The New Originalism

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No version of originalism is going to be completely new. As a method of constitutional interpretation in the United States, originalism has a long history. It has been prominently advocated from the very first debates over constitutional meaning. At various points in American history, originalism was not a terribly self-conscious theory of constitutional interpretation, in part because it was largely unchallenged as an important component of any viable approach to understanding constitutional meaning. Originalism, in its modern, self-conscious form, emerged only after traditional approaches had been challenged and, to some degree, displaced.[1]

At least initially, let me offer a fairly basic definition of originalism. Originalism regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present. A number of variations on this basic theory are possible and have been advocated over time. The new originalism offers a different variation on this basic theory than the old originalism. The "old originalism" flourished from the 1960s through the mid-1980s. The "new originalism" has flourished since the early 1990s. I should note that my focus here is not on the actions and opinions of judges. Constitutional arguments drawing on evidence from the founding period are one of several forms of argument that can be found in judicial opinions, and judges often make use of that evidence whenever they find it helpful to advancing their position. But I have no particular illusions about the consistency or sophistication of constitutional theorizing on the bench, and judicial rhetoric and behavior is not my primary concern. My focus here is on developments within academic constitutional theory.

I. THE "OLD" ORIGINALISM

The old originalism came to greatest prominence in the 1980s with its explicit embrace by Attorney General Edwin Meese and the nomination of one of its most notable exponents, Robert Bork, to the U.S. Supreme Court in 1987. However, the political and academic debate over originalism was well advanced by then. As the Warren Court's rights revolution became increasingly controversial in the late 1960s, critics of the Court frequently recurred to original intent to ground their disagreement with the Court's innovative rulings. The tension was evident in an exchange between Senator Sam Ervin and Thurgood Marshall during the latter's confirmation hearings in 1967. Unsatisfied with Marshall's

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

initial response, Ervin repeated the question: "Is not the role of the Supreme Court simply to ascertain and give effect to the intent of the framers of this Constitution and the people who ratified the Constitution?" Marshall answered, "[y]es, Senator, with the understanding that the Constitution was meant to be a living document."[2]

As part of Richard Nixon's 1968 "law and order" campaign for president, Nixon repeatedly attacked the Warren Court and its decisions. Nixon prominently pledged to appoint only "strict constructionists who saw their duty as interpreting law and not making law."[3] Nixon's idea of a strict constructionist was hardly well defined, but it was clear that he meant judges who would oppose the Warren Court's expansion of individual rights, especially those of criminal defendants. In 1971, Nixon introduced William Rehnquist as a Supreme Court nominee who knew what it meant to "to interpret the Constitution . . . not twist or bend the Constitution in order to perpetuate his personal political and social views."[4] Rehnquist gave somewhat more specific content to this directive at his 1971 confirmation hearings, explaining that the Constitution should be understood "by the use of the language used by the framers, [and] the historical materials available."[5] He affirmed to the senators that he would be unwilling "to disregard the intent of the framers of the Constitution and change it to achieve a result that you thought might be desirable for society."[6]

In that same year, Robert Bork published his *Indiana Law Journal* article that forcefully rejected any alternative to originalism as illegitimate; Bork grounded his critique of judicial activism in moral skepticism. Because "there is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ . . . the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute."[7] The only alternative to the judicial assertion of "personal political and social views," was for the judge to "stick close to the text and history, and their fair implications, and not construct new rights."[8] In this fashion, "value choices are attributed to the Founding Fathers, not the Court."[9] In 1977, Raoul Berger influentially added to this argument the provocative historical claim that the Fourteenth Amendment had extremely limited legal implications, and the theoretical assertion that originalism was part of the "background of interpretive

2. Quoted in GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION 12 (1992).

3. Quoted in DONALD GRIER STEPHENSON JR., CAMPAIGNS AND THE COURT 181 (1999).

4. Richard Nixon, *The Public Papers of the President: Richard Nixon, 1971* 1054 (Washington, D.C.: Government Printing Office, 1973).

5. *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Comm. on the Judiciary*, 92d Cong., 1st Sess., 55 (1971) (Statement of William H. Rehnquist).

6. *Id.* at 19.

7. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 10 (1971) [hereinafter Bork, *Neutral Principles*].

8. *Id.* at 8.

9. *Id.* at 4.

presuppositions" at the time of the founding and therefore constitutionally required.[10] Of course, substantial additional commentary followed.[11]

Several features of originalism were developed during this period. It is important to note that originalism was a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts; originalism was largely developed as a mode of criticism of those actions.[12] Above all, originalism was a way of explaining what the Court had done wrong, and what it had done wrong in this context was primarily to strike down government actions in the name of individual rights. As with a good deal of constitutional theory, originalism was largely oriented around the actions of the U.S. Supreme Court. Thus originalism's agenda was whatever was on the Court's agenda. Given the Court's constitutional agenda during this period, the focus was largely on civil rights and civil liberties.

Strikingly, a core theme of originalist criticisms of the Court was the essential continuity between *Lochner v. New York* and *Griswold v. Connecticut*. It is an intriguing feature of conservative critiques of the Court during this era that they mirror the central critique of the *Lochner* Court favored by the New Dealers in the 1930s: that the justices were essentially making it up and "legislating from the bench." In words that could have been lifted from Franklin Roosevelt, Nixon on the campaign trail insisted that the justices should be "servants of the people, not super-legislators with a free hand to impose their social and political viewpoints on the American people."[13] Rehnquist drew this particular lesson from the *Lochner* experience: the Court should not defend controversial rights claims that were not firmly grounded in text and history. His well known 1976 address against the "notion of a living Constitution" was exclusively concerned with federal judges addressing "themselves to a social problem simply because other branches of government have failed or refused to do so" and substituting "some other set of values for those which may be derived from the language and intent of the framers."[14] Rehnquist approvingly quoted Justice Oliver Wendell Holmes's dissent in *Lochner* in support of his general conclusion that the Court must always avoid imposing "extraconstitutional principles" on the

10. RAOUL BERGER, GOVERNMENT BY JUDICIARY 366 (1977).

11. For useful overviews, *see* Daniel A. Farber, *The Originalism Debate: A Guide to the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988).

12. On Bork and the Warren Court, *see* Johnathan O'Neill, *Shaping Modern Constitutional Theory: Bickel and Bork Confront the Warren Court*, 65 REV. POL. 325 (2003). By contrast, Raoul Berger's originalism was formed earlier and was less specifically concerned with the Court. See Johnathan O'Neill, *Raoul Berger and the Restoration of Originalism*, 96 NW. U. L. REV. 253, 257–263 (2001).

13. STEPHENSON, *supra* note 3. Compare Roosevelt's pledge to "appoint Justices who will act as Justices and not as legislators." 6 FRANKLIN ROOSEVELT, PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 129 (Samuel I. Rosenman ed., 1938).

14. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 695 (1976).

people.[15] Similarly, on his way to considering "some First Amendment problems," Bork took a long digression through *Griswold*, "a typical decision of the Warren Court."[16] To Bork, the only change from *Lochner* to *Griswold* was "in the values chosen for protection and the frequency with which the Court struck down laws," but both were fundamentally "unprincipled decision[s]" that could not be rendered by a "legitimate Court" and "cannot be squared with the presuppositions of a democratic society."[17]

The primary commitment within this critical posture was to judicial restraint. Originalist methods of constitutional interpretation were understood as a means to that end. In the context of judicial restraint, originalism seemed useful in two distinct ways. First, originalism was thought to limit the discretion of the judge. As Bork and others repeatedly argued, the central problem of constitutional theory was how to prevent judges from acting as legislators and substituting their own substantive political preferences and values for those of the people and their elected representatives. What was needed was some mechanism to redirect judges from essentially subjective consideration of morality to objective consideration of legal meaning. By rooting judges in the firm ground of text, history, well-accepted historical traditions, and the like, originalists hoped to discipline them. The "political seduction of the law" was a constant threat in a system that armed judges with the powerful weapon of judicial review, and the best response to that threat was to lash judges to the solid mast of history.[18]

Second, originalism was married to a requirement of judicial deference to legislative majorities. Bork admitted that originalism would require that "broad areas of constitutional law . . . be reformulated," but what he had in mind was that the Court get out of the way of legislative majorities in the many areas "where the Constitution does not speak."[19] The originalist Constitution, as these writers imagined it, was primarily concerned with empowering popular majorities. As these originalists understood it, the "living constitution" was best realized by the Court "declining to intervene in the political process."[20] Although this notion of the Federalists as majoritarian democrats may seem historically out of kilter, it was nonetheless a matter of faith that kept the priority on judicial restraint, which was the paramount concern of these originalists.[21] Moreover, to the extent that the primary point at issue was the historical

15. *Id.* at 703. On Rehnquist's post-New Deal judicial conservatism, *see* Keith E. Whittington, *William H. Rehnquist: Nixon's Strict Constructionist, Reagan's Chief Justice*, *in* REHNQUIST JUSTICE (Earl Maltz ed., 2003).

16. Bork, *Neutral Principles*, *supra* note 7, at 7.

17. *Id.* at 11, 9, 6.

18. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) [hereinafter BORK, TEMPTING].

19. Bork, *Neutral Principles*, *supra* note 7, at 11.

20. Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1031 (1992). *See generally* Gillman, *supra* note 1, at 241–244.

21. It is not so historically out of kilter to regard the Federalists as sympathetic to empowering government, and of course the originalist emphasis on majoritarianism is also an emphasis on the

foundation for such new-found rights as those being announced by the Court in cases such as *Griswold*, *Roe v. Wade*, and *Stanley v. Georgia*, then the originalists could plausibly conclude that the justices had upset the "Madisonian" balance by leaning in favor of the "freedom of the individual" over the "freedom of the majority."[22]

A final aspect of originalism during this period was an emphasis on the subjective intentions of the founders. While this might not have actually been a central commitment of many originalists, emphasis was sometimes implied by originalists and became the central concern of critics of originalism.[23] In any case, originalists often did speak in terms of attempting "to understand the Constitution according to the intention of those who conceived it," even though they might simultaneously renounce the view that interpreters should attempt to open up the heads of the founders and "look inside for the truest account of their brain states at the moment that the texts were created."[24] Perhaps more precisely, this form of originalism can be said to be concerned with the "scope beliefs" and "counterfactual scope beliefs" of the founders regarding "the specific legal *implications or effects* of (correctly interpreted) constitutional provisions."[25] This seems to be the target of Paul Brest's critique of "strict intentionalists," for example, who would "determine how the adopters would have applied a provision to a given situation," as well as Ronald Dworkin's critique of "concrete," and later "expectations," originalism.[26]

II. THE PASSING OF THE OLD ORIGINALISM

For a number of reasons, some political and some intellectual, the "old originalism" largely passed from the scene by the early 1990s. The political are probably at least as important as the intellectual. If originalism in its modern form arose as a response to the perceived abuses of the Warren and Burger

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upholding of government power. *See also*, William H. Rehnquist, *Government by Cliché*, 45 MO. L. REV. 379, 387 (1980).

22. BORK, TEMPTING, *supra* note 18, at 139.

23. Interestingly, when Bork came to his main subject of the First Amendment, he quickly admitted that the Framers did not have a particularly coherent theory of free speech and concluded "[w]e cannot solve our problems simply by reference to the text or its history." Bork, *Neutral Principles*, *supra* note 7, at 22. He instead attempted to derive a coherent theory of free speech from the democratic processes established by the Constitution, a set of rights that would equally exist "even if there were no first amendment." *Id* at 23. Later, Bork explained "all an intentionalist requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a premise. That premise states a core value that the framers intended to protect." Robert H. Bork, *Before the University of San Diego Law School*, *in* THE GREAT DEBATE 46 (1986). It is notable that in his influential critique of "strict intentionalism," Paul Brest does not point to a single theorist who exemplifies or advocates the approach he dismantles. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209–218 (1980).

24. Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751, 756, 759 (1987).

25. BASSHAM, *supra* note 2, at 29.

26. Brest, *supra* note 23, at 222; RONALD DWORKIN, A MATTER OF PRINCIPLE 48 (1985); Ronald Dworkin, *Comment*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION 119 (1997).

Courts, then the advent of the Rehnquist Court made it largely irrelevant. By the late 1980s, Ronald Reagan had significantly changed the complexion of the Court. This is not to say that the Court immediately stopped producing the kinds of opinions to which Rehnquist, Bork, and others had objected, but such opinions did become less common and less extreme. As a reactive and critical posture, the old originalism thrived only in opposition. If the Reagan-appointed Court removed the fuel from the originalist fires, it also created new demands on conservative constitutional theory.[27] As conservatives found themselves in the majority, conservative constitutional theory—and perhaps originalism—needed to develop a governing philosophy appropriate to guide majority opinions, not just to fill dissents.

Of course, this might mean that having gained a majority, conservative jurists might shed their previous commitment to judicial deference and restraint, perhaps in favor of bolder theories of conservative judicial activism offered by scholars such as Richard Epstein. Certainly there has been some of that, though not as much as one might have imagined. Just as liberal jurists did not turn on a dime once FDR had packed the Court and abandon deferential philosophies, many conservative jurists remain surprisingly attached to a certain rhetoric of restraint.[28] But control of the judicial majority also creates a need to identify what the Court should be doing in the political system, which the old originalism never really did. It also requires that conservative jurists move beyond their critique of Warren-era rights, where all the originalist energy had been expended but was no longer needed or productive. If conservative originalism was to remain relevant when its *raison d'etre* was gone, then it would have to change form. Moving beyond the use of originalism to criticize particular judicial decisions also required confronting the difficulties of using originalism as a comprehensive guide to judicial constitutional decisionmaking. Whether or not originalist approaches to constitutional interpretation (on both their historical and restraintist dimensions) could legitimate the outcome in *Brown v. Board of Education*, for example, was of limited interest as long as the focus was on the legitimacy of the outcome in *Roe*. Once originalism was embraced as a comprehensive judicial philosophy by the Reagan administration, however, it became imperative to address a wider array of potential implications of the

27. Constitutional theory regarding judicial activism and restraint, and relative authority of the various branches of government, is linked to long partisan cycles of reconstruction and affiliation with dominant constitutional norms and institutions. *See* Martin Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values, in* THE BURGER COURT (Vincent Blasi ed., 1983); Keith E. Whittington, *Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning*, 33 POLITY 365 (2001).

28. I do not in any way mean to minimize the extraordinary rhetoric of judicial supremacy, especially relative to Congress, that has emerged from the latter Rehnquist Court, but merely to note the historically surprising restraint shown by this Court relative to state governments and the (increasingly awkward) rhetorical continuity in the conservative movement (*e.g.*, the 1996 "End of Democracy" symposium in *First Things*).

interpretive approach, including getting right with *Brown*.[29] At the same time, to the extent that appeals to originalism are often useful for developing criticisms of the Court, then it could also be expected that conservative control of the Court would encourage the development of a liberal originalist critique. Broadly originalist arguments are widespread and are increasingly common "in liberal and progressive theory."[30]

There are also intellectual reasons for the transition. The theoretical objections leveled at the old originalism were serious ones. Originalists were often not closely engaged in the academic debate and not always clear about their own theoretical claims, and as a consequence, the supporters and critics of originalism did not always grapple as closely as one might like. Nonetheless, some of the objections to originalism struck home. Many of these objections are familiar and I will just briefly note them here. (I do not intend by listing these objections to endorse them as correct. In fact, as I have detailed elsewhere[31] and reference in the footnotes, I think most of these objections are illuminating but ultimately flawed.) First, critics point to methodological problems associated with identifying the specific scope beliefs of the founders, especially the so-called "summing problem" of identifying a "single coherent shared or representative intent" from the "varying intentions of individual framers."[32] They also cite problems with the possible ambiguity of original intent and with identifying the appropriate level of generality at which constitutional principles are to be understood.[33] Moreover, critics claim there are problems of circularity in the justification for originalism and the possibility that the "interpretive intentions" of the founders were non-originalist.[34] Finally, critics of originalism

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29. In 1971, Bork took a digression through *Brown* as well. After a sympathetic summary of Wechsler's critique of *Brown*, Bork offered a defense of *Brown* (but not *Shelley*) on the grounds that "one thing the Court does know: [the Fourteenth Amendment] was intended to enforce a core idea of black equality against governmental discrimination." Bork, *Neutral Principles*, *supra* note 7, at 14. Michael McConnell had to reconstruct an originalist defense of *Brown* after Berger's assault on it. Michael McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

30. James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1344 (1997). *See also* Jack N. Rakove, *Fidelity Through History (or to it)*, 65 FORDHAM L. REV. 1587, 1592 n.14 (1997); LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 138–39 (1996).

31. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION (1999).

32. BASSHAM, *supra* note 2, at 83. Possible solutions to this problem are discussed in BASSHAM, *supra* note 2, at 83–90; Kay, *supra* note 11, at 248–256; WHITTINGTON, *supra* note 31, at 192–95.

33. *E.g.*, Brest, *supra* note 23, at 216–217; DWORKIN, TAKING RIGHTS SERIOUSLY 131–149 (1978); DWORKIN, MATTER OF PRINCIPLE, *supra* note 26, at 48–49. For responses, *see* BASSHAM, *supra* note 2, at 71–83; WHITTINGTON, *supra* note 31, at 182–187; Keith E. Whittington, *Dworkin's 'Originalism': The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197 (2000); Bork, *Tempting*, *supra* note 18, at 98–100, 148–150.

34. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). For responses, *see* BASSHAM, *supra* note 2, at 67–71; Kay, *supra* note 11, at 273–281; Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1186–1220 (1987); Charles A. Lofgren, *The Original Understanding of Original Intent?* 5 CONST. COMMENT. 77, 115 (1989); Raoul Berger, *"Original Intention" in Historical Perspective*, 54 GEO. WASH. L. REV. 101, 142 (1986); WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 31, at 179–182.

argue that there are "dead hand" problems related to the authority of the long-dead founders over present political actors and the potential undesirable outcomes of substantive originalist interpretations of the Constitution.[35]

A third component of the transition was also related to the theoretical objections to originalism. In 1975, Thomas Grey drew a sharp distinction between "interpretive" and "noninterpretive" approaches to judicial review and constitutional adjudication. In a manner that was largely unremarkable at the time, Grey noted that new criticisms of a type that "have scarcely been heard in the scholarly community for a generation" were being made of the Court's new rights jurisprudence, a criticism based on the claim that "the new developments rest on principles not derived by normal processes of textual interpretation from the written Constitution."[36] Grey contrasted this "pure interpretive model" of judicial review with what he took to be the view that "tacitly underlies much of the affirmative constitutional doctrine developed by the courts over the last generation," the view that "courts do appropriately apply values not articulated in the constitutional text."[37] This way of dividing the debate in constitutional theory was embraced by others.[38] Grey later clarified that although the "purest form of noninterpretive review" was "virtually moribund today," many less dramatic forms of noninterpretive review continued to thrive, as they "claim some connection to the constitutional text, but their actual normative content is not derived from the language of the Constitution as illuminated by the intent of its framers."[39]

The drawing of this basic distinction helped launch the hermeneutics debate that engulfed constitutional theory, for the central feature of that debate was the contention that "the concept of interpretation is broad enough to encompass any plausible mode of constitutional adjudication." As Grey concluded in the mid-1980s, "[w]e are all interpretivists; the real arguments are not over whether judges should stick to interpreting, but over what they should interpret and what interpretive attitudes they should adopt."[40] Again, Brest and Dworkin made

35. *E.g.*, BASSHAM, *supra* note 2, at 97–107; Farber, *supra* note 11, at 1095–1097. For a response, *see* WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 31, at 195–212.

36. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703–04 (1975).

37. *Id.* at 705.

38. *E.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 1 (1980); MICHAEL PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 16 (1982).

39. Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 844 n.8 (1978).

40. Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984). Grey did not give much ground in marking the shift, however. He relabeled the two competing sides "textualists" and "supplementers," whose respective claims and problems were otherwise largely the same. He then noted a new faction, the "rejectionists" who thought "judges are always interpreting the constitutional text, but this is not the kind of significant constraint on judicial activism that textualists think it is," who rejected the distinction between textualism and supplementism. *Id.* at 2. He thought this new position was wrong; the commitment to interpretation was confining and "supplementing" should be recognized for what it was and it was not what happened when "judges invoke the Constitution to decide cases, [when] they should be guided by what it says in some fairly literal sense." *Id.* at 23.

path-breaking contributions in this regard. Brest characterized originalism as a subcategory of interpretivism, since "virtually all modes of constitutional decisionmaking . . . require interpretation. The difference lies in what is being interpreted . . . the interpretation of text and original history as distinguished, for example, from the interpretation of precedents and social values."[41] Relatedly, Dworkin argued that "any recognizable theory of judicial review is interpretive in the sense that it aims to provide an interpretation of the Constitution as an original, foundational legal document, and also aims to integrate the Constitution into our constitutional and legal practices as a whole." All theories are really concerned with interpreting "our actual constitutional tradition," and in doing so must integrate "a *prior* commitment to certain principles of political justice" with "the way the Constitution is read and enforced."[42] Once the question of authority is recognized as inherent in the question of constitutional interpretation, then "the important question for constitutional theory is not whether the intention of those who made the Constitution should count, but rather what should count as that intention." So-called "noninterpretive" theories merely "emphasize an especially abstract statement of original intentions."[43]

As Dworkin's own argument suggested, once constitutional theory embraces a commitment to the interpretation of textual constitution provisions, then a commitment to fidelity to the framers of that constitutional text may be inescapable. The hermeneutics debate enriched our understanding of the interpretive process and the possible arguments regarding the nature of the interpretive process that were available. But ultimately, the commitment to textual interpretation implied a commitment to attempting to understand "what should count as [the founders'] intention." If "we are all interpretivists" as Grey declared, then we may all also be originalists.[44] But the question remains what "originalism" might mean.

III. THE "NEW" ORIGINALISM

As already suggested, the new originalism is distinct from the old in that it is

41. Brest, *supra* note 23, at 204 n.1.

42. DWORKIN, MATTER OF PRINCIPLE, *supra* note 26, at 35.

43. *Id.* at 57. Note that Dworkin and Brest make related, but still quite distinct, arguments. Dworkin argues that interpretive fidelity requires some commitment to original "intentions" but understands those intentions quite differently than originalists would. Brest argues that interpretive fidelity requires some commitment to "the Constitution," but that "the Constitution" is not just the founder's document and thus may have no relationship to original intentions of any kind. For Brest, the question is what is "the Constitution?" For Dworkin, the question is what are the intentions that would render the textual Constitution authoritative?

44. Stanley Fish, somewhat mischievously but not altogether wrongly, argued that "interpreters of the Constitution are always and *necessarily* both textualists and supplementers, and the only argument between them is an argument over which text it is that is going to be read." STANLEY FISH, DOING WHAT COMES NATURALLY 330 (1989). It is not surprising that Dworkin's recent statements could be easily confused with originalism, though there remains some space between them. Dworkin, *Comment*, *supra* note 26, at 126; Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1258 n.18 (1997).

no longer primarily a critique of the Warren Court's rights jurisprudence. The new originalism is more comprehensive and substantive than the old. It is more concerned with providing the basis for positive constitutional doctrine than the basis for subverting doctrine. Although one criticism of the old originalism was that it seemed too "clause bound" in its approach, the old originalism also held an implicit advantage over many alternative approaches to constitutional adjudication that emerged in response to the Warren Court in that it was equally applicable to the entire constitutional text and did not reduce the Constitution to a handful of clauses or commitments. If Robert Bork was the most prominent originalist of the 1980s, Michael McConnell is undoubtedly the most prominent new originalist. Whereas Bork's originalism was mostly negative and critical, McConnell's has been mostly positive. Probably not coincidentally, McConnell's work has also been far more historical, developing detailed (if controversial) accounts of the original meaning of the Fourteenth Amendment and the First Amendment's religion clauses.[45] As Randy Barnett has noted, "the past fifteen years has yielded a boon tide of originalist scholarship that has established the original meanings of several clauses that had previously been shrouded in mystery primarily for want of serious inquiry."[46] This is not to say that all these historical issues are settled. Significant historical controversies remain in many of these areas. At the same time, these are primarily *historical* debates, which is where originalists claimed the constitutional argument should be. Detailed historical research has tended to replace high-level theoretical arguments, and that research is as likely to focus on the commerce clause,[47] the Second Amendment,[48] the war powers,[49] or the executive power[50] as the "majestic generalities" of the Bill of Rights that concerned the old originalism.

The new originalism is less likely to emphasize a primary commitment to judicial restraint. This is true in both the senses of judicial restraint. First, there seems to be less emphasis on the capacity of originalism to limit the discretion of the judge. Much of the earlier rhetoric of moral skepticism emphasized by Bork and others, and the related concern with disciplining the judge, has been dropped. A closely related theme has received greater attention instead, the "importance of humility in judicial review" and the limited authority of the

45. *E.g.*, Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise Clause*, 103 HARV. L. REV. 1409 (1990); McConnell, *Originalism and the Desegregation Decisions*, *supra* note 29.

46. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 650 (1999).

47. *E.g.*, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

48. *E.g.*, Randy E. Barnett and Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996).

49. *E.g.*, John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

50. *E.g.*, Steven G. Calabresi and Christoper S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997).

judicial role within the constitutional system.[51] The new originalist would emphasize that "fit is everything" in fulfilling "the judge's role" in the process of constitutional decisionmaking, but is unlikely to argue that only originalist methodology can prevent judicial abuses or can eliminate the need for judicial judgment.[52]

By the 1990s, originalists, along with other constitutional theorists, were no longer working so clearly in the shadow of the Legal Realists and the fear of judicial freedom, and other interpretative approaches to judicial review were more clearly *interpretive approaches* that likewise could serve to guide judicial decisionmaking.[53] The justification for originalism is grounded more clearly and firmly in an argument about what judges are supposed to be interpreting and what that implies, rather than an argument about how best to limit judicial discretion. Second, there is also a loosening of the connection between originalism and judicial deference to legislative majorities. Even when arguing against Dworkinian judicial review, Michael McConnell does not exactly sound like James Bradley Thayer in asserting that legislation "can be overturned only when the alleged constitutional violation is tolerably clear" and emphasizing that the "job of the judge is to ensure that representative institutions conform to the commitments made by the people of the past, and embodied in text, history, tradition, and precedent."[54] Others are clear that a commitment to originalism is distinct from a commitment to judicial deference and that originalism may often require the active exercise of the power of judicial review in order to keep faith with the principled commitments of the founding.[55] The new originalism does not require judges to get out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less. Together, these two features of the new originalism open up space for originalists to reconsider the meaning of such rights-oriented aspects of the Constitution as the Ninth Amendment or the Fourteenth Amendment's privileges or immunities and due process clauses. The primary virtue claimed by the new originalism is one of constitutional fidelity, not of judicial restraint or democratic majoritarianism.[56]

Finally, the new originalism is focused less on the concrete intentions of individual drafters of constitutional text than on the public meaning of the text that was adopted. Too much can be made of this shift, but it does carry some

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51. 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 (1997).

52. *Id.* at 1273.

53. *See also* WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 31, at 39–40.

54. McConnell, *Importance of Humility*, *supra* note 51, at 1272, 1273.

55. WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 31, at 43–44, 168; EARL MALTZ, RETHINKING CONSTITUTIONAL LAW 18–20 (1994); MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS 54–55, 81–82 (1994).

56. As a consequence, originalism is being used to strike libertarian themes as well as traditional conservative ones. *See, e.g.*, WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 31; RANDY BARNETT, THE LOST CONSTITUTION (2004).

important implications that should be emphasized. As the founders themselves noted, the constitutional text is meaningless unless and until it is ratified. It is the adoption of the text by the public that renders the text authoritative, not its drafting by particular individuals. This is not to say the history of the drafting process is irrelevant—it may provide important clues as to how the text was understood at the time and the meaningful choices that particular textual language embodied—but it is not uniquely important to the recovery of the original meaning of the Constitution. Similarly, the discovery of a hidden letter by James Madison revealing the "secret, true" meaning of a constitutional clause would hardly be dispositive to an originalism primarily concerned with what the text meant to those who adopted it. The Constitution is not a private conspiracy.

What is at issue in interpreting the Constitution is the textual meaning of the document, not the private subjective intentions, motivations or expectations of its authors. This is not because intentions are irrelevant to textual meaning. It is because textual meaning embodies and conveys intentions. The text is the medium by which we convey intended meaning to an audience. In a sense, the text is a window into the mind of the author, but the point is not to open up the head of the author and see what is inside. The point is to understand as well as possible what was said. Detailed historical information is not always necessary to understand what is being said. One need not know much about the particular author or the circumstances of an authorship of the "exit" sign that hangs in the hallway in order to understand the meaning of the text. Nonetheless, quite a bit of context goes into the meaning and the successful understanding of that text (understanding of English, understanding of the convention of signs in buildings, etc.), and substantially more may be necessary to understand other, more complicated texts. The key point for an originalist, however, is that the meaning of a text derives from the author, not from the reader. An interpreter may succeed or fail in understanding a text, but the original meaning is the meaning to be interpreted.[57]

Dworkin is quite correct to say that, in a defensible version of originalism, authorial expectations about how the text will be applied are not the important measure of textual meaning. It is entirely possible for a text to embody principles or general rules, and much of the constitutional text does exactly that. The point for an originalist should be to understand those original principles or rules, to understand what principle was entrenched in the Constitution. The scope beliefs that particular drafters might have had about the application of that constitutional principle may be useful to understanding what principle they actually intended to convey with their language, but the textual principle should not be reduced to the founders' scope of beliefs about that principle. The founders could be wrong about the application and operation of the principles

57. The relationships among authorial intentions, texts, and textual meaning and interpretation are elaborated at length in WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 31, at 47–109.

that they intended to adopt. The point of originalist inquiry is not to ask Madison what he would do if he were a justice on the Supreme Court hearing the case at issue. The point is to determine what principle Madison and his contemporaries adopted, and then to figure out whether and how that principle applies to the current case. If the founders gave examples of how they thought the constitutional principle would work in practice, then that is helpful to understanding what the constitutional principle is that they adopted, but it is not dispositive to determining how that principle should in fact be applied. Likewise, it is entirely possible that the principles that the founders meant to embody in the text were fairly abstract. It is also possible that the founders merely meant to delegate discretion to future decisionmakers to act on a given subject matter with very little guidance as to how that discretion should be used or on the substantive content of the principles on which those decisionmakers should act. A properly developed originalism should be open to those possibilities. But originalism would also insist that those are interpretive questions to be discovered through historical investigations. An abstract text may be subject to judicial manipulation, but its meaning is historically determined.[58]

These points also suggest what originalists should explicitly admit: interpretation requires judgment. It is not a mechanical process, and interpretive results cannot be rigidly determined. Interpretations can be argued for and justified, and interpreters can be subjected to the discipline of defending their interpretations with reasoning and generally accessible evidence. Originalism cannot eliminate disagreement and controversy in resolving hard questions of constitutional meaning. It is not uniquely capable of preventing judicial abuse or of hemming in judicial discretion. But originalism does point interpreters to the correct forms of evidence and argumentation for understanding constitutional meaning and it does identify a particular (and some would say appropriate) role for the judiciary within the American constitutional system.[59] However, originalism is incomplete as a theory of how the Constitution is elaborated and applied over time. Although originalism may indicate how the constitutional text should be interpreted, it does not exhaust what we might want to do and have done with that text.

Constitutional meaning must be "constructed" in the absence of a determinate meaning that we can reasonably discover. The need for construction arises for a variety of reasons. In some cases, the founders simply had not thought of or adequately accounted for contingencies that arise within the course of political practice. In others, the language that the founders used may be unavoidably

58. This meaning of constitutional principles, especially in relation to Dworkin's arguments regarding abstract intentions, is discussed in Whittington, *Dworkin's 'Originalism,' supra* note 33.

59. Originalism also seems consistent with various "modalities" of constitutional argumentations. Certainly originalists would be willing to draw inferences based on the constitutional structure, for example, or employ arguments based on precedent, though such arguments would ultimately be harnessed to some claim about the original meaning of the Constitution. On common modalities of constitutional argumentation, *see* PHILIP BOBBITT, CONSTITUTIONAL FATE 3-119 (1982).

vague, leaving substantial uncertainties about cases that arise on the margins. Furthermore, even as faithful interpreters we may be limited in our capacity to understand fully what the constitutional commitments of the founders really were and how they might apply to our current concerns. In such cases, where interpretation fails, the Constitution may still be relevant to our deliberations. The text and the values enshrined in the text may be the starting point for our own consideration of how best to structure politics, what fundamental values to recognize, how to compromise important political interests and principles, and what the appropriate limits and purposes of government might be. We construct an effective constitution through our decisions regarding constitutional subject matter. We exercise political judgments as to how best to constitute our political present and future. The founders' Constitution may be the starting point for those considerations, but it may not be able to carry us all the way to the end point of those deliberations. As we make important constitutional decisions in the present, we engage in the constitutional project launched at the founding. However, in doing so we cannot be said to be interpreting their Constitution, because our conclusions do not carry the same authority as theirs do. Certainly, constitutional constructions, as distinct from constitutional interpretations, must be and are made by political actors in and around the elected branches of government. Perhaps they should also be made on occasion by judges, but in doing so, judges are engaging in a political and creative enterprise and cannot simply rely on the authority of interpreting the founders' Constitution.[60]

IV. CONCLUSION

It is important to note, in conclusion, a couple of assumptions, and therefore limitations, built into this account of originalism. This account of originalism largely assumes a prior commitment on the part of constitutional theorists, judges, and the nation to constitutional interpretation. It assumes that the constitutional text is authoritative and that the judicial duty in particular is to interpret that text. If we are to interpret, then I believe we must be originalists. The only question left, in this regard, is what being a good originalist requires, which is to say what being a good interpreter requires. But we may not want to interpret. As I have indicated, we may not be able to interpret and may want to do more than interpret, and that is perfectly consistent with originalism. Construction is a necessary feature of constitutionalism, and originalism can accept it as a supplementary theory of constitutional elaboration. But it is possible that, all things considered, we would rather not be bound by our interpretations and the founders' text. We may *only* want to engage in constitutional construction, and forsake constitutional interpretation. We may, with Brest for example, regard certain judicial precedents or theories of justice as equally authoritative to or

60. On constitutional constructions, see WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 31, at 195–212; KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION (Cambridge: Harvard University Press, 1999).

even as more authoritative than the original document entitled the U.S. Constitution. But if so, then we should be explicit about it. We may want to engage in a "text-based social practice," but that is not the same thing as being committed to interpretive fidelity.[61] I believe this remains the central point of disagreement between originalists and their critics.

This account of originalism also assumes that the Constitution should be understood as an act of communication, that it is an intentional text conveying meaning from an author to a reader. While this is the best and most common way of understanding our constitutional text, it is possible to understand it differently. We might, for example, simply regard the text as a national symbol or a convenient "thin" site for organizing our ongoing political disputes.[62] It may be that authoritative communication (*e.g.*, legislation, contracts, and wills) is not the model we want to use for our constitutional practice and our understanding of the Constitution and the role it should play in our current politics. In that case too, it would no longer make sense to engage in constitutional interpretation, and we would no longer regard original meaning as authoritative. There are reasons why we might not want to make the assumptions that drive our commitment to interpretation, and through it our commitment to originalism, and there are reasons why we would. But the debate in the future over whether we should be originalists would be most productive if it focused on these central questions, for it is on these questions that the new originalism might be distinguished from other schools of thought within constitutional theory.

61. I borrow the phrase from Howard Gillman, who bases it on his understanding of Judaism. *See also*, Noam J. Zohar, *Midrash: Meaning through the Molding of Meaning*, *in* SANFORD LEVINSON, RESPONDING TO IMPERFECTION (1995).

62. The reference is to MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURT (1999).