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Selling Originalism

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ARTICLES

Selling Originalism

JAMAL GREENE*

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INTRODUCTION

Justice Scalia has described an originalist approach to interpretation as a prerequisite to faithful application of a written Constitution. If, says he, constitutional judicial review is implicit in the notion that the Constitution is paramount law, as has been settled in this country at least since *Marbury v. Madison*,¹ then that review must be guided by the ordinary tools of legislative interpretation.² In a democracy, serious legislative interpretation requires that judges keep faith with the meaning of the text as understood at the time of enactment, not as desired by those judges or by anyone else who does not, in the relevant way, represent the will of the People. To pledge allegiance to the understandings or the will of contemporary majorities—or, worse, of contemporary judges—is to subvert the aim of higher lawmaking. “The purpose of constitutional guarantees,” Justice Scalia has written, “is precisely to prevent the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable.”³

A substantial number of legal academics regard this as hogwash. For one thing, Justice Scalia's writings on constitutional interpretation reflect a restless fixation on what is, to many, a false dichotomy. Non-originalists do not generally imagine themselves to be making up constitutional meaning as they go along, or even to be seeking “the *desirable* result for the case at hand.”⁴ Whether or not interpretive constraints other than original meaning are more difficult to apply and discern, there is no reason beyond Justice Scalia's own (formidable) imaginings to think them less constraining. Nor does rejecting the supremacy of the framing generation's understanding of the import and limitations of the Constitution's language portend the interpretive paralysis that Justice Scalia supposes it does.⁵ At the very least, it does so no more than his “time-dated” version of originalism,⁶ which compels judges to engage in an

1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

2. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).

3. *Id.* at 862.

4. 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: FEDERAL COURTS AND THE LAW 3, 39 (Amy Gutmann ed., 1997).

5. Scalia, *supra* note 2, at 855; see also Scalia, *supra* note 4, at 44–46.

6. See Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 147–49 (Amy Gutmann ed., 1997).

often contentious and indeterminate historical examination that is beyond their institutional competence. And if democratic legitimacy is the measure of a sound constitutional interpretive practice,⁷ then Justice Scalia needs an account of why and how rote obedience to the commitments of voters two centuries distant and wildly different in racial, ethnic, sexual, and cultural composition can be justified on *democratic* grounds. The proposition that, absent open revolution, we may change an ancient Constitution only through the onerous and constitutionally endogenous Article V process is both undemocratic and unattractive.

Whatever its theoretical shortcomings, however, originalism in practice is at least as healthy today as it was when Justice Scalia joined the Court in 1986. Arguments from original intent or original meaning are a prominent feature of both our legal practice and our constitutional pop culture, such as it is. The force of such arguments was dramatically in evidence in the Court's decision last Term in *District of Columbia v. Heller*,⁸ which struck down the District's handgun ban and threatens to invalidate numerous others. Not only did Justice Scalia secure five votes for the most thoroughgoing originalist opinion in the Court's history, but Justice Stevens's dissent appeared to engage rather than challenge the majority's originalist premises.⁹ Perhaps the two most significant lines of criminal law cases of the last decade, those resting on *Apprendi v. New Jersey*¹⁰ and *Crawford v. Washington*,¹¹ rely primarily on originalist reasoning, and on talk radio, on cable news, and in the blogosphere, originalist constitutional presuppositions remain vibrant. Polls report that nearly half of Americans claim to believe that the original intentions of the Constitution's authors should be the *sole* consideration in Supreme Court constitutional interpretation,¹² and about seven in ten believe it is "very important" for a good Supreme Court Justice to "uphold the values of those who wrote our Constitution two hundred years ago."¹³ Notwithstanding its many academic critics, originalism continues to sell.

Originalism's resiliency comes at a time when constitutional methodology more generally has assumed a cultural prominence it has not always enjoyed. This is not a coincidence. As others have noted, exalting originalism was part of

7. See Scalia, *supra* note 2, at 862.

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

9. See *id.* at 2822–47 (Stevens, J., dissenting).

10. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (prohibiting increasing criminal sentences beyond the statutory minimum based on facts not submitted to a jury and proved beyond a reasonable doubt).

11. *Crawford v. Washington*, 541 U.S. 36 (2004) (prohibiting out-of-court testimonial statements at trial under the Confrontation Clause).

12. Press Release, Quinnipiac University Polling Institute, American Voters Oppose Same-Sex Marriage Quinnipiac University National Poll Finds, but They Don't Want Government To Ban It (July 17, 2008), <http://www.quinnipiac.edu/images/polling/us07172008.doc>.

13. James L. Gibson & Gregory A. Caldeira, *Citizens, Courts, and Confirmations: Positivity Theory and the Judgments of the American People* 141, 163 tbl.4.5 (Sept. 17, 2008) (unpublished manuscript, on file with author).

a deliberate effort by the Reagan Justice Department to rally Americans against a Federal Judiciary it perceived as frustrating its conservative political agenda.¹⁴ Deliberately using an interpretive methodology as a site for political mobilization was novel¹⁵ and has contributed to heightened popular attention to “judicial philosophy” as a subject of conventional political discourse. When John Marshall Harlan was nominated to the Supreme Court in 1955, Judiciary Committee members asked him three questions about constitutional methodology, less than two percent of the total questions he was asked.¹⁶ By contrast, John Roberts was asked 135 questions about methodology at his televised 2005 confirmation hearing, representing about one out of every seven questions he was asked.¹⁷ As confirmation fights have become more contentious, politicized, and popularized, so too has the discourse around methodology that was—deliberately—so central to the pivotal Robert Bork hearing of 1987.

In short, there appear to be more consumers of constitutional arguments than there have been in other times, and they are consuming originalist rhetoric in relatively large numbers. Still, for all the trees slain in exposition of originalism’s theoretical bona fides *vel non*, few legal scholars have focused on constitutional methodology generally, or on originalism in particular, as items of political commerce.¹⁸ Those in the legal academy who have examined the “selling” of originalism have tended to focus on the “supply” side; that is, they have studied how originalism has been used by political actors to further political ends.¹⁹ This Article views the market for constitutional methodologies more holistically. Originalism is not only instrumental to a particular political agenda but is also responsive to a set of demands the public makes during moments of constitutional engagement. I therefore examine originalism as a constitutional aesthetic, in order to distill those features that make it an attractive part of our overall conception of the role of a constitutional judge.

This inquiry is vital not only as a matter of political strategy but also, as importantly, to develop more fully those (generally non-originalist) interpretive

14. See Edwin Meese III, Att’y Gen. of the United States, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, Address Before the American Bar Association (July 9, 1985), in 27 S. TEX. L. REV. 455, 465–66 (1986); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 559 (2006).

15. Post & Siegel, *supra* note 14, at 548.

16. See *infra* note 203 and accompanying text.

17. See *infra* note 213 and accompanying text.

18. Those few include Robert Post and Reva Siegel, see Post & Siegel, *supra* note 14, and Jack Balkin, see Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007). For related perspectives, see also RICHARD A. POSNER, *OVERCOMING LAW* 245 (1995) (“The dominant rhetoric of judges, even activist judges, is originalist, for originalism is the legal profession’s orthodox mode of justification.”), and Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 951 (2001) (remarking that legal academics “do not know enough about how the public gets its information about constitutional decisions, about public support for the institution of judicial review, about the extent to which the Justices are aware of or influenced by public opinion, and about the conditions under which political actors will heed judicial decisions with which they disagree”).

19. See, e.g., Post & Siegel, *supra* note 14.

theories that regard public acceptance as a strong criterion for legitimacy. It is not enough to recognize the salience of originalism as a matter of subconstitutional politics; constitutional theory must itself confront and, as necessary, accommodate the political practice of originalism. Doing so may illuminate ways in which, paradoxically, originalism may help resolve the countermajoritarian difficulty in practice even if it fails to do so in theory. That is, originalism's responsiveness to public demand may supply it with a legitimating force that, as non-originalists have ably demonstrated, it otherwise lacks.

I begin, in Part I, with a brief description of the academic debate over originalism, which is either at an impasse or, less sympathetically, has demonstrated that a strong form of originalism lacks satisfactory theoretical grounding. Part II documents originalism's growth and success as a constitutional methodology, both in judicial practice and within the larger political culture. Part III discusses the place of public appeal in constitutional theory. I argue that an account of why originalism is successful is crucial to fundamentally non-originalist interpretive theories insofar as those theories regard continued public acceptance as an important legitimating criterion for an interpretive regime. I then begin to develop a descriptive model for the marketing of originalism. I suggest that a form of democratization of the market for constitutional ideas has broadened the audience of concern for constitutional methodologies, thereby making populist methodologies, and the populist features of individual methodologies, bear greater emphasis. Originalism's proponents have taken advantage of this dynamic by speaking of originalism in simple and transparent terms, by highlighting the putative limitations originalism places on judicial elites, and by emphasizing originalism's distinctively American character. Finally, in Part IV, I offer some brief thoughts on what this Article's observations augur for other methodologies, particularly Chief Justice Roberts's "minimalism" and Justice Breyer's "active liberty."

I. ORIGINALISM AND ITS DETRACTORS

Before I discuss the tension between originalism as a jurisprudence and originalism as a constitutional aesthetic, I should explain the terms I am using and justify my earlier claim that the theoretical debate over originalism is either inconclusive or has been lost by strict originalists. Even Justice Scalia, who lambasts non-originalists for their eclecticism, concedes that originalism takes a variety of forms.²⁰ It is therefore necessary first to identify the specific originalist model with which I am concerned and to outline its traditional defenses. I then discuss the most effective critiques of that model.

A. WHOSE ORIGINALISM?

Originalism is an inconstant term. Among contemporary constitutional theo-

20. See Scalia, *supra* note 2, at 855.

rists it most often refers to the normative constitutional interpretive theory that instructs judges faced with indeterminate textual guidance to look primarily to the original understanding of a particular clause's ratifying generation. The inquiry is meant to be objective rather than subjective and so—with little to no loss of purchase—the original understanding of a clause's ratifiers is often conflated with the “original public meaning” of the clause's text. Not everyone associated with originalism has endorsed original understanding or original meaning as the appropriate object of concern. Raoul Berger, for example, though an intellectual patron of the originalism movement, believed that constitutional interpretation must be faithful to the intentions of the drafters.²¹ Few academic originalists maintain this position,²² and the theoretical gulf between an original meaning approach and an original intent approach can be vast indeed.²³ Nonetheless, the term originalism is capacious enough to embrace both theories, and the political rhetoric associated with originalism does not distinguish between the two.²⁴ Because academic criticisms of “original understanding” generally apply with equal (and at times greater) force to “original intent,” nothing follows from my bracketing of the latter for the purposes of this Part.

There is a secondary question of *which* understanding originalists consider authoritative. Is it the original meaning of the words of a constitutional provision or the provision's original expected application? On Ronald Dworkin's formulation, is it “what some officials intended to *say* in enacting the language they used” or is it instead “what they intended—or expected or hoped—would be the *consequence* of their saying it”?²⁵ This is a question of the level of generality at which we should assess the ratifying generation's original understanding. Dworkin insists that Justice Scalia errs in focusing on original ex-

21. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 4 (2d ed. 1997). I am not aware of any evidence that Berger reflected seriously on the distinction between original meaning and original intent.

22. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990); Scalia, *supra* note 4, at 38; see also Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1137 (2003) (“By the mid-1980s, if not earlier, ‘original intent’ was on the wane and ‘original understanding’ was on the rise.”).

23. Intentionalist interpretation is a more natural ally of purposivism, which the Scalia School ferociously rejects in the statutory context.

24. See, e.g., LORI J. OWENS, *ORIGINAL INTENT AND THE STRUGGLE FOR THE SUPREME COURT: THE POLITICS OF JUDICIAL APPOINTMENTS* 1 n.1 (2005) (stating casually that “original meaning,” “original understanding,” “interpretivist,” and “original intent” are interchangeable for the purposes of the political debate around originalism on the Court); Scalia, *supra* note 4, at 38 (“[T]he Great Divide with regard to constitutional interpretation is not that between Framers’ intent and objective meaning, but rather that between *original* meaning (whether derived from Framers’ intent or not) and *current* meaning.”); see also *infra* notes 181–82 and accompanying text.

25. Ronald Dworkin, *Comment*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, 115, 116 (Amy Gutmann ed., 1997). This mirrors Dworkin's well-known distinction, in earlier work, between general “concepts” of moral or political values and specific “conceptions.” See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 134–36 (1977).

pected application rather than original meaning in constitutional interpretation.²⁶ Justice Scalia denies the charge, insisting that he and Dworkin agree in principle that it is not original expected application but original meaning—what Dworkin calls “semantic intention”—that controls.²⁷ The disagreement between two learned men over what kind of originalist Justice Scalia is confirms that this distinction resists intelligent application. It is difficult to conceive of better evidence of the “semantic intention” behind constitutional text than how that text was expected to be applied. Paul Brest understated things, I think, when he said that “[a] principle does not exist wholly independently of its author’s subjective, or his society’s conventional exemplary applications, and is always limited to some extent by the applications they found conceivable.”²⁸ Let it suffice for now to say that in practice, Justice Scalia’s originalism does not allow constitutional interpretations to prohibit what was permitted at the time of the relevant clause’s enactment.²⁹ It is this version of originalism, however labeled, that is the subject of this Part.

Finally, we can distinguish between originalism as a constitutional adjudicative practice and originalism as a method of ascertaining constitutional meaning. Students of the philosophy of language debate whether the semantic meaning of a text is provided by the intentions of its author.³⁰ Identifying oneself as a semantic originalist does not commit one to the view that originalism is the appropriate method of constitutional interpretation.³¹ Likewise, a belief that federal judges should resolve textual ambiguity in favor of original meaning need not necessarily entail a belief that constitutional provisions *mean* what they meant when they were enacted, although Justice Scalia appears to hold both views. Thus, the claim that the political branches or ordinary citizens should identify, motivate, or act upon tacit changes in constitutional meaning but that judges should be originalists is a coherent normative position. Moreover, extrajudicial actors do of course actively engage in both originalist and non-originalist constitutional interpretation. This Part, however, is concerned primarily with judicial constitutional practice, which has for many years been the principal terrain of the debate over originalism.

26. See Dworkin, *supra* note 25, at 116–22.

27. See Scalia, *supra* note 6, at 144–47.

28. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 217 (1980).

29. See Scalia, *supra* note 6, at 141.

30. See, e.g., Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004); Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629 (2005).

31. See Posting of Lawrence Solum to Legal Theory Blog, http://lsolum.typepad.com/legal_theory/2007/10/semantic-and-no.html (Oct. 30, 2007, 00:30 EST). Some scholars distinguish constitutional *interpretation*, which properly aims at divining the meaning of the text, from constitutional *construction*, which in this nomenclature refers to the fashioning of legal rules to govern the adjudication of controversies surrounding vague textual commands. See generally KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999). Whatever the merits of this distinction, I choose not to honor it in this Article.

B. WHY ORIGINALISM?

The central conceit behind originalism as a mode of judicial constitutional interpretation is that it is more consistent with constitutional democracy than are its competitors. Both words—"constitutional" and "democracy"—are important. Constitutionalism entails a judicial commitment to a written text that is superior to the ordinary legislative enactments of present majorities. The authority of unelected judges to override majority will derives exclusively from that written text and from the status of that written text as law. Legal interpretation has rules that are familiar to lawyers, and it is part of this country's legal custom to give effect to the intent of the parties when interpreting written documents. Hardly anyone questions that this is the appropriate way to interpret contracts, treaties, wills, and judicial opinions.³² The suggestion that constitutional interpretation should be any different is curious and dangerous. Short of constitutional amendment, only the Supreme Court itself may alter its prior constitutional pronouncements. An unelected lawmaking body bound to the intentions of neither present majorities nor the democratic populace who supplied and continue to justify its authority bears uncomfortable resemblance to an oligarch.

But what of the "dead hand" problem? As the founding generation itself was well aware, life is for the living;³³ why should that long since deceased generation's understandings of the Constitution's meaning be authoritative today? Originalists will say that the objection proves too much. It is in the nature of a constitution to limit the will of a present majority. The relevant question is whether such limitations should be faithful to the intentions of the supermajority that ratified our governing document or whether they should instead be divined in some uncertain way by unelected judges.³⁴ It is in our nature to exercise discretion in favor of our own interests. Interpretation according to original meaning not only enforces the Constitution's status as law but also has the benefit of providing neutral—in the sense of impersonal—criteria to govern a judge's exercise of discretion and a reasonably transparent basis upon which to evaluate judicial acts. "The point," says Michael McConnell, "is that *in principle* the textualist-originalist approach supplies an objective basis for judgment that does not merely reflect the judge's own ideological stance. And when errors are made, they can be identified as such, on the basis of profes-

32. See BERGER, *supra* note 21, at 403; BORK, *supra* note 22, at 144–45; Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1525 (1989) (reviewing MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* (1988)); cf. Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 392 (1981) (suggesting that the Constitution's origins as a negotiated compact "make plausible, even if they do not compel, a conclusion that constitutional interpretation should be assimilated to the process of statutory interpretation").

33. See, e.g., Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in THOMAS JEFFERSON: *POLITICAL WRITINGS* 593, 593 (Joyce Appleby & Terence Ball eds., 1999) ("I set out on this ground which I suppose to be self-evident, 'that the earth belongs in usufruct to the living'; that the dead have neither powers nor rights over it.").

34. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704–06 (1976).

sional, and not merely ideological, criteria.”³⁵

Originalism is democratic, then, not primarily because it binds us to democratically enacted commitments—this, rather, is why it is consistent with constitutionalism—but because the limitations it imposes on undemocratic actors preserve adequate space for democratic decisionmaking.³⁶ Says Robert Bork, “the attempt to adhere to the principles actually laid down in the historic Constitution will mean that entire ranges of problems and issues are placed off-limits for judges.”³⁷ And if the Constitution evolves, democracy demands that the custodian of that evolution be the People via the amendment process and via legislation, not elite lawyers via their own ideological predilections.³⁸

C. WHY NOT ORIGINALISM?

The case against this brand of originalism is more complicated but, to most of the legal academy, more persuasive. The two most effective theoretical deficiencies of originalism relate in varying degrees to the difficulty that *time* poses for historicist constitutional methodologies.³⁹ Originalism relies on the notion that an interpretive anchoring at a particular historical moment inheres in the fact that the Constitution was indeed written down and ratified at a particular point in time.⁴⁰ Unlike background assumptions, unspoken values, shared political culture, social movement output, or other candidates for the embodiment of our fundamental rights and governmental structure, a written document invites comparison to a contract.⁴¹ Its reduction to writing seems to resist open-ended and evolving interpretation in favor of sober interpretive fixation on the understandings of the parties at the time of contracting.

This intuition is misleading. The “parties” to our Constitution are the American people as a collective over a 220-year period, which complicates the analogy between the Constitution and an ordinary contract. It raises profound questions both as to whether the original understanding can or should give authoritative guidance and, if so, how exactly one should go about mining that guidance.

Consider the recent case of *Reliable Consultants v. Earle*,⁴² which concerned

35. Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2415 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)); see also BORK, *supra* note 22, at 146–53.

36. See BORK, *supra* note 22, at 163–64. It bears mention that originalism is not necessarily less constraining of present majorities. See, e.g., *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring); see also *infra* section III.B.

37. See BORK, *supra* note 22, at 163.

38. See Scalia, *supra* note 2, at 854, 862–63; see also McConnell, *supra* note 32, at 1528–29.

39. There are other objections, of course, which for present purposes I leave aside.

40. See, e.g., AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 5 (2005) (describing the Constitution as “not merely a text but a deed—a *constituting*”).

41. See, e.g., *id.* (“Like the phrases ‘I do’ in an exchange of wedding vows and ‘I accept’ in a contract, the Preamble’s words actually performed the very thing they described.”).

42. *Reliable Consultants v. Earle*, 517 F.3d 738 (5th Cir. 2008).

the constitutionality of Texas's ban on the sale of vibrators. The plaintiff merchant argued, successfully in the Fifth Circuit, that the statute violated its customers' right to sexual privacy.⁴³ Imagine the Supreme Court grants certiorari.⁴⁴ How should a committed originalist vote on the merits? She might first note that the text of the Constitution does not mention "privacy." She might on that basis conclude that there is no such constitutional right and that the lawsuit should therefore fail. Although Justice Scalia and Justice Thomas are apt to react in this way, originalism does not require that they do. At a minimum, and bracketing considerations of stare decisis, an originalist will want to know whether the Fourteenth Amendment was originally understood to codify a right comprising the freedom to use sex toys.

Whatever the answer to this inquiry, discretion-limiting it is not. It is difficult enough for a judge to divine the *original* ratifying generation's collective understanding of an ambiguous constitutional provision. The Constitution was a negotiated compromise. Those who drafted the document are not the same as those who ratified it, those who ratified it are not the same as the population at large, and the various agendas and understandings of its provisions were wide-ranging and at times contradictory.⁴⁵ Where Fourteenth Amendment incorporation is involved, the task of locating a single original understanding becomes nearly impossible. Is our originalist jurist concerned with the founding generation's understanding of "liberty" in the Fifth Amendment or the Reconstruction generation's understanding of "liberty" in the Fourteenth? Is she instead concerned with what the 39th Congress thought "privileges or immunities" included? The people of the ratifying states? Does that include the former Confederate states (including Texas) that were barred from seating members in Congress and whose readmittance to the Union was conditioned on accepting the terms of the Fourteenth Amendment? And what if the Fourteenth Amendment ratifying generation was itself originalist? Does she then need to determine what that generation thought the founding generation thought?⁴⁶

Putting aside these abstract difficulties, there is always historical practice—except when there isn't. The electromechanical vibrator was invented by a British physician in the 1880s.⁴⁷ Texas passed its law banning the promotion of

43. *Id.* at 744.

44. In fact, Texas declined to seek certiorari in the case.

45. See Larry Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 636–37 (1985).

46. See Laurence H. Tribe, *Comment*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 65, 72 (Amy Gutmann ed., 1997) (suggesting that Justice Scalia and Ronald Dworkin alike lack sufficient humility about the existence of an "objective" meaning of constitutional provisions and their ability to discern that meaning); see also Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1036 (1981) ("To ask, in each instance, whether the framers 'intended' the specific or the general is to pose a question that almost invariably is unanswerable.").

47. RACHEL P. MAINES, *THE TECHNOLOGY OF ORGASM: "HYSTERIA," THE VIBRATOR, AND WOMEN'S SEXUAL SATISFACTION* 15 (1999).

such devices in 1979.⁴⁸ Are we to imagine how the American people of 1868 (or 1791?) would have regarded a law against vibrators? The question is unanswerable. Texas's law against sex toys resulted from the sexual revolution of the 1960s, which saw a rediscovery of the vibrator, previously used to relieve "hysteria" in women, as a sexual gratification device.⁴⁹ That law is unique to the culture of the 1970s; to transplant it into the 1860s or 1790s would deprive it of its oxygen. As Mark Tushnet has observed,

perspectives, beliefs, and intentions are thoroughly interwoven with the concrete social and economic realities of [the] day. . . . When interpretivists presume that they can detach the meanings that the framers gave to the words they used from the entire complex of meanings that the framers gave to their political vocabulary as a whole and from the larger political, economic, and intellectual world in which they lived, interpretivists slip into the error of thinking that they can grasp historical parts without embracing the historical whole.⁵⁰

It will be objected that this sort of indeterminacy is inherent in the project of interpretation. The constitutional provisions most in need of authoritative interpretation are those whose text is ambiguous and whose application is uncertain. Originalists do not claim that judging is easy or may be performed with mathematical precision, only that it is most consistent with constitutional democracy to use ideologically neutral and transparent criteria. There is a point, however, at which indeterminacy becomes so paralyzing that originalism can no longer perform this function.⁵¹ If hard cases invite principled disagreement as to why and how a particular interpretation represents the relevant original meaning, then judicial discretion is not substantially limited and one of originalism's principal selling points dissolves.⁵² And unlike statutes or contracts, for which the scope of the inquiry into original intent or understanding is relatively narrow, the Constitution binds for all time, absent an extraordinary political

48. See 1979 Tex. Gen. Laws 1975; see also *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020 (5th Cir. 1981). See generally Danielle J. Lindemann, *Pathology Full Circle: A History of Anti-Vibrator Legislation in the United States*, 15 COLUM. J. GENDER & L. 326, 330–36 (2006) (describing state statutes regulating vibrator use).

49. See MAINES, *supra* note 47, at 3, 20.

50. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 797 (1983); see also MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY* 280 n.7 (1988).

51. See Brest, *supra* note 28, at 222; Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 478 (1981).

52. See Brest, *supra* note 28, at 218–19; Tushnet, *supra* note 50, at 793 ("Interpretivist history requires both definite answers (because it is part of a legal system in which judgment is awarded to one side or the other) and clear answers (because it seeks to constrain judges and thereby to avoid judicial tyranny). The universal experience of historians, however, belies the interpretivists' expectations."); see also Thomas B. Colby & Peter J. Smith, *Living Originalism* 4 (George Washington Univ., Working Paper No. 393, 2008), available at <http://ssrn.com/abstract=1090282> (arguing that originalism's chameleonic nature undermines its normative claims).

moment. Is it not better, then, that our interpretive regime avail itself of social and intellectual progress rather than bind us to what we think we know about an indeterminable past?

A second and perhaps more significant objection to the form of originalism I have described derives from its implication that the Constitution itself, through Article V, prescribes the sole method of peaceful amendment.⁵³ This is quite unlike most ordinary contracts, which customarily may be amended by consent of the parties, and indeed distinguishes the Constitution from most statutes, wills, judicial opinions, and other documents to which constitutions have been too casually compared. Not only is Article V exclusivity an unattractive conception of constitutional change, but it does not now nor has it ever described our actual constitutional practice.⁵⁴ Courts bound by the Supreme Court's constitutional precedents are not free in our legal culture to regard those precedents as distinct from what the Constitution "really" contains or contained.⁵⁵ Nor is the Supreme Court as a body fond of relying on that distinction in any consistent way. The Rehnquist Court in particular, in cases such as *City of Boerne v. Flores*⁵⁶ and *Dickerson v. United States*,⁵⁷ refused to permit the Court's constitutional decisions—originalist or otherwise—to be regarded as anything short of authoritative.

Apart from Supreme Court doctrine, our political culture also recognizes our authoritative higher law as extending beyond the text and original understandings of our Constitution. Much of what we almost universally believe the Constitution "contains" diverges from that understanding. A committed historian could easily conclude that the Court's privacy and women's rights decisions

53. Notably, the text of Article V does not declare itself to be the exclusive means of amendment.

54. See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1459 (2001) ("[C]onstitutional amendments have not been an important means of changing the constitutional order."); cf. Simon, *supra* note 45, at 613 ("[T]he notion that the Constitution means what it meant in 1789 has had virtually no currency at all in the Supreme Court during most of this century.").

55. This distinction should not be conflated with the distinction between constitutional meaning and judicial enforcement, which has been the subject of much scholarly debate. Compare Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006) (arguing for a clear distinction between constitutional rights and judicial remedies), with Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (arguing that constitutional rights are shaped by judicial remedies). I do not mean to say that there is no gap between what the Constitution contains and what courts are willing to enforce, nor do I believe that judicial enforcement of constitutional rights is coextensive with the platonic ideal of our constitutional rights. What I mean, rather, is that there is no gap between that ideal and the Court's conception of those rights themselves. That is, to the extent that our Constitution constitutes or is part of our rule of recognition, Court precedents that actually recognize rights form part of that rule. See Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 659 (1987).

56. *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997) (holding that the Religious Freedom Restoration Act was beyond Congress's power to legislate under Section Five of the Fourteenth Amendment because its remedial legislation was not congruent and proportional to unconstitutional conduct as recognized by the Court).

57. *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (rebuking Congress's effort to legislatively supercede *Miranda v. Arizona*, 384 U.S. 436 (1966)).

are wrong, and that the use of paper money as legal tender, the use of the federal commerce power to establish the welfare state and federal civil rights laws, and the federal administrative state itself are all unconstitutional. Yet all of these doctrinal developments lie beyond any reasonable constitutional objection.⁵⁸

What is an originalist to make of this fact? Justice Scalia at times succumbs to *stare decisis* concerns out of a need, he says, to avoid reinventing the wheel in every case. “[S]*tare decisis* is not *part of* my originalist philosophy,” he explains, “it is a pragmatic *exception* to it.”⁵⁹ Bork, too, does not allow that *stare decisis* is a problem for his version of originalism. Because his is a theory both of interpretation and of adjudication, Bork concedes that a judge who has determined a particular interpretation to be wrong as a matter of original understanding has other, practical machinations to go through before deciding how to proceed. “The previous decision on the subject may be clearly incorrect but nevertheless have become so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions, that the result should not be changed now.”⁶⁰

Regarding *stare decisis* as simply a “pragmatic exception” to originalism and moving on either misunderstands the objection or ignores it. Originalists of the kind I have discussed in this Part believe the text and original understanding of the Constitution are binding because that text and that understanding were popularly ratified through a particular extraordinary democratic process. But it cannot be that the Constitution continues to bind us for *that* reason, because all of those democrats are dead. In order to answer the question of why the Constitution binds us, and to remain faithful to democratic constitutionalism, we must ask what *we* consented to, and continue to assent to, through an extraordinary democratic process.⁶¹ That democratic process cannot be prescribed by the Constitution itself nor indeed can it be *prescribed* by any *a priori*

58. See Balkin, *supra* note 18, at 299; Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL’Y 495, 502 (1996); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 724–39 (1988). See generally BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (2000) (applying his theory of amendment outside of Article V to the Reconstruction Amendments and the New Deal).

59. Scalia, *supra* note 6, at 140.

60. BORK, *supra* note 22, at 158.

61. See Brest, *supra* note 28, at 225. There are, of course, normative arguments for constitutional legitimacy that do not rely on any conception of consent. See, e.g., Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 FORDHAM L. REV. 2087, 2104–15 (2001) (justifying judicial enforcement of the written constitution on the ground that judges are more likely than legislatures to protect natural rights); Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 157, 162–64 (Larry Alexander ed., 1998) (arguing that constitutional decisions are justified only if they are morally justified, independent of consent). As these arguments are not typically used to justify originalism, I do not address them here. But see generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004) (arguing that consent is not an appropriate basis for constitutional legitimacy but that originalism best preserves pre-constitutional liberty rights).

set of rules, for that would beg the question.⁶²

On those criteria, there is no reason to privilege the process that created the written Constitution over the one that creates and sustains certain contemporary constitutional understandings that depart from the original. Hardly anyone of influence questions the constitutionality of minimum wage laws,⁶³ the National Labor Relations Act,⁶⁴ or the social security and federal unemployment insurance systems.⁶⁵ Their settled constitutionality did not materialize all at once, but resulted from the political process that produced the Roosevelt presidency and his Democratic Congresses, and from the absence of either subsequent challenges to the constitutional rules the New Deal Justices declared or subsequent political or legal developments that undermined those constitutional rules.⁶⁶ It is that sort of acquiescence over time, not formal ratification ages ago, which constitutes the "consent" necessary to legitimate supreme law on democratic terms.⁶⁷ Constitutional interpretive methodologies must account for—and not just grudgingly tolerate—those developments.⁶⁸ Stated in terms that are familiar to legal academics, the theory of originalism fails to resolve the countermajoritarian difficulty. It is not unique among constitutional methodologies in that respect, but it might be unique in the extent to which it exacerbates that difficulty (contrary to its claims) by locating the source of judicial authority as far back in time as possible.

D. NEW ORIGINALISM

It is the odd academic originalist who subscribes to a full-throated version of the methodology just described and critiqued. That is not to say that what might be called Scalian originalism is not influential, and, indeed, the next Part

62. See Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1128 (1998) ("No document is authoritative because it says so."); see also Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 459 (1994) (arguing that "Congress would be obliged to call a convention to propose [constitutional] revisions if a majority of American voters so petition; and that an amendment or new Constitution could be lawfully ratified by a simple majority of the American electorate"). Consider the Constitution itself, which did not abide by the amendment process prescribed by Article XIII of the Articles of Confederation.

63. See *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

64. See *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937).

65. See *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding the Social Security Act's old-age benefit provisions); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (upholding the Social Security Act's unemployment compensation tax scheme).

66. See generally ACKERMAN, *supra* note 58, at 255–344.

67. Sandalow, *supra* note 46, at 1050 ("In making [constitutional] decisions, . . . the past to which we turn is the sum of our history, not merely the choices made by those who drafted and ratified the Constitution."); cf. *Missouri v. Holland*, 252 U.S. 416, 434 (1920) (stating that, in deciding what powers are reserved to the States under the Tenth Amendment, "[w]e must consider what this country has become" (emphasis added)).

68. See Greenawalt, *supra* note 55, at 659 (recognizing that constitutional precedents of the Supreme Court constitute part of the rule of recognition in the United States). See generally Levinson, *supra* note 55 (arguing that precedent is more important than originalism for Supreme Court Justices and inferior court judges).

demonstrates quite the opposite. What it does say is that over the two decades of Justice Scalia's tenure on the Court, academics sympathetic to originalism have filled in some of its theoretical gaps. Few academic originalists, for example, are nearly as enamored of original expected application (as against original meaning) as Justice Scalia appears to be in practice.⁶⁹ McConnell, now a Tenth Circuit judge, has suggested a richer account of the role that precedent must play in the constitutional interpretation even of those who take original understanding seriously.⁷⁰ Akhil Amar, whose work might be described as "structuralist" in the mold of Charles Black,⁷¹ but who has made a career out of rigorous examination of drafting history and original public meaning, has provocatively suggested that the Constitution may legitimately be amended by bare majority outside of the Article V framework.⁷² That concession, or some other allowance for the exercise of sovereignty by present majorities, seems to me necessary in light of the dead-hand critique as I have stated it.

Much of the problem with Scalian originalism arises out of his claim that it is the only correct mode of constitutional interpretation. Such a statement requires a rationale grounded in political theory, and the consent-based theory Justice Scalia relies upon does not adequately justify originalism's exclusivity. Compare that, however, with John McGinnis and Michael Rappaport, who seek to defend originalism on the pragmatic ground that constitutional rules simply work better when they are produced by a supermajoritarian process.⁷³ Reliance on good governance as a justification for originalism emerges from a different, realist tradition and faces its own set of challenges, but those challenges are different from the ones Justice Scalia faces.

Randy Barnett and Keith Whittington have helpfully written of what they call "new" originalism.⁷⁴ In contrast to Justice Scalia's defensive, reactionary brand of originalism, which arose primarily as a criticism of the Warren Court, new originalism "is more concerned with providing the basis for positive constitutional doctrine than the basis for subverting doctrine."⁷⁵ It is more historically

69. See Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 384 (2007) ("[A]lmost nobody espouses fidelity to the originally expected applications."). But see Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 449 (2007) ("Today's original meaning originalists often view original expected applications as very strong evidence of original meaning, even (or perhaps especially) when the text points to abstract principles or standards.").

70. See McConnell, *supra* note 35, at 2417 (arguing that "overwhelming public acceptance constitutes a mode of popular ratification, which gives [long-standing decisions] legitimacy and authority under the theory of active liberty"). See generally Monaghan, *supra* note 58.

71. See, e.g., Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671 (2002); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999). See generally CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

72. See Amar, *supra* note 62, at 459.

73. See John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 385 (2007).

74. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 608 (2004).

75. Whittington, *supra* note 74, at 608.

rigorous, less likely to emphasize judicial restraint, and more genuinely attuned to original public meaning than to original intent.⁷⁶ I am not convinced that an originalist “school” can be identified that has all of these characteristics, but originalists today have certainly developed more comprehensive, more positive versions of originalism than Bork’s and Justice Scalia’s.⁷⁷ These versions of originalism are less susceptible to (though not wholly immune from) the critiques I have outlined.

Whether “new” originalists ultimately overcome the theoretical failings I have identified remains to be seen. Originalism outside of Justice Scalia’s defensive, critical paradigm has not yet had a complete intellectual vetting. Undeniably, though, that paradigm has very little currency within today’s legal academy. The next Part examines a more sympathetic audience.

II. POPULAR ORIGINALISM

In 2005, Mark Levin, an alumnus of the Reagan Justice Department under Edwin Meese and, of greater moment, an extremely popular radio talk show host, authored a book called *Men in Black: How the Supreme Court Is Destroying America*.⁷⁸ Using provocative chapter titles⁷⁹ and prefacing the book with provocative (not to mention demonstrably false) statements—for example, that Thurgood Marshall “couldn’t have had a weaker grasp of the Constitution”⁸⁰—

76. *Id.* at 607–10.

77. Whittington himself is Exhibit A. See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999) (arguing that originalism is the judicial interpretive methodology most appropriate for a government system grounded on popular sovereignty, but eschewing judicial restraint as a justification for originalism); see also BARNETT, *supra* note 61 (arguing that the Constitution is legitimate because it protects the liberty rights retained by the people and defending originalism as the best way to preserve the Constitution); Balkin, *supra* note 18 (arguing that original-meaning originalism requires fidelity to the principles embodied in the Constitution’s generalities and therefore need not be inconsistent with living constitutionalism). It is not uncommon to see Justice Scalia himself included among the new originalists, owing to his eschewing of original intent in favor of original public meaning. See, e.g., Posting of Lawrence Solum to Legal Theory Blog, <http://lsolum.typepad.com/legaltheory/2008/06/heller-and-orig.html> (June 28, 2008, 10:51 EST). I have no quarrel with the notion that Justice Scalia’s originalism differs in important ways from that of, say, Berger or Edwin Meese, see *supra* section I.A, but calling it therefore “new” is another matter. Justice Scalia articulated a public defense of original-meaning originalism as early as 1986, see Kesavan & Paulsen, *supra* note 22, at 1139–40 (citing Antonin Scalia, Speech Before the Attorney General’s Conference on Economic Liberties (June 14, 1986), in OFFICE OF LEGAL POLICY, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 106 (U.S. Dept. of Justice 1987)), long before the term “new originalism” came into vogue. If there is a new originalism, it inheres not in the proliferation of original-meaning originalism but in what one might call the depoliticization of originalism. The trends Whittington and Barnett identify result in large measure from the academic reaction to originalism’s infiltration of the political sphere. Both conservative and liberal legal scholars have had reason to articulate putatively politically independent bases for originalism, the former to defend it against academic attack and the latter to appropriate it for progressive ends. See *infra* Part IV.

78. MARK R. LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA* (2005).

79. See, for example, Chapter Six (“Endorsing Racism”) and Chapter Eight (“Al Qaeda Gets a Lawyer”).

80. LEVIN, *supra* note 78, at 9.

Levin set about showing that all judges are either originalists or “activists.”⁸¹ Rush Limbaugh wrote the introduction, Meese the afterword. The book spent nine weeks on the *New York Times* best-seller list, reaching as high as third.⁸² At the time of publication, Levin’s radio show was ranked number one in the evening-commute time slot—in New York City.⁸³

Two years later, self-styled originalist Ilya Somin started a post on a popular conservative legal blog discussing whether the Air Force is unconstitutional.⁸⁴ The argument, which Somin sought to rebut, is that Article I, Section 8 of the Constitution grants Congress the power to “raise and support Armies” and to “provide and maintain a Navy,” but does not expressly permit Congress to create another standing military branch. Somin did not argue that the Constitution’s allowance for a federal army and navy was designed to permit the national government to provide for the common defense⁸⁵ and that that principle permits Congress to establish an analogous air-based fighting force that the founding generation could not have contemplated.⁸⁶ Instead, he argued that two “compelling” answers to the claim of unconstitutionality were, first, that it may be prohibited to have an independent Air Force but not one that is part of the Army or Navy, and second, that the Air Force may be created under the Necessary and Proper Clause.⁸⁷ Commentators engaged Somin’s argument.

Last Term, the Supreme Court struck down the District of Columbia’s handgun ban on Second Amendment grounds.⁸⁸ The Court rejected the argument that the Second Amendment right to keep and bear arms is inexorably linked to militia service, despite a sixty-nine-year-old precedent that had been repeatedly (and recently) cited for that proposition by legions of federal courts.⁸⁹

81. *Id.* at 13.

82. See *Best Sellers: March 6, 2005*, N.Y. TIMES, Mar. 6, 2005, at 22; *Best Sellers: April 24, 2005*, N.Y. TIMES, Apr. 24, 2005, at 26. *Men in Black* also spent five weeks on *Library Journal*’s list of most-borrowed books. See *LJ Bestsellers: The Books Most Borrowed in U.S. Libraries*, LIBR. J., Sept. 1, 2005, at 200.

83. See *Conservative Leads Challenge to the Supreme Court*, P.R. NEWSWIRE, Feb. 8, 2005 [hereinafter *Conservative Leads Challenge*].

84. Posting of Ilya Somin to The Volokh Conspiracy, <http://volokh.com/posts/1170032632.shtml> (Jan. 28, 2007, 19:03 EST).

85. See AMAR, *supra* note 40, at 43–50 (outlining the Framers’ “geostrategic” vision for the new nation).

86. There might then be a question of whether Air Force appropriations could last longer than two years. That limitation was placed on army appropriations out of fear that a standing army was more threatening than a standing navy. See *id.* at 115–16; see also *id.* at 45 (“Unlike navies, armies could be and were easily used not just to thwart invaders, but also to crush individual freedom and collective self-government.”).

87. Somin, *supra* note 84.

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

89. *United States v. Miller*, 307 U.S. 174, 178 (1939); see *United States v. Lewis*, 455 U.S. 55, 65 n.8 (1980); *Silveira v. Lockyer*, 312 F.3d 1052, 1086 (9th Cir. 2002); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 711 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265, 1272 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995) (“[T]he lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual, right.”); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992);

Instead, while conceding that militia composition and readiness was the purpose behind the Second Amendment, the five-to-four majority concluded that the original meaning of the Amendment was not limited to that purpose and controlled the outcome of the case.⁹⁰

Originalism is in renaissance. The idea that the Constitution should be interpreted according to its original meaning or the intent of its drafters is not new, of course, and it would be hyperbolic to say that originalism ever entirely went away. But as Justice Scalia has noted, many of the Warren Court's individual rights decisions, and many of the liberal academic defenses of those decisions, have been historically anomalous in their open rejection of originalist methods.⁹¹ Bork, too, has lamented that "[w]hat was once the dominant view of constitutional law—that a judge is to apply the Constitution according to the principles intended by those who ratified the document—is now very much out of favor among the theorists of the field."⁹²

If they ever did, however, professional theorists no longer occupy the entire field of constitutional law, nor even of constitutional theory. This Part discusses the salience of originalism outside the academy, within constitutional practice and popular political discourse. I argue that, while not nearly as dominant as Justice Scalia would prefer, originalism is by those measures better off now than when he found it. First, in section II.A, I briefly chronicle the history of originalism in constitutional argument. Contrary to Scalia's and Bork's implications, the notion that the meaning of constitutional provisions is fixed at the time of their commitment to text has been viewed with skepticism by influential constitutional theorists for at least a century. What is new, however, is the magnitude of political mobilization that has accompanied the originalism movement of which Scalia and Bork are part. I identify the fruits of that mobilization in section II.B, which discusses *Heller* and other exemplars of originalism within contemporary constitutional practice, and section II.C, which discusses the salience of constitutional methodology outside of academic discourse. Whatever the state of the academic debate around originalism, originalist arguments have the capacity to mobilize support around substantive political ends, to destabilize the legal landscape, and to influence the selection of federal judges.

A. A BRIEF HISTORY OF ORIGINALISM

Reactive originalism, born as it is of an obsession with the perceived patholo-

United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976); Cases v. United States, 131 F.2d 916, 922 (1st Cir. 1942); see also United States v. Scanio, No. 97-1584, 1998 U.S. App. LEXIS 29415, at *5 (2d Cir. Nov. 12, 1998) ("[T]he Supreme Court has held that the Second Amendment right to keep and bear arms is meant solely to protect the right of the states to keep and maintain armed militia." (emphasis omitted)).

90. See *Heller*, 128 S. Ct. at 2801.

91. See Scalia, *supra* note 2, at 852-54.

92. BORK, *supra* note 22, at 143. If Bork's contentious Supreme Court nomination fight is any measure, originalism was hardly the unanimous preference of the American people of 1987 either.

gies of living constitutionalism, is largely of twentieth-century vintage, but grounding legal interpretation in original understanding is not new. Writes Howard Gillman, buttressing Scalia's and Bork's contentions, "From the time of the founding throughout the nineteenth century, there was a consensus in court opinions and legal treatises that judges were obligated to interpret the Constitution on the basis of the original meaning of constitutional provisions."⁹³ That proposition is contestable as a descriptive claim about constitutional practice, but it is certainly the case that strong intentionalist rhetoric was a consistent theme of Supreme Court opinions throughout the nineteenth century.⁹⁴ This is hardly surprising given the generally positivistic tone that dominated nineteenth-century American legal thought.⁹⁵ Most infamously, in *Dred Scott v. Sandford*, Chief Justice Taney relied heavily on his view of original expected application to sustain his argument that Sanford, born a slave and descended from slaves but claiming to be a free man,⁹⁶ was not a "citizen" of the State of Missouri for the purpose of invoking the Court's diversity jurisdiction.⁹⁷ It did not matter to Taney that such a reading might be incompatible with contemporaneous notions of personhood:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only

93. Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 *STUD. AM. POL. DEV.* 191, 192 (1997).

94. See, e.g., *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 574, 583 (1895) (striking down the federal income tax based on original intent), *vacated*, 158 U.S. 601 (1895); *Ex parte Bain*, 121 U.S. 1, 12 (1887) ("It is never to be forgotten that, in the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."), *overruled by* *United States v. Cotton*, 535 U.S. 625 (2002); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., dissenting) ("To say that the intention of the [Constitution] must prevail; that this intention must be collected from its words, that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers;—is to repeat what has been already said more at large, and is all that can be necessary."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803) (stating that there is "no middle ground" between a "permanent" constitution and legislative supremacy).

95. See P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS* 245–50 (1991).

96. *Scott v. Sandford (Dred Scott)*, 60 U.S. 393, 403 (1857), *superseded by* U.S. CONST. amend. XIV.

97. *Id.* at 454; see Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 *CONST. COMMENT.* 37, 46 (1993) (calling Taney's opinion "a riot of originalism").

the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.⁹⁸

Taney, that is, was a Scalian originalist. It was sufficiently unusual for nineteenth-century judges to reason outside the presuppositions of intentionalism that the *Dred Scott* dissenters, rather than counterattack with teleological, minimalist, or dead-hand arguments, chose to dispute only Taney's tortured *reading* of original intent.⁹⁹

By contrast, Progressive Era thinkers, judges included, were comfortable applying the metaphor of evolution to the Constitution.¹⁰⁰ With Darwin came a reconsideration of the idea that an organism is now all that it ever was.¹⁰¹ Woodrow Wilson, in his pre-Presidential career as a constitutional theorist, made explicit the link between Darwinian evolution and national values. "[G]overnment," he said, "is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton."¹⁰² The Justices most associated with the Progressive movement—Holmes, Brandeis, and Cardozo—rather openly rejected original-

98. *Dred Scott*, 60 U.S. at 426.

99. See *id.* at 532–33 (McLean, J., dissenting); *id.* at 572–88 (Curtis, J., dissenting); JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW & POLITICS: A CONSTITUTIONAL HISTORY 12–13, 16–17, 20 (2005); Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 44, 48–51 (1993). See generally H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (discussing the early understanding of "original intent of the framers"). The first American treatise devoted entirely to interpretation was Francis Lieber's *LEGAL AND POLITICAL HERMENEUTICS* (Roy M. Mersky & J. Myron Jacobstein eds., Wm. S. Hein & Co., Inc. 1970) (1839). O'NEILL, *supra*, at 22. Lieber defined interpretation as "the art of finding out the true sense of any form of words: that is, the sense which their author intended to convey, and of enabling others to derive from them the same idea which the author intended to convey." LIEBER, *supra*, at 23.

100. See Gillman, *supra* note 93, at 214–16; see also CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW* 122 (New York, G.P. Putnam's Sons 1890) ("The binding authority of law . . . does not rest upon any edict of the people in the past; it rests upon the present will of those who possess the political power.").

101. See O'NEILL, *supra* note 99, at 30 ("The idea of an evolving, adapting law integrated the broader instrumentalist, updating, and organic tendencies of pragmatic philosophy, Progressive politics, and Darwinist evolutionary theory.").

102. WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 56 (1908). Wilson was parroting the earlier rhetoric of Harvard professor A. Lawrence Lowell. See A. LAWRENCE LOWELL, *ESSAYS ON GOVERNMENT* 2–3 (1889) ("[A] political system is not a mere machine which can be constructed on any desired plan, and the parts of which can be adjusted according to the fancy of the designer. It is far more than this. It is an organism; and in order to appreciate its possible forms and the causes of its development, stability, or decay, it is necessary to investigate the laws of its organic life.");

ism as unable to accommodate the institutional changes brought about by economic modernization and the rise of the administrative state.¹⁰³

In the shadow of the Red Scare, the advent of constitutional evolutionism prompted a reactionary backlash that resulted in the creation of groups devoted to the preservation of enduring constitutional values. Thus, the Constitution Anniversary Association formed in 1923 with the goal of designating September 17 as Constitution Day, with a concomitant program of civics education in schools.¹⁰⁴ A cadre of these preservationist groups formed the Sentinels of the Republic, whose aim was to induce one million people "to pledge themselves to guard the Constitution and wage war on socialism."¹⁰⁵ The problem, said former Solicitor General and preservationist James Beck, was that Americans "at heart, [were] not interested in their Constitution and the spirit of pragmatism dominate[d] the consideration of every constitutional problem, if and when they consider[ed] it at all."¹⁰⁶

As Bruce Ackerman and others have detailed, the constitutional crisis provoked by President Roosevelt's legislative initiatives dramatized the dichotomy between preservationists and evolutionists.¹⁰⁷ Roosevelt resorted frequently to the rhetoric of living constitutionalism,¹⁰⁸ and by the time of his second election the legal academy was replete with non-originalist scholars.¹⁰⁹ Some of these scholars, such as Harvard's Felix Frankfurter and Yale's Thurman Arnold, would serve in Roosevelt's administration and on the federal bench. The most significant non-originalist constitutional triumphs of the 1930s, *Home Building*

MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* 19–20 (Transaction Publishers rev. ed. 2006) (1986).

103. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) ("[G]eneral limitations on the powers of government . . . do not forbid the United States or the states from meeting modern conditions by regulations which a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world." (internal citations and quotation marks omitted)); *Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes, J.) ("[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 17 (1921) ("The great generalities of the constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them. Interpretation, thus enlarged, becomes more than the ascertainment of the meaning and intent of lawmakers whose collective will has been declared. It supplements the declaration, and fills the vacant spaces, by the same processes and methods that have built up the customary law.").

104. KAMMEN, *supra* note 102, at 221.

105. *Id.* at 225 (internal quotation marks omitted); see Gillman, *supra* note 93, at 227–28.

106. KAMMEN, *supra* note 102, at 230–31.

107. See ACKERMAN, *supra* note 58.

108. See O'NEILL, *supra* note 99, at 32; see also Gillman, *supra* note 93, at 230 (noting Roosevelt's statement in his first inaugural that the "Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form").

109. See Gillman, *supra* note 93, at 234.

& *Loan Ass'n v. Blaisdell*¹¹⁰ and *West Coast Hotel v. Parrish*,¹¹¹ were met by strong originalist dissents from Justice Sutherland.¹¹² The Sutherland dissents differed in important ways, however, from the brand of originalism Justice Scalia has popularized. The originalist project begun in the 1970s aimed in large measure to restore power to prosecutors and state legislatures. Justice Sutherland's goal, instead, was to *curtail* the power of the coordinate branches of the federal government. Thus, in *West Coast Hotel*, we see Justice Sutherland's agitated rebuttal of the charge of judicial activism:

Self-restraint belongs in the domain of will and not of judgment. The check upon the judge is that imposed by his oath of office, by the Constitution, and by his own conscientious and informed convictions; and since he has the duty to make up his own mind and adjudge accordingly, it is hard to see how there could be any other restraint.¹¹³

I argue in section III.D that the mantle of judicial restraint is essential to originalism's present political success. It is useful, then, to note that the rhetoric of restraint has not always been associated with originalism and is hardly an inevitable feature of it.

*Brown v. Board of Education*¹¹⁴ must bear some responsibility for that present association. The *Brown* Court's conspicuous disregard for the original expected application of the Equal Protection Clause cried out for an intellectually satisfying theory of the case.¹¹⁵ And using the putatively factbound *Brown* to outlaw all manner of public segregation in a series of unsigned summary

110. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

111. *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

112. *See id.* at 403 (Sutherland, J., dissenting) ("[T]o say . . . that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise."); *Blaisdell*, 290 U.S. at 453 (Sutherland, J., dissenting) ("The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent of its framers and the people who adopted it.").

113. *W. Coast Hotel*, 300 U.S. at 402.

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

115. Between the first and second arguments of *Brown*, the Court requested briefing specifically on whether "the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools." *Brown v. Bd. of Educ.*, 345 U.S. 972, 972 (1953). Chief Justice Warren found the assorted evidence "at best . . . inconclusive" and then declared it irrelevant anyway: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation." *Brown*, 347 U.S. at 489, 492–93. The evidence remains (at best) inconclusive. Compare Michael W. McConnell, *Originalism and the Desegregation Decision*, 81 VA. L. REV. 947 (1995) (arguing a more persuasive originalist justification for the decision in *Brown*), with Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1881–83 (1995) (arguing that there is no originalist justification for the decision in *Brown*).

dispositions did not help matters.¹¹⁶ As liberal academics certain that *Brown* and its progeny were correctly decided scrambled to answer skeptics such as Learned Hand and Herbert Wechsler,¹¹⁷ they of necessity marginalized the relevance of original expected application to present interpretation. Thus, Alexander Bickel, a Frankfurter clerk during the first *Brown* argument, insisted that the level of generality at which we view constitutional principles may be so broad as to prove the ratifying generation incorrect about specific applications.¹¹⁸ And Louis Pollak, a member of the *Brown* legal team, argued that the original intent of the Equal Protection Clause was for its content to evolve.¹¹⁹ On these theories, original expected application was devalued in the service of judicial puissance.

Brown could not, of course, do all the work of tying originalism to judicial restraint. Polite company requires, after all, that constitutional methodologies be premised on *Brown*'s correctness, and to my knowledge neither Bork nor Justice Scalia has ever stated in such company that *Brown* was wrongly decided.¹²⁰ The originalist movement instead addresses its critique primarily at the criminal procedure,¹²¹ First Amendment,¹²² and substantive due process¹²³ precedents of the Warren and Burger Courts. It is well to remember that the Warren Court relied on original intent arguments plenty, including in some of its most criticized decisions.¹²⁴ But it is as much what the Warren Court symbolized as what it actually did that led Raoul Berger, a former New Deal liberal, to

116. See *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (buses); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (golf courses); *Baltimore v. Dawson*, 350 U.S. 877 (1955) (beaches).

117. See LEARNED HAND, *THE BILL OF RIGHTS* 54–55 (1958) (arguing that *Brown* was decided on the basis of values rather than law); Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1, 31–34 (1959) (arguing that the *Brown* Court failed to articulate a neutral principle justifying the result).

118. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 109–10 (Yale Univ. Press, 2d ed. 1986) (1962) (“When we find in history, immanent or expressed, principles that we can adopt or adapt, or ideals and aspirations that speak with contemporary relevance, we find at the same time evidence of inconsistent conduct. But we reason from the former, not from the frailties of men who, like ourselves, did not always live up to all they professed or aspired to.”); cf. Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 64 (1955) (suggesting that the content of the Equal Protection Clause intentionally “was left to future determination”).

119. See Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Response to Professor Wechsler*, 108 U. PA. L. REV. 1, 25 (1959) (musing, in an alternative writing of *Brown*, that the history of the Fourteenth Amendment “contemplat[es] an essentially dynamic development by Congress and this Court of the liberties outlined in such generalized terms in the Amendment”).

120. See BORK, *supra* note 22, at 74–83 (arguing that *Brown* was correctly decided even though inconsistent with original understanding).

121. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

122. See, e.g., *Stanley v. Georgia*, 394 U.S. 557 (1969); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

123. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1963).

124. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Flast v. Cohen*, 392 U.S. 83 (1968); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Engel v. Vitale*, 370 U.S. 421 (1962).

conclude that America had by its bicentennial devolved into "government by judiciary."¹²⁵ Johnathan O'Neill does not exaggerate in saying that Berger's book of that title, which argued vociferously for a return to Fourteenth Amendment decisions grounded in original intent, "had an explosive effect on constitutional debate in the late 1970s and 1980s."¹²⁶ Berger believed that liberal academics, "floating on a cloud of post-Warren Court euphoria," had blinded themselves to the dangers of an unrestrained Judiciary.¹²⁷

While academics busied themselves mostly attacking and only occasionally defending Berger's critique, disaffected conservatives were recognizing a template for their recapture of the Federal Judiciary. Berger's book presaged the conservative political tide that swept Ronald Reagan into office and in 1980 gave Republicans control of the Senate for the first time in twenty-six years. Republicans pushed two strategies for reining in the federal bench. The first tack, court-stripping legislation, was a failure. Measures were introduced during Reagan's first term to limit federal court jurisdiction over school prayer,¹²⁸ busing,¹²⁹ and abortion¹³⁰ cases and to repeal the incorporation doctrine, the exclusionary rule, and federal question jurisdiction in the district courts.¹³¹ None of those bills succeeded.

The second tack was subtler and more effective. As Paul Bator, who served as Deputy Solicitor General under Rex Lee, wrote in response to the court-stripping movement, withdrawing the Court's jurisdiction because it makes decisions Congress does not like "is a technique of dealing with the Court that adopts the Court's own disregard of the Constitution's structural spirit."¹³² It is far better that criticism of the Court exploit Americans' reverence for separation of powers by developing and deploying arguments internal to jurisprudence. That was the mission of organizations like the Federalist Society, founded in 1982, and the Center for Judicial Studies, which in 1983 began publishing *Benchmark*, a bi-monthly opinion journal that promoted originalism as a means of reining in the Court.¹³³

After Reagan's landslide re-election, Meese replaced William French Smith as Attorney General and immediately set about making fidelity to original intent a subject of popular political discourse.¹³⁴ There was no ambiguity in Meese's message: a jurisprudence of original intent was essential to judicial restraint.

125. See BERGER, *supra* note 21.

126. O'NEILL, *supra* note 99, at 123-24.

127. BERGER, *supra* note 21, at 4-5.

128. S. 784, 98th Cong. (1983); H.R. 183, 98th Cong. (1983); H.R. 253, 98th Cong. (1983).

129. S. 139, 98th Cong. (1983); H.R. 798, 98th Cong. (1983).

130. S. 26, 98th Cong. (1983); S. 210, 98th Cong. (1983).

131. S. 3018; 97th Cong. (1982).

132. Paul M. Bator, *Withdrawing Jurisdiction from Federal Courts*, 7 HARV. J.L. & PUB. POL'Y 31, 31 (1984).

133. See O'NEILL, *supra* note 99, at 129-30; Steven G. Calabresi, *Introduction to ORIGINALISM: A QUARTER-CENTURY OF DEBATE I* (Steven G. Calabresi ed., 2007).

134. See O'NEILL, *supra* note 99, at 154.

And, in turn, judicial restraint was essential to democratic self-government. In an early speech before the American Bar Association, Meese said that “[t]o allow the courts to govern simply by what it [sic] views at the time as fair and decent, is a scheme of government no longer popular; the idea of democracy has suffered.”¹³⁵ It would therefore be the policy of the Reagan Justice Department “to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment.”¹³⁶ Meese’s well-publicized series of speeches in 1985 and 1986 generated voluminous debate both within the legal academy and in popular publications,¹³⁷ and prompted public responses from Justices Brennan and Stevens.¹³⁸

Deliberately and provocatively, Meese’s public promotion of originalism set the stage for the nomination of Bork to replace Lewis Powell on the Supreme Court in 1987. A few months earlier, the Republican-controlled Senate had confirmed William Rehnquist as Chief Justice and Scalia to fill Rehnquist’s seat. With Democrats having obtained a Senate majority in the 1986 midterm elections, and with the Court’s swing vote in the balance, the Bork nomination was a test of conservatives’ originalism strategy. The public’s attention had focused on the Court’s personnel before, most famously during the New Deal era. But never before had the public debate focused so intently on methodology *per se*. As Robert Post and Reva Siegel write, “Although Americans have traditionally incorporated assertions about constitutional text and history into both liberal and conservative arguments, it is almost unknown for a general theory of constitutional interpretation to itself become a site for popular mobilization.”¹³⁹ Americans spent the summer of 1987 debating constitutional methodology, precisely as Meese and his allies wanted.

Meese could not have been pleased with the immediate result of his efforts—Bork’s spectacular defeat—but the long-term scorecard is more encouraging. As Randy Barnett has noted, the conventional storyline is that originalism’s theoretical bona fides were fatally undermined by the hermeneutic and historical critiques of scholars such as Brest and H. Jefferson Powell,¹⁴⁰ and the failed Bork nomination laid bare originalism’s inability to gain currency with the public. This tale is incomplete. To be sure, the originalism trumpeted by Meese and Bork is, as I have discussed, *non gratus* within much of the legal academy, and most of the public does not understand the original expected application of constitutional provisions to be the only legitimate interpretive guide.¹⁴¹ But

135. Meese, *supra* note 14, at 465.

136. *Id.* at 465–66.

137. See O’NEILL, *supra* note 99, at 156–57.

138. See Justice William J. Brennan, Jr., Speech to the Text and Teaching Symposium (Oct. 12, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 11 (1986) [hereinafter *GREAT DEBATE*]; Justice John Paul Stevens, Speech Before the Federal Bar Association (Oct. 23, 1985), in *GREAT DEBATE*, *supra*, at 27 (1986).

139. Post & Siegel, *supra* note 14, at 548.

140. See BARNETT, *supra* note 61, at 89–91.

141. See *supra* section I.C; *infra* text accompanying notes 219–24.

using historicist arguments to enforce an ideal of judicial restraint, to achieve political goals, and to re-orient settled legal practice is alive and well.

B. ORIGINALISM IN PRACTICE

United States v. Miller involved the prosecution of two men for carrying an unregistered sawed-off shotgun across the border from Oklahoma into Arkansas in violation of the National Firearms Act.¹⁴² The men argued successfully in the district court that the Act was unconstitutional under the Second Amendment.¹⁴³ The Supreme Court heard the case on direct appeal and reversed in a unanimous opinion. Justice McReynolds wrote for the Court that the "obvious purpose" of the Second Amendment was to effectuate the Militia Clause and that the Amendment "must be interpreted and applied with that end in view."¹⁴⁴ Because there was no evidence in the record that the possession or use of a sawed-off shotgun "at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia," there was no warrant to hold the Act unconstitutional.¹⁴⁵

Miller is not a model of clarity. It could be read for the proposition that the Second Amendment is only enforceable on behalf of individuals rendering or training for militia service. It could also be read as guaranteeing the right to keep and bear arms to a broader set of individuals but only insofar as their *weapons* are relevant to a well-regulated militia.¹⁴⁶ It could even be read as holding that only regulations that frustrate the Militia Clause—that is, state but not federal regulation of firearms—violate the Second Amendment, though that reading would be inconsistent with the notion that the Bill of Rights was intended as a limitation upon Congress.

Until 1999, no federal court had read *Miller* as embracing an individual right to keep and bear arms unqualified by militia readiness. In *United States v. Lewis*, the Supreme Court said, citing *Miller*, that a federal ban on firearm possession by felons does not "trench upon any constitutionally protected liberties."¹⁴⁷ Because the felon-in-possession statute covers muskets, gunpowder, bullets, and other ordnance, the implication can be drawn that the Second Amendment does not confer rights on civilians against the federal govern-

142. *United States v. Miller*, 307 U.S. 174, 174–75 (1939); see National Firearms Act, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. § 1132 (2006)).

143. *Miller*, 307 U.S. at 177.

144. *Id.* at 178 ("With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made."). The Militia Clause reads: "The Congress shall have power . . . [t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. CONST. art. I, § 8.

145. *Miller*, 307 U.S. at 178.

146. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2814 (2008).

147. *United States v. Lewis*, 445 U.S. 55, 65 n.8 (1980) (citing *Miller*, 307 U.S. 174, 178 (1939)).

ment.¹⁴⁸ Ten federal Courts of Appeals have taken a “collective rights” view of the Amendment, holding or implying that it only protects the rights of the States to maintain armed militias, and until 2001 none had adopted a contrary position.¹⁴⁹ Such was the consensus on that view that former Chief Justice Warren Burger declared in a 1991 television interview that grounding opposition to gun control legislation in a putative Second Amendment right was “one of the greatest pieces of fraud, I repeat the word ‘fraud,’ on the American public by special interest groups that I have ever seen in my lifetime.”¹⁵⁰ As Carl Bogus has written, “If there is such a thing as settled constitutional law, the Second Amendment may have been its quintessential example.”¹⁵¹

In 1999, Judge Sam R. Cummings, a Reagan appointee sitting in the Northern District of Texas, held that 18 U.S.C. § 922(g)(8), which prohibits firearm possession by a person subject to a temporary restraining order, violated the Second Amendment.¹⁵² Judge Cummings acknowledged, understating things, that “several other federal courts have held that the Second Amendment does not establish an individual right to keep and bear arms, but rather a ‘collective’ right, or a right held by the states.”¹⁵³ He nevertheless concluded that “[a] historical examination of the right to bear arms, from English antecedents to the drafting of the Second Amendment, bears proof that the right to bear arms has consistently been, and should still be, construed as an individual right.”¹⁵⁴ A panel of the Fifth Circuit reversed, but not before agreeing with the district court that the Second Amendment confers an individual right.¹⁵⁵ The court conceded that “almost all of our sister circuits have rejected any individual rights view of the Second Amendment,” but it concluded that those opinions did so “either on the erroneous assumption that *Miller* resolved that issue or without sufficient articulated examination of the history and text of the Second Amendment.”¹⁵⁶ Six years later the D.C. Circuit also came around to the individual rights view and struck down the District’s handgun ban in an opinion written by

148. See also *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 n.10 (1961) (citing *Miller* for the proposition that the Second Amendment should not be read literally).

149. See *supra* note 89.

150. *MacNeil/Lehrer Newshour: First Freedoms* (PBS television broadcast Dec. 16, 1991).

151. Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 3 (2000); cf. Chris Mooney, *Showdown: Liberal Legal Scholars Are Supporting the Right To Bear Arms. But Will Historians Shoot Them Down?*, LINGUA FRANCA, Feb. 2000, at 26, 32 (quoting Akhil Amar’s view that the collective rights view “might be false as a matter of historical fact but nonetheless true as a matter of constitutional law”).

152. *United States v. Emerson*, 46 F. Supp. 2d 598, 611 (N.D. Tex. 1999), *rev’d*, 270 F.3d 203 (5th Cir. 2001).

153. *Id.* at 607.

154. *Id.* at 602.

155. *United States v. Emerson*, 270 F.3d 203, 264–65 (5th Cir. 2001). That portion of the opinion was joined only by Judge Garwood, a Reagan appointee and the opinion’s author, and Judge DeMoss, appointed by the first President Bush. Judge Parker, a Clinton appointee, specially concurred to say that the “individual rights” discussion was dicta and need not be followed by any court. *Id.* at 272 (Parker, J., specially concurring).

156. *Id.* at 227.

Judge Silberman, also a Reagan appointee.¹⁵⁷

That case gave us *Heller*. It is fashionable among legal academics to refer to *Heller* as a significant triumph for originalism.¹⁵⁸ It is a victory, to be sure, though perhaps not of the magnitude or for the reasons sometimes cited. Justice Scalia's majority opinion is, as explained below, as fixated on originalism as any this country's High Court has ever produced. That conceded, much of the early scholarly attention that followed *Heller* has burrowed in on the dissenting opinions, particularly that of Justice Stevens, who, it is said, tried unsuccessfully to beat Scalia at his own game. Dale Carpenter's posting on the Volokh Conspiracy under the subheading, "We're all originalists now," was typical of many: "Stevens might not be a very accomplished originalist, or you might think he was wrong in this instance, but the mere fact that he and the three who joined him paid such obeisance to originalism on a matter of constitutional first impression confirms again its ascendance as a methodology."¹⁵⁹ That reading of the dissent risks confusing historicism with original-meaning originalism; the Stevens dissent is awash in the former but, best read, only flirts with the latter. It is nonetheless significant that the public face of *Heller* and of the resolution of the Second Amendment issue more generally is an abidingly originalist one.

The *Heller* majority opinion's rejection of the collective rights view is originalist to its core. At least three layers of original-meaning originalism are on display. First, the opinion specifically and repeatedly announces that the original understanding of the Second Amendment's text rather than the purpose behind its codification controls the Court's interpretation.¹⁶⁰ Justice Scalia's key move, and the one that most fundamentally divides the majority opinion from

157. *Parker v. District of Columbia*, 478 F.3d 370, 395 (2007).

158. See, e.g., Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13 ("Justice Scalia's opinion is the finest example of what is now called 'original public meaning' jurisprudence ever adopted by the Supreme Court."); Posting of Lawrence Solum to Legal Theory Blog, <http://lsolum.typepad.com/legaltheory/2008/06/heller-and-the.html> (June 28, 2008, 10:50 EST) ("The opinion of the Court by Justice Scalia provides the clearest expression of public meaning originalism to be found in a Supreme Court decision.").

159. *Heller* on a First Read, Posting of Dale Carpenter to The Volokh Conspiracy, <http://volokh.com/posts/1214514180.shtml> (June 26, 2008, 17:03 EST); see also Some Preliminary Reflections on *Heller*, Posting of Sandy Levinson to Balkinization, <http://balkin.blogspot.com/2008/06/some-preliminary-reflections-on-heller.html> (June 26, 2008, 17:47 EST) ("One of the most remarkable features of Justice Scalia's majority opinion . . . and Justice Stevens's dissent . . . is the view that the Second Amendment means only what it meant at the time of its proposal and ratification in 1789-91. Justice Scalia, of course, has long been identified with 'originalism' But Justice Stevens has certainly not embraced originalism. Yet they spend a total of 110 pages debating arcane aspects of the purported original meaning of the Amendment."); More on *Heller*, Posting of Mark Tushnet to Balkinization, <http://balkin.blogspot.com/2008/06/more-on-heller.html> (June 27, 2008, 9:57 EST) ("Both Justice Scalia's opinion for the Court and Justice Stevens's dissent devote a great deal of attention to the original understanding—or, as it turns out, understandings—of the Second Amendment's terms.").

160. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008) (suggesting that the meaning of the Second Amendment is that which would have been "known to ordinary citizens in the founding generation"); *id.* at 2805 (arguing that post-ratification history is relevant "to determine the public understanding" of the text); *id.* at 2810 (justifying his use of post-Civil War sources based solely on the fact that it reflects the views of those "born and educated in the early 19th century"); see also *id.* at

Justice Stevens's dissent, is to declare that the militia-related purpose announced by the Amendment's prefatory clause does not limit the meaning of the operative clause.¹⁶¹ For Justice Scalia, the meaning of the text essentially decides the case; the purpose behind the Amendment is only evidence of meaning where meaning is otherwise ambiguous.¹⁶² For Justice Stevens, by contrast, the motivation behind the Amendment is the chief end of interpretation, and the text is simply strong evidence of that motivation; the purpose the prefatory clause declares may therefore introduce, and not merely resolve, textual ambiguity.¹⁶³

To wit, Justice Scalia readily concedes that enactment of the Second Amendment was motivated by considerations of militia composition and readiness.¹⁶⁴ But because, on Scalia's view, the purpose-announcing prefatory clause "does not limit or expand the scope of the operative clause,"¹⁶⁵ it is the latter whose meaning controls the case. And by dint of his own analysis of contemporaneous dictionaries and analogous wording elsewhere in the Bill of Rights and in state constitutions,¹⁶⁶ Justice Scalia determines that the operative clause rather unambiguously "guarantee[s] the individual right to possess and carry weapons in case of confrontation."¹⁶⁷ On this analysis, once that guarantee is established by grammatical scrutiny, only directly contrary purpose or precedent may upset it.¹⁶⁸ The majority opinion mentions *Miller* just once (and even then, not to address its import as precedent) in the first twenty-six pages of the opinion. It's as if original meaning called "Shotgun!"

Justice Scalia's startlingly textualist reading of *Miller* itself is *Heller*'s second layer of original-meaning originalism. The "holding" of the *Miller* Court is that

2817 ("[T]he fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.").

161. *Id.* at 2801.

162. *Id.* at 2789–90 ("While we will begin our textual analysis with the operative clause, we will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose.").

163. *Id.* at 2826 (Stevens, J., dissenting) ("The preamble thus both sets forth the object of the Amendment and informs the meaning of the remainder of the text."). This critical distinction reprises the two Justices' long-running debate over textualism versus purposivism in the context of ordinary statutory interpretation. Compare *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1549 (2007) (Stevens, J., concurring) ("As long as [the] driving policy [behind policy-driven interpretation] is faithful to the intent of Congress (or . . . aims only to give effect to such intent)—which it must be if it is to override a strict interpretation of the text—the decision is also a correct performance of the judicial function."), with *id.* at 1557 (Scalia, J., dissenting) ("Contrary to the Court and Justice Stevens, I do not believe that what we are sure the Legislature *meant* to say can trump what it *did* say.").

164. See *Heller*, 128 S. Ct. at 2789, 2801 (majority opinion).

165. *Id.* at 2789.

166. Supplemented, it must be said, with a dose of *ipse dixit*.

167. *Heller*, 128 S. Ct. at 2797.

168. See *id.* at 2799 ("Before turning to limitations upon the individual right, however, we must determine whether the prefatory clause of the Second Amendment comports with our interpretation of the operative clause."); *id.* at 2812 (discussing case law only to determine "whether any of our precedents forecloses the conclusions we have reached about the meaning of the Second Amendment").

[i]n the absence of any evidence tending to show that the possession or use of a [sawed-off shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.¹⁶⁹

A literal reading of those words, and indeed their meaning circa 1939, arguably supports Justice Scalia's rendering of *Miller* as a statement about which kinds of weapons one has a Second Amendment right to keep and bear, rather than about the ends to which one may keep and bear those weapons.¹⁷⁰ An analysis of the *telos* of the opinion does not, however, bear that limitation. The *Miller* Court said that the Second Amendment "must be interpreted and applied" with a view toward its "obvious purpose to assure the continuation and render possible the effectiveness" of the militia.¹⁷¹ If the Court meant only that the Second Amendment does not apply to *arms* that have no military purpose, it chose an unduly capacious way of saying so. As Justice Stevens notes, adopting Justice Scalia's reading would naturally have prompted the *Miller* Court to inquire whether a sawed-off shotgun could be used for some legitimate non-military purpose, which it did not do.¹⁷² In atomistically divorcing the language of the *Miller* opinion from the obvious intent of its drafters—and from the meaning given it by legions of federal courts—Justice Scalia imposes the same methodological limitations on his reading of precedent as on his reading of constitutional text.

The third, perhaps most ambitious, layer of originalism evident in *Heller* lies in the majority's suggestion that *Miller*'s precedential weight is diminished by its failure to discuss the history of the Second Amendment with sufficient rigor.¹⁷³ When *stare decisis* becomes *stare originalist*, we have reached a high and unprecedented plane of historicism indeed.

Justice Stevens's contribution to *Heller*'s originalist moment is not the dissent's methodology, which on close reading is hardly unorthodox, but rather its failure to trumpet the revolutionary nature of the majority's approach. Although Justice Stevens is not nearly as explicit about his methodology as Justice Scalia, he makes clear that his principal interpretive guides are the purpose behind the Second Amendment—as identified by the text of both the preamble and the

169. *United States v. Miller*, 307 U.S. 174, 178 (1939).

170. *Heller*, 128 S. Ct. at 2814.

171. *Miller*, 307 U.S. at 178.

172. *Heller*, 128 S. Ct. at 2845 (Stevens, J., dissenting).

173. *Heller*, 128 S. Ct. at 2814–15 (majority opinion); *cf. id.* at 2824 (Stevens, J., dissenting) (referring to the majority's "feeble attempt to distinguish *Miller* that places more emphasis on the Court's decisional process than on the reasoning in the decision itself"). As to other Supreme Court precedents such as *Lewis*, Justice Scalia rejects the collective rights view suggested in that opinion by saying, "It is inconceivable that we would rest our interpretation of the basic meaning of any guarantee of the Bill of Rights upon such a footnoted dictum in a case where the point was not at issue and was not argued." *Id.* at 2816 n.25 (majority opinion). One page later, he rejects Justice Breyer's suggested Second Amendment reasonableness standard based on a footnoted dictum from *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). *Heller*, 128 S. Ct. at 2817 n.27.

operative clause—and stare decisis. He does dispute Justice Scalia's reading of the operative clause,¹⁷⁴ but quite unlike Justice Scalia, that clause is not the end of the matter: "Even if the meaning of the text were genuinely susceptible to more than one interpretation, the burden would remain on those advocating a departure from the purpose identified in the preamble and from settled law to come forward with persuasive new arguments or evidence."¹⁷⁵ Justice Stevens's turn to history¹⁷⁶ and his occasional references to the intent of the Framers¹⁷⁷ are best read as supporting his purposive approach to interpretation of both statutes and constitutions.¹⁷⁸ Purposive analysis, which seeks dynamically to give effect to the aims that animated the statute, is distinct from strict intentionalism, which aims instead to be faithful to the expectations of the legislature.¹⁷⁹

This distinction is not well understood outside of the legal academy. Had Justice Stevens more forcefully identified his own methodology as hewing to the Court's traditional eclectic mix of purpose and precedent, contrasting it explicitly with Justice Scalia's doctrinaire textualism, *Heller* might well have stood for the proposition that Scalia's originalism can garner five votes in some cases but remains fundamentally contested. Instead, much of the reaction to the case was premised on the mistaken notion that the Justices agreed on methodology but split only on their reading of history.¹⁸⁰ Politicians took the opportunity to praise Justice Scalia's faithfulness to original "intent,"¹⁸¹ and commentators either lauded or attacked each side's application of that approach.¹⁸² Whether or

174. The surest sign of the ambiguity of the operative clause is that both the majority and the dissenters read it as unambiguous. See *Heller*, 128 S. Ct. at 2826 (Stevens, J., dissenting); cf. *Scott v. Harris*, 127 S. Ct. 1769, 1785 (2007) (Stevens, J., dissenting) ("If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events.").

175. *Heller*, 128 S. Ct. at 2831.

176. *Id.* at 2824–36.

177. See, e.g., *id.* at 2822 ("[T]here is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution."); *id.* at 2841 (criticizing the majority on the ground that post-enactment statements "cannot possibly supply any insight into the intent of the Framers").

178. See *id.* at 2835 ("Madison's initial inclusion of an exemption for conscientious objectors sheds revelatory light on the purpose of the Amendment.").

179. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 14, 25–26 (1994).

180. See Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, *NEW REPUBLIC*, Aug. 27, 2008, at 32, 35 ("[Justice Stevens's opinion] leaves the impression that all that divided the two wings of the Court was a disagreement over the historical record.").

181. See, e.g., *Rep. Price Lauds Landmark Second Amendment Decision*, *U.S. FED. NEWS*, June 26, 2008 (quoting Tom Price, R-Ga.: "It is the benchmark by which all future cases regarding the Second Amendment will be gauged and validates the intent of our Founding Fathers."); *Rep. Young Lauds Overturning of D.C. Gun Ban*, *U.S. FED. NEWS*, June 26, 2008 (quoting Don Young, R-Alaska: "I am incredibly pleased today that finally, the freedoms created by the Second Amendment will apply to all citizens in our Nation's capital. The original intent of the Second Amendment was to protect each individual's right to keep and bear arms.").

182. See, for example, the statement of former New Jersey attorney general John Farmer, Jr.: "The problem for the majority opinion and for its 'original intent' foundation is that Justice Stevens' dissent looks at precisely the same evidence and reaches the opposite conclusion." John Farmer, Jr., *The Ongoing Duel About Guns: A Living Constitution vs. 'Originalism,'* *NEWARK STAR-LEDGER*, July 6,

not Justice Stevens's dissent could be characterized as an original-intent opinion, the only way both his opinion and the majority's could be understood as engaged in the same interpretive enterprise is if original intent and original meaning are but two sides of the same interpretive coin. That is untrue as a matter of constitutional theory but true as a matter of constitutional politics.

Indeed, no issue better illustrates the cleavage between the academic and public lives of originalism than the Second Amendment. That the only four federal court opinions since *Miller* to hold that the Amendment confers an essentially unqualified individual right to keep and bear arms were originalist opinions written by Reagan appointees is a better measure of Meese's success than the arguments, however strong, of Brest and other critics in the legal academy. The Second Amendment movement is an example of how, as Post and Siegel have argued, "[o]riginalism uses political and litigation strategies to infuse the law of the Constitution with contemporary political meanings that originalists find compelling."¹⁸³ The National Rifle Association had never endorsed a presidential candidate until it backed Reagan days before the 1980 election.¹⁸⁴ The tying of the gun rights lobby to the national Republican Party and political conservatism gained significant momentum throughout the 1980s, just in time for the originalism debate to reach its peak. That decade witnessed an explosion in the number of academic arguments addressing the Second Amendment generally and advocating the individual rights view specifically. According to research conducted by Robert Spitzer, only 9 of the 39 articles published through 1980 adopted that position, compared to 21 of the 38 published in the 1980s and 58 of the 87 published in the 1990s.¹⁸⁵ Many of those individual rights arguments, overwhelmingly originalist, were in turn cited by George W. Bush's Justice Department when it formally adopted the individual rights view in 2004,¹⁸⁶ and by Reagan's judicial appointees when

2008; see also E.J. Dionne, *The D.C. Handgun Ruling: Originalism Goes Out the Window*, WASH. POST, June 27, 2008, at A17 (arguing that the majority opinion is not "an honest attempt to determine the 'original' intention of the Constitution's authors"); Bryan Hendricks, *Historical Context of Second Amendment Validated*, ARK. DEM.-GAZETTE, July 6, 2008, at 12C (describing *Heller* as "affirm[ing] the amendment's original intent"); Colin McNickle, *On Second Thought . . .*, PITT. TRIB.-REV., June 29, 2008 (suggesting that Justice Scalia's view was consistent with original intent); Meg Mott, *On Guns and Kings*, BRATTLEBORO REFORMER, July 1, 2008 ("Scalia usually categorizes his method of interpretation as original intent."); Editorial, *Original Intent and Right To Bear Arms*, N.J. LAWYER, July 21, 2008, at 6 (suggesting that all three *Heller* opinions debated original intent and attributing to the majority the view that "original intent is . . . dispositive"); David Reinhard, *Guns and Judges: How in Heller Is This Judicial Activism?*, OREGONIAN, July 3, 2008, at C7 (saying the opposite of Dionne); Editorial, *Ruling Only Rekindles Debate over Gun Rights*, DES MOINES REG., June 29, 2008, at 10P (arguing that Justice Scalia "disingenuously misread" the original intent of the Framers).

183. Post & Siegel, *supra* note 14, at 560.

184. See Dudley Clendinen, *Soaps, Guns, and Politics*, N.Y. TIMES, Oct. 30, 1980, at B14.

185. Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 367-68 (2000).

186. Compare Whether the Second Amendment Secures an Individual Right, Op. Off. Legal Counsel (2004), <http://www.usdoj.gov/olc/secondamendment2.pdf>, and Letter from John Ashcroft, Att. Gen. to James Jay Baker, Executive Dir., National Rifle Association (May 17, 2001), <http://>

they set about making the individual rights view “true” as a matter of constitutional law.

Originalists seek to alter the hierarchy of constitutional argument. It is hoped that, in select cases, *prima facie* interpretation will be established by historicist moves at the expense of precedent or, at times, purpose, policy, structure, or even text.¹⁸⁷ In *Heller*, that meant devoting the bulk of the majority opinion to original meaning and relegating precedent to, in effect, an affirmative defense.¹⁸⁸ In *Printz v. United States*,¹⁸⁹ which invalidated the so-called commanding provisions of the Brady Handgun Violence Prevention Act¹⁹⁰ on largely originalist grounds, Justice Scalia was explicit that, in the absence of textual guidance, the Court would seek answers in “historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court . . . in that order.”¹⁹¹ None of which is to say that originalists necessarily act in bad faith. Certain of Justice Scalia’s originalist triumphs reflect what appears to be a genuine populism that does not always hue to traditional partisan lines. Both *Crawford v. Washington*¹⁹² and *Apprendi v. New Jersey*,¹⁹³ for example, used original meaning arguments to the immediate benefit of criminal defendants. The relevant “contemporary political meaning” in each case was a devotion to formalism and an aversion to judicial discretion, in *Crawford* to determine the reliability of testimonial hearsay and in *Apprendi* to find certain sentencing facts. *Heller*, *Crawford*, and *Apprendi* exemplify a remarkable turn in constitutional law wherein originalist arguments are used not to restrain constitutional updating but to overrule longstanding precedential lines with substantial reliance interests at stake. It was Meese’s aim to endow originalism with that affirmative power, the capacity not just to resist but actually to motivate constitutional change, and in that respect his efforts have been at least a qualified success.

Originalist arguments appear to find an increasingly receptive audience on the federal bench. According to research conducted by the Harvard Law School

www.nra.org/images/Ashcroft.pdf, with Margaret E. Sprunger, Comment, *D.C. as a Breeding Ground for the Next Second Amendment Test Case: The Conflict Within the U.S. Attorney's Office*, 53 CATH. U. L. REV. 577, 577 n.3 (2004) (quoting a letter from former Solicitor General Seth Waxman advocating the collective rights view). Notably, the Ashcroft letter suggests that the individual rights view is consistent with original intent.

187. See, e.g., *Alden v. Maine*, 527 U.S. 706, 730 (1999) (“To rest on the words of the [Eleventh] Amendment alone would be to engage in the type of ahistorical literalism we have rejected in interpreting the scope of the States’ sovereign immunity since the discredited decision in *Chisholm*.”).

188. Likewise, even in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), one of last Term’s most conspicuously non-originalist opinions, the Court concluded that the availability of habeas corpus does not depend on formal sovereignty only after determining that the evidence of historical practice at the time of the founding was inconclusive. See *id.* at 2251.

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

190. Brady Handgun Violence Protection Act, Pub. L. No. 103-159, 107 Stat. 1536 (codified as amended in scattered sections of 18, 42 U.S.C.).

191. *Printz*, 521 U.S. at 905 (emphasis added).

192. *Crawford v. Washington*, 541 U.S. 36, 42–43 (2004).

193. *Apprendi v. New Jersey*, 530 U.S. 466, 497 (2000).

Federalist Society, between 1957 and 1986 only three federal court decisions referenced founding-era dictionaries. Over that period, the average number of federal court decisions referencing *The Federalist* grew more or less steadily from 2.80 in the five years from 1957 to 1961 to 21.20 in the five years from 1982 to 1986. Both practices appear to have grown dramatically since then. In each of the four semi-decanal periods from 1987 to 2006—representing Justice Scalia's tenure on the Supreme Court—the number of founding-era dictionary references has been, respectively, 6, 11, 5, and 24; the average number of references to *The Federalist* has been 31.80, 43.00, 40.00, and 37.40. The trend is less dramatic with respect to references to records of the Philadelphia Convention or the state ratifying conventions. Over each of the five five-year periods from 1957 to 1981, the number of references to the conventions in federal court decisions has been, respectively, 5, 16, 18, 30, and 29. In the five semi-decanal periods since, the number of such references has been 42, 40, 33, 33, and 32, respectively.¹⁹⁴

I do not make too much of this data; statistical averages are notoriously suspect, and it is difficult to draw confident conclusions from these data without also compiling, for example, the number of cases reaching the merits of a constitutional question over each semi-decanal period. These numbers do, however, appear to conform to what one would expect given Meese's efforts to reform the Federal Judiciary. As much as ever, originalist arguments are able to legitimate political ends by dressing them in a widely accepted form of constitutional argument. Even if making originalism the sole acceptable means of constitutional interpretation is wholly aspirational, legitimating and calcifying a particular hierarchy of constitutional argument is within the realm of the possible.

C. THE SALIENCE OF METHODOLOGY

A second outgrowth of the originalism movement of the 1970s and 1980s is increased public attention to constitutional methodology generally and to originalism in particular. The results of the Supreme Court's cases and the composition of its membership have often been the subject of conventional political discourse, but methodology *qua* methodology has rarely been such a salient feature of the public discussion about the Federal Judiciary. This is so in part because of the increased visibility of and interest group participation in the Senate confirmation hearings, wherein "judicial philosophy" has become, in the words of Christopher Eisgruber, the "Holy Grail."¹⁹⁵ Moreover, with the proliferation of legal blogs, talk radio, and twenty-four-hour cable news channels, the

194. These data are on file with the author. There is sense in the observed decline in constitutional convention references after a steady rise. As I have discussed, since the mid-1980s originalists have deemphasized the significance of original intent, for which convention debates are most probative, in favor of original meaning.

195. CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 98 (2007).

potential audience for constitutional methodology is as broad as it has ever been.

There is no doubt that public participation and interest in the confirmation process has risen dramatically over the last three decades.¹⁹⁶ The Senate did not open floor debate on federal court nominations until 1929; nominees did not testify as a matter of course before 1955; and interest groups did not regularly participate in the confirmation process until the Nixon presidency.¹⁹⁷ As Richard Davis writes, "Until the latter part of the twentieth century, most nominations involved exclusively the White House, the Senate, and legal community leaders. Public controversy over nominees erupted on occasion, but typically the debate was joined by a relatively small number of insiders."¹⁹⁸ The confirmation battles over the two most recently confirmed Justices, Roberts and Alito, were the subject of fifty-two and fifty-six stories respectively on the three major-network evening newscasts. With the exception of Clarence Thomas, who was confirmed by a four-vote margin following controversy over his alleged sexual harassment of Anita Hill, no confirmed Justice since Thurgood Marshall has received as much coverage.¹⁹⁹

With increased attention to the Court nomination process comes increased attention to methodology. As Appendix B demonstrates, references to the original intent of the Framers and to originalism spiked dramatically in the *Washington Post*, the *New York Times*, and the *Wall Street Journal* during the confirmation hearings of Bork and Roberts. The terms "originalism" or "originalist" appeared in those three publications a total of eighty-five times in the three-year period from 2005 to 2007. By contrast, those terms appeared in the three publications just seventy-six times in the twenty-one-year period from 1984 to 2004. The term "original intent" appeared in the same sentence as the word "Framers" twenty-four times from 2005 to 2007 and 109 times from 1986 to 1991, which spanned Meese's originalism movement and the Bork hearing. In the intervening thirteen-year period from 1992 to 2004, in which the only two nominees to the Court were consensus picks by a Democratic president, the term "original intent" appeared in the same sentence as "Framers" twenty-seven times.

Originalism is the most prominent recent frame to the now-familiar nomination rite wherein Senators try to induce nominees to articulate a "judicial philosophy," hoping it will provide a window into the nominee's political commitments.²⁰⁰ What is different about originalism is that, unlike, for ex-

196. See, e.g., Gibson & Caldeira, *supra* note 13, at 16 ("In the past, it was relatively rare for the mass public to play much of a role [in judicial confirmation battles]. Today, one of the crucial elements in confirmation strategies concerns how public opinion will be managed and manipulated.").

197. See JOHN ANTHONY MALTESE, *THE SELLING OF SUPREME COURT NOMINEES* 36–37, 89, 109 (1995).

198. RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* 15 (2005).

199. These data are generated from the Vanderbilt University Television News Archive and are reported in Appendix A.

200. See MALTESE, *supra* note 197, at 109.

ample, "judicial activism" or "strict constructionism," originalism has content within the discourse of legal professionals.²⁰¹ I examined the twenty-eight nomination hearings conducted since that of John Marshall Harlan II in 1955, when testimony before the Senate Judiciary Committee became routine. I studied the Senators' relative interest in methodology during the hearings before the judiciary committee. I counted the total number of questions asked of each nominee and the total number that concerned constitutional methodology.²⁰² I coded as "methodological" questions about whether the Constitution is a rigid and fixed document or should be updated over time; the role of stare decisis in constitutional adjudication; whether judges should ever act as legislators or make policy decisions; whether a judge's personal views of justice or morality should influence his decisions; whether the difficulty of Article V amendment justifies changing established constitutional decisions; what role foreign law should play in constitutional interpretation; the importance of constitutional avoidance; and equivalent or related questions. More generally, I was interested in questions about how a nominee approaches constitutional cases, as opposed to what kinds of results he prefers in particular categories of cases or how he would shape doctrine in specific areas.

My observations suggest that interest in methodology has been most significant in the aftermath of substantial criticism of the Court's decision in *Brown* and its progeny, during the Bork hearing, and during the recent Roberts and Alito hearings. Justice Harlan's confirmation hearing, for example, was a product of its time. The major source of controversy was his position on the advisory board of the Atlantic Union Committee, which favored a transatlantic union not unlike the current European Union. Of the 183 questions Harlan was asked, only three pertained to constitutional methodology.²⁰³ Less than a year after the Court had effectively overruled *Plessy v. Ferguson*,²⁰⁴ all three methodological questions related to whether the Court should ever change established constitutional interpretations in the absence of an amendment. The first time Harlan was asked a question along those lines, he did not understand what he was being asked.²⁰⁵ By contrast, Justices Brennan, Stewart, and Goldberg, whose hearings coincided with *Brown*'s controversial implementation, were

201. See EISGRUBER, *supra* note 195, at 35 ("The idea that judges should defer to the intentions of the people who drafted and ratified the Constitution is a real interpretive strategy, not a rhetorical trick like 'strict construction.'").

202. When a question was repeated because the nominee did not hear or understand what was asked, I did not count two questions. I did count two questions, however, if a question was repeated because the Senator was not satisfied with the response.

203. See *Nomination of John Marshall Harlan, of New York, To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 84th Cong. 140-41 (1955) [hereinafter *Harlan Nomination*].

204. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

205. Senator Eastland asked Judge Harlan on behalf of another unnamed Senator, "Do you believe the Supreme Court of the United States should change established interpretations of the Constitution to accord with the economic, political, or sociological views of those who from time to time constitute the membership of the Court?" Harlan answered, non-responsively, that the Court is bound by the

questioned repeatedly on whether the Constitution may be amended judicially.

The hearings of Justices Stevens and O'Connor were relatively light on methodological questions. The O'Connor hearing, the first to appear live before the American public, saw a dramatic increase in the number of questions—338, compared to 199 asked of Justice Stevens—but less than ten percent of those questions related to methodology. By contrast, she was repeatedly questioned about the constitutionality of jurisdiction-stripping, which was the conservative strategy *du jour*. Indeed, Senator Dole spoke of the term “strict construction” the way Adams and Strouse spoke of Herbert Hoover:²⁰⁶ “We used to talk about strict constructionists around here—it has been some time. I do not quite remember when that was, come to think of it, but what does that term mean to you? It was one that was widely discussed.”²⁰⁷

By the time of Bork's 1987 hearing, which coincided with the 200th anniversary of the Constitution's drafting, “strict constructionism” had been translated into the modern idiom. Bork not only described himself as an originalist (as O'Connor had done), but he was willing openly to attack what he believed to be unprincipled decisionmaking in decisions as popular as *Bolling v. Sharpe*,²⁰⁸ *Shelley v. Kraemer*,²⁰⁹ and *Griswold v. Connecticut*.²¹⁰ What today is viewed as a template for how not to get confirmed to the Supreme Court was thought at the time to test the extent to which the soundness of a constitutional methodology could be divorced from the public saleability of the results it dictated.²¹¹ Of the staggering 1,182 questions I tallied over Bork's four days of testimony, 175 were about the constitutional methodology he chose to place immediately in issue.²¹²

Bork is the only nominee to receive more questions about constitutional methodology than Roberts and Alito, who rank second and third respectively. Judge Roberts was asked early and repeatedly about methodology generally and about originalism specifically. Of the 916 questions asked of Roberts, 135

Constitution. When pressed he conceded that he had “misinterpreted the question.” *Harlan Nomination*, *supra* note 203, at 140.

206. See LEE ADAMS & CHARLES STROUSE, *Those Were the Days*, on ALL IN THE FAMILY (Atlantic Records 1971).

207. *Nomination of Judge Sandra Day O'Connor of Arizona To Serve as an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. 94 (1981).

208. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

209. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

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

211. Senator Simpson was prescient in gauging the impact the Bork hearing would have on subsequent nomination battles. Citing the milquetoast responses of O'Connor, Scalia, and Rehnquist in response to questions about their substantive views, he said: “This will never happen again. Doesn't matter whether you are confirmed or rejected. . . . [T]hat next time and every time before we would have the same answer to the same questions, . . . and they will be more accepted by us if they have written nothing, done nothing and said nothing.” *Nomination of Robert H. Bork To Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 851–52 (1987) (statement of Sen. Simpson).

212. See *id.* at 103–05 (opening statement of Judge Bork).

related to constitutional methodology, including fifty-two of the 178 written questions submitted. Four different Senators questioned Roberts about originalism.²¹³ Notably, when Senator Schumer asked Judge Roberts at the end of the hearing what questions he would ask himself were he a senator, Roberts replied, "I would ask a lot of the questions that have been asked, a lot of the questions that were asked in the questionnaire that I completed earlier, and it begins with the most important question, What is your view of the proper role of a judge in our system?"²¹⁴

Over the course of fifty years, we went from three questions about methodology—one of which the nominee did not understand and evidently had not contemplated—to more than 100 such questions, not including the one the nominee says he would have asked of himself. And with the advent of televised hearings, we saw an additional dynamic of relevance to this discussion. Not only did televised hearings correspond with a sharp increase in the number of questions asked, but the Senators often specifically addressed the television audience in the course of addressing the witness. At Judge Roberts's hearing, for example, Senator Sessions spent much of his time in his first question describing the federal court system to the public.²¹⁵ Senators Cornyn and Kyl mentioned that many people in the audience were hearing about concepts they had never heard before and described the process as a pedagogical moment.²¹⁶ At the Alito hearing, Senator Hatch asked Judge Alito to explain the meaning of "pro se," and Senator Sessions patiently explained to the viewing audience the distinction between a trial and an appellate court.²¹⁷ Not only was there more discussion of methodology generally—Alito received ninety-seven questions on methodology—but there was a concomitant recognition that the Senators and the witness were in dialogue with the public as much as with each other.

For this, the originalism movement deserves some credit. The confirmation process represents our most significant site for political-legal translation, a moment at which the public is more educated about the business of the federal courts and at which that business is held to uncommon public scrutiny. And for reasons I discuss in section III.B, methodology is the dialogic terrain on which traditional originalists are most comfortable.²¹⁸ Understanding judges as agents

213. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 158, 181, 203, 298 (2005) [hereinafter *Roberts Hearing*] (Sen. Hatch, Sen. Grassley, Sen. Kohl, Sen. Specter, respectively).

214. *Id.* at 438–39.

215. *Id.* at 232–36.

216. *Id.* at 272, 332–34 (Sen. Cornyn and Sen. Kyl, respectively).

217. See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 337–38, 403–04 (2006) (Sen. Hatch and Sen. Sessions, respectively).

218. In the press release announcing *Men in Black*, Levin stated: "We need to broaden the debate during the nomination process to include more than simply the qualifications of individual candidates. There must be a discussion about the role of the Court, and whether the public wants so many important decisions made by a handful of unelected lawyers." *Conservative Leads Challenge*, *supra* note 83.

not of justice but of process shifts the terms of debate from a battle over competing moral conceptions to one over competing justifications for judicial authority. A generation of legal scholars had struggled to rationalize the Warren Court's aggressive approach to judicial review. Bringing elements of the public into the conversation over professional norms complicated those scholars' task enormously. Meanwhile, originalists had their arguments about the integrity of judicial review down pat, and to an impressive degree, they stayed on message.

Today, a substantial portion of the American public reports an affinity for originalism. A 2005 Fox News poll asked the following question of registered voters:

Which of the following comes closest to your view of how the Constitution should be interpreted by the U.S. Supreme Court? Judges should base their rulings on what they believe the Constitution's framers meant when it was originally written. Judges should base their rulings on what they believe the Constitution means in today's world.

Forty-seven percent of respondents chose the "Framers' intent" option, while only thirty-six percent chose contemporary meaning.²¹⁹ In a more polemically worded July 2008 poll conducted by Quinnipiac University, forty percent of respondents reported believing that "[i]n making decisions, the Supreme Court should only consider the original intentions of the authors of the Constitution."²²⁰ Fifty-two percent of respondents favored the proposed alternative, that "[i]n making decisions, the Supreme Court should consider changing times and current realities in applying the principles of the Constitution."²²¹ This number is in line with identically worded Quinnipiac polls in 2007, 2005, and 2003.²²² Belief in the exclusivity of original-intent originalism—a position held by no prominent academic I am aware of—is not solely a conservative phenomenon: roughly one-third of Democrats report holding this view.²²³ Significantly, only

219. FOX News/Opinion Dynamics Poll, Aug. 30–31, 2005, <http://www.pollingreport.com/court2.htm> (last visited Sept. 18, 2008). Ten percent of respondents said that judges should use a combination of the two, and eight percent were unsure.

220. Press Release, Quinnipiac University Polling Institute, *supra* note 12.

221. *Id.* Fifty-two percent supported the alternative formulation and eight percent had no opinion or were unresponsive.

222. *Id.* The percentages were the following: 48% (2007), 50% (July 2005), 51% (May 2005), and 54% (2003).

223. *See id.*; *see also* Press Release, Quinnipiac University Polling Institute, Voters Back Supreme Court Limit on School Deseg 3-1 Quinnipiac University National Poll Finds; Approval of Congress Drops to Lowest Point Ever (Aug. 16, 2007) (placing Democratic support for the originalist position at thirty percent); Press Release, Quinnipiac University Polling Institute, Supreme Court Nominee Should Speak up on Abortion, U.S. Voters Tell Quinnipiac University National Poll; Bush Approval Drops to New Low (July 27, 2005) (placing Democratic support for the originalist position at thirty-four percent); Press Release, Quinnipiac University Polling Institute, U.S. Voters Back *Roe v. Wade* 2-1, Support Filibusters, Quinnipiac University National Poll Finds; Bush Approval at Lowest Point Ever (May 25, 2005) (placing Democratic support for the originalist position at thirty-one percent); Press Release, Quinnipiac University Polling Institute, Supreme Court Should Listen to the People, Ameri-

eight percent of respondents to the 2008 poll said they did not know enough to answer whether they favored a jurisprudence of original intent. By contrast, some forty-five percent of respondents to a May 2005 Quinnipiac poll could not say whether or not they had a favorable opinion of William Rehnquist, even though the question identified Rehnquist as Chief Justice of the Supreme Court.²²⁴ The public does not seem to understand the Court or its business with nearly the sophistication of legal professionals and academics, but it is nonetheless willing to offer an opinion on constitutional methodology.

* * *

I have endeavored in this Part to describe the recent success of originalist argument in sociopolitical terms—terms which are not its own. Appeals to original intent have the power, certainly in a thin sense and arguably in more fundamental ways, to translate political ends into constitutional law. Moreover, an important segment of the public—beyond law professors—accepts originalist arguments as legitimate. As Post and Siegel write, a certain brand of originalism has “flourished” over the last two decades.²²⁵ In that time it has “emerged as a new and powerful kind of constitutional politics in which claims about the sole legitimate method of interpreting the Constitution [have] inspired conservative mobilization in both electoral politics and in the legal profession.”²²⁶ Barnett goes further still: “Originalism has not only survived the debate of the eighties, but it has virtually triumphed over its rivals.”²²⁷

III. ORIGINALISM AS NON-ORIGINALIST

The success of originalism results not from its penetrable logic but from its consistency with a political morality defended most ardently by originalism's opponents. Non-originalist constitutional interpretive methodologies frequently locate the sustained popular acquiescence necessary and sufficient to update the Constitution within the successful efforts of social movements—through processes of political capture and reinforcement—to alter our collective understanding of the content of our national commitments. Proponents of such methodologies rarely consider the implications of recognizing such transformative power within the originalism movement itself. Section III.A argues that such consideration is necessary. Section III.B then sketches a market-based model for situating the Judiciary and the larger public within what I call the

cans Tell Quinnipiac University Poll; 2-1 Are Opposed to Race-Based College Admissions (Mar. 5, 2003) (placing Democratic support for the originalist position at thirty-two percent).

224. Press Release, Quinnipiac University Polling Institute (May 25, 2005), *supra* note 223.

225. Post & Siegel, *supra* note 14, at 548.

226. *Id.*

227. Barnett, *supra* note 74, at 613; cf. James E. Ryan, *Does It Take a Theory?: Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1623 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)); cf. also CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005)) (“For the last fifteen years or so, Justice Antonin Scalia and his sympathizers within and outside the academy have dominated discussion and debate over how best to interpret the Constitution.”).

supply chain for constitutional methodologies. Section III.C defends the use of a market metaphor in the context of a discourse over legal professional norms. Then, in section III.D, I suggest three features of originalism—its appeals to simplicity, populism, and nativism—that enable it to compete successfully within that market. Finally, section III.E explains why methodologies, and not decisional outcomes, are my objects of concern.

A. CONSTITUTIONAL PRACTICE AS CONSTITUTIONAL THEORY

Chief Justice Roberts began his confirmation hearing by likening the job of a Supreme Court Justice to that of a baseball umpire: “Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role.”²²⁸ The analogy has much to commend it, though not for the reasons the Chief Justice suggests.²²⁹ An umpire calls balls and strikes according to the strike zone. The rules of baseball do not describe the strike zone as a matter of discretion. Rather the strike zone submits to a specific anatomical definition that is written into those rules.²³⁰ Yet, any baseball fan will tell you that the strike zone is far narrower than what is described in the text of the rule and that, quite apart from several formal amendments of that rule, it has narrowed over time.²³¹ Any umpire who based his strike zone on original intent would have to throw out a lot of managers. In Philip Bobbitt’s terminology, original intent is not a conventional “modality” for determining the strike zone.²³²

But it might be. Imagine a team has a stable of pitchers who specialize in getting batters to swing and miss at high pitches. A charismatic fan of such a team begins a public campaign to convince other fans that umpires who do not call high strikes are not being faithful to the text of or original intent behind the rules of baseball. In certain ballparks, umpires who fail to call strikes according to original intent are roundly jeered. Newspaper columnists and sports bloggers call for such umpires to lose their jobs. Over time, some umpires begin to call a wider strike zone and, over still more time, consideration of original intent becomes a conventional means of calling balls and strikes. What began as a

228. *Roberts Hearing*, *supra* note 213, at 55.

229. While the Chief Justice’s analogy implies that neither judges nor umpires have discretion, in fact the inverse is true. Cf. Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701 (2007) (arguing that the analogy misstates the judicial role).

230. The strike zone is defined as “that area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and the top of the uniform pants, and the lower level is a line at the hollow beneath the knee cap. The Strike Zone shall be determined from the batter’s stance as the batter is prepared to swing at a pitched ball.” Major League Baseball, Official Rules: 2.00 Definition of Terms, available at http://mlb.mlb.com/mlb/official_info/official_rules/definition_terms_2.jsp.

231. See GLEN WAGGONER, SPLITTERS, BEANBALLS, AND THE INCREDIBLE SHRINKING STRIKE ZONE: THE STORIES BEHIND THE RULES OF BASEBALL 41–45 (2000). For a useful chronology of the history of the strike zone, see Baseball Almanac, *The Strike Zone: A Chronological Examination of the Official Rules*, http://www.baseball-almanac.com/articles/strike_zone_rules_history.shtml.

232. See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–22 (1991).

narrow political campaign will have blossomed into a phenomenon of baseball practice and a source of baseball truth.

In constitutional adjudication, we are not just fans but also players. The determinations of constitutional meaning the Supreme Court makes in close cases determine our own rights and obligations as well as those of others. As Bobbitt has described, there is a matrix of legal arguments that our culture recognizes as able to legitimate constitutional decisions.²³³ Bobbitt identifies historical, textual, doctrinal, prudential, structural, and what he terms "ethical" arguments as constituting that matrix.²³⁴ Part of Bobbitt's project is to demonstrate that in our constitutional system there is no external criterion for legitimacy. Legitimate constitutional decisions are those that obey the conventional grammar of constitutional argument, full stop.²³⁵ There is obvious sense in the reliance of pluralistic theories of constitutional interpretation such as Bobbitt's on what Richard Fallon labels "the implicit norms of our constitutional practice."²³⁶

But nonpluralists also generally tailor their arguments to those norms. Ronald Dworkin's nonpluralistic commitment to "law as integrity" requires that constitutional interpretation fit contemporary constitutional and political practices.²³⁷ Those practices might accord a prominent place to an array of arguments, including those that proceed from text, history, and precedent.²³⁸ Bruce Ackerman's dualist-democracy thesis is also nonpluralistic but follows from his conclusion that American constitutional practice *is* dualist. Ackerman states, "Unless and until a political movement does succeed in entrenching a modern Bill of Rights, dualism describes the ambition of the American enterprise better than any foundationalist interpretation."²³⁹ There is general agreement across a wide spectrum of scholars that constitutional theories should, in some measure, "fit or explain the central features of our constitutional order."²⁴⁰

That agreement proceeds naturally from a concern for relevance, a desire to avoid becoming academic in its more pejorative sense. But it also follows from the view of many constitutional theorists, pluralist and nonpluralist alike, that the reason the Constitution legitimately binds us is because we accept it as authoritative.²⁴¹ I alluded to this view in my earlier discussion of the various

233. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3-8 (1982).

234. *Id.* at 3-119. Ethical arguments are those derived from a set of traditions and institutional arrangements that are peculiar to the American ethos. *Id.* at 94.

235. See *id.* at 5.

236. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1192-93 (1987).

237. See RONALD DWORKIN, *LAW'S EMPIRE* 378, 380 (1986).

238. See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 8-12 (1996).

239. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 16 (1991).

240. Richard H. Fallon, Jr., *How To Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 545 (1999).

241. See, e.g., Brest, *supra* note 28, at 225 ("Given the questionable authority of the American Constitution . . . it is only through a history of continuing assent or acquiescence that the document

critiques of a strong originalist position.²⁴² Consent, either implicit or explicit, forms the irreducible core of democratic self-government. Originalists generally derive the consent relevant to the legitimacy of judicial review from the popular ratification of the Constitution and its amendments. But as I have discussed, many non-originalists locate popular consent elsewhere, for example in the well-settled precedents of the Supreme Court. McConnell writes:

[M]any decisions, even some that were questionable or controversial when rendered, have become part of the fabric of American life; it is inconceivable that they would now be overruled. . . . The staying power of these holdings is not attributable to the bare fact that the Supreme Court decided them, for other decisions of equally long standing remain controversial and subject to reconsideration. The difference, I think, lies in the fact of overwhelming public acceptance. Whatever may have been their original legal merit, these decisions have been accepted by the nation. Legislatures do not pass laws in defiance of these decisions; commentators do not attack their reasoning (except as an academic exercise, which serves a different purpose than provoking their reconsideration); people have forgotten they ever were controversial. This overwhelming public acceptance constitutes a mode of popular ratification, which gives these decisions legitimacy and authority²⁴³

There comes a time in the precedential life of certain constitutional decisions at which their reconsideration is no longer a matter of ordinary judicial politics. Judicial nominees are not today asked whether they believe *Brown* should be overruled. It is common ground among all participants in our constitutional system that overruling *Brown* in short order would require an Article V amendment. Deliberate segregation of public facilities by race is the called strike that even the batter concedes.

Plainly, the same is not true of *Roe v. Wade*. Senator Specter's attempt to goad then-Judge Roberts to acquiesce in his description of the case as not merely a precedent of the Court but a "super-duper precedent" was an effort, in part, to tease out Roberts's own measure of popular ratification.²⁴⁴ But *Roe* has

could become law."); Michael C. Dorf, *Integrating Descriptive and Normative Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1772 (1997) ("The authority of the Constitution today rests on its general acceptance as authoritative rather than on its adoption in 1787."); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790–92 (2005) ("[T]he legal legitimacy of the Constitution depends much more on its present sociological acceptance (and thus its sociological legitimacy) than upon the (questionable) legality of its formal ratification."); Simon, *supra* note 45, at 611 ("The United States Constitution is authoritative because major American institutional actors such as legislative bodies, courts, and agencies as well as a large segment of the population . . . regard the Constitution as a source of legally controlling rules and norms.").

242. See *supra* section I.C.

243. McConnell, *supra* note 35, at 2417.

244. *Roberts Hearing*, *supra* note 213, at 145; see Bruce Ackerman, 2006 Oliver Wendell Holmes Lectures: *The Living Constitution*, 120 HARV. L. REV. 1737, 1751 (2007).

not been “ratified,”²⁴⁵ at least not in the sense in which *Brown* has. The question of whether the Constitution guarantees a woman’s right to an abortion remains a subject of hot political debate, the temperature of which was raised by *Roe* itself.²⁴⁶ The way to overrule *Roe* in short order is not via a constitutional amendment but by changing the Court’s composition.

Recognizing that our constitutional practice distinguishes between ordinary precedents and those that attain the status of constitutional content is Ackerman’s chief contribution. Specter’s silly phrase demonstrated, however, that we lack a shared vocabulary for differentiating between what I call “thick” and “thin” constitutional law.²⁴⁷ Whether *Brown*-like or *Roe*-like, the Supreme Court’s constitutional decisions count as law in the United States,²⁴⁸ but they do not all count in the same way. Returning to our baseball analogy, the umpire’s call forms part of the law of baseball, but individual participants and fans might disagree with his conception of a strike. Sufficient arguing with and criticism of the umpire has the demonstrated capacity to make him and his colleagues change the rule itself. We might identify a strike zone suffering through withering criticism as “thinner” law than a strike zone that proceeds unchallenged.²⁴⁹ Much non-originalist scholarship seeks an account of this distinction within constitutional law. While other scholars may disagree as to how Ackerman identifies higher politics, accounting for the possibility of constitutional change through the political thickening or thinning of law outside of Article V is a common feature of non-originalist theories. We can say, then, that another reason why many non-originalists care deeply about actual constitutional practice is because such practice may, under certain conditions peculiar to a given theory, become constitutional law on par with the text.

This logic applies as much to constitutional decisions as to the methodologies that are said to generate them. As Bobbitt notes, the various modalities are stable over short periods of time—a generation, say—but they are not inevitable features of constitutional practice: “[i]t would not surprise me if some of the present forms should fall into desuetude. . . . Because the constitutional system of establishing these forms is entirely descriptive of practice, any change that is

245. See Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1149–50 (2008).

246. See William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review To Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1079–80 (2004) (arguing that *Roe* raised the stakes of politics by preempting an adequate political movement).

247. I use these terms differently than Tushnet, who differentiates between the “thin” Constitution—the fundamental guarantees of liberty and equality that it shares with the Declaration of Independence—and the “thick” Constitution—the document’s structural provisions. See MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 7–11 (1999). In my very different lexicon, “thin” constitutional law represents those guarantees that remain contested and political, whereas “thick” constitutional law refers to consensus understandings that are no longer in a position to be revised by judges.

248. See Greenawalt, *supra* note 55, at 659.

249. Cf. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 90–91 (1970) (favorably comparing *Brown* to the Court’s school prayer decisions along analogous dimensions).

sufficiently widespread becomes a legitimate participant.”²⁵⁰ In other words, modalities may grow in stature or shrink even to extinction. Proponents of originalism promote its growth at the expense of other arguments, particularly of the prudential, ethical, and doctrinal varieties. To the extent that the originalist project succeeds in promoting originalism’s priority over other modalities, pluralists must revise their accounts of decisional legitimacy and nonpluralists must recognize that the susceptibility of a constitutional decision to originalist appeals may affect its stability as constitutional law and its place along the spectrum of constitutional thickness. What’s more, the capacities of institutional players, interest groups, and ordinary citizens to endow a methodology with the ability to translate political ends into acceptable constitutional forms, and their methods of doing so, should be as significant to non-originalist constitutional theorists as the capacities of political actors to affect the course of substantive constitutional decisionmaking.

In short, many non-originalist theoretical models need not only to acknowledge but also to accommodate the success of originalism as a political practice.²⁵¹ To the extent that originalism succeeds at generating thick constitutional law, it succeeds on non-originalist terms notwithstanding its failure on its own terms. This has the feel of a paradox, but it isn’t. The theoretical failing of originalism is that it lacks an account of how legitimate constitutional change occurs outside the Constitution’s text or original understanding. It lacks an account of how judicial pronouncements (among other legal and political acts) come to *be* constitutional law. But non-originalist theories that do include such an account must create within it a space for the originalism movement, or else explain why no space is needed.

The legal community does not and cannot monopolize the discourse around constitutional legitimacy.²⁵² The public participates in that discourse and makes claims, at times vulgarly, within it. Insofar as the rhetoric of constitutional methodology is itself a subject of conventional political discourse, a model of the political appeal of methodologies must be internal to any model of constitutional change outside the text and history of the Constitution.²⁵³ On the logic of

250. Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1916–17, 1919 (1994).

251. I borrow this phrase from Post and Siegel, who have come closest to developing the themes of interest to this Article. See Post & Siegel, *supra* note 14; see also *What Is Living Constitutionalism?*, Part II, Posting of Jack Balkin to Balkinization, <http://balkin.blogspot.com/2008/03/what-is-living-constitutionalism-part.html> (Mar. 28, 2008, 6:00 EST) (“The conservative originalism of the past several decades has been an attempt to replace a more liberal constitutionalism with a more conservative one. . . . That is also an example of the processes of a living constitution, although not one many liberals like.”).

252. Cf. Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 925 (1986) (“Most theories of constitutional law rest on some notion of the consent of the governed, either through tacit institutional acquiescence or through some kind of social contract theory. A brilliant theory is by definition one that would not occur to most people. It is hard to see how the vast majority of the population can be presumed to have agreed to something that they could not conceive of.”)

253. See THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 11–12 (2004) (“If the development of modern constitutional law has reflected

such models, it might be that originalism is not persuasive because it is right, but rather becomes right because it is sufficiently persuasive.²⁵⁴

B. THE MARKET FOR METHODOLOGIES

What might a model of the political appeal of constitutional methodologies look like? In developing such a model it is useful first to recognize that the various methodologies are in active competition with each other. Many political conservatives want the Court to be originalist; many liberals want the Court to recognize evolving conceptions of substantive due process and cruel and unusual punishment; many libertarians want the Court to recognize certain natural rights or embrace the philosophies of John Stuart Mill or Milton Friedman. Whether or not the Court's commitment to each methodology would in the end lead to the preferred political outcomes of its proponents, each group is, through the mechanisms of political competition, attempting to influence both the Court and the public generally to buy the modality it is selling. Those mechanisms include, at varying nodes along the supply chain for constitutional ideas: academic articles, amicus briefs, white papers, the interest group politics that surround the judicial nomination process, legal and political blogs, newspaper editorials, broadcast and cable news, and talk radio.

Constitutional methodologies are distributed by constitutional judges to the people generally. The people are not, of course, a single indivisible entity. We are an amalgam of individuals, differently situated along the supply chain and at various levels of constitutional engagement. Not only are different people differently engaged constitutively, as for example constitutional lawyers are typically more engaged than teenagers, but as Ackerman has noted, any one person's engagement with higher politics varies over time.²⁵⁵ Frederick Schauer recently observed and sought to demonstrate empirically that "neither constitutional decisionmaking nor Supreme Court adjudication occupies a substantial portion of the nation's policy agenda or the public's interest."²⁵⁶ That is beyond reasonable dispute. The set of issues that most people care about most of the time is radically different than, and indeed barely conversant with, those that the Court's typical docket comprises. That does not mean the public does not care about the Court as an institution. It does mean, though, that the conclusions it reaches about the Court's activities are likely to be influenced disproportionately by periods of unusual constitutional engagement, such as the Bork hear-

the efforts of conservative justices (and others) to fashion and maintain a coherent constitutional vision out of their competing political and legal commitments, then we must pay careful attention to the evolution of competing doctrinal arguments and broader constitutional rhetorics over the past generation.").

254. Cf. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result) ("We are not final because we are infallible, but we are infallible only because we are final.").

255. See generally ACKERMAN, *supra* note 58; ACKERMAN, *supra* note 239.

256. Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 9 (2006).

ings or the 2000 presidential election.

Judges are not the only producers of methodologies nor are they only producers. Whether one is a producer or a consumer of a methodology depends not on one's professional status but on one's intentions. Academics, politicians, lawyers, and indeed anyone with an interest to be served by a methodology may also therefore be a supplier, and judges often, perhaps typically, act as intermediaries between academics and the public, "buying" constitutional ideas that they then repackage and "sell" to consumers. Among all the various suppliers of constitutional ideas, however, judges are unique because they are lawgivers. They are accountable for a methodology's general merchantability—its consistency with the conventional forms of constitutional argument—and for its fitness for the particular cases in which it is employed. A judge who consistently produces defective methodologies will lose prestige and will be unable to corral and preserve the majorities necessary to distribute her constitutional ideas.²⁵⁷

Politicians and the media—newspapers, magazines, bloggers, radio and television personalities—may act as intermediaries as well, though they are typically closer to what we might call the retail end of the supply chain of constitutional methodologies. It has been said that the dynamics of intermediation are changing within political markets, as in commercial markets. As Yochai Benkler observes, "The possibility of sustainable, widely accessible and effective communications by individuals or groups, organized on- or offline, makes possible direct democratic discourse. It creates direct means for the acquisition of information and opinion."²⁵⁸ A similar process may be occurring in the market for methodologies. Where once a small core of well-connected legal academics engaged in closed-circuit conversation about constitutional methodology with a relatively small number of federal judges, and those judges produced opinions that reached the public via a limited number of newspaper reporters,²⁵⁹ the audience for the fruits of academic and judicial discourse is now vast and expanding.²⁶⁰

Levin's *Men in Black*,²⁶¹ for example, was virtually ignored by traditional Supreme Court media and the legal academy. It was not reviewed in the *New York Times* or the *Washington Post*, and in the week it reached its peak on the best-seller list, David Garrow was quoted as saying, "The fascinating thing is that it's a bestseller on a subject where 100 percent of us who present ourselves

257. See POSNER, *supra* note 18, at 117–18 (including "popularity" and "prestige" in the judicial utility function).

258. Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245, 1263 (2003).

259. The Court was once called "the worst reported . . . institution in the American system of government." LARRY CHARLES BERKSON, *THE SUPREME COURT AND ITS PUBLICS: THE COMMUNICATION OF POLICY DECISIONS* 58 (1978) (quoting Max Freedman, in Mark Cannon, *An Administrator's View of the Supreme Court*, 22 FED. BAR NEWS 112 (1975)). Plainly, that is no longer so.

260. See *supra* section II.C.

261. LEVIN, *supra* note 78.

as experts haven't read it."²⁶² Tushnet said at the time that he "has not read 'Men in Black' and does not know anyone who has."²⁶³ Levin explained that the book is "written in plain English and not for Harvard Yard";²⁶⁴ it was marketed on talk radio and over the Internet. Levin was able to reach an entire deliberative community without going through the conventional intermediaries.²⁶⁵ One could surmise that the rise of legal blogs, the increasingly pedagogical tone of Supreme Court confirmation hearings, the recent increase in the number of public appearances and interviews by Supreme Court Justices,²⁶⁶ and even perhaps the decline in traditional doctrinal scholarship²⁶⁷ all may be explained in part by this protestantization of constitutional methodological discourse.²⁶⁸

C. TESTING THE MARKET (METAPHOR)

Market analogies are famously fraught. They might suffer from one of two common maladies. First, they might be descriptively inaccurate. I leave it to the reader and to future scholarship to determine whether the market metaphor I have suggested accurately describes the process by which constitutional interpretive methodologies are communicated and gain adherents.²⁶⁹ The second common problem with market analogies is that, even if accurate, they might be

262. Charles Lane, *Conservative's Book on Supreme Court Is a Bestseller*, WASH. POST, Mar. 20, 2005, at A6.

263. *Id.*

264. *Id.*

265. See Dahlia Lithwick, *The Limbaugh Code: The New York Times Best Seller No One Is Talking About*, SLATE, Apr. 1, 2005, <http://www.slate.com/id/2116087> ("To refuse to acknowledge the call-to-arms behind *Men in Black*, as the press and most of the legal academy has done, can feel like intellectual integrity. But it also represents a failure to take part in a national conversation that may have very serious long-term consequences for the courts."); cf. Jack M. Balkin, *Online Legal Scholarship: The Medium and the Message*, 116 YALE L.J. POCKET PART 23, 28 (2006), <http://www.thepocketpart.org/2006/09/06/balkin.html> ("Online media don't just route around traditional gatekeepers. They also glom onto them—they depend on them rather than displace them. . . . The old gatekeepers don't go away entirely, and new ones arise that partially supplement and partially compete with them.").

266. See Mark Sherman, *High Court Becomes More Media Friendly*, WASH. POST, Dec. 25, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/12/25/AR2006122500298_pf.html.

267. Cf. Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8.

268. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 27–29 (1988). Levinson uses the metaphor of Catholics and Protestants to discuss competing visions of constitutional interpretive authority. I think the metaphor is apt as well to describe a shift from a narrow font of relatively obtuse methodological wisdom to widespread retail-level engagement with constitutional arguments.

269. The metaphor does have more to commend it in this context than in the First Amendment area. Some critics have suggested that the "marketplace of ideas" metaphor misunderstands the subjective nature of truth and is incapable of representing how ideas are disseminated in the real world. See, e.g., Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1; David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 348–49 (1991). There are important differences between the market for interpretive methodologies and the market for "ideas" generally. Most significantly, the existence and staying power of judicial opinions provides an ascertainable measure of market activity and success. The market I have described is supposed to produce law, not truth.

normatively inappropriate. Most of us believe that some things that might be commodified—sex, kidneys, babies, and so on—should not be. Many of us also believe that some things that have been completely or partially commodified—secondary education, health care, or housing, say—should not have been.²⁷⁰ Simply to describe an existing or putative market in such things without discussing whether and to what extent the market should determine how those things are distributed may be a mistake in emphasis. Developing and relying upon market metaphors may therefore have the effect of generating policy proposals that respond to a normatively incorrect hierarchy of values.²⁷¹ The question remains whether conceiving of constitutional methodology in the language of commodification is appropriate and whether the operation of a market in methodologies is beneficial to constitutional law. Is pandering to the interpretive “preferences” of the public, expressed in necessarily imperfect ways, any way to adjudicate a constitutional dispute?

A complete answer to that question is beyond the scope of this Article, but it is useful briefly to discuss some of the relevant considerations. Our discomfort with describing certain transactions in market terms arises out of a common concern that the rhetoric of commercial exchange impoverishes our understanding of what is valuable about certain putative commodities. But most of us also believe it entirely appropriate, indeed enriching, to use market language to discuss the exchange of traditional commodities. We might conceive of a spectrum ranging from those items, T-shirts, say, for which commodification identifies the normatively appropriate values better than noncommodification, to those, like love, for which the converse is true.

It is not obvious where constitutional interpretive methodology falls along that spectrum. It is certainly arguable that a conscientious constitutional judge should at least in some sense be giving the people what they want. The existence and authority of popular constitutional values legitimate judicial review for originalists and non-originalists alike. And it is certainly true that, in theory at least, popular values may attach in the relevant way to methodology as such. One could imagine a constitutional amendment that provided general instructions on how constitutional provisions should be interpreted by judges. Many states and foreign countries have similar codifications with respect to statutory interpretation,²⁷² and the Constitution provides specific rules of construction in the Ninth and Eleventh Amendments. Such a hypothetical constitutional

270. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1856–57 (1987).

271. See *id.* at 1878; see also Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1 (arguing that the “marketplace of ideas” metaphor has led to an overemphasis on the “truth seeking” and “self-government” values of free speech); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2363–66 (2000) (suggesting that the apparent implications of the theory of the marketplace of ideas do not jibe with First Amendment doctrine, which is not content-neutral in fact).

272. See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2089–90 (2002).

interpretation amendment could, for example, require that textual ambiguities be resolved in favor of original expected application. Under many non-originalist approaches to constitutional interpretation, there is no theoretical reason why a similar outcome could not be achieved outside of the Article V process. That result would require that originalist methodology achieve conspicuous dominance within legal practice or become a driving force behind the thickening of constitutional law.

In thinking about whether a market metaphor appropriately describes the process by which methodologies are popularized, it is crucial to develop a normative account of judges' roles in *motivating* the values that the metaphor contemplates them *responding to*. If judges should have no affirmative role in that process and should simply craft or adopt methodologies that respond to an exogenous set of preferences, then a market metaphor seems appropriate. We would then want to ask whether we can identify a market failure: whether and to what extent there is slippage between our actual methodological preferences and the perceived preferences to which judges are systematically responsive. If we believe instead that judges should play a role in persuading people that they should or should not demand certain qualities in constitutional decisionmaking, then a market metaphor will be less effective at generating satisfactory prescriptions. If it is valuable to conceive of law in terms of its commitment to reason, then it disserves us to promulgate models that conceive of it solely in terms of its capacity to be enjoyed or beneficially experienced. The fact that the public is responsive to a particular rhetoric may not be sufficient reason for judges to tailor their interpretive methodology to that rhetoric, particularly to the exclusion of other conceptions of the judicial role.

I defend neither position here, but I do want to suggest that the first, more passive conception of the judge's role is not obviously the less attractive. The notion that judges should deploy methodologies that have achieved public acceptance need not entail the wholesale outsourcing of professional reason. Legal professionals are an important segment of the public and exercise influence over public attitudes that are out of proportion to their representation in the population.²⁷³ That is certainly true today when, as mentioned, a significant segment of the public pays no attention whatever to constitutional adjudication. Professional reason is best understood as an important component of public appeal, not as its opposite. Professionals can and do use their elite status to influence public opinion in the direction of genuine views derived from reason. Judges are of course part of that professional elite and even on the "passive" view of the judicial role may influence public opinion in their roles as citizens. Doing so would not prevent them from acting as *receivers* of public wisdom when they are actually adjudicating cases. The point is not that public appeal

273. See generally ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 39-67 (1998) (arguing that persuasion under complex conditions requires that a listener perceive a speaker to be both knowledgeable and trustworthy).

should displace professional reason but that professional reason should not be dispositive.²⁷⁴

The question of the appropriate role of judges may also be informed by their relative competence to identify and enforce our higher law preferences. The likelihood of market failure may well lead us to prefer a system in which judges do not conceive of themselves as satisfying rhetorical demands but instead think of themselves as norm entrepreneurs.²⁷⁵ Ascertaining market failure is not, however, an easy task. The market for methodologies, such as it is, is not perfectly competitive. There are obvious barriers to entry in becoming a judge and well-known difficulties in punishing judges who are not responsive to the public—life tenure, the unavailability of salary reduction, and an entrenched culture of judicial independence. Perhaps the prospect of prestige and the desire to build and maintain court majorities create incentives for judges to respond to popularly informed values.²⁷⁶ But it is not at all clear whether those values in fact represent our higher law values and, in any event, they do not perfectly determine judicial decisionmaking.

To complicate matters further, the public might be genuinely indifferent to some slippage between methodological rhetoric and actual practice. In organization theory, Chester Barnard wrote of a “zone of indifference” that makes possible the cooperation of disparate individuals within an organization. Barnard argued that the authority of orders proceeds from the bottom up—it requires “the *accepting* of a communication as authoritative.”²⁷⁷ Someone who accepts membership in an organization concomitantly is willing to obey an essentially undifferentiated and unquestioned range of orders falling within his zone of indifference.²⁷⁸ These observations may be generalizable to the authority of judicial decisions. We are participants in a collective enterprise of governance so complex that, in order both to enforce cooperation and to guarantee competence, we give judges our proxy over matters of constitutional interpretation.²⁷⁹ Professional reason may expose certain decisions as inconsistent with methodological rhetoric, as for example in the apparent refusal of Justice Scalia and Justice Thomas to practice originalism in affirmative action

274. Cf. Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 929–31 (1983) (discussing his ambivalence over the gap between the rightness of the result and the weakness of Justice Powell's reasoning in *Regents of the University of California v. Bakke*, 435 U.S. 265 (1978)).

275. See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) (defining norm entrepreneurs as “people interested in changing social norms”).

276. See *supra* note 257 and accompanying text.

277. CHESTER I. BARNARD, *THE FUNCTIONS OF THE EXECUTIVE* 163 (1938).

278. *Id.* at 169. Herbert Simon referred to this range instead as the “zone of acceptance,” or the range of decisions for which a subordinate “permits his behavior to be guided by the decision of a superior, without independently examining the merits of that decision.” HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF THE DECISION-MAKING PROCESS IN ADMINISTRATIVE ORGANIZATION* 11, 12 (2d ed. 1957).

279. See Jamal Greene, *Giving the Constitution to the Courts*, 117 YALE L.J. 886, 916–17 (2008) (reviewing KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* (2007)).

cases.²⁸⁰ But the originalism “brand” may be less a promise of interpretive fidelity than a mechanism for settling the question of authority. That is, credibly advertising herself as an originalist may be sufficient to satisfy a public demand that a judge is competent to issue authoritative orders. On this theory, what is being sold is not a methodology inasmuch as it does not (without more) decide cases. Rather it is a professional credential, the market for which does not “fail” so long as decisions are falling within the public’s methodological zone of indifference.²⁸¹ Ensuring that decisions fall within that zone is plausibly within the institutional competence of judges.

Market metaphors are most dangerous when they obscure values that morality or justice require us to recognize. They are most useful when they draw our attention to values that our intuitions may not appreciate. The tendency among constitutional theorists is to minimize the role public appeal should play in generating and deploying constitutional methodologies.²⁸² This, I think, insufficiently accounts for the source of judicial authority, particularly if public appeal is understood to include continued engagement with the professional elite.

D. SELLING ORIGINALISM

Originalism is particularly well-situated to take advantage of what I have suggested is the changing status of intermediaries in the market for constitutional methodologies. Most importantly, to the extent that intermediaries close to the wholesale side of the supply chain are marginalized, the failure of originalism to satisfy its academic skeptics becomes less relevant. Retail consumers of constitutional ideas are naturally less interested in what Daniel Farber might call “brilliant” academic criticism.²⁸³ Originalism’s success is thereby disaggregated from its theoretical bona fides and a premium is placed on those features that appeal, even if superficially, to popular understandings of the judicial role.

There are at least three features of originalism that place it at a competitive advantage in the methodologies market. First, it is easier to understand than other theories. Second, it caters to populist suspicion of legal elites. Third, it appeals to a sense of cultural nationalism. I outline each in turn.

1. Simplicity

In a speech before the D.C. Federalist Society in November 1985, Meese

280. See Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 427 (1997); Stephen A. Siegel, *The Federal Government’s Power To Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998); see also Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

281. Cf. Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2606 (2003) (“[T]he wealth of existing evidence suggests that most of the time judicial decisions fall within the range of acceptability that one might expect of the agents of popular government.”).

282. See generally *id.* (exploring and criticizing that tendency).

283. See generally Farber, *supra* note 252.

explained that “[i]n the main, jurisprudence that seeks to be faithful to our Constitution—a Jurisprudence of Original Intention, as I have called it—is not difficult to describe.”²⁸⁴ From that aspect of originalism’s character—its elegant simplicity—derives one of its greatest theoretical weaknesses. But originalism’s simplicity is also one of its chief selling points and, therefore, one of its greatest strengths. The Constitution is a written document. Written documents are interpreted according to the intent of the parties to the document. Writes Limbaugh of originalism, “It sounds like common sense, and it is”²⁸⁵ When interpretation can be explained in simple and unadulterated terms, it need not be mediated through elites. As Justice Thomas has said, “[w]henver possible, the Court and judges generally should adopt clear, bright-line rules that, as I like to say to my clerks, you can explain to the gas station attendant as easily as you can explain to a law professor.”²⁸⁶

Not only is originalism in fact relatively easy to explain to people outside the legal academy, but its most vocal expositor actually does so. Witness *Heller* itself, in which Justice Scalia wrote of the dissent, “Justice Stevens’ view thus relies on the proposition, unsupported by any evidence, that different people of the founding period had vastly different conceptions of the right to keep and bear arms. That simply does not comport with our longstanding view that the Bill of Rights codified venerable, widely understood liberties.”²⁸⁷ It is ironic that Justice Scalia stated so controversial a proposition without a citation to any evidence of his own,²⁸⁸ but it is easy to understand why. Originalism’s public appeal relies heavily on perpetuating the presupposition that different people do not routinely have vastly different conceptions of rights that they have nonetheless chosen to codify constitutionally.

The “simplicity” feature of originalism may therefore be its most useful. Constitutional law, and individual rights cases in particular, require judges to give definitive answers to questions that we have not always resolved definitively as a people. Living constitutionalists tend to emphasize rather than conceal that fact and seek to develop complicated heuristics aimed at discerning correct answers. Conceiving of law in those terms is not, however, conducive to cooperation. Better perhaps to agree on a common language—here, originalism—

284. Edwin Meese III, Att’y Gen. of the United States, Speech Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), in *GREAT DEBATE*, *supra* note 138, at 31, 36.

285. Rush Limbaugh, *What Is Originalism?*, in *THE LIMBAUGH LETTER* (Dec. 2005), available at <http://www.rushlimbaugh.com/home/menu/limfunoriginalism.guest.html>. Meese concurs: “Those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning was. This is not a shockingly new theory; nor is it arcane or archaic.” Meese, *supra* note 14, at 465.

286. Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 7 (1996).

287. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2804 (2008).

288. To take just one obvious counterexample, President Adams did not believe the Alien and Sedition Acts violated the First Amendment. See Letter from John Adams to Benjamin Rush (Dec. 25, 1811), in *CORRESPONDENCE OF JOHN ADAMS AND THOMAS JEFFERSON, 1812–1826*, at 26, 27 (photo. reprint 1972) (Paul Wiltstach ed., 1925).

and to let professional “linguists” argue amongst themselves as to specific applications.²⁸⁹ Dan Kahan has suggested that deterrence arguments serve a similar function in criminal law: “the deterrence idiom takes the political charge out of contentious issues and deflects expressive contention away from the criminal law.”²⁹⁰ So too the language of originalism, and particularly its appeal to scientific norms, satisfies a public demand for a digestible means of muting conflict over unresolved issues of constitutional law.²⁹¹

Justice Scalia is keen to the need to appeal to the public directly. Court watchers have noted that he “eschew[s] the reclusive public life of many justices, or at least the blandly apolitical public lives of most, to play the role of benighted public intellectual and knight gallant in the culture wars.”²⁹² Scalia’s public appearances are frequent and newsworthy. He at least appears to make “every effort to insure his politically volatile statements are media-friendly. His writing is eminently quotable. He laces his public statements and opinions with doses of mockery, humor, and insult. He effectively deploys expressions of alarm. He supplies a rare mix of legal analysis, emotional pique, and ideological fervor.”²⁹³ Justice Scalia has the tongue of a pitchman, and he doesn’t hide what he’s selling. The lead paragraph of the lead essay of his 1997 book, *A Matter of Interpretation*, reductively describes construction of legal texts as a “science” and says the essay “is addressed not just to lawyers but to all thoughtful Americans who share our national obsession with the law.”²⁹⁴ The text of the forty-seven-page essay is in fact pitched at that level.²⁹⁵ Justice Scalia is at ease explaining his constitutional views to laypersons. That has much to do with his affable personality but, I would argue, as much to do with the fact that the methodology he is selling can be painlessly reduced to a sound bite.²⁹⁶

The elegance of originalism recommends it not only to the lay public but also

289. Cf. JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS’ BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* 85–86 (2002) (concluding on the basis of empirical research that “people do not want to make political decisions themselves, . . . [and] would . . . prefer decisions to be made by . . . empathetic, non-self-interested decision makers”).

290. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 417 (1999).

291. Cf. JAMES BRADLEY THAYER, JOHN MARSHALL 107 (1901) (“The tendency of a common and easy resort to [judicial review is] to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.”). Inasmuch as imperfect competition in the market for methodologies is responsible for creating a professional elite, which then enables judicial decisionmaking to fill a subterfugal role in values debates, there may be efficiency advantages over a perfectly competitive market.

292. Dahlia Lithwick, *Scaliapalooza: The Supreme Court’s Pocket Jeremiah*, SLATE, Oct. 30, 2003, <http://www.slate.com/id/2090532>.

293. Stephen A. Newman, *Political Advocacy on the Supreme Court: The Damaging Rhetoric of Antonin Scalia*, 51 N.Y.L. SCH. L. REV. 907, 919–20 (2006) (footnotes omitted).

294. Scalia, *supra* note 4, at 3.

295. See, e.g., *id.* at 3–9 (sardonically describing legal education and putting words like “distinguishing” and “hypotheticals” in quotes).

296. See Dahlia Lithwick, *Talk of the Gown: What the Supreme Court Justices Won’t Say Speaks Volumes*, SLATE, Jan. 27, 2007, <http://www.slate.com/id/2158322> (contrasting “the taut lines of [Scalia’s] theory of ‘originalism’” with Justice Breyer’s “active liberty,” which “requires a whole hour with Charlie Rose to unpack”).

to judges in their alternate capacities as consumers of methodology. It is important in a democratic society that members of the public who are so inclined understand the process by which government officials make momentous decisions. Judges are also citizens, and the conscientious among them wish to understand and to be able to articulate what it means for them to interpret the Constitution in good faith. As most have neither the time nor the temperament to theorize, the appeal of bright-line rules of decision should not be underestimated.

2. Populism

In *Planned Parenthood v. Casey*, the plurality described the Court as being “invested with the authority to decide [the American people’s] constitutional cases and speak before all others for their constitutional ideals.”²⁹⁷ Multiple generations of legal scholars have sought to demonstrate, mostly to each other, that non-originalist methodologies do not necessarily occasion judges deciding our values on our behalf and indeed do not necessarily endow judges with any more discretion than originalism. Statements of the sort made in *Casey* show that there is work still to be done. Originalists have appropriated the rhetoric of judicial restraint that was once the province of progressive judges.²⁹⁸ Justice Scalia’s response to the *Casey* passage makes the point:

The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges—leading a Volk who will be “tested by following,” and whose very “belief in themselves” is mystically bound up in their “understanding” of a Court that “speak[s] before all others for their constitutional ideals”—with the somewhat more modest role envisioned for these lawyers by the Founders.²⁹⁹

Originalism is not inherently a doctrine of judicial restraint. Originalists emphasize restraint in cases such as *Casey* but not in cases such as *District of Columbia v. Heller*, *Parents Involved in Community Schools v. Seattle School District No. 1*,³⁰⁰ and *Kelo v. City of New London*,³⁰¹ creating the impression that it is they who leave constitutional decisionmaking in the hands of the people.

Lain atop the rhetoric of popular decisionmaking is the rhetoric of class warfare.³⁰² Justice Scalia’s frequent references to himself and his colleagues as

297. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 868 (1992).

298. See *supra* section II.A.

299. *Casey*, 505 U.S. at 996 (Scalia, J., dissenting) (citations omitted).

300. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

301. *Kelo v. City of New London*, 549 U.S. 469 (2005).

302. See Charles Lane, *Once Again, Scalia’s the Talk of the Town: Justice Renders Frank Out-of-Court Opinions on 2000 Presidential Election, ‘Sicilian’ Gesture*, WASH. POST, Apr. 15, 2006, at A2 (“[Scalia’s] is the voice of a conservative populist: combative, humorous, and sharply critical of the media and of the legal establishment atop which he sits.”).

"nine lawyers" reinforces the impression that the Court, cloistered and aloof, is out of touch with, even disdainful of, popular values.³⁰³ Justice Scalia tells audiences that "[a] world in which these moral sentiments would be given full expression by unelected judges"—which he describes as the alternative to originalism—"would scare the devil out of me."³⁰⁴ On this projected conception, the very notion of judicial review is an evil to be minimized if not avoided,³⁰⁵ lest power-hungry elites usurp our sovereignty.³⁰⁶ Justice Scalia's rhetorical move is ancient and effective. Dismissive references to the Court as a bunch of lawyers go back at least to the beginnings of the *Lochner* era.³⁰⁷ A jurisprudence of originalism, says Justice Thomas,

places the authority for creating legal rules in the hands of the people and their representatives rather than in the hands of the nonelected, unaccountable federal judiciary. Thus, the Constitution means not what the Court says it means, but what the delegates of the Philadelphia and of the state ratifying conventions understood it to mean.³⁰⁸

303. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) ("By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the nation?"); *Stenberg v. Carhart*, 530 U.S. 914, 955 (2003) (Scalia, J., dissenting) ("There is no cause for anyone who believes in *Casey* to feel betrayed by this outcome. It has been arrived at by precisely the process *Casey* promised—a democratic vote by nine lawyers . . ."); Antonin Scalia & Stephen Breyer, *A Conversation Between U.S. Supreme Court Justices*, 3 INT'L J. CONST. L. 519, 526 (2005) (saying, to a group of law students, "Do you think you're representative of American society? Do you not realize you are a small layer of cream at the top of the educational system, and that your views on innumerable things are not the views of America at large?"); Alex Rawson, *Scaling Down Scalia*, DAILY PRINCETONIAN, Feb. 27, 2001 ("To his mind, as he explained in answer to a question on abortion, there is no way that five out of nine lawyers in Washington—in other words, a Supreme Court majority—have the right to decide whether abortion is right or wrong."); Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, NEW YORKER, Mar. 28, 2005, at 40, 42 (quoting a Scalia speech: "If the Constitution is an empty bottle into which we pour whatever values—the evolving standards of decency of a maturing society—why in the world would you let it be filled by judges? . . . Why you would want to leave these enormously important social questions to nine lawyers with no constraints, I cannot fathom."); Antonin Scalia, ACLU Membership Conference Debate (Oct. 15, 2006) ("Why in the world would you want nine people from a very uncharacteristic class of society—to wit, nine lawyers—to decide how the Constitution evolves? It means whatever they think it ought to mean.").

304. Lane, *supra* note 302.

305. The title of Justice Scalia's influential essay, *Originalism: The Lesser Evil*, is exemplary. See *supra* note 2.

306. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 981 (1992) (Scalia, J., dissenting) ("The Court's statement that it is 'tempting' to acknowledge the authoritativeness of tradition in order to 'cur[b] the discretion of federal judges' is of course rhetoric rather than reality; no government official is 'tempted' to place restraints upon his own freedom of action, which is why Lord Acton did not say 'Power tends to purify.' The Court's temptation is in the quite opposite and more natural direction—towards systematically eliminating checks upon its own power; and it succumbs." (internal citation omitted)).

307. See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 97 (2007) (noting the Farmers' Alliance of Minnesota's reference to the Court as "'a squad of lawyers sitting as a supreme authority high above Congress, the President, and people,'" following its property-rights-protecting decision in *Chicago, Milwaukee, & St. Paul Railway Company v. Minnesota*, 134 U.S. 418 (1890)).

308. Thomas, *supra* note 286, at 7.

The suggestion is that we the people have more in common with those long deceased revolutionaries than with our elite contemporaries on the federal bench.

3. Nativism

Originalists are almost uniformly opposed to citation of foreign and international law in constitutional cases. That opposition arguably follows from the theory of originalism but, as valuably perhaps, it also promotes the political practice of originalism. It is safe to assume that among the few members of the public who care deeply about the issue of foreign law citation, most are against it. It has become routine for Congress members to seek to limit federal court citation of foreign law³⁰⁹ and for conservative activists to call for the impeachment of Justices who cite foreign materials in the course of constitutional interpretation.³¹⁰ Values imputed to “the Framers” or “the Founders” are not only distinctly American but have acquired a presumption of rightness within our political culture.³¹¹ An interpretive modality that avails itself of their views and associates its own rightness with theirs gains an immediate rhetorical advantage. Thus, at the joint investiture of originalists Rehnquist as Chief Justice and Scalia as an Associate Justice, President Reagan ended his speech with an ominous allusion:

The warning, more than a century ago, attributed to Daniel Webster, remains as timeless as the document he revered. “Miracles do not cluster,” he said, “Hold on to the Constitution of the United States of America and to the Republic for which it stands—what has happened once in 6,000 years may never happen again. Hold on to your Constitution, for if the American Constitution shall fall there will be anarchy throughout the world.”³¹²

Recall that during the Progressive era, constitutional preservationist groups linked non-originalist methodologies to socialism and anarchy.³¹³ So too with Reagan. Associating Scalia and Rehnquist with proto-American and anti-Communist values shines a spotlight on one of originalism’s more underappreci-

309. See, e.g., Constitution Restoration Act of 2005, S. 520, 109th Cong. (2005); H.R. 1070, 109th Cong. (2005); Constitution Restoration Act of 2004, S. 2082, 108th Cong. (2004); H.R. 3799, 108th Cong. (2004).

310. See Post & Siegel, *supra* note 14, at 546 n.11.

311. This has not always been so. During the progressive era, for example, Charles Beard helped inspire widespread skepticism about the achievements and motivations of the Founders. See Ackerman, *supra* note 244, at 1793–96 (discussing CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913)).

312. President Ronald Reagan, Address at the Investiture of Chief Justice William H. Rehnquist and Associate Justice Antonin Scalia at the White House (Sept. 26, 1986), in GREAT DEBATE, *supra* note 138, at 56.

313. See *supra* section II.A.

ated selling features: its emphatic, irreducible "American-ness."³¹⁴

E. SELLING ORIGINALISM?

Some will greet my claims about the appeal of originalism with skepticism. They will say that "originalist" is a rather obvious stand-in for "conservative" and that the originalism debate is simply about results. On this view, the populism to which a methodology appeals is the capacity to generate politically popular outcomes. I do not believe that to be universally true. There are certainly some who care only about outcomes, and a certain brand of originalist is certainly, self-consciously, selling outcomes. But it is equally obvious, I think, that some people, including some originalist judges, care about procedural integrity as much as or more than outcomes, or at least that some people believe that about themselves. Writes Thomas Keck,

[W]hile the Court's rules, norms, and traditions allow (or even require) the justices to act on and respond to political ideas and interests, broadly understood, they generally discourage them from simply manipulating constitutional arguments to achieve their preferred results or to advance the policies of the president who appointed them.³¹⁵

The thickening and thinning of judge-made constitutional law with which we are ultimately concerned requires both consistency with a dominant political agenda and an accompanying narrative that promises consistency with prevailing legal norms.³¹⁶ Much attention has been paid to the former in political

314. See, e.g., Calabresi, *supra* note 133, at 18 ("President Reagan was right to exhort us to 'hold on' to the Framers' Constitution because it is a remarkable document for a remarkable country. President Reagan's exceptionalist rhetoric explains why in most cases the Supreme Court should not look for guidance to foreign constitutional law."). Notably, originalism is quite unpopular in Europe and Canada. See Peter W. Hogg, *Canada: From Privy Council to Supreme Court*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 55, 83 (Jeffrey Goldsworthy ed., 2006); Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States*, 2 INT'L J. CONST. L. 633, 656 (2004).

315. KECK, *supra* note 253, at 9.

316. See David A. Strauss, *What Is Constitutional Theory?*, 87 CAL. L. REV. 581, 589-90 (1999) ("The fact that many people (even a majority) might disagree with a particular Supreme Court decision . . . does not necessarily mean that that decision is wrong. . . . The decision may still be correct if it follows from broader principles about constitutional interpretation that themselves are widely accepted . . ."). There is conflicting evidence in the political science literature on the extent to which individual ideological preferences influence public support for the Court as an institution, compare Joseph Tanenhaus & Walter F. Murphy, *Patterns of Public Support for the Supreme Court: A Panel Study*, 43 J. POL. 24 (1981) (finding that changes in diffuse support for the Court from 1966 to 1975 correlated with various ideological variables), with Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 658 (1992) ("[T]he mass public does not seem to condition its basic loyalty toward the Court as an institution upon the satisfaction of demands for particular policies or ideological positions."), as well as over the extent to which one's satisfaction with individual Court decisions influences one's support for the Court more generally, see, e.g., Anke Grosskopf & Jeffery J. Mondak, *Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court*, 51 POL. RES. Q. 633, 633-34 (1998) (noting the conflict in the literature). There is general

science literature and, increasingly, among constitutional theorists.³¹⁷ This Article emphasizes the significance of the latter, particularly in light of what I have suggested is a popularization of methodological discourse.

Many originalists hope that succeeding in their particular project of transforming legal norms will make the legal environment more hospitable to the movement's substantive political claims. It will not do, however, to mediate those claims directly through the judiciary. Not only do many Americans disagree with those political ends, but we also conceive of our federal judges ideally as faithful to an apolitical agenda. What is needed, then, is an appeal that is both pre-political and post-methodological. It must simultaneously appear to be conventionally "legal" but must not in fact be indifferent to the outcomes generated. Cases like *Crawford v. Washington* and *Apprendi v. New Jersey* are originalist victories not because their results may be understood in politically conservative terms³¹⁸ but because they bolster a constitutional interpretive norm that subordinates administrative convenience and contemporary understanding to historical practice and original understanding. In short, they make originalism look more legal.

* * *

Appeals to simplicity, populism, and nativism fall outside the nucleus of conventional constitutional argument. But to the extent that the simple model I have sketched accurately describes the originalist appeal, and insofar as originalism is in fact successful at translating ordinary politics into constitutional law, these sociopolitical arguments have legitimating force. To the extent these

agreement that diffuse support for the Court—in short, support for the Court as an institution—remains relatively stable (and generally positive) over long periods of time. See Jeffery J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114, 1116 (1997).

317. See, e.g., WHITTINGTON, *supra* note 307, at 9 ("The judiciary may assert its own supremacy over constitutional interpretation, but such claims ultimately must be supported by other political actors making independent decisions about how the constitutional system should operate."); Robert A. Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) ("[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 512 (2002) (arguing that the expansion of judicial power in the late nineteenth century "is best understood as . . . familiar partisan or programmatic entrenchment"); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 40–44 (1993) (discussing the incentives of legislatures to place decisionmaking in the hands of the judiciary); see also Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–83 (2001) (articulating a theory of "partisan entrenchment" to explain what they view as the Rehnquist Court "revolution"); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005) (emphasizing the need to integrate normative and positive scholarship to understand the practice of judicial review); cf. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323 (2006) (arguing that the Equal Rights Amendment movement altered the Court's sex discrimination doctrine even though the amendment itself failed). See generally ACKERMAN, *supra* note 239; ACKERMAN, *supra* note 58.

318. See *supra* text accompanying notes 192 & 193.

popular appeals influence constitutional values, originalism's success constitutes a non-originalist argument for its legitimacy.

IV. ORIGINALISM'S LESSONS

I have argued that for all its proponents' failure to win jurisprudential arguments set in traditional theoretical terms, originalism's staying power must nevertheless be taken seriously by constitutional theorists. Post and Siegel are quite right that originalism's "capacity to influence the actual substance of modern constitutional law illustrates how constitutional law is made in continuous dialogue with political culture. Its success illustrates that the authority of constitutional law does not derive merely from professional reason, but also from reason incarnate in the body politic."³¹⁹ As it is marketed by its proponents, originalism satisfies certain demands—for ease of explication, for the appearance of value-neutrality, for diverting power from social and political elites, and for divesting our constitutional politics of foreign influence—that are evident in the market for constitutional ideas and that have arguably become more relevant due to a relative democratization of that market. That these are dynamic and conventional norms does not deprive them of their capacity to legitimate a constitutional methodology and to calcify political preferences into constitutional law.

It will be important to know how much these observations may be extrapolated beyond originalism itself. Rarely, after all, have constitutional interpretive methodologies been so discrete, practiced so overtly by judges, and marketed so deliberately by political actors. Most judges are not constitutional theorists, and most disclaim reliance on any one mode of reasoning in the face of ambiguity. I would contend, however, that originalism itself is partly responsible for two recent qualifications to that general trend. Chief Justice Roberts has announced himself, at his confirmation hearing,³²⁰ in speeches,³²¹ and in interviews,³²² to be committed to a jurisprudence of restraint and consensus. As Cass Sunstein suggests, the Chief Justice has chosen to align himself with the Burkean minimalist legal tradition, which emphasizes that "constitutional principles must be built incrementally and by analogy, with close reference to long-standing practices."³²³ Minimalism is less a constitutional methodology than a frame of reference and a set of presumptions. As a theoretical matter it gives only limited instruction to judges who seek answers to difficult interpretive questions. With sufficient emphasis, however, the Chief Justice's minimalism might have the capacity to perform a public role similar to a more specified

319. Post & Siegel, *supra* note 14, at 570–71.

320. See Roberts Hearing, *supra* note 213, at 177.

321. See John G. Roberts, Jr., Chief Justice, U.S. Supreme Court, Commencement Address at the Georgetown University Law Center (May 21, 2006) ("If it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more.").

322. See Jeffrey Rosen, *Roberts's Rules*, ATLANTIC, Jan./Feb. 2007, at 104.

323. Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006).

constitutional methodology. Fulfilling that role depends not on minimalism's competence as a theory of interpretation, nor even perhaps on its actual practice by Chief Justice Roberts, but rather on its persuasiveness as a justification for constitutional decisions.

There is reason to believe that once the legal academy is through with it, Robertsonian minimalism will suffer a similar fate to Scalian originalism. Academics have already begun to notice the tension between his stated judicial philosophy and his early results on the Court. In particular, the list of precedents overturned in fact or in effect by the Roberts Court, and with the Chief in the majority, is impressive.³²⁴ Originalism's lesson, however, is that that tension will not by itself be the measure of the effectiveness of Roberts's minimalism. Judicial minimalism is an attractive constitutional commodity for many of the same reasons originalism is. It is easy to explain to lay audiences and it explicitly wrests political control from unelected judges by instructing them to make decisions only when absolutely necessary. Minimalism holds the promise, moreover, of preserving the status quo, which most people (almost by definition) prefer most of the time. There are also indications that the telegenic Chief Justice understands the need to shill. Within a little more than a year on the Court, he discussed his judicial philosophy in an hour-long *Nightline* interview at the University of Miami basketball arena,³²⁵ gave a lengthy interview to Jeffrey Rosen for the *Atlantic Monthly*,³²⁶ and was prominently featured in a PBS special on the Court.³²⁷ As Dahlia Lithwick has written, "[n]ot only is the new chief justice unafraid of the media spotlight, he—perhaps alone among his Supreme Court colleagues—has figured out how to use it to his advantage."³²⁸

Justice Breyer also appears keen to the need to convince the public of the

324. See, e.g., *Pearson v. Callahan*, No. 07-751 (U.S. Jan. 21, 2009) (overruling in part *Saucier v. Katz*, 533 U.S. 194 (2001)); *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (effectively overruling *United States v. Miller*, 307 U.S. 174 (1939)); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (effectively overruling *Sch. Comm. of Boston v. Bd. of Educ.*, 389 U.S. 572 (1968) (per curiam)); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (overruling *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)); *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (effectively overruling *McConnell v. FEC*, 540 U.S. 93 (2003)); *Bowles v. Russell*, 127 S. Ct. 2360 (2007) (overruling *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam), and *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam)); *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007) (overruling in part *Conley v. Gibson*, 355 U.S. 41 (1957)); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (tacitly overruling *Stenberg v. Carhart*, 530 U.S. 914 (2000)). With the exceptions of *Pearson*, which was unanimous, and *Twombly*, which was 7-2, each of those decisions was 5-4. Had the Chief Justice's plurality opinion in *Parents Involved* been the opinion of the Court, it would have substantially weakened and, I think, effectively overruled *Grutter v. Bollinger*, 539 U.S. 306 (2003), decided just four years earlier.

325. *Nightline* (ABC television broadcast Nov. 13, 2006).

326. Rosen, *supra* note 322.

327. *The Supreme Court* (PBS television broadcast Jan. 31 & Feb. 6, 2007).

328. Dahlia Lithwick, *The High Court Goes Courting: Supreme Court Justices Talk to the Media in Self-Defense*, SLATE, Nov. 14, 2006, <http://www.slate.com/id/2153759>. As is evident, I believe Justice Scalia has also figured out how to use the media to his advantage. It will be useful to think about the relationship between media-friendliness and constitutional theory as we debate the wisdom of televising Supreme Court oral arguments.

rightness of his constitutional methodology. He is not camera-shy, having given numerous lectures and having participated in a well-received series of debates with Justice Scalia on the use of foreign and international materials in constitutional interpretation.³²⁹ His recent book, *Active Liberty*, was short, plain-spoken, and readable.³³⁰ Its obvious aim was to provide a relatively progressive alternative to originalism. Its tack was to wrest the imprimatur of "democracy" from Justice Scalia by focusing on the ways in which judicial review can and should grant space for present Americans to reach consensus on difficult legal questions.³³¹ Whether Justice Breyer succeeds remains to be seen, though it appears to me that his theory is neither concrete enough nor concise enough to capture the public's attention in any significant way.

My intuitions about Justice Breyer's active liberty raise the question of whether viewing constitutional theory in populist market terms can ever work to the advantage of liberals, who generally want the Constitution to protect the unpopular. Answering that question is not this Article's aim and exceeds its scope, but it is worth noting that the project is underway. As I have mentioned, Post and Siegel have identified this problem in their work, and Jack Balkin, Douglas Kendall, and James Ryan have recently advocated liberals' appropriating originalist rhetoric and arguments to their own ends.³³² These efforts face difficulties but I do not think them futile. Originalists have done what all constitutional theorists must do to be successful: They have married their constitutional theory to a particular American (and particularly American) self-conception. That self-conception is stable over short periods of time but is nonetheless conventional and contingent; judges and their sympathetic market intermediaries have the power to influence it. The arguments that the Constitution protects natural rights, or that a post-September 11 environment demands a pluralistic and egalitarian political identity, or that evolving interpretation reflects the nature of truth in a post-Wiki world, are available for elaboration and amplification by proponents of a non-originalist constitutional ideal. But availing oneself of such arguments is a political act, and in order to do so, liberals will have to overcome any platonic objection to the politicization of constitutional argument.

329. See Scalia & Breyer, *supra* note 303.

330. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

331. See *id.* at 109–11.

332. See Douglas T. Kendall & James E. Ryan, *Liberal Reading*, NEW REPUBLIC, Aug. 6, 2007, at 14, 16; Post & Siegel, *supra* note 14; Balkin, *supra* note 18; Posting of Jack M. Balkin to Balkinization, <http://balkin.blogspot.com/2007/07/originalism-is-for-progressives.html> (July 25, 2007, 14:31 EDT); see also Robert Post & Reva Siegel, *How Liberals Need To Approach Constitutional Theory*, TNR ONLINE, Sept. 18, 2007, available at <http://www.law.yale.edu/news/5658.htm> (arguing that Kendall and Ryan mistakenly locate originalism's appeal in its methodological rhetoric rather than in the substantive ideals it implicitly promises).

CONCLUSION

To say that constitutional argument must attend to politics is not to say, with the Critical Legal Studies movement, that all law is politics or that the language of law is false or self-contradictory. We live in a pluralistic society in which multiple consumers at vastly different levels of political engagement are making simultaneous decisions about how to evaluate government acts. On the views of many non-originalist constitutional theorists, those consumers' reactions, over time, to constitutional decisions of the Supreme Court determine the pace and direction of constitutional change and ultimately affect the legitimacy of subsequent Court decisions. Those reactions are themselves determined not solely by the results in particular cases but by public reason-giving; that reason-giving must, for some, fall within the contours of conventional constitutional argument.

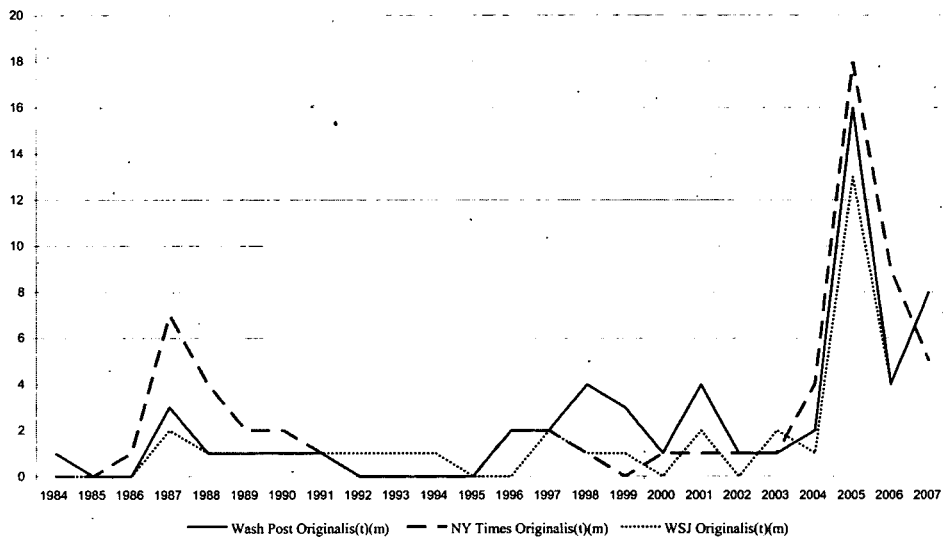
Conventional constitutional argument may itself change, however. That change may occur as new theories emerge, but it may also occur as the market for constitutional methodologies evolves. Changes in the number and nature of intermediaries in that market may broaden the audience for constitutional argument and thereby alter the kinds of arguments that prove persuasive. Arguments traditionally regarded as banal or political may on this model displace or augment the conventional constitutional forms. A sensible theoretical grounding may thereby have a less certain relationship than it once did to the legitimacy of a constitutional methodology.

Constitutional arguments with a certain aesthetic appeal are a rising stock. We may deride those who buy such arguments for their irrational exuberance, but in the realm of constitutional methodology that exuberance has the capacity to create real value over time. It is accordingly imperative that constitutional theory accommodate the relationship between social currency, political practice, and higher law as applied to methodology. I have made some preliminary observations about the appeal of originalism that seek to explain how a theory of constitutional interpretation that locates legitimacy exclusively within the original understanding may itself become legitimate precisely because of its contributions to constitutional evolution. Those contributions are neither complete nor irreversible. It remains legitimate for a judge to reject originalism in a given case and will remain so for the foreseeable future. What is at stake is not the legitimacy of individual decisions but their staying power. It is not that we must recognize that all law is politics, but rather that we must theorize creatively from the premise that, over time, politics of a certain sort becomes law.

APPENDIX A

**Evening News Stories Featuring Supreme Court Justices on ABC, CBS,
and NBC by Placement Within Broadcast**

	1st Third	2nd Third	3rd Third	Total
Fortas	29	21	9	59
Burger	8	8	3	19
Haynsworth	43	41	19	103
Carswell	43	42	18	103
Blackmun	4	13	16	33
Powell	6	17	3	26
Rehnquist	12	30	7	49
Stevens	7	9	3	19
O'Connor	23	8	2	33
Scalia	15	8	4	27
Rehnquist	30	14	6	50
Bork	72	35	5	112
Kennedy	16	16	1	33
Souter	19	15	3	37
Thomas	89	50	16	155
Ginsburg	12	9	4	25
Breyer	15	6	1	22
Roberts	25	20	7	52
Alito	42	10	4	56

APPENDIX B**References to Originalis(t)(m) in Three Major Newspapers****References to Original Intent in Three Major Newspapers**