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## ORIGINALISM'S CLAIMS AND THEIR IMPLICATIONS

André LeDuc\*

In this article I explore six of the most fundamental disagreements between originalism and its critics over originalism's implications. These implications—and the implications of the critics' alternatives—figure prominently in the arguments advanced in the debate. Reconstructing these arguments in their strongest possible form permits the confusion and misdirection in the debate over originalism to emerge.

First, originalism argues that it best comports with our republican democracy. Judicial review, performed by unelected judges with lifetime appointments, may appear inconsistent with the fundamental principles of our democratic republic. Originalism argues that deference to the original understandings or expectations with respect to the Constitution answers this challenge. The critics offer three principal replies to that claim. First, the originalist strategy of finding the original understanding and intentions with respect to the Constitution is rejected as undoable. Second, even if and to the extent that such intentions and understandings existed, the originalist project of finding meaning is rejected as blinkered and mechanical. Third, Bobbitt argues that the originalist premise is flawed: there is no need to reconcile judicial review and constitutional interpretation with democracy.

Second, originalism claims that it offers the only neutral method of constitutional interpretation. Critics deny the argument from discretion on a number of grounds. Third, originalism claims to offer a better account of the textuality of the written Constitution. Critics reject the arguments for that claim. Fourth, I examine how originalism limits constitutional change. Critics

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argue that the originalists fail to provide a plausible account of constitutional flux. Fifth, I assess the claim that originalism is necessary, and therefore any other inconsistent theory of constitutional interpretation is necessarily impossible. The critics rightly deny this singularly bold and implausible claim. Sixth, I examine the claim that originalism can restore the Lost Constitution, and, in so doing, radically change our constitutional law. Critics of originalism, and even some defenders, have questioned whether originalism can accomplish the mission set out for it. This skepticism is misplaced, at least on the terms on which originalism makes its constitutional argument.

When the claims advanced by originalism and by its critics are examined, they generally prove implausible or uninteresting. The debate over originalism has reached a stalemate on these key issues. The exchanges with respect to these claims offer no reason to rehabilitate or even to continue the originalism debate.

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## I. INTRODUCTION

Originalism and its critics disagree not only about the claims of originalism but also about originalism's most fundamental implications.<sup>1</sup> By claims I mean the central, express tenets of originalism. The implications of originalism are the inferences that may be derived from these claims—or the indirect arguments that may be made for or against originalism from those claims or from critics' competing claims. The two aspects of originalism are closely related. Originalism and its critics each make important arguments for their claims from the implications of those claims. If the debate has been more fruitful and productive than I have earlier claimed,<sup>2</sup> it is likely with respect to these claims and implications. This article addresses those readers who may be intrigued by the argument of the earlier articles in this series but believe that the debate about originalism has developed important and fruitful arguments about neutrality, judicial review, and the textuality of the Constitution, for example. Looking at these core claims about originalism, I will argue that the debate displays the same fruitlessness—and many of the same confusions—that I have previously described more generally. The exchanges with respect to these central originalist

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1. I have previously explored originalism's claims about meaning, interpretation, and constitutional reasoning in some detail, along with the critics' response. See André LeDuc, *Making the Premises about Constitutional Meaning Express: The New Originalism and Its Critics*, 31 BYU J. PUB. L. 111, 113-23 (2016) [hereinafter LeDuc, *Constitutional Meaning*]; André LeDuc, *Competing Accounts of Interpretation and Practical Reasoning in the Debate over Originalism*, 16 U.N.H. L. Rev. 51, 51-61 (2017) [hereinafter LeDuc, *Interpretation and Practical Reasoning*]. In that account, I emphasize the *performative* and *inferential* elements in our constitutional texts and decisions. I don't revisit those concepts, which have, at least in the case of the performative analysis, caused some readers some confusion, here, but I certainly employ the fruits of that analysis. To repeat, the performative analysis I endorse, following an all-too-casually smushed together Austin and Grice, emphasizes what the Constitution does as more important than what it says—and calls into question the tacit assumption that authoritative propositions of constitutional law have non-trivial truth conditions.

2. André LeDuc, *Striding Out of Babel: Originalism, Its Critics, and the Promise of Our American Constitution*, 26 WM & MARY BILL OF RTS. L.J. 101 (2017) [hereinafter LeDuc, *Striding Out of Babel*]; see also Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT. 411, 412 (1998) (“This essay argues that the academic debate over the legitimacy of originalist and non-originalist constitutional interpretation has not progressed materially [over the past century].”).

claims and implications provide no reason to try to salvage or rehabilitate the debate.

Originalism, most fundamentally, claims that certain original facts about the constitutional text—intentions, expectations, or linguistic understandings—generate privileged interpretations of that text that determine constitutional controversies. In its recent formulation as the New Originalism, the theory asserts that the linguistic understanding of what the constitutional text meant when it was adopted or amended is the authoritative interpretation that must be applied in constitutional cases today.<sup>3</sup> It is, admittedly, an appealing and seemingly plausible claim. It is appealing because it appears to assimilate constitutional interpretation and application to paradigms of linguistic behavior that are common and compelling.<sup>4</sup> Originalism's critics have nevertheless challenged this account with a number of arguments and from an array of stances.<sup>5</sup> The debate continues to rage.

In this article I explore the fundamental disagreements between originalism and its critics over six key claims and implications of originalism, including the recent statement of originalism offered by the New Originalism.<sup>6</sup> These implications

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3. See, e.g., Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609-10 (2004) [hereinafter Whittington, *New Originalism*] (arguing as a matter of semantics that certain provisions of the Constitution require mere interpretation while other provisions require the democratic political tools of construction to determine their meaning); see generally Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013) (again distinguishing the processes of interpretation and construction without allocating the construction function to the legislative branch); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

4. See CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 56-59 (2005) [hereinafter SUNSTEIN, RADICALS] (cleverly—if misleadingly—invoking the analogy of following a friend's direction in choosing a birthday present for him).

5. See, e.g., *id.* (defending a minimalist, consequentialist critique); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 400-01 (1995) [hereinafter Lessig, *Understanding*] (arguing that constitutional law accommodates change without requiring constitutional amendment through changed readings of the constitutional text).

6. See, e.g., Whittington, *New Originalism*, *supra* note 3, at 607-12. Certain claims are neither explored here nor in the companion articles in the series. Originalism occasionally claims to be a scientific method. For example, Justice Scalia began his Tanner lectures by offering a contribution to “the science of construing legal texts.” Antonin Scalia, *Common Law Courts in a Civil Law System: The Role of United States Federal Courts in*

are of particular importance for originalism and for the debate. The implications of originalism—and the implications of the critics’ alternatives—figure prominently in the arguments advanced in the debate. Reconstructing these arguments in their strongest possible form is an important part in recreating the ideopolises of the participants in the debate.<sup>7</sup>

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*Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 3 (Amy Gutmann ed., 1997) [hereinafter *Scalia, Interpretation; INTERPRETATION*]. Another part of his published lectures is titled “The Science of Statutory Interpretation.” *Id.* at 14. Bork invoked science in comparing non-originalist theories of constitutional interpretation to building perpetual motion machines. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 251 (1990) [hereinafter *BORK, TEMPTING*]. That is, the truth of originalism is analogous to the truths of physics. It is possible, of course, that these claims are only rhetorical. What did Justice Scalia mean here by science? Is it a natural science or a social science? It is undoubtedly the alleged, pre-Kuhnian crystalline clarity and certainty of natural science that Justice Scalia sought to invoke. It is the paradigm of natural scientific knowledge that is invoked. The obvious tension, perhaps inconsistency, between Justice Scalia’s invocation of science, and Bork’s apparently casual dismissal of the Ninth Amendment because of its difficulty, should not go unremarked. Scientific knowledge has often been invoked as a model to be followed with respect to other kinds of inquiry, on the basis that it provides a firmer basis on which to know things. After reason and science replaced faith and philosophy in the seventeenth century, scientific knowledge has been repeatedly invoked as a model in the social sciences. The late Richard Rorty outlined how the aspiration to science had shaped philosophy and, generally, all of Western culture after the rise of the secular state. *See generally* RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979) (arguing that the model of scientific inquiry is seductive but misleading for philosophy). Yet, to the extent that the scientific method involves fundamentally controlled, replicable experiments, it is unclear that anyone has ever seriously considered legal experiments. Indeed, to the extent such experiments would result in checkerboard laws, Dworkin has criticized such a regime as unconstitutional. *See* RONALD DWORKIN, *LAW’S EMPIRE* 179-84 (1986) [hereinafter *DWORKIN, EMPIRE*]. The claim to scientific knowledge with respect to originalism would appear to be rooted in the philosophical premises of originalism. Foremost among these are models of language, truth, and a positivist distinction between facts and values. For the originalist, interpretive law operates within the domain of facts. Values may be embodied in legislative choices made by democracies or other legal choices by other sovereigns, but a judge’s role is to determine the facts, at trial, and the law at trial and on appeal. The best methodology for exploring facts—including textual facts—is science. Thus, the claim to the mantle of science is the expression of other philosophical commitments inherent in originalism. Do the originalists make the case that their method is scientific? Very little effort went into defending that claim. Ironically, the claim by originalism to scientific methods and knowledge appears more expressive than empirical. In the originalists’ own space of reasons the claim to science appears a matter of value, not fact. Neither Judge Bork nor Justice Scalia explained what was scientific about their interpretive theory. Without such an explanation or defense, that claim would appear to reduce to an expressive statement that their originalisms are *good* and the methods are neutral, not political or based upon subjective values.

7. *See* Jonathan Lear, *An Interpretation of Transference*, 74 *INT’L J. OF PSYCHOANALYSIS* 739 (1993), reprinted in JONATHAN LEAR, *OPEN MINDED: WORKING OUT THE LOGIC OF THE SOUL* 56, 69-73 (1998) (defining an ideopolis as the pathological,

First, one of the most forceful and engaging arguments for originalism is that it best comports with our republican democracy. This is simply the statement of the originalist argument from Alexander Bickel's countermajoritarian challenge.<sup>8</sup> Federal judicial review has been challenged as undemocratic.<sup>9</sup> Judicial review, performed by unelected judges with lifetime appointments, may override otherwise valid democratically-enacted legislation.<sup>10</sup> That may appear inconsistent with the fundamental principles of our democratic republic.<sup>11</sup> Originalism argues that deference to the original understandings or expectations with respect to the Constitution provides a uniquely powerful answer to this challenge because judges are obligated to follow the directives of the Founders, ratifiers, or other relevant actors, without exercise of independent value choices or other judicial discretion.<sup>12</sup>

The critics offer three principal replies to the originalists' claim. First, the originalist strategy of finding the original understanding and intentions with respect to the Constitution is rejected as undoable. Those understandings and intentions simply did not, and do not, exist, the critics assert.<sup>13</sup> Second, even to the extent that such intentions and understandings existed, the originalist project of finding meaning is rejected as blinkered and mechanical.<sup>14</sup> To interpret those understandings and intentions,

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idiosyncratic polis within which a patient constructs and lives his conceptual life); *see generally* LeDuc, *Striding Out of Babel*, *supra* note 2, at 11-12 (exploring the concept of constitutional ideopolises and the notion of therapy for the originalism debate).

8. *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962) [hereinafter BICKEL, *LEAST DANGEROUS*] (arguing that the fundamental challenge of constitutional theory is to explain the role and legitimacy of judicial review in our democratic republic).

9. *Id.* at 16-17; Scalia, *Interpretation*, *supra* note 6, at 9 (broadening Bickel's concerns to encompass traditional common law methods of judicial decision).

10. *See* BORK, *TEMPTING*, *supra* note 6, at 139-41.

11. *Id.* at 139 (characterizing the task of reconciling judicial review with the democratic principles as the fundamental challenge of constitutional theory); BICKEL, *LEAST DANGEROUS*, *supra* note 8, at 16-23.

12. BORK, *TEMPTING*, *supra* note 6, at 139-41.

13. *See* RONALD DWORKIN, *The Forum of Principle*, in *A MATTER OF PRINCIPLE* 33, 34-57 (1985) [hereinafter Dworkin, *Forum of Principle*]; Laurence H. Tribe, *Comment*, in *INTERPRETATION*, *supra* note 6, at 68-71 [hereinafter Tribe, *Interpretation*].

14. *See, e.g.*, SUNSTEIN, *RADICALS*, *supra* note 4, at 73; John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *IND. L.J.* 399, 412-448, 445 (1978)



the critics assert, a different interpretative methodology is called for. Those critics reject the facile assimilation of the originalist interpretative methodology to historical research and analysis.<sup>15</sup> Dworkin, in particular, described a bolder, more expansive and more imaginative interpretive project.<sup>16</sup> Third, and perhaps most controversially, Bobbitt argues that the originalist premise is flawed: there is no need to reconcile judicial review and constitutional interpretation with democracy.<sup>17</sup>

The originalism debate has reached no resolution with respect to the originalists' argument from democracy and judicial review. Moreover, the debate has made no progress; the two sides do not appear to have engaged with respect to each other's positions. The reason for that failure is that originalism tacitly adopts an ontological characterization of the Constitution that makes it independent of the judicial determination of its consequences with respect to constitutional controversies. They believe that there is an objective constitution-in-the-world that judges are to find and apply.<sup>18</sup> As a result, constitutional arguments must be measured by the extent to which they produce results that are congruent with that objective Constitution.<sup>19</sup> The concept of the objective Constitution as the benchmark for decision is often clearest in originalist discussion of precedent,

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[hereinafter Ely, *Allure and Impossibility*] ("The point of all this is this: you cannot be an interpretivist.").

15. See, e.g., Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 *FORDHAM L. REV.* 87, 92-93 (1997) (emphasizing the differences between historical research and scholarship and historical argument in constitutional argument and adjudication); Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 *HARV. J.L. & PUB. POL'Y* 437 (1996).

16. DWORKIN, *EMPIRE*, *supra* note 6, at 225-75 (describing the process of adjudication as based upon a comprehensive interpretative project with respect to law and moral theory).

17. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 181 (1982) [hereinafter BOBBITT, *FATE*]. I explore that argument in André LeDuc, *The Anti-Foundational Challenge to the Philosophical Premises of the Debate over Originalism*, 119 *PENN ST. L. REV.* 131 (2014) [hereinafter LeDuc, *Anti-Foundational Challenge*] (concluding that an anti-foundational account of our constitutional law and decisional practice is plausible and compelling). For an important recent statement of the problem of judicial review, see Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006) (arguing that certain forms of judicial review are improper in democratic politics).

18. André LeDuc, *The Ontological Foundations of the Debate over Originalism*, 7 *WASH. U. JURIS. REV.* 263, 269-74 (2015) [hereinafter LeDuc, *Ontological Foundations*].

19. *Id.*

where the originalists often characterize existing doctrine and precedent as erroneous.<sup>20</sup>

Many of originalism's critics share that same commitment to an objective Constitution, however.<sup>21</sup> Because the constitutional text appears to the originalists generally to state positive law, arguments from democracy that justify judicial review operate at a level that seems conceptually quite different from arguments that go directly to the originalists' interpretative mission of determining the meaning of the constitutional text.<sup>22</sup> I will explore some of the ways in which these arguments have unfolded in the debate—and how they have failed to advance the competing claims of the debate.

Originalists also claim that because originalism offers the only neutral method of constitutional interpretation and adjudication, all of the other methods permit judges to substitute their personal preferences and discretion for the rule of law. This neutrality thesis is advanced to discredit other theories of constitutional interpretation and decision. This claim, like the first argument for originalism from democracy, has its origin in a critical response to the jurisprudence of the Warren Court. For originalists, the Warren Court committed the twin sins of overturning democratic legislation and upending the democratic process on the one hand and substituting its values and preferences for those of the Congress and state legislatures on the other.<sup>23</sup> Thus, these claimed implications of originalism reveal both the power and the provenance of originalism.

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20. See Antonin Scalia, *Response*, in INTERPRETATION, *supra* note 18, at 129, 139-40 [hereinafter Scalia, *Response*]; BORK, TEMPTING, *supra* note 6, at 155-59; Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 205 (2006) [hereinafter Solum, *Constitutional Bondage*] (adopting a quite Borkian stance on non-originalist precedent and concluding: "This means that isolated precedents contrary to original meaning will have a limited effect on constitutional adjudication."); Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 258-62 (2005) [hereinafter Barnett, *Trumping*] (arguing that non-originalist precedent must fall to the theoretical claims of originalism).

21. DWORKIN, EMPIRE, *supra* note 6, at 355-99 (describing an open-ended interpretative methodology that gives a fundamental role to philosophical analysis).

22. See Scalia, *Interpretation*, *supra* note 6, at 37 (characterizing constitutional interpretation as like textual interpretation but of a distinctive text).

23. See BORK, TEMPTING, *supra* note 6, at 69, 131-32; Scalia, *Interpretation*, *supra* note 6, at 149 (sarcastically mocking the "glorious days" of the Warren Court); RAOUL

The critics, however, sometimes make a strong objection, denying that the appeal of neutrality is coherent.<sup>24</sup> If neutrality is not a coherent concept or virtue for constitutional jurisprudence, then the originalist claim that originalism must be adopted as a method of constitutional interpretation because it alone satisfies the requirement of neutrality fails.<sup>25</sup> Critics also sometime make a conceptually weaker claim, accepting the standard of neutrality but arguing that originalism makes no stronger claim to neutrality than competing theories.<sup>26</sup>

The debate over neutrality is similarly fruitless. The failure to engage and to make progress arises from differing accounts of the nature of the Constitution and constitutional argument. Neutrality cannot play the simple, self-evident role that Judge Bork sought.

Third, I explore the originalist claim to offer a better account of the textuality of the written Constitution. Originalism has, to a greater or lesser degree, tied its claims to the written nature of the American Constitution.<sup>27</sup> Barnett, for example, claims that the Republic's decision to have a written Constitution has implications for constitutional interpretation and decision that support originalism.<sup>28</sup> Critics dispute that claim.<sup>29</sup> They argue that nothing about the text of the Constitution or the understandings and intentions on its adoption and amendment require that it be applied as the originalists interpret it.<sup>30</sup>

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BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) [hereinafter BERGER, GOVERNMENT BY JUDICIARY].

24. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 804-06 (1983) [hereinafter Tushnet, *Following the Rules*].

25. *Id.*

26. SUNSTEIN, RADICALS, *supra* note 4, at 72.

27. See, e.g., Scalia, *Interpretation*, *supra* note 6, at 40-41; Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 629-35 (1999) [hereinafter Barnett, *Originalism*] (emphasizing original understanding as the starting point for constitutional interpretation by analogy with the law of contract interpretation).

28. See Barnett, *Originalism*, *supra* note 27, at 617; see also Scalia, *Interpretation*, *supra* note 6, at 40-41 (describing the lock-in function of a written constitution).

29. See, e.g., Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1029-30 (2010) (arguing that the narrow originalist definition of interpretation assumes away the hard questions about how constitutional cases ought to be decided).

30. *Id.* at 1047-59.

Here, too, the protagonists in the debate appear to overstate their claims and to talk past each other. The existence of a constitutional text makes possible textual arguments and enriches and enhances the force of historical arguments. Justice Scalia was not wrong when he claimed that there are important implications for our constitutional law from the decision to adopt a written Constitution.<sup>31</sup> How could there not be?

Again, the failure for a more productive exchange arises from the shared assumption about the nature of the Constitution, its meaning, and constitutional interpretation and argument.<sup>32</sup> The textuality of the Constitution is central to our constitutional practice, but is neither a necessary<sup>33</sup> nor sufficient condition for originalism to establish itself as the uniquely proper method of constitutional interpretation or mode of constitutional argument.

Fourth, I examine how originalism accounts for constitutional change. Originalism aspires to give us a more stable Constitution, yet must interpret and apply a text largely written in the eighteenth century in the twenty-first. To do so requires an account of the kinds of change that constitutional theory may incorporate, as well as the kinds that it may not. The unchanging dimension of the Constitution is often described by originalists as normative or expressing value choices.<sup>34</sup> The theories offered by originalism rely on the distinction between changing empirical facts and unchanging values,<sup>35</sup> but even with that well-accepted distinction, it is not clear that the originalists have offered a plausible account of constitutional flux. On the

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31. Scalia, *Interpretation*, *supra* note 6, at 40-41; RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 100-03 (2004) [hereinafter BARNETT, LOST].

32. LeDuc, *Constitutional Meaning*, *supra* note 1 (arguing that semantic and even linguistic accounts of meaning defended by the New Originalists and their ilk fail to capture the pragmatics and inferentialist content of our constitutional practice); LeDuc, *Interpretation and Practical Reasoning*, *supra* note 1 (arguing that originalist descriptions of constitutional interpretation and reasoning fail to capture much of our constitutional practice).

33. See generally Stephen E. Sachs, Essay, *Originalism Without Text*, 127 YALE L.J. 156 (2017).

34. See, e.g., Scalia, *Response*, *supra* note 20, at 146 (describing the Bill of Rights as embedding the moral values of America in 1791); BORK, TEMPTING, *supra* note 6, at 251-52 (characterizing the Constitution as furnishing the moral premises for judicial decision).

35. See Scalia, *Response*, *supra* note 20, at 146 (describing moral principles as unchanging).

other hand, critics of originalism, with their metaphors of the Living Constitution and the Unwritten Constitution, often fail to recognize the power of historical and textual arguments. They sometimes appear to discount the certainty that arises regarding many issues from the constitutional text, exaggerating the sense of constitutional flux. As a result, the claims on both sides of the debate as to the nature of constitutional change appear overstated. Moreover, there is a sense that the premises about the Constitution, constitutional argument, and constitutional decision endorsed by the protagonists in the debate fail to capture key elements of constitutional flux—and the correlative elements of constitutional certainty.

Fifth, I assess the modal claim made by some originalists that originalism is necessary, and therefore any other inconsistent theory of constitutional interpretation is necessarily impossible. Bork suggests that such impossibility is analogous to the physical impossibility of theories that violate fundamental laws of physics or chemistry (like the alchemical project to transmute lead into gold or the pre-Newtonian physicists' project to design a perpetual motion machine).<sup>36</sup> That analogy is misleading, if rhetorically powerful. Until recently, other originalists have ignored this claim, but it has recently been restated.<sup>37</sup> The critics had generally ignored this singularly bold claim by Bork, but, as it has been restated and defended, the critics have begun to engage.<sup>38</sup> It is a claim that is particularly controversial with the past 50 years or so of the debate over originalism; on Bork's account, the critics of originalism are not merely wrong, they are necessarily wrong.

The claim of necessity for originalism does not warrant rehabilitation and a more central place in debate. It is important, however, for what it reveals about certain strands of originalism

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36. BORK, TEMPTING, *supra* note 6, at 251; *see also* Frank H. Easterbrook, *Alternatives to Originalism*, 19 HARV. J.L. & PUB. POL'Y 479, 479 (1995) [hereinafter Easterbrook, *Alternatives to Originalism*].

37. *See generally* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) [hereinafter Baude, *Our Law*] (making a positivist defense of the necessity of originalism).

38. Cass R. Sunstein, *There is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193, 193-98 (2015) [hereinafter Sunstein, *Nothing*] (arguing that the concept of interpretation cannot determine the nature or methods of constitutional interpretation).

and its implications for the debate. The claim of necessity reveals Bork's commitments to an account of the nature of the Constitution and the nature of constitutional reasoning. Those premises informed his originalism.<sup>39</sup> Originalists' critics do not share those commitments about constitutional reasoning.<sup>40</sup> The failure to share common ground on these issues prevents a more meaningful and productive debate over these questions.

Sixth, I examine the claim that drives much originalist thinking that originalism can restore the Lost Constitution, and, in so doing, radically change our constitutional law.<sup>41</sup> The Lost Constitution is that original Constitution before corruption.<sup>42</sup> Corruption, on this account, is the disregard for the interpretation of the Constitution based upon its original understanding.<sup>43</sup> It is fair to speak of this error as constituting corruption, rather than mere error, because the consequences are both that judges deciding cases on non-originalist arguments or grounds have arrogated power to themselves and that the most fundamental, foundational legal authority for the Republic has been cast aside.<sup>44</sup> The merits of the results under alternative constitutional decisional approaches—in terms of social utility, wealth maximization, fairness, or justice—are irrelevant, as are the good faith or good intentions of the judges committing such error. At the very least, the original Constitution is that which existed before corruption by the Warren Court.<sup>45</sup> For many, however, the corruption that must be excised started much earlier with the creation of the liberal state under President Franklin Roosevelt.<sup>46</sup>

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39. See LeDuc, *Ontological Foundations*, *supra* note 18, at 269-74, 285-88; LeDuc, *Interpretation and Practical Reasoning*, *supra* note 1, at 93-96.

40. LeDuc, *Interpretation and Practical Reasoning*, *supra* note 1, at 103-07.

41. See BARNETT, *LOST*, *supra* note 31, at 354-55.

42. See *id.* at 356.

43. As Sunstein has pointed out, the originalists sometimes treat non-originalists as lawless. See SUNSTEIN, *RADICALS*, *supra* note 4, at 54.

44. *Id.*

45. See BORK, *TEMPTING*, *supra* note 6, at 69-100. Thus Judge Bork wrote: "The Court headed by Chief Justice Earl Warren from 1953 to 1969 occupies a unique place in American law. It stands first and alone as a legislator of policy, whether the document it purported to apply was the Constitution or a statute." *Id.* at 69. Originalism cannot be understood as a matter of intellectual history except as a reaction to the jurisprudence of the Warren Court. See DANIEL T. RODGERS, *AGE OF FRACTURE* 232-35 (2011).

46. SUNSTEIN, *RADICALS*, *supra* note 4, at 3; see BARNETT, *LOST*, *supra* note 31, at 354-57.

For some, indeed, it began with Chief Justice Marshall and the doctrine of judicial review.<sup>47</sup> Critics of originalism have questioned whether originalism can accomplish the mission set out for it.<sup>48</sup> They argue that the originalist arguments either fail to establish the substantive constitutional law conclusions that the originalists defend<sup>49</sup> or, more radically, that the originalist arguments support very different substantive constitutional law conclusions.<sup>50</sup> In the context of originalism, these claims are admittedly counterintuitive.

Here, the shift in the debate is sufficiently recent and sufficiently novel that it is difficult to assess the competing claims. But it is safe to predict that few originalists will be easily persuaded by the claim that there is a compelling originalist argument for a woman's right to an abortion. So, at least to that extent, the debate will not move forward on this front. In fairness to the originalists, however, it does not appear that they ought to be persuaded by these arguments. The argument that the originalist mission fails does not account for the power traditional originalist arguments have had in expressing the reasons to reach traditional originalist conclusions about substantive constitutional questions and in the opinions supporting originalist decision of constitutional cases. As so often with the theoretical argument for substantive constitutional results, theory is often impotent.<sup>51</sup>

The six claims and implications explored here are of particular importance in the debate and in assessing the

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47. See BORK, *TEMPTING*, *supra* note 6, at 19-28.

48. David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969, 975 (2008) [hereinafter Strauss, *Why*] (arguing that originalist arguments may be made for decidedly non-originalist constitutional results). That bold claim underestimates the conservative force of arguments based upon original intentions, expectations, and understandings of the eighteenth and nineteenth centuries.

49. *Id.* ("originalism's characteristic features . . . makes it a decidedly non-conservative rhetorical weapon").

50. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007) (arguing that the original meaning of the Constitution creates a woman's right to an abortion). See generally JACK BALKIN, *LIVING ORIGINALISM* (2011) [hereinafter BALKIN, *LIVING ORIGINALISM*] (adapting originalist arguments to support traditionally liberal constitutional results).

51. LeDuc, *Ontological Foundations*, *supra* note 18; André LeDuc, *The Relationship of Constitutional Law to Philosophy: Five Lessons from the Originalism Debate*, 12 GEO. J.L. & PUB. POL'Y 99, 153-54 (2014) [hereinafter LeDuc, *Relationship of Constitutional Law to Philosophy*].

importance of constitutional originalism.<sup>52</sup> The power and appeal of originalism should at once be apparent upon stating these six theses. After the relatively bitter, partisan battles that have surrounded the Supreme Court's constitutional jurisprudence,<sup>53</sup> a theory that promises a neutral method makes a powerful claim on our loyalty. Finally, the power of that theory—if required by democracy—could certainly survive mere subtle philosophical criticism. I will explain why the originalists fail to establish this powerful claim. The critics do not establish their claims or most of their criticisms of originalism. They fail to establish that the Lost Constitution cannot be recovered by originalism; it very likely can.

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52. There is, of course, a certain arbitrariness in the selection of these six theses. Others before me have attempted to identify the key theses of originalism, both as proponents and as critics. See, e.g., Barnett, *Originalism*, *supra* note 27, at 629-43 (defending originalism's claims); Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311, 311-13 (1996) [hereinafter Sunstein, *Five Theses*] (arguing that a weak version of what he terms soft originalism is a valuable constitutional theory, preferable to the non-originalism of Dworkin and the Warren Court or to more ambitious strong originalisms). There are other important theses in originalism. Originalism is presented, at least metaphorically, as a scientific method. Justice Scalia began his essay *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*: "The following essay attempts to explain the current neglected state of the *science* of construing legal texts, and offers a few suggestions for improvement." Scalia, *Interpretation*, *supra* note 6, at 3 (emphasis added). Additionally, originalists claim that attention to the original meaning is the only honest method of interpreting the Constitution. Bork wrote, for example, that the literature of constitutional interpretation challenging originalism and offering alternatives "is in effect coded . . ." BORK, TEMPTING, *supra* note 6, at 135. Elsewhere he characterizes such authors' projects as "nothing less than the subversion of the law's foundations." *Id.* at 136. Strong words. The claim that originalism is an honest creed with which to interpret the Constitution—and that the competing theories are not—is thus also a powerful and compelling thesis. Moreover, by implicitly accusing opponents of dishonesty—least in the matter of constitutional interpretation—it is necessarily a polarizing and divisive claim. See SUNSTEIN, RADICALS, *supra* note 4, at 3-7, 54. Nevertheless, there is reason to suspect that most originalists don't really believe those bold claims. If to depart from originalism were to abandon the Constitution and subvert the laws, then mere claims of *stare decisis* would be hardly compelling. Yet, as noted below, even strong proponents of originalism like Justice Scalia acknowledge the legitimacy of such deference. Scalia, *Response*, *supra* note 20, at 139-140 (arguing in response to criticism from Tribe that all theories allow for deference to theoretically questionable precedent under the doctrine of *stare decisis*).

53. See, e.g., Jed Rubenfeld, *Not as Bad as Plessy. Worse.*, in BUSH V. GORE: THE QUESTION OF LEGITIMACY 20, 34 (Bruce Ackerman ed., 2002) (exploring the Supreme Court's decisive role in the 2000 presidential election and concluding that the decision was "utterly indefensible"); BORK, TEMPTING, *supra* note 6, at 9-11, 11 (characterizing the academic constitutional criticism of originalism as a "heresy").



With respect to the other four core claims, the arguments are more complex and subtle than either side generally acknowledges. The debate thrives on simplistic and oversimplified premises and unstated assumptions. From within the framework within which the debate has unfolded the arguments have been largely inconclusive. The originalists generally believe that originalism is more consistent with our democratic republic and their critics dissent; the claim of neutrality made by the originalists is rejected by their critics; and the claim to hew more closely to the written nature of the constitutional text advanced by the originalists is also rejected by their critics. Moreover, there is little progress occurring in the debate; there is no sense that we are moving toward a resolution of these issues. The debate appears at an impasse on these central issues and the arguments fruitless. Companion articles have explored the sources of this impasse.<sup>54</sup> This article confirms that the stalemate of the debate has also occurred with respect to the debate over these six central claims and implications of originalism.

## II. SIX CLAIMS AND IMPLICATIONS OF ORIGINALISM

### A. The Originalist Argument from Democracy

One of the most powerful and complex arguments for originalism is that all of its alternatives are undemocratic.<sup>55</sup> If that were true, it would be a compelling argument for originalism. Describing common law adjudication, Justice Scalia concludes: “This is preeminently a common-law way of making law, and not

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54. See generally LeDuc, *Ontological Foundations*, *supra* note 18; LeDuc, *Anti-Foundational Challenge*, *supra* note 17; André LeDuc, *Paradoxes of Positivism and Pragmatism in the Debate about Originalism*, 42 OHIO N.U. L. REV. 613 (2016) [hereinafter LeDuc, *Paradoxes of Positivism*]; LeDuc, *Constitutional Meaning*, *supra* note 1.

55. See Scalia, *Interpretation*, *supra* note 6, at 40; BORK, *TEMPTING*, *supra* note 6, at 143. Dworkin characterized this argument as Justice Scalia’s “most basic” argument for originalism. Ronald Dworkin, *Comment*, in *INTERPRETATION*, *supra* note 6, at 115, 127 [hereinafter Dworkin, *Interpretation*].

the way of construing a democratically adopted text.”<sup>56</sup> That is, the degrees of freedom in a democracy with respect to the construction or interpretation of a legal text are fewer than in adjudication in a common law tradition. Bork made a similar point more forcefully: “[O]nly the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy.”<sup>57</sup> Here, Bork apparently made the point that, in a democracy, the supremacy of the legislative will of the people requires that sources of law not derived from the democratic exercise of that will be rejected

The Borkian argument from democracy is simple and direct. The Constitution is the pre-eminent democratic law.<sup>58</sup> Judges and justices have sworn oaths to uphold it.<sup>59</sup> Its choices and directives are controlling, not to be subverted or amended by an appointed judiciary in derogation of the democratic will.<sup>60</sup>

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56. Scalia, *Interpretation*, *supra* note 6, at 40. Justice Scalia does not pause to explore the definition of democracy or otherwise analyze the elements of democracy that implicate constitutional interpretation and adjudication. It is likely that he thinks that the commonsensical notion of democracy does not require more careful analysis. The fundamental notion is that citizens make the fundamental choices about what their government does. *But see generally* RICHARD A POSNER, LAW, PRAGMATISM, AND DEMOCRACY 130-57 (2005) [hereinafter POSNER, LAW AND DEMOCRACY] (arguing that the legal academy has been cavalier in its invocation of concepts of democracy in ways that conflate two very different visions).

57. BORK, TEMPTING, *supra* note 6, at 143. Earlier, in *Neutral Principles*, Bork had made the same point: “If I am correct so far, no argument that is both coherent and respectable can be made supporting a Supreme Court that ‘chooses fundamental values’ because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society.” Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971) [hereinafter Bork, *Neutral Principles*].

58. U.S. CONST. art. VI, cl. 2.

59. ORIGINALISM: A QUARTER-CENTURY OF DEBATE 163-64 (Steven G. Calabresi ed., 2007) [hereinafter ORIGINALISM] (remarks of Judge Easterbrook); *see also* Easterbrook, *Alternatives to Originalism*, *supra* note 36. The significance of the judicial oath to uphold the Constitution goes largely unremarked in this debate. *But see* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 12 (1980) [hereinafter ELY, DEMOCRACY AND DISTRUST]. Judges may take the oath more seriously than the commentators suggest and, to the extent that they do not, that may properly be a matter of concern. The oath does not answer the relevant decisional questions, however; it leaves open the question of what it means to uphold the Constitution. Dworkin might have said that it means to uphold it with fidelity to its highest aspirations. But the task of upholding the Constitution is arguably a different task than to interpret it faithfully.

60. Two comments are in order. First, the import of appointment is not entirely clear. Since the Progressive movement, many Midwestern states (among others) have elected their judges. I am unaware of any suggestion that selecting judges by popular election solves, or

Originalism claims to offer the best interpretation of the meaning of the Constitution and the best bulwark against interpretative subversion or de facto amendment. I have previously canvassed originalism's argument to offer the best interpretation.<sup>61</sup> Most fundamentally, originalism and many of its critics accord a priority to interpretation in constitutional adjudication that is misplaced, and problems of interpretation are more complex than many originalists acknowledge.<sup>62</sup> Originalism also claims to offer the best bulwark against judicial adventurism because it purports to limit the sources of law to which judges may look, thereby limiting the possibility that a judge might import her own subjective preferences into the decision process.

Sunstein captures the intuitive appeal of this argument.<sup>63</sup> He compares it to a friend's request for music of Barbra Streisand as a birthday present from one who dislikes such music.<sup>64</sup> The manifestly proper response is to make the gift of the music of Barbra Streisand, not the gift of the "better" music enjoyed by the donor.<sup>65</sup> "Fundamentalists believe courts should think in the same way, as agents of the people, implementing their

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would solve, the countermajoritarian objection. Elected judges, performing their judicial roles, either re-elected or turned out of office, appear fully consistent with democracy in a democratic republic. This case, so prevalent in the states since the Progressive Era, casts substantial doubt that the countermajoritarian difficulty is, fundamentally, a problem in democratic process and institutions—not a problem of the subversion of democracy itself. But even very careful thinkers about judicial review have missed this point. *See* Waldron, *supra* note 17, at 1353. So exploring that dimension of judicial review is a topic for another day. Similarly, there is generally no suggestion that the problem of judicial review was exacerbated by the adoption of the Seventeenth Amendment and its requirement of direct election of United States Senators or the democracy-reinforcing decisions of the Warren Court that have enhanced the democratic nature of the Republic. The second point to highlight is the importance of the reference to will in the formulation of the objection. Because it is the democratic *will* that is preeminent, mere argument or reason, in which a court might legitimately claim institutional competence, if not expertise, is discounted. Dworkin's strategy to challenge originalism (and also to solve the problem that judicial review appears countermajoritarian) is to elevate the role of reason and argument, and their place in comparison to will.

61. *See generally* LeDuc, *Interpretation and Practical Reasoning*, *supra* note 1 (concluding that the reduction of constitutional decision to interpretation is mistaken); LeDuc, *Anti-Foundational Challenge*, *supra* note 17 (introducing my arguments about the foundations of the interpretative claims in the debate).

62. *See id.*

63. *See* SUNSTEIN, *RADICALS*, *supra* note 4, 56-59.

64. *Id.* at 57.

65. *See id.*

commands.”<sup>66</sup> That is an intuitive way to think about law, grounded in the positivist model of law as the command of the sovereign<sup>67</sup> and the classical liberal political theory of democracy.<sup>68</sup> John Hart Ely, before criticizing originalism, also acknowledges its fundamental appeal in the context of our classical democratic theory.<sup>69</sup> But Sunstein is mistaken because the performative mission of the Constitution is very different from the performative role of a friend’s report of what she would like as a birthday present.<sup>70</sup> In the social context of selecting a friend’s birthday present, what his personal preferences are is very close to controlling, in the weak sense of being determinative of what a friend should do. That sensitivity to another’s preferences is part of what makes one a good friend.<sup>71</sup> In the context of our practice of applying the Constitution to resolve controversies presented in constitutional cases the original understanding of the text is not, as a matter of that practice, controlling.<sup>72</sup> Other kinds or modes of argument have often proved decisive. Originalists may argue against the practice, but in doing so they are pitting theory against practice.

The analysis of originalism’s argument from democracy—and the critics’ response—requires three principal steps. First, originalism’s tacit account of the linguistic meaning

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66. *Id.* Note also how clearly positivist such an originalist account of the law is. See generally LeDuc, *Paradoxes of Positivism*, *supra* note 54 (exploring the positivist and non-positivist themes in the originalism debate, emphasizing the relative absence of consequential differences that arise from positive and natural commitments in the debate).

67. See H.L.A. HART, *THE CONCEPT OF LAW* 18-22 (1st ed. 1961) [hereinafter HART, *THE CONCEPT OF LAW*] (describing the jurisprudential theory of John Austin, but characterizing it as overly simplistic).

68. See generally André LeDuc, *Political Philosophy and the Fruitless Quest for an Archimedean Stance in the Debate over Originalism*, 85 UMKC L. REV. 1 (2016) [hereinafter LeDuc, *Fruitless Quest*] (criticizing the invocation of political philosophy to play a foundational role in constitutional interpretation and decision).

69. ELY, *DEMOCRACY AND DISTRUST*, *supra* note 59, at 4-5.

70. See generally SUNSTEIN, *RADICALS*, *supra* note 4, at 57.

71. See DANIELLE ALLEN, *OUR DECLARATION: A READING OF THE DECLARATION OF INDEPENDENCE IN DEFENSE OF EQUALITY* 250-52 (2014) [hereinafter ALLEN, *OUR DECLARATION*].

72. See generally BOBBITT, *FATE*, *supra* note 17 (describing the alternative modes of constitutional argument including prudential, doctrinal, and structural arguments that do not derive from the original understandings or intentions with respect to the constitutional text). To avoid possible misunderstanding, I should emphasize that I am here making a descriptive claim about our constitutional practice, not a prescriptive claim about what that practice ought to be.

of the Constitution must be expressly articulated. That meaning provides the linguistic force that originalism seeks to capture. Second, the originalist account of the authority of the Constitution—which emphasizes the Constitution’s democratic provenance—must be articulated. It is the democratic legitimacy of that authority that is at the core of the argument for originalism from democracy. Third, the relationship of originalism’s theoretical arguments from democracy with our constitutional practice must be highlighted. I will explore each in turn.

### 1. *The Appeal to Meaning*

To make the argument from democracy, originalism must first establish the meaning of the Constitution that is to be faithfully followed. Originalists argue that it is only that constitutional meaning that has democratic legitimacy. Critics of originalism, after all, do not dispute that the Constitution is paramount or that judges and justices are bound to uphold it.<sup>73</sup> The disagreement is generally with respect to the claim that originalism is the best interpretation of what the Constitution means and occasionally as to how interpretation fits into constitutional adjudication. The disagreement is over what it means to uphold the Constitution.<sup>74</sup> For example, Dworkin’s reply to Justice Scalia claimed to offer a more faithful reading of the Constitution.<sup>75</sup> Both he and Justice Scalia endeavored to determine what the Constitution means about what it says.<sup>76</sup> Yet

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73. See, e.g., Dworkin, *Interpretation*, *supra* note 55, at 122. Martha Nussbaum noted this recently almost in passing: “Textualists and their critics typically differ over how to find the meaning of the constitutional text, not over its relevance.” Martha C. Nussbaum, Foreword, *Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 58 n.210 (2007). Nussbaum has, however, overstated the role of interpretation in constitutional adjudication.

74. LeDuc, *Anti-Foundational Challenge*, *supra* note 17, at 133; see also Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1262 (1997) [hereinafter Dworkin, *Arduous*] (arguing that Justice Scalia’s originalism is not faithful to the Constitution).

75. Dworkin, *Interpretation*, *supra* note 55, at 122-23 (“I said, for example, that, subject to the constraints of integrity which require judges to keep faith with past decisions, ‘The Constitution insists that our judges do their best collectively to construct, reinspect, and revise, generation by generation, the skeleton of freedom and equality of concern that its great clauses, in their majestic abstraction, command.’”).

76. Nevertheless, Justice Scalia accuses Tribe and Dworkin of misinterpretation and Dworkin levels the same charge against Justice Scalia. Scalia, *Response*, *supra* note 20, at

it is surely fair to acknowledge, as with respect to the closely related argument from neutrality, that the apparent tension with democracy is clear. There is something about a theory that claims judges should be merely interpreting the constitutional text based upon special expertise and a judicial demeanor that appears to comport with the proper role of judicial review in a democracy. Whether this promise can sustain the challenges from its critics, we ought to begin by acknowledging the appeal of this theory.

If we analyze the theory and its intuitive appeal more closely, we can identify several strands of the argument. First, the model of adjudication—following the rule—is an intuitively engaging account of how we are bound by legal rules. The appeal of this model emerges if we look more generally at our ordinary notions about the nature of following rules more generally. But the model of rule following also emerges as more complex and ultimately somewhat misleading. Wittgenstein explores the psychological and theoretical elements in following rules in the *Philosophical Investigations*.<sup>77</sup> Wittgenstein's analysis, although controversial, is generally understood to defend rule following as a social practice and to reject the claim that following a rule begins with an interpretation of the rule.<sup>78</sup> He rejects the common assumption that we can understand how we follow rules expressed by our language without understanding the behavior in a social context.

The role of legal rules in adjudication presents a more complex problem than the kinds of rule following that Wittgenstein focuses upon. Most legal cases—at least most appellate cases—present questions as to exactly how we are to proceed under the relevant rule or rules. The cases may be

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143 (“Professor Tribe’s methodology [of constitutional interpretation] and mine are poles apart.”); Dworkin, *Arduous*, *supra* note 74, at 1262 (“Scalia wants to be seen to embrace fidelity, but he ends by rejecting it.”). So too Tribe: “Let us . . . take Justice Scalia at his word and assume that . . . he does indeed believe, as I do, that it is the *text*’s meaning . . . that binds us as law.” Tribe, *Interpretation*, *supra* note 13, at 66.

77. See generally LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 3d ed. reprt. 1986) (1953).

78. SAUL A. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* (1982); G.P. BAKER & P.M.S. HACKER, *SCEPTICISM, RULES & LANGUAGE* vii-xiii (1984) (rejecting Kripke’s reconstruction of Wittgenstein’s argument as developing and rebutting an account of rule skepticism).

described, at least in part, as presenting the question of *how* to follow the relevant rule. That is, in a sense, the nature of a question of law. Whether that question is helpfully viewed as a semantic question or something else is central to Dworkin's theory of law. So if we are to invoke the notion that the judicial mission is to determine how to follow a rule, we are going to have to do so having acknowledged that we are operating in the borderlands of the rules. Constitutional adjudication generally arises when the parties disagree about how to follow the rule or whether there is a rule.

The concepts of meaning, interpretation, and constitutional reasoning tacitly adopted by originalism are more complex and problematic than they—and many of their critics—acknowledge.<sup>79</sup> As a result, the premises for the debate are more problematic than is generally acknowledged, too.

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79. LeDuc, *Constitutional Meaning*, *supra* note 1; LeDuc, *Interpretation and Practical Reasoning*, *supra* note 1. To the extent that the constitutional text ought to be read performatively, along lines suggested by the pragmatics of Austin and Grice, the originalist approach to constitutional meaning is inadequate. See LeDuc, *Constitutional Meaning*, *supra* note 1, at 150-78. I have previously explored the apparent puzzle about the question whether the Vice President may preside over her own impeachment trial and shown how a performative and inferentialist analysis helps explain why she may not. See LeDuc, *Constitutional Meaning*, *supra* note 1, at 152-53 (emphasizing the inferentialist commitments inherent in the constitutional text); LeDuc, *Interpretation and Practical Reasoning*, *supra* note 1, at 73 n.114 (emphasizing the performative dimension of the text).

Another example arises with respect to the limitation on the ability to amend Article I to change the equal representation of each State in the Senate. Article V provides that such representation may not be changed for a State without its express agreement. U.S. CONST. art. V (“[N]o state, without its consent, shall be deprived of its equal suffrage in the Senate.”). But, by the express terms of Article V, no amendment to the restrictive terms of Article V itself require each State's consent. Thus, according to the public understanding of the linguistic meaning of the Constitution on its adoption, a two-step process could change the undemocratic charter of the Senate. The first step would simply repeal the requirement of consent, without actually stripping any state of its equal representation in the Senate. Again, a performative analysis that recognizes what the restrictive provision of Article V was doing—rather than merely what it was saying—demonstrates rather powerfully why such an approach would be impermissible. (I think this example also highlights the fallacy of the infinite regress argument made by Tribe and Dorf.) LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 73-80 (1991) [hereinafter TRIBE & DORF, READING] (arguing that determining the level of generality at which a constitutional provision is to be applied requires interpretations relying upon premises outside the text); see also Robert Brandom has also rejected of the problem of infinite regress. Robert B. Brandom, *A Hegelian Model of Legal Concept Determination: The Normative Fine Structure of the Judges' Chain Novel*, in PRAGMATISM, LAW, AND LANGUAGE 19, 21-22 (Graham Hubbs & Douglas Lind eds., 2014) [hereinafter Brandom, *Hegelian Model*] (expressly invoking Lewis Carroll's logic fable of Achilles and the Tortoise to deny that a legal rule

Second, there is a very important strand of political theory to the originalist claim. Because of the enormous direct power accorded judges over particular persons in the particular context of their lawsuits, we are anxious to cabin and constrain that power. That implicit concern with power, and with its potential abuse, is one of the sources of originalism's appeal. If we can assimilate the judge's role to that of an honest umpire, in Chief Justice Roberts's formulation,<sup>80</sup> we have denied her the authority to do more. The model of rules appears to offer a path to do so. Appellate judges simply resolve disagreements about what the rules are or how they apply in particular cases.

Third, related to the second consideration with respect to the requirement that judicial power be legitimate, is the collateral

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needs an interpretation before it can be applied); LeDuc, *Ontological Foundations*, *supra* note 18, at 320–22.

80. “Judges are like umpires. Umpires don’t make the rules, they apply them.” *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be C.J. of the United States). Implicit and important in this metaphor, but unarticulated or acknowledged is the premise that there is a fact of the matter with respect to what the rules of the game are. On this matter, the judge confronts the rules of the game with an internal point of view, but passively, accepting the rules as they are without regard to whether they make sense, or are defensible. I explore both why the notion that there is a fact of the matter with respect to propositions of constitutional law is an initially seductive notion of what makes propositions of constitutional law defensible or, in other terms, true, as well as why it is a misleading approach to the performative texts of the Constitution in three companion articles. See generally LeDuc, *Ontological Foundations*, *supra* note 18; LeDuc, *Anti-Foundational Challenge*, *supra* note 12; LeDuc, *Constitutional Meaning*, *supra* note 1. Leading defenders of contemporary accounts of constitutional claims as true and what makes them so, like Christopher Green, seem to take the truth value of authoritative propositions of constitutional law as so obvious as not to need any defense. Christopher R. Green, *Constitutional Truthmakers*, 32 NOTRE DAME J.L. ETHICS & PUB. POL’Y (forthcoming 2018) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2901157](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2901157) [<https://perma.cc/SEB8-H67X>]) [hereinafter Green, *Truthmakers*] (devoting an entire article to the competing accounts of the truthmakers for propositions of constitutional law without addressing the question whether any such truthmakers exist). That is a surprising omission, in the light of the philosophical and constitutional literature that has called that premise into doubt. Bob Brandom’s formulation of the distinction between our pure and practical reason is perhaps most helpful. That is, we make propositions of constitutional law true (to the extent that’s a helpful notion) rather than take them as true. This formulation probably best captures the fundamental thrust of the alternative to a representational theory of constitutional texts that accounts for the truth of constitutional texts by their correspondence with facts about the Constitution-in-the-world.

For my more complete analysis of the tacit and express use of political philosophy in the originalism debate and my assessment that political philosophy cannot provide the Archimedean stance from which to resolve the debate see LeDuc, *Fruitless Quest*, *supra* note 68.



concern that, in our Republic, the power to make laws is vested in our democratically-elected representatives. Any lawmaking by the judiciary would appear to challenge this premise of our democracy. This, of course, is the celebrated countermajoritarian difficulty;<sup>81</sup> courts appear undemocratic, perhaps even antidemocratic, as and to the extent that they strike down otherwise properly enacted democratically enacted laws.

The critics' responses to this democracy-preserving defense of originalism are made in stronger and weaker forms. The strong form challenges the notion that texts have meanings independent of readers and interpretive communities.<sup>82</sup> This skeptical challenge is most clearly associated with the Critical Legal Theorists<sup>83</sup> and with Stanley Fish.<sup>84</sup> These radical, skeptical arguments may be rebutted a number of ways.<sup>85</sup> More powerful is a weaker form of the challenge to original meanings. The weaker form of the challenge to originalist claim to rely upon original meaning simply denies that the meaning of the provisions answers the concrete questions of modern times.<sup>86</sup> Even committed originalists sometimes make this argument.<sup>87</sup> All that I want to reiterate here is that those challenges to the implicit premise of a self-interpreting Constitution and the claim of an

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81. BICKEL, LEAST DANGEROUS, *supra* note 8, at 16-17.

82. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 519-21 (2003).

83. See generally Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

84. See generally STANLEY FISH, *Working on the Chain Gang: Interpretation in Law and Literature*, in DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 87 (1989) [hereinafter FISH, *Chain Gang*]; DOING WHAT COMES NATURALLY; STANLEY FISH, *Wrong Again*, in DOING WHAT COMES NATURALLY, *supra*, at 103 [hereinafter FISH, *Wrong Again*].

85. See DENNIS J. PATTERSON, LAW AND TRUTH 99-127 (1996) [hereinafter PATTERSON, TRUTH] (arguing that the interpersonal social world is constructed not by interpretation but by shared understanding of social practice); see also Martha Nussbaum, *Sophistry About Conventions*, 17 NEW LITERARY HIST. 129, 129-30 (1985) reprinted in LOVE'S KNOWLEDGE: ESSAYS IN PHILOSOPHY AND LITERATURE 220, 220-211 (1990) [hereinafter Nussbaum, *Sophistry*] (arguing that Fish's radical skepticism is sophistical because the truth of what we say matters, even if we reject realism).

86. See, e.g., Dworkin, *Arduous*, *supra* note 49.

87. *United States v. Jones*, 565 U.S. 400, 420 n.3 (2012) (Alito, J., concurring in the judgment) ("The Court suggests that something like this might have occurred in 1791, but this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.").

unambiguous statement of abstract provisions are powerful objections, even if not as dispositive as their proponents might sometimes suggest.<sup>88</sup> In the face of those criticisms, the originalists' appeal to the meaning of the Constitution, without more, probably fails.

## 2. *The Authority of the Constitution*

An implicit premise of the argument from democracy is that the Constitution, as a text, has an authoritative status by virtue of actions taken by white males, generally of Northern European extraction, in the eighteenth century.<sup>89</sup> That limited class comprised the relevant political actors. Their actions in revolting against England in the 1770's and then overthrowing the Articles of Confederation of the thirteen states<sup>90</sup> are now, still, binding upon all American citizens and residents. How does that work? One model of explanation often employed is the model of laws. Properly adopted laws under the federal and the states' constitutions are binding laws. The Constitution proposed, and ratified by its own terms, may appear to be binding in a similar way. But how is such a constitution distinguished from the possible constitutions of otherwise non-authoritative groups, such as the *posse comitatus*?

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88. See *infra* Section II.C; see also Scalia, *Interpretation*, *supra* note 6, at 40 (asserting, without argument, his claim as to the inherent conservative mission of constitutions).

89. See, e.g., BORK, *TEMPTING*, *supra* note 6, at 171-76; Baude, *Our Law?*, *supra* note 37, at 2352.

90. Under the Articles of Confederation, the mission of the Philadelphia convention in 1787 was only to propose amendments to the Articles of Confederation. The convention far exceeded its authority, effectively overthrowing the Confederation established under the Articles of Confederation. See generally AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 29-38 (2005) [hereinafter AMAR, *AMERICA'S CONSTITUTION*]; MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* (2016); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 471-75 (new ed. 1998) (describing a "Federalist revolution"). Thus, the original legitimacy and force of law of the Constitution cannot be explained easily in terms of conformity with then existing positive law, a point that appears to go unaddressed by Bork and Justice Scalia. Tribe explores the source of the legitimacy of the Constitution. His argument, of course, is that the legitimacy of the Constitution is a clear demonstration of the powerful "dark matter" of the invisible Constitution. See LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 6-7, 149-51 (2008) [hereinafter TRIBE, *INVISIBLE*].

Bork acknowledged the criticism that the Constitution, adopted by our forefathers—or at least, some of our white forefathers—cannot bind citizens of a heterogeneous democracy today, and, in his customary style, purports to address it head on.<sup>91</sup> He suggested that the argument questioning the legitimacy of the Constitution is confined by its proponents to the provisions guaranteeing rights.<sup>92</sup> Second—and the relationship of these two restatements is not clear—the objection challenging the Constitution may be restated as a claim that judges may go beyond the text of the Constitution in creating rights, because of the limitations on the democratic process inherent in the Constitution’s formation.<sup>93</sup> Once the argument for expanded judicial powers was so reformulated, Bork offered the reply that alleged defects in the Constitution’s formation cannot ground an anti-majoritarian defense of judicial activism.<sup>94</sup> The power of the judiciary, created by the Constitution, to strike down otherwise legitimate laws, cannot be expanded by flaws in the adoption of the constituting authority. Thus, for Bork, the challenge based on the provenance of the Constitution was seemingly beside the point. The failure to define a broader spectrum of protected rights entitled to constitutional protection could not justify a court striking down otherwise duly enacted statutes to protect other rights not protected by the dead white men’s Constitution. Thus, Bork concludes, the attack on the legitimacy of the Constitution cannot be an argument for greater judicial authority (under that Constitution) nor for judicial activism.

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91. BORK, TEMPTING, *supra* note 6, at 170-76.

92. *Id.* at 170. Bork’s claim was both too broad, and too narrow. It was too broad because many rights in the Constitution are uncontroversial. No one is today much concerned about the Third Amendment—prohibiting the quartering of troops in private homes—notwithstanding its provenance. That could change in time, of course. Nor, contrary to Bork’s implicit suggestion, is the controversy limited to the need for greater reach for the rights assured by the Constitution. The Second Amendment assuring the right to bear arms has long been a *bête noir* of liberals. See generally Sanford Levinson, Comment, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) [hereinafter Levinson, *Embarrassing Second Amendment*]. So the formulation is too narrow, too.

93. See BORK, TEMPTING, *supra* note 6, at 172-75; Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1230 (2012). But see AMAR, AMERICA’S CONSTITUTION, *supra* note 90, at 15-19 (arguing that the process of ratification of the Constitution was democratic to an unprecedented degree at that time).

94. BORK, TEMPTING, *supra* note 6, at 170-76.

While Bork appears right to deny that the assault on the provenance of the Constitution cannot expand the powers of the judiciary under that same Constitution, it would also appear that Bork and his critics have failed to engage. The claim of the critics of the Constitution ought not—at least under the principle of charity—be construed as one that the Constitution is invalid or illegitimate, but rather as a claim that the validity of the Constitution as a source of law, and the legitimacy of that law, derive from something more than the historical events of the late 18<sup>th</sup> century along the east coast of the United States. The emphasis upon the limitations of that historical process and its distance from the present merely serves to lay the foundation for an inquiry into the rest of the story of how we are today to interpret and apply the Constitution. The claim that the historical origin of the Constitution is insufficient to explain how it applies today as a source of legal obligation can be restated abstractly as an example of the claim that no text can be self-interpreting. Each text must be interpreted within the context of linguistic and, often, other social practices.

We can acknowledge these claims without committing ourselves to the strong claims made about reading and interpretation by some.<sup>95</sup> Once we do acknowledge that a text cannot be self-interpreting, or, indeed, self-referential in any controlling way, we understand why the authority of the Constitution is fundamentally different than the authority of a law enacted in conformity with the Constitution. A corollary of this difference explains why the sanctions for violating the Constitution are different from the sanctions for violating other laws. As important as the force of the Constitution is, it nevertheless implicates fundamental choices in our democratic republic. Imposing individual sanctions, whether criminal or civil, would potentially constrain the expression of views and the making of political decisions and thereby impair the robust

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95. Some critics have argued that texts are fundamentally empty and that all meaning is brought to them by their readers and interpreters. That claim has achieved a certain currency, in certain circles, but has not played a prominent role in the debate over originalism. For leading commentary on an important element of the interpretation controversy, see Fish, *Chain Gang*, *supra* note 84, at 87; Fish, *Wrong Again*, *supra* note 84, at 103; Ronald Dworkin, *On Interpretation and Objectivity*, in *A MATTER OF PRINCIPLE*, *supra* note 13, at 167 (1985); Nussbaum, *Sophistry*, *supra* note 85.

democratic political life contemplated and intended by the Constitution.

That historical story leads, on the best account of the critics of originalism, to an account of the social practices surrounding the Constitution; our government officials' pledges to maintain and defend it, our veneration of it within the community, and, far from least, our practice of construing it and interpreting it, in the courts and in the academy.<sup>96</sup> When we look at how those practices contribute to the force of the Constitution we are necessarily looking beyond the four corners of the text. That, I take it, is the better interpretation of the criticism of the origin of the Constitution, not the reconstruction offered by Bork. That better interpretation is not adequately rebutted by Bork's arguments.

### *3. The Place of Constitutional Practice in a Democracy*

Bobbitt argues that the existence of our constitutional practices establishes the legitimacy of judicial review.<sup>97</sup> If that is

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96. The classic account of this practice-based anti-foundationalist analysis is BOBBITT, FATE, *supra* note 17; *see also* LeDuc, *Anti-Foundational Challenge*, *supra* note 12 (developing Bobbitt's analysis in the context of the originalism debate).

97. BOBBITT, FATE, *supra* note 17, at xix n.1. Bobbitt's modalities, and the role that he ascribes to them, have often been misunderstood. Bobbitt himself describes the reader who thought the subtitle of the work ought to have been "Theories of the Constitution," not understanding Bobbitt's notion that it is the very articulation and argument with and through these theories that gives meaning to the Constitution and legitimates judicial review; no one of these theories can itself be dominant and the modes themselves are incommensurable—there is no formula for when a prudential argument trumps a structural or historical argument. Thus, Bobbitt's theory is a meta-theory of how these constitutional theories legitimate the practice of judicial review. *See* PHILIP C. BOBBITT, CONSTITUTIONAL INTERPRETATION xi (1991) [hereinafter BOBBITT, INTERPRETATION]. In his first statement of those modes, their logical status was not made nearly so clear as in his later work. *Compare* BOBBITT, FATE, *supra* note 17, at 10-11 *with* BOBBITT, INTERPRETATION, *supra*, at 11-22. Thus, he did not generally characterize the type of arguments as modes, instead terming them types or archetypes. BOBBITT, INTERPRETATION, *supra*, at 7-8. Bobbitt's presentation and style was clearly considered; much like Wittgenstein, Bobbitt was committed to showing, rather than stating, his claims. *See* WITTGENSTEIN, *supra* note 77, §§ 198-240. Bobbitt's admiration for Wittgenstein expressed itself in the choice of publisher for *Constitutional Interpretation*. BOBBITT, INTERPRETATION, *supra*, at xi. The pedagogical or therapeutic foundation for this choice would appear to be that describing the richness of constitutional argument and discourse more accurately than merely characterizing that discourse. Moreover, as therapy, the goal was to induce the reader to experience the grip of the modes of argument. There is, especially in *Constitutional Fate*, a very Wittgensteinian presentation. Even many of

true, then there is no countermajoritarian problem, and no reconciliation of judicial review with democracy required. Has Bobbitt successfully rebutted to claim that originalism is necessary to rebut the countermajoritarian challenge? According to Bobbitt, there cannot be an argument for the primacy or exclusiveness of the historical mode, the doctrinal mode, the prudential mode, or any of the other three modes. The deployment of such arguments by the courts—and their acceptance by the citizens of the republic and the professorial commentariat—establish their legitimacy and legitimating function and power. Such an argument as to how we ought to interpret the Constitution has no force in the context of an inquiry into how we do interpret the Constitution. Bobbitt's novel claim is that the Constitution is how we interpret and apply it. The aspiration to a radical, Archimedean critique of our practice is illusory. From this perspective, two insights emerge. First, because judicial review is a central part of our practice of constitutional construction—a keel, not a plank, in Neurath's boat,<sup>98</sup> it needs little, if any, defense. Its defense and legitimation arises from its pride of place in our constitutional practice. From this perspective, Bobbitt's claim to have legitimated judicial review appears at least plausible.<sup>99</sup> Second, given how radical an approach to constitutional interpretation Bobbitt is proposing, it is hardly surprising that his claims have largely been ignored or misunderstood. Nevertheless, to the extent he has a strong argument to have disarmed Bickel's countermajoritarian challenge, he has eliminated one of the classic best arguments for

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Bobbitt's astute and sophisticated readers did not get the point. See, e.g., Patrick O. Gudridge, *False Peace and Constitutional Tradition*, 96 HARV. L. REV. 1969, 1969 (1983) (reviewing BOBBITT, FATE, *supra* note 17); see also Mark Tushnet, *Justification in Constitutional Adjudication: A Comment on Constitutional Interpretation*, 72 TEX. L. REV. 1707, 1707 (1994) (pessimistically predicting that “the insights in [Bobbitt's] work are likely to be ignored or transformed by the larger scholarly community”).

98. See WILLARD VAN ORMAN QUINE, WORD AND OBJECT 3 (1960) (citing Otto Neurath's holistic metaphor of science as a boat at sea that can only be rebuilt in stages if it is to remain afloat and extending that metaphor to ordinary talk and knowledge of the world).

99. Bobbitt's rejection of doubts about judicial review—in our constitutional world—thus parallels modern philosophy's rejection of radical Cartesian doubt as untenable and misguided—quite intentionally, I suspect.

originalism. Because of the radical nature of this challenge and because I have explored it elsewhere, I will put it aside here.<sup>100</sup>

#### 4. Conclusion

Returning, then, to the claim that originalism is the only theory of interpretation that is compatible with constitutional democracy, it would appear that such a claim is implicitly premised on a claim that the Constitution derives its legitimacy solely from historical events and its text. Missing, however, is an account of the political theory that underlies this premise.<sup>101</sup> In the absence of such an account, originalism cannot refute theories of the Constitution that explain its legitimacy on a different political theoretical account. Originalism must therefore necessarily import sources beyond the text itself, and do so consistently with our republican democracy. If originalism is the theory of interpretation most consistent with, or perhaps, the only theory consistent with, democracy, that claim has yet to be made persuasively.

The New Originalists sometimes suggest that their arguments from positivism and from the nature of language and interpretation are independent of arguments like the argument from democracy of classical originalism. They can therefore claim indifference to the power of the argument from democracy. But to the extent that the New Originalists abandon the rhetorically powerful classical argument from democracy in favor

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100. See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 12; LeDuc, *Fruitless Quest*, *supra* note 68. The problem of judicial review continues to be thought of as a live question in constitutional theory, of course. See Waldron, *supra* note 17; TARA SMITH, *JUDICIAL REVIEW IN AN OBJECTIVE LEGAL SYSTEM* (2015) [hereinafter SMITH, *JUDICIAL REVIEW*] (defending judicial review on an analysis derived from Ayn Rand's libertarian theory). The arguments made in that literature are not made from within our constitutional decisional process, however. They are made as a matter of political philosophy. Moreover, the premises expressly adopted by Waldron, at least, in making his criticism would be potentially problematic for some of the proponents of judicial review. In any case, I think philosophical arguments will be inadequate to reverse *Marbury v. Madison*, 5 U.S. 137 (1803) and that resilience ought perhaps to be explored by the philosophical critics of judicial review. See LeDuc, *Relationship of Constitutional Law to Philosophy*, *supra* note 51.

101. See generally LeDuc, *Paradoxes of Positivism*, *supra* note 54 (exploring the surprising little importance of the distinction between positive and natural law theories in the debate); LeDuc, *Fruitless Quest*, *supra* note 68 (arguing that the efforts of the protagonists to employ arguments from political philosophy to win the originalism debate have been, and will remain, fruitless).

of arcane arguments about linguistic philosophy, some of the political power of originalism's appeal is forfeit.

More fundamentally, critics who argue (as do I) that our existing constitutional practice is prior to our theoretical accounts of that practice, easily dismiss the argument from democracy. Our democracy has fit remarkably comfortably with our practices of constitutional argument and adjudication. In making that claim, I do not mean to make a strong, normative claim about the quality of our democracy, either with respect to the power or equitable allocation of the franchise or the presence of corrupting elements in our democracy. I instead mean only to assert that the Republic has not faced serious constitutional crises over the Court's practice of constitutional decision.

The lack of resolution or even progress with respect to the debate over originalism's claim from democracy reflects the failure of the protagonists to work through and make express the premises of their argument. There are likely inherent puzzles in the concept of democracy to which appeal is made.<sup>102</sup> For example, it appears unlikely that originalists would view the democratic election of judges as responding to the countermajoritarian problem, but it is unclear why such a change would not solve the problem. My focus has instead been on the gaps in the premises about the Constitution and its import that figure in the arguments from democracy. Those gaps and ambiguities prevent the goal of assuring democratic choice in the Republic from translating into a conclusion as to the way the courts should approach the Constitution in adjudication.

## B. The Promise of Neutrality

Originalism also claims to offer a neutral method of constitutional jurisprudence.<sup>103</sup> The neutrality to be sought is

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102. POSNER, *LAW AND DEMOCRACY*, *supra* note 56, at 130-57 (describing the ambiguities inherent in different concepts of democracy).

103. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184-85 (1989) [hereinafter Scalia, *Rules*]; Bork, *Neutral Principles*, *supra* note 57, at 1-8. New Originalists like Larry Solum do not employ the older terminology of neutrality but emphasize much the same concept when they make the constraint thesis a central tenet of originalism and assert that originalists are committed to the consistency of their interpretation with the original meaning of the adopted text. See Lawrence B. Solum, *Originalism and*



usually an absence of bias that might otherwise arise from the particular moral or political views of the judge applying and interpreting the constitutional law and deciding the constitutional case at bar.<sup>104</sup> As in our ordinary usage, neutrality is generally understood contextually, in reference to other, generally adversarial, or competing or alternative, persons or things.<sup>105</sup> Neutrality is often contraposed against partiality or partisanship. Understanding the claims made for neutrality also requires understanding the relationship between neutrality and objectivity. Neutrality requires acting without reference to subjective preference.<sup>106</sup>

Bork may have made the strongest statement of the neutrality thesis, but he was not alone in making that claim for originalism.<sup>107</sup> Noting that neutral application of legal principles has long been identified as a good, Bork asserted that such neutrality is not sufficient and that the principles themselves must also be neutral in their derivation and in their definition.<sup>108</sup> “The philosophy of original understanding is capable of supplying neutrality in all three respects—in deriving, defining, and applying principle.”<sup>109</sup> In this section I want to address three elements of this claim. First, I will argue that the nature of the neutrality that originalism claims to offer is not well defined and that the resulting debate is confused. Second, I argue that the contrast between the promised neutrality and the alternative of unfettered judicial discretion that originalism seeks to foreclose is an illusory dualism. Some of Robert Brandom’s insights are

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*Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 461-62 (2013) [hereinafter *Solum, Constitutional Construction*]. With consistency to the original meaning, as with neutrality, the discretion of the constitutional judge is cabined.

104. See Scalia, *Interpretation*, *supra* note 6, at 46.

105. Thus, in international relations, we speak of nations being neutral as between warring countries and in our intellectual discourse we speak of being neutral as between competing theories or claims.

106. See Scalia, *Interpretation*, *supra* note 6, at 46 (criticizing non-originalist approaches to constitutional interpretation and decision and concluding that “it is up for each judge to decide for himself (under no standard I can discern . . .)”).

107. Scalia, *Rules*, *supra* note 103, at 1183-85; Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849, 854 (1989) [hereinafter *Scalia, Lesser Evil*].

108. See BORK, *TEMPTING*, *supra* note 6, at 146; Bork, *Neutral Principles*, *supra* note 57, at 7.

109. BORK, *TEMPTING*, *supra* note 6, at 146. Bork apparently first articulated this trinity of neutrality in 1971 in Bork, *Neutral Principles*, *supra* note 57, at 7.

particularly helpful,<sup>110</sup> along with Bobbitt's pluralist modal account of constitutional argument. We can (and do) have constraints within our constitutional decisional practice without either eliminating the power and freedom that judges have—or their need for judgment. Third, and finally, I argue that the promise of neutrality cannot be delivered by an originalism that also preserves non-originalist precedent. But I will also show that the criticisms leveled against originalism often misunderstand the nature of constitutional argument and decision. They often exaggerate the role—and the power—of constitutional theory.

### 1. *The Meaning of Neutrality*

Neutrality has long been sought in constitutional interpretation.<sup>111</sup> Herbert Wechsler sharpened our focus on its importance in the aftermath of *Brown*.<sup>112</sup> It has been less often defined with precision, perhaps in part because it appears such an ordinary, commonsensical notion.<sup>113</sup> It is seductively simple, we think, like the related concept of equality.<sup>114</sup> The desideratum of neutrality is, generally, expressly or implicitly contrasted with the expression of personal preferences and occasionally with policy

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110. See generally Brandom, *Hegelian Model*, *supra* note 79 (highlighting, in Hegelian terms, the interrelationship of authority and responsibility in adjudication).

111. See, e.g., BICKEL, *LEAST DANGEROUS*, *supra* note 8, at 49-65 (acknowledging the limitations of neutral principles in the resolution of difficult political issues); ELY, *DEMOCRACY AND DISTRUST*, *supra* note 59, at 54-55; see generally LeDuc, *Interpretation and Practical Reasoning*, *supra* note 1 (arguing that the role accorded interpretation and the formal account of constitutional reasoning is inadequate as a description of our constitutional law decisional practice). Express critics, outside the Critical Legal Studies movement, are relatively few. See, e.g., Tushnet, *Following the Rules*, *supra* note 24, at 804-06 (arguing that liberalism's commitment to individual autonomy ensures disparate sources of constitutional meaning and precludes the existence of neutral principles of constitutional law).

112. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7 (1959) [hereinafter Wechsler, *Neutral Principles*].

113. The apparent simplicity of the concept of neutrality is at best exaggerated. See Tushnet, *Following the Rules*, *supra* note 24, at 804-05 (arguing that the requirements for the construction of linguistic meaning are inconsistent with the liberal principles grounding the claims for the value neutrality of constitutional law).

114. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272-78 (1977) [hereinafter DWORKIN, *TAKING*] (distinguishing treating persons equally and treating them as equals).

judgments.<sup>115</sup> Understanding Bork's claim requires understanding the concept of neutrality and the related concepts of derivation, definition, and application.

Neutrality for Bork was Kantian; it was to treat all like cases alike<sup>116</sup>—that is, to apply principles “to all cases that may fairly be said to fall within them.”<sup>117</sup> “Fairly” may carry a great deal of weight. But its meaning is never articulated. It may import the standards of the community of language users, and the standards they would acknowledge. Or it may be seeking to articulate a purportedly more objective standard; that is, what really, truly would be fair. The choice of verb may be inartful. Or it may be acknowledging the uncertainty. That which only “may” be said to be fair, may also not be fair—or merely said to be unfair. “Fairly” might acknowledge that inclusion within a rule is not a mechanical phenomenon. That is, whether a rule or a principle applies to a particular case is not necessarily a given, not a matter merely of “looking.” (Whether that means the rule needs an interpretation,<sup>118</sup> or whether the concept of following a rule can admit of uncertainty,<sup>119</sup> and, if so, how,<sup>120</sup> probably does not need to delay us.) Once that uncertainty is recognized, however, Bork needed to explain how it was to be resolved and,

115. Thus, for example, in writing about such non-neutral decision making, Justice Scalia proclaimed:

The Due Process Clause of the Fifth and Fourteenth Amendments says that no person shall be deprived of life without due process of law . . . . No matter. Under The Living Constitution the death penalty may have become unconstitutional. And it is up to each Justice to decide for himself (under no standard I can discern) when that occurs.

Scalia, *Interpretation*, *supra* note 6, at 46.

116. See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 44, 45 (Robert Paul Wolf ed., Lewis White Beck trans., 1969) (1785) (arguing that ethical principles must be universally applicable); see also Paul Dietrichson, *Kant's Criteria of Universalizability*, in KANT, *supra*, at 163.

117. BORK, TEMPTING, *supra* note 6, at 146.

118. For a discussion of this question see WITTGENSTEIN, *supra* note 77, §§ 198-240. While Wittgenstein's remarks on following a rule are far from direct and straightforward (and have been, as noted below, very controversial), Wittgenstein appears to be challenging the paired positions that (1) the application of a rule is premised upon the prior interpretation of that rule and (2) when a rule is unclear in its application that uncertainty can be removed by articulating a fuller or more precise interpretation of that rule.

119. *Id.* See generally LeDuc, *Interpretation and Practical Reasoning*, *supra* note 1 (denying that a rule must be first interpreted before it can be applied).

120. *Id.* The interpretation of Wittgenstein's comments has been controversial. Compare KRIPKE, *supra* note 78, with BAKER & HACKER, *supra* note 78, at viii.

in particular, how it was to be resolved without involving judicial discretion. It is also possible that I am reading Bork too closely here. He may simply have meant that we know how to work with a principle when we encounter it. But that practical account would strip the concept of neutral principles of the apparent force to play the jurisprudential role Bork sought.

Bork invoked the concept of neutrality, and used it, without adequately explaining and defending it. A claim to neutrality is admittedly an engaging and intuitive position, of course, especially in the case of adjudication. We expect our judges to be disinterested and neutral between the parties. Moreover, at least intuitively, we often know whether a principle covers a case, and we also often know when it would be unfair to claim that a principle covers a particular case. But that is not enough to ground a claim to neutrality in general, or neutrality in interpretation in particular, in the conceptual content of the neutral principle. Those understandings might simply be rooted in a mastery of a shared practice, of knowing how to go on in the relevant circumstance.<sup>121</sup>

Bork needed an account that showed that the source of the neutral application is in the conceptual content or linguistic meaning of the neutral principle. It is not enough to be neutral; the interpretation and decision must follow the original understanding. He also likely needed to account for the hard case where the application of the principle to the particular case is not so obvious.<sup>122</sup> Bork needed his account to have that explanatory force because many constitutional controversies arise from such hard cases. Moreover, he needed to defend the position that such application, even in the hard cases, could be established as neutral.

Finally, he needed such a case to rebut those theorists, like Hart and Dworkin, who believe we need a theory or an interpretation of the principle in order to know whether and how

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121. See WITTGENSTEIN, *supra* note 77, §§ 198-240.

122. See DWORKIN, TAKING, *supra* note 114, at 81 (arguing that each legal question has a unique answer). Even without endorsing Dworkin's theory, it does seem that if Bork asserted that constitutional principles figure in constitutional interpretation and decision, he needed to explain how with some precision, since the text of the Constitution does not appear to state principles expressly.

to apply it in such hard cases. That, of course, is just what Bork wanted to, and did, deny.<sup>123</sup> But what tells us how to apply the principle neutrally? We begin to ask questions that sound as if they came from the interlocutor of Wittgenstein's *Philosophical Investigations*.<sup>124</sup> These questions do not have apparent or satisfying answers. The promise of Bork's neutrality remains unarticulated and ultimately unfulfilled. Bork's claim that the application of a principle can be explained by some feature of neutrality in the principle is misleading. Principles—as shorthand for the conclusion of constitutional arguments (by no means necessarily deductive or syllogistic in form)—are compelling because of the content and nature of the underlying argument. Debating an account of constitutional decision that emphasizes formulation and application of principles is misleading and unhelpful—for the originalists and for their critics.

The neutral derivation of principle is another concept Bork invoked, and used, without much explanation.<sup>125</sup> He appears to have assumed that principles may be found in the Constitution, and that such finding constitutes a derivation.<sup>126</sup> That is problematic because the Constitution comprises provisions, not principles.<sup>127</sup> How do provisions yield principles? Bork did not offer much explanation, but we might conclude that provisions yield principles by a variety of kinds of reasoning, including analysis and synthesis. Together those methods provide the articulation of the force of provisions. That approach may capture the inferential content of the constitutional text, but it does not capture the performative content of the text. When we think of the pragmatics of performative content, the usual logic of declarative utterances and texts is not very helpful.

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123. See BORK, TEMPTING, *supra* note 6, at 251-57 (mocking the state of modern moral philosophy and dismissing such philosophical theory and argument as a source of constitutional law); Scalia, *Interpretation*, *supra* note 6, at 45 (same).

124. Thus, for example, the complex and controversial discussion of following rules: “Then am I defining ‘order’ and ‘rule’ by means of ‘regularity’?—How do I explain the meaning of ‘regular[,]’ ‘uniform[,]’ ‘same’ to anyone?” WITTGENSTEIN, *supra* note 77, § 208. “But do you really explain to the other person what you yourself understand? Don’t you get him to *guess* the essential thing?” *Id.* § 210. “How am I able to obey a rule?” *Id.* § 217.

125. See BORK, TEMPTING, *supra* note 6, at 143-47.

126. *Id.* at 146.

127. *Id.* at 150.

One potentially dramatic example of the derivation of constitutional principle can be seen in *Griswold v. Connecticut*.<sup>128</sup> In that case, Justice Douglas analyzed the First Amendment, Fourth Amendment, and Fourteenth Amendment to identify and extract the principle of a right to privacy, protected from the interference of the governments, state and federal.<sup>129</sup> The principle, once constructed from the “penumbras” formed by “emanations” of the specific provisions, was deployed with independent force to protect the activities of Doctor Griswold.<sup>130</sup> Justice Douglas’s opinion captures the non-deductive methods of constitutional argument.<sup>131</sup> Yet *Griswold*, for Bork, was an example of improper constitutional interpretation.<sup>132</sup> He did not expressly object to the tools employed in constructing the argument. His objection was that this derivation of principle fails the neutrality standard because it tacitly privileges sexual freedom over other freedoms.<sup>133</sup> But Justice Douglas’s opinion also ranges far from the linguistic meaning of the constitutional text.

Other examples in which more expansive principles were derived from narrower provisions raise the question why Bork thought he needed principles and what role they play in an originalist theory of interpretation. For example, Bork was comfortable extending the protections of the Fourth Amendment against new technology and the protections of the First Amendment for new technologies like television and radio. The extension of the Fourth Amendment to new techniques of electronic surveillance was not automatic or free from difficulty. Indeed, when the Supreme Court first considered electronic surveillance, it sought to analyze the Fourth Amendment issues in terms of physical intervention.<sup>134</sup> Only in 1967, in *Katz v. United*

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128. 381 U.S. 479 (1965).

129. *Id.* at 482-85.

130. *Id.* at 484.

131. See LeDuc, *Interpretation and Practical Reasoning*, *supra* note 1.

132. See BORK, *TEMPTING*, *supra* note 6, at 95-100, 257-59.

133. *Id.* at 258-59.

134. See *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (warrantless wiretap of bootlegger’s telephone did not violate Fourth Amendment because there was no search or seizure of a material thing). Brandeis’s dissent, emphasizing the protection of privacy interests in light of changing conditions and purposes, was rejected by the Court. See *id.* at 471-79 (Brandeis, J., dissenting). Instead, the Court adopted a common law analysis,

States,<sup>135</sup> did the Supreme Court formally recognize that the Fourth Amendment was about persons, not places or things. Accordingly, with *Katz* electronic surveillance was brought within the ambit of the prohibitions of the Fourth Amendment.

Even with hindsight, we can understand why a physical interpretation of the Fourth Amendment's prohibition of warrantless searches and seizures was not an obvious wrong turn. Grounding the protection of the Fourth Amendment on the established tort law concepts would provide a clarity and certainty that alternative approaches would not obviously provide, or, at the least, provide immediately. Moreover, Justice Brandeis's dissent would have extended the protection of the Fourth Amendment on the basis of a theory that privileges the right of privacy. Originalists like Bork could perhaps endorse that approach to the extent that it finds and applies a neutral principle found in the constitutional text. But the principle so derived would perhaps fail the test of neutrality *because* it privileges expectations of privacy over other expectations.<sup>136</sup> If the principle passes the neutrality test then it may be a permissible source of new law in the face of new technologies. Originalism would not endorse change arising from evolving purposes or the application of non-neutral principles—that would make ours a living Constitution.<sup>137</sup>

More fundamentally, the creation of a principle as a matter of originalist constitutional interpretation would appear to raise its own fundamental questions.<sup>138</sup> After all, the meaning of the words of the provisions themselves would seem to require no

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focusing upon the absence of a physical invasion of the defendants' property or a physical taking of their property. *Id.* at 466.

135. 389 U.S. 347 (1967).

136. To the extent such a principle privileges privacy it would appear vulnerable to Bork's objection to *Griswold* that it improperly privileges sexual freedom over other freedoms. See BORK, TEMPTING, *supra* note 6, at 258-59.

137. See *United States v. Jones*, 565 U.S. 400, 404-13 (2012) (adopting an originalist approach to the Fourth Amendment that purported to return to the requirement of tortious trespass); see generally *infra* Section II.D.

138. See LeDuc, *Interpretation and Practical Reasoning*, *supra* note 1, at 106 (describing the complexities inherent in Justice Scalia's casual characterization of the express language of the First Amendment as a "sort of" synecdoche and the role of that characterization in his account of constitutional interpretation and reasoning). Justice Scalia's easy invocation of synecdoches and principles is all the more puzzling because of his criticism of common law methods of judicial decision.

principles for interpretation.<sup>139</sup> If the task of interpretation is to determine the import of the meaning of the specific words of a specific provision, then a digression into the articulation of unexpressed principles would appear misguided. Indeed, from Bork's originalist perspective it might appear that the originalist Occam's razor would dispatch the excrescence of principle. Bork, after all, wanted to distinguish very clearly between the Supreme Court's decisional constitutional jurisprudence and the constitutional text.<sup>140</sup> Once derivative principles are recognized as authoritative, it is a small step to acknowledging precedent. The text of the Constitution is its provisions which, by their express terms, do not state principles.<sup>141</sup> So the place of derived principle in an originalist constitutional jurisprudence is not so simple as initially appears.

It may be that the principle to be extracted from the Constitution arises out of its structure or its architecture. But it is seemingly a small step from such a derivation to the forbidden territory of penumbra and emanations<sup>142</sup> and unenumerated rights. It is simply not clear what principle beyond the literal text of the Constitution that Bork would have wanted to derive.

One possible reconciliation of Bork's concept of the derivation of principle with his originalism is to read the notion of derivation narrowly. If derivation means no more than to find the principle stated expressly in a constitutional provision, it may be possible to identify a role for principle to play in Borkinian jurisprudence. Thus, for example, the First Amendment may be described as stating the principle of free speech or the principle of freedom of expression.<sup>143</sup> So clarified, derivation would be no more than the restatement of the imperatives of the Constitution into declaratives that can figure as the major premise of a

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139. Dictionaries, after all, generally define words; they do not state principles first to provide the foundation or theory underlying the definitions. Accounts of linguistic meaning do not begin with interpretations of words or sentences.

140. See BORK, TEMPTING, *supra* note 6, at 69 (characterizing the Warren Court as standing "first and alone as a legislator of policy").

141. Originalists like Robert Bork somehow seem to assume that the provisions do state principles that are naturally part of the decisional law. See BORK, TEMPTING, *supra* note 6, at 146. An inferentialist account of the constitutional texts would support such a conclusion, but the inferentialist approach is not part of the originalist canon.

142. *Id.* at 97.

143. See *id.* at 147-48.



syllogism or other argument. Justice Scalia appears to take the formulation of constitutional principles in just this way, finding the principles of the Constitution stated in the Constitution.

I . . . believe that the Eighth Amendment is no mere “concrete and dated rule” but rather an abstract principle. If I did not hold this belief, I would not be able to apply the Eighth Amendment (as I assuredly do) to all sorts of tortures quite unknown at the time the Eighth Amendment was adopted.<sup>144</sup>

On this interpretation, the principle derived from the Eighth Amendment is that cruel and unusual punishments are prohibited. While we may quibble with characterizing that principle as derived from the Eighth Amendment (there’s not much to the derivation) it is a use of principle that fits with the originalist methodology.

But Bork endows the derivation of principle with more import and power than this description provides. The derivation of principle extends the express linguistic meaning of the constitutional text; it can also excise provisions of the Constitution that would otherwise appear to have substantial import.<sup>145</sup> Thus, the freedom of the press guaranteed by the First Amendment can be extended without hesitation to the electronic media,<sup>146</sup> and the prohibitions of the Fourth Amendment can be extended to preclude warrantless wiretaps.<sup>147</sup> The principle-constructing power that Bork sometimes claims goes far beyond those types of instances, however.<sup>148</sup> In interpreting the First Amendment, Bork looks first to the text and history of the

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144. Scalia, *Response*, *supra* note 20, at 145.

145. BORK, *TEMPTING*, *supra* note 6, at 166.

146. *Id.* at 168.

147. *Id.* at 169-70.

148. We are, then, forced to construct our own theory of the constitutional protection of speech. We cannot solve our problems simply by reference to the text or to its history. But we are not without materials for building. The first amendment indicates that there is something special about speech. We would know that much even without a first amendment . . . Freedom for political speech could and should be inferred even if there were no first amendment.

Bork, *Neutral Principles*, *supra* note 57, at 22-23.

provision.<sup>149</sup> Finding little guidance,<sup>150</sup> he then looks to what he refers to as “the entire structure of the Constitution.”<sup>151</sup> That structure creates a representative democracy, “a form of government that would be meaningless without freedom to discuss government and its policies.”<sup>152</sup> It is on this foundation that Bork constructed a First Amendment theory powerful in its protection but narrow in its scope.<sup>153</sup>

For all of the rhetoric of original understandings and expectations with respect to the constitutional text, the method of neutral principle took Bork very far from that underlying text. The power of that method of deriving and applying principles from the text explains why the need to constrain the method by the requirement of neutrality. Whatever other questions might be raised as to Bork’s description of following the original semantic or linguistic understandings, the purported channeling of the derivation and application of constitutional principles with a requirement of neutrality seems strangely ill-defined.

Other originalists appear more cautious in their derivation of principles from the provisions of the Constitution. Harry Jaffa was not entirely mistaken when he characterized Meese’s Constitution as “without overarching principles.”<sup>154</sup> Jaffa undoubtedly meant that description as a criticism, but there is a practicality in Meese’s approach to constitutional originalism—and no express natural law commitments. Nevertheless, Jaffa was unfair in part to Meese because Meese’s Constitution had a prominent place for principle, too.<sup>155</sup> Meese believes that the Constitution’s principles are fundamentally those of federalism

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149. *Id.* at 22.

150. “The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject.” *Id.* at 22. Despite the lacunae that Bork recognized in the original understanding, Bork was generally able to extract an application of the law. *See, e.g., Ollman v. Evans*, 750 F.2d 970, 976-79 (D.C. Cir. 1984).

151. Bork, *Neutral Principles*, *supra* note 57, at 23.

152. *Id.*

153. *See id.*

154. Harry V. Jaffa, *What Were the “Original Intentions” of the Framers of the Constitution of the United States?*, 10 U. PUGET SOUND L. REV. 351, 358 (1987) [hereinafter Jaffa, *What Were the “Original Intentions”*].

155. *Id.* at 360-61.

and separation of powers.<sup>156</sup> It may therefore be more accurate to acknowledge that Meese's fundamental constitutional principles were simply different from those of Jaffa.<sup>157</sup> Jaffa's originalism committed him to legal principles reflecting the natural law beliefs of the founders. Natural law originalists, of course, are highly committed to what they characterize as a principled reading of the Constitution's provisions.<sup>158</sup> The techniques for the derivation of such principles, informed by natural law commitments, are as ambitious as Judge Bork's—and lead as far from the linguistic meaning of the text.

Bork was also prepared effectively to excise constitutional provisions. Bork gave the Privileges and Immunities Clause of the Fourteenth Amendment very short shrift.<sup>159</sup> Effectively, Bork

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156. See Edwin Meese III, *Speech Before the D.C. Chapter of the Federalist Society Lawyers Division*, in ORIGINALISM, *supra* note 59, at 71, 77 [hereinafter Meese, *Speech*] (asserting without argument that Chief Justice Taney did not follow the original understanding of the Privileges and Immunities Clause in *Dred Scott*).

157. See HARRY V. JAFFA WITH BRUCE LEDEWITZ ET AL., ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION 13-22 (1994) (arguing that Chief Justice Taney employed a mistaken form of originalism in his *Dred Scott* opinion).

158. Jaffa, *What Were the "Original Intentions"*, *supra* note 154, at 359-60 ("It cannot be too greatly emphasized that the people's will, properly so called, is a rational will, whose inherent right to be obeyed is attenuated to the extent that it becomes merely arbitrary or despotic."); see also Clarence I. Thomas, *Toward a "Plain Reading" of the Constitution: The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983 (1987). Having laid out his constitutional method, Jaffa is remarkably circumspect in expressly articulating its doctrinal consequences. See Bruce Ledewitz, *Judicial Conscience and Natural Rights: A Reply to Professor Jaffa*, 10 U. PUGET SOUND L. REV. 449 (1987).

159. The judge who cannot make out the meaning of a provision is in exactly the same circumstance as a judge who has no Constitution to work with. There being nothing to work with, the judge should refrain from working. A provision whose meaning cannot be ascertained is precisely like a provision that is written in Sanskrit or is obliterated past deciphering by an ink blot. No judge is entitled to interpret an ink blot on the ground that there must be something under it. So it has been with the clause of the fourteenth amendment prohibiting any state from denying citizens the privileges and immunities of citizens of the United States.

BORK, TEMPTING, *supra* note 6, at 166. Bork's formulation with the simile of an ink blot is presumably intentionally confrontational. Certainly it has drawn a response by other defenders of a more holistic Constitution who are troubled by the seemingly cavalier disregard of the text. See TRIBE & DORF, *READING*, *supra* note 79, at 53; TRIBE, *INVISIBLE*, *supra* note 90, at 147. Farber reminds us of the differences between the skills of lawyers and judges and those of historians. Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1089 (1989). The moral is that judges are not particularly well qualified to undertake historical research—and that no responsible historian would simply discard an important historical document or text merely because of the difficulties

eliminated this provision. Bork's important and complex reductive claim warrants careful scrutiny, and his claim must be distilled from its overly exuberant rhetoric.<sup>160</sup> What did Bork claim a judge must do when confronted by a difficult text like the Privileges and Immunities Clause? Perhaps the most notorious example of Bork's willingness to excise constitutional provisions is the Ninth Amendment, which he appeared willing to delete in its entirety.<sup>161</sup>

He asserted that it was as if the provision were written in Sanskrit or covered by an inkblot.<sup>162</sup> Bork could not really be committed to the proposition that a Sanskrit text could not be distinguished from an inkblot. Admittedly, we read both the Bhagavad Gita and Rorschach tests, but few (none?) think the process remotely similar. Moreover, to face a difficult text is not to face no text. Even on Bork's account, a judge facing an incomprehensible text (perhaps a statute void for vagueness) must offer an explanation why the text is unintelligible.

What makes a text difficult for an originalist?<sup>163</sup> The Ninth Amendment's text, like that of the Fourteenth, is simple and direct upon its face: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."<sup>164</sup> Twenty-one words; the longest, "enumeration," contains no more than five syllables. The Privileges and Immunities Clause: "No State shall make or enforce any law which shall abridge the privileges or immunities

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presented. Perhaps the model is more the archaeologist confronting an inscription in an unknown language; but even in that context the search for a Rosetta Stone goes on.

160. BORK, TEMPTING, *supra* note 6, at 183-84 ("There is almost no history that would indicate what the ninth amendment was intended to accomplish. . . . [T]he claim that the Founders intended judges to make up rights not specified in the Constitution itself is obviously inconsistent with the historical record. . . . Thus, the enumeration of certain rights in the federal Constitution was not to be taken to mean that the rights promised by the state constitutions and laws were to be denied or disparaged.").

161. *Id.* at 166. For a description of the criticism of this position, see, e.g., BARNETT, LOST, *supra* note 31, at xii.

162. BORK, TEMPTING, *supra* note 6, at 166.

163. Scott Soames distinguishes linguistic difficulty and legal difficulty in his analysis of the specific features of legal texts, arguing that understanding the elements of linguistic content makes many of the texts treated as difficult in constitutional theory easily interpretable. See 1 SCOTT SOAMES, *Interpreting Legal Texts: What Is, and What Is Not, Special about Law*, in PHILOSOPHICAL ESSAYS: NATURAL LANGUAGE: WHAT IT MEANS AND HOW WE USE IT 403, 404-05, 408-09, 417-20 (2009) [hereinafter SOAMES, *Legal Texts*].

164. U.S. CONST. amend. IX.

of citizens of the United States . . . .”<sup>165</sup> Even simpler, it is also only twenty-one words. What makes reading or applying them difficult?

Turning first to the Ninth Amendment, the source of the difficulty is, first, the verbs and, second, the direct object of the sentence. The verbs are “deny” and “disparage” and the direct object is “others.” The concept of denial is straightforward enough; a right is denied when a government prohibits its exercise, or burdens or regulates it in a manner that makes its exercise difficult. The concept of disparage is seemingly broader. A right may be disparaged without being denied: shareholders’ voting rights in modern, publicly-held corporations rarely have significant import or value.<sup>166</sup> If shareholders are unhappy with corporate management the typical response is to sell their shares.<sup>167</sup> So one issue is what the prohibition on disparagement means in this context. Most naturally, it likely means to limit the scope of the rights protected, to limit the kinds of rights protected, or the persons entitled to claim the rights, or to impose procedural limits on claims to the substantive rights.<sup>168</sup>

A second textual issue is what the reference or meaning of “others” is. What other rights are not to be denied or disparaged? The rights retained might be rights under natural law, or under common law. They might be rights under the various states’ laws or constitution. The language of the Constitution offers no express guidance. Third, and finally, by whom are the other rights not to be denied or disparaged? The two candidates, of course, are the states and the Federal government.<sup>169</sup> Again, however, the

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165. U.S. CONST. amend. XIV, § 1.

166. See Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 416-20 (2006).

167. See generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970) (describing the competing strategies of voicing criticism within an organization and choosing to exit).

168. See generally THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy Barnett ed., 1989); KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014).

169. They are the sovereigns with the authority to deny or limit citizens’ rights under traditional political philosophy and as a matter of political and legal realpolitik. Nothing in the text sheds any light on the choice among the alternative readings of the scope of the provision, although the context might suggest that it is the Federal government whose power is limited.

text of the Constitution offers no guidance on the answer to this question. At the end of the day, therefore, we are left with fundamental questions about what is being protected and how it is being protected. Bork was surely right that this is a difficult text.

The Privileges and Immunities Clause presents some similar difficulties. The first clause is relatively clear. The subject, at least, is clear: any “State.” The verbs, too, are clear: “make or enforce.” Finally, the object, “laws,” is hardly ambiguous, except in the ordinary sense that many words and concepts have a fringe of potential meaning with respect to which the application of the word or concept is contestable.<sup>170</sup> The dependent clause brings the principal difficulties. The verb “abridge” presents some difficulty. But the heart of the difficulty arises from the object: “privileges and immunity of citizens of the United States.” What are the privileges and immunities of a citizen of the United States? For Bork, the Ninth Amendment was limited to the proposition that the rights expressly enumerated in state constitutions were not to be limited or denied by the state protection of a more limited set of rights in the federal constitution.<sup>171</sup> The two arguments Bork made for this conclusion are grammatical and contextual, with the latter based upon the proximity of the text to the Tenth Amendment.<sup>172</sup> In the case of the Privileges and Immunities Clause, Bork dismissed Ely’s assertion that no legislative evidence supports the view that the clause is meaningless.<sup>173</sup> He further dismissed Ely’s interpretation, but offered no interpretation of his own.<sup>174</sup> Thus, Bork at least believed that the process of constructing ordinary

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170. Thus, for example, the text leaves open the questions of whether a regulatory agency of a state could make such a regulation and what qualifies as state action. The notion of legal rules as open textured with a core as to which application is clear and a fringe, penumbra or neighborhood as to which the application is unclear or uncertain figured prominently in Hart’s statement of position in the Hart-Fuller debate and, more generally, in *The Concept of Law*. See, HART, CONCEPT OF LAW, *supra* note 67, at 124-36; H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607-09 (1958) [hereinafter Hart, *Positivism*]; see generally TIMOTHY WILLIAMSON, VAGUENESS 36-95 (1994).

171. BORK, TEMPTING, *supra* note 6, at 184-85.

172. *Id.*

173. *Id.* at 180 (citing ELY, DEMOCRACY AND DISTRUST, *supra* note 59, at 22).

174. *Id.*

principles of interpretation then gives judges the power to go beyond the words of the text, but also, at least in rare cases, the surprising authority to disregard seemingly meaningful language of the Constitution. Other originalists have not followed Bork in that approach to the Ninth Amendment.<sup>175</sup>

Third, Bork also championed the neutral application of principles. (This is the “from neutral principles” for constitutional decision making part of his theory.) It is not clear what he intended here, or why principle would be invoked. It may be, of course, that Bork was here again speaking only loosely, and that the neutral application of principle is nothing more than the neutral application of a constitutional provision. Often stated in more general terms, there is certainly a traditional task of applying such general provisions to the facts of a particular case properly presented to the Court. In his all-too-brief discussion of this critical issue, Bork offered only one paragraph explaining what neutral application is, and six paragraphs with an example, *Shelley v. Kraemer*.<sup>176</sup> The one paragraph and the six are not easily harmonized. In the initial explanation, Bork noted that such neutrality “requires a fair degree of sophistication and self-consciousness . . . .”<sup>177</sup> That suggests that the principles to be applied are the general rules or statements of constitutional law that are inferred from the constitutional text along the lines explored above. Moreover, he further conceded that the “only external discipline . . . is the scrutiny of professional observers who will be able to tell *over a period of time* whether he is displaying intellectual integrity.”<sup>178</sup>

Bork described the demonstration of the integrity of a series of decisions (and associated series of opinions) as unfolding

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175. See BARNETT, LOST, *supra* note 31, at 235-42.

176. 334 U.S. 1 (1948).

177. BORK, TEMPTING, *supra* note 6, at 151.

178. *Id.* (emphasis added). The importance of the temporal dimension reveals adjudication, including the legitimation of adjudication through the articulation of reasons, as a social practice. It is an activity, bounded in part, by rules (broadly defined) but with room for creativity and innovation. It can only be fully assessed, as an activity and social practice over time. An example of such a check, presumably, would be works like Wolfman's *Dissent Without Opinion*, in which Justice Douglas's tax opinions were shown to be thoroughly ends-oriented through a comparative analysis. BERNARD WOLFMAN, JONATHAN L.F. SILVER & MARJORIE A. SILVER, *DISSENT WITHOUT OPINION: THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES* (1975).

over time. The *temporal* dimension of this process went unremarked by Bork, but is significant. The evolution of a corpus of decisions is more instructive, and more revealing, of its integrity and consistency than any one atemporal snapshot precisely because, over time, a theory is presented with novel, often unanticipated facts. How those facts are incorporated into the pre-existing authority is particularly revealing. By focusing upon the development of a judge's interpretive canon over time, Bork was perhaps implicitly invoking the constraints of a practice. It is the practice of judging, over time, that can best be evaluated and tested for conformity to rules. With the addition of a temporal dimension Bork may have moved from doctrine or theory to practice. Nevertheless, if present, that strategy is only implicit, and was never articulated or acknowledged by Bork and would not be easily harmonized with the usual self-descriptions of originalism.

In discussing *Shelley*, Bork offers no contextualization or comparative study; his criticism of that decision, while focusing upon the expansive interpretation of state action, does not explain how the Court's interpretation is ends-oriented.<sup>179</sup> Such an explanation might involve, for example, similar restrictive covenants barring transfers to individuals who were not minorities. But the Court anticipated this objection, noting that “[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities.”<sup>180</sup> Moreover, Bork's criticism that the *Shelley* Court did not properly sustain its determination of state action warrants scrutiny. Bork noted that the state courts were not the source of the racial discrimination, they merely enforced it.<sup>181</sup> Bork went on to characterize the enforcement of such discriminatory private agreements as “pursuant to normal, and neutral, rules . . . .”<sup>182</sup>

Bork supported this characterization of *Shelley* with the discussion of a hypothetical case in which a guest in a private home speaks abusively about political matters and is ejected by

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179. BORK, TEMPTING, *supra* note 6, at 152-53.

180. *Shelley*, 334 U.S. at 22.

181. BORK, TEMPTING, *supra* note 6, at 152.

182. *Id.*



his host.<sup>183</sup> The guest sues—Bork did not expressly indicate the relief sought, but it is apparently the right to return to the host’s home and continue his abusive harangue. Bork claimed that the *Shelley* Court is committed to the view that the denial of such relief is state action contravening the First Amendment.<sup>184</sup> First, the example seems to confuse action with inaction, commission with omission. The hypothetical court has merely denied relief, refused to deploy the power of the sovereign on behalf of the haranguing guest, against the hapless host. That distinction may or may not make a difference. But, in fairness, we can rehabilitate Bork’s example by adding a call to the police to assist the host in removing the guest, or making the host the moving litigant with a petition for a restraining order, for example. In such cases the state action would appear affirmative, rather than a mere failure to act. In such a case, nevertheless, it is far from clear what First Amendment violation is alleged to occur. Bork’s example characterizes the guest as “abusive”; the conduct occurs by a guest in a host’s home. It is well-settled First Amendment law that speech is not protected everywhere, and in every way.<sup>185</sup> So an alternative analysis is not that there is no state action, but that there is no infringement of a constitutional right. Outside the public sphere, in a private home, the protection of speech under the First Amendment may well be less robust (other associational rights may be more robust).

Bork failed to deliver a compelling argument for his strident assertion that *Shelley* constitutes a political decision imposing non-neutral principles. While it is clear that Bork

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183. *Id.*

184. *Id.*

185. Bork himself understood the limits of the First Amendment. Thus, in *Neutral Principles*, Bork noted some of the obvious limits of the protections of the First Amendment casting some doubt on the absolutist view. Bork noted that no one believes that the federal government cannot prohibit urging mutiny on naval vessels engaged in action or shouted harangues in the visitors’ gallery in either chamber of the United States Congress. Bork, *Neutral Principles*, *supra* note 57, at 21. The cases, of course, confirm Bork’s understanding of the limits of the right of free speech protected by the First Amendment. *See, e.g.*, *Barnes v. Glen Theatre, Inc.* 501 U.S. 560, 570-72 (1991) (upholding Indiana statute barring nude dancing); *Dennis v. United States*, 341 U.S. 494, 516-17 (1951) (upholding conviction for advocating overthrow of the United States government by force and violence); *Kovacs v. Cooper*, 336 U.S. 77, 84-89 (1949) (upholding a Trenton, New Jersey ordinance regulating soundtrucks).

agrees with the result but disagrees with the finding of state action, the issues are fundamentally more complex than he acknowledges. Bork offers no analysis or explanation of his criticism of the finding of state action. Instead, he assumes that a private contract, enforced by the agents of the sovereign state, does not involve state action. While that is neither a novel nor a ludicrous view, it is neither self-evident nor true by definition. It warrants a defense, not a mere assertion.

Justice Scalia also asserted the Neutrality Premise in his defense of originalism.<sup>186</sup> The absence of neutrality with respect to the various critics of originalism can be confirmed for Justice Scalia by the absence of agreement or consensus.<sup>187</sup> The absence of such a consensus confirmed, for Justice Scalia, that the critics are relying, at least tacitly, upon their own subjective preferences and values.<sup>188</sup> Originalism, by contrast, is neutral. To uphold that claim of neutrality, Justice Scalia's originalism must address Tribe's challenge that originalism imports subjective preferences *sub rosa* through its selective invocation of the doctrine of *stare decisis*.

In response to Tribe's suggestion that the uncertain role of *stare decisis* imports judicial discretion and non-neutrality, Justice Scalia made two arguments. First, he acknowledged that originalism does not preclude willfulness. He would appear to have acknowledged that there remains some judicial discretion under originalism, but he did not explore the nature of that discretion or how it differs from discretion in a non-originalist constitutional theory and practice. Second, Justice Scalia asserted that *stare decisis* is not part of originalism, but is instead "a pragmatic exception to it."<sup>189</sup> I now turn to these two arguments and the critics' response.

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186. Thus, Justice Scalia wrote, "Perhaps the most glaring defect of Living Constitutionalism, next to its incompatibility with the whole antievolutionary purpose of a constitution, is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution." Scalia, *Interpretation*, *supra* note 6, at 44-45.

187. *Id.*

188. *Id.* at 46. Justice Scalia takes the disagreement with respect to the substantive alternatives to originalism to evidence that the theories encompass judicial discretion because, tacitly, neutral principles are self-evident.

189. *Id.*

## 2. *Neutrality, Will, and Discretion*

Justice Scalia conceded that originalism offers no inoculation against willfulness.<sup>190</sup> When Justice Scalia implicitly characterized other interpretative doctrines as “cater[ing]” to willfulness and originalism as not “inoculat[ing] against it” what are the relationships he was describing, in non-metaphorical terms?<sup>191</sup> Beginning with the particular, what Bork had in mind as an exemplar of the method to be avoided was that of the Warren Court’s jurisprudence.<sup>192</sup> The outcomes, interpretations, and interpretative methods of that constitutional jurisprudence were all to be avoided and condemned.

More abstractly, how did Bork seek to distinguish the implications of the two methods as a matter of discretion? To cater to willfulness, an interpretative theory or method presumably has to provide doctrinal or technical support for the judge who inclines toward deciding cases as seems just to him, regardless of constitutional arguments to the contrary, precedent, or other law.<sup>193</sup> So, for example, a judge who is a perfectionist in Sunstein’s terms would be reinforced in her willingness to construe the Constitution on terms different from the original understanding in order to secure a more perfect interpretation and better outcomes, so interpreted. Similarly, a judge who believes that constitutional interpretation is informed by considerations of the structure of the Constitution and of the Republic that it creates, is likely to interpret the Constitution in ways that may depart from the original understanding.<sup>194</sup>

Critics may question whether those inclinations or predispositions are properly characterized as willfulness. Even conceding that the interpretative doctrine one holds either supports or militates in favor of a given particular interpretation, how is that a matter of willfulness? Choice of constitutional

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190. Scalia, *Response*, *supra* note 20, at 140 (“I have never claimed that originalism inoculates against willfulness; only that . . . it does not cater to it.”).

191. *Id.*

192. See BORK, TEMPTING, *supra* note 6, at 69-100; Scalia, *Response*, *supra* note 20, at 149.

193. BORK, TEMPTING, *supra* note 6, at 69-70.

194. Bobbitt’s modalities of constitutional argument capture the richness of the arguments available. BOBBITT, FATE, *supra* note 17, at 7-8.

interpretation may be a matter of will (choosing an interpretation that enriches one's brother in law, for example) but it would seem equally possibly a matter of reason (holding a different view of language or the role of prefatory clauses, for example).

The concept of the dualism between will and reason, and its place in classical democratic political theory, is complex.<sup>195</sup> Fortunately, because of the thinness of the concepts deployed in the debate, we do not need to understand these concepts very deeply here. At a risk of oversimplification, democratic republicanism sought to harness and channel the will and the passions for the public good.<sup>196</sup> Unfettered will apparently poses a fundamental general challenge to that regime. The goal of the democratic republic is to provide institutions for the reasoned expression of the public's values in an ordered way, and in so doing, to channel will into the form of reasoned expression.<sup>197</sup> If judges could exercise their own will in derogation of the democratic choices of the citizens then democracy would be subverted. In particular, if a judge were to exercise judgment based upon her own values or preferences—according to her own will—she would not be acting in furtherance of the people's collective will expressed by their democratic choices.<sup>198</sup>

Justice Scalia adopted a concept of willfulness and the articulation of the risk it poses to the democratic republic like that articulated by Dean Landis.<sup>199</sup> Willfulness refers to the imposition by judges of their own substantive views—political, moral, economic, whatever—in deciding cases presented to them,

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195. See generally Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449 (1989) (arguing that in pre-Reconstruction constitutional theory, reason was understood within a technical, rational space and will was understood to operate within a larger, organic space).

196. "The psychological virtue required by republican government is not simply well-formed habit. Rather, it is precisely the capacity to act on the basis of reason . . . . The virtue required is the capacity to overcome passion, or appetite, in both reason and will." *Id.* at 459 (footnotes omitted).

197. See Jaffa, *What Were the "Original Intentions,"* *supra* note 154, at 359 (citing President Jefferson's First Inaugural Address).

198. Brandom describes this as the tension in our judicial system between authority and responsibility. Brandom, *Hegelian Model*, *supra* note 79, at 38. The focus on the role of discretion and will emphasizes the place of authority and loses sight of the mechanisms of responsibility.

199. James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 887-91 (1930).

in derogation of the substantive judgments on such matters made by the enacting legislative or constitution-adopting authorities.<sup>200</sup> Will, by implication, is contrasted with deference, reason, and principle.<sup>201</sup> More fundamentally, the contrast between principle and will follows classical Lockean political theory.<sup>202</sup>

With this gloss in mind, it is perhaps a little difficult to identify the theorist or theorists against whom Justice Scalia was writing. Who, after all, speaks or writes in favor of judicial willfulness—even among Scalia’s biggest bugaboos? For example, Dworkin argued that there is discretion in judicial decision making, in the sense that the applicable rules often do not determine the outcome of cases. But he asserted that discretion is circumscribed and, more importantly, informed by the duty to decide the case in a manner that can be reconciled with making the law best. Best in this context is not unfettered, to be determined by the values of the judge but, like the analogy of the chain novel, must remain truest to the preceding chapters of the law.<sup>203</sup> The answer can be found less in the target theorists of *The Tempting of America* than in the defenders of the Warren Court engaged in Bork’s earlier Harris lectures.<sup>204</sup> Skelly Wright of the D.C. Circuit was a principal target for allegedly endorsing the view that the defense of the Constitution required the making of substantive value choices by the federal judiciary.<sup>205</sup> According to the argument Bork attributed to Wright, those fundamental value choices are required to fill in, or complete the gaps of, the Constitution.<sup>206</sup>

Justice Scalia’s and Judge Bork’s dualism can also be restated in terms of objective rules or principles and subjective preferences. Originalism promises objective rules or principles (no Dworkinian dualism is intended here). Competing theories appear to leave no alternative to judges’ imposition of their own subjective preferences, detached from the words of the

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200. See, e.g., Scalia, *Interpretation*, *supra* note 6, at 46-7.

201. Kahn, *supra* note 188, at 450.

202. See *id.* at 463 n.57.

203. See DWORKIN, EMPIRE, *supra* note 6, at 245-50; DWORKIN, TAKING, *supra* note 114, at 28-39 (describing the role of legal principles in adjudication).

204. Bork, *Neutral Principles*, *supra* note 57.

205. *Id.* at 4-5.

206. *Id.* at 5-6.

Constitution or the will of the people. Several of the leading critics of originalism would acknowledge the role of the judge's choice.<sup>207</sup> They would plead necessity as a defense; the determining authority claimed by originalism is insufficient to determine decision.<sup>208</sup> The originalists would accept that plea neither as defense nor excuse.

The contrast Bork thus sought to make is between a judiciary that makes its own substantive value choices in deciding cases and a judiciary that neutrally implements those value choices made by the Founders in the Constitution.<sup>209</sup> Whether that contrast can be sustained, the apparent contrast is clear. Equally clear is the promise of a theory of constitutional decision making that can deliver such neutrality in a democratic republic. With neutrality the allocation of power and legitimacy to the legislature and the executive is given effect, not to be subverted by alternative or competing values of the judiciary. Thus, the real advantage originalism offers its advocates is a limitation on judicial discretion.<sup>210</sup> In contemporary constitutional language we more typically speak in terms of discretion than will. In so doing, I don't mean to endorse the view that willfulness equates discretion, only that the ongoing debate about positivism and legal rules are, at least in part, couched in terms of judicial discretion,<sup>211</sup> and that Bork's argument can be translated into more contemporary terms. A judge can willfully act effectively only if one has discretion, but not all exercises of discretion are willful. A judge may exercise her discretion in a particular way

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207. See, e.g., TRIBE & DORF, *READING*, *supra* note 79, at 98-101; Dworkin, *Forum of Principle*, *supra* note 13, at 34-38; SUNSTEIN, *RADICALS*, *supra* note 4, at 247-49 (embracing a judicial strategy of minimalism in constitutional adjudication).

208. See, e.g., Dworkin, *Forum of Principle*, *supra* note 13, at 34-38 (the original understandings and intentions on which originalism claims to rely do not exist as a matter of linguistic philosophy); TRIBE & DORF, *READING*, *supra* note 79, at 98-101 (because texts are not self-interpreting, judges charged with interpreting and applying the constitutional text must import extra-textual sources of law); TRIBE, *INVISIBLE*, *supra* note 90 (describing the myriad non-textual sources of constitutional law); SUNSTEIN, *RADICALS*, *supra* note 4, at 71-73 (arguing that originalism is indefensible because of the consequences of following its methods).

209. See Bork, *Neutral Principles*, *supra* note 57.

210. *Id.* at 4. But see William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2219-28 (2017) (arguing that originalism can provide only a weaker, internal constraint, not an external constraint, on judicial decision).

211. See generally DWORKIN, *TAKING*, *supra* note 114, at 14-80.

because of a reasoned belief in a very abstract proposition. Originalism circumscribes judicial discretion through a decision process that permits, indeed, provides for, the resolution of constitutional cases by appeal to rules without the addition or substitution of the judge's personal values or preferences. The preferences and values imbedded in the Constitution trump.

Why, then, did Justice Scalia qualify his claim that originalism limits will or discretion? What residual role does discretion play in his originalism? Justice Scalia did not answer this question clearly. At first impression, discretion would not appear to have any place in the originalist theory of constitutional appellate adjudication. As described above, the inquiry into meaning, coupled with the application of the principles uncovered to the facts determined by the trial court, completely describes the process. In that process, there is no apparent place for discretion. Discovering the meaning of the constitutional provisions may present a difficult historical or linguistic problem, but the task does not call for judicial discretion. Determining the relevant facts found by the lower court may not be as simple as reading the decision and underlying record, but, again, while the determination of the legally relevant facts found may be difficult, no call would appear for the exercise of judicial discretion. The concession of a role for discretion may therefore be another *deus ex machina* for originalism, like *stare decisis* (as described below), to avoid the consequences of its theory in the real world.

Bork also did not speak directly to the problem of judicial discretion, what to do when the original meaning of a constitutional provision is unclear or when two provisions conflict. Indeed, those possibilities almost seem precluded by Bork's account of constitutional interpretation.<sup>212</sup> Bork did admit of a place for discretion and judgment when the originalist confronts non-originalist precedent, but his account is murky.<sup>213</sup>

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212. See BORK, TEMPTING, *supra* note 6, at 155-60; Charles Fried, *On Judgment*, 15 LEWIS & CLARK L. REV. 1025 (2011) [hereinafter Fried, *On Judgment*].

213. Indeed, he sets the stage by denying that the doctrine of *stare decisis* has ever been clearly articulated: "The law . . . has no very firm theory of when precedent should be followed and when it may be ignored or overruled." BORK, TEMPTING, *supra* note 6, at 157. The theory of precedent is much less critical to many of those other theories of constitutional interpretation, however, particularly to the extent that they acknowledge a place for prudence and doctrine in their interpretative arsenal. Prudential and doctrinal arguments are the usual

He merely described a series of factors to be taken into account in the decision whether to respect such precedent: whether the precedent has “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 . . . .”<sup>214</sup> To the untutored, this might sound like a defense of *Roe*, but Bork immediately went on to distinguish *Roe* because of the ongoing public dissent from it.<sup>215</sup> The extent of doctrinal deviation from the original understanding also seems a factor.<sup>216</sup> Finally, the vitality and potential implications of a decision also appears to be a factor, the extent to which a prior erroneous precedent may engender further error.<sup>217</sup> The application of these factors appears complicated, if not difficult, and to require seemingly non-legal judgments. For example, how does a judge assess the extent to which a judicial decision has become embedded in public and private expectations?<sup>218</sup> Similarly, how does a judge determine the extent to which the public originally dissented from a decision? How does she determine how potentially powerful a precedent may be in engendering further doctrinal departure from the original understanding? This enumeration of factors or considerations does not shed much light on how the decision process is supposed to go. Accordingly, it is hard not to conclude that the potential for judicial discretion to intrude into the decision process whether to respect or overrule non-originalist precedent, with the result that the claimed neutrality is forfeit.

Intuitively, the originalist position that we should commit to a neutral approach to constitutional interpretation and decision is very engaging. After all, verbal communication appeared to work pretty well in the eighteenth and nineteenth centuries, and it is reasonable to anticipate that we can figure out what the provisions of the Constitution adopted in those centuries (among

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reasons offered for respecting otherwise questionable precedent. It is precisely because of the deontological nature of originalism and its failure to endorse prudential and doctrinal arguments generally that its account of *stare decisis* is at once so critical, and so difficult.

214. *Id.* at 158.

215. *Id.*

216. *Id.* at 158-59.

217. See BORK, TEMPTING, *supra* note 6, at 159.

218. Cf. Scalia, *Interpretation*, *supra* note 6, at 45 (criticizing potential reliance upon public opinion in judicial decision making).



others, of course) meant. To the extent that this account misunderstands the nature of the original communications, the optimistic premise behind originalism may be flawed. That could be the case, for example, if the communicative strategy of the Constitution were not to anticipate and answer such questions, but merely to provide broad concepts and an institutional structure for future consideration and resolution of more specific questions.<sup>219</sup> Under those circumstances, it would seem that asking the judge to interpret the meaning of the terms of the Constitution, and thus the meaning of the Constitution itself would be a relatively simple decision procedure. So discretion ought to be limited at the least, and eliminated at best. But the point that originalism glosses over or, perhaps, obscures, is that the methods that originalism must introduce to determine the principles that underlie and inform the provisions of the constitution and to determine when and how to accommodate non-originalist precedent are complex. Moreover, the kinds of judgment that those methods call for a judge to make require determinations that are anything but the application of only logical reasoning from the constitutional text, even supplemented with historical exegesis. As a result, the intuitive appeal of originalism to offer an interpretive theory that dispense with the complexities that may result in, or be mistaken for, discretion, has not been easily realized in practice.

### 3. *Neutrality, Originalism, and Stare Decisis*

Justice Scalia defends his deference to the principle of *stare decisis* as a pragmatic exception to originalism.<sup>220</sup> That defense, however, raises some important questions, because of the extent to which originalism would appear to depart from established constitutional doctrine, unless non-originalist

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219. See generally Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1980) [hereinafter Dworkin, *Forum*], reprinted in A MATTER OF PRINCIPLE, *supra* note 13, at 33 (challenging the linguistic and social theory underlying the originalist project).

220. The demand that originalists alone “be true to their lights” and forswear *stare decisis* is essentially a demand that they alone render their methodology so disruptive of the established state of things that it will be useful only as an academic exercise and not as a workable *prescription* for judicial governance. Scalia, *Response*, *supra* note 20, at 139; see also *id.* at 140.

precedent is accorded a very substantial place.<sup>221</sup> Thus, when we examine the accommodation that *stare decisis* provides for the status quo against the fundamental changes that a strict originalism would require, it creates a more substantial set of exceptions than Justice Scalia's language might suggest.<sup>222</sup> A critic might (and many have)<sup>223</sup> conclude that the deference to *stare decisis* is the *deus ex machina* that saves originalism from the consequences of its own principles. It is not entirely clear, of course, whether those consequences would be particularly troubling for most originalists. To the extent those consequences follow from the theory and to the extent that theory is presented as the sole legitimate foundation for judicial review in a democratic republic, it is hard to avoid them. Yet it must be acknowledged those implications could create a fundamental political problem for originalism.<sup>224</sup>

With respect to the impact of the role of non-originalist precedent in weak or non-exclusive originalism, it would appear that the claim to free judges from the meretricious appeal of discretion is highly problematic. The kinds of factors that Bork would introduce to determine the precedential weight to be given to such prior non-originalist decisions would appear to re-introduce the kinds of judgments that present the hazards of discretion that Bork purported to avoid. It must also be acknowledged that Bork, at least, never gave an express account of the role of discretion in originalism.<sup>225</sup> Even when describing

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221. Sunstein suggests that originalism would, among other things, result in constitutionalizing state bans on the purchase and sale of contraceptives, holding key provisions of the Clean Air Act, Federal Communications Act and the Occupational Safety and Health Act unconstitutional, permitting state establishment of churches, and striking down even modest gun control laws. SUNSTEIN, *RADICALS*, *supra* note 4, at 1-3. More recently, he has also suggested that racial discrimination by the Federal government would be permitted and that the right to privacy would be entirely eliminated. ORIGINALISM, *supra* note 59, at 292-94.

222. See SUNSTEIN, *RADICALS*, *supra* note 4, at 76. (“[Justice Scalia] describes himself as a ‘faint-hearted originalist.’ His faintness of heart is a frank recognition that taken seriously, [originalism] would lead in intolerable directions.”).

223. See, e.g., Tribe, *Interpretation*, *supra* note 13, at 82-83.

224. See LeDuc, *Paradoxes of Positivism*, *supra* note 54, at 685-87 (discussing Sunstein's arguments against originalism and explaining why they miss the mark).

225. The closest Bork came is when he acknowledged the rare gaps in the historical understanding of the constitutional text, as in the case of the Privileges and Immunities Clause and the Ninth Amendment. See BORK, *TEMPTING*, *supra* note 6, at 180-85.

the factors that an originalist judge should consider (which carry with such terminology an implicit concession that a judge must adopt a decision process that takes such factors into account in some, non-deterministic manner), Bork never suggests that we have reached the stage at which judicial discretion may be deployed. In light of the enormous attention that judicial discretion has received in mid-twentieth century jurisprudential theory,<sup>226</sup> this gap is surprising. It would appear that the failure to acknowledge the place of judicial discretion, even in originalist decision theory, arises from an unwillingness to confront the qualification that such recognition imposes on the claim to neutrality. In the case of Justice Scalia, the most he could do was to articulate the cryptic concession that originalism does not inoculate against willfulness or discretion.<sup>227</sup> Buried in that concession is a tacit acknowledgment that the originalist claim to neutrality still needs a foundation and a defense.

Originalism's critics have recognized some of these flaws. For example, the critics have asserted that the approach of the Warren Court can be criticized and the scope of its novel constitutional jurisprudence rejected without a commitment to the bolder originalist claims.<sup>228</sup> They have shown that whatever the provenance of originalism, it is unnecessary for a more restrained constitutional jurisprudence.

#### 4. Conclusion

Despite the central place of originalism's claim to neutrality in the defense of classical originalism and in the critics' response, the debate over this claim shows little progress or signs of imminent resolution. Originalists continue to assert the argument from neutrality. Their critics continue to dismiss it.

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226. See Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1162 (2015) ("For more than forty years, jurisprudence has been dominated by the Hart-Dworkin debate."); Noel B. Reynolds, *Dworkin as Quixote*, 123 U. PA. L. REV. 574, 574-76 (1975). But see Brian Leiter, *The End of Empire: Dworkin and Jurisprudence in the 21<sup>st</sup> Century*, 36 RUTGERS L.J. 165 (2005) (denying that Dworkin's analysis of judicial discretion was a major jurisprudential contribution).

227. Scalia, *Response*, *supra* note 20, at 140.

228. See Sunstein, *Five Theses*, *supra* note 52, at 313 n.12 (criticizing the Warren Court's decisions in *Griswold* and, amazingly, *Brown*).

Originalists have made scant progress defending either classical versions of the claim or more modern versions like Solum's fixation thesis.<sup>229</sup> The fixation thesis measures neutrality by reference to the constitutional meaning allegedly fixed at the earlier time. Neutral interpretations articulate that earlier meaning.<sup>230</sup> Originalism's critics reject those arguments from neutrality.<sup>231</sup> Their criticisms that the originalists have not defended their concept of neutrality nor their arguments from it generally have some force.

Originalism's critics have been less successful in articulating their competing non-originalist accounts and defending them against originalist criticism.<sup>232</sup> The radical challenge to the concept of neutrality by Critical Legal Studies theorists or by Stanley Fish appears to face a powerful, practical response that there is far more agreement about the neutral interpretation and application of the Constitution than such theories would recognize.<sup>233</sup> The strong claims of indeterminateness sometimes made by critics<sup>234</sup> lose sight of the constraints on constitutional argument and decision.<sup>235</sup> The indeterminacy objection to neutrality is mistaken. But neutrality can be questioned without need to rely on a claim that legal argument is indeterminate (rather than merely underdetermined).

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229. See Solum, *Constitutional Construction*, supra note 103, at 456 (asserting that originalism commitments to the meaning of the Constitution that was fixed at the relevant time of its adoption or amendment).

230. *Id.* at 459 (Solum does not, however, expressly articulate this claim as a matter of neutrality); ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM* 36-63 (2011).

231. See, e.g., Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609 (2008) [hereinafter Tushnet, *New Originalism*] (arguing that the New Originalism relies on the same evidence and sources as the old originalism); Tushnet, *Following the Rules*, supra note 24, at 804-06.

232. Thus, few originalists have renounced their originalism in response to their critics' arguments.

233. See, e.g., Nussbaum, *Sophistry*, supra note 85, at 130, 134-38.

234. See, e.g., Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QLR 339 (1996); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

235. Bobbitt's modal argument description captures important dimensions of the constraints on the argumentation and decision in our constitutional law practice. BOBBITT, *FATE*, supra note 17, at 9-119 (describing six canonical modes of constitutional argument). Brandom describes in more conceptual Hegelian terms the constraints imposed by the responsibility judges have with respect to their authority. Brandom, *Hegelian Model*, supra note 79, at 38.

To the extent that theories like Dworkin's would assert that the historical or textual statement of neutral constitutional principle is always defeasible by moral or other philosophical theory again appears inaccurate and implausible as a matter of the description of our constitutional decisional practice.<sup>236</sup> Some originalist arguments are compelling and prove dispositive.

Finally, and most importantly, it is not clear how the debate about substantive constitutional theory and practice has been advanced by the focus on the nature and place of neutrality of principle. Appeals to neutrality do not easily resolve the tensions that have resulted in complex and discontinuous constitutional doctrine and precedent or the apparent inconsistencies between constitutional text and constitutional decisional law. Nor do such appeals authoritatively point the way to a path to harmonize such complexities. The focus on neutrality is another example of how highly theoretical arguments prove largely unhelpful in critiquing or refining our constitutional practice.

### C. Originalism's Account of the Textuality of the Constitution

Originalism also argues for its claim to be the only proper method of constitutional interpretation and, implicitly, of constitutional decision on the basis of a simple characterization of the Constitution. The originalists claim to offer an account of the Constitution that hews more closely to the text of the Constitution because it reflects the textuality of the Constitution.<sup>237</sup> That is, originalism is a better interpretation of the written Constitution because it recognizes and emphasizes the writtenness of that text.

The argument from writtenness here emphasizes two features of the written Constitution: its accessibility and transparency and the fixed nature of the text.<sup>238</sup> Originalism claims to correspond to the text better than all or most other theories of constitutional interpretation. This argument is

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236. See Christopher R. Green, "This Constitution": *Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1674 (2009).

237. See LeDuc, *Constitutional Meaning*, *supra* note 1, at 125 n.65.

238. Justice Scalia emphasized the conservative nature of the Constitution. See Scalia, INTERPRETATION, *supra* note 6, at 40.

content-neutral; it relies on how the Constitution is expressed rather than what it says. It is expressed in writing, locking in the linguistic content (as an oral constitution would do less effectively), if not the substantive constitutional law.<sup>239</sup>

The first element of that closer correspondence is the conformity principle, which requires that interpretations of the Constitution ought not to be less transparent and accessible than the text of the Constitution itself.<sup>240</sup> Transparency is a desideratum of constitutional interpretations. Transparency makes the text of the Constitution more effective. The Constitution as a whole and each provision in particular give guidance to the citizens and to governmental officers as to their rights and duties and the limits on their powers. If that mission is to be performed, the text must be accessible and its meaning and force reasonably transparent and understandable. Transparency and accessibility is generally defined by reference to ordinary citizens; they ought to be able to read and understand at least at a fundamental level what the Constitution says.<sup>241</sup> On the other hand, constitutional law experts can certainly have a deeper, technical understanding of our constitutional law.<sup>242</sup>

Critics have neither accepted the implicit criticisms of their own theories nor the express claims made for originalism. Many do not expressly accept the conformity principle itself and articulate theories that appear to flout it.<sup>243</sup> Some simply disregard any suggestion that transparency is to be sought in constitutional law. Dworkin, for example, in his theory of law as

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239. See generally Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 271 (2017); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479 (2013) (distinguishing the linguistic content of the text from the substantive legal force of the text).

240. See André LeDuc, *Evolving Originalism: What's Privileged?*, section III.A (unpublished manuscript) (on file with author) [hereinafter LeDuc, *Evolving Originalism*].

241. See ALLEN, OUR DECLARATION, *supra* note 71, at 160-66 (exploring what the Declaration of Independence's claim that certain propositions are "self-evident" means).

242. See generally Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981) (describing the respect in which legal reasoning is independent of other forms of practical reasoning).

243. See, e.g., DWORKIN, EMPIRE, *supra* note 6 (endorsing an account of constitutional interpretation and decision that employs philosophical analysis and argument as a central feature); Scott Soames, *Deferentialism: A Post-Originalist Theory of Legal Interpretation*, 82 FORDHAM L. REV. 597 (2013) (also introducing philosophical analysis into judicial decision theory to better explain the meaning of legal texts).

integrity, was prepared to construct a complex ideal for constitutional interpretation, a model, indeed, that he acknowledges cannot be satisfied in practice.<sup>244</sup> Dworkin's rejection of the conformity principle rejected the principle on both sides of the claimed equivalence. Not only did he deny that constitutional interpretation should have the transparency and accessibility of the Constitution, but he denied that the Constitution itself has that transparency.<sup>245</sup> The understanding and interpretation of the Constitution, at least with respect to its most fundamental provisions, requires a Hercules. Dworkin never adequately explained why such a construct does not reveal his theory of law as integrity as unworkable.<sup>246</sup>

Posner's wealth maximizing theory of interpretation also appears susceptible to challenge, insofar as it employs a reasonably sophisticated economic analysis to explain how cases should be resolved.<sup>247</sup> Posner's theory may be defended on the basis that he is simply offering a deeply theoretical analysis of why cases come out as they do, rather than defended as an express theory of justification.

The theories of other critics appear less susceptible to such a criticism. For example, Sunstein's theory of judicial minimalism would appear to avoid such an objection.<sup>248</sup>

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244. Dworkin created the mythological figure of Judge Hercules to present his theory of law as integrity. Judge Hercules has proven to be one of the most consistent elements of Dworkin's jurisprudence, having made his debut in Dworkin's inaugural lecture when he assumed his Oxford chair. His powers and his role have not diminished with age. See DWORKIN, *EMPIRE*, *supra* note 6, at 264-65.

245. Dworkin and law as integrity read the Constitution as Catholicism reads the Bible, with a complex textual exegesis informed by a large corpus of canonical interpretation and mediated by privileged interpreters. Ironically, Justice Scalia, an observant and public Catholic, offered a Lutheran critique of that style of interpretation with its philosophical mumbo jumbo and its apparent dispensation of indulgences. See *id.* at 238-58 (describing the task and role of Herculean interpreters of our constitutional law).

246. Dworkin defends his use of the supernatural by characterizing Judge Hercules as the ideal. He sees no need to address a possible concern that the theory of the second best may have something to say about the aspirations of his theory of adjudication.

247. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 60-76 (1981) [hereinafter POSNER, *THE ECONOMICS OF JUSTICE*].

248. See generally CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 24-48 (1999) [hereinafter SUNSTEIN, *MINIMALISM*] (case by case adjudication is less costly and less likely to result in error than a more sweeping decision process, and errors that do occur are likely to result in smaller costs); CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 60-61 (1996) [hereinafter SUNSTEIN, *LEGAL REASONING*] (fundamental principles of a political society ought to be developed through

Sunstein's non-originalist minimalism would appear to satisfy the conformity principle because the judicial decisions that it endorses and the associated opinions that it advocates do not require complex, conceptual, or theoretical agreements.<sup>249</sup> By recognizing implicit disagreements and the legitimacy of conflicting values and interpretations, Sunstein's theory allows citizens to understand judicial outcomes.<sup>250</sup> That is because such judicial outcomes are to be understood based almost exclusively on their result, rather than on the basis of a complex theoretical derivation or justification. Reaching a narrower result for the case at hand is easier done, Sunstein implicitly urges, than understanding the theoretical constructs that might support broader conclusions.<sup>251</sup> Similarly, while Tribe is more willing to construct bolder and broader constitutional theories, he argues that those theories are accessible and compelling, like the Constitution itself.<sup>252</sup> Originalists respond that there is no foundation for Tribe's constitutional arguments and attendant conclusions,<sup>253</sup> and some originalist critics agree with that criticism, too.<sup>254</sup> Without those foundations, Tribe's claim to transparency would appear hard to sustain.

There is a second implicit thread to the originalist textual argument. Originalists also argue that their account, by relying on the original understanding, intent, or expectations, better accounts for the decision to adopt a written Constitution.<sup>255</sup> Justice Scalia makes this point forcefully: "It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot

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democratic decision rather than by adjudication). Thus, Sunstein's defense of minimalism is largely procedural rather than substantive.

249. SUNSTEIN, *LEGAL REASONING*, *supra* note 248, at 61; SUNSTEIN, *RADICALS*, *supra* note 4, at 27-30 (restating the argument of *Legal Reasoning and Political Conflict* in the context of the debate over originalism).

250. SUNSTEIN, *LEGAL REASONING*, *supra* note 248, at 60-61.

251. SUNSTEIN, *MINIMALISM*, *supra* note 248, at 44.

252. LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 19-20 (1985) [hereinafter TRIBE, *CONSTITUTIONAL CHOICES*].

253. *See, e.g.*, Scalia, *Response*, *supra* note 20, at 140-42, 142 (criticizing Tribe's interpretation of a changing "vagrant Constitution").

254. *See* RONALD DWORKIN, *JUSTICE IN ROBES* 126-31 (2006).

255. Barnett, *Originalism*, *supra* note 27, at 617.



readily take them away.”<sup>256</sup> From the commitment of the adopters of the Constitution to a policy or principle to lock in, Justice Scalia argues that the interpretation of the Constitution should also commit to a principle of conservation.<sup>257</sup> Interpretation of the Constitution should acknowledge and honor the original commitment to bind future generations.<sup>258</sup> To do so, Justice Scalia argues, requires attention to, and deference to, the original understandings and expectations.

The critics also discount this second argument from textuality. They offer two responses. First, they dispute that the adopters of the Constitution shared any such commitment to a conservative interpretation of its terms.<sup>259</sup> Acknowledging contemporary expressions of such a conservative approach to constitutional interpretation,<sup>260</sup> those critics cite others, like Thomas Jefferson, who appears to adopt a radically different perspective.<sup>261</sup> Second, the critics invoke the dead hand argument against such an interpretive approach. Put most simply, regardless of what the adopters thought or intended, the dead hand argument urges that the dead cannot control the living, and it is for us and our contemporaries to determine how we read the Constitution and what it means. The dead hand argument appears in two related forms. The first is a linguistic argument, based upon a theory of meaning. On that version, a text must be given contemporary meaning by a contemporary linguistic community. A text cannot sail forward into time and impose its meaning upon future individuals or communities.<sup>262</sup> The second version is an argument from political theory; there is no legitimacy in an effort

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256. Scalia, *Interpretation*, *supra* note 6, at 40.

257. *See id.*

258. *Id.*

259. *See, e.g.*, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985). *But see* Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 79 (1988) (questioning Powell’s historical argument).

260. *See* Lofgren, *supra* note 259, at 77 n.1, 78 nn. 4-5.

261. Traditionally cited is Jefferson’s comment that the United States should adopt a new Constitution each generation. *See* GARRETT WARD SHELDON, *THE POLITICAL PHILOSOPHY OF THOMAS JEFFERSON* 84 (1991) (citing Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) in 15 *THE WRITINGS OF THOMAS JEFFERSON* 32-44 (Albert Ellery Bergh ed., 1907)) *see also* Jaffa, *What Were the “Original Intentions,” supra* note 155 (emphasizing the natural law perspective of Jefferson and the other Founders).

262. *See, e.g.*, BOBBITT, *FATE*, *supra* note 17, at 239-40.

by one temporal community to bind a later, otherwise unrelated community.<sup>263</sup>

Bork made two arguments against the dead hand argument. First, he urged that the dead hand argument is incoherent.<sup>264</sup> He contended that those making the argument rely precisely on the institutions constituted by the dead hand of the dead—the Republic’s courts—to accept their challenges to the original understandings and expectations. Thus, he urged, such arguments are internally inconsistent.<sup>265</sup> This argument appears mistaken. Its flaw is that critics of the interpretation need not rely on the dead hand to legitimize the courts or judicial review. They may, for example, rely upon the extant practices of interpreting and applying our American Constitution without regard to the original understanding. The vitality and authority of the courts is not subject to a significant fundamental challenge. The status of many historical understandings of the constitutional text is very different. Moreover, if Bobbitt is correct that those practices are themselves the bedrock legitimation of constitutional propositions,<sup>266</sup> there is no implicit recourse to the legitimacy of original understandings, intentions, or expectations. It is far from clear that Bobbitt is mistaken<sup>267</sup> and, in any event, there was no argument for that conclusion by Bork.

Second, Bork argued that the dead hand argument is essentially an argument against democratic majority rule.<sup>268</sup> He asserted that this argument is invoked to overturn democratically enacted legislation.<sup>269</sup> With the argument so recharacterized, Bork may be understood to have simply urged that nothing in the Constitution supports such an argument. Indeed, the Constitution asserts that it and the laws enacted to it are “the supreme Law of the Land” without regard to when adopted or enacted.<sup>270</sup> Bork

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263. For an originalist acknowledgment of the weakness of this argument, see BARNETT, LOST, *supra* note 31, at 19-22.

264. BORK, TEMPTING, *supra* note 6, at 170-71.

265. *Id.* at 171.

266. See BOBBITT, FATE, *supra* note 17, at 237-40.

267. See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 17.

268. See BORK, TEMPTING, *supra* note 6, at 170-71.

269. *Id.* at 171.

270. U.S. CONST. art. VI, cl. 2.

therefore concluded that these challenges should fail.<sup>271</sup> But Bork was not really fair to the dead hand argument.<sup>272</sup> That argument asserts that the Constitution should be interpreted as we understand it today. Article VI does not shed any particular light on the validity of the claim. Bork did not explain why such invocations of a different reading of the Constitution should fail.<sup>273</sup>

As noted above, Dworkin and Tribe present the strongest criticism of this second argument. They argue that the Constitution neither offers, nor even was originally understood to offer, answers to all constitutional questions that would later arise in the Republic. Thus, the argument from textuality certainly does some work in defense of originalism, insofar as it raises serious questions about at least a couple of the alternative theories. But some of the critics offer theories that satisfy the conformity condition as well as originalism. Thus, a variety of theories, originalist and not, would appear to take the textuality of the Constitution into account.

#### D. Accounting for Constitutional Flux

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271. BORK, TEMPTING, *supra* note 6, at 170-71.

272. He was not fair because the dead hand is not made as a textual argument; it is made as an argument from political philosophy or from the philosophy of action. (Gary Lawson recognizes the theme of ambiguity in the debate as to the nature of the claims made. Gary Lawson, *Originalism Without Obligation*, 93 B.U. L. REV. 1309, 1313 (2013) [hereinafter Lawson, *Originalism Without Obligation*] (“Originalism-as-interpretation is a theory of *meaning*; originalism-as-adjudication is a theory of *action*.”). So claiming incoherence because of a reliance on the constitutional text is unfair. Judge Bork might have argued that critics making the dead hand argument *must* rely on the Constitution if they make an argument to courts created by the Constitution. But I don’t think that claim is self-evident either. He needed an argument that the critics cannot require the support they insist on for the Constitution. While I think such an argument exists, made from an anti-foundationalist stance that accords our constitutional practice priority, that argument is not easily made by originalists.

273. BORK, TEMPTING, *supra* note 6, at 171. Bork did not directly engage the linguistic version of the dead hand argument. There are two reasons why. First, writing as judge and lawyer, Bork took for granted that old texts have meaning; he was neither attentive to, nor interested in, the philosophical questions that Dworkin and Bobbitt might identify, for example. Second, to the extent that Bork had a theory of meaning, it would appear to rebut the dead hand challenge. That is, the objective meaning of the constitutional text, determined by the truth conditions of propositions about that text, is an alternative account of meaning to that offered by anti-foundationalist, anti-representationalist accounts like that defended by Bobbitt and Patterson. *See generally* BOBBITT, FATE, *supra* note 17; PATTERSON, TRUTH, *supra* note 85.

### *1. The Problem of Constitutional Change*

Any adequate account of constitutional interpretation and decision must offer an account of constitutional change.<sup>274</sup> That the interpretation, application, and understanding of the Constitution has changed over time appears incontrovertible.<sup>275</sup> Constitutional change takes a variety of forms. It may also be characterized a variety of ways. A whiggish account of constitutional change would treat all such change as the correction of earlier error. Such an account could assert that all precedent that had been reversed was wrong the day it was decided.<sup>276</sup> A more pessimistic account, often at least hinted at by the originalists, is that constitutional change reflects a corruption of earlier, sound law.<sup>277</sup> An ontologically more complex account might treat the constitution as unchanging, confining the account of change as only a matter of interpretation, understanding, or application.<sup>278</sup> But some account of change must be offered.

### *2. Originalism's Reductive Approach to Constitutional Flux*

Because originalism looks to the original meanings and intent, it accommodates constitutional change only in limited

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274. See, e.g., Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 559 (2006) [hereinafter Green, *The Sense-Reference Distinction*] (“I explain how distinctions of long standing in the philosophy of language can present a compelling distinction between which of the Constitution’s attributes change and which do not.”).

275. Thus, for example, segregated public schools were understood to satisfy the Equal Protection Clause under *Plessy* but held to violate that clause in *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954). Anti-miscegenation statutes were held to violate that clause in *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

276. Such decisions are characterized in academic constitutional vernacular as “wrong the day they were decided.” See Green, *Truthmakers*, *supra* note 80, (manuscript at 5).

277. See BORK, TEMPTING, *supra* note 6, at 161.

278. But this account would introduce an important distinction between the constitutional law and the interpretation of that law that few originalists would welcome.

ways.<sup>279</sup> That is one of its claimed strengths.<sup>280</sup> In general, of course, originalism has challenged<sup>281</sup> non-originalist theories of constitutional interpretation that embrace broader avenues of change, usually by looking to changing extra-textual sources of law.<sup>282</sup> That response to other theories' endorsement of sources of constitutional change is consistent with originalism's conservatism as a theory of constitutional interpretation. For originalism, conservatism in interpretation, in the sense of hewing to the original understanding of the text, is a paramount virtue.<sup>283</sup> Nevertheless, the world around us changes<sup>284</sup> and those changes

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279. I have previously explored technological progress and the changing scope of the Fourth Amendment protection against warrantless searches. See André LeDuc, *Beyond Babel: Achieving the Promise of Our American Constitution*, 64 CLEV. ST. L. REV. 185, 197-99 (2016) [hereinafter LeDuc, *Beyond Babel*]. Ironically, one of the most telling objections to originalism is that it offers insufficient stability and excessive change to our established constitutional law. See, e.g., SUNSTEIN, RADICALS, *supra* note 4, at 75-76. While some proponents of originalism urge that originalism offers the interpretive path by which we may restore the Lost Constitution, most originalists and most critics wrestle with the problem of saving a century or so of precedent within originalism. See BARNETT, LOST, *supra* note 31, at 335-351.

280. BORK, TEMPTING, *supra* note 6, at 139-41; Scalia, *Interpretation*, *supra* note 6, at 38-40, 46-47.

281. See, e.g., Scalia, *Interpretation*, *supra* note 6, at 38-40, 46-47. Justice Scalia made a number of arguments, including that embedding certain rights in the Constitution locks them in in a way that blocks further social and political evolution, on the one hand, and that the commitment to a Living Constitution elevates majority rule to the exclusive source of rights and obligations, on the other. Some might find these two arguments in tension, if not inconsistent.

282. See, e.g., Justice William J. Brennan, Jr., Speech to the Georgetown University Text and Teaching Symposium, (October 12, 1985), in ORIGINALISM, *supra* note 59, at 55, 61 ("We current Justices read the Constitution in the only way that we can: as twentieth century Americans. . . . What do the words of the text mean in our time?"); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 115-32 (2005) (arguing that the interpretive goal should be to interpret and apply abstract principles to the modern world, informed by that world); DWORKIN, EMPIRE, *supra* note 6, at 225-75 (describing construction of philosophically grounded harmonic interpretation of law as the best reading of the law and the preferred means of establishing the integrity of law). Most fundamentally, Dworkin's criticism of legal positivism was a challenge designed to permit the importation of authoritative sources of law from outside the practice (or texts) of positive law.

283. See generally Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2015) [hereinafter Sachs, *Legal Change*]. Of course, as Dworkin and Sunstein, among others, have repeatedly pointed out, originalism is anything but a conservative theory of interpretation as applied to the existing understanding and practice of our American Constitution.

284. See JOHN MANSLEY ROBINSON, AN INTRODUCTION TO EARLY GREEK PHILOSOPHY: THE CHIEF FRAGMENTS AND ANCIENT TESTIMONY, WITH CONNECTING COMMENTARY 89 (1968) (assertion by Heraclitus that all is flux).

require reinterpretation or rethinking of constitutional doctrine.<sup>285</sup> How then does originalism accept and account for constitutional flux? Originalism's critics charge that the doctrine cannot provide a coherent and plausible account of such change. To assess this element of the debate, it is helpful to explore a general theory of constitutional change before looking to what the originalists and their critics have said.

Larry Lessig offers one of the most thoughtful, highly articulated, and comprehensive theories of constitutional change.<sup>286</sup> He claims to offer a theory of change that even originalists can agree with.<sup>287</sup> That claim may be overstated. Nevertheless, there is much in Lessig's view of the constitution that originalism would reject.<sup>288</sup> But that theory may be helpful in articulating and analyzing the problem of constitutional change and the sources of permissible constitutional change for originalism. First, and foremost, Lessig emphasizes constitutional change: "Readings of the Constitution change. This is the brute fact of constitutional history and constitutional interpretation. . . . No theory that ignored these changes, or that presumed that constitutional interpretation could go on without these changes, could be a theory of our Constitution. Change is at its core."<sup>289</sup> Lessig crucially distinguishes readings of constitutional provisions from the meaning of those provisions.<sup>290</sup> Readings are context specific. By introducing and emphasizing the concept of constitutional readings, distinct from the meaning

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285. How one characterizes that interpretative or adjudicative response is, of course, one of the central questions of originalism and its competing theories.

286. Lessig, *Understanding*, *supra* note 5, at 439-42 (arguing that changes in background context of the constitutional text can explain changes in the interpretation and application of the constitutional provisions in our constitutional decisional practice).

287. *Id.* at 396 ("Are these changed readings always changes of infidelity? Everyone, whether originalist or not, agrees that they are not."). Although Lessig asserts this point without citation, it is surely true in at least the trivial sense that many of the changed readings advocated by originalism would reverse unfaithful precedent, and in so doing, would restore fidelity. Whether it is true in a stronger sense may be questioned, as explored below.

288. For example, few originalists would likely be willing to accept Lessig's notion that changes in uncontested views like the characterization of homosexuality could alter the proper interpretation of the Constitution. If they did, their views on recent cases addressing the relationship of homosexual activity and protected privacy rights would likely be very different.

289. *Id.*

290. *Id.* at 402. Readings are applications of a constitutional provision to a particular set of facts.

of the constitutional text, Lessig creates the field within which constitutional change may unfold, without committing him to the counterintuitive proposition that the meaning of the Constitution changes.

Lessig's attempt to construct a theory of constitutional change is intended to explain how the apparent discontinuity in the Supreme Court's approach to the Commerce Clause and the New Deal legislation in 1937 can be legitimated without invoking a theory like that of Bruce Ackerman that there was a *de facto* constitutional amendment.<sup>291</sup> To do so, Lessig constructs a matrix of types of possible constitutional change.<sup>292</sup> Those four types of change involve changed readings of the constitutional text or changed readings of the constitutional context.<sup>293</sup> The key claim that Lessig makes is that in addition to changes of factual context—like the kinds of technological change I have already explored—the reading of the Constitution may change with a changed understanding of context. One of the examples that Lessig cites of such change is the medical characterization of homosexuality.<sup>294</sup> What Lessig's article contributes to our task here is a description of fidelity as the translation of a reading in one context as a reading in another context that preserves meaning.<sup>295</sup> Originalists, by contrast, often simply focus on the unchanging meaning of the Constitution.<sup>296</sup> Inherent in the nature of a Constitution is stability, resistance to change. Lessig captures some of the complexity in the project of preserving that unchanging meaning. What, then, are the legitimate sources of change?<sup>297</sup>

The first permissible type of constitutional change comes in response to technological change. Perhaps the most obvious is that the permanent Constitution must be applied in a changing

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291. *See id.* at 472.

292. Lessig, *Understanding*, *supra* note 5, at 404-07.

293. *Id.* at 404.

294. *Id.* at 415-19.

295. *Id.* at 401-02.

296. *See, e.g.,* BORK, TEMPTING, *supra* note 6, at 143-44; Scalia, *Interpretation*, *supra* note 6, at 47. This rejection of change—or at least impermissible sources of change—lies at the heart of the rejection of the notion of a “Living Constitution.” *See generally* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

297. *Compare* Lessig, *Understanding*, *supra* note 5, at 404-05, *with* Scalia, *Interpretation*, *supra* note 6, at 41-44.

world.<sup>298</sup> The First Amendment<sup>299</sup> and Fourth Amendment<sup>300</sup> present the clearest examples in the case of originalist writings, but the Second Amendment<sup>301</sup> and the Sixth Amendment<sup>302</sup> provide similar instances where originalists confront potential new constitutional rules to respond to because they reflect the technologically changed world. How, then is such change accommodated? It would appear that such technological change is incorporated into the interpretation through a two-step process. First, a principle is extracted from the constitutional provisions. Second, that principle—which on its face already goes beyond the text—is applied to the new technology. I have discussed examples of such applications with respect to the First Amendment in *Evolving Originalism*.<sup>303</sup>

Beyond technological change, are there other forms of scientific or non-scientific changes that would properly be taken into account under originalism? The other two types of change acknowledged by originalism, constitutional amendment, and the correction of prior error, are not conceptually particularly interesting.<sup>304</sup> Are there then any other legitimate sources of

298. Technologies change, religions change, political practices change, foreign threats change, states join the Union, States purport to secede from the Union, Federal government roles evolve, treaty partners' demands and expectations change, life expectancies change, demographics change.

299. See the discussion in LeDuc, *Evolving Originalism*, *supra* note 240, at section II.A.(5).

300. See *supra* notes 134-37 and accompanying text.

301. See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

302. See Scalia, *Interpretation*, *supra* note 6, at 43-44 (rejecting a proposed interpretation of the confrontation clause to permit a child who is an alleged victim of sexual abuse to testify by live video feed).

303. See LeDuc, *Evolving Originalism*, *supra* note 240, at section II.A.(5); see also LeDuc, *Striding Out of Babel*, *supra* note 2, at 197-204 (discussing the Court's efforts to grapple with the requirements of the Fourth Amendment with respect to GPS tracking technology).

304. A second source of permissible change for originalists is constitutional amendment. On December 31, 1932, the sale of beer and wine was illegal in the United States, and any court should have so held; on January 1, 1934, such sale was, at least as a matter of United States constitutional law, not prohibited, any court should so hold. The difference in constitutional law was a matter of the proper adoption of the Twenty-First Amendment. That change was entirely proper under originalism. See, e.g., Meese, *Speech*, *supra* note 156, at 80. A third source of legitimate change is the correction of prior error. Thus, we had *Brown* correcting and reversing *Plessy v. Ferguson*, *West Coast Hotel* correcting *Lochner*, and *Crawford v. Washington* apparently correcting *Maryland v. Craig*. All would be examples of proper and permitted constitutional change for most originalists. Much of the originalist corpus addresses the need to reverse precedent that is inconsistent



constitutional change in originalism? The answer to that question turns on the relevant version of originalism at issue. At least two sources of law are acknowledged by certain versions of originalism, and those sources of law may therefore be sources of change.<sup>305</sup> In weak originalism, precedent is accepted as a binding source of law.<sup>306</sup> That precedent, when applied in conjunction with other doctrine to novel facts, may generate change.<sup>307</sup> In non-exclusive or moderate originalism, other interpretive modes are also accepted, and those others modes may be sources of change.<sup>308</sup>

With respect to the other stronger (narrower) versions of originalism, it is less clear that there are other permissible sources of change. Justice Scalia addressed these questions directly in his criticism of those who would find the death penalty prohibited by the Eighth Amendment.<sup>309</sup> One helpful way to analyze the debate over the death penalty under the Eighth Amendment is to ask what kinds of change are permissible to take into account in the interpretation of the Constitution. Technological change is apparently relevant. To the extent that we develop new, more humane ways of execution, those ways can make the old ways constitutionally obsolete because they become cruel (if hardly

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with the original meaning. See, e.g., BORK, TEMPTING, *supra* note 6, at 155-59 (criticizing *Roe v. Wade*, and the expansion of the commerce power, but grudgingly accepting *Shelley v. Kraemer* and *Griswold*). Such corrective change is also legitimate in originalism. It is this type of permissible change that opens originalism up to the criticism that it is too radical a doctrine of constitutional interpretation. Other theories do not deny the ability to correct error; they disagree as to what constitutes error in existing constitutional law.

305. See generally BORK, TEMPTING, *supra* note 6, at 155-59 (acknowledging constitutional amendment and the correction of prior constitutional error as sources of change).

306. See LeDuc, *Evolving Originalism*, *supra* note 240, at section II.B.(12).

307. For example, once *Griswold v. Connecticut* was decided recognizing a right to privacy and extending certain constitutional protection to certain sexual behavior, *Roe v. Wade* was arguably a natural extension; so, too, *Casey*. While few originalists would endorse these developments, an argument may be made that a weak originalist should accept these results. See BORK, TEMPTING, *supra* note 6, at 159.

308. Thus, for example, were a non-exclusive originalist to conclude that the language of the Eighth Amendment prohibiting cruel and unusual punishment is ambiguous, she might follow non-originalists in looking to emerging international legal consensus against the death penalty as a source of interpretation of the Eighth Amendment as applied to capital punishment.

309. Scalia, *Response*, *supra* note 20, at 146.

unusual).<sup>310</sup> But what cannot be taken into account are public opinion,<sup>311</sup> the views of other sovereigns,<sup>312</sup> moral theories about the state and the individual,<sup>313</sup> or any other topic.<sup>314</sup> What tells us which sources of change are legitimate, and which sources constitute judicial arrogations of power in derogation of the constitutional text?<sup>315</sup>

One strategy employed by Judge Bork and Justice Scalia is substantially the same, although articulated rather differently. As presented by Bork, the limitation on change is classically positivist.<sup>316</sup> The commands of the Constitution, as the commands of the sovereign, are to be respected as positive law.<sup>317</sup> It would take an authoritative action to change that positive law. Those commands may implicitly or explicitly incorporate normative or moral choices. Those choices are to be given effect, not because they are correct or uncontroversial, but because they are positive law.<sup>318</sup> Thus, having reduced the implicit moral choice to a statement of positive law, any change in public morality or philosophical perspective becomes irrelevant. Justice Scalia, by contrast, emphasized the unchanging moral view of the

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310. Cf. Scalia, *Interpretation*, *supra* note 6, at 45 (endorsing application of First Amendment to protect new technologies).

311. *Id.*

312. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 348 (2002) (Scalia, J. dissenting).

313. Scalia, *Interpretation*, *supra* note 6, at 45 (“[Does the extraneous source of constitutional law include] the philosophy of Hume, or of John Rawls, or of John Stuart Mill, or of Aristotle?” That is a rhetorical question, dripping with sarcasm, to be answered in the negative.).

314. *Id.*

315. The Congress could, of course, exercise its legislative function to prohibit capital punishment; there is no apparent constitutional mandate requiring capital punishment.

316. See BORK, *TEMPTING*, *supra* note 6, at 177; see generally LeDuc, *Paradoxes of Positivism*, *supra* note 54.

317. BORK, *TEMPTING*, *supra* note 6, at 177.

318. *Id.* at 177-78; see also Scalia, *Response*, *supra* note 20, at 146 (“[The founders] were embedding in the Bill of Rights *their* moral values . . .”).

Founders, trapped as it were, in amber.<sup>319</sup> As a historical fact, it, too, cannot change.<sup>320</sup>

Justice Scalia's claim that the meaning of cruel and unusual in the Eighth Amendment cannot change may be tested with a couple of hypotheticals. Consider the use of the guillotine as an instrument of capital punishment. That method of capital punishment was well-established in contemporary Western societies at the time of the adoption of the Bill of Rights and was not generally regarded as cruel or barbaric.<sup>321</sup> Would the use of the guillotine be permitted today as an instrument of capital punishment, or has the guillotine joined the stocks and the lash as an instrument of cruel and unusual punishment? If so, what has changed? What if we discovered that all available methods of capital punishment operate not to dispatch their victims expeditiously, but instead impose an eternity of suffering on the souls of those so condemned? What if we discovered that all but one of our techniques of capital punishment had that effect? Would either of those discoveries result in a change in our understanding of the relationship of some or all of our techniques of capital punishment to the prohibitions of the Eighth Amendment? Although Justice Scalia appears to have been denying that even such discoveries would change our interpretation,<sup>322</sup> perhaps a more charitable reading is that he is simply reflecting on the current state of our law in the absence of any such hypothetical discoveries.

With this survey of the originalist perspective on permissible sources of change we come, finally, to the great Princeton mink debate.<sup>323</sup> That debate offers one of the clearest statements of the disagreement between originalism and its critics as to the permissible sources of constitutional flux. The exchange

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319. Scalia, *Response*, *supra* note 20, at 146 (“[P]rovision for the death penalty in a Constitution that sets forth the moral principle of ‘no cruel punishments’ is conclusive evidence that the death penalty is not (in the moral view of the Constitution) cruel.”). The express characterization of the moral grounding of the Constitution in Justice Scalia’s jurisprudence makes his rejection of natural law in his originalism all the more puzzling.

320. *Id.* Sometimes Justice Scalia states this premise in moral absolute terms, but this does not appear essential to his argument, and when he does, he does so tentatively: “[M]oral principles, most of us think, are permanent.” *Id.*

321. *See id.*

322. *Id.* at 144-46.

323. *Id.* at 146; Dworkin, *Interpretation*, *supra* note 55, at 121.

between Justice Scalia and Dworkin addressed sources of permissible constitutional change. The debate hypothesized the interpretation of a statute that both protected endangered species and regulated the hunting of unendangered species, including, in particular, mink.<sup>324</sup> Dworkin explored the proper interpretation of such a statute in the face of changing populations of mink.<sup>325</sup> Both Justice Scalia and Professor Dworkin addressed the question of how to interpret an endangered species act that protects “endangered” species, as populations rise and fall and threats of endangerment to particular species rise and fall.<sup>326</sup> To Dworkin, the statute should be read to respond to those changing facts in the world;<sup>327</sup> fidelity to the statute demands it. Moreover, for Dworkin, that model of derivative statutory change was a model of constitutional flux.<sup>328</sup> So Dworkin invoked the changing interpretation as a model of how we should, for example, interpret the Eighth Amendment prohibition on cruel and unusual punishments. Most simply, Dworkin intended his hypothetical statute as a counterexample to Justice Scalia’s simple, oft-repeated claim<sup>329</sup> that the mention of capital punishment in the Constitution precludes a determination that such punishment is prohibited by the Eighth Amendment as cruel and unusual. Justice Scalia would apparently read the *statute* no differently; he, too, would protect the newly endangered mink (or call off the protections for newly unendangered mink).<sup>330</sup> Justice Scalia denied that such change with respect to the protection required corresponds to a change in the interpretation of the relevant statute.<sup>331</sup> Similar changes in constitutional protections ought not

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324. Dworkin, *Interpretation*, *supra* note 55, at 121; Scalia, *Response*, *supra* note 20, at 146.

325. Dworkin, *Interpretation*, *supra* note 55, at 121.

326. *Id.*; Scalia, *Response*, *supra* note 20, at 146.

327. Dworkin, *Interpretation*, *supra* note 55, at 121-23.

328. *Id.* at 121-22.

329. Scalia, *Interpretation*, *supra* note 6, at 46. (“No fewer than three of the Justices with whom I have served have maintained that the death penalty is unconstitutional, *even though its use is explicitly contemplated in the Constitution.*” (footnotes omitted)).

330. *Id.*

331. *Id.*

to be understood as deriving from a change in interpretation of Dworkin's "majestic" clauses of the Constitution.<sup>332</sup>

Justice Scalia appeared to rely on the distinction between facts and values. Changes in animal population are changes in facts; changes in the definition of cruel or equal or others highly abstract terms are often changes in moral or other values. The latter are not properly taken into account by an implicit positivist account of law that denies such moral theories the status of law. Thus, Justice Scalia could easily distinguish Dworkin's mink case to the extent he could distinguish facts from values or otherwise rely upon a positivist account of law.<sup>333</sup> While neither of those foundations is free from doubt,<sup>334</sup> neither are they suspect or unusual in American jurisprudence. Indeed, the distinction between facts and value is very much a traditional one. In short, Dworkin needed to do a lot more work before the mink case would pose a difficult challenge for Justice Scalia's theory.

Beyond operating as a counterexample to Justice Scalia's capital punishment argument,<sup>335</sup> Dworkin appeared to use his hypothetical statute more generally as a proxy for the types of change that must be accommodated in constitutional interpretation. As noted, Dworkin accepted that there is a distinction between facts and values, but he believed that values, including moral values, evolve. That argument was not made with the endangered mink example, however. Instead, Dworkin's argument that the moral values and principles inherent in the Constitution may evolve was based upon the text of the Constitution itself. Dworkin argued that the language of the Constitution demonstrates a commitment to the highest and best moral theory available to us.<sup>336</sup>

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332. See Dworkin, *Interpretation*, *supra* note 55, at 123 (citing RONALD DWORKIN, *LIFE'S DOMINION* 145 (1993)).

333. See Hart, *Positivism*, *supra* note 148, at 625-29; see generally LeDuc, *Paradoxes of Positivism*, *supra* note 54 (exploring the positivist character of most originalist and non-originalist theories in the debate).

334. See HILARY PUTNAM, *THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS* 9-10, 99, 101-02 (2002) (arguing, following Dewey, that the distinction between facts and values does not generate a philosophically important ontological dichotomy); Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 *PHIL. & PUB. AFF.* 87, 88-99 (1996) (defending the objective truth of value judgments).

335. See Scalia, *Interpretation*, *supra* note 6, at 46-47.

336. See, e.g., Dworkin, *Interpretation*, *supra* note 55, at 122-23.

Accordingly, Justice Scalia's originalism appears to offer a theory of constitutional flux that acknowledges a limited array of sources of change. The Constitution may change as technology changes. I described the evolution with respect to the First Amendment and the Fourth Amendment above.<sup>337</sup> For Justice Scalia, it sometimes appeared as if sorting out the impact of technological change on the Constitution was not difficult.<sup>338</sup> The history of the Fourth Amendment jurisprudence suggests otherwise. It also raises a question whether *Griswold v. Connecticut*<sup>339</sup> should be reconciled with originalism theory as a technological change case. Just as the eighteenth-century Constitution permitted married couples to access the forms of contraception then available, that same Constitution ought to permit the use of newer technologies in the twentieth century. Other sources of constitutional change are generally not permitted. Of particular importance, changes in community standards or morality would not be properly taken into account. There remain at least a few rough patches in this account. Two examples are the criminal punishments of lashing and branding.<sup>340</sup> This account of Justice Scalia's originalism still does not explain why stocks and whipping are cruel and unusual and thus prohibited by the Eighth Amendment. He invoked *stare decisis* to avoid the implication that such punishments would not be prohibited under the Constitution.<sup>341</sup> The second is the implicit reliance and the distinction between facts and values. But that distinction is not manifestly wrong—and is certainly customary.

### 3. Conclusion

A powerful objection to originalism's account of change is that the account is inadequate. For example, Justice Scalia did

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337. See *supra* notes 298-303 and accompanying text.

338. For example, note Justice Scalia's discussion of the First and Fourth Amendments' proper interpretation in the face of technological change. See Scalia, *Interpretation*, *supra* note 6, at 45-46.

339. 381 U.S. 479, 480, 486 (1965).

340. Scalia, *Lesser Evil*, *supra* note 107, at 861 (acknowledging that such penalties would not be sustained under the Eighth Amendment by an originalist, characterizing originalism as, in "its undiluted form, at least, . . . medicine that seems too strong to swallow.")

341. *Id.*

not explain why stocks and lashing are prohibited, but capital punishment is not (except as a matter of deference to non-originalist precedent). Nor did he explain why the First Amendment protects broadcast television and flag burning.<sup>342</sup> Justice Scalia asserted that the concepts of speech and press serve as “sort of” synecdoches, but this is itself more a metaphor than an explanation or an argument. Moreover, it is hardly an apparently originalist claim about semantic or linguistic meaning.<sup>343</sup> Simply distinguishing facts and values does not make possible performance of the task that originalism seeks to accomplish. Our objections to stocks and lashings are rooted in our changed values, not in any changed facts. Our protection of flag burning, which cannot be justified by reference to original expectations, understandings, or intentions, is similarly rooted in changed values, understanding of democracy, and the permissible scope of debate within the public discourse.<sup>344</sup> The originalist account of constitutional flux falls not from the criticisms of its critics, but from its own inadequacy.

#### E. The Claim of Necessity

The final principal implication Bork drew from originalism’s claims is that all other theories of constitutional interpretation are impossible.<sup>345</sup> The sense in which theories were impossible for Bork is strong: such theories are no more possible than a perpetual motion machine under the laws of physics.<sup>346</sup>

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342. Scalia, *Response*, *supra* note 20, at 138.

343. See Scalia, *Interpretation*, *supra* note 6, at 38; LeDuc, *Constitutional Meaning*, *supra* note 1, at 138 (criticizing the casual invocation of the concept of synecdoche in interpretation of the constitutional text—and questioning how Justice Scalia’s approach differs from Justice Douglas’s much criticized penumbras and emanations in *Griswold*).

344. See Lessig, *Understanding*, *supra* note 5, at 400-01.

345. BORK, TEMPTING, *supra* note 6, at 251. Although Douglas Ginsburg and Frank Easterbrook do not expressly defend originalism on the basis that alternatives are impossible, Ginsburg’s characterization of non-originalists as lawless and Easterbrook’s analogy of non-originalism to infant baptism sound parallel themes. See Easterbrook, *Alternatives to Originalism*, *supra* note 36, at 479. Tara Smith dubs a related argument for the necessity of originalism the “iron grip argument.” See SMITH, JUDICIAL REVIEW, *supra* note 100, at 165 (naming the argument that interpretation must be originalist). Critics have likewise claimed the impossibility of originalism. See, e.g., Ely, *Allure and Impossibility*, *supra* note 14, at 412-15.

346. BORK, TEMPTING, *supra* note 6, at 251.

Other originalists argue that non-originalist theories are erroneous or misguided, but the modal claim about the world appears to have been made first by Bork.<sup>347</sup> The necessity argument makes two turns: a positivist turn, to be restated as a claim about the absence of legal change that could alter the original law and understanding<sup>348</sup> and a linguistic turn, to be restated as an argument about the nature of interpretation.<sup>349</sup>

Bork's argument was that moral choices are required in our foundational constitutional law. We have to choose how we want to live as individuals and as a political and civil society. If a judge, following originalism, simply implements the moral choices made by the Founders in the Constitution, that process becomes possible. Reliance upon the express or implied moral choices of the Constitution reduces the "ought" of such moral judgments and choices to the "is" of the constitutional text. In constitutional interpretation, "is" implies "ought."<sup>350</sup> But any attempt to make our own moral choices to resolve hard cases unanswered by the choices implicit or express in the Constitution is necessarily controversial because of moral relativism. A judge embarked on such a project becomes "at once adrift on an uncertain sea of moral argument."<sup>351</sup> Implicit in that criticism is that a debatable or controversial moral theory fails as a foundation of legal obligation.<sup>352</sup> (Bork quite nicely anticipates the objection that the moral theory of the Constitution is no less controversial, acknowledging that fact, but noting that the theory of the Constitution is vindicated not because it is less controversial, but because its constitutional embodiment makes it authoritative.)<sup>353</sup>

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347. *Id.* at 251-52.

348. Baude, *Our Law?*, *supra* note 37, at 2352.

349. SMITH, JUDICIAL REVIEW, *supra* note 100, at 165.

350. See LeDuc, *Paradoxes of Positivism*, *supra* note 54, at 634. That is, Bork relied on the reduction of the moral judgments of the Founders to positive law to purge those judgments of their controversial nature as moral judgments. BORK, TEMPTING, *supra* note 6, at 252.

351. BORK, TEMPTING, *supra* note 6, at 252. Bork's moral relativism is descriptive, not prescriptive.

352. *Id.*

353. *Id.*



Dworkin rendered this argument a little differently, with four steps:

- (1) Any method other than originalism requires “major moral choices.”<sup>354</sup>
- (2) Judges cannot show legitimate authority to make such moral choices.
- (3) Absent authority, judges must follow rules based upon a theory that “the public would accept.”<sup>355</sup>
- (4) There is no such theory.<sup>356</sup>

Dworkin challenged the second premise, arguing that belief in, and acceptance of, such authority “is very widely accepted.”<sup>357</sup> Dworkin offered no defense for such claim.<sup>358</sup> That support is probably not critical, however, because Dworkin offered his claim about public opinion not to establish the proposition that judges have such authority but merely to show that to the extent one holds the view contrary to Bork’s (and thus believes that judges have legitimate authority to make such decisions), then such a non-originalist theory would be possible. Without establishing the falsity of Bork’s second premise, Dworkin could refute Bork’s *argument* simply by showing that Bork has not established the truth of his premise.<sup>359</sup>

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354. RONALD DWORIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 301-02 (1996) (quoting Bork).

355. *Id.* at 302.

356. *Id.*

357. *Id.*

358. That omission is perhaps understandable or appropriate in a book review. If Dworkin were to defend that claim, it would likely be on both empirical and theoretical grounds. Empirically, there are wide areas of consensus in our Republic on a wide range of moral questions. Theoretically, Dworkin is committed to the view that there are right answers, as a matter of law and as a matter of moral theory. *See, e.g.*, DWORIN, *TAKING*, *supra* note 114, at 81-130; RONALD DWORIN, *Is There Really No Right Answer in Hard Cases?*, in *A MATTER OF PRINCIPLE*, *supra* note 13, at 119 (arguing that complete analysis of legal doctrine and moral philosophy will provide a unique right answer to all legal questions). *See generally* RONALD DWORIN, *JUSTICE FOR HEDGEHOGS* (2011) (defending a unified theory of value).

359. Dworkin was likely correct that Bork’s second premise is questionable. A variety of judges have claimed that power expressly or implicitly and a wide range of commentators

Reverting to my initial rendition of Bork's argument, however, may put that argument in a more charitable light. First, Dworkin asserts that judicial decision making must ultimately be based upon moral judgments to be morally legitimate; that claim misses the mark as a response to Bork. Bork did not deny Dworkin's moral theory. Rather, he only asserted the existence of conflict among both theorists and citizens more generally over the correct moral theory. That is, Bork's argument need assert only that Dworkin's claim is contested. From the existence of that controversy Bork argued that a controversial decision, resting on controversial premises or arguments, is not legitimate as a foundation for a holding of constitutional law. From this absence of uncontested outcomes Bork first inferred an absence of legitimacy and then inferred the failure of non-originalist theories, including those like Dworkin's that turn to moral philosophy for a foundation. I think this more charitable rendition of Bork's argument is closer to the mark; it is certainly more interesting. There is a plausibility that applying moral choices embedded in the Constitution has a manifest legitimacy that other, more avowedly interpretive theories cannot claim on their face. Perhaps because of his vocation as a legal philosopher, Dworkin had sufficient confidence in the power of reason that the complexity of the analysis and argument necessary under his theory does not appear to have caused him concerns.<sup>360</sup>

If Bork's argument fails, it is because the first premise is flawed. Implicit in the premise is the claim that originalism requires no new moral choices in the interpretation of the Constitution or the decision of constitutional cases.<sup>361</sup> It would not be enough to defer to the moral judgments of the Founders if those judgments left unresolved a range of other moral choices

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from Posner to Tribe and Dworkin have claimed that power for judges, too. While Bork may have strenuously disagreed with the claim to such authority, he could claim neither that such authority is uncontroversial nor that he had generally persuaded those who champion such authority. See, e.g., Brennan, *supra* note 240 at 60-61; see also DWORKIN, *EMPIRE*, *supra* note 6, at 225-75; RICHARD A. POSNER, *What Am I? A Potted Plant? in OVERCOMING LAW* 238-39 (1995); TRIBE, *CONSTITUTIONAL CHOICES*, *supra* note 252, at 21-22 (1985).

360. See DWORKIN, *EMPIRE*, *supra* note 6, at 264-66 (rejecting the challenge that a second-best account of judicial decision is to be preferred to Dworkin's idealized but impossible description of Hercules's method).

361. BORK, *TEMPTING*, *supra* note 6, at 252.

that face the objections that Bork has asserted. The moral choices inherent in the constitutional text must be complete. It must be sufficient for originalism merely to follow the implicit moral choices embedded in the positive constitutional text. That is a strong claim.<sup>362</sup> In fact, originalism itself requires moral choices, as Dworkin and others have noted.<sup>363</sup> Here Dworkin is on solid ground for two reasons. First, originalism cannot escape moral choices by relying on the language of the Constitution because that language does not give us the answers to all of the kinds of questions the Court must confront.<sup>364</sup> The subjects covered by the Constitution and the Republic governed by the Constitution are more complex and uncertain than the Ten Commandments and the limited aspect of human conduct that they governed.<sup>365</sup> To extract purported answers from ambiguous texts is both to follow non-textual sources of law and to render that practice opaque. In any event, moral or other choices—within a structured constitutional practice itself—are required.<sup>366</sup>

Second, if the critics of originalism are correct that the Constitution is not self-executing, and that its continuing vitality and force requires the political, social, and judicial practices in which it is imbedded, then the choice to look to the text of the

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362. Having acknowledged that technological change may sometimes pose new constitutional questions and denied that new moral questions may arise, it follows that the originalists are committed to the claim that technological changes can generate no new constitutional questions with a moral dimension. That seems a strong claim and hardly obvious *a priori*.

363. DWORKIN, *EMPIRE*, *supra* note 6, at 98-101; James E. Fleming, *Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution*, 92 B.U. L. REV. 1171, 1173-75 (2012).

364. See *United States v. Jones*, 565 U.S. 400 (2012) (wrestling with the application of the Fourth Amendment to the warrantless installation of a GPS tracker); see generally LeDuc, *Beyond Babel*, *supra* note 279 (exploring the exchange between Justices Scalia and Alito as to the salience of originalist methods with respect to the dramatically different technology of GPS tracking).

365. The Ten Commandments, after all, merely articulated a narrow set of personal ethical requirements for a relatively homogeneous set of co-religionists. Even in the case of the Ten Commandments, moreover, arguments may be made that difficult interpretative questions may be imagined if that text is subjected to the same scrutiny as is routinely applied to the constitutional text. See Sanford Levinson, *On Interpretation: The Adultery Clause of the Ten Commandments*, 58 S. CAL. L. REV. 719, 722-23 (1985) (conjuring up various purported ambiguities in one of the commandments).

366. The very different but complementary accounts Bobbitt and Brandom offer are perhaps the most helpful to understand the constraints that apply and channel decisional choice in our constitutional decisional practice. See Brandom, *Hegelian Model*, *supra* note 79, at 38.

Constitution as it was interpreted on adoption is to choose to practice in a particular way.<sup>367</sup> There are alternatives to that original practice. One of the starkest examples would be to follow Bork's imperative to apply the Constitution with a single, consistent stance but to follow the early Posner position with a social wealth-maximizing practice. That is, we could interpret and apply the Constitution not as if it codified Spencer's *Social Statics*, but as if it codified Posner's early law and economics account of justice.<sup>368</sup> The arguments as to why that approach would be problematic would take us far from the constitutional text. Another approach would be that offered by Ely, to interpret the Constitution in a manner that maximizes the democratic features of our Republic.<sup>369</sup> Bork, of course, would dispute the legitimacy of those other practices. But he had no neutral, Archimedean position from which to make that criticism. It follows, therefore, that originalism itself must make moral choices. In so doing, it is no different from those other theories and practices, except insofar as it makes better or worse choices.

Will Baude makes a positivist argument for the necessity of originalism.<sup>370</sup> Such an argument could potentially avoid the challenges that Bork's argument faces. Baude argues that originalism must be our law because, under legal positivism, there is no source of law that would explain how the law changed from that originally adopted or enacted.<sup>371</sup>

Baude's argument faces three threshold objections. The first objection comes from natural law theorists who reject the positivist foundations of Baude's argument.<sup>372</sup> Natural law asserts that the foundation for our constitutional law is natural law and that natural law informs the interpretation of the Constitution

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367. See TRIBE & DORF, *READING*, *supra* note 79, at 98-101.

368. See POSNER, *ECONOMICS OF JUSTICE*, *supra* note 247, at 60-76 (offering an early argument that justice requires wealth maximization, a position he later abandoned).

369. See ELY, *DEMOCRACY AND DISTRUST*, *supra* note 59, at 73-104.

370. Baude, *Our Law?*, *supra* note 37, at 2352.

371. *Id.* at 2263-65.

372. Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 *GEO. L.J.* 97, 117-21 (2016) [hereinafter Pojanowski & Walsh, *Enduring Originalism*] (offering a competing, natural law account of originalism).

and the adjudication of constitutional controversies.<sup>373</sup> If this is so, then constitutional and other legal change comes, not ontologically, from a change in the underlying, unchangeable natural law, but epistemologically, from a better understanding of the natural law.<sup>374</sup> As a result, the sources of potential change are not entirely a matter of social fact—and might even include the kinds of Herculean philosophical reasoning endorsed by Dworkin.<sup>375</sup> Thus, a natural law theory fatally undermines Baude's argument.

Second, Baude's argument assumes that constitutional law has an independent ontological status independent of the arguments we make and accept in deciding constitutional controversies. The result of this positivist account is that our existing constitutional law has a priority over the arguments and theories about that law. We don't generally think we already have an originalist constitutional law. Baude anticipates that objection and tries to disarm it with his very creative interpretation of our constitutional doctrine as originalist.<sup>376</sup> That interpretation likely strikes many—originalists and critics alike—as unpersuasive. Baude's account also doesn't explain the absence of more originalist constitutional law. Most originalists believe that a consistent or even a stronger commitment to originalist arguments would substantially change our constitutional law.<sup>377</sup> Baude's theory does not explain all of that missing originalist constitutional precedent and doctrine. Fundamentally, Baude's positivist originalism is inconsistent with our constitutional law

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373. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 284-90 (2d ed. 2011) (describing the concept of the *determinatio*); see generally LeDuc, *Paradoxes of Positivism*, *supra* note 54, at 651 n.296.

374. I am oversimplifying here; natural law, with its concept of the *determinatio*, accommodates positive law elements that may change in the manner required by Baude. See generally LeDuc, *Paradoxes of Positivism*, *supra* note 54, at 651 n.296.

375. See DWORKIN, *EMPIRE*, *supra* note 6, at 355-99.

376. Baude, *Our Law?*, *supra* note 37, at 2376-86; LeDuc, *Paradoxes of Positivism*, *supra* note 54, at 675 (rejecting Baude's creative reimagining of our constitutional canon as pervasively originalist).

377. See, e.g., Scalia, *Response*, *supra* note 20, at 149 (describing the future for the constitutional protection of individual rights); BORK, *TEMPTING*, *supra* note 6, at 69-128 (criticizing the non-originalist constitutional law of the Warren, Burger, and Rehnquist Courts); BARNETT, *LOST*, *supra* note 31, at 354-55; BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 23.

and practice.<sup>378</sup> The result is the paradox of a positivist originalism that does not fit the social facts of our constitutional practice.

Third and finally, Baude's pervasive originalist reinterpretation of our constitutional doctrine runs roughshod over the arguments actually made for the Court's holdings.<sup>379</sup> Those decisions make a variety of prudential, doctrinal, structural, and ethical arguments.<sup>380</sup> Making the arguments for those decisions on originalist arguments fundamentally changes those decisions.<sup>381</sup> As Bobbitt points out, the genius of *Griswold* was its authoritative re-reading of the precedents that it cited to support a right of privacy.<sup>382</sup> While one may disagree with that re-reading and even the decision of the case, it is important to recognize what Justice Douglas's decision does.

It changes those decisions because *why* we reach a constitutional decision is generally almost as important as *what* the decision is.<sup>383</sup> The reading of a precedent or a constitutional provision carries further inferential content that the mere holding does not. That is part of the lesson of an inferentialist account of the language of constitutional argument and decision.<sup>384</sup> Thus, an originalist restatement of the prior, self-consciously non-originalist decisions does not do justice to those decisions.

The final argument for the necessity of originalism is that made with the linguistic turn and emphasizes what interpretation

378. Baude, *Our Law?*, *supra* note 37, at 2376-86 (reading the constitutional canon creatively as originalist and rejecting arguments that key elements of the canon are non-originalist); LeDuc, *Paradoxes of Positivism*, *supra* note 54, at 644-45 (rejecting Baude's originalist reading of the constitutional canon).

379. Bobbitt offers a survey of the kinds of argument actually made in the opinions in constitutional cases. *See generally* BOBBITT, FATE, *supra* note 17.

380. *Id.* at 25-119.

381. *See* Brandom, *Hegelian Model*, *supra* note 79, at 38 (describing the complementary elements of responsibility and authority in judicial decision, which are mediated through the expressive content of the legal opinions accompanying decision).

382. BOBBITT, FATE, *supra* note 17, at 224-25, 225 ("I must read *Pierce* and *Meyer* differently having read *Griswold* and must read them all differently having read *Roe*.").

383. I have qualified the claim because there may be unusual decisions, like *Bush v. Gore*, 531 U.S. 98 (2000) where making the decision, regardless of the nature of that decision, is more important than what the decision is. In those rare cases what the decision is may be of relatively little importance, and so the comparison may be less meaningful.

384. *See id.*; LeDuc, *Constitutional Meaning*, *supra* note 1, at 168-73; BOBBITT, FATE, *supra* note 17, at 224-25 (describing the implications that arise from decisions and their accompanying opinions).

requires.<sup>385</sup> On this argument, only originalism satisfies the requirements of interpretation.<sup>386</sup> What does this claim mean? What does it entail? The claim that interpretation requires an originalist methodology of course assumes that constitutional decision begins with interpretation.<sup>387</sup> That assumption is likely mistaken;<sup>388</sup> leaving that objection aside, the claim that interpretation requires originalism argues that interpretation is the method of determining the meaning of a text.<sup>389</sup> The argument appears based upon a concept of communication.<sup>390</sup>

I have previously explored the role of meaning and interpretation in the originalist debate.<sup>391</sup> Briefly, the accounts of meaning inherent in the claim that the nature of language and interpretation makes originalism the only legitimate method for interpretation misunderstands language, misunderstands the world, misunderstands the role of truth, and misunderstands the performative and inferential elements in constitutional texts.<sup>392</sup> Language does not grab us by the throat to force us to be originalists—as our constitutional decisional practice demonstrates.

Although the argument about the necessity of originalism has revived recently, that debate reflects the elaboration of more scholastic and baroque embellishment than fundamental contributions either to assessing the claims of originalism or its implications for our constitutional doctrine and decision. Bork's

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385. Lawson, *Originalism without Obligation*, *supra* note 272, at 1311-12. *But see* Sunstein, *Nothing*, *supra* note 38 (asserting that the concept of interpretation does not have the meaning and commitments that Lawson claims).

386. *See* Lawson, *Originalism without Obligation*, *supra* note 272, at 1311-12.

387. *See* LeDuc, *Interpretation and Practical Reasoning*, *supra* note 1, at 86-92 (arguing that interpretation is not logically prior to decision and the process of constitutional decision does not begin with interpretation); *see also* LeDuc, *Ontological Foundations*, *supra* note 18, at 325.

388. *Id.*; Dennis Patterson, *Interpretation in Law*, 42 SAN DIEGO L. REV. 685 (2005) [hereinafter Patterson, *Interpretation*] (arguing against the priority of interpretation).

389. Lawson, *Originalism without Obligation*, *supra* note 272, at 1316 (“To interpret a communicative instrument is to seek to ascertain its meaning. Otherwise, one simply is not engaged in the enterprise of interpretation.”).

390. *Id.*

391. LeDuc, *Constitutional Meaning*, *supra* note 1; LeDuc, *Interpretation and Practical Reasoning*, *supra* note 1.

392. LeDuc, *Constitutional Meaning*, *supra* note 1; LeDuc, *Interpretation and Practical Reasoning*, *supra* note 1; LeDuc, *Ontological Foundations*, *supra* note 18; LeDuc, *Anti-Foundational Challenge*, *supra* note 17.

claim for the necessity of originalism is manifestly implausible. The positivist and linguistic arguments for the necessity of originalism, while conceptually more sophisticated than Bork's argument, are equally implausible. While I think it is possible to score this particular exchange in the debate over originalism, that assessment is hardly shared among the originalists themselves—or their critics, who continue to engage these arguments.<sup>393</sup>

#### F. Can Originalism Restore the Lost Constitution?

According to the originalists, the Constitution, like China in 1949, has been lost.<sup>394</sup> Along with the task of determining the culpable, originalism, unlike Republican foreign policy in the early fifties, offers the prospect of a recovery.<sup>395</sup> Unlike the case of China, however, in the case of the Lost Constitution, it is not always clear what has been lost, or when.<sup>396</sup> At the least, it was lost with the Warren Court's decisions; however, it was likely lost much earlier with the jurisprudence of the later New Deal, and it may have been lost at the earliest stages of the Republic with the broad scope of judicial review.<sup>397</sup> What was lost was the constitutional text unencumbered by such later doctrinal development. It was a Constitution of greater States' rights and of more limited individual freedoms, and with a Federal government of much lesser powers.

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393. Sunstein, *Nothing*, *supra* note 38.

394. See, e.g., BARNETT, *LOST*, *supra* note 31, at 354-55, 354 (“Imagine holding up a copy of the Constitution and seeing empty holes in the parchment where these passages once appeared—or seeing ink blots over them.”); Scalia, *Response*, *supra* note 20, at 149 (predicting that the late twentieth century constitutional law recognizing individual rights “disfavored by the majority” faces hard times and implying that the change would be a return to a truer Constitution).

395. See, e.g., BARNETT, *LOST*, *supra* note 31, at 354-55.

396. Randy E. Barnett, *Restoring the Lost Constitution, Not the Constitution in Exile*, 75 *FORDHAM L. REV.* 669, 669-70 (2006) [hereinafter, Barnett, *Exile*] (arguing that the Lost Constitution includes the provisions that have been disregarded in the development of our constitutional law).

397. See BORK, *TEMPTING*, *supra* note 6, at 20-28 (criticizing Chief Justice Marshall's role in the development of judicial review).



One of the most puzzling challenges offered against originalism is the counterintuitive claim that it fails to deliver in its mission to reverse the constitutional history of the Warren Court and to restore, to a greater or lesser degree, the Lost Constitution.<sup>398</sup> This argument against the instrumental efficacy of originalism is dramatic. If it were true, it would cast the entire originalist project into disarray. But it is also counterintuitive; it asks us to conclude that the originalists fundamentally misunderstand the nature of the interpretative arguments that they make.

The argument was first advanced by Michael Perry<sup>399</sup> and has been recently renewed by David Strauss.<sup>400</sup> According to that argument, whatever the truth or other merits of originalism, it cannot reverse the law made by the Warren Court or the New Deal, or restore the Lost Constitution sought by conservative originalists.<sup>401</sup> The claim is counterintuitive precisely because originalism's mission is to restore the Lost Constitution.<sup>402</sup> However strongly originalism's proponents believe in the linguistic and jurisprudential claims it makes, they generally believe equally strongly in the substantive constitutional law that emerges from the application of that theory.<sup>403</sup>

Critics argue that originalism cannot restore the Lost Constitution for three reasons. First, the critics argue that originalist arguments also support the constitutional

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398. BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 23 (arguing against the Warren Court's expansive reading of the Fourteenth Amendment on the basis that it was inconsistent with the original intent and purpose in adopting the Amendment); *see also* BARNETT, *LOST*, *supra* note 31, at 354-55.

399. MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 53-69 (1994) (arguing that the indeterminacy of history prevents originalism from eliminating judicial discretion).

400. *See* Strauss, *Why*, *supra* note 48, at 975-76 (arguing that historical and textual arguments privileged by the originalists can be advanced for classically liberal constitutional positions).

401. BARNETT, *LOST*, *supra* note 31, at 354 (describing the provisions of the Constitution that would be revived (or resurrected) by his libertarian originalism).

402. *See id.* at 356; *see also* BORK, *TEMPTING*, *supra* note 6.

403. BARNETT, *LOST*, *supra* note 31, at 354. *But see* SUNSTEIN, *RADICALS*, *supra* note 4, at 76 (arguing that Justice Scalia's equivocation about the consequences of originalism reveals the weakness of originalism); Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006) (arguing that Justice Scalia ought not to disavow the implications of originalism, while conceding that he has done so); Scalia, *Lesser Evil*, *supra* note 107, at 861.

developments that the Lost Constitution would repudiate. We can see this in *Brown v. Board of Education*<sup>404</sup> and *District of Columbia v. Heller*.<sup>405</sup> *Brown* was not decided on originalist terms;<sup>406</sup> originalists, however, have sought to reinterpret that case, perhaps not wholly persuasively, with an originalist foundation and rationale.<sup>407</sup> In so doing, they have offered an originalist rationale for reversing *Plessy v. Ferguson* and sustaining *Brown*.<sup>408</sup> To the extent *Brown* stands as one of the prime examples of the activism of the Warren Court that originalism would abjure in its quest for the Lost Constitution, rehabilitating the decision in *Brown* would not appear wholly desirable for originalism. On the other hand, because *Brown* is now the quintessential element of the constitutional canon, originalism must rehabilitate the result in *Brown* if it is to be credible.

The originalist efforts to rehabilitate *Brown* consider only the task of constructing an originalist argument for its result and fail to consider the performative dimensions of *Brown*. That case not only had to strike down the laws that created segregated public schools; it had to do that in a powerful, accessible way that could lead the country. The performative role of the *Brown* decision and opinion were to initiate a substantial change in the legal relationship of the races in America. Would McConnell's reconstruction, making a subtle and controversial argument about original understandings on the ratification of the Fourteenth Amendment,<sup>409</sup> satisfy that requirement? I don't think so. The lack of a compelling, emotionally engaging argument would

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404. 347 U.S. 483 (1954).

405. 554 U.S. 570 (2008).

406. For an extensive contemporaneous discussion of the Court's efforts to find an originalist foundation for the rejection of the "separate but equal" construction of the 14<sup>th</sup> Amendment, see generally Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) [hereinafter Bickel, *Original Understanding and Segregation*].

407. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 949-53 (1995) [hereinafter McConnell, *Originalism and Desegregation*] (arguing that the linguistic understanding of the Equal Protection Clause is inconsistent with racially segregated public schools). But see Michael J. Klarman, *Response, Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1883 (1995) (rejecting McConnell's historical arguments).

408. McConnell, *Originalism and Desegregation*, *supra* note 407, at 1120-40.

409. *Id.*

likely have kept any such analysis from having the same performative role that *Brown* had.<sup>410</sup>

More recently, more serious problems for the originalist project may have emerged in *Heller*, decided by Justice Scalia in what some have been termed the most fundamentally originalist case in Supreme Court history,<sup>411</sup> was met with a vigorous and robust originalist dissent by Justice Stevens.<sup>412</sup> These two cases exemplify the flexibility of originalism. Originalism, in the hands of Justice Stevens, purports to show the ability of Congress and the states to regulate gun ownership.<sup>413</sup> The same point, however, can be, and has been, made with respect to vast swathes of precedent that was expressly decided on non-originalist grounds.<sup>414</sup> For example, as I have discussed elsewhere, the Eighth Amendment prohibition on cruel and unusual punishment admits of an originalist interpretation that would prohibit capital punishment.<sup>415</sup> Even originalists have applied the prohibitions of

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410. But some have expressed skepticism as to the extent to which the courts can lead the country to social change. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

411. See Tushnet, *New Originalism*, *supra* note 231, at 609-10. But see Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 247 (2008) [hereinafter Sunstein, *Second Amendment Minimalism*] (arguing that *Heller* is analogous to *Griswold* in that each was a minimalist decision that struck down a statute lying well outside the democratic consensus on the issues it governed).

412. See Sunstein, *Second Amendment Minimalism*, *supra* note 411, at 256. Perhaps only a third-year law student could take that split as evidence of the differing forces of competing versions of originalism. Fundamentally, and despite the thrust of the *Heller* opinion, Justice Stevens is no originalist. See *Citizens United v. FEC*, 558 U.S. 310, 425-446, 479 (2010) (Stevens, J., concurring in part and dissenting in part) (offering an originalist rebuttal to the Court's argument before concluding: "In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules."). But see Brian A. Lichten & David P. Baltmanis, *Foreword: Original Ideas on Originalism*, 103 NW. U. L. REV. 491, 493 (2009) (arguing that *Heller* "illuminates the debate about the proper method of originalist interpretation").

413. *District of Columbia v. Heller*, 554 U.S. 570, 636-62 (2008) (Stevens, J., dissenting).

414. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-95 (1954). But see Baude, *Our Law?*, *supra* note 37, at 2376-86 (creatively assimilating a great deal of non-originalist precedent into the originalist canon).

415. See *supra* Section II.D. That argument was made most clearly by Dworkin: that the term (or terms) "cruel and unusual" were intended and understood to incorporate our citizens' best understanding, rather than merely their contemporaneous meaning. See Dworkin, *Interpretation*, *supra* note 55, at 124.

the Fourth Amendment to bar surveillance never anticipated in the eighteenth century.<sup>416</sup>

Nevertheless, this argument appears ultimately unpersuasive. The originalist promise of the Lost Constitution is persuasive because the eighteenth century was a different world. It was a world in which criminal defendants had far fewer rights. Women and minorities were disenfranchised in the broadest meaning of that term. Freedom of belief, association, and expression were far more limited. Finally, the needs of the economy and of the society for regulation and defense were far simpler. Originalism aspires to that world, and the originalist reading of the Constitution from that era is far more often consistent with that world. Originalism can, indeed, replicate many (if not most) of the features of that earlier world, looking generally to the values of a world no later than the mid-nineteenth century when the Reconstruction Amendments were adopted. It is therefore not surprising that Robert Bork followed up his defense with a broader critique of the culture of modernity.<sup>417</sup> New originalists and other contemporary originalists may not share this stance.

Second, critics assert that originalism may be unable to protect the Constitution from further loss. Again, the concern, as in *Heller*, is that originalist arguments have greater diversity—and permit more diverse constitutional outcomes in adjudication—than sometimes appears.<sup>418</sup> On this account, for example, David Strauss argues that originalism could become an interpretive weapon in the hands of liberal theorists of the Constitution.<sup>419</sup> He cites McConnell's effort to justify *Brown* based upon original understandings.<sup>420</sup> He could today just as easily cite Justice Stevens's dissent in *Heller* with respect to the

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416. See BORK, TEMPTING, *supra* note 6, at 169; see also *United States v. Jones*, 565 U.S. 400, 402-11 (2012) (holding that the use of a GPS tracker on a suspect's automobile qualified as a search that required a warrant under the Fourth Amendment); LeDuc, *Beyond Babel*, *supra* note 279, at 197-204.

417. See ROBERT BORK, *SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* (1996).

418. *Heller*, 554 U.S. at 645-62 (Stevens, J., dissenting).

419. Strauss, *Why*, *supra* note 48, at 975-76.

420. McConnell, *Originalism and Desegregation*, *supra* note 407, at 953-55.

scope of the Second Amendment.<sup>421</sup> In the face of the indeterminacy of the original understandings or original meanings, a doctrine that disparages precedent could be a powerful tool for liberal jurists seeking to reverse conservative precedent.

Two immediate cautions come to mind. First, this concern with originalism would apply only to forms of originalism that adopt a narrow view of *stare decisis* and precedent. Second, Strauss is not embarked upon a project of strengthening originalism.<sup>422</sup> His goal runs in the opposite direction. His real goal, at best, is a more candid and transparent constitutional debate. As noted elsewhere in this article, that may well be a fair concern. But what Strauss's criticism overlooks is that originalism has proven an extraordinarily powerful tool—as strict constructionism never proved to be—for conservatives challenging liberal constitutional interpretation. Strauss is effectively proposing unilateral disarmament.

The third argument against the feasibility of the project to restore the Lost Constitution is the role of the appeal to original understandings as a classical strategy of constitutional dissent. Hinted at by Strauss,<sup>423</sup> this argument emphasizes the argumentational strategy of challenging established interpretations by appealing to the original understanding. If the current crop of originalists were to establish their reading of the Constitution, we may easily imagine a liberal reaction that would emphasize a broader reading of the rights expressed in the Constitution to challenge that new status quo. The language and historical record would likely be no more adequate to rebut that reading than the current evidence is to rebut the originalists. Evidence for that proposition can be found in the dissent in

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421. See *Heller*, 554 U.S. at 636 (Stevens, J., dissenting).

422. See Strauss, *Why*, *supra* note 48, at 976 (somewhat brazenly characterizing originalism's claims as inviting "intellectual disingenuousness"). I characterize Strauss's criticism as brazen because he is hardly forthright in his acknowledgment of his more fundamental rejection of originalism.

423. See DAVID STRAUSS, *THE LIVING CONSTITUTION* 31 (2010) [hereinafter STRAUSS, *LIVING*] (describing the effective use of an appeal to original understandings by Justice Black to broaden the scope of constitutionally protected rights against the then dominant doctrinal position championed by Justice Frankfurter); see also BALKIN, *LIVING ORIGINALISM*, *supra* note 50 (adapting originalist arguments to support traditionally liberal constitutional results).

*Heller*.<sup>424</sup> Nevertheless, in fairness to current originalism, because the Constitution was adopted and the Reconstruction Amendments added in a world without many of the current views, there is a core of originalism that will likely prove difficult to overturn.

Originalism does offer a robust constitutional promise to the conservative constitutional theorist because it promises a return from modernity. It offers a world before the Romantics, before the uncertainty of quantum physics and without the complexities of Freud. Returning to the simpler world of the Enlightenment, originalism offers a simpler account of constitutional understandings and meanings. Originalists are right that it is a world without paper money or a Federal Reserve System, still less an Environmental Protection Agency or a Food and Drug Administration.<sup>425</sup> That was a simpler and more conservative world. If the originalists can resort to it as the touchstone of constitutional interpretation, they will construct a simpler, more conservative constitutional world. Whether that world is one in which we are safe from international stateless terrorists,<sup>426</sup> or protected against global economic or environmental crisis would appear highly unlikely. But this is a matter of prudence, not original understanding. The suggestion that originalism cannot perform at least a large part of the mission assigned to it is not very plausible. The argument that historical and textual arguments cannot accomplish the originalist mission is perhaps only evidence of the desperation among some of originalism's critics—and of the stalemate that has developed in the debate itself.<sup>427</sup>

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424. See *Heller*, 554 U.S. at 636-52 (Stevens, J., dissenting).

425. Compare SUNSTEIN, *RADICALS*, *supra* note 4, at 63-65 (cataloging widely accepted elements of our contemporary Federal regulatory welfare republic that would be called into question or eliminated under originalism) and STRAUSS, *LIVING*, *supra* note 423, at 12-16, with ORIGINALISM, *supra* note 59, at 27-39 (denying the full range of effects asserted by Sunstein but endorsing certain substantive constitutional results under originalism).

426. See generally PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* (2002) (arguing that the national state that emerged in Europe in the sixteenth and seventeenth centuries is increasingly obsolete as a result of economic, technological, and ideological developments).

427. Will Baude offers a similar assessment of the debate, although his response to rehabilitate originalism's claims is more traditional. See Baude, *Our Law*, *supra* note 37, at 2351 ("Debates about originalism are at a standstill . . .").

### III. CONCLUSION

Three principal conclusions emerge from this survey of the debate about these six central claims and implications of originalism. First, the stalemate that I have elsewhere sketched is equally applicable to these key questions in the debate. Second, many of the sources of the stalemate and fruitlessness lie in the unexamined assumptions that ground the debate—and make it possible. Third, the moves in the debate are becoming ever more arcane and academic—without generating any meaningful progress within the debate itself or as the debate informs our constitutional law. We can see the evidence for these conclusions in more detail if we look at the debate about each of these six claims.

Originalism's argument from democracy faces strong objections.<sup>428</sup> The argument from democracy—an argument premised on the celebrated countermajoritarian problem—has a powerful intuitive appeal, and Judge Bork and Justice Scalia make powerful statements of the argument for it. But I think the three principal arguments canvassed here against that position have the better position. In particular, the fundamental premise of originalism that there is a countermajoritarian problem in our constitutional practice is flawed. Judicial review is grounded not in theoretical argument but in our constitutional decision practice.<sup>429</sup>

Second, the claim for neutrality is probably the most fully articulated important claim for originalism, and the intuitive appeal of this claim is manifest. The claim for neutrality relies on the implicit premise that there exists a neutral interpretation or adjudication process. While intuitive, it is not clear that the originalists have established a concept of neutrality with the

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428. In an earlier, unpublished article Larry Solum has even questioned whether the argument is “fully coherent.” See Lawrence B. Solum, *Semantic Originalism* (Univ. of Ill. Coll. of Law, Pub. Law & Legal Theory Research Papers Series, No. 07-24, 2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244) [<https://perma.cc/746G-HVYB>]; see generally LeDuc, *Fruitless Quest*, *supra* note 68.

429. BOBBITT, INTERPRETATION, *supra* note 97, at 6-8 (lampooning the received account of *Marbury* that treats Chief Justice Marshall as having created judicial review in a judicial bid for power).

specificity and transparency sufficient to perform the role required. Neutrality is the concept that is intended to allow us to assess interpretations and readings of the Constitution for their faithfulness to the constitutional text.<sup>430</sup> If that concept of representation is unfounded or if the process of constitutional decision cannot be reduced to constitutional interpretation, then neutrality cannot be the measure of the legitimacy of constitutional decision.

Despite the enormous scrutiny that *Brown* has received, there is no consensus whether its holding and reasoning would qualify as an application of neutral principles.<sup>431</sup> Originalists, as well as other constitutional commentators, have divided over this issue.<sup>432</sup> The debate over the neutrality of *Brown* suggests that the concept of neutrality is itself suspect. Other less celebrated cases are no easier to assess from a neutral perspective.<sup>433</sup>

The argument for originalism from its exclusive claim to neutrality is thus fundamentally flawed. Originalism's critics often err, too, in overstating their objections to originalism's claimed neutrality. The critics of that claim who go on to deny that there are constraints on constitutional argument, interpretation, and decision also misunderstand the nature of the real constraints that channel and inform our constitutional law and practice. Originalism may misunderstand constitutional language and argument when it claims neutrality, but its critics misunderstand that same language and argument when they assert that constitutional argument and decision are indeterminate. By

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430. The New Originalists, as noted above, state their claims in linguistic terms. They claim originalism is the only approach to the constitutional text that preserves the original meaning of that text when it was adopted. I have explored those claims more fully in earlier articles in this series. See LeDuc, *Constitutional Meaning*, *supra* note 1; LeDuc, *Interpretation and Practical Reasoning*, *supra* note 1.

431. Compare Wechsler, *Neutral Principles*, *supra* note 112, at 29-30 (arguing that recognition of special race-based protections violates neutrality) with ELY, DEMOCRACY AND DISTRUST, *supra* note 59, at 73-104 (arguing for neutrality based upon the constitutional principle of protecting insular minorities to enhance democracy).

432. See, e.g., Bickel, *Original Understanding and Segregation*, *supra* note 410, at 6-65 (arguing that racially segregated public schools were not inconsistent with the original understanding of the Fourteenth Amendment); McConnell, *Originalism and Desegregation*, *supra* note 407, at 953-55 (arguing that the original understanding of the Fourteenth Amendment was inconsistent with racially segregated public schools); Wechsler, *Neutral Principles*, *supra* note 112, at 22-24.

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



focusing on neutrality and the specter of judicial discretion and willfulness, the originalists and their critics distract us from more important questions about constitutional doctrine and practice.

The third controversial implication of originalism arises from originalism's account of constitutional change. Originalism purports to permit certain kinds of change to be incorporated into its constitutional interpretation, while fiercely rejecting other types of change and sharply criticizing alternative interpretative theories that permit or welcome such change.<sup>434</sup> That approach is persuasive only if the distinction between permissible and impermissible sources of flux can be articulated. The originalist reliance upon a fundamental distinction between fact and value to help distinguish permissible and impermissible sources of change appears one of the less problematic features of the originalist account.

Critics also argue that the originalist claim that the meaning and the appropriate reading of the Constitution do not change does violence to the constitutional text.<sup>435</sup> That challenge is harder to disarm. It is harder to disarm in light of Lessig's helpful distinction between meaning and readings, because it allows us to account for changed understandings of the constitutional text without committing to the counterintuitive claim that the meaning of the Constitution itself changes or morphs. The proponents of change, the critics of originalism, have history and the world on their side, not just in the general sense, that we recognize that the world and we ourselves have greatly changed since the Constitution was ratified. It is also true in the important parochial sense that there has been constitutional change, too.<sup>436</sup> For the originalist to repudiate those changed

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434. See generally Scalia, *Interpretation*, *supra* note 6, at 41-44 (rejecting the Living Constitution of originalism's critics); Rehnquist, *supra* note 296; Baude, *Our Law?*, *supra* note 37 (making a positivist argument that the original understanding of the Constitution must remain law in the absence of amendment).

435. See, e.g., Tribe, *Interpretation*, *supra* note 13, at 94; Dworkin, *Arduous*, *supra* note 74, at 1262.

436. Larry Lessig asserts this claim very strongly, but the existence of constitutional flux appears incontrovertible, even without regard to the ramifications that have emerged from constitutional amendments or the correction of perceived constitutional error. Lessig, *Understanding*, *supra* note 5, at 396. But even originalists generally acknowledge the existence of constitutional change—and endorse it. See, e.g., Scalia, *Interpretation*, *supra* note 6, at 41-44; Green, *The Sense-Reference Distinction*, *supra* note 274. But see Peter J.

readings of the Constitution is itself a radical challenge to our American Constitution and to our Republic. But it is also hard for their critics to establish this claim. It is harder for the critics because of the intuitive appeal of the unchanging Constitution, and our very rhetoric of constitutional interpretation. That rhetoric as well as the substance of the debate's arguments generally treat the Constitution and the constitutional text as an objective Constitution-in-the-world.<sup>437</sup> That premise underlies the reduction of constitutional decision to constitutional interpretation. The critics must persuade us to abandon the simple and initially attractive account that originalism offers.

The critics can successfully challenge originalism's claim to privilege constitutional arguments from the original intentions, expectations, and original public linguistic understandings. But they cannot establish that the other forms of constitutional argument they generally want to emphasize are themselves privileged. They are not. Originalist arguments from history and text are, in certain cases, dispositive.<sup>438</sup> They appear compelling to the Court<sup>439</sup> or to dissenting Justices<sup>440</sup> and they often persuade us.<sup>441</sup> Originalism's critics make the case that the originalist arguments from text and history are not a complete account of constitutional interpretation, argument, and decision.<sup>442</sup> Other non-originalist modes of argument are also dispositive in certain cases.<sup>443</sup> Pluralist theories make a place for originalist and non-

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Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485, 556 (2017) (arguing that the originalist claim to neutrality is inconsistent with key decisions in the modern constitutional canon that changed prior constitutional law).

437. LeDuc, *Ontological Foundations*, *supra* note 18, at 269-74, 306-18.

438. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Crawford v. Washington*, 541 U.S. 36 (2004).

439. See, e.g., *McDonald*, 561 U.S. at 754-59, 768-78; *Heller*, 554 U.S. at 576-628; *Crawford*, 541 U.S. at 50-53.

440. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 506 (Thomas, J., dissenting) (“[T]he Court has erased the Public Use Clause from our Constitution . . .”).

441. See Levinson, *Embarrassing Second Amendment*, *supra* note 92 (arguing that the contemporary widespread academic hostility to the Second Amendment is unjustified and the resulting pre-*Heller* constitutional doctrine difficult to reconcile with the constitutional text).

442. BOBBITT, FATE, *supra* note 17, at 7-8; Tribe, *Interpretation*, *supra* note 13, at 72-74.

443. See generally *Kelo*, 545 U.S. 469 (largely disregarding the constitutional text that tacitly limits the power of eminent domain to property taken for public use in deference to doctrinal and precedential arguments that do not).

originalist arguments.<sup>444</sup> The pluralist, anti-foundational accounts don't explain when such arguments are dispositive.<sup>445</sup> But those theories don't concede that such an explanation is necessary.<sup>446</sup> At least as importantly, they deny that such an account is possible.<sup>447</sup> Thus, the pluralist theories are also incompatible with the originalist claims of privilege (as well as the corresponding claims of privilege by the non-originalists).

The fourth challenge, that originalism cannot accommodate non-originalist precedent and a robust theory of *stare decisis*, generates another key controversy. Some strong originalists would avoid this challenge by denying a robust role for non-originalist precedent.<sup>448</sup> But most would seek to accommodate precedent, including those versions defended on the bench by Justice Scalia, Justice Thomas, and Judge Bork and defended in the academy by, among others, Larry Solum.<sup>449</sup> That accommodation of precedent deflects Tribe's challenge to stronger forms of originalism that would systematically overturn non-originalist precedent.<sup>450</sup>

The accommodation of precedent is not easily reconciled with other key claims of originalism, including the claim to limit judicial discretion. Reconciling originalism with such precedent, and harmonizing such disparate authorities, requires judgment, not an algorithm.<sup>451</sup> With judgment comes discretion.

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444. See, e.g., BOBBITT, FATE, *supra* note 17, at 7-8 (describing the existing modes of constitutional argument); Green, *Truthmakers*, *supra* note 80 (manuscript at 21-22).

445. Green, *Truthmakers*, *supra* note 80 (manuscript at 28-30) (criticizing anti-foundational modal accounts as incomplete); BOBBITT, FATE, *supra* note 17, at 5-6 (acknowledging that his theory does not provide a means by which competing argument might be harmonized or privileged); BOBBITT, INTERPRETATION, *supra* note 97, at x-xi.

446. See BOBBITT, FATE, *supra* note 17, at 5-6; BOBBITT, INTERPRETATION, *supra* note 97, at x-xi; see generally LeDuc, *Anti-Foundational Challenge*, *supra* note 17.

447. See BOBBITT, FATE, *supra* note 17, at 5-6; BOBBITT, INTERPRETATION, *supra* note 97, at x-xi; see generally LeDuc, *Anti-Foundational Challenge*, *supra* note 17.

448. See, e.g., Barnett, *Trumping*, *supra* note 20, at 258-62 (arguing that non-originalist precedent must fall—even though originalists on the bench have not gone that far).

449. Solum, *Constitutional Bondage*, *supra* note 20, at 205.

450. See Tribe, *Interpretation*, *supra* note 13, at 82-83 (asserting that Justice Scalia's constitutional decisional practice has sustained non-originalist precedent in the face of his theoretical claims).

451. The emphasis on judgment—and the associated, implicit acceptance of discretion—is the source of Fried's express repudiation of originalism. See Fried, *On Judgment*, *supra* note 212, at 1043-46. Similar objections have been made by some originalists to the New Originalists' introduction of the distinction between interpretation

Originalism ought to be prepared to sacrifice its claim to cabin discretion, in the strong sense that it has claimed, to establish the defense of a non-exclusive originalism, for two reasons. First, non-exclusive originalism cannot prevent judicial discretion because there remains substantial play in the joints of judicial decision with respect to the weight to be accorded to non-originalist precedent and other modes of argument. Second, a non-exclusive originalism can do the work that need be done. The accommodation of non-originalist precedent requires substantial discretion, as well as the departure from original understandings, expectations, and intentions. The kinds of judgment that Judge Bork and Justice Scalia called for requires the exercise of discretion: judges must determine how central non-originalist precedent has become in our constitutional doctrine and legal practice.<sup>452</sup> Justice Scalia's argument that originalism has no more trouble with precedent than other theories of interpretation overlooked the fundamental theoretical challenge that originalism offers to much precedent in our American constitutional practice. Many other theories do not challenge precedent so fundamentally, and this is the sense in which Sunstein aptly characterizes originalism as radical.<sup>453</sup>

Fifth, the weakest argument made by the originalists is for the necessity of originalism. The arguments made for that claim appear implausible, for several reasons. First, if originalism be true, it is only contingently true. At a somewhat conceptual level, for modern Hegelians as well as pragmatists, history is contingent. There is nothing essential or fundamental that must necessarily be the case about how history and society evolve or the values that are endorsed at any point in time.<sup>454</sup> Second, it

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and construction. See Richard S. Kay, *Construction, Originalist Interpretation and the Complete Constitution*, U. PA. J. CONST. L. ONLINE, Mar. 6, 2017, at 2, 7 (criticizing the introduction of the distinction between constitutional interpretation and construction because it reintroduces substantial judicial discretion).

452. See Scalia, *Response*, *supra* note 20, at 139-40; BORK, *TEMPTING*, *supra* note 6, at 157-59.

453. SUNSTEIN, *RADICALS*, *supra* note 4, at 26 (criticizing the far-reaching doctrinal implications of a pervasive constitutional originalism).

454. See, e.g., CHARLES TAYLOR, *THE SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989); ARTHUR C. DANTO, *ANALYTICAL PHILOSOPHY OF HISTORY* (1968). The minority strand of natural law originalism would assert the ahistorical

would be surprising if the critics of originalism were so confused that they advocated the impossible. The protagonists in the debate may be confused or reliant on mistaken, confused, or unhelpful premises in the debate, but it is implausible that either side is committed to a manifestly impossible position. By contrast, in the face of the fruitless, stalemated debate that has unfolded over the past half century, it seems quite plausible that the debate reflects unproductive scholastic commitments and confusions.<sup>455</sup> Proof that the kinds of argument endorsed by originalism's critics are integral parts of our constitutional decisional practice comes directly from the Court's decisions and opinions.<sup>456</sup> A broader array of authority and arguments were deployed there in central roles in decision. The modern positivist and linguistic arguments are no more effective.

To the extent that most of originalism's critics would privilege arguments made otherwise than on the basis of history or text, those claims also appear indefensible.<sup>457</sup> Arguments from text and history are sometimes persuasive and determinative.<sup>458</sup> Thus, the arguments of originalism's critics that originalism's modes of constitutional argument are disfavored or marginal are also unconvincing. The sources of the fruitless quest for both

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foundations of our constitutional law. *See generally* LeDuc, *Paradoxes of Positivism*, *supra* note 54.

455. LeDuc, *Striding Out of Babel*, *supra* note 2, at 17-31; LeDuc, *Ontological Foundations*, *supra* note 18; LeDuc, *Relationship of Constitutional Law to Philosophy*, *supra* note 51.

456. *See, e.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2556-57 (2014) (following structural arguments about the relationship of the Executive and Legislative Branches in articulating the limits of the Recess Appointments Clause); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 532-38 (2012); *District of Columbia v. Heller*, 554 U.S. 570, 687-705 (2008) (Breyer, J., dissenting) (advancing prudential arguments for a limited, not absolute, application of the protections of the Second Amendment). I discuss the role of the originalism debate in shaping the reasoning and decision of *Canning* and *Sebelius* in LeDuc, *Beyond Babel*, *supra* note 279 (arguing that the tacit premises and conceptual framework of the originalism debate has distracted and weakened the analysis and reasoning in our contemporary constitutional jurisprudence).

457. *See generally* SUNSTEIN, *RADICALS*, *supra* note 4 (insisting on the primacy of prudential, consequentialist arguments in constitutional law).

458. *See* authorities cited *supra* note 438; *see also* LeDuc, *Beyond Babel*, *supra* note 279, at 197-220; BOBBITT, *FATE*, *supra* note 17, at 9-119.

sides in the debate include tacit, mistaken ontological assumptions that go unstated and unacknowledged.<sup>459</sup>

Sixth, the counterintuitive claim that the originalist interpretation of the Constitution would not yield a very different constitutional doctrine than that which we have seems questionable. Few critics of originalism advance this claim.<sup>460</sup> Indeed, some, like Cass Sunstein, argue that the substance of the constitutional law that arises under originalist theory is the most powerful argument against originalism.<sup>461</sup> The originalist arguments deployed against many constitutional doctrines grounded on prudential, structural, doctrinal, or ethical arguments would, on their terms, do the work claimed by originalists. Without those modes of constitutional argument, our constitutional decisional discourse would be confined to arguments from history and text. Originalism passes the functional test; if originalism fails, it is not because originalist interpretation and decision would not create the Constitution that originalists seek. It fails to accomplish that mission only because its arguments cannot delegitimize non-originalist modes of argument and privilege the originalist modes.

These six central claims of originalism and their implications capture many of the most salient features in the debate over originalism. While it is possible to assess those claims and arguments from within the debate, it is also possible to step back to look at the claims and arguments of the debate from the outside. From that vantage the claims and arguments appear problematic. Many of the claims on both sides of the debate appear implausible—like the claim by originalism that it is necessarily so, the claim that our constitutional law is systematically originalist, and the claim by the critics that originalism, even if adopted, cannot restore the Lost Constitution. The arguments for those claims, while often creative and

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459. See LeDuc, *Ontological Foundations*, *supra* note 18; LeDuc, *Relationship of Constitutional Law to Philosophy*, *supra* note 51 (arguing that philosophical therapeutic argument can sometimes reveal and treat confusion in constitutional argument).

460. See, e.g., BALKIN, *LIVING ORIGINALISM*, *supra* note 50 (making originalist arguments for untraditionally originalist constitutional conclusions).

461. See SUNSTEIN, *RADICALS*, *supra* note 4, at 15-19.

rhetorically sophisticated, appear more often desperate or disingenuous than persuasive.

The sources of the sterility are harder to identify, but common threads emerge. Part of the difficulty in seeing the problems inherent in the debate is a matter of achieving the perspective necessary to recognize a scholastic debate and to escape the seductive grip of its puzzles and intricate controversies. That's easier to do with respect to earlier debates and with the benefit of centuries of intellectual history than in the present. But even in the present we can be struck by the lack of progress and increasingly Ptolemaic intricacy of the distinctions, arguments, and strategies in the debate over these fundamental claims. We can also be struck by the enormous gap between the theoretical claims made within the context of the debate and our constitutional decisional practice.

Ironically, some perspective can be gained by considering again Justice Scalia's oft-repeated claim that it takes a theory to beat a theory.<sup>462</sup> This claim reflects a fundamental methodological error. In the case of describing our constitutional decisional practice, it doesn't take a theory to beat a theory. It doesn't even take a theory.<sup>463</sup> Understanding here is a matter of mastering our constitutional practice, not conceptualizing a theoretical superstructure. Justice Scalia's own decisional practice reflected the primacy of practice.<sup>464</sup> When we understand the priority of practice, the apparent paradox of the divergence of that practice from the proclaimed originalist theory dissolves.<sup>465</sup>

It is hard to avoid a "don't care" conclusion as to the increasingly sophisticated and arcane exchanges on these issues. When we look closely at the claims and arguments that comprise

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462. See Scalia, *Lesser Evil*, *supra* note 107, at 855 (accusing the non-originalists of offering a compelling alternative to originalism). *But see* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009) (making the overstated claim of his title).

463. See generally LeDuc, *Relationship of Constitutional Law to Philosophy*, *supra* note 51 (arguing that philosophical theory and argument plays a very limited role in our constitutional law).

464. Barnett, *Trumping*, *supra* note 20.

465. See Fried, *On Judgment*, *supra* note 212, at 1043-44 (suggesting that Justice Scalia wrote his strongest opinions when he paid the least attention to the constraints of his originalist theory).

the debate we see a controversy that appears more misdirected and confused than vital and robust.

Finally, it is valuable to consider what may be productively winnowed from the chaff of the debate over originalism. It is not clear that there is an important argument that has convinced an opponent on either side of the controversy and so advanced the debate. But there are insights into the nature of our constitutional law that are valuable. Justice Scalia's reminders that rights of individuals may adversely impact the interests of the majority or even the society as a whole and that philosophical argument generally lacks the finality that we need in our constitutional argument and decision is valuable. Ely's and Black's argument that the meaning of particular clauses of the Constitution are affected and informed by the meaning and import of other provisions of the Constitution is also important. But salvaging those insights leaves us very far from a commitment to the value of the debate—or a need to carry the debate forward.