NO HISTORY, NO CERTAINTY, NO LEGITIMACY . . . NO PROBLEM: ORIGINALISM AND THE LIMITS OF LEGAL THEORY

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INTRODUCTION

Professor Martin H. Redish is on the warpath. Like General Sherman marching toward Atlanta (or Justin Tuck marching toward Tom Brady), Professor Redish, together with Matthew Arnould,[1] lays waste to every constitutional theory that he encounters. Originalism, with its "belief that constitutional interpretation should be characterized exclusively by an effort to determine the Constitution's meaning by means of some form of historical inquiry,"[2] generates "an often contrived and opaque veil of historical inquiry"[3] that provides "an ideal smokescreen behind which judges may pursue their personal[,] moral, political[,] or economic goals with relative impunity."[4] Nontextual theories, for their part, "permit[] selective manipulation of constitutional doctrine in order to advance narrow political goals"[5] and allow judges "to insert their own values in

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1. Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485 (2012). Having published four coauthored articles with students at Northwestern University School of Law during my time there (and one more during my time at Boston University School of Law), I understand the indispensable role that the students play in the generation of such works. I am therefore reluctant to shorten "Professor Redish and Mr. Arnould" to "Professor Redish." Nonetheless, I will do so in this Article, at least in textual references, in order to promote editorial economy (and afford Mr. Arnould a measure of plausible deniability, should he ever seek it).

2. *Id.* at 1487.

3. *Id.* at 1489.

4. *Id.* at 1522.

5. *Id.* at 1490.

place of democratically sanctioned choices."[6] Modern constitutional theory, proclaims Professor Redish, is therefore caught between the Scylla of "an often fruitless and strategically manipulative straightjacket of originalism's supposedly rigid historical inquiry on the one hand"[7] and the Charybdis of "the linguistic chaos and epistemological arrogance of nontextualist inquiry, on the other."[8] As an alternative, Professor Redish proposes a methodology that uses the contemporary linguistic meaning of constitutional provisions to set outer boundaries for adjudication, supplemented by "use of principled normative inquiry, informed and controlled by a transparent, candid explication of a constitutional provision's underlying meaning based on the intellectual normative framework chosen to be employed by the jurist."[9]

I am delighted and honored that I was selected by Professor Redish and the *Florida Law Review* to represent fruitless and strategic manipulation in this exchange. (Dean Erwin Chemerinsky is presumably the standard-bearer for linguistic chaos and epistemological arrogance.) Unfortunately for the spirit of the exchange, I actually think that much of Professor Redish's assessment of originalism is correct. To be sure, though, we part company on some important matters. I believe (1) that Professor Redish is wrong to reason from differences in methodology *among* originalists[10] to the impossibility of a principled and coherent approach *within* a single originalist theory; (2) that his very strong claims about the dangers of manipulation of various versions of originalist theory[11] need more systematic empirical support, rather than scattered examples; and (3) that he is sometimes too quick to attribute bad motives to actions that might more easily be explained by lack of careful analysis. But Professor Redish is on generally solid ground in thinking that (1) history done by legal scholars or judges is likely to be bad history;[12] (2) it is a mistake to think that reliance on history, even if done well, will necessarily produce interpretative results that are certain in all, or even most, significant

6. *Id.* at 1522.
7. *Id.* at 1492.
8. *Id.*
9. *Id.*
10. *See id.* at 1501–02.
11. *See id.* at 1594 ("[T]he originalist model *inevitably* lends itself to precisely the type of strategic political manipulation that it claims to be designed to avoid.") (emphasis added).
12. *See id.* at 1500–02, 1509; Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 77–78 (2006). This is not to say that history done by professional historians is necessarily going to be all peachy—as a noteworthy modern episode involving probate records and gun ownership amply demonstrates. *See generally* Stanley N. Katz, Hanna H. Gray & Laurel Thatcher, *Report of the Investigative Committee in the Matter of Professor Michael Bellesiles* (July 10, 2002), http://www.emory.edu/news/Releases/Final_Report.pdf. But the problems with even professional historiography simply strengthen Professor Redish's critique of interpretative methodologies that rely heavily on historical analysis.

cases;[13] (3) interpretative reliance upon the concrete intentions (whether they are labeled "intentions" or "understandings") of historically real persons presents grave practical and conceptual problems;[14] and (4) employing temporally changing, judge-made "constructions" to fill in interpretative gaps left by historical uncertainty is, at best, oddly described as a form of "originalism."[15] That is a lot about which to be right. In fact, once one has done away with history, certainty, actual intentions, and construction, what is left of originalism?

For at least some forms of originalism, the answer is "not very much." If the goal of interpretation really is to identify the historically real mental states of some group of persons—whether the "Framers," the "ratifiers," or the "general public" (however one chooses to define those terms)—then, at the very least, judges, lawyers, and law professors are likely not the people best suited to interpret. Rather, it would seem that historians, linguists, psychologists, and semioticians are better qualified for the job.[16] Even more fundamentally, and aside from the practical and conceptual problems involved in identifying the concrete intentions or understandings behind a centuries-old, jointly authored document, the Constitution itself seems to prescribe interpretation by reference to the intentions of a fictitious, rather than real, person: the imaginary "We the People" by whom the Constitution purports to be "ordain[ed] and establish[ed]."[17] Grounding constitutional meaning in historically real intentions, including the intentions or understandings of the ratifiers, or some even broader grouping of the general public, is indeed rife with "archeological and conceptual shortcomings."[18]

Nor is it clear that any particular version of originalism, including one (such as mine) that avoids the principal epistemological problems of reliance on history,[19] is necessarily going to yield more certain and predictable results than other theories. After all, perhaps the most predictable votes on the United States Supreme Court in recent memory were those of Chief Justices Warren Burger and William Rehnquist and

13. *See* Redish & Arnould, *supra* note 1, at 1502–03.

14. *See id.* at 1595; Lawson & Seidman, *supra* note 12, at 61–67 (discussing problems with attributing intentions to collectives).

15. *See* Redish & Arnould, *supra* note 1, at 1511; Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1232–33 (2012).

16. *See* Lawson & Seidman, *supra* note 12, at 50, 76–78. By the same token, legal scholars who advocate theories of interpretation that rely on moral theory or evolving social values also write themselves out of work. Philosophers, sociologists, and pollsters, just to name a few classes of professionals, are all more plausible "constitutional interpreter[s]" than judges, lawyers, and law professors under any such model. *Id.* at 76–77.

17. U.S. CONST. pmbl. For a modest defense of this claim, and a short discussion of how "We the People" relates to the historically real authors of the Constitution, see Lawson & Seidman, *supra* note 12, at 58–61.

18. Redish & Arnould, *supra* note 1, at 1490.

19. *See infra* Part II.

Justices William Brennan and Thurgood Marshall, none of whom was either a sophisticated, or consistent, practitioner of originalism.[20] An interpretative methodology that says, "decide cases in accordance with (pick one) the current political platform of the liberal wing of the Democratic Party *or* the current political platform of the conservative wing of the Republican Party" yields predictability and determinacy in abundance. A judge faithfully following this methodology would be severely constrained by a source of meaning external to the judge. If constraint and certainty are the goals, originalism is a relatively poor way to achieve it compared to numerous other methodologies.

Finally, if one is seeking democratic legitimacy for constitutional review, one is unlikely to find it in adherence to a two-centuries-old document. Legitimacy, democratic or otherwise, is a moral concept and can only be found in moral theory. Perhaps the Constitution, interpreted in accordance with its original meaning, is morally better than any available alternative source of governance in some particular context of time and culture—but that is not something that can be determined by originalism (or any other interpretative theory), and the claim is hardly self-evident. It will not do to argue that the Constitution itself prescribes, even if only implicitly, a particular role for judicial review, because that only establishes what the Constitution means. It does not establish that real-world judges should decide real-world cases in accordance with that meaning.

Thus, judged by the standards of interpretative soundness, certainty, and democratic legitimacy, originalism as described by Professor Redish, definitely has problems. The remaining questions are whether he has described originalism accurately and whether his own "controlled activism" alternative is superior to originalism along any relevant dimensions. This Article will address those questions.

Part I will identify which versions of originalism are and are not subject to the kinds of criticisms that Professor Redish levels. In particular, it will show that the form of originalism that is increasingly emerging among sophisticated adherents—a form in which meaning is determined by the hypothetical understandings of a fictitious reasonable observer, rather than those of any concrete historical figures—does not suffer from the

20. *See* EARL M. MALTZ, THE CHIEF JUSTICESHIP OF WARREN BURGER, 1969–1986 29 (2000) (noting that Justice Rehnquist was frequently swayed by the politics of particular cases); Lee J. Strang, *Originalism as Popular Constitutionalism?: Theoretical Possibilities and Practical Differences*, 87 NOTRE DAME L. REV. 253, 287–88 (2011) (explaining that "[o]riginalism's modern incarnation arose as a critique of the Warren and Burger Courts" and their consistently liberal rulings); SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 504–05 (2010) (quoting Justice Brennan's description of originalism as "little more than arrogance cloaked as humility"); THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 281 (Mark V. Tushnet ed., 2001) (describing Justice Marshall as a challenger of originalism).

interpretative pathologies that Professor Redish identifies. Furthermore, it will show that any interpretative theory—originalist or otherwise—can achieve adjudicative *determinacy* even in the face of interpretative *uncertainty* through appropriate allocations of burdens and standards of proof. A highly indeterminate interpretative theory can generate a highly determinate set of adjudicative outcomes—which presumably is the form of determinacy with which Professor Redish is most concerned. Finally, Part I will briefly suggest that a focus on democratic legitimacy—a focus shared by almost everyone engaged in constitutional theory, except me—is a distraction from the kinds of issues with which legal theory can sensibly concern itself.

Part II will briefly engage Professor Redish's "controlled activism" approach. Because it is primarily a theory of adjudication rather than a theory of interpretation, in the sense that the demands of the adjudicative theory drive the underlying interpretative theory rather than vice versa, any critique of the theory must be normative. I try to avoid normative theory in my professional work, and I will try to avoid it here. Accordingly, I will content myself with posing some questions that Professor Redish might want to consider in fleshing out his approach.

Again, I am grateful to Professor Redish and the *Florida Law Review* for allowing me to participate in this forum. I miss many things about Northwestern University School of Law—and having Marty Redish as a colleague is one of the things I miss most.

I. PROJECT ORIGINALISM: INTERPRETERS OF THE RUNWAY[21]

Why would anyone be a constitutional originalist? Presumably, one cannot answer that question without first asking, and answering, what being a "constitutional originalist" really means—a question that is not asked nearly often enough, especially by self-proclaimed constitutional originalists.

Originalism can be a theory of *interpretation*, a theory of *adjudication*, or both. That is, originalism can be either a theory of ascertaining the meaning of a document—for example, the United States Constitution—or a theory of decision making in cases that at least nominally invoke that document. The relationship between the two kinds of originalism is contingent. One could perfectly well believe that originalism is the interpretatively correct way to understand the United States Constitution, but doubt whether decision makers (such as courts) should make real-world decisions based on that understanding. Similarly, one might believe that originalism is inferior to some other methodology as a tool for ascertaining constitutional meaning, but believe, for institutional and normative reasons, that it is the best tool for resolving real-world disputes

21. With apologies to Heidi Klum.

in which the Constitution is invoked. And, of course, one might believe that originalism is both a sound interpretative methodology and an appropriate decision making tool—albeit for very different reasons.

Originalists are all too frequently unclear about which species of originalism they support and why. It would, therefore, be more than a bit unfair to chide Professor Redish for not keeping this distinction clear in his discussion. Accordingly, this Article offers the following remarks as clarification—not criticism—of Professor Redish's assessment of originalism.

Professor Redish identifies essentially three sets of problems with originalism: practical and conceptual problems with tying meaning to history; problems of interpretative uncertainty and the resulting risk of manipulation of materials to reach predetermined results; and concerns about legitimacy stemming in large measure from the foregoing uncertainty-generated risks of manipulation. The severity of these problems depends both on what variant of originalism is involved and whether one is worried about interpretation (ascertainment of meaning) or adjudication (resolution of disputes).

It is fair to say that Professor Redish is principally concerned about originalism-as-adjudication—that is, originalism as a normative prescription for how real-world decision makers, such as judges, should resolve real-world problems of social governance. This is, for the most part, the originalism of Justice Antonin Scalia,[22] of Professors John McGinnis and Michael Rappaport,[23] of Judge Robert Bork,[24] and indeed of almost everyone (except me) who is involved in the contemporary debates about which Professor Redish is commenting. It is very rare to see someone try to separate originalism as a tool of interpretation from originalism as a tool for making decisions. But from an analytical standpoint, it is worthwhile to "break out" the interpretative from the adjudicative aspects of originalism, to see what kinds of problems map onto each aspect and how those problems might be addressed.

A. *"Don't [Need to] Know Much About History"*[25]

From the standpoint of pure interpretation, with no regard for adjudicative consequences, some kind of originalism is clearly the correct

22. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 862 (1989) (espousing originalism as the preferred means of constitutional judicial decision making).

23. *See* John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1733–35 (2010) (arguing that the Constitution "should be interpreted according to the methods that [its] enactors would have regarded as applicable").

24. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143 (1990) (describing the "Original Understanding" in terms of how a judge should apply the Constitution).

25. With apologies to Same Cooke. *See* SAM COOKE, *Wonderful World*, *on* THE WONDERFUL WORLD OF SAM COOKE (Keen Records 1960).

way to ascertain the meaning of the United States Constitution—just as it is the correct way to ascertain the meaning of the Confederate Constitution, the Rhode Island Corporate Charter of 1663, Professor Redish's latest article, and any other communicative instrument. Originalism is, as Professor Saikrishna Prakash has so elegantly phrased it, a "Default Rule"[26] for human communication. If one is not trying to understand the original meaning of a communicative instrument, then one simply is not engaging in the attempt to ascertain meaning. To be sure, it is possible to use the word "interpretation" to describe something other than the ascertainment of meaning—such as the invention of meaning or the indulgence of fantasies—and as long as those usages are clearly identified and employed without equivocation, there is nothing "wrong" with them. It is also possible that the original meaning of a particular communicative instrument is that the instrument should be understood in terms of changing or contemporary meanings—rendering the use of original meaning essentially a one-time affair that sets in motion a different interpretative enterprise. But in the ordinary run of things, the standard usage of "interpretation" connotes ascertainment, and ascertainment connotes original meaning. Probably these propositions generate any measure of controversy only because, in the context of the United States Constitution, ascertainment of meaning is widely thought to have prescriptive as well as descriptive consequences, so that most people's views on interpretation are shaped by their views on adjudication. Yet if one can get over this analytical conflation and simply treat the meaning of the Constitution as an inconsequential anthropological fact to be studied, akin to the meaning of the Code of Hammurabi, then original meaning must be the starting point.

Does that mean that originalist interpretation-as-ascertainment-of-meaning must rely on history, as Professor Redish maintains, along with all of the problems (especially for lawyers and law professors) that such reliance entails? Yes and no. Yes, because once one has identified a document's time of origin as critical to its meaning, some kind of history will necessarily come into play. No, because not all kinds of history are created equal, and some kinds of "history"—including some kinds to which historians would not dream of giving that label—can be done by lawyers.

If original meaning is found in the concrete, historical intentions or understandings of real people, then the identification of those mental states is the central enterprise of interpretation. That is a task for which lawyers and legal scholars have no special claim to expertise. It is not even clear that historians have any such claim; they are much better qualified to say what happened than to say what certain people were thinking. That

26. Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 541 (1998).

ultimate inquiry into mental states probably requires some deft combination of expertise in subjects such as history, psychology, linguistics, semiotics, and perhaps law, if the thoughts that people were expressing involved technical legal concepts—not to mention other specialized disciplines such as economics or religious studies, if those disciplines also shaped the actors' thinking. If that is really what originalist interpretation of the Constitution requires, then Professor Redish has probably *understated* the practical problems involved in discerning that kind of "meaning." And this is without even considering the enormous conceptual and practical problems raised by trying to distill the intentions or understandings of a large group of people who do not share a single collective consciousness into the unitary "meaning" of a document.

These problems are only magnified by moving from "original intentions" to "original understandings," if the "understandings" that define meaning are the real understandings of real people. Moving from Framers, to ratifiers, to members of the public makes discerning "meaning" progressively *more* difficult, if "meaning" is located in the actual thoughts—that is, actual understandings—of the relevant subjects, because it multiplies the actual thoughts that must be discerned and somehow distilled. But what other kinds of understandings could possibly constitute meaning besides the actual understandings of actual people?

The obvious answer is: fictitious understandings. One could, in principle, construct a theory of meaning entirely around a legal fiction. One simply needs to invent a single hypothetical "person" who serves as the locus of original meaning and to "discern" the intentions or understandings of that imaginary "person." This kind of methodology neatly solves the problems involved in trying to draw meaning out of collective or multiple intentions or understandings, because there is only one fictitious entity with which to be concerned. It also solves, or at least mitigates, the problems of reliance upon history *if*—and this is the big *if*—the process of "discerning" the meaning of this hypothetical person is something other than a purely historical undertaking.

In prior work, Professor Guy Seidman and I have tried to explain why this methodology that focuses on legally constructed fictitious intentions is sound interpretative theory rather than psychosis.[27] Although I cannot repeat the entire argument here, it is sufficient (I hope) for present purposes to emphasize several points: (1) the Constitution itself prescribes this kind of interpretative methodology by declaring itself to have been legally authored ("ordain[ed] and establish[ed]")[28] by the fictitious entity "We the People";[29] (2) all real-world documents that are collectively authored in fact *must* be interpreted as though they were constructed by a single author

27. *See* Lawson & Seidman, *supra* note 12, at 56–57.

28. U.S. CONST. pmbl.

29. *See* Lawson & Seidman, *supra* note 12, at 58–61.

who is an idealized composite of the historically real authors, as only individual minds can have intentions;[30] and (3) the circumstances that led to the Constitution's general acceptance as authoritative—namely, that most of the people with guns in 1788 chose not to shoot them at the new government's officials—effectively foreclose any method of interpretation that relies on real, rather than fictitious, understandings because the number and range of relevant minds simply gets too large.[31]

Something like this view of originalism has been steadily gaining momentum in recent years, even if all of its features are not always acknowledged by all of its proponents. In essence, it locates meaning in the fictitious mind of *the reasonable person of 1788*. The "beliefs" of this reasonable person do not necessarily correspond to the beliefs of any actual person. Instead, the reasonable person is a construct—and a construct put together by *lawyers*. Why lawyers? Because the Constitution is a legal document. If the Constitution were a novel (chain or otherwise), presumably the reasonable person who determined its meaning would be put together by literary theorists (or perhaps by lawyers masquerading as literary theorists). But the Constitution is rather obviously not a novel; it is a blueprint for assembling and operating a particular form of government. Of course, because we are talking about a reasonable person at a particular moment in history—in this case, 1788—the need for some knowledge of and reliance upon history (and any number of other disciplines) cannot be avoided in assembling this imaginary person. Constructing a reasonable person from more than two centuries ago is not a casual undertaking. However, just as lawyers are, all else being equal, likely better situated than, for example, semioticians to construct the reasonable person of tort law, they are likely better situated than nonlawyers, including historians (or historians masquerading as legal scholars) to construct the reasonable person of constitutional interpretation. At the very least, the lack of a Ph.D. in history is not disqualifying for the task of constitutional interpretation when the source of meaning is a legally constructed fiction. Again, to quote Professor Prakash, "history department law"[32] is a much greater threat to sound constitutional interpretation than is "law office history."

It is, of course, possible for lawyers to do a bad job of legally constructing the reasonable person of 1788, just as it is possible for anyone to do a bad job of anything. Professor Redish is right on the money to chastise originalists for not setting forth their necessary methodological premises with sufficient care[33]—and that is true both of originalists who ground meaning in actual history and originalists who ground meaning in hypothetical thoughts. If one is making a claim about what a reasonable

30. *See id.* at 61–67.
31. *See id.* at 68–70.
32. Prakash, *supra* note 25, at 534.
33. *See* Redish & Arnould, *supra* note 1, at 1502.

person of 1788 would have thought about something, one must have criteria for determining whether such a claim is well or poorly supported. One needs something like a "Restatement of the Law of Originalism" or the "Federal Rules of Originalism," which presently does not exist.[34] But it could exist. In principle, it is possible for lawyers—inexpert, generalist, but sophisticated lawyers—to construct an originalist methodology that does not fall prey to the conceptual problems of joint understandings or pose insuperable problems of historiography. And, increasingly, perhaps even without realizing the full implications, sophisticated originalists are moving toward that understanding of originalism. Those who do not move in that direction certainly have some splainin' to do, and I leave them to fend for themselves against Professor Redish's potent critique.

It is quite possible to have an originalist theory of interpretation that is neither archeologically nor conceptually foreclosed by the nature of interpretation—and that indeed is *compelled* by the very nature of interpretation-as-ascertainment-of-meaning. Reasonable-person originalism, as one might call it, is not simply one among many possible means of interpreting the Constitution. It is uniquely the *correct* means of interpreting the Constitution, if by "interpreting" we mean "ascertaining the meaning."

But if originalism is not tethered to hard historical facts, and instead roams inside the fictitious head of a legally constructed reasonable person, how can originalism "succeed in its most fundamental pursuit: avoidance of uncertainty and ideologically driven outcome determination"?[35] Once originalism is understood to be founded upon a legal fiction constructed by lawyers—rather than upon actual historical facts contained in available documentary materials—does not originalism's veneer of constraint and objectivity vanish away?

I certainly hope so. Anyone who tries to structure an interpretative inquiry to generate only answers that are *constraining* or *rule-like* fundamentally misunderstands the enterprise of interpretation. The goal of interpretation is to find *correct* answers, however freeing or un-rule-like they may turn out to be. If the Constitution contained an Article VIII that said, "Anything else in this document to the contrary notwithstanding, judges get to make up at random wildly subjective standards, to be applied in cases at the uncontrollable whims of judges," a good originalist would have to interpret the document as prescribing exactly what it says, however open-ended, freeing, and un-rule-like the instruction seems (or is). No good interpretative originalist should prejudge the content of the Constitution before undertaking the enterprise of interpretation. One finds whatever one

34. For my and Professor Guy Seidman's preliminary thoughts on how to construct the reasonable person of 1788 for purposes of constitutional interpretation, see Lawson & Seidman, *supra* note 12, at 70–73.

35. Redish & Arnould, *supra* note 1, at 1501.

finds.[36]

Nor should a good originalist prejudge *how likely one is to find anything at all*. For example, if a historian is searching for an answer to why Napoleon Bonaparte chose a particular moment in time to sell the Louisiana Territory, it is possible that the historian will find an answer that satisfies the historian's professional norms. But presumably, if the historian is a good historian, he will be open to the possibility that the inquiry will end indeterminately. He might conclude, at the end of the inquiry, that he simply cannot determine the answer from the available materials and might as well move on to the next question. Similarly, an originalist interpreter must be open to the possibility that, after examining a particular question, the "correct" originalist answer will be something to the effect of "beats me." Especially when dealing with the hypothetical thoughts of a legally constructed fiction, a bit of humility in the interpretative enterprise seems appropriate. How often originalism will fail to yield a determinate interpretative answer is impossible to say without (1) specifying a complete theory of interpretation; (2) identifying the standard of proof for interpretative claims within the theory ("I don't know" will be the "correct" answer far more often if the standard of proof for interpretative claims is "beyond a reasonable doubt" than if the standard is "best available alternative")[37]; and (3) applying the fully specified theory to a sufficient number of representative problems to allow useful generalizations about the theory's interpretative determinacy. The same is true of any other interpretative theory: Claims about determinacy, without specification of all of the above, are worth about as much as a current law student's Social Security account.

Professor Redish is right, however, to recognize a uniquely strong commitment to constraint in much of contemporary originalism. He does not exaggerate when he writes that this version of originalism—what might be called "mainstream" originalism—zealously tries to ground interpretation in some kind of objective inquiry (whether historical or not) that will "preserve the democratic system, promote judicial restraint and consistency of precedent, and produce 'good' results."[38] A good deal of originalism undeniably presents itself to the world as an, or even the, interpretative theory that can significantly constrain results. As indicated above, any such effort is profoundly mistaken, both factually and aspirationally. Interpretative theory should aim for correct interpretations, not institutional or political goals.

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36. For an example of a prominent originalist getting this right (and contrasting the position with that of another prominent originalist getting it wrong), see Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 673–75 (2009).

37. *See generally* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992) (discussing the role of standards of proof in the proper assessment of interpretative claims).

38. Redish & Arnould, *supra* note 1, at 1494 (footnotes omitted).

But then what should judges do in constitutional cases? Should they be trying to construct the hypothetical thoughts of the reasonable person of 1788, whatever that entails? Yes, they should, *if*—and again, this is a very large *if*—they want to decide cases in accordance with the correct interpretation of the Constitution. While that may seem like a trivial condition, in fact it is anything but. Most constitutional theorists—and that includes most originalists as well as Professor Redish—*do not* view the endeavor of correctly interpreting the Constitution as the exclusive, or even primary, goal of constitutional adjudication. If they did, they would have nothing but an epistemological view of precedent (in which precedents would count only as evidence of the right answer). They would not worry about judicial restraint or democratic legitimacy, and they would not care about reliance interests or institutional consequences. As it happens, everybody (well, everybody except me) cares quite deeply about these other, non-interpretative matters,[39] which just illustrates the obvious, but oft-neglected, point that *interpretative theory* and *adjudicative theory* are two different intellectual enterprises. It is one thing to say that *X* is the right way to *interpret* the Constitution and another thing altogether to say that *X* is the right way to *apply* the Constitution. The former statement is a proposition in the domain of interpretative theory, while the latter is a proposition in the domain of moral or political theory, as it prescribes a normative course of action for real-world actors threatening the real-world exercise of the government's coercive power. The latter might or might not consider the former relevant, but the former has no regard for the latter. For people who are interested only in interpretative theory, this Article is therefore pretty much at an end.

However, for the vast majority who are interested in adjudicative theory, the nagging question remains whether reasonable-person originalism, without a strict reliance on historical materials, can produce an even remotely plausible adjudicative theory. While I am not prepared to enter the thicket of normative theory by purporting to tell judges what to do with people's lives, liberty, and property,[40] there appears to be an overlapping consensus that adjudication should employ methods that yield answers at least most of the time. An adjudicative theory that cannot resolve disputes indeed seems like a very silly adjudicative theory, particularly since the whole purpose of adjudication is to resolve

39. *See* Lawson, *supra* note 15, at 1227–28 (identifying seven tasks other than ascertainment of meaning that Professor Jack Balkin proposes for interpretative theory in JACK M. BALKIN, LIVING ORIGINALISM (2011)).

40. To be precise, I am not prepared to tell them what to do in a work of professional scholarship. Outside of scholarship, where there is no pretense of professionalism, I will be happy to tell them, and the rest of their fellow governmental lackeys, to keep their grubby mitts off of my money and their statist laws out of my life. But not here.

disputes.[41] If translating originalism-as-interpretation into originalism-as-adjudication yields a theory of decision making that requires decision makers to say "beats me" much of the time, is that a workable theory of adjudication? Does that describe reasonable-person originalism? Adjudicating minds want to know.

B. *"In My Head are Many Facts of Which I Wish I Was More Certain I Was Sure"*[42]

As indicated above,[43] I am in no position to make strong claims about the degree of interpretative determinacy of reasonable-person originalism, either absolutely or comparatively. For one thing, it requires a full specification of the theory's principles of admissibility and significance. For another, it requires specification of a standard of proof for interpretative claims; the extent of interpretative indeterminacy will vary, perhaps wildly, with changes in the standard of proof. And for another, it requires a large empirical sample of efforts at interpretation to see how many inquiries turn up indeterminate.

I will, however, make the very strong claim that an adjudicative theory that relies upon reasonable-person originalism yields a completely determinate set of adjudicative outcomes. A judge applying reasonable-person originalism will always be able to decide the case for one or another party in a principled and determinate fashion.

The key is to recognize that interpretative indeterminacy and adjudicative indeterminacy are very different concepts. They are connected *only if* one has a theory of adjudication that requires a correct interpretative answer to every problem; however, there is nothing in the enterprise of adjudication that entails any such requirement.

Consider how a legal system deals with factual uncertainty. There will often be great difficulty determining what happened in any particular dispute. Evidence is often ambiguous or unavailable. Testimony is often conflicting or unreliable, and reconstructing even relatively recent past events poses grave epistemological problems. Much of the time, the honest answer to factual questions under any particular standard of proof, other than a never-employed "best available alternative" standard,[44] is likely to

41. Or, at least, so says one very prominent view of adjudication. It is also possible to see adjudication as serving other goals, such as declaring public values or allowing people to tell stories. *See* Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1218–34 (2011) (describing different models of adjudication and their implications). I will hesitantly venture into a bit of normative territory by suggesting that if one wants a forum for declaring values or telling stories, blogging is probably a more appropriate venue than litigation, because blogging does not put other people's lives, fortunes, and sacred honors in the dock.

42. With apologies to Rodgers and Hammerstein. *See* RICHARD RODGERS & OSCAR HAMMERSTEIN II, *A Puzzlement*, *in* THE FIRST PART OF THE KING AND I act 1, sc. 3.

43. *See supra* note 38 and accompanying text.

44. While some scholars have proposed something like a "best available alternative" standard

be, "I don't know." If fact finders always had to reach definitive conclusions about what happened, the legal system would be in real trouble.

Fortunately, fact finders can decide cases without actually reaching conclusions about what happened. That is because the law always assigns a *burden of proof* to one or the other party. If there is genuine uncertainty about what happened, the party that bears the burden of proof loses. Indeed, the epistemological function of a burden of proof is to allocate the risk of uncertainty to the party that bears the burden. A party with the burden of proof loses *either* if the fact finder affirmatively decides that the party's account of the facts is wrong *or* if the fact finder fails affirmatively to decide that the party's account of the facts is correct. An agnostic fact finder rules against the party with the burden of proof. As long as a burden of proof is always specified, epistemological uncertainty can still yield complete adjudicative determinacy.

The same is true of constitutional adjudication. As long as it is possible to specify a burden of proof for claims about constitutional meaning, it is simply irrelevant for the determinacy of adjudication just how indeterminate the underlying theory of interpretation proves to be. A highly indeterminate interpretative theory—and again, the degree of indeterminacy is highly dependent on the standard of proof—just means that parties with burdens of proof will lose a lot of cases.

I have argued elsewhere[45] that originalism prescribes a complete and specific—and, under a wide range of standards of proof, interpretatively determinate—allocation of burdens of proof for constitutional adjudication. "He who asserts must prove" is a basic principle of epistemology, and therefore of rational thinking. As long as the Constitution contemplates rational thinking by those who administer it (and the evidence for that contemplation is overwhelming), the ordinary allocation of burdens of proof for claims of constitutional meaning must rest with the party that asserts the Constitution as part of its claim. In practice, this means that *advocates* of federal power will almost always bear the burden of proof while *opponents* of state power will (I think I can safely say) always bear the burden of proof. The federal government draws all of its power from the Constitution, so any action of any federal actor must be justified by reference to some affirmative grant of power in the Constitution. The initial burden of justifying federal action thus always lies with the party relying on the legal validity of such action for its claim. To

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for factual questions, *see* Ronald J. Allen, *A Reconceptualization of Civil Trials*, 66 B.U. L. REV. 401, 425–437 (1986), the Anglo-American legal system normally imposes at least a "more likely than not" standard for fact finding. The higher the standard of proof, the more opportunities are created for epistemological uncertainty.

45. *See* Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411, 423–28 (1996); Lawson, *supra* note 15, at 1233–35.

be sure, there are instances where that initial burden seems to be met, but is countered by a claim from the other side that a grant of power to a federal actor is qualified or limited or negated by some other provision, such as a "thou shalt not." In that instance, the burden of proving the "thou shalt not" shifts to the party asserting it; in that context, the *opponent* of federal power will bear the burden of proof, and will therefore assume the adjudicative risk of interpretative uncertainty. Similarly, because state governments do not draw their legal power from the Federal Constitution, a proponent of state authority never bears an initial burden of proof. Rather, an opponent of state power who is invoking a "thou shalt not" contained in the Federal Constitution has the burden of proof. Epistemological uncertainty (again as defined by the relevant standard of proof) means adjudicative defeat for whoever holds that burden.

The nature of the Constitution as a grant of certain powers to the federal government and a denial of certain powers to state governments establishes the appropriate burdens of proof for interpretative uncertainty. In essence, the Constitution establishes a presumption against federal power in favor of state power, which can only be overcome by sufficient interpretative evidence to the contrary, depending on the relevant standard of proof. Otherwise, the presumptions—which are interpretatively derived and not simply normative inventions[46]—decide the case. Importantly, those presumptions are not easily manipulated. There is not much room for argument about whether a claim depends upon an affirmative assertion of federal power, of state power, or of a limitation on federal power for which a prima facie case has already been established. Ironically, the more that adjudicative results depend upon these burdens of proof and presumptions, the more principled and non-manipulable the adjudicative process becomes.

Of course, this kind of presumption-driven decision making does not appear to be what many, or even most, originalists mean when they talk about the determinacy of originalist adjudication. In all likelihood, what they have in mind is reaching interpretatively determinate conclusions, akin to having fact finders decisively conclude what really happened. But, at the risk of appearing immodest, I think they have such things in mind simply because they have not thought through basic questions of interpretation and adjudication very carefully. It may well be that reasonable-person originalism, or any other interpretative theory, can in fact provide determinate *interpretative* conclusions in a large percentage of

46. In this respect, the Constitution's presumptions are quite different from something like Professor Randy Barnett's presumption of liberty, *see generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004), which Professor Barnett applies to assertions of both state and federal power. In essence, the actual Constitution prescribes one presumption of liberty (for assertions of federal power) and another presumption of tyranny (for assertions of state power).

the relevant cases. Indeed, if the standard of proof for interpretative claims is something like a "best available alternative" standard, interpretative determinacy is all but guaranteed in most instances. The point here is only that the *adjudicative* determinacy of originalism does not depend on any such result.

Accordingly, what emerges from Professor Redish's critique of originalism, and from my reconstruction of originalism in light of that critique (much of which I echo), is something that may well be unrecognizable to, and unwelcomed by, many self-described originalists. Sound originalist interpretation consists of discerning the legally constructed hypothetical thoughts of the reasonable person of 1788, embodied in the fictitious "We the People" whom the Constitution claims as its legal author. Originalist adjudication may well involve a healthy dose of decision-by-presumption, depending upon the standard of proof for interpretative claims and the ability of the underlying interpretative theory to meet that standard in important cases. This model of originalist interpretation fares reasonably well under Professor Redish's history-based interpretative critique, and this model of originalist adjudication survives relatively undamaged by Professor Redish's determinacy-and-manipulation-based critique. It may not be what Justice Scalia does and what Judge Bork would like to do, but it is the correct way to interpret the Constitution.

But what of democratic legitimacy? It is one thing to be governed by the real thoughts of real people who one believes were either authorized to set legal rules or were wise enough in the ways of human affairs to trust with one's life, liberty, and property. It is quite another to be governed by a legal fiction filtered through adjudicative presumptions. How could originalism, as this Article has constructed it, possibly lay claim to any kind of normative legitimacy, democratic or otherwise?

How indeed?

C. *"You Don't Care if it's Wrong or if it's Right"*[47]

"Concerns about legitimacy underwrite theories of constitutional interpretation . . . [and] we argue for or against different theories of constitutional interpretation in terms of their effects on legitimacy."[48] When Professor Jack Balkin wrote those words, he spoke for almost everyone involved in debates over constitutional theory. Those debates are, and have long been, dominated by concerns about the legitimacy of various constitutional theories and of the roles for federal judges prescribed by those theories. Constitutional theory is as much, if not more, about the institutional role of the federal judiciary as it is about the ascertainment of

47. With apologies to The Police. *See* THE POLICE, *Roxanne*, *on* OUTLANDOS D'AMOUR (1978).

48. BALKIN, *supra* note 38, at 64.

constitutional meaning. Indeed, many theories of interpretation—including many versions of originalism—are driven by concerns about institutional decision making rather than by interpretative theory.[49] These concerns obviously animate much of Professor Redish's analysis—as they have animated much of his work over a long and distinguished career.

I have nothing interesting to say about such matters, and so I choose to say nothing about them. Legitimacy is a political and moral concept, and I am not a political or moral theorist. As I am fond of saying, I am barely a lawyer.[50] To be sure, political legitimacy is an important thing about which to think.[51] It just is not the province of legal theory, and I would prefer not to venture outside that relatively narrow zone of comfort in professional academic work.[52]

Accordingly, I make no claim that judges, or anyone else, *ought*, as a matter of political morality, to decide real-world cases in accordance with originalism (or any other theory of interpretation). I say only that reasonable-person originalism is uniquely the correct way to ascertain the meaning of the Constitution, that such a methodology interpretatively prescribes an allocation of burdens of proof for claims about constitutional powers and limitations, and that an adjudicative theory founded upon such a methodology would be determinate and relatively hard to manipulate. Further the deponent saith not.[53]

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49. *See* Gary Lawson, *Conservative or Constitutionalist?*, 1 GEO. J.L. & PUB. POL'Y 81, 82 (2002) (stating that the essence of much of modern originalism's philosophy rests on a theory of judging rather than interpretative theory).

50. J.D., 1983, Yale Law[?] School.

51. Indeed, in my nonprofessional life, I am very concerned about political legitimacy—especially since, as a libertarian anarchist, I do not find much of it anywhere. I certainly do not find it in democracy. If two people come upon a third in an alley and vote to take the third person's wallet, there is nothing legitimate about the action (unless, of course, they have a valid claim to the wallet based on something other than their vote, such as a prior theft of the wallet by the third person). If one multiplies the numbers on each side by 100,000,000 and changes the alley to a series of polling booths, all one has changed is the number of victims and the number of perpetrators. Democracy is a fine way for a group to decide where to have dinner or who will chair the next faculty meeting. It is not a fine way to decide who gets to spend my money or which substances I can ingest.

52. Since anyone can find it by a simple web search, here is the one very modest exception to that rule (along with the special reasons for that very modest exception). *See generally* Gary Lawson, *Truth, Justice, and the Libertarian Way(s)*, 91 B.U. L. REV. 1347 (2011).

53. Does that mean that I have no opinion about whether the original meaning of the Constitution should be considered authoritative by judges? Of course I have an opinion about that. It simply is not an opinion that I think can be defended with the kind of analytical rigor that is appropriate to an academic endeavor. I should be clear that in saying this, I am not purporting to judge others who choose to opine more freely. My silence on these matters results from a personal preference, not from a grand theory about appropriate academic behavior.

II. WHY IS THIS THEORY DIFFERENT FROM ALL OTHER THEORIES?[54]

Professor Redish is searching for the "appropriate method of *adjudication* for our system of constitutional democracy."[55] His primary focus is adjudication, not interpretation. His account of interpretation—which is to follow a contemporary plain-language understanding of the constitutional text and supplement it with explicitly identified normative premises where necessary—is entirely driven by the demands of his "controlled activism" model of adjudication rather than by, for example, philosophical theories of meaning or language. Accordingly, because adjudicative theory is inherently normative (a prescription of what decision makers *ought* to do), any assessment of Professor Redish's "controlled activism" model must also be normative. For reasons previously stated, I will therefore neither praise nor bury the model. Instead, I have some questions—four questions, of course—concerning its foundation and mechanics that might help others, including Professor Redish, evaluate, modify, and apply the model.

First, I have an empirical question that may not have an accessible answer. Professor Redish is preoccupied with the ideas of *candor* and *consistency*, which he often labels as *principle*. He does not object to having judges draw on their own moral judgments in adjudication, but he does object to their doing so under a false veneer of objectivity or with partisan inconsistency. His enemies are deceit and manipulation, not (as with me) interpretative error or (as with mainstream originalism) lack of fidelity to external standards. Accordingly, his theory is structured to minimize those vices by encouraging judges to be open about their normative premises and to formulate those premises into doctrine at a sufficient level of generality to prevent their nakedly partisan application. But, of course, judges can lie (or honestly mislead themselves) about their actual premises and dress up normative premises that they think would be looked upon unkindly in other terms, and they can always misapply doctrine or fudge the level of generality of the underlying norms sufficiently to make partisan application hard to detect. Professor Redish does not claim otherwise; his argument is that any such dangers are less than they are with originalism (or the various nontextual theories that he critiques). But his argument to this effect is purely anecdotal. He identifies some instances of what he regards (perhaps correctly) as false originalist claims to objectivity and generalizes to inherent problems with the entire theory. The empirical question is: exactly how susceptible to manipulation is the kind of originalism most commonly practiced by courts and scholars (which is *not* the kind of originalism that I would advocate, but forget me for a moment)? It seems to me that one would need to run the mainstream

54. With apologies to Abraham, Isaac, and Jacob.

55. Redish & Arnould, *supra* note 1, at 1522.

originalist theory through not just a few leading cases and a few comments by pompous historians and economists, but a large enough sample of cases to make reliable judgments about susceptibility to the kinds of abuse to which Professor Redish objects. Are there no originalist success stories? Every instance of originalist application involves hidden motives and partisan subterfuges? For the kinds of strong claims that Professor Redish is making, one probably should have much better data about the actual rate at which originalism falls prey to the various pathologies to which Professor Redish finds it susceptible. The fact (and it is a fact) that it *might* fall prey to those pathologies, and that on some occasions it in fact *does*, does not provide enough information to make good judgments about the *overall extent* to which it falls prey to those pathologies. A second aspect of that empirical question concerns the susceptibility to abuse of Professor Redish's controlled activism alternative. Let us concede that Professor Redish's model, perfectly and faithfully applied, is superior along the dimensions of candor and neutrality to mainstream originalism applied faithlessly and in partisan fashion. But that is not a meaningful comparison. The meaningful comparisons are either faithful and neutral application versus faithful and neutral application, or dishonest and partisan application versus dishonest and partisan application. Perhaps there are empirical reasons to think that there will be less dishonest and partisan application under controlled activism than under mainstream originalism, but those reasons have yet to be produced.

Second, and more fundamentally, Professor Redish never explains why the contemporary plain language of the Constitution serves as the baseline limit on judicial review. To be sure, he has a theory of adjudication that requires some external constraint on judges, so that judicial review is not simply naked political preferences, but there are many candidates for such a restraining influence other than the contemporary meaning of the Constitution's words. One could just as readily choose the contemporary meaning of the words of the Constitution of Massachusetts, the United Nations Charter, or the Libertarian Party Platform of 1980. Why the contemporary meaning of the words of the Constitution?

One possible answer is that those words were "subjected to the ratification process."[56] But all of the other words that I suggested as alternatives were also subjected to some kind of ratification process by different groups of people. What is it about the ratification process (or, more precisely, the multiple ratification processes for various provisions and amendments across two centuries) of the Constitution's words that gives those words such a special role as vehicles for constraint? Particularly if the meanings of those words are determined by modern understandings—rather than by any understandings that actually, or even

56. *Id.* at 1528.

hypothetically, existed during the actual ratification processes—it is hard to see why one would privilege those words in any fashion. To be clear, I am not arguing in favor of linguistic chaos and epistemological arrogance. I fully understand Professor Redish's desire to have some kind of textual check on judges. I am just wondering why that textual check needs to be the contemporary meanings of the words of the Constitution, rather than the contemporary meanings of some other text.

Third, on a more modest mechanical level, Professor Redish states that when considering the plain meaning of a provision, it is permissible (and perhaps even mandatory) to "take into account the words that appear *around* the words in question."[57] But what counts as the words "around" a provision? Do *all* of the words in the entire Constitution count as part of the linguistic context in which any particular provision must be understood? A simple example will illustrate the importance of determining the sheer physical scope of surrounding context. The Territories and Property Clause in Article IV provides that Congress has power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[58] Since money in the federal treasury is "Property belonging to the United States," a straight linguistic analysis could read this provision as a "spending clause" allowing Congress to "dispose of" that "Property" as it pleases. The clause contains no internal limitations on the purposes or forms of that spending, so the "plain meaning" approach would appear to yield an unlimited federal spending power. If, however, one looks back to Article I, one will find all of the other fiscal powers and responsibilities of the federal government loaded into that Article, including the powers to tax and borrow and limitations on the forms of appropriations. One will also find in Article I a clause authorizing Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,"[59] and spending laws certainly seem to qualify as such "Laws." Since the location of every fiscal power other than the spending power is in Article I, it probably makes sense to read the reference to "Property" in Article IV as meaning something like "Property similar in nature to Territory, which is the primary object of this clause." Thus, it likewise would make sense to locate the federal spending power in the Article I Necessary and Proper Clause, along with whatever limitations are contained within that clause, rather than in the Article IV Territories and Property Clause.[60] But the proper interpretation depends on how far (quite

57. *Id.* at 1529.

58. U.S. CONST. art. IV, § 3, cl. 2.

59. *Id.* art. I, § 8, cl. 18.

60. There is no remotely plausible textual case for reading the Article I Taxing Clause as a spending clause—which means that there is yet another feature of modern law, in addition to those identified by Professor Redish, for which there is no remotely plausible textual case. While I am on

literally) from the Territories and Property Clause one is willing to look for context.

Fourth, Professor Redish falls back on normative judging because he thinks, quite rightly, that his contemporary-meaning textualism will answer a relatively small (though certainly far from trivial) number of cases, and something must fill in the gap to allow courts to resolve disputes. I would be curious to know whether he regards open and candid judicial application of normative premises as superior to resolution of disputes through allocations of burdens of proof, and, if so, why. As I have shown, allocation of burdens of proof can certainly do the job of allowing courts to decide cases when constitutional meaning, however it is determined, has been exhausted. Is that method less candid and more subject to manipulation than controlled judicial activism? Or are there other criteria for selecting among methods of dispute resolution that need to be identified?

CONCLUSION

Professor Redish and I are interested in very different kinds of constitutional questions, which in some respects makes me an unfortunate choice as a commenter. My interest lies in the ascertainment of constitutional meaning, while Professor Redish's lies primarily in the prescription of norms for real-world adjudication. But even for those who are interpreters rather than adjudicators, Professor Redish's analysis forces them to confront some very basic questions about the nature of interpretation (and even the nature of adjudication) that are frequently swept under the rug. Interpreters and adjudicators alike are better for having to think about Professor Redish's work. And making people think is, in my judgment, an academic's highest calling.

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the topic, let me suggest another textually implausible conclusion for Professor Redish's list: that the President or the federal courts can ever violate the First Amendment. Textually, the First Amendment refers only to Congress. Since the Constitution quite specifically defines what counts as Congress (of which the President and the courts are not part), plain meaning textualism categorically rules out any First Amendment restraints on the President and the federal courts. And just to be clear: I am endorsing, not criticizing, this conclusion. *See* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 16–19 (2006).