ORIGINALISM IN CRISIS:
THE MOVEMENT TOWARDS INDETERMINATE ORIGINALISM

JOSE JOEL ALICEA*

ABSTRACT

I argue that the theories of Randy Barnett, Jack Balkin, and Lawrence Solum represent a fundamental rejection of what originalism has been through much of its history and what it ought to be if it is to make a meaningful contribution to legal thought. The fact that originalists have by and large welcomed these three theorists into the originalism tent is therefore deeply troubling because the meaning of the word "originalism" has been stretched beyond recognition. There is now a crisis of indeterminacy within originalist scholarship. In this essay, I will attempt to recover the core concepts that comprise a sound originalist theory in order to reestablish the perimeter of originalism. I will argue that Barnett, Balkin, and Solum constitute a separate scholarly movement, what I call "post-originalism." The paper has obvious implications for originalist theory, but it is equally important for nonoriginalists who require a clear conception of what originalism is in order to meaningfully engage its proponents in scholarly discourse. At its heart, then, the paper is an effort to reintroduce theoretical boundaries so that scholars do not talk past one another and so that originalism can continue to have influence in American law and politics.

CONTENTS

I. INTRODUCTION: ORIGINALISM ADRIFT 2

II. THE PATH TO INDETERMINACY: A BRIEF HISTORY OF ORIGINALISM 10

A. THE PATRIARCHS OF ORIGINALISM: BORK, REHNQUIST, AND BERGER 11
B. ORIGINALISM IN TRANSITION: INTENTION, HERMENEUTICS, AND RESTRAINT 14
C. THE RISE OF THE POST-ORIGINALISTS 21
D. POST-ORIGINALISM: EVOLUTION OR BREAKING POINT? 25
E. THE SALIENCE OF THE ORIGINALISM/NONORIGINALISM DICHOTOMY 27
F. OUT WITH THE OLD: THE ABANDONMENT OF THE ORIGINALIST PATRIARCHS 34

III. THE CORE CONCEPTS OF ORIGINALISM 37

A. THE NEED FOR LEGITIMACY 38
B. WHY POPULAR SOVEREIGNTY? 46
C. JUDICIAL RESTRAINT AS FIDELITY TO THE POPULAR SOVEREIGN 55

* Princeton University. I am grateful to Robert P. George, Keith E. Whittington, and Donald L. Drakeman for their criticisms and insights. For their helpful advice during the research portion of this paper, I thank Melissa S. Lane, Alan W. Patten, Christopher W. Morris, Saikrishna Prakash, Larry Alexander, Larry Kramer, and Brian Bix. I am also thankful for Jim Snow's input on style. All opinions contained herein, as well as all mistakes, are of course my own.

D. THICK V. THIN ORIGINAL MEANING 58
IV. RANDY BARNETT AND CONSTITUTIONAL LEGITIMACY 64
A. THE THEORY: THE LIBERTARIAN CONSTITUTION 65
B. THE INTERNAL CRITIQUE: DISAGREEMENT AND CONSTITUTIONAL INSTABILITY 68
C. THE ORIGINALIST CRITIQUE: WARPING CONSTITUTIONAL COMMANDS 79
V. JACK BALKIN AND THE WOBBLY FRAMEWORK 83
A. THE THEORY: A FRAMEWORK FOR POLITICS 84
1. BALKIN AND THE PURPOSE OF INTERPRETATION 84
2. RECONCILING ORIGINALISM AND LIVING CONSTITUTIONALISM 89
B. THE INTERNAL CRITIQUE: CONSTITUTIONAL DISCOURSE AND THE UNSTABLE FRAMEWORK 91
C. THE ORIGINALIST CRITIQUE: EXPECTED APPLICATIONS AND THE ILLEGITIMACY OF PASSIVE ACQUIESCENCE 104
VI. LAWRENCE SOLUM AND THE IMPORTANCE OF LANGUAGE 120
A. THE THEORY: ORIGINALISM AS LINGUISTIC FACT 121
B. DEBATING THE ORIGINALISM LABEL 124
C. THE ORIGINALIST CRITIQUE: SEMANTICS AS THE BASIS OF ORIGINALISM 132
1. THE PROBLEMS WITH THIN ORIGINAL MEANING 132
2. THE PERILS OF SOPHISTICATION 135
VII. CONCLUSION 142

I. INTRODUCTION: ORIGINALISM ADRIFT

Originalism is in a state of crisis. Contemptuous of its past, befuddled by the present, and uncertain of its future, originalism today has no clear sense of what it is and what it will be. Like the archetypal undergraduate experiencing an intellectual assault on its long-held beliefs, originalism has spurned its former ideas and been enticed by the respectability that comes with conversion to voguish theories. Unmoored from its formative past, originalism has been set adrift.

There is an emerging awareness among constitutional law scholars that the line between originalism and its traditional rival, living constitutionalism, has become

blurred. Originalism, as I will show in Section II, has for much of its history[1] been concerned with three core concepts: popular sovereignty, judicial restraint, and a robust conception of original meaning.[2] Not only have these ideas been central to originalism descriptively, but they are inextricably bound-up with originalism from a normative perspective as well, as Section III demonstrates. The theories of Randy Barnett, Jack Balkin, and Lawrence Solum have brought about a crisis of indeterminacy within originalist scholarship by throwing out these core concepts. Constitutional law theorists have begun to recognize this state of indeterminacy. At a 2006 symposium on constitutional law, James Fleming began his lecture with a question made relevant by "Ronald Dworkin and Jack Balkin dressing up their theories in the garb of originalism."[3] Fleming asked "[a]re we all originalists now?"[4] Fleming was commenting on the fact that the originalism label has been stretched to fit many diverse and often-times conflicting constitutional theories. As he observed, "[T]here are numerous varieties of originalism, and the only thing they agree upon is their rejection of the moral reading [of the Constitution]."[5] Responding to the diffusion of originalist theories, Fleming argued "it would not mean much to claim that this display shows that we are all originalists now.

---

[1] Throughout this paper, when I refer to the "history of originalism" or to originalism generally, I am referring to the originalism that emerged out of the jurisprudence of the Warren and Berger Courts. This originalism came onto the scene in the 1970s, as I will discuss in Section II. I make this note because I do want the reader to think I am referring to the kind of textualist-originalism that was dominant during the nineteenth century. As Johnathan O'Neill has wisely cautioned, "[T]raditional textual originalism and contemporary originalism should not be ahistorically equated." *See* JONATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS 13 (2007).

[2] All of these concepts will be explained in more detail later on. I request the reader's patience as I use these complicated terms in this Introduction.

[3] Fleming, "The Balkinization of Originalism," 67 MD. L. REV. 10 (2007-2008). The 2006 lecture was delivered at the Maryland Constitutional Law Schmooze, and this article is a subsequent version published in the *Maryland Law Review*.

[4] *Id*.

[5] *Id*. at 11. When Fleming refers to the "moral reading" of the Constitution, he is likely referencing the work by Ronald Dworkin. *See generally*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION (1996).

Indeed, we are witnessing the Balkanization of originalism (as well as the Balkinization of it)."[6] To Fleming, this over-burdening of the originalism brand should lead us to wonder whether the term "originalism" is meaningful anymore. Thus, turning around the question posed at the beginning of his lecture, Fleming asks, "[A]re we all moral readers now?"[7]

Thomas Colby and Peter Smith have answered in the affirmative in their important article "Living Originalism." As the title of the piece suggests, Colby and Smith see originalism as having lost any claim to internal consistency. Arguing that "disagreement among originalists about matters of considerable importance is becoming the rule, not the exception" in originalist scholarship, the two authors conclude that originalism is "not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label."[8] Like Fleming, Colby and Smith point to Justice Antonin Scalia's so-called "it takes a theory to beat a theory"[9] argument and turn it against originalists. In *A Matter of Interpretation*, Scalia argued that:

> Perhaps the most glaring defect of Living Constitutionalism . . . is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of evolution . . . . As soon as the discussion goes beyond the issue of whether the Constitution is static, the evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful.[10]

---

[6] Fleming, *supra* note 2, at 12.
[7] *Id*. at 13.
[8] Thomas B. Colby and Peter J. Smith, "Living Originalism," 59 DUKE L.J. 239, 244 (2009).
[9] *Id*. at 241.
[10] ANTONIN SCALIA, A MATTER OF INTERPRETATION 44-45 (Amy Guttman ed., 1998).

By contrast, the originalist "at least knows what he is looking for: the original meaning of the text."[11] But with the diffusion of theories doing business under the auspices of originalism, Colby and Smith point out "the substantial disagreement among originalists must be equally powerful evidence that originalist theory lacks coherence."[12] The two authors sum up the problem for originalists succinctly: "The very notion of originalism itself has become indeterminate."[13]

Steven Smith, in an unpublished paper, agrees that the idea of originalism is increasingly nebulous. He claims that "the more contemporary versions and discussions [of originalism] threaten to dissolve originalism as a distinctive position by collapsing it into its long-time nemesis, the idea of the 'living Constitution.'"[14] But from whence does this danger emerge? Smith answers: "The danger is apparent, or already realized, in the work of originalism's most recent high profile convert (or infiltrator?)—Jack Balkin."[15] Noting that the conversion of progressive thinkers to the originalist cause is not unprecedented, Smith cautions that Balkin's case is different: "In this instance, though, it turns out that Balkin sacrifices little or nothing by the conversion; conversely, in gaining Balkin and the like-minded thinkers, originalism loses . . . well, its soul."[16]

Each in his own way, Barnett, Balkin, and Solum has brought about this indeterminacy crisis within originalism. They have rejected the core concepts that have defined originalism for much of its history and are central to its future as a discrete constitutional theory. Constitutional legitimacy based on popular sovereignty holds no

---

[11] *Id*. at 45.
[12] Colby and Smith, *supra* note 8, at 273.
[13] *Id*. at 246.
[14] Steven D. Smith, *That Old-Time Originalism*, 10 (Legal Studies Research Paper Series, Research Paper No. 08-028, June 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1150447. This is an unpublished piece, and I am quoting from the latest draft.
[15] *Id*. at 10-11.
[16] *Id*. at 11. (Ellipses in original.)

sway over them. As a result, the principle that the judiciary has no power where the Constitution does not speak is cast aside, producing a court system with awesome power. In the case of Barnett, his libertarian theory of constitutional legitimacy produces a hyper-aggressive judiciary and distorts the meaning of the constitutional text. With Balkin, his desire to legitimize past court decisions confers unencumbered power on the judiciary to rewrite constitutional law. And Solum, by putting forward a thin and highly technical version of original meaning and no theory of constitutional legitimacy, paves the way for further indeterminacy and undermines popular sovereignty.

To say that these theorists are totally alien to originalism would, however, be untrue. Each theory was produced within the trajectory of originalist scholarship over the last decade, and each theorist sincerely believes he working within the realm of originalist theory. For this reason, though I will argue that all three are decidedly outside of the originalism tradition, I will refer to these theorists as "post-originalists." I think this terminology is helpful and accurate because it distinguishes these theories from originalism while acknowledging their historical roots in originalist theory. They trace their origins to originalism but are largely a reaction against the core concepts of originalism. All form the basis for a constitutional theory that can justify politically liberal outcomes, even if those theorists do not themselves endorse such outcomes.[17] They constitute a distinct scholarly movement despite their internal disagreements,[18] and

[17] When I say that the outcomes may be progressive, I am simply describing the theories. I am not saying that because the outcomes could be progressive that there is something wrong with the post-originalist movement. I am not of the opinion that originalism yields only politically conservative outcomes.

[18] The reader here might ask how it is that I can contend that the post-originalists constitute a distinct scholarly movement despite their disagreements while originalism cannot endure similar disagreements. First, I would respond that I certainly allow for internal disagreements within originalism, as will be clear later on. More fundamental, however, is the fact that originalism is a different kind of theory than post-

they should be recognized as such. Their project is fundamentally different from that of the originalists, and to the extent that they are considered originalists they will continue to undermine originalism's theoretical foundations.

Significantly, there has been little resistance by originalists to the inclusion of these theorists in the originalist fold. Steven Smith has written an unpublished paper noting (without much argument) that Balkin's theory is outside of the originalist tradition,[19] and John McGinnis and Michael Rappaport have strongly criticized Balkin's theory while still welcoming his conversion.[20] No originalist has recognized these three theorists as part of a separate scholarly movement and the threat they pose to the coherence of originalism. Because of this, there has also been no effort on the part of originalists to articulate why these theories should not be identified as originalist. In fact, Balkin and Barnett have been embraced,[21] to a considerable degree, by prominent originalists and originalist groups like Steven Calabresi[22] and the Federalist Society.[23] This response has undoubtedly helped contribute to the indeterminacy crisis by accepting

---

originalism, and it is more vulnerable to indeterminacy. This is a topic I will treat in the conclusion of this essay. *See infra*, Section VII.

[19] *Id*. at 10-15.

[20] McGinnis and Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 381-82 (2007). ("Despite our doubts about important aspects of his theory, we welcome Professor Balkin's embrace of originalism").

[21] Solum has yet to publish his massive work, "Semantic Originalism," and his article "District of Columbia v. Heller and Originalism" has not been in print long enough to generate responses. However, it is noteworthy that Ed Whelan of the Ethics and Public Policy Center, a well-known originalist, has spoken very favorably of Solum's unpublished work. *See* Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923 (2009); Posting of Ed Whelan to Bench Memos, http://bench.national review.com/post/?q=MWUzMGE5Y2M0Yjg2NDk2YjQ3NzA3NjY0MzJmNmRlNzg= (April 15, 2008, 13:57 EST).

[22] Calabresi and Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 664 (2009) ("Professor Jack Balkin's recent writings on originalism are just superb and are among the best work done on the subject . . . . Professor Balkin now takes his rightful place, alongside New Deal Justice Hugo Black and Balkin's Yale Law colleague Akhil Amar, in the pantheon of liberal originalism").

[23] A simple Google search on the Federalist Society and Randy Barnett shows how often the Society's chapters have collaborated with him and invited him to speak. In addition, there is his inclusion in the Society's important 25th Anniversary book. *See* FEDERALIST SOCIETY, ORIGINALISM: A QUARTER-CENTURY OF DEBATE 253-85 (Steven G. Calabresi ed., 2007).

these theories as originalist without considering the consequences of their inclusion for originalism.

It will be my task in this essay to fill this hole in the scholarship by reaffirming originalism's foundations and reestablishing a boundary between originalist and post-originalist thought. I want to be very clear about the purpose of this paper. This essay will not try to show that originalism is the best method of constitutional interpretation; I am not out to convince the reader of originalism's merit. Nor am I going to argue that the post-originalist theories are incorrect forms of constitutional interpretation. While I will provide internal critiques of each theory to show why they should be rejected even by nonoriginalists, it is not necessary that the reader be convinced by these arguments. My aim in this essay is much narrower. I want to show that the theories of Barnett, Balkin, and Solum are fundamentally different from what originalism has been descriptively and what it must be normatively. The great majority of the argument is dedicated to the normative case, though I hope the reader will discern throughout the essay that there are major, irreconcilable differences between how originalism has traditionally been understood and the theories that the post-originalists advocate. My hope is that readers who disagree with my normative claims about originalism will nonetheless agree that the post-originalist theories are, as a historical matter, so different from what originalism has been that it would be helpful to use a distinct label to describe Barnett, Balkin, and Solum. The project of this paper, then, is to try and reestablish theoretical coherence to originalism and restore clarity in the body of originalist literature. While I think this has great value for originalism in solving the indeterminacy crisis, clarity in originalist scholarship is useful for nonoriginalists as well. Only when nonoriginalist scholars have

fairly similar notions of what "originalism" means can any meaningful criticism be leveled against it. Thus, while my task in this essay is limited, it is of great importance to originalists and nonoriginalists alike.

The most significant descriptive argument of this essay is laid out in Section II, which sketches an "opinionated history"[24] of originalist scholarship to show how we arrived at the current crisis and how different the post-originalist theories are from what originalism has traditionally been. In the second section, I argue that popular sovereignty, judicial restraint, and a "thick" version of original meaning are the central components of originalism. This will provide the normative basis for the analysis of the three theories in the rest of the essay. Sections IV-VI deal with each of the three post-originalists. The fourth section argues against Randy Barnett's post-originalism by focusing on his theory of constitutional legitimacy, which is the most innovative and significant feature of his thought. I argue that his theory of legitimacy distorts the meaning of the Constitution and authorizes unprecedented judicial power. Section V turns to Jack Balkin, whose theory bears the greatest responsibility for the current crisis. This section is more wide-ranging, examining several features of Balkin's highly original theory. Section VI takes up Lawrence Solum's so-called "Semantic Originalism" and contends that its thinness fails to respect popular sovereignty. The section concludes with a critique of the use of linguistic theory as a basis for originalism.

The discussion of these theories raises the important question of why originalism was so vulnerable to an indeterminacy crisis. Reestablishing the coherence of originalism

[24] I borrow this phrase from Lawrence Solum. *See* Solum, *Semantic Originalism*, 13 (Illinois Public Law and Legal Theory Research Papers Series, No. 07-24, November 22, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244. This is Solum's latest draft of his comprehensive explication of his theory, but it is, nonetheless, a draft, and he may very well make substantial changes to it before it is published.

requires recognizing its weaknesses as well as its strengths. This is a topic I will treat briefly in my conclusion. Originalism is on the precipice of a theoretical collapse. It is my aim to begin the process of pulling it back from the cliff.

II. THE PATH TO INDETERMINACY: A BRIEF HISTORY OF ORIGINALISM

As with most crises, originalism's current predicament was a long time in the making and resulted from the confluence of several factors. What had been the pillars of originalism in the 1970s and 1980s—commitments to popular sovereignty, judicial restraint, and a robust conception of original meaning—slowly gave way under the weight of scholarly criticism and historical events. By the end of the first decade of the twenty-first century, scholars had articulated purportedly originalist theories that allocated tremendous power to the federal judiciary, freed interpreters from tight textual constraints, and appealed to very different ideas of constitutional legitimacy. The introduction of these new approaches places originalism under the strain of having to sustain widely divergent and irreconcilable theories. In the final analysis, the crisis came from within. For with no "official gatekeeper" for originalism,[25] the theory was defenseless against destabilizing theories. The first half of this section will show how this story unfolded and how we arrived at this critical point in originalism's history. The second will argue that there is still a reason to make the originalism/nonoriginalism distinction, a division which lies at the heart of this essay.

[25] Colby and Smith have noted the absence of a "gatekeeper" of originalist orthodoxy as a major reason for the creation of a "living originalism." *See* Colby and Smith, *supra* note 8, at 258.

A. THE PATRIARCHS OF ORIGINALISM: BORK, REHNQUIST, AND BERGER

The well-known narrative of originalism's evolution begins with Judge Robert Bork.[26] His landmark 1971 *Indiana Law Journal* article is widely considered to be the

[26] Richard Kay has noted this "standard story about the originalist approach to constitutional interpretation." Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 Nw. U. L. Rev. 703 (2009). This section draws on several of these accounts, though it supplements them significantly and interprets the events in a new way. *See* Solum, *supra* note 24, at 13-24; Randy E. Barnett, "An Originalism for Nonoriginalists," 45 LOY. L. REV. 611-29 (1999); Stephen M. Griffin, "Rebooting Originalism," 2008 U. ILL. L. REV. 185-91 (2008); Colby and Smith, *supra* note 8, at 247-62; *see generally* Keith E. Whittington, "The New Originalism," 2 GEO. J.L. & PUB. POL'Y 599 (2004). Whittington's article is the seminal piece documenting this shift. For other useful histories, *see generally* Daniel Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1988-1989); O'NEILL, *supra* note 1. Farber's piece, in particular, is worthy of attention given its status as a classic summary of the originalism debate in the 1970s and 1980s.

One of the principal ways in which I differ from some of these authors, particularly Whittington and Barnett, is in my rejection of the phrases "Old Originalism" and "New Originalism" as they are understood by these two authors and by much of recent scholarship on originalism. Frankly, I find the distinction unhelpful and believe it leads to misrepresentations and confusion in the literature. As described in Whittington's article on the subject, the New Originalism is primarily characterized by its willingness to put forward a comprehensive view of constitutional interpretation. It is "more concerned with providing the basis for positive constitutional doctrine than the basis for subverting doctrine." *See* Whittington, *supra*, at 608. New Originalism also entails less concern for judicial restraint, decreased deference towards legislative majorities, and a move away from original intent and towards some iteration of original public meaning. *Id*. at 609.

The problem with this analysis is not that it is untrue; it is that the labels can lead to confusion. While it is correct to say that the more recent originalist theories (as well as the post-originalist ones) share many of the traits Whittington notices, they also vigorously disagree on foundational questions of originalist theory. For example, Barnett believes that popular sovereignty must be rejected as a theory of constitutional legitimacy and that judges should presume all legislative acts to be unconstitutional. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 11-31, 253-69 (2004). Whittington thinks that popular sovereignty is crucial to originalist theory and, while rejecting what he sees as the excessive deference to legislative majorities characterizing the originalism of the 1970s and 1980s, does not believe that judges have the authority to strike down legislation without a clear basis for such action in the Constitution. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 110-59, 168 (1999). Yet, under Whittington's taxonomy, these two scholars both fall within the New Originalism category. The result is that when a scholar refers to the New Originalism, the reader has little idea what kind of originalism is under discussion beyond the minimal distinctions Whittington ascribes to New Originalism (such as less emphasis on judicial restraint, etc.).

Worse yet, these terms can mislead the reader. Lawrence Solum, for instance, in defending his "Semantic Originalism," points to New Originalism as the basis for his theory's inclusion in the originalism family. He repeatedly insists that because the move towards original public meaning (or some version thereof) is the hallmark of the New Originalism, and because his theory adheres to some form of this central idea, his theory can legitimately be included in the originalist tent. *See* Solum, *supra* note 24, at 10-11, 58-59. But as this paper will hopefully help show, there are many more critically important aspects of originalism than this minimal criterion, which is why I can argue that Solum's theory should not be

scholarly kick-off to the originalism debate.[27] Bork's essay begins with the question that he perceived to be central to the debate over the rulings of the Warren Court: "when is authority legitimate?"[28] It is significant that Bork introduces his originalism with this question and with specific reference to the Warren Court. From the start, Bork's originalism was primarily concerned with judicial authority.[29] Originalism was rooted in a theory of popular sovereignty in which "[s]ociety consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution."[30] For Bork, the exercise of judicial review was only legitimate if it could be grounded in principles derived from and defined by the original intentions of the Founders and/or the text of the Constitution.[31]

---

described as originalist. However, the continued use of the Old Originalism/New Originalism categories only makes these discussions more difficult and increases confusion.

Of course, if the project of this paper is successful, the problems with these categories would be greatly ameliorated because post-originalists would no longer be thought of as "New Originalists." However, as of today, these post-originalist theories are included in the New Originalism described in the literature. Thus, I will not use these phrases in this paper. Instead, in this paper, when I refer to "old originalism" or "new originalism" (or other versions of these terms), I am only speaking descriptively. I only mean that some theories of originalism are older relative to others. These phrases have no substantive content in this essay beyond what I ascribe to them in any given context.

To be clear, I am not using the "post-originalist" label in order to avoid using the "New Originalism" nomenclature. While the post-originalists are often included as part of the New Originalists in scholarly discourse, there are many other scholars who are also lumped in with this group, such as Michael McConnell and Keith Whittington, who I think merit the description "originalists." *See* Whittington, *supra*, at 608; Griffin, *supra*, at 1188-91. To use the phrase "New Originalists" as a way to describe the post-originalists, then, would be inaccurate and over-inclusive.

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

[28] *Id*.

[29] However, I do not think Bork's originalism saw judicial restraint as its *raison d'etre*. Rather, judicial restraint followed from his view of popular sovereignty and the so-called "Madisonian Dilemma." Efforts to portray Bork as solely concerned with constraining judges from reaching results he disliked are misguided.

[30] Bork, *supra* note 27, at 3.

[31] What Bork meant by "original intentions" is not entirely clear. He later took the position that this language was "a shorthand formulation" for the original public meaning of the text. *See* BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990). However, some scholars have suggested that Bork's original position was much closer to that of Raoul Berger and other intentionalists who derived original intent from the debates in the Constitutional Convention and the writings of the Founders. *See* Colby and Smith, *supra* note 8, at 249; Mitch Berman, *Originalism is Bunk*, 84 N.Y.U. L.R. 1, 9 n.20 (2009).

This clarion call for an originalist theory of interpretation and for the restraint of judicial authority was echoed five years later by then-Justice William Rehnquist in a lecture at the University of Texas.[32] Unlike Bork's article, which criticized judicial decisions while trying to put forward its own theory of originalism, Rehnquist's lecture focused on the theory of the "living Constitution" and sought to show why it was untenable. Rehnquist, then, was more focused on attacking a theory than on constructing one, but there are areas in his speech where his constitutional philosophy is evident. It is abundantly clear, for instance, that Rehnquist's view of the Constitution was firmly within the popular sovereignty tradition: "The people are the ultimate source of authority; they have parceled out the authority that originally resided entirely with them by adopting the original Constitution and by later amending it."[33] As with Bork, Rehnquist saw a connection between popular sovereignty and a constrained view of judicial authority. He located the legitimacy of judicial review in the judges' ability to act as agents of the people, which could only be done by adhering to the intentions they expressed in creating the Constitution.[34] Once those intentions were discarded, the judiciary became "a small group of fortunately situated people with a roving commission to second-guess" the people's representatives.[35]

Perhaps the most prolific defender of this early version of originalism was Raoul Berger, whose *Government by Judiciary* represents another landmark in the rise of originalism in the 1970s.[36] Berger was the first originalist to produce a steady stream of

---

[32] William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).
[33] *Id*. at 696.
[34] *Id*. at 698.
[35] *Id*.
[36] RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (2d. ed. 1997).

historical scholarship which investigated the Founders' intentions about specific constitutional provisions, putting into practice what Bork and Rehnquist had only theorized about. While he, too, looked to popular sovereignty as the basis for his originalism,[37] Berger was distinct in having a more detailed originalist theory than either Bork or Rehnquist had worked out in their early writings. He was more explicit about what "original intent" meant,—"shorthand for the meaning attached by the Framers to the words they employed in the Constitution and its Amendments"[38]—and he linked popular sovereignty to the fact that the Constitution was a written document: "A judicial power to revise the Constitution transforms the bulwark of our liberties into a parchment barrier."[39] He also brought in historical arguments, such as the idea that the Constitution had been written "against a background of interpretive presuppositions,"[40] and that to change those interpretive methods would be to change the original intended meaning of the words. Berger thus began the effort to develop a more complete picture of originalism.

B. ORIGINALISM IN TRANSITION: INTENTION, HERMENEUTICS, AND RESTRAINT

The 1980s witnessed several important shifts that began to take place in originalist scholarship. These changes occurred roughly parallel to one another, but perhaps the one that figures most prominently in histories of originalism is the transition from an originalism of original intent to one of original public meaning. In the battle over

---

[37] *Id*. at 314 ("The Constitution represents fundamental choices that have been made by the people, and the task of the Courts is to effectuate them . . . . When the judiciary substitutes its own value choices for those of the people it subverts the Constitution by usurpation of power").

[38] *Id*. at 402.

[39] *Id*. at 403.

[40] *Id*. at 404.

the locus of the original meaning of constitutional provisions, the opening salvo is credited to Paul Brest. In 1980, Brest argued that "there may be instances where a framer had a determinate intent but other adopters had no intent or an indeterminate intent," posing the so-called "summing" problem of how to reconcile conflicting or indeterminate intentions.[41] He also pointed out the sticky issue of deciding the level of generality at which the original intention is to be reconstructed. Just how specific were the original intentions of the Framers, and how strong is our evidence of those intentions? Indeed, how can we be sure that the Founders did not intend to delegate the meaning of certain constitutional provisions to future interpreters?[42] These and other questions represented the first body blow to an intentionalist originalism.

Normally left out of descriptions of Brest's article is the fact that he anticipated the second major argument against original-intent originalism that would emerge in the 1980s: that the Founders themselves did not intend for their intentions to be the basis for discovering constitutional meaning.[43] This was the basis for H. Jefferson Powell's historical critique of original-intent originalism in 1985. Powell examined the history of interpretation in the Anglo-American context, looking at Protestant biblical exegesis,[44] the common law tradition,[45] the ratification debates,[46] and the early interpretations of the Constitution.[47] He concluded that the Framers "shared the traditional common law view . . . that the import of the document they were framing would be determined by reference to the intrinsic meaning of its words or through the usual judicial process of case-by-case

---

[41] Brest, "The Misconceived Quest for the Original Understanding," 60 B.U. L.R. 204, 214 (1980).
[42] *Id*. at 216-17. Whittington provides a helpful list of later responses to Brest's arguments. *See* Whittington, *supra* note 26, at 605 nn.32-33. I would add to his list Kay, *supra* note 26.
[43] Brest, *supra* note 41, at 215-16. Solum mentions it in his account. *See* Solum, *supra* note 24, at 15.
[44] Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 889-94 (1985).
[45] *Id*. at 894-902.
[46] *Id*. at 902-913.
[47] *Id*. at 913-24.

interpretation."[48] They rejected, in other words, the idea that "future interpreters could avoid misconstruing the text by consulting evidence of the intentions articulated at the convention."[49] A real dilemma seemed to emerge for original-intent originalists: the original intent was against the use of original intent.[50]

In 1986, Justice Antonin Scalia stepped forward with a proposal that seemed to overcome these objections. Suggesting that originalists "change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning,"[51] Scalia shifted the purpose of the originalist inquiry from one interested in the subjective intentions of the Founders to one seeking the meaning of the Constitution's words as understood in their original public context. As Scalia later elaborated: "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."[52]

By itself, this movement of originalism away from original intent might have been no more than a good-faith intramural scuffle, but other, more dramatic changes were also underway. Keith Whittington has chronicled the origins of the hermeneutics debates that featured prominently in the originalist literature of the 1980s. As Whittington tells the story, the hermeneutics debate can be traced to 1975, when Thomas Grey authored an article distinguishing between "interpretive" and "noninterpretive" theories of judicial

---

[48] *Id*. at 903-04.

[49] *Id*. at 903.

[50] For responses, *see* Whittington, *supra* note 26, at 605 n.34. Powell's article touched off a prolific debate with Raoul Berger, who rose to intentionalism's defense. *See generally* Berger, *"Original Intention" in Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1985-1986) (disputing Powell's historical account and reaffirming intentionalism); *see* Powell, *The Modern Misunderstanding of Original Intent* (Book Review), 54 U. CHI. L. REV. 1513, 1531-42 (1987); Berger, *The Founders' Views—According to Jefferson Powell*, 67 TEX. L. REV. 1033, 1055-80 (1988-1989).

[51] Antonin Scalia, "Speech Before the Attorney General's Conference on Economic Liberties (June 14, 1986)," *in* UNITED STATES, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 106 (1988).

[52] SCALIA, *supra* note 10, at 38.

review.[53] For Grey, those theorists of the 1970s (originalist and otherwise) who criticized the Court's controversial individual rights decisions were arguing for a method of constitutional interpretation that confined itself to the text, while the noninterpretivists were willing to go "beyond interpretation" to redeem "basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution."[54]

Grey's distinction, however, came under heavy fire and ignited the hermeneutic debates of the decade to come. As Whittington points out, Paul Brest and Ronald Dworkin played key roles in the development of this literature.[55] Both objected to Grey's implication that those theories of constitutional interpretation that did not limit themselves to the text were somehow unconcerned with interpretation as such. In Dworkin's view, "[a]ny recognizable theory of judicial review is interpretive in the sense that it aims to provide an interpretation of the Constitution as an original, foundational legal document."[56] There was now a legitimate debate over the nature and meaning of interpretation *qua* interpretation.

Two prominent originalists, Richard Kay and Larry Alexander, were at the forefront of these debates. Each addressed the questions of linguistics and hermeneutics that were implicated in the discussions over what it meant to interpret. This literature expanded the "possible arguments regarding the nature of the interpretive process that were available," and originalists began to argue that originalism was directly implied by

---

[53] Whittington, *supra* note 26, at 606. *See generally* Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

[54] *Id*. at 706.

[55] *See* Whittington, *supra* note 26, at 606-07.

[56] RONALD DWORKIN, A MATTER OF PRINCIPLE 35 (1985). This passage and the contribution from Brest are quoted in Whittington, *supra* note 26, at 607.

any valid theory of legal interpretation.[57] To interpret simply *was* to give effect to the original intentions of the lawmaker. As Kay wrote, "Language meaning independent of some human intention, real or postulated, does not exist."[58] Alexander, whose writings on this topic emerged more in the 1990s, stated in 1995, "If texts are attempts by their authors to communicate, then *texts mean what their authors intend them to mean*. Take away the author's intentions, and you fail to have a text."[59] Importantly, however, while both Kay and Alexander made arguments for originalism based solely on what it means to interpret, neither thought that arguments for originalism could ultimately be disaggregated from theories of constitutional legitimacy.[60] Both saw the hermeneutic arguments as part of a more comprehensive case for originalism. Nonetheless, this turn in originalist scholarship seemed to allow for new justifications of originalism having nothing to do with popular sovereignty or any other normative claims.

As the millennium's last decade unfolded, there was another major development in the originalist literature: the de-emphasis of the idea of judicial restraint so central to the originalism of the 1970s and 1980s. Whittington hypothesizes that a major reason for the shift was political necessity. As the makeup of the federal courts was dramatically changed under Presidents Ronald Reagan and George H.W. Bush, originalists had fewer decisions to attack:

> As a reactive and critical posture, the old originalism thrived only in opposition . . . . As conservatives found themselves in the majority,

---

[57] *Id.*

[58] Kay, *Original Intentions, Standard Meanings, and the Legal Character of the Constitution*, 6 CONST. COMMENT. 39, 40-41 (1989).

[59] Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, *in* LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 355, 361 (Andrei Marmor, ed., 1995). Alexander provides a useful bibliography of hermeneutical writings adopting his position in footnote 11 of his essay.

[60] *See* Alexander, *The Constitution as Law*, 6 CONST. COMMENTARY 103, 111 (1989); Kay, *supra* note 58, at 44-45.

> conservative constitutional theory—and perhaps originalism—needed to develop a governing philosophy appropriate to guide majority opinions, not just to fill dissents.[61]

Whether or not this account is accurate, there are indications that originalists were beginning to move away from judicial restraint in the 1990s. Three writings, in particular, are noteworthy here. Earl Maltz's 1994 book seriously challenged the judicial-restraint thesis, arguing that "it should be obvious that originalism and noninterventionism are far from synonymous" because there are instances in which "[a] consistent originalist would [] advocate a significant increase in interventionism."[62] This effort was followed up in Whittington's important book. While Whittington's theoretical framework certainly places strict limits on judicial decision making, it does not do so self-consciously or, rather, it does not make judicial restraint the purpose or end of originalism. In fact, both Whittington and Randy Barnett—the third theorist to throw over judicial restraint as a goal of originalism—agree that courts ought to vigorously enforce the original meaning, striking down whatever precedents and legislative acts stand in the way. As Barnett put it in 1999: "'[A]ctivism'—whether by judges or by Congress—that conflicts with the original meaning of constitutional provisions . . . is forbidden by the commitment to preserve, protect, and defend a written Constitution."[63] Originalism, under this new

---

[61] Whittington, *supra* note 26, at 604. Whittington's implicit premise that the ideologies and rationales of courts often change to suit new governing coalitions is supported in one of his books. *See generally* WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY (2007).

[62] EARL M. MALTZ, RETHINKING CONSTITUTIONAL LAW: ORIGINALISM, INTERVENTIONISM, AND THE POLITICS OF JUDICIAL REVIEW 20 (1994).

[63] Barnett, *supra* note 26, at 643. *See also* WHITTINGTON, *supra* note 26, at 4 ("An originalist Court may well find itself quite active in striking down legislation at odds with the clear requirements of the inherited text. Originalism requires deference only to the Constitution and to the limits of human knowledge, not to contemporary politicians").

model, would not countenance the "faint-hearted" originalist's acceptance of precedent and judicial restraint.[64]

This departure from the principle of judicial restraint developed alongside the concept of the need for "construction" in constitutional decision making. Whittington was the first and most influential originalist to lay out a comprehensive argument for constitutional construction. Distinguishing between constitutional construction and constitutional interpretation, Whittington describes interpretation as "a search for meaning already in the text. Interpretation is discovery," while construction is "essentially political" and "cannot claim merely to discover preexisting, if deeply hidden, meaning within the founding document."[65] Construction occurs when the knowable meaning of the text "runs out"[66] and meaning must be supplied by something other than the text and its history. While Whittington's endorsement of popular sovereignty places strict limits on the role of judges in constitutional construction, the interpretation/construction distinction was a further invitation to theorists already willing to discard the idea of judicial restraint.

Thus, at the close of the twentieth century, originalism was undergoing several important changes. The locus of meaning had changed from the intent of the Founders to the public meaning of the text; hermeneutics had opened up a new venue for justifying originalism quite apart from considerations of popular sovereignty; and judicial restraint was no longer originalist dogma. All of these elements shared a common theme—they

---

[64] The reference is to Justice Scalia's 1989 Taft Lecture. *See* Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 862 (1988-1989). For Barnett's critique of Scalia's originalism, *see generally* Barnett, *Scalia's Infidelity: A Critique of Faint-Hearted Originalism*, 75 U. CINN. L. REV. 7 (2006).

[65] WHITTINGTON, *supra* note 26, at 5-7. Whittington has produced the most extensive historical examination of the idea of constitutional construction. *See generally* WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

[66] Solum, *supra* note 24, at 19.

loosened the threads holding originalism together as a coherent theory. Each development fed the other and contributed to a sense that momentum was driving originalism in a distinctly different direction from the Borkian path it had once been on. If originalism had been a way of giving content to otherwise opaque constitutional provisions, the shift to original public meaning was the start of a slide towards an originalism in which the textual meaning was much less certain.[67] If originalist interpretations had given life to and been constrained by a theory of popular sovereignty, the hermeneutic debates cleared the path for originalist justifications disconnected from popular sovereignty. And if originalism was meant to restrain judges, the revamping of the federal judiciary and developments in the literature led to an originalism much more comfortable with expansive judicial power.

C. THE RISE OF THE POST-ORIGINALISTS

The rise of the post-originalists marks the culmination of these trends. In the case of Randy Barnett, popular sovereignty has been supplanted by a libertarian theory of constitutional legitimacy which requires judges to presume legislative acts are unconstitutional unless they are "necessary to protect the rights of others" and do not "improperly violat[e] the rights of those whose freedom is being restricted."[68] Barnett replaces a theory which requires judges to justify their authority by reference to a sovereign act of the people (popular sovereignty) with a theory that requires judges, especially in cases of constitutional construction, to wield their authority in the name of

[67] It is important to recognize, of course, that not all originalists went along with this flight from original intent. Richard Kay and Larry Alexander, as might have been inferred from the paragraphs on hermeneutics, continue to defend intentionalism. As Colby and Smith have said, the shift was not a "clean break." *See* Colby and Smith, *supra* note 8, at 251.

[68] BARNETT, *supra* note 26, at 45.

protecting an undefined universe of rights.[69] The older originalism favored judicial restraint and deference to majorities; Barnett's post-originalism requires sweeping exercises of judicial power and skepticism of majorities. The older originalism was based on popular sovereignty; Barnett's theory deems popular sovereignty impossible.[70] With Barnett, we are clearly far afield from the originalism of the 1970s and 1980s.

Jack Balkin's "framework originalism" is even further removed from the older originalist theories. Requiring only that judges adhere to the "semantic content of the words" in the Constitution, Balkin's idea of original meaning is quite thin, its only goal being that the meaning of the words themselves not change over time.[71] Thus, the phrase "domestic violence" in Article IV would continue to refer to rebellions and insurrections and not spousal abuse.[72] This adherence to a very thin conception of original meaning exemplifies the continued evolution from original intent—which supplied a great deal of content to the text—to semantic meaning—which provides no content beyond the dictionary-like definition of words at the time of ratification. Balkin believes that constitutional interpretation is limited to discerning semantic meaning and that constitutional construction occupies the remaining space of constitutional decision making.[73] Construction, in his opinion, is described by a theory of "living constitutionalism" in which, to pick just one example, courts "make sense of [] constructions" and "ratify changes in social mores and institutional practices."[74] This expansive view of judicial power makes sense given Balkin's conception of popular

---

[69] *Id*. at 121-28.
[70] *Id*. at 11-31.
[71] Jack Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 552 (2009).
[72] *Id*.
[73] *Id*. at 560.
[74] *Id*. at 562.

sovereignty, which relies on the fact that "in the long run, [constitutional construction] is democratically responsive."[75] The people are seen as exercising sovereignty because the Court's decisions eventually line up with public opinion. In this way, Balkin attempts to achieve the reconciliation of originalism and the theory which originalism was founded to oppose—living constitutionalism.

The importance of the hermeneutic debates is most evident in the work of Lawrence Solum, whose "semantic originalism" makes originalism a much weaker thesis than it was in the 1980s. Solum's post-originalism is constructed on the basis of four claims, which can be roughly summarized as follows: originalism entails that the semantic meaning of the Constitution— the public meaning of the words in context—was fixed at the time of ratification, that this meaning contributes in some way to our understanding of the content of constitutional provisions, and that we have a duty to obey that semantic meaning in almost all cases.[76] Like Balkin, Solum's notion of original meaning is minimalist, hoping to keep the words in the Constitution from meaning different things as time passes but ascribing little content to the significance of those words. Thus, "due process" means whatever the phrase "due process" meant during Reconstruction, but we do not know how that applies to abortion cases, for instance. Solum's work marks the epitome of the hermeneutic approach to justifying and defining originalism and the evolution of original meaning. It sidesteps questions of constitutional legitimacy while providing a view of original meaning that lacks strong implications for judicial decision making. Besides decisions which flatly contradict the constitutional text or grossly distort its meaning (so that "domestic violence" is interpreted to mean spousal

[75] *Id*. at 598.
[76] *See* Solum, *supra* note 24, at 2-10.

abuse), it is difficult to discern what limit there is to judicial authority under Solum's post-originalism.

Consider where we began this history and where we have ended. What started as a theory concerned with judicial neutrality has become one mandating judicial "ratification" of evolving social mores.[77] What was a theory deeply rooted in popular sovereignty is now one that rejects such a vision as impossible or ignores sovereignty questions altogether.[78] What was once a method of constitutional interpretation confined to the Founders' intentions has become a method concerned only with ensuring that the phrase "domestic violence" does not come to mean spousal abuse.[79] And the theory that used to be originalism's nemesis—that of a Living Constitution—is now cast as its natural companion.[80] The old originalists and their intellectual descendents persist in their worldview, while the ascendant theories revolt against the principles of the old order. The result is theoretical incoherence, a crisis of indeterminacy in which the originalist label loses all force. Like two runners sprinting in opposite directions and linked only by drawstring, a break must come. The center cannot hold; the string cannot bind. If originalism is to survive as a viable school of constitutional meaning, it must separate

---

[77] *Compare* BORK, *supra* note 31, at 143-53 (specifying the need for the neutral derivation, definition, and application of principles) *with* Balkin, *supra* note 71, at 562 (describing the function of courts as legitimizing changes in constitutional law in accordance with changing social mores).

[78] *Compare* Bork, *supra* note 27, at 1-7 (describing the Madisonian Dilemma and the authority delegated to the Supreme Court by the people) *with* BARNETT, *supra* note 26, at 11-31 (positing the impossibility and incoherence of popular sovereignty in the United States) *and*, *generally*, Solum, *supra* note 24 (in which Solum does not endorse a theory of constitutional legitimacy).

[79] *Compare* BERGER, *supra* note 36, at 402 (giving a definition of original intent based on the intent of the Founders) *with* Balkin, *supra* note 71, at 552 (providing the example of "domestic violence" in Article IV) *and* Solum, *supra* note 24, at 3-4 (providing the same example to explain what he means by "semantic content").

[80] *Compare* Rehnquist, *supra* note 32 (arguing for originalism in opposition to "the notion of a Living Constitution) *with* Balkin, *supra* note 71, at 562 (describing constitutional construction as the employment of Living Constitutionalism).

itself from the post-originalist theorists. It must renounce their theories, because the alternative is its own repudiation.

D. POST-ORIGINALISM: EVOLUTION OR BREAKING POINT?

Of course, one could argue, against my descriptive account of why the post-originalists are fundamentally different from what originalism has been understood to mean, that some of the developments in originalist scholarship chronicled above, such as the move from original intent to original public meaning, are as significant as the shifts that the post-originalists represent. If originalists were still originalists after largely abandoning original intent, why cannot originalism adapt to the views of the post-originalists? Furthermore, it could be said that my account is insufficient as a historical matter because it leaves out much of the literature of the last twenty years. How can this constitute an adequate descriptive account?

The changes that I describe as beginning in the 1980s, however, are not of the same magnitude as those advocated by the post-originalists. The change from original intent to original public meaning meant that the historical evidence used to define original meaning shifted somewhat, but the same framework continued in force after the change took place. The question was what best represented the will of the popular sovereign, not whether one ought to obey that will. Moreover, in practice, the distinction between original intent and original public meaning is usually not very significant. As Richard Kay has noted, "[The ratifiers'] subjective intentions are even more likely to coincide with the meaning of the text that would have been generally understood at the

time. Consequently, original understanding almost always will yield the same results as will original intentions."[81] The hermeneutics debate may have opened up the possibility of doing away with theories of legitimacy, but early on the most prominent originalists engaged in those debates—Kay and Alexander—continued to adhere to such theories. And while Maltz and Whittington's move away from judicial restraint may at first seem alarming, in fact this was more a de-emphasis of self-conscious judicial restraint than a wholesale abandonment of the idea that the judicial role is limited. What Whittington, at least, sought to dispel was the notion that judicial restraint was an end in itself and could trump original meaning when that meaning was clear, but he remained suspicious of judicial power when it was not firmly grounded in original meaning.[82]

By contrast, the post-originalists have forcefully thrown out these core concepts, which is why they are so different in a purely descriptive sense. While, my descriptive account might be more complete with a full, methodical chronicling of several major originalists I have left out, such as Michael McConnell, Steven Calabresi, and other more recent theorists, such an account would inevitably become tedious and distract from the flow of the argument. A much more comprehensive descriptive account has been produced by Jonathan O'Neill,[83] and its narrative largely coincides with my own. One would be hard-pressed, in any event, to find evidence of a radical departure from traditional originalism in any of the theorists preceding Barnett, Balkin, and Solum. While I do not maintain that originalism has stuck to the three core concepts outlined above throughout its history, I think that deviations from those principles have never been

[81] Kay, *Originalist Values and Constitutional Interpretation*, 19 HARV. J. L. & PUB. POL'Y 338 (1995).

[82] It is somewhat more difficult to get a handle on what Maltz saw as the implications of a de-emphasis on judicial restraint. His book is not very clear on this point, but I do not read him as advocating the abandonment of a restrained judicial role in the way the post-originalists do.

[83] *See generally* O'NEILL, *supra* note 1.

as significant or sweeping as the theoretical developments of the post-originalists have been. One can recognize the difference between black and white while acknowledging shades of gray. It is my hope that what I have presented will be sufficient to show that from a historical perspective the post-originalists constitute a distinct theoretical strain from what originalism has traditionally been. If at least that much is clear, then there is already a sufficient basis for creating a new label for these three theorists for the sake of theoretical coherence and clarity in scholarly discourse.

E. The Salience of the Originalism/Nonoriginalism Dichotomy

All of this assumes implicitly, of course, that originalism is itself a distinctive theory of constitutional meaning. However, this is not an uncontroversial position. Stephen Griffin has recently revived the criticism that there is no meaningful way to distinguish between originalism and nonoriginalism. Griffin finds it "puzzling that scholars persist in making this distinction without taking account of earlier cogent criticisms."[84] The fact is, according to Griffin, "all plausible theories of constitutional interpretation make some appeal to understanding the Constitution in a historical context."[85] Thus, "scholars today distinguish among forms of originalism, not between originalism and nonoriginalism."[86]

Griffin makes a reasonable objection that deserves a response. Perhaps it is begging the question to assume that the originalism/nonoriginalism dichotomy exists. Given that this essay is premised on such a distinction, it is worth devoting a few pages to

[84] Griffin, *supra* note 26, at 1192.
[85] *Id*. at 1193.
[86] *Id*.

an examination of the arguments Griffin finds so persuasive. These arguments come from two sources, one more and the other less familiar to the reader: Lawrence Solum and David Hoy.

In 1988, Lawrence Solum published an article challenging the originalism/nonoriginalism distinction.[87] Like David Hoy's similar effort that same year,[88] Solum put forward a hermeneutic critique based primarily on Hans-Georg Gadamer's work. Solum contended, following Gadamer, that "[o]ur understanding of the Constitution . . . is enabled by our participation in a tradition that links us to (but also separates us from) the concerns of the framers and ratifiers . . . . [T]radition both conditions and enables understanding."[89] As Solum characterizes Gadamer, interpretation occurs against a background of prejudices and prejudgments about meaning such that "[t]here is no neutral vantage point from which a text can be understood independently of any tradition or prejudice."[90] Solum provides the example of a tribe totally ignorant of American history and tradition attempting to interpret our Constitution. The tribe, says Solum, would have no recourse but to look to its own prejudices about the meaning of language and its own traditions to interpret the text. "In a real sense," Solum concludes, "[The tribe] would have a different constitution."[91] Our traditions and contemporary perspectives shape our understanding of a text. To divorce ourselves from these prejudices is not only impossible but, if successful, would completely alter the meaning of the Constitution.

---

[87] Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599 (1988-1989).
[88] David C. Hoy, *A Hermeneutic Critique of the Originalism/Nonoriginalism Distinction*, 15 N. KY. L. REV. 479 (1988).
[89] Solum, *supra* note 87, at 1606.
[90] *Id*.
[91] *Id*. at 1604-05.

From this basic premise, Solum deploys two complementary arguments against the originalism/nonoriginalism distinction. The first is that because our understanding of the text depends on background assumptions about meaning, and because those prejudices are shaped in large part by tradition, "we cannot help but understand [the Constitution] in light of its origin . . . . In this sense, to the extent that anyone is an originalist, we all are and must be originalists."[92] Because all interpreters have the tradition of the Founding in mind when approaching the text, reference to the Founding is not unique to any particular school of interpretation but, rather, is common to all.

The second argument proceeds from the other end of the spectrum and claims that since our background assumptions and prejudices include our contemporary experiences and context, we are invariably separated from the original context of the Constitution. Solum writes: "Our understanding of original intent is necessarily conditioned by our own situation and concerns. Thus, our understanding of an author's original intent necessarily reflects our perspective."[93] Originalism, insofar as it seeks to reconstruct this intent, becomes an impossibility since "[t]o understand, says Gadamer, is to understand differently."[94] We can try to access the original historical context of the Constitution, but whatever we construct will always be an ahistorical merger of past and present contexts. Solum's first argument is that nonoriginalism is conceptually incoherent, while his second is that originalism is impossible. The result is the collapse of the originalism/nonoriginalism distinction.

Whittington has provided a powerful rejoinder to the hermeneutic critique advanced by Solum and others, a fact overlooked by Griffin when he invokes the

[92] *Id*. at 1607.
[93] *Id*. at 1609.
[94] *Id*. at 1610.

arguments in Solum and Hoy's respective articles.[95] Correctly, I believe, Whittington admits frankly that our perception of the past is inevitably tainted by our present context. "[W]e can only understand a text as we understand it; that is, there is no way to step outside our context in order to check its accuracy."[96] However, it does not follow that originalism is impossible or that all theories are, in fact, originalist.

Whittington points out that the hermeneutic critique has buried within it the solution to the problem it poses. Solum posits that the historical and interpretive distance between us and the Founders is so great that we can never really understand the Constitution in the same way they did. However, the fact that we can recognize that our context is different from the Founders' context demonstrates that we understand both contexts enough to be able to identify these differences, and that entails a great degree of knowledge of both contexts.[97] The logical implication is that "the differences [between contexts] are not in fact radical, that they are not so extreme as to prevent translation or interpretation."[98] If they were, the Founders' context would be impenetrable to us, and interpretation would never get off the ground.

Furthermore, the same advocates of these hermeneutic arguments, including Solum, regularly point out differences between methods of interpretation that implicitly recognize that there are, in fact, distinctions between theories.[99] Solum falls into this self-made trap by arguing in the first half of his article that no theoretical distinction between originalism and nonoriginalism could exist and then turning in the second half to an empirical analysis purporting to show how self-described originalists fail to live up to

---

[95] *See* Griffin, *supra* note 26, at 1192-93.
[96] WHITTINGTON, *supra* note 26, at 92.
[97] *Id.*
[98] *Id*.
[99] *Id*. at 92-93.

originalist tenets.[100] But if Solum is capable of showing how these avowedly originalist judges transgress the rules of originalism he uses for his analysis, then he must be capable of identifying what those rules are and how they differ from nonoriginalism. If originalism is the same as nonoriginalism, then Solum could not conduct an analysis showing how judges never practice originalism in the real world. The second half of his paper is an implicit refutation of the first.

Of course, Solum could respond with a more practical argument, asserting that the distance from the Founders' context renders historical research inherently subjective and arbitrary. The objectivity that originalists so often tout is, Solum would say, a sham. But this asks too much of originalism or any historical interpretation, and it is a weak argument when applied to originalist historical inquiries in particular. Because originalism seeks specific answers to narrow questions (e.g., does the Equal Protection Clause prohibit segregation in public schools?), "originalism constrains the historical interpretation, structuring the historical field so as to distinguish different levels of historical evidence and to provide the footing for relatively objective evaluation."[101] Discerning the causes, symptoms, and consequences of the American Revolution is one kind of historical project, but seeking to know what was meant by the phrase "freedom of speech" is quite another. The latter, being relatively limited, lends itself to much more objective analysis by virtue of its specificity.

Solum also puts forward Gadamer's theory of how to understand a text. He does this in order to show that originalism's attempt to understand the past and apply it to the present is flawed, but the effect of his argument is limited. Hoy makes this argument with

---

[100] *Compare* Solum, *supra* note 87, at 1603-21 *with id*. at 1621-29.
[101] WHITTINGTON, *supra* note 26, at 107.

greater force, taking issue with the common view that an interpreter first understands a text and then applies it to a given fact pattern. Hoy contends that an interpreter cannot understand a text until he has applied it to the current context. For Hoy, understanding a text necessarily involves applying it to present circumstances:

> In finding that the text is at all intelligible, the moment of application . . . has already taken place for us. A text only makes sense insofar as it inheres in a context, and for us even to be able to understand the text at all, we must presuppose an understanding of that context.[102]

Application and understanding occur at the same time because the former is required for the latter. Legal texts, in particular, require application for understanding because they exist for the sake of the present. As Gadamer wrote:

> A law does not exist to be understood historically, but to be concretized in its legal validity by being interpreted . . . . This implies that the text . . . if it is to be understood properly—i.e., according to the claim it makes—must be understood at every moment, in every concrete situation, in a new and different way. Understanding here is always application.[103]

To attempt to understand a law in its historical context apart from application, then, is to misunderstand the law because understanding it involves knowing how it applies *today*. Thus, originalism's insistence that we must first understand the original historical context of the Constitution before proceeding to apply the document to current problems is profoundly mistaken from Hoy's perspective, and this suggests that a truly "original" understanding of the text is impossible as much as a truly contemporary understanding would be. Originalism merges with nonoriginalism because it is impossible to separate original context from contemporary application.

But as Whittington points out, this theory flies in the face of common interpretive experience. We experience understanding and application as separable moments in

---

[102] Hoy, *supra* note 88, at 493.
[103] HANS-GEORG GADAMER, TRUTH AND METHOD 307 (2d. rev. ed. 2004).

everyday life. "Quite often, in fact, we must formulate and understand a general principle before specific applications can be considered, let alone resolved."[104] It would be difficult, for instance, for us to begin deciding whether certain cases fall under the Supreme Court's original jurisdiction before we knew what "original jurisdiction" was understood to mean in 1788.[105] In interpretation, we often move from the abstract to the specific, but it is frequently impossible to consider the specific without first understanding the abstract. Even in instances where the two actions—understanding and application—seem to occur simultaneously, they remain distinguishable. Whittington provides a very helpful elaboration on this point worth quoting at length:

> The process of application may help clarify our understanding, aid in our explanations of what we understand, or deepen our understanding by extending the logic of our thoughts in ways we had not previously considered. None of these uses of application, however, requires that the text take on new meaning with each application. Even after an application is made, the meaning of the text remains the same, though it is now more explicit.[106]

Application, then, can make our understanding of meaning more precise, but it need not determine that understanding. Because there is a meaningful difference between understanding and application, there is nothing illogical in saying that originalism seeks to understand the original meaning before applying it to a given situation, and originalism is able to maintain the separation of original context from contemporary application.

However, the discussion about the originalism/nonoriginalism dichotomy does highlight at least one important lesson—the need for clarity in defining the two camps. Griffin is correct in protesting that no credible constitutional theory purports to divorce

---

[104] WHITTINGTON, *supra* note 26, at 104.
[105] U.S. CONST., art. 3, § 2.
[106] WHITTINGTON, *supra* note 26, at 104.

itself entirely from some notion of original beliefs about the text.[107] I will not offer a definition of originalism here because the defense of such a definition would be the project of a different and lengthy essay. The next section should help the reader understand what I think are the core elements of originalism—popular sovereignty, judicial restraint, and a robust conception of original meaning—, but originalism entails more than these core concepts. It is possible, however, to define nonoriginalism more precisely. When I use "nonoriginalism" I refer to those theories which I think fall outside of the originalism family, and they might do so for a number of reasons. Within the context of this paper, the three post-originalists are nonoriginalists because they fail to incorporate the three core concepts into their theories. Generally, however, there is nothing to unite nonoriginalist theories other than their rejection of originalism. For instance, a theorist who privileges the consequences of an interpretation over the history of a provision necessarily discards the primacy of original meaning, which is connected with all three core concepts even if it does not focus on one in particular. It may at first seem odd to define nonoriginalism relative to originalism since I do not offer a definition of originalism in the first place, but the reader should not be too troubled by the exact boundary between originalism and nonoriginalism outside a specific context. It is sufficient for our purposes to say that when I label a theory as being nonoriginalist I mean that it falls outside the boundaries of originalism based on whatever particular aspects of the theory I am evaluating.

F. OUT WITH THE OLD: THE ABANDONMENT OF THE ORIGINALIST PATRIARCHS

[107] *See* Griffin, *supra* note 26, at 1193.

In the introduction to this paper, I compared originalism to the paradigmatic case of an undergraduate who, under a barrage of criticism, renounces many of his long-held beliefs and embraces those which are deemed more respectable by his critics. The student does not realize that the new positions he has adopted are incompatible with many that he still retains from his upbringing; all he knows is that he cannot bring himself to return to the callow views he once held. Seduced by his new fellows into abandoning those "extreme" or "unsophisticated" tenets of his past, our undergraduate friend now looks upon his parents' opinions with ill-disguised contempt. He feels he cannot go back, but the future is confused, uncertain, imposing. He is adrift.

Having now read a brief synopsis of the history of originalism, the reader, hopefully, will find the analogy to the hapless undergraduate more cogent. Originalism, under sustained criticism (especially during the 1980s), has thrown off the core principles of its patriarchs. The popular sovereignty, judicial restraint, and original intent of Bork, Rehnquist, and Berger have been replaced by the problematic sovereignty, judicial license, and semantic meaning of Barnett, Balkin, and Solum. Living constitutionalism, a position reviled by these patriarchs but, at the same time, the theory favored by most legal academics, has been incorporated by originalism. But I have not yet discussed an important, though subordinate, cause for this crisis in originalism—the contempt for the older originalism.

Perhaps because of his visibility and prominence since Bork's failed nomination to the Supreme Court, Justice Scalia has come in for the brunt of this kind of criticism. While Scalia's move away from original intent started the evolution towards semantic

meaning, his originalism is a far cry from that of the post-originalists,[108] and his importance in the history of originalism solidifies his status as one of the founders of the originalism movement. But Scalia's stature has not prevented originalists and nonoriginalists alike from assailing his views as outdated and simplistic. Even an originalist whose general outlook resembles Scalia's, Michael Stokes Paulsen, has written that "though Justice Scalia remains the dominant figure in the shift to originalist textualism, his is not always the most refined or consistent version of the theory. In some ways, he is a leader whose followers have bettered their leader's own work."[109]

There is the much less respectful recent critique by Andrew Koppelman, in which, besides taking issue with Rehnquist's originalism on the Establishment Clause issue,[110] he takes Scalia to task for alleged inconsistencies and logical fallacies in Scalia's Establishment Clause jurisprudence: "This is a distinctive kind of originalism, and it

---

[108] Solum has tried to link Scalia to some version of semantic originalism since the Supreme Court handed down its decision in District of Columbia v. Heller, 128 S. Ct. 2783 (2008). *See* Solum, *supra* note 21. Ultimately, I think attempting to reconstruct any judge's judicial philosophy on the basis of a single opinion is problematic. Justice Scalia has written many opinions and dissents, and his respect for precedent, advocacy of judicial restraint, continued belief in popular sovereignty, and the fact that his view of original meaning is more robust than the minimalist "semantic originalism" of Solum, mark him as part of the old originalist order rather than the new, at least as "old" and "new" are used in this paper when referring to originalism. *See* Scalia, "Response," *in* SCALIA, *supra* note 10, at 144-49 (explaining his view of original meaning, which entails more than just semantic content). For opinions decrying judicial activism and hinting at a popular sovereignty theory of constitutional legitimacy, *see generally* Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (Scalia, J., dissenting); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (Scalia, J., dissenting); Romer v. Evans, 517 U.S. 620 (1996) (Scalia, J., dissenting); Stenberg v. Carhart, 530 U.S. 914 (2000) (Scalia, J., dissenting); Lawrence v. Texas, 539 U.S. 558 (2003) (Scalia, J., dissenting). For a more explicit invocation of popular sovereignty, *see generally* C-SPAN. (2010). *Justices Scalia and Breyer on the Constitution* [Video] Retrieved March 31, 2010, from http://cspan.org/Watch/Media/2010/03/27/AC/R/31071/Justices+Scalia+Breyer+on+the+Consti tution.aspx. For a discussion of precedent, *see* Scalia, *supra* note 64 , at 861-62. For an explanation of "old" and "new" originalism within the context of this paper, *see supra* note 26.

[109] Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91GEO. L.J. 1113, 1140 (2002-2003).

[110] Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 731-33 (2009).

ought to have a name. Call it 'I Have No Idea Originalism.'"[111] Then, of course, there is Randy Barnett's lecture entitled "Scalia's Infidelity" in which he famously goes so far as to argue that "Justice Scalia is simply not an originalist."[112] All of this has led Steven Smith to summarize the disdain for the older originalists in a way that is as articulate as it is true:

> Older originalist heroes like Bork and Scalia, though they still labor beside us, by now are viewed, even by originalists, with a mixture of filial respect and condescending embarrassment. These venerable figures can look like conceptual neophytes, klutzing among concepts and distinctions that they do not quite grasp.[113]

Originalists, by and large, see these titans of the past as antiquarian. They "get older, get out of date, get left behind."[114] The old guard discredited, the new theorists have a free hand to lead originalism astray. After all, how many undergraduates, once they have lost faith in their parents' ideas, are willing to endure their father's lecture?

III. THE CORE CONCEPTS OF ORIGINALISM

In a recent article, Kurt Lash described the theory of popular sovereignty as "the most common and most influential justification for originalism."[115] The historical account of originalist thought provided in the last section lends credence to this analysis.[116] But to claim, as this paper does, that popular sovereignty is a fundamental

---

[111] *Id*. at 737. Koppelman's sentiments about Scalia's Establishment Clause jurisprudence have been echoed in more general form by Colby and Smith. *See* Colby and Smith, *supra* note 8, at 253.

[112] Barnett, *supra* note 64, at 13.

[113] Smith, *supra* note 14, at 6.

[114] *Id*. at 7.

[115] Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1440 (2007).

[116] For further sources documenting the role popular sovereignty plays in originalism, *see* Colby and Smith, *supra* note 8, at 275-79.

component of originalism requires more than a descriptive account of originalist scholarship; it requires a normative defense of why originalism must include popular sovereignty as its theory of constitutional legitimacy. Once this is established, it becomes clearer why judicial restraint is so central to originalist thought and why a "thick" as opposed to a "thin" conception of original meaning must be adopted. These three core components—popular sovereignty, judicial restraint, and a robust notion of original meaning—form the basis of a coherent originalism. In this section, I defend all three.

A. THE NEED FOR LEGITIMACY

It is not immediately obvious why originalism should be wedded to popular sovereignty or, for that matter, to any theory of constitutional legitimacy. One could reasonably argue—in fact, some have argued—that originalism can stand without appeals to theories of constitutional legitimacy or popular sovereignty in particular. Saikrishna Prakash, for instance, tries to separate the question of whether to adhere to the Constitution from the puzzle of how to interpret the document. Originalism, in his view, "has a broader appeal as a theory of interpretation, and it should not be tied to controversial normative arguments that have more to do with whether we ought to adhere to the rules found in the original Constitution."[117] Prakash's argument raises the question: why should originalists care about theories of constitutional legitimacy?

While Prakash might be right in distinguishing between theories of interpretation and legitimacy, it is very important to understand that, historically, originalism has not

[117] Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 HARV. J. L. & PUB. POL'Y 485, 491 (2008).

been merely a theory of textual interpretation. Theories of textual interpretation aim only at discerning the true or best meaning of a text, be it legal, literary, or otherwise. But because originalism, as understood in jurisprudential literature,[118] is primarily designed to guide judges in their capacity as arbiters in legal disputes,[119] it seeks not only the true meaning of a text, but also a way of legitimizing that meaning for the parties to a case. Originalism, because it is supposed to produce and explain results in instances of legal

[118] *See generally* Section II, *supra*. The reader will recall that originalism was born as a response to the decisions of the Warren Court and was, from the beginning, a theory that contested the legitimacy of those decisions. The writings of Bork, Rehnquist, and Berger make this abundantly clear, as does the political rhetoric of the time. *See generally* Edwin Meese, III, *Speech Before the American Bar Association, Washington, D.C., July 9, 1985*, *in* FEDERALIST SOCIETY, *supra* note 23.

[119] It is important to emphasize the word "primarily" here, since I think that a truly comprehensive theory of originalism would take into account constitutional interpretation as practiced by the political branches. Originalism, properly understood, is not just about judicial constitutional interpretation. Nonetheless, given that constitutional decisions are primarily made by the courts, I think it is fair to say that originalism is directly principally at the judiciary. *See generally* Jose Joel Alicea, *Originalism and the Legislature*, 56 LOY. L. REV. (forthcoming Summer 2010).

The reader might wonder if this acknowledgement on my part supports Prakash's argument that originalism is only about interpretation. After all, how could judicial restraint be a core component of legislative originalism? How could the need to adjudicate constitutional disputes be central to legislative originalism? While these concerns may be superficially potent, upon closer examination they do not hold up. Legislative interpreters, for instance, would also have to adhere to a theory of popular sovereignty when defining the limits of their powers, and they would employ thick original meaning to do this. Because it is a lawmaking body, unlike the judiciary, there is a difference in terms of what "restraint" means to the legislature. Whereas the judiciary cannot go beyond what constitutional interpretation commands, legislatures need no such command to act so long as those actions are *consistent* with original meaning. That is because the popular sovereign has empowered the legislature to create laws even where the sovereign has not specifically demanded them, whereas no similar mandate exists for the judiciary. Legislatures have more power under originalist constraints by virtue of popular sovereignty theory, but they still must uphold the three core concepts. This is important to emphasize lest I be interpreted as saying that the legislature has supremacy over interpretation. There are strict limits to legislative power as there are for judicial power, and the judiciary ought to enforce rigorously those limits against the legislature where it has a clear warrant from the Constitution to do so. I will make this point more explicitly later on in the section when I discuss the idea of judicial restraint.

As for resolution of constitutional disputes, the fact that constitutional disputes are not formally presented in legislative action does not mean that they do not exist. Lawmakers must always decide whether or not they have the power to do a particular action or pass a piece of legislation. Here, I agree with Jack Balkin when he says that "every Congressional enactment passed under the commerce power, and every appropriation under the General Welfare Clause, involves an implicit interpretation of these clauses, whether or not any court ever considers them. Every appointment of an inferior officer, indeed, even the purchase of a new stapler in a regional office of the Social Security Administration presumes the political power to act." Balkin, *supra* note 71, at 568. Originalism thus plays a similar adjudicative role in legislative interpretation when it guides lawmakers as to the extent of their powers and allows them to explain the legitimacy of their actions to constituents. The fact that this paper is concerned with judicial interpretation should not lead to the conclusion that the three concepts are only relevant to judicial interpretation.

conflict, must have the capacity to show parties that the result is both correct as a matter of legal interpretation and worthy of their obedience as a matter of legitimacy.

This might at first seem tautological, so an example might help to clarify the point. Imagine that in 1940, two brothers, both of whom are lawyers, write a document similar to the United States Constitution. Call it the Charter. Sixty years later, the grandson of one of the lawyers happens to be an appellate court judge, and in a case before his court the judge uses the Charter as the basis for his opinion. A firm believer that the meaning of the text is identical with the intention of the authors, the judge provides a detailed historical account to explain the intended meaning of the provision he thinks governs the case. Nonetheless, the parties to the case are shocked when they read the opinion. Both parties agree that the intention of the authors governs the meaning of a text, but they are incensed at the outcome of the case. Obviously, the reason is not that the judge was incorrect as a matter of interpretation; both parties think his analysis of the Charter is correct. They are upset because the judge is asking them to obey a decision that lacks legitimacy. Because the judge can provide no reasons why the parties should obey a result dictated by this alien text, his decision has no normative force. Significantly, if originalism is merely a theory of textual interpretation, it has nothing to say about this thought experiment. An originalist *qua* originalist, according to this view, would not be able to reprimand the judge. However, we must recall that originalism was born out of the controversies surrounding the Warren Court. Its most prominent advocates and some of its most sophisticated theorists have been judges.[120] It is difficult to deny that originalism has been throughout its history a theory designed to guide judicial decision

[120] One immediately thinks of Robert Bork, William Rehnquist, Antonin Scalia, Clarence Thomas, and Michael McConnell.

making. But if a theory of judicial decision making is silent on the absurd result of the hypothetical sketched above, how can it be a plausible theory for judges to adopt?

For originalism to live up to its historical aspirations of providing a rationale for judicial decisions, it cannot just be a theory of *how* to interpret the Constitution; it must also be a theory of *why* we should interpret the Constitution.[121] Why should we be faithful to *this* constitution? Why should it command our obedience and form the basis for legal judgments? If originalism cannot answer these questions, if it is nothing more than a theory of how to interpret a text, then it has nothing special to offer jurisprudence. If originalism is just about interpretation, then the debates about originalism would become no more than the continuation of debates surrounding textual interpretation that have endured throughout the ages. But surely we think this account is false, for why else would we have so earnestly and resolutely engaged in debates about originalism instead of in debates about hermeneutics for the past forty years?[122] We engage in these debates because what is at issue is more than how to interpret a text; it is the argument over the basis of the Constitution's legitimacy and how to preserve that legitimacy through time. As Larry Alexander has said: "[A] method of constitutional interpretation must reflect why the Constitution is considered authoritative."[123] Originalists think they can provide the best account of constitutional legitimacy and the interpretive method that maintains that legitimacy.[124]

---

[121] John McGinnis and Michael Rappaport's article helped put me on the track to this way of thinking about originalism. *See* McGinnis and Rappaport, *supra* note 20, at 371-73.

[122] Of course, hermeneutics is an important part of the originalism debate, but there has obviously been much more to the originalism debate than this.

[123] Alexander, *Takings of Property and Constitutional Serendipity*, 41 U. MIAMI L. REV. 223, 226 (1986-1987).

[124] The reader may wonder whether the requirement that originalism serve as more than a theory of interpretation is a fourth core concept. Have I smuggled in an underlying fourth concept to support my other three? I do not believe so. The notion that originalism is more than a theory of interpretation is rather

Of course, Professor Prakash might remain unconvinced. In fact, his view that "originalism, properly understood as an interpretational methodology, can never hope to provide an argument for a document's authority or legitimacy" strongly suggests he would.[125] He might deny that originalism really is about more than discerning the true meaning of a legal text, or he might disagree with the claim that originalism tries to guide legal decision makers (usually judges) and therefore must provide an account for why these decisions should be regarded as legitimate. This back-and-forth could continue for quite some time without any satisfactory resolution, and may serve only to beleaguer the issue as well as the reader; furthermore, there are other reasons for including a theory of constitutional legitimacy in originalism which might prove more compelling.

The main argument in this vein is that a theory of legitimacy may impact interpretation, and that it is therefore a vital companion to interpretation. This is a position taken by many legal theorists, including prominent originalists. Judge Frank Easterbrook, for example, has said that "[f]or the textualist a theory of political legitimacy comes first, followed by a theory of interpretation that is appropriate to the theory of obligation."[126] Judge Michael McConnell has made the point even more explicitly:

---

a statement of what makes originalism a theory of jurisprudence, not an argument for what makes originalism unique among those theories (which is the role played by the core concepts). I think, in other words, that *any* theory of jurisprudence has to have the ability to produce and explain outcomes. Otherwise, it is not a theory of jurisprudence as much as it is a theory of textual interpretation; it is not distinctly jurisprudential in character (though it may be, perhaps, legal in character insofar as it prescribes the method of interpreting legal texts). While I realize this is not an obvious or uncontroversial position, I do not think it would make sense to argue for it here since my purpose is narrower. I only have to show that originalism must have this characteristic to distinguish it from the intentionalist theories of textual interpretation, which I believe I have done.

[125] Prakash, *supra* note 117, at 490.

[126] Frank Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1119 (1997-1998).

> We cannot address the question of *how* to interpret the Constitution for the purpose of resolving present-day disputes without first understanding *why* we should consult the decisions of persons long dead for that purpose. Moreover, it turns out that our answer to the "why" question has implications for the "how" question. We can determine the method to interpret the Constitution only if we are first clear about why the Constitution is authoritative.[127]

The argument, then, is that whatever theory of constitutional legitimacy we adopt has implications for our theory of interpretation.

There are two possible responses to this line of reasoning. The first would be to question whether it is necessarily true that our chosen legitimacy theory will affect how originalism operates. Adam Samaha recently wrote an incisive article challenging the notion that the relationship between legitimacy theories and theories of interpretation is always unidirectional or that there is a relationship in all instances.[128] Despite finding that, in the cases of most theories of legitimacy, the relationship is much more complex than a simple linear path from legitimacy to interpretation, Samaha nonetheless argues that in the case of contractarian theories of legitimacy there is an influence on interpretation.[129]

It is not difficult to see why. If popular sovereignty is the legitimacy theory we choose to accept, there are clear implications for how we should interpret the written document purporting to transfer power from the popular sovereign to its agent. For one, if the people are sovereign and have only delegated powers to government agents, then those agents are barred from exceeding their mandate lest they supplant the people as the

---

[127] Michael McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1128 (1997-1998).

[128] *See generally* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606.

[129] *Id*. at 655-60, 670-71, 680. By contractarian, Samaha is referring to popular sovereignty theories that presuppose a contract in which the popular sovereign transfers power to a government agent.

sovereign. Tara Smith, paraphrasing Gregory Bassham, has summarized the principle as stating that "no people can be truly sovereign if its agents are free to defy their commands by re-interpreting those commands in a way that the people never intended."[130] Whittington writes that "methods that authorize judicial activism in disregard of the intentions of the founders implicitly cast the Court itself in the role of the sovereign, authorized to remake the constitutional meaning in accord with some preferred conception of the political good."[131] Viewing the people as sovereign places heavy demands on constitutional interpreters, who are acting merely on borrowed authority.

This is where the second argument against the need for a legitimacy theory comes into focus. Prakash and his intellectual allies who believe that interpretation is no more than the search for original intent might object that a popular sovereignty theory has no impact on their view of interpretation. After all, if interpretation entails a theory of original intent, and if the implications of popular sovereignty seem to be in the direction of original intent, what more could popular sovereignty add to the theory?

Not much—if one assumes that original intent will provide us with answers to all constitutional questions. But, as Whittington reminds us, "Regardless of the extent of judicial interpretation of certain aspects of the Constitution, there will remain an impenetrable sphere of meaning that cannot be simply discovered."[132] There will always be clauses or words in the Constitution whose meaning cannot be entirely discovered by reference to original intent. Likewise, there will always be cases which fall into crevices within the Constitutional structure and are difficult to resolve solely by looking to

---

[130] Tara Smith, *Originalism's Misplaced Fidelity: "Original" Meaning is Not Objective*, 26 CONST. COMMENT. 1, 7 (2009).

[131] WHITTINGTON, *supra* note 26, at 155.

[132] *Id*. at 7.

original intent. In such instances, an interpreter needs something beyond original intent to direct his action. A theory of constitutional legitimacy can fulfill that role by placing restrictions on the possible choices an interpreter can choose.

For instance, where the original intent is not clear, a theory of popular sovereignty would prohibit a judge from deciding a case by the dictates of his own moral code. For a judge to do so would be for him to act without a specific mandate from the sovereign, which would be tantamount to the judge's taking on the position of sovereign. As Whittington has stated, "[J]udicial passivism is appropriate at the limits of interpretive knowledge."[133] Instead, the judge would either leave the decision to the branches most in tune with the sovereign will (the political branches)[134] or would seek some other means of resolving the case which had roots in the sovereign will of the people. Michael Rappaport and John McGinnis, for example, have suggested that interpreters use "the interpretive methods that the constitutional enactors would have deemed applicable to [the Constitution]."[135] This "original methods originalism" would be one way of filling in the gaps that original intent leaves behind while staying within the boundaries set up by popular sovereignty. A theory of legitimacy can therefore affect interpretation even where it seems that one can derive a theory of interpretation without reference to a legitimacy theory.[136]

---

[133] *Id*. at 168.

[134] *See id*. at 158 (describing the nature of constitutional decision making when interpretation runs out).

[135] McGinnis and Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW UNIV. L. REV. 751, 751 (2009).

[136] A theory of legitimacy would play an even more important role where the interpreter does not have a "thick" conception of original meaning. If, for instance, the interpreter followed Solum's "Semantic Originalism," he would only be bound by the semantic content of the Constitution, which would supply very little guidance for notoriously vague provisions like the Fourteenth Amendment. In cases requiring interpretation of such provisions, Solum cannot offer much to direct the interpreter's decision since he has no theory of legitimacy. A theory of legitimacy like popular sovereignty, however, places tight restrictions

B. WHY POPULAR SOVEREIGNTY?

Even if a theory of constitutional legitimacy must be incorporated into originalism, there is the additional question of what theory should be chosen. Fortunately, because we are looking for a legitimacy theory that conforms with originalism in particular, our search need not go far. There is only one theory of legitimacy that is consistent with originalism, and that is the theory of popular sovereignty. Only popular sovereignty makes sense of the constitutional text and allows for a contextualized—and, therefore, accurate—examination of the Constitution's language and meaning.

Popular sovereignty is the theory of legitimacy out of which the Constitution was born. Gordon Wood has provided a classic account of the role the idea of sovereignty played in bringing about the American Revolution:

> Every new institution and new idea sooner or later had to be reconciled with this powerfully persuasive assumption that there could be but one final, indivisible, and incontestable authority in every state to which all other authorities must be ultimately subordinate; "for otherwise, there could be no supremacy, or subordination, that is no government at all."[137]

This eighteenth-century conventional wisdom about sovereignty, Wood writes, "pervaded the arguments of the whole Revolutionary generation from the moment in the 1760's when it was first raised through the adoption of the federal Constitution in 1787."[138] Where sovereignty resided was ultimately the question that led to separation from Great

---

on what options are available to the interpreter finding himself in this conundrum. He would, at least, be able to rule out the idea of deciding the case based on his own sense of justice. *See infra* Section VI.

[137] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787 345 (1998). The popular sovereignty thesis is also maintained by Griffin, no friend of originalism. *See* Griffin, *Barnett and the Constitution We Have Lost*, 42 SAN DIEGO L. REV. 283, 286-90 (2005).

[138] WOOD, *supra* note 137, at 345.

Britain, as Wood tells the story. With Britain insisting that sovereignty could only reside in Parliament and the colonists unwilling to subject themselves to the absolute will of that legislative body, Americans concluded that a split was necessary.[139] That does not mean, however, that the new nation immediately embraced popular sovereignty. There were many turns in the post-Revolutionary road before the country eventually arrived at the notion that the people were sovereign:

> If sovereignty had to reside somewhere in the state—and the best political science of the eighteenth century said it did—then many Americans concluded that it must reside only in the people-at-large . . . . In the people alone "that plenary power rests and abides which all agree should rest somewhere."[140]

In this passage and throughout the relevant chapter of his book, Wood depicts the Americans as slowly coming to the realization that popular sovereignty was the inevitable result of their revolution. Differing slightly from this account is Sean Wilentz's portrayal of the American Revolution as the start of a steady march towards radical democratization in the decades to come. "Nothing like the articulate democratic outburst that gripped America in 1776 had occurred anywhere in the world since the days of the Levellers and Diggers," Wilentz contends, pointing to "democratic partisans [who] demanded any and every sort of political innovation in order to secure what one called 'Proper Democracy . . . where the people have all the power in themselves.'"[141]

---

[139] *Id*. at 344-54.

[140] *Id*. at 382. For an examination of how and why this transition from legislative to popular sovereignty took place *see id*. at 372-89.

[141] SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 29 (2005). For a brief discussion of the socio-political movements and undercurrents underlying the Revolution and ratification, *see id*. at 13-39. It should be noted that Wilentz does not portray the revolutionaries as uniformly democratic. In fact, he masterfully identifies the various groups that emerged out of the Revolution with dramatically different points of view as to the significance and meaning of that event. However, he does argue that the country was swept by a democratic fever in the immediate aftermath of the Revolution, which is slightly different from Wood's depiction in which the revolutions do not immediately embrace the notion of popular sovereignty.

It was within this context that the American Constitution was written. Thomas McAffee writes that it was precisely because the notion of popular sovereignty was dominant that the idea of a written Constitution unchangeable by ordinary legislative action arose: "This creation of a special category of legal norms that the British constitution lacked was accomplished by giving the higher law roots in a document that proceeded from the people—the fountain of all political power."[142] Indeed, the very text of the Constitution is unintelligible without appealing to the idea of popular sovereignty, as McAffee makes clear when he describes James Wilson's lecture on the Preamble. Wilson subscribed to the need for a sovereign in any state, "a power established from which there is no appeal and which is therefore called absolute, supreme, and uncontrollable,"[143] and saw the Preamble as indicating where that power was derived from in the United States. McAffee sums up the conclusion of this line of thought: "Whereas in Great Britain this power resided in Parliament, Wilson contended that in the United States it resided in the people."[144]

The Preamble's opening words, "We the People," are only the most obvious case in which the text of the Constitution is infused with notions of popular sovereignty.[145] The fact that the powers of the federal government are listed[146] carried with it the assumption that the government is not sovereign in the sense described by Wilson and endemic to late eighteenth century thought. If the government was sovereign, and therefore had powers that were "absolute, supreme, and uncontrollable," in Wilson's

---

[142] THOMAS B. MCAFFEE, INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY 121 (2000).
[143] *Id*. at 126.
[144] *Id*.
[145] U.S. CONST., preamble.
[146] U.S. CONST., art. 1-3.

words, why list those powers? It seems to follow that a body with such magnificent authority has all and any powers it desires, "uncontrollable" by an outside source. Yet, as McAffee points out, "this is an appropriate place in which to apply the common law maxim of *expressio unius est exclusio alterius*—the inclusion of such a list of powers logically excludes others," an impossible condition for a sovereign.[147] This is reinforced by the fact that Article I begins, "All legislative Powers *herein granted* shall be vested in a Congress of the United States."[148] Granted by whom? Surely not the Congress itself, and there is little to support the idea that the grant of authority comes from the other branches or the states.[149] Quite clearly, the grant comes from the people, since the Preamble shows that they are the ones who are speaking throughout the text.

---

[147] MCAFFEE, *supra* note 142, at 86. Impossible, that is, for a sovereign as described in the passage by Wood quoted above.

[148] U.S. CONST., art. 1, § 1 (emphasis added). Barnett notes this language in the opening to his chapter on the Necessary and Proper Clause. *See* BARNETT, *supra* note 26, at 153.

[149] The idea that the states were sovereign is probably the most likely competitor to the author's account of popular sovereignty. The Virginia and Kentucky Resolutions as well as the Nullification Crisis both point to the idea that some viewed the states as sovereign after ratification took place. While a full examination of this topic would require another essay, I would like to make three quick points about this view. First, these examples and other prominent instances in which states asserted their sovereignty over the federal government occurred years after ratification. They took place in the midst of very heated and contested constitutional disputes, and I think it is very likely that the state sovereignty rationale was more of a convenient tool than a historical truth about the founding moment. Second, the idea that the states are the sovereign is inconsistent with the Preamble, which announces that "The People" and not "The States" "ordain and establish" the Constitution. *See* U.S. CONST., preamble. Finally, the ratification procedures for the Constitution deliberately appealed to popular conventions, not state legislatures, which reinforces the notion that it was a popular sovereign, not a state sovereign, that was assumed to have established the Constitution. While there are no doubt very good rejoinders to all of these arguments, I believe that the burden is decisively on those who would disagree with my position since both text and contemporary history seem to support a popular sovereignty narrative.

There are other examples that could be cited from the text,[150] but what has been said should be enough to demonstrate that a theory of popular sovereignty is implicit throughout the Constitution. There is great significance for originalists in the facts that popular sovereignty was the accepted theory of legitimacy at the time of ratification and that it was incorporated into the text of the Constitution. An originalist seeks to understand what the text of the Constitution meant at the time of the Founding, whether that entails looking for the original intent, public meaning, or some other conception of original meaning. But if words can only be understood in the context in which they were written, as originalists believe, then how can an originalist ignore the political theory that gave birth to the text? If the text itself presupposes a theory of popular sovereignty, then how can an accurate interpretation of the text disregard this theory of legitimacy?

This is a real problem for any originalist who wants to ignore theories of legitimacy altogether or substitute a different theory.[151] The whole point of originalism is to recapture the meaning of the words by reference to their original context.[152] This is why originalists conduct extensive research into the history of the era as well as the conventions and understandings that permeated legal and political discourse. But to

---

[150] In my view, and in McAffee's as well, the Tenth Amendment is also strong evidence for the popular sovereignty thesis. The amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST., amend. 10. The language of "delegated," "prohibited," and "reserved" powers assumes an authority other than the federal government who has the authority to distribute power. One might say the states are that authority, but that does not comport with the text of the amendment, since it acknowledges that powers can be "prohibited by [the Constitution] to the states," which could not be the case were the states the sovereign. The most plausible conclusion is that the people are sovereign, and it is they who distribute power. *See* MCAFFEE, *supra* note 142, at 85-88.

[151] It might be possible to offer a different version of popular sovereignty that closely resembles the one dominant at the time of ratification. Whittington's "potential sovereignty" theory does seem to preserve the same basic context of the original popular sovereignty theory, though I am not yet certain of this. It remains possible that no theory other than the idea of popular sovereignty endemic to the Founding can be used to accurately read the text. *See* WHITTINGTON, *supra* note 26, at 110-59.

[152] Of course, with the caveat that we will never be able to completely recapture that context because we are looking at it through our present context. *See supra* Section II discussion of Gadamer's hermeneutics and Whittington's response.

understand historical sources and materials, the originalist tries to see things as the people at the time saw them. To approach these materials with no theory of legitimacy is to be blinded from seeing things as the people saw them, just as substituting a different theory is to see things with colored lenses. How is one to interpret the words "herein granted" in Article I without a theory of popular sovereignty? How are the enumerated powers to be understood if the people are not conceived of as sovereign? To throw out the theory of popular sovereignty is emphatically nonoriginalist.

Popular sovereignty and originalism, then, can be thought of as mutually reinforcing concepts. Earlier, I discussed the view held by Michael McConnell and others that popular sovereignty logically leads the interpreter to originalism. But as I have just shown, the relationship is reciprocal. An interpreter who comes to originalism by some other method (be it the writtenness of the Constitution,[153] pragmatism,[154] etc.), will be led by the demands of originalism to a theory of popular sovereignty. The two concepts are bound up with one another.

Of course, this is not an uncontroversial view, and there are several potential responses to it. The least successful response would be to attack the coherence of popular sovereignty itself. Randy Barnett cites the lack of unanimous, free consent to the Constitution, both in the past and the present, as the reason why popular sovereignty is an untenable theory of legitimacy.[155] Christopher Morris has written a powerful critique of the idea of "a people" who are able to give consent.[156] In fact, Morris and others have

---

[153] *See*, *e.g.*, WHITTINGTON, *supra* note 26, at 47-61; BARNETT, *supra* note 26, at 100-09.

[154] *See*, *e.g.*, McGinnis and Rappaport, "A Pragmatic Defense of Originalism," *in* FEDERALIST SOCIETY, *supra* note 23, at 164-78.

[155] *See* BARNETT, *supra* note 26, at 11-31. *See also* Smith, *supra* note 130, at 13-14.

[156] Christopher W. Morris, *The Very Idea of Popular Sovereignty: "We the People" Reconsidered*, 17 SOC. PHIL. & POL'Y 6-11 (2000). For more arguments and citations to other articles against the theory of popular sovereignty, *see* Samaha, *supra* note 128, at 655-60.

gone further to argue that the notion of sovereignty itself, as it was conceived in the late eighteenth century, is impossible and can be done without.[157] There is, thus, no shortage of arguments to be leveled against the logic of popular sovereignty, either from a historical or a normative perspective. None of these claims will avail the originalist skeptic of popular sovereignty, however, since my argument does not depend on the validity of popular sovereignty as a political theory or as a historical reality.[158] Rather, my argument is that originalism demands popular sovereignty as a matter of historical and interpretative accuracy. It is entirely consistent for an originalist to think that the idea of popular sovereignty is absurd and yet agree with my argument that it is required when engaging in the originalist enterprise. Historians, in looking through the eyes of their subjects, take on theories they strongly disagree with all the time to better understand a particular text. How is one to truly understand the internal logic of the writings of John C. Calhoun, for example, if one reads them with an abolitionist mindset? This allows Barnett, for instance, to reject popular sovereignty as a political theory so long as he accepts it for purposes of constitutional interpretation (which, of course, he does not). Skeptics coming from an originalist perspective, then, must find some other way of ridding themselves of popular sovereignty than pointing out its flaws.

Tara Smith has recently put forward two internal criticisms of popular sovereignty based on the idea that the Founders were committed first and foremost to the protection of individual rights.[159] Both are, I take it, intended to show that originalism is self-contradictory because, insofar as it embraces popular sovereignty, it violates the original

---

[157] MORRIS, AN ESSAY ON THE MODERN STATE 172-227 (1998).

[158] I mean that my argument does not depend on popular sovereignty having actually been carried out the way we would expect it to have been at the time of ratification given the theory's precepts. Limitations on voting, for instance, detract from the idea that popular sovereignty was a historical reality.

[159] Smith, *supra* note 130, at 15.

intentions of the Founders with regard to natural rights. She argues, first, that the idea of popular sovereignty is inconsistent with this commitment to natural rights because "the Founders were not so reckless as to replace the rejected notion of the divine right of kings with a comparable belief in an unlimited right of the masses."[160] Smith's article suffers from a lack of clarity about whether she thinks popular sovereignty entails absolute deference by government actors to current popular opinion (which she suggests many times) or instead that it vests too much power in the hands of the people by locating sovereignty there. I will assume she means the latter since it is the stronger of the two theses.

Smith's argument that there is a conflict between popular sovereignty theory and the Founders' historical commitment to natural rights reflects a misunderstanding of history. As argued by Wood, the idea that there was in every state a sovereign with absolute, indivisible power was orthodoxy among members of the founding generation.[161] The real question was where to locate this power, and they eventually came to see sovereignty as inhering in the people. Smith is correct that this has the logical consequence that the people could pass laws infringing on rights if they so chose, but this would be the case no matter where sovereignty was located. Any organ of government or conceivable agent with the legitimate power to govern can infringe on rights, and placing the ultimate power of the state in the hands of the people does no more to disparage those rights than any other scheme. Furthermore, Smith's claim that if the people "enjoy final authority, individual rights are eradicated"[162] is simply false. The fact that a sovereign can infringe on rights does not entail that those rights cease to exist. The rights-bearer

[160] *Id*. at 16.
[161] WOOD, *supra* note 137, at 382.
[162] Smith, *supra* note 130, at 25.

retains his natural rights even if they are suppressed. Therefore, even if the people did decide to pass laws violating the rights of a minority group, it would not follow that those rights were "eradicated."

Smith's second critique is more theoretical. She asserts that originalism is inconsistent with the Founders' historical commitment to rights insofar as it empowers "the public of a given time the power to dictate what words mean. Such a power is unlimited. It is incapable of being limited, since on such a view, the public would equally dictate the meanings of any words that might be intended to express limitations on that power."[163] Thus, according to Smith, because originalism looks to the original meaning of the words, and because the original meaning of those words is set by the people, originalism gives the people from the Founding the untrammeled privilege to control language and, as a consequence, to abolish rights. But the fact is that the founding generation did not have the ability to change the meaning of words at will. They relied on, and were constrained by, linguistic conventions in existence at the time. If for no other reason than that ratification required the approval of people stretched from New Hampshire to Georgia, the language used had to have a limited range of meaning. It was simply not possible for the founding generation to manipulate language at will in the way Smith suggests. As with any group of people at any point in history, linguistic conventions limited the range of meanings that could be ascribed to words. Originalist popular sovereignty, then, is not inconsistent with the Founders' commitment to rights.

[163] *Id*. at 23. If this and her previous argument seem to be portrayed unfairly here, I assure the reader that they are not. Smith's arguments are deeply confused, but I thought it worth rebutting them given that they are the most recent attempt to argue that originalism is internally inconsistent with popular sovereignty.

Finally, one could dispute my contention that originalism requires a theory of popular sovereignty by employing an argument originally conceived by Gregory Bassham. Bassham was responding to H. Jefferson Powell's claim that original-intent originalism is self-refuting because the Founders did not intend for their intent to be the guiding principle of constitutional interpretation.[164] Bassham pointed out, quite rightly, that "[n]o intentionalist claims that all of the framers' original intentions are binding," and among those intentions that are not binding are the Founders' views of how the Constitution should be interpreted.[165] Similarly, it could be said that there is no obligation to incorporate popular sovereignty into originalism merely because the founding generation intended for the Constitution to be understood this way. But to embrace this position would be to misinterpret my argument. I am not claiming that the founding generation intended for the Constitution to be understood through the lens of popular sovereignty; I am saying that because that generation understood the Constitution in terms of popular sovereignty, a proper historical interpretation of the text must understand the text in the same way. To do otherwise would be to import a foreign conception of sovereignty or legitimacy into the constitutional text, which can only warp our perceptions of the text and historical materials. This is not an appeal to the original intentions of the founding generation; it is an argument for the contextualized reading of the Constitution. Once this is understood, the necessity of incorporating popular sovereignty into originalism becomes apparent.

C. JUDICIAL RESTRAINT AS FIDELITY TO THE POPULAR SOVEREIGN

[164] *See supra* Section II.

[165] GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 69 (1992).

From this basis, the next two core features of originalism naturally follow. If the Constitution is rooted in a theory of popular sovereignty, then the actions of government are only legitimate insofar as the government derives its authority from the people. In the case of the legislative and executive branches, it is easy enough to see that they have been given popular sanction to change laws by virtue of their lawmaking powers provided in the Constitution.[166] Not so with the judiciary. It is for this reason that we encounter Bruce Ackerman's famous counter-majoritarian difficulty, the problem of justifying judicial review of popular legislation by an unelected judiciary.[167] Originalism's ready answer to this dilemma is that because the originalist judge never goes further than is warranted by the original meaning of the text, he can safely say that any action he takes to change the law by striking down legislation is based on authority derived from the people in the form of the Constitution. This leads to the second principle of originalism: judicial restraint.

Perhaps no component of originalism has been as misunderstood as the concept of judicial restraint. The most powerful critique of including judicial restraint within an originalist framework comes from Bassham, who points out that it "clearly conflicts with a strict or pure form of originalism, since it requires judges in some cases not to enforce what seems on balance to be the best originalist reading of a particular constitutional provision."[168] Bassham's argument, however, relies on a particular version of judicial restraint he calls "clear-mistake originalism."[169] This version embraces Thayer's Rule,

---

[166] *See supra* note 119. The President, while not a lawmaker himself, participates in the process with his veto power and ability to suggest legislation for Congress' consideration. *See* U.S. CONST., art. 1, § 7, cl. 3; art. 2, § 3, cl. 1.

[167] *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986).

[168] BASSHAM, *supra* note 165, at 4-5.

[169] *Id*. at 40.

made famous by the eminent constitutional theorist James Bradley Thayer, that the judiciary ought not strike down legislation unless it is manifestly unconstitutional, deferring in all other cases to the legislature. It is the kind of judicial restraint Whittington calls "judicial passivism": "A passive court . . . would be unwilling to intervene actively in the political process and strike down a large number of laws or executive actions."[170] As Bassham shows, however, to follow this form of judicial restraint would be to violate the original meaning of the Constitution. If, in the best judgment of a court, a law conflicts with the original meaning of a constitutional provision, it would be an abdication of originalism to forsake that meaning out of respect for judicial restraint. Doing so would "destabilize the meaning of the text and contradict the expressed intent of the sovereign people."[171]

Judicial passivism gets the relationship between originalism and judicial restraint all wrong. It sees restraint as the end and originalism as the means. Restraint *qua* restraint is the goal, and the original meaning of the Constitution suffers as a result. A proper understanding of the relationship between judicial restraint and originalism views judicial restraint as a natural extension of originalism, not its object. Because a judge adheres to the original meaning of the Constitution and sees himself as merely the instrument of the people's will, he will go no further than the text allows; he will restrain himself. But if a statute is contrary to the original meaning in the best judgment of a court, that body has an obligation to strike it down.[172] As Whittington writes, "Originalism requires deference

---

[170] WHITTINGTON, *supra* note 26, at 168.

[171] *Id*.

[172] This should not, however, be taken to mean that precedence has no role to play in deciding upon the constitutionality of a statute. The obligation to strike down a law contrary to the will of the sovereign is tempered by the fact that the sovereign will was enacted against a background of interpretive assumptions, among them being the idea that courts would take precedent very seriously. The "judicial power" granted to the courts reflects, I believe, this background assumption. It is therefore not contrary to the sovereign will

only to the Constitution and to the limits of human knowledge, not to contemporary politicians."[173]

Thus, the strongest originalist arguments against judicial restraint usually proceed from a view of judicial restraint as judicial passivism. This subverts originalism to the goal of restraining judges. Once we understand the proper relationship between originalism and judicial restraint, we can see that judicial restraint does not entail a passive judiciary unwilling to challenge legislative action. In fact, Whittington is right to say that an originalist judiciary, under the right circumstances, would be very activist insofar as an "activist court" is one that strikes down a great deal of legislation.[174] But originalism does include within it a conception of judicial restraint by virtue of the fact that judges are disallowed from going beyond what the original meaning permits.

D. THICK V. THIN ORIGINAL MEANING

Thus far, our discussion has shown that originalism ought to be a distinct theory of constitutional meaning that includes the concepts of popular sovereignty and judicial restraint. For this view of originalism to be sustainable, a third element is required, and

---

to view precedent as a constraint on judicial decisions, and it may very well be that there are some precedents that are too entrenched to be undone even if they violate the original meaning. *See generally* McGinnis and Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 803-29 (2009). Henry Monaghan and Justice Scalia provide a kind of brute-fact rationale for allowing precedent to be part of originalism. *See generally* Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); *see* Scalia, *supra* note 64, at 864. Judge Bork combines the brute-fact approach with an appeal to the historical understanding of precedent and the "judicial power" granted to the courts in Article III. *See* BORK, *supra* note 31, at 155-59.

My stance is a controversial position to take, and it is opposed by a number of noted originalist scholars. *See generally* WHITTINGTON, *supra* note 26, at 168-74; Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007). However, the issue of precedence is not directly relevant to my purposes here and is therefore bracketed for another day.

[173] WHITTINGTON, *supra* note 26, at 4.

[174] *Id*.

that is a robust version of original meaning. The importance of a robust conception of original meaning—what I will call a "thick" as opposed to a "thin" version of it—is its capacity to prevent originalism from collapsing into nonoriginalism and to maintain fidelity to a theory of popular sovereignty. A "thick" notion of original meaning is one which respects and tries to give effect to the will of the popular sovereign. It views the Constitution as the commands of the sovereign and adheres to these instructions by trying, to the extent possible, to understand the words as the sovereign would have understood them. To do so, it employs several resources to recapture the original context. Solum has described usefully three different senses of meaning which might be referred to in thinking about original meaning: semantic, applicative, and teleological. The semantic meaning of a constitutional provision focuses on linguistic facts about the way words were used, including the linguistic conventions of the time.[175] A semantic analysis of a text would use dictionaries and other public documents from the relevant time period to discern the meaning of words and the rules that governed their usage. Applicative meaning differs in that it looks at "implications, consequences, and applications."[176] It examines, for instance, examples used by people at the time as well as other texts using similar language that illustrate how the people might have anticipated that their will would be carried out. Finally, there is a teleological meaning of a text, which concerns the purpose for which a provision was written.[177] Thick original meaning uses all three ideas of meaning when it tries to understand the sovereign's will. Thin original meaning is usually disconnected from popular sovereignty theory and excludes one or more of

[175] Solum, *supra* note 21, at 940.
[176] *Id*. at 941.
[177] *Id*.

these types of meaning on the basis of some principle. It is "thinner" because fewer sources and content go into discovering this sort of original meaning.

Solum, whose "semantic originalism" is a paradigmatic case of thin original meaning,[178] could respond to this framework in two ways. First, he would argue that thin original meaning is just as much originalist as thicker versions and there is nothing intrinsic about thick original meaning that elevates it to being a central component of originalism. In fact, Solum would say that thin original meaning can be quintessentially originalist when it refers to semantic meaning. Solum believes that his "fixation thesis," the idea that the semantic meaning of the constitutional text was fixed at ratification,[179] "provides the unifying content of the family of originalist constitutional theories."[180] For this reason, he believes it is impossible to deny that his theory (and, one could argue, thin original meaning generally) is originalist.

This argument holds little water. The fact that semantic meaning is the point at which all originalist theories overlap does not make it, by itself, originalist. It may be an important component of originalism, but that does not make it originalist. Theories often have points of overlap that by themselves do not define those theories. For instance, some natural law and anti-rationalist theories of practical reason agree that there is such a thing as a naturalistic fallacy, that it is impossible to derive an "ought" from an "is."[181] But this point of agreement, by itself, is not the defining feature of either theory. Both theories are deeply complex, and belief in the naturalistic fallacy is just one common

---

[178] Importantly, however, Solum does not exclude the use of teleological or applicative meaning to inform semantic meaning, but he does think that only semantic meaning is binding and that, once semantic meaning is found, the rest of the work of interpretive theory involves construction. I will discuss this more in the section on Solum. *See infra*, Section VI.

[179] Solum, *supra* note 24, at 2-4.

[180] *Id*. at 11.

[181] *See generally* Jeffrey Goldsworthy, *Fact and Value in the New Natural Law Theory*, 41 AM. J. JURIS. 21 (1996); ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 17-30 (1999).

component of these otherwise-divergent theories. Originalism is about more than the minimalism of thin original meaning.[182]

While Solum does not offer a theory of legitimacy, he might argue that thin original meaning does give effect to the sovereign will. In the case of semantic meaning, this would likely be based on the idea that, in ratifying the Constitution, the people agreed only to the text of the Constitution and nothing more. To go beyond the text to examine the teleological and applicative meanings would be to take into account meanings that were not ratified. An argument might also be made on behalf of thin original meaning constituted by the teleological meaning. It could be said that what we are trying to do in respecting the sovereign will is get at the purpose for which a provision was enacted, the evil it was designed to alleviate. So long as we are faithful to this *telos*, we have respected the sovereign's will.

It is true that idiosyncratic notions of teleology or application were not ratified along with the text. The fact that James Madison might have had a particular rationale for pushing through the Ninth Amendment does not bind us to that rationale since he, by himself, is not the popular sovereign.[183] However, if there is a purpose behind a particular provision and it is evident from historical sources that this *telos* was widely acknowledged, then this provides an important context within which to understand the meaning of the text. We know, for example, that a major reason for the passage of the Fourteenth Amendment was to constitutionalize the Civil Rights Act of 1866.[184] Of course, the language of the amendment is broader than the narrower purposes of that

---

[182] I treat this argument at much greater length in Section VI. *See infra*, Section VI.

[183] This is a point Randy Barnett would do well to recognize in his treatment of this amendment. *See* BARNETT, *supra* note 26, at 224-52.

[184] *See generally* McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

legislation, so we know that its purpose is not limited to the aims of the Civil Rights Act. But being aware of the driving force behind the amendment provides insight into what the people at the time were seeking to accomplish. In this way, we are given a better sense of the people's will.

As for focusing exclusively on the teleological meaning, it is difficult to see why the purpose of a provision should be unconstrained by semantic meaning. Allowing interpreters to derive a purpose from the history of a provision and apply it without respecting the original semantic meaning is hardly in line with the sovereign's will. The popular sovereign did, after all, agree on a text to communicate its will, and to disregard the text or to interpret its semantic content differently from the way the sovereign did is to go against that will. Both text and purpose comprise the sovereign will, and to ignore one or the other is to substitute contemporary interpreters for the original sovereign.

Thin original meaning is always on the cusp of collapsing into nonoriginalism. A judge who cares only about the purpose of a provision has free reign to warp that purpose for whatever ends he wishes to accomplish. Similarly, exclusive reliance on applicative meaning ignores the constraints imposed by the text, substituting the way in which people may have understood a provision for the language of the provision itself.[185] One who

[185] This point has been made many times by scholars who think so-called "expected application" originalism cannot be justified. *See* Dworkin, "Comment, "*in* SCALIA, *supra* note 10, at 115-27; Balkin, *Abortion and Original* Meaning, 24 CONT. COMMENT. 291, 295-97 (2007); Solum, *supra* note 21, at 934-37; *see generally* Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 REV. POL 197 (2000); Mark D. Greenberg and Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1997-1998). My point is slightly different because I do not think applicative meaning necessarily has to be the same as expected application. What I mean by applicative meaning is the way in which the people thought about a provision in relation to their everyday lives. So, for example, when a person in 1791 read that the Eighth Amendment barred "cruel and unusual punishment" he would likely have understood it in relation to what he thought was cruel and unusual in his own time. When we find evidence of how people applied these provisions to their own time, including the potential implications and consequences, we have a window into applicative meaning. This is different from expected application, which is an assumption by the people at the time about how a provision would be implemented in the future. Nonetheless, the argument against exclusive applicative meaning is the same as that against

focuses exclusively on semantic meaning will often find that an opaque provision remains opaque within the context of a particular case. As Richard Kay has noted, "There will be few occasions when a litigant defends an interpretation flatly at odds with any plausible meaning of the words of the text."[186] The original meaning of the words is a more demanding standard than a merely plausible meaning, but what is a judge to do when confronted with a case about whether the Fourteenth Amendment's Privileges and Immunities Clause[187] applies to abortion? Any one of these types of meaning, by itself, is inadequate for discerning the will of the sovereign. Originalism, because it is committed to popular sovereignty, must embrace thick original meaning.[188]

Importantly, thick original meaning still leaves room for debate among originalists about whether original intent, original public meaning, or any number of

---

expected application. Namely, that how people at the time thought about these provisions in relation to examples in their lives is not binding on future interpreters, though this can be extremely useful in discerning the will of the people and should, therefore, be part of the original meaning we seek.

[186] Kay, *supra* note 26, at 706.

[187] U.S. CONST., amend. 14, cl. 1.

[188] As mentioned earlier, Solum has tried to tie Justice Scalia to his thin version of original meaning. Solum thinks Scalia's majority opinion in *Heller* employed semantic meaning in reaching its conclusions. He might, therefore, object to my argument by claiming that it excludes Scalia as an originalist since, on Solum's analysis, Scalia is committed to Solum's thin original meaning. Scalia himself has said that he thinks expected application is irrelevant, and in *Heller* he did say that Justice John Paul Stevens' teleological approach was "dubious." *See* Scalia, "Response," *in* SCALIA, *supra* note 10, at 144-49 (disavowing expected applications); District of Columbia v. Heller, 128 S. Ct. 2783, 2804 (2008) (calling Justice Stevens' reliance on the legislative history of the Second Amendment to determine its purpose "dubious"). However, as I have pointed out already, one case is not enough to determine a judge's judicial philosophy, and Justice Scalia's numerous other cases and writings indicate a far more complicated theory of original meaning than the thin one embraced by Solum. *See supra* note 108 (especially Scalia on the importance of precedent).

Furthermore, Solum's reading of *Heller* is misguided. Scalia does employ teleological and applicative meaning in his opinion. He discusses, for example, the history of Stuart oppression of political dissidents in England before the Glorious Revolution as the reason why a Second Amendment was believed to be necessary, and he links this to the prefatory clause of the amendment to show its teleology. *See* Heller, 128 S. Ct. at 2797-2800. Scalia also provides an extended treatment of the post-enactment history of the Second Amendment, which shows how the amendment was understood *and applied* later on. *Id*. at 2805-13. This examination of the implications of the amendment can reasonably be thought of as a form of applicative meaning, though not in quite the way I think of applicative meaning (because it is not contemporaneous with the amendment language and thus does not reflect how the people at the time contextualized and thought about the amendment). In any event, it is clear from Justice Scalia's other opinions and writings that he relies on a great deal more than thin original meaning to arrive at his decisions, and even *Heller* goes beyond bare semantic meaning to discover the sovereign's will.

other iterations of original meaning is the correct originalist methodology. All of these employ the various senses of thick original meaning to some extent, though some more than others. The point of this section was not to decide these healthy intramural scuffles; rather, I have tried to show that originalism has three core components that are required for a theory to call itself originalist. Popular sovereignty and originalism are mutually reinforcing and point towards one another, and this is the source from which judicial restraint and thick original meaning flow. Judicial restraint, properly conceived, is a natural outgrowth of popular sovereignty because the judge must go no further than the sovereign has permitted him, though he must also be prepared to actively enforce the sovereign's will against the popular branches. The sovereign's will is also the rationale behind the need for thick original meaning. Only by using the several senses of meaning can we come close to understanding the popular sovereign's will as the sovereign understood it. Armed with these core concepts and with a firm grasp of what originalism entails, we can proceed to tackle the first of the post-originalist theories, the misguided libertarian constitutionalism of Randy Barnett.

IV. RANDY BARNETT AND CONSTITUTIONAL LEGITIMACY

On a superficial level, Randy Barnett's status as an originalist seems unimpeachable. A frequent editorialist on originalist court decisions,[189] prominent

[189] *See* Barnett, *News Flash: The Constitution Means What It Says*, WALL STREET JOURNAL, June 27, 2008, at A13; *Rehnquist's Legacy*, WALL STREET JOURNAL, September 10, 2005, http://www.opinionjournal.com/extra/?id=110007239.

member of the Federalist Society,[190] and outspoken advocate for originalist positions on high-profile issues,[191] Barnett's inclusion in the originalist fold appears obvious. It is my task in this section to show why it would be a mistake to regard Barnett's theory of constitutional meaning as originalist. As I shall argue, not only does his post-originalism provide a mandate for unprecedented judicial power in tension with the original meaning of the Constitution, but his theory of constitutional legitimacy is deeply flawed and provides judges with a workable justification for ignoring the constraints imposed on government officials by popular sovereignty. If Barnett's theory is originalist, then many of the core principles of originalist thought must be thrown overboard. Restoring coherence to originalism begins with the exclusion of his theory from the originalist tent.

A. THE THEORY: THE LIBERTARIAN CONSTITUTION

Any discussion of Barnett's theory has to begin with the proposition that popular sovereignty in the United States is a myth and that, insofar as the Constitution depends on popular sovereignty for its legitimacy, it is illegitimate. For Barnett, popular sovereignty is not a plausible theory of constitutional legitimacy, at least not within the context of the American polity. He reaches this conclusion from the premises that ratification of the Constitution did not require unanimous consent, and "[a]nything less than unanimous consent simply cannot bind nonconsenting persons."[192] He goes on to rebut the common

---

[190] *See* Barnett, "Debate on the Original Meaning of the Commerce, Spending, and Necessary and Proper Clauses," *in* FEDERALIST SOCIETY, *supra* note 23, at 253-85.

[191] The Heritage Foundation. (2009). *Is the Personal Mandate to Buy Health Insurance Unconstitutional?* [Video] Retrieved March 31, 2010, from http://link.brightcove.com/services/player/bcpid13746676001?bctid=55710764001.

[192] BARNETT, *supra* note 26, at 11.

justifications for ratification without unanimous consent.[193] While Barnett thinks unanimous consent is possible in smaller political communities (such as retirement communities), the size of the United States at the Founding leads him to deny that "the conditions needed to make [popular sovereignty] valid existed at the time the Constitution was adopted or ever could exist."[194]

By what right, then, does the Constitution command our obedience? Barnett begins by affirming that our natural rights are antecedent to any form of government: "First come rights, and then comes law."[195] A legitimate regime, then, will be one that ensures respect for those rights: "[A] law is just, and therefore binding in conscience, if its restrictions are (1) necessary to protect the rights of others and (2) proper insofar as they do not violate the preexisting rights of the persons on whom they are imposed."[196] The two conditions operate at different levels. The second makes consent of the governed unnecessary because "if a law has not violated a person's rights (whatever these rights may be), then that person need not consent to it."[197] The first condition makes the law binding in conscience because, if a law is necessary to protect someone's rights (mine or another's), I have an obligation to respect that law as I do to respect my or someone else's rights.[198] A legitimate lawmaking process, then, "provides adequate assurances that the laws it validates are just in this respect."[199]

---

[193] *Id*. at 14-31. Barnett discusses implied consent based on voting, residency, acquiescence, etc. Interestingly, while he criticizes popular sovereignty on the basis of consent, Barnett never questions the idea that there is such a thing as "the people" who can be sovereign. For a critique of the idea of "the people," *see* Morris, *supra* note 156, at 6-11.

[194] BARNETT, *supra* note 26, at 11, 40-43.

[195] *Id*. at 44. He attempts to show that this proposition is both true and in line with the Founders' historical understanding. *See id*. at 53-86.

[196] *Id*. at 44.

[197] *Id*.

[198] *Id*. at 44-45.

[199] *Id*. at 45.

Barnett's rationale for originalism flows from this theory of legitimacy. If we assume that the Constitution's language gives us reasons to think that its lawmaking procedures produce just laws, then the preservation of those procedures becomes vitally important. Allowing the procedures to change from one court decision to the next undermines the assurances we have that those procedures that we initially adjudged to be just remain so. To that end, the Constitution has been embodied in written form, and Barnett places great weight on this fact: "Primarily, constitutions are put in writing to better constrain the political actors it empowers to accomplish various ends. In particular, it is put in writing so these actors cannot themselves make the laws by which they make law."[200] But this purpose, this ability to "lock-in" the procedures by which laws are made and to constrain the powers of political actors, is seriously undermined if the original meaning of those words is ignored, and if we no longer have confidence in the justness of the procedures, the resultant laws lose legitimacy and we lose the obligation to follow those laws in conscience.[201] To be sure, Barnett thinks that an original meaning approach is inherent in the nature of a written constitution irrespective of that document's legitimacy, but he thinks that it is the lynchpin of a legitimate constitutional regime because it preserves that initial judgment that the procedures are just.[202]

This framework has a decisive impact on the practice of constitutional decision making in Barnett's vision. Importantly, he affirms the distinction between constitutional interpretation and constitutional construction that Whittington made famous. The need for construction arises in proportion with the vagueness of the text.[203] Once the content

---

[200] *Id*. at 103.
[201] *Id*. at 109.
[202] *Id*. at 109-113.
[203] *Id*. at 120.

supplied by interpretation—conceived of here as discovery of the original meaning from historical sources—runs out, then "the meaning of the text must be *determined* rather than found."[204] How is this meaning to be determined? The answer is obvious once Barnett's theory of legitimacy is taken into account: "To enhance legitimacy, therefore, vague terms should be given the meaning that is most respectful of the [enumerated and unenumerated] rights of all who are affected, and rules of construction most respectful of these rights should be adopted to put general constitutional provisions into legal effect."[205] Constructions should be made in line with what the judge believes to be most respectful of the rights of the people. The question of what those rights are will be touched on later in this section, but this overview should permit us to proceed to an examination of Barnett's theory of legitimacy before delving into a critique from a specifically originalist perspective.

B. The Internal Critique: Disagreement and Constitutional Instability

One of the first problems one notices about Barnett's theory is its volatility. Because the criteria for legitimacy call for a continual reexamination of a regime's legitimacy, a constitution that is legitimate today can be adjudged illegitimate tomorrow based entirely on whether the lawmaking procedures have been altered. Barnett is very clear on this point, and it is worth quoting him at length so the reader can judge the implications of this passage:

---

[204] *Id*. (Emphasis in original).
[205] *Id*. at 126.

> Of course, to determine the existence of a prima facie duty to obey a law, we must look beyond what the Constitution says to see how it has in fact been interpreted and construed over the years since its adoption and amendment. Suppose the original meaning of these provisions was "good enough" to establish a lawmaking process that imparts legitimacy upon the commands issued by government officials acting in its name. This would still not impart legitimacy on legal commands if the procedures and constraints mandated by the original meaning are ignored by judges and other officials. This is especially so if these procedures and constraints were changed to something that is not "good enough" from the standpoint of legitimacy. If so many deviations have been made from the original meaning that the lawmaking processes no longer have the same legitimacy-providing integrity, then the binding nature of its products may be more dubious.[206]

The passage is significant because Barnett clarifies that the legitimacy of the Constitution is to be evaluated on the basis of how it has been implemented, not on how it is understood through the lens of original meaning. Assuming the procedures as originally understood provide good assurances that the laws will be just, when officials ignore the original meaning and change the procedures, the legitimacy of the Constitution is called into serious doubt. But here is the kicker: nobody thinks that the original meaning has been preserved. Just think of the parade of clauses whose original meanings have been warped by judicial and political actors. Better yet, why not consult Barnett himself, who points to the Interstate Commerce Clause,[207] the Privileges and Immunities Clause,[208] the Ninth Amendment,[209] and the Necessary and Proper Clause[210] as just a handful of fundamental constitutional provisions that, in his view, have been distorted almost beyond recognition. Barnett thinks that these provisions, properly understood, provide crucial protections for natural rights and set up important procedures to protect those

---

[206] *Id*. at 110.
[207] *Id*. at 274-318.
[208] *Id*. at 191-223.
[209] *Id*. at 224-252.
[210] *Id*. at 153-190.

rights. But if they have largely been gutted, then by Barnett's own account the Constitution's legitimacy is lost, and we are not bound in conscience by the laws passed under it.[211] We would, quite literally, have a "lost Constitution," to use the title of Barnett's book.

There are three ways Barnett would likely respond to this criticism. He could simply deny that the legitimacy of the Constitution is lost under his account because, despite the widespread departure from original meaning, the new procedures and protections worked out by judges and political actors still provide sound assurances that the laws are just. But this is a difficult argument to make given the importance that Barnett attaches to the constitutional provisions mentioned above, all of which he contends have been bastardized during the course of American history and are critical to protecting rights. Furthermore, while Barnett mentioned some of the most notable provisions in which the original meaning has been left behind, there are surely many others that could be added to this list, including the Free Speech[212] and Religion[213] clauses, just to name a couple. Remember, Barnett can only claim any increase in rights protections if they accord with the original meaning.[214] So while Barnett likely thinks that some of the judicial decisions have increased rights protections in line with the original meaning, it would be a tough sell to argue that these advances outweigh both the dramatic flight from original meaning and the reduction in original rights and procedural protections.

---

[211] Barnett defines the legitimacy of a law in terms of whether a person is bound in conscience to obey it. *See* BARNETT, *supra* note 26, at 48.

[212] *See generally*, *e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964).

[213] *See generally*, *e.g.*, Everson v. Board of Education, 330 U.S. 1 (1947).

[214] Otherwise, he would be admitting that departure from original meaning is acceptable, which he denies. *See* BARNETT, *supra* note 26, at 109 ("Judges and legislators cannot change what the Constitution says without destroying their commitment to the written Constitution"). Because Barnett attaches decisive importance to the writtenness of the Constitution, dispensing with it is unacceptable for him.

Barnett might instead contend that my argument applies equally to a theory of popular sovereignty. He could argue that because the sovereign will confers legitimacy on the Constitution, and because that will is embodied in the original meaning of the Constitution, to depart from that meaning is to undermine the document's legitimacy. Barnett could also argue, as a third point, that popular sovereignty also calls for a continual reevaluation of the Constitution's legitimacy by the popular sovereign. After all, the Declaration of Independence affirms the right of the people to change their government should its abuses become too great to sustain.[215] The Founding-era commitment to rights preceding the Constitution[216] would provide the justification for the people to renounce their Constitution should its meaning become so distorted that it ceased to protect those rights. Thus, popular sovereignty fails to escape the same criticisms I level at Barnett's theory, or so goes the argument.

There are, however, real differences between Barnett's theory of legitimacy and popular sovereignty. The people conferred legitimacy on the Constitution by ratifying it, and that legitimacy endures irrespective of how its meaning is distorted by later generations. If judges interpret the Constitution in a way at odds with the original meaning and the sovereign will, then it is the judges' *decisions* that are illegitimate, not the Constitution itself. The meaning of the Constitution is and always will be what the sovereign said it was, and to that extent it will always be legitimate. Certainly there can be illegitimate judicial or political constitutional decisions, but those do not touch the legitimacy of the document itself. Importantly, this is a distinction which Barnett cannot

---

[215] THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776) ("That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness").

[216] BARNETT, *supra* note 26, at 53-86.

draw with regard to his own theory. Because what matters is the justness of the procedures in place today, the evaluation of the Constitution's legitimacy is a continual process. Whereas legitimacy is settled at the moment of ratification under a theory of popular sovereignty, and it is only later interpretations that are illegitimate, under Barnett's theory those later interpretations are the basis for evaluating legitimacy.

As for Barnett's third point, he is correct when he says that the American tradition includes a right of the people, as the sovereign power, to change their Constitution and replace it with another. The abandonment of the Articles of Confederation is a real historical example of that power. But this does not mean that a theory of popular sovereignty connotes a continual reevaluation of the Constitution's legitimacy. Should the people decide that they wish to adopt a new constitution, it would not be because the current one ceased to be legitimate. As mentioned before, legitimacy is conferred at ratification. Subsequent interpretations and government actions may make continued existence under the Constitution unbearable, but if that were to happen it would only mean that the Constitution had failed to secure the people's rights. This would not entail the forfeiture of constitutional *legitimacy*, only the forfeiture of constitutional *efficacy*. The people would have the power to change their governing document, but, as happened with the Articles of Confederation, it would be for reasons other than loss of legitimacy. There is, therefore, no continual reexamination of the Constitution's legitimacy, though there may be a continual appraisal of its effectiveness or of the legitimacy of government actions. But none of these evaluations are as destabilizing as Barnett's, whose theory allows for constant reevaluation of constitutional legitimacy based on the malleable criterion that the original meaning has been departed from enough to erode our

confidence in the justness of the laws being produced. Popular sovereignty, then, is a much more stable theory of legitimacy and does not share in the volatility of Barnett's theory.

Barnett's theory also suffers from its failure to tackle major questions imbedded in its principles. The most prominent example is its two-fold requirement that laws be (1) "necessary to protect the rights of others and (2) proper insofar as they do not violate the preexisting rights of the persons on whom they are imposed."[217] These criteria raise a flurry of questions. What rights are we talking about? How are rights identified? What happens when these rights come into conflict with one another? In a political society marked by disagreement, legitimacy based on the protection of "rights" is question begging. The real issue, of course, is *what are rights*? This can also lead to a great many conflicts between competing rights-claimants. For example, the debate over abortion is one in which two sides argue for competing conceptions of rights. Each side believes it is the champion of liberty and rights, and each thinks that laws favoring its opinion are "necessary to protect the rights of others and proper insofar as they do not violate the preexisting rights of the person on whom they are imposed."[218] How is law to resolve this problem in a way which does not cause one side or the other to question the legitimacy of the regime? After all, both sides believe that the rights they are arguing for are foundational, at the core of what it means to respect human dignity. If the legitimacy of the Constitution is premised on its ability to ensure just laws, then no matter which side the laws come down on, both abortion-rights and prolife groups would be justified in doubting the legitimacy of the system that could produce such abominations.

---

[217] *Id*. at 44.
[218] *Id*.

Here we need to introduce Barnett's way of identifying rights protected by the Constitution. Barnett relies heavily on the Ninth and Fourteenth Amendments as bases for his scheme of rights.[219] He views both amendments as protecting rights not specified in the Constitution, and he thinks historical sources can be good clues as to what unenumerated rights were intended to be protected by these amendments. Significantly, however, Barnett goes beyond historical sources to find these rights because he thinks that to confine unenumerated rights to historical discovery violates the original meaning of the text: "The Ninth Amendment and Privileges and Immunities Clause referred to natural rights because it was impossible to specify them all in advance. Any approach that overlooks this in favor of particular historically situated liberties runs afoul of original meaning."[220] What, then, are the rights enshrined in these clauses? Barnett offers a quintessentially libertarian response:

> At this level of generality, while the concept of liberty rights excludes other types of rights claims, the specific liberty rights it includes are as numerous as the various acts we may perform within our jurisdictions. Our actions must remain within proper jurisdictional bounds but, within those bounds, our rights are as varied as our imaginations.[221]

As far as I can tell, Barnett does not provide criteria for establishing what these "jurisdictional bounds" are, but the general sense of his book is that he has in mind Mill's Harm Principle.[222] He would therefore respond to my criticism by arguing that he does, in fact, see a way of identifying many of these rights. He would also acknowledge disagreement on many rights claims, but for him this "[f]ailure to agree upon the

---

[219] *Id*. at 54-68.
[220] *Id*. at 258.
[221] *Id*. at 259.
[222] *See id*. at 80.

complete set of rights . . . should not conceal the fact that there is surely a consensus as to some."[223]

It is probable that he would go further and contend that disagreement is a problem for any legitimacy theory to resolve, popular sovereignty included. As for the abortion example, Barnett could respond in many ways, but I think his most likely argument would be that where two rights claims are made which strike at the foundations of natural rights, it is best for the state to remain neutral between them. In the case of abortion, this might entail, from this point of view, allowing the woman to decide whether to have an abortion but also permitting state laws that would provide women with the information necessary to evaluate the rights claim of the fetus.

These responses fail to grapple with just how problematic rights disagreement is for Barnett's theory of legitimacy. Because his theory is dependent on citizens agreeing that their rights are being respected, substantial disagreement on core issues of justice poses a serious obstacle to the legitimacy of any constitution. This is not a problem that affects a theory of popular sovereignty in the same way. While disagreement over rights makes the initial decision of what rights to protect when writing a constitution difficult, and while it raises questions about what rights to enforce when provisions are vague, neither of these issues impacts the legitimacy of the regime because legitimacy is conferred by ratification irrespective of how rights are evaluated afterwards. Barnett's nearly open-ended appeal to rights limited only by "our imaginations" as confined to "jurisdictional bounds" makes it difficult to evaluate the legitimacy of the Constitution

[223] *Id*.

under his theory.[224] What I imagine his response to the abortion example would be is equally unhelpful. Barnett and others might see this as a neutral position, but prolife groups certainly would not, and I imagine not a few prochoice groups would also object. The position described above is quite similar to the abortion regime set up in *Planned Parenthood v. Casey*,[225] yet prolife advocates continue to believe that the abortion laws in the United States are morally appalling. As between two strong and competing views on fundamental rights, there is no neutral position that is likely to satisfy the contending parties. Legitimacy comes under heavy strain in such situations.

This strain is likely to be exacerbated by concerns over the role Barnett's theory assigns to the federal judiciary. His central concern is the protection of individual rights, and he is deeply suspicious of majoritarian powers to say what rights are recognized and how they should be protected. As evidenced in the following passage, he prefers to place the protection of rights in the hands of what he views as an impartial judiciary:

> When legislation encroaches upon the liberties of the people, only review by an impartial judiciary can ensure that the rights of citizens are protected and that justice holds the balance between the legislature or executive branch and the people. Without judicial review to see that Congress stays within its powers and refrains from violating the rights retained by the people, there is little reason to believe that legislation is binding in conscience on the people.[226]

This skepticism of majoritarian power and concomitant confidence in the impartiality of the judiciary leads Barnett to grant sweeping powers to the courts to strike down

---

[224] The reader might object that earlier in the section I had no trouble declaring that the Constitution is illegitimate under Barnett's theory, but recall that I based that conclusion on the fact that Barnett links legitimacy with the preservation of original meaning. Because original meaning has been abandoned in many core areas of rights protection that Barnett identifies, it is hard to see how the Constitution retains its legitimacy. However, if this hurdle could be overcome (for example, if the original meaning had been preserved), then the Constitution would be evaluated in terms of whether it protects rights sufficiently. It is this evaluation that I think is rendered almost impossible under such an open-ended view of rights since we cannot agree on what we are evaluating.

[225] 505 U.S. 833 (1992).

[226] BARNETT, *supra* note 26, at 267.

legislation. Believing that the Ninth and Fourteenth Amendments compel government to enforce unenumerated rights but also arguing that these rights are always subject to expansion, Barnett thinks that the only way to adequately protect rights is to adopt what he terms a "presumption of liberty."[227] As opposed to a presumption of constitutionality, the presumption of liberty is one in which all legislation that could restrict rights would be assumed by courts to be unconstitutional, which would force the government to show courts how such laws meet Barnett's standards of being necessary and proper with respect to rights.[228] The judiciary would no longer have to show why a law that impairs liberty was unconstitutional; such laws would already be presumed unconstitutional. Barnett thus allocates fearsome powers to the judiciary to check majority rule with the confidence that the courts are impartial.

While there are many problems with this idea, I would like to point out one in particular, and that is that, contrary to the goal Barnett sets for himself, his theory does not provide strong reasons to believe that laws will ultimately safeguard rights. It relies too much on a false conception of judges as immune to the very factions and political pressures that he thinks leads majorities to oppress minorities. Justices are appointed by the political branches, and many times they are appointed with a firm view of what rights are and how they should be enforced. To depend on the impartiality of nine judges to safeguard rights is a tenuous proposition. There is little reason for the citizen, who is to evaluate the legitimacy of lawmaking procedures, to entrust the Supreme Court with such tremendous power as Barnett's presumption of liberty would grant it. In fact, with such a long history of ignoring original meaning, it is difficult to see why Barnett places so

[227] *Id*. at 259.
[228] *Id*. at 260-66.

much trust in the courts to protect rights in line with that meaning. The presumption of constitutionality and restrictions on unenumerated rights both serve as checks on judicial power to trample on rights while allowing the courts to strike down laws that clearly violate the original meaning. Take away these two impediments to the exercise of raw judicial power and the very rights that Barnett holds dear (and a great many he probably does not) are imperiled. The system that Barnett sets up to assure the protection of rights and the legitimacy of the Constitution in fact undermines both aims.

Barnett might say that judges are less subject to faction and political pressures than the popular branches, but even if that is conceded it is insufficient to justify the power Barnett gives to judges. Barnett quite literally makes judges the guardians of our rights, with the power to rule legislation unconstitutional without having to give reasons for thinking it so. They need only show that the government has not proven that a law is necessary and proper with respect to rights, a highly subjective judgment indeed, as has been shown by the discussion about the indeterminacy of rights under Barnett's theory. To justify this power Barnett really does need the judges to be impartial, something he cannot reasonably assume. And while Barnett might come back with his argument that the presumption of liberty is necessary to protect unenumerated rights without listing them, this rationale fails because it provides a method for protecting rights that I have shown gives little assurance that those rights will be protected. His initial justification for a presumption of liberty, then, cannot sustain this radical allocation of power to the judiciary. Barnett's theory, as we have seen throughout this section, fails on its own terms to uphold rights and legitimize the Constitution. What is left is an unstable theory that accomplishes neither of the goals it sets out for itself.

C. THE ORIGINALIST CRITIQUE: WARPING CONSTITUTIONAL COMMANDS

From an originalist perspective, there are two significant and related problems with Barnett's theory that mark it as outside the originalist tradition. Fortunately, because of the discussion of the core elements of originalism in Section III, these problems can be fleshed out in relatively short order. The first is that by substituting his own theory of legitimacy for a theory of popular sovereignty, Barnett dramatically changes the original meaning of the Constitution and the way in which judges approach the text. Recall Barnett's view of constitutional construction. He believes that "vague terms should be given the meaning that is most respectful of the [enumerated and unenumerated] rights of all who are affected, and rules of construction most respectful of these rights should be adopted to put general constitutional provisions into legal effect."[229] This follows naturally from a theory of legitimacy which is entirely based on respecting individual rights.

But there is nothing in the Constitution which specifies this rule of construction; it stems entirely from his theory of legitimacy. The case is different for an originalist viewing the text through the lens of the sovereign will, who does his best to decide what is the most likely interpretation in light of the historical evidence at his disposal. In fact, Rappaport and McGinnis have argued that it is unlikely that there will be circumstances in which there is no discernable meaning at all, even if the evidence is only marginally in favor of one particular construction (though they would not use the word

[229] *Id*. at 126.

"construction").[230] But if there were a case where the meaning was completely opaque, the originalist would recognize that, where the Constitution does not speak, he has no authority as a judge. He would uphold the constitutionality of a statute neither because it was constitutional nor because the legislature was authorized to pass it. Rather, he would do so because he has no authority to do otherwise. This is a very different approach to construction from what Barnett offers, and the difference is due entirely to the theory of legitimacy Barnett's judge would operate under. Barnett's theory of legitimacy would change the meaning of the text from what it would otherwise be in an originalist judiciary by providing a libertarian rule of construction found nowhere in the text of the Constitution.

This speaks to a broader point about how Barnett's theory changes the relationship between judge and text. By imposing a responsibility on judges to be the sole guardians of the people's rights as the means of legitimizing the Constitution, Barnett's theory makes judges necessarily aggressive where popular sovereignty makes them necessarily cautious. Where there is indeterminacy, Barnett's judge rushes in to fill the breach with a construction that maximizes rights. By contrast, the originalist judge sees indeterminacy and realizes his authority is at an end. Where an originalist judge reads "stop," Barnett's judge reads "go!" Even in cases where indeterminacy is not an issue, Barnett's judge is inherently aggressive towards and suspicious of legislation while the originalist judge is neutral. The originalist judge does not see himself as the White Knight defending the people's liberty. Rather, the originalist sees himself as a mere agent or instrument of the people's will, and as such he is aggressive only where called to be and permissive where the people demand he be. The prism through which the judge views the

[230] *See* McGinnis and Rappaport, *supra* note 135, at 772-76.

text, then, is very different for Barnett's judge, and thus the relationship between text and judge is altered by Barnett's theory of legitimacy.[231]

I doubt that Barnett would deny these points. Rather, I think he would respond that he does not view them as problematic given that he and I start from different premises. From Barnett's perspective, the judge's skepticism of legislation and his attendant aggressiveness is perfectly reasonable given that the judge's responsibility is to protect rights from popular infringement and preserve constitutional legitimacy. My criticisms all stem from a popular sovereignty point of view, which he rejects. Similarly, he would see no problem with a rule of construction that maximizes rights protection given that the purpose of the judiciary is to protect rights under his formulation of legitimacy. Barnett would say that construction necessarily entails deciding, rather than discovering, the meaning of a vague provision, and that his rule of construction is the best way of making that decision given his legitimacy theory. But as the reader now knows from this section and its predecessor, Barnett's legitimacy theory suffers from several fatal defects, and his rejection of popular sovereignty is tantamount to a rejection of originalism. He and I might agree to disagree, but I would argue that this nonetheless places him outside the originalist fold.

The second major problem with Barnett's theory is related to the first, and that is the sweeping powers he confers on the judiciary. The preceding discussion as well as the

---

[231] A clear example of the impact Barnett's theory of legitimacy has on construction can be seen by comparing his notion of construction with that of Whittington. Whittington, who embraces a theory of popular sovereignty, thinks that construction is almost entirely reserved for the political branches because the judiciary has little authority to engage in construction, whereas Barnett sees the judiciary as being perhaps the primary practitioners of construction. *See* WHITTINGTON, *supra* note 26, at 158 ("The introduction of this element indicates t he political nature of the task [of construction] and the inappropriateness of its pursuit by the judiciary with its limited access to external sources of authority"); *see generally* WHITTINGTON, *supra* note 65 (in which constructions are described throughout the book entirely in the context of action by the political branches).

analysis in Section III shows why this is problematic. Judicial restraint is an outgrowth of a theory of popular sovereignty, whereas judicial aggression is the result of Barnett's theory of legitimacy. Theoretical problems aside, there are also real historical and textual issues that confront Barnett's vision of judicial power. Steven Calabresi has provided a thoughtful critique in this vein. For example, Calabresi points out that in comparison with Articles I and II, Article III does not impose many requirements. "Indeed, Article III neither establishes the size of the Supreme Court nor requires Congress to set up any lower federal courts. In theory, Congress could fulfill its obligations under Article III by creating a one-person Supreme Court and excepting from that Justice's jurisdiction many interesting and important constitutional cases."[232] From this and from the rejection of the Council of Revision at the Constitutional Convention, Calabresi concludes, "There is simply no way to read the bare-bones language of Article III, in contrast to the detailed language of Article I, and conclude that the Framers meant for the Court to be a powerful institution."[233] While Calabresi might be overstating his point a bit, he is right that it is hard to square Barnett's advocacy of an enormously powerful judiciary with the text of the Constitution, which does not seem to envision the judiciary playing such a central role in protecting rights and striking down legislation.

This latter point is also highlighted by Calabresi. He thinks that it is difficult to read the text or history of the Constitution as conferring on the courts the "distinct role as the defenders and protectors of the federal Constitution."[234] It is the President who takes

---

[232] Steven G. Calabresi, *Review: The Originalist and Normative Case against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1092 (2005).
[233] *Id*.
[234] *Id*.

the oath to "preserve, protect, and defend the Constitution of the United States,"[235] not the Supreme Court.[236] The President's veto is the primary means by which he protects the Constitution from legislative encroachment, something the Constitution does not specifically grant the courts.[237] Historically, Barnett's reading of the text is in tension with Ratification-era debates concerning the power of the judiciary. Most obvious is Alexander Hamilton's description of the judiciary as the "least dangerous" branch of the government, one with neither "force nor will."[238] From this data, Calabresi infers that "[t]he Framers simply never imagined that the judicial power conferred by Article III would come to mean as much raw power as Barnett says it means."[239]

Much more could be said about the ahistorical nature of Barnett's theory. I only mention a few criticisms to show that the problems with the judicial power inherent in Barnett's theory go beyond popular sovereignty and judicial restraint. There are real historical and textual obstacles to reading the judicial power the way Barnett does, and he never really addresses these objections. Alone they would be nettlesome to Barnett, but in combination with the fact that his theory rejects popular sovereignty and judicial restraint, we must conclude that Barnett's theory is distinctly outside the originalist camp. His is a theory that fails both on its own terms and as a claimant to the originalism label.

V. JACK BALKIN AND THE WOBBLY FRAMEWORK

[235] U.S. CONST., art. 2, § 1, cl. 8.
[236] Calabresi, *supra* note 232, at 1092.
[237] *Id*.
[238] THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1999).
[239] Calabresi, *supra* note 232, at 1093.

The scholarship on constitutional theory, and originalism in particular, is voluminous, and rarely can major shifts in the literature be traced to a single event. There is not a single, definitive article that led to the move away from original intent originalism, nor is there a single event that brought about the de-emphasis of judicial restraint in the 1990s. The case is different with the current crisis within originalism. While Randy Barnett's theory came before and Lawrence Solum's came after 2007, it was the publication of Jack Balkin's pair of articles in the 2007 volume of *Constitutional Commentary* that triggered the indeterminacy crisis.[240] Alone, the theories of Barnett and Solum would significantly destabilize originalism. In combination with Jack Balkin, they create a genuine crisis over the meaning of originalism. Unless originalists firmly reject Balkin's theory, originalism will not be able to recover a coherent identity. In this section, I will show why originalists should oppose the Balkinization[241] of originalism.

A. THE THEORY: A FRAMEWORK FOR POLITICS

1. BALKIN AND THE PURPOSE OF INTERPRETATION

To understand Jack Balkin's theory of constitutional interpretation, it is first necessary to understand what he thinks is the purpose of a theory of interpretation. Balkin has spent much of his career writing about "positive constitutional theory,"[242] which he takes to mean "how the constitutional system works and develops over time: how government and political institutions influence and interact with each other, and how

[240] *See* Balkin, *supra* note 185; Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007).

[241] *See* Fleming, *supra* note 2, at 12. ("Indeed, we are witnessing the Balkanization of originalism (as well as the Balkinization of it)").

[242] Balkin, *supra* note 240, at 513 n.211.

features of politics and institutional structure influence the creation and development of constitutional doctrine."[243] Positive constitutional theory is descriptive; it seeks to know how constitutional doctrine develops rather than making claims about how it ought to develop. Balkin carries over his work in positive constitutional theory to his enterprise in constitutional interpretation. He thinks that any theory of interpretation must be able to explain and legitimate the changes in constitutional doctrine that have occurred. This is an important and complex idea; so I will flesh it out in more detail below.

Balkin's theory starts from the observation that a great deal of what Americans see as the grandest achievements of their constitutional law are departures from what many originalists believe is the true meaning of the constitutional text. "These decisions are part of how and why we understand ourselves to be a nation that has grown freer and more democratic over time."[244] Americans do not see these judicial decisions as mistakes or deviations from legitimate interpretation. Balkin thinks that they are central to maintaining the Constitution's status as "our" Constitution. By this he means two things. First, that "citizens must be able to interpret the document for themselves so that it speaks to their current ideals and concerns. Because the Constitution is theirs, they can speak truth to power: they can criticize officials for failing to live up to what the Constitution means, rightly interpreted."[245] Second, seeing the text as "our" Constitution entails a "transgenerational 'we,'" a view of the current generation as being connected with generations past and future, all working towards a redemption of the "hopes, struggles, principles and commitments" of the past as embodied in the text.[246] As I understand

[243] *Id*.
[244] Balkin, *supra* note 185, at 299.
[245] Balkin, *supra* note 240, at 506-07.
[246] *Id*. at 507.

Balkin, being able to call the Constitution "ours" means being able to identify with its principles (being proud of those principles and sharing them) and feeling as though we have had control over its development through social movements and political action. The Constitution becomes the unifying document of our civic religion in more than a procedural sense; it really does come to embody what we today think are our most fundamental principles.

Because of the importance Balkin attributes to the notion of "our" Constitution, he thinks that "[n]o interpretive theory that regards [judicial decisions central to the idea of 'our' Constitution] as unfortunate blunder[s] that we are now simply stuck with because of respect for precedent can be adequate to our history as a people."[247] Such an attitude "confuses achievements with mistakes, and it maintains them out of a grudging acceptance."[248] Certainly no theory that calls for overturning these decisions can be acceptable or maintain the legitimacy of the Constitution over time: "The Constitution maintains its legitimacy to the extent that people with very different commitments can reasonably view it as sufficiently worthy of their respect and obedience so that all of them can enjoy the benefits of the rule of law, social cooperation, and political union."[249] If we lose our hold on "our" Constitution, then its ability to command that respect wanes. To uphold the legitimacy of the Constitution and its status as the center of the American civic religion, a theory of constitutional interpretation must be able to explain how the decisions that we now view as sources of pride are consistent with the text.

---

[247] Balkin, *supra* note 185, at 299.
[248] *Id*.
[249] Balkin, *supra* note 240, at 517.

Furthermore, a theory of constitutional interpretation must accord with political and historical realities. As Balkin says, "Ought implies can."[250] A theory of interpretation cannot expect what is impossible. There is no such thing as an obligation to do what cannot be done. "We cannot expect actors to do what is not possible for them to do. A causal and structural account of the constitutional system is a necessary precursor to any normative account of constitutional legitimacy."[251] When Balkin describes how he thinks the Constitution actually changes through time, he expects that this will have a direct impact on the kind of theory we construct about interpretation. This is why Steven Calabresi has said "Professor Balkin offers us a positive account of our constitutional regime that has normative implications."[252]

Balkin's positive account of constitutional change is centered around constitutional construction, a concept which encompasses quite a bit in his view. For Balkin, construction is concerned with "implementing and applying the Constitution in practice, and building out institutions to perform constitutional functions."[253] It "create[s] doctrines and laws to concretize principles and decide cases," particularly where the text is vague or where "we need to create laws or build institutions to fulfill constitutional purposes."[254] The distinction he makes between interpretation and construction will become clearer later on when I address Balkin's theory of interpretation.

Balkin sees construction as being the primary means of constitutional change over time, and he thinks political actors, often spurred on by social movements,[255] are behind

---

[250] Balkin, *supra* note 71, at 604.
[251] *Id*.
[252] Calabresi and Fine, *supra* note 22, at 687.
[253] Balkin, *supra* note 71, at 559.
[254] *Id*. at 560.
[255] I say "often" because Balkin sees construction taking place all the time, and this includes constructions about issues citizens generally do not pay attention to or care about. Social movements are

most constructions. He thinks political actors engage in construction all the time. Whenever they create new institutions, precedents, or constitutional understandings, political actors change the way the Constitution is implemented and the norms that govern it.[256] "It follows that even miniscule tasks and quotidian legislation could in theory contribute to constitutional construction if they help forge new understandings of the relative powers of the different branches or of the federal and state governments under the Constitution."[257] The role of the courts in this system is "legitimating and rationalizing the work of the national political process and its constitutional constructions."[258] Balkin thinks that the courts almost always align themselves, in the long-run, with national political coalitions and the beliefs of the majority of the population.[259] Courts, then, "take on the task of articulating and applying the values of the dominant national coalition, imposing the values of national majorities on regional or local majorities."[260] Under this positive account of constitutional change, the meaning of the Constitution is largely determined by the political branches and rationalized by the judiciary.

Balkin thinks this positive account explains why the Constitution has changed the way it has and why significant court decisions, such as the New Deal line of cases, came about. For Balkin, a theory of constitutional interpretation must be able to explain this positive account for two reasons. First, because, as stated previously, no normative theory of interpretation can get off the ground if it is in tension with the way constitutional law

---

behind the big changes in constitutional meaning, such as the New Deal coalition that pushed through massive expansions in the power of the federal government.

[256] Balkin, *supra* note 71, at 566-69.

[257] *Id*. at 569.

[258] *Id*.

[259] *Id*. at 563-66.

[260] *Id*. at 571.

actually develops. Second, since this positive account has led to some of the most important decisions in our nation's history and is crucial to the notion of "our" Constitution, there is a strong normative reason for adopting it. Of course, Balkin does not think a theory of interpretation should just be an apology for past decisions; it must provide the basis for critiquing those decisions as well. I will discuss this aspect of his theory later in the section.

2. RECONCILING ORIGINALISM AND LIVING CONSTITUTIONALISM

Now that we understand how Balkin sees the purposes of constitutional interpretation, we can understand the theory of interpretation he proposes. Balkin calls his theory "framework originalism," and the use of the word "framework" is apt.[261] He thinks the purpose of the Constitution is to set politics in motion and create a framework to guide politics.[262] The document enacts principles upon which politics is based and erects strictures that discipline politics. These guideposts are the "hard-wired" portions of the text, those provisions which clearly articulate rules for government (such as the presidential age minimum[263]) and are not subject to change.[264] But much of the Constitution consists of general principles or standards which later generations draw upon when engaging in politics. The principles are derived from the text itself: "Where [the words of the drafters of the text] presume underlying principles, [we seek to know]

[261] *Id*. at 550-51.
[262] *Id*. at 550.
[263] U.S. CONST., art. 2, § 1, cl. 5.
[264] Balkin, *supra* note 71, at 600.

what principles they sought to endorse."[265] The process by which these principles and standards are used and formulated into concrete laws is constitutional construction, which Balkin says is living constitutionalism in practice.[266] Constitutional interpretation consists of discovering the semantic meaning of the text, which can either act as a firm limit (as with the hard-wired provisions) or as the starting point for construction. Balkin thinks it is very important to focus on semantic meaning, which he formulates in opposition to an "expected application" originalism that looks to how the generation that enacted a provision expected it would be implemented. The latter is unacceptable precisely because it disallows much of the great decisions which Balkin thinks comprise "our" Constitution.[267] Balkin calls this interpretive scheme the theory of "text and principle,"[268] and he believes that through it we can achieve a reconciliation between originalism and living constitutionalism.[269]

His overall theory is consistent with his purposes of interpretation. It explains the positive account of constitutional development because it views as legitimate constructions decisions like those of the New Deal[270] or *Griswold*[271] lines of cases. These were instances of courts concretizing and rationalizing constructions that the political branches at the state and federal levels were already putting in place. In this way, it vindicates "our" Constitution. It is also consistent with the positive account insofar as it

---

[265] Balkin, *supra* note 185, at 303.

[266] Balkin, *supra* note 71, at 560 ("Living constitutionalism concerns the process of constitutional construction").

[267] Balkin, *supra* note 185, at 297.

[268] *Id*. at 293.

[269] Balkin, *supra* note 71, at 549 ("Original meaning originalism and living constitutionalism are compatible positions. In fact, they are two sides of the same coin").

[270] Balkin includes as examples Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); Steward Machine Co. v. Davis, 301 U.S. 548 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). *See id.* at 561 n.34.

[271] *See generally*, *e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973).

does not make impossible demands on interpreters, who only have to be sure that they do not violate the semantic meaning of the text or the principles enacted in the Constitution.

How is this system legitimate? How is it that government actors, political or judicial, can justify construing the principles of the text as they see fit? Balkin's theory offers two answers to these questions. The first is his idea that the legitimacy of the Constitution depends on its status as "our" Constitution, and that the theory of text and principle allows the Constitution to continually incorporate those principles and mores that develop with each passing generation. To prevent this would be to allow the Constitution to drift further and further away from being recognizable as "ours" and risk its illegitimacy. The second and most direct answer is that the "democratic legitimacy of this system of constitutional construction rests on the fact that, in the long run, it is democratically responsive. In this way, the process of constitutional construction, mediated through the three branches of the federal government, respects popular sovereignty." [272]

If by this point the reader is still with me, then I must express my gratitude. Certainly this was a lengthy summary, but Balkin's is by far the most intricate and nuanced of the post-originalist theories. It requires extensive explanation before it can be examined. With this behind us, we can turn now to criticize Balkin's theory on its own terms before ending the section with an explicitly originalist critique.

B. The Internal Critique: Constitutional Discourse and the Unstable Framework

[272] Balkin, *supra* note 71, at 598.

Balkin's desire to legitimize what he thinks are the nation's proudest constitutional decisions and to develop an interpretive theory that explains constitutional development deals a heavy blow to constitutional discourse. Recall the limits on construction that come along with Balkin's theory. All forms of interpretation must be in line with the semantic meaning of the text. Political and judicial actors are permitted to create constitutional constructions that are consistent with the semantic meaning, and so long as they are responsive to majority sentiment, any constitutional construction is plausible. This follows from Balkin's desire to legitimize the courts' role in "imposing the values of national majorities on regional or local majorities."[273] Let us suppose, then, that there is a case contesting the meaning of a vague constitutional provision. The Supreme Court issues a decision that provides a construction of the text which does not violate the semantic meaning, and a survey of the actions taken by state legislatures on this issue shows that this construction is in line with majority opinion on the topic.[274] Under Balkin's theory, I would have no non-normative basis to say that the construction was constitutionally implausible and therefore "unconstitutional." I might be able to argue that the construction is unjust or illegitimate insofar as it fails to respect what I deem to be the rights of citizens,[275] but that is a dispute about the justness of the construction, not its historical plausibility.

The point made by this example is that Balkin's theory robs citizens of the ability to condemn a decision on neutral grounds acceptable to all citizens. Today, when a citizen claims that a court decision violates the Constitution, he can usually point to some

---

[273] *Id*. at 571.

[274] Balkin, *supra* note 185, at 333.

[275] Balkin also focuses on other aspects of legitimacy besides individual rights, including the rule of law. *See* Balkin, *supra* note 240, at 517 n.215.

historical basis for his claim, whether that is a provision's teleology, expected application, semantic meaning, etc. His claim is based on concrete evidence that others can approach and evaluate irrespective of their ideological commitments. When he says a decision is "unconstitutional," it carries great rhetorical and substantive force because it connotes something approaching an objective, legal basis for opposing a decision.[276] Within the confines of semantic meaning, Balkin's theory effectively amputates the word "unconstitutional" from political discourse and substitutes the word "unjust" or the contention that a decision does not live up to our aspirations for the Constitution. Constitutional discourse becomes indistinguishable from everyday political fights on controversial issues such as abortion, affirmative action, or anti-sodomy laws. This robs citizens of some of their most powerful vocabulary when engaging in constitutional debates. The word "unconstitutional" loses its force since all assume that it is based on a normative judgment about rights or what principles the Constitution *ought* to protect rather than a historical evaluation of what the Constitution *does* protect.

I doubt Balkin would accept this consequence. He might respond in two ways. The first would be to deny that historical reasoning is largely gutted from constitutional discourse under his theory. Responding to related concerns in one of his articles, Balkin proposes a "division of labor between laypersons who call on the Constitution and legal professionals who bring their claims before judges and other legal decisionmakers" in which "lawyers and judges translate claims of constitutional politics into claims about

[276] Of course, even a historical claim involves judgments about what kind of weight to give to evidence, and a person's normative judgments will likely affect those decisions. But a historical claim is as close to an objective argument as is possible in constitutional discourse, which is why I say it is something "approaching an objective, legal basis for opposing a decision."

constitutional law."[277] He envisions scenarios in which average citizens make claims about what the Constitution demands, with the task "fall[ing] to lawyers to explain in greater detail how these claims are consistent with the constitutional text and principle in ways that are persuasive to courts."[278] This would include "more detailed historical and textual arguments than most nonlawyers could make."[279] Balkin thinks that the arguments he makes in "Abortion and Original Meaning" are precisely these kinds of "arguments made by legal professionals for legal professionals."[280] He would contend, then, that historical and other more objective methods of constitutional argumentation are fully consistent with his theory.

Of course, I am not denying that there would be historical reasoning used in Balkin's theory, only that it would rarely be invoked as a reason to oppose a court's decision. His theory makes room for historical reasoning in order to establish the semantic meaning of the text, but beyond that lie any number of equally acceptable constitutional constructions that can only be argued against on normative grounds. Balkin's discussion of abortion makes my point. He begins his analysis of the right to abortion by briefly examining the ratification and subsequent history of the first section of the Fourteenth Amendment. From his survey, Balkin concludes that the semantic meaning of Section I forbids "deny[ing] women equal citizenship," which can occur when laws "are class or caste legislation or because they help create or maintain second class citizenship or a subordinate status for women in American society. Or they might

[277] Balkin, *supra* note 240, at 509.
[278] *Id*. at 510.
[279] *Id*.
[280] *Id*. at 511.

do so because they deny privileges or immunities of national citizenship."[281] After establishing this rather thin definition of Section 1, Balkin proceeds to argue that restricting abortion violates equal citizenship for women by, among other things, "requir[ing] a woman's body to undergo the strains of pregnancy and the difficulties of childbirth without her consent [and] . . . requir[ing] women, against their will, to become mothers."[282] He also argues that criminalizing abortion "helps place women in a socially dependent status and keep[s] them there,"[283] and he concludes that the unborn do not qualify as "persons" within the semantic meaning of the Constitution because "the fertilized ovum is not yet an individual."[284]

Notice that history was only relevant to establish the barebones semantic meaning of the Fourteenth Amendment. From that point onward, Balkin makes highly controversial normative claims to argue for a constitutionally protected right to an abortion. The historical reasoning matters little in this analysis; the real heart of the discussion is the normative part. One could accept Balkin's gloss on the semantic meaning of the amendment while avoiding his conclusion simply by disputing some of his normative contentions. Were his theory widely accepted, oral arguments at bar would become indistinguishable from the ethical and moral debates one is used to seeing play out in academia and, in less sophisticated form, in political campaigns. If the right to abortion hinges, for example, on a debate about whether antiabortion laws lock women into a subordinate class within American society, constitutional discourse will lose almost all that resembles the historical and legal reasoning foundational to court decisions since

[281] Balkin, *supra* note 185, at 319.
[282] *Id*. at 323.
[283] *Id*. at 324.
[284] *Id*. at 337.

the Constitution's inception. True, there is some historical reasoning involved in implementing Balkin's theory, but very few of the debates will take place over the semantic meaning of the words. They will, by and large, be confined to normative claims, as Balkin's treatment of the abortion issue demonstrates. The word "unconstitutional," in its everyday use, will become indistinguishable from the word "unjust" or "immoral."

Balkin might then push back on my claims about the loss of objectivity inherent in his theory. He could make a similar argument to that made by Whittington when the latter criticizes Judge Bork for his alleged moral skepticism.[285] Balkin could argue that, like Bork, I am seeking so-called "neutral principles" upon which to base interpretation out of a lack of faith in the objectivity of moral claims. If normative judgments can be scrutinized rigorously and we can find the objectively correct normative position on a given topic, then there should be no significant difference between a theory based on normative claims and one based on historical ones.

But my argument is not that moral claims cannot be objective. Indeed, I would categorically reject the notion that there is no way of ascertaining moral truth and of evaluating the plausibility of moral arguments. What I am arguing is that historical reasoning is more accessible to any given citizen than is moral reasoning. It is easier for citizens of vastly different ideological persuasions to evaluate historical evidence and test the plausibility of conclusions drawn from it. By contrast, moral reasoning is much more personal and susceptible to biases. It is more difficult for prolife and prochoice citizens to agree on whether antiabortion laws relegate women to a subordinate class than it is for them to agree on whether historical evidence supports Barnett's view that the Ninth Amendment protects unenumerated rights. Obviously there are heated disagreements on

[285] *See* WHITTINGTON, *supra* note 26, at 45-46.

both of these issues, but it is harder to ignore clear historical evidence than it is strong normative arguments. My claim, then, is not that Balkin's theory leads to constitutional relativism in which there is no way to argue for one construction over another;[286] my argument is that it largely deprives citizens of a powerful and much more accessible way of sorting out those constructions. This, I think, invariably follows from Balkin's theory and is a strong reason to reject it.

The most puzzling aspect of Balkin's theory, however, is its reliance on false dichotomies and unjustified assumptions. One of each can be seen in his argument that constitutional legitimacy depends on the Constitution's status as "our" Constitution. Balkin presents a choice between a theory that accepts the canonical decisions of the past central to the idea of "our" Constitution and the rejection of those decisions along with our ability to accept the Constitution as "ours." Surely there are other options. We do not have to say that all of the New Deal and Warren Court decisions were legitimate and constitutional in order to salvage "our" Constitution. We could accept a theory of interpretation which rejects many of these decisions while we enshrine them in federal or

[286] This is an argument made by Calabresi in response to Balkin. *See* Calabresi and Fine, *supra* note 22, at 691 ("Under Balkin's account of the legitimacy of engaged social movements changing constitutional meaning, Plessy [v. Ferguson] was just as normatively justifiable in 1896 as Brown [v. Board of Education] was in 1954"). I disagree with Professor Calabresi's interpretation of Balkin's theory, though I certainly understand why he comes away with that impression. Balkin's positive account of constitutional development seeks to legitimize the changes that result from courts being influenced by social movements. However, there is a difference between a decision being legitimate as a matter of positive law—that is to say, as a law binding on the citizenry—and it being the most plausible interpretation of the law. I think that Balkin wants to show how we can see past decisions as democratically legitimate even if they are normatively illegitimate. His concern is with justifying decisions typically accused of violating popular sovereignty, such as the New Deal decisions. His theory, if accepted, would allow him to legitimize those decisions as a matter of democratic theory even if some of them (such as *Plessy*) should ultimately be rejected because they are unjust. To be sure, this is a very thin line for Balkin to walk, but I am willing to give him the benefit of the doubt that it is a line he sincerely believes can be drawn. Otherwise, we would have to conclude, with Calabresi, that Balkin's theory creates a pernicious relativism that sanctions any and all of the most vile and unconstitutional decisions of the past. Under that interpretation, there would quite literally be no such thing as an "unconstitutional" decision. I do not think this is what Balkin intends.

state laws. *New York Times v. Sullivan*[287] could be deemed illegitimate, but there is no constitutional barrier to the federal government passing a law enhancing freedom of the press to the level set by the Court in *Sullivan*. Indeed, the political and financial resources that would be required to secure passage of such laws could make their passage a greater source of pride than their effective imposition via Supreme Court decision. With citizens and their representatives actively invested in passing the laws, the people take greater ownership over these achievements and value them in a personal way. They could become part of our national character in a sense similar to but distinct from revered Supreme Court decisions. Balkin assumes that if these achievements of the American constitutional system are not integrated into the Constitution we begin to feel like the text is alien to us. But there is little reason to think that the people would not feel the same national unity and connection with the Constitution if these achievements were instead embodied in federal and state laws. Why constitutionalize everything? Balkin assumes that the Constitution must be the repository of all constitutional achievements, but that is not necessarily so.[288]

Here's another option. If Balkin can develop an argument for why all of these decisions must be constitutionalized, then why not do this through amendment? Why have the courts do it if there are good reasons to think that this is democratically illegitimate? Balkin never responds to this challenge directly, but he does have a lot to say about the amendment process that indicates he thinks this alternative is an unrealistic way of constitutionalizing significant achievements. Article V "make[s] it so easy for a

[287] 376 U.S. 254 (1964).

[288] Henry Monahan's description and critique of this odd desire among some theorists to find all their values in the Constitution remains the best I have read. *See generally* Monaghan, *Our Perfect Constitution*, 56 N.Y. U. L. REV. 353 (1981).

minority to block an amendment."[289] Amendments are difficult because they "require more than widespread consensus—they also require considerable political mobilization."[290] Such efforts are unlikely to be successful for "decisions that lie in the interstices of doctrine—the sort of decisions that law professors care about most."[291] But even with regard to major decisions, Balkin thinks the amendment process is too demanding: "If the Court overturned *Loving v. Virginia* or *Brandenburg v. Ohio* or *Cohen v. California* or even *Griswold v. Connecticut* today, it is not at all clear that these decisions could be reinstated by Article V amendment."[292]

There is something fishy about this argument. If these decisions really are tremendous sources of national pride and serve as the bedrock of our national political heritage, then why would they have trouble garnering the support of three-fourths of the state legislatures? Either these decisions really are central to our identity as a people and would have no trouble getting through as constitutional amendments, or Balkin is wrong to say that they are integral to the idea of "our" Constitution. In any event, the difficulty of the amendment process is no reason to oppose this route for constitutionalizing otherwise-questionable Supreme Court decisions.[293] The difficulty of amending the Constitution makes the Article V process a valuable test of whether a decision really does merit the status of being part of "our" Constitution in a literal sense.

Balkin's argument that what makes the Constitution "ours" involves the legitimization of tenuous but important decisions also makes important assumptions. He

---

[289] Balkin, *supra* note 240, at 473.
[290] *Id*.
[291] *Id*. at 474.
[292] *Id*.
[293] That is not to say, of course, that any of the decisions Balkin mentions (*Loving*, *Brandenburg*, *Cohen*, or *Griswold*) are questionable.

believes that these decisions are so vital to our national character and how we relate to the Constitution that to overturn them would be to cut us off from the text. But what if Americans think that it is profoundly illegitimate for unelected judges to impose decisions that bear little or no relation to how a provision has historically been understood? What if it is equally a part of our national political heritage that the courts stay within strict limits? What if the principle of judicial restraint was central to making the Constitution "ours?" If that is the case, then Balkin's theory actually has the consequence of separating us even further from the Constitution. Balkin might respond that this is implausible given the widespread support for popular (if constitutionally tenuous) decisions in the past. The American people clearly prefer courts that protect and implement constitutional principles as the people see them, even if that means throwing process to the wind. I am not sure this response is correct given the political salience that Republican Party appeals to judicial restraint have had over the last thirty years, but even if it is true it is somewhat beside the point. My argument is not necessarily that Balkin is incorrect in saying that the principles involved in these decisions are important to making the Constitution "ours;" it is that he has not done enough to show that what makes the document "ours" necessarily entails his theory. As shown above, this is just one of several false dichotomies and assumptions that Balkin relies on to make his theory plausible. Balkin may be able to show why those dichotomies are real and why his assumptions are correct, but he has yet to do so.

Then there is the essential question of the permanence of the constitutional "framework" that Balkin identifies. Balkin thinks that the semantic meaning sets boundaries within which politics plays out through construction. The strongest beams in

this framework are the so-called "hard-wired" provisions, those which express "rule-like, concrete and specific" commands, such as the requirement that the President be at least thirty-five years old.[294] Balkin asserts that it would be "quite wrong" to bend or break these rules and that his theory does not allow for such actions.[295]

I disagree. As far as I can tell, there is no principled reason why Balkin's theory would disallow breaking even the clearest of constitutional rules. We can use the presidential age requirement as an example to illustrate this point. Suppose there was a public servant—call him Jose Joel Alicea—for whom the electorate had a great deal of affection and who, at a time of crisis within the nation, the voters turned for security. He is drafted into a presidential bid and wins in a stunning landslide, capturing over two-thirds of all congressional districts and three-fourths of all states. The Supreme Court, wary of stepping into another presidential contest after *Bush v. Gore*,[296] refuses to intervene and disqualify his candidacy, and members of Congress know that any attempt to block certification of Alicea's election would carry tremendous political costs. He is therefore duly sworn in as President. Using his enormous political capital, Alicea goes on to accomplish some of the most significant constitutional achievements in the history of the nation. He pushes balanced budget, line-item veto, and term limit amendments through Congress that are immediately ratified by the states. The whole nation feels tremendous pride over his accomplishments and his presidency. Of course, by now the reader will have guessed the rub: Alicea is only twenty-two years old.

Nonetheless, I see no way for Balkin's theory to condemn Alicea's election. To do so, Balkin would have to argue that the people had no right to elect someone under

[294] Balkin, *supra* note 185, at 305.
[295] Balkin, *supra* note 71, at 599-600.
[296] 531 U.S. 98 (2000).

age to the presidency, but on what basis could he make this argument given that his theory allows the popular sovereign to exercise its sovereignty over the Constitution through ordinary politics? Balkin says that popular sovereignty is respected even when the Court, for example, creates a right which no act of the people could be interpreted to have sanctioned because, in the long run, the Court generally lines up with public opinion. If the people can wield sufficient sovereign power to ratify what amounts to a change in the constitutional scheme without voting for it, what would be wrong with an overwhelming majority—enough to pass a constitutional amendment to change the age requirement—actively deciding to effectively change the Constitution by ignoring the presidential age minimum? If the people can exercise sovereignty over constitutional change through ordinary politics rather than having to go through a formal amendment process, then I see no reason why Alicea's presidency would be problematic for Balkin. The people have ignored hard-wired provisions in the past,[297] and should not a theory of interpretation accept a positive account of constitutional development that includes flouting these provisions? Moreover, the fact that Alicea goes on to accomplish constitutional reforms that are a source of great pride for the people gives Balkin a strong reason to ignore any constitutional improprieties because otherwise he risks delegitimizing events that have become central to the idea of "our" Constitution.

Balkin would respond that this scenario violates the "text" portion of text-and-principle by ignoring a clear textual command, and this is disallowed for two reasons. First, these hard-wired provisions are crucial limits on constitutional politics and change.

[297] The Emoluments Clause is the most obvious example of a crystal-clear constitutional provision that is regularly ignored, with Hillary Clinton's appointment as Secretary of State being just the latest example. *See generally* John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 HOFSTRA L. REV. 89 (1995-1996); Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1501 (2008-2009).

Doing away with them essentially entails the abandonment of constitutional government, and constitutional limits are a key part of Balkin's framework theory. Second, these provisions have to remain in place to preserve the "assumption that law continues in force over time until it is amended or repealed."[298] This is basically a Rule of Law argument. Balkin would say both arguments show why his theory does not countenance Alicea's election.

But I do not see how these responses can save Balkin's framework. Sure, constitutional limits are important to his interpretive theory, but why should we respect the limits already in place in the Constitution? If each generation can redefine the principles and rights protected by the Constitution, then why do they owe allegiance to the clear limits of the text? What would be wrong with each generation defining for itself what those limits ought to be? Balkin's second reason—the Rule of Law—would seem to supply an answer: law cannot change without being formally amended or repealed. But there are several problems with this response. First, it is simply an assertion, a formalist assumption about how law operates that Balkin does not justify despite its tension with the rest of his very un-formalistic theory. Second, we return to the problem of popular sovereignty. If the people can exercise constitutional sovereignty passively by acquiescing to Supreme Court decisions they had no role in bringing about or sanctioning, then what prevents them from actively deciding through normal politics to change the text? What is the force behind the text/principle distinction that Balkin seeks to draw?

Balkin would respond that the importance of the distinction follows from the fact that the Constitution is a written document and that to allow the text to be ignored makes

[298] Balkin, *supra* note 240, at 429.

nonsense of its writtenness. But the same is true of principles. Why enact specific principles in the Constitution if they can be redefined or supplemented with new principles that no one voted on or consented to, as Balkin's theory allows? Does this not make nonsense of the constitutional project as well? Furthermore, Balkin runs into the problem of reconciling his belief in the need for textual limits with the need for the Constitution to be "ours" in order to be legitimate. In my thought experiment, Alicea's election led to great constitutional achievements that became integral to the people's conception of the Constitution as "theirs." If Balkin is prepared to declare his election illegitimate, is he also prepared to deal a body blow to the legitimacy of the Constitution in the eyes of the people?

In the end, Balkin's theory suffers from the irreconcilability of his formalist views of the text and his living constitutionalist views of how the text is implemented. One or the other must win out. Either he must admit that the "framework" he creates is no framework at all and that there are no limits to what the people and the courts can decide, or he must abandon the living constitutionalist elements of his theory and become a true originalist. Balkin's project is about finding a way to get beyond the originalism/living constitutionalism dichotomy, but in trying to satisfy the requirements of both he ends up satisfying the requirements of neither.

C. The Originalist Critique: Expected Applications and the Illegitimacy of Passive Acquiescence

By now it should be more apparent to the reader why I think Balkin's theory is the most troubling of the post-originalist alternatives to originalism. It not only confers

tremendous power on the federal government to change the meaning of the constitution without the approval of the popular sovereign; it is also the most nuanced and brilliant alternative to originalism advocated today. It cannot be easily dismissed, and Balkin's deserved personal reputation for creativity and intellectual prowess make him a formidable advocate for his position. Thus, Balkin's theory presents the dual problem of having real credibility and of being the least originalist of the post-originalist theories.

From an originalist perspective, Balkin's theory misses the mark. This is especially true with respect to Balkin's theory of legitimacy. Balkin accepts the idea of popular sovereignty, but he thinks that popular sovereignty can be exercised without any formal participation by the people in constitutional development. It is perfectly legitimate, in Balkin's view, for a court to declare that a heretofore unknown right is in the Constitution because, in the long run, the court will respond to the will of the people by maintaining or overturning this decision in line with popular sentiment. This is a deeply problematic and nonoriginalist approach to popular sovereignty.

Why should we assume that if the people acquiesce to a court's decision—that is to say, there is never a successful popular movement to overturn it and it eventually becomes accepted as precedent—that this means that the people agree with it or would vote for it? Like Balkin says, it is very difficult to amend the Constitution to overturn a decision, and sometimes intensely unpopular decisions can stand the test of time because of the inability of the people to effectively mobilize against it in ordinary politics. Calabresi points out that there are tangible historical examples of the court imposing a decision that the people continue to fervently disagree with:

> [W]hen the Court struck down school prayer as unconstitutional in the 1960, public opinion polls at the time revealed that that decision was

> disapproved of by over 70% of all Americans. Public opinion polls today continue to show that 70% of the public disagrees with the Court on school prayer, and the level of disapproval is deep enough to have created the engaged social movement that many journalists call the Christian Right. How has the Supreme Court responded to this social movement? It has doubled down on the Establishment Clause not only by keeping its ban on school prayer, but also by banning, among other things, Christmas holiday displays and displays of the Ten Commandments.[299]

More generally, it is inaccurate to say that the Supreme Court always follows public opinion in its methodology. Again, Calabresi corrects Balkin's positive account:

> This view overlooks the fact that from 1801 to 1836, the Marshall Court imposed Federalist constitutional law on a Jeffersonian and Jacksonian nation. The Dred Scott Court likewise spoke for no national majority when it held the Missouri Compromise unconstitutional. Nor is it at all likely during the Lochner era from 1905 to 1937 that a national majority rejected the constitutionality of worker safety laws . . . . Neither the Marshall Court nor the Dred Scott Court nor the Lochner Court spoke for national majorities against regional state stragglers and outliers.[300]

The argument that a constitutional construction is legitimate because it is responsive to majority will rests on dubious assumptions and historical inaccuracies.

There is also the possibility that what seems like a court responding to majority opinion may, in fact, be the majority responding to the court's opinion. Courts influence public opinion at least as much as—and possibly more than—public opinion influences the courts. Balkin himself recognizes this point:

> No doubt popular understandings of the Constitution build on what ordinary citizens recognize in the work of lawyers and judges; they in turn criticize and reshape these ideas in the popular imagination, and these revisions in turn may eventually influence professional understandings. Thus, when we speak about social movement constitutional interpretations, we actually refer to a complex set of interactions.[301]

---

[299] Calabresi and Fine, *supra* note 22, at 689-90.
[300] *Id*. at 688-89.
[301] Balkin, *supra* note 240, at 510.

The interaction between courts and public opinion is a two-way street. Balkin acknowledges that courts can change public opinion through decisions: "The causal inferences, of course, do not run in only one direction. Judicial interpretations like those in *Brown v. Board of Education* or *Miranda v. Arizona* can become important parts of our constitutional culture, they can be absorbed into ordinary citizens' understandings of what the Constitution means."[302] I do not think Balkin realizes the force of this concession. If judicial decisions can become part of how citizens think about the Constitution, then it is very difficult to ascertain when the majority acquiesces to a decision because the people actually agree with it and when the decision has simply become engrained in their everyday lives without their consent. Citizens never voted for *Miranda*, but if they watch enough *Law and Order* it becomes difficult to imagine a judicial system without *Miranda* rights. Decisions can acquire acceptance even if the people never really give thought to whether they agree with the decisions.

Even if Balkin's positive account of constitutional development were right and we could always assume that the courts will be responsive to public opinion in the long run, his conception of popular sovereignty remains deeply flawed. It ties the legitimacy of major changes in constitutional doctrine to the vagaries of public opinion. There are good reasons for requiring a formal amendment process to change the Constitution. When the people are called upon to make changes to the Constitution, they are forced to think seriously about the issues involved and the implications of their actions. There are political campaigns to educate and lobby voters. If an amendment passes, it is only because there exists a genuine and overwhelming national consensus that has emerged after a lengthy period of reasoned public discourse. Constitutional change occurs after

[302] Balkin, *supra* note 185, at 309.

careful and thoughtful deliberation in this formalistic approach, and what the sovereign will is is undeniable. By contrast, when the public is polled about its opinion of *Miranda*, none of these features exist. There has been no public debate, educational or political campaigns, time for deliberation, or formal vote. A poll demonstrating that the majority of Americans support the holding in *Miranda* is meaningless in terms of ascertaining whether the popular sovereign would approve this constitutional change. When the people passively accept a court decision, there is little reason to assume that they have exercised sovereign power over constitutional development.

Balkin could argue that he has as much a right to assume that the people agree with a decision by acquiescing to it as I have to assume that the people agreed to the Constitution despite the fact that a majority of the population did not vote for it. He would likely dispute Calabresi's rejoined to his positive account of constitutional development, and he might see no problem with the courts influencing people's opinions. Instead, he might contend that when the courts influence public opinion, it is likely that the people have been convinced by the reasoning and positive results of the Court's decision, which is a perfectly legitimate outcome. He would also likely deny that his positive account only requires majority opinion to be reflected in polling data. In his discussion of *Lawrence v. Texas*, Balkin cites the actions of state legislatures,[303] and he looks at the actions of prominent national organizations that influence public opinion in his defense of abortion rights.[304] Especially in the case of state legislative action, Balkin could argue that many of the features I think are vital to ascertaining the people's will are present, and we can fairly read public sentiment based on this data.

---

[303] *Id*. at 333.
[304] *Id*.

Setting aside the historical question of whether Balkin's positive account is accurate, none of these counterarguments is availing. I set aside the historical question of whether the courts always follow public opinion because it is beyond the scope of this paper to adjudicate, though I would be interested to hear Balkin's response to Calabresi's examples. However, we can examine the other defenses raised above. First, I do not claim that we can assume that a majority consented to the Constitution despite the fact that a majority did not and could not vote for it. My argument for popular sovereignty is not based on its theoretical coherence but on its necessity for understanding the text of the Constitution. Without assuming popular sovereignty to be true when we are interpreting the text, we cannot explain the language of several textual provisions or the original context in which the document was written and ratified. Original meaning becomes distorted without assuming popular sovereignty. Balkin's theory, however, cannot appeal to necessity as a reason for assuming that people agree with court decisions. He asserts this as a fact of political science that is crucial to his positive account of constitutional development and his ability to legitimize otherwise-dubious constitutional constructions. The "I'm rubber and you're glue" argument does not work here.

It is indeed possible that when courts influence public opinion it is a case of the people being convinced of the correctness of a decision, but my point was that there is no way of being sure that this is the case and that we have good reasons to believe that it is often not. Oftentimes people come to accept court decisions through cultural influences or as brute facts without taking the time to evaluate the merits of these decisions. Balkin

cannot assume that acquiescence equals full consent.[305] Finally, while it is true that Balkin examines the actions of state legislatures and national organizations as indicators of public opinion, he is also willing to ignore those indicators when they are opposed to the result he wants to achieve in a given case. When *Roe* was handed down, Balkin admits that "state laws on the books had not caught up with the direction of public opinion" on abortion since "only thirteen states had passed abortion reform statutes."[306] From this, Balkin concludes that "when *Roe* was decided, the right to abortion was not a privilege or immunity of national citizenship, at least under the declaratory theory."[307] But Balkin proceeds to emphasize polling data that shows "strong public resistance to overturning *Roe v. Wade*," and he speculates that "an overwhelming majority of the states would protect some kind of right to abortion" were *Roe* overturned today.[308] Based on these two claims, Balkin argues that "most of the public now regards a basic abortion right as among the guarantees of citizenship," and therefore that it is a constitutional right under the Privileges and Immunities Clause.[309]

As we can see, here Balkin is willing to defer to polling data as the primary indicator of whether the public has accepted a decision. An equally important point, however, is that when one reads his discussion of how the public feels about *Roe*, one walks away convinced that the argument boils down to mere speculation. Assuming

---

[305] Here I am happy to agree with Barnett, who makes this argument forcefully when he questions the idea of constitutional legitimacy based on popular sovereignty. *See* BARNETT, *supra* note 26, at 22-25.

[306] Balkin, *supra* note 185, at 333-34.

[307] *Id*. at 334.

[308] *Id*.

[309] *Id*. at 334-35. I hasten to add that I am using Balkin's arguments here slightly out of context. He is arguing in these passages for the proposition that the right to abortion is protected under the Privileges and Immunities Clause, which he thinks requires some sort of public acceptance before it can be established. However, I think that his discussion of how to ascertain public opinion in this instance is a valuable window into how Balkin perceives the task of understanding public opinion generally. The evidence he uses to make his claims are good indications of the methods he would use to argue that a decision has now been accepted by the public and is therefore legitimate.

Balkin is right in saying that abortion is now accepted as a constitutional right, we have no way of knowing whether abortion would have achieved that status without the intervention of *Roe*, as Balkin concedes.[310] This underscores the point that Balkin's theory requires a great number of assumptions to reach the conclusion that the Court's actions are legitimate since they are democratically responsive. Popular sovereignty does not work this way. How can the Constitution be "ours" if we never formally consent to the dramatic constitutional changes Balkin contemplates the Court would impose? Balkin's theory of popular sovereignty runs counter to an originalist notion of what popular sovereignty means.[311] In the final analysis, the sovereign power in Balkin's approach is not the people; it is the judiciary.

This leads to the second major problem with Balkin's theory that an originalist would perceive: the awesome powers he grants subsequent generations to modify the Constitution's meaning. This is properly a subject of criticism because it is historically and textually dubious and because of the power it gives to the judiciary. Balkin justifies the broad latitude he allows for constructions by arguing that the text not only allows but demands a broad delegation of interpretive power to future generations. This stems from what Balkin sees as the purpose of the Constitution: "Constitutions are designed to create political institutions and to set up the basic elements of future political decisionmaking. Their basic job is not to prevent future decisionmaking but to enable it."[312] He rejects the

---

[310] *Id* ("We cannot be sure how much of current public acceptance of abortion rights is due to the Court's early decision [in *Roe v. Wade*] and how much is due to the success of social movement activism that changed the minds of most Americans throughout the country").

[311] Henry Monaghan has written a terrific article demonstrating that the founding generation did not think the people could alter constitutional meaning outside of the amendment process. His historical sketch of what popular sovereignty entailed is slightly different from what I have presented here, but I think it is generally consistent with my conclusions. *See generally* Monaghan, *We the People(s), Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996).

[312] Balkin, *supra* note 71, at 554.

idea that Constitutions are supposed to act as constraints on future decisions where the textual language is broad: "Constitutional drafters use rules because they want to limit discretion; they use standards or principles because they want to channel politics but delegate the details to future generations."[313] He thinks this is the only way to make sense of vague language because "it makes little sense if the purpose of constitutionalism is to strongly constrain future decision-making."[314]

The well-established narrative of the Constitution-as-constraint argues against Balkin's interpretation. As Calabresi states, "The Framers themselves made it quite clear that they designed the Madisonian system of checks and balances to prevent temporary passions, which might engulf the body politics, from being legislated immediately into law."[315] Whittington has shown how the experience of an unwritten constitution under the British led the Americans to seek strict limits on the powers of government by codifying those limits in written form.[316] This desire to restrain power was famously spelled out by Madison in *Federalist 51*, where he wrote:

> In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[317]

The Tenth Amendment's command that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states

---

[313] *Id*. at 553.
[314] *Id*. at 554.
[315] Calabresi and Fine, *supra* note 22, at 681.
[316] WHITTINGTON, *supra* note 26, at 50-53.
[317] THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1999).

respectively, or to the people" only makes sense in the context of a document meant to limit power. The language of "delegate," "prohibit," and "reserve" indicates a relationship in which power is on loan from the people to the government, and this means that the government may not go beyond these strict limits.

Of course, it could very well be that the people chose to delegate broad authority to future interpreters in the text, but vague language is not enough to support this proposition. Whittington has powerfully made this argument:

> The founders could well have used "broad" terms to convey relatively narrow thoughts. Few people, for example, believe that the founders literally meant that Congress could pass "no law" infringing speech, yet in order to recognize this it must be admitted that the absolutist phrase meant something more narrow to the authors who wrote it.[318]

History helps provide the context we need to evaluate the purpose of broad language. The problem with Balkin's theory is that it tries to make a historical claim—that the Founders delegated broad authority to future generations—without offering any historical evidence to support it. He argues that the language of the text is often vague or enshrines general principles and deduces from this that there is a textual and historical warrant for later generations to rewrite much constitutional meaning as they see fit. The conclusion does not follow from its premises, and what historical data there is strongly argues against it.

Balkin would likely respond that the history originalists often use to narrow the principle enshrined in the text is improper because it looks to "expected applications." This leads to the third originalist problem with Balkin's theory: his absolute prohibition on the use of expected applications in discerning the meaning of a constitutional provision. Balkin writes:

---

[318] WHITTINGTON, *supra* note 26, at 184.

> Fidelity to the Constitution as law means fidelity to the words of the text, understood in terms of their original meaning, and to the principles that underlie the text. It follows from these premises that constitutional interpretation is not limited to those applications specifically intended or expected by the framers and adopters of the constitutional text.[319]

This distinction between expected application and text is not new. Ronald Dworkin popularized it in his response to Justice Scalia in *A Matter of Interpretation*,[320] and Lawrence Solum draws a similar line.[321] Importantly, however, both Scalia[322] and Solum[323] think that expected applications are nonetheless relevant to discerning the meaning of the text, whereas Balkin thinks this, too, is illegitimate because it almost invariably leads to treating expected applications as authoritative: "[T]oday's originalists often conflate the two ideas in practice."[324] He also resists the relevance of expected applications because they would cause a "retreat from the achievements of our constitutional tradition or accept them only grudgingly."[325] This would amount to a denial of "our" Constitution.

Rappaport and McGinnis take up the challenge of responding to many of Balkin's arguments about expected applications, which both scholars think are highly relevant to interpretation. They begin by arguing that "it is hard to ascertain what constitutional provisions mean without reference to expected applications."[326] This is because:

---

[319] Balkin, *supra* note 185, at 295.

[320] *See* Dworkin, "Comment," *in* SCALIA, *supra* note 10, at 115-27.

[321] *See* Solum, *supra* note 24, at 19-21.

[322] Scalia, "Response," *in* SCALIA, *supra* note 10, at 144 ("Ultimately, of course, [semantic meaning and expected applications] chase one another back and forth to some extent, since the import of language depends upon its context, which includes the occasion for, and hence the evident purpose of, its utterance").

[323] Solum, *supra* note 24, at 20 ("That *original expected applications* are distinct from *original meanings* does not entail that there is no relationship between the two. *Expected applications* may be evidence about *meanings*, even if they are not decisive evidence") (Emphasis in original).

[324] Balkin, *supra* note 240, at 449.

[325] Balkin, *supra* note 185, at 300.

[326] McGinnis and Rappaport, *supra* note 20, at 378.

> Words are slippery things and dictionary definitions do not pin down their political meanings any more than they pin down the meaning they would have in recipes, technical manuals, or haute couture. Context is important and the recovery of context can be greatly enhanced by considering how the words would have applied in the sociopolitical usage of the day.[327]

Context is thus a key argument made by Rappaport and McGinnis. They think expected applications are particularly relevant for those of us so far removed from the original context: "Expected applications are especially useful because they caution modern interpreters against substituting their own preferred glosses on meaning for those that would have been widely held at the Framing."[328] Arguing contra Balkin and along the same lines as Whittington, Rappaport and McGinnis say that this context is crucial for interpreting general principles because "[t]he language of a provision may appear to adopt a general principle, but verbal formulations often do not tell us which particular variation of a principle was intended."[329] The purpose of expected applications in these cases would be to understand precisely *what version* of the principle was codified in law. These two scholars offer a powerful rejoinder to Balkin's ban on expected applications.

In truth, Balkin's response to Rappaport and McGinnis is disappointing. He argues that "to adopt this method is essentially to reinstitute a new form of expectations originalism under the guise of original meaning."[330] Balkin reiterates his point that the use of expected applications collapses into expectations originalism, where those expectations are authoritative. But this ignores the substantive arguments made by Rappaport and McGinnis about the importance of expected applications to understanding context and meaning. These two scholars are arguing that *even the semantic meaning* of a

---

[327] *Id*. at 379.
[328] *Id*.
[329] *Id*.
[330] Balkin, *supra* note 240, at 453.

provision is quite difficult to grasp without the context supplied by expected applications. Balkin never responds to what I think is a very strong argument.

It would be unfair to Balkin to stop there and declare victory for proponents of expected applications. The fact that he offers a weak defense of his opposition to expected applications does not mean no strong defense exists. Calabresi, though a forceful critic of several aspects of Balkin's theory, defends him vigorously in this area and provides a much stronger case for a firm line between text and expected applications. Calabresi makes four arguments. First, he notes that the ways in which the Founders, ratifiers, or other groups during ratification expected the Constitution to be implemented were not ratified with the text. "Ordinary citizens could not have been expected to know what these original expected applications were, and they could not have responded to them even if they had."[331] Second, there is a real possibility that expected applications and the language of the text will not match up. "Congress often passes statutes with a mistaken impression of what they mean or of how they will apply."[332] Third, it is often difficult to figure out what the original expected applications were. There are too many expectations to adjudicate, and there is "no way to sum these up or determine which group's expectations ought to get priority."[333] Finally, Calabresi claims that resorting to expected applications creates a disincentive for lawmakers to take the task of writing legislation seriously. "Unless judges read the texts formalistically," the lawmaker can always try to finagle meaning into a text that does not support it.[334]

---

[331] Calabresi and Fine, *supra* note 22, at 669.
[332] *Id*.
[333] *Id*.
[334] *Id*. at 671.

All of these are reasonable objections to the use of expected applications as binding on interpreters, which is what Calabresi is arguing against. But Rappaport and McGinnis only argue that expected applications are relevant to interpretation, not that they are binding, and that is all they need to argue since Balkin categorically forbids the use of expected applications. This deals with three of the four arguments Calabresi raises. Once we understand that Rappaport and McGinnis are only arguing for the relevance of expected applications, then it does not matter whether or not those expectations were ratified by the people. Their only purpose is to supply context, and to that extent they are no less useful than dictionaries or public documents that were also not ratified by the people. The fact that text and expected application might not match up also becomes unproblematic. Whittington's example of the "no law" language of the First Amendment demonstrates that almost no one thinks we should interpret the text literally since in that example we defer to what we know to be the intended meaning of those words rather than the literal one. When there is a conflict between text and expected applications, our task is to use the expected applications and other sources to contextualize the language and give it its most reasonable construction. Judges do this all the time when the language of the text is clearly deficient, as when statutes are poorly written.[335]

Finally, the fact that Rappaport and McGinnis want to establish the relevance rather than the binding nature of expected applications means that Calabresi's concerns about incentives are overblown. He is correct in saying that if judges privileged expected applications over the text in all instances this would create a disincentive for legislators to make the text precise, but this disincentive is almost entirely erased by a theory of

[335] *See*, *e.g.*, In re Dumont, 581 F.3d 1104, 1110 n.11 (2009) (discussing the much-derided drafting of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)).

interpretation that examines expected applications but also pays strict attention to textual language. Calabresi's argument is also less apposite in the case of constitution-writers than it is for members of Congress since constitution-writing is a rare and high-stakes event that leads to great care on the part of the authors. In any case, these three arguments do not hold up against the arguments of Rappaport and McGinnis.

There is also the argument that summing the expected applications is nearly impossible. This argument remains somewhat relevant even after clarifying that Rappaport and McGinnis do not advocate that expected applications be binding, but the relevance/binding distinction still decisively settles this question. There is no need to "sum up" the expected applications because there is no need to derive a single expected application. Even if we have multiple, conflicting expected applications, this presents no problem since they are all merely sources which we use to contextualize the language of the provision in question. It is akin to having multiple dictionaries or public documents that are in tension with one another. No one thinks we need to "sum up" the dictionaries to arrive at a single dictionary definition. The fact that they conflict just means that more historical data is needed in order to discern where the preponderance of the evidence lies. The same is true of expected applications. Different groups might have expected the Constitution to be applied in divergent ways, but in combination with other historical materials and, of course, with the language of the text itself, we should be able to come up with a sound historical analysis of what the language means. There is no "summing" problem with expected applications.

Before leaving this topic, it is worth noting that Balkin's own words should lead him to endorse expected applications. As Balkin writes when discussing the method of

text-and-principle: "We must ask what the people who drafted the text were trying to achieve in choosing the words they chose, and, where their words presume underlying principles, what principles *they sought* to endorse."[336] Rappaport and McGinnis rightly argue that we can rarely know what principle the drafters sought to endorse without looking at expected applications. Those applications supply historical context and information about word usage that is critical to understanding what version of a general principle was being enacted. True, the First Amendment protects freedom of speech, but freedom of *what kind of* speech? Political speech? Artistic expression? Pornography? These are very different conceptions of what "speech" means and what the amendment protects. They are, in a very real sense, *different principles*. The interpreter who thinks the Constitution only protects political speech will not regard pornography as speech in any relevant sense, and he would therefore think that a principle protecting a right to make and use pornography is a different principle than the one he finds in the text. To say that the amendment protects the principle of "freedom of speech" is to say nothing at all, or at least to say nothing of relevance. If Balkin wants to discover what principles the drafters sought to endorse, then he must turn to expected applications as a historical source that informs his search.[337]

Jack Balkin has presented a sophisticated alternative to originalism, but it is crucial that originalists recognize it as precisely that—an alternative. Seeking to justify decisions that most originalists abhor, Balkin constructs a theory in which the text serves

---

[336] Balkin, *supra* note 185, at 303. (Emphasis added).

[337] Balkin later says that he seeks other principles besides those specifically endorsed by the drafters. *See* Balkin, *supra* note 240, at 486-503. This does not really address my argument, however, since he never renounces the need to find the principles that were endorsed by the drafters. He is willing to supplement those principles with others that were not intended, but that does not excuse him from using expected applications when he is searching for those that *were* intended.

as only a framework within which constitutional meaning is settled by constitutional construction. This basic set-up unjustifiably delegates enormous power to future generations and, more specifically, to the judiciary, which becomes the true sovereign power in Balkin's system. Even this framework, as we have seen, can be done away with in line with his theory. The result of Balkin's theory would be a Constitution-in-name-only, a document setting no firm limits on government power and the will of the majority. It is a vision that is irreconcilable with originalism, which is founded above all on respect for the popular sovereign's will and the strict limits the people have placed on government power. Balkin's theory is unique and, with its desire to vindicate decisions many Americans like and to get past the originalism/living constitutionalism distinction, it will be appealing to many who want to claim the strong populist arguments of originalism while holding fast to the decisions at odds with originalism. This is a temptation that must be resisted. To do otherwise, to allow for the Balkinization of originalism, is to allow originalism to lose its soul.[338]

VI. LAWRENCE SOLUM AND THE IMPORTANCE OF LANGUAGE

As the reader may have perceived by now, the crisis within originalism is due in large part to the "thinning out" of originalist theory wrought by recent scholarship. Originalism has traditionally been a robust theory that sought to explain the legitimacy of the Constitution, provide the most legitimate methods of interpreting the text, and guide

[338] *See* Smith, *supra* note 14, at 11. ("In this instance, though, it turns out that Balkin sacrifices little or nothing by the conversion; conversely, in gaining Balkin and like-minded thinkers, originalism loses . . . well, its soul").

judicial decisions about constitutional meaning. Randy Barnett and Jack Balkin show that when originalism is stripped of its core elements, the door is opened for interpreters to insert whatever theory of legitimacy or method of interpretation is most conducive to achieving the results they desire.[339] The result is the incoherence of originalism, with diametrically opposed theories all jostling with each other to stand under the same umbrella. It is within this context that we can understand the problems presented by Lawrence Solum's theory, which exemplifies and attempts to justify what would be the thinnest of originalist theories. If Solum's theory is admitted as a distinct version of originalism, then there are no grounds for resisting the introduction of far more destabilizing post-originalist theses into the realm of originalism. What Solum offers originalists is the torch with which to burn down the theoretical walls protecting them from the damaging intrusion of the post-originalists. It is a torch originalists should quickly put out.

A. THE THEORY: ORIGINALISM AS LINGUISTIC FACT

The reader is already familiar with much of Solum's theory from earlier sections. The motivating force behind Solum's work is an effort to construct a theory of constitutional interpretation that relies on non-normative "facts" about the nature of textual interpretation. These "linguistic facts" are "facts about language usage that are relevant to meaning in the semantic sense."[340] They rely on conventions of semantic

[339] I am speaking here of interpreters of the Constitution, not of Barnett and Balkin personally. While their views about political theory or other topics no doubt influence their constitutional theories, I do not contend that they design their theories in order to disingenuously reach the results they want.

[340] Solum, *supra* note 21, at 942.

meaning from the time in which the text was written to decipher the semantic content of the text. When we explain what we think an utterance means, "we are making factual assertions about the world."[341] By contrast, normative arguments are "reasons for action" or what ought to be done.[342] The claim that judges ought to be restrained in the exercise of judicial authority is a normative argument. Solum wishes to avoid normative arguments for most of this theory (the fidelity thesis being the exception). In this way, I believe, Solum hopes to establish a theory which originalists and nonoriginalists alike can accept because it should not require them to acknowledge normative arguments they may disagree with.[343]

The linguistic framework Solum constructs consists of four claims, which he terms "theses." The fixation thesis is the idea that the semantic meaning of words are fixed at the time they are written.[344] The reader will recall the example of "domestic violence" earlier in the paper. Because the semantic meanings of words often change over time, the fixation thesis prevents the meaning of a text from changing by this accidental evolution. The clause meaning thesis asserts that the semantic meanings of words are to be derived within the context of a particular clause,[345] with clauses being examined in the context of the whole document.[346] This thesis contextualizes words because the meaning of a word on its own may be different from its meaning in relation to other words. The

---

[341] *Id*.

[342] *Id*. at 943.

[343] To the extent that this is his goal or that he generally seeks to avoid constructing a theory based on normative premises, Solum's efforts fail according to Saul Cornell. *See* Cornell, Heller, *New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss*," 56 UCLA L. REV. 1095, 1101-06 (2008-2009) ("As Larry Kramer correctly notes, choosing among different Founding-era practices is a political choice. Any approach to constitutional interpretation, including new originalism, requires that we take sides in the Founding-era debates").

[344] Solum, *supra* note 21, at 944-47.

[345] *Id*. at 947-53.

[346] This is the famous Hermeneutic Circle. *See* Solum, *A Reader's Guide to Semantic Originalism and a Reply to Professor Griffin*, 7-10 (Illinois Public Law and Legal Theory Research Papers Series, No. 08-12, July 19, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1130665.

contribution thesis claims that the semantic content of the text makes some contribution to the content of the law.[347] Solum does not specify how much of a contribution the semantic meaning makes to the way the text is applied, only that there is a contribution. The semantic meaning will not settle all constitutional questions, but it will settle some and may help settle a great many. Finally, the fidelity thesis maintains that citizens are obligated to obey the semantic content of the Constitution because it is the supreme law of the land.[348] This obligation can be defeated where there are strong moral reasons for disobeying the law.[349] The fidelity thesis is the only truly normative component of Solum's theory, while the other theses are claims about the way textual interpretation works. Solum summarizes his theory as follows: "The semantic content of the Constitution was fixed at the time of utterance by conventional semantic meaning, and the conventions of legal practice make that content the supreme law of the land to which officials and citizens owe fidelity as a matter of political morality."[350]

For Solum, the interpretation/construction distinction is an important one. Interpretation, in his view, consists only in discerning the semantic meaning of the text. Construction is "the translation of the semantic content into rules of constitutional law."[351] Construction therefore does the majority of the work in cases where the meaning of the text or how it is applied to a specific case is vague.[352] In fact, by defining interpretation to mean only the discovery of the semantic content of the text and by omitting his own theory of constitutional legitimacy, Solum creates a very minimal

---

[347] Solum, *supra* note 21, at 953-55.
[348] Solum, *supra* note 24, at 8-9.
[349] *Id*.
[350] *Id*. at 173.
[351] Solum, *supra* note 346, at 2.
[352] *Id*.

conception of interpretation that allows for broad latitude in constitutional construction. This creates the defining characteristic of Solum's theory: its ability to serve as the basis for a whole range of different theories of interpretation. Solum believes that a "semantic originalist" would have no trouble integrating theories such as popular sovereignty, the rule of law, or the writtenness of the Constitution into his theory.[353] He even goes so far as to say that it opens the door for reconciliation between originalism and living constitutionalism.[354] Solum sets out to construct a theory that identifies the core features of constitutional interpretation and originalism in particular, and his resultant theory serves as a ready foundation upon which to build a variety of different theories.

B. DEBATING THE ORIGINALISM LABEL

Perhaps anticipating the argument that his theory does not belong to the originalism fold, Solum argues throughout his extensive, unpublished essay that the originalism label is not all that important. What is significant, Solum contends, is substance: "So long as the discussion is clear and terms are defined, we can stipulate different senses of the terms and phrases like 'originalism' and 'living constitutionalism.'"[355] Solum does acknowledge later on in his article that "names matter, because the names for theoretical positions resonate and ramify throughout the space of theoretical discourse."[356] He argues that "[s]cholars should not attempt to manipulate

[353] Solum, *supra* note 24, at 128-34.
[354] *Id*. at 164-67.
[355] *Id*. at 58.
[356] *Id*. at 168.

terminology with the undisclosed purpose of recasting the topography of theoretical space to gain the high ground and force their opponents into an indefensible position."[357]

I certainly agree with Solum's point about resisting the manipulation of labels in scholarly discourse, but the literature can be equally distorted when scholars, acting in good faith, assume labels for their theories that they ought not. I have written this essay not out of an unhealthy desire for an insular originalism but so that the term "originalism" regains its unique characteristics and its usefulness in scholarly and political debate. When monikers are misused, they lose their force and their ability to serve as useful shorthand for complex sets of ideas and arguments. Worse still, the continual misuse of labels can lead to theoretical confusion since scholars begin to associate the misfit ideas with the misused term. Scholars end up talking past one another because neither quite understands what the other is saying, and the debate becomes hopelessly muddled. Moreover, the ideas of the legal academy have a great deal of influence over the legal profession and how political movements discuss legal issues. One need only look at the history of originalism over the past forty years for an example of this phenomenon. This means that terminological and theoretical incoherence in the academy can find its way into the legal and political realms, which can entail serious consequences extending beyond the pages of law reviews. Maybe more than most legal scholars, originalists ought to grasp the importance of language and terminology given how central language is to proper originalist interpretations, and Solum, with his impressive command of linguistic theory, surely understands how powerful terminology is. Thus, while Solum might be right in a superficial sense when he says that ideas are more important than labels, it is crucial to understand that the relationship between ideas and labels is a two-

[357] *Id*.

way street and that the latter can influence the former. For this reason, we must seek clarity in terminology.

Solum's repeated defense of his use of the word "originalism" to describe his theory indicates to me that he would largely agree with what I have said so far. So now we can move on to how he defends that label. Solum makes three arguments that are relevant to this essay. First, he argues that the core of originalism and the principle that unites all originalist theories is the fixation thesis, such that "[i]f the claim that the semantic content of the provisions of the Constitution were fixed at their times of origin were false, then the foundations of originalism would be shaken and all or almost all the members of the family of originalist theories would no longer be viable."[358] Because of this fact, Solum thinks his theory can properly be described as originalist. He also thinks this argument defeats any attempts (such as my own) to define originalism as anything more than the fixation thesis.[359] He would argue, for example, that my argument in Section III depends on the affirmation of the fixation thesis, and while I might make claims about what else originalism entails, all of these claims can be denied by other theorists. Only the fixation thesis has to be affirmed by all originalists.

Second, he contends that his use of the word "originalism" is "neither misleading nor obfuscatory . . . . The term 'originalism' contributes to the meaning of the phrase ['Semantic Originalism'] by pointing to the role that 'original public meaning' plays in 'Semantic Originalism.'"[360] Because his theory incorporates a version of original public meaning (a version concerned only with semantic content), Solum thinks his theory is originalist. Finally, he makes the historiographical point that "as a matter of intellectual

[358] *Id*. at 11.
[359] *Id*. at 121-22.
[360] *Id*. at 10.

history the relationship between Semantic Originalism and predecessor views, including the New Originalism or original-meaning originalism is clear and beyond dispute. Semantic Originalism traces its origins to the New Originalism."[361] Solum thinks that if we accept this claim then it is impossible to deny that his theory is originalist.[362]

Solum's first argument involves a conclusion that does not follow from its premises. The structure of his argument is:

> 1) all originalists agree on the fixation thesis;
> 2) all originalists do not agree on any other aspect of originalist theory;
> therefore,
> 3) the fixation thesis is what defines a theory as originalist.

This conclusion rests on two implicit and false assumptions. First, it assumes that just because all originalists agree on the fixation thesis but do not agree on any other aspect of originalism, that they all agree that the fixation thesis is what defines originalism. But it is entirely possible that all originalists agree that there is more to originalism than the fixation thesis even while they disagree on what that additional desiderata might be. It is clear that Solum is making this assumption because if he is not making it then he has to admit that there is a real possibility that originalists could agree on some other criterion for what constitutes originalism that would disqualify his theory. The only way his argument has any force is if he can say that agreement on the fixation thesis *must* lead to the acceptance of his theory, and he can only say this if there is no possibility that originalists could agree on some other aspect of originalist theory.

Second, it draws a normative conclusion from what Solum asserts are factual premises. The fact, if true, that all originalists agree on the fixation thesis but do not agree

---

[361] *Id*. at 58-59.

[362] Solum lists four arguments that he makes in this area, but I think that these can be combined in the way I have done. The arguments are tightly interconnected and do not have hard-and-fast boundaries between them. *See id*. at 161-62.

on any other elements of originalist theory does not mean that the fixation thesis is what constitutes originalism. What defines originalism is a normative question. It is an assertion of what *ought* to be considered originalism. Solum's factual observations about what unites originalists is useful data when thinking about originalist theory, but by themselves these observations do not inexorably lead us to conclude that originalism is the fixation thesis and no more.

An example will help clarify these points. A group of fashion designers might all agree that a dress' silhouette is necessary to evaluating its beauty and artistic value. This might even be the only criterion they agree on when making such an evaluation. However, it does not follow that a dress' silhouette is what defines beauty and artistic value for this group of designers. It is almost certain that they each have other criteria that they think essential when judging a design, such as the fabric used, the quality of the construction, and the choice of colors. It might be impossible to get them all to agree on what other criteria besides the silhouette should be employed in making their evaluation, but surely none of them would be comfortable with the statement that the silhouette is all that is important to ascribing beauty and value to a garment. Furthermore, even if they did all agree that the silhouette was the only important criterion, this would not bind any other fashion designer to agree with them. If this group of designers judged that a particular dress was beautiful based only on its silhouette, that would not prevent another designer, who took other criteria into account, from having a legitimate disagreement with them. Similarly, Solum's conclusion that, because the fixation thesis unites all

originalist theories, it is the sole demand that a theory must meet to be considered originalist, is unfounded.[363]

Solum's second argument involves similar mistakes. The fact that his theory can claim a relationship and even continuity with the history of originalism does not necessarily mean that his theory is originalist. A theory can derive its origins from and share many important features with a predecessor theory but nevertheless be classified differently. Biological taxonomy is a good example here. Even if it is true that modern chimpanzees and humans have very similar DNA and share a common ancestor, they are not part of the same species or even the same genus.[364] Furthermore, Solum misperceives the literature on originalism when he says that to exclude his theory would entail throwing out much of more recent originalist scholarship (so-called "New Originalism"[365]).[366] While it is true that his theory shares many important elements with New Originalism, such as the interpretation/construction distinction and the focus on original public meaning, there are also critical differences between his theory and those associated with New Originalism. For instance, Solum mentions Whittington as having a great influence on "Semantic Originalism's" theoretical development,[367] but Whittington and Solum are far apart on many highly significant issues. Whittington strongly argues

---

[363] I made this argument earlier in less extended form and with a different example in Section III. *See supra* Section III.

[364] *See* Feng-Chi Chen and Wen-Hsiung Li, *Genomic Divergences between Humans and Other Homonoids and the Effective Population Size of the Common Ancestor of Humans and Chimpanzees*, 68 AM. J. HUM. GENET. 444, 446, 455 (2001).

[365] For a discussion of why I have refused to use the "New Originalism" terminology throughout this paper, *see supra* note 26.

[366] Solum writes, "If the New Originalism is a form of originalism, then given the relationship between the substance of Semantic Originalism and substance of the New Originalism, it follows that Semantic Originalism is a form of originalism." Solum, *supra* note 24, at 59.

[367] *See id*. n.177.

for popular sovereignty[368] and the importance of the Constitution's writtenness;[369] Solum argues for neither and does not adopt any theory of legitimacy. Whittington restricts construction to the political branches in almost all cases;[370] Solum imposes no similar limitation on construction. Most relevant for Solum, however, is that Whittington endorses a theory of original intent,[371] not a theory of original public meaning. And while Solum is correct in connecting his theory to the work of recent theorists who claim to be part of the New Originalism, it just so happens that those theorists are precisely the ones I am arguing have no business being called originalists. Even if I accept his theory's connection to recent work by Balkin and Barnett, that means nothing to me in terms of defining Solum as an originalist because I strongly contend that neither of the others is an originalist. Thus, Solum's arguments defending his use of the originalism label fall away.

I think Solum would argue that my position fails to take into account the way originalist scholars actually talk about originalism. Solum would likely say that my theory of what originalism entails is all well and good for me but that it does not describe how many other originalists think of themselves and their theories.[372] This is similar to H.L.A. Hart's argument for the "internal point of view" when evaluating what law is, the need to take into account how practitioners of law actually think about law and their

---

[368] WHITTINGTON, *supra* note 26, at 110-59.

[369] *Id*. at 47-61.

[370] *Id*. at 158. ("The introduction of this element indicates t he political nature of the task [of construction] and the inappropriateness of its pursuit by the judiciary with its limited access to external sources of authority"); *see generally* WHITTINGTON, *supra* note 65 (in which constructions are described throughout the book entirely in the context of action by the political branches).

[371] WHITTINGTON, *supra* note 26, at 3, 88-109, 192-95. These are just a few pages in which Whittington makes his views clear, but the entirety of the book is about original intent.

[372] Solum makes this argument in response to Christopher Eisgruber's definition of originalism. *See* Solum, *supra* note 24, at 123-24.

relation to it.[373] My argument is inadequate because of its inability to describe originalist theory as it exists in the literature, or so Solum would contend.

I do not deny that my view of what originalism is excludes some theorists who might consider themselves originalists. In fact, the obvious effect of my essay is to exclude those theorists. But I do not think this means that I fail to respect the internal point of view or that Solum does respect it. The internal point of view consists of taking into account how practitioners in a particular field, *in the main*, view their task. There is no obligation to cater to the perspectives of outliers within the profession whose views might differ significantly from those of their colleagues. For this reason, I see no obligation on my part to ensure that my theory of originalism explains the work of Balkin, Barnett, or others who I think are on the margins of originalist thought. I would go further in arguing—in fact, I have argued in Section II—that a lot of recent originalist scholarship is a dramatic break from what originalism had been for at least a quarter-century of its existence (from the early 1970s through the mid-1990s). It is these theorists whose views have failed to respect the internal point of view, not those of us who seek to return originalism to the core principles that have traditionally been accepted by originalist theorists.

But what Solum would really be getting at with the internal point of view critique is that by going beyond the fixation thesis I am bringing on board a host of concepts that do not describe how many originalists see themselves. What I have already said, however, should be enough to answer this criticism. The fact that originalist theorists may not see popular sovereignty as central to originalism, for example, does not mean that they think the fixation thesis is the defining characteristic of originalism. A cursory

[373] H.L.A. HART, THE CONCEPT OF LAW 88-91 (2d ed., 1994).

survey of the originalist literature would show that few originalists hold this position. They see originalism as being comprised of much more than just the fixation thesis, and so *it is Solum* who fails to respect the internal point of view by excising from originalism all but the most basic of propositions. As the first section of this paper shows, Solum's view of what originalism consists of is at odds with how originalists have viewed their theory throughout its history. It even fails to describe theories like those of Balkin and Barnett, Solum's closest theoretical companions, whose normative claims about "our" Constitution and individual rights, respectively, are central to their visions of originalism. Solum's proffered justifications for calling his theory originalist, then, do not hold up under scrutiny.

C. The Originalist Critique: Semantics as the Basis of Originalism

1. The Problems with Thin Original Meaning

Solum's theory strips originalism of many of its defining characteristics. Because it does not endorse any particular theory of legitimacy, it cannot be said to encompass popular sovereignty. Solum thinks that popular sovereignty is compatible with his theory, but as a stand-alone theory he does not integrate popular sovereignty into his approach. This is highly problematic in its own right for the reasons discussed in Section III, but the issue is exacerbated by the thinness of Solum's theory of original meaning. That is because even if we were to accept Solum's theory with the addendum of popular sovereignty, a thin original meaning cannot adequately respect the popular sovereign's will.

The difference between Solum's notion of original meaning and my own is that I think the aim is to discern the sovereign's will and that any sources relevant to that enterprise should be used. This means that there are instances when the teleological or applicative meanings are decisive for a constitutional dispute. Solum privileges semantic meaning above all other forms of meaning and sees the other meanings as informing semantic meaning. Once the work of discovering the semantic meaning is finished, any remaining constitutional questions are to be settled by construction. One can think about these differing approaches as competing pyramidal structures. In my view, the sovereign will is at the top of the pyramid, with the various forms of meaning underneath used to support it. By contrast, Solum places semantic meaning at the top of the pyramid, with other forms of meaning subordinated to it. The sovereign will does not enter into the picture for Solum because he does not endorse popular sovereignty, but even if it did it would become identical with the semantic meaning at the top of the pyramidal structure, and this robs the popular sovereign of his full sovereignty.

If the popular sovereign's commands are reduced to the semantic meaning of the text and no more, then the judiciary, as one of its agents, will not be giving attention to what the sovereign truly wished its agents to do. This true will of the sovereign includes taking into account the context within which the sovereign was acting, which includes the evil it was trying to remedy, the rights it sought to protect, the historical context, and how the sovereign expected its will would be implemented to carry out these purposes. The language, by itself, does not fully capture what the sovereign was willing; it only captures the meaning of the method by which the sovereign chose to communicate (in this case, a text).

With this review of and elaboration on the arguments made in Section III, we can discuss other problems with Solum's theory from an originalist perspective. The first has already been alluded to, and that is that Solum's theory, if accepted as originalist, opens the door to other, much more damaging post-originalist theories like those of Barnett and Balkin. Indeed, Solum admits as much and finds this a happy result: "Jack Balkin argues persuasively that living constitutionalists should opt for compatabilism [between originalism and living constitutionalism]. Semantic Originalism supports that argument and provides foundations for its semantic component by providing a theory of constitutional meaning."[374]

This follows from the fact that Solum ascribes such minimal content to original meaning and allows great latitude for constitutional construction. In this way, "[o]riginalism has constitutional interpretation as its domain: the semantic content of the Constitution is its original public meaning. Living constitutionalism has constitutional construction as its domain: the vague provisions of the Constitution can be given constructions that change over time in order to adapt to changing values and circumstances."[375] Of course, as the reader will now know, Solum is not quite right in saying that his theory is fully compatible with Balkin's. Balkin restricts his theory to semantic meaning and excludes all other forms of meaning, whereas Solum allows for expected applications to inform semantic meaning. Nonetheless, Solum's basic argument that his theory opens the way for what he would see as reconciliation between living constitutionalism and originalism is correct. As the last section should have made clear, however, in my view this "reconciliation" entails the collapse of the

[374] Solum, *supra* note 24, at 167.
[375] *Id*. at 166.

originalism/nonoriginalism dichotomy and, therefore, the loss of a distinct and coherent originalism. Once we understand that Balkin and future theorists like him would undermine the basis for coherent originalism, and once we see that Solum thinks his theory provides a way for these theorists to make their way into the originalism fold, we can conclude that Solum's theory clears the way for originalism's ultimate collapse.

There is not much for Solum and I to say about this conclusion. Solum would simply deny that the reconciliation of originalism and living constitutionalism is a defect of his theory. As seen throughout this and previous sections, Solum and I have different conceptions of what originalism entails, and I have tried to show that mine is the sounder view. If the reader concludes that there is nothing wrong with Balkin's theory from an originalist perspective, then there is little reason for him or her to give any weight to this critique. But since I hope that at this point I have accomplished my task of demonstrating the serious problems with Balkin's theory from the point of view of originalism, the reader might see the force of this criticism.

2. The Perils of Sophistication

Whatever one's view of this criticism may be, however, there are other reasons besides those already mentioned for thinking that originalism cannot countenance Solum's theory. The most powerful reason relates to the complexity of it, a critique made by Steven Smith. Smith argues that Solum's theory, with its intellectual foundation in the language philosophies of Wittgenstein, Gadamer, Grice, and Austin, has taken originalism to a new level of sophistication. But with that sophistication comes

consequences, some of which we may think outweigh the benefits of being able to distinguish between "speaker's meaning" and "sentence meaning."[376] When a subject becomes overly sophisticated, it can "tend to become the exclusive province of a narrower group of people—namely, those who are fluent in the concepts, diction, distinctions, discursive moves, sources, and authorities that have come to dominate the field."[377] This is a negative consequence because it makes the barriers to understanding and accepting originalism higher. Smith explains the problem well:

> Many lawyers, scholars, and citizens generally may lack the ability to master this discourse. Or they may simply lack the incentive. The investment required for full participation becomes inflated while the lag between the expenditure of time and effort and the payment of actual dividends (if there ever are any) increases. Faced with these barriers to entry, would-be originalists may simply decide to redirect their resources elsewhere.[378]

I think Smith is absolutely right. Originalists need to give careful consideration to whether linguistic theory really should become the heart of originalist theory as Solum advocates. Linguistic theory and philosophies of language are not easily comprehended even by the most astute scholars, and there is a real probability that most lawyers and judges will lack the capacity or the time to read and understand Wittgenstein or Grice. If the theoretical foundations of originalism become incomprehensible to all but the most elite of academics, then originalism loses its appeal and will begin to peter out within the legal profession.

Smith rightly points out that this hyper-sophistication is especially devastating to originalism for two reasons. First, in line with the conception of originalism I articulated in Section III, Smith thinks that "originalism is supposed to be an approach that actual

---

[376] *Id*. at 34-35.
[377] Smith, *supra* note 14, at 11.
[378] *Id*. at 7-8.

lawyers and judges can employ in deciding actual cases." Originalism is not just a theory about how to interpret a legal text; it is a comprehensive theory that guides constitutional decision makers by providing them with a theory of constitutional legitimacy, a theory of interpretation, and the methodology to put that theory of interpretation into practice. "So," Smith continues:

> If the approach becomes so conceptually cumbersome that only a theoretical elite can fully understand and participate in it, then what good is originalism? It would be as if a new Henry Ford were to design the perfect car, except that it is so complicated that only people with advanced degrees in engineering can actually drive it.[379]

Originalism is a theory that is supposed to be able to guide legal practitioners, but if a theory like Solum's is accepted as being central to originalist thought, then originalism loses its *raison d'etre*. Relatedly, over-sophistication is especially problematic for originalism because, as Smith correctly observes:

> [P]art of the appeal of originalism . . . has always been its inclusively commonsensical quality, in contrast to fancier hermeneutical approaches associated with the likes of Heidegger and Gadamer. Originalism was not heavy or ponderous. It made interpretation seem much like the sort of communication we all engage in routinely . . . . Insofar as sophistication robs originalism of this commonsensical quality, it deprives the approach of a major part of its reason for being.[380]

Solum's theory and others like it present a genuine question of whether the added benefit of sophistication (assuming there is one) is worth the cost of turning away would-be originalists and depriving the theory of its rhetorical and argumentative salience in classrooms, courtrooms, and campaign stops. More importantly, if originalism is supposed to guide interpreters but they are turned away by its intricacies, then it ceases to be useful to legal practice and becomes the province of an academic elite.

---

[379] *Id*. at 9.
[380] *Id*. at 9-10.

While these are both significant problems stemming from the complexity of Solum's theory, there is a much more fundamental difficulty created by its intricacy. For an originalist, the Constitution comprises the written commands of the popular sovereign to the people's agents in government.[381] The relationship between sovereign and agent is hierarchical; the former gives orders to the latter, who has no legitimate basis for flouting these commands. But if the method used by the agent to interpret the sovereign's instructions becomes so complicated that the sovereign no longer understands them, the relationship is dramatically altered. If the basis for constitutional decisions is a theory which is inaccessible to the popular sovereign, then the people lose control over their own commands. The agent is free to manipulate the commands according to its interpretive theory, leaving a befuddled popular sovereign with no way to test or verify the interpretation since the sovereign does not understand how it was reached. If the people do not comprehend how their instructions are being interpreted, then they cannot ensure that the agent adheres to their orders and, therefore, they cease to be the sovereign. At that point, it is the one who controls the interpretation and is able to manipulate the orders who is truly sovereign, and in a society that accepts judicial supremacy that can only mean that here the Judge shall rule.

To some extent, Solum anticipates this critique of what he terms "the colonization of law by philosophy" and responds with three arguments.[382] First, Solum claims that there is no *a priori* reason for ruling out a particular theoretical tool before it has been given a chance to show whether it is useful. "The proof of the pudding is in the eating. If

[381] Of course, the Constitution serves several functions, including serving as a locus for civic religion and as a means of constraining the people themselves and the transient sentiments of the majority. But the primary purpose of the text is as a set of instructions to government agents, as is clear from the presence of the text's command-like language.

[382] Solum, *supra* note 24, at 169.

philosophical tools make significant contributions to fundamental issues of constitutional theory, then constitutional theorists must master them."[383] Second, Solum observes that other fields of law are rightly forced to learn highly complex concepts as well, and he sees constitutional law as being no different. As an example, he cites tort law: "In this day and age, I venture to guess that no one would attempt to do serious torts scholarship without mastery of the Coase Theorem or the notion of a transaction cost."[384] Constitutional law theorists, then, should stop whining and get down to work. Finally, he argues that introducing these high-level concepts into originalism does not shut out average citizens or judges, who "need an intuitive understanding of the basic principles of constitutional theory" and whose understanding of the concepts "can be shallow and not deep."[385] These complex ideas can be translated into layman's terms because only constitutional theorists need concern themselves with the nuance of linguistic theory. "The theoretical apparatus of the philosophy of language provides foundations for a practical imperative accessible to common sense."[386] Solum thus proposes something akin to a division of labor in which the citizen, lawyer, and judge understand originalism at a very high level of generality while the theorists immerse themselves in the theories of Gadamer, Wittgenstein, and Grice.

Solum's first point, that there is no *a priori* reason for rejecting his move towards linguistic theory, is in one sense obviously correct. If the tools of a particular field of study make the explication of originalist theory more accurate and precise then we should welcome their use. But this is not the real source of the dispute. Solum is not just

---

[383] *Id.*
[384] *Id.*
[385] *Id.*
[386] *Id.* at 170.

advocating the use of linguistics as a tool in the originalist box, a tool originalists have known and used since the hermeneutic debates began in the early 1980s. The question is whether linguistic theory ought to be the principal foundation and core of originalist thought, as Solum's theory assumes it is. There are good reasons for rejecting this proposition, as I have indicated above.

Solum's second argument is equally unavailing. He is right when he observes that other fields of law have to tackle concepts at an extraordinarily high level of abstraction and sophistication, and no doubt constitutional law must do so as well when it discusses issues of sovereignty or legitimacy, for example. But there are two important differences to note. First, as we have seen, there are features unique to originalism that make hyper-sophistication problematic. The judge in a tort law case does not have any special obligation to ensure that the public-at-large can understand the reasoning behind his decision. There are surely good reasons for him to try and make his decisions accessible, but little harm is done if they are not. Not so with constitutional law, for reasons of sovereignty and legitimacy tied up with constitutional decisions.

Second, in the areas that have traditionally featured high-level debates within constitutional theory, such as issues surrounding legitimacy, little to no background knowledge is required for a citizen to engage meaningfully with the question at hand. A citizen can understand the criticism that constitutional legitimacy based on popular sovereignty does not exist because the majority of the population could not vote for the document, just as he could comprehend a critique of the idea of "the will of the people" since a group of people might be thinking very different things when they vote on something. Those of us engaged with these questions may know that Randy Barnett has

forcefully articulated the first criticism while Christopher Morris has voiced the second, but why should such details matter to the average citizen? By contrast, Solum's theory is entirely grounded in linguistic concepts that can be difficult and time-consuming to explain. One can only imagine the look on most citizens' faces when one tries to describe the distinction between "utter," "utterer," "and "utterance type."[387] To truly understand Solum's theory, one must master a great many technical concepts, as evidenced by the grand sweep of his own article on the topic.

Here we meet Solum's third argument, because I imagine at this point Solum would argue that, even if he conceded my points about the inherent complexity of his argument and the problems this poses for popular sovereignty and originalism generally, these problems can be remedied by a division of labor along the lines he proposes. But notice the example Solum gives to demonstrate how this division of labor would work: "For example, the ideas contained in the fixation thesis and the clause meaning thesis can be expressed in language that is easily accessible to both judges and ordinary citizens: look to the meaning of the text for ordinary people at the time it was written."[388] In the example, the fixation thesis is expressed as a command rather than as an explanation. The conclusion is given but not the reasoning. We are told what to look for but not why to look for it. But why we are looking for the semantic meaning is exactly what the citizen needs to understand! Anyone can be told what to do; the problem confronting Solum's theory is explaining to judges and citizens why they should do it. It is here that Solum's theory runs into a wall because of its complexity. The average citizen has an intuitive grasp of what popular sovereignty means, but try explaining Solum's four theses and the

[387] *Id.* at 34.
[388] *Id.* at 169-70.

rationale behind each of them. Yet, this is the burden Solum would have to meet to overcome the arguments relating to the appeal of originalism and to the issue of sovereignty. It is a burden I do not think he can meet.

Lawrence Solum has provided an interesting and useful explanation for why originalists adhere to the fixation thesis, and his four theses are an innovative framework within which to think about originalist theory. But, as was the case with Balkin, originalists must resist the understandable desire to embrace Solum's sophisticated and impressive theory. Its acceptance within the originalism family can only lead to the collapse of originalism into nonoriginalism and the elimination of originalism as a distinct constitutional theory. On the road leading to originalism's demise, Randy Barnett and Jack Balkin might be the traveling companions guiding originalism towards its own destruction, but it is Lawrence Solum who is paving the road.

VII. Conclusion

Ideas have consequences. Ideas can summon the people to their greatest victories or enthrall them with their own horrific power. Neither outcome requires sudden, noticeable shifts in thinking. More often than not, great changes result from the steady but ever-advancing march of new ideas. Ideas, like water, can make their way into unseen crevices, slowly dissolving the foundations upon which a theory stands. Unnoticed and unceasing, these small erosions in the foundation of a theory spread throughout the base, and many years later, the trickle has become a torrent, and the great edifice comes crashing down violently and unexpectedly. Better to have shored up the foundation when

it was first weakened. Better to have paid attention to the power of that small stream. Better, it seems, not to ignore the power of ideas.

Originalism now faces just this sort of test. Fortunately, many have noticed the cracks in its foundation and the water that is quickly flowing in to fill the breaches. The ideas of Randy Barnett, Jack Balkin, and Lawrence Solum can still be recognized for the destabilizing influence that they are and excluded from the originalist tent. But how did this crisis come about? Why was originalism so vulnerable to indeterminacy?

The answer, I think, has a great deal to do with the kind of theory that originalism is. Originalism is a demanding theory. It holds fast to several core concepts that bring with them a host of other principles and implications. Popular sovereignty, for instance, brings with it skepticism of judicial power, particularly at the margins of constitutional meaning. Ever wary of the possibility that Rule by the People might be supplanted with Rule by the Judge, originalism jealously guards the people's sovereignty against encroachments by judicial actors. This firm commitment to popular sovereignty bleeds into other spheres as well. Interpretation itself is affected since the need to respect the sovereign's will requires attempting to understand the sovereign's commands as it would understand them. This and other core principles are what give originalism its theoretical force and attracts new converts. Its assertiveness and strong, multi-tiered structure are its greatest assets.

At the same time, the determinate nature of originalism is precisely what makes it so vulnerable to indeterminacy. Let popular sovereignty be dispensed with and the entire theoretical structure is alarmingly destabilized. Allow judges broad discretion to change constitutional meaning and originalism's central commitments are imperiled. Reduce

originalism to no more than a theory of textual interpretation and its history and traditions become unintelligible. Vigorously defended, a robust theory can take on all challengers; but let its strong buttresses rot and weaken from within, and the theoretical edifice becomes no more than a hazard to those still inside.

By contrast, originalism's alternatives risk no such dangers, but they also accrue no similar benefits. Nonoriginalism cannot make claims to the same theoretical determinacy or manifold commitments. As Justice Scalia has said, it suffers from "the impossibility of achieving any consensus on what, precisely, is to replace original meaning, once that is abandoned."[389] This radical indeterminacy of nonoriginalist thought makes its defense difficult since the reasons for favoring one approach over another seem largely idiosyncratic. At the same time, this indeterminacy makes nonoriginalism a moving target that is difficult to pin down. How could an originalist claim to have definitively refuted nonoriginalism when we have little idea what nonoriginalism entails? We may know what some of its commitments are, such as the rejection of the binding nature and primacy of thick original meaning, but we can never fully glimpse the true colors of this chameleon.

With regard to the subject of this essay, the indeterminacy of nonoriginalism provides it with the powerful advantage of being able to accommodate virtually all iterations of constitutional theory. A nonoriginalist might defend popular sovereignty, or he might dispense with it altogether. He might expect judges to rule according to the precepts of Adam Smith, or he might demand that they be disciples of John Maynard Keynes. He could demand that judges enforce natural law, or he might ask that they implement the teachings of John Rawls. Nonoriginalism can accommodate these

[389] Scalia, *supra* note 64, at 862-63.

diametrically opposed commitments without risk of being stretched beyond its limits because there are, in fact, no limits.

Originalism, as we have seen, has no such luxury. It is built upon solid ground and is bound by the principles it embraces. Were it to abandon any of these, it would be like knocking down one of the walls in a cathedral. Nonoriginalism has no walls. It is an open field. Originalism's sturdy nature gives it a strength nonoriginalism cannot mimic, but it is also its greatest vulnerability.

Originalism demands much of its adherents, and it is vulnerable in large part because of those demands. But what is at stake in the debate over originalism is the very meaning of the Constitution, the law that shapes and determines our politics at the most fundamental level. The indeterminacy crisis is, thus, the greatest issue confronting originalists today. Against a more than half-century tide of constitutional theory that has advocated freewheeling judicial power, it is originalism that has stood fast and demanded that the people's will be respected. It is therefore worth defending, and I hope I have managed to show that it is in need of defending. I close with the words of William McKinley, so often invoked as to be cliché to the tired ears of the cynic but powerful and moving to those dedicated to originalism. Let these be the words that guide originalists as they overcome this crisis, for they are the words that give purpose to the originalist project: "In no other country is there so much devolving upon the people relating to government as in ours. Unlike any other nation, here the people rule, and their will is supreme law."[390]

[390] SAMUEL FALLOWS, LIFE OF WILLIAM MCKINLEY, OUR MARTYRED PRESIDENT 272 (1901).