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## ORIGINALISM AND PURPOSE: A PRÉCIS

*Mark E. Brandon\**

### I. APPROACHES TO CONSTITUTIONAL INTERPRETATION

In the world of constitutional law and theory, there are lots of cleavages. One of the most prominent is the division between those who view constitutional law as primarily an exercise in common law reasoning, built on a weak version of *stare decisis*, and those who view it, at bottom, as an exercise in textual interpretation. Each view has its constituencies.

It's fair to say that lawyers and judges are strongly inclined to the common law view in some form or fashion.<sup>1</sup> Judges, after all, tend to take seriously what they themselves have said. Lawyers, being instrumentally motivated, have reason to talk in ways that respect judicial statements. This synergy between the conceit of judges and the professional motives of lawyers has produced large bodies of constitutional doctrine. The legal academy has tended to focus on these bodies, not only as the principal objects of legal scholarship but also as the primary materials for training future lawyers.

Still, the view of the Constitution as text has had its proponents, even among lawyers and judges. For one thing, legal positivism is a powerful force in the legal profession, and positivism demands that legal rules and pronouncements be traceable to some authoritative source. Relatedly, there are strong expectations in the legal profession, in the legal academy, and in the political culture that, when judges decide cases, the rules they deploy not be simply made up for the occasion. Historically and rhetorically, the ultimate authoritative

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\* Professor of Law and Political Science, Vanderbilt University Law School. Thanks to the *University of Pennsylvania Journal of Constitutional Law* for a splendid Symposium on originalism and textualism. I'm grateful to Mark Killenbeck for inviting me to join a panel at the 2012 annual meeting of the Southeastern Association of Law Schools, which permitted me to test the water with some of the themes of this Article. Thanks to my fellow panelists there: Jack Balkin, Joel Goldstein, Eric Segall, and Mark Tushnet. Finally, thanks to Kevin Stack and Christopher Yoo for helpful conversations in formulating the Article.

<sup>1</sup> For a defense of the common law method, see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

source in the American constitutional order has been the Constitution itself.

Often enough, its function has been fairly modest: to provide particular provisions as launching pads for the “real” legal work of creating judicial doctrines in present cases and deciphering judicial decisions in prior cases. In short, its function has been to supply textual cover for an essentially common law enterprise. A non-trivial number of observers and practitioners, however, have viewed the Constitution not merely as a device for organizing judicial doctrines, but also (and significantly) as a text that can be interpreted independent from the pronouncements of judges. One virtue of this approach, if it is a virtue, is that it permits one to profess that the Constitution is the property not merely of lawyers and judges but also of other branches, officers, and levels of government—perhaps, too, of ordinary people. For many lawyers, judges, and legal academics, this is a quaint notion. But it has enough respectable adherents, even in the legal professions, that it cannot easily be dismissed out of hand.

At least one Justice on the Supreme Court sometimes seemed to insist that the text alone was sufficient unto itself; as when he famously said, “I simply believe that ‘Congress shall make no law’ means Congress shall make no law.”<sup>2</sup> In fact, this position was too simple, as Justice Hugo Black himself understood, even if he didn’t say as much explicitly. He was willing, for example, to say that “Congress shall make no law” meant also that states shall make no law.<sup>3</sup> And he held that “no law” permitted government to impose reasonable restrictions on conduct (even expressive conduct) and on the time, place, or manner of speaking.<sup>4</sup> We’ll see below that his approach to interpretation was complicated in other ways, too.

As Justice Black’s positions suggest, anyone who is serious about the Constitution as a text to be interpreted must ultimately confess that its language alone cannot decide cases or resolve conflicts over policy, rights, or values. Sometimes, for example, provisions conflict with other provisions, so that an interpreter has to make some choice among them according to rules or standards not apparent on the face of the document. Frequently, textual provisions are simply too ambiguous to point clearly to one meaning or another. Either way, text alone is insufficient or indecisive as to the particular rule, principle, or policy pertinent to the case at hand. Something else is needed

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2 HUGO LAFAYETTE BLACK, *A CONSTITUTIONAL FAITH* 45 (1968).

3 *Id.* at 44.

4 *See id.* at 54–59 (discussing the opinions in which Justice Black so held).

to aid interpretation, an additional set of sources or methods. But which sources or methods are authoritative? Which can satisfy the need for interpretive direction and constraint? And which are compatible with—can promote and preserve—the values and institutions instantiated in the text?

Over the years, judges and commentators have offered more than two score interpretive sources, besides judicial doctrine or the text itself. Candidates have ranged from natural law or natural right,<sup>5</sup> to moral philosophy,<sup>6</sup> contemporary ethos,<sup>7</sup> the ethos or morality of the text,<sup>8</sup> evolving meaning,<sup>9</sup> tradition,<sup>10</sup> institutional structuralism,<sup>11</sup> and textual structuralism.<sup>12</sup> Some scholars and judges have argued or held that the Constitution should (or may) be interpreted in the shadow of common law rules and principles.<sup>13</sup> Still others have ar-

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- 5 Compare ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (1993) (defending the proposition that laws can and should establish and maintain public morality), with RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004) (combining originalist textualism with natural right).
  - 6 RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).
  - 7 See generally William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986) (arguing that judges should interpret the Constitution in line with contemporary public morality).
  - 8 This approach is similar but not identical to the notion of the interior morality of law that Lon Fuller made popular. See LON L. FULLER, *THE MORALITY OF LAW* (1964); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 93–119, 125–36 (1982) (discussing ethical argument and perspective); RONALD DWORKIN, *LAW'S EMPIRE* 176–224 (1986) (discussing the principle of integrity in law).
  - 9 See Brennan, *supra* note 7; see also ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).
  - 10 Compare SOTIROS A. BARBER, *ON WHAT THE CONSTITUTION MEANS* (1984), with Antonin Scalia's narrower version, in *Michael H. v. Gerald D.*, 491 U.S. 110, 124–25 (1989) (Scalia, J.) (plurality opinion) (reading the Constitution against the common law principles ostensibly in place at the time of ratification). See also *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding that access to assisted suicide could not be a fundamental liberty interest because, *inter alia*, the right to commit suicide does not have a place in “our Nation's traditions”).
  - 11 See generally CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1986) (applying a structuralist framework to questions of the scope and content of national powers and rights). See also *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327–28 (1819) (holding that a state cannot tax an organ of the federal government because, *inter alia*, it would violate the structure of nationalism in the Constitution).
  - 12 See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing that textual interpretation should be informed by themes derived from elsewhere in the Constitution); see also BLACK, *supra* note 11 (same).
  - 13 See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (Scalia, J.) (plurality opinion); *Meyer v. Nebraska*, 262 U.S. 390 (1923); see also John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005) (arguing for a right to at least a minimum law of redress grounded in the common law).

gued for one or another form of legal pragmatism. What form pragmatism takes depends on the source. In general, it's an anti-foundationalist approach that favors consequentialist modes of analysis.<sup>14</sup> For some, pragmatism holds simply that judges should use whatever tools, sources, and methods work in the context of the case at hand.<sup>15</sup> The more systematic or rigorous pragmatists aim for social utility, whether through the hard analysis of costs and benefits<sup>16</sup> or through the softer consideration of social advantage.<sup>17</sup> This "social utility" form of pragmatism resembles—and traces its pedigree to—American legal realism. A few of the more radical proponents of legal realism went even further, however, to argue that judges may rely on personal preference in reaching decisions, at least in hard cases.<sup>18</sup> This move was partly because the radical realists claimed that even a conscientious judge cannot avoid relying on preferences and partly because they claimed that an honest articulation of preferences would lead to better decisions.<sup>19</sup> And, of course, there is originalism.<sup>20</sup>

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14 For a self-described pragmatist who favors a soft form of consequentialism, see CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 69–72* (2009) (using a consequentialist argument to attack strict constructionism).

15 See Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989) (arguing that judges must rely upon precedent, tradition, and social values as well as originalism).

16 See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981) (using economic analysis to explain and justify legal doctrines). For an example of Judge Posner's use of cost-benefit analysis to evaluate, under the First Amendment, a high school athletic association's rule banning basketball players from wearing yarmulkes on the court, see *Menora v. Illinois High School Ass'n*, 683 F.2d 1030 (7th Cir. 1982).

17 See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 11–15 (1995) (asserting that the complexity of the American legal system requires judges to be creative decision-makers to encourage socially advantageous results); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467–68 (1897) (noting that it is a judge's duty to weigh considerations of social advantage in decision making).

18 JEROME FRANK, *LAW AND THE MODERN MIND* (Peter Smith ed., 1970) (1930) ("The judge, at his best, is an arbitrator . . . He does not merely 'find' or invent some generalized rule which he 'applies' to the facts presented . . . '[T]he arbitrator sees what is equitable, but the judge only the law . . . The bench and the bar usually try to conceal the arbitral function of the judge. . . . The concealment has merely made the labor of the judges less effective. We must stop playing the ostrich . . .").

19 *Id.*

20 Compare, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–64 (1989) (preferring originalism to non-originalism because it is more compatible with democracy), with Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006) (criticizing Scalia for shying away from originalism when the Constitution is not sufficiently rule-like).

Of these sources or methods, only one is indefensible: personal preference. Antipathy to mere predilection makes sense, as the rule of law presupposes the existence of comprehensible, standing, public rules that can provide a transparent basis for principled decision. Thus, no sitting judge can safely admit today to relying on preference as a source for constitutional meaning, whatever his or her practice might be. In fact, confessing to personal preference is a likely way to derail a nomination to a federal judgeship. This has sometimes produced sworn testimony from judicial nominees that is either silly or dishonest—as when the now sitting Chief Justice of the United States professed that he decided constitutional cases like a baseball umpire calls balls and strikes.<sup>21</sup>

I should note that some people have argued that natural law (or natural right), too, is an illicit source for constitutional interpretation. One claim has been that it is not in the text and therefore not sufficiently authoritative. If we are honest, we have to acknowledge that, in fact, various textual provisions stand as signs or expressions of precepts that may be traceable to natural law. And, if the Declaration of Independence has a constitutional status, we can see there an embrace of a form of natural law (or natural right)—not Thomistic, but Lockean (with a twist from the Scottish Enlightenment). The second reason that many reject natural law as a source for constitutional meaning is that it is too abstract and too contestable to provide constraint and direction. Put more directly, it is simply a cover for the imposition of personal predilection. This was Justice James Iredell's worry in *Calder v. Bull*.<sup>22</sup> It is a non-trivial concern. But, if natural law can survive the criticism that it is fatally indeterminate, it cannot be dismissed categorically as an aid to constitutional interpretation.

## II. ORIGINALIST SUPREMACY

Let us put personal predilection aside and reserve judgment on natural law. Although each of the remaining methods is controversial in its own way, respectable scholars celebrate them. And artful lawyers and judges can, and do, deploy all of them. If that's descrip-

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21 *Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (“Judges are like umpires. Umpires don’t make the rules; they apply them. . . . Nobody ever went to a ballgame to see the umpire. . . . I will remember that it’s my job to call balls and strikes and not to pitch or bat.”).

22 *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J.) (“The ideas of natural justice are regulated by no fixed standard: the ablest and the purest of men have differed upon the subject. . . .”).

tively accurate—if all of the methods I have listed above are acceptable “modalities” of interpretation (à la Philip Bobbitt<sup>23</sup>)—why not simply let a hundred flowers bloom? Or, as William F. Harris II once suggested, why not adopt an inclusive position: that we can be most assured of a particular constitutional meaning or holding when a diversity of methods has led us to it?<sup>24</sup> In short, the greater the overlap among interpretive methods, the greater our confidence in the outcome. To borrow from the late Rodney King, can’t we all just get along?

One difficulty in answering those questions is that, if each source or method has its proponents, there is no consensus for any of them—not even for textualism neat, nor for a muscular version of stare decisis. In fact, proponents of some methods claim primacy for their favorite method, and even more strongly exclude most others. So it is that many originalists claim not only that originalism is presumptively legitimate, but that many non-originalist modes are impermissible. We might call this position “originalist supremacy.”<sup>25</sup>

In the United States, the doctrine of originalist supremacy has achieved among some people what can fairly be characterized as quasi-religious devotion. Constitutional lawyers in other countries consider this devotion to be, almost literally, insane—a kind of constitutional necrophilia. But, perhaps we shouldn’t worry about such criticisms. After all, Americans have followed their own fives and

23 See BOBBITT, *supra* note 8, at 7 (describing the five modalities of constitutional argument: historical, textual, structural, prudential, and doctrinal).

24 See William F. Harris II, *Bonding Word and Polity: The Logic of American Constitutionalism*, 76 AM. POL. SCI. REV. 34, 44 (1982) (“The more interpretive modes that support the decision, the more solid the decision would be presumed to be.”). See generally WILLIAM F. HARRIS II, *THE INTERPRETABLE CONSTITUTION* 3 (1993) (“The resulting structure of constitutive signification . . . compels reading both the document and the polity that it has signaled into existence—the republic that in turn gives the words their political as distinguished from their literary meaning: both of which change over time, pushing, restraining, and adapting to each other in a profound illustration of the affinity of the language and politics. If this intertextual dialectic is maintained, there is both movement away from the static character of sentences enshrined in a document two centuries old and boundedness for a political process that supplies its own imperatives.”).

25 This is the position of the most committed originalists. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 10 (1971) (arguing that constitutional protection extends only to explicitly political speech). Justice Scalia’s commitment to originalist supremacy is more restrained than Bork’s, but he holds onto originalism’s supremacy. See, e.g., Scalia, *supra* note 20. Randy Barnett observes that Scalia’s opinions lack the courage of his ostensible conviction, as they fail to embrace originalist interpretations even when they are available. Barnett, *supra* note 20. Justice Clarence Thomas is a zealous and consistent originalist supremacist. Compare, for example, Justice Scalia’s concurrence with Justice Thomas’s dissent in *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (Scalia, J., concurring in the judgment); *id.* at 57 (Thomas, J., dissenting).

drums down many paths, and have sometimes been happily successful doing so. Maybe originalism is merely a quaint artifact of American exceptionalism, inscrutable to the rest of the world but useful in the American context.

Even as an expression of exceptionalism, however, originalism's claim to a privileged position among competing methods begs for justification, apart from the fact that it is what some of us, at least, claim to be doing around here. What sense can we make of the normative claim, in the last half century or so, that, where text is uncertain, originalism has a privileged place in resolving the uncertainty? Why prefer originalism?

#### A. Which Originalism?

Before it can answer the question of privilege, however, originalism has to admit that it is more a family of interpretive strategies than a single option. In short, there's more than one originalism.<sup>26</sup> One version is original intent, which aims to identify and apply the intentions of the authors (and ratifiers) of constitutional provisions. One person who is sometimes associated with this position is Hugo Black. He did indeed use language that seemed to support the association. He not only invoked the Framers—or “our Founding Fathers”—but also, though more rarely, talked about what they “intended” or “thought” or “knew” or “believed.”<sup>27</sup> As I shall argue below, I believe that Black's position and practice were not consistently intentionalist. Justice (later Chief Justice) William Rehnquist often staked out an interpretive approach that claimed to be intentionalist, though he too was inconsistent in his devotion.<sup>28</sup> The person who most zealously advocated this method was Edwin Meese, whose muscular version of intentionalism served political and jurisprudential ends that Justice Black, in more than one respect, would have spurned, but Chief Jus-

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26 On the evolution of originalism, see generally Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).

27 BLACK, *supra* note 2, at 34, 45, 48, 49, 55.

28 For example, in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), he applied a more dynamic or “developmentalist” approach to the construction of presidential power over international relations. Compare William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976) (“Where the framers of the Constitution have used general language, they have given latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.”) with *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the scope of Congress's power to regulate commerce was defined by judicial doctrine).



tice Rehnquist embraced.<sup>29</sup> Meese's intentionalism was specially designed to check what he perceived to be excesses of a free-wheeling and unconstrained Supreme Court under the Chief Justiceships of Earl Warren and Warren Burger. The Court, said Meese, was anti-states' rights, anti-law enforcement, anti-religion, and anti-democratic; intentionalism, he urged, would produce a jurisprudence more congenial to states, police, religion, and democracy.<sup>30</sup>

Whatever the desirability of these ends, intentionalism presented something of a dilemma. On the one hand was a syllogism built upon a semiotic intuition: written texts have authors who aim to communicate intentions; the Constitution is a written text; therefore, the Constitution must have an intended meaning.<sup>31</sup> On the other hand rested a major difficulty and several questions. The difficulty was that intentionalism was simply impossible to apply in most interesting cases. Reading one's own mind can be challenging enough. Reading the minds of others (especially the dead) is closer to the domain of clairvoyants and psychics than of lawyers or judges or even historians.<sup>32</sup> This difficulty was enhanced by the facts that the Constitution had more than one author and that written records and notes on its drafting and ratification were wildly incomplete.<sup>33</sup> There were questions, too: What if the Framers and ratifiers had multiple, even conflicting, intentions? Should the positions of opponents of the Constitution (or of amendments) also count for understanding their meaning, and if so, how and how strongly? Even if intentions were decipherable, what if the first-order Framers' intention was that the Framers' second-order intentions not be binding on later generations?<sup>34</sup> Substantive meanings aside, what rules or canons of construction, if any, are we permitted to impute to the Framers?<sup>35</sup>

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29 Edwin Meese III, Att'y Gen., Address to the American Bar Association 1 (July 9, 1985) (transcript on file with U.S. Department of Justice), available at <http://www.justice.gov/ag/aghistry/meese/1985/07-09-1985.pdf> ("The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution.").

30 *Id.* at 3-7.

31 Daniel Farber makes this point nicely. See Farber, *supra* note 15, at 1101 ("Since people often think of a document's meaning as consisting of the author's intentions in writing it, this stress on the Constitution's status as a written text provides strong support for originalism.").

32 See, e.g., MARK E. BRANDON, *FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE* 23-25 (1998) ("The first is the epistemological objection. It aims at the difficulty of reading people's minds, especially people who have been dead a century or more.").

33 Farber, *supra* note 15, at 1088-89, 1101.

34 H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 904 (1985) ("Although the Philadelphia framers did not discuss in detail how they intended

These questions were not fatal, but the first difficulty—inscrutability—was. For this reason, even persons who were sympathetic to the intentionalist project adopted a fallback position: original understanding or meaning.<sup>36</sup> This approach aims to identify not the subjective intentions of Framers and ratifiers, but the meaning that the Founding generation would have attributed to the text. If this method averted the problem of discerning subjective intentions, it did not avoid the challenges of possible multiple meanings of the same provision. Still, those who are most committed to the method have claimed that it is possible to identify a single meaning, indeed that this possibility is central to originalism's appeal as a constraining method of interpretation.<sup>37</sup>

As Jack Rakove has shown, this aspiration cannot be consistently realized.<sup>38</sup> At the very least, it is difficult—more appropriate for historians than for practicing lawyers and judges. (It is telling, for example, that Justice Antonin Scalia's most persuasive originalist interpretation came not in a judicial opinion but in an article that took him years to write.)<sup>39</sup> Degree of difficulty aside, what do we do about the ostensible Twenty-Seventh Amendment, which was proposed in 1789 and wasn't ratified (if at all) until 1992? Who was the Amendment's Founding generation? These issues are difficult, but they are not insurmountable, at least not for original meaning. It is possible, that is, to generate historically informed accounts of the Constitu-

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their end product to be interpreted, they clearly assumed that future interpreters would adhere to then-prevalent methods of statutory construction.”)

35 See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003) (arguing that rules and canons of construction are mutable and dependent on their times).

36 In embracing original meaning, Justice Scalia has repudiated intentionalism as a heresy—a “false notion,” he calls it. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 391–96 (2012) (rejecting “[t]he false notion that the purpose of interpretation is to discover intent” and adopting instead a “reasonable reader” modality).

37 See, e.g., Scalia, *supra* note 20, at 854 (“Central to that analysis, it seems to me, is the perception that the Constitution, though it has an effect superior to other laws, is in its nature the sort of ‘law’ that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law.”).

38 JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 6 (1996) (“In this context, it is not immediately apparent how the historian goes about divining the true intentions or understandings of the roughly two thousand actors who served in the various conventions that framed and ratified the Constitution, much less the larger electorate that they claimed to represent.”).

39 See his defense of Chief Justice William Howard Taft's approach to the removal power in *Myers v. United States*, 272 U.S. 52 (1926), in Scalia, *supra* note 20, at 851–52 (“[The opinion] is a prime example of what . . . is known as the ‘originalist’ approach to constitutional interpretation.”).

tion's meanings at particular points in time, even if it is not always possible to reduce the number of possible meanings to a single one at any given time.

There is a third type of originalism whose roots extend at least as far back as Aristotle's *Nicomachean Ethics*. For Aristotle, the problem was this: It is the job of the judge, he said, to do equity, but equity is not always consistent with "legal justice."<sup>40</sup> The reason for this is that legislation (or, we might add, a written constitution) speaks in terms of general rules. These rules adequately cover the majority of cases, but there may well be cases in which the rules are inequitable. What is a judge to do in such a case? According to Aristotle, the job of the judge is essentially to bring the lawgiver forward in time—bring him to the present—and ask, hypothetically, what he would have done had he anticipated the ethical inadequacy of the rule. In short, "what [would] the lawgiver himself . . . have said if he were present, and what [would he] have enacted if he had known (of this particular case)."<sup>41</sup> Justice Benjamin Cardozo may have employed a version of Aristotle's method in an unpublished concurring opinion in *Home Building & Loan Ass'n v. Blaisdell*.<sup>42</sup> Cardozo acknowledged that his position "may be inconsistent with things that men said in 1787 when expounding to compatriots the newly written constitution," and "inconsistent with things that they believed or took for granted."<sup>43</sup> Still, the doctrine for which Cardozo argued was "not . . . inconsistent with what they would say today nor with what today they would believe, if they were called upon to interpret 'in the light of our whole experience' the constitution that they framed for the needs of an expanding future."<sup>44</sup>

To similar though not identical effect is Ronald Dworkin's twist on originalism. We can think of moral requirements as either concepts (which tend to abstract notions, like fairness) or as conceptions (which have to do with particular examples or applications of concepts). Take a parent who instructs her children to "act fairly." What are children to do with that instruction? One option is to try to implement the parent's particular conception(s) of fairness. Another is to apply the concept of fairness to contexts to which it is material, ac-

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40 ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, at 141 (Martin Ostwald trans., Macmillan Publ'g Co. 1962) (c. 384 B.C.E.).

41 *Id.* at 142.

42 290 U.S. 398 (1934).

43 Cardozo's concurrence is reprinted in WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 229–31 (4th ed. 2008).

44 *Id.* The internal quotation comes from Justice Oliver Wendell Holmes's opinion for the Court in *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

ording to the children's best moral lights. Dworkin argued that the parent must have intended the latter: that children implement the concept of fairness by applying their own conception of fairness. This, Dworkin implied, is akin to constitutional interpretation. Framers of constitutions, like parents, must have intended that later generations would apply their own conceptions of fairness to the various contexts that later arise, employing their best (current) understanding of political morality.<sup>45</sup> Jack Balkin implicitly trades on Dworkin's insight, albeit with greater fidelity to constitutional text. Balkin says that the point of constitutional interpretation is to use the old words—the provisions of the Constitution—but to give them new meanings. To be faithful to the Constitution, we (today) must read the words of the (original) Framers. And we remain faithful to the Constitution when we apply the provisions consistent with what the words mean today.<sup>46</sup>

Cardozo's version is interesting, Dworkin's is suggestive, and aspects of Balkin's are appealing. Still, I hesitate to celebrate. For one thing, it is somewhat suspicious that the upshot of each is progressive or liberal. In my view, any evolutionary method of interpretation must be capable of permitting and accounting for both liberal and non-liberal content. Second, and more directly to the point of this Article, none of these versions is, strictly speaking, "originalist," because none of them aims to read the Constitution according to substantive original intentions or understandings. So I shall put aside these three accounts for now, in the interest of considering the "purer" versions: original intent and original meaning. What might justify them as preferred methods of interpretation?

### *B. What Justifies Originalism?*

Given the proliferation of originalism in recent years,<sup>47</sup> the method has plenty of defenders, many of whom are subtle and articulate. I cannot canvas them all. What I shall do instead is consider three general sets of reasons that a committed proponent of originalism might offer for its supremacy.

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45 DWORKIN, *supra* note 6, at 134–37.

46 JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011) ("In each generation the American people are charged with the obligation to flesh out and implement text and principle in their own time.").

47 Mitchell Berman calculates that there are now as many as seventy-two versions of originalism. See Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 14 (2009).

### 1. *A Semiotic Justification*

One is a semiotic claim about the source of meaning—or the point at which meaning arises. The originalist approach might rest on a deeply philosophical claim: that meaning arises simply at the point where the author(s) create(s) a text. And, to be true to this view, the text's meaning must be either what the authors conceived their text to mean (original intent) or what a discerning audience would have taken the text to mean at the time it came into being (original understanding). This is not an irrational or philosophically insupportable aspiration. But I believe it is inadequate as a description of how meaning is made.

The key to understanding why is rooted in Edmund Husserl's phenomenology, which was picked up by Martin Heidegger and domesticated by Hans-Georg Gadamer.<sup>48</sup> This view posits that meaning attaches, not (merely) when a text is created by an author, but (also) when the text is engaged by a reader. This is not to say that authors do not matter. It is merely to say that the enclosure within which meaning arises must include the reader and that there is an unavoidable creativity in the reader's engagement. This creativity is in part a function of uncertainty or imprecision. This is not an imprecision borne of the difficulty of reading minds. It arises instead from the character of the medium used for conveying meaning: language. Here is how James Madison framed the problem on the eve of the Constitution's ratification:

The use of words is to express ideas. Perspicuity therefore requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriated to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence, it must happen, that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful, by the cloudy medium through which it is communicated.<sup>49</sup>

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48 For a general discussion of these issues as presented in Husserl and Heidegger, see ROBERT R. MAGLIOLA, *PHENOMENOLOGY AND LITERATURE: AN INTRODUCTION* 38–39, 62–64 (1977).

49 THE FEDERALIST NO. 37, at 236–37 (James Madison) (Jacob E. Cooke ed., 1937).

As this extended excerpt from Madison suggests, uncertainty and imprecision are all the greater in the language of a constitution, much of which is—and must be, given its functions and purposes—abstract and ambiguous. The difficulty is heightened not only by the fact that a constitution is a text with many authors, nor that its authors disagreed with one another, but also because constitutions are often in important respects compromises among competing interests, preferences, principles, and values. Authors negotiate compromise in many ways, including strategic ambiguity (through which a particular provision, by design, possesses the potential for more than one meaning) and self-conscious silence (which permits indecision or disagreement at the Founding to be worked out through post-Founding engagement).

We may add to these considerations a frank acknowledgment that the reader's perspective—the reader's lens, if you will, which is informed by the reader's experience and values—cannot help but inform, in turn, the meaning or construction of a text, even a text that has been binding for many years prior to a particular interpretive act. In short, this phenomenology of reading suggests that the meaning of even a stable text is (and must be) fluid or dynamic over time. Hence, Gadamer emphasizes that interpretation cannot be locked into the moment at which the text is created—cannot, in his words, be “compared with an immovably and obstinately fixed point of view.” Even tradition itself is not a fixed point but a moving thing, precisely because tradition is expressed in language, and because subsequent generations can't help but view “linguistic tradition” (Gadamer's phrase) through their own experiences and aspirations (which Gadamer calls the “interpreter's horizon”).<sup>50</sup>

Having said all this, the semiotic critique of originalism might seem too philosophical, too precious, too much a matter of faith or belief. Even if it is, this doesn't make the critique baseless. But it might make it less potent or persuasive. And, in any event, originalism has more than just the semiotic card up its sleeve.

## 2. *Democracy*

The second, and most familiar, justification that originalists might offer for their method is rooted in a political theory of the Constitution. At its heart are two concerns. One is that originalism is neces-

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50 HANS-GEORG GADAMER, *TRUTH AND METHOD* 345–51 (Joel Weinsheimer & Donald G. Marshall rev. trans., Crossroad Publ'g Co., 2d ed. 1989) (1960).

sary to prevent judges from innovating. The second is to promote democracy. The Constitution, this argument goes, is intended to embody, embrace, and promote democratic—i.e., majoritarian—ways of making policy. And judges should construe rights narrowly, so as to maximize the space for majoritarian institutions to act.

The concern about judicial innovation helps clarify that originalism is primarily an approach to *constitutional law*—i.e., to judicial decision—and not necessarily a prescription for *constitutional interpretation* generally. This is clear especially when the concern is connected to the value of democracy. Citizens, for example, need not be originalists. For one thing, they are not doing constitutional law. For another, the actions of citizens as a collective are typically not (perceived to be) incompatible with democracy, nor with constitutionalism, for that matter. Thus, citizens may participate in periodic moments or episodes in which basic working conceptions of the Constitution change, as during Reconstruction or the New Deal or after the terrorist attacks of September 11, 2001.<sup>51</sup> And, according to some scholars (most of whom are not originalists), the people have an elemental and continuing role in construing and applying the Constitution, even outside the amending process.<sup>52</sup> If any or all of these forms of popular participation in making, maintaining, or changing the Constitution are valid, then the people who engage in them need not be originalists.

According to some originalists (including Scalia and Rehnquist), even the President need not be originalist in his approach to his own power. Why not? Because the developmental gloss of history and experience may expand executive power even beyond the original commands of the constitutional text. It is not intuitive that an originalist would take this position, but it is easy enough to trace the extent to which Justice Felix Frankfurter's penumbral view of executive power in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>53</sup> came to hold

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51 For an account of moments of dramatic change, see 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991), and 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998). For an account of the ways in which ordinary political actors might (sometimes unwittingly) produce constitutional change, see KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999).

52 See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (describing the role of the people of the United States in enforcing constitutional limits).

53 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (allowing traditional practice and separation of powers principles “to provide ‘essential content’ to and a ‘gloss’ on constitutional provisions . . .”).

sway in Chief Justice Rehnquist's opinion for the Court in *Dames & Moore v. Regan*.<sup>54</sup> We might compare that approach with Hugo Black's opinion for the Court in *Youngstown*, which insisted on old-timey textualism even in construing the boundaries of executive power.<sup>55</sup>

Interestingly, the non-originalist, evolutionary, expansive approach to presidential power may not hold for acts of Congress, at least for some originalists. Justice Clarence Thomas, for one, insists that Congress's power to regulate commerce among the several states is limited, strictly and precisely, to (his conception of) the original understanding of the scope of the Commerce Clause. Hence, he says, Congress may regulate only interstate "selling, buying, and bartering, as well as transporting for these purposes."<sup>56</sup> But Congress may not regulate production or agriculture, nor the "substantial effects" of local economic activity.<sup>57</sup> This restrictive definition flies in the face of more than 150 years of the Court's jurisprudence under the Commerce Clause. Justice Thomas's penchant for slashing and burning precedent was one reason Justice Scalia said, "I am an originalist. I am a textualist. I am not a nut."<sup>58</sup> Scalia is, by his own self-description, a "faint-hearted" originalist.<sup>59</sup> This spat between Scalia and Thomas aside, it is plain that democratic originalists will tend to insist that judges narrowly construe rights. Even on this strategy, originalists carve out exceptions, as they did for the Second Amendment, which they gave an expansive interpretation, arguably beyond the "plain words" or original understanding of the Amendment, and certainly against the decisions of majoritarian institutions.<sup>60</sup>

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54 453 U.S. 654, 661–62 (1981) (describing the ongoing discussion about the President's executive powers within a system of checks and balances).

55 *Youngstown*, 343 U.S. at 585 (arguing for the practice of textualism when deciphering the powers of the executive).

56 *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring).

57 *Id.* at 587–89 (outlining limitations to Congress's power to regulate local commercial activity); *see also* *Gonzalez v. Raich*, 545 U.S. 1, 58 (2005) (Thomas, J., dissenting) (arguing for the continuation of limits placed on Congress's ability to regulate local commercial affairs); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (reaffirming the holding in *Lopez*); Randy E. Barnett, *Jack Balkin's Interaction Theory of 'Commerce'*, 2012 U. ILL. L. REV. 623 (reviewing BALKIN, *supra* note 46) (arguing that "commerce" was not intended to include economic activity such as manufacturing or agriculture).

58 Jeffrey Rosen, Editorial, *If Scalia Had His Way*, N.Y. TIMES, Jan. 9, 2011, (Week in Review), at 6–7 (laying out Justice Scalia's argument in favor of an originalist reading of the Constitution).

59 Scalia, *supra* note 20, at 864.

60 *See* *District of Columbia v. Heller*, 554 U.S. 570 (2008) (expanding the interpretation of the Second Amendment as it pertains to handgun possession); *McDonald v. Chicago*, 130 S. Ct. 3020, 3026 (2010) (expanding *Heller* to restrict state legislatures).



Whatever one might say about the anxiety over judicial innovation (and I shall say more below), I confess that the interest in democracy strikes a chord with me. I like democracy. I believe that, in the hands of a capable citizenry, democracy can produce and reinforce valuable ways of life. The Constitution does include democratic institutions and procedures. And I suspect that, if anything, we presently suffer from too little democracy in America, not too much.

If this last claim is accurate, it is not entirely the fault of the judiciary, for counter-democratic forces are evident in an overweening executive and an administrative state that is insufficiently transparent, that is partially captive to vested and monied interests (often precisely those interests who are supposed to be regulated), and that is not politically accountable (at least not in any broad or robust way). If there is a problem with the administrative state, however, it is not that it contravenes original understandings of the structure and scope of governmental powers (although it probably does). If there is a problem with the administrative state, it is that it tends to unbalance even modernist views of a principled and functionally sustainable allocation of institutional responsibility in a constitutional democracy. This tendency may be even stronger when administrative authority is combined with expansive presidential power.<sup>61</sup>

Administrative and executive powers aside, one difficulty with justifying originalism by reference to democracy is that democracy *simpliciter* isn't the (sole) theory of the Constitution. For example, John Hart Ely famously noted that the Constitution embraces not an undiluted majoritarian democracy, but a representative form that sometimes goes under the name of republicanism. Republican government presupposes structural and perhaps even substantive limits on what majorities may do.<sup>62</sup>

To drive the point further, Walter Murphy observed that, if the Constitution includes a version of democracy, it also includes a commitment to individualism (or liberalism).<sup>63</sup> This commitment embraces not only the freedom to participate in the making of law but also freedom from the operation of certain laws, even when enacted according to the forms prescribed by the Constitution. Randy Barnett makes the point in terms comprehensible to originalists. What should an originalist do, he asks, with claims of right? Why construe

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61 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (discussing executive power's effect on republican form of government).

62 JOHN HART ELY, *supra* note 12 (describing the republican form of government as sometimes constraining majoritarian power).

63 MURPHY ET AL., *supra* note 43, at 45–78.

a right narrowly, if the Founding generation conceived it expansively? Barnett's answer is even more libertarian than Murphy's theory would allow, for in Barnett's constitution, liberalism trumps democracy. Put differently, his constitution is libertarian all the way down, grounded in a theory of natural right.<sup>64</sup>

An expansive reading of rights doesn't guarantee happy endings, however, even by liberal lights. Recall, for example, the original Constitution's commitment to rights of property in persons. Chief Justice Roger Taney drew on this commitment—this original understanding—when he held that persons of African descent weren't "citizens" for the purpose of diversity jurisdiction and that the Missouri Compromise was an unconstitutional infringement on the right to carry one's property (including slaves) into the territories.<sup>65</sup> Then-Associate Justice Rehnquist criticized the Court's decision in *Dred Scott* as an example of impermissible judicial policy making.<sup>66</sup> In fact, it was at least in part an exercise in originalism.<sup>67</sup> But happy or sad, the bottom line is this: if the Constitution includes more than one theory of politics—*a fortiori* if it gives a primacy of place to a theory or value that's not, strictly speaking, democracy—then the democratic-originalist argument proves either too much or too little. Either way, it rests on an incomplete understanding of the Constitution.

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64 See generally BARNETT, *supra* note 5 (arguing that courts have weakened parts of the Constitution meant to limit governmental power over individuals).

65 *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393 (1857).

66 See Rehnquist, *supra* note 28, at 700–02 (arguing that the *Dred Scott* decision was an example of courts applying the "Living Constitution" doctrine, which he criticized as judicial policy making).

67 See Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 CONST. COMMENT. 37, 50 (1993) (arguing that Chief Justice Taney's originalism was the root of the *Dred Scott* discussion). To be sure, Barnett offers a spirited argument, grounded in the writings of nineteenth-century abolitionist Lysander Spooner, that slavery was unconstitutional from an originalist perspective. BARNETT, *supra* note 5, at xii–xiv; see also LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* (1845). A close reading of Spooner, not to mention the constitutional history, demonstrates that the original understanding was closer to Taney's position than to Spooner's. See BRANDON, *supra* note 32. Walter Murphy's non-originalist theory avoids the problem altogether. On Murphy's reading, neither (representative) democracy nor liberal individualism exists for its own sake, for the Constitution's *grundnorm*, underwriting both theories, is human dignity. Slavery plainly, violates this norm. Walter F. Murphy, *Slaughter-House, Civil Rights, and Limits on Constitutional Change*, 21 AM. J. JURIS. 1, 18 (1986) (arguing that the Thirteenth and Fourteenth Amendments sought to bring the Constitution in accordance with the goals of the Preamble); Walter F. Murphy, *An Ordering of Constitutional Values*, 53 SO. CAL. L. REV. 703, 750 (1980) (arguing that the Founders acted inconsistently in tolerating slavery while creating a government founded on respect for human dignity).

### 3. *The Rule of Law*

The third justification for an originalist approach to constitutional law grows out of a commitment to the rule of law. The concern that drives this version of originalism is that judges be restrained from innovating. As we have seen, this concern is an element of democratic originalism, and may also be germane to semiotic originalism, but it's a central tenet of rule-of-law originalism. This means that, although one may be a democratic originalist and a rule-of-law originalist simultaneously, it is possible to be a rule-of-law originalist without being a democratic originalist. A prominent example of the latter is Randy Barnett, who is a rule-of-law originalist as a matter of method and a proponent of natural right as a matter of substance.

For judges to do "law," they must decide cases according to rules laid down in comprehensible, authoritative sources. In short, judges cannot just make it up as they go. If judges stray too far from constitutional text—if they move beyond original understandings (or, for some, tradition)—they become untethered from law. And, in doing so, as Justice Lewis Powell worried in *Moore v. City of East Cleveland*,<sup>68</sup> they become instruments of illegitimacy. For reasons already mentioned, the worry about judicial discretion and constraint is neither trivial nor illicit. But originalism cannot solve this problem in the way that originalists claim that it does (and say that it must).

I have already noted how difficult it is for a judge to adhere conscientiously to originalist methods. It is not merely that judges aren't historians. It is that even historians would be hard pressed to answer questions about the Constitution's meaning, in the context of a case or controversy, within the limits of time and resources that characterize judicial decision. The difficulty is only enhanced by some originalists' insistence on finding an original meaning (or tradition) at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."<sup>69</sup> In *Michael H. v. Gerald D.*, Justice Scalia claimed to have discovered the most specific tradition. There is reason to doubt this claim.<sup>70</sup>

Difficulty aside, it is also the case, as Mark Tushnet and others have long observed, that there is almost always an element of uncer-

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68 431 U.S. 494, 544 (1977).

69 *Michael H. v. Gerald D.*, 491 U.S. 110, 127–28 (1989) (Scalia, J.) (plurality opinion) (arguing for Chief Justice Rehnquist and himself that there was a traditional protection of parental rights within the unitary family).

70 See MARK E. BRANDON, *STATES OF UNION: FAMILY AND CHANGE IN THE AMERICAN CONSTITUTIONAL ORDER* 234–35 (2013).

tainty—and therefore choice—in any interesting constitutional case.<sup>71</sup> Originalism is not immune to uncertainty, choice, or even disagreement, and this is partially independent of the fact that one can identify a multiplicity of understandings among a relevant Founding constituency. To understand how and why, one can turn to any number of decisions of the Supreme Court.

Take *Dred Scott v. Sandford*, for example. Writing for the Court, Justice Taney rehearsed the history of African slavery in North America from colonial times, to the Declaration of Independence, to the constitutional Founding, to the mid-nineteenth century. Persons of African descent, at the time of the Founding, were

considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.<sup>72</sup>

They were not, “and were not intended to be included, under the word ‘citizens’ in the Constitution.”<sup>73</sup> If some blacks were citizens of one or more of the several states, they were not, by virtue of that fact, citizens of the United States.<sup>74</sup>

Compare Justice Benjamin Curtis’s dissent, which presented a different interpretation of the Founding history. The form of citizenship that mattered at the Founding, wrote Curtis, was citizenship in a state, for at the time of the Founding there was no nation of which to be a citizen. The Constitution itself was ratified by the citizens of each state, who acted “in behalf of themselves and all other citizens of that State.”<sup>75</sup> What’s more,

[i]n some of the States, . . . colored persons were among those qualified by law to act on this subject. These colored persons were not only included in the body of ‘the people of the United States,’ by whom the Constitution was ordained and established, but in at least five of the States they had the power to act, and doubtless did act, by their suffrages, upon the question of its adoption.<sup>76</sup>

The point in reciting the two positions is not merely that Taney and Curtis disagreed about the historical facts of the matter. They

71 See Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 801, 818 (1983) (arguing that history and precedent provide support for multiple, conflicting interpretations, leaving judges with discretion to choose between them).

72 *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 404–05 (1857).

73 *Id.* at 404.

74 *Id.*

75 *Id.* at 576 (Curtis, J., dissenting).

76 *Id.*

did disagree about some facts, though they agreed on others. Even so, it is worth noting that neither of these historical accounts answers the precise legal question of whether blacks could be counted as citizens for the purpose of diversity jurisdiction in a federal court. To answer that question as an original matter, one would need an account of not only the facts, but also, and more importantly, the *significance* of the facts. It is this matter of mattering that originalism alone cannot answer. And this is one reason Taney and Curtis, both doing historical interpretation, could reach different conclusions about the legal question presented in *Dred Scott*.

One can see similar dynamics at work in more recent cases. In *U.S. Term Limits, Inc. v. Thornton*, the Court considered the constitutionality of a state constitutional provision imposing term limits on the state's members of Congress.<sup>77</sup> Justice John Paul Stevens, writing for the Court, examined the historical record. He concluded that "the power to add qualifications is not within the 'original powers' of the States, and thus is not reserved to the States by the Tenth Amendment," because that amendment could reserve only those powers that existed before the Constitution came into existence.<sup>78</sup> Specifying the terms of members of Congress could not be among those powers, because the Congress did not come into being until after the Constitution was ratified. "Second, even if States possessed some original power in this area, we conclude that the Framers intended the Constitution to be the exclusive source of qualifications for members of Congress."<sup>79</sup> If the states were to possess the power to set the qualifications of members of Congress, the Constitution would have announced the power expressly. The Constitution's silence means that states lack the power.<sup>80</sup>

Compare Justice Thomas's dissent, which also rested on an examination of the historical record and the understandings of the Constitution's Framers and ratifiers. "The ultimate source of the Constitution's authority," he wrote (citing James Madison's *Federalist* No. 39), "is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."<sup>81</sup> What follows from this is that the powers of the national government are limited to those that the Constitution confers. Thus, said Thomas,

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77 514 U.S. 779 (1995).

78 *Id.* at 800-01.

79 *Id.*

80 *Id.*

81 *Id.* at 846 (Thomas, J., dissenting).

where the Constitution is silent, the national government lacks power, while the states possess power.<sup>82</sup>

Compare Justice Anthony Kennedy's concurrence, which presents yet a third account of the original historical record. "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."<sup>83</sup> The right to select one's representatives in Congress is a federal right of citizenship, with respect to the operation of institutions of the nation, with which states may not interfere.<sup>84</sup>

In *Printz v. United States*, Justice Scalia, writing for the Court, held that Congress was prohibited from "commandeering" state executive officers to enforce federal law (the Brady Handgun Violence Prevention Act).<sup>85</sup> His reasoning rested on originalist methods, which drew from several of James Madison's and Alexander Hamilton's contributions to the *Federalist Papers*. "[T]he Framers rejected the concept of a central government that would act upon and through the States . . . and instead designed a system in which the state and federal governments would exercise concurrent authority over the people."<sup>86</sup> Justice Stevens's dissent, citing some of the same contributions to the *Federalist*, in addition to enactments of Congress on the heels of the Constitution's ratification, concluded that "the historical materials strongly suggest that the Founders intended to enhance the capacity of the Federal Government by empowering it . . . to act through local officials."<sup>87</sup>

As in *Dred Scott*, the heart of the disagreements among the Justices in *U.S. Term Limits* and in *Printz* are less about the facts of the matter than about the significance of those facts. As in *Dred Scott*, originalism itself is unable to resolve questions of significance precisely because they are, at bottom, questions of value. Lest there be doubt about the relevance of my conclusions to cases involving conflicts over national and state powers, consider *Lee v. Weisman*, involving the constitutionality of a non-denominational prayer in a public middle school's "graduation" ceremony. Justice Kennedy drew on the nation's "tradition," while Justice David Souter drew on the history of the First Amendment's ratification, together concluding that even the appear-

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82 *Id.*

83 *Id.* at 838 (Kennedy, J., concurring).

84 *Id.* at 838, 845.

85 *Printz v. United States*, 521 U.S. 898, 914–16 (1997).

86 *Id.* at 919–20.

87 *Id.* at 945 (Stevens, J., dissenting).

ance of coercion of public school children in prayer violates the Establishment Clause.<sup>88</sup>

Justice Scalia wrote a scathing dissent, grounded in history, tradition, and public understandings and practices dating from the primordial days of the republic. The Court's holding that a school prayer violates the Establishment Clause, he wrote, "lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally."<sup>89</sup>

In Justice Souter's concurrence, he took direct aim at Justice Scalia's historical claims, drawing on the experience and ideology of the Founding generation, the original understanding of "the Framers," and the experience of the new nation. To be sure, Souter wrote, there were countervailing practices in which religion was sometimes inserted into public life in the republic's early years. "Yet . . . those practices prove, at best, that the Framers simply did not share a common understanding of the Establishment Clause, and, at worst, that they, like other politicians, could raise constitutional ideals one day and turn their backs on them the next."<sup>90</sup>

My point in reciting these examples is not to try to demonstrate that originalism is impossible. It is difficult. And it is not within the professional competence of many lawyers and judges. But it is not impossible. In fact, we can learn useful things from originalist inquiry in any number of constitutional questions. But the dogma of originalist supremacy is unsupportable, in my view. Moreover, because the legal utility of originalist inquiry rests on assumptions about historical significance, and because originalism cannot justify those assumptions solely on the basis of originalist sources and methods, originalism is subject to the very uncertainty and choice that originalists insist that judges evade if they are to be true to the rule of law. Judicial decision, especially on constitutional questions, is unavoidably creative. It certainly involves more than simply calling balls and strikes. The question is how to navigate in the midst of uncertainty in ways that are honest about judicial creativity but avoid regression to mere personal predilection.

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88 *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (Kennedy, J.); *id.* at 612–15 (Souter, J., concurring).

89 *Id.* at 632 (Scalia, J., dissenting).

90 *Id.* at 626 (Souter, J., concurring).

### III. PURPOSIVE INTERPRETATION

In fact, as I have already indicated, there are any number of interpretive approaches and methods.<sup>91</sup> Methodological supremacists aside, each method and approach is an accepted part of constitutional law as it is practiced in the United States. And among these approaches and methods, we have devices for critically assessing doctrinal claims of judges and therefore for constraining judicial discretion within recognizable and authoritative bounds.

Having said this, I want to consider an additional contender that I did not include in the opening section of this Article: purpose. To make my position clear, I do not intend to promote a kind of purposive supremacy. Purposive interpretation is appealing for a variety of reasons. It has long roots in American constitutional jurisprudence. And it is valuable in that it promotes sense, consistent with the relative significance of constitutional provision and with the point of the larger constitutional enterprise. But I have no wish to displace completely other approaches and methods (as if I could).

The gist of the method is this: In interpreting and applying a constitutional provision, the interpreter may consider the purpose for the provision.<sup>92</sup> There may well be more than one such purpose. In that case, the interpreter might try to arrange purposes into a hierarchy that permits a reasoned choice from among them,<sup>93</sup> or to arrive at a rough accommodation of potentially competing purposes. Either way, purposive interpretation asks some straightforward questions about the relevant provision. The key question is “why?” For what reason(s) is the provision included in the Constitution? What is its point? What is its function? What institutional arrangement does it underwrite? What values does it promote?

It may come as a surprise to some that even Hugo Black was a practitioner of purposive interpretation. In describing his use of history, for example, he wrote that

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91 See *supra* notes 2–20 and accompanying text.

92 The word “provision” suggests that the analytical and interpretive starting point is constitutional text. In my view, there are good reasons for such a starting point. It may be possible, however, to identify rules, principles, or values that have a constitutional status, though they may not be expressed, in so many words, in the text. For example, we don’t see the word “democracy” in the text of the Constitution. Nonetheless, we are justified in taking it seriously as a constitutional value, consistent with the Constitution’s structure, procedures, history, and purposes. In short, text isn’t the sole point of departure for purposive interpretation.

93 See, e.g., Murphy, *An Ordering of Constitutional Values*, *supra* note 67, at 750 (arguing that the Constitution’s principles derive from a higher-order commitment to the value of human dignity).



I strongly believe that . . . the basic purpose and plan of the Constitution is that the federal government should have no powers except those that are expressly or impliedly granted, and that no department of government—executive, legislative, or judicial—has authority to add to or take from the powers granted it or the powers denied it by the Constitution.<sup>94</sup>

Similarly, he defended his interpretation of the Fifth Amendment's Due Process Clause by focusing on the historical purpose of the provision.<sup>95</sup> And, he justified his muscular interpretation of the First Amendment by reference to the Amendment's purposes—as a bulwark against “despotic government” and in underwriting the “safety and prosperity” of the nation.<sup>96</sup>

Justice Black is only one example, albeit an interesting one given his reputation as a textualist. The number of additional practitioners of purpose is huge. I shall consider one more: Chief Justice John Marshall. In his opinion for the Court in *M'Culloch v. Maryland*<sup>97</sup> (and elsewhere), Marshall understood that some of the Constitution's provisions are abstract (and their application in a particular case therefore ambiguous), that others are more specific (and their reach in a particular case might still be uncertain), and that between or among various provisions are gaps and silences (which beg for illumination or explanation).

The threshold question in *M'Culloch* was how to read the Constitution—how, specifically, to interpret the powers of the national government. The State of Maryland had argued that the Court should construe Congress's powers narrowly, within the strict confines of the constitutional text. Marshall rejected this approach, and he did so by asking about the larger purposes of the Constitution as a whole. The Constitution, he observed, was ratified by—and “derive[d] its whole authority” from—the people of the new nation.<sup>98</sup> They ratified it for purposes spelled out in the Preamble: “to form a more perfect union, establish justice, ensure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity.”<sup>99</sup> Because the people ratified, he said, the states are bound. Because the people ratified for grand and noble purposes, the government created by the Constitution—the national government—was the recipient of expansive powers consistent with these purposes. Were it otherwise, the

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94 BLACK, *supra* note 2, at 8.

95 *Id.* at 33.

96 *Id.* at 43.

97 *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

98 *Id.* at 403.

99 *Id.* at 403–04 (quoting U.S. CONST. pmb.).

purposes themselves would be a nullity, and the incipient nation might fracture and dissolve.<sup>100</sup>

But how to understand—how to read—the powers delegated to the national government? Here again, Marshall’s move was purposive. Why, he asked, would a people enact a written constitution in the first place? Not, he insisted, to continue “the embarrassments resulting from . . . the articles of confederation.”<sup>101</sup> Not, that is, to interpret the general government’s powers so strictly as to defeat the purposes of the Preamble. The point of a constitution, said Marshall, is to mark out “its great outlines” and to designate “its important objects,” leaving “the minor ingredients which compose those objects [to] be deduced from the nature of the objects themselves.”<sup>102</sup>

This may be well and good in the abstract, but may Congress incorporate a bank? Marshall acknowledged that the text of the Constitution doesn’t include such a power in so many words. There are powers to tax, to borrow, to regulate commerce, to declare and wage war, to maintain an armed force. But there’s no express power to incorporate a bank. He said, however, that it was only reasonable to infer that a constitution that delegated great powers, delegated also “ample means for their execution,” even though the means are not expressed.<sup>103</sup> Should we read the Constitution to make the execution of great powers “difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of [the Constitution], when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means?”<sup>104</sup> Note that this way of putting the question did not entail actually discerning the Framers’ intentions or understandings. Instead, he had only to infer what, in his view, must have been the Framers’ purpose on the question of construction, in light of the larger purposes of the Constitution. A construction that confined the national government to powers precisely spelled out in the text would defeat the reasons (the purposes) for adopting the Constitution and for delegating great powers to the nation:

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not se-

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100 *Id.*

101 *Id.* at 406.

102 *Id.* at 407.

103 *Id.* at 408.

104 *Id.* at 354.

lect any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.<sup>105</sup>

Bottom line: incorporating a bank is an appropriate means for exercising the government's substantial, substantive powers.<sup>106</sup>

This is the heart of Marshall's justification for reading into the delegation of national powers an implied delegation of ancillary powers that promote the principal delegation. As every law student knows, this was not Marshall's only justification. He also noted that the text of the Constitution authorized Congress to make "all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department thereof."<sup>107</sup> As I read him, however, Marshall viewed the Necessary and Proper Clause merely as a sign that implied powers existed and not as the source for those powers.

First, it is noteworthy that Marshall led with the argument from purpose, not an argument from the text. My reading is that he led with his principal—and stronger—argument. Second, it is significant that Marshall framed his textual argument only in response to Maryland's claim that the Necessary and Proper Clause should be read strictly to refer narrowly to those implied powers which are not only appropriate ("proper") but also strictly "necessary." As a matter of exegesis, Maryland's point was not frivolous, and Marshall had to meet it. In rejecting Maryland's claim, he presented an exegetical rationale, but his textual explanation was awkward and not entirely persuasive. Perhaps understanding this, Marshall's rejection moved away from textual parsing and returned to his larger argument from purpose. Again, he invoked putative intentions of the makers of the Constitution. Again, he did so, not as evidence of actual intentions of actual Framers, but because of what he said was the manifest purpose of the Constitution: "The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution."<sup>108</sup> The purpose of a constitution is not the same as the purpose of an

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105 *Id.* at 409–10.

106 *Id.*

107 *Id.* at 353 (quoting U.S. CONST. art. I, § 8, cl. 18). For reasons unknown, Marshall omitted the words "or Officer" from the final clause of his quotation.

108 *Id.* at 415.

ordinary code of laws. The purpose of a constitution like the Constitution of the United States, said Marshall, was

to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character [i.e., the purpose] of the instrument, and give it the properties of a legal code.<sup>109</sup>

There is a third (and substantive) reason that Marshall may have relied principally on his argument from purpose, as opposed to the exegetical argument. The purposive argument spoke, not to the powers of Congress, but to the powers of the national government. This difference is significant, for it suggests that the government of the nation, in all its institutional functions and manifestations, is not subject nor subordinate to the powers of the states.

I do not intend to say that Marshall's nationalist position is the only position possible concerning the scope and content of governmental power. One might be able to deploy, for example, a purposive analysis that produces a localist, or states' rights, interpretation of the Constitution. Nor am I claiming that purpose was Marshall's sole method. He referred also to text and context and experience. And he relied heavily on inferences from institutional (and textual) structure, though his structural analysis was substantially connected to his purposive understandings.<sup>110</sup> Moreover, I acknowledge that my third reason for believing that Marshall placed principal reliance on his argument from purpose is suggestive only. A more definitive defense will require a more expansive biographical and jurisprudential investigation than I can carry out in this Article. For my purposes here, it is sufficient that we can see purposive interpretation from a judge of some stature in a constitutional case with canonical status.

Pedigree aside, there are good reasons to embrace purpose as a method of constitutional interpretation. It permits us to acknowledge, without evasion or rigid methodology, that provisions of the Constitution range from the abstract to the concrete. Uncertainty can arise from provisions on either end of the spectrum, not merely from provisions that are framed in general terms but also from those that appear to be specific or concrete. Uncertainty may arise in part from gaps between or among provisions. It may arise from outright silences—matters to which the text simply does not speak explicitly—either because some things went without saying, be-

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109 *Id.*

110 See BLACK, *supra* note 11 (applying a structuralist framework to questions of the scope and content of individual rights and national powers).

cause they were too controversial, because it did not occur to constitution makers to speak to them, or because a constitution simply cannot say everything.

As a method, purpose does not prefer powers to rights (nor vice versa). For one thing, uncertainty may arise from the interpretation or application of rights as well as of powers. Purposive interpretation gives full play to both aspects of the Constitution. In so doing, it leaves ample room for both democratic and liberal theories of the Constitution. Against democratic originalists (like Scalia, Rehnquist, and Thomas) and a libertarian (like Randy Barnett), purposive interpretation leaves open the possibility that the Constitution purposefully embraces both theories simultaneously, and that their interaction is what gives rise to some of our most enduring (sometimes poignant) constitutional disputes.

The relative primacy of purposes may change over time. The fact that some purposes may be traced textually to the Preamble does not alter this. Change comes in different ways and for different reasons. It may come through gradual accretion or erosion, via judicial doctrines, institutional practices, or shifts in the larger political culture. It may come more dramatically, through events that alter institutional arrangements or produce profound shifts in the country's ethos. Examples of such "moments" have been the Civil War (whose impact was partially instantiated in the Reconstruction Amendments), the Great Depression, and the attacks on September 11. Purposes are not exempt from change. I say this, not necessarily in the sense that one or another purpose will become irrelevant, though a few might become so. I have more in mind that purposes may change in their relative primacy. National security, for example, weighs more heavily now than it did, say, one hundred years ago.

To say that change happens and that it affects the meaning and application of the Constitution is not especially controversial in most circles. It is what Justice Oliver Wendell Holmes, Jr., had in mind when he wrote in *Missouri v. Holland* that

[i]t was enough for [the makers of the Constitution] to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation . . . . We must consider what this country has become in deciding what [the Tenth] Amendment has reserved.<sup>111</sup>

The fact of change does not guarantee that change is irreversible. Nor does it ensure that change is consistently desirable. But change

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111 *Missouri v. Holland*, 252 U.S. 416, 433–34 (1920).

will happen, and the Constitution adapts or risks sliding into irrelevancy.

As Chief Justice Marshall deployed it, purposive interpretation permitted the nation to realize that the Constitution was “intended to endure for ages to come.”<sup>112</sup> He did so with a keen appreciation for the acts that framed and ratified the Constitution. These acts were the primal forces that created the Constitution’s authority. But a constitution that endures must also become the property of later generations, if they are willing and able to attach to it. These later generations are tied to the Founding generation by asking the very questions the Founders themselves asked. Why a constitution? Why this Constitution? For what reason(s) do we include (or respect) particular provisions? What purposes do they serve? For Marshall, these questions were not an exercise in mining for specific intentions or cultural understandings. They were instead part of a thought experiment that brought the Framers forward in time. Unlike Aristotle (or Justice Cardozo’s unpublished opinion in *Blaisdell*), however, Marshall did not ask what the Framers would have done had they seen the future. He asked instead what the Constitution’s purposes might entail in cases and under conditions the Framers could not have imagined.<sup>113</sup>

I believe this is a responsible approach to interpreting a constitution. It is faithful to the instrument the Founders created, and it reinforces a connection between the Framers and later generations, but it recognizes the unavoidable creativity involved in later generations’ coming to understand, apply, and attach to the “original” Constitution. It does not eliminate disagreement over meaning (nor could it), but it makes clear the substantive stakes of disagreement in a way that promotes clarity and understanding. Purposive interpretation has one more virtue, in my view. It helps to promote the idea that the Constitution is not merely the property of lawyers and judges (and historians), but that even citizens (and denizens) may attach to it. This is not to overturn established institutional arrangements for making and enforcing constitutional law. But it opens up the possibility that the Constitution is not solely about law.

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112 *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

113 This idea, or something like it, animates Jack Balkin’s notion of “living originalism.” See BALKIN, *supra* note 46, at 3–20 (arguing that “original meaning” originalism and living constitutionalism are compatible methods of constitutional construction).

