case.”

This umbrella approach ensures that all judges are provided with comprehensive and balanced historical analyses that are vetted by the adversarial process. There are no surprises, and advocates on both sides can have their arguments duly considered.

Moreover, *amici* will have an express incentive to participate in a case knowing a court will be receptive to their arguments. Once this briefing record is developed, judges should be far more comfortable to engage in originalist jurisprudence – to determine whether a given Supreme Court precedent is supported by original meaning, and whether that precedent can be extended.

Dissenting colleagues, who may otherwise not be inclined to find originalism persuasive, will need to develop originalist responses to majority opinions.<sup>64</sup> Look no further than *District of Columbia v. Heller*: Justice Stevens developed a thoroughly originalist dissent in response to Justice Scalia’s originalist majority opinion.<sup>65</sup> Moreover, that appellate record tees up originalist questions with clarity for Supreme Court review. It is especially helpful if a lower court judge can make the meaningful case that the Supreme Court’s own precedent cannot be supported by original meaning.

It is entirely feasible that this process convinces the judges that a constitutional issue cannot be resolved on originalist grounds. For example, the Sixth Circuit panel ultimately did not find the

---

<sup>64</sup> *Gamble v. United States*, 139 S. Ct. 1960, 1986 (2019) (Thomas concurring) (“Reasonable jurists can apply traditional tools of construction and arrive at different interpretations of legal texts.”)

<sup>65</sup> Compare *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008) (“We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment.”) with *id.* at 637 (Stevens dissenting) (“Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.”)

supplemental originalist briefing useful.<sup>66</sup> But this framework leaves open the possibility that originalism can be used to decide important constitutional questions.

### CONCLUSION

This essay explains how lower court judges can expand their own use of constitutional originalism. But this approach need not be so limited. Judges who adopt this framework will invariably exert market pressure on the bench and bar to become more familiar with originalism. Law firms who seek to persuade originalist judges will rationally incorporate originalist arguments into their briefs—whether voluntarily, or in response to a standing order. Public defenders, in particular, would be well-served to refine their arguments: conservative jurists may be personally opposed to the plight of the accused, but favor the rights of the accused, as originally understood.

But this briefing cannot be cobbled together haphazardly. Practicing attorneys of all stripes will need to improve their ability to develop originalist arguments. In an ideal world, law firms will begin to recruit associates who have originalist bona fides. And, dare I dream, law schools may recognize these market forces, and begin to offer specialized courses on originalism, taught—gasp!—by self-professed originalists. Perhaps law schools will establish originalism clinics. Generally, once an issue is briefed in one court, the same brief can be recycled in other courts that present similar issues.

A simple standing order from a federal court of appeals would, in time, trickle down to all facets of the legal practice. This change would not be top-down, but would be bottom-up. And, in turn, that

---

<sup>66</sup> *Wright v. Spaulding*, 939 F.3d 695, 700 n. 1 (6th Cir. 2019) (“We asked the parties to file supplemental briefs on the original meaning of Article III’s case-or-controversy requirement, specifically whether the corpus of Founding-era American English helped illuminate that meaning. A team of corpus linguistics researchers submitted two amicus briefs as well. We are grateful to both the parties and the amici for their hard work. Here, we agree with the parties that corpus linguistics turned out not to be the most helpful tool in the toolkit.”)

ripple will trickle up to the Supreme Court. As the bench and bar are acculturated to originalism, it will become far more normal for the Supreme Court to base its constitutional decisions on originalism.