

## SAVING ORIGINALISM

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AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY. By *Akhil Reed Amar*. New York: Basic Books. 2012. Pp. xvi, 483. \$29.99.

### INTRODUCTION

It is sometimes said that biographers cannot help but come to admire, even love, their subjects. And that adage seems to ring true of Professor Amar,<sup>1</sup> the foremost “biographer” of the Constitution. He loves it not just as a governing structure, or a political system, but as a document. He loves the Constitution in the same way that a fan of English literature might treasure Milton’s *Paradise Lost* or Shakespeare’s *Macbeth*. He loves the Constitution not just for the good: the separation of powers, federalism, and the Bill of Rights. He also loves it for its nooks and crannies, idiosyncrasies, funny phrasing, and odd language.

Amar’s earlier book, *America’s Constitution: A Biography*,<sup>2</sup> displayed his contagious enthusiasm for the Constitution and its history. Postmodern theories, the Frankfurt School, or economic determinism did not make an appearance in his holistic interpretation of the Constitution. But like many a biographer, Amar cannot admire his subject if it has great faults. Some biographers fail because their admiration overwhelms their objectivity, and they tend to minimize or ignore serious personal flaws. Amar, however, is too honest to ignore his subject’s blemishes. He is faced with the quandary of an imperfect Constitution.

His answer is to bend, pull, and stretch the original into a better form—a constitutional photoshop for the twenty-first century. Amar appears to get cold feet in the face of “the unhappy truth that not every problem was meant to be solved by the United States Constitution, nor can be.”<sup>3</sup> Readers must judge whether his quest for perfection has overwritten, if not erased, the original image. In this sequel, *America’s Unwritten Constitution: The*

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1. Sterling Professor of Law, Yale Law School.
2. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2005).
3. *Herrera v. Collins*, 506 U.S. 390, 428 n.\* (1993) (Scalia, J., concurring) (citing Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981)).

*Precedents and Principles We Live By*, Amar tries to save the object of his affection from the success of *Biography*.

Amar's method, however, yields conclusions that many leading constitutional law scholars would find unacceptable. Under a strict originalist approach, the Fourteenth Amendment does not appear to prohibit segregation by gender. Critics like David Strauss argue that originalism would permit racial segregation by the federal government, and perhaps by the states too, and would not have incorporated the Bill of Rights against the states.<sup>4</sup> An original Constitution might not provide for a right to privacy or recognize a woman's right to an abortion. It could reject parts of the large federal administrative state in areas such as the environment and labor, and it could restrict the scope of freedom of speech, including core political speech. It may well be that textualism and originalism, properly applied, do not produce these outcomes, but most constitutional law scholars appear to believe that the framers' Constitution is doomed by these interpretive methods.

Amar loves the Constitution so much that he cannot allow it to suffer what he sees as crippling, perhaps mortal, flaws such as these. But Amar has a tool that does not lay in the kit of a normal biographer. Faced with serious faults in his subject, Amar corrects them. His remedy is to invent an unwritten Constitution that sits beside the written text. While he cautions that his unwritten Constitution "supplements but does not supplant" the written one (p. 273), he also admits that a "particular unwritten rule or principle [can] form[ ] part of America's *Constitution*—and is thus roughly on a par with or somehow akin to the canonical text" (p. 479). "America's unwritten Constitution and America's written Constitution fit together to form a single system" (p. 479). Although Amar would not describe it as such, the unwritten Constitution functions to cure virtually every supposed imperfection in the written version. And this simply cannot be right. As one of Amar's most penetrating critics has rightly said, "[t]he Constitution is not an unwritten vessel into which to pour the objects of one's interpretive desires. And it is on precisely this score that *America's Unwritten Constitution* is most deeply and seriously flawed."<sup>5</sup>

In this Review of *Unwritten*, we will make three points. First, we will describe Amar's method in revealing an unwritten Constitution. We will use women's rights as an example of a gap in the written Constitution that Amar corrects with a variety of sources. While we agree with his results as a matter of policy, we argue that, without the originalism of *Biography*, *Unwritten* contains no consistent limits on its sources and methods. Second, we delve deeper into the history of originalism as an interpretive method to

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4. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 12–15 (2010).

5. Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution*, 81 U. CHI. L. REV. 1385, 1415 (2014) (reviewing *America's Unwritten Constitution*); see also David A. Strauss, *Not Unwritten, After All?*, 126 HARV. L. REV. 1532, 1550 (2013) (reviewing *America's Unwritten Constitution*) ("If you believe that the only true source of constitutional law is the written Constitution—but you want to accept American constitutional law in something like its present shape—then Amar will show you how to do it.").

show that it is not as flawed, perhaps, as Amar might think. While it arguably might have been conceived as a response to judicial activism of the Warren Court era, originalism has evolved into a sophisticated approach to constitutional interpretation that does not advance any particular political ideology. Third, we take up the question of instrumental or consequentialist reasons for originalism. We use bargaining theory to explain why originalism could have served as an important aid to the formation and continuation of the Union.

#### I. UNWRITTEN'S SEARCH FOR THE PERFECT CONSTITUTION

The unwritten Constitution would be unnecessary if Amar did not find the results of originalism so unsatisfyingly desiccated. To be sure, there are plenty of areas where Amar need not find a conflict between the original Constitution and good policy. In his view, for example, those who drafted and ratified the Fourteenth Amendment did not clearly preclude “separate but equal” segregation. But Amar finds that the unwritten Constitution—composed in part of the “words and deeds” of segregationists in the 1860s—shows no “gloss” on the Fourteenth Amendment’s text that segregation was permissible (pp. 147–48). But, strictly speaking, Amar did not need to resort to a claim of an unwritten Constitution on this score. A reading of the plain text of the Fourteenth Amendment’s Privileges and Immunities and Equal Protection Clauses, and the principles that the Reconstruction-era framers had in mind, would have supported the idea of a color-blind Constitution. In fact, Amar has contributed much to the literature seeking to recover the original understanding of the Reconstruction Amendments,<sup>6</sup> which does not support the Supreme Court’s mistakes in *Plessy v. Ferguson*<sup>7</sup> and the *Slaughter-House Cases*.<sup>8</sup>

It is the question of women’s rights that shows the lengths to which Amar will go to save desirable, modern values from originalist outcomes. The written Constitution’s explicit protection for women’s rights appears only in the Nineteenth Amendment’s guarantee of women’s right to vote. The 1972 Equal Rights Amendment (“ERA”), moreover, fell short of ratification, failing to acquire the necessary approval of three-quarters of the states. But Amar finds an unwritten “Feminist Constitution” that adopted the substance of the ERA anyway (pp. 295–96). “This broad popular support was entitled to interpretive weight as a popular gloss on the Fourteenth Amendment and the Ninth Amendment, in keeping with the principles of America’s lived Constitution” (p. 296). A majority of Americans may have supported the ERA, as Congress voted by the required two-thirds margin to send the amendment to the states. But the states failed to ratify it, which should indicate that the nation chose not to incorporate full gender equality

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6. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 137–214 (1998).

7. 163 U.S. 537 (1896).

8. 83 U.S. (16 Wall.) 36 (1872).

in the constitutional text. Rather, the American people chose to continue to protect women's rights by statute in such laws as Titles VII and IX of the Civil Rights Act of 1964. Amar, however, concludes that "the ERA itself was a largely declaratory proposal—a restatement and elaboration" of the Fourteenth Amendment's guarantee of equality (p. 296).

If this is true, of course, why bother with a constitutional amendment at all? Amar's approach confers on judges the license to conjure amendments to the Constitution based on perceived political and social movements but without any change to the text. Only the People can amend the text. That time-consuming process might strike some as much too cumbersome and unreliably plebeian as far as the scope and direction of the project are concerned. The ideas proposed by those movements may temporarily command majority support, but if they cannot survive the rigorous steps demanded by the Article V amendment process, they cannot assume the status of constitutional law. Even if one were to accept that political movements can supplement but not supplant constitutional meaning, how are judges to discern which principles qualify for constitutional establishment and which should seek their fates in the normal legislative process? It may be comforting that in some cases such movements lead to broader rights and greater equality, but widespread popular support has also coalesced around principles that Amar surely would not endorse. Racial segregation received majority support between Reconstruction and the 1950s, if the laws enacted by Congress and opinions of the Supreme Court are any sign at all. To illustrate, in 1875, the Blaine Amendment capitalized on anti-Catholic feeling in the country to try to prohibit any public aid for religious institutions, especially schools.<sup>9</sup> Although the amendment passed the House and fell short by four votes in the Senate, twenty-one states added such provisions to their constitutions while seventeen already had them.<sup>10</sup> Interracial marriage was widely disfavored, and legal bans on it were not struck down until 1967.<sup>11</sup> Under Amar's approach, judges of the era could have found the unwritten Constitution to allow "separate but equal"-style racial segregation, to prohibit miscegenation, or to restrict the rights of religious minorities. We are sure Amar would not support any of these outcomes. Nor would we. But we cannot tell what separates these results from others in *Unwritten*, once it opens the Pandora's box of social movements as proxies for constitutional meaning.

Correcting originalism's perceived shortcomings forces Amar to turn ever more intricate interpretive somersaults. Let's return to the question of women's rights. Conventional defenses of *Roe v. Wade* rely on a right to privacy, sexual freedom, autonomy, or gender equality recognized by the

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9. See STEVEN K. GREEN, *THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA* 294–302 (2010).

10. STEVEN K. GREEN, *THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE* 230 (2012).

11. See *Loving v. Virginia*, 388 U.S. 1 (1967).

Due Process or Equal Protection Clauses.<sup>12</sup> Nevertheless, the right to an abortion has deeply troubled many leading constitutional law scholars, even liberal ones, for its lack of textual roots and its weak theory of substantive due process rights.<sup>13</sup> Amar, however, suggests that the right to an abortion emerges from the unwritten Feminist Constitution that complements the Nineteenth Amendment (pp. 291–92). He argues that laws burdening women enacted before the Nineteenth Amendment became illegitimate because no women had voted for them (pp. 291–92). This does not just include laws prohibiting women from voting, holding office, or serving on juries, but any law that imposed “special burdens” on women (p. 292). “As for these laws, perhaps judges should have wiped the legal slate clean in 1920, by striking down the old laws and thereby obliging states to put the matter to a fresh vote” (p. 292; emphasis omitted). But it is unclear why only laws that impose “special burdens” on women should have been invalidated (not to mention the problem of defining a “special burden”). If women did not participate in the electoral process before the Nineteenth Amendment, they should not have had to live under *any* laws that were passed in the pre-amendment period. Furthermore, there is no reason whatsoever why the supreme law of the land—the Constitution itself—should be exempted from this deducible rule. Sparked by the Nineteenth Amendment, Amar’s unwritten Feminist Constitution subverts the decisions of the Constitutional Convention, the state ratifying conventions, the Reconstruction Congress, and every Congress and state legislature between the American Revolution and 1920.

An obvious problem in Amar’s Feminist Constitution arises here. Legislatures elected after the Nineteenth Amendment have enacted many restrictions on abortion. Pennsylvania, for example, enacted the Abortion Control Act, which was struck down in part by *Planned Parenthood v. Casey* in 1992.<sup>14</sup> Polls apparently show that a plurality of the nation considers itself pro-life rather than pro-choice.<sup>15</sup> This seems to undermine a key premise in Amar’s “special-burdens” thesis. American women’s political consciences are not monolithic toward policies generally or those that impose “special burdens” on them. This ploy deprives women of their *individual* political agency.<sup>16</sup>

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12. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985).

13. The most well-known example being John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

14. 505 U.S. 833, 844 (1992).

15. E.g., KARLYN BOWMAN & JENNIFER MARSICO, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, AEI PUBLIC OPINION STUDIES: ATTITUDES ABOUT ABORTION 43 (2014), available at [https://www.aei.org/wp-content/uploads/2014/01/-attitudes-about-abortion-an-aei-public-opinion-study\\_165237903059.pdf](https://www.aei.org/wp-content/uploads/2014/01/-attitudes-about-abortion-an-aei-public-opinion-study_165237903059.pdf) (reporting that, in a May 2013 Gallup poll, 48 percent of respondents identified as pro-life and 45 percent identified as pro-choice).

16. There is no warrant to presuppose that women, just by virtue of being women, have certain views on any policies. See *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 268–70 (1993).

Even if one were to accept Amar's broad claim about pre-1920 laws, his argument would support abortion limits enacted in the years since. Amar then switches ground from constitutional language to unwritten rule to argue that contemporary restrictions on abortion violated the Constitution by preventing women from fully participating in the political process (p. 292). Again, Amar faces the difficulty of identifying the source of this principle and why it does not extend to other groups or rights. Should we consider any difference in the government's treatment of any group unconstitutional, because such treatment might inhibit that group's participation in politics? If we include gender, and perhaps sexual orientation, why not also constitutionalize protections for social class and economic status, immigration status, prior conviction for a felony, or even appearance, intelligence, or physical ability? Why stop with women's rights?

Amar's difficulty in answering these questions shows in his literary treatment of the issue. At this point in *Unwritten*, Amar resorts to a hypothetical conversation between Adam, a constitutional scholar from the 1950s, and Eve, a present-day professor "familiar with avant-garde feminist theories" (p. 297). The dialogue is an unusual mix of abstract constitutional theories (Adam begins with "how exactly does a constitutional norm of sex-equality prohibit laws designed to protect the innocent human life of male and female babies alike?") and imagined contemporary lingo (Eve responds, in one exchange, with "A cute point—but again, please get real.") (pp. 297–302). Amar even asks readers to think of Spencer Tracy as Adam and Katharine Hepburn as Eve from the 1949 movie *Adam's Rib* (p. 297). It is unclear why Amar uses this literary device instead of direct prose statements and argument, nor is it apparent why he does not simply present Eve's view as his own. A Socratic dialogue probably meant to illuminate the "[s]ocial meaning outside the terse text" (p. 303) cannot supply the authority for the constitutional treatment of gender differences.

Amar's treatment of women's rights reveals the problem with his approach: It has no limiting principle. Amar's unwritten Constitution grants women and gay people the same rights as those reserved for racial minorities, but it cannot explain its principle for including some groups, but not others, once we have discarded the original understanding. Unwritten constitutional rights may depend on the enlightened perspectives of judges or law professors (far removed from the Constitution's grant of political power to "the People," via the means of plebiscite), but if they have no common methodology, the lines will prove unpredictable. And wherever those lines happens to lie, *Unwritten* would take those fundamental decisions away from the political process.

Take, for example, socioeconomic class. Class may be one of the more durable traits in dictating the government's treatment of someone. Wealth makes available a great many other things, such as employment opportunities, material comfort, educational access, political influence, and social status. Discrimination based on wealth may have a long history in our country, and social mobility might be low. We could say that many of the framers of



the Constitution and of the Reconstruction Amendments—although certainly not all—wanted to open up American society to allow for greater social mobility. The framers might even have favored a market economy that rewarded individual talent, not inherited wealth. Broad populist movements have periodically swept the land, sometimes pushing radical measures to debase the currency, confiscate property, nullify debts, or redistribute income. If *Unwritten* finds constitutional protections for gender and sexual orientation, Amar should find similar rights for those the government treats differently because of their socioeconomic status.

Amar's lack of a limiting principle comes from the very purpose of *Unwritten*: to leave the constitutional text behind. Text restricts the amorphous moral imaginations of judges. Without a text, however, interpreters are loose agents. They can still bring a set of coherent principles to the Constitution, but they might also allow their preferences and their imaginations to run wild. Some, such as Ronald Dworkin, will claim that the Constitution must fit a conception of a liberal-democratic society akin to that sketched out in John Rawls's theory of justice.<sup>17</sup> Some, such as Hadley Arkes or Robert George, might inform the Constitution with natural law.<sup>18</sup> For his part, John Hart Ely has proposed that the Constitution be construed in a way that reinforces democratic "values."<sup>19</sup> Others might want the Constitution interpreted according to their critical theories of racial or economic progress. Yet still others might try to supplement the Constitution's procedures for amendments with their own procedures. Bruce Ackerman, for example, has attempted to defend the unwritten changes to the Constitution during the New Deal by claiming that sufficient supermajorities would have enacted them anyway.<sup>20</sup> All of these approaches, no matter how fanciful, share a goal with Amar's approach: to cure an imperfect Constitution by resorting to a set of principles outside the document. And yet they run counter to Justice Holmes's sentiment that the Constitution, like its Fourteenth Amendment, "does not enact Mr. Herbert Spencer's Social Statics"—nor any other subterranean philosophy divorced from the Constitution's text.<sup>21</sup>

Originalism seeks to forestall such moves beyond the Constitution. Amar parts ways with *Biography's* approach, however, because he finds originalism's results so unacceptable. But formal legal equality for women in American society arrived through a combination of Supreme Court decisions, congressional statutes, and changing social norms. The question, however, is not the result itself but whether the result should have come about through unwritten constitutional amendment or by statute. Amar must hold great doubt that the American people would have expanded women's rights by statute to the same level as today. He is willing to sacrifice originalism to

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17. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 363–69 (1986).

18. See, e.g., HADLEY ARKES, *BEYOND THE CONSTITUTION* (1990); ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* (1999).

19. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

20. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 40–50 (1991).

21. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

get there, but his technique, if in different hands, could produce a range of other nontextual results, such as *Plessy*'s separate-but-equal segregation.<sup>22</sup> Before giving up so quickly on the constitutional text, we think it worthwhile to look more carefully at originalism and the principles behind it. The next Part examines the recent history and contemporary practice of originalist interpretation to determine whether its outcomes are indeed so beyond the pale. We conclude with some alternative justifications for originalism today.

## II. THE ORIGINS OF CONTEMPORARY ORIGINALISM

Among the many contemporary theories of constitutional interpretation, "originalism" occupies pride of place.<sup>23</sup> At least two conservative Supreme Court justices have proclaimed their belief in it; Justice Scalia, who had once publicly regarded himself as "fainthearted," has since "repudiate[d]" this characterization and now regards himself as an "honest," if stouthearted, originalist—the justice implied that a fainthearted originalist cannot be an honest one.<sup>24</sup> Other justices are at least "moderate" originalists, in the sense that the original meaning of constitutional clauses and the intentions behind them serve as important elements of their constitutional reasoning. And no liberal theory of constitutional interpretation has commanded the support of even the liberal bloc on the Court. The extent of originalism's influence was clearly seen in the Supreme Court's 2008 decision on the Second Amendment, *District of Columbia v. Heller*.<sup>25</sup> The majority opinion (by Justice Scalia) and the lead dissent (by Justice Stevens) fought a constitutional duel on consciously originalist terms.<sup>26</sup> Likewise, in the 1995 *Term Limits* case,<sup>27</sup> Justices Stevens and Thomas sparred over the framers' intentions in the Qualifications Clauses.<sup>28</sup> In *Lee v. Weisman*,<sup>29</sup> Justice Souter sought to refute, on originalist grounds, the originalist position that then-Justice Rehnquist had staked out earlier in his dissent in *Wallace v. Jaffree*.<sup>30</sup> Even liberal justices now speak in an originalist dialect. And in the legal academy, both liberal scholars like Amar and his colleague Professor

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22. See, e.g., Paulsen, *supra* note 5, at 1388.

23. Even in 1999, it could be said that originalism "is now the prevailing approach to constitutional interpretation," despite the powerful criticisms that had been directed against it. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999).

24. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989); Clarence Thomas, Lecture, *Judging*, 45 U. KAN. L. REV. 1, 6–7 (1996); Jennifer Senior, *In Conversation: Antonin Scalia*, NEW YORK, Oct. 14, 2013, at 22, 24, available at <http://nymag.com/news/features/antonin-scalia-2013-10>.

25. 554 U.S. 570 (2008).

26. See *Heller*, 554 U.S. at 576–78 (Scalia, J.); *id.* at 636–37 (Stevens, J., dissenting).

27. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 782–838 (1995) (Stevens, J.); *id.* at 845–926 (Thomas, J., dissenting).

28. U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3.

29. 505 U.S. 577, 609, 612–17 (1992) (Souter, J., concurring).

30. 472 U.S. 38, 91–98 (1985) (Rehnquist, J., dissenting).



Balkin,<sup>31</sup> and conservative scholars like Professor McGinnis and Professor Rappaport<sup>32</sup> (to name but a few), are in at least a broad sense “originalists.” How did this come about, and is originalism’s influence deserved? We start with a thumbnail sketch of the origins of contemporary originalism.<sup>33</sup>

A. *In the Beginning Was Bork (and Bickel and Wechsler)*

If contemporary originalism<sup>34</sup> can be assigned a definite starting point, that point must be the publication of Robert Bork’s *Neutral Principles and Some First Amendment Problems*.<sup>35</sup> In that article, Bork came at the subject of originalism from, so to speak, a sidewise direction: as its title reflects, Bork’s paper started out with a discussion of the scholarly controversy over the Supreme Court’s desegregation decisions that stemmed from Herbert Wechsler’s celebrated article, *Toward Neutral Principles of Constitutional Law*.<sup>36</sup> Wechsler’s article was part of a broader debate among legal scholars over the doctrinal defensibility of the Supreme Court’s desegregation decisions. That debate had roiled the legal academy for well over a decade before Bork entered the fray, and several of Bork’s colleagues on the Yale Law School faculty had been actively engaged in it.<sup>37</sup> Like some of these controversialists, Bork doubted the strength of the doctrinal underpinnings of the desegregation decisions, and, more generally, he was troubled by what he

31. See JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

32. See JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013).

33. For more extensive accounts, see, for example, BALKIN, *supra* note 31, at 100–08; Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 Nw. U. L. REV. 923, 927–40 (2009); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004) [hereinafter Whittington, *New Originalism*]; Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013) [hereinafter Whittington, *Originalism: A Critical Introduction*].

34. There was, to be sure, an originalism before contemporary originalism, see Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT. 159, 171–73 (1996), although it has been argued that the resemblances between early and contemporary originalism are superficial, see H. Jefferson Powell, *On Not Being “Not an Originalist”*, 7 U. ST. THOMAS L.J. 259, 264–65 (2010). And “originalist constitutional interpretation as a discipline—that is, as a distinct subject with a distinct methodology—actually came into being . . . in the late nineteenth century.” Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL’Y 907, 907 (2008).

35. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971), reprinted in ROBERT H. BORK, *A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS* 186 (2008). There were, to be sure, other legal scholars whose ideas provided a foundation for early contemporary originalism. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 283–84 (1997).

36. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

37. See ALEXANDER M. BICKEL, *POLITICS AND THE WARREN COURT* (1965); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

regarded as judicial overreach. Indeed, in the same year Bork published *Neutral Principles*, he also published a semipopular article entitled *We Suddenly Feel that Law Is Vulnerable*.<sup>38</sup> The latter article sheds light on the origins of originalism: it was, in part, an expression of, and a response to, anxieties that were widely felt during the Nixon era and that had cultural and political roots, no less than legal ones.<sup>39</sup>

Bork's writing from the period heralded themes that would recur in his (and others') writings on originalism: the insistence (as against the legal realists) that autonomous, rule-governed legal reasoning is indeed possible; the necessity of keeping the majoritarian functions of the political branches and the countermajoritarian functions of the judiciary firmly apart; the imperative need to distinguish legal reasoning from the exercise of power, so that constitutional adjudication cannot be collapsed into policymaking, even of an exceptionally high order; and the corresponding importance of judicial restraint, in the sense of a deep reluctance on the part of judges to declare legislative or executive action unconstitutional.<sup>40</sup>

Furthermore, in company with many other later originalists (although signally not with Amar), Bork had little esteem for the decisions of the Warren Court. But Bork's criticism focused on what he regarded as its deficiencies in judicial *craftsmanship*—the flaws in its decisions as measured by standards of general rules, of consistency, and of intellectual rigor—rather than on the failure of its reasoning to correspond to the original intent behind the constitutional provisions it was interpreting. Bork seemed to be saying that the chief vice of the Warren Court was its adherence to “legal realism”<sup>41</sup> and that the main corrective to that vice would be more

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38. Robert H. Bork, *We Suddenly Feel that Law Is Vulnerable*, FORTUNE, Dec. 1971, at 115, reprinted in A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS, *supra* note 35, at 585.

39. *Id.* at 588–89.

40. “Judicial restraint” is a term with varying meanings. In one sense, it could refer to a reluctance to overturn preexisting constitutional case law. Bork did not argue for “restraint” in that sense—quite the opposite, in fact. “Judicial restraint” might also refer to a judicial practice, not of deferring to the decisions of the political branches, but of declining, on various grounds, to review them at all.

41. The core of “legal realism” as understood at the time was the doctrine that judicial decisionmaking is not primarily a matter of applying rules. See C.J. Friedrich, *Karl Llewellyn's Legal Realism in Retrospect*, 74 ETHICS 201, 205 (1964). Among more recent writers, Judge Posner should be counted as an exponent of legal realism. See, e.g., Richard A. Posner, *Realism About Judges*, 105 NW. U. L. REV. 577 (2011). “Legal realism” had long been a powerful intellectual current at leading American law schools, such as Bork's Yale. See LAURA KALMAN, LEGAL REALISM AT YALE 1927–1960 (The Lawbook Exchange, Ltd. 2001) (1986). The “legal process” school at Yale, led by Bork's friend and colleague Bickel, had emerged in response to it. For an account of the relationships among realism, process, and originalism, see JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 47–66 (2005). The leading judicial exponent of the legal process viewpoint was Justice Frankfurter, see, e.g., *Trop v. Dulles*, 356 U.S. 86, 119–20 (1958) (Frankfurter, J., dissenting); see also Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947), and Bickel was Frankfurter's clerk, friend, and disciple, see Edward A. Purcell, Jr.,

committed dedication to “legal process.”<sup>42</sup> Only in *Neutral Principles* did Bork begin to distinguish his originalist critique from the types of critiques that Wechsler (and even more, Bork’s colleague Alexander Bickel<sup>43</sup>) were apt to make.

In the article that provided the backdrop for Bork’s first thoughts on originalism, Wechsler had criticized the Court’s decisions because they were often unrooted in “neutral principles.”<sup>44</sup> By a “principled decision,” he carefully explained, he meant “one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”<sup>45</sup> Some of Wechsler’s criticisms faulted the Court for not being “neutral”—that is, *consistent*—in applying the principles that underlay its decisions.<sup>46</sup> More important for Wechsler, however, was the point that the Court had too often failed to *articulate* or *define* the operative principle on which a decision rested. Thus, he complained that the Court had issued a series of per curiam decisions in the wake of *Brown v. Board of Education*<sup>47</sup> in which it had ordered the desegregation of various public facilities—transportation, parks, golf courses, bath houses—without identifying any underlying legal principle that rendered segregation in these varied contexts unconstitutional.<sup>48</sup> Similarly, he argued that the desegregation cases posed a choice between two incompatible applications of the principle of freedom of association and that the Court had been unable to explain why one application of the principle was to be preferred over the other.<sup>49</sup>

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*Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521, 527–28 (1976).

42. Indeed, in a fascinating 1968 article in *Fortune*, Bork repeatedly emphasized the Warren Court’s asserted failures of “craftsmanship” in criticizing its decisions. For Bork at that time, “craftsmanship” did not include reliance on an originalist interpretative method. Rather, he took “craftsmanship” to “mean respect for such things as logic, consistency, history, precedent, and the allowable meanings of words.” Robert H. Bork, *The Supreme Court Needs a New Philosophy*, FORTUNE, Dec. 1968, at 140, 142. In this article, Bork appeared to believe that the proper antidote to legal realism was legal process.

43. Bork’s work at this time shows the clear influence of Bickel. In a posthumous (1979) appreciation entitled *The Legacy of Alexander M. Bickel*, Bork elegiacally wrote as follows:

[Bickel] counted on a judicial tradition of modesty, intellectual coherence, the morality of process, to make judicial supremacy tolerable. These traits have often been lacking on the Court and [Bickel] felt they may have been damaged beyond repair by the Warren Court. We have never had a rigorous theory of judicial restraint; for a time we had a tradition; now that is almost gone.

Robert H. Bork, *The Legacy of Alexander M. Bickel*, YALE L. REP., Fall 1979, at 6, reprinted in A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS, *supra* note 35, at 684, 690.

44. Wechsler, *supra* note 36.

45. *Id.* at 19.

46. *Id.* at 17.

47. 347 U.S. 483 (1954).

48. Wechsler, *supra* note 36, at 22.

49. *Id.* at 34 (“[I]f the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the

Wechsler was reasonably clear, however, that the Court's decisions could be both "neutral" and "principled" even if they were *nonoriginalist*. Thus, he maintained that the Court had correctly interpreted the Sixth Amendment right to counsel to "imply a right to court-appointed counsel when the defendant is too poor to find such aid," even though he believed that "when the sixth amendment was proposed, a right to defend by counsel if you have one [was] contrary to what was then the English law."<sup>50</sup>

It is strange, therefore, that Bork's defense of originalism began with a lengthy account of the need for neutrality in the *application* of principles. Only after that did he turn to considering neutrality in the *definition* of principles; and only at the end did he take up the need for neutrality in the *derivation* of principles.<sup>51</sup> But originalism has little or nothing special to say about neutrality in applying principles or even in defining them; it is primarily an answer to the question of how constitutional principles are to be *derived*, that is, it is a methodology of constitutional interpretation.

When it came to that crucial question, however, Bork's paper was disappointing. He said merely the following:

There appear to be two proper methods of deriving rights from the Constitution. The first is to take from the document rather specific values that text or history shows the framers actually to have intended and that are capable of being translated into principled rules. We may call these specified rights. The second method derives rights from governmental processes established by the Constitution. These are secondary or derived individual rights.<sup>52</sup>

Bork did not explain why judges must seek to discover the "rather specific values" that "the framers actually . . . intended." True, if judges did that, they would be deriving constitutional rules from "neutral" sources, in the sense that the judges' reasoning would not be driven by the desire to reach the particular outcomes that they preferred but by considerations that could lead them either way in terms of results. The constitutional materials used in judicial decisionmaking would therefore reflect not the *judges'* values but rather (ideally) those of the framers. Nonetheless, if achieving "neutrality" in that sense is an overriding *desideratum*, it is not true to say that the *only*

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issue involved, a conflict . . . of high dimension, not unlike many others that involve the highest freedoms . . . . Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?" (footnote omitted).

50. *Id.* at 18. *But see* Gideon v. Wainwright, 372 U.S. 335 (1963). Similarly, Wechsler criticized Learned Hand's view that courts should apply "a fixed 'historical meaning' of constitutional provisions." Wechsler, *supra* note 36, at 16.

51. *See* Bork, *supra* note 35, at 192.

52. *See id.* at 201–02. To be sure, Bork did return to the explanation and defense of originalism in later works. *See* ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986); Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 394 (1985).

way to achieve it is through identifying the framers' intentions and giving them controlling weight. Judges could derive specific rules for constitutional decisions from, say, the natural law, rather than from the framers' values, in an equally "neutral" fashion. Or judges could base their decisions on the consistent application of constitutional *precedent*. A judge governed by natural law or case law could derive specific rules of decision from "neutral" constitutional materials that would be just as robust as the principles employed by a judge bound solely by the framers' original intentions. Originalism as the exclusive or primary method of deriving constitutional rules of decision has to be defended on grounds other than the claim that it alone ensures that the derivation of constitutional rules will be "neutral."

### B. Originalism and "Judicial Restraint"

At this point in the development of his ideas, Bork was not primarily occupied with the question of constitutional interpretation but rather with the question of judicial restraint. It might seem to some that he invented "originalism" and then conscripted it to serve the ends of judicial restraint.<sup>53</sup> But originalism is neither the only nor even the most effective means of ensuring such restraint. True, originalism commended itself to Bork (and many later writers) because it was thought of as a bridle on judges, restraining their forays into policymaking and reserving more scope and flexibility for the political branches.<sup>54</sup> But originalism is a theory of constitutional interpretation, not of judicial restraint.<sup>55</sup> In application, originalism could in principle lead to overturning majoritarian decisions as often as it leads to sustaining them: *Heller* might arguably stand as an example of originalist "activism." (Indeed, some liberal scholars and a law-and-economics judge have argued that originalism is essentially conservative political activism in jurisprudential garb.<sup>56</sup>) Simply denying the possibility of

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53. See Johnathan O'Neill, *Shaping Modern Constitutional Theory: Bickel and Bork Confront the Warren Court*, 65 REV. POL. 325, 337–38, 341–42 (2003).

54. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 42 (1997) ("As things now stand, the state and federal governments may either apply capital punishment or abolish it, permit suicide or forbid it—all as the changing times and the changing sentiments of society may demand. But when capital punishment is held to violate the Eighth Amendment, and suicide is held to be protected by the Fourteenth Amendment, all flexibility with regard to those matters will be gone.").

55. At this early point in the development of originalism, judicial restraint seems to have been more important for conservative critics of the Warren Court than methods of constitutional interpretation. Later originalists have tended to place less emphasis on the need for such restraint. See Whittington, *New Originalism*, *supra* note 33, at 602, 608.

56. See, e.g., Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 569 (2006) ("[F]or the past quarter century originalism has been animated less by its jurisprudence than by its political practice, which is deeply inconsistent with that jurisprudence. As a political practice, originalism does not preserve a fixed and unchanging Constitution; it does not transparently reproduce the democratic consent of the Constitution's ratifiers; it does not focus on process rather than outcomes. As a political practice, originalism seeks instead to forge a vibrant connection between the Constitution and contemporary conservative values."); Richard A. Posner, *The Incoherence of Antonin*

judicial review altogether would be a far more effective means of curbing judicial “activism” than originalism could ever be. James Bradley Thayer’s idea of judicial “deference”—that judges should invalidate statutes only when their unconstitutionality is so clear that it is not open to rational question—would also be far more protective of majoritarianism than originalism is.<sup>57</sup>

Likewise, a judicial practice of declaring much of the Constitution non-justiciable would also restrain judicial interference with the political process. Thus, after *Luther v. Borden*,<sup>58</sup> there was for decades virtually no significant litigation under the Republican Guarantee Clause,<sup>59</sup> although there otherwise might well have been. Similarly, the frequent judicial determination that disputes over the Constitution’s allocation of war powers are not justiciable (or that plaintiffs lack standing to bring such claims) has cleared much of that important area from litigation, at least until recently. And perhaps the current Court, after several decades of inconclusive and erratic constitutional litigation, has all but decided to remit the question of affirmative action (at least in higher education) to the political arena.<sup>60</sup>

In any case, originalism has clearly parted company with belief in judicial restraint. Although they were closely intertwined in Bork’s writings, there was never a robust conceptual relationship between them.<sup>61</sup> And both in judicial practice and legal scholarship, they have grown far apart. There can be (and are) both liberal and conservative exponents of judicial activism

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*Scalia*, NEW REPUBLIC, Sept. 13, 2012, at 18, available at <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism> (“[T]ext as such may be politically neutral, but textualism is conservative.”).

57. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 142 (1893). Although Thayer’s influence has receded, some legal scholars espouse a doctrine similar to his. See Jeffrey Rosen, *Originalism and Pragmatism: False Friends*, 31 HARV. J.L. & PUB. POL’Y 937 (2008). For an account of Thayer’s “deference,” his followers, his later influence, and a critique of his views, see Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519 (2012) (arguing that the rise of theories of constitutional interpretation—such as originalism—has undercut Thayer’s case for judicial restraint).

58. 48 U.S. (7 How.) 1 (1849).

59. U.S. CONST. art. IV, § 4. On the Republican Guarantee Clause, see Charles O. Lerche, Jr., *The Guarantee Clause in Constitutional Law*, 2 W. POL. Q. 358 (1949).

60. Compare *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014) (no equal protection violation in state rollback of affirmative action program), with *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (declaring strict scrutiny to be the applicable standard of review for affirmative action program in state higher education but remanding the case rather than applying the standard). Combining *Schuette* with the apparently relaxed “strict scrutiny” standard adopted in *Fisher*, one might reasonably conclude that the Court will uphold state affirmative action programs except in outlier or extreme cases but will also permit the political process to undo such programs. Given the highly abstract and indeterminate text of the Equal Protection Clause and the paucity of materials relevant to discerning what the original intent of the framers and ratifiers of that clause might have been with regard to affirmative action, an originalist might well approve of the Court’s current stance (if we have described it correctly).

61. See Whittington, *Originalism: A Critical Introduction*, *supra* note 33, at 392–94.



who also fly the standard of originalism; there can be (and are) advocates of judicial restraint who are nonoriginalists.<sup>62</sup>

### C. *Originalism After Bork: Criticisms and Corrections*

Bork's 1971 article was the catalyst for extensive scholarly and political commentary—much of it critical, but also much sympathetic—in the years that followed.<sup>63</sup> Several overlapping but distinguishable lines of criticism developed during the more than forty years following the article's publication.

First, critics noted the extreme difficulty, or even in some cases the impossibility, of ascertaining what the original intent of the framers *was*. It was argued that evidence of their intentions can be fragmentary, incomplete, contradictory, or nonexistent. (Astonishingly, Bork himself had raised precisely these difficulties three years before writing *Neutral Principles*.<sup>64</sup>) Especially when constitutional rules must be fashioned to address situations that the framers could not have imagined, their “intentions” were likely to be highly indeterminate<sup>65</sup>: one is engaging in counterfactual guesswork.<sup>66</sup> Moreover, specialized historical knowledge would be needed in order to appreciate the evidence in its context before reliable inferences concerning intent could be made. And not only was such specialized scholarship needed but a “historicist” appreciation of the distinct *otherness* of the past would be required before it could be brought to bear on contemporary controversies.<sup>67</sup>

Furthermore, the critics noted that the framers who gathered in Philadelphia in 1787 were a corporate body, consisting of men with strongly held but sharply different views. Recovering the “intent” of a large, diversified corporate body can have special difficulties of its own.<sup>68</sup> Even the most

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62. Compare, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (rev. ed. 2014) (the former), with Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081 (2005) (the latter).

63. A Google search reveals nearly 3,000 citations to it. See GOOGLE SCHOLAR, <http://scholar.google.com> (last visited Jan. 13, 2015) (search “Neutral Principles and Some First Amendment Problems”).

64. “History can be of considerable help, but it tells us much too little about the specific intentions of the men who framed, adopted, and ratified the great clauses. The record is incomplete, the men involved often had vague or even conflicting intentions, and no one foresaw, or could have foreseen, the disputes that changing social conditions and outlooks would bring before the Court.” Bork, *supra* note 42, at 143.

65. See Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL’Y 437 (1996).

66. See Bork, *supra* note 35, at 199 (discussing *Brown* and stating that “[t]he Court cannot conceivably know how these long dead [framers and ratifiers of the Equal Protection Clause] would have resolved these issues had they considered, debated and voted on each of them. Perhaps it was precisely because they could not resolve them that they took refuge in the majestic and ambiguous formula: the equal protection of the laws”).

67. See Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1205–09.

68. For a celebrated analysis of several of these problems, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 212–15 (1980). Professor Brest is credited with coining the term “originalism.”

prominent speakers may not reflect the consensus of opinion within the body at large. Language may be drafted with deliberate vagueness or ambiguity as a compromise measure, submerging intractable differences and deferring further controversy in order to secure an agreed-upon text. Secret bargains may be struck that result in clauses whose true purposes do not appear on the public record. And so on.<sup>69</sup>

Second, the framers were not the only, or even the most important, makers of the original Constitution: the state ratifying conventions were the primary or sole constitutional creators. The intentions of *the framers*, insofar as they might differ from those of *the ratifiers*, should therefore count for little or nothing, except insofar as the ratifiers were aware of the framers' intentions and made them their own.<sup>70</sup> The framers can be compared to the drafters of a legal instrument, such as a will or a contract; the ratifiers, to the principals (testators or contracting parties) whose purposes the drafters seek to serve. If intentions are to be consulted at all, they must, then, be the intentions of the ratifiers. This type of objection could be interwoven with the first: the ratifying conventions were themselves separate corporate bodies meeting in the different states, which compounds the difficulty of ascertaining the putatively original, but corporate, intent.<sup>71</sup>

Originalists generally responded to these criticisms by shifting their grounds from original *intent* to original (public) *meaning*.<sup>72</sup> But although "public meaning" originalism appeared to correct some of the defects of "original intent" originalism, it was open to the objection that, even in the 1790s, there was great controversy about the public meaning of important constitutional terms and clauses.<sup>73</sup> (Consider, for instance, the debate in

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69. It is arguable, however, that the originalists of the 1970s and 1980s were not centrally concerned with the framers' subjective intentions and that the criticisms focused on that issue were therefore at least somewhat off target. See Whittington, *New Originalism*, *supra* note 33, at 603.

70. See CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 157–58 (1969); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 *CONST. COMMENT.* 77, 84–85 (1988).

71. See Kramer, *supra* note 34, at 910.

72. Whittington, *Originalism: A Critical Introduction*, *supra* note 33, at 378–82; Whittington, *New Originalism*, *supra* note 33, at 610; see also Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 *HARV. L. REV.* 751, 758–59 (1987). There are competing narratives—and evaluations—of the shift from original intent to original public meaning. For a favorable account of the shift, see Vasav Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 *GEO. L.J.* 1113, 1136–48 (2003). For a more critical view arguing the case on behalf of intentionalist originalism, see Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 *NW. U. L. REV.* 703, 705–09 (2009).

73. See Kramer, *supra* note 34, at 911. It is not as though early originalists were altogether unaware of this fact, although their attempts to address it may have been weak. Even in the 1980s, Edwin Meese, President Reagan's attorney general, spoke on the issue, arguing as follows:

Where there is a demonstrable consensus among the Framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed. Where there is ambiguity

1791 in President Washington's first cabinet between Secretary of State Jefferson and Secretary of the Treasury Hamilton over the meaning of "necessary" in the Necessary and Proper Clause.<sup>74</sup>) And the original public meaning of other crucial constitutional terms (for example, the term "person" in Section 1 of the Fourteenth Amendment or "commerce" in Article I, Section 8<sup>75</sup>) may be the subject of current controversy.<sup>76</sup>

#### D. *Original Meaning and Original Expected Applications*

Furthermore, even when the original public meaning of a clause was at first and still is now agreed upon, the *applications* of that clause might be uncertain, especially (but not only) when the original meaning is highly abstract and indeterminate. For example, the public *meaning* of the Equal Protection Clause seems tolerably obvious (the bare language seems to mean now what it meant at the time of its ratification), but how is the clause to be applied? Many scholarly originalists have argued that the application of such language should ordinarily be controlled by reference to the consequences or applications of it that the ratifying generation would have held.<sup>77</sup> Not only does that move take the interpreter well beyond the text but it also calls for constitutional *construction*.<sup>78</sup> And not only is "construction" distinct from "interpretation" but the argument for basing constructions only on *ratification-era expectations* would itself have to be made.<sup>79</sup> For instance, in a presidential impeachment trial, should the House and Senate be guided by the framing era's likely expectations (assuming they were discoverable) of what

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as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.

Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL'Y 875, 883 (2008) (quoting Edwin Meese III, U.S. Att'y Gen., Speech Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 71, 76 (Steven G. Calabresi ed., 2007)).

74. Compare Thomas Jefferson, Sec'y of State, Opinion on the Constitutionality of the Bank (Feb. 15, 1791), reprinted in MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 60–62 (2d ed. 2013), with Alexander Hamilton, Sec'y of the Treasury, Opinion on the Constitutionality of the Bank (Feb. 23, 1791), reprinted in THE CONSTITUTION OF THE UNITED STATES, *supra*, at 62–66.

75. See BALKIN, *supra* note 31, at 149–59.

76. E.g., Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13 (2013).

77. See Whittington, *Originalism: A Critical Introduction*, *supra* note 33, at 382–86 (discussing reliance on original expected applications); *id.* at 386–87 (discussing the question of to what extent the Constitution delegates substantial discretion to the judiciary to fashion practical rules of implementation).

78. See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 457 (2013) ("[C]onstitutional construction is ubiquitous in constitutional practice. The central warrant for this claim is conceptual: because construction is the determination of legal effect, construction always occurs when the constitutional text is applied to a particular legal case or official decision.").

79. Balkin has pressed these points as follows:

would count as a “high Crime[ ]” or “Misdemeanour[ ],”<sup>80</sup> or might they fashion a different standard?

Originalists have sometimes failed to recognize the necessity and importance of constitutional construction. Yet construction plays a crucial role—perhaps even the *leading* role—in constitutional adjudication. Courts may derive and enforce rules that could not be inferred from the original public meaning alone but that are intended, for example, to preserve or promote the values that the constitutional text is understood to serve. The Warren Court fashioned and applied the exclusionary rule in *Mapp v. Ohio*,<sup>81</sup> not under the compulsion of the original meaning or intent of the Fourth Amendment, but with the aim of protecting the value of privacy that it saw at the amendment’s core.<sup>82</sup> *Miranda* warnings were a similar constitutional

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If original meaning is original semantic meaning—the concepts that the framers employed in the words they chose—then fidelity to original meaning does not require following what the framing generation thought the consequences of adopting the words would be. That is especially so when the text employs abstract principles or vague standards. The logical consequence of moving from original intention . . . to original meaning is that original meaning originalism . . . becomes a form of living constitutionalism.

Needless to say, this is not what most conservative originalists were looking for. . . .  
 . . . [C]ontemporaneous constructions may be quite important and persuasive authority, and especially powerful in the first decades after adoption. But we should not confuse these constructions with original meaning . . . .

BALKIN, *supra* note 31, at 104.

While this is not the place to respond fully to Balkin’s challenge, we would make three points. First, Balkin conceptualizes the Equal Protection Clause as a delegation of power from the Reconstruction-era generation to later generations: the very indeterminacy of the clause’s language is supposed to “delegate the articulation and implementation of important constitutional principles to the future.” *Id.* at 107. But on that understanding, constitutional law becomes subject to incessant changes that would destabilize entrenched expectations and subvert respect for the law. (Bork made essentially that criticism of the Warren Court.) See MCGINNIS & RAPPAPORT, *supra* note 32, at 204 (stating that “living constitutionalism undermines the objectivity of law”). Moreover, we would expect such constitutional innovations to be ever more sweeping and radical as the distance between the Reconstruction era and later generations widens.

Second, to whom is the purported delegation made? To the judiciary alone? Or to “the People” of the future, as organized into a political community under the Constitution? If to the latter, it would seem that the Court could not claim to be the only, or the supreme, interpreter of the Equal Protection Clause. The national legislature would have a much better claim to the leading role, and a “judicial supremacy” case such as *City of Boerne v. Flores*, 521 U.S. 507 (1997), would have been wrongly decided. Perhaps the Court might legitimately occupy a secondary role as the interpreter of the Equal Protection Clause in default of congressional action; but if Congress spoke to the meaning and application of the clause, the Court should defer to it.

Third, is the purported “delegation” accompanied by an “intelligible standard” to control the interpretations that future generations would wish to place on the clause? If not, then in what way did the Reconstruction-era generation hope to affect the future? Simply bequeathing the bare language of “equal protection” would have been no constraint at all. If, by contrast, there was an intelligible standard to guide future interpreters, what could it have been other than the original expected applications?

80. U.S. CONST. art. II, § 4.

81. 367 U.S. 643 (1961).

82. Wrongly, according to Amar. *See* pp. 172–74.

construct, designed as a prophylaxis against Fifth Amendment violations by the police.<sup>83</sup> *Roe v. Wade*'s<sup>84</sup> trimester system and *Casey*'s<sup>85</sup> emphasis on fetal viability were both judge-made constructs that attempted to find a workable "balance" between (what the Court took to be) a pregnant woman's constitutionally protected interests in liberty or privacy and the state's legitimate interests in protecting unborn human life. Construction is also needed to fill in gaps in the constitutional text. For example, the Suspension Clause permits the suspension of the writ of habeas corpus in cases of "Rebellion or Invasion" but does not specify *who* has the power to suspend it.<sup>86</sup> Using constructivist logic, Chief Justice Taney argued in *Ex parte Merryman*<sup>87</sup> that the power was solely congressional; President Lincoln countered the Chief Justice's reasoning with a constructivist argument of his own.<sup>88</sup>

Whatever one thinks about these particular controversies, construction seems to be unavoidable even after the interpretative questions posed by a constitutional text have been fully answered. This seems most especially true of open-textured constitutional clauses like the Equal Protection Clause or the Due Process Clauses. Originalism therefore needs a theory that would distinguish between valid and invalid constructions.<sup>89</sup> Interestingly, in *Neutral Principles*, Bork seems to have recognized the need for construction, as distinct from interpretation. There, he distinguished between constitutionally "specified rights" and "[s]econdary or derivative rights."<sup>90</sup> The latter are "extraordinarily important" but not immediately derivable from "text or history."<sup>91</sup> They do not exist "because the Constitution has made a value choice about individuals," but rather they are "located in the individual for the sake of a governmental process that the Constitution outlines and the Court should preserve."<sup>92</sup> For instance, Bork argued that claims to the right to an equal vote in the legislative reapportionment cases should not have been decided by reference to the Equal Protection Clause; it would have been far better to derive the relevant rights from the Republican Guarantee Clause

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83. See *Miranda v. Arizona*, 384 U.S. 436 (1966); see also *Dickerson v. United States*, 530 U.S. 428 (2000) (holding *Miranda* to have stated a constitutional rule).

84. 410 U.S. 113 (1973).

85. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

86. U.S. CONST. art. I, § 9, cl. 2.

87. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

88. Abraham Lincoln, Special Session Message (July 4, 1861), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 3221, 3227–29, 3231–32 (James D. Richardson ed., 1897).

89. For an outline of one such theory, see Paulsen, *supra* note 5, at 1431–41. Although based on constitutional text and structure, Paulsen's originalist theory of construction is itself (inevitably, it seems) a construction.

90. Bork, *supra* note 35, at 202.

91. *Id.*

92. *Id.*

or on the basis of “constitutional structure and political practice.”<sup>93</sup> Regardless, in either case, the “derivation” required construction, not merely interpretation.

Another line of criticism found that originalism, consistently applied, pointed beyond itself: it was, at the worst, self-refuting. The argument was that if constitutional decisionmakers were supposed to follow the framers’ intentions, then they would also be bound to follow the framers’ intentions with regard to rules of interpretation. But this, it was argued, would require the decisionmakers to consult, and be guided by, authorities *other* than the framers’ intentions, notably constitutional structure.<sup>94</sup> Furthermore, although this criticism was directed at “original intent” originalism, it could be (and has been) recycled as an objection to “original public meaning” originalism, in the form of the argument that recourse to original public meaning was “at odds with the dominant modes of constitutional interpretation in place at the time the Constitution was debated and ratified.”<sup>95</sup>

Closely allied to this line of criticism is the objection that the actual interpretative practice of constitutional adjudication in the early republic (and after) was not originalist. Rather, it drew eclectically on source materials that included evidence of original meaning and intent but were not limited to them. As Professor Kramer put it, “Everyone essentially believed that the Constitution could and should be interpreted using the same, open-ended process of forensic argument that was employed across legal domains—marshalling (as applicable, and in a relatively unstructured manner) arguments from text, structure, history, precedent, and consequences to reach the most persuasive overall conclusion.”<sup>96</sup> Chief Justice Marshall’s opinion in

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93. *Id.* at 203. Amar works out Bork’s suggestion in detail, arguing for the Republican Guarantee Clause as a sounder basis for the reapportionment decisions. See pp. 190–92.

94. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 885 (1985) (arguing that the “modern resort to the ‘intent of the framers’ can gain no support from the assertion that such was the framers’ expectation, for the framers themselves did not believe such an interpretive strategy to be appropriate”). For critical responses, see Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of “This Constitution”*, 72 IOWA L. REV. 1177, 1186–1220 (1987), and Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 273–81 (1988). More recently, Robert Natelson has argued that statutory interpretation in the founding era assigned a controlling role to the lawmakers’ intentions. See Robert G. Natelson, *The Founders’ Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007). We would also note that, although James Madison expressed different views at different times, he did say late in life that the “key to the sense of the Constitution” was to be found “in the proceedings of the Convention, the contemporary expositions, and above all in the ratifying Conventions of the States.” Letter from James Madison to Andrew Stevenson (Mar. 25, 1826), reprinted in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 473–74 (Max Farrand ed., 1966).

95. Saul Cornell, *The Original Meaning of Original Understanding: A Neo-Blackstonian Critique*, 67 MD. L. REV. 150, 150 (2007).

96. Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621, 624 (2012).



*McCulloch v. Maryland*,<sup>97</sup> much admired and imitated by Amar,<sup>98</sup> could be seen as representative of an open-ended interpretative approach. So (to cite a later example) is Chief Justice Rehnquist's opinion in *Nixon v. United States*.<sup>99</sup>

#### E. Originalism Versus Pluralism

Originalism has been understood as the belief that “only certain sorts of historical evidence, such as the understandings of constitutional meaning of the Philadelphia framers or ratifiers of the Constitution, are legitimate in constitutional interpretation.”<sup>100</sup> So understood, it lays claim to *exclusivity* in constitutional interpretation. “Exclusive originalism . . . has real bite as a constitutional theory. It asserts that other methods of interpretation are wrong or illegitimate . . .”<sup>101</sup> Opposed to originalism (so understood) is not nonoriginalism but pluralism: the claim that the Constitution should be expounded by a *variety* of interpretive methods or modalities.

One early critic of originalism who pursued this line of attack was Thomas Grey. Grey assailed what he called “the pure interpretive model,” which he associated with Justice Black, Bork, and others.<sup>102</sup> Grey argued for a “broader view of judicial review” that would accept “the courts’ additional role as the expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution.”<sup>103</sup> In support of his view that the Constitution incorporated unwritten rights and powers, Grey was even able to play a textual card, the Ninth Amendment.<sup>104</sup> But beyond that, he noted that Supreme Court opinions from the founding era had expressed such assumptions.<sup>105</sup> For example, in *Fletcher v. Peck*,<sup>106</sup> Chief Justice Marshall had held a Georgia statute invalid because it violated “general principles which are common to our free institutions,”<sup>107</sup> such as the protection of

97. 17 U.S. (4 Wheat.) 316 (1819).

98. Amar writes as follows: “To read *McCulloch* is to behold the art of constitutional interpretation at its acme.” P. 22. For a critique of his reading, see Strauss, *supra* note 5, at 1535–40.

99. 506 U.S. 224 (1993).

100. Griffin, *supra* note 67, at 1187.

101. *Id.*

102. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975) [hereinafter Grey, *Unwritten Constitution?*]; see also Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 844–50 (1978).

103. Grey, *Unwritten Constitution?*, *supra* note 102, at 706.

104. *Id.* at 716.

105. *Id.* at 708.

106. 10 U.S. (6 Cranch) 87 (1810).

107. Fletcher, 10 U.S. (6 Cranch) at 139.

vested rights. Likewise, in *Calder v. Bull*,<sup>108</sup> Justice Chase had stoutly defended judicial review based on the principles of natural law, not (simply) on the text, history, and interrelationship of constitutional provisions:

There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established.<sup>109</sup>

Grey's study of the sources led him to conclude as follows:

For the generation that framed the Constitution, the concept of a "higher law," protecting "natural rights," and taking precedence over ordinary positive law as a matter of political obligation, was widely shared and deeply felt. . . . [I]t was generally recognized that written constitutions could not completely codify the higher law. Thus in the framing of the original American constitutions it was widely accepted that there remained unwritten but still binding principles of higher law.<sup>110</sup>

From such a perspective, Bork's "originalism" reflected not so much a desire to be faithful to the intentions of the framing generation but rather a modernist, post-*Erie*<sup>111</sup> repudiation of any form of naturalism in favor of a Holmesian legal positivism.

Furthermore, Grey argued that the systemic application of originalist methods to existing Supreme Court case law would uproot many precedents that had long been considered both settled and fundamental.<sup>112</sup> And if originalism holds itself out as the *exclusive* method of constitutional interpretation, it must obviously face a problem in explaining (or explaining away) constitutional *precedent*. What interpretive force can precedent have, except as an indication of what earlier justices, after considering the Constitution's text and intent, had concluded it meant? And what if it were apparent that their conclusions were mistaken? Some originalists have decided to reject (with varying degrees of nuance) the legitimacy of judicial reliance on constitutional case law; others have sought to find a place for (some) precedents within an originalist framework.<sup>113</sup>

Finally, later critics of originalism's claim to exclusivity argued that originalism simply fails to capture the "pluralistic" character of American

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108. 3 U.S. (3 Dall.) 386 (1798).

109. *Calder*, 3 U.S. (3 Dall.) at 388.

110. Grey, *Unwritten Constitution?*, *supra* note 102, at 715–16. The jurisprudence of the antebellum period and the Reconstruction era was also attached to "natural rights" doctrine. *See id.* at 716.

111. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

112. Grey, *Unwritten Constitution?*, *supra* note 102, at 710–14.

113. For a survey of originalist positions and an attempt to find a role for precedent, see MCGINNIS & RAPPAPORT, *supra* note 32, at 175–96.

constitutional adjudication—a character with deep roots in our constitutional tradition and abundantly evident in the present.<sup>114</sup> On one widely influential account of constitutional interpretation and argument, recourse to original text, meaning, or intent hardly exhausts the major “modalities” commonly employed by courts and practitioners; such modalities also include structure, precedent or doctrine, history, prudence, and ethics.<sup>115</sup> Are these other modalities all to be abandoned—and if originalists think so, how is that to be accomplished in practice? It may prove possible for originalism to accommodate other methods or forms of constitutional interpretation, but originalists should not “sidestep the main force of this distinctive critique.”<sup>116</sup>

#### F. *Originalism and Legitimation*

Originalism in any form seems to depend on the core claims that original public meaning (or intent) was not only fixed at the time of textual adoption and is still recoverable but also that, once recovered, original meaning or intent has a *normatively privileged* place in constitutional adjudication.<sup>117</sup> Accordingly, scholars have distinguished between a *fixation thesis*, which goes to the original linguistic meaning of constitutional texts, and a normative *contribution thesis*, which states that “the linguistic meaning of the Constitution constrains the content of constitutional doctrine.”<sup>118</sup> To present the matter in an oversimplified manner, we might know the exact original public meaning of the Necessary and Proper Clause. We might also know what Madison, Hamilton, and the other framers and ratifiers intended in adopting it. Even then, we simply might not care. Something more than mere knowledge of a constitutional text’s meaning and intent is necessary to vivify the text, in the sense of causing the constitutional decisionmakers to regard it as *binding and constraining* them. What is the “legitimizing source” of the Constitution, if read in an originalist manner? The obvious and correct answer lies, of course, in the doctrine of popular sovereignty: “We the People” express our sovereign will in the Constitution, and its binding force

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114. It may be useful to distinguish “pluralism” as a view about the multiplicity of the sources legitimately available to constitutional adjudicators (Grey’s main concern) from “pluralism” as a view about the variety of methods that may legitimately be used in such adjudication (the focus of later criticism).

115. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 23–24 (1982).

116. Whittington, *Originalism: A Critical Introduction*, *supra* note 33, at 388.

117. See Powell, *supra* note 34, at 266 (“The argument over originalism is a debate over a question of law.”).

118. Solum, *supra* note 33, at 954; see also Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 *HARV. L. REV.* 1275, 1317–18 (2006); Whittington, *Originalism: A Critical Introduction*, *supra* note 33, at 378.

derives from that will.<sup>119</sup> But that answer plainly does not decide the question of whether originalism is the true method of determining “the People’s” sovereign will.

Two distinct types of answers to the legitimation question seem to appear in current originalism. One type is *internal* or *backward looking*: it defends the normativity of originalism by reference to the circumstances of the founding and ratification of the Constitution (and its several amendments). The other type is *external* or *forward looking*: it argues that an originalist interpretation of the Constitution produces *better consequences* if applied consistently than any other method of constitutional interpretation (and in particular, better consequences than those that would follow from recurring judicial departures from the originalist method).

Professor Kay has ably made the first, internal type of normative argument. He argues that the founders and ratifiers possess a unique authority as lawgivers and that the later constitutional decisionmaking derives whatever authority it has because of *their* authority:

The normative force of any legal rule is, first and foremost, the consequence of regard for the lawmaker. No one is obligated to follow a rule arising from the accidental arrangement of words . . . . Numerous colonies of the United Kingdom entered independence under “off the rack” constitutions drafted by the departing imperial power. Over time, and apart from the substantive quality of these constitutions, more and more such countries found it essential to replace them with indigenous instruments. No constitution—no posited norm of any kind—can succeed if it is not regarded as the authentic command of a legitimate lawmaker.<sup>120</sup>

To say that a constitution will not be an effective governing text unless the lawgiver is regarded as an authoritative source is, of course, not to say that *the original framers and ratifiers* continue to enjoy such regard. But Kay maintains that they do:

Certainly the population today might have serious doubts about the ratifying conventions’ right to speak for “the people” in light of the restricted franchise of the time and doubts, perhaps, about the adequacy of indirect democracy for questions of this magnitude. Nonetheless, it seems undeniable that contemporary attachment to the Constitution derives, in substantial part, from respect for acts of constitution-making that were undertaken by the actual people who wrote and ratified it and a conviction that those acts were exercises of the ultimate constituent authority of “the people.”<sup>121</sup>

The second, external or consequentialist defense of an originalist Constitution’s normative character is exemplified in an argument of great depth and subtlety by McGinnis and Rappaport.<sup>122</sup> Like Kay, they agree that the

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119. Kay, *supra* note 72, at 716.

120. *Id.* at 715.

121. *Id.* at 717.

122. MCGINNIS & RAPPAPORT, *supra* note 32.

Constitution, similar to other legal texts, derives its binding force from the circumstances of its enactment. For them, however, the critical circumstance is that the Constitution and its amendments were enacted through supermajoritarian voting procedures. They argue that supermajoritarian procedures tend to produce rules that generate, on the whole, more beneficial consequences than rules that are adopted through majoritarian (or other) procedures. Supermajoritarian procedures filter out unwise or improvident decisions, yield outcomes that enjoy widespread and durable support, and help secure predictability and stability in the law when entrenched.<sup>123</sup> But the benefits of such rules will continue to flow only for as long as they are interpreted and enforced in the sense in which the original enactors understood them. Should they be interpreted and applied in a significantly different sense, the benefits will dry up; the rules that come to replace them will have all the characteristic weaknesses of rules enacted through merely majoritarian (or weaker) procedures. To be sure, some constitutional rules were distinctly unwise (such as the Prohibition-era Eighteenth Amendment), despite carrying supermajority sanction; but when their imprudence begins to show, a superseding amendment can repeal them (in that case, the Twenty-First Amendment, ratified only fourteen years later).

Both of these contrasting originalist approaches have attractive features. Among other things, Kay's analysis draws strength from the reverence that the American public continues to feel for such figures as Washington, Madison, and Hamilton. We suspect that rather few ordinary Americans would feel that their local governments were bound to follow a Supreme Court ruling on, say, the public display of the Ten Commandments, if they thought that the mandate was ultimately based on the authority of Justice Breyer rather than on that of Madison. McGinnis and Rappaport's analysis has the singular virtue of wedding an originalist approach to the Constitution's text with a pragmatic, consequence-based argument for perseverance in applying the original meaning.

### III. ORIGINALISM WITHOUT ROMANCE

Modern lawyers, judges, and scholars might not find a backward-looking justification for originalism compelling. Historic attachment to American history and the nation's founders does not sound in contemporary theories of democratic legitimacy, unless we were to assume that the American people today, if a plebiscite were to occur, would vote to continue living under the framers' choices. McGinnis and Rappaport's approach might persuade those in American public law moving in an instrumental direction. We remain unsure, however, whether originalism must walk hand in hand with supermajority rules and even whether supermajority rules themselves will always prove more efficient. While there are nations that have suffered from a fragile majoritarian democracy, such as Weimar Germany, there are also nations that have no supermajority rules, such as Great Britain, Canada,

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123. *Id.* at 33–61.

and other common law nations, all of which have enjoyed political stability similar to our own.<sup>124</sup> Indeed, supermajoritarianism derived its very utility as compensation for the New World's rejection of the "balanced government" created by the "separate social elements" of monarchy, aristocracy, and the people.<sup>125</sup> And there are nations, such as Iraq, where supermajority rules can produce a deadlock that paralyzes the government during times of crisis.<sup>126</sup>

In this Part, we suggest another reason to remain loyal to originalism, despite Amar's implicit view that it fails to yield desirable social norms. Our argument relies on neither romanticism about American history nor instrumental attachment to supermajority rules. Instead, we borrow from bargaining theory to explain why interpreters today may rely on originalism. Constitutions can serve as power-sharing agreements that allow different groups to live together under one roof. Divisions can run along several different fault lines, such as geography, economic system, religion, or ethnicity. The framers had to reach compromises between several competing groups, such as North and South, free and slave states, large and small states, creditors and debtors, and commercial and agricultural economies. These groups cemented their deals at the constitutional level. The framers bridged the divide that threatened the very future of the nation—the divide between large states and small states—by creating a Congress with a House elected by the population and a Senate representing the states. They solved another crisis by allowing state law to decide on slavery but giving Congress the authority to regulate the territories and to end the slave trade by 1808.

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124. See, e.g., F.H. BUCKLEY, *THE ONCE AND FUTURE KING: THE RISE OF CROWN GOVERNMENT IN AMERICA 176–77* (2014); JOSEP M. COLOMER, *POLITICAL INSTITUTIONS: DEMOCRACY AND SOCIAL CHOICE* 43 (2001); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 *TEX. L. REV.* 703, 722 (2002).

125. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 603–04 (1969) (articulating that republican America had affirmatively departed from "various parts of the government of [British and other Old World] social constituents," like monarchy and aristocracy); McGinnis & Rappaport, *supra* note 124, at 723 (stating that simple majorities "needed to be constrained in order to avoid destructive political passions and encroachment upon minority interests"); John O. McGinnis, *The Partial Republican*, 35 *WM. & MARY L. REV.* 1751, 1777–78 (1994) (reviewing CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993)) (explaining, in broad brush strokes, the classlessness of American political institutions as opposed to British ones).

126. See generally CHARLES FERGUSON, *NO END IN SIGHT: IRAQ'S DESCENT INTO CHAOS* 410–11 (2008) (discussing supermajority rule-induced deadlock that caused, in substantial part, Iraqi governmental paralysis); DAVID GHANIM, *IRAQ'S DYSFUNCTIONAL DEMOCRACY* 13–14 (2011) (same); *THE OXFORD HANDBOOK OF POLITICAL SCIENCE* 176 (Robert E. Goodin ed., 2009) (discussing how supermajority rules can induce instances of "legislative paralysis and interinstitutional conflict"); BARRY AMES, *THE DEADLOCK OF DEMOCRACY IN BRAZIL* 15, 17 (2001) (explaining that "supermajority requirements," which might be "common for constitutional amendments," nonetheless diminish the likelihood of the passage of "significant legislation" in Latin America generally and in Brazil particularly); John Yoo, *Fixing Failed States*, 99 *CALIF. L. REV.* 95, 144–49 (2011) (discussing the use of a constitution to commit ethnic and religious factions to sharing power).



Obstacles will challenge the ability of groups to agree on the compromises necessary to bring a nation together. For simplicity, assume that just two groups, the North and the South, must agree to produce a unified nation. They could both choose to go it alone, which might have drawbacks and could even lead to war. Or they could reach an agreement that would benefit each group. Rational groups should conclude such an agreement when the gains from cooperation outweigh the benefits of separation or conflict. Situations involving the possibility of armed conflict should produce high incentives to settle disputes peacefully because nations will want to avoid the deadweight losses that result from going to war.<sup>127</sup> States can divide a resource, redraw a border, or end a struggle—all strategies that give each side some benefit and may help avert the costs of independence or conflict. States will generally divide the benefits of unification based on the ratio of their expected gains had they chosen to contest rather than cooperate. This calculation will depend on their political and military strength and their probability of prevailing in any dispute.

This approach follows the law-and-economics analysis of litigation in which parties acting rationally and with full information should always prefer settlement to going to court, which consumes time and money without any return.<sup>128</sup> Similarly, states that have full information about each other should prefer an agreement that increases the welfare of both parties over going their separate ways. And yet groups encounter significant obstacles that do not afflict domestic contracts in the same way. At home, parties can rely on a legal system, backed up by courts and police, to enforce a settlement. Parties will face difficulties in reaching an agreement due to asymmetric information about the range of the settlement and about the financial resources available for litigation. But once the parties reach a settlement, high uncertainty will not attend the enforcement of the terms.

This is not the case with a constitution (or treaties, from which this discussion is drawn). Leading scholars of international relations begin with the fundamental observation that the international system is anarchic.<sup>129</sup> The world does not enjoy a unified government that has a monopoly on violence and can maintain law and order. While the United Nations formally serves as something of a world government by treaty, it has no military forces under its direct command, it relies on the member states to provide financial resources, and it cannot regulate private individuals directly.

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127. E.g., James D. Fearon, *Rationalist Explanations for War*, 49 INT'L ORG. 379, 380–81 (1995); Robert Powell, *The Inefficient Use of Power: Costly Conflict with Complete Information*, 98 AM. POL. SCI. REV. 231, 231 (2004); Robert Powell, *War as a Commitment Problem*, 60 INT'L ORG. 169, 179 (2006) [hereinafter Powell, *Commitment Problem*].

128. See, e.g., Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067 (1989); Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435 (1994).

129. HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 4–16 (Kenneth W. Thompson & W. David Clinton eds., 7th ed. 2006); KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 102–28 (1979); John J. Mearsheimer, *The False Promise of International Institutions*, INT'L SECURITY, Winter 1994/95, at 5, 10.

Anarchy does not necessarily produce a philosopher's state of nature, with a war of all against all. Problems extending beyond a state's borders will yield opportunities for cooperation.<sup>130</sup> Even in the area of security, nations form defensive alliances that pool their resources to deter potential aggressors. Other opportunities, such as free trade, the environment, and coordination of transportation and communication, provide benefits to states if they can cooperate. There can be little doubt about the mutual gains for states that commit to reciprocal actions, such as lowering trade barriers to take advantage of the law of comparative advantage. The Constitution, for example, effectively empowered the United States to create the world's largest free-trade area.

Anarchy, however, impedes the ability of states to enforce those agreements, despite their obvious benefits to all parties. Without international courts or police with effective authority to force compliance, parties can renege on an agreement—here, a constitution—without consequence other than retaliation from the other states. This produces a classic prisoner's dilemma: two suspects could receive lower sentences if they could only cooperate on their stories, but they cannot do so because of a lack of trust. Similarly, states might not enter into agreements because they do not trust their partners to live up to their promises. This problem will be particularly acute where one party must take a first step that bears high costs before the other party must act. For example, a state that has strong offensive military capabilities but weak defensive systems may be reluctant to hand over territory to a national government—thereby losing its tactical advantages—without a firm guarantee that the other states will withdraw too. Without institutional mechanisms for enforcement, the state that moves second will have an opportunity to exploit the vulnerabilities of the state that disarmed first. There is no guarantee that the second state will refrain from taking advantage.

We can illustrate this problem by referring to the literature on international bargaining. As Thomas Schelling argued, "conflict situations are essentially bargaining situations."<sup>131</sup> Nations will seek to acquire territory, population, goods, or resources. They will strive to stop harms, such as pollution, drugs, terrorism, disease, or excessive migration. Nations may come into conflict when these goals meet the agenda of other nations. One nation may want to add territory and population held by another, or may seek to stop pollution emitted by another nation's factories. A crisis will arise when the two sides cannot reach an agreement that peacefully divides the benefits at stake.

Professors Fearon and Powell have taken Schelling's insight and constructed a sophisticated model of the choice between war and peace. Under

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130. See ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984).

131. THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 5 (1960) (emphasis omitted).

their approach, rational nations with perfect information should favor a settlement over conflict in order to resolve a dispute.<sup>132</sup> Reaching an agreement enables states to avoid the deadweight loss of war.<sup>133</sup> Of course, a nation could choose to gamble by going to war in the hopes of capturing all of a territory rather than only a part of it. Full information and rational decisionmaking, however, should surpass such gambling. Instead, the two nations should agree to a deal that divides a resource in proportion to their objective chances of prevailing in a conflict.

With full information, two states in a dispute should reach a settlement rather than turn to armed hostilities. If both sides know the expected values of going to war, they can simply divide the resource based on the differences in their probability of winning. They will receive the expected benefit of any conflict but avoid the expected cost. One condition that might prevent an agreement, however, is if the two countries place greatly different values on the resource in question. War, in the words of Powell, becomes an “inefficiency puzzle.”<sup>134</sup> States should almost always reach a settlement and avoid the costs of war. But because of international anarchy, they do not; the absence of a supranational government inhibits cooperation by making it difficult for states to overcome information asymmetries. The most important of these asymmetries involves the variables that contribute to a nation’s probability of winning a conflict. Some of these factors may appear in the public domain, such as economic size and growth, defense budgets, and military capacity, but others will fall primarily within the knowledge of a single state.<sup>135</sup>

These asymmetries produce several problems. First, imperfect information will lead to mistakes in bargaining.<sup>136</sup> If states overestimate their expected benefits—and correspondingly underestimate their opponent’s—they will fail to realize that there is a broader range for agreement and may choose to go it alone instead of seeking union.

Second, states will have an incentive to conceal their true expected benefits from an agreement.<sup>137</sup> A party might seek to conceal its abilities in order to take advantage of the other party. Or it might seek to exaggerate its resources in order to bluff its way to a better deal.

Third, states will have few ways to reveal private information.<sup>138</sup> In order to reach an agreement, a state should disclose its true capabilities. This picture will allow the parties to judge more accurately the expected benefits for each side, which should smooth the way to a settlement. But under conditions of anarchy, the parties will have difficulty revealing private information

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132. Fearon, *supra* note 127, at 380–81; Powell, *Commitment Problem*, *supra* note 127, at 179.

133. Powell, *Commitment Problem*, *supra* note 127, at 179.

134. *Id.* at 169.

135. *Id.* at 172–76.

136. Fearon, *supra* note 127, at 393–95.

137. *Id.* at 395–400.

138. *Id.* at 400–01.

in a credible manner. Historical, ethnic, or religious tensions may also make groups doubt others' credibility. One group that may have suffered at the hands of a government dominated by the other group may believe that deception is at work. Unlike in the case with domestic litigation, states cannot reveal information through a third party—such as a federal court—that will provide certainty about the information's accuracy.

Even if states could overcome these informational asymmetry problems, the anarchy of the international system creates a second, more difficult obstacle to cooperation. Full information would allow each party to identify the range of outcomes where both parties benefit and where an acceptable distribution of the surplus of cooperation is achievable. But even with perfect information, states may still refuse to reach a peaceful settlement because of the lack of future enforcement mechanisms. They may understand that they both will be better off by sharing a territory or resource. But nations may not trust each other to abide by the agreement in the future. This problem will prove particularly acute in situations where a settlement changes the status quo between states, where rapid changes are already affecting the balance of power, or where parties are more concerned with relative gains than absolute gains.<sup>139</sup> One nation will find it difficult to trust the other to keep a promise if the other will become even more powerful as a result of the agreement.

Suppose, for example, that at the time the North and South decide to unify, the North holds 55% of the power and the South retains 45%. They agree to establish institutions that give the North a 55–45% advantage in political power to mirror the existing balance. But suppose that the North's 55% advantage in power will grow over time to 65% because the North's population and economy are expected to grow faster than the South's. It will be difficult for the South to trust the North to keep its original commitment to a 55–45 division of power when the North could eventually take advantage of the relative shift in resources in the future to seek even greater gains in political power. The North will have a strong incentive to renege on its deal and pursue a revision of the initial terms. No higher political power can force the North to keep its original promise, even when both North and South have complete information at the time of the agreement.

A constitution may present an opportunity for the North and South to send costly signals that demonstrate their credibility. As scholars of bargaining theory have argued, a costly signal can help reveal that a party will keep its commitment. In international politics, for example, a nation can send a costly signal that it will defend an ally by stationing large military assets in its ally's territory. A party to a private contract can send a costly signal by investing in equipment that has value only if the party completes the deal. In the context of national unification, one group can send a costly signal that it intends to keep its promises by agreeing to a constitution that freezes its political power. In the U.S. Constitution, for example, the North agreed to a

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139. Powell, *Commitment Problem*, *supra* note 127, at 171–72.

structure of government that allowed the states greater sway than a parliamentary democracy would have permitted and thus gave the South an advantage. This sent a costly signal to the South that the North would keep its promises on issues that fell within the jurisdiction of the federal government.

Originalism can help overcome the obstacles to bargaining in two ways. First, it represents another way for the North, in our example, to show its commitment to keeping its political promises. While the constitution embodies an agreement to share political power, the weaker parties may choose not to enter the nation until they are confident that the more powerful parties will keep their promises to share power along the original terms. Interpretation creates another source of disagreement. Parties may worry that others will seek to renegotiate the deal in their favor once they become more powerful thanks to the union. Interpretation may create an opportunity for the more powerful states to break their commitments, and this very possibility may discourage weaker states from agreeing to a union in the first place. Originalism, of course, signals a commitment to the original terms of the deal; its very purpose is to follow the understandings of only those who ratified the constitution. It can help reassure weaker states that interpretation will not serve as a covert means to break the original agreement of union.

In addition, originalism can serve as a costly signal in itself. It not only reassures the parties to the constitution that each of them is committing to the political deal of the union; it is also an expensive means of interpretation that will prevent the more populous states from having their way through majority rule. To the extent that originalism prevents even marginal changes in constitutional understandings, it will work to the disadvantage of the growing states, which would otherwise be able to alter future arrangements to their advantage through simple majority rule. Originalism may not be the best way, from a normative perspective, to interpret the constitution, but it serves a critical purpose by persuading parties to a political union that they can trust each other to keep their promises. From this perspective, originalism would be critical to the ratification of the U.S. Constitution itself.

We need not limit our suggestion about originalism only to structural, power-sharing features of the Constitution. Originalism might contain an important element of aspects of the Constitution's individual rights provisions, such as the Reconstruction Amendments. We can regard these amendments as the peace agreement at the end of the Civil War: the North would allow the South to reenter the Union as long as it provided equal political rights for newly freed slaves. As our analysis has shown, the North and South might have good information on the benefits to both regions of restoring the Union as well as the costs to the South of remaining occupied and outside the federal government. But an obstacle to the bargain would still arise. The North might lack confidence that the South would keep its promise to respect the rights of the freedmen. After all, the South had just fought and lost a war to defend its right to maintain the system of slavery. Of course, one way for the South to show its commitment was by ratifying

the Reconstruction Amendments, which would give the promise of equal rights the force of law. Agreeing to an originalist interpretation, which would look to the understandings of the Reconstruction Congress, would send another costly signal about the South's commitment to obeying the bargain over its reentry into the Union. In this case, originalism would not embody a power-sharing agreement but instead would work to expand individual rights. After the controversy over the 1876 elections, multiple and successive presidential administrations and Congresses reneged on the Reconstruction Amendments' political agreement. One of the many tragedies of *Plessy v. Ferguson*<sup>140</sup> was that it ignored the original understanding of the Fourteenth Amendment's text in favor of contemporary, unwritten notions of constitutional meaning.

#### CONCLUSION

As Amar's readers have come to expect from him, he has produced a tour de force. His book abounds in fertile and ingenious arguments, its lively enthusiasm for the Constitution is contagious, and the writing is at once erudite and accessible. Although this work does not stand on the level of Amar's earlier book, it remains a signal accomplishment in constitutional legal theory.

Nonetheless, the book contains a deep flaw. As Amar's narrative unfolds, it becomes clear that his "unwritten" Constitution deviates widely from the original Constitution. Amar's unwritten Constitution is a Panglossian Constitution, perfectly reconfigured to align with current ideals and policy preferences. This leads to strange anomalies in a work that is otherwise so attentive to history. Thus, Amar can argue that "the original Constitution . . . seemed to condemn a legalized racial hierarchy"—at least if one reads the Bill of Attainder Clause "generously, with idealistic attention to both letter and spirit" (p. 144). Alas, this tendency to idealize is pervasive throughout the work.<sup>141</sup>

Among its many surprises, *Unwritten* explores a new direction for originalism. In Amar's eclectic form, originalism is not confined to constitutional text, framing intention, ratification discourse, and early postadoption practice. He extends the range of legitimate interpretive material to encompass a vast array of sources, including the political and social forces that influenced the text's original adoption and those that are currently mobilized in favor of certain interpretations of it. Historical contingencies that surrounded the ratification of one clause are taken as interpretative clues to the meaning of another. Thus, for example, the presence of the Union Army

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140. 163 U.S. 537 (1896).

141. See Strauss, *supra* note 5, at 1561–62; see also Randy Barnett, *The Mirage of Progressive Originalism*, WALL ST. J., Sept. 7, 2012, at C7 (reviewing *Unwritten*), available at <http://online.wsj.com/articles/SB10000872396390444914904577619763983330558> ("Where Mr. Amar cannot make the written Constitution say what he wants, he can simply appeal to the unwritten Constitution to say the rest. And, judging from this book, the unwritten Constitution just happens to agree with everything Akhil Reed Amar believes is right and good.").



in the South during the ratification of the Fourteenth Amendment becomes an argument for the constitutionality of the draft.<sup>142</sup> But the principles that guide Amar's choice of sources and his selection of relevant materials are unstated and thus lack coherent and discernible limits.

We suggest that a return to a more austere and "original" understanding of originalism would avoid such problems. To be sure, contemporary originalism has undergone searching criticisms since it was advanced in the 1970s. But it has also found capable and sophisticated defenders, and it has proven remarkably resilient through a succession of reformulations. Its normative effects, however, remain controversial. Why should the *original* meaning of the Constitution presumptively decide current interpretations of it? And what if an interpretation that is true to the original meaning simply fails to answer a question that calls for constitutional construction?

Originalists can offer a variety of answers to these normative questions. They can point to the framing and ratification of the Constitution and contemporary beliefs about the government's legitimacy as rooted in these origins. Or they can offer a more pragmatic, less historical justification by highlighting the desirable consequences of following the Constitution's original meaning and the risks of departing from that understanding when the formal rules for amendment are not followed. Or they can make both kinds of arguments at once. We have advanced a different approach here. By encouraging fidelity to the original bargain that created and renewed the Union, originalism can help to keep that Union alive and well.

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142. For criticisms, see Paulsen, *supra* note 5, at 1400–01, and Strauss, *supra* note 5, at 1553.

