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# Originalism: A Critical Introduction

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# ORIGINALISM: A CRITICAL INTRODUCTION

*Keith E. Whittington**

*The theory of originalism is now well into its second wave. Originalism first came to prominence in the 1970s and 1980s as conservative critics reacted to the decisions of the Warren Court, and the Reagan Administration embraced originalism as a check on judicial activism. A second wave of originalism has emerged since the late 1990s, responding to earlier criticisms and reconsidering earlier assumptions and conclusions. This Article assesses where originalist theory currently stands. It outlines the points of agreement and disagreement within the recent originalist literature and highlights the primary areas of continuing separation between originalists and their critics.*

TABLE OF CONTENTS

INTRODUCTION .......... 375
I. POINTS OF AGREEMENT .......... 377
- A. *Original Meaning* .......... 378
  - 1. Original Meaning and Original Intent .......... 379
  - 2. Expected Applications .......... 382
  - 3. Rules and Standards .......... 386
  - 4. Constitutional Pluralism .......... 388
- B. *Judicial Restraint* .......... 391
  - 1. Judicial Discretion .......... 391
  - 2. Judicial Deference .......... 392

II. POINTS OF CONTENTION .......... 394
- A. *Justifications for Originalism* .......... 394
- B. *The Relationship Between Originalism and Judicial Review* .......... 400

III. POINTS OF SEPARATION .......... 404
CONCLUSION .......... 408

## INTRODUCTION

Originalism as an approach to constitutional interpretation and a guide to the exercise of judicial review enjoyed its greatest prominence in the 1980s. The Reagan Administration invited public debate over judicial philosophy, and the Administration controversially committed itself to the search for

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original meaning as the correct approach to construing the Constitution.[1] Attorney General Edwin Meese, Judge Robert Bork, and then-Judge Antonin Scalia became the high-profile advocates for originalism.[2] The Federalist Society was founded, and promoted the "great debate" over originalism between such figures as Meese and Bork on the one hand, and Justices William Brennan and John Paul Stevens on the other.[3] Given this history, it is no surprise that concerns about originalism were a prominent theme in the debate over the nomination of Robert Bork to the U.S. Supreme Court in 1987.[4]

The Reagan era was also a time for active academic debate over the intellectual merits of originalism. By the time Robert Bork[5] and Antonin Scalia[6] published their book-length defenses of originalism, their views were both familiar and well mooted in the literature. The political salience of originalism undoubtedly boosted academic interest in the theory, but the period was also a fertile time for such theoretical debates.[7] Scholarly debates revolved around competing "grand constitutional theories" concerned with justifying and guiding the exercise of judicial review.[8] Raoul Berger's *Government by Judiciary*,[9] backed by his aggressive defense of its theoretical premises in law review articles,[10] fit right in with John Hart Ely's *Democracy and Distrust*[11] and Ronald Dworkin's *A Matter of Principle*.[12]

Originalist theory has continued to develop and grow in the intervening years, even if the Bork nomination continues to define the image of originalism for many. Paul Brest launched the 1980s with an influential article bemoaning the "misconceived quest for the original understanding"

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1. *See generally* JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS 133–60 (2007).

2. *See, e.g.*, ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW (1984); Edwin Meese III, U.S. Attorney Gen., Speech Before the American Bar Association (July 9, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 1, 1 (Paul G. Cassel ed., 1986); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1988).

3. *See generally* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION, *supra* note 2.

4. O'NEILL, *supra* note 1, at 170–75.

5. ROBERT H. BORK, THE TEMPTING OF AMERICA (1990).

6. ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997).

7. *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 132–64 (1996) (describing how the originalism debate fit into other trends in normative constitutional theory).

8. *See* MARK TUSHNET, RED, WHITE AND BLUE 1 (1988); *see also* Keith E. Whittington, *Herbert Wechsler's Complaint and the Revival of Grand Constitutional Theory*, 34 U. RICH. L. REV. 509, 509–10 (2000).

9. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

10. *See* O'NEILL, *supra* note 1, at 111–32.

11. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

12. RONALD DWORKIN, A MATTER OF PRINCIPLE (1985).

of the Constitution.[13] Daniel Farber closed the decade with a "guide for the perplexed" to the originalism debate.[14] With the rise of a "new originalism,"[15] it is perhaps time for a new brief "tourist guide"[16] that outlines some of the key features of originalism as it stands today. As originalist arguments have proliferated and deepened, some have questioned whether there is anything distinctive left to the label.[17] Certainly the old familiar standards may no longer be the best touchstones for discussing modern originalism.

This Article provides a critical guide to the current state of originalist theory.[18] Part I focuses on some key points of general agreement among originalist theorists,[19] while Part II identifies some key points of contention among originalists about originalist theory. Part III focuses on some central points of continuing separation between originalists and their critics.

## I. POINTS OF AGREEMENT

Before examining some of the more interesting points of agreement among current originalists, it would be useful to clarify what I mean by originalism. At its most basic, originalism argues that the discoverable public meaning of the Constitution at the time of its initial adoption should be regarded as authoritative for purposes of later constitutional interpretation.[20] The text of the Constitution itself, including its structural design, is a primary source of that public meaning, but extrinsic sources of specifically historical information might also elucidate the principles embodied in the text of the Constitution.[21] Each textual provision must

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13. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

14. Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

15. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004). Or, in Ken Kersch's helpful terms, the development of a "proactive originalism," to be contrasted to the "reactive originalism" of the 1970s and 1980s. *See* Ken I. Kersch, *Ecumenicalism Through Constitutionalism: The Discursive Development of Constitutional Conservatism in* National Review, *1955–1980*, 25 STUD. AM. POL. DEV. 86, 103 (2011).

16. Farber, *supra* note 14, at 1085.

17. Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009).

18. Unlike Farber, I am not concerned in this Article with reviewing the entire originalism debate. This Article concentrates on just one side of the debate and is intended to provide a brief, accessible introduction to modern originalism. At the same time, this Article does not attempt to inventory all the recent work on originalism. I identify what I take to be some major themes in the current literature on originalism, but I do not pursue other features that can no doubt be found in the literature, and I do not marshal systematic evidence to support my particular conclusions about the current contours of the literature.

19. The level of agreement is never, of course, complete, even on these central points. Unsurprisingly, some still prefer that old-time religion and remain a bit puzzled by the apparent shift. *See* Steven D. Smith, *That Old-Time Originalism* (Univ. of San Diego Sch. of Law, San Diego Legal Studies Research Paper Series, Research Paper No. 08-028, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1150447.

20. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 35 (1999); Whittington, *supra* note 15, at 599.

21. *See* WHITTINGTON, *supra* note 20, at 35.

necessarily bear the meaning attributed to it at the time of its own adoption. Later constitutional amendments stand separately from the original Constitution, reflecting different purposes, understandings, and debates.[22]

The two crucial components of originalism are the claims that constitutional meaning was fixed at the time of the textual adoption and that the discoverable historical meaning of the constitutional text has legal significance and is authoritative in most circumstances. Lawrence Solum has called the first claim the "fixation thesis." In his terms, the "semantic meaning" of the text was "fixed" at the time it was written and formally adopted.[23] The semantic content of a word or phrase may drift over time, but the fixation thesis contends that the proper meaning of a word within a particular document is the one that was meant at the time of the document's creation, rather than alternative meanings that might have emerged later or been in use earlier.[24] Solum has called the second claim the "contribution thesis"—the idea that "the linguistic meaning of the Constitution constrains the content of constitutional doctrine."[25] Historical meaning might "contribute" to or constrain the development of legal doctrine for reasons internal to our particular legal culture and its commitments to, and understandings of, the rule of law, or for reasons external to our legal system that appeal to a normatively compelling political theory.[26] As we shall see, there is space for disagreement over such questions of how best to justify the contribution thesis or how strongly the contribution thesis ought to be framed (i.e., how much should original meaning constrain legal doctrine?), but these two components—that the meaning of the text is historically fixed and that the historical meaning constrains legal meaning—are at the heart of originalist theory.

### A. *Original Meaning*

The terms of the debate have shifted somewhat over time, from talking about "original intent" to talking about "original meaning." The turn to

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22. Thus, it is possible, for example, for the Due Process Clause of the Fourteenth Amendment to have a different original meaning than the Due Process Clause of the Fifth Amendment. Within this paper, I use "Founding" generally as the point of historical interest for originalism, but strictly speaking the examination of the meaning of any given piece of constitutional text would be centrally interested in the period of that text's adoption.

23. Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 944 (2009). I express some caution about the turn to "semantics" in Keith E. Whittington, *Dworkin's 'Originalism': The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197, 207–16 (2000). Ultimately Solum's approach to "semantic originalism" comes closer to mirroring the practice of searching for illocutionary intent than Dworkin's abstracted and normatively infused "semantic intentions."

24. Solum, *supra* note 23, at 944–46.

25. *Id.* at 954.

26. *Id.*; *see also* WHITTINGTON, *supra* note 20, at 49, 61, 110–13. Just how constraining original meaning might be on the content of constitutional law is also left ambiguous by Solum. As the name of the thesis implies, Solum primarily argues that original meaning "contributes" to "the legal content of constitutional law." Solum, *supra* note 23, at 954. He at least leaves open the possibility that the contribution is not complete and that the original meaning of the constitutional text and the legal content of constitutional law will not be identical.

original meaning reflects some theoretical and practical adjustments in emphasis within the literature on originalism.

1. Original Meaning and Original Intent

The first point of substantial agreement among modern originalists is an emphasis on original meaning of the constitutional text. Justice Scalia has referred to this by the somewhat misleading label of "textualism."[27] By textualism, Scalia has in mind the "objectified intent" of the legislature—what "a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris."[28] Scalia clarifies that what the reasonable person should be gathering is the "original meaning of the text."[29]

There are alternative ideas about the definition of original meaning, but ultimately these different ways of framing the issue have little consequence. In the early stages of the debate, scholars were more likely to refer to the "original intent" than to the "original meaning." Thus, in his classic article advancing the idea of originalism, Robert Bork tended to refer to "framers' intent."[30] At times, the reference to what "the framers actually . . . intended" could readily be understood as simply a loose way of talking about the combination of "text and history"[31] or the "text, structure, and history of the Constitution"[32]—in other words, the kind of "objectified intent" that Scalia has emphasized.[33] But at other times, original intent was clearly used to refer to subjective states of mind of individual Framers.[34] The slippage is understandable since the inquiry was almost always said to be one of discovering what *they meant* when creating this constitutional

27. SCALIA, *supra* note 6, at 23. Even Brest suggests this linkage in his early critique of originalism, observing that his focus was on theories that emphasized "the interpretation of text and original history as distinguished, for example, from the interpretation of precedents and social values." Brest, *supra* note 13, at 204 n.1.

28. SCALIA, *supra* note 6, at 17.

29. *Id.* at 38.

30. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 13 (1971).

31. *Id.* at 16–17; *see also Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the S. Comm. on the Judiciary*, 92d Cong. 55, 19 (1971) (statement of William H. Rehnquist, Assistant Att'y Gen. of the United States, Office of Legal Counsel) (pledging to focus on "the use of the language used by the framers, the historical materials available," and "the intent of the framers of the Constitution").

32. Robert H. Bork, *Original Intent: The Only Legitimate Basis for Constitutional Decision Making*, JUDGES J., Summer 1987, at 13, 15.

33. SCALIA, *supra* note 6.

34. *See, e.g.*, Larry Alexander and Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988). But the distinctive significance of subjective intent for originalism was more often emphasized by critics than proponents of originalism, who in turn highlighted the complications associated with a pursuit of subjective intentions. *See, e.g.*, STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION 10–16 (1986); Brest, *supra* note 13; H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513 (1987).

text. What was "the meaning attached by the framers to the words they employed in the Constitution"?[35]

Alternative ways of framing the theory appealed to "original public understanding" or "original public meaning." Although such language might also be used interchangeably, as Paul Brest did in his defining critique of this approach to constitutional interpretation,[36] there is at least the potential for subtly distinguishing among them. Henry Monaghan, for example, emphasized that the "relevant inquiry must focus on the *public* understanding of the language when the Constitution was developed."[37] Quoting Alexander Hamilton, Monaghan pointed out that the "intention . . . to be sought" is "in the instrument itself."[38] How was the text received and understood by the people assembled in the state ratifying conventions? How would it have been understood by lawyers and jurists familiar with the "usual & established rules of construction"?[39] Similarly, Gary Lawson characterized originalism, or "originalist textualism," as "a method which searches for the ordinary public meanings that the Constitution's words . . . had at the time of those words' origins."[40] The interpreter's goal was to find evidence that would help illuminate the "text's original public meaning."[41] The implicit contrast was both with any *current* public meaning that might conflict with the historical meaning and with any original *private* meaning that might have been held by individual drafters.

Originalist theory has now largely coalesced around original public meaning as the proper object of interpretive inquiry. Although the terminology deployed can still vary, "originalism" or "original meaning" has now pretty clearly taken dominance over "original intent" as the preferred shorthand for this collection of theories.[42] In part, original meaning better captures the primary orientation of even the early literature in the 1970s and 1980s, for which understanding "the Constitution according to the intention of those who conceived it" almost never meant

35. BERGER, *supra* note 9, at 363. Similarly, in my initial writings on this subject, I used original intent and original meaning interchangeably, ultimately arguing that what mattered was the intent "embodied in the text." WHITTINGTON, *supra* note 20, at 181.

36. Brest, *supra* note 13, at 204 (stating that originalism is the approach that "accords binding authority to the text of the Constitution or the intentions of its adopters" and advocates "[a]dherence to the text and original understanding").

37. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 725 (1988).

38. *Id.*

39. *Id.* (quoting Alexander Hamilton, *Opinion on the Constitutionality of an Act To Establish a Bank*, *in* 8 PAPERS OF ALEXANDER HAMILTON 97, 111 (H. Syrett ed., 1965)); *see also* Scalia, *supra* note 2, at 854 (describing the Constitution as having "a fixed meaning ascertainable through the usual devices familiar to those learned in the law").

40. Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992).

41. *Id.*

42. Perhaps indicative of the transition is the shift in the historian (and critic of originalism) Jack Rakove's books on the subject. *Compare* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (Jack N. Rakove ed., 1990), *with* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1997).

"look[ing] inside for the truest account of their brain states at the moment that the texts were created."[43]

More substantively, the focus on original public meaning more clearly emphasizes two aspects of the originalist approach. First, original meaning better captures the public authority of the text. The Constitution as drafted and ratified is the supreme law of the land by virtue of its ratification and continued acceptance by the people, not by virtue of its drafting history or the superiority of the virtue or intellect of James Madison and his brethren. The goal of constitutional interpretation is not to capture what James Madison meant but to capture what the constitutional text means. Though determining what is entailed by a project of capturing the meaning of the constitutional text is properly the subject of controversy and debate, the idea of original public meaning at least better identifies the content and orientation of one contender within that debate.

Second, original meaning better captures the search for the public meaning of an objective legal rule. The language of original intent too often encouraged the pursuit down false trails in an effort to locate the preferences of political actors, or buried ideas, or value systems. At the end of the day, constitutional interpretation by judges is concerned with understanding and articulating authoritative legal rules, and a vital task of originalism is to help guide constitutional interpreters to a better understanding of the applicable constitutional rules.

A clearer focus on original public meaning also minimizes some of the problems that were thought to be associated with original intent.[44] First, it avoids some of the problems associated with the search for subjective intent. Paul Brest took the lead in criticizing a method that would seek to "try to figure out how [the legislator] would have decided any particular case."[45] The degree of knowledge on the part of the interpreter, and the degree of foresight on the part of the legislator, to persuasively build such a counterfactual for issues that might arise today seemed to require heroic assumptions. By contrast, even Brest conceded that relevant evidence for identifying the historical public meaning of the text was readily available, even if it was not always determinant or determinative.[46]

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43. Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751, 756, 759 (1987).

44. Such concerns are unlikely to go away entirely, even if the theory is more clearly understood to be concerned with original meaning. Interpreters must still attempt to determine what the public or commonly understood meaning of a given constitutional provision might be and what legal rule might be embodied in a given piece of text, and those tasks will still involve sifting through potentially contradictory or incomplete evidence and making the best possible judgment as to what the evidence suggests. And, of course, critics of originalism are still likely to have a variety of other concerns about the approach besides those specifically associated with some forms of intentionalism.

45. Brest, *supra* note 13, at 212. It is possible that the category of "strict intentionalist" as Brest defined it was always a null set, since few commentators of the period seem to have endorsed this approach and Brest did not cite any examples.

46. *Id.* at 231 ("Moderate originalism is a perfectly sensible strategy of constitutional decisionmaking.").

Second, the focus on public meaning also avoids some of the problems associated with uncovering collective intent. In practice, legal interpreters do not deal with a legislator, but rather with a legislature composed of multiple legislators. If assessing original intent is the target for the interpreter, then we may find ourselves enmeshed in efforts to count "intention-votes" and determine how the myriad subjective intentions of multiple legislators can be aggregated up into a single collective legislative intent. Although lawyers and judges are familiar with discussions of legislative intent (and the challenges associated with those discussions), constitutional original intent was often thought to be more slippery, subjective, and idiosyncratic. Recasting originalism in terms of original meaning refocuses on the type of "objective" or "embodied" intent that is closer to conventional understandings of legislative intent.

Even so, original "intent" still has some relevance in theories of originalism. The historical sources of interest to originalists in the 1970s and 1980s continue to have some bearing as useful evidence of public meaning. Identifying how the delegates of the Philadelphia Convention talked about and understood a given piece of text is a productive starting point for uncovering the public meaning of that legal language in the period. What James Madison might have recorded delegates as saying may not have pride of place in determining the public meaning of a textual provision, but when added to other sources of information it might well be informative of how those familiar and careful with language understood the content of the rule that was being debated and adopted. Even more specifically, the records of Founding debates may be informative of the significance of the particular choice of language incorporated into the text. Such evidence must always be handled carefully. Alternative language, for example, might have been rejected either because it was excluded from the rule being adopted or because it was already included within that rule. But understanding how a debate progressed when the formulation of the text and the adoption of a rule were still uncertain may be helpful in unpacking the nuance of meaning contained in a particular piece of text as it was used in this context.

### 2. Expected Applications

But the greater theoretical attention to original meaning does have some implications for the practice of originalist constitutional interpretation. An orientation to public meaning rather than intentions calls attention to the limited relevance of original expectations about legal applications. Like many commentators in the initial round of debate over originalism, Brest highlighted the potential significance of original expectations. He imagined that the originalist interpreter would first ask, what would James Madison do? The question not only invited an examination of the particular thoughts and desires of a particular individual involved in the Founding debates, but it also suggested that the goal of originalist constitutional interpretation was to recapture the mindset of a Framer and implement their preferences for how specific disputes ought to be resolved. The task seems simultaneously

impossible and unappealing. Even if a judge could successfully channel James Madison while answering the question of whether the Affordable Care Act is consistent with the Commerce Clause, the results would not be decisive for a proper originalist inquiry.

Specific expectations about the consequences of a legal rule are distinct from the meaning of the rule itself. Bork took notice of this point as well, though still speaking in terms of intentions.

> In short, all an intentionalist requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. That premise states a core value that the Framers intended to protect. The intentionalist judge must then supply the minor premise in order to protect the constitutional freedom in circumstances the Framers could not foresee.[47]

Although Bork situates this point in the context of "circumstances the Framers could not foresee," the argument is in fact generalizable to include circumstances that the Founders could see.[48] The point does not turn on the "open textured" or "general" quality of the textual provision in question.[49] The key issue is that the words used had a generally understood meaning which expressed an identifiable rule. The rule might be rephrased in a way that makes it easier to apply or that breaks out various key considerations and subcomponents, but the textual provision embodies a legal commitment of its own that the interpreter attempts first to ascertain. As such, the text, structure, and history provide Bork's "major premise." The text does not, however, tell the interpreter how to resolve a given dispute. Once the rule itself is clarified, the resolution of a given dispute might be obvious. But the effort to think through how a rule would apply to a given circumstance is a distinct jurisprudential effort from that of identifying the appropriate rule in the first place. A student must first understand what the accepted constitutional rule for determining the scope of congressional power was under the Commerce Clause at the turn of the twentieth century, but it is a distinct task to then determine whether Congress could regulate stockyards given that rule.

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47. Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 826 (1986).

48. It possible that Bork thought this point was restricted to those circumstances that the Founders did not see. In his first forays into originalist theory, Bork implied that the interpreter would be bound if the Founders had a clear and uniform view regarding a particular application regardless of a generally phrased text. Bork is not clear why he might have believed this would follow. Bork, *supra* note 30, at 13 ("If the legislative history revealed a consensus about segregation in schooling . . . I do not see how the Court could escape the choices revealed . . . even though the words are general and conditions have changed.").

49. Ronald Dworkin forcefully argued against a kind of expectations originalism, in which constitutional provisions are read "to have the consequences that those who made them expected them to have." Ronald M. Dworkin, *Comment*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION 119 (1997). Although I think this basic caution has been widely accepted by originalists, I have more difficulty with the particular version of semantic originalism that Dworkin recommended as the alternative to the flawed expectations originalism. *See* Whittington, *supra* note 23, at 197.

Why might the original expectations about the application of a rule and the original content of the rule diverge? First, it must be recognized that expectations about consequences are not dispositive to ascertaining the content of the constitutional rule itself. The drafters of a constitutional provision may have a variety of conflicting goals and expectations about a constitutional provision, and yet reach an agreement on the meaning of the provision under consideration. Borrowing from the political theorist Quentin Skinner, we can usefully distinguish between an intent *to do* something and an intent *in doing* something.[50] A motive is prior to the text, and is only contingently connected to the text (the motive could be different, and yet the text and its meaning could be the same, or the motive could be present, and a different text with different meaning could be adopted). Similarly, expectations about applications are merely predictions about the future consequences of adopting a given legal rule, and the author of the rule has no special privilege in predicting the future.[51]

The drafters could, in fact, be wrong about the consequences of their own constitutional rule. If they wrote a natural born citizen qualification for the presidential office with a desire and expectation that this rule would preclude a given individual from assuming the office, there could be a perfect understanding of the meaning of the qualification and yet the consequence may not follow (e.g., they were wrong about the birth status of the individual in question, and thus the rule posed no obstacle to a presidential run). Similarly, they could be wrong about the principled implications that follow from the primary rule (e.g., how the natural born citizen qualification would apply to children of ambassadors born on foreign soil). The more complicated or less precise the constitutional text being adopted, the more opportunities there will be for such mistakes or uncertainties to arise. The array of possible implications and applications of the age requirement for presidential eligibility may be easily foreseen and well understood as the provision is being adopted. It might not be possible to say the same about the standard for impeachable offenses. Regardless, the proper mode of proceeding for a later adjudicator of a constitutional dispute involving those provisions is not to ask how the drafters would have resolved the present controversy. The proper inquiry is what constitutional rule was adopted. Having determined the answer to that question, the adjudicator must then determine how the rule applies to the current dispute.

It is also worth recognizing that early government officials might not have fully and faithfully implemented the adopted constitutional rule themselves. It is commonplace for judges to take the early interpretation of a constitutional provision as informative about the meaning of the provision, and such early practice is no doubt informative in illuminating an opaque rule. But such behavior should still be viewed with some appropriate skepticism. Constitutional drafters self-consciously limited

50. Quentin Skinner, *Motives, Intentions, and the Interpretation of Texts*, *in* MEANING AND CONTEXT 73 (James Tully ed., 1988).

51. *See also* WHITTINGTON, *supra* note 20, at 177–78.

themselves, as well as others, by erecting constitutional fences. The purpose of constitutional rules is not simply to bind future generations. Political actors also tie their own hands by adopting a constitutional limitation. The desire to bind contemporary government officials is part of the reason that we prefer constitutional conventions that are distinct from legislative assemblies, and ratification procedures that can affirm or reject constitutional proposals independent of legislative will.[52] Incumbent politicians may have had a seat at the table when a constitutional provision was drafted, but they cannot continue to claim ownership of the constitutional text. Otherwise, they could readily assume the authority to alter their handiwork at will. Higher lawmaking and normal lawmaking should be kept distinct.

Moreover, early government officials had their own reasons to deviate from constitutional rules. Understanding the constitutional rule is distinct from adhering to the constitutional rule. Famously, the Federalists who had advocated on behalf of the adoption of the Constitution in 1787 were splintered by 1797. Although some of those disagreements might be accounted for by subconstitutional conflicts or matters that had been left unresolved in Philadelphia, the disputes also featured disagreements about potentially knowable constitutional meaning. As Madison might have anticipated, the faithful interpretation and application of constitutional rules became more difficult once they were wrapped up in partisan fighting, factional interests, and personality clashes. But even if early national politicians had acted as one with little disagreement, the same considerations could have affected their own ability to adhere to their prior constitutional commitments. The exigencies of the moment could place pressure on the first generation as easily as subsequent generations, and evidence of how they would have or did interpret or apply constitutional commitments should be held separate from evidence of how the rule was understood when it was adopted.

Despite these cautions, expected applications might be helpful to later interpreters in clarifying the substantive content of the embodied constitutional rule. The Founders could be mistaken or disingenuous about the implications of adopting a proposed rule, but the rule itself must be publicly understandable.[53] If examples of likely applications of the rule are regularly offered and there is widespread agreement on such applications, then they may be reflective of the content of the rule in question. If, for example, a given application would help distinguish between two plausible interpretations of a textual provision, then the existence of a consensus

52. The use of constitutions to target contemporary government officials is effectively examined in the state context in EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 49–55 (2013).

53. Dworkin, by contrast, would hold open the possibility that the Founders were mistaken about the rule itself, and not merely its applications. In his famous illustration, the father might be wrong not only about what the implications of the commandment to "play fair" but also about what the principle of fairness actually is. For Dworkin, it is the true principle, not the legislator's mistaken view of it, that is authoritative. RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY 134–36 (1977).

about the application might allow us to better understand which of the plausible alternatives was in fact being proposed and adopted. The point is not that the Founders correctly anticipated a given application, but that knowing the application and its relationship to possible principles would allow us to infer the otherwise obscure rule. The insight to be gleaned is not the authoritative status of the expected application, but the apparent rule at play given that such an application is expected to follow from it. If we know that the Founders simultaneously adopted a rule against cruel and unusual punishments and embraced the death penalty, this should not help us assemble a list of accepted punishments or create a special carve-out for the death penalty from the general principle. Rather, it should help guide us in understanding what principle they thought they were adopting with the cruel and unusual punishment clause.[54]

### 3. Rules and Standards

One implication that was often thought to follow from a focus on original intentions was the narrow reading of constitutional provisions. Scalia has notably argued against the identification of originalism and "strict construction," though the two were often linked by conservative politicians and jurists in the 1970s and 1980s. As Scalia observed, the "text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."[55] Thinking in terms of specific intentions and expected applications can give constitutional provisions the feel of a laundry list of allowed or proscribed government actions. The interpreter's job is therefore to identify the contents of the list and check the disputed actions of government officials against that list.

Originalism has instead recently emphasized the value of fidelity to the constitutional text as its driving principle. The goal of constitutional interpretation is not to restrict the text to the most manageable, easily applied, or majority-favoring rules. The goal is to faithfully reproduce what the constitutional text requires. Textual rules need not be narrow. The breadth of the rule is determined by the embodied principle, not an a priori commitment to narrowness.

It is entirely possible for constitutional drafters to establish general or abstract rules or to prefer broad standards over narrow rules. Although such broadly worded rules may provide less guidance to later interpreters than narrowly crafted rules, they are not therefore without content. The Equal Protection Clause has a meaning that can be interpreted and applied (though perhaps with less certainty), even if it is framed more broadly than the rules regarding the eligibility of candidates for presidential office.

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54. Even so, having inferred from various pieces of evidence what the meaning of the Cruel and Unusual Punishments Clause is, the adjudicator might still conclude that the Founders were mistaken in thinking that the death penalty and the constitutional provision could be reconciled in a principled way. The burden for making out such an argument would necessarily be heavy, however.

55. SCALIA, *supra* note 6, at 23.

The distinction between broad and abstract constitutional principles and narrow and specific constitutional rules is perhaps most familiar from the work of Ronald Dworkin. For Dworkin, the Constitution spoke most importantly in "majestic abstraction."[56] A Dworkinian interpreter would provide an "abstract, principled, moral reading" of the text, rather than "a concrete, dated reading."[57] There may be difficulties with Dworkin's particular approach to the distinction, but he usefully reminds us of the possibility of intended principles. Constitutional rules are not confined to the choice between long or short lists of specific applications. Broad language may well be used to convey specifically chosen, content-rich commitments. Jack Balkin notes that constitutions employ a complex "linguistic technology of regulation and constraint."[58]

> The text of our Constitution contains different kinds of language. It contains determinate rules. . . . It contains standards. . . . And it contains principles. . . . If the text states a determinate rule, we must apply the rule because that is what the text offers us. If it states a standard, we must apply the standard. And if it states a general principle, we must apply the principle.[59]

Balkin observes that standards and principles "do not constrain people in the same way that rules do," but that is not to say that they do not constrain or do not have a discoverable content.[60]

It is also possible for constitutional drafters to simply delegate discretion to later government officials. As originalists have long recognized (and sometimes even emphasized), the power-granting provisions of the Constitution are designed to give the legislative and executive branches discretionary authority to make policy and the necessary tools to implement those policies. By the same token, it is at least conceptually possible to recognize that constitutional drafters might similarly empower judges through constitutional provisions that authorize them to exercise substantial discretion. With a primary commitment to constitutional fidelity (rather than, for example, the restraint of judicial discretion), originalists have at least accepted the possibility of textual provisions embodying broad standards. The breadth of any given constitutional commitment and the extent to which it delegates discretionary authority are ultimately empirical questions to be resolved through the examination of the text.

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56. RONALD DWORKIN, LIFE'S DOMINION 145 (1993).

57. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1253 (1997).

58. JACK M. BALKIN, LIVING ORIGINALISM 43 (2011).

59. *Id.* at 6.

60. *Id.* at 43. Balkin's elaboration of the idea of textual principles suggests that principles are largely delegations to future decisionmakers. One does not have to go that far to embrace the notion that the text may embody standards that cover a wider array of situations, provide less concrete guidance, and require more "practical reasoning" than rules do. *See id.* at 349 n.12. Balkin would read the relevance of what he calls "*historical* principles or *historical* standards" differently than I would. *Id.* at 40.

### 4. Constitutional Pluralism

One of the significant new critiques of originalism that has emerged in recent years has been the charge that the current judicial practice does not reflect originalist commitments.[61] To the extent that normative constitutional theory should be concerned with legitimatizing how judicial review is currently exercised, a theoretical position that does not describe current reality would be problematic.[62] There are a variety of ways in which this sort of critique can be framed, but here, I am concerned with a particular aspect of the argument. It is frequently observed that American constitutional jurisprudence is descriptively "pluralistic" in its methodological approach.[63] There are various ways of mapping the argumentative terrain in contemporary American constitutional discourse, but one prominent typology identifies six common modalities of constitutional argumentation that are apparently accepted as legitimate by practitioners, including historical, textual, doctrinal, prudential, structural, and ethical arguments.[64] Any theory that elevates a single modality of constitutional argumentation as its centerpiece, therefore, would seem to run into some difficulty with reconciling its recommendation of argumentative monism with an accepted practice of argumentative pluralism.

I believe that most current originalists sidestep the main force of this distinctive critique.[65] Arguments about original meaning are usually characterized as one among many that interpreters might reasonably employ to elucidate the meaning of the Constitution and develop the content of constitutional law.[66] To what extent, therefore, does originalist theory recommend that judges and others lay down the various interpretive tools with which they are familiar and employ only one historical method? From an originalist perspective, is it inappropriate and illegitimate for judges and other constitutional interpreters to make use of a range of argumentative modalities when attempting to ascertain constitutional meaning? There is a place for pluralism within originalism, but originalist theory would argue

61. *See, e.g.*, Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1195.

62. A weaker version of this concern would suggest that the empirical reality should at least be recognizably related to any credible normative theory such that it is possible to see how plausible reform might bring the two into alignment. If descriptive and normative theories are apparently unrelated to one another, then we might waive the latter away as mere utopianism.

63. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL FATE 23–24 (1982); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753 (1994).

64. BOBBITT, *supra* note 63, at 23–24.

65. The aspect of this critique that still bites originalism joins with other arguments contending that original meaning is not authoritative for purposes of guiding the formation of constitutional doctrine. This general argument is discussed below.

66. The argument in this section borrows from Keith E. Whittington, *On Pluralism Within Originalism*, *in* THE CHALLENGE OF ORIGINALISM 70 (Grant Huscroft & Bradley W. Miller eds., 2011).

that such a wide array of argumentative modalities should be carefully disciplined by the overarching interpretive enterprise. Originalism is less about method or form of argument than about interpretive purpose.

The originalist project is committed to uncovering, to the degree possible, the meaning of the rule or principle that those who were authorized to create the Constitution meant to communicate, not to making use of any particular form of constitutional argument. Arguments marshaling historical evidence about Framers' intent and original meaning and drawing on sources such as ratification convention debates or early constitutional commentary are the obvious form that originalist arguments are expected to take. They provide the clearest examples of the originalist modality for creating and illustrating typologies of constitutional argumentation, and they provide the most direct basis for considering the acceptability and authoritativeness of referencing original meaning in order to resolve current constitutional disputes.

But if the goal of the interpretive enterprise, for originalists, is to discover the meaning that the author was attempting to convey through the text, then the interpreter should not have strong precommitments regarding the type of evidence that might be helpful for discovering and understanding that meaning. Originalists are committed to an interpretive effort, not an argumentative form. When available and illuminating, classically historical arguments should no doubt be given great weight. But historical materials as such are likely to tell only part of the story. Relevant materials may not be particularly probative of the specific issues that are of concern to us, or may in themselves leave substantial indeterminacies to be resolved as to what the constitutional meaning might be.

Other modalities of constitutional argumentation may also be deployed within an originalist framework. It is no accident that Robert Bork, for example, tended to speak of originalists being focused on the "text, structure, and history of the Constitution."[67] Exclusive reliance on external, historical evidence as such was never thought to be the defining feature of originalism. The text of the Constitution is quite appropriately the first piece of evidence that an originalist would consult in interpreting the document, and both Scalia and Solum characterize originalism as a form of textualism.[68] A close textual analysis of the words and phrases that were actually chosen for inclusion in the Constitution, the relationships among them, and their relationship to other texts is a ready starting point for originalist analysis. An originalist might well expect that the words in the text have a "plain meaning" that is readily accessible, and would certainly expect that the words in the text convey meaning and would be

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67. Bork, *supra* note 47, at 826; *see also* 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, 1273 (1997) (advocating adherence to "commitments made by the people in the past, and embodied in text, history, tradition, and precedent").

68. *See* SCALIA, *supra* note 6; Lawrence B. Solum, *Constitutional Texting*, 44 SAN DIEGO L. REV. 123 (2007).

comprehensible to appropriate audiences even without extrinsic interpretive aids (such as access to convention debates). Framing originalism in terms of original meaning (rather than original intent) has put even greater emphasis on the text as an independent bearer of original meaning.

For similar reasons, arguments grounded in structures or values implicit in or embedded in the constitutional scheme or language are likewise fair game for originalists. Originalist arguments need not be clause-bound. Arguments drawn from the design of the Constitution, the background assumptions of the Constitution, or even the "ethos" or traditions of the people may well be appropriate from an originalist standpoint, so long as the aim is to illuminate the meaning of the constitutional rules put in place by those who created the document. Examining the constitutional design for clues about original constitutional meaning is, in principle, as useful as examining the constitutional text.

Doctrinal arguments are perhaps the most common form of constitutional argumentation in contemporary legal and judicial practice. There are good reasons why this should be the case, and originalist theory does not suggest that doctrinal arguments should not predominate in most legal decisions. Precedent provides intellectual shortcuts for thinking about the meaning of a law and how it might be applied to a range of common problems. A case of first impression may require examining the full range of messy arguments relating to constitutional meaning, but over time, precedent should have distilled those arguments down to a set of more reliable and accepted conclusions. For Supreme Court justices, as much as for lower court judges or executive branch officials, doctrine provides an easy to follow and more detailed constitutional rulebook that does not require mastering and synthesizing a wide array of materials and arguments for every case or problem that might arise. Precedent translates the Constitution into ubiquitous and accessible constitutional rules, and most constitutional cases are really disputes about routine administration of those agreed-upon rules of our baseline constitutional understandings. For most legal disputes involving the Constitution, we are primarily concerned with constitutional administration, applying what we have already learned from earlier disputes. The goal is not to return to first principles and to get the meaning of the Constitution itself right. Such cases are concerned with clarifying the meaning and implication of judicial doctrine. They assume that the doctrine correctly and adequately conveys constitutional meaning.

Yet the way in which originalists make use of a plurality of argumentative forms may still be distinctive. The various arguments and evidence adduced by an originalist serve the particular function of advancing our ability to understand and apply the original meaning of the Constitution. The various modalities of constitutional argument are tethered to the originalist enterprise. An originalist would therefore resist any independent normative force that such argumentative approaches might have. The array of constitutional arguments can be used to clarify original meaning, not trump identifiable original meaning. To the extent that such argumentative modalities lead us away from, rather than toward, original

meaning, then, to borrow from Justice Clarence Thomas, the originalist would have to conclude that "[s]omething has gone seriously awry with this Court's interpretation of the Constitution."[69]

### *B. Judicial Restraint*

The commitment to judicial restraint is distinct from the commitment to an originalist interpretive approach. The former is focused on when judicial review ought to be exercised and the relative authority of legislatures and courts. The latter is focused on how constitutional meaning is understood. Although a preference for judicial restraint might lead one naturally to originalism as an interpretive approach, the acceptance of originalism as an interpretive approach has no necessary implications for judicial restraint.

The separation of judicial restraint from originalism is one of the more distinctive features of the recent originalist literature. Advocates of originalism during the Reagan era were almost uniformly also advocates of judicial restraint, and the two commitments were often conflated in both scholarly and popular discourse. Reflecting an inherited New Deal sensibility, this originalism was a vehicle for empowering popular majorities by preventing judges from behaving as superlegislatures.[70] Originalism was a tool of majoritarian democrats.

There is nothing like the same level of agreement within the recent originalist literature on the desirability of judicial restraint. Rather, there is agreement on the separation between interpretive approach and judicial posture. Within that open space, originalists have recently taken a variety of positions, from continuing to advocate judicial restraint[71] to embracing a more active exercise of the power of judicial review.[72] But the primary virtue now claimed by originalism is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism.

In order to elaborate more fully on the separation between originalism and judicial restraint, we should distinguish between two distinct ideas that are often referenced by the common term of "judicial restraint." The first idea might be referred to as "judicial discretion" and concerns the degree of choice and will in judicial decisionmaking. The second idea might be referred to as "judicial deference" and concerns how tentative judges should be in striking down legislation as unconstitutional. Neither idea follows inevitably from a commitment to originalism.

#### 1. Judicial Discretion

Excessive judicial discretion has been a recurring concern in American political history. Politicians and scholars alike have worried that judges have too many opportunities to express their individual moral and political

69. Kelo v. City of New London, 545 U.S. 469, 518 (2005) (Thomas, J., dissenting).
70. *See* Whittington, *supra* note 15, at 602–03.
71. *See* Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081 (2005).
72. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2004).

preferences while conducting their official duties. Rather than faithfully adhering to constitutional requirements, judges may be "tempted" to use their position to advance favored policies at the expense of the law.[73] The challenge would then be to find a way to constrain judges just as judges attempt to constrain other government officials. An originalist approach to constitutional interpretation was offered as a potential solution to this problem by delimiting how judges make decisions.

The hope that a public commitment to originalism would force judges to restrain themselves and limit their discretion would seem to have been overly optimistic.[74] As a practical matter, no interpretive method is likely to restrict discretion in judicial decisionmaking, and originalism is unlikely to perform any better in this regard than various other approaches to constitutional interpretation. To the extent that we are worried about willful judges rendering arbitrary decisions, most interpretive methods offer the means for criticizing such judges. As constitutional theory has blossomed, it has become more apparent that constitutional adjudication is characterized more by normative disagreement than bad faith, and normative disagreement in turn can be rooted in theoretical disagreement. A faithful Dworkinian can be self-restrained by her interpretive method, and be subjected to scrutiny and criticism for failure to appropriately apply the favored method. The apparent abuse of discretion is more likely to be attributable to what Jeremy Waldron has called the "circumstances of politics" that comes from good-faith disagreements over what is to be done than to willfulness.[75] Limiting judicial discretion has rarely been offered as a compelling justification for the adoption of originalism in the recent literature.

### 2. Judicial Deference

The willingness of judges to interpose their constitutional judgments in policy disputes and to block the implementation of politically determined public policies has been a further source of persistent debate. The first wave of the modern originalist literature came in response to the constitutional decisions of the Warren Court and early Burger Court,[76] and was developed from a critical stance. The Supreme Court justices were seen as unduly activist—too willing to exercise the power of judicial review and nullify state and federal policies. Originalism was seen by many to be a solution to that problem. Advocacy of originalism often went hand-in-hand

73. BORK, *supra* note 5, at 2.

74. J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY 33–59 (2012).

75. JEREMY WALDRON, LAW AND DISAGREEMENT 102 (1999). The inherent difficulty of the judicial task and core indeterminacies in the constitutional text are also likely to breed disagreements, even if a hegemony of a single interpretive method could be established. Good-faith originalists will also come to different answers for difficult constitutional questions.

76. The Warren Court lasted from 1953 to 1969. The Burger Court followed and its first few years continued to embody many of the liberal impulses that characterized the Warren Court.

with a strong Thayerian deference,[77] which urged judges to strike down statutes only in the most extreme cases when no reasonable defense of the laws could be offered. Both the substantive content of the original Constitution and the high information requirements for an originalist judge to reach clear conclusions about constitutional meaning suggested to early originalists that democratic majorities would be empowered to act.

The recent literature has had a different emphasis. There is now a widespread emphasis on the centrality of constitutional fidelity to the originalist project, rather than the centrality of judicial restraint. If the primary commitment of originalist theory is to maintain the inherited constitutional rule against the temptations to deviate from it or alter it, then the tendency of the judiciary to uphold or strike down political actions must be purely contingent. The stringency of constitutional requirements and the decisions of political actors will determine the extent to which an originalist court will actively strike down legislation. Upholding the constitutional rule, as originally understood, may or may not require upholding contemporary legislation.

A commitment to judicial deference is a potential add-on to an originalist theory of constitutional interpretation. As such, it might be independently justified as a value that is unrelated to originalism but is nonetheless worth adopting. There is little consensus among current originalists that a general principle of judicial deference is separately attractive. Indeed, many would regard judicial deference as subversive of the primary commitment of originalism to identify and adhere to the original meaning of the Constitution.

Judicial deference may nonetheless be regarded as implicit in a commitment to originalism rather than a separate normative principle. Few recent originalists have made such an argument, but unpacking that possibility is worthwhile. Three possible angles seem most likely to be productive. First, the Constitution might itself be thought to embody democratic majoritarianism. To the extent that the text entrusts democratic majorities with extensive powers to make public policy, then the judiciary would have little authority to stand in their way. Such a reading of the Constitution seems implausible, however. Although some specific features of the Constitution are clearly designed to give policymaking flexibility to elected officials, others delimit that authority and impose constraints on political power. A generalized policy of judicial deference to the actions of government officials does not seem consistent with that "Madisonian" balance.[78] Second, the clear mistake rule might itself be part of original meaning of a textual provision of the Constitution. James Bradley Thayer spent much of his classic article making out something like that argument, though he emphasized early jurisprudential traditions more than original

77. Thayerian deference emphasizes a "clear mistake" rule for when statutes of doubtful constitutionality should be struck down, as advanced most influentially in James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

78. BORK, *supra* note 5, at 139.

textual commitments as such.[79] But others have found little evidence that the original meaning of the Constitution directs the Court to adopt such a restrictive reading of its own powers.[80] Third, we might think that proper respect for the constitutional judgment of elected officials demands that judges defer to them. But to the extent that the very practice of judicial review follows from the judiciary's duty to interpret and apply the law of the Constitution, judges would seem to be obliged to follow their own judgment about the law's meaning rather than defer to the judgment of others. While judges should perhaps be modest about the strength of their own insights into constitutional meaning, that humility suggests that they should learn from others and not simply accept the conclusions that others have reached.[81] On the whole, the case for judicial deference would seem to rest in a separate normative argument, rather than being implicit in originalism or the original Constitution itself. There is little agreement among originalists that courts should be especially deferential when exercising the power of judicial review.

## II. POINTS OF CONTENTION

Recent originalists do not, of course, agree on every point of originalist theory. While there are important points of agreement, many of which both unite recent advocates of originalism and distinguish them from key features of older versions of originalism, there remain points of internal contestation. These continuing points of contention emphasize the fact that originalist theory remains a work in progress and that adjustments and refinements in the theory are likely to occur in the future, just as they have in the past.[82]

### A. *Justifications for Originalism*

One area in which agreement has not yet been reached is in identifying the best justification for adopting an originalist approach to constitutional interpretation. There has at least been some winnowing down of the options, and some justifications for originalism that were once under active consideration now receive relatively little attention. The idea that originalism is justified by a commitment to judicial restraint has already been mentioned. For a generation concerned with reining in the Warren Court, a chief attraction of originalism was that it seemed to make plain the

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79. *See* Thayer, *supra* note 77.

80. Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 SUP. CT. ECON. REV. 115 (2004).

81. *See* McConnell, *supra* note 67, at 1292–93.

82. Perhaps it goes without saying that originalists will no doubt disagree among themselves about the actual content of the Constitution. Although such interpretive disagreements might derive from theoretical disagreements, they are more likely to derive from simply different approaches to and evaluation of the available evidence about original meaning, and are, potentially, resolvable within the confines of originalist theory. Balkin, for example, may reach rather different results about the meaning of the Fourteenth Amendment than Scalia, but much of the interesting disagreement comes at the level of interpretation rather than theory.

Court's errors, and held some promise of preventing judges from making the same errors in the future. In recent years, the desire to restrain the courts has not had a prominent place in academic defenses of originalism.[83]

There also now appears to be substantial agreement that the best justification for originalism will not itself be historical. The significance of the "interpretive intentions" of the Founders in mandating that current interpreters adopt an originalist philosophy was, most notably, aggressively advocated by Raoul Berger.[84] The argument for interpretive intentions has played relatively little role in the originalist literature of the past two decades. The shift away from trying to root originalist theory in interpretive intentions has been driven less by a belief that the Founding generation did not itself accept some form of originalism and more by the conviction that interpretive intentions are ultimately irrelevant for evaluating contemporary normative theories of constitutional interpretation and adjudication. The Founders may well have embraced originalism themselves, but such evidence will not do much to advance the argument for originalism.

Three considerations might be noted in pointing to the irrelevance of interpretive intentions for originalist theory. First, we might think of interpretive intentions as a form of expected applications. As noted above, the authoritativeness of original expectations about the applications associated with the adoption and implementation of a given constitutional rule have been generally rejected in originalist theory. Rather, it is the original meaning of the substantive content of the rule (as distinct from the expected consequences of the rule) that is the target for originalist inquiries. The Founders might well have expected that later interpreters would be guided by their own understandings of the Constitution, but such expectations would have been grounded in general theories about judicial decisionmaking and legal interpretation and could well be disappointed without doing damage to the embodied meaning of the text itself. The Founders might have expected that the federal judiciary would often or rarely strike down laws as unconstitutional, would play an important or a minor role in federal policymaking, would deploy a wide range of legal tools to enforce and implement their judgments, or would have few tools available. Such ideas about how the practice of constitutional dispute resolution and adjudication would play out under the constitutional text could be either prescient or myopic, but they are not authoritative.

Second, interpretive intentions are not themselves embodied in a textual constitutional rule. It seems plausible that the Founders could have entrenched a particular interpretive approach to the Constitution by including a textual instruction to future interpreters. From an originalist

83. The place of originalism in popular discourse may rest on a different footing. *See* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009).

84. Raoul Berger, "*Original Intention" in Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986). This justification for originalism was likewise aggressively attacked by critics. *See, e.g.*, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

perspective at least, such a text-based second-order rule would be as authoritative and binding as any other constitutional rule, only in this case the rule would direct and constrain interpreters rather than directing and constraining the substantive exercise of political power by government officials. The Constitution, however, contains very few explicit interpretive guidelines, and nothing that speaks to the general interpretive approach to be taken toward the document.[85] Any interpretive intentions that the Founders might have had regarding the Constitution were left at the level of background assumptions and expectations about future behavior.[86] An emphasis on original meaning would lead us to ask where those interpretive intentions appear in the Constitution itself—to ask what aspect of the Constitution (whether textual provision or structural principle) conveys a constitutional rule that all constitutional rules should be interpreted according to their original meaning. The Constitution seems to lack such an element.[87]

Finally, reliance on any interpretive intentions of the Founders as sufficient grounding for an interpretive theory seems inadequate. Any normative theory regarding constitutional interpretation and adjudication requires an explanation of why current political actors should regard that theory as compelling. Reliance on the factual existence of interpretive intentions is liable to appear circular, asking current political actors to bind themselves to the original meaning of the Constitution because such a practice would have the original meaning of the Constitution. Ultimately, we would want a theory to justify and explain the desirability of constitutional fidelity and the exercise of judicial review. Why *should* we follow this set of constitutional rules (the set of constitutional rules contained in the original meaning of the text) rather than some other? Justifying any particular approach requires normative argumentation, not appeal to authority. We cannot bootstrap our way to an interpretative theory.

If there is mostly agreement in the current originalist literature on the need for a normative theory (other than the instrumental desire to restrain the courts) to justify the adoption of originalism, there is disagreement on what that theory should be. Proponents of originalism have in recent years developed a variety of alternative justifications for the theory, and at least for the moment these alternatives have not yet been reconciled with one another or reduced to a common core.

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85. The Ninth Amendment and Eleventh Amendment represent exceptions to this general pattern, being framed explicitly as directions to future interpreters.

86. There might be a case for discovering commitments regarding legal interpretation implicit in the "judicial power" delegated in Article III, but such a case has yet to be made.

87. I have argued that originalism is most consistent with a core structural feature of American constitutionalism, the existence of a written fundamental law drafted and ratified by popularly elected assemblies. WHITTINGTON, *supra* note 20, at 50–59. I do believe that any persuasive interpretive theory must take account of and be reconcilable with this design feature, but I would not go so far as to argue that this structural feature embodies a clear set of interpretive intentions.

One approach is to justify originalism by reference to the likely political and policy outcomes to be generated by this approach to constitutional interpretation.[88] Cass Sunstein suggests that a consideration of outcomes always drives approaches to judicial review.[89] At the very least, we might imagine that the quality of the policy outcomes likely to be generated by a given normative constitutional theory has to be measured against some baseline of political legitimacy before we would be willing to take such a theory seriously.[90] An approach to constitutional interpretation that systematically generates unjust results would be hard to sustain, and would eventually call into question either the interpretive approach or the fundamental law itself.[91] The range of tolerable outcomes at least provides bounds on acceptable constitutional rules.

But some would go further and argue that originalism provides positively attractive substantive policy outcomes. We might simply imagine that the Constitution is particularly well written, such that its faithful interpretation and implementation will lead to desirable results.[92] A more intriguing possibility has been suggested by John O. McGinnis and Michael B. Rappaport.[93] Rather than suggesting that the Constitution just happens to be an excellent one, they argue that the constitution-creating procedures characteristic of American constitutionalism systematically produce good constitutional rules. Of particular significance for them is the use of supermajority rules for higher lawmaking in the United States. Such rules ensure that constitutional provisions will command widespread support and thus tend to enhance the general welfare. Faithfully enforcing rules that have been vetted and approved through such procedures will, they contend, generate better political and policy outcomes than substituting rules that have not survived such a gauntlet.

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88. The desire to generate judicial restraint is, in effect, a variation of this strategy. The desirable policy outcome is one in which courts seldom interfere with public policy decisions and general innovative policies (or constitutional rules) of their own, and the recommended strategy to achieve this result is the adoption of originalism as a means for achieving judicial self-restraint. This is a perfectly sound strategy for justifying the theory, but in practice few now believe that generalized judicial restraint is an attractive goal to pursue or that originalism is a particularly well-suited instrument for achieving that goal.

89. CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS 20–23 (2009).

90. Much turns on how high the normative baseline of legitimacy is against which an actual constitution is to be measured. *See* WHITTINGTON, *supra* note 20, at 86–87; Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111 (2003); Mark A. Graber, *Our (Im)Perfect Constitution*, 51 REV. POL. 86 (1989).

91. One might well ask whether it would be preferable to challenge the constitutional text itself rather than the effort to faithfully apply that text, but as a pragmatic matter a theory of constitutional interpretation that produces unacceptably bad results is unlikely to be politically sustainable. On the problem of deeply flawed constitutions, see J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703 (1997), and Mark A. Graber, *Why Interpret? Political Justification and American Constitutionalism*, 56 REV. POL. 415 (1994).

92. Sunstein posits the hypothetical possibility of a "Scalialand" in which "the original public meaning of the Constitution is quite excellent," and in which the "excellence of the Constitution" justifies an originalist approach. SUNSTEIN, *supra* note 89, at 21.

93. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013).

The supermajoritarian argument has the advantage of providing a rationale for expecting that an originalist constitution might provide superior results to constitutional rules elaborated in other ways. But this sort of argument rests normative constitutional theory squarely on an evaluation of political outcomes. Although we might have some reason to think that supermajority adoption rules are likely to produce some desirable features in public policy, the advantages of strict reliance on supermajority rules do not come without some costs. Such rules introduce substantial status quo bias into the constitutional or political system, and such a bias may not always be welfare enhancing. Resting the justification for enforcing constitutional rules on the quality of the outcomes resulting from them may also invite specific departures from an originalist constitution. Even if supermajority procedures generally produce high-quality rules, it might well be possible to identify exceptions (of either omission or commission) where better results could be achieved by substituting a rule that had not emerged from such a process. The very justification for originalism might therefore authorize departures from originalism.

Alternatively, one might view liberty to be the highest priority of constitutionalism. The best approach to the exercise of judicial review and the interpretation of constitutional rules, therefore, might be driven by considerations of enhancing liberty. Dworkin's constitutional theory is reflective of this type of orientation. For Dworkin, an emphasis on rights-enhancement was most consistent with a "moral reading" of the Constitution, in which constitutional interpreters seek to make the Constitution as compatible as possible with the demands of moral philosophy.[94] Dworkin was famously critical of originalism and would hardly conclude that an originalist constitution maximizes liberty.[95] Nonetheless, a Dworkinian theory might conclude either that the original Constitution we happen to have is, in fact, liberty maximizing, or that an originalist approach to constitutional interpretation is compatible with efforts to reconcile the demands of fit and justification in constitutional jurisprudence.[96]

Deriving originalism from a primary commitment to rights foundationalism is complicated, but not impossible. Such a justification for originalism is not without its difficulties. Most efforts to construct constitutional theories on the base of rights foundationalism do not routinely lead to the conclusion that originalism is the preferred approach.[97] Grounding originalism in such a justificatory approach would entail defending not only the adoption of a rights-oriented theory, but also the specific conclusion that originalism is the best instantiation of such a theory. Complicating that final conclusion is the possibility that originalism

94. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2–3 (1996).

95. *Id.* at 13–14.

96. From different political directions, the originalist theories of Balkin and Barnett show some Dworkinian inspirations. *See* BALKIN, *supra* note 58; BARNETT, *supra* note 72.

97. For a critical discussion of such theories, see WHITTINGTON, *supra* note 20, at 27–32.

might not always maximize rights. To the extent that in any particular instance rights could be further enhanced by departing from the original meaning of the Constitution, a rights-foundationalist argument might well suggest that such a departure should be made. Again, originalism would seem to be purely contingent when grounded on this sort of justification. The potential tensions between the original meaning of the constitutional text and the conclusions of a moral reading of the Constitution might derive from the apparent deficiencies of the original meaning (from the perspective of moral philosophy), but also from the competing objectives of constitutionalism. The protection of individual rights might be a core commitment of constitutionalism, but it is not the only purpose that constitutions are meant to serve. Constitutions are also concerned with structuring and empowering government and coordinating political action.[98] The various purposes that constitutions are designed to serve may require compromises and adjustments, and a single-minded focus on enhancing rights might conflict with, rather than realize, the features and commitments of the original meaning of the Constitution.

Finally, originalism has been justified by process-based considerations. Under this approach, pursing the original meaning of the Constitution is justified by the special status of the authorized lawmakers who established the fundamental rules to govern the polity. Only those lawmakers were democratically authorized to create fundamental law, and the goal of constitutional interpretation therefore should be to uncover the content of the rules laid down by those lawmakers and faithfully apply them. Drafting text for a written constitution allows for public deliberation and choice about the desired content of the fundamental law. Originalism refers back to that deliberate choice and seeks to understand the substance, and not merely the form, of the rule that was adopted. Originalism directs interpreters to defer to the authorized lawgiver, rather than deliberate anew on what might be desirable constitutional rules.

This justificatory strategy is particularly concerned with judges as constitutional interpreters. Normative constitutional theory is regularly focused on constitutional interpretation within a specific institutional context and for a specific purpose: the exercise of the power of constitutional review by judges to nullify or uphold legislative policy. The challenge is to explain the basis on which judges may exercise such an authority to overturn public policy endorsed by democratic institutions. Originalism points to the limited warrants on which government officials make policy to coerce social actors—warrants that are established in the same constitutional text that judges are called upon to interpret and enforce. The authority of legislators to make legitimate laws with binding force ultimately depends on the scope of their public office. Government officials are chosen to make policy within the limited scope of their predefined legal authority. The power of judicial review in a particular case

98. 1 HOWARD GILLMAN, MARK A. GRABER & KEITH E. WHITTINGTON, AMERICAN CONSTITUTIONALISM 5–10 (2013); Keith E. Whittington, *Recovering "from the State of Imbecility,"* 84 TEX. L. REV. 1567, 1574–81 (2006).

is merely an inference from the general judicial duty to apply the law correctly and appropriately to the case at hand.[99] Judges are justified in ignoring the dictates of a statute only when the statute conflicts with the superior authority of the Constitution. Judicial action properly trumps legislative action only to the extent that the judicial action is properly grounded in the higher law endorsed by the people.[100] By orienting judges to the original meaning of the Constitution as they exercise the power of judicial review, originalism preserves the ultimate authority of democratic decisionmakers to determine the content of the fundamental law.[101]

### *B. The Relationship Between Originalism and Judicial Review*

The theory of originalism may have been motivated by the particular practice and problems of judicial review and the judicial elaboration of constitutional law, but originalism is not itself a theory of constitutional adjudication. Originalism offers an argument about how the Constitution should be interpreted. Originalism is at least distinguishable from arguments about how courts ought to exercise the power of judicial review and what use courts ought to make of the Constitution while conducting their duties. Given that originalism only partly covers the ground that is of interest to normative constitutional theory, it is no surprise that originalists continue to differ among themselves over how courts ought to exercise the power of judicial review and what the implications of the originalist logic might be for judicial interpreters in particular.[102]

Most immediately, if not most obviously, originalists continue to disagree about whether courts are limited to constitutional interpretation. Originalist theory contends that a political actor engaging in constitutional interpretation ought to search for the original meaning of the constitutional text. Originalist theory, narrowly construed, does not tell us whether judges should engage in constitutional interpretation or whether judges are limited to constitutional interpretation when evaluating the constitutionality of a law or resolving a constitutional dispute. Establishing what is to be done when judges engage in judicial review requires a distinct normative argument that only partly overlaps with the kinds of justificatory strategies and interpretive contentions outlined above.

There are, of course, some natural points of tangency between a theory of originalism and a theory of constitutional adjudication. Many of the justifications for adopting originalism are aimed at judges and have in mind the practice of judicial review. If originalist interpretation generates better

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99. Philip Hamburger elaborates on the notion of judicial duty and its implications for constitutional law. *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008).

100. On the basic logic of a dualist democratic system, see 1 BRUCE ACKERMAN, WE THE PEOPLE (1993), and WHITTINGTON, *supra* note 20, at 135–42.

101. This point is developed at greater length in WHITTINGTON, *supra* note 20, at 152–59.

102. Solum, for example, is more modest in his ambitions than most in explicitly delimiting his inquiry to the nature of constitutional interpretation and declaring neutrality on contested normative issues of what judges ought to do. *See* Lawrence B. Solum, *Semantic Originalism* (Univ. of Ill. Coll. of Law Ill. Pub. Law & Legal Theory Research Papers Series, Paper No. 07-24, 2008), *available at* http://papers.ssrn.com/abstract=1120244.

policy outcomes, optimizes liberty, or preserves democratic decisionmaking, then this would serve to recommend originalism to judges. Given a particular concern with the interpretation of legal texts and the process of the authoritative resolution of disputes, originalist theory seeks to clarify and guide the general practice of legal interpretation (while saying little about the interpretive process of such different enterprises as literary criticism or Biblical exegesis). To the extent that judicial review as an ongoing political practice is understood to be a practice of constitutional interpretation and justified on the basis of the faithful interpretation of the fundamental law, then originalism works to make plain and refine those implicit commitments of existing legal practice.

But there are many issues of constitutional adjudication and dispute resolution that do not fall so neatly within the ambit of originalist theory. What remedies can courts properly deploy when they are confronted with constitutional violations? What sorts of disputes are properly subject to judicial intervention and resolution? Are courts limited to constitutional interpretation when deciding how to respond to political disputes that have come before them? May judges, for example, decide to ignore a constitutional rule that seems obsolete or unworkable?[103] May judges take action to resolve a political problem even when the Constitution is silent or unclear? Would the Supreme Court's decisions in *Brown v. Board of Education*,[104] *Gray v. Sanders*,[105] or *Bush v. Gore*[106] be justifiable even if they could not be grounded in constitutional interpretation?[107] What standard of certainty must judges reach before determining to act on their perception of a constitutional violation against the constitutional judgments of other government officials? Does the Constitution form the sum total of the fundamental law to be interpreted and applied by the courts, or may judges also make use of such materials as natural law or a judicially created common law as sources of constitutional law? Originalism may hold some inherent answers to those questions, but there is room for disagreement among originalists over how such questions should be answered and there is as yet little agreement among originalists over such broader questions of constitutional adjudication.

An unsettled, related question has commanded more attention within the originalist literature: how much respect judges should pay to judicial precedents that are apparently inconsistent with the original meaning of the Constitution. Originalist theory would indicate that the original meaning is

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103. *See* Mark V. Tushnet, *The Hardest Question in Constitutional Law*, 81 MINN. L. REV. 1 (1997) (examining the possibility of this sort of constitutional failure); Keith E. Whittington, *Yet Another Constitutional Crisis*, 43 WM. & MARY L. REV. 2093 (2001) (same).

104. 347 U.S. 483 (1954).

105. 372 U.S. 368 (1963).

106. 531 U.S. 98 (2000).

107. *See* Rogers M. Smith, *The Inherent Deceptiveness of Constitutional Discourse: A Diagnosis and Prescription*, *in* INTEGRITY AND CONSCIENCE 218 (Ian Shapiro & Robert Adams eds., 1998) (examining the possibility of an extraordinary judicial prerogative power).

authoritative in constitutional interpretation, not subsequent judicial decisions that sought to apply the Constitution. Likewise, I argue above that judicial doctrines and doctrinal analysis might be useful from an originalist perspective in conveying the accumulated understanding of judges on what the Constitution means and how it should be applied, and in assisting judges in administering constitutional rules for purposes of day-to-day legal adjudication. But originalist theory does not necessarily resolve the question of whether judicial precedent should be taken as an authoritative source of law that might supplement or trump the constitutional text. Originalist theory, as such, also does not definitively instruct judges on what they should do if they find themselves confronted with a legal and political status quo that already departs substantially from the original meaning of the constitutional text.

The potential tensions between judicial precedent and original meaning are only of academic interest if the body of constitutional law can be reconciled with the original meaning of the Constitution. Some potential conflicts may not matter if the relevant issues are unlikely to be raised in justiciable cases, or if the questions are no longer politically salient. The possibility of significant and salient conflicts between received judicial doctrine and apparent constitutional original meaning, however, can hardly be avoided entirely. Few would expect that originalism in practice would simply validate the constitutional status quo in all its various parts and details. Originalists have proposed a range of possible responses to this situation. For some, judicial precedents should be held in high esteem and current judges should normally defer to past decisions, even when they would be decided differently as matters of first impression. In an otherwise sympathetic account of originalism, Monaghan concluded "original understanding must give way in the face of transformative or longstanding precedent."[108] For others, a consequentialist approach to normative theory would suggest a potentially intermediate position in which "precedent doctrine should consist of rules that require precedent to be followed when doing so would produce net benefits."[109] By contrast, Gary Lawson has offered a more radical approach to precedent, concluding that a "court may properly use precedent if, but only if, the precedent is the best available evidence of the right answer to constitutional questions."[110] Arbitrating among such alternatives depends both on the pragmatics of judging in an imperfect world and on the proper relationship between originalist constitutional interpretation and the sources of constitutional law.

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108. Monaghan, *supra* note 37, at 724; *see also* BORK, *supra* note 5, at 155–59.

109. John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 804 (2009); *see also* Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent and the Common Good*, 36 N.M. L. REV. 419 (2006).

110. Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 4 (2007); *see also* WHITTINGTON, *supra* note 20, at 168–74; Randy E. Barnett, *Trumping Precedent with Original Meaning: Not As Radical As It Sounds*, 22 CONST. COMMENT. 257 (2005).

There are also practical issues of applying originalist theory that remain unresolved. Many recommendations about how best to pursue originalist constitutional interpretation in particular contexts no doubt operate below the level of theory, though best practices are likely to continue to emerge through concrete efforts to understand constitutional provisions. Theory is more likely to be relevant to some basic methodological issues. How authoritative are the particular interpretive methods and frameworks that were in place at the time of the Founding for later originalist interpreters? Are original interpretive methods also embodied in the Constitution, or are they dispensable features of a historic legal practice?[111] Are legal canons from the Founding era entrenched along with the constitutional text and essential to forming a coherent original understanding of the text?[112] How should the common law background of the constitutional text be interpreted?[113] How should common background assumptions of the Founding period be incorporated into the interpretation of the constitutional text?[114] Such issues have only begun to be explored in earnest.

Uncertainty and indeterminacy are inherent in the originalist approach to constitutional interpretation. The evidence of the historical meaning of particular provisions of the constitutional text may often be inadequate to guide the modern interpreter. Constitutional provisions may have been vague in their original usage, leaving uncertainty about how they should be clarified or elaborated. The law may have gaps that do not adequately guide political actors, even when action is necessary. Such considerations suggest that there are limits to what constitutional interpretation can accomplish.[115]

Originalists differ among themselves on how best to respond to this uncertainty. One recent option has been to supplement originalist constitutional interpretation with nonoriginalist constitutional construction.[116] Constitutional construction characterizes the constitutional elaboration within the interstices of the discoverable meaning of the constitutional text. Constructions perform important work by filling in gaps of constitutional meaning and providing guidance for how political actors should behave when original constitutional meaning is indeterminate. The process of construction allows political actors to depart from known constitutional meaning without violating constitutional meaning. Within

111. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

112. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003).

113. Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006).

114. Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615 (2009).

115. *See* WHITTINGTON, *supra* note 20, at 6–13, 204–19 (discussing the limits of constitutional interpretation); Lawrence B. Solum, *The Interpretation–Construction Distinction*, 27 CONST. COMMENT. 95 (2010) (same); Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119 (2010) (same).

116. *See, e.g.*, *supra* note 115.

the "construction zone" of indeterminate constitutional meaning, political actors creatively assemble new constitutional rules.[117]

Although embraced by some, the idea of constitutional construction has not been universally accepted by advocates of originalism, and the elaboration of the idea has not always been consistent among those who endorse it. Some would emphasize that constructions should primarily be pursued by political actors, while others suggest that courts should routinely engage in significant constructions of constitutional meaning in order to limit political actors.[118] Of course, one possible response to the idea of constructions is to deny that the meaning of the constitutional text is ever indeterminate or that there is significant uncertainty in constitutional interpretation. Perhaps all significant indeterminacies can be resolved through sufficiently careful efforts at interpretation. This, however, seems improbable. A more credible response is to suggest that there are other options for addressing interpretive uncertainty other than construction. One such option would suggest that a plethora of default rules could guide constitutional interpreters in the face of uncertainty. A particularly prominent default rule would be a rule that judges should defer to legislators on disputed constitutional questions whenever constitutional meaning is unclear. Rather than attempting to construct an effective constitutional rule on their own, judges encountering indeterminacies in the discoverable meaning of the Constitution might simply determine that, for example, the actions of government officials should be upheld against contested rights claims or that state authority should be upheld against the contested actions of Congress.[119] It remains to be seen whether such options are sustainable as alternatives to the idea of constitutional constructions or whether constructions will occupy a significant space within originalist theory.

## III. POINTS OF SEPARATION

There has been greater convergence between originalists and nonoriginalists in recent years than when the originalism debates first began.[120] Whereas the early originalists were particularly concerned with drawing contrasts between themselves and their critics, more recent offerings in originalism have emphasized points of commonality between originalist and nonoriginalist theories (and, in fact, have found more common ground with nonoriginalists). At the same time, critics of originalism have emphasized concerns with constitutional interpretation and

117. *See* Solum, *supra* note 115, at 108.

118. *Compare* BARNETT, *supra* note 72, at 118–30, *with* WHITTINGTON, *supra* note 20, at 6–13.

119. Default rules are considered in greater detail in Whittington, *supra* note 115, at 130–33.

120. I wish it went without saying that I do not believe that constitutional theory can simply be reduced to this particular dichotomy between originalists and nonoriginalists. There are a wide variety of approaches to constitutional theory beyond the confines of originalism (and much disagreement among originalists), but for present purposes what is of interest is the unity of other schools of thought in their criticism of originalism.

historical meaning in ways that help bridge the gulf between them and originalists.

Despite this growing common ground, there remain some notable points of separation between originalists and their critics. There are still features of originalist theory that remain unpalatable to nonoriginalists, and vice versa. Originalists and nonoriginalists continue to build their normative theories on distinct foundations and reach incompatible results. Even as we try to clarify the points of agreement and contestation within the recent originalist literature, it is worth bearing in mind what continues to separate originalists from their critics and prevents an easy reconciliation. I highlight two broad points of continued separation.

The first point of separation is that originalists remain far more optimistic than their critics about how discernible or useful original meaning might be. This is ultimately less of a theoretical disagreement than a practical one. One can fully accept every feature of originalist theory, and yet still conclude as an empirical matter that the particular constitution that one seeks to interpret is largely indeterminate and vague—or at least is indeterminate and vague relative to most of the legal issues that we happen to find most salient. The original meaning of a text may be hopelessly lost to us because the text in question is frustratingly vague, because the historical evidence that might clarify its meaning is irredeemably corrupt or missing, or for a variety of other reasons. For those who are pessimistic about the recoverability of the original meaning of the constitutional text, the proper response would lean less towards thinking that originalism is flawed and more towards thinking that originalism is necessarily irrelevant to contemporary constitutional practice.

There are three notes to be made regarding this point of separation between originalists and their critics. First, while it is reasonable enough to be skeptical about the ultimate value of an originalist inquiry for resolving immediate constitutional disputes, such pessimism should ultimately be supported by historical research. It is thus an empirical question whether originalist efforts at interpretation of any given piece of text bear any fruit. Both those who are optimistic about the value of originalist interpretation and those who are pessimistic would do well to wait until the research has been done before drawing any firm conclusions about how useful originalist admonishments might be.

Second, when considering the possible utility of originalist interpretation for resolving contemporary disputes, pessimists should bear in mind that the relevant inquiry is into the original meaning of constitutional rules, not into the historically expected applications of the textually embodied rule. Expected applications are likely to become obsolete relatively quickly, not because those inferences about the implications of the adopted rule are likely to be flawed, but because the application of the rule to political debates is likely to be narrow and time bound. The drafted text might itself take such an obsolescent character. The particular fears of the Founding generation led to the constitutional entrenchment of items such as the right to a jury trial in civil cases involving more than twenty dollars and the

prohibition on titles of nobility. As Richard Primus has emphasized, constitutional rights and prohibitions are often the product of particular political conflicts and experiences.[121] The United States is relatively fortunate that the drafters of the Constitution tended to frame the rules somewhat abstractly, such that the Third Amendment is the exception rather than the rule. Many of our constitutional rules may have grown out of the Founders' particular historical experiences, but the rules themselves generally have broad implications for situations that the Founders never imagined.[122]

Third, if originalist interpretive efforts prove fruitless, there still remains the question of what is to be done in the face of such textual indeterminacy. As we have seen, originalists disagree among themselves on this point. Some would no doubt fall into the same camp as many critics of originalism when considering what courts or political actors should do when the original meaning of a constitutional provision runs out. Whether in such circumstances judges should creatively generate rules of their own or defer to the actions of elected officials is beyond the scope of a theory of originalism per se and turns on a broader set of normative issues about the scope of judicial power and how to govern in the face of constitutional indeterminacy. The pessimist may simply believe that we more often find ourselves in the "construction zone" than most originalists do.

The second important point of separation between originalists and their critics is a theoretical one that goes to the heart of originalist theory: a disagreement over how authoritative original meaning should be. Specifically, this disagreement centers on Solum's "fixation" and "contribution" theses, and whether the meaning of a term is fixed at the time that it is uttered, constraining the content of constitutional law. To adhere to originalism necessarily requires adherence to those key features of the theory, and these are features that still provoke objections from critics of originalism, no matter how capacious such a theory of originalism might be.[123]

There are a variety of concerns about originalism that might be grouped under this heading. Broadly speaking, we might think that the original meaning is only one component of the effective law. From this perspective, the original meaning of the Constitution might be one factor to consider when attempting to determine what the applicable law might be for resolving a particular dispute, but the original meaning is not a hard constraint on the formulation of a rule to be applied. Original meaning might be one source of constitutional law, but it has no pride of place. The development of constitutional law might not be the equivalent of

121. RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS (1999).

122. The concern that constitutional provisions may be framed or conceptualized so narrowly that they have few implications outside their own context is distinct from a concern that historically generated constitutional provisions may no longer seem like the correct rules with which to govern.

123. This is why Dworkin ultimately could not embrace even his own reconstructed version of originalism. Dworkin, *supra* note 57, at 1258 n.18.

interpretation of the constitutional text, but may instead be a broader, more wide-ranging process. Original meaning might therefore be integrated into or balanced within the larger web of legal sources that must be considered when attempting to ascertain the applicable constitutional rule.

Whether from a Dworkinian law-as-integrity perspective or a constitutional pluralism perspective, we might think that judicial doctrine or ideas of social justice have as much role in determining the content of the law as the original meaning of the text as understood by those who laid down that text. Is judicial precedent, for example, as authoritative as the original meaning of the text in determining what the constitutional rules might be? If precedents are as authoritative (or more so) than the original meaning of the text, is this true only of particularly celebrated landmark decisions or would it be equally true of run-of-the-mill judicial decisions? Although such arguments might be pitched as critiques of the fixation thesis (must the text mean what it originally meant?), they are perhaps more telling when aimed at the contribution thesis (is constitutional law determined by the original meaning of the text?). Is original meaning one factor to be considered when identifying the constitutional rule; is original meaning just one data point to be weighed in the balance with other, potentially contradictory considerations? For originalists, the original meaning must be a hard constraint on how constitutional law can develop. For many nonoriginalists, the original meaning is simply one piece of information to consider in determining how law should develop.

Critics of originalism have suggested a range of considerations that might trump original meaning if the two were to come into conflict. From this perspective, fidelity to original meaning is not the chief goal of constitutional theory. For originalists, the original meaning is the trump card and could not be appropriately overridden by other considerations when seeking to interpret the Constitution. For nonoriginalists, original meaning may be important, but it is hardly a trump card—nor is the discernment of original meaning the primary goal of constitutional interpretation. We might imagine, for example, that a concern with good outcomes should trump original meaning. While it might be useful to determine what a constitutional provision originally meant, the interpreter should perhaps keep one eye on the likely effects of such a reading of the constitutional text and, if necessary, make some adjustments. To borrow a phrase, critics of originalism might be "faint-hearted."[124] Confronted with suitably unpleasant results, the nonoriginalist might posit that the original meaning should be sacrificed. Alternatively, we might think that contemporary public opinion should trump original meaning.

124. Scalia, *supra* note 2, at 862. As with Scalia himself, the implication here is not that the fainthearted are cowardly, but simply that they regard the medicine as sometimes "too strong to swallow." *Id.* at 861. Scalia suggested that even originalists should make some concessions to political and social reality. We might instead think that constitutional theory should be consequentialist and should appropriately reject an approach that tends, in general or in specific cases, to produce unpalatable results, or that constitutional theory should be a moral enterprise concerned with generating rules that reflect true claims about the political good.

Contemporary public opinion might be an independent source of law, or it might be situated within a theory of constitutional legitimacy in which the authoritative constitutional rules are those that can command respect and assent from the current populace, regardless of their pedigree.

Underlying all these considerations is a view that courts are authorized to impose constitutional rules other than those adopted by the constitutional drafters. This returns to the question of whether courts are limited to constitutional interpretation or whether they may exercise the power of judicial review on other grounds. Originalists disagree among themselves on this question, but the disagreement with nonoriginalists is more particular. An originalist might accept that courts can operate with some discretion within the boundaries set by the discoverable meaning of the Constitution, and that they can construct doctrine that is not dictated by constitutional interpretation so long as it does not conflict with constitutional interpretation. The crucial point of disagreement with nonoriginalists must be with whether courts may also exercise discretion to construct doctrine that does conflict with the original meaning of the Constitution. The originalist need not conclude that judges must stay their hand when they reach points of constitutional indeterminacy, but the originalist must insist that judges not close their eyes to the discoverable meaning of the Constitution and announce some other constitutional rule to supersede it.[125] It is at that point that the originalist and the nonoriginalist must part ways.

## CONCLUSION

To borrow from Daniel Farber, "It is not my purpose in this essay to convert readers to my own view about originalism."[126] I have staked out positions of my own within the originalism debate, and, of course, I am fond of them.[127] My goal here, however, is to survey the terrain at this point in the originalism debate. A great deal of work has been done since the first wave of the originalism debate. Originalists developed arguments and came to prominence in the 1970s and 1980s, but the number of participants in that theory-building exercise was relatively few and the central concerns of their arguments were rather immediate and political. Those advocates of originalism were met with a substantial response. Over

125. Again, there are qualifications to be added here to address extraordinary circumstances or entrenched precedents, to which originalists might disagree on how to respond. But significantly, in such circumstances the authority for judicial action would rest explicitly on noninterpretive grounds. Judges would take action in a crisis because such action was necessary, or judges would adhere to doctrine because such adherence is required by considerations of fairness and good order. While the worry about precedent from an originalist perspective is that the exception might swallow the rule, the points of separation between theories are not best measured by the exceptions. The interesting gap between originalists and their critics is not on how doctrinal mistakes should be corrected, for the doctrine that originalists would regard as mistakes might be embraced and exalted by the nonoriginalist.

126. Farber, *supra* note 14, at 1104.

127. *See* WHITTINGTON, *supra* note 20.

the past decade or so, another round of originalist theory has emerged. This second wave of theorizing has often (though not entirely) been advanced by a new generation of advocates, and has generally had a lower political profile and stronger academic orientation. While this new originalism shares many features of the old, there are some significant differences, and the contours of the current version of originalist theory should be properly recognized.

There remain important differences and issues that are subject to debate among originalists. It is hard to imagine how the situation could be any different, absent reducing originalist theory to the views of a single canonical figure or organizing a political movement concerned with generating a manifesto. Those who engage in originalist theory come to the topic from a range of substantive concerns, normative commitments, and ideological angles. Even so, this second wave of originalism seems to have settled on a set of commonalities, even as a number of issues important to the theory of originalism remain internally contested. Today, originalism is clearer on the centrality of the public meaning of the constitutional text and more agnostic about the importance of judicial restraint than it once was. The rationales for originalism and relationship between originalist constitutional interpretation and the exercise of judicial review remain matters of continued disagreement. If these adjustments have brought originalist theory closer to the views of many of its critics, there remain important points of separation between originalism and other approaches to constitutional theory. The questions of how important constitutional interpretation should be to the development of constitutional law and whether we should remain bound to the Founders' text are, I believe, central to the continuing disagreement between originalists and their critics.