LIVING ORIGINALISM

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ABSTRACT

Originalists routinely argue that originalism is the only coherent and legitimate theory of constitutional interpretation. This Article endeavors to undermine those claims by demonstrating that, despite the suggestion of originalist rhetoric, originalism is not a single, coherent, unified theory of constitutional interpretation, but is rather a disparate collection of distinct constitutional theories that share little more than a misleading reliance on a common label. Originalists generally agree only on certain very broad precepts that serve as the fundamental underlying principles of constitutional interpretation: specifically, that the "writtenness" of the Constitution necessitates a fixed constitutional meaning, and that courts that see themselves as empowered to give the Constitution some avowedly different meaning are behaving contrary to law. Originalists have been able to achieve agreement on these broad underlying principles, but they have often viewed as unduly narrow and mistaken the understanding held by the original originalists—the "framers" of originalism, if you will—as to how those principles must be put into action. And originalists disagree so profoundly amongst themselves about how to effectuate those underlying principles that over time they have articulated—and continue to articulate—a wide array of strikingly disparate, and mutually exclusive, constitutional theories. In this regard, originalists

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have followed a living, evolving approach to constitutional interpretation.

Our account of originalism's evolution—and of the extensive disagreement among originalists today—undermines originalists' normative claims about the superiority of their approach. Originalists' claims about the unique and exclusive legitimacy of their theory—that originalism self-evidently represents the "correct" method of constitutional interpretation—founder when one considers that originalists themselves cannot even begin to agree on what their "correct" approach actually entails. And their claims that originalism has a unique ability to produce determinate and fixed constitutional meaning, and thus that only originalism properly treats the Constitution as law and properly constrains judges from reading their own values into the Constitution, stumble when one considers the rapid evolution and dizzying array of versions of originalism; because each version has the potential to produce a different constitutional "meaning," the constitutional meaning that a committed originalist judge would find turns out to be anything but fixed. As originalism evolves, the constitutional meanings that it produces evolve along with it. Today's originalists not only reach results markedly different from those originalists reached thirty years ago, but also produce widely divergent results amongst themselves. Judges committed to the originalist enterprise thus have significant discretion to choose (consciously or subconsciously) the version of originalism that is most likely to dictate results consistent with their own preferences. As such, originalism suffers from the very flaws that its proponents have identified in its alternatives.

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INTRODUCTION

For the last several decades, the primary divide in American constitutional theory has been between those theorists who label themselves as "originalists"[1] and those who do not. It is widely understood that the side that does not embrace originalism is populated by proponents of a vast array of constitutional theories. To many proponents of originalism, the staggering diversity of these alternative approaches—which Justice Scalia and other originalists dismiss as nonoriginalism[2] or, even more derisively (in their minds), "living" constitutionalism[3]—is evidence of their collective inferiority. Nonoriginalists, Justice Scalia explains, can reach "agreement on nothing except what is the wrong approach."[4] It takes a theory to beat a theory, he argues, but "it is hard to discern any emerging consensus among the nonoriginalists as to what this might be."[5] The "glaring defect of Living Constitutionalism," he contends, "is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution" of constitutional meaning.[6]

This assertion trades implicitly on the notion that "originalism" represents a single, coherent constitutional theory, against which are arrayed the disparate nonoriginalist alternatives. Originalist rhetoric paints a powerful picture of originalism as a consistent, coherent

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1. "Originalism" is a murky term, as this Article seeks to explain. But at its core, it treats "the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present." Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004).

2. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989); *see also* Rebecca L. Brown, *History for the Non-Originalist*, 26 HARV. J.L. & PUB. POL'Y 69, 69 (2003) ("[Non-originalists] have long borne the stigma of identification by negative appellation."); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1126 n.42 (2003) ("Non-originalism seems best defined, derivatively, in contradistinction to originalism.").

3. *See* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694–97 (1976); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 38, 41–47 (Amy Gutmann ed., 1998).

4. Scalia, *supra* note 2, at 855.

5. *Id.*; *accord* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 617 (1999) ("It takes a theory to beat a theory and, after a decade of trying, the opponents of originalism have never congealed around an appealing and practical alternative.").

6. Scalia, *supra* note 3, at 44–45; *accord* Scalia, *supra* note 2, at 862–63 ("I also think that the central practical defect of nonoriginalism is fundamental and irreparable: the impossibility of achieving any consensus on what, precisely, is to replace original meaning, once that is abandoned.").

theory that has stood the test of time[7] while countless other convoluted theories—reverse-engineered by hopeless activists who start with desired results and try unsuccessfully to reason backward to a principled theory—have come and gone, all so plainly flawed that they are unable to attract adherents. To hear many originalists tell it, the fact that all of the smart and talented nonoriginalists have failed to come up with "the" alternative to originalism after decades of desperately trying—have failed, that is, to develop a theory that is coherent and compelling enough for the other nonoriginalists to rally around—suggests that no such theory is possible.[8] Originalism, they insist, is the only coherent method of constitutional interpretation. As Raoul Berger puts it, because originalism has been a consistent theory of constitutional interpretation, whereas nonoriginalists "parade[] as many theories as writers" and there is little "consensus among activists about a theory of interpretation,"[9] "[o]riginalism . . . justifies itself by the falseness of the beliefs that oppose it."[10]

It is not just the rhetorical attraction of originalism, but also its normative force, that to a substantial degree turns on there being one, consistent originalist approach. To its proponents, originalism is not simply the only *coherent* approach, but also the only *legitimate* approach. Normative defenses of originalism are generally based on the notion that the predictability, determinacy, and coherence of the originalist approach both respects law and constrains judges. Those defenses typically begin by noting that originalism, unlike other approaches to constitutional interpretation, accords to the Constitution fixed and determinate meaning. This determinacy is essential, originalists maintain, to preserving the Constitution as a form of law in a democratic society; after all, "[w]hen we speak of 'law,' we ordinarily refer to a rule that we have no right to change except through prescribed procedures," such as those in Article V of

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7. *See, e.g.*, Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 11 (1988) (describing originalism as an "enduring standard").

8. *See, e.g.*, Barnett, *supra* note 5, at 617 ("The inability of the most brilliant and creative legal minds to present a plausible method of interpretation that engendered enough confidence to warrant overriding the text . . . make[s] . . . originalism much more attractive.").

9. Raoul Berger, *New Theories of "Interpretation": The Activist Flight from the Constitution*, 47 OHIO ST. L.J. 1, 10 (1986).

10. *Id.* at 44 (quoting Raymond Aron, *Pensées*, N.Y. TIMES, Oct. 23, 1983, at E19); *see also* Raoul Berger, *Original Intent and Boris Bittker*, 66 IND. L.J. 723, 754–55 (1991) (arguing that a "great merit of originalism" is "that it is a 'simple' concept" and noting that, by contrast, "[n]onoriginalists . . . cannot unite on a single alternative but struggle in a welter of theories").

the Constitution.[11] Originalists often assert that the propriety of originalism follows naturally from the very fact that the Constitution is a form of law; originalism, they say, is "almost self-evidently correct"[12] and "so obvious that it should hardly need a name, let alone a defense."[13] Responding directly to the long-standing problem of the countermajoritarian difficulty—that is, the concern that judicial review allows unelected, unaccountable judges to thwart the will of democratically elected legislatures[14]—originalists further contend that the determinacy provided by reliance on constitutional text, or at least on some objective guidepost for the fixed meaning of the constitutional text, is essential to constraining judges' ability to impose their own views under the guise of constitutional interpretation.[15]

As a result, originalists insist, originalism is not merely *a* legitimate method of constitutional interpretation, but rather is the *only* legitimate interpretive approach, and the only alternative to "judicial activism." Prominent originalists have, for some time now, smugly declared that "there *is* a single, 'true' method of constitutional interpretation,"[16] and that "[o]ther approaches to interpretation are *simply wrong*."[17] Any form of constitutional interpretation other than originalism "must end in constitutional nihilism and the imposition of the judge's merely personal values on the rest of us."[18]

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11. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143 (1990); *see also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 3 (1987).

12. Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1020 (1992).

13. Steven G. Calabresi, Op-Ed., *The Right Judicial Litmus Test*, WALL ST. J., Oct. 1, 2007, at A23.

14. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962) (describing the countermajoritarian difficulty).

15. *See* Barry Friedman, *The Turn to History*, 72 N.Y.U. L. REV. 928, 943 (1997) (reviewing LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996)) (noting originalism's promise to solve the countermajoritarian difficulty).

16. Kesavan & Paulsen, *supra* note 2, at 1129; *see also id.* at 1121 (arguing that the "interpretive project of determining the original public meaning of the Constitution" is "the only truly legitimate approach to the interpretation of the Constitution as a legal document").

17. Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1834 (1997) (emphasis added).

18. Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 387 (1985).

Critics of originalism have sought to undermine these assertions by questioning the legitimacy of originalism,[19] or by seeking to articulate alternative interpretive theories that can lay claim to coherence and legitimacy.[20] But they have for the most part accepted uncritically the characterization of originalism as a coherent, monolithic theory that stands in marked contrast to the mishmash of divergent theories on the nonoriginalist side of the divide.[21]

This Article argues that what both originalists and nonoriginalists alike have generally failed to appreciate is that this characterization is unfounded. In fact, just as with nonoriginalism, there is profound internal disagreement on the originalist side of the line.[22] A review of originalists' work reveals originalism to be not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label. The image of a monolithic theory standing tall and firm, deflecting

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19. *See, e.g.*, Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 354 (2007) (questioning whether "the Constitution and its original principles" are binding); Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1105 (1998) ("Constitutionalism cannot survive when squeezed into a jurisprudence of a particular past moment, for it then lacks any account of its own legitimate authority, its own supremacy over the popular will of the present moment."). *See generally* Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1095–96 (1989) (explaining that originalism is chiefly criticized for being "too static . . . to keep the Constitution up to date with changing times").

20. *See, e.g.*, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1192–94 (1987) (presenting a "constructivist coherence theory" of constitutional interpretation).

21. Others have on occasion noted the basic point that, as Christopher Eisgruber once aptly put it, "[o]riginalism comes in a bewildering variety of colors and flavors." CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 26 (2001); s*ee also, e.g.*, Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 9–16 (2009) (arguing that "literally thousands of discrete theses can plausibly claim to be originalist"); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1812 (1996) ("If ever a term muddied as much as it clarified, 'originalism' is it."). But these observations have not been developed as the basis for an independent critique of originalism. Our endeavor here is to develop and illustrate this point in detail, and to derive from it a conclusion that others have missed: that the very existence of this discord substantially undermines the normative claims upon which originalism is typically based.

22. Indeed, the line that separates originalists from nonoriginalists itself is hazy at best. Few nonoriginalists ignore the original meaning, *see* Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1766 (1997), and plenty of originalists are willing to accept interpretations of the Constitution that depart from the original meaning, *see, e.g.*, Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 186 (2006).

countless hapless attempts to knock it down, is inaccurate. The more accurate picture is one of a collection of rapidly evolving theories, constantly reshaping themselves in profound ways in response to devastating critiques, and not infrequently splintering further into multiple, mutually exclusive iterations.

Part I explains that, in a relatively short period of time, originalism has evolved dramatically—indeed, so dramatically that the brand of originalism advanced by some of its most prominent defenders today would be virtually unrecognizable to those in originalism's vanguard in the 1970s and 1980s. More important, contrary to the suggestion of its proponents—for whom there is only originalism and everything else—there are today countless variations of originalism, and the differences among them are sometimes so stark that it is difficult to treat them as one coherent interpretive methodology. The original "jurisprudence of original intention"[23] slowly gave way to one of original meaning, determined by reference to the understanding—held by either the drafters, those who voted in state ratification conventions, or the general public, depending upon whom you asked—of the relevant provision at the time of its adoption. And from there, originalist theory gradually shifted again, to a jurisprudence of objective textual meaning. Today, pressing that theory to its logical extreme, several of the most prominent academic proponents of originalism dismiss not only the original intention of the Framers but also the actual original understanding of the Framing generation. Instead, they seek to determine how the words of the Constitution "would have been understood by a *hypothetical*, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted, and within the political and linguistic community in which they were adopted."[24] In the meantime, other prominent originalists who also claim to rely on original textual meaning have recast the theory in very different terms, as one that boldly empowers the judiciary to protect libertarian or even progressive visions of constitutional liberty. These various current forms of originalism have almost nothing in common with each other, or with the original originalism, except their self-conscious adoption of the same label. Infighting among originalists

23. Edwin Meese III, U.S. Attorney Gen., Address Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), *in* OFFICE OF LEGAL POLICY, *supra* note 11, at 96.

24. Kesavan & Paulsen, *supra* note 2, at 1132 (emphasis added).

has reached a fevered pitch, and it is not limited to disagreements about how the theory is properly applied to particular legal questions; rather, it concerns the very nature of the theory itself.

In Part II, we analogize originalism's evolution to living constitutionalism. Originalists, who have long criticized the notion of a living constitution, have themselves followed a living, evolving approach to constitutional interpretation. That is to say, originalists' understanding of the relationship among *originalism's* current meaning, its original meaning, and its underlying principles is similar to living constitutionalists' understanding of the relationship among *the Constitution's* current meaning, its original meaning, and its underlying principles.

It is not our objective here to criticize originalists for continually refining their approach. Indeed, any rigorous theory must be capable of adaptation in the quest for perfection. But because the rhetorical and normative defenses of originalism—in whatever variation—turn so substantially on the claims that originalism is the only theoretically coherent and legitimate approach to constitutional interpretation, it is notable that it has become virtually impossible today to define what exactly originalism entails. With unintended irony, originalism has become something of a moving target, evolving from speech to speech, opinion to opinion, and law review article to law review article. Justice Scalia is perhaps correct when he argues that "it is not very helpful to tell a judge to be a 'nonoriginalist.'"[25] But the proliferation of competing models of originalism suggests that it is also increasingly unhelpful to tell a judge to be an originalist. The very notion of originalism itself has become indeterminate.

Part III of this Article argues that this state of affairs has important implications for originalism's normative defense. Originalists regularly advance at least three normative claims about the superiority of their approach. They contend: (1) that their methodology is the only theoretically coherent approach to constitutional interpretation; (2) that, because their approach accords to the Constitution a fixed and determinate meaning based on the document's text, it is the only legitimate approach to constitutional interpretation—that is, the only approach that is consistent with the Constitution's status as law and the judiciary's role in a democratic society; and (3) (with perhaps less frequency today) that their

25. Scalia, *supra* note 2, at 855.

approach is uniquely promising for constraining the ability of judges to impose their own views under the guise of constitutional interpretation. We explain that the diversity in and evolution of originalist thought undermine these three claims. If even originalists cannot agree about what originalism is and what it entails, then how can originalism be uniquely coherent and self-evidently correct? And because different versions of originalism focus on different historical criteria—and, as a result, frequently produce different constitutional meanings—how can originalists maintain that originalism is uniquely determinate, and thus uniquely consistent with law and democracy? Finally, when one recognizes that the diversity of originalist theories allows originalist judges to pick and choose among the various strands of originalism from case to case to reach results that accord with their personal policy preferences, one is left to question the assertion that originalism is uniquely resistant to judicial activism. Indeed, as Part III explains, originalists can and often do move from one version of originalism to another as they decide different issues, thus allowing them to reach results that they personally prefer, all the while claiming (and likely mistakenly believing) that they are being guided by nothing more than the external constraint of history. For these reasons, the diversity of originalist theories undermines the very normative claims that tie those theories together.

I. ORIGINALISM'S EVOLUTION

A. The Shifting Hub of Originalism

In the late 1960s and early 1970s, frustration among conservatives with the sweeping decisions of the Warren Court led critics to insist that the Constitution be interpreted to give effect to the intent of the Framers.[26] In his confirmation hearings in 1971, for instance, soon-to-be-Justice Rehnquist promised that he would not "disregard the intent of the framers of the Constitution and change it to achieve a result that [he] thought might be desirable for society."[27] These were the origins of the modern originalist movement.

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26. For example, Senator Sam Ervin asked Thurgood Marshall in the latter's confirmation hearings, "Is not the role of the Supreme Court simply to ascertain and give effect to the intent of the framers of this Constitution and the people who ratified the Constitution?" Whittington, *supra* note 1, at 599–600.

27. *Id.* at 600 (quoting *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the S. Comm. on the Judiciary*, 92d Cong. 19 (1971) (statement of Sen. McClellan, Member, S. Comm. on the Judiciary)).

When scholars like Raoul Berger and Robert Bork, and political and judicial figures like Attorney General Edwin Meese III and then-Justice Rehnquist, began to compose scholarly monographs articulating an intellectual defense of originalism in the 1970s and 1980s, they repeated and developed the notion that the proper meaning of the Constitution is the meaning originally *intended* by the Framers. Meese insisted upon a "jurisprudence of original intention" that focused upon "the original intent of the Framers."[28] Rehnquist demanded allegiance to the "language and intent" of the "framers of the Constitution."[29] Bork insisted that "original intent is the only legitimate basis for constitutional decisionmaking."[30] And Berger decreed that any constitutional interpretive theory other than one grounded in "original intention" amounted to nothing more than a "judicial power to revise the Constitution."[31]

The theory of original intent was met with savage criticism, focusing most prominently on two fundamental weaknesses. First, it is nearly impossible to ascertain a single collective intent of a large group of individuals, each of whom may have had different intentions.[32] Second, original intention is a self-defeating philosophy, insofar as much of the historical evidence suggests that the Framers in fact intended for future generations *not* to interpret the Constitution according to their intent—thus requiring the paradoxical conclusion that the only way to follow the intent of the Framers is *not* to follow the intent of the Framers.[33]

Largely in response to these devastating critiques, originalists shifted the focus of their theory from the original *intent* of the

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28. Meese, *supra* note 23, at 96–97.

29. Rehnquist, *supra* note 3, at 694–97.

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

31. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 364 (1977); *see also, e.g.*, Earl Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811, 811–12 (1983) ("[J]udges should be guided by the intent of the Framers of the relevant constitutional provisions.").

32. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209–22 (1980).

33. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 907 (1985). Powell's conclusion was that the "original intent" favored by the Framing generation was in fact an inquiry into "the 'intentions' of the sovereign parties to the constitutional compact, as evidenced in the Constitution's language and discerned through structural methods of interpretation; it did not refer to the personal intentions of the framers or of anyone else." *Id.* at 948.

Framers to the original *meaning* of the Constitution. As Justice Scalia, who led the "campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning,"[34] explained, originalists began to seek "the original meaning of the text, not what the original draftsmen intended."[35] Notwithstanding his central role in the original movement in favor of original intent, Judge Bork quickly joined that campaign.[36]

The conventional wisdom holds that this was the watershed transition in originalist thought.[37] Of course, this monumental shift alone substantially undermines the self-image of originalism as a single, coherent theory. Yet the inconsistency of originalism—the incoherence of the movement—runs much deeper. And it always has.[38]

Even in the early days of "original intent" originalism, there was internal disagreement about the proper focus of the inquiry. The "intent of the Framers" was a misleading abstraction that implied a degree of agreement that was not really there. Just who were the "Framers" whose intentions mattered: the men who drafted the text of the Constitution and agreed upon it at the Philadelphia convention, or the men whose ratification votes at the subsequent

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34. Antonin Scalia, Judge, U.S. Court of Appeals for the D.C. Circuit, Address Before the Attorney General's Conference on Economic Liberties (June 14, 1986), *in* OFFICE OF LEGAL POLICY, *supra* note 11, at 106.

35. Scalia, *supra* note 3, at 38. As one of us has previously written,

> This redirected focus on original meaning, rather than original intent, ostensibly avoids both the problem of determining the collective intent of the numerous Framers (the Framers may have had many reasons for enacting it, but the text nonetheless had only one meaning) and the problem of self-defeat (much of the historical evidence that was mustered to undermine the reliance on original intent actually supports the reliance on original meaning by suggesting that the Framers believed that the original meaning of the text, rather than the original intent of the drafters, would control future constitutional interpretation).

Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 531 (2008) (footnotes omitted).

36. *See* BORK, *supra* note 11, at 144 ("The search is not for a subjective intention. If someone found a letter from George Washington to Martha telling her that what he meant by the power to lay taxes was not what other people meant, that would not change our reading of the Constitution in the slightest. Nor would the subjective intentions of all the members of a ratifying convention alter anything. When lawmakers use words, the law that results is what those words ordinarily mean.").

37. *See, e.g.*, Barnett, *supra* note 5, at 620–29; Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 3–9 (2007).

38. Vasan Kesavan and Michael Stokes Paulsen tell a detailed and thoughtful tale of the evolution of originalist thought. *See* Kesavan & Paulsen, *supra* note 2, at 1134–48. But they too convey an unduly rosy impression of coherence and continuity. *See id.*

state conventions gave it the force of law? The early originalists could not agree on the answer to that question. Meese focused on the intent of the drafters;[39] Berger initially concurred,[40] but later shifted his focus to the intent of the ratifiers.[41]

The move from original intent to original meaning exponentially multiplied that sort of internal disagreement among originalists. In some respects, that move was simply a semantic one. Even before the shift in rhetoric, Raoul Berger had defined "original intent" as "the meaning attached by the framers to the words they employed in the Constitution."[42] In other words, originalism was always to some degree, at least to some originalists, about original meaning.[43] It was just that the original meaning was initially understood to be the meaning originally *intended* by the drafters—or perhaps the ratifiers, depending upon whom one asked.

But the rhetorical shift from intent to meaning also had substantive implications—although exactly *why* it was important again depended upon who was telling the tale. For many originalists, the rhetorical change represented a shift from the *intent* of the Framers to the *understanding* of the Framers—from what the Framers actually *intended* the Constitution to mean to what they actually *understood* it to mean. Thus, as the focus shifted from original intent to original meaning, many originalists began to speak in terms of the

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39. *See* Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 456 (1986) ("The standard of interpretation applied by the judiciary must focus on the text and the drafter's original intent."); *see also, e.g.*, Earl Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773, 774 (calling for "a jurisprudence based on the intent of the drafters").

40. *See* BERGER, *supra* note 31, at 365 ("Effectuation of the draftsman's intention is a long-standing rule of interpretation in the construction of all documents . . . ."); RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 3–20 (1987).

41. *See* Raoul Berger, *Jack Rakove's Rendition of Original Meaning*, 72 IND. L.J. 619, 640–41 (1997) (arguing that although the drafters' intentions and understandings are usually dispositive, they are so only when in accord with those of the ratifiers). Bork seems initially not to have taken a stand. *See* Bork, *supra* note 30, at 826 (pressing the necessity of "interpret[ing] the document's words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments"). Later, he explained that the focus should be on the "ratifying conventions" because it is "their intent, not the drafters', that counts." BORK, *supra* note 11, at 181.

42. BERGER, *supra* note 31, at 363.

43. Indeed, Justice Black explicitly demanded a jurisprudence of original meaning in 1966. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 677 (1966) (Black, J., dissenting) (lambasting the Court for "consulting its own notions rather than following the original meaning of the Constitution").

"public understanding" of the meaning of the Constitution.[44] These originalists explained that a judge should determine "what the original language actually meant to those who used the terms in question"[45]—that is, the "meaning of the provision to the public on whose behalf it was ratified."[46] As Keith Whittington explains, this change in focus stemmed from the belief that, "[i]n ratifying the document, the people appropriated it, giving its text the meaning that was publicly understood."[47]

This shift was significant, but it was not a clean break. One can find many references to original understanding in the early writings of the originalists whose work is generally associated with original intent, rather than original meaning.[48] And one can find many references to original intent in the later writings of the originalists whose work is generally associated with original meaning, rather than original intent.[49] What is more, the move to original understanding did not obviate the disagreement over whose intentions matter; it simply replaced that debate with a new one among originalists—at least, that is, among those originalists who abandoned the quest for original intent—as to whose *understanding* matters. Some originalists have focused on the understanding of the drafters;[50] others on the

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44. *E.g.*, Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 339 (2004).

45. Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Barnett*, 103 MICH. L. REV. 1081, 1081 (2005).

46. Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 675 (1991); s*ee also, e.g.*, Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 29 (2000) ("What counts as text is the document as understood by the American People who ratified and amended it . . . .").

47. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 60 (1999).

48. *See, e.g.*, BERGER, *supra* note 31, at 366–67 (quoting favorably Jefferson's promise as the president to administer the Constitution "according to the safe and honest meaning contemplated by the plain understanding of the people at the time of its adoption").

49. *See, e.g.*, Steven G. Calabresi, Lawrence*, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1112 (2004) ("Surely, if that had been the framers' intent, there would have been extended discussion and controversy about the Privileges and Immunities Clause of Article IV during the ratification debates, which there was not.").

50. *See, e.g.*, Earl M. Maltz, *Personal Jurisdiction and Constitutional Theory—A Comment on* Burnham v. Superior Court, 22 RUTGERS L.J. 689, 696 (1991) (arguing that originalism "focuses on the original understanding of those who drafted the fourteenth amendment").

understanding of the ratifiers;[51] and still others on the understanding of the public.[52]

For another group of originalists, the move to original meaning was more profound than a simple shift from subjective *intentions* to subjective *understandings*. It was instead a shift from *subjective* meaning—what particular individuals actually intended the text to mean—to *objective* meaning—the meaning reasonably suggested by the words of the Constitution, as used in context at the time that they were adopted. Slowly, the "original understanding" incarnation of the "original meaning" incarnation of originalism has given way, for these originalists anyway, to an originalism that focuses on objective meaning.[53]

At first, this notion of "objective" meaning was seemingly tied to the actual understanding of the people. In insisting on objective constitutional meaning, for example, the Reagan Justice Department explained that "[o]ur fundamental law is the text of the Constitution as understood by the ratifying society, not the subjective views of any group or individual."[54] In other words, the objective meaning is the one actually shared by the ratifying society as a whole: "The common understanding of the text is what counts . . . ."[55] As Justice Scalia explained it, the originalist should seek the "meaning of the words of the Constitution to the society that adopted it—regardless of what the Framers might secretly have intended."[56]

Indeed, some originalists who seek the original, objective meaning have in fact gone so far in the direction of reliance on the actual public understanding as dispositive proof of original meaning that they determine original meaning by reference to the concrete

51. *See, e.g.*, WHITTINGTON, *supra* note 47, at 35–37; Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 79 (1988) (discussing "ratifier intent"); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 512 (1988) (noting Alexander Hamilton's statements focusing on the ratifiers' intentions).

52. *See, e.g.*, Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1998) ("Originalism is the idea that the words of the Constitution must be understood as they were understood by the ratifying public at the time of enactment."); Perry, *supra* note 46, at 677 ("It is the meaning to, or the understanding of, those, the enfranchised, in whom sovereignty ultimately resides and on whose behalf the ratifiers acted—those the ratifiers 'represented'—that should matter.").

53. *See, e.g.*, OFFICE OF LEGAL POLICY, *supra* note 11, at 14–15; Scalia, *supra* note 3, at 38.

54. OFFICE OF LEGAL POLICY, *supra* note 11, at 17.

55. *Id.* at 20.

56. Scalia, *supra* note 34, at 103.

expectations of the Framing generation as to how the constitutional provision at issue would apply to a particular practice[57]—an approach that some commentators call original-expected-application originalism.[58] Justice Scalia often employs a particular version of this practice in resolving constitutional questions,[59] even though he has disavowed it in his scholarly writing.[60] Justice Scalia has frequently decided cases on the basis of the proposition that if the first Congresses and presidents engaged in a practice, then the Framing generation must have expected and thus understood the practice to be constitutional—in which case it "necessarily remains constitutional today."[61] So wedded is Justice Scalia in these cases to the Framers' expectations—as evidenced by the actions of early officials—that he does not bother even to attempt to articulate the original meaning. As Andrew Koppelman explains, "Scalia's claim is that whatever the . . . Clause means, it cannot apply to a practice of which the Framers knew and approved. The argument is essentially, 'I have no idea what this provision means. But whatever it means, it can't prohibit this, because the framers approved of it.'"[62] Koppelman refers to this brand of originalism as "I Have No Idea Originalism."[63]

57. *See* John O. McGinnis & Michael Rappaport, *Original Interpretative Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378–79 (2007) (arguing in favor of giving very heavy weight to original expected application).

58. *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295–97 (2007). This theory is premised not only on the notion that the meaning of a constitutional provision is determined by "the meanings that words had at the time they were adopted" as "read in light of [the provision's] underlying principles," but also on the notion that "the concepts and principles underlying those words must be applied in the same way they would have been applied when they were adopted." *Id.* at 296 (emphasis omitted).

59. *See* Balkin, *supra* note 58, at 295–96 ("Scalia's version of 'original meaning' is not original meaning in my sense, but actually a more limited interpretive principle, what I call *original expected application*."); Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 386 (2007) ("[M]uch of Scalia's writing . . . does appear to endorse and rely upon the expectation originalism that he purports to reject."); Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 556–58 (2006) (noting Justice Scalia's suggestion that "in order to maintain a stable constitutional meaning, we must adhere to the Founders' practices" (emphasis omitted)); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 574–82 (1998) (surveying Justice Scalia's opinions involving fidelity to originally expected practices).

60. *See infra* notes 259–66 and accompanying text.

61. *See* Colby, *supra* note 35, at 574.

62. Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 737 (2009).

63. *Id.*

Most originalists who seek the original, objective meaning of the Constitution, however, have explicitly rejected this practice.[64] Indeed, originalists have found themselves disagreeing with Justice Scalia on matters of constitutional theory with increasing frequency. As originalists Vasan Kesavan and Michael Stokes Paulsen explain, "even though Justice Scalia remains the dominant figure in the shift to originalist textualism, his is not always the most refined or consistent version of the theory. In some ways, he is a leader whose followers have bettered the leader's own work."[65] According to Kesavan and Paulsen, "[s]cholars and judges a half-generation younger than Scalia, who are in some respects his heirs, often appear to be employing more thoroughly and carefully honed versions of originalist textualism."[66] As two such prominent originalists recently said in taking issue with Justice Scalia, "[o]ne can disagree with giants even when standing on their shoulders."[67]

This newer generation of originalists has developed a theory that some of its proponents have labeled "original, objective-public-meaning textualism."[68] This theory disavows not only original intent, but also original understanding.[69] Its proponents do not concern themselves with how the words of the Constitution were *actually* understood by the Framers, the ratifiers, the public, or anyone else,

64. *See* Berman, *supra* note 59, at 385–89 ("[L]eading academic defenders of originalism have been disavowing expectation originalism for years."); Colby, *supra* note 35, at 579–80 ("[I]t would be a mistake to assume, as many commentators seem to do, that original expected application is the prevailing academic model of originalism."); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1284 (1997) ("[N]o reputable originalist, with the possible exception of Raoul Berger, takes the view that the Framers' 'assumptions and expectation about the correct application' of their principles is controlling."). In particular, they have disagreed with the assertion that the mere fact that the First Congress engaged in a practice necessarily means that the practice is constitutional. *See, e.g.*, Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1045 (2007) ("The touchstone must always be the Constitution, not what anyone in particular, including the First Congress, says about the Constitution.").

65. Kesavan & Paulsen, *supra* note 2, at 1140.

66. *Id*.

67. Calabresi & Lawson, *supra* note 64, at 1009; *see also, e.g.*, Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 23 (2006) (arguing that "Justice Scalia misunderstands what originalism requires").

68. Kesavan & Paulsen, *supra* note 2, at 1132 (emphasis omitted).

69. *See id.* ("It is not a theory of anyone's intent or intention. Nor is it a theory of anyone-in-particular's understanding. Nor is it a theory of the collective intention of a particular body of people, or of a society as a whole.").

but rather with how a hypothetical, reasonable person *should have* understood them. They "do not regard the search for original meaning as a search for historically concrete understandings. Instead, [they] conceive of the inquiry in hypothetical terms."[70]

This jurisprudence is so far removed from the "original" originalism of the likes of Raoul Berger and Edwin Meese as to be an entirely different constitutional theory. Kesavan and Paulsen explain that "when [they] use the term 'originalism,' it is not in reference to a theory of 'original intent' or 'original understanding.'"[71] But when Berger and Meese use the term "originalism," it *is* in reference to a theory of "original intent."[72] And when Bork and a great many other originalists use the term "originalism," it *is*—at least more recently, even if not always—in reference to a theory of "original understanding."[73] Gary Lawson explains that original, objective-public-meaning textualism

> is a hypothetical inquiry that asks how a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world, would understand a particular provision. Actual historical understandings are, of course, relevant to that inquiry, but they do not conclude or define the inquiry—nor are they even necessarily the best available evidence.[74]

But Raoul Berger, by contrast, had adamantly insisted as recently as 1997 that "[o]riginalists do not speculate about how the Founders 'would have' construed their handiwork; we rely rather on what they actually understood, on their accompanying explanations of what their words mean and are intended to accomplish."[75]

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70. Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 25 (2001).

71. Kesavan & Paulsen, *supra* note 2, at 1132.

72. *See, e.g.*, Berger, *supra* note 9, at 2 ("'[O]riginalists' . . . maintain that the provisions of the Constitution mean what the Founders intended them to mean—the 'original intention.'"); Raoul Berger, *Original Intent: The Rage of Hans Baade*, 71 N.C. L. REV. 1151, 1159 n.48 (1993) ("Originalists seek the maker's intention." (emphasis omitted)); Edwin Meese III, *Reagan's Legal Revolutionary*, 3 GREEN BAG 2D 193, 193 (2000) (noting that originalism involves "a deep-seated commitment to the doctrine of original intent").

73. *See, e.g.*, BORK, *supra* note 11, at 143–44.

74. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002).

75. Berger, *supra* note 41, at 627 (emphasis omitted).

B. The Many Spokes of Originalism

What is more, even among those originalists who claim to rely on the original, objective public meaning of the constitutional text, there is profound disagreement about the nature and effect of originalism. Randy Barnett, for instance, appears to have espoused loyalty to the new school of "original meaning" that focuses on the objective meaning of the text.[76] Aligning himself with Lawson, Paulsen, and others, Barnett "claims to use the exact methodology those sophisticated originalists use."[77] Yet he believes—in sharp contrast to the other originalists whose methodology he generally shares—that the major rights-granting provisions of the Constitution, including the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment, objectively have such a broad meaning that they direct judges to interpret them at a very high level of generality[78]—so high in fact that they should be read to embody a "presumption of liberty"[79] and essentially to "mandate[] libertarianism at both the state and federal level."[80] Barnett's originalism, which empowers the judiciary aggressively to protect countless individual rights from democratic infringement, is the antithesis of the originalism of Scalia, Bork, and the many others who seek to preserve democratic rule by *limiting* the scope of judicial power to interfere with the output of democratically elected decisionmakers and by *narrowing* the pool and scope of enforceable individual constitutional rights.[81] For this reason, other originalists have been highly critical of Barnett's theory.[82] And Barnett, in turn,

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76. *See* Barnett, *supra* note 5, at 620–29. Some of Barnett's work seems to straddle—or not to acknowledge—the line between the actual original public understanding and the hypothetical understanding of an objective observer. *Compare id.* at 621 (seeking "the objective original meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment"), *with id.* at 627–28 (arguing that "[t]he public meaning of the words of the Constitution, as understood by the ratifying conventions and the general public . . . should prevail").

77. Calabresi, *supra* note 45, at 1081.

78. *See* Barnett, *supra* note 67, at 23 ("That the founders . . . drafted texts that leave some discretion in application to changing circumstances is not a bug. It's a feature. Applying the more abstract provisions of a text is required by a proper approach to originalism.").

79. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 253–69 (2004).

80. Calabresi, *supra* note 45, at 1081.

81. *See infra* Part III.C.

82. *See, e.g.*, Calabresi, *supra* note 45, at 1083–97 ("Barnett . . . claims that originalism leads to judicial activism . . . . [but] Barnett . . . has failed in his quest to accurately describe the true original understanding of the Constitution."); Douglas G. Smith, *Does the Constitution Embody*

has been highly critical of other originalists—specifically those "original public meaning originalists [who] would have courts ignore the original meaning of the text when it is insufficiently rule-like."[83]

Similarly, Michael Perry endorses a jurisprudence that seeks the "'objective meaning' to the public at the time the provision was ratified."[84] Perry explains that this inquiry is hypothetical: "it is what the public 'would have' understood that should matter."[85] But his originalism has a unique flavor. It "does not entail . . . a small or passive judicial role."[86] Rather, because the Constitution is so textually vague and open-ended, Perry believes that judges can legitimately choose between many plausible original meanings, at varying levels of generality, such that much of the Supreme Court's modern individual rights jurisprudence can (and should) be defended on originalist grounds.[87]

And the originalist tent keeps getting bigger. Bernadette Meyler, for instance, has recently articulated a theory of "common law originalism" that seeks the meaning of legal terms of art in the Constitution by reference to the common law, but, "rather than [being] static or inflexible," "regards the strands of eighteenth-century common law not as providing determinate answers that fix the meaning of particular constitutional clauses but instead as supplying the terms of a debate about certain concepts, framing questions for judges but refusing to settle them definitively."[88]

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a "Presumption of Liberty"?, 2005 U. ILL. L. REV. 319, 321–37 (criticizing the arguments that Barnett advances in *Restoring the Lost Constitution: The Presumption of Liberty*).

83. Randy E. Barnett, *Trumping Precedent with Original Meaning: Not As Radical As It Sounds*, 22 CONST. COMMENT. 257, 264 (2005). Barnett cites Justice Scalia as an example of such an originalist. *See id.* at 264 n.21. Michael Stokes Paulsen would be another example. *See* Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 296 n.18 (2005) ("[A] decision invalidating political action where the constitutional text is vague or ambiguous (in the sense of failing to yield a determinate rule of law) is simply an incorrect constitutional decision. Adherence to such a precedent is adherence to a decision that is incorrect on originalist grounds and thus corrupts the interpretive theory of originalism.").

84. Perry, *supra* note 46, at 677 (emphasis omitted).

85. *Id.*

86. MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 55 (1994).

87. *See* Richard B. Saphire, *Originalism and the Importance of Constitutional Aspirations*, 24 HASTINGS CONST. L.Q. 599, 612–21 (1997) ("Perry now argues that originalism and a defense of the modern constitutional jurisprudence of human rights can coexist. . . . [A]n originalist can feel free to adopt either [plausible] position.").

88. Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 558 (2006).

Similarly, Jack Balkin has announced his recent conversion to originalism.[89] But his version of originalism, which he labels "text and principle," contemplates a Constitution "whose reach and application evolve over time."[90] Balkin explains that under his theory, *Roe v. Wade*[91] was correctly decided.[92] To most originalists, however, *Roe* represents the very epitome of illegitimate constitutional decisionmaking.[93] It is thus likely, as Ethan Leib speculates, that "many originalists will read Balkin to be a living constitutionalist in disguise—and may not let him into their club."[94]

Perhaps. But there is, alas, no official gatekeeper for that club. There is no person or body with the accepted authority to decide whose theory is a pure version of originalism, and whose is not. As a result, there is no single, formal, canonical version of originalism. Indeed, any self-appointed gatekeeper who sought to weed out the Balkins and the other heretics would probably find herself rejecting the majority of originalists, because no matter which version of originalism the gatekeeper followed, her theory would likely be fundamentally inconsistent with that of many, or even most, other originalists. As it turns out, there *is* no theory of originalism that commands anywhere near universal consensus, even among self-professed originalists.

That discordance is not simply the product of the passage of time. The history of originalism has not been a tidy story of steady, linear evolution. Instead, at any given point in time, there have been many mutually inconsistent theories of constitutional interpretation that are unified, for the most part, only by their claims to carry the banner of originalism.

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89. *See* Balkin, *supra* note 58, at 293 ("I maintain . . . that constitutional interpretation requires fidelity to the original meaning of the Constitution and to the principles that underlie the text.").

90. *Id.* (emphasis omitted).

91. Roe v. Wade, 410 U.S. 113 (1973).

92. *See* Balkin, *supra* note 58, at 319–36.

93. *See, e.g.*, OFFICE OF LEGAL POLICY, *supra* note 11, at 63.

94. Leib, *supra* note 19, at 355; *see also, e.g.*, Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1371–72 (2009) (criticizing Balkin's theory and pressing the need "to distinguish genuinely originalist interpretations from those that amount to living constitutionalism . . . dressed up in originalist clothing"). *But see* Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405, 416 (2007) (taking Balkin at his word that "he is sincere in his embrace of original meaning originalism" and expressing a substantial amount of agreement with parts of his theory, while rejecting other parts of it).

Consider, for instance, the state of originalism during one snapshot in history in the late 1980s. In 1985, Michael Perry observed that there were "different ways to conceive of originalism (and thus of 'an originalist approach to adjudication')."[95] Two years later, a Federalist Society symposium on constitutional interpretation took that conclusion to heart when it held a panel discussion on the topic of "Originalist *Theories* of Constitutional Interpretation." At that symposium, Robert Bennett explained that there are different "kind[s] of originalism,"[96] a point elaborated upon in some detail by Michael Moore, who explained that there are both "intentionalist" and "textualist" flavors of originalism—each markedly different from the other—and that, in turn, each of those subtheories has itself been subdivided by originalists into still many more and different operating versions.[97] Thus, explained Moore: "Raoul Berger's 'old-time religion'—intentionalist interpretation—is badly fractionated. There is not just one kind of intentionalism."[98] Moore explained that the same was true of the "textualist"—or "original meaning"—flavor of originalism: "Textualism too is badly fractionated as a theory of interpretation."[99] In response, Raoul Berger proclaimed himself "surprised to hear about varieties of originalism," declaring, "[t]he only variety I know is the good, old-fashioned kind"—the kind that treats "original intention" as dispositive.[100] But Michael McConnell, also a proud originalist, responded by defending a particular version of "original-meaning" originalism[101] that is quite distinct from Berger's original-intent originalism. Indeed, McConnell vigorously rejected original intent as illegitimate, even going so far as to give an example of a case that "represents original intent subverting the principle of the rule of law."[102]

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95. Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551, 597 (1985).

96. Robert Bennett, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 355, 355 (1988).

97. Michael Moore, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 364, 364–66 (1988).

98. *Id.* at 365.

99. *Id.* at 366.

100. Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 350 (1988).

101. In so doing, however, McConnell rejected the "original expected application" jurisprudence often employed by Justice Scalia. *See* Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 361–63 (1987).

102. *Id.* at 362 (discussing Marsh v. Chambers, 463 U.S. 783 (1983)).

That disagreement in the late 1980s did not reflect a onetime bout of growing pains in the originalist movement. Indeed, if anything, this state of affairs—the existence of an endless variety of constitutional theories all claiming the mantle of originalism—has become even more pronounced. There are not many proponents of original-intent originalism left today,[103] but original-understanding originalism remains highly popular, in all of its various incarnations, as does original, objective-meaning originalism—in all its countless iterations, from the liberal versions of Jack Balkin and Michael Perry, to the libertarian versions of Randy Barnett and Timothy Sandefur,[104] to the conservative versions of Justice Scalia and his many allies, to the extremely textualist versions of Gary Lawson and Michael Stokes Paulsen, to the philosophical version of Lawrence Solum.[105]

And the debates among originalists today do not end there. To take just one example of the polarizing debates currently raging in the originalist community, consider the role of precedent in originalist theory. Justice Scalia has famously declared himself to be a "faint-hearted originalist," insofar as he would sometimes allow judicial precedent or societal custom to trump the original meaning of the Constitution.[106] Justice Scalia insists that "almost every originalist would adulterate [originalism] with the doctrine of *stare decisis*."[107] But a growing number of originalists would not. Gary Lawson, for instance, has argued that it is unconstitutional for the Supreme Court

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103. But there are still a few. *See, e.g.*, Larry Alexander, *Simple-Minded Originalism* 1 (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Paper No. 08-067, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1235722 ("[G]iven what we accept as legally authoritative, the proper way to interpret the Constitution . . . is to seek its authors' intended meanings . . . ."). *See generally* Berman, *supra* note 59, at 384 ("[T]here does exist a live intramural disagreement among originalists concerning whether to abide by the originally intended meaning of the framers (or ratifiers) of constitutional text or the text's original public meaning.").

104. *See* Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J.L. & PUB. POL'Y 489, 490–91 (2004) (articulating, based in substantial part on the work of Scott Gerber, a version of originalism that relies on the Declaration of Independence as part of the nation's organic law).

105. *See* Lawrence B. Solum, *Semantic Originalism* 2, 28–30 (Ill. Pub. Law & Legal Theory Research Paper Series, Paper No. 07-24, 2008), *available at* http://ssrn.com/abstract=1120244 (articulating a version of original-public-meaning originalism that seeks a theoretical foundation in the philosophy of language).

106. Scalia, *supra* note 2, at 864; *see also* Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION, *supra* note 3, at 138–40 ("Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew.").

107. Scalia, *supra* note 2, at 861.

to follow a precedent that deviates from the Constitution's original, objective meaning.[108] And Michael Stokes Paulsen concurs that "*stare decisis* . . . is completely irreconcilable with originalism."[109] Indeed, Randy Barnett has argued that, because Justice Scalia sometimes is willing to allow stare decisis to trump original meaning, "Justice Scalia is simply not an originalist."[110] Even Justice Scalia admits that "*stare decisis* is not *part* of [his] originalist philosophy; it is a pragmatic *exception* to it."[111]

But some prominent originalists—including Robert Bork,[112] Lawrence Solum,[113] and Steven Calabresi,[114] among others[115]—have

108. *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994) ("If the Constitution says *X* and a prior judicial decision says *Y*, a court has not merely the power, but the obligation, to prefer the Constitution."). *But cf.* Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 18–22 (2007) (arguing that stare decisis might be consistent with originalism when the prior decision used the proper methodological approach to discern original meaning, even if it reached an erroneous conclusion about the original meaning). Justice Thomas also appears to disagree, at least to some extent, with Justice Scalia on the desirability and permissibility of deviating from original meaning in the name of stare decisis. *See* Stephen B. Presser, *Was Ann Coulter Right? Some Realism About "Minimalism*,*"* 5 AVE MARIA L. REV. 23, 28 (2007) (stating that Justice Thomas "has argued that . . . constitutional adjudication should not involve the assumption that *stare decisis* is the binding rule").

109. Paulsen, *supra* note 83, at 289. According to Paulsen, "[*s*]*tare decisis* contradicts the premise of originalism—that it is the original meaning of the words of the text, and not anything else, that controls constitutional interpretation." *Id*.

110. Barnett, *supra* note 67, at 13. According to Barnett, a true "originalist simply could not accept that the Supreme Court could change the meaning of the text from what it meant as enacted and still remain an originalist." Barnett, *supra* note 83, at 263. Michael Stokes Paulsen agrees, calling those who, like Justice Scalia and Judge Bork, would sometimes adulterate originalism with precedent "would-be originalists." Paulsen, *supra* note 83, at 289 n.2.

111. Scalia, *supra* note 106, at 140.

112. *See* BORK, *supra* note 11, at 155–59 (arguing that "[a]t the time of ratification, judicial power was known to be to some degree confined by an obligation to respect precedent").

113. *See* Solum, *supra* note 22, at 195–96 (arguing for "a system in which the decisions of the Supreme Court which respect that text and original meaning are given binding effect").

114. *See* Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311, 314, 335–48 (2005) ("My conclusion is therefore that practice has settled the matter such that the Court does have an autonomous, implied power to sometimes follow precedent . . . .").

115. *See, e.g.*, Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1441 (2007) ("Preserving legitimacy under popular sovereignty-based originalism . . . does not require the complete abandonment of stare decisis."); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 419–21 (2006) (arguing that "limited respect is due some nonoriginalist constitutional precedent because of the larger societal and constitutional goal of effectively pursuing the common good").

argued that some limited use of stare decisis to override the original meaning *is* consistent with originalism. And other scholars have gone even further in favor of reconciling stare decisis with originalism—so far as to suggest that originalism *requires* the use of stare decisis in some circumstances. Polly Price, for example, argues that the original meaning of the "'judicial power' in Article III encompassed significant respect for prior precedent as a starting point for judicial decision making," such that, "as a matter of original understanding," "an originalist owes some obligation to a nonoriginalist precedent."[116]

There is profound disagreement among originalists about this fundamental aspect of their theory. And, as should be plain from the account provided here, disagreement among originalists about matters of considerable importance is becoming the rule, not the exception.

II. ORIGINALISM'S LIVING CONSTITUTIONALISM

One conclusion that could be drawn from this conceptual diversity and disagreement is that "originalism" is not a constitutional theory at all, but rather is simply rhetorical code for a commitment to a series of particular judicial outcomes favored by political conservatives. A colorable case can be made for this claim,[117] especially if one recognizes that judges might be guided by such a commitment at the purely subconscious level.[118] But making sense of the evolution and dissonance of originalist theory does not necessitate that degree of cynicism. Originalism might better be understood by

116. Polly J. Price, *A Constitutional Significance for Precedent: Originalism, Stare Decisis, and Property Rights*, 5 AVE MARIA L. REV. 113, 114 (2007); *see also* Lund, *supra* note 94, at 1347 (noting that "there is strong evidence that the Vesting Clause of Article III implicitly incorporated a principle of *stare decisis*"); *cf.* Peter J. Smith, *The Marshall Court and the Originalist's Dilemma*, 90 MINN. L. REV. 612, 664 (2006) (arguing that originalists must account for the apparent original understanding that the meaning of ambiguous constitutional provisions would be "fixed" by adjudication).

117. *See* Bennett, *supra* note 96, at 358 ("What really animates much of the originalist enterprise is not a reasoned conclusion that there is a theory there, but rather a dissatisfaction with what is perceived to be mischievous judicial activism."); Richard H. Fallon, Jr., *The Political Function of Originalist Ambiguity*, 19 HARV. J.L. & PUB. POL'Y 487, 487, 492 (1996) (noting that "defenses of originalism, with rare exceptions, leave its nature mushy and confused" and concluding that originalism is in reality "most often a political or rhetorical stalking horse for a set of substantive positions with respect to a relatively narrow set of constitutional issues in the current age").

118. *See infra* notes 225–310 and accompanying text.

reference to its archnemesis, living constitutionalism.[119] Modern originalism's genesis, of course, was as a response to the perceived excesses of the theory of the living constitution.[120] But originalism is a jurisprudential theory undergoing its own endless evolution, with its own living constitution. That is to say, originalists' understanding of the relationship among *originalism's* current meaning, its original meaning, and its underlying principles is similar to living constitutionalists' understanding of the relationship among *the Constitution's* current meaning, its original meaning, and its underlying principles. Just as the theory of living constitutionalism permits the meaning of the Constitution's provisions to evolve to reflect current *societal* values, the theory of originalism permits the meaning of originalism to evolve to reflect current *interpretive* values.

Consider the argument that Justice Brennan, a leading proponent of the theory of the living constitution, advanced about the evolution of constitutional meaning. He argued that although the "struggles against particular malefactions of the Crown . . . shape[d] the particular contours" of the "fundamental principles" that the Framers discerned, "our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic, contours."[121] According to this view, the Constitution contains broad,

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119. The term "living constitution" is generally attributed to Thomas Grey, *see* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 711 (1975), although it almost certainly has a lengthier pedigree than that, *see* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 13–14 (1998) (discussing the constitutional theories of Sidney George Fisher and Christopher Tiedeman, who "urged the Court to 'recognize the present will of the people as the living source of law' and, 'in construing the law, to follow, and give effect to, the present intentions and meaning of the people'" (quoting CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 154 (Putnam 1978) (1890))). The notion of living constitutionalism is itself a broad tent. The version that we have in mind here is the one articulated by Justice Brennan, the originalists' own boogeyman. Brennan argued:

> Current Justices read the Constitution in the only way that we can: as twentieth-century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time.

William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986).

120. *See supra* notes 26–27 and accompanying text.

121. Brennan, *supra* note 119, at 437; *see also* Barnett, *supra* note 67, at 19 ("Although alternatives to originalism are surprisingly hard to identify with any specificity, there is one very

general principles that can—and ought to—be adapted to current circumstances and understandings.

The same can be said of originalism. As our discussion suggests, and as we explain in further detail in Part III, originalists generally are in agreement only on certain very broad precepts that serve as the fundamental underlying principles of constitutional interpretation: specifically, that the "writtenness" of the Constitution necessitates a fixed constitutional meaning, and that courts that see themselves as generally empowered to give the Constitution some avowedly different meaning are behaving contrary to law.[122] Those precepts are substantially broader and less constricting than the intention-based animating principles that the original originalists—the "framers" of originalism, if you will—articulated as essential to the originalist enterprise. Subsequent originalists have been able to achieve agreement on the broad underlying principles, but they have often viewed as unduly narrow and mistaken the framing originalists' understanding of how those principles must be put into action.

Of course, agreement on broad principles does not necessarily produce one unified, coherent theory. For living constitutionalists, this insight has led to the conclusion that the Constitution is capable of sustaining many meanings, and that its broad animating principles are capable of supporting many rules.[123] Similarly, the core principles upon which originalists agree are broad enough that one can fashion from them a stunning variety of constitutional theories. Agreement on the proposition that the Constitution must have a fixed meaning leaves plenty of room for disagreement about what that meaning is, and how and at what level of generality it is to be ascertained. The project of actualizing these capacious principles into a working theory

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popular method that can be called the 'underlying principles' approach. We discern from the text the deeper underlying principles that underlie its particular injunctions. We then appeal to these underlying principles to limit the scope of the text or ignore it altogether. Those who employ this approach can claim that they are still enforcing the Constitution, in the sense that they are implementing the principles for which it stands.").

122. *See* Berman, *supra* note 21, at 22 (arguing that "[o]riginalism proper" is the view expressed by the Court in *South Carolina v. United States*, 199 U.S. 437, 448 (1905), that "[t]he Constitution is a 'written instrument'" whose "meaning does not alter" but instead "means now" what it "meant when adopted"); Solum, *supra* note 105, at 3, 5, 12 (arguing that originalists of all stripes agree on the basic thesis that the Constitution's meaning was fixed at the time of origin).

123. *See* Brennan, *supra* note 119, at 437 ("To remain faithful to the content of the Constitution, therefore, an approach to interpreting the text must account for . . . [its] substantive value choices and must accept the ambiguity inherent in the effort to apply them to modern circumstances.").

is a task that each generation of originalists has undertaken anew, occasionally drawing upon, but occasionally rejecting, the work of its predecessors. This, of course, sounds very much like the living constitutionalists' view of the manner in which constitutional meaning evolves.[124]

Thus, not unlike living constitutionalists, who have argued for evolving constitutional meaning on the ground that "[w]hat the constitutional fundamentals meant to the wisdom of other times cannot be the measure to the vision of our time,"[125] originalists have pushed for changes in the working theories of originalism (in effect, the "meaning" of originalism) as academic understanding of constitutional and interpretive theory has deepened—and as they have come to believe that the "framers" of originalism were wrong about the interpretive implications of the broad, animating principles of the movement. For instance, originalism shifted to original meaning when it became clear that a jurisprudence of original intent was conceptually untenable[126] and was no longer in accordance with contemporary interpretive values.[127]

And, just as living constitutionalists have recognized that judges must not "turn a blind eye to social progress and eschew [adaptation] of overarching principles to changes of social circumstance,"[128] and that "the genius of the Constitution rests . . . in the adaptability of its

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124. *See* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 9 (1991) ("[T]he very meaning of the thing we call 'the Constitution' is a reality partly reconstructed by each generation of readers." (emphasis omitted)); Brennan, *supra* note 119, at 437 ("Successive generations of Americans have continued to respect these fundamental choices and adopt them as their own guide to evaluating quite different historical practices."); Friedman & Smith, *supra* note 119, at 5–6 ("[H]istory is essential to interpretation of the Constitution, but the relevant history is not just that of the Founding, it is that of all American constitutional history." (emphasis omitted)); Robert M. Shrum, *Tribute to Laurence Tribe*, 59 N.Y.U. ANN. SURV. AM. L. 11, 12 (2003) (praising Laurence Tribe for recognizing that "the Constitution is not an historical artifact frozen in amber, but that its words have a living meaning, and that guarantees like 'equal protection' are an ongoing mandate for each generation to widen and realize the ideals of liberty and justice").

125. Brennan, *supra* note 119, at 438.

126. *See supra* notes 32–36 and accompanying text.

127. When one steps back from questions of constitutional interpretation and considers interpretive theories more generally, one finds a familiar pattern of evolution. In the 1970s, when the modern originalist movement began, intentionalism was the prevailing approach to the interpretation of legal texts. *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 6–23 (2006). It was not until the mid-1980s that textualist approaches to interpretation began their ascendancy. *See id.* at 23–29. The evolution in originalist thought that we have described here tracks this modern change in interpretive theory.

128. Brennan, *supra* note 119, at 436.

great principles to cope with current problems and current needs,"[129] originalists have reconstituted their working theories of originalism as they have been presented with new problems that were not contemplated by the "framers" of originalism. For example, because the mischief that brought the originalist movement into being was the liberal "activism" of the Warren Court, the early originalists focused on cabining judicial subjectivity and limiting judicial power.[130] But as the federal courts became increasingly populated with conservative judges, the initial mischief that gave rise to the originalist movement faded considerably.[131] Accordingly, originalist theories evolved to tackle new, previously ignored, and unforeseen problems that also implicate the core concerns of originalism,[132] such as the incompatibility of a substantial number of precedents (decided long ago by nonoriginalist judges), and the incompatibility of many democratically enacted laws, with the original constitutional meaning. Many originalists thus changed their focus from seeking to *limit* judicial power in order to *empower* legislatures to seeking to *expand* judicial power in order to *limit* legislatures.[133] Although this new focus is consistent with the broader values and principles that have always animated the originalist movement, it is wholly inconsistent with the particular "original meaning" of originalism as understood by the framers of the movement.

In sum, "originalism," despite what its pioneers believed, is capable of multiple meanings. Although in all of its various iterations it has always been grounded in certain general animating principles, originalist theory—the actual meaning of originalism—has evolved

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129. *Id.* at 438.

130. *See* John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL'Y 83, 83–84 (2003) ("The intuition, that judicial subjectivity was rampant and very bad, got Originalism Mark I going."); Whittington, *supra* note 1, at 599–603 ("It is important to note that originalism was a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts; originalism was largely developed as a mode of criticism of those actions.").

131. *See* Whittington, *supra* note 1, at 604 ("By the late 1980s, Ronald Reagan had significantly changed the complexion of the Court. . . . If conservative originalism was to remain relevant when its *raison d'etre* was gone, then it would have to change form.").

132. *Cf.* Brennan, *supra* note 119, at 438 ("Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." (quoting Weems v. United States, 217 U.S. 349, 373 (1910))).

133. *See* Whittington, *supra* note 1, at 607–09 ("The primary virtue claimed by the new originalism is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism."). We discuss this point further in note 225, *infra*.

over time to correct mistaken assumptions, to broaden myopic visions, to keep up with evolving interpretive values, and to confront unforeseen threats. That evolution has not been linear; at any given time, there are countless competing versions of originalism. And there is every indication that originalism continues to evolve and splinter, now perhaps more than ever. Originalism—a movement born of contempt for the notion of a living constitution of evolving meaning—is itself a living, evolving approach to constitutionalism.[134]

To be clear, we do not mean to suggest that there is something inherently hypocritical about the fact that originalists insist that the Constitution must have a fixed meaning while simultaneously allowing the meaning of originalism itself to evolve. Although we have analogized the evolution of originalism to living constitutionalism, we recognize that originalism's "constitution"—that is, the core principles of originalist theory—lacks the features of this nation's Constitution that prompt originalists to insist that the latter must have a fixed meaning; originalism's constitution, unlike America's, is not a written one and was never ratified in any particular form. Still, as we explain in Part III, originalism's evolution does indeed undermine originalists' claims, but not for reasons of hypocrisy.

III. IMPLICATIONS FOR ORIGINALISTS' CLAIMS

In one respect, this story of evolution reflects well on originalists. The proponents of any rigorous theory should, after all, constantly strive to improve it, to smooth out the bumps of incoherence. For most theories, this development is a virtue, a sign that its proponents are sufficiently humble to respond to criticism and to recognize the room for theoretical maturation while still holding on to their core principles. But for originalists, there is a twist: the central claims of their faith are to a substantial degree belied by the very existence of

134. Robert Post and Reva Siegel have also suggested that originalism has a living constitution. *See* Robert Post & Reva Siegel, *Originalism as Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 549–50 (2006). But their metaphor differs from ours. Post and Siegel distinguish the scholarly jurisprudence of originalism from the political practice of originalism. That is to say, although theoretical justifications for originalism focus on its apolitical nature, in practice originalism is used to rally political actors and to champion political outcomes. Thus, as the political commitments of the right change, the practice of originalism changes along with them. Originalists, claim Post and Siegel, selectively ignore or reinterpret the past to serve their evolving political agendas. It is in that sense that Post and Siegel speak of originalism as having its own living constitutionalism. *See id.* at 565.

this evolution and discord. Originalists have consistently insisted that they have discovered the one, true faith—the one approach that is self-evidently correct. Yet the faith, it seems, keeps changing.

The contours of originalist methodology might be in flux, but originalists' normative claims about the merits of their approach have been largely consistent since the ascendancy in the 1970s and 1980s of modern originalism. When we refer generically to "originalists" in making this assertion, we obviously are keenly aware that the originalist tent is a very large one—indeed, that insight is central to our point, as should be apparent from Part I. But the reach of the tent that we have in mind here is nonetheless not infinite. To borrow Mitchell Berman's thoughtful taxonomy, we address here claims by "strong" originalists—that is, originalists who claim either (1) that "whatever may be put forth as the proper focus of interpretive inquiry (framers' intent, ratifiers' understanding, or public meaning), that object should be the sole interpretive target or touchstone," or (2) that "interpreters must accord original meaning (or intent or understanding) lexical priority when interpreting the Constitution but may search for other forms of meaning . . . when the original meaning cannot be ascertained with sufficient confidence."[135] Our quarrel is with these thinkers, whom Stephen Griffin has referred to as "exclusive originalists."[136] To the extent that there are other constitutional theorists who consider themselves originalists but do not hold these beliefs, our objections do not extend to them.[137]

In this Part, we consider what originalism's constant evolution and dissonance mean for originalists' normative claims. Strong, exclusive originalists may come in all shapes and sizes, but they have, with remarkable (if not complete) consistency, made several

135. Berman, *supra* note 21, at 10. We might nuance this definition, as does Berman, *see id.* at 22 & n.49, to include originalists who are sometimes willing to afford stare decisis effect to nonoriginalist precedents that they believe to have been wrongly decided. *See supra* notes 106–16 and accompanying text. We might also allow some room for "faint-hearted" originalists who are willing to depart from original meaning (or intent or understanding) to avoid profoundly immoral or unpalatable results in a very narrow category of extraordinary cases. *See, e.g.*, Scalia, *supra* note 2, at 864 ("I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging.").

136. Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1187 (referring to an approach that argues that originalism is "the only (or at least primary) legitimate method of interpretation" (emphasis omitted)).

137. Berman refers to these thinkers as "moderate originalists" or "weak originalists." Berman, *supra* note 21, at 10–12.

sweeping claims about the normative superiority of their approach.[138] First, originalists contend that their methodology is the only theoretically coherent approach to constitutional interpretation. Second, originalists argue that because their approach accords to the Constitution a fixed and determinate meaning based on the document's text, it is the only legitimate approach to constitutional interpretation—that is, the only approach that is consistent with both the Constitution's status as law and the judiciary's role in a democratic society. Third, originalists argue that their approach is uniquely promising for constraining the ability of judges to impose their own views under the guise of constitutional interpretation. This Part recounts each of these claims in turn, largely in the originalists' own words, and seeks to demonstrate that they are significantly undermined by the reality of originalism's constant evolution and dissonance.

A. Originalism and Theoretical Coherence

To take them at their word, originalists believe that there are two categories of approaches to constitutional decisionmaking—originalism and everything else—distinguished by their theoretical purity or lack thereof. We have in mind the familiar claim noted at the outset of this Article that originalism must prevail because (1) it takes a theory to beat a theory, and (2) after decades of trying, the nonoriginalists have been unable to agree upon an alternative. The thrust of this argument appears to be that the very fact that nonoriginalists cannot agree on an alternative theory is compelling evidence that no such legitimate theory is possible.[139] As Justice Scalia

138. We recognize that not every strong originalist has defended originalism on a ground as aggressive as those described here. Notably, several prominent originalists have recently backed away from the claim that originalism is uniquely able to constrain judges. *See*, *e.g.*, John Harrison, *On the Hypotheses That Lie at the Foundations of Originalism*, 31 HARV. J.L. & PUB. POL'Y 473, 473–76 (2008) ("I am deeply skeptical of the capacity of any methodology to constrain any interpreter and thereby to keep Americans from doing what they love to do, which is to find that their Constitution is good, and, therefore, contains what it needs to contain."); *infra* note 225 and accompanying text. *See generally* Whittington, *supra* note 1, at 608–09 (noting that in recent originalist writing "there seems to be less emphasis on the capacity of originalism to limit the discretion of the judge" and that new originalists are "unlikely to argue that only originalist methodology can prevent judicial abuses or can eliminate the need for judicial judgment"). Still, in its strong form, originalism is distinct among constitutional interpretive theories for the frequency with which its proponents have argued that it, and it alone, is the only acceptable method for interpreting the Constitution.

139. As Gregory Bassham articulates it, "[Justice] Scalia argues that originalism is superior to all nonoriginalist theories, because there is no agreement, and no prospect of agreement,

puts it, it is simply not possible to achieve "consensus on what, precisely, is to replace original meaning, once that is abandoned."[140] Nonoriginalists, he argues, "divide into as many camps as there are individual views of the good, the true, and the beautiful," which makes theoretical coherence among nonoriginalists a virtual impossibility.[141] Randy Barnett has picked up on this theme, dismissing nonoriginalism on the ground that "the opponents of originalism have never congealed around an appealing and practical alternative."[142] And when President Reagan's Department of Justice

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about *which* version of nonoriginalism should be adopted in its place. Over the past few decades, a host of nonoriginalist theories have enjoyed their brief day in the sun, but none has been widely accepted. Only originalism, he argues, provides a clear, fixed standard upon which agreement is ultimately possible." Gregory Bassham, *Justice Scalia's Equitable Constitution*, 33 J.C. & U.L. 143, 149–50 (2006); *see also* James E. Ryan, *Does It Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1631 (2006) ("As Scalia observed in his 1989 essay, it is impossible to 'discern any emerging consensus among the nonoriginalists' regarding the appropriate interpretive methodology. This remains true today. By their internal disagreement and their very diversity, nonoriginalists unwittingly bolster the originalists' assertion that nonoriginalists are simply making it up as they go along." (quoting Scalia, *supra* note 2, at 855)).

Lawrence Solum has suggested that Justice Scalia may not actually be making this argument at all. According to Solum, Scalia might instead simply be making the standard originalist argument that nonoriginalism's flaw lies in the fact that (1) it necessarily relies on moral judgments, and (2) in a pluralist society there is no possibility of consensus on those matters, which (3) will inevitably lead judges to mistake their own views for constitutional mandate. *See* Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 336 (2008). If Solum is right, then Justice Scalia's language is uncharacteristically inartful here, and we are mistakenly responding to a straw man. But other passages suggest that Scalia does indeed intend to make the argument to which we are responding. Consider the argument that he advanced in his other principal defense of originalism:

> Apart from the frailty of its theoretical underpinning, nonoriginalism confronts a practical difficulty reminiscent of the truism of elective politics that "You can't beat somebody with nobody." It is not enough to demonstrate that the other fellow's candidate (originalism) is no good; one must also agree upon another candidate to replace him. Just as it is not very meaningful for a voter to vote "non-Reagan," it is not very helpful to tell a judge to be a "non-originalist." If the law is to make any attempt at consistency and predictability, surely there must be general agreement not only that judges reject one exegetical approach (originalism), but that they adopt another. And it is hard to discern any emerging consensus among the nonoriginalists as to what this might be.

Scalia, *supra* note 2, at 855. In addition, others have read Scalia as we do, and others have separately endorsed the argument that we believe Scalia to be making, *see infra* notes 140–45, so our response remains useful. In any event, if Solum's reading is correct, then Scalia's argument is still undermined by the diversity of originalist theories for the reasons set out in Part III.C.

140. Scalia, *supra* note 2, at 862–63.

141. Scalia, *supra* note 3, at 45; *see also supra* notes 4–10 and accompanying text.

142. Barnett, *supra* note 5, at 617; *see also id.* ("The inability of the most brilliant and creative legal minds to present a plausible method of interpretation that engendered enough confidence to warrant overriding the text . . . make[s] . . . originalism much more attractive.");

produced a "Sourcebook" of originalist claims, its authors asserted that "[a]lthough all [nonoriginalists] reject original meaning as relevant to constitutional interpretation"—hardly an obvious or accurate proposition, but that is another matter[143]—"there is no consensus among them as to an appropriate alternative standard."[144] Indeed, this has been a constant refrain of originalists: that "one need spend no time worrying over [nonoriginalism's] legitimacy or intellectual coherence because it pretends to neither."[145]

There was always something fishy about this it-takes-a-theory-to-beat-a-theory argument. By dividing the world of constitutional interpretation into originalism and "nonoriginalism," originalists have stacked the deck in their favor.[146] One could easily make the same

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Raoul Berger, Response, *"Original Intent": A Response to Hans Baade*, 70 TEX. L. REV. 1535, 1549 (1992) ("Even a Justice of the Supreme Court, Antonin Scalia, has entered the lists; after examining the voluminous literature and dwelling on the non-originalists' failure to develop a theory acceptable to their fellows, he opted for originalism as the lesser evil."); Berger, *supra* note 41, at 646 ("Justice Scalia considers it a grave defect of the nonoriginalists that they have been unable to agree upon an alternative theory."); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 391 n.36 (2007) (defending originalism on the ground that "judges of various ideologies cannot be expected to reach agreement on any alternative method"); Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450, 1474 (2006) (reviewing JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005)) ("Nonoriginalism is, as an initial problem, not a positive constitutional theory: As Justice Scalia colorfully points out, it is united only in agreement that orignalism is not the right approach; it would substitute a bewildering array of proposals, yet agrees upon none. This difficulty is particularly troublesome in foreign affairs law.").

143. *See, e.g.*, Farber, *supra* note 19, at 1086 ("Almost no one believes that the original understanding is wholly irrelevant to modern-day constitutional interpretation."); James E. Fleming, Response, *Original Meaning Without Originalism*, 85 GEO. L.J. 1849, 1849 (1997) (praising Michael Dorf for showing "that one can take original meaning seriously without being a narrow originalist"); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 881 (1996) (noting that "[v]irtually everyone agrees" that the text and original meaning matter in constitutional interpretation).

144. OFFICE OF LEGAL POLICY, *supra* note 11, at 7.

145. Bork, *supra* note 18, at 393 (describing Paul Brest's constitutional theory); *see also id.* at 387–88 ("The nature of the non-interpretive enterprise is such that its theories must end in constitutional nihilism and the imposition of the judge's merely personal values on the rest of us. . . . Nihilism turns instead to advocacy of opportunistic judicial authoritarianism precisely because what fuels the non-interpretivist impulse in the first place is a desire to change society in ways that legislatures refuse. The desire for results is greater than the respect for process, and, when theory fails, power remains.").

146. Over the years, some commentators have contended that "theoretically, there is no real distinction between originalism and nonoriginalism." Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1602–03 (1989); *see also* MICHAEL PERRY, MORALITY, POLITICS, AND THE LAW: A BICENTENNIAL ESSAY 279–80 n.7 (1988) ("There is a sense in which we are all originalists: We all believe that constitutional adjudication should be

argument about any method of constitutional interpretation. It would be just as compelling to argue that common-law constitutionalism,[147] for example, must prevail because all of the many "non-common-lawists"—including the diverse adherents to the various schools of originalism, along with a great many nonoriginalists of assorted stripes—are unable to agree upon an alternative. Indeed, one could come up with an entirely new (and entirely inane) theory of constitutional interpretation—say, that the Constitution should be interpreted by flipping a coin or by reading the stars—and then argue just as convincingly that the theory must prevail on the ground that (1) it takes a theory to beat a theory, and (2) all of the "non-coin-flippers" or the "nonastrologers"—from original-intent originalists to common-law constitutionalists to original, objective-public-meaning textualists to believers in "constitutional moments"[148]—cannot even begin to agree on the proper alternative.

But our account of the substantial diversity and frequent evolution in the originalist camp indicates that even if one allows the originalists to stack the deck by dividing the world of constitutional theory into originalism and nonoriginalism (rather than, say, "common-lawism" and "noncommon-lawism," or "process-based theories" and "non-process-based theories"[149]), their argument that originalism must prevail because it takes a coherent theory to beat a coherent theory still holds no water. Intentionally or not, their binary taxonomy paints a highly misleading picture of a unified, cohesive originalist movement standing as one against a fractured, and thus theoretically incoherent, hodgepodge of alternative approaches.[150] As

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grounded in the origin . . . . But there is a sense, too, in which none of us is an originalist . . . ."). The account we provide here in some sense strengthens that view. Our objective, however, at least for present purposes, is to take originalists' claims as they make them. And to hear the vast majority of originalists tell it, there is a world of difference between originalism and nonoriginalism. *But see* Balkin, *supra* note 58, at 292 (arguing that the "debate between originalism and living constitutionalism rests on a false dichotomy"); Solum, *supra* note 105, at 165–68 (arguing that some originalist theories are compatible with some theories of living constitutionalism).

147. *See, e.g.*, Strauss, *supra* note 143, at 885 (arguing that "the common law . . . provides the best way to understand the practices of American constitutional law").

148. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).

149. *Compare* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980), *with* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

150. *See* Brown, *supra* note 2, at 69–70 ("Even though there is no unanimity about what originalism actually means, or what it calls upon judges to do in a close case, its adherents gain a

we have sought to demonstrate, originalism is no more a single, intellectually coherent theory than is "nonoriginalism"; originalists cannot agree amongst themselves on constitutional interpretation, either. What is sauce for the goose is sauce for the gander: if the substantial disagreement among nonoriginalists is persuasive evidence that nonoriginalist theory is incoherent, then the substantial disagreement among originalists must be equally powerful evidence that originalist theory lacks coherence, as well. The reality of originalism's internal discord should put an end to the ubiquitous argument that originalism is the only theoretically coherent approach to constitutional interpretation.

B. Originalism and Theoretical Legitimacy

Originalists' claims to unique theoretical coherence, then, are (on their own terms) seriously undermined by the constant evolution in originalists' thinking and the constant infighting among originalists about what their approach actually entails. But originalists do not stop there. Modern originalists have also consistently argued that originalism is not simply the only *coherent* theory, but also the only *legitimate* theory of constitutional interpretation.[151] This claim is generally premised on assertions about the Constitution's status as law and the judiciary's role in a democratic system. Most defenses of originalism begin by noting that the originalist approach provides fixed, determinate, and objective constitutional meaning based on (some measure of) the original meaning of the constitutional text. Justice Scalia, for instance, has argued that originalism treats the Constitution as having "a fixed meaning ascertainable through the usual devices familiar to those learned in the law,"[152] by "establish[ing] a historical criterion that is conceptually quite separate from the preferences of the judge himself."[153]

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great deal by sharing one name that offers the appearance, if not the reality, of agreement. They also gain the strategic advantage of claiming, by virtue of their name alone, the baseline from which departures must be justified." (footnote omitted)).

151. *See* Post & Siegel, *supra* note 134, at 547 ("Critics of the Warren Court began to argue that determining the original understanding of the Constitution's framers was the *only* legitimate way of interpreting the Constitution, and they began to denounce all other approaches to constitutional interpretation as improper and unprincipled." (footnote omitted)).

152. Scalia, *supra* note 2, at 854.

153. *Id.* at 864. Lillian BeVier calls this the "impersonality" of originalism's decisionmaking criteria, which she argues "invokes all the virtues of objectivity and by implication rejects subjective judging." Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL'Y 283, 288 (1996); *see also* BORK, *supra* note 11, at 143 ("When we speak of

For this reason, proponents argue that originalism is the natural approach to interpreting a written Constitution. Keith Whittington, for example, distinguishes the United States' written Constitution from the British reliance on practice and tradition, and he argues that "[f]ixing constitutional principles in a written text against the transient shifts in the public mood or social condition becomes tantamount to an originalist jurisprudence."[154] Originalists argue that their theory is the only one that is consistent with the view that the written Constitution is a form of law. After all, the Constitution itself—in the Supremacy Clause of Article VI—proclaims its status as authoritative law.[155] And its status as supreme law "can emerge from the text as intended . . . only if the text has the fixed meaning it is uniquely capable of carrying."[156]

Originalists also note that judicial review is premised on the assumption that the Constitution is "the sort of 'law' that is the business of the courts."[157] Originalists argue that originalism flows naturally from this premise—indeed, "is a virtual axiom of our legal-political system."[158] "The central premise of originalism . . . is that the text of the Constitution is *law* that binds each and every one of us until and unless it is changed through the procedures set out in Article V."[159] And to interpret written law is by definition to determine what the words originally meant—and thus always will mean.[160] Accordingly, originalists argue, "[i]f the Constitution is to be

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'law,' we ordinarily refer to a rule that we have no right to change except through prescribed procedures. That statement assumes that the rule has a meaning independent of our own desires.").

154. WHITTINGTON, *supra* note 47, at 53; *see also* BERGER, *supra* note 31, at 291 ("In substituting a written Constitution and expressly providing for change by amendment, [the Framers] evidenced that they had created a 'fixed' Constitution, subject to change by that process alone.").

155. U.S. CONST. art. VI, cl. 2; *see also, e.g.*, Kesavan & Paulsen, *supra* note 2, at 1127–28 (arguing that the Supremacy Clause mandates textualism as the only legitimate method of interpretation).

156. WHITTINGTON, *supra* note 47, at 56; *see also id.* at 55 ("[O]nly a fixed text can be adequately ratified, that is, legislated into fundamental law.").

157. Scalia, *supra* note 2, at 854; *see also* Bork, *supra* note 30, at 824 ("Any intelligible view of constitutional adjudication starts from the proposition that the Constitution is law.").

158. Graglia, *supra* note 12, at 1020.

159. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 551 (1994); *see also* Bork, *supra* note 18, at 384.

160. *See, e.g.*, Calabresi, *supra* note 13 ("[T]he long-accepted rule for interpreting legal texts is to construe them to have the original public meaning that they had when they were enacted into law."); Calabresi & Prakash, *supra* note 159, at 552 ("The meaning of all such legal writings

considered more than simply a traditional political document . . . but instead is treated as an enactment of judge-enforceable law," then judges must seek to determine the original meaning of the words or "to effectuate the intent of the authorized lawmakers."[161] Therefore, originalists argue, "[i]f we are to interpret, then . . . we must be originalists."[162]

Most sophisticated originalists do not rest this argument on the mere assertion that the Constitution, as law, must be interpreted as any other law—that is, to have a fixed meaning unless and until its text is formally amended. Michael McConnell, for example, argues "that there are two essential characteristics of any theory of interpretation under our Constitution, which follow from the function of constitutional interpretation in our system."[163] The first, as noted above, is that "the constitutional text must be treated as 'law'"; the second is that "it must be understood as having its origins in the consent of the governed."[164] According to this view, the foundational notion of popular sovereignty requires originalist interpretation: if "[a]ll power stems from the sovereign people, and the authority of the Constitution comes from their act of sovereign will in creating it,"

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depends on their texts, as they were objectively understood by the people who enacted or ratified them."); Lawson, *supra* note 17, at 1823; Solum, *supra* note 105, at 40–60.

161. OFFICE OF LEGAL POLICY, *supra* note 11, at 4 ("Once we recognize the importance of the Constitution to constitutional law, we must also acknowledge the importance of the Constitution's original meaning to the Constitution."); *see also* WHITTINGTON, *supra* note 47, at 59–60 ("[W]riting, especially legal writing, is a means of transmitting intent. . . . It can be certain that the founders did intend to convey meaning in writing the Constitution."); Graglia, *supra* note 12, at 1023 ("Because the Constitution derived its legal authority only when it was ratified at state conventions, judges should take it to mean what it was understood to mean by the ratifiers or . . . the people they represented."); *id*. at 1024 ("[I]nterpreting a document *means* to attempt to discern the intent of the author . . . ."). Jack Balkin makes a similar argument, albeit in a form probably not recognizable to most originalists and with strikingly different results. *See* Balkin, *supra* note 58, at 295 ("Constitutional interpretation by judges requires fidelity to the Constitution as law. Fidelity to the Constitution as law means fidelity to the words of the text, understood in terms of their original meaning, and to the principles that underlie the text.").

162. Whittington, *supra* note 1, at 612; *see also* WHITTINGTON, *supra* note 47, at 4 (arguing that if we "take interpretation seriously . . . we [must] adopt an originalist approach to interpretation"); Graglia, *supra* note 12, at 1029 ("Originalism is less a philosophy than a definition of 'interpretation,' and a plainer, more conventional, or less esoteric definition does not seem possible.").

163. McConnell, *supra* note 101, at 360.

164. *Id.*; *see also* BERGER, *supra* note 31, at 296 ("Substitution by the Court of its own value choices for those embodied in the Constitution violates the basic principle of government by consent of the governed.").

then "[i]t follows that the Constitution should be interpreted in accordance with their understanding."[165]

Continuing the theme of popular sovereignty, originalists contend that originalism is the only approach "that permits our society to remain self-governing"[166]—that is, the only approach that is consistent with the judiciary's proper role in a democratic society. Originalism is uniquely consistent with democratic government, they argue, because it ensures that judges will invalidate democratically enacted laws only when those laws conflict with the judgment of the supermajority that ratified the Constitution.[167] Robert Bork, for example, argues that "only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy."[168] Justice Scalia

165. McConnell, *supra* note 52, at 1132; *see also* WHITTINGTON, *supra* note 47, at 59 ("The text is not simply a list of words but is the embodied will of the people."); *id*. at 154 ("The fundamental basis for the authority of originalism is its capacity to retain a space for the popular sovereign."); *id.* at 111–52 (arguing that a well-developed theory of popular sovereignty is an important theoretical basis for originalism). *See generally* Lash, *supra* note 115, at 1440 (noting "the most common and most influential justification for originalism: popular sovereignty and the judicially enforced will of the people"). Other originalists, such as Judge Frank Easterbrook and Randy Barnett, have made similar arguments based more explicitly on contract theory or on the Constitution's "writtenness." *See* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1121 (1998) (arguing that "the Constitution was designed and approved like a contract," and that "contractarian views imply originalist . . . interpretation by the judicial branch"). Barnett, who concedes that contracts and Constitutions are different in important ways, also argues that a Constitution's "writtenness," like a contract's, entails a commitment to originalism. *See* Barnett, *supra* note 5, at 629–36; *accord* BARNETT, *supra* note 79, at 112 ("Short of making the claim of illegitimacy . . . we are bound to respect the original meaning of a text, not by the dead hand of the past, but because we today—right here, right now—profess our commitment to this written Constitution, and original meaning interpretation follows inexorably from this commitment."); *see also id.* at 100–09. Barnett disagrees, however, with McConnell's focus on popular sovereignty as a justification for adherence to the Founding generation's Constitution, because "[u]nlike a contract . . . a constitution purports to govern even those who did not consent to it at the founding." Barnett, *supra* note 5, at 637 (emphasis omitted); *see also* BARNETT, *supra* note 79, at 11–52 (arguing that the legitimacy of the Constitution is not based on a theory of popular sovereignty).

166. OFFICE OF LEGAL POLICY, *supra* note 11, at 3.

167. *See* William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1043 (2004) (noting the originalist belief that "[a]lthough such original meaning will sometimes trump the will of current majorities, it is ultimately consistent with democracy because it reflects the will of engaged supermajorities").

168. BORK, *supra* note 11, at 143. Bork argues that originalism is "crucial" if we are "to draw a sharp line between judicial power and democratic authority," Bork, *supra* note 30, at 824, because an application of originalism means that "[e]ntire ranges of problems will be placed off-limits to judges, thus preserving democracy in those areas where the Framers intended democratic government," *id*. at 827; *see also* BORK, *supra* note 11, at 163–64 ("[In] its

similarly contends that originalism is uniquely "compatible with the nature and purpose of a Constitution in a democratic system," because "the purpose of constitutional guarantees . . . is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable."[169] And Michael McConnell has argued that only originalism produces democratic legitimacy because "[w]hen a judge goes beyond the meaning of the words that were enacted . . . the judge has no democratic warrant."[170]

The necessary implication of these assertions about originalism's unique compatibility with law and democracy is that any other approach to constitutional interpretation is effectively lawless and undemocratic. And originalists have been equally explicit on these points. Lillian BeVier argues that nonoriginalist approaches to constitutional interpretation are characterized by "the absence of respect for (or even acknowledgement of) law as a constraint."[171] Robert Bork contends that nonoriginalism is inconsistent with the notion that the Constitution is a form of law because the very concept of law "assumes that the rule has a [fixed] meaning independent of our own desires,"[172] and nonoriginalism inevitably requires judges to rely on their own values in determining constitutional meaning.[173] And Michael McConnell argues that, if courts employ nonoriginalism, then the Constitution is not law in any meaningful sense, but instead is simply "a makeweight."[174]

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vindication of democracy against unprincipled judicial activism, the philosophy of original understanding does better by far than any other theory of constitutional adjudication can.").

169. Scalia, *supra* note 2, at 862 (emphasis omitted).

170. McConnell, *supra* note 52, at 1136; *see also* WHITTINGTON, *supra* note 47, at 43 (arguing that originalism supports democratic legitimacy); Graglia, *supra* note 12, at 1026 ("If the end is democracy, that end is served when judge-restraining originalism permits the results of the democratic process to stand.").

171. BeVier, *supra* note 153, at 287.

172. BORK, *supra* note 11, at 143; *see also* Lund, *supra* note 94, at 1370 (arguing that "living constitutionalism . . . does not treat the Constitution as binding law").

173. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 10 (1971); *see also* Kesavan & Paulsen, *supra* note 2, at 1130 ("It is simply not consistent with the idea of the Constitution as binding law to adopt a hermeneutic of textualism that permits individuals to assign their own private, potentially idiosyncratic meanings to the words and phrases of the Constitution.").

174. McConnell, *supra* note 52, at 1129. McConnell also argues that if a text must have determinate meaning to count as law, then nonoriginalism, which is characterized by a lack of objective standards, fails to treat the Constitution as law because embracing nonoriginalism is tantamount to accepting that multiple interpretations of the Constitution might be equally good. *See* McConnell, *supra* note 101, at 359 ("[W]e lawyers do not have the luxury of stating that

To originalists, it follows that if nonoriginalism does not treat the Constitution as law, then it must also fail the test of democratic legitimacy. Robert Bork maintains that "no argument that is both coherent and respectable can be made supporting [nonoriginalism] because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society."[175] Steven Calabresi contends that "[n]on-originalist judicial review severely distorts the allocation of powers that is central to the Constitution."[176] And former Chief Justice Rehnquist argued that nonoriginalism—which he called living constitutionalism—is simply "a formula for an end run around popular government."[177]

Central to the normative case for originalism, then, is not simply the claim that the originalist approach is legitimate, but also the claim that it is the *only* legitimate approach—that its alternatives are fundamentally illegitimate. Although the point should already be apparent, we belabor it for a moment longer to underscore just how aggressively—and sometimes smugly and hubristically—originalists have asserted their claims to unique legitimacy. Lillian BeVier, for example, argues that "[i]ntegrity characterizes a judicial process based on originalism, and its lack is one of the chief deficiencies of its alternatives."[178] (Among the other deficiencies of nonoriginalism, she says, are that it is "irredeemably hypocritical and essentially dishonest."[179]) Michael McConnell is more polite, if only slightly more charitable; he argues that originalists "offer a principled justification for the pattern of decisions they favor: that judges should interfere with legislative decisions only when necessary to protect individual rights or structural principles genuinely derived from the text of the

multiple interpretations [of the Constitution] are all 'good.'"). This has been a common originalist claim. *See, e.g.*, WHITTINGTON, *supra* note 47, at 58 ("To give the words of the Constitution new meanings over time would deny both the value and risk of a system of written constitutions."); *cf.* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 438 (2007) ("If we do not seek to be faithful to the Constitution, we may be trying to improve the Constitution, but we are not trying to interpret it.").

175. Bork, *supra* note 173, at 6; *accord* Bork, *supra* note 18, at 388 ("[N]on-intepretivism ends in nihilism [because] it has proved wholly unable to meet a condition most theorists have accepted as indispensable—consistency with democratic control of government."); *see also, e.g.*, McConnell, *supra* note 101, at 360 (arguing that any approach other than originalism leads to the conclusion that the Constitution embodies "principles that the people did not choose," and that "such a holding has no democratic legitimacy").

176. Calabresi, *supra* note 13.

177. Rehnquist, *supra* note 3, at 706.

178. BeVier, *supra* note 153, at 286.

179. *Id.* at 287.

Constitution, as interpreted in light of history and tradition." Nonoriginalists, in contrast, "have yet to propound a comparable theory."[180]

These criticisms are nothing new. Robert Bork made the same case more than thirty-five years ago,[181] arguing that nonoriginalism fails the test of legitimacy because "[w]here constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other."[182] And without the constraint of constitutional text or history, he argued, "the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute. That, by definition, is an inadequate basis for judicial supremacy."[183] Justice Scalia has elaborated on this theme, arguing that the "principal theoretical defect of nonoriginalism . . . is its incompatibility with the very principle that legitimizes judicial review of constitutionality."[184] And Michael Perry has argued that "[n]onoriginalist judicial review seems fundamentally antithetical to basic axioms of modern American political-legal culture."[185]

Thus, to take them at their word, originalists do not believe that there are some good and some bad methods of constitutional interpretation, with perhaps one that seems better than all the others. Rather, they start from the premise that there is a correct method of constitutional interpretation,[186] from which it necessarily follows that

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180. Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2387–88 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)).

181. Bork argued that if the Supreme Court "does not have and rigorously adhere to a valid and consistent theory of majority and minority freedoms based on the Constitution"—by which he meant originalism—"judicial supremacy, given the axioms of our system, is, precisely to that extent, illegitimate." Bork, *supra* note 173, at 4.

182. *Id.* at 8.

183. *Id.* at 10; *see also* BERGER, *supra* note 31, at 371 (arguing that nonoriginalist approaches "convert the 'chains of the Constitution' to ropes of sand").

184. Scalia, *supra* note 2, at 854.

185. Perry, *supra* note 46, at 687–88; *see also* Graglia, *supra* note 12, at 1044 (arguing that nonoriginalist approaches mean, "as a practical matter, that the judge is the lawmaker, and such review therefore cannot be legitimate unless the judge is authorized to be the lawmaker"—which, of course, the judge is not).

186. *See, e.g.*, McConnell, *supra* note 101, at 359 (arguing that "we lawyers do not have the luxury of stating that multiple interpretations are all 'good'"); Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 529 (1998) (reviewing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996)) ("Originalism's advocates claim that it supplies the one, true interpretive method . . . .").

all other methods of interpretation are not simply inferior, but also wrong. From the very beginning of the modern originalist movement, originalists of every stripe have insisted unfailingly that theirs is the one true constitutional faith—that only their approach is legitimate and coherent and properly respects the Constitution and the judiciary's institutional role. To originalists, everything other than originalism is constitutional heresy; nonoriginalist approaches are not methods to interpret the Constitution at all, but rather are proposals "to *replace* the Constitution as our fundamental law."[187] Originalism, they believe, is the "only approach that takes seriously the status of our Constitution as fundamental law and that permits our society to remain self-governing."[188]

Yet when an originalist says that originalism is the only legitimate method of constitutional interpretation, what he often appears to mean is that *his particular brand of originalism* (which he regards as the true form of originalism) is the only legitimate method of constitutional interpretation. To originalists like Raoul Berger and Bruce Fein, "the doctrine of *original intent* is the only legitimate judicial guide for constitutional jurisprudence."[189] To originalists like Saikrishna Prakash,[190] Steven Calabresi,[191] and Robert Bork, however, "only the approach of *original understanding* meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy."[192] To originalists like Justice Scalia, by contrast, the only form of constitutional interpretation that "take[s] the need for theoretical legitimacy seriously" is an approach that

187. OFFICE OF LEGAL POLICY, *supra* note 11, at 66 (emphasis added); *see also, e.g.*, Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631, 632 (1993) (arguing that nonoriginalists "are not seeking a different means of interpretation—there are no different means—rather, they are seeking to empower the Court to make constitutional law apart from the Constitution").

188. OFFICE OF LEGAL POLICY, *supra* note 11, at 3.

189. Bruce E. Fein, Comment, *Original Intent and the Constitution*, 47 MD. L. REV. 196, 197 (1987) (emphasis added); *see also, e.g.*, BERGER, *supra* note 31, at 364 (delineating the importance of "original intention").

190. *See* Prakash, *supra* note 186, at 529 (citing Bork and arguing that uncovering the "public understanding" is "the one, true interpretive method").

191. *See* Calabresi, *supra* note 13 ("It is legitimate for courts to decide [controversial] issues only when they are enforcing the Constitution as originally understood and ratified by the people."). Calabresi has at other times suggested that original, objective-public-meaning originalism is the only legitimate method of interpreting the Constitution. *See infra* note 310.

192. BORK, *supra* note 11, at 143 (emphasis added). It was apparently of no moment that Bork made this assertion not long after insisting that "original *intent* is the only legitimate basis for constitutional decisionmaking." Bork, *supra* note 30, at 823 (emphasis added).

seeks the *objective original meaning* of the text.[193] And to originalists like Vasan Kesavan, Michael Stokes Paulson, and Gary Lawson, the originalism that is the "single, 'true' method of constitutional interpretation" is "original, objective-public-meaning textualism"[194]—which would have come as a shock to Raoul Berger and the other pioneers of the modern originalist movement. To each of these originalists, and to many others, it is not exactly that originalism *simpliciter* is the only legitimate method of constitutional interpretation; it is that each one's particular version of originalism—and, *a fortiori*, not any other version of originalism—is the only legitimate method.[195]

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193. Scalia, *supra* note 2, at 862; *see also* Scalia, *supra* note 3, at 37–44 (rejecting the use of original intent in favor of discovering an objective original meaning for the purposes of textual analysis).

194. Kesavan & Paulsen, *supra* note 2, at 1129; *accord id.* at 1121 (arguing that the "interpretive project of determining the original public meaning of the Constitution" is "the only truly legitimate approach to the interpretation of the Constitution as a legal document"); Gary Lawson, *Everything I Need to Know About Presidents I Learned from Doctor Seuss*, 24 HARV. J.L. & PUB. POL'Y 381, 387 n.26 (2001) (opining that "this particular species of originalism is the correct way to interpret the Constitution"); Lawson, *supra* note 17, at 1834 ("[T]he Constitution's meaning is its original public meaning. Other approaches to interpretation are simply wrong.").

195. Raoul Berger, for example, argued not only that original-intent originalism is the only legitimate method of constitutional interpretation, but also that a focus on the objective original public meaning is illegitimate. *See* Berger, *supra* note 100, at 353 (arguing that the "essence of communication" is for "the writer to explain what his words mean; the reader may dispute the proposition, but he may not insist in the face of the writer's own explanation that the writer meant something different"). Michael McConnell, in contrast, has argued not only that original-meaning originalism is the only legitimate approach to constitutional interpretation, *see* McConnell, *supra* note 180, at 2387–88, but also that original-intent originalism and original-expected-application originalism are illegitimate, s*ee* McConnell, *supra* note 101, at 362 (arguing that these approaches are, as represented by the decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), "subverting the principle of the rule of law"). Vasan Kesavan and Michael Stokes Paulsen have argued not only that the "interpretive project of determining the original public meaning of the Constitution" is "the only truly legitimate approach to the interpretation of the Constitution as a legal document," Kesavan & Paulsen, *supra* note 2, at 1121, but also that original-intent originalism and original-understanding originalism are illegitimate, *id.* at 1132–33. Paulsen has gone even further, deriding even other original-meaning originalists—including Justice Scalia and Robert Bork—as "would-be originalists" because they do not subscribe to his particular approach. Paulsen, *supra* note 83, at 289 n.2. Randy Barnett similarly has argued not only that original-meaning originalism is the only legitimate method of interpreting the Constitution, *see* Barnett, *supra* note 5, at 630, but also that those self-proclaimed original-meaning originalists (in particular, Justice Scalia) who are willing to follow precedents that are inconsistent with the original meaning, or are unwilling to follow the original meaning of constitutional provisions that are insufficiently rule-like, simply are not originalists, and thus do not follow a legitimate method of constitutional interpretation, *see* Barnett, *supra* note 67, at 13. And Gary Lawson has argued not only that original, objective-public-meaning originalism is the only legitimate approach to interpreting the Constitution, *see* Lawson, *supra* note 194, at 387

But there is something self-defeating in all of that. The claims about the unique—and exclusive—legitimacy of originalism wither when one considers the profound disagreement among originalists on questions central to the interpretive enterprise. The frequent originalist assertion that there is one and only one legitimate approach to constitutional interpretation—in Kesavan and Paulsen's words, "a single, 'true' method of constitutional interpretation"[196]—has a certain rhetorical pull if one imagines originalists as offering a unified, categorically distinctive approach to constitutional questions—an argument along the lines of, "Everyone else labors in the mistaken belief that there are no right answers, but we (and we alone) have figured out that there is a universal truth out there, and we know how to find it." But that assertion is, at the very least, substantially less compelling when it becomes apparent that originalists themselves cannot even begin to agree on what their correct approach actually entails. The profound internal squabbling among originalists negates their self-assured claim that originalism is "almost self-evidently correct"[197] and "so obvious that it should hardly need a name, let alone a defense."[198]

Of course, the mere fact that originalists disagree among themselves does not necessarily mean that they are *all* wrong—or that at least *one* of them is not actually right. It is possible that among the many competing versions of originalism lies the one "correct" and uniquely legitimate method of constitutional interpretation, just as it is possible that there is a correct moral philosophy and a correct answer to the question, "which was the greatest baseball team of all time?" But if fifty people with fifty different approaches all insist that their particular approaches are not merely the best but are also correct, and that all other approaches are not merely less desirable but also illegitimate and wrong, then one can have only so much confidence in any one of their claims.

It is not simply the general claim to unique legitimacy that is substantially more difficult to take seriously when one considers the rapid evolution of originalist thought and the wide range of originalist

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n.26, but also that all "[o]ther approaches to interpretation"—including what he calls "original private meaning" originalism, which is tantamount to an approach that seeks the relevant audience's subjective understanding of the text, *see* Lawson, *supra* note 17, at 1826–27, "are simply wrong," *id.* at 1834.

196. Kesavan & Paulsen, *supra* note 2, at 1129.

197. Graglia, *supra* note 12, at 1020.

198. Calabresi, *supra* note 13.

views that currently exist, but also originalists' specific claims that their approach alone properly treats the Constitution as a form of law and properly limits the judiciary to its appropriate role in a democratic society. These claims start from the premise that originalism (and only originalism) treats the Constitution as having a fixed and determinate meaning.[199] Yet the meaning that a committed originalist judge would find obviously turns on the particular brand of originalism that the judge applies. And over the last thirty-five years, that meaning has been anything but fixed. A judge committed to the originalist enterprise would once have invoked original intent, and would today have the freedom to choose from a smorgasbord that includes original intent and many other originalist approaches—approaches that, in at least some important classes of cases, have the potential to produce starkly different meanings of the constitutional provision at issue, and thus to dictate starkly different outcomes.

To take perhaps the most obvious example of originalists' invoking divergent theories and reaching disparate results, consider the range of responses originalists have offered to *Brown v. Board of Education*.[200] In the 1970s, Raoul Berger argued vigorously that, as a matter of original intent—which he claimed can easily be determined from the debates surrounding the drafting and ratification of the Fourteenth Amendment—*Brown* was incorrectly decided (although he also argued that this result obviously was undesirable as a political matter).[201]

But Robert Bork relied on a different version of originalism to argue that *Brown* was correctly decided. Bork argued—first in 1971 and then again in 1990—that, although the Fourteenth Amendment originally was intended and understood to *permit* segregated schools, *Brown* nevertheless was correct because the "purpose that brought the fourteenth amendment into being" was "equality," and "equality and segregation were mutually inconsistent," even "though the

199. *See* Solum, *supra* note 105, at 4 (noting that "the claim that semantic content is fixed at the time of origin plays a crucial role in all (or almost all) of the normative justifications for originalism").

200. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

201. *See* BERGER, *supra* note 31, at 117–33, 245 (arguing that "the framers had no intention of striking down segregation"); *see also* Raoul Berger, *Activist Indifference to Facts*, 61 TENN. L. REV. 9, 20–21 (1993) (highlighting that the decision to strike down segregation reflected neither original intent nor contemporary political will).

ratifiers did not understand that."[202] Bork thus viewed the original meaning at a very high level of generality—so high, in fact, that many commentators have observed that his approach is starkly inconsistent with most standard versions of originalism.[203]

Perhaps troubled by the implications of discerning original meaning at such a high level of generality, Michael McConnell in the mid-1990s made a different originalist argument in favor of *Brown*: that *Brown* was in fact consistent with the original, narrow understanding of how the Fourteenth Amendment would actually apply to segregated schools. McConnell relied not on evidence of strictly contemporaneous framer and ratifier understanding—which would require reference to the debates of 1866–1868 on which Berger had relied—but instead on evidence of Republican responses to the proposed Civil Rights Act almost a decade later.[204]

Steven Calabresi has indicated that he too believes that *Brown* was correctly decided, on what he calls "new originalist" grounds.[205] Although he has yet to develop that argument in detail, in a recent article, he (along with coauthor Sarah Agudo) sketches out one

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202. BORK, *supra* note 11, at 82; *accord* Bork, *supra* note 173, at 14–15. Akhil Amar agrees with this reasoning. *See* Akhil Reed Amar, *Rethinking Originalism: Original Intent for Liberals (and for Conservatives and Moderates, Too)*, SLATE, Sept. 21, 2005, http://www.slate.com/id/2126680/.

203. *See, e.g.*, Maltz, *supra* note 31, at 847 ("The difficulty with Bork's principle is that it superimposes his view of 'neutrality' on the Framers' intent. If the concept of the intent of the Framers is to have any coherent meaning, it must include the Framers' idea of what lines can appropriately be drawn."); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 432 n.25 (1997) ("If achieving 'equality' is the relevant intention, it would be equally originalist to say that the Fourteenth Amendment enacted Marxism, on the theory that equality and capitalism were mutually inconsistent, though the ratifiers did not understand that."); Ronald Turner, *Was "Separate but Equal" Constitutional?: Borkian Originalism and* Brown, 4 TEMP. POL. & CIV. RTS. L. REV. 229, 262 (1995) (arguing that if originalists "wish to adhere to the *Brown*-is-right position, something must give; that something may be a total abandonment of the originalist analysis or a reformulation of originalism that results in a more flexible and broader conception of what originalism entails").

204. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1132–33 (1995); Michael W. McConnell, *Segregation and the Original Understanding: A Reply to Professor Maltz*, 13 CONST. COMMENT. 233, 233 (1996) (defending *Brown* as consistent with the original understanding of the Fourteenth Amendment).

205. *See* Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1377 (1998) (stating that *Brown* "was warranted on textualist/originalist grounds"); Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 655 n.138 (2006) ("For the record, I am working on an article arguing that *Brown* was rightly decided based on the correct original understanding of the Fourteenth Amendment." (citing Steven G. Calabresi & Michael W. Perl, *New Originalist Justification of* Brown v. Board of Education (unpublished manuscript))).

possible argument for *Brown* based on objective original meaning. He argues that the fact that, by 1868, thirty-seven states guaranteed the right to public education in their state constitutions suggests that that right is one of the "privileges or immunities" protected by the Fourteenth Amendment.[206] He further argues that the fact that thirteen states had constitutional clauses explicitly prohibiting the deprivation *or unequal provision* of privileges and immunities lends support to the argument, previously advanced by John Harrison,[207] that the Fourteenth Amendment Privileges or Immunities Clause is best understood as protecting against the enactment of laws that discriminate on the basis of race in the provision or protection of fundamental privileges or immunities.[208] Putting those two points together, Calabresi explains, might "imply that a right to a public school education in 1868 was a privilege or immunity for Fourteenth Amendment purposes as to which the states were not allowed to discriminate on the basis of race."[209] Rejecting original understanding in favor of original textual meaning, he concludes:

> The framers and ratifiers of the Fourteenth Amendment may well not have understood that the Amendment outlawed segregation in education, but arguably that is precisely what it did. Obviously, it is the formal text of the Fourteenth Amendment that governs, and not the uncodified and erroneous ideas of the ratifiers of that text as to what it might mean.[210]

Earl Maltz, however, has challenged the originalist propriety of *Brown*, relying on contemporaneous historical evidence of the "understanding" of "those who drafted and ratified the Fourteenth Amendment . . . during the earlier Reconstruction period" to conclude that *Brown* is incompatible with originalism.[211] (A decade earlier, Maltz had made a similar argument relying on the unambiguous "inten[t]" of the "Framers of the fourteenth

206. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 108–11 (2008).

207. *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1473–74 (1992).

208. *See* Calabresi & Agudo, *supra* note 206, at 96–97.

209. *Id.* at 110.

210. *Id.*

211. Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENT. 223, 231 (1996).

amendment."[212]) Similarly, John Harrison has at least hinted that *Brown* cannot be reconciled with the text of the Equal Protection Clause as understood at the time of the ratification of the Fourteenth Amendment.[213] And Justice Scalia has allegedly acknowledged that *Brown* cannot be defended on originalist grounds.[214]

It is not our objective here to referee these competing claims by originalists about the validity of *Brown*. Our point is that these originalists have not only drawn upon competing sources, but have in fact employed a wide range of inconsistent approaches to originalism itself—a wide variety of divergent constitutional theories—to reach diametrically opposing conclusions to one of the most significant and controversial questions of constitutional law. That fact suggests that considerable skepticism is warranted toward the claim that something amorphously called "originalism" is uniquely consistent with law and democracy because of its ability to produce a single, objective, unchanging constitutional meaning.

And it is not just the issue of segregation that yields different results depending upon the version of originalism employed.[215] The same is true of countless other major constitutional questions. Jack Balkin's "text and principles" originalism vindicates *Roe v. Wade*,[216] whereas most originalist methodologies would reject it. Randy

212. *See* Maltz, *supra* note 31, at 846 ("[T]he historical record indicates unambiguously that the Framers of the fourteenth amendment did not intend to outlaw state-imposed segregation per se.").

213. *See* John Harrison, *Equality, Race Discrimination, and the Fourteenth Amendment*, 13 CONST. COMMENT. 243, 254–55 (1996). We say "hinted" because Harrison does not directly answer the question. He does suggest, however, that if the Fourteenth Amendment had been ratified in 1954—the year that the Court decided *Brown*—it would have been far from clear whether, in light of support for Jim Crow laws in a large part of the country, it would have been understood to outlaw segregated schools, and he suggests, somewhat elliptically, that the same was true in 1866. *See id.*

214. *See* Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, NEW YORKER, Mar. 28, 2005, at 40, 54 (describing Justice Scalia's response when asked about *Brown*'s inconsistency with originalism). *But see* Rutan v. Republican Party of Ill., 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting) (suggesting that segregation was inconsistent with the unambiguous textual meaning of the Equal Protection Clause).

215. It is certainly true that original public meaning, original understanding, original intent, and original expected application often tend to collapse into one another in practice. *See* Colby, *supra* note 35, at 581–82 & n.284, 598–99. But they can just as often produce starkly different outcomes, especially when one considers the many subsidiary theories that fall within the original-public-meaning tent.

216. *See* Balkin, *supra* note 58, at 311–36 (arguing that the text and underlying principles of the Fourteenth Amendment's Equal Protection and Privileges or Immunities Clauses support a constitutional right to abortion).

Barnett's "presumption of liberty" originalism would protect a nearly infinite list of unenumerated constitutional rights,[217] whereas Robert Bork's narrow original-understanding originalism essentially rejects all unenumerated rights.[218] Original, objective-public-meaning textualism yields a conclusion that Congress cannot strip the Supreme Court of appellate jurisdiction over particular constitutional issues, whereas original-understanding and original-expectations originalism yield the opposite conclusion.[219] Original-expected-application originalism supports the constitutionality of legislative prayer, whereas other forms of originalism that seek to identify the principle embedded in the text do not.[220] Justice Scalia's particular version of expected-applications originalism supports the constitutionality of government-sponsored Ten Commandments monuments, whereas forms of originalism that seek to identify and vindicate the original purpose of the Establishment Clause do not.[221] And so on.

For a particularly timely example, consider *District of Columbia v. Heller*,[222] the Supreme Court's recent blockbuster Second Amendment case. Justice Scalia's majority opinion employed original-public-meaning originalism, with an emphasis on the public understanding and ordinary meaning of the text at the time of the Framing, to conclude that the Second Amendment protects the right to own and carry a gun for confrontation.[223] Justice Stevens's dissent, by contrast, employed what is essentially an original intent methodology to conclude that the Second Amendment does not protect such a right.[224]

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217. *See supra* text accompanying notes 78–80.

218. *See* BORK, *supra* note 11, at 114, 118–19, 125 (characterizing judicial protection of unenumerated rights as an illegitmate attempt to bypass the legislative process).

219. Or so say Steven Calabresi and Gary Lawson. *See* Calabresi & Lawson, *supra* note 64, at 1015–25 (arguing that the text and structure of Article III establish that all federal judicial power must be subject to the final authority of the Supreme Court).

220. *See* McConnell, *supra* note 101, at 361–63.

221. *See* Koppelman, *supra* note 62, at 728–29, 733–40, 743–49.

222. District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

223. *See id.* at 2788, 2790–801, 2804–05; Solum, *supra* note 105, at 1–2.

224. *See Heller*, 128 S. Ct. at 2822 (Stevens, J., dissenting) (arguing that "there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution"); *id.* at 2835 (arguing that the drafting history "sheds revelatory light on the purpose [and intent] of the Amendment"); *id.* at 2836–37, 2839 (arguing that the majority "gives short shrift to the drafting history of the Second Amendment," and that the majority's sources regarding the public understanding in the era after the Amendment went into effect are not helpful because those authors "appear to have been unfamiliar with the drafting history of the Second Amendment"); *id.* at 2841 (arguing that some of the majority's sources

C. Originalism and Judicial Discretion

Finally (and obviously related to originalists' claims about law and democracy), many of originalism's proponents claim that their approach is uniquely capable of constraining judges' ability to impose their views under the guise of constitutional interpretation.[225] As

"cannot possibly supply any insight into the intent of the Framers"). Perhaps not surprisingly, self-professed originalist commentators have disagreed about the propriety of the Justices' approaches. *See, e.g.*, Lund, *supra* note 94, at 1345 ("[T]he Court's reasoning is at critical points so defective—and in some respects so transparently non-originalist—that *Heller* should be seen as an embarrassment for those who joined the majority opinion.").

225. For the first thirty years of the modern originalist ascendancy, the "primary commitment" of the originalist project was to judicial restraint. Whittington, *supra* note 1, at 602. Early originalists, after all, offered the approach as an antidote to the perceived judicial excesses of the Warren Court. *See* BERGER, *supra* note 31, at 363–72 (asserting that a focus on the Framers' "original intention" is necessary to prevent "unbounded judicial interpretive discretion"); Harrison, *supra* note 130, at 83–86 (explaining that early originalists believed the Warren Court's decisions were a product of the Justices' "own views of desirable results" rather than neutral legal principles). These originalists claimed that originalism would both limit the opportunities of judges to displace the judgment of democratically elected officials, *see, e.g.*, Bork, *supra* note 173, at 11 (asserting that "where the Constitution does not speak," decisional authority is with legislative majorities), and, by narrowing the focus of judicial inquiry to the original meaning of the Constitution (or intent of its Framers), limit the discretion of judges to impose their personal, subjective views of good policy, *see, e.g.*, Scalia, *supra* note 2, at 863–64 ("Originalism . . . establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."). More recently, however, many originalists have tended to downplay the arguments about the dangers of judicial authority, insisting not that judges should "get out of the way of legislatures" but instead simply that judges must "uphold the original Constitution—nothing more, but also nothing less." Whittington, *supra* note 1, at 609. These new originalists often have argued for more, not less, judicial interference with the work product of democratically elected officials. *See, e.g.*, BARNETT, *supra* note 79, at 259–69 (arguing for the abandonment of the presumption of constitutionality traditionally afforded to government actions); Balkin, *supra* note 58, at 311–36 (arguing that originalist methodology justifies *Roe v. Wade*). Still, even if there is disagreement among originalists about the general desirability of judicial invalidation, in the name of the Constitution, of the output of democratic processes, originalists regularly contend that originalism, by limiting the judicial role to a fixed historical baseline, is substantially more likely than other approaches to constrain the ability of judges to impose their views under the guise of constitutional interpretation. *See, e.g.*, BORK, *supra* note 11, at 163 ("Many cases will be decided as the lawgivers would have decided them, and, at the very least, judges will confine themselves to the principles the lawgivers intended."); Scalia, *supra* note 2, at 863–64 ("[T]he main danger in judicial interpretation . . . is that the judges will mistake their own predilections for the law. . . . Nonoriginalism . . . plays precisely to this weakness. . . . Originalism does not . . . for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."); Calabresi, *supra* note 13. Even those originalists who have recognized that claims of originalism's constraining power have often been overstated have tended to view originalism as nonetheless meaningfully, even if not completely, constraining. *See, e.g.*, WHITTINGTON, *supra* note 47, at 89–99, 204–06; Amar, *supra* note 46, at 53–54 ("[Originalism] aims not to constrain more, but to constrain better, by focusing judges on America's most attractive legal norms as a matter of prestige and substance."); Barnett, *supra*

Steven Smith explains, "A central concern of originalism is that judges be *constrained* by the law rather than be left free to act according to their own lights, a course that originalists regard as essentially lawless."[226] This claim proceeds from the premise that only originalism uses an objective criterion that is "exterior to the will of the Justices"[227]—that is, some measure of the original meaning of the Constitution's text—to produce a fixed and determinate meaning. As Keith Whittington explains, originalists have argued that if the "political seduction of the law" is the principal threat from judicial review, then "the best response" is to "lash judges to the solid mast of history."[228] Justice Scalia argues that for this reason, originalism is "less likely to aggravate the most significant weakness of the system of judicial review"—that is, that "the judges will mistake their own predilections for the law."[229] And Robert Bork has argued that with its "attempt to adhere to the principles actually laid down in the historic Constitution," adoption of the originalist methodology "will mean that entire ranges of problems and issues are placed off-limits for judges."[230]

Originalists contend, moreover, that nonoriginalist approaches to constitutional interpretation not only fail to constrain judges, but also effectively invite judicial instrumentalism under the guise of constitutional interpretation. Whereas "the textualist-originalist approach supplies an objective basis for judgment that does not

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note 67, at 23 (arguing that the Constitution's broader provisions require some judicial discretion, but are constrained by the original public meaning of their terms).

226. Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 106 (1989).

227. Bork, *supra* note 173, at 6.

228. Whittington, *supra* note 1, at 602. Whittington has argued, however, that "[j]udicial restraint is an inadequate basis for justifying an originalist jurisprudence," because "[o]riginalism requires deference only to the Constitution and to the limits of human knowledge, not to contemporary politicians." He also doubts whether originalism can "provide the type of restraints on judicial decision making favored by some of its advocates." WHITTINGTON, *supra* note 47, at 4.

229. Scalia, *supra* note 2, at 863. Justice Scalia argues that originalism is more likely to create judge-constraining rules rather than standards that confer discretion. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989); *cf.* McGinnis & Rappaport, *supra* note 142, at 385 (arguing that the "most common defense of originalism" is that it "generally ties judges to rules").

230. BORK, *supra* note 11, at 163; *see also* BERGER, *supra* note 31, at 284–86; BeVier, *supra* note 153, at 291 ("[T]he criteria of originalism constrain all the participants in the game—including, most especially, the referees."); Bork, *supra* note 30, at 826 ("The only way in which the Constitution can constrain judges is if the judges interpret the document's words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments.").

merely reflect the judge's own ideological stance," Michael McConnell argues, "constitutional interpretation based on the judge's own assessment of worthy purposes and propitious consequences lacks that objectivity."[231] Because nonoriginalist approaches to constitutional interpretation are not limited by the original meaning of the constitutional text, originalists argue, judges applying them are free to rely on an infinite number of sources and even ultimately their own conceptions of the public good.[232] And "[b]ecause these alternative standards are so vague, [they] often lead[] to the imposition of the judge's personal concept of prudent public policy."[233] Justice Scalia argues that "[n]onoriginalism, which under one or another formulation invokes 'fundamental values' as the touchstone of constitutionality," by definition increases the risk that judges will "mistake their own predilections for the law," because "[i]t is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are 'fundamental to our society.' Thus, by the adoption of such a criterion judicial personalization of the law is enormously facilitated."[234] Lino Graglia puts it less charitably: he argues that the "justification for judicial disallowance of political choices—that the judges are enforcing the Constitution—is not available" to nonoriginalists, "for they are by definition enforcing something other than the Constitution."[235] Indeed, many originalists not only think that nonoriginalist approaches are unlikely to constrain judges, but also doubt that nonoriginalists even have any interest in constraining judges.[236]

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231. McConnell, *supra* note 180, at 2415.

232. *See, e.g.*, BERGER, *supra* note 31, at 370 ("If the Court may substitute its own meaning for that of the Framers it may . . . rewrite the Constitution without limit."); Lund, *supra* note 94, at 1369–70 (arguing that living constitutionalism "simply replaces the written Constitution with the political preferences of contemporary judges").

233. OFFICE OF LEGAL POLICY, *supra* note 11, at 1; *see also id*. at 7 ("[A]ll non-interpretivist theories . . . provide no substantive guidance and can easily be manipulated by the very people they purport to constrain, federal judges.").

234. Scalia, *supra* note 2, at 863.

235. Graglia, *supra* note 12, at 1025.

236. *See, e.g.*, OFFICE OF LEGAL POLICY, *supra* note 11, at 1 ("In effect, non-interpretivists argue that life-tenured federal judges should have free rein to decide policy issues that affect virtually every aspect of our society, restrained by neither the text of the Constitution nor the electorate."); Graglia, *supra* note 12, at 1032 ("What is wrong with originalism, its opponents believe, what provides the fundamental impetus for their search for alternative, is simply that it leaves too little for courts to do.").

These claims of originalism's unique capacity for judicial constraint are, however, substantially undercut by the reality of originalism's rapid evolution and long-standing fragmentation. Many commentators have argued, quite persuasively in our view, that even assuming that there is such a thing as a standard, correct originalist approach, originalism—whichever version is canonized—is unlikely in most important cases effectively to constrain judges.[237] In fact, commentators have suggested, originalists remain largely unconstrained in practice, for at least three reasons. First, originalists' claims about the constraining effect of their approach break down when one recognizes that originalists—particularly judges who purport to be originalists—sometimes selectively choose not to employ originalism at all.[238] Second, originalists' claims about judicial

237. *See, e.g.*, RAKOVE, *supra* note 186, at 10–11 (explaining that historical ambiguities make it difficult to establish a fixed constitutional meaning); Colby, *supra* note 35, at 586–99 ("In the cases in which the fear of judicial discretion is most acute, judges cannot render their decisions on the basis of the original public meaning of the Constitution for the simple reason that there never was such a meaning."); Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 397 (1989) ("Because there were many framers with differing intentions, it is impossible to determine with much specificity what policies and programs were intended by those who made our Constitution in 1787 or remade it in 1865-70."); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 277–82 (2005) (explaining that originalism is less likely to result in judicial restraint than a system of precedent because originalism provides a smaller body of norms, uses sources that are less accessible, and requires skills that are less compatible with those of a typical judge); Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 282–86 (2004) ("The fact that the historical record is susceptible to . . . conflicting interpretations means that there is significant room for judges to slant the historical record to serve instrumentalist goals.").

238. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 101 (1991) (arguing that Robert Bork "insists on 100% original understanding, 20% of the time"); Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 385 (2000) ("Justice Scalia's . . . jurisprudence of 'original meaning' . . . is . . . one that Justice Scalia uses selectively when it leads to the conservative results he wants, but ignores when it does not generate the outcomes he desires."); Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113, 133 (2002) (concluding on the basis of an empirical examination of Supreme Court opinions that "Justices might speak about following an 'originalist' jurisprudence, but they only appear to do so when arguments about text and intent coincide with the ideological position that they prefer"); Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 260 (1993) ("Justice Scalia, the author of [*Employment Division v. Smith*, 494 U.S. 872 (1990)], claims to be an originalist. *Smith* shows no signs, however, of any such orientation; the Court's opinion totally ignores both the text and history of the Free Exercise Clause." (footnote omitted)); Gene R. Nichol, *Justice Scalia and the* Printz *Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953, 969–71 (1999) (arguing that, in cases involving takings, free exercise, standing, and affirmative action, "Justice Scalia departs radically from his chosen theory when it suits his fancy"); Eric J. Segall, *A Century Lost: The End of the Originalism*

constraint are overblown because, when they do choose to employ any particular form of originalism, originalists can, whether consciously or subconsciously, pick and choose among the various and often conflicting sources of original meaning (or understanding or intent) to produce the substantive results with which they personally agree.[239] Third, originalism often fails to constrain judges because the process of applying the original meaning (or understanding or intent) to the particular problem at hand still leaves room for substantial discretion on the part of the judge to follow her personal preferences—especially when that meaning (or understanding or intent) is articulated at a broad level of generality.[240]

We do not seek to diminish these critiques, which we find quite convincing. Instead, we seek to add another reason to suspect that originalism is far from the constraining influence that its proponents claim. The judicial-constraint defense of originalism turns on the premise that originalism "establishes *a* historical criterion that is conceptually quite separate from the preferences of the judge himself."[241] But in reality, there is a dizzying array of originalisms, each of which establishes a *different* "historical criterion." Accordingly, a judge who seeks to answer difficult questions of constitutional meaning by invoking originalism in fact has significant discretion to choose (consciously or subconsciously) the version of originalism that is most likely to produce results consistent with his own preferences.

Indeed, that is precisely what originalist judges have done. Even those self-professed originalists on the bench who have claimed to endorse one particular brand of originalism, to the exclusion of all

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Debate, 15 CONST. COMMENT. 411, 427–28 (1998) (noting that Justice Scalia's "votes to overturn flag burning laws, hate speech laws, and affirmative action programs cannot be reconciled with a strictly originalist approach to constitutional interpretation").

239. *See, e.g.*, Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437, 437–41 (1996); Smith, *supra* note 237, at 279–86 ("Faced with . . . indeterminacies [in historical materials], judges might be tempted—either consciously or subconsciously—to read the history in a manner that advances their own preferences."); *cf.* Koppelman, *supra* note 62, at 749 ("Since the conclusions of historical scholarship shift over time and since the judges are not constrained by the fact that a conclusion reached by some scholar at some time has since been refuted, the consequence is to expand the field of judicial discretion by presenting judges with a broad menu of possible interpretations, each of which have [*sic*] sufficient originalist credentials to qualify for citation in the *U.S. Reports*.").

240. *See*, *e.g.*, Colby, *supra* note 35, at 600 ("[T]he higher the level of generality, the more indeterminate the . . . originalist inquiry will be, and thus the less capable orignalism will be of fulfilling its promise to constrain judicial discretion.").

241. Scalia, *supra* note 2, at 864 (emphasis added).

others, have in fact bounced around among originalist theories from case to case, each time choosing the version of originalism that allows them to reach their desired results. This point can be illustrated by reference to the jurisprudence of the three most influential originalist judges: Justices Scalia and Thomas and Judge Bork.

We begin with Justice Scalia—the most outspoken and revered of originalist judges. Despite his strident claims to follow a consistent constitutional jurisprudence, Justice Scalia has in fact drifted among various versions of originalism.[242]

Consider his approach to the Eleventh Amendment and the question of state sovereign immunity. The Court's recent decisions in this area are, of course, all but impossible to square with either the text of the Amendment[243] or (most commentators have concluded) its history.[244] Justice Scalia has acknowledged that "[i]f this text were intended as a comprehensive description of state sovereign immunity in federal courts," then many of the Court's decisions in this area

242. He has also sometimes abandoned originalism altogether. *See supra* note 238.

243. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Court, however, has concluded that the states are protected from suits in federal court brought by their *own* citizens seeking to recover on claims arising under federal law, *see* Hans v. Louisiana, 134 U.S. 1 (1890), and, more recently, that states are even immune from private suits filed in *state* court, *see* Alden v. Maine, 527 U.S. 706 (1999). *See generally* John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989).

244. *See, e.g.*, Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States*, 126 U. PA. L. REV. 1203, 1279–80 (1978) (explaining that, as indicated by historical materials, sovereign immunity survived as a common law doctrine but could be legislatively abrogated); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1130 (1983) ("[T]he adopters of the amendment originally had the more modest purpose of requiring that the state-citizen diversity clause of article III be construed to confer jurisdiction on the federal courts only when a state sued an out-of-state citizen."); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 2004 (1983) ("Neither federal question cases nor admiralty cases fit within [the Amendment's] language, within the intention of its framers, or within the interpretation that the Court consistently gave it prior to the constitutional crisis of 1877."); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 55 (1988) ("[T]he historic purpose of the Eleventh Amendment . . . suggests that the primary objective of the . . . Amendment was to ensure that the Constitution not be construed to permit an adjudication against a state, where suit was (1) based only on liabilities arising under state law, and (2) brought originally in a federal forum whose jurisdiction was not subject to legislative change or direction.").

would be "unquestionably" wrong.[245] But he nevertheless has endorsed the Court's decisions on the ground that an unwritten "assumption" of state sovereign immunity "was implicit in the Eleventh Amendment."[246] To be sure, that approach is not inexorably inconsistent with an originalist jurisprudence, which Justice Scalia claimed to have employed in reaching his conclusion.[247] It might well follow (assuming the correctness of the history upon which it is based) from an original intent or original understanding approach. But it certainly is in substantial tension with the particular version of original-meaning originalism that Justice Scalia generally professes to follow—a version that relies on *the primacy of constitutional text* in the quest for constitutional meaning, and that treats the objective, "original meaning of the text" as the touchstone of original meaning.[248] In the abstract (and in other contexts), Justice Scalia has insisted that, when it comes to constitutional interpretation, "[w]ords do have a limited range of meaning, and no interpretation that goes beyond" the "limited range of meaning" that words carry is "permissible."[249] Indeed, he has condemned interpretations that the constitutional "language will not bear."[250] Yet when it comes to interpreting the Eleventh Amendment, he reaches a result (one generally preferred by political conservatives[251]) that cannot be squared with, and is admittedly not limited by, the constitutional text.

Similarly, Justice Scalia has adamantly asserted that, because what should matter to originalists is the original objective meaning of

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245. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 31 (1989) (Scalia, J., concurring in part and dissenting in part).

246. *See id.* at 32–33.

247. *See id.* at 34.

248. Scalia, *supra* note 3, at 38; *see also, e.g.*, District of Columbia v. Heller, 128 S. Ct. 2783, 2788 (2008) (Scalia, J.) ("In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.' Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." (quoting United States v. Sprague, 282 U.S. 716, 731 (1931))).

249. Scalia, *supra* note 3, at 24.

250. *Id.* at 37.

251. *See*, *e.g.*, Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 484 (2002) ("[T]he Court's sovereign immunity decisions are part of a broader agenda for the protection of a conservative vision of constitutional federalism."); Michael E. Solimine, *Formalism, Pragmatism, and the Conservative Critique of the Eleventh Amendment*, 101 MICH. L. REV. 1463, 1464 (2003) ("[M]any conservatives cheer on — or do not criticize — the Rehnquist Court's Eleventh Amendment jurisprudence, perhaps because it resonates with a pro-federalism policy agenda.").

the text, rather than the subjective understandings of the Framers, historical sources such as *The Federalist* should be used to determine the common, objective meaning of the words used in the Constitution, not to ascertain the actual, subjective understanding of the Framers.[252] But he has not always been faithful to that assertion. In *Printz v. United States*,[253] for example,[254] Justice Scalia's opinion for the Court concluded that the federal government lacks authority to compel state officials to implement federal law, even though he found "no constitutional text speaking to this precise question,"[255] and even though the most relevant constitutional text—the Commerce Clause, the Necessary and Proper Clause, and the Supremacy Clause (and even perhaps the truistic Tenth Amendment)—appeared to cut against his conclusion.[256] Justice Scalia's opinion relied heavily on *The Federalist* not to determine the original meaning of the text, which he concluded was all but irrelevant, but rather to ascertain "the historical understanding and practice" of the Framers.[257] Indeed, Justice Scalia was so focused on the actual understandings of the Framers that he went as far as to discount almost entirely the views that one Framer expressed in *The Federalist*—concluding that Hamilton was too nationalistic to be trusted—and to rely instead on another Framer's—Madison's—particular understanding of the Constitution.[258]

Moreover, in his academic writing, Justice Scalia has claimed to reject the original-expected-application approach to originalism—the notion that the Constitution must be interpreted to reflect the actual expectations of the Framing generation as to how it would apply to particular practices. In a response to Ronald Dworkin, Justice Scalia explained that he follows what Dworkin calls "semantic intention"

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252. *See* Scalia, *supra* note 3, at 38.

253. Printz v. United States, 521 U.S. 898 (1997).

254. For additional examples, see Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here than Meets the Eye?*, 14 WM. & MARY BILL RTS. J. 243, 298 (2005). One such case is *United States v. Hatter*, 532 U.S. 557 (2001), in which Justice Scalia cited *The Federalist* to determine what "the Framers . . . had . . . in mind" and what they "believed" about the meaning of the Constitution. *Id.* at 583–84 (Scalia, J., concurring in part and dissenting in part).

255. *Printz*, 521 U.S. at 905.

256. *See* William N. Eskridge, Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1307 (1998).

257. *Printz*, 521 U.S. at 905; *see also* Eskridge, *supra* note 256, at 1305 ("To determine the historical understanding and practice, Scalia relied strongly on *The Federalist*.").

258. Eskridge, *supra* note 256, at 1307 & n.38. William Eskridge explains that Justice Scalia was using *The Federalist* to establish that the Constitution "as specifically understood by at least one framer" dictated the Court's conclusion. *Id.*

(and what Justice Scalia would call "semantic import"—that is, "what the text would reasonably be understood to mean") and not the "concrete expectations of the lawgivers."[259] Although he suggested that sometimes an original-expected-application approach will yield the same result as an original-objective-meaning approach, he concluded that only the latter approach is the proper one.[260] On the bench, Justice Scalia has indeed sometimes rejected an expectations approach.[261]

But at other times, he has in fact employed such an approach—both in his academic writing and in his decisionmaking on the bench. To take the most familiar example, Justice Scalia has argued that capital punishment cannot violate the Eighth Amendment's prohibition on cruel and unusual punishment because its wide use at the time of the Framing indicates that the Framers did not expect or understand the Eighth Amendment to prohibit it.[262] He has also employed original-expected-application originalism, in the version that Andrew Koppelman has labeled "I Have No Idea Originalism,"[263] in the many cases in which he has sought to determine the constitutionality of a particular practice by asking whether the Framing generation engaged in the practice shortly after ratification, on the theory that this practice demonstrates authoritatively that the Framing generation did not seek to prohibit the particular practice. For instance, he used this approach in concluding that the Establishment Clause allows government-sanctioned displays of religion,[264] and he used the converse approach—treating the absence of a particular form of practice as strong evidence that the Framing generation believed that the Constitution prohibited the particular

259. *See* Scalia, *supra* note 106, at 144.

260. *See id.*

261. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 33–34 (2001) ("It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."); Minnesota v. Dickerson, 508 U.S. 366, 379, 382 (1993) (Scalia, J., concurring) ("[E]ven if a 'frisk' prior to arrest would have been considered impermissible in 1791, perhaps . . . it is only since that time that concealed weapons capable of harming the interrogator quickly and from beyond arm's reach have become common—which might alter the judgment of what is 'reasonable' under the original standard.").

262. *See* Scalia, *supra* note 106, at 145–46 ("[I]t is entirely clear that capital punishment, which was widely in use in 1791, does not violate the abstract moral principle of the Eighth Amendment."); *see also* Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 279–82, 296–97 (2002).

263. *See supra* notes 62–63 and accompanying text.

264. *See* McCreary County v. ACLU, 545 U.S. 844, 885–905 (2005) (Scalia, J., dissenting).

practice—in concluding that the federal government lacks the authority to compel state executive officials to implement federal law.[265] In these instances, Justice Scalia does not seek to determine the original meaning of the Constitution. He instead places dispositive weight solely on the actual narrow expectations of the Framing generation.[266]

In sum, Justice Scalia might insist that original-meaning originalism is the only legitimate approach to constitutional interpretation, but his application of originalist methodology has not been a consistent story of fidelity to a particular version of original-objective-meaning originalism. Rather, he has sometimes employed versions of originalism that he has otherwise criticized in order to reach results that appear to be consistent with his personal preferences, but not with the version of originalism that he generally endorses. This is not to say that Justice Scalia always, or even usually, departs from a strict adherence to his original-objective-meaning approach, but he has done so frequently enough that one must question whether originalism is quite the constraining tool that its proponents—principal among them Justice Scalia himself[267]—claim that it is.

And Justice Scalia is not the only originalist judge who has tended to drift among the various iterations of originalism. Robert Bork, the academic-originalist-turned-judge-turned-social-critic, has also done so. First, as we described above, Bork shifted from original-intent originalism to original-understanding originalism.[268] Of course, that move might simply reflect the same genuine intellectual evolution that characterized much of the originalist movement in the late 1980s and early 1990s. But Bork never actually expressly acknowledged the shift, instead simply declaring, as he had previously

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265. *See* Printz v. United States, 521 U.S. 898, 905–10 (1997).

266. *See* Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1132–38 (2006) (arguing that it is virtually impossible to articulate an original objective meaning of the Establishment Clause that would account for Justice Scalia's theory of the extent of the government's power to endorse religion—a theory that is based entirely on his understanding of the expectations of the Framing generation and that eschews any effort to articulate the original meaning of the Clause); Koppelman, *supra* note 62, at 737–38 (arguing that Scalia's originalism "does not attempt to state the principle for which the disputed constitutional provision stands").

267. *See* Scalia, *supra* note 2, at 863 (arguing that originalism is "less likely to aggravate the most significant weakness of the system of judicial review and more likely to produce results acceptable to all").

268. *See supra* note 36 and accompanying text.

for original-intent originalism,[269] that only the approach that he eventually embraced was constitutionally legitimate.[270] Indeed, as James Boyle has noted, Bork simply lifted language from his earlier writing in support of original intent originalism and replaced all references to intent with references to "understanding," an approach that Boyle describes as "'search and replace' jurisprudence."[271]

Second, even accepting that the shift to original understanding represented a genuine intellectual evolution, Bork has varied the level of generality at which he seeks the original understanding, depending upon the question at issue. When the question is whether the original understanding embraces a constitutional right to privacy—a question to which an affirmative response could validate the Court's decisions in *Griswold v. Connecticut*[272] and *Roe v. Wade*, among other cases that defy his policy preferences—Bork seeks the original understanding at a very high level of specificity.[273] He rejects *Griswold* and *Roe* on the ground that contraception is not "covered specifically or by obvious implication by any provision of the Constitution"[274] and "the right to abort, whatever one thinks of it, is not to be found in the Constitution."[275]

Bork disdains the historical evidence that John Hart Ely,[276] among others, has provided to substantiate the claim that the original understanding of the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment was that they protected unenumerated fundamental rights,[277] insisting instead on more specific evidence that the ratifiers sought to command judges to "abandon clause-bound interpretation" in order to "create

269. Bork, *supra* note 30, at 823 (asserting that "original *intent* is the only legitimate basis for constitutional decisionmaking" (emphasis added)).

270. BORK, *supra* note 11, at 143 (asserting that "only the approach of original *understanding* meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy" (emphasis added)). Bork claimed that his endorsement of original understanding was simply a clarification of his earlier work. *See id.* at 144.

271. James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J.L. & HUMAN. 263, 283–90 (1991).

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

273. *Cf.* Glenn Harlan Reynolds, *Sex, Lies and Jurisprudence: Robert Bork,* Griswold *and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045, 1082–85 (1990) (arguing that Bork's demand for such specificity for the right to privacy is actually inconsistent with the originalist methodology that he outlines in his book).

274. BORK, *supra* note 11, at 258.

275. *Id.* at 112; *see also id.* at 100, 113–16, 118–19, 257.

276. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 22–30, 34–41 (1980).

277. *See* BORK, *supra* note 11, at 166, 177–85 (questioning Ely's conclusions).

unmentioned rights by an unspecified method."[278] Because such evidence is, not surprisingly, elusive, Bork concludes that the Constitution does not create a right to privacy.[279]

But his approach is quite different when he seeks to discern the original understanding of the Equal Protection Clause, at least with respect to the question of racial segregation. As noted above, Bork argues that the Constitution is properly read to prohibit racial segregation because, notwithstanding the particular views of the ratifiers about segregation at the time, the "purpose that brought the fourteenth amendment into being" was "equality," and "equality and segregation were mutually inconsistent"—and this is the kicker—even "though the ratifiers did not understand that."[280] Bork, of course, cannot be faulted for recognizing, as have many others,[281] that originalism will fail to win adherents if it requires the politically unpalatable conclusion that *Brown* was wrongly decided.[282] But when he chooses to employ an extremely high-level-of-generality version of originalism in addressing the segregation question, he abandons the narrower originalism that he applies to the question whether there is

278. *Id*. at 181–82.

279. *See* Dronenburg v. Zech, 741 F.2d 1388, 1391–97 & n.5 (D.C. Cir. 1984); BORK, *supra* note 11, at 118 (rejecting unenumerated rights because they are not specifically listed in the text of the Constitution); *cf.* Robert H. Bork, Commentary, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 695–97 ("I represent that school of thought which insists that the judiciary invalidate the work of the political branches only in accordance with an inference whose underlying premise is fairly discoverable in the Constitution itself.").

280. BORK, *supra* note 11, at 82; *see also* Bork, *supra* note 173, at 14 ("[Although] the men who put the amendment in the Constitution intended that the Supreme Court should secure against government action some large measure of racial equality . . . . those same men were not agreed about what the concept of racial equality requires.").

281. Because *Brown* occupies a position at the center of the untouchable canon of constitutional law, *see, e.g.*, Jack M. Balkin, *"Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 681–82 (2005), as a practical matter, "[n]o constitutional theory is taken seriously unless it can accommodate the result in *Brown*." Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 488 (2005); s*ee also*, *e.g.*, Cass R. Sunstein, *In Defense of Liberal Education*, 43 J. LEGAL EDUC. 22, 26 (1993) (arguing that "an approach to constitutional interpretation is unacceptable if it entails the incorrectness of *Brown*").

282. *See* BORK, *supra* note 11, at 77 ("*Brown* has become the high ground of constitutional theory. Theorists of all persuasions seek to capture it, because any theory that seeks acceptance must, as a matter of psychological fact, if not logical necessity, account for the result in *Brown*."); *see also* McConnell, *supra* note 204, at 952 ("The supposed inconsistency between *Brown* and the original meaning of the Fourteenth Amendment has assumed enormous importance in modern debate over constitutional theory. Such is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited.").

a right to privacy.[283] As Cass Sunstein has observed, Bork's typical approach is to seek to resolve specific questions according to the specific understanding or expectations of the Framers.[284] But when it comes to segregation, Bork abandons this approach in favor of one that entails taking "the Framers' understanding at a certain level of abstraction or generality" in order to reach results that may be inconsistent with the narrow expectations or understandings of the Framers, but nonetheless accord with the fundamental values underlying the Constitution.[285] This approach allows Bork to reach his desired result of upholding *Brown* while still claiming to be a faithful originalist.[286] To be sure, there have been other issues to which Bork has applied a higher-level-of-generality version of originalism. The most well known is the scope of the limitations that the First Amendment imposes on claims for libel.[287] But the flexibility that Bork has shown on that question merely confirms our broader point—that the wide range of competing versions of originalism enables self-professed originalists to reach, while applying ostensibly originalist methodology, virtually any result that they wish to reach.

Finally, consider Justice Thomas, who has long declared himself to be an originalist. But of which variety? Justice Thomas has at times

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283. *See* David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373, 1381–82 (1990) (reviewing BORK, *supra* note 11) (arguing that Bork's high-level-of-generality analysis of *Brown* is inconsistent with the very originalist methodology that he otherwise advocates); *see also supra* note 203.

284. *See* Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311, 312 (1995). Sunstein calls this approach "hard originalism." *But see* Reynolds, *supra* note 273, at 1070 n.90 ("[T]he question—even in Bork's formulation—is not how the Framers themselves would have decided such a question; Bork's theory is more sophisticated than that. Rather, the question is what principles we can draw from the Framers' understanding of what the Constitution was about so as to decide for ourselves whether the Constitution permits bans on contraception.").

285. Sunstein, *supra* note 284, at 313. Sunstein calls this form of originalism "soft originalism."

286. *See* BORK, *supra* note 11, at 82 (arguing that it is possible to reconcile the result in *Brown* with the Framers' original understanding that segregation was not objectionable).

287. *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 996 (D.C. Cir. 1984) (en banc) (Bork, J., concurring) ("We know very little of the precise intentions of the framers and ratifiers of the speech and press clauses of the first amendment. But we do know that they gave into our keeping the value of preserving free expression and, in particular, the preservation of political expression, which is commonly conceded to be the value at the core of those clauses. Perhaps the framers did not envision libel actions as a major threat to that freedom. . . . But if, over time, the libel action becomes a threat to the central meaning of the first amendment, why should not judges adapt their doctrines?"); Harrison, *supra* note 138, at 479–80 (noting that Bork's *Ollman* opinion employs a sort of "purposivism"—originalism that "tak[es] as normative the original purpose" of the First Amendment).

explicitly sought the original intent of the Framers.[288] At other times, he has sought the original meaning of the Constitution,[289] which he equates with the original understanding of the Constitution's meaning[290]—in particular, with the understanding held by the Framers themselves.[291] Thus, he often articulates the judge's task as discovering the Framers' understanding of the Constitution.[292] In truth, however,

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288. *See, e.g.*, Davis v. Washington, 547 U.S. 813, 836 (2006) (Thomas, J., concurring in the judgment in part and dissenting in part) (noting that "it is unlikely that the Framers intended the word 'witness' to be read so broadly as to include such statements"); Hamdi v. Rumsfeld, 542 U.S. 507, 580 (2004) (Thomas, J., dissenting) ("The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations."); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 898 n.22 (1995) (Thomas, J., dissenting) (asking "whether the Framers intended to preclude *the people* of each State from supplementing the constitutional qualifications").

289. *See, e.g.*, Rothgery v. Gillespie County, 128 S. Ct. 2578, 2595 (2008) (Thomas, J., dissenting) (rejecting the majority's holding because it "is not supported by the original meaning of the Sixth Amendment"); Apprendi v. New Jersey, 530 U.S. 466, 518 (2000) (Thomas, J., concurring) (seeking "the original meaning of the Fifth and Sixth Amendments").

290. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting) ("Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its *original meaning*. In my view, the Public Use Clause, *originally understood*, is a meaningful limit on the government's eminent domain power. Our cases have strayed from the Clause's original meaning, and I would reconsider them." (emphases added)); Utah v. Evans, 536 U.S. 452, 490–91 (2002) (Thomas, J., concurring in part and dissenting in part) (equating original meaning with original understanding); *see also* Baze v. Rees, 128 S. Ct. 1520, 1556 (2008) (Thomas, J., concurring in the judgment) (rejecting the majority's holding because it "finds no support in the original understanding of the Cruel and Unusual Punishments Clause"); Morse v. Frederick, 551 U.S. 393, 420 (2007) (Thomas, J., concurring) ("The *Tinker* Court made little attempt to ground its holding in . . . the original understanding of the First Amendment."); Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment) (noting that neither party argued whether "our substantive due process cases were wrongly decided and . . . [whether] the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights"); United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) ("Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce."); Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6 (1996) (arguing that "when interpreting the Constitution, judges should seek the original understanding of the provision's text").

291. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) ("[O]ur task would be far simpler if we returned to the original meaning of the word 'establishment' than it is under the various approaches this Court now uses. The Framers understood an establishment necessarily [to] involve actual legal coercion." (internal quotation marks omitted)); Saenz v. Roe, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting) ("[W]e should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant.").

292. *See, e.g.*, Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 380 (2006) (Thomas, J., dissenting) ("The Framers understood [that] '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" (quoting Hans v. Louisiana, 134

he seems not to contemplate any distinction among original intent, original understanding, and original textual meaning. For instance, in *McIntyre v. Ohio Elections Commission*,[293] he articulates his constitutional jurisprudence as follows:

> When interpreting the Free Speech and Press Clauses, we must be guided by their *original meaning*, for "[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now." We have long recognized that the meaning of the Constitution "must necessarily depend on the words of the constitution [and] the meaning and *intention* of the convention which framed and proposed it for adoption and ratification to the conventions . . . in the several states." We should seek the *original understanding* when we interpret the Speech and Press Clauses . . . .[294]

This conflation of distinct modes of originalism allows him to draw indiscriminately on sources that are of differing value to different versions of originalism—Anglo-American law and tradition,[295] the drafting history of the Constitution,[296] the ratification history,[297]

U.S. 1, 13 (1890))); *id.* at 385–86 (noting that the "practice of the early Congresses can provide valuable insight into the Framers' understanding of the Constitution"); Whitman v. Am. Trucking Ass'ns., 531 U.S. 457, 487 (2001) (Thomas, J., concurring) ("I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.").

293. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

294. *Id.* at 359 (Thomas, J., concurring in the judgment) (emphasis added) (citations omitted) (quoting South Carolina v. United States, 199 U.S. 437, 448 (1905); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838)).

295. *See, e.g.*, Rothgery v. Gillespie, 128 S. Ct. 2578, 2596 (2008) (Thomas, J., dissenting) (relying on Blackstone); *Baze*, 128 S. Ct. at 1556 (Thomas, J., concurring in the judgment) (relying on "the historical practices that led the Framers to include [the Cruel and Unusual Punishments Clause] in the Bill of Rights"). This evidence is of greater import to versions of originalism that seek the underlying purpose than to those that seek the objective textual meaning.

296. *See, e.g.*, *Saenz*, 526 U.S. at 526 (Thomas, J., dissenting) (citing congressional debates over the Fourteenth Amendment); U.S. Term Limits v. Thornton, 514 U.S. 779, 876–77 (1995) (Thomas, J., dissenting) (citing cases that rely on drafting debates from the Constitutional Convention). This body of evidence is, of course, of central import to those who seek the original intent of the Framers. *See, e.g.*, BERGER, *supra* note 31, at 300–02 (relying on Convention debates). Proponents of the original-understanding version of originalism, by contrast, typically argue that it is inappropriate (and perhaps even illegitimate) to consider evidence from the Constitutional Convention in 1787 in seeking to discern the original understanding. Steven Calabresi and Saikrishna Prakash, for example, have argued that the original understanding approach's focus on the ratifiers' understanding of the text forecloses reference to a drafting history that had not been disclosed at the time of the ratification conventions, and thus was unknown to the ratifiers. *See* Calabresi & Prakash, *supra* note 159, at

postenactment behavior and statements of government officials,[298] and eighteenth-century dictionaries,[299] among other evidence[300]—which of course broadens his ability to find evidence to support what may really be a subconsciously predetermined meaning that yields his preferred outcome.

Indeed, after a thorough study of Justice Thomas's jurisprudence, Scott Gerber has concluded that "Justice Thomas is a 'liberal originalist' on civil rights and a 'conservative originalist' on civil liberties and federalism."[301] Gerber uses the term "liberal originalism" to refer to the notion that the Constitution should be interpreted at a higher level of generality to reflect the natural-law inspired political philosophy of the Declaration of Independence, and the term "conservative originalism" to refer to the notion that the Constitution should be interpreted in the same manner in which the

576 ("Since originalists maintain that it is the meaning of the text *to the ratifiers* that counts, they should give little weight to an antitextual argument derived from legislative history."); Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 161 n.37 (1995) ("There are very serious reasons to question whether *any* weight at all should be given . . . to Madison's secret legislative history from Philadelphia . . . ."). But, as Kesavan and Paulsen have explained, this evidence is often quite persuasive for original-public-meaning textualists, because, among other things, it can help to illustrate the way in which "informed eighteenth-century Americans understood and used the language of the Constitution." Kesavan & Paulsen, *supra* note 2, at 1187.

297. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 580–81 (2004) (Thomas, J., dissenting) (relying on *The Federalist* to articulate the actual intentions and understandings of the Framers); *U.S. Term Limits*, 514 U.S. at 863 (Thomas, J., dissenting) (citing a speech made by John Jay at the New York ratifying convention). This evidence is more important to original understanding than it is to original intent or original objective textual meaning. *See supra* notes 44–70, 252 and accompanying text.

298. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 502–03 (2000) (Thomas, J., concurring) (relying on cases decided shortly after the Framing). This evidence is of greatest value in the search for original expected application. *See supra* notes 57–63 and accompanying text.

299. *See, e.g.*, Utah v. Evans, 536 U.S. 452, 492 (2002) (Thomas, J., concurring in part and dissenting in part) (relying on several dictionary definitions for support). Dictionaries are the bread and butter of original public meaning textualism. *See* Barnett, *supra* note 5, at 621 ("[It] can be very disappointing for critics of originalism—and especially for historians—when they read original meaning analysis. They expect to see a richly detailed legislative history only to find references to dictionaries . . . .").

300. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 360 (1995) (Thomas, J., concurring in the judgment) ("Unfortunately, we have no record of discussions of anonymous political expression either in the First Congress, which drafted the Bill of Rights, or in the state ratifying conventions. Thus, our analysis must focus on the practices and beliefs held by the Founders concerning anonymous political articles and pamphlets.").

301. SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 193 (1999).

Framers would have interpreted it.[302] Thus, explains Gerber, "Justice Thomas appeals to the *ideal* of equality at the heart of the Declaration of Independence when he decides questions involving race, but to the Framers' *specific* intentions—as manifested in the text and historical context of the Constitution—when he decides questions involving civil liberties and federalism."[303] This allows him to reject segregation and affirmative action,[304] even though the framers of the Fourteenth Amendment likely would have accepted them,[305] while at the same time relying on the narrow understanding of the Framers to reach politically conservative results in cases involving other issues, such as the establishment of religion and abortion.[306] It appears that his strong personal feelings about race, shaped by his own life experience,[307] have led him to adopt a different jurisprudence for race cases than for other constitutional cases.[308] But because both jurisprudences can lay claim to the originalist label, Justice Thomas can shift back and forth between them all the while insisting that "[s]trict adherence to [the originalist] approach is essential if we are to fulfill our constitutionally assigned role of giving full effect to the mandate of the Framers without infusing the constitutional fabric with our own political views."[309]

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302. *Id.* at 47 n.*.

303. *Id.* at 193.

304. *See id.* at 193–94 (citing *Adarand Construction, Inc. v. Peña*, 515 U.S. 200 (1995), as an example of Justice Thomas's position on affirmative action, and Justice Thomas's comments about *Brown v. Board of Education*, 347 U.S. 483 (1953), as an example of his position on segregation); Book Note, *Justice Thomas's Inconsistent Originalism*, 121 HARV. L. REV. 1431, 1435–36 (2008) (citing Grutter v. Bollinger, 539 U.S. 306 (2003)).

305. *See* Michael J. Klarman, Response, Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1884–914 (1995) (arguing that the original understanding of the Fourteenth Amendment did not invalidate segregation); Rubenfeld, *supra* note 203, at 429–32 (1997) (arguing that race-conscious Reconstruction programs show that the framers of the Fourteenth Amendment did not understand it to preclude affirmative action); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754–83 (1985) (same).

306. *See* GERBER, *supra* note 301, at 193 (citing *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), as an example of Justice Thomas's position on the Establishment Clause); Book Note, *supra* note 304, at 1435–36 (citing *Stenberg v. Carhart*, 530 U.S. 914 (2000), as an example of Justice Thomas's position on abortion).

307. *See generally* CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR (2007) (describing the role of race in his life).

308. *See* Book Note, *supra* note 304, at 1435 (arguing that "this framework appears results-driven, a sort of racial exception to his generally conservative originalism, seeming to reflect little more than Justice Thomas's policy preferences and his desire to remain true to his view of racial equality").

309. Lewis v. Casey, 518 U.S. 343, 367 (1996) (Thomas, J., concurring).

We do not mean to suggest that these judges have consciously and consistently acted opportunistically in deploying different versions of originalism to different constitutional questions.[310] And, we suppose, it remains theoretically possible for a conscientious and principled judge to select one version of originalism and consistently apply it. But the fact that originalist judges can (and, it seems, do), even at the subconscious level, choose among these versions—and in doing so produce different results than they would have produced had they chosen a different version of originalism—suggests that originalists' claims that originalism is likely to be overwhelmingly better than its alternatives at constraining judicial discretion are substantially overblown.

CONCLUSION

Originalists' ubiquitous claim that they subscribe to a uniquely coherent theory has until now gone largely unchallenged. The reality, as we have explained, is substantially more complex. There are important differences among originalists about the proper way to interpret the Constitution—differences that undermine the rhetorical and normative claims that underlie much of the originalist enterprise.

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310. Our focus here is on judges, because it is their actions that originalists claim their approach can constrain. It is worth noting, however, that even academic originalists—who have the luxury of opining in the abstract, without having to issue opinions with the force of law—have not always escaped the charge of employing inconsistent versions of originalism. For instance, Randy Barnett, who is a political libertarian, has claimed that originalism essentially yields the conclusion that the Constitution is a libertarian charter. *See* BARNETT, *supra* note 79, at 356. But, according to Steven Calabresi, he does so only by selectively varying the version of originalism that he employs in interpreting different constitutional provisions. *See* Calabresi, *supra* note 45, at 1083–88 (arguing that Barnett arrives at his libertarian originalism only by inconsistently employing a low-level-of-generality version of originalism in interpreting constitutional provisions granting powers to the federal government, and a high-level-of-generality originalism in interpreting constitutional provisions affording rights to individuals). Ironically (and perhaps tellingly), Calabresi himself has been criticized by other originalists for being imprecise and inconsistent in his articulation and application of originalism. *See* Kesavan & Paulsen, *supra* note 2, at 1142 & n.99 (noting that Calabresi and his coauthor Saikrishna Prakash are sometimes "a bit more imprecise in their description of originalism," insofar as they claim at different points in the same article to seek both the objective understanding of a hypothetical ratifier and the actual understandings of the actual ratifiers). *Compare* Calabresi & Lawson, *supra* note 64, at 1002–03 (employing an "originalist methodology that looks to the objective meaning of the Constitution that would have been held by a hypothetical reasonable observer in 1788"), *with* Calabresi, *supra* note 45, at 1081 ("[W]hat really matters in constitutional interpretation is . . . what the original language *actually meant* to those who used the terms in question." (emphasis added)).

We imagine that many committed originalists would respond to this Article by asserting, as has Justice Scalia, that originalism's normative claims still carry force because, although there are some differences among originalists about their methodology, originalism "by and large represents a coherent approach, or at least an agreed-upon point of departure."[311] But this grossly understates the level of disagreement among originalists. As we have endeavored to show, originalism does not "by and large" represent a coherent approach. And because the shared principles that can be said to animate all of its various iterations are remarkably broad, it is an "agreed-upon point of departure" only in the way that Chicago's O'Hare Airport is a point of departure: because there are so many flights on so many airlines to so many different places, you can use it to get virtually anywhere you want to go.

Originalists thus find themselves in something of a bind. They can assert, as Lawrence Solum has suggested,[312] that more than one, or perhaps even all, originalist theories are legitimate—that is to say, that the underlying principles shared by all originalist theories are essential to a legitimate constitutional theory, but that one can employ a number of distinct legitimate theories derived from those principles. But that assertion undercuts the core normative claims of many originalists that originalism is uniquely consistent with law and democracy and is uniquely capable of constraining judges.[313] If all that originalism entails is agreement on a point of departure that can still take judges wherever they want to go, then it surely fails to live up to its lofty claims and promises. One cannot take the position that multiple iterations of originalism are legitimate while simultaneously touting originalism's unique fidelity to law, democracy, and judicial constraint.

Alternatively, originalists can assert, as many of them explicitly have done, that only one particular brand of originalism is legitimate.

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311. Scalia, *supra* note 2, at 855.

312. *See* Lawrence B. Solum, *Colby and Smith on Originalism (and a Comment About the Meaning of Originalism)*, LEGAL THEORY BLOG, Feb. 15, 2008, http://lsolum.typepad.com/legaltheory/2008/02/thomas-colby-an.html (arguing that there is a core of originalist beliefs that tie all versions of originalism together); Lawrence B. Solum, *Incorporation and Originalist Theory* 1 (Ill. Pub. Law and Legal Theory Research Paper Series, Paper No. 08-16, 2009), *available at* http://ssrn.com/abstract=1346453 ("Originalism is best viewed as a family of theories that characteristically affirm . . . [t]he Fixation Thesis . . . [and] [t]he Contribution Thesis . . . .").

313. *See supra* Part III.B–C.

But that assertion, as we have explained,[314] undercuts not only the facile "it-takes-a-theory-to-beat-a-theory" argument, but also the notion that originalism is obviously and self-evidently correct. Finally, one might contend that all (or at least most) iterations of originalism are legitimate, but that true legitimacy requires a judge to choose one version and follow it faithfully. But picking and sticking to one particular originalist methodology appears to be much harder in practice than it is in theory; judges have not done particularly well on this score.

Perhaps our account will aid originalists by informing or reminding them that "originalism" is a broad tent and that, to gain the professed benefits of an originalist approach, they need to be substantially more disciplined and consistent in distinguishing among originalist theories. But one wonders whether the temptation to drift subconsciously among originalisms in order to reach desired results will in fact prove to be insurmountable. Perhaps the true lure of originalism lies in its ability to allow judges to claim the interpretive high ground by purporting to be bound by objective historical meaning, while at the same time giving the judges the wiggle room to reach, whether consciously or not, the results that they desire and demand. If that is so, then much of the originalists' case for their theory collapses.

Originalism, it turns out, is not just a work in progress.[315] It is in fact a loose collection of a staggering array of often inconsistent approaches to constitutional interpretation. And the approaches themselves continue to change and evolve, sometimes too fast for anyone to keep up. Originalists might despise the notion of a "living constitution," but they have gone a long way toward creating a living constitutionalism of their own—the very existence of which undermines much of their own rhetorical and normative claims to superiority.

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314. *See supra* Part III.A–B.

315. *Cf.* Kesavan & Paulsen, *supra* note 2, at 1127 ("[O]riginalism as a theory of constitutional interpretation is still trying to work itself pure—and it is not there yet.").