Ohio Northern University Law Review

Volume 42 | Issue 2 Article 7

Originalism: A Thing Worth Doing . . .

D.A. Jeremy Telman

Ohio Northern University
Law Review

Dean's Lecture Series

Originalism: A Thing Worth Doing . . .

D. A. JEREMY TELMAN*

Originalism in constitutional interpretation continues to grow in its reach, sophistication, practical applicability, and popular support. Although originalism first developed in the 1960s as a doctrine of judicial modesty, originalist judges are now far more confident of their ability to discern the Constitution's original meaning and thus are willing to strike down legislative enactments inconsistent with that meaning. Two aphorisms by the leading practitioners of originalism sum up originalism's journey. Justice Scalia, writing in the 1980s, conceded that originalism was merely "the lesser evil" and consoled himself with the Chestertonian dictum that "a thing worth doing is worth doing badly." Justice Thomas places fewer limitations on his own belief in originalist method and adopts as his motto "any job worth doing is worth doing right." The challenge for contemporary originalism is that the judicial function is not the sort of thing that G.K. Chesterton thought was worth doing badly, but specifying the Constitution's original meaning is a job that is very difficult to do right.

* Professor of Law, Valparaiso University Law School. The author thanks Karen Koelemeyer for her editorial assistance and Natlie Banta, Martin Buinicki, Heath Carter, Rosalie Levinson, Joellen Lind, Kevin Ostoyich, Lawrence Rosenthal, Lawrence Solum, and Mary Szto for helpful comments.

TABLE OF CONTENTS

I. INTRODUCTION: ORIGINALISM AND ITS DISCONTENTS

This Article presents a slice of a larger project with the working title "Originalism and Its Discontents." The title alludes to Sigmund Freud's classic sociological work *Civilization and Its Discontents*.[1] There, Freud mused on the possible sources of the inescapable malaise associated with human psychology[2]—although we strive for happiness,[3] we continually suffer from feelings of frustration and incompletion, even as our cultural and technological accomplishments mount.[4] We mistake absences for losses and thus feel perpetually cheated out of what we never had.[5]

I contend that a similar sociological phenomenon underlies the movement that favors originalism in constitutional interpretation. We see

1. SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 11 (James Strachey ed., 1961). Freud insists that *Civilization and Its Discontents* is not a work of psychoanalysis, and he claims not to share any insights drawn from psychoanalysis with his readers until Chapter seven. *Id*. at 75 ("And here at last an idea comes in which belongs entirely to psycho-analysis and which is foreign to people's ordinary way of thinking."); *see* Leo Bersani, *Speaking Psychoanalysis*, *in* WHOSE FREUD?: THE PLACE OF PSYCHOANALYSIS IN CONTEMPORARY CULTURE 154-55 (Peter Brooks & Alex Woloch eds., 2000) [hereinafter WHOSE FREUD?] (characterizing Freud as complaining that the argument of *Civilization and Its Discontents* largely derives from information that is "'universally known . . . .'" and that does not rely on the insights of psychoanalysis).

2. FREUD, *supra* note 1, at 19 (arguing that people seek solace in religion in order to escape the feelings of helplessness they experience as infants); *see id.* at 33 (contending that humans' ability to experience happiness bumps up against three insuperable barriers: nature's superior powers, our own bodily feebleness, and other people).

3. *Id.* at 23 (contending that people strive for happiness and that the "purpose of life is simply the programme of the pleasure principle.").

4. *Id.* at 39 (observing that even as we attain an almost god-like character, we remain unhappy).

5. For an extended discussion of the complicated relationship between absence and loss, see Dominick LaCapra, *Reflections on Trauma, Absence, and Loss*, *in* WHOSE FREUD?, *supra* note 1, at 178, 178 (treating the relationship of absence and loss as akin to that between structural and historical trauma).

the familiar confusion between absences and losses in the titles of some classic works of originalist scholarship, such as Robert Bork's *A Country I Do Not Recognize*[6] and Randy Barnett's *Restoring the Lost Constitution*.[7] Two questions animate the project of which this Article is a part. First, why did originalism arise when it did in the 1960s? Second, why has it enjoyed mass appeal beyond the legal profession and the legal academy and grown into a cultural movement that is as strong as ever half a century later? While this Article hopes to shed some light on those questions, its primary focus is on the practice of originalism in early twenty-first century constitutional interpretation.

This Article proceeds as follows: In Part II, I briefly sketch the history of originalism since the 1960s by highlighting what I regard as the two most striking developments in originalist methodology. Part III sketches what is, in my view, the unavoidable tension between the compelling, and perhaps even inescapable, logic of the originalist credo and its epistemological limits. In Part IV, I highlight these epistemological limits in the work of Justices Scalia and Thomas, two of originalism's greatest contemporary practitioners. Here, I draw on Justice Scalia's legal scholarship and on Justice Thomas's autobiography. I contend that the methodological problems that arise in those contexts also raise questions about the two Justices' very different originalist projects. Part V concludes with some thoughts about what lies ahead for originalism.

What follows is neither a defense of nor an attack on originalism. My purpose is not to dethrone originalism, which some now consider the dominant mode of constitutional interpretation, and propose an alternative. Rather, I am working as an intellectual historian to understand the currents that underlie a cultural moment and to highlight its accomplishments as well as its challenges. Much of what follows is critical of originalism, but pointing out the limitations of a theory is not the same as suggesting that it is obsolete or that some proposed alternatives are preferable.

II. ORIGINALISM'S JOURNEY

Following Lawrence Solum, we can take it as a given that, despite the many divergent approaches within originalism, originalists are united by

6. *See* "A COUNTRY I DO NOT RECOGNIZE:" THE LEGAL ASSAULT ON AMERICAN VALUES xxxvi (Robert H. Bork ed., 2005) [hereinafter A COUNTRY I DO NOT RECOGNIZE]; *see also* ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE xiii-xiv (1996).

7. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 1 (2004).

what Solum has called the "fixation thesis" and the "constraint principle."[8] The fixation thesis affirms that the meaning of each constitutional clause "is fixed at the time [it] is framed and ratified."[9] The constraint principle stands for the view that the meaning of the constitutional text should constrain those who interpret, implement, and enforce constitutional doctrine.[10] While there is great room for disagreement among those who adhere to these principles, it is nonetheless highly likely that any attorney, judge, public official, or legal scholar who accepts these two principles will identify as an originalist.

The argument of this section is simple: First, the history of originalism shows that this approach is a twentieth-century innovation in constitutional interpretation, and it has developed and changed very rapidly in the half-century since it was first articulated as a radical departure from the dominant approach to constitutional adjudication applied in the 1960s and 70s. Second, as originalism has grown in sophistication and persuasive power, it has also become more self-confident. As a consequence of that confidence, contemporary originalism no longer eschews judicial activism, opposition to which inspired the early originalists. Rather, contemporary originalists sometimes embrace activism and urge judges to reject not only long-standing or recent precedent but also legislative enactments that they see as exceeding legislative power according to the Constitution's original meaning.

Two important aphorisms by the two leading practitioners of originalism capture this second, less appreciated development in originalism. Justice Antonin Scalia's defense of originalism relied crucially on his argument that "a thing worth doing is worth doing badly," a motto that captures early originalism's self-consciousness of its own limitations as a methodology of constitutional interpretation.[11] Justice Clarence Thomas counters in his autobiography with his own motto: "Any job worth doing is worth doing right."[12] Justice Thomas's motto articulates the self-confidence with which originalist scholars and judges, including Justice Scalia, currently proceed. However, while Justice Thomas's motto better captures the originalist movement in its present form, this Article illustrates, through a close reading of the two Justices' originalist slogans in Part IV, that Justice Scalia's motto is more in keeping with the modest capabilities of originalist jurisprudence.

---

8. Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1941 (positing that the two principles unite the originalist family).

9. *Id.*

10. *Id.* at 1942.

11. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989).

12. CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 26 (2007).

A. Originalism's Precursors

Originalism seems obvious and inescapable to us now, but it was almost unheard of until the 1960s.[13] Contemporary originalism had its antecedents in the Four Horsemen of the judicial reaction during the *Lochner* era.[14] According to legal historian G. Edward White, the jurisprudence of those who resisted the New Deal entailed the view that "the Constitution was not designed to change with time. Its principles were universal, and thus its 'meaning' at a generalized level was fixed. Its structure and language were not altered by events but accommodated events. Events were seen as precipitating restatements of fundamental constitutional principles."[15]

But the jurisprudence of the Four Horsemen did not command a stable majority even during the *Lochner* era.[16] In holding that federal authority, pursuant to the Article II treaty power, could exceed that of Congress alone, Justice Holmes composed the following hymn to living constitutionalism on behalf of seven Justices in the 1920 case of *Missouri v. Holland*:[17]

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of ou[r] whole experience and not merely in that of what was said a hundred years ago.[18]

Justice Holmes's words, perhaps because they are Justice Holmes's words, exude self-confidence and serenity, as though he were merely reminding his

13. *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004).

14. *See* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 285 (2000) (The "Four Horsemen" label did not become common until the 1950s); *see also* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 3 (1998) (caricaturing New Deal historians who describe the "Four Horseman" as pursuing a jurisprudence "driven by their devotion to the anachronistic tenets of laissez-faire economics and their sympathetic subservience to the interests of rich and powerful people and institutions."); Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 580-81 (1997) (noting that the Four Horseman were by no means united on all issues, nor were their votes always best understood as promoting political conservatism).

15. WHITE, *supra* note 14, at 205.

16. *See id*. at 290 (noting how the *New York Times* highlighted that the Four Horsemen "had been on the losing side of divided decisions.").

17. 252 U.S. 416 (1920).

18. Mo. v. Holland, 252 U.S. 416, 433 (1920).

readers of truths as self-evident as those enumerated in the Declaration of Independence.[19] Two dissenting Justices filed no opinion.[20]

The New Deal Supreme Court extended this outlook as early as 1934, when Chief Justice Hughes upheld a state law that enabled courts to postpone mortgage deadlines in the face of a challenge based on the Constitution's Contracts Clause.[21] Chief Justice Hughes was well aware that the Contracts Clause was enacted to prevent states from passing such legislation.[22] Invoking Chief Justice John Marshall's famous reminder that "we must never forget that it is a *constitution* we are expounding,"[23] Chief Justice Hughes rejected the notion that "the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them."[24] If the meaning of the Contracts Clause entails "the social implications of its application," then the mortgage crisis of the 1930s was not the same as the debt crisis that the Framers contemplated when they ratified the Constitution.[25] Not surprisingly, Justice Sutherland wrote a vigorous dissent, in which the other three Horsemen joined.[26]

According to Noah Feldman, Justice Hugo Black "was the first justice to frame originalism as a definitive constitutional theory."[27] Feldman calls Justice Black "the inventor of originalism."[28] Justice Black called his version of originalism "absolutist" on the subject of individual rights.[29] Unlike the academics who popularized originalism in the 1960s and 1970s, Justice Black is generally viewed as a liberal Justice and is often considered an activist,[30] in that he would not hesitate to vote down legislation that

19. *See id.*

20. *See id.* at 435.

21. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 415-18, 448 (1934); *see also* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . impair[] the Obligation of Contracts . . . .").

22. *See* WHITE, *supra* note 14, at 212 (noting "that the Contracts Clause was unambiguously designed to prevent the very legislative intervention being challenged in . . . ." *Blaisdell*).

23. McCulloch v. Md., 17 U.S. 316, 407 (1819).

24. *Blaisdell*, 290 U.S. at 443.

25. WHITE, *supra* note 14, at 214.

26. *Blaisdell*, 290 U.S. at 448-49 (Sutherland, J., dissenting) ("A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time.").

27. NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 145 (2010).

28. *Id.*

29. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 492 (1994) (the term derives from Justice Black's inaugural James Madison lecture at New York University in 1960 in which he stated, "It is my belief that there *are* 'absolutes' in our Bill of Rights, and that they were put there by men who knew what words meant, and meant their prohibitions to be 'absolute.'"); *see* HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 122-23 (1996) (stressing Justice Black's belief in the need for courts to invalidate legislative enactments that threatened individual liberties).

30. *See* Arthur J. Goldberg, *Attorney General Meese vs. Chief Justice John Marshall and Justice Hugo L. Black*, *in* JUSTICE HUGO BLACK AND MODERN AMERICA 185, 193 (Tony Freyer ed., 1990)

violated his understanding of the Constitution's meaning.[31] While he certainly adhered to the notion that fidelity to the written Constitution was a mechanism for restraining judicial activism,[32] his voting record is hard to reconcile with some versions of contemporary originalism.[33] Moreover, Justice Black was an outlier in his jurisprudential approach throughout his time on the Court; his originalism did not sway others.[34]

The current vogue for originalism thus did not originate in the minds of our eighteenth-century Framers.[35] Leaders of the new Republic did not contemplate originalism for many reasons, but the most obvious is that the source materials that make originalism possible were not available to them.[36] George Washington held on to the official record of the debates, which is incomplete, and eventually handed it over to John Quincy Adams, who published it in 1819.[37] That document was edited and more widely

---

[hereinafer FREYER] (calling into question characterizations of justices as "liberal" or "conservative," but referring to Justice Black as "that outstanding 'liberal' jurist"); *see also* Akhil Reed Amar, *America's Constitution and the Yale School of Constitutional Interpretation*, 115 YALE L.J. 1997, 2008 n.33 (2006) (describing Justice Black as "a liberal lion and a confessed textualist-originalist."). Justice Black himself would not have appreciated the "activist" label. He considered the *Lochner* era, during which the courts struck down business regulation, as a regrettable period of activism. *See* Goldberg, *supra* note 30, at 193 (citing Justice Black's opinion in Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963)).

31. *See, e.g.*, In re Winship, 397 U.S. 358, 377 (1970) (Black, J., dissenting) (contending that the Constitution does not require that states apply the "beyond a reasonable doubt" standard in criminal cases); Wesberry v. Sanders, 376 U.S. 1, 7-15, 17-18 (1964) (construing Article I, § 2 of the Constitution, with the help of historical materials from the period of the 1787 Constitutional Convention, to require that electoral districts have similar populations within a given state); Adamson v. Cal., 332 U.S. 46, 74-78, 92-123 (1947) (Black, J., dissenting) (contending that the Fourteenth Amendment was intended to make the Bill of Rights applicable against the states and attaching an appendix chronicling the Amendment's history); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 2 (1980) (recognizing Justice Black "as the quintessential [original]ist.").

32. *See* NEWMAN, *supra* note 29, at 349 (describing the aim of limiting judicial discretion as being the root of Justice Black's judicial tree).

33. *See* Goldberg, *supra* note 30, at 185, 188-89 (contrasting Attorney General Meese's originalist opposition to incorporation through the Fourteenth Amendment with Justice Black's originalist insistence on incorporation).

34. *See* Anthony Lewis, *Justice Black and the First Amendment*, *in* FREYER, *supra* note 30, at 237, 237-38 (suggesting that Justice Black wrote for the majority in only one First Amendment case); *see also id*. at 251 ("The fact is that Justice Black's oft-proclaimed belief in First Amendment absolutes never commended itself to a majority of his colleagues.").

35. *See, e.g.*, Stephen M. Griffin, *Rebooting Originalism*, U. ILL. L. REV. 1185, 1194-96 (2008) (noting that various contemporary methods of non-originalist constitutional interpretation are rooted in traditions that extend back to the time of the Constitution's adoption and were employed by Justice John Marshall); Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL'Y 907, 908 (2008) (citing Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 6 (2006)) ("The idea of originalism as an exclusive theory, as *the* criterion for measuring constitutional decisions, emerged only in the 1970s and 1980s."); Whittington, *supra* note 13, at 599.

36. *See* Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620, 1663-80 (2012) [hereinafter Bilder, *How Bad?*].

37. *See id.* at 1626; *see also id*. at 1663-80 (recounting battles during the Washington administration over the meaning of the Constitution and the struggle over the extent to which the men involved in the Convention could rely on the written record of that Convention).

circulated in 1830.[38] James Madison's influential account of the Constitutional Convention was first published in 1840.[39] The first scholarly edition of the Convention's proceedings did not appear until 1911.[40] Mary Bilder raises significant questions as to the accuracy of Madison's account,[41] and she also faults earlier scholars for their neglect of the Constitutional Convention's official records.[42] Such accounts are most relevant to intentionalists and, as we shall see, because most twenty-first century originalists are more concerned with original public meaning than they are with original intent, the more important documents relate to the Constitution's ratification in the several states and not to its drafting in Philadelphia.

But there the situation is no better. The first comprehensive scholarly account of the ratification was published in 2010.[43] Even today, the documentary record relating to ratification is incomplete.[44] We have detailed records of some ratification assemblies and almost none relating to others.[45] The situation for the Bill of Rights is far worse, as the final text was the product of a committee that kept no minutes of its proceedings and of a vote in the Senate, whose deliberations were secret by design.[46]

Although it claims to be the original understanding of the Framers, originalism is a twentieth-century invention, not without its historical antecedents, but not realized as a comprehensive approach to interpretation

---

38. *Id.* at 1626.

39. JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 iii (Gordon Lloyd ed., 2014).

40. *See generally* THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911).

41. *See, e.g.*, MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 179 (2015) (contending that Madison revised his account of the Convention in the years after the Convention to reflect his evolving views of the Constitution in action and of the men responsible for drafting it).

42. *See* Bilder, *How Bad?*, *supra* note 36, at 1623 (defending the usefulness of the official records and the competence of the recording secretary against Max Farrand's assessment that the records are flawed and the secretary was incompetent).

43. *See generally* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788 (2010) (discussing previous scholarship on ratification, the best of which consisted of two edited collections that appeared in 1988 and 1989 but which devoted separate chapters to the ratification process in each state and thus missed part of the story).

44. *See id.* at xiii-xiv (describing the way Federalists conspired to create a one-sided record of the ratification debates that favored their perspective).

45. *See id.* at xii (noting that in the twenty-one-volume collection *The Documentary History of the Ratification of the Constitution*, the records for Delaware, New Jersey, Georgia, and Connecticut take up one volume, while three volumes are devoted to Virginia and five to New York).

46. RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 235 (2006) (noting that "[l]ittle is known about the debate" in the Senate that winnowed the Bill of Rights down from seventeen amendments to twelve "because the Senate met behind closed doors until 1794, and thus the record of their discussion is sparse.").

until about 200 years after the framing.[47] Justice Scalia acknowledged as much:

> It would be hard to count on the fingers of both hands and the toes of both feet, yea, even on the hairs of one's youthful head, the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean.[48]

We do not know whether the Framers would have wanted their intentions or understandings to govern our modern approach to constitutional conundrums that they could not have contemplated. That is, we do not know whether originalism was originally intended.[49]

B. From Intentionalism to Textualism

Scholarship on originalism in constitutional interpretation routinely notes one important development of originalist theory. Early originalist scholars saw it as their task to divine the intentions of the drafters of the Constitution.[50] Later originalists shifted their focus to the understandings of the men who ratified it.[51] Finally, textualist originalists attempt to discern the original public meaning of the document as adopted; that is, these textualists maintain that the Constitution ought to be understood as meaning what its original, intended audience understood it to mean.[52]

Originalism, as an academic movement in constitutional interpretation with a popular following, began as a response to the Warren and Burger Courts.[53] Judge Robert Bork contributed to this area by expanding upon

---

47. *See* Whittington, *supra* note 13, at 599.

48. Scalia, *supra* note 11, at 852.

49. *See* Kramer, *supra* note 35, at 912 ("[T]here was no more agreement about what the 'correct' way to interpret the Constitution was or should be in the early years of the Republic than there is today.") (citing H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 912-21 (1985)).

50. *See* Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 530 (2008) [hereinafter Colby, *The Federal Marriage*].

51. *See id.* at 580.

52. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 624 (1999) [hereinafter Barnett, *An Originalism*]; Whittington, *supra* note 13, at 609-10.

53. *See* Griffin, *supra* note 48, at 1188; *see also* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L. J. 239, 247 (2009) ("[T]he Warren Court led critics to insist that the Constitution be interpreted to give effect to the intent of the Framers."); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 560 (2006) ("[T]he political practice of originalism seeks to change the meaning of the Constitution by mobilizing the political energy necessary to limit the precedents of the Warren Court . . . .").

Herbert Wechsler's "neutral principles" approach.[54] In Judge Bork's view, the judge's task was to apply "neutral principles" articulated in the Constitution.[55] Originalism was at this point a reactive theory that sought to rein in judicial activism by forcing judicial attention to the original meaning of the Constitution.[56] As Judge Bork explained,

> Though there have been instances of judicial perversity throughout our history, nothing prepared us for the sustained radicalism of the Warren Court, its wholesale subordination of law to an egalitarian politics that, by deforming both the Constitution and statutes, reordered our politics and our society.[57]

Given the focus of early originalism on the Supreme Court's perceived liberal, judicial activism, originalism had a clear, if purely negative, political agenda that it assumed could be realized if judges respected the wills of legislatures.[58]

Early academic practitioners of originalism described their project as one of fidelity to the original *intentions* of the Framers.[59] Although contemporary academic and judicial originalists sometimes lapse into the language of intentions,[60] originalism largely abandoned the intentionalist project in the 1980s when legal scholars published compelling criticisms of

---

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

55. *See id.* at 1, 15 (reflecting on the implications of Wechsler's concept of neutral principles and applying that concept to some First Amendment issues).

56. *See id*. at 4-6 (criticizing Judge Wright and the claim that the Supreme Court must unavoidably make fundamental value choices in interpreting the Constitution).

57. Robert H. Bork, *Introduction* to, A COUNTRY I DO NOT RECOGNIZE, *supra* note 6, at ix, ix-x.

58. *See* DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM 34 (2005) (conceding that originalism was a conservative reaction to the perceived liberalism of the Warren and Burger Courts but rejecting the notion that originalism and the principle of judicial restraint could be tied to any particular political ideology). Raoul Berger, one of the leading academic originalists of the 1960s and 70s, was a principled originalist who abhorred judicial activism, but he did not have a political axe to grind. Berger may well have agreed with the politics of the Warren and Burger Courts but he opposed government by judiciary. *See* Jonathan G. O'Neill, *Raoul Berger and the Restoration of Originalism*, 96 NW. L. REV. 253, 257-68 (2001).

59. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 363-64 (1977) ("The sole and exclusive vehicle of change the Framers provided was the amendment process"); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986) ("[O]riginal intent is the only legitimate basis for constitutional decisionmaking."); Edwin Meese, III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 5, 10 (1988) (explaining the meaning and practical significance of a jurisprudence of original intent).

60. *See* Clarence Thomas, U.S. Supreme Court Justice, *How to Read the Constitution*, Address Before the Manhattan Institute (Oct. 2008), *in* WALL ST. J., Oct. 20, 2008, at A19 ("[T]here are really only two ways to interpret the Constitution—try to discern as best we can what the [F]ramers intended or make it up").

the original intentions approach.[61] Stanford Law School's Paul Brest exposed the extraordinary difficulty in reconstructing the Framers' original intentions with respect to any particular constitutional provision, a very strong position given the state of historical research at the time.[62] Brest's critique established the foundations for the "instability thesis"—the idea that the contestations that emerge from the historical record render futile originalism's attempts to fix constitutional meaning.[63]

It is very difficult to know the intentions of the Framers, beyond what we can discern from the text itself, based on the legislative history of the Constitution.[64] The complex ratification process involved hundreds of actors, and records of the ratification process are spotty at best.[65] However, some contemporary originalists are increasingly confident of our ability to discern the original understanding of the Constitution through the use of computer-assisted research techniques.[66]

---

61. *See* Barnett, *An Originalism*, *supra* note 52, at 611-13 ("If ever a theory had a stake driven through its heart, it seems to be originalism.").

62. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 222 (1980) ("The interpreter's understanding of the original understanding may be so indeterminate as to undermine the rationale for originalism.").

63. *See* Lawrence B. Solum, What is Originalism? The Evolution of Contemporary Originalist Theory 2, 8-9, (April 28, 2011) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1825543 (Brest "advanced a variety of criticisms of original intentions originalism, including . . . the problem of instability, in that an inflexible constitutional order cannot adapt to changing circumstances"); GOLDFORD, *supra* note 74, at 146-49 (discussing both empirical and theoretical difficulties with the attempt to reconstruct the intention of the Framers); Joel Alicea & Donald L. Drakeman, *The Limits of the New Originalism*, 15 U. PA. J. CONST. L. 1161, 1171-82 (2013) (using *United States v. Hylton* to demonstrate the varied understandings among the Framers of the meaning of "excise tax"); Patrick J. Charles, *History in Law, Mythmaking, and Constitutional Legitimacy*, 63 CLEV. ST. L. REV. 23, 26-27 (2014) (describing historians as having exposed original intents originalism as an instance of the pathetic fallacy and pointing out that the move to textualism does little to prevent subjective outcomes).

64. *See* Brest, *supra* note 62, at 222.

65. *See, e.g.*, MAIER, *supra* note 57, at 122-23 (describing the journal of the New Jersey ratifying convention as not "very revealing" and noting that there were no "published debates or newspaper accounts" of the convention). Georgia unanimously ratified the Constitution after one day of deliberations, and the journal of those deliberations records only the result with no explanation. *Id*. at 124. No records "survived" the debates where North Carolina held its ratifying convention. *Id.* at 457. Delaware approved the Constitution unanimously after a four-day convention. *Id*. at 122 (records are so spotty that Pauline Maier mentions Delaware's ratification on only one page in her over 500-page history of ratification).

66. *See* Lee J. Strang, How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions 1-2 (January 22, 2016) (unpublished manuscript) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2665131 (arguing that computer-assisted research techniques enables originalism to overcome the instability thesis). *Compare* Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 857-58 (2003) [hereinafter Barnett, *New Evidence*] (reviewing all instances of the word "commerce" in the *Pennsylvania Gazette* from 1720-1800 and finding that the word's conventional meaning is relatively narrow, connoting only "trade" or "exchange"); *with* Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1199-1200 (2003) (noting a broader understanding of the term "commerce" in writings, such as those of Adam Smith and Daniel Defoe, with

Duke Law's H. Jefferson Powell emphasized the Framers' reluctance to have interpretations of the Constitution depend on claimed knowledge of their own original intentions.[67] Anticipating contemporary textualism, Powell argued that in the early Republic, references to "intention" were akin to the common law tradition whereby one discerns the intention of a legal text from the text itself.[68] Joseph Ellis states in the conclusion to his most recent history of the founding that the Constitution does not embody "timeless truths" and that the Framers' humility, in knowing that they did not have all the answers, has enabled their Constitution to survive.[69] Rather, the Framers aimed to "provide a political platform wide enough to allow for considerable latitude within which future generations could make their own decisions."[70] According to Ellis, Jefferson spoke for most of the prominent Framers when he urged that constitutions ought not be regarded with "sanctimonious reverence" and that "law and institutions" must develop "hand in hand with the progress of the human mind."[71] Statements by the drafters as to their intentions formed no part of eighteenth- or early nineteenth-century attempts to discern the Constitution's meaning.[72]

In response to critiques of intentionalism, originalists refined their methodology and shifted their focus from the original intentions of the Constitution's drafters to the understandings of the men who ratified it, as a shorthand for the original public understanding of the Constitution's text.[73] This makes more sense, because we are less interested in what the Framers thought they were saying at the Constitutional Convention in Philadelphia than we are with the thoughts of those who voted in the thirteen separate

---

which the Framers were familiar and that some Framers express broader understandings of "commerce" at the Convention itself).

67. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 906-07 (1985) (pointing out the Federalists' view that the intentions of the drafters of the Constitution would not be legally relevant because they were "mere scriveners" appointed to draft an instrument for the people).

68. *See id.* at 894-96 (describing the evolution of the objective approach to common law interpretation in which one gave effect to the will of the parties to a contract or the drafters of a statute through interpretation of the text intended to give expression of those wills).

69. JOSEPH J. ELLIS, THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION, 1783-1789, 218-19 (2015).

70. *Id.*

71. *Id.* at 219-20 (quoting Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* THE PORTABLE THOMAS JEFFERSON 558-59 (Merrill D. Peterson ed., 1975)).

72. *See* Powell, *supra* note 83, at 887-88 ("This original 'original intent' was determined not by historical inquiry into the expectations of the individuals involved in framing and ratifying the Constitution, but by consideration of what rights and powers sovereign polities could delegate to a common agent without destroying their own essential autonomy").

73. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990) ("[The original meaning] must be taken to be what the public of that time would have understood the words to mean"); Colby, *The Federal Marriage*, *supra* note 50, at 580.

ratification processes.[74] From there, the shift to textualist originalism was not far. Justice Scalia is largely credited with spearheading the shift in the originalist movement from intentionalism to textualism—that is, the shift from a focus on the intent of the drafters or ratifiers of the Constitution to a focus on the original public meaning of the document as it would have been understood by educated people living in the late eighteenth century.[75] We care about that understanding because the ratification process was a founding moment in which the states, through their representatives, (eventually) all agreed to bind their wills through a common text.[76] So, what judges ought to be trying to reconstruct is not what the drafters thought they said but what a reasonable, educated person would have understood the constitutional text to mean.[77]

We have now come full circle, with a group of originalist scholars embracing the intentionalist label in full awareness of the debate over its adequacy.[78] In fact, the difference between textualist approaches or original-public-meaning approaches and intentionalist originalism should

---

74. *See* Charles Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 79 (1988) ("[The Framers] were clearly hospitable to the use of original intent in the sense of ratifier intent, which is *the* original intent in a constitutional sense"); Powell, *supra* note 83, at 888 ("To the extent that constitutional interpreters considered historical evidence to have any interpretive value, what they deemed relevant was evidence of the proceedings of the state ratifying conventions, not of the intent of the framers").

75. *See* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 9 (2006) [hereinafter Barnett, *Scalia's Infidelity*] ("Justice Scalia was perhaps the first defender of originalism to shift the theory from its previous focus on the intentions of the framers of the Constitution to the original public meaning of the text at the time of its enactment"); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 554-55 (2003) ("[M]ost originalists have accepted Justice Scalia's suggestion 'to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning.'").

76. *See* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 417-18 (2013) [hereinafter Barnett, *Gravitational*] (articulating new originalism's normative claim that original meaning should presumptively govern constitutional interpretation).

77. *See id.* at 415.

78. *See, e.g.*, LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 133 (2008) (elaborating a theory of interpretation whose goal is to capture the lawmaker's intended meaning); Heidi M. Hurd, *Interpretation Without Intentions* 4-5 (May 29, 2015) (University of Illinois College of Law, Legal Studies Research Paper No. 15-31), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612115 (contending that if Alexander and Sherwin's defense of intentionalism fails, other versions of originalism are unlikely to be more persuasive); Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1685 (2012) (contending that original intent matters more than original meaning). Those not embracing intentionalism, have pointed out that the new originalism fares no better in its attempts to escape the subjectivism associated with non-originalist mechanisms of constitutional interpretation. *See, e.g.*, Joel Alicea & Donald Drakeman, *The Limits of the New Originalism*, 15 U. PA. J. CONST. L. 1161, 1207-09 (2013) (advocating a "descriptivist" version of intentionalism which permits courts to allow the Framers' intention to break ties when original public meaning is unclear); Tara Smith, *Originalism's Misplaced Fidelity: "Original" Meaning Is Not Objective*, 26 CONST. COMM. 1, 55-56 (2009) (concluding that both original public understanding approaches and Randy Barnett's attempt to ground originalism in the importance of the "writtenness" of the Constitution fail to escape subjectivism).

not be overstated. Regardless of nomenclature, originalists of all stripes consult the same sources in determining the meaning of the text.[79] The Framers, whose intentions shaped the text, were among the most prolific writers who opined on the text's meaning and thus provided evidence of the Constitution's original public meaning.[80] They also were among the ratifiers, whose understanding of the text matters the most.[81]

In this context, it is worth noting that the leading historians of the founding period, including Gordon Wood and Jack Rakove, are not originalists.[82] Joseph J. Ellis, a Pulitzer Prize-winning historian who has written nine books about the founding era, decries the pointlessness of trying to imagine how George Washington might view contemporary constitutional controversies.[83] Ellis compares the exercise to "planting cut flowers."[84] He notes that one of the original intentions that the Framers all shared "was opposition to any judicial doctrine of 'original intent.'"[85] Ellis concedes that the Framers wished to be remembered, "but they did not want

79. *See, e.g.*, Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 741-42 (2011) [hereinafter Colby, *The Sacrifice*] (noting that even so-called New Originalists concede that recourse to evidence of original intent or original expected applications is the best method for establishing original public meaning); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. L. REV. 703, 713 (2009) ("[T]he public meaning of the constitutional text will almost always mirror the intentions of the human beings who drafted and approved it").

80. *See* Kay, *supra* note 79, at 714.

81. *See* SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 79 n.1 (2007) ("The distinction between intention and meaning is a refinement that cuts no ice with us"); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981) ("[T]he difficulties of ascertaining the intent of the ratifiers leaves little choice but to accept the intent of the Framers as a fair reflection of it"); Nelson, *supra* note 91, at 557 (pointing out that original intent and original meaning most likely align in most cases and where they do not, modern readers are not well positioned to discern original meaning).

82. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 6 (1996) (calling the idea that the Constitution had a fixed meaning at the time it was adopted a "mirage"); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 578-79 (2011) ("Historical answers may be just as indeterminate as other forms of legal reasoning, allowing judges to pick and choose the evidence that satisfies their predispositions."); Gordon S. Wood & Scott D. Gerber, *The Supreme Court and the Uses of History*, 39 OHIO N.U. L. REV. 435, 443-44 (2013) (distinguishing real history from "law office history" or "history lite" and arguing that no historian who wants to maintain her reputation among her peers should engage in the latter); *see also* Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 165 (2006) ("[M]ost academics with joint degrees in history and law tend to be highly skeptical of the claims asserted by . . . 'originalists,' not least because . . . most trained historians are considerably more nuanced in their conclusions about the meanings of past events . . . ."); Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 352-56 (1989) (marshaling evidence that the Framers did not intend for the Constitution to be interpreted according to their intentions and raising questions about who should be included among "the Framers").

83. *See* ELLIS, *supra* note 85, at xvii ("What would George Washington say about our invasion and occupation of Iraq?").

84. *Id.*

85. *Id.* at 220.

to be embalmed."[86] A recent gathering of historians at a symposium on originalism provides new evidence of the skepticism with which professional historians regard the originalist project.[87]

C. The Return of Originalist Judicial Activism

There is a second development in originalist theory that is at least as significant as the move from intentionalism to textualism—originalism began in the 1960s as a theory of judicial humility.[88] As Thomas Colby put it, "[o]riginalism was born of a desire to constrain judges [and therefore,] judicial constraint was its heart and soul—its *raison d'être*."[89] It was a response to what was regarded at the time as a period of unprecedented judicial activism.[90] Today, originalism thrives as a far more robust, sophisticated, and self-confident theory that contemporary judges may overrule legislative enactments and court precedents based on originalist methods, which may be intentionalist or textualist, as the occasion dictates.[91] Originalism now enacts judicial activism rather than resisting it.[92]

---

86. *Id.*

87. *See* Saul Cornell, *"To Assemble Together for their Common Good": History, Ethnography, and the Original Meanings of the Rights of Assembly and Speech*, 84 FORDHAM L. REV. 915, 917 (2015) ("To understand the meaning of post-Revolutionary era constitutional thought and culture, . . . [o]ne must move beyond matters of mere linguistic usage, speculations about ideal readers, and the thin notions of context associated with originalist inquiry.") (citing Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011) [hereinafter Barnett, *Interpretation and Construction*); Martin S. Flaherty, *Historians and the New Originalism: Contextualism, Historicism and Constitutional Meaning*, 84 FORDHAM L. REV. 905, 905-06 (2015) (arguing that the historians' essays in the collection do not go far enough in their criticisms of "public meaning" originalism and pointing out the misuses of history that "public meaning" originalism represents); Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 936 (2015) (faulting contemporary originalists for failing to appreciate the holistic character of meaning and to appreciate how the meaning of any one word or phrase relates to a linguistic whole that must be painstakingly reconstructed); Helen Irving, *Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning*, 84 FORDHAM L. REV. 957, 965 (2015) ("[Historians] can identify the range of possible meanings. But they cannot resolve, or even enlighten, a legal dispute."); Jack Rackove, *Tone Deaf to the Past: More Qualms about Public Meaning Originalism*, 84 FORDHAM L. REV. 969, 970 (2015) (calling it "problematic" to think that the meaning of a legal text could be fixed at the moment of its creation).

88. *See* Whittington, *supra* note 13, at 599, 608-09.

89. Colby, *The Sacrifice*, *supra* note 79, at 714; *see* John W. Compton, *What Is Originalism Good For?*, 50 TULSA L. REV. 427, 434 (2015) ("If there is one point on which virtually all originalists agree, it is that originalism constrains judicial behavior.").

90. *See* Colby, *The Sacrifice*, *supra* note 79, at 777 ("The only antidote to . . . judicial activism is the conservative judicial philosophy known as Originalism.").

91. *See* Barnett, *Gravitational*, *supra* note 76, at 421-32 (arguing that, even where recent Supreme Court cases were decided on other grounds, originalism still exerts a "gravitational force" influencing those opinions); Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1548 (2008) ("[I]n theory, originalists can be either activist or passivist, depending on their reading of the Framers' intent in any specific situation.").

92. *See, e.g.*, Eric J. Segall, *The Constitution According to Justices Scalia and Thomas: Alive and Kickin'*, 91 WASH. U. L. REV. 1663, 1663 (2014) (discussing recent constitutional decisions in which

For example, the Supreme Court recently recognized for the first time that the Second Amendment protects an individual right to bear arms, striking down both state and federal gun control enactments that had been in place for decades.[93] In so doing, the Court overturned a seventy-year-old constitutional precedent (a McReynolds opinion, no less) that had implicitly rejected the claim that the Second Amendment protected an individual right to bear arms outside the context of a well-regulated militia,[94] and which had been subsequently relied on in hundreds of cases.[95]

In its first Obamacare decision, *Nat'l Fed'n of Indep. Bus. v. Sebelius*,[96] the Supreme Court was willing to draw on originalist jurisprudence[97] and set aside decades of precedent during which the scope of Congress's powers under the Commerce Clause was nearly unfettered.[98] The Court first began its retreat from deference in 1995 with *United States v. Lopez*,[99] but in all but one of the cases in which the Court struck down laws as exceeding Congress's Commerce Clause powers, it did so by a five-to-four vote, "with the [Court's] five most conservative Justices in the majority."[100] In so doing, the Justices "most commonly associated with advocating judicial

---

Justices Scalia and Thomas have voted to overturn precedent or have struck down legislation); Colby, *The Sacrifice*, *supra* note 79, at 714-15 (noting that the "new originalism" has abandoned the emphasis on judicial constraint that inspired its original popularity).

93. *See generally* McDonald v. City of Chicago, 561 U.S. 742 (2010) (holding that the Second Amendment right to keep and bear arms is fully applicable to the States through the Fourteenth Amendment); Dist. of Columbia v. Heller, 554 U.S. 570 (2008) (holding that the District of Columbia's ban on handgun possession and any lawful firearm in the home violates the Second Amendment).

94. *See* United States v. Miller, 307 U.S. 174, 178 (1939) ("In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.").

95. *See, e.g.*, *Heller*, 554 U.S. at 638 n.2 (Stevens, J., dissenting) (citing cases and noting that until a Fifth Circuit decision in 2001, every Circuit Court had followed *Miller* in holding that the Second Amendment does not protect an individual right to possess and use weapons for private purposes).

96. 132 S. Ct. 2566 (2012).

97. *See* ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM 113-14 (2013) (specifying Chief Justice Roberts' unacknowledged reliance on Gary Lawson and David Kopels' narrow reading of the Necessary and Proper Clause based on historical evidence from the eighteenth century); *id*. at 118 (characterizing the opinion of the dissenting Justices who joined in Justice Scalia's opinion as adopting an interpretation of the Necessary and Proper Clause that Justice Marshall specifically rejected in *McCulloch v. Maryland*); Randy Barnett, *A Weird Victory for Federalism*, SCOTUSBLOG (June 28, 2012, 12:56 PM), http://www.scotusblog.com/2012/06/a-weird-victory-for-federalism/ (proclaiming that the Court had "accepted all of our arguments" in adopting the novel action/inaction distinction in *NFIB v. Sebelius*).

98. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 264 (5th ed. 2015) (discussing the Court's extremely broad understanding of Congress's Commerce Clause powers between 1937 and 1995).

99. 514 U.S. 549 (1995).

100. CHEMERINSKY, *supra* note 98, at 281.

restraint . . . abandoned almost 60 years of deference to the legislature under the commerce clause."[101]

Finally, in *Citizens United v. Fed. Election Comm'n*,[102] the Court ordered a rehearing and decided issues that were not raised in the first oral argument before it in the case.[103] It then overturned recent precedent and invalidated long-standing campaign finance regulation.[104] All of these decisions might be on solid ground and well reasoned, but they are not the actions of a minimalist court.[105] As a result, some originalists see in its moment of triumph—especially in the context of the Court's Second Amendment jurisprudence—the seeds of corruption.[106]

III. ORIGINALISM: BEAUTIFUL AND DAMNED

F. Scott Fitzgerald named his novel *The Beautiful and Damned*[107] rather than *The Beautiful and the Damned* in order to stress that to be beautiful is to be damned. Beauty and damnation are, in Fitzgerald's universe, inseparable. Freud would likely concur. Just as civilization brings with it an inescapable malaise, all human endeavors eventually bump up against their own limitations The more beautiful the endeavor, the more its incompletion galls.[108] Originalism is inescapable; originalism cannot succeed in its dual aims of fixing historical meaning and constraining constitutional decision makers.

It is now very difficult to imagine or defend a theory of constitutional interpretation that would be indifferent to the original meaning of the text. Thus, some proponents of originalism have confidently declared that we are all originalists now.[109] And both originalism and originalists have made great advances. Originalism has largely addressed the concerns of its early critics and, as a result, it has become a far more robust interpretive

---

101. *Id.*

102. 558 U.S. 310 (2010).

103. *See* Jeffrey Toobin, *Money Unlimited: How Chief Justice John Roberts orchestrated the Citizens United decision*, NEW YORKER (May 21, 2012), http://www.newyorker.com/magazine/2012/05/21/money-unlimited.

104. *See Citizens United*, 558 U.S. at 319 (holding that the doctrine of *stare decisis* does not compel adherence to Austin v. Mich. Chamber of Commerce, 494 U.S. 642 (1990)).

105. *See* Toobin, *supra* note 103 ("The case . . . reflects the aggressive conservative judicial activism of the Roberts Court.").

106. *See* J. Harvie Wilkinson, III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 257-306 (2009) (likening the activism informing the *Heller* decision to that of *Roe v. Wade*).

107. *See generally* F. SCOTT FITZGERALD, THE BEAUTIFUL AND DAMNED (1922).

108. *See* FREUD, *supra* note 1, at 39-41 (cataloguing technological advances that, to our surprise, do not enhance our overall happiness, and querying, "[W]hat good to us is a long life if it is difficult and barren of joys, and if it is so full of misery that we can only welcome death as a deliverer?").

109. *See* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1 (2011).

approach.[110] As more and more legal scholars engage in originalist research, the amount of information we have about the background to the Constitution steadily grows.[111] This historical research into original intent and original meaning in turn informs judicial opinions and scholarship, effecting a fundamental reorientation of the interpretive task.

The last few decades have produced an incredible outpouring of high-quality legal-historical scholarship, some of which is written in support of originalism; some in opposition. Either way, as a result of this scholarship, originalists can now claim much greater and more specific knowledge of the original meaning of—sampling just some of the recent scholarship—the Commerce Clause,[112] the Necessary and Proper Clause,[113] foreign affairs,[114] the scope of Executive power,[115] Article IV's Privileges and Immunities Clause,[116] the Supremacy Clause,[117] the First Amendment's Free Speech Clause,[118] the First Amendment's Religion Clauses,[119] the Second

110. *See* Whittington, *supra* note 13, at 609-10.

111. *See, e.g.*, Strang, *supra* note 66, at 1-2; Barnett, *New Evidence*, *supra* note 66, at 856-58; Pushaw, *supra* note 66, at 1199-1200.

112. *See generally* Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce,"* U. ILL. L. REV. 623 (2011); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Mark R. Killenbeck, *The Original(?), Public(?) Meaning of "Commerce"*, 16 J. CONST. L. 289 (2013).

113. *See generally* GARY LAWSON ET AL., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (2010); Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L. J. 1045 (2014); John T. Valauri, *Originalism and the Necessary and Proper Clause*, 39 OHIO N.U. L. REV. 773 (2013).

114. *See generally* MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS (2007); Ingrid Wuerth, *An Originalism for Foreign Affairs?*, 53 ST. LOUIS U. L.J. 5 (2008).

115. *See generally* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010); David Fontana, *The Second American Revolution in the Separation of Powers*, 87 TEX. L. REV. 1409 (2009); Robert G. Natelson, *The Original Meaning of the Constitution's "Executive Vesting Clause"—Evidence from Eighteenth-Century Drafting Practice*, 31 WHITTIER L. REV. 1 (2009).

116. *See generally* Kenyon D. Bunch, *The Original Understanding of the Privileges and Immunities Clause: Michael Perry's Justification for Judicial Activism or Robert Bork's Constitutional Inkblot?*, 10 SETON HALL CONST. L.J. 321 (2000); Stewart Jay, *Origins of the Privileges and Immunities of State Citizenship under Article IV*, 45 LOY. U. CHI. L.J. 1 (2013); Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117 (2009).

117. *See generally* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land"*, 99 COLUM. L. REV. 2095 (1999); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731 (2010); Michael D. Ramsey, *The Supremacy Clause, Original Meaning, and Modern Law*, 74 OHIO ST. L.J. 559 (2013); D. A. Jeremy Telman, *Medellín and Originalism*, 68 MD. L. REV. 377 (2009); Carlos Manuel Vazquez, *The Four Doctrines of Self Executing Treaties*, 89 AM. J. INT'L L. 695 (1995); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999).

118. *See generally* Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1 (2011); Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057 (2009).

119. *See generally* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, UTAH L. REV. 489 (2011); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002); Andrew M. Koppelman, *Phony Originalism*

Amendment,[120] the Fourth Amendment,[121] the Fifth and Fourteenth Amendments' Due Process Clauses,[122] the Eighth Amendment,[123] the Ninth Amendment,[124] the Tenth Amendment,[125] the Fourteenth Amendment's Equal Protection Clause,[126] and the Fourteenth Amendment's Privileges or Immunities Clause.[127] Judges who want to give originalist interpretations to specific constitutional clauses can now draw on this extremely rich trove of research in order to do so.

---

and the Establishment Clause, 103 NW. U. L. REV. 1 (2009); Vincent Philip Munoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083 (2008).

120. *See generally* Saul Cornell, *Commonplace Or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMM. 221 (1999); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487 (2004); David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295 (2009); Nathan Kozuskanich, *Originalism, History and the Second Amendment: What Did Bearing Arms Really Mean to the Founders*?, 10 J. CONST. L. 413 (2008); Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009).

121. *See generally* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Fabio Arcila, Jr., *A Response to Professor Steinberg's Fourth Amendment Chutzpah*, 10 U. PA. J. CONST L. 1229 (2008); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000); David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST L. 581 (2008).

122. *See generally* Natalie M. Banta, *Substantive Due Process in Exile: The Supreme Court's Original Interpretation of the Due Process Clause of the Fourteenth Amendment*, 13 WYO. L. REV. 151 (2013); Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMM. 339 (1987); Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation. . . and Parking Tickets*, 60 OKLA. L. REV. 1 (2007); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010).

123. *See generally* John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531 (2014); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008).

124. *See generally* Kurt T. Lash, *Three Myths of the Ninth Amendment*, 56 DRAKE L. REV. 875 (2008); Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?*, 5 N.Y.U. J.L. & LIB. 1 (2010); Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, CATO SUP. CT. REV. 13 (2010).

125. *See generally* Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty and "Expressly" Delegated Power*, 83 NOTRE DAME L. REV. 1889 (2008); Gary Lawson, *A Truism with Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME L. REV. 469 (2008); D. A. Jeremy Telman, *A Truism That Isn't True? The Tenth Amendment and Executive War Power*, 51 CATH. U. L. REV. 135 (2001).

126. *See generally* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219 (2009); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1 (2008); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71 (2013).

127. *See generally* Philip Hamburger, *Privileges or Immunities*, 105 NW. L. REV. 61 (2011); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 GEO. L. J. 1275 (2013); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, (2011); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J. 1241 (2010).

Nonetheless, our attempts to discern the original meaning have not produced greater certainty or predictability in constitutional interpretation, which is still claimed as one of the advantages of the originalist approach.[128] In *District of Columbia v. Heller*,[129] the majority and the dissent used nearly identical interpretive methods to arrive at opposite conclusions regarding the meaning of the Second Amendment.[130] Self-proclaimed originalists are divided on every conceivable issue,[131] as is clear from the number of times that Justice Thomas has written separately from Justice Scalia, often but not invariably[132] arriving at the same disposition of the case by a separate originalist path.[133]

---

128. *See, e.g.*, Barnett, *An Originalism*, *supra* note 52, at 611, 641 (linking the legitimacy of a written constitution to the fact that its provisions will be respected over time); Richard S. Kay, *Adherence to Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226, 286-88 (1988) (defending originalism as "about as stable and objective as human beings can contrive while still working with a constitution sufficiently complex to be a workable instrument of government").

129. 554 U.S. 570.

130. *See generally id.*

131. *See, e.g.*, Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1282 (1997) (finding historical support for a range of views on the original understanding of the Fourteenth Amendment's Equal Protection Clause). *Compare* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 668-70 (2009) (defending substantive due process as consistent with public meaning originalism), *with* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 542-47 (1997) (questioning the propriety of substantive due process based on an examination of the historical record). *Compare* BORK, THE TEMPTING OF AMERICA, *supra* note 73, at 166 (declaring the meaning the Privileges or Immunities Clause largely unknown and unascertainable), *with* Steven G. Calabresi & Livia Fine, *Original Ideas on Originalism: Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 694-95 (2009) (finding that the Privileges or Immunities Clause has a clear, specific meaning).

132. *Compare* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 358-60 (1995) (Thomas, J., concurring) (concluding that the First Amendment, as originally understood, protected anonymous leafleting), *with id.* at 371, 374 (Scalia, J., dissenting) (finding the historical evidence inadequate to support a belief that the Framers of either the First or the Fourteenth Amendment understood them to protect anonymous political leafleting).

133. *See, e.g.*, *Nat'l Fed. of Indep. Bus.*, 132 S. Ct. at 2677 (Thomas, J., dissenting) (adhering to the view that "'the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress's powers and with this Court's early Commerce Clause cases'"); *McDonald*, 561 U.S. at 805-06 (Thomas, J., concurring) (rejecting the majority's substantive due process reasoning and finding that the Fourteenth Amendment's Privileges or Immunities Clause protects an individual right to bear arms against state interference); *Citizens United*, 558 U.S. at 480 (Thomas, J., concurring and dissenting) (writing separately to insist that the Constitution protects *anonymous* political speech); Gonzales v. Raich, 545 U.S 1, 67 (2005) (Thomas, J., dissenting) (calling the "substantial effects" doctrine rootless because it is tethered to neither the Commerce Clause nor the Necessary and Proper Clause); United States v. Morrison, 529 U.S. 598, 682 (2000) (Thomas, J., concurring) (writing separately to opine that precedents establishing Congress's power to regulate economic activities that substantially affect interstate commerce should be overturned); *Lopez*, 514 U.S. at 584 (Thomas, J., concurring) (same); *see also* Timothy Sandefur, *Clarence Thomas's Jurisprudence Unexplained*, 4 N.Y.U. J.L. & LIB. 535, 553 (2009) (questioning why Justices Thomas and Scalia, both regarded as originalists, so often differ on constitutional issues).

One critic of originalism has identified seventy-two different theoretical strains within the originalist camp.[134] That camp has become so broad as to encompass the very people whom some originalists identify as their arch-nemeses.[135] And in some cases, originalists add so many caveats to their insistence on originalism that they end up sounding a lot like living constitutionalists.[136] Moreover, because of the adversarial nature of the common law, as Richard Primus has pointed out, the more people become adept at originalist arguments, the less helpful originalist arguments become in adjudication.[137]

There are some constitutional provisions with respect to which we are all originalists. When it comes to the rule that the President "shall . . . have attained to the Age of thirty five Years,"[138] nobody argues that this should be read to mean anything other than what it meant to the Framers. There have been no serious attempts to argue that, for example, because the Constitution is a living document, and because life expectancy in the eighteenth century was about thirty-seven years, only people on death's door should be eligible for our nation's highest office.[139] Similarly, when the Constitution speaks of "domestic violence,"[140] we all understand that the reference is to civil unrest and not to spousal abuse.[141] In such contexts, if we want to be taken seriously, we are all originalists.

In other contexts, however, nobody can claim that all constitutional difficulties can be resolved through originalist interpretive methods, because some of our most fundamental constitutional traditions have no textual

134. Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 14 (2009); E. Fleming, *Jack Balkin's Constitutional Text and Principle: The Balkinization of Originalism*, U. ILL L. REV. 669, 669-71 (2012); *see* Colby, *The Sacrifice*, *supra* note 79, at 719-20 (discussing various strains within originalism, including original intent, original meaning, subjective and objective meaning, actual and hypothetical understanding, standards and general principles, differing levels of generality, original expected application, original principles, interpretation, construction, normative and semantic originalism).

135. *See* Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197, 202 (2000) (construing Ronald Dworkin's approach as a commitment to the "abstract principles" that the Founders wrote into the Constitution).

136. *See, e.g.*, James E. Fleming, *Are We All Originlists Now? I Hope Not!*, 91 TEX L. REV. 1785, 1796 (2013) (providing a quotation from Robert Bork in which he incorporates positions that one more readily associates with Ronald Dworkin or Jack Balkin).

137. Richard A. Primus, *When Should Original Meanings Matter*?, 107 MICH. L. REV. 165, 207 (2008).

138. U.S. CONST. art. II, § 1, cl. 5.

139. *See* Andrew B. Coan, *Talking Originalism*, BYU L. REV. 847, 851 (2009) (listing "precise" constitutional provisions about which there is no controversy, including "the presidential age requirement, equal state representation in the Senate, proportional representation in the House of Representatives, and the procedures for appointing and confirming federal judges.").

140. U.S. CONST. art. IV § 4.

141. *See* Colby, *The Sacrifice*, *supra* note 79, at 753; *but see* Mark S. Stein, *The Domestic Violence Clause in "New Originalist" Theory*, 37 HASTINGS CONST. L.Q. 129, 133–34 (2009) (arguing that a new originalist reading of the clause could permit such an understanding of "domestic violence").

basis. Thus the so-called "new originalism" distinguishes between constitutional interpretation and constitutional construction: "Constructions do not pursue a preexisting if deeply hidden meaning in the founding document; rather, they elucidate the text in the interstices of discoverable, interpretive meaning, where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules."[142]

Keith Whittington has identified scores of fundamental institutions that are integral to actual legal and political processes in the United States but about which the Constitution itself is silent. These include what Whittington calls "organic structures," such as the various agencies of the administrative state, the nine-Justice Supreme Court, the creation of inferior courts, and the President's cabinet. [143] They also include structures of political participation and citizenship structures, such as the party system and voting processes.[144] Here, interestingly enough, Whittington includes the regulation of campaign finance,[145] which the Supreme Court has treated as an issue of interpretation rather than construction.[146] Whittington includes, as constitutional constructions, principles of delegation and distribution of federal powers, such as executive and congressional/executive agreements, and judicial review of legislative enactments.[147] He also incorporates economic infrastructural elements, such as the federal reserve and the federal treasury,[148] to which we might add federal bankruptcy courts and the national highway system.[149] Nobody can seriously claim that the constitutional text can determine whether all of these things should or should not be part of our constitutional system.[150]

In addition to the Constitution's silences, there are also numerous key constitutional words and phrases that defy clear definition. These include, to name some of the Constitution's "majestic generalities,"[151] "due process of law,"[152] "equal protection of the laws,"[153] "cruel and unusual

142. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 5 (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL CONSTRUCTION].

143. *Id*. at 9-10.

144. *Id.* at 10.

145. *Id.* at 12.

146. *Citizens United*, 558 U.S. at 322-27.

147. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 142, at 12.

148. *Id*.

149. *See id*. at 11 (noting that his list of constitutional constructions only scratches the surface but is intended to indicate their nature and range).

150. *See* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 604-05 (2009) ("[O]riginalism does not dictate the results of constitutional construction, and for a very large number of disputed cases, construction is the name of the game.").

151. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

152. U.S. CONST. amend. V, § 1.

153. U.S. CONST. amend. XIV, § 1.

punishments,"[154] and "necessary and proper."[155] As Randy Barnett, one of the most persuasive originalists, concedes, there are times when we are unable to discern what the constitutional meaning is, or as he puts it, there are times when constitutional meaning "runs out."[156] To some extent, the difference between originalists and non-originalists are differences with regard to the frequency with which original meaning runs out.

As a result, the difference between originalists and non-originalists is not that originalists think the constitutional text is controlling and that non-originalists think that the constitutional text is irrelevant. In almost all cases, contemporary judges faced with a constitutional issue now start with an attempt to discern the original meaning, and if the original meaning can be discerned, it is controlling absent some strong reason to abandon it.[157] Justice Scalia has acknowledged that the differences between his own originalism and moderate non-originalism are small and that most non-originalists are moderate.[158] As we shall see, although several Justices have proclaimed themselves as adherents of originalism, Justice Thomas is the only one who writes opinions in which he arrives at a conclusion as to the Constitution's original meaning and then ends the analysis.[159] But as Scott Gerber noted early on, even Justice Thomas's originalism is also not entirely consistent.[160]

---

154. U.S. CONST. amend. VIII.

155. U.S. CONST. art. I, § 8, cl. 18.

156. Barnett, *Interpretation and Construction*, *supra* note 87, at 69 (acknowledging that the meaning of the Constitution sometimes runs out and that "[o]riginalism is not a theory of what to do when original meaning runs out"); *see* Lawrence B. Solum, *Semantic Originalism* 19 (Univ. of Ill. Coll. of Law Ill. Pub. Law & Legal Theory Research, Paper Series No. 07-24, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id_1120244 (observing that when the meaning of the constitutional text is underdetermined, original meaning "runs out" and must be supplemented with constitutional construction).

157. *See* Stephen Breyer, *Active Liberty*, Tanner Lectures on Hum. Values 1, 8 (2004), http://tannerlectures.utah.edu/_documents/a-to-z/b/Breyer_2006.pdf.; Brest, *supra* note 62, at 229 (observing that text and original understanding are important for the non-originalist but not determinative).

158. Scalia, *supra* note 11, at 862.

159. *See* Barnett, *Scalia's Infidelity*, *supra* note 75, at 15; Christopher E. Smith, *Rights Behind Bars: The Distinctive Viewpoint of Justice Clarence Thomas*, 88 U. DET. MERCY L. REV. 829, 829-30 (2011) (citing approvingly Linda Greenhouse's observation that Justice Thomas's jurisprudence is characterized by "'the impressive consistency of the views that he actually expresses in his written opinions'"); *but see* Lee J. Strang, *The Most Faithful Originalist: Justice Thomas, Justice Scalia and the Future of Originalism*, 88 U. DET. MERCY L. REV. 873, 881-82 (2011) (contending that Justice Scalia is the more consistent originalist).

160. SCOTT DOUGLAS GERBER: FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 193 (1999) (summarizing Justice Thomas's jurisprudence as "liberal originalist" on civil rights and "conservative originalist" on civil liberties and federalism).

IV. TWO ORIGINALIST APPROACHES: SCALIA AND THOMAS

It is now time to look more closely at the methodologies of the Supreme Court's self-proclaimed originalist Justices. The two men could not be more different in their temperaments. The combative Justice Scalia has transformed oral arguments with his frequent questions[161] and made "vitriol" a featured component of the Supreme Court Justices' dissents.[162] Justice Thomas is the quietest Justice.[163] In 2013, Justice Thomas spoke from the bench for the first time in seven years, but even then his comment was not a question relating to the case but a joke at the expense of Yale Law School.[164] However, like Justice Black, he is not afraid to write separately to stand up for his principled version of originalism in constitutional interpretation.[165]

A. Justice Scalia: Originalism "Done Badly"

In his most extended essay on originalism,[166] Justice Scalia recognized that the originalist enterprise really requires training in historical research, a task for which most judges are ill-prepared.[167] Even a professional historian, Justice Scalia concedes, would need more time to undertake the

161. *See* Timothy R. Johnson et al., *Pardon the Interruption: An Empirical Analysis of Supreme Court Justices' Behavior during Oral Arguments*, 55 LOY. L. REV. 331, 341 (2009) (finding that Justice Scalia "asks significantly more questions than the Court average as well as significantly more questions than each of his colleagues.").

162. Lawrence C. Levin, *Justice Kennedy's "Gay Agenda": Romer, Lawrence, and the Struggle for Marriage Equality*, 44 MCGEORGE L. REV. 1, 3 (2013). A Westlaw search (Scalia /s dissent /s vitriol!) turned up thirty-four results, accounting for nearly one-third of all results in which the words "vitriol" and dissent appeared in the same sentence. The latter search captured dissents from beyond the realm of the U.S. Supreme Court.

163. *See* J. Richard Broughton, *The Loudness of Justice Thomas*, 88 U. DET. MERCY L. REV. 737, 738 (2011) (contrasting Justice Thomas's silence during oral argument with the impact of his written opinions).

164. *See* Mike Sacks, *Justice Clarence Thomas Speaks After Almost 7 Years of Silence*, HUFF POST POLITICS (Jan. 16, 2013) (noting that Justice Thomas is well known as a "smiling, jovial presence" and thus finding his outburst of wit unsurprising); Jeffrey Toobin, *Clarence Thomas Speaks, Finally*, NEW YORKER (Jan. 14, 2013), http://www.newyorker.com/news/news-desk/clarence-thomas-speaks-finally (characterizing the joke at Yale's expense as evidencing the Justice's still-simmering bitterness and resentment over his treatment at Yale).

165. *See,* e.g., *Nat'l Fed. of Indep. Bus.*, 132 S. Ct. at 2677 (Thomas, J., dissenting); *McDonald*, 561 U.S. at 805-06 (Thomas, J., concurring); *Citizens United*, 558 U.S. at 322-27 (Thomas, J., concurring and dissenting); *Gonzales*, 545 U.S. at 67 (Thomas, J., dissenting); *Morrison*, 529 U.S. at 682 (Thomas, J., concurring); *Lopez*, 514 U.S. at 584 (Thomas, J., concurring); *see also* Sandefur, *supra* note 133, at 553.

166. *See generally* Scalia, *supra* note 11.

167. *Id.* at 860-61 (conceding that the Supreme Court is not the ideal environment in which to undertake the sorts of historical research necessary for originalist jurisprudence, nor does it have the appropriate personnel).

originalist task properly than a judge typically has to decide a case.[168] Still, Justice Scalia wrote that originalism is the best approach because any other approach would involve judges deciding cases by their own lights rather than by the lights of those who agreed to be bound by the Constitution's provisions.[169] Even if determining the meaning of those provisions is difficult for a judge, Justice Scalia concluded that a "thing worth doing is worth doing badly."[170]

Justice Scalia mentions that the statement comes from G.K. Chesterton, but he does not mention that it comes from Chesterton's 1910 book, *What's Wrong with the World*.[171] Justice Scalia would likely find much to admire in the book. To the extent that Chesterton highlights a lot of things that are wrong with the world, the book evokes a version of Catholic Romantic Conservatism that would resonate with Justice Scalia.

However, context matters. The passage in question comes at the end of a chapter in which Chesterton advocates separate and decidedly distinct education for women.[172] Here, I have to quote Chesterton at length, both because I am happy to have the opportunity to introduce new readers to him and because there is no way to do justice to his manner of reasoning without extended quotation:

> There was a time when you and I and all of us were all very close to God; so that even now the color of a pebble (or a paint), the smell of a flower (or a firework), comes to our hearts with a kind of authority and certainty; as if they were fragments of a muddled message, or features of a forgotten face. To pour that fiery simplicity upon the whole of life is the only real aim of education; and closest to the child comes the woman—she understands. To say what she understands is beyond me; save only this, that it is not a solemnity. Rather it is a towering levity, an uproarious amateurishness of the universe, such as we felt when we were little, and would as soon sing as garden, as soon paint as run. To smatter the tongues of men and angels, to dabble in the dreadful sciences, to juggle with pillars and pyramids

168. *Id.* at 857-60 (reviewing one decision by Justice Taft and elaborating on how difficult it would have been for any Supreme Court Justice to undertake a full historical inquiry into the relevant issues).

169. *Id.* at 863 (contending that non-originalism exacerbates the danger that "judges will mistake their own predilections for the law").

170. *Id.* at 863.

171. 4 G.K. CHESTERTON, COLLECTED WORKS 33-218 (1987) [hereinafter CHESTERTON, 4 COLLECTED WORKS].

172. *Id.* at 197-99.

> and toss up the planets like balls, this is that inner audacity and indifference which the human soul, like a conjurer catching oranges, must keep up forever. This is that insanely frivolous thing we call sanity. And the elegant female, drooping her ringlets over her water-colors, knew it and acted on it. She was juggling with frantic and flaming suns. She was maintaining the bold equilibrium of inferiorities which is the most mysterious of superiorities and perhaps the most unattainable. She was maintaining the prime truth of woman, the universal mother: that if a thing is worth doing, it is worth doing badly.[173]

This is an exquisite piece of writing, and it requires a lot of unpacking. In what follows, we focus only on the parts relevant to Justice Scalia's use of Chesterton.

One of Chesterton's themes was the importance of maintaining the distinction between professionals and amateurs, or between generalists and specialists.[174] Chesterton supported an educated amateurism, and viewed specialization as the "peculiar peril" of his time, giving rise to imperialism, tyranny, and a host of other evils.[175] There are occasions in life, Chesterton laments, when men must adopt the role of experts and interact with others based on the status attached to their qualifications as experts.[176] But most of the time, we partake of what Chesterton calls mankind's "comrade-like aspect."[177] That is, we deal with one another as peers pursuing a common interest.

For women, he advocated only educated amateurism.[178] Indeed, as indicated in the passage quoted above, he thought that women's superiority lay precisely in their unconstrained amateurism.[179] He thought that women were the last link that men had to a time when all of us could engage in

---

173. *Id.* at 199.

174. *Id.* at 110-14 (bemoaning specialization not only of human activities, but of things, while associating universalism with religion and specialization with separation and divorce).

175. *Id.* at 103 ("The essential argument is 'Specialists must be despots; men must be specialists. You cannot have equality in a soap factory; so you cannot have it anywhere. You cannot have comradeship in a wheat corner; so you cannot have it at all. We must have commercial civilization; therefore we must destroy democracy.'").

176. CHESTERTON, 4 COLLECTED WORKS, *supra* note 171, at 100-01 (associating specialization with the need for efficiency and quick action and pointing out that soldiers obey their military officers not in recognition of the officers' superior moral or intellectual qualities but as a result of discipline and in recognition of their rank).

177. *Id.* at 101.

178. *Id.* at 119 (observing that "the essential of the woman's task is universality").

179. *See id.* at 199.

civilized amateurism.[180] Indeed, it is clear from the passage quoted above that Chesterton placed great stock in amateurism and regarded women as the guardians of the realm of amateurism. The most important things in life are the things worth doing badly. In its original context, Chesterton was advocating the raising and educating of one's own children—or at least, he argued that women should raise and educate their own children, rather than working and sending their children to daycare.[181]

Chesterton's advice, quoted by Justice Scalia, applied to things like "writing one's own love-letters and blowing one's own nose."[182] Such things, Chesterton argued, are worth doing badly.[183] However, Justice Scalia applies the motto to his activities as a specialist, and there the motto does not inspire confidence. Chesterton acknowledged the role of professions and understood that specialists have to do their jobs well:

> The democratic contention is that government (helping to rule the tribe) is a thing like falling in love, and not a thing like dropping into poetry. It is not something analogous to playing the church organ, painting on vellum, discovering the North Pole (that insidious habit), looping the loop, being Astronomer Royal, and so on. For these things we do not wish a man to do at all unless he does them well.[184]

While Chesterton clearly thinks that democratic government is a thing of the common people, it should be clear that judicial interpretation of the law is not the same as democratic government. Justice Scalia could not claim that Supreme Court Justices act in the comrade-like aspect and not as specialists. They are judges, not jurors. Chesterton never intended his motto to be applied to a brain surgeon, a mechanical engineer, or a federal judge.

If Justice Scalia has lost track of Chesterton's argument in *What's Wrong with the World*, we need not be concerned that the quoted aphorism comes in the context of an argument that would flunk the sniff test of constitutional Equal Protection and in a book that devotes one quarter of its pages to attacks on the movement for women's suffrage.[185] Originalism

---

180. *Id.* at 114 ("But for women this ideal of comprehensive capacity (or common-sense) must long ago have been washed away. It must have melted in the frightful furnaces of ambition and eager technicality.").

181. CHESTERTON, 4 COLLECTED WORKS, *supra* note 171, at 119 (arguing that "woman was set to guard" two primary things: "one's own children, [and] one's own altar," and that women went wrong when they transferred their "sacred stubbornness" for those things to the world of work).

182. *See* GILBERT K. CHESTERTON, ORTHODOXY 83-84 (1908) (linking doing such things for oneself to the common conception of democracy).

183. *See id.*

184. *Id.* at 83.

185. *See* CHESTERTON, 4 COLLECTED WORKS, *supra* note 171, at 107-52.

need not entail a formalism that would limit the meaning of the aphorism to Chesterton's original meaning. However, that context may matter to us a great deal if Justice Scalia knew exactly the context in which the quotation appears—that is, in a book in which Chesterton rails against feminism, homosexuality, women's suffrage, birth control, and divorce, among other things.[186] Perhaps Justice Scalia's invocation of Chesterton *sotto vocce* signals that he wishes he could vent his frustrations on these topics as freely as Chesterton did.

But again, context matters. Justice Scalia has ripped the aphorism out of its context, much as common law judges are wont to elevate dicta to holdings and reduce holdings to dicta when it suits their purposes. The main problem with Justice Scalia's use of Chesterton's aphorism is that it actually enacts what happens when one does something worth doing—badly. Chesterton was not advocating amateurism among professionals, and why on earth would anybody recommend such a thing? Deciding cases is the sort of activity about which Justice Thomas's aphorism seems better to apply. What possible purpose is served by a constitutional methodology that even a judge well versed in the law could only apply badly? Justice Scalia has elided Chesterton's binary opposition between acceptable methods for professionals and for amateurs, and in so doing he has imported the ethos of generalists into a realm that should be reserved for specialists.

Moreover, recently Justice Scalia has forgotten his own warning that originalism is something that judges can only do badly. Did Justice Scalia bear his Chestertonian dictum in mind when he was considering the District of Columbia gun control statute at issue in *Heller*? As Judge Wilkinson points out in his critique of the decision, the majority's and the dissent's textual analysis and historical analysis do not resolve the basic ambiguity of the constitutional text.[187] In such cases, Judge Wilkinson chides, "the tie for many reasons should go to the side of deference to democratic processes."[188] Certainly that ought to be the case for Justice Scalia, who recognizes that a judge's attempts at historical reconstruction are doomed to inadequacy.[189]

---

186. *See id.* at 9 (General Editors' Introduction) ("[Chesterton] knew that relaxed moral standards, eugenics, behavioral psychology, divorce, the feminist movement, birth control, scientism and abortion would lead to the dehumanization of man and the annihilation of the family."); *id.* at 12 (James V. Schall, S.J., Introduction) (regretting that many of the ideas against which Chesterton wrote—"from divorce to feminism to euthanasia to homosexuality to abortion have gained much of the day.").

187. Wilkinson, *supra* note 106, at 266-67 (citing Stuart Taylor Jr., *Torn by the Past: D.C. Gun Case Shows Shortcomings of Originalism*, LEGAL TIMES, July 7, 2008, at 44).

188. *Id.* at 267.

189. *See* Scalia, *supra* note 11, at 863.

B. Justice Thomas: Originalism "Done Right"

Being a Supreme Court Justice is something that even G.K. Chesterton would want to see done right. But what does it mean to do such a thing right? For Justices Thomas and Scalia, doing constitutional adjudication right involves originalism, but for reasons discussed above in Part III, doing originalism right is challenging. This brief discussion of Justice Thomas illustrates the interpretive challenges raised by Justice Thomas's principled originalism.

Justice Thomas invokes the slogan "any job worth doing is worth doing right" twice in his autobiography.[190] The first iteration comes when Justice Thomas is describing the refusal of his revered grandfather (to whom Justice Thomas refers as "Daddy") to demonstrate any warmth or affection for Thomas or his brother, Myers.[191] According to Justice Thomas: "He never praised us, just as he never hugged us. Whenever my grandmother urged him to tell us that we had done a good job, he replied, 'That's their responsibility. Any job worth doing is worth doing right.'"[192] This statement was on Justice Thomas's mind, he tells us, as he took his oath of office and became a Justice of the Supreme Court: "Struggling to control my surging emotions, I repeated the oath, thinking as I did so how Daddy and Aunt Tina [Daddy's wife] had raised me to fulfill it. Any job worth doing, they had told me, is worth doing right. This, I knew, was a job worth doing."[193] Justice Thomas clearly wants us to know that he aims to live by his grandfather's words but also that he will not forget who his grandfather was and the milieu that his own determination helped him escape.[194]

Justice Thomas relates his experience upon reading Robert Frost for the first time, and he excerpts for us a passage that he read as if it told his own story: "*Two roads diverged in a wood, and I – / I took the one less traveled by, / And that has made all the difference*."[195] Justice Thomas tells us that reading the poem "comforted me as I drifted farther from home," reflecting his sense of himself as "the odd man out."[196]

Justice Thomas's reading of the poem certainly resonates with his reading of his life.[197] He was a poor Black boy who aspired to be a Catholic

190. THOMAS, *supra* note 12, at 26, 287.
191. *See id.* at 26.
192. *Id.*
193. *Id.*
194. *See id.* at 26-27 (crediting Daddy, Aunt Tina, and the nuns at his Catholic school for opening "doors of opportunity leading to a path that took me far from the cramped world into which I had been born.").
195. THOMAS, *supra* note 12, at 37.
196. *Id.*
197. *See id.* at 2-5, 30, 287.

priest and then went on to serve on the U.S. Supreme Court.[198] He also joined that Court as its most conservative member, hardly the road one would expect an African-American to take. Unfortunately, his reading of the poem does not resonate at all with the poem itself. That is, Justice Thomas's interpretation is at odds with clear markers of contrary meaning in the poem.[199] Here it is in full:

> Two roads diverged in a yellow wood,
> And sorry I could not travel both
> And be one traveler, long I stood
> And looked down one as far as I could
> To where it bent in the undergrowth;
>
> Then took the other, as just as fair,
> And having perhaps the better claim,
> Because it was grassy and wanted wear;
> Though as for that the passing there
> Had worn them really about the same,
>
> And both that morning equally lay
> In leaves no step had trodden black.
> Oh, I kept the first for another day!
> Yet knowing how way leads on to way,
> I doubted if I should ever come back.
>
> I shall be telling this with a sigh
> Somewhere ages and ages hence:
> Two roads diverged in a wood, and I—
> I took the one less traveled by,
> And that has made all the difference.[200]

Thomas's reading of the poem, evidenced by the way he has excerpted it, is consistent with the most common interpretation of the poem, an interpretation that is clearly at odds with the plain meaning of the text. This reading ignores the poem's two middle stanzas and thus overlooks the profound irony of the final stanza.

---

198. *See id.*

199. *See* WILLIAM H. PRITCHARD, FROST: A LITERARY LIFE RECONSIDERED 127-28 (1984) ("For the large moral meaning which 'The Road Not Taken' seems to endorse . . . does not maintain itself when the poem is looked at more carefully.").

200. Robert Frost, *The Road Not Taken*, *in* THE POETRY OF ROBERT FROST: THE COLLECTED POEMS, COMPLETE AND UNABRIDGED 105, 105 (Edward Connery Lathem ed., 1979).

The facts of the poem clearly contradict any claim that the poem's narrator took the road less traveled by or that such a choice could have made any difference. The narrator expressly and repeatedly tells us that the two roads were equally traveled by: both are worn "about the same," both "that morning equally lay in leaves no step had trodden black." The poem clearly announces that nothing momentous turned on the traveler's arbitrary choice.

Justice Thomas follows the more-traveled-by reading of Frost.[201] Frost's poem is often excerpted in precisely the way that Justice Thomas has done.[202] People, seeking to reaffirm their commitment to their self-conception as mavericks who follow their self-appointed paths, place the last stanza of Frost's poem (or parts of it) on greeting cards or pin it to bulletin boards.[203] But the fact that that Justice Thomas's interpretation of Frost is a common misreading should give the originalist little solace. Excerpting the poem as Justice Thomas has done violates contextual canons enunciated by none other than Justice Scalia,[204] and there is no reason to think the two men differ as to canons of construction. Texts should be construed as a whole,[205] every word and provision should be given effect,[206] and the words of a text should be interpreted so as to make them compatible, not contradictory.[207] One might object that we are dealing here with a literary and not a legal text, but it is hard to imagine why these particular interpretive canons would not apply with the same force to a literary text.

The poem clearly mocks the narrator's self-regard in the final stanza and in fact, as the critic William Pritchard points out, the complicated twists of the poem are what make it "un-boring."[208] The poem is not at all about what Justice Thomas takes it to be about—choosing the unusual path for oneself. It is more about what Justice Thomas, in writing his

201. *See* DAVID ORR, THE ROAD NOT TAKEN: FINDING AMERICA IN THE POEM EVERYONE LOVES AND ALMOST EVERYONE GETS WRONG 3-7 (2015) (compiling evidence of the poem's popularity but noting that "almost everyone gets it wrong").

202. *See* PRITCHARD, *supra* note 199, at 125-26 (citing the high-minded use of the poem Alexander Meiklejohn of Amherst College in his essay, *What the College Is*).

203. *See id.* at 127-28; *see also* ORR, *supra* note 201, at 3.

204. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167, 174, 180-82 (2012).

205. *See id.* at 167-69 (describing the "whole text canon," which requires that a text be considered as a whole).

206. *See id.* at 174-79 (describing the surplusage canon, which provides that a reading should not arbitrarily ignore or inadequately account for the linguistic components of a text).

207. *See id.* at 180-82 (favoring readings that render each component of a text compatible with all other components).

208. *See* PRITCHARD, *supra* note 199, at 128.

autobiography, is engaged in: self-mythologizing.[209] But Justice Thomas lacks Frost's ironic frame of mind, at least in this context. And *that* makes all the difference.

Questioning Justice Thomas's skills as a literary critic may seem uncharitable, but Justice Thomas's approach to constitutional interpretation places a premium on the judge's ability to discern the meaning of texts. His misreading of Frost illustrates the sorts of hermeneutic slip-ups to which the judge as critic or as law-office historian will often be vulnerable. His misreading of Frost suggests that Justice Thomas might be capable of misreading other texts, including the text of his own life.

To take just one example, I want to look a bit more carefully at Justice Thomas's relationship to Yale Law School. I have selected this example for two reasons. First, as I shall endeavor to show, Justice Thomas's reading of the impact of his Yale experience on his legal career is shockingly inconsistent with the facts *as he presents them*. Second, Justice Thomas's misreading of his Yale experience is a product of a narratological choice. Like Frost's narrator, Justice Thomas reflects on his Yale experience "ages and ages hence," and he manipulates the story to serve a purpose in his autobiographical narrative. Such narratological choices are unavoidable and must shape Thomas's legal as well as his non-legal writings.

In his autobiography, Justice Thomas introduces the theme of the contrast, learned from Daddy, between rattlesnakes and water moccasins.[210] Both are deadly, but rattlesnakes warn you with their rattle, while water moccasins strike without warning.[211] This distinction becomes Justice Thomas's key metaphor for understanding the different types of bigotry to which he is subjected throughout his life.[212] He could deal with the open bigotry of the segregated South, but the deception of the liberal white establishment posed the far greater danger.[213] At the height of the Anita Hill controversy, Justice Thomas reflected on lynch mobs (rattlesnakes) and sanctimonious liberals (water moccasins):

> As a child in the Deep South, I'd grown up fearing the lynch mobs of the Ku Klux Klan; as an adult, I was starting to wonder if I'd been afraid of the wrong white people all

209. *See* ORR, *supra* note 201, at 9 (summing up the scholarly consensus that poem is not "a salute to can-do individualism" but "a commentary on the self-deception we practice when constructing the story of our own lives").

210. *See* THOMAS, *supra* note 12, at 75-76.

211. *Id.* at 76.

212. *See id.* at 87.

213. *See id.* at 75-76 (preferring white southerners' open bigotry to that of the "ostensibly unprejudiced whites who pretended to side with black people while using them to further their own political and social ends.").

> along. My worst fears had come to pass not in Georgia but in Washington, D.C., where I was being pursued not by bigots in white robes but by left-wing zealots draped in flowing sanctimony. For all the fear I'd known as a boy in Savannah, this was the first time I'd found myself at the mercy of people who would do whatever they could to hurt me . . . .[214]

Yale Law School appears in Justice Thomas's memoir as the biggest water moccasin of them all.[215]

He provides no concrete examples of discriminatory conduct, but he tells us that, right from the start, he felt out of place.[216] Although he recognized that he was out of place more because he was disadvantaged than because he was Black, Justice Thomas believed that ultimately the stigma that attached to his admission to law school based on affirmative action[217] could never be eliminated regardless of his academic success.[218] After graduating, Justice Thomas boasts that he "peeled a fifteen-cent price sticker off of a package of cigars and struck it to the frame of" his Yale law degree to symbolize his "disillusionment" with the fact that "Yale meant one thing for white graduates and another for blacks . . . ."[219] Justice Thomas meant that his career opportunities were far more limited than those of his white classmates, but that claim is hard to square with the narrative Justice Thomas provides in his autobiography.[220]

---

214. *Id.* at 257.

215. *See* THOMAS, *supra* note 12, at 75-76 (regretting that, having gotten in to Yale while disclosing his race, he "had stepped within striking distance" of the water moccasin). After not being able to find a job during his third year in law school, a failure Justice Thomas attributes to the fact that his Yale degree "bore the taint of racial preference," Justice Thomas observes, "[t]he snake had struck." *See id.* at 87.

216. *See id.* at 74. His antipathy towards Yale Law School at times takes in all of New England, which he found subject to a "herd mentality" when it came to political perspectives. *See id.* at 98. But Justice Thomas also provides evidence that Yale was not the ideological monolith he paints it to be. It was there that he met John Bolton, and his key Republican supporter, John Danforth, is also a Yale Law School alumnus. While working for Danforth in Missouri, Thomas reads Thomas Sewell with interest for the first time, but he had already been introduced to Sewell while he was at Yale. Someone gave him a Sewell book at Yale, which he "skimmed . . . angrily and threw . . . [into] the trash, furious that any black man could think like that." *Id.* at 107.

217. THOMAS, *supra* note 12, at 231 (contemplating liberal opposition to his nomination to become a Supreme Court Justice, Justice Thomas muses, "[h]ad I been a liberal, they would have overlooked my youth and comparative inexperience, not to mention the fact that I'd been admitted to Yale Law School in part because I was black.").

218. *See id.* at 74-75 ("As much as it stung to be told that I'd done well in the seminary *despite* my race, it was far worse to feel that I was now at Yale *because* of it.").

219. *Id.* at 99-100.

220. *See id.* at 87 (describing his difficulty finding work in big-city law firms after graduation and attributing that difficulty to the value of a Yale law degree "when it bore the taint of racial preference").

His memoir also provides ample evidence of the benefits he derived, not from his Yale Law School education, but from having gone to Yale.[221] He landed his first summer job during law school—the only one he applied for and the only one he wanted[222]—because his Yale classmate, Lani Guinier, helped him "obtain a $60-a-week Law Students Civil Rights Research Council grant from the Legal Defense Fund" so that he might do so.[223] During his third year in law school, Justice Thomas applied to work for Missouri's Attorney General John Danforth because he had heard that Danforth was "looking for other Yalies to work for him."[224] John Danforth also found a place for Thomas to live rent-free while he was studying for the bar[225] and secured a loan for him when he defaulted on his student loans.[226]

As Scott Gerber put it, "Thomas's association with Danforth would later prove to be the most important in his professional career."[227] Through John Danforth's contacts, and now on the strength of his fine performance in the Missouri Attorney General's office, Justice Thomas was able to move into a far better paying job with the Monsanto Corporation.[228] That job proved short-lived.[229] Justice Thomas expresses some concern about the harms corporations like Monsanto caused to ordinary working people, but it seems he was simply not interested in the work at Monsanto—there was not enough for him to do there to keep him occupied.[230] In any case, John Danforth, now a Senator, once again rescued Justice Thomas by inviting him to join the Senator's staff in Washington, D.C.[231] A few years after moving to the capital, Justice Thomas determined that he could no longer remain in his first marriage.[232] With great reluctance and tormented by guilty feelings, he left his wife and child.[233] He moved in with a friend from

221. *Id.* at 80-81, 87-88, 102.
222. THOMAS, *supra* note 12, at 81.
223. *Id.* at 80-81 (the law firm paid an additional $40/week).
224. *Id.* at 87.
225. *Id.* at 88-89.
226. *Id.* at 102.
227. GERBER, *supra* note 160, at 12. Professor Gerber alerted me in private conversation that, having spoken with Justice Thomas, he now shares Justice Thomas's negative assessment of the importance of Yale Law School in the latter's career trajectory. But the evidence that both Gerber and Justice Thomas present does not support Justice Thomas's narrative.
228. THOMAS, *supra* note 12, at 109-10.
229. *See id.* at 119-20.
230. *See id.* at 113, 115-16 (explaining how he realized that one of his neighbors when he was a child likely suffered symptoms associated with exposure to creosote, complaining that there was not enough work for him to do at Monsanto, and noting that even when he worked hard, he felt empty at Monsanto).
231. *Id.* at 119-20.
232. *Id.* at 135.
233. THOMAS, *supra* note 12, at 135.

Yale Law School.[234] Without Yale, Justice Thomas's career would have looked very different.

All of this evidence is presented in Justice Thomas's autobiography, and it suggests that Justice Thomas grossly misreads the importance of Yale Law School to his career. He does so in a manner consistent with his misreading of Frost. That is, the autobiography insists on Justice Thomas's outlier status as a self-made man and resists any suggestion that institutions such as Yale, affirmative action, and the federal government itself might have played important roles. Nor does he acknowledge that he was the beneficiary of the support of political allies who were eager to push forward the career of a young Black conservative.[235] The autobiography suggests that, while Justice Thomas took a less-traveled-by road, that road would look very different to an outside observer than it does to Justice Thomas.

What has happened here? How is it possible that Justice Thomas has completely misread a poem that he seems to have committed to memory, at least in part? How is it possible that Justice Thomas could have reached a conclusion about the value of a Yale law degree that seems so at odds with the facts he presents? Those facts show that his Yale connections played an important role in his career development. One response is that nothing at all has happened. One could maintain that Justice Thomas's reading of the Frost poem is a plausible one. One could proclaim that one prefers Justice Thomas's reading of his own life to the one I have provided. While I would defend my own reading, it is enough if I have shown that Justice Thomas's readings are open to doubt. And the source of that doubt is not any uncertainty as to Justice Thomas's intellectual gifts.

Rather, the problem is ideological and narratological. Like all of us, Justice Thomas is inclined to read facts so as to fit into a narrative that suits his purposes. That is why he reads Frost's poem as being about choosing a unique path for oneself rather than being an ironic commentary on self-mythologizing.[236] That is why he ignores clear evidence of the role of his Yale connections in constructing a narrative of his own life.[237] It is not hard to see how the same narratological problems can affect Justice Thomas's readings of the historical record in constitutional cases.

A brief discussion of one of Justice Thomas's opinions will have to suffice to indicate my point here. In *Brown v. Entertainment Merchants Association*,[238] the Supreme Court upheld lower court decisions that

234. *Id.*

235. *But see* GERBER, *supra* note 160, at 12 (noting the importance of Thomas' political associations to his career).

236. *Compare* THOMAS, *supra* note 12, at 37, *with* PRITCHARD, *supra* note 199, at 127-28.

237. *See* GERBER, *supra* note 160, at 12.

238. 131 S. Ct. 2729 (2011).

permanently enjoined enforcement of a California statute restricting the sale or rental of violent video games to minors.[239] The Court found that the statute could not survive the strict scrutiny that the First Amendment's protections of free speech demand.[240] Justice Thomas dissented, on the ground that the First Amendment, as originally understood, does not protect the free speech interests of children, except through their guardians.[241]

In support of his reading of the First Amendment's original meaning, Justice Thomas relies mostly on late-seventeenth-century and early-eighteenth-century tracts on education and more contemporary scholarly studies expounding on that literature.[242] Justice Thomas never claims, let alone demonstrates, that the Framers had such writings in mind when they drafted the First Amendment.[243] David Post summarizes the difficulty with this approach along lines similar to what I have sketched out above, although he characterizes the problem as one of categorization rather than of narratology:

> I understand, and am sympathetic to, the notion that the meaning of a constitutional provision should be informed by the meaning given to it by those who drafted and ratified it. But can that really mean that we will look to the child-rearing principles of Cotton Mather and John Locke to define, for all time, the scope of the constitutional protection for free speech? . . . The question in this case is not 'do parents have absolute authority over their children?' The question in the case is, rather, 'how does what the state did *here* relate to (1) the authority of parents over their children, (2) the power of the state to protect the well-being of children, and (3) the constitutional protection for 'the freedom of speech'?' . . . Is this, actually, a case about the authority of parents over their children? Or is it a case about the extent of the state's power to protect minors? The scope of the First Amendment rights of video game manufacturers? Or the scope of the First Amendment rights of minors? Nothing in Justice Thomas's historical research

239. *Id.* at 2732-33, 2742.

240. *Id.* at 2742.

241. *See id* at 2751 (Thomas, J., dissenting) ("The practices and beliefs of the founding generation establish that 'the freedom of speech,' as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians.").

242. *Id.* at 2752-57.

243. *Brown*, 131 S. Ct. at 2752-57 (Thomas, J. dissenting).

> tells me, or can possibly tell me, how people in the 18th century would have answered *those* questions.[244]

Both David Post[245] and Justice Scalia, in his majority opinion in *Brown*, point out that Justice Thomas's position ought to apply to the First Amendment's Religion Clauses as well, with the result that the state could prohibit children from attending church services of which their guardians do not approve.[246] Justice Scalia also points out that the problem with Justice Thomas's opinion lies not in his historical research, but in the way he has categorized the case.[247] The question is not whether parents have a right to control their children but whether the state has a right to do so.[248]

Justice Thomas's opinion in *Brown* is interesting. His historical research is impressive.[249] However, his conclusion does not follow from his research. He has created a historical narrative in which seventeenth and eighteenth-century pedagogical literature informs the First Amendment's protections of free speech rights.[250] However, if one reads the First Amendment in the context of any number of different historical narratives, as Justice Scalia is inclined to do in his majority opinion, one arrives at a different interpretation of the original meaning of the First Amendment.[251]

The more confident originalist practitioners become of their historical methodology, the less inclined they are to self-criticism.[252] The result can be a form of robust judicial activism that differs from older forms of judicial activism in its justification, but not in its results: the reversal of legislative enactments by five men (the women dissent) in robes.[253] As Judge J. Harvie Wilkinson noted in his critique of *Heller*,[254] conservatives may win certain battles in overturning legislation that they find objectionable, but in doing so, they undermine the very conservative principles that gave rise to the

---

244. David G. Post, *Sex, Lies and Videogames: Brown v. Entertainment Merchants Association*, CATO SUP. CT. REV. 27, 46 (2011) (emphasis in original).

245. *Id.* at 46-47 (contending that Justice Thomas would permit the government to prohibit children from attending religious services).

246. *Brown*, 131 S. Ct. at 2736, n.3 (noting that, following Justice Thomas's approach, "[i]t could be made criminal to admit a person under 18 to church, or to give a person under 18 a religious tract, without his parents' prior consent").

247. *Id.*

248. *See id.* ("In the absence of any precedent for state control, uninvited by the parents, over a child's speech and religion (Justice Thomas cites none), and in the absence of any justification for such control that would satisfy strict scrutiny, those laws must be unconstitutional.").

249. *See id.* at 2752-57.

250. *See id.* at 2758-59.

251. *See Brown*, 131 S. Ct. at 2736.

252. *See* Segall, *supra* note 92, at 1663-64; Colby, *The Sacrifice*, *supra* note 79, at 714-15; Stone, *supra* note 91, at 1548.

253. *See* Segall, *supra* note 92, at 1663; Colby, *The Sacrifice*, *supra* note 79, at 714-15; Stone, *supra* note 91, at 1548.

254. Wilkinson, *supra* note 106, at 254.

practice of originalism in constitutional interpretation—separation of powers, judicial restraint, textualism, and federalism.[255] Now only originalism remains.[256]

V. CONCLUSION: THE FUTURE OF AN ILLUSION

At the beginning of *Civilization and Its Discontents,* Freud summarizes his earlier work, *The Future of an Illusion*, which is on the subject of religious belief.[257] Freud calls religious belief "patently infantile" and "foreign to reality," but he also concedes, "the great majority of mortals will never be able to rise above this view of life."[258] The non-originalist might reach a similar conclusion with respect to originalism. Even as originalism in its scholarly form grows more sophisticated and multi-valent, popular originalism thrives as a blunt instrument used to constrain activist (read "liberal") judges.[259] As Thomas Colby points out, "Originalism somehow continues to thrive as both a political movement and as a scholarly theory, even though the features that make it attractive as a political movement render it impotent as a scholarly theory and vice versa."[260]

My conclusion is somewhat different. The future of originalism, as a popular movement that exerts a normative pull on judges to adhere to the written text of the Constitution, is bright but illusory. Politicians and judges can easily adjust their rhetoric to nourish that populist notion of what constitutional adjudication ought to be. However, regardless of their rhetoric, judges will continue to be constrained, not by the written text of the Constitution, but by the main sources of human malaise that Freud identified in *Civilization and Its Discontents*: the outside world, their own bodily infirmities (here of the cognitive variety), and other people.[261]

The world will continue to confront judges with novel situations, and textual meaning will continue to run out, leaving the judges to their own devices for constitutional adjudication. Judges of good will and intention will continue to render decisions in the name of originalism that will be

---

255. *See id.* (characterizing *Heller* as showing inadequate commitment to textualism, judicial overreach, disregard for legislative processes, and a rejection of the principles of federalism).

256. *See id.* at 256 (contending that *Heller* has swept away "counsels of caution" leaving originalism as the only foundation for a conservative jurisprudence).

257. *See* FREUD, *supra* note 1, at 21-23.

258. *See id.* at 21.

259. *See* Jamal Greene, *Selling Originalism*, 97 GEO L.J. 657, 661 (2009) (noting that "[o]riginalism's proponents have taken advantage of this dynamic by speaking of originalism in simple and transparent terms.").

260. Colby, *The Sacrifice*, *supra* note 79, at 716.

261. *See* FREUD, *supra* note 1, at 24, 33; *see also* Lawrence Baum, *Supreme Court Justices as Human Decision Makers*, 41 OHIO N.U. L. REV. 567, 567 (arguing that "scholarship on the Supreme Court should adopt a more realistic picture of the justices. [W]e can best understand decision making on the Court by thinking of the justices as human decision makers.").

subject to lively criticisms. Some of those criticisms will focus on the faulty methodology, subjectivism, tendentious interpretation, and incomplete historical evidence, and thus point out the judge's intellectual limitations. Other criticisms will evidence the continuing debate between originalism and non-originalism. People on both sides of the divide have entrenched positions, and neither side is going away. Originalism's rhetorical advantages suggest that its adherents will become increasingly confident of the judiciary's ability to do the job right. Increasingly, its chief practitioners have lost sight of Justice Scalia's fundamental insight that originalism is something that federal judges can only do badly.