

# SURPRISING ORIGINALISM: THE REGULA LECTURE\*

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## I. INTRODUCTION: PRECONCEPTIONS ABOUT ORIGINALISM

My impression is that most Americans believe that they already know everything they need to know about constitutional originalism. Originalism is based on two ideas: (1) the meaning of the constitutional text was fixed at the time each provision was framed and ratified; and (2) courts and officials should be bound by that fixed meaning.<sup>1</sup> These ideas

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1. This Article is part of a larger project that is in progress. The treatment here is informal and brief. The larger project is longer, formal, and more theoretical. See Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, CONST. COMMENT. (forthcoming 2018); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621 (2018); Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017); Lawrence B. Solum, *The Fixation Thesis: The Original Meaning of the Constitutional Text*, 91 NOTRE DAME L. REV. 1 (2015); Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111 (2015); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 480 (2013); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479 (2013); Lawrence B. Solum, *Construction and Constraint*, 7 JERUSALEM REV. LEG. STUD. 17, 22 (2013); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2011); Lawrence B. Solum, *What Is Originalism?* in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION (Grant Huscroft and Bradley W. Miller eds., Cambridge University Press, 2011); Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 440 (2009); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923-981 (2009). In addition to the published and forthcoming articles, works in progress include Lawrence B. Solum, *The Public Meaning Thesis* (unpublished work-in-progress, August 20, 2105); Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (unpublished manuscript, March 24, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2940215](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215). The earliest version of the project was developed in a work that is still in progress, *Semantic Originalism*, November 22, 2008, <https://papers.ssrn.com/>

are simple but many Americans may be surprised to learn what originalists today actually think about many topics, including the nature of original meaning, the implications of originalism for a variety of issues, and the justifications for originalism. Even sophisticated lawyers may be surprised by the reality of contemporary originalism. Today's "public meaning originalism" is not yesterday's "doctrine of original intent."

Although Americans revere the Constitution,<sup>2</sup> they disagree about originalism.<sup>3</sup> Conservatives and libertarians are sure that originalism is a necessary corrective to the liberal excesses of the Warren Court.<sup>4</sup> Progressives have an almost unshakeable belief that originalism is a right-wing ideology that seeks to legitimize conservative outcomes by invoking the prestige of the Founding Fathers.<sup>5</sup> One distinguished legal scholar has gone so far as to suggest that using the word "originalism" to describe a theory that does not invariably lead to conservative outcomes is Orwellian.<sup>6</sup> On both the left and the right, minds are made up, because most of us are pretty sure that there is nothing surprising to be learned about originalism.

My aim in this year's Regula Lecture is to provide some food for thought. Contemporary originalist constitutional theory and practice turn out to be surprising—in fact, it would not be an exaggeration to say that originalism is very surprising indeed. Unless you have been following

sol3/papers.cfm?abstract\_id=1120244.

2. Preston D. Hutson, *The Oxford Handbook of the U.S. Constitution* Edited by Mark Tushnet, Mark A. Graber and Sanford Levinson, Oxford University Press, 2015, HOUS. LAW., March/April 2016, at 42 ("Americans revere the Constitution as a sacred text justifying their continued belief in a Constitutional faith.").

3. See generally Neal Devins and Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 U. PA. J. CONST. L. 455, 456-57 (2010); Ryan D. Walters, *Fragmenting the Judiciary: Shifting Implementation of Supreme Court Doctrine from Federal Courts to State Courts*, 42 CAP. U. L. REV. 951, 952 (2014).

4. Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485, 556 (2017) ("The old originalism was primarily a response to the perceived excesses of the Warren Court."); JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 66-67, 92-110 (2005); John Calhoun, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L.J. 484, 514 (2014) ("Textualism and originalism developed in part in response to discomfort with the perceived excesses of the Warren Court.").

5. See Calvin TerBeek, *Originalism's Obituary*, 2015 UTAH L. REV. 29, 33-5 (2015); Robert Post and Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 549 & 567 (2006); Sheldon D. Pollack, *Constitutional Interpretation as Political Choice*, 48 U. PITT. L. REV. 989, 1003 (1987); James E. Fleming, *The New Originalist Manifesto*, 28 CONST. COMMENT. 539, 544 (2012); see also Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL'Y 29, 38 (2011).

6. Martin H. Redish and Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1509 (2012).

constitutional jurisprudence very closely, it is likely that much of what you believe about originalism is inaccurate, incomplete, or just plain wrong.

This article takes the reader on a guided tour of contemporary originalism. Along the way, I will engage in speculation about the original meaning of various constitutional provisions. Let me be crystal clear: this Article does not reach conclusions about the original meaning of any particular constitutional provision. Reaching firm conclusions requires meticulous research and analysis that I have not undertaken and that could only be presented in an extensive treatment—a long article on each topic. Rather, I am presenting my tentative views, informed by long experience with originalism and a deep familiarity with the constitutional text, but not by rigorous application of the best originalist methodology.<sup>7</sup> I am prepared to be surprised once the research has been done. Indeed, that is the whole point: originalism as it is practiced today does not fit our preconceptions. Originalism can and does surprise us—once we know what originalism really is.

This Article discusses three ways in which originalism is surprising: *Surprising theory* is the topic of Part I.<sup>8</sup> *Surprising implications* are explored in Part II.<sup>9</sup> *Surprising justifications* are the subject of Part III.<sup>10</sup> The Conclusion reflects on the implications of surprising originalism.

## II. A SURPRISING THEORY

The word “originalism” was first introduced into the vocabulary of American constitutional theory in 1981 by law professor Paul Brest.<sup>11</sup> But the core originalist ideas predated Brest’s neologism.<sup>12</sup> From the very beginning, American constitutional jurisprudence has recognized that the *meaning* of the constitutional text does not change; the ideas<sup>13</sup>

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7. See Solum, *Originalist Methodology*, *supra* note 1.

8. See *infra* Part I, p. 4.

9. See *infra* Part II, p. 20.

10. See *infra* Part III, p. 42.

11. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

12. Brest wrote after critics of the Warren Court and “living constitutionalism” were beginning to flesh out the ideas that later gelled into contemporary originalist constitutional theory. This early stage of originalist theorizing has been called “Proto-Originalism.” We can call these early versions of originalism “Proto-Originalism.” See Solum, *Originalism and Constitutional Construction*, *supra* note 1, at 462–63.

13. The word “ideas” has philosophical connotations that I do not intend to convey here. The word “content” would be more precise, but that word may sound odd to readers who are not familiar with contemporary philosophy of language or theoretical linguistics. The content of a text or oral communication is the set of concepts and propositions conveyed. Thus, the public “communicative

communicated by the text are fixed at the time each provision of the constitution is set down on paper.<sup>14</sup> Further, the fixed meaning of the constitutional text is not mere advice: it is binding! Judges do not have the power to promulgate “stealth amendments” to the Constitution in the guise of “interpretation.”<sup>15</sup> The constitution should constrain judges—it is not a blank check. Nothing about these ideas should be surprising: I believe it is quite likely that most of the bar and bench would agree with the core originalist ideas of fixation and constraint, although things might be different in the rarefied atmosphere of the ivory tower and the august chambers of the highest courts.

#### A. *The Wrong Question: What Would James Madison Do?*

Many Americans who agree with the core originalist ideas of fixation and constraint disagree with “originalism” as they understand the word. Somewhere along the way, the perception of originalism by the bar and bench, the general public, and even most law professors became distorted. In part this is because some of the early critiques of the Warren Court emphasized what are called “the original intentions of the framers.”<sup>16</sup> The early reaction to originalism in the academy was swift: the whole idea of “original intent” makes no sense<sup>17</sup>—and even if it did make sense, we wouldn’t want to ground our constitutional jurisprudence on the thoughts of white property-owning males who lived in a world that is very different than our own.<sup>18</sup>

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content” of the constitutional text is the set of propositions conveyed to the public by the text at the time each provision was framed and ratified.

14. This idea is the Fixation Thesis. See Lawrence B. Solum, *The Fixation Thesis: The Original Meaning of the Constitutional Text*, 91 NOTRE DAME L. REV. 1 (2015). Michael Dorf argues that fidelity to the constitution does not require adherence to the fixed original meaning of the constitutional text but could instead be fidelity to the contemporary meaning of the text. Despite this distinguished company. Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2040–44 (2012). This argument does not deny the Fixation Thesis, but it does challenge the constraint principle. See *infra* note 15.

15. This idea is the Constraint Principle. See Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (unpublished manuscript, March 24, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2940215](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215).

16. These early forms of originalism could be called “Proto-Originalism.” See Solum, *Originalism and Constitutional Construction*, *supra* note 1, at 462.

17. In addition to Brest, *supra* note 11, there were many other prominent critics of the intentionalist approach. See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 470 (1981).

18. R. George Wright, *Originalism and the Problem of Fundamental Fairness*, 91 MARQ. L. REV. 687, 693 (2008); Philip C. Kissam, *Explaining Constitutional Law Publicly, Or, Everyman’s Constitution*, 71 U.M.K.C. L. REV. 77, 89 (2002); Harold Anthony Lloyd, “Original” Means Old,

Indeed, the notion of the original intentions of the framers has been parodied by equating originalism with the question, “What would James Madison do?”<sup>19</sup> However, that is not the question that contemporary originalists ask. More than thirty years ago, the mainstream of originalist constitutional theory turned away from intentionalism and toward textualism. One of the most important events in this turn was a talk given by Justice Scalia, in which he urged originalists to “change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning.”<sup>20</sup>

Indeed, almost all of the actual development of originalism after the publication of Brest’s critique has assumed that we should not be asking what James Madison would do, or what he would have thought about contemporary problems, or what the members of the Philadelphia Convention believed about the purposes, goals, or expected applications of the Constitution that they proposed for ratification. By the 1990s, it was clear that there was a “New Originalism” that was concerned with the original public meaning of the constitutional text. This new originalism was first elaborated by Professor Gary Lawson,<sup>21</sup> followed by many others including, Professors Steven Calabresi and Saikrishna Prakash.<sup>22</sup>

Where did the idea that originalists want to know what would James Madison do come from? One source may be the early prominence of Raoul Berger, whose book *Government by Judiciary*, included a chapter entitled “Why the Original Intention?.”<sup>23</sup> Berger was characterized by Paul Brest as a “strict intentionalist” and originalist in 1981, the same year that Brest coined the word “originalism.”<sup>24</sup> Attorney General Edwin Meese promoted the doctrine of original intent in a series of prominent speeches.<sup>25</sup>

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“Original” Means New: An “Original” Look at What “Originalists” Do, 67 NAT’L LAW. GUILD REV. 135, 149 (2010).

19. See, e.g., Lee J. Strang, *How Big Data Can Increase Originalism’s Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181, 1190 (2017); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 382 (2013); Pamela S. Karlan, *Constitutional Law as Trademark*, 43 U.C. DAVIS L. REV. 385, 396 (2009); Carl T. Rowan, *Equality As A Constitutional Concept*, 47 MD. L. REV. 10, 12 (1987).

20. Antonin Scalia, *Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C.* (June 14, 1986), in ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101 at 106 (U.S. Dep’t of Justice ed., 1987).

21. See Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992).

22. See Steven G. Calabresi and Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 553 (1994).

23. RAOUL BERGER, *GOVERNMENT BY JUDICIARY*, ch. 21 (rev. ed. 1997).

24. Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1089 (1981). The first use of the word is in Brest, *The Misconceived Quest*, *supra* note 11.

25. See Edwin Meese III, *Speech Before the American Bar Association* (July 9, 1985),

Moreover, the idea of “original intentions” has never entirely disappeared. Following Brest’s critique, intentionalism was defended by Richard Kay<sup>26</sup> and there is now a “new intentionalism” that is based on some very sophisticated work in the philosophy of language. The new intentionalism is based on the idea that the drafter of a constitutional provision has a “communicative intention”—the meaning the drafter of each constitutional provision intended to convey to readers.<sup>27</sup>

This new version of intentionalism avoids many of the problems of the old version: it does not require that we identify the concrete policy preferences of the framers. One of the new intentionalism’s chief virtues is that it almost always converges with public meaning originalism.<sup>28</sup> The drafters were writing for the public. The constitutional text was drafted to be read by “We the People.” This idea was eloquently expressed by the great Supreme Court Justice, Joseph Story, in his magisterial *Commentaries on the Constitution of the United States*:

In the first place, then, every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness, or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and

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*reprinted in The Great Debate: Interpreting Our Written Constitution* (Paul G. Cassell ed., 1986); *see also* Edwin Meese III, *The Case for Originalism*, THE HERITAGE FOUNDATION, June 6, 2005, <https://www.heritage.org/commentary/the-case-originalism> [<https://www.heritage.org/commentary/the-case-originalism>]; Lynette Clemetson, *Meese’s Influence Looms in Today’s Judicial Wars*, N.Y. TIMES, Apr. 17, 2005, <https://www.nytimes.com/2005/08/17/politics/meeses-influence-looms-in-todays-judicial-wars.html> [<https://perma.cc/23M5-B2E9>].

26. Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988).

27. To be more precise, the new intentionalism is the view that the original meaning of the constitutional text is the meaning that the drafters intended to convey to their intended readers via the reader’s recognition of the drafters’ communicative intentions. This idea is based on the work of Paul Grice. *See* PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 3–143 (1989). For a Gricean approach to original intentions originalism, *see* Larry Alexander, *Simple-Minded Originalism* in *THE CHALLENGE OF ORIGINALISM* 87 (Grant Huscroft and Bradley W. Miller eds. 2011); *see also* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 72 n.7 (2006); Jeffrey Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, 42 SAN DIEGO L. REV. 493, 510 n.57 (2005).

28. Because the constitution was drafted for “We the People,” the meaning that the authors of the constitutional text intended to convey to the public (the intended readers) will be the public meaning in the absence of some kind of linguistic mistake. For this reason, the new intentionalism converges with public meaning originalism in almost all cases.

fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss.<sup>29</sup>

Because the drafters of the constitutional text wrote for the public, the meaning that they intended to convey was the public meaning—the *original public meaning of the constitutional text*.

The now old-fashioned doctrine of original intent played an important role in the early history of originalism. That is why the mistaken belief that originalism is about the original intent of the framers is understandable—even if it is about 30 years out of date.

*B. The Right Question: What Is the Public Meaning of the Constitutional Text?*

“What would Madison do?” is the wrong question. Here is the right question: “What was the public meaning of the constitutional text?” This is *public meaning originalism*.

In “What *was* the public meaning?”—the “was” is important. Words change meaning over time: this is the well-known phenomenon of linguistic drift or semantic shift.<sup>30</sup> The word “satellite” originally meant “bodyguard” but Johannes Kepler used “satellite” metaphorically to describe the moons of Jupiter and Jules Verne borrowed the metaphor to apply it to a fictional man-made device orbiting the Earth. Verne’s usage was borrowed to apply to Sputnik.<sup>31</sup> And now the primary meaning of satellite is “a manufactured object or vehicle intended to orbit the earth, the moon, or another celestial body” and the original sense of bodyguard is no longer in use.<sup>32</sup> English is like a living organism; it grows and changes.

What does linguistic drift have to do with the constitution? Consider the phrase “domestic violence,” which appears in Article IV of the Constitution: “The United States shall guarantee to every state in this

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29. JOSEPH L. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §451 (1833); see also *State of Rhode Island v. Palmer*, 253 U.S. 350, 398 (1920) (stating, “in the exposition of statutes and constitutions, every word ‘is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify or enlarge it,’ and there cannot be imposed upon the words ‘any recondite meaning or any extraordinary gloss.’”) (citing Story).

30. See SOL STEINMETZ, SEMANTIC ANTICS: HOW AND WHY WORDS CHANGE MEANING 49–50 (Random House 2008).

31. See *id.* at 200.

32. MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/satellite> [perma.cc/S5PM-8GCH] (last visited May 21, 2018).

union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.”<sup>33</sup> Today the phrase “domestic violence” refers to “‘intimate partner abuse,’ ‘battering,’ or ‘wife-beating,’” and it is understood to be “physical, sexual, psychological, and economic abuse that takes place in the context of an intimate relationship, including marriage.”<sup>34</sup>

But this twenty-first century meaning of “domestic violence” was unknown in the late eighteenth century when Article IV was drafted. It would simply be a linguistic mistake to interpret the domestic violence clause of Article IV of the Constitution of 1789 as referring to spouse or child abuse. The anachronistic reading of “domestic violence” would be mistaken because meaning (or more technically semantic content) is fixed at the time when a text is written.<sup>35</sup> When we interpret the constitutional text, we seek the original meaning and not some new meaning that is a product of a linguistic accident.

In the case of “domestic violence,” hardly anyone is tempted to substitute the contemporary meaning for the original meaning—although a whole law review article has been written that tries to do just that.<sup>36</sup> Why not? Because the surrounding context of Article IV plus a bit of knowledge about the historical circumstances in which the constitution was drafted are sufficient to steer us to the original meaning. We can then intuitively grasp that the original meaning is *the* correct meaning of the constitutional text. When a law professor tries to tell us that “domestic violence” could mean “violence in the family,” we rebel! We know that the phrase “domestic violence” occurring in close proximity to the word “invasion” in an eighteenth-century document dealing with the basic structure of government and the relationship of the states to each other

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33. U.S. Constitution, Art. IV, Cl. 4 (“The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.”)

34. *Glossary*, HUMAN RIGHTS WATCH, <http://www.hrw.org/reports/2003/nepal0903/3.htm> [<https://perma.cc/G9BP-FKPW>] (visited March 29, 2008); see Emily J. Sack, *The Domestic Relations Exception, Domestic Violence, and Equal Access to Federal Courts*, 84 WASH. U. L. REV. 1441 (2006).

35. Jack Balkin introduced me to this example. See Lawrence B. Solum, *Blogging from APSA: The New Originalism*, Legal Theory Blog (Sept. 3, 2007), <http://lsolum.typepad.com/legaltheory/2007/09/bloggng-from-a.html> [<https://perma.cc/6CHC-JPEF>] (live blogging at the meeting of the American Political Science Association and describing Balkin’s presentation); JACK M. BALKIN, *LIVING ORIGINALISM* 37 (2011).

36. Mark S. Stein, *The Domestic Violence Clause in “New Originalist” Theory*, 37 HASTINGS CONST. L.Q. 129 (2009).

and to the national government refers to things like “riots” and “rebellions” within the boundaries of a state. Our intuitive reaction to clever arguments that Article Four referred to spousal abuse is that these verbal gymnastics are a form of sophistry.<sup>37</sup>

No one is much surprised by the news that “domestic violence” in Article IV does not mean “spousal abuse,” but here is an example that may surprise you. The Seventh Amendment to the Constitution uses the word “dollar”:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.<sup>38</sup>

Contemporary readers are likely to assume that the word “dollar” refers to the Federal Reserve Notes. They look like this:



A law student note has been written about the Seventh Amendment’s “twenty-dollar clause”—based on the assumption that the word “dollar” had the same meaning in 1791 that it does today, creating a problem because inflation has reduced the purchasing power of the paper-money legal-tender dollar.<sup>39</sup>

But think about it, national legal-tender paper currency did not exist in the United States in 1791:<sup>40</sup> there were no Federal Reserve Notes.<sup>41</sup> The

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37. Mortimer Sellers, *Think of Your Latin When Hurling Accusations*, NAT’L L. J., Feb. 9, 1998, at A1g (“Lawyers have earned a bad name for sophistry and manipulating language to mislead to unwary.”).

38. U.S. CONST. amend. VII.

39. See Note, *The Twenty Dollars Clause*, 118 HARV. L. REV. 1665, 1672 (2005).

40. The “greenback” was created by the Legal Tender Act of 1862, 12 Stat. 345.

41. For a very brief recounting of the history, see Christopher M. Bruner, *The Changing Face of Money*, 30 REV. BANKING & FIN. L. 383, 389–94 (2010); see also Ali Khan, *The Evolution of Money: A Story of Constitutional Nullification*, 67 U. CIN. L. REV. 393 (1999); Edwin Vieira, Jr., *The Forgotten Role of the Constitution in Monetary Law*, 2 TEX. REV. L. & POL. 77 (1997); Ajit V. Pai, *Congress and the Constitution: The Legal Tender Act of 1862*, 77 OR. L. REV. 535 (1998).

word dollar almost certainly referred to the Spanish silver dollar weighing 416 grains and possibly other coins that were called “dollars” with closely approximate silver content.<sup>42</sup> Traces of this meaning of dollar persisted until 1965, when Congress enacted legislation ending the redeemability of silver certificates for silver bullion.<sup>43</sup>

This is an example of a “dollar” as that term was understood by the public in 1791:



Note the date and the figure in profile. It is Charles the Fourth, the king of Spain. This is a Spanish silver dollar, also known as a “Peso de Ocho” or “piece of eight.”<sup>44</sup>

The “greenback,” precursor to the modern Federal Reserve Note, was not created until decades later and was the subject of much controversy, cumulating in the back and forth of the *Legal Tender Cases*,<sup>45</sup> with the Supreme Court first invalidating and then upholding legal-tender paper currency. There is a long and complicated history that led to the emergence of the contemporary “dollar,” which was tied to the value of silver until a few decades ago.<sup>46</sup>

Contemporary readers of the Seventh Amendment may have a strong

42. In 1791, the word “dollar” likely referred to the Spanish silver dollar, as congressional acts from 1786 and 1792 indicate that the “dollar” was the Spanish silver dollar. *See* The Coinage Act of April 2, 1792, 1 Stat. 246 § 9 (1792) (enabling Congress to coin “dollars or units—each to be the value of a Spanish milled dollar.”); H.R. Rep. No. 23-278 at 65 (1834) (noting the Articles of Confederation Congress used the Spanish silver dollar standard in 1786); *see also* Sumner, *The Spanish Dollar and the Colonial Shilling*, 3 AMER. HIST. REV. 607 (1898).

43. UNITED STATES DEP’T OF THE TREASURY, SILVER CERTIFICATES, <https://www.treasury.gov/about/history/collections/Pages/silver.aspx> [https://perma.cc/E2LD-R4PJ] *See generally* ARTHUR L. & IRA S. FRIEDBERG, PAPER MONEY OF THE UNITED STATES (2010).

44. Shepard Pond, *The Spanish Dollar: The World’s Most Famous Silver Coin*, 15 BULLETIN OF THE BUSINESS HISTORICAL SOCIETY 12–6. (1941).

45. *Hepburn v. Griswold*, 75 U.S. 603 (1869) *overruled in part by* *Legal Tender Cases*, 79 U.S. 457 (1870); *Knox v. Lee*, 79 U.S. 457 (1870); *Juilliard v. Greenman*, 110 U.S. 421 (1884).

46. For sources on the history, see *supra* note 41.

linguistic intuition that “dollar” meant then what it means today, but that intuition is incorrect. The eighteenth century “dollar” was a hard-money coin with a value that depended on its silver content and not on a federal statute that required that pieces of paper be accepted as payments.<sup>47</sup> The primary referent of the term “dollar” in the Seventh Amendment is the Spanish silver dollar or more precisely any coin with silver content approximately equal to that of that “dollar.”

The examples of “domestic violence” and “dollar” illustrate the importance of looking for the *original* public meaning of the constitutional text. Some of the words and phrases in the constitutional text have the same meaning today as they did when they were written. But some don’t. And for that reason, we must always check our linguistic intuitions against the historical evidence.

What would James Madison do is the *wrong* question. The *right* question is: “What was the *public* meaning of the constitutional text?” The word “public” is crucial. Public meaning originalism is a form of textualism: we are looking for the meaning communicated to the public by the text.<sup>48</sup> Public meaning is a function of both the semantic meaning of the words and phrases and the context in which they occur.<sup>49</sup> The public meaning of the text is the meaning that was conveyed to the public at the time each provision was framed and ratified—not the literal meaning (just the words) but the full meaning (including the role of context in resolving ambiguities and enriching the text).

I am sure that many readers of this Article are not surprised to learn that original intentions originalism has given way to public meaning originalism. After all, there has been a lot of talk about “public meaning originalism,” especially in the last few years. It came up in the confirmation hearings for Neil Gorsuch.<sup>50</sup> Because Justice Scalia was a very well known figure, even among the general public, his advocacy of public meaning originalism may well have penetrated public consciousness. The constitutional cognoscenti *should* know about public meaning, and most of them do—although surprisingly, even sophisticated writers still believe that originalism is all about original intent.<sup>51</sup>

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47. Solum, *Originalist Methodology*, *supra* note 1, at 281–82.

48. More precisely, public meaning originalism aims to recover the communicative content of the constitutional text. *See supra* note 13.

49. For a fuller explanation of the idea of “public meaning,” *see* Solum, *The Public Meaning Thesis*, *supra* note 1.

50. Lawrence B. Solum, *Statement Presented at the Hearings on the Nomination of Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States*, 31 DIRITTO PUBBLICO COMPARATO ED EUROPEO ONLINE 575 (2017).

51. Among the many examples is Linda Greenhouse, *Justice Scalia’s Fading Legacy*, N.Y.

Even I myself was not fully aware that the transition from intent to public meaning occurred in the 1980s until about twenty years later. I had learned about “originalism” as a law student, judicial clerk, and in the first year or two of my teaching career. I knew that originalism was dead. Not just dead, but dead dead. Dead, dead, dead! Brest killed it. Dworkin drove a wooden stake through its heart. Joe Biden demolished it at the Bork hearings. It would not rise again.

But originalism is back! Not “Zombie Originalism,” propped up by a motley crew of Neanderthal true believers. Originalism is back at the center stage of debates about the Constitution—in the public square, in the courts, and in the legal academy. And the move to public meaning is the reason that originalism is back.

What is “public meaning” and how do we discover it? And now, another surprise! Contemporary public meaning originalists do not believe that we can reliably discover the public meaning of constitutional text by looking the words up in Noah Webster’s dictionary of 1828<sup>52</sup> or Samuel Johnson’s dictionary of 1755.<sup>53</sup> Those are the best two dictionaries from the period, but they both have serious problems.

The first problem is that neither dictionary was compiled at the right time. Samuel Johnson’s dictionary was compiled some three decades before the Philadelphia Convention and it reports on usage in England and not in the United States. Noah Webster’s dictionary was published about four decades after the Philadelphia Convention, and it may well have been influenced by debates about the Constitution.

The second problem concerns the accuracy and completeness of the dictionaries. Either dictionary could misreport the conventional semantic meanings of its era. Either dictionary could omit a meaning that was the relevant public meaning of a constitutional provision once context is taken into account. Lots of words, including some words used in the Constitution, are omitted from these dictionaries. Neither dictionary provides primary evidence of the patterns of usage that constitute meaning.

Thus, originalists have begun to look for a better way to investigate the meaning of words and phrases from the late eighteenth century and

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TIMES, March 15, 2018, <https://www.nytimes.com/2018/03/15/opinion/justice-antonin-scalia-legacy.html> [<http://perma.cc/GG9D-77AN>] (former Supreme Court reporter for the *New York Times* and lecturer at Yale Law School stating, “Justice Scalia’s view [was] that the only legitimate basis for interpreting the Constitution is the original intent of its framers . . .”).

52. JOSHUA KENDALL, *THE FORGOTTEN FOUNDING FATHER* (2010).

53. See WALTER JACKSON BATE, *SAMUEL JOHNSON* Ch. 15 (New York: Harcourt Brace Jovanovich, 1975).

from the mid-nineteenth century for the Reconstruction Amendments. It turns out that those within the discipline of linguistics have been working on this problem for quite some time. Ideally, we want to examine primary evidence of usage. Forgive me for using a bit of jargon: we are looking for the “conventional semantic meanings” of the words and phrases used in the constitutional text. Until the 1990s, this involved laborious searches through old texts and the transcription of examples: this is the method that produced the magnificent Oxford Dictionary of the English Language. But this approach has obvious limitations.

The surprising new approach is called “corpus linguistics.” This is big data semantics. The use of this technique was pioneered by Associate Chief Justice Thomas Lee of the Utah Supreme Court.<sup>54</sup> Corpus lexicography was utilized by the Supreme Court of Michigan in *People v. Harris*.<sup>55</sup> And there is a growing body of legal scholarship exploring and using corpus techniques,<sup>56</sup> including an important article co-authored by

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54. *State v. Rasabout*, 2015 UT 72, ¶ 39, 356 P.3d 1258, 1271 (Lee, A.C.J., concurring in part and concurring in the judgment); *see also* Note, *State v. Rasabout*, 129 HARV L REV 1468 (2016). Justice Lee’s law clerk, Stephen Mouritsen, should be credited with the introduction of corpus lexicography to the theory of statutory and constitutional interpretation. *See* Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics As an Empirical Path to Plain Meaning*, 13 COLUM. SCI. & TECH. L. REV. 156 (2012); Stephen C. Mouritsen, *The Dictionary Is Not A Fortress: Definitional Fallacies and A Corpus-Based Approach to Plain Meaning*, 2010 BYU. L. REV. 1915, 1915 (2010). At about the same time as Mouritsen’s article, Neal Goldfarb authored a groundbreaking brief, *Brief for the Project on Government Oversight, the Brechner Center for Freedom of Information, and Tax Analysts as Amici Curiae in Support of Petitioners*, FCC v. AT&T, Inc. The brief is available at : [https://www.americanbar.org/content/dam/aba/publishing/preview/publiced\\_preview\\_briefs\\_pdfs\\_09\\_10\\_09\\_1279\\_PetitionerAmCuPOG\\_O\\_BrechnerCtr\\_andTaxAnalystsnew.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_1279_PetitionerAmCuPOG_O_BrechnerCtr_andTaxAnalystsnew.authcheckdam.pdf).

55. *People v. Harris*, 499 Mich. 332, 347, 885 N.W.2d 832, 838–39 (2016):

Keeping in mind that we must interpret the word “information” as used in the DLEOA “according to the common and approved usage of the language,” we apply a tool that can aid in the discovery of “how particular words or phrases are actually used in written or spoken English.” The Corpus of Contemporary American English (COCA) allows users to “analyze [ ] ordinary meaning through a method that is quantifiable and verifiable.”

*Id.*; *see also* Am. Bankers Ass’n v. Nat’l Credit Union Admin., No. CV 16-2394 (DLF), 2018 WL 1542049, fn. 5 (D.D.C. Mar. 29, 2018) (“The database, called the Corpus of Historical American English, is a giant repository of text that houses more than 400 million words collected from fiction, non-fiction, magazines, and newspapers published from 1810 to 2017. A search at [corpus.byu.edu/coha](http://corpus.byu.edu/coha) for “rural district” shows a dramatic decline in usage beginning around 1950.”)

56. *See, e.g.*, Lee J. Strang, *How Big Data Can Increase Originalism’s Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181 (2017); Lawrence M. Solan, *Can Corpus Linguistics Help Make Originalism Scientific?*, 126 YALE L.J. FORUM 57 (2016); James C. Phillips, Daniel M. Ortner, Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. FORUM 20 (2016); Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus*

Justice Lee and Stephen Mouritsen.<sup>57</sup> The corpus approach has recently been applied<sup>58</sup> to a case pending before the United States Supreme Court that hinges on the meaning of the phrase “officer of the United States” in the Appointments Clause, *Lucia v. SEC*.<sup>59</sup>

Corpus linguistics provides a rigorous data-driven approach to constitutional semantics. It allows us to identify the range of possible meanings of the various words and phrases that make up the constitutional text. Sometimes that is the end of the matter. Some of the words and phrases that comprise the constitutional text may be unambiguous, having one and only one possible meaning. But this is actually rare. When you look up a word in the dictionary, you are likely to find multiple definitions—corresponding to multiple meanings. So, the next step in the determination of original public meaning is disambiguation: which of the possible meanings was actually communicated to the public?

This brings us to the role of context. Again, there are some surprises. Even very sophisticated scholars and judges may make the mistake of equating originalist “textualism” with “literalism.” Thus, originalism may be criticized for being “acontextual”<sup>60</sup> for ignoring the role of context in the production of meaning. Nothing could be further from the truth.

Originalism has always been concerned with context. Serious applied originalism has always involved exhaustive historical research that attempts to recreate the context in which the constitutional text was written. And recent constitutional theory has labored hard to provide the theoretical foundations that connect historical context to original public meaning.

Lawyers intuitively know that the full “meaning” of writing is not reducible to its literal meaning. This same insight can be restated using the vocabulary of linguistics: the communicative content of a written text

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*Linguistics*, 25 B.U. PUB. INT. L.J. 101 (2016); D. Carolina Núñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 BYU L. REV. 1517 (2013).

57. Thomas R. Lee and Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L. J. 788 (2018).

58. See Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 453 (2018); James Cleith Phillips, Jacob Crump, and Benjamin Lee, *Investigating the Original Meaning of ‘Officers of the United States’ with the Corpus of Founding-Era American English* (unpublished manuscript) (March 24, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3126975](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126975).

59. *Raymond J. Lucia Companies, Inc. v. Sec. & Exch. Comm’n*, 832 F.3d 277, 283 (D.C. Cir. 2016), reh’g en banc granted, judgment vacated (Feb. 16, 2017), on reh’g en banc, 868 F.3d 1021 (D.C. Cir. 2017), cert. granted sub nom. *Lucia v. S.E.C.*, 138 S. Ct. 736 (2018).

60. See Aviva Orenstein, *Sex, Threats, and Absent Victims: The Lessons of Regina v. Bedingfield for Modern Confrontation and Domestic Violence Cases*, 79 FORDHAM L. REV. 115, 159 (2010) (criticizing “Justice Scalia’s atomized, acontextual originalism”).

is richer than its semantic meaning. Where does the “extra” meaning come from?

First, something obvious: context allows us to resolve ambiguities. The Constitutional text uses the word “Senate”: without consideration of context, that word could refer to the Roman Senate or the Senate of University College, London. But in context, it is clear that the word “Senate” refers to one of the two houses of Congress—the United States Senate. Contextual disambiguation is one of the keys to the recovery of public meaning.

Second, something surprising: context enriches meaning—it adds new meaning in surprising ways. There is a fancy name for this: “pragmatic enrichment.” What is that? Let’s start with some simple examples:

- “Jack and Jill are married.” Ordinarily when we say this, we communicate more than we literally said. Jack and Jill are married—to each other. The “to each other” is unstated but implicit in what has been said. The fancy name for this is “implicature.”<sup>61</sup>
- “Bob is no longer the dean.” When you say this, you also communicate what is called a “presupposition.” Bob was once the dean.
- Someone writes a letter of recommendation for a former student who is applying to be a Supreme Court Clerk. The letter says, “Ann was punctual, and she regularly attended class. I recommend her.” And that is all the letter says. Of course, this letter communicates another message: don’t hire Ann! The technical name for this kind of enrichment is “implicature.”

The Constitution is full of implicatures: like many statutes, the Constitution frequently omits explicit reference to geographic scope, but most of its provisions apply only to the United States—the missing “in the United States” is an implicature. One of the most famous examples of presupposition is the Ninth Amendment. It says, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>62</sup> The text does not explicitly say that there are any “rights . . . retained by the people” but nonetheless communicates the existence of such rights.

Even sophisticated constitutional scholars may not be aware of a

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61. Note that “implicature” is spelled differently than the related term “implicature.”

62. U.S. CONST. amend. IX.

linguistic phenomenon that is called “modulation.”<sup>63</sup> We can actually change the meaning of a word by using it in a way where the new meaning becomes clear. For example, the Recess Appointments Clause in the United States Constitution uses the phrases “recess of the Senate” and “session of the Senate.” Literally, a recess of the Senate could be a break of any kind. In fact, Noah Webster’s dictionary gave the following as the sixth definition of “recess”: “Remission or suspension of business or procedure; as, the house of representatives had a recess of half an hour.”<sup>64</sup> So, the President could make recess appointments while the Senate was at lunch. But that is probably not the meaning of “recess of the Senate.” The Constitution juxtaposes “recess” and “session.” Here is the language: “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”<sup>65</sup> Recess and session are opposed to one another in a way that communicates a new and special meaning of “recess” that is limited to the period between sessions.

You may be surprised by the fact that originalist scholars and judges have engaged in deep and serious study of linguistics and the philosophy of language. Of course, legal scholars have done interdisciplinary work for decades: the law and economics movement has been the most prominent example. We should not be surprised that twenty-first century originalists are using the theories and empirical methods of linguistic science to facilitate the rigorous and objective investigation of the original meaning of the constitutional text.

### III. SOME SURPRISING IMPLICATIONS

Enough theory! Let’s get down to brass tacks. Does originalism have surprising implications for the way that cases will be decided?

#### A. *The Surprising Myth: Originalism is an Inherently Conservative Judicial Ideology*

Let’s start with the myth: originalism is an inherently conservative judicial ideology.<sup>66</sup> This myth did not come out of nowhere; it was not made up out of whole cloth. The rise of originalism was associated with

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63. For the exceptions, see Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 288-91(2017); Lee and Mouritsen, *Judging Ordinary Meaning*, *supra* note 57 at 816 n.126;

64. MERRIAM-WEBSTER, <http://webstersdictionary1828.com/Dictionary/recess> [https://perma.cc/J25Z-AV2H] (last visited May 21, 2018).

65. U.S. CONST. art. II, § II

66. *See supra* note 5.

conservative critiques of the Warren Court.<sup>67</sup> But it is one thing to identify conservatism as part of the “origins story” of originalism. It is quite another to say that originalist constitutional theory itself is inherently conservative.

In fact, it would be quite surprising if originalism had contemporary conservative political ideology baked into its DNA. Critics of the Warren Court could have taken a quite different path than originalism: they could have argued that living constitutionalism was a good thing, but that the court should be packed with hardline conservatives who will translate their policy agenda into constitutional law. What a counterproductive move that would have been—with no political appeal to moderates of either party. Instead, the critique focused on the rule of law and democratic legitimacy. The Supreme Court was acting lawlessly, because it was ignoring the original meaning of the constitutional text. The Court was acting undemocratically, because it was striking down actions by democratically elected legislators—in cases where the text of the Constitution did not so require. In my opinion, it seems highly likely that these lines of criticism were sincere, but they were also attractive to advocates of originalism because they were more effective, both strategically and rhetorically.<sup>68</sup> Strategically, an appeal to the rule of law was more likely to succeed with moderates. Rhetorically, the rule of law and democratic values are more appealing than an open call to politicize the judiciary.

This does not mean that conservative critics of the Warren Court did not care about results. Obviously, they did. But it does mean that they became committed to a theory that is ideologically neutral at its core. Originalism commits us to the idea that we must follow the Constitution wherever it leads, whether the destination is conservative or libertarian, liberal or progressive.

*B. The Surprising Reality: Some Progressive Implications of an Old Constitution*

At this point, I think the following objection will occur to many readers. Sure, conservatives advanced a neutral theory that emphasized the rule of law and democratic legitimacy, but they only did that because they believed that we have a very old constitution that favors their conservative agenda. We will never know whether this speculation about

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67. See *supra* note 4.

68. For an illuminating discussion of the rhetoric associated with originalism, see rhetoric Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009).

motives is entirely true because it is very difficult to discover decisive evidence of deep motives. But my opinion is that it is at least partially correct with respect to support of originalism by politicians: originalism garnered political support because it embraced a constitutional text that seemed sensible to early advocates of originalism. But is it true that our constitution is conservative, root and branch, through and through?

Again, it would be surprising if a Constitution born in the aftermath of revolution and revised to guarantee the rights of the former slaves had no liberal or progressive provisions. Moreover, we are quite distant from the ideological world of the late eighteenth century or the mid-nineteenth century: it would be very surprising indeed if their political ideas mapped neatly onto ours. Of course, an on-balance assessment of the ideological implications of the original meaning of the constitutional text is a very big job; too big for a single article. Nonetheless, it is possible to identify some surprising implications of an originalist approach.

#### 1. Gender Equality and the Privileges or Immunities Clause of the Fourteenth Amendment

Of course, the Constitution includes an explicit gender equality provision, the Nineteenth Amendment: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”<sup>69</sup> Aside from the right to vote, the Constitution does not create explicit gender equality rights. But the constitutional text does employ the words “person” and “citizen.” Women are persons. Women are citizens. This was not in doubt in 1787 when the constitutional text was drafted in Philadelphia; or in 1791 when twelve amendments were proposed and ten ratified; or during Reconstruction when the Thirteenth, Fourteenth, and Fifteenth Amendments became part of the Constitution.

Section One of the Fourteenth Amendment reads as follows:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*<sup>70</sup>

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69. U.S. CONST. amend. 19.

70. U.S. CONST. amend. 14, § 1.

The passage in italics is the Privileges or Immunities Clause. Most educated Americans know something about “due process” and “equal protection,” but even among lawyers, knowledge of the Privileges or Immunities Clause is rare. Why is that? The answer is living constitutionalism: the Supreme Court adopted an interpretation of the clause that had the effect of making it a virtual dead letter in two notorious cases, the *Slaughter-House Cases*<sup>71</sup> and *United States v. Cruikshank*.<sup>72</sup> Originalists differ among themselves about the meaning of the somewhat mysterious phrase, “privileges or immunities of citizens of the United States,”<sup>73</sup> but a leading and plausible interpretation is that these “privileges or immunities” include both the specific rights spelled out in the Bill of Rights and the basic common law rights (or natural rights), including the rights to own property, enter into contracts, and to pursue a lawful occupation.

What does this have to do with gender equality? An originalist answer to this question begins with the very unoriginalist decision of the Supreme Court in *Bradwell v. Illinois*.<sup>74</sup> Myra Bradwell passed the bar examination in Illinois but was denied her right to pursue a lawful occupation. What occupation could be more “lawful” than the practice of law? A living constitutionalist Supreme Court denied her claim on the basis of precedent, but Chief Justice Salmon Chase dissented. The Chief Justice was very ill and did not write an opinion, but if he had, I believe that it would have been an originalist dissent, arguing that Myra Bradwell was a citizen and therefore entitled to practice law.<sup>75</sup>

Here is how one recent scholar summarizes the originalist case for Bradwell’s claim:

The privileges or immunities of the citizens of the United States include a set of rights termed basic rights. These basic rights are a set of fundamental civil rights, which includes the rights in the first eight amendments to the constitution, the rights of Article I sections 9 and 10, and the right to own property, enter into contracts, and pursue a lawful occupation: all of the basic rights (whether conceived of as natural or

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71. 83 U.S. 36 (1873).

72. 92 U.S. 542 (1875).

73. Compare RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (rev. ed. 2014) with KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP (2014).

74. *Bradwell v. People of State of Illinois*, 83 U.S. 130 (1872).

75. For a description of the case, see M. Frances Rooney, *The Privileges or Immunities Clause of the Fourteenth Amendment and an Originalist Defense of Gender Nondiscrimination*, 15 GEO. J.L. & PUB. POL’Y 737 (2017).

common law rights) must be extended to women given the original meaning of the Privileges or Immunities Clause.

Because these rights are granted to all citizens, discrimination on the basis of gender as to these rights is an unconstitutional violation of the Fourteenth Amendment unless it is true as a matter of fact that women are not capable of exercising these rights. This is the same principle that was used to deny women the right to practice law in *Bradwell*, on the grounds that they were unable to do so as a matter of fact. Likewise, children, who are obviously citizens but are not factually able to enter into valid contracts of their own volition, are still protected by this grant of rights as a matter of law. Though many in the nineteenth century may have believed that women were intellectually unable to exercise them, this is clearly, demonstrably false. If women lacked the ability to exercise one of these substantive basic rights, preventing them from doing so would not be a constitutional violation. Likewise, if an activity in question is not one of these substantive basic rights, preventing them from doing so is also not a constitutional violation.<sup>76</sup>

At this point, I imagine that some readers will object that I am trying to pull a fast one. Many of the framers and ratifiers of the Fourteenth Amendment would have been quite surprised and even appalled by Myra Bradwell's argument. Don't originalists believe that their intentions should govern us today? Surprisingly, the answer is no, no, no!

Even if the Supreme Court had not gutted the Privileges or Immunities Clause in *Slaughterhouse*, the Court would probably have denied Myra Bradwell's claim. That is because the Justices (like most male Americans at the time) believed that women lacked the intellectual capacity to practice law. But that is a belief about facts and not about original meaning. Originalists believe that the original meaning of the constitutional text is fixed and that it binds us, but they do not believe that the framers' beliefs about facts are binding: that would be just plain silly. The meaning of a legal text is one thing. The facts to which that text applies is quite another. Originalism requires that we apply the original public meaning of the constitutional text to the facts as they exist today given current understandings. Let me say that another way: originalism rejects the idea that our view of the facts to which the constitution applies should be frozen in time by the beliefs of the framers about circumstances that no longer exist.

Once we combine the original meaning of the Privileges or Immunities Clause with the truth about women's intellectual capacities,

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76. *Id.* at 32-33.

*Bradwell v. Illinois* is an easy case from an originalist perspective. Sadly, even if the Supreme Court had embraced the original public meaning of the Privileges or Immunities Clause, it would not have helped Myra Bradwell herself, because of epistemic injustice:<sup>77</sup> the Justices (aside from Chief Justice Chase) were not prepared to listen to women about their own intellectual capacities. It is remarkable that even in 1873, the contention that the original meaning of the Privileges or Immunities Clause protected women like Myra Bradwell from irrational discrimination was not beyond the pale.

But society eventually did come to realize that the intellectual capacities of women were equal to those of men. By the time the Nineteenth Amendment was ratified in 1920, the change in factual beliefs had crystallized into constitutional law. Had the Court followed the original meaning of the Privileges and Immunities Clause, it could have given us a powerful gender equality jurisprudence about fifty years before the Supreme Court's living constitutionalist jurisprudence of the 1970s.

## 2. The Technicalities of Pleading and the Seventh Amendment

The next surprise is only exciting to law geeks. The original meaning of the Seventh Amendment would require the Supreme Court to overrule its notorious decisions in *Twombly*<sup>78</sup> and *Iqbal*,<sup>79</sup> two pleading decisions that have split the Court along ideological lines. If you aren't a lawyer, you might say, "Who cares about the technicalities of pleading?" But all Americans should care about the role of the civil jury. *Twombly* and *Iqbal* introduced a new pleading standard that gives judges power to dismiss cases before the plaintiff even has a chance to conduct discovery and thereby insures that claims will never come before a jury. This has important implications: plaintiff's lawyers know that the ability to get to a jury is critical.

Civil procedure scholars have complained about plausibility

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77. The concept of epistemic injustice has been developed in a substantial literature. See, e.g., MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 27-28 (2007) (developing idea of systemic testimonial injustice); JOSÉ MEDINA, THE EPISTEMOLOGY OF RESISTANCE: GENDER AND RACIAL OPPRESSION, EPISTEMIC INJUSTICE, AND RESISTANT IMAGINATIONS (2012) (developing a theory of epistemic injustice); Alison Bailey, *The Unlevel Knowing Field: An Engagement with Dotson's Third-Order Epistemic Oppression*, 3 SOCIAL EPISTEMOLOGY REVIEW AND REPLY COLLECTIVE 62 (2014), <http://wp.me/p1Bfg0-1Gs> [<https://perma.cc/5A9Q-RC2X>] (developing conception of an unlevel knowing field); Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 HYPATIA 236 (2011) (developing notion of testimonial quieting).

78. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545-46 (2007).

79. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

pleading as a matter of the interpretation of the Federal Rules of Civil Procedure—and, in my opinion, they are right to do so on grounds that are essentially originalist in nature. But there is a more fundamental problem that emerges if we take the original meaning of the Seventh Amendment seriously. The Seventh Amendment states:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.<sup>80</sup>

At common law, plaintiffs had a right to a jury trial if they survived a demurrer. But the common law demurrer did not allow for judges to assess the plausibility of the plaintiff's factual allegations. From an originalist perspective, the Supreme Court's interpretation of Rule 12 in *Twiqbal* (as the two cases are known together) seems to violate the Seventh Amendment's command to preserve the right to jury trial in suits at common law.<sup>81</sup>

Speaking of civil procedure, the original meaning of the Seventh Amendment is likely to have many implications that ought to be welcomed by progressives and liberals. Two of these are especially important: mandatory arbitration and summary judgment. The liberals on the Supreme Court were sharply critical of the Supreme Court's decisions that the Federal Arbitration Act precluded class action suits in cases where the plaintiffs had agreed to an arbitration clause in a form contract. The Seventh Amendment may invalidate these clauses, because it is not clear that they were valid under the common law in 1791.<sup>82</sup> The Supreme Court has upheld the use of summary judgment to prevent cases from getting to a jury, but scholars have argued that the modern practice of summary judgment is contrary to the original meaning of the Seventh Amendment.<sup>83</sup>

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80. U.S. CONST. amend. 7.

81. Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261, 262 (2009) ("[I]t is unconstitutional to give a judge the power to weigh the factual heft of a complaint at the outset of a civil case and to dismiss it as insufficient.").

82. For an investigation of these issues that does not use the resources of originalism, see Judge Craig Smith and Judge Eric V. Moyé, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 TEX. TECH L. REV. 281, 282 (2012).

83. The key work has been done by Suja Thomas, who does not employ the resources of the most sophisticated forms of public meaning originalism. See SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* (2016); Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007).

You may be thinking to yourself, “Hey! If the Seventh Amendment is so important, then why didn’t Justice Scalia and Justice Thomas say so?” Fair question. I cannot answer on their behalf, but I do know this: the advocates in many of the recent cases haven’t bothered to make originalist arguments. Perhaps, this is because they are ignorant of the original meaning of the right to jury trial in civil cases. I can almost guarantee very few of them studied the original meaning of any provision of the Constitution in law school. Or perhaps, the failure to present originalist arguments stems from the fact that most liberal and progressive advocates just don’t *see* the possibility that original meaning could favor their side.

### 3. Mass Incarceration and the Eighth Amendment

What? Mass incarceration! How is the original public meaning of the constitutional text of any help in dealing with what is surely the most important challenge facing the criminal justice system? The answer may lie in the text of the Eighth Amendment to the Constitution: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>84</sup> The best originalist work on the Eighth Amendment has been done by John Stinneford.<sup>85</sup> He discovered something quite surprising about the meaning of the word “unusual.” The contemporary meaning of the word “unusual” focuses on frequency. For example, Merriam Webster defines “unusual” as “uncommon” or “rare.”<sup>86</sup>

But that was not the meaning in 1791 when the Eighth Amendment was framed and ratified. Here is Stinneford’s description of the original public meaning of “unusual”:

In conclusion, American courts of the first half of the nineteenth century shared the Framers’ understanding that the word “unusual” in the Cruel and Unusual Punishments Clause meant “contrary to long usage.” They generally upheld punishments that were consonant with common law precedent and were willing to strike down those that were not, even if such punishments did not involve the infliction of physical pain or degradation. Moreover, American courts in this period demonstrated awareness that even traditional common law punishments could become

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84. U.S. CONST. amend. 8.

85. John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745 (2008); John F. Stinneford, *The Original Meaning of “Cruel,”* 105 GEO. L.J. 441, 506 (2017).

86. MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/unusual> [https://perma.cc/PD63-S459] (last visited May 21, 2018).

unusual if they actually fell out of usage.<sup>87</sup>

Stinneford marshals impressive evidence for this thesis and explains how the original meaning of unusual fit the eighteenth-century understanding of the nature of the common law.

What does this have to do with mass incarceration? Given the original meaning of “cruel,” there is no question that prison sentences that last for decades are “cruel” as that word was understood by the public in the eighteenth century: “The original meaning of the word ‘cruel’ in the Cruel and Unusual Punishments Clause is unjustly harsh.”<sup>88</sup> Judged against the relevant baseline—punishment practices that were long in use and approved by the common law in 1791—there is a powerful argument that modern multiyear sentences are both “cruel” and “unusual.” Of course, there are many reasons for the emergence of mass incarceration, but the imposition of lengthy sentences is clearly one of the root causes.

How would the argument go? I imagine that it would look something like this:

Mass incarceration is founded on sentencing practices that constitute cruel and unusual punishment—not because of any fancy new theory, not because of changing values and circumstances, not because we have come to realize that mass incarceration is bad policy. The carceral state is unconstitutional because it depends on punishments (long prison sentences) that are harsh, unjust, and were contrary to long usage in 1791. Mass incarceration cannot be sustained given the original public meaning of the Eighth Amendment.

I am not sure that this argument works. I am not an Eighth Amendment specialist, and I have done neither the corpus linguistics work nor careful study of the constitutional record. But I do find Stinneford’s surprising theory to be plausible and if he is right, then the original public meaning of the Eighth Amendment may well have surprising implications for our practices of punishment.

This article is entitled “Surprising Originalism,” and I have been pointing out some of the surprising implications of originalism. But don’t get me wrong. originalism has implications that are unsurprising and many of these implications will be welcome to conservatives but anathema to liberals. For example, I think it is likely that the original public meaning of Article One would be inconsistent with the modern expansive interpretation of the Interstate Commerce Clause. I suspect that

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87. Stinneford, *Original Meaning of “Unusual,”* *supra* note 85, at 1814-15.

88. Stinneford, *Original Meaning of “Cruel,”* *supra* note 85, at 506.

the original public meaning of the grants of “legislative power” to Congress, “judicial power” to Article Three courts, and “executive power” to the President is difficult to reconcile with independent administrative agencies that combine legislative and judicial power with executive power that is almost entirely free of presidential direction. The political valence of public meaning originalism is a mixed bag: there is something for everyone, but everything for no one.

### C. *What About Segregation?*

At this point, I imagine that many readers will want to know about the implications of originalism for segregation, *Plessy v. Ferguson*,<sup>89</sup> and *Brown v. Board of Education*.<sup>90</sup> *Brown* is what constitutional scholars call a “canonical” case, by which they mean that *Brown* is considered a fixed point, a case that is surely right.<sup>91</sup> *Plessy* is an “anti-canonical” case—also a fixed point, but on the “wrongly decided” side of line.<sup>92</sup> Given these starting points, originalism must be rejected if it is inconsistent with *Brown* or if it would endorse *Plessy*. Discussion of these issues by living constitutionalist scholars usually begins and ends with the Equal Protection Clause of the Fourteenth Amendment, and the Privileges or Immunities Clause does not enter into the conversation.

What does originalism have to say about *Brown* and *Plessy*? The first step is to identify the relevant parts of the constitutional text. And now another surprise! The Equal Protection Clause is the wrong place to look. Why? Here is a clue: contemporary understandings of the Equal Protection Clause almost always cut off the final three words “of the laws.” What did “equal protection of the laws” mean? The primary function of what we should call the Protection of Laws Clause was to ensure that the former slaves would receive the same protection of their personal security and property as other persons. The clause accomplishes this end by requiring states to provide every person protection of the laws on an equal basis—“equal protection of the laws.” Another surprise is that reading renders an affirmative duty of protection on state governments:

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89. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

90. *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954).

91. See Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 681–82 (2005) (Some canonical cases, like *Brown v. Board of Education*, are uniformly understood as data points that any serious theory of constitutional law must justify and explain.); Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 Rutgers L. Rev. 383 (2000).

92. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 412 (2011).

this result would undermine the controversial *DeShaney* case.<sup>93</sup> In that case, Chief Justice Rehnquist concluded, “[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”<sup>94</sup> But from an originalist perspective, the Court was looking at the wrong clause. The place to look for an affirmative obligation for government to provide persons protections of the laws is the full Equal Protection *of the Laws* Clause, not merely the Equal Protection Clause, leaving “of the Laws” out. That clause does seem to require “protection of the laws.” But it was not addressed by Chief Justice Rehnquist.

Therefore, the Equal Protection Clause is the wrong place to look. Where is the right place? A good way to answer that question is to examine what actually happened in *Plessy v. Ferguson*.<sup>95</sup>

The following is my understanding of *Plessy v. Ferguson*, but keep in mind that I am not an expert and I have not done the necessary work to assure you that this account is correct. When Homer Plessy challenged the Louisiana statute that required the segregation of railroad cars, his primary argument was based on the Privileges or Immunities Clause.<sup>96</sup> This may come as a surprise to many law students who come away from class assuming that *Plessy* was all about the Equal Protection Clause.<sup>97</sup>

Restated in modern terms, the essence of Plessy’s argument was that access to a public carrier (a railroad) was one of the privileges or immunities (basic rights) that states may not deny to any citizen.<sup>98</sup> *Plessy v. Ferguson* dismissed this claim out of hand, relying on the *Slaughterhouse Cases*. If the *Plessy* Court had followed the original meaning of the Privileges or Immunities Clause and if it had not had erroneous factual beliefs about the mixing of the races, Plessy could have

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93. For a brief review of the issues, see Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 604 (2006).

94. *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989).

95. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

96. See CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 152-62, 164-68 (1987) (citing Brief for Plaintiff in Error, submitted by Albion Tourgée and James C. Walker, *Plessy v. Ferguson*, 163 U.S. 537 (1896); Brief for Plaintiff in Error, submitted by S.F. Phillips and F.D. McKenny, *Plessy v. Ferguson*, 163 U.S. 537 (1896)); see also Barry P. McDonald, *A Reluctant Apology for Plessy: A Response to Akhil Amar*, 39 PEPP. L. REV. 91, 99 (2011).

97. Michael Klarman’s *The Plessy Era* does not even mention the *Privileges or Immunities Clause*. See Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303 (1998).

98. As noted earlier in connection with gender equality, there is a serious dispute about the original public meaning of the phrase “privileges or immunities of citizens of the United States.” See *supra* note 7073.

prevailed, and Jim Crow might never have gotten off the ground.<sup>99</sup>

Nonetheless, a living constitutionalist Supreme Court rejected Plessy's claims: the separate but equal doctrine reflected the Court's view that segregation was consistent with what we now would call "contemporary circumstances and values." It was not until *Brown v. Board* that the Supreme Court reversed course: circumstances and values had changed. The *Brown* Court did not even consider the possibility that the relevant constitutional provision was the Privileges or Immunities Clause.

The world of 1954 was substantially different than the world of 1868 when the Fourteenth Amendment was adopted. Originalism is committed to the public meaning of the constitutional text, and the public meaning is fixed at the time each provision is framed and ratified. But originalism is not committed to the patently ridiculous proposition that facts about the world are fixed or the even more ludicrous position that the application of the public meaning to current facts should be guided by the factual beliefs of the public at the time constitutional provisions were framed and ratified—much less the absolutely insane idea that the false beliefs of the framers about facts bind us today. That is why the original meaning of the privileges and immunities clause can support gender equality rights—even though most men thought that the intellectual capacity of women was childlike and therefore women could be treated like children by the law. Originalism is committed to the constitutional text—not the factual beliefs of the people who wrote the text. At this point, I hope that readers will no longer find that conclusion surprising.

So, what about *Brown v. Board of Education*? Was it supported by the original public meaning of the constitutional text given the facts as they were known in 1954? This is a large question. The eminent

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99. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1462–63 (1992):

The Supreme Court upheld a railroad car segregation law in *Plessy v. Ferguson*. Although symmetrical, the law restricted the right to contract by forbidding a white citizen from buying a ticket on a car that carried blacks. It also limited the even more fundamental privilege of natural liberty because the black passenger was not allowed to walk into the white train car. The law should have been held invalid. The same is true with respect to segregated public education. Schools financed by general taxation are very probably a privilege of citizens. If so, to give individuals of different races different versions of the privilege would constitute an abridgment.

*Id.* (footnotes omitted). In my opinion much work needs to be done on the original public meaning of the Privileges or Immunities Clause, but as opposed to Klarman, Harrison actually does have a theory of the meaning of the clause and an argument that this meaning is inconsistent with *Plessy* and consistent with *Brown*.

constitutional scholar Michael McConnell stated in a subsequent summary of his famous article:<sup>100</sup>

As originally proposed by Senator Charles Sumner, the Civil Rights Act guaranteed equality in access to various types of public accommodation, including railroads, inns, theaters, steamboats, cemeteries, and—most controversially—public schools.<sup>101</sup>

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In numerous votes between introduction of the bill in 1870 and passage of a stripped-down version of the bill in 1875, majorities in both Houses of Congress supported the desegregation position. At the high-water mark in May and June of 1874, the bill passed the Senate by a vote of 29-16 and won the support of the House (on a procedural vote) by a margin of 141-72. That comes close to two-thirds. The margin of victory among supporters of the Fourteenth Amendment was far higher. Moreover, both Houses consistently rejected versions of the bill that would have allowed separate-but-equal facilities. The bill failed only because procedural rules in the House, permitting filibustering and dilatory motions, made a two-thirds vote necessary. Supporters of the bill came tantalizingly close, but could never break that barrier. On one fateful date in June, 1874, the switch of just two votes would have carried the measure, and the requirement of school desegregation would have been written into the law. Would history not have looked different if those two votes had changed?

But the bill, in its strong version, failed. The Democrats were able to stave off action on the bill in the House throughout 1874. Then, in the elections of that November, the Democrats won a landslide victory. When the lame duck Congress met in early 1875, the Republican majority was demoralized. Even then, their last great project was passage of the civil rights bill. The Democrats were willing to acquiesce in the bill if it were amended to permit separate-but-equal schools, but the Republicans angrily denounced this effort to introduce what they called “invidious discrimination in the laws of this country.” They preferred to delete coverage of schools from the bill altogether, rather than to countenance a separate-but-equal provision for schools. That did not mean that their constitutional interpretation had changed, but only that their political power to achieve enforcement of that interpretation had changed. Supporters of desegregated education still had hopes for

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100. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

101. Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL’Y 457, 459 (1996).

the courts. James Monroe, Republican from Ohio, stated that black Americans “think their chances for good schools will be better under the Constitution with the protection of the courts than under a bill containing such provisions as this.”

Defeat of the schools provision was fateful as a legislative matter, but viewing the course of deliberations as an exercise in constitutional interpretation by persons well situated to know and understand the original meaning of the Fourteenth Amendment, the evidence of original meaning survives the defeat of the bill. Large majorities of both houses of Congress, and even larger majorities of supporters of the Fourteenth Amendment, concluded that it forbade de jure segregation of public schools. That fact puts to rest the notion that the Supreme Court had to disregard the original meaning of the Amendment in order to “do the right thing” in *Brown*.<sup>102</sup>

In this very short article, I cannot state the full case, but I hope this extended quotation gives you a lively sense of McConnell’s argument.<sup>103</sup> More recent originalist scholarship reaches a similar conclusion on the basis of additional evidence and explicit focus on public meaning.<sup>104</sup>

If you are in the “in crowd,” you were not surprised by my invocation

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102. *Id.* at 463–64.

103. The argument would be stated differently if it were made today using the state-of-the-art version of public meaning originalism.

104. Steven G. Calabresi and Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 436–37 (2014)

We conclude that by 1868, when the Fourteenth Amendment was adopted, citizens in thirty out of thirty-seven states had a fundamental right to a public school education that was a privilege or immunity of state citizenship. As a result, the Fourteenth Amendment forbade racial segregation in public schools from the moment it was adopted. Thus, the original public meaning of the text of the Fourteenth Amendment prohibited racial segregation in public schools.

The only serious engagement with Calabresi and Perl’s argument is found in an article by Ronald Turner. See Ronald Turner, *The Problematics of the Brown-Is-Originalist Project*, 23 J.L. & POL’Y 591, 637 (2015). Turner’s argument is not fully articulated, but it can be reconstructed as the claim that: (1) the right to attend a public school is a “social” right in contradistinction to “political” and “civil” rights, (2) social rights are excluded from the privileges or immunities of citizens of the United States, and therefore (3) *Brown* is not supported by the Privileges or Immunities Clause. These issues are complex and even a cursory discussion is beyond the scope of this Article. My sense is that it is not clear that the phrase “privileges or immunities of citizens of the United States” had the same communicative content as “civil rights” and that the categorical division between “civil,” “political,” and “social” rights was highly uncertain at the time. If privileges or immunities include the important or fundamental rights of citizens that are legally enforceable and if there was in 1954 a general prevailing and legally enforceable right to public education that was then fundamental or important, then the original public meaning of the text would support the decision in *Brown v. Board*. In this Article, I am not claiming that this view is correct. Rather my claim is that the widely accepted belief that it has been demonstrated that *Brown* is inconsistent with the original public meaning of the Privileges or Immunities Clause is not well supported.

of McConnell’s argument—which is well known to constitutional scholars who debate the merits of originalism. And it is likely that you believe that Michael Klarman *proved* that McConnell was wrong in an equally famous article.<sup>105</sup> And you might even believe that Klarman’s article addressed the original public meaning of the constitutional text and demonstrated that it supported segregation of public schools. Some might say that is the “conventional wisdom.”

At this point, sophisticated readers surely see the surprise that is coming.<sup>106</sup> Klarman wrote his article in 1995 and, like most constitutional scholars at the time, he seems to have been unaware of the existence of public meaning originalism. The phrase “public meaning” does not appear in his article—not even once. The article does mention the Privileges or Immunities Clause *once* and only *once*,<sup>107</sup> but it does not quote the clause or interpret the language of the clause, much less undertake an investigation of the public meaning of the text. Klarman offers no evidence of the public meaning of the clause. I doubt that in the 1990s, Klarman had even a vague idea that originalists were seeking the communicative content conveyed to the public by the constitutional text—no wonder that he did not discuss the public meaning of the Privileges or Immunities Clause. As an exercise in public meaning originalism, Klarman’s article is not a failure, because he does not even try.<sup>108</sup> Klarman’s principal argument is that the public opposed school integration, but this evidence does not even establish that the original expected application of the Privileges or Immunities Clause would have supported *Plessy* and opposed *Brown*.

Klarman’s argument does not take into account the distinction between original public meaning (which is fixed) and beliefs about facts (which do change over time). Even if Klarman had produced an argument that demonstrated that the public believed that the Privileges or

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105. Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881, 1883 (1995) (stating “the four principal difficulties with McConnell’s originalist defense of *Brown* based on the 1875 CRA debates” are “his focus on legal principle rather than actual practice, his prioritization of congressional sentiment over popular opinion, his failure adequately to consider the possibility of values changing over time, and his equation of ‘full and equal enjoyment’ language with integrationism”).

106. An example of a sophisticated approach to *Brown* and originalism is found in Michael C. Dorf, *The Undead Constitution*, *supra* note 14 (recognizing that it is original-expected applications originalism that may be inconsistent with *Brown*).

107. Klarman, *supra* note 105, at 1889.

108. The failure to engage public meaning originalism’s implications for the relationship between the Privileges and Immunities Clause has been repeated more recently. See Ronald Turner, *Justice Antonin Scalia’s Flawed Originalist Justification for Brown v. Board of Education*, 9 WASH. U. JURISPRUDENCE REV. 179, 193 (2017).

Immunities Clause was consistent with segregation, his argument would not be complete until he examines the *reasons* for this belief and shows that they were based on the *meaning* of the Privileges or Immunities Clause and not on factual beliefs that we now know are false. Klarman's article barely mentions the Privileges or Immunities Clause: it does not even hint at a theory of its meaning.

The notion that originalism is inconsistent with *Brown* has become an article of faith among scholars. Richard Fallon, one of the most careful and fair-minded constitutional theorists, wrote in 2018, "Most of those who have examined the evidence have concluded that the original contextual meaning permitted segregated schools to survive."<sup>109</sup> Fallon's phrase "original contextual meaning" is his way of expressing the same notion that most scholars call "original public meaning." But in fact, there is no scholarship of which I am aware (and no evidence that Fallon cites<sup>110</sup>) that demonstrates that the original public meaning of the Privileges or Immunities Clause is consistent with segregation given the actual facts—as opposed to false factual beliefs in 1868. Let me say it one more time: Klarman's article makes no arguments that demonstrate that *Brown* is inconsistent with the original public meaning of the Privileges or Immunities Clause. None. Not one. Nada. Nil. Zero. Zip.<sup>111</sup>

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109. RICHARD FALLON, *LAW AND LEGITIMACY IN THE SUPREME COURT* 52 (2018).

110. The footnote for the passage quoted at text accompanying note 109 reads in full as follows: "21. The sole prominent exception is Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 1881, 1885-93 (1995)." Fallon, *Law and Legitimacy in the Supreme Court*, *supra* note 109, at 186 n.21. The next footnote is to Klarman, *supra* note 105. Fallon is not alone here. As William Eskridge observed, "The consensus among law professors is that *Brown* is hard to defend on originalist grounds." William N. Eskridge Jr., *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067, 1088 n.96 (2015). (A quick aside: Eskridge himself does not endorse the consensus.) The point here is that this consensus is based on work by Klarman that did not engage with public meaning originalism. There may be a consensus that *Brown* is inconsistent with the original public meaning of the Fourteenth Amendment, but it turns out that the scholarship on which the consensus is based does not address the Privileges or Immunities Clause. It seems likely that Fallon was unaware of John Harrison's work on the Privileges or Immunities Clause which predated the McConnell-Klarman debate. See Harrison, *supra* note 99. Fallon's discussion is framed in terms of the Equal Protection Clause and does not even mention the Privileges or Immunities Clause. See Fallon, *supra* note 109, at 52. Fallon does not discuss other work, including that of Steven Calabresi and Michael Perl, see Calabresi & Perl, *Originalism and Brown v. Board of Education*, *supra* note 104, but it is possible that Fallon was aware of this work but did not consider it "prominent."

111. This is not to say that Klarman's evidence has no bearing on the original public meaning of the Fourteenth Amendment. Evidence that the public opposed school integration is secondary evidence that the public would have expected that the application of the Privileges or Immunities Clause would not have invalidated the segregation of public schools. It is not very strong evidence, because it seems unlikely that members of the public actually had a specific expectation one way or the other regarding this issue. Expectations are mental states, and there is no evidence of which I am aware of the existence of such mental states with respect to the application of the Privileges or Immunities Clause to school segregation. It seems much more likely that most members of the public

Perhaps Klarman can be excused for failing to understand the state of originalist theory in 1995. I hope so, because I was equally ignorant. In my own case, I am not sure that I can claim a defense of excusable neglect. If I had bothered to read the key texts, I would have known about the shift to public meaning. Since I was teaching constitutional law, the neglect is hard to excuse. Be that as it may, there is now no excuse for the belief that Klarman's 1995 article demonstrated that *Brown v. Board* is inconsistent with the original public meaning of the Privileges or Immunities Clause—that belief can only be a product of epistemic negligence. Undoubtedly, there is more to say about that topic, but the case that *Brown v. Board* is inconsistent with the original public meaning of the Privileges or Immunities Clause has yet to be made.

At this point, let us take a step back. Our investigation of the possible implications of the Privileges or Immunities Clause for gender equality and segregation has revealed a surprising fact: the people who draft and ratify a constitutional provision can themselves be surprised by its applications! But how are surprising applications possible? Anyone who has ever drafted a rule or policy is well familiar with the phenomenon of unintended consequences. You write it down on paper and you think you know what the effects will be, but then you are confronted with a case you did not anticipate, and you come to realize that the rule that you wrote does something you did not anticipate and don't particularly like. If you had it to do over again, you would write the rule differently.

The problem of unintended consequences looms larger once we take facts into account. You write a rule for today's facts, but tomorrow's facts are different. You write a rule based on your belief about the facts, but then it turns out that you were wrong—the facts are different than you believed them to be. And so, *the very rule that you wrote has unintended consequences*—consequences that you did not even imagine when you wrote the rule. And this is especially true when you write a rule in very general and abstract language. Consider the text of the Privileges or

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had no belief either way with respect to this question—because they simply had not thought about it at all. Moreover, original expected application beliefs do not constitute original public meaning; they are not binding. Original expected applications do, however, provide evidence that is relevant to public meaning. For example, if a constitutional provision is ambiguous and one interpretation is consistent with application expectations and the other is not, then the expectations are evidence in favor of the interpretation with which they are consistent. But in order to make the argument, Klarman would need to provide an account of the communicative content of the Privileges or Immunities Clause that includes an ambiguity, demonstrate the existence of the application expectations, and then show that this evidence supports the disambiguation that is inconsistent with the outcome in *Brown*. The distinction between original expectations and original meaning was first articulated in Mark Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 573-74 (1998); see also Solum, *Incorporation and Originalist Theory*, *supra* note 1, at 414.

Immunities Clause again: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>112</sup> Is it any wonder that such powerful language could have unintended consequences, given changing circumstances and changing beliefs about the facts to which the clause is to be applied?

But what if *Brown v. Board* cannot be justified on originalist grounds? This question sounds simple and invites a simplistic answer: if *Brown v. Board* is inconsistent with originalism, then originalism is obviously wrong. But not so fast. Racial segregation was consistent with the Supreme Court’s understanding of contemporary circumstances and values for some seventy years: if living constitutionalism gave us *Plessy*, what then? Again, the simple question invites a simplistic answer—living constitutionalism is obviously wrong. Astute readers may now realize that we are on a slippery slope, because every constitutional theory can be shown to lead to unacceptable outcomes in some circumstances. Living constitutionalism yields the outcomes produced by contemporary circumstances and values—as they are understood by the Justices of the Supreme Court at the time a particular case is decided. A living constitutionalist court that believes in segregation will gut the Fourteenth Amendment in the name of contemporary circumstances and values. Indeed, Klarman’s argument about *Brown v. Board* actually provides a devastating critique of living constitutionalism, even as it fails to engage public meaning originalism. Honestly, I didn’t see that surprise coming.

These points may now seem obvious to some readers, but it will nonetheless come as a surprise to many critics of originalism who are inclined to say, “Originalism? *Brown v. Board*. Game over!” Surprisingly, though, the game is not over. It would be more accurate to say that it has barely begun.

#### D. *That’s Not Originalism! Or Is It?*

At this point, some readers may be in a state of shock. I seem to be suggesting that their preconceptions about “originalism” are wrong—not just a little wrong, but really truly deeply wrong. Not only that, but originalism might well have very surprising implications—some of which might be progressive or liberal if judged by modern standards. One possible reaction to that state of affairs is to say something like the following:

*Okay, that theory you are talking about is not so bad, but that is not what*

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112. U.S. CONST. art. IV, cl. 2.

*I mean by “originalism.” “Originalism” is “What would James Madison do?” “Originalism” is outcomes I reject. “Originalism” is a conservative ideology. Don’t confuse me by changing the definition of “originalism.” I might be okay with the idea that courts should respect the public meaning of the constitutional text. Can’t we call that something else? Maybe “moderate living constitutionalism” or “new textualism” or “common sense constitutionalism.” All my friends are against originalism. I don’t want to be put in the position of explaining my sympathies with “originalism.” I need to be able to say, “Originalism is crazy.”*

Believe me, I sympathize. I am tempted by Professor Michael Dorf’s suggestion that originalism needs “rebranding.”<sup>113</sup> But in the end, I think this move would simply be dishonest—and that it wouldn’t fool anyone for long. The mainstream of originalism has been public meaning originalism for more than thirty years. It is just too late to pretend otherwise.

#### IV. AND THE SURPRISING JUSTIFICATIONS

If you are still with me, then you might have been struck by the following thought:

*I see that originalism is not so bad, but why should I care? For the sake of argument, let’s assume that originalism makes sense as a theory and that it might actually lead to good results in some cases and bad results in others. Living constitutionalism does that too. And I don’t see how originalism would support some of the results that matter a lot to me. What about Obergefell<sup>114</sup> and the right to marriage? What about Roe v. Wade<sup>115</sup> and the right to choose? The living constitutionalists on the court supported those decisions, and the originalists opposed them. Why shouldn’t I support the constitutional theory that enables the Supreme Court to reach progressive (or liberal) outcomes on the issues that are most important to me?*

Indeed, many of us may be “single issue voters” when it comes to constitutional theory—with a hot button issue that we deeply care about, the temptation is to choose the constitutional theory that produces the “right outcome” on that single constitutional question. Or perhaps, you

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113. Michael Dorf, *Advice to Conscientious Originalists: Rebrand*, DORF ON LAW, Apr. 13, 2017, <http://www.dorfonlaw.org/2017/04/advice-to-conscientious-originalists.html#more> [<https://perma.cc/J63T-UGNY>].

114. *Obergefell v. Hodges*, 135 S. Ct. 2584, (2015).

115. *Roe v. Wade*, 410 U.S. 113 (1973).

would join a coalition of groups, each of which cares most about a single constitutional question and then combines with the others to seek the appointment of Justices that will advance the agenda of the coalition. Why shouldn't constitutional law be the outcome of action by social movements with political agendas?<sup>116</sup> This question about originalism raises important questions, but once again, the answers may come as a surprise.

A. *Thought Experiment: “Bad” Living Constitutionalists*

Let's start with a thought experiment:

*Imagine a Supreme Court that has adopted an undisguised form of living constitutionalism: all of the Justices believe that constitutional issues should be resolved on the basis of “constitutional values”—their fundamental beliefs about the principles of morality that should govern society. Now imagine that the Court consists of Justices who have values with which you disagree. If you are a Democrat, imagine nine very conservative Republican Justices. If you are a Republican, imagine nine very liberal Democratic Justices. They vote their values across the board in constitutional cases, and you disagree with those values. From your perspective they are “bad” living constitutionalists.*

Does this thought experiment make you nervous? You are pro-choice, but the Supreme Court consists of nine pro-life Justices—they hold that state laws permitting abortion violate the constitution because they violate the constitutional right to life of the unborn. You support campaign finance reform, but the Supreme Court holds that the constitution creates an absolute right to make anonymous and unlimited donations to candidates for elected office.

Or from the other side of the ideological divide, you believe in the right to bear arms, but the Supreme Court holds that state laws permitting private ownership of guns of any type violates the due process clause because guns deprive persons of their lives without due process of law. You believe that the decision, whether of a priest or rabbi, to perform a marriage ceremony may properly be limited to those who are permitted to marry under the religious doctrine of the faith of the officiant, but the Supreme Court holds that marriage officiants (religious or secular) must

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116. For examples of academic discussion of the relationship of constitutional change to social movements, see Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877 (2013); Jack M. Balkin and Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); Jack M. Balkin and Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006).

provide their services to all comers, whatever their faith, prior marital status, or gender-orientations.

The thought experiment might provoke the following thought:

*No, I do not want the Justices with values opposed to mine to enact their values into constitutional law. I only want living constitutionalism when the Justices share my values. I am willing to concede that originalism is sometimes a good idea, but only when the Court is controlled by Justice who do not share my values—"bad" living constitutionalists.*

Would this work? Can there be a stable constitutional jurisprudence that relies on double standards—one set of rules for your friends, another set for your enemies?

### B. *The Risks of Politicization*

Here is one problem with a double standard (living constitutionalism for us, originalism for them): the other side is not likely to go along with it in the long run. It would be irrational to comply with the rule of law when your party controls the Court if the other side will defect when they are in power. This is, of course, an example of what is called the "prisoners' dilemma" in game theory.<sup>117</sup> The rational response to the prisoners' dilemma is called "tit for tat," but there is a problem with retaliation. What I believe is a proportionate response, you are likely to see as escalation. Once a downward spiral of politicization starts, it is hard to stop.

Of course, living constitutionalism can try to disguise itself, hiding the role of the Justices' personal beliefs about questions of value behind a curtain of legal mumbo jumbo. But at some point, Senators and Presidents are going to wise up and start playing hardball. When one party controls the Presidency and the Senate, they will select hardliners who will reliably vote their ideology and then shove them through the process. When there is divided government, the Senate may actually refuse to confirm Justices nominated by a President that they oppose—simply freezing the confirmation process until the next election. The membership of the Court might decline from nine to eight, or even seven or six, the number that is the bare minimum for a Supreme Court quorum.<sup>118</sup> What if the membership fell to five? Things would go on, with the United States Courts of Appeal and the State Supreme Courts functioning as the

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117. Lawrence B. Solum, *Legal Theory Lexicon 007: The Prisoners' Dilemma*, LEGAL THEORY LEXICON, Apr. 13, 2017, [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2003/10/legal\\_theory\\_le.html](http://lsolum.typepad.com/legal_theory_lexicon/2003/10/legal_theory_le.html) [https://perma.cc/S9TY-RSZF].

118. SUP. CT. R. 4.

effective courts of last resort on constitutional questions.

In the world of a thoroughly politicized Supreme Court, it would be foolish for a party with control of the presidency and Congress to nominate candidates who elevated either precedent or the constitutional text over ideology. Given polarization in electoral politics and a politicized Supreme Court, the opportunity to lock in a majority for decades is just too good to pass up. The ideal nominee is a committed ideologue under the age of 40.

But there are further moves and countermoves. If one party succeeds in stacking the court with nine ideologues who will serve for 40 or more years, the other party can expand the size of the Supreme Court from nine to 19, creating a ten to nine majority for their own partisans. Of course, why stop there? Once the other party gains a majority, then it will add however many seats are required to flip the balance again. There is no stopping point to this game: why not a Supreme Court of 99? Let me say it again: *once started, a downward spiral of politicization is difficult to stop.*

You may say that I am crying wolf, but isn't it obvious that the wolf is already at the door? Republicans blocked Merrick Garland. I'm sure you've heard talk about how Democrats will respond if they regain the Senate: no judicial nominations by a Republican President will be allowed to reach the floor. And the idea of court-packing has already been floated. Here is an example:

It is impossible to know when Democrats might regain total control of the U.S. government. But assuming that American democracy survives the high-stakes stress test of a Trump presidency, they will at some point find themselves in the commanding position the Republicans are in now. And when they do, they should be prepared to pass a law expanding the number of seats on the Court from nine to 11 and to fill the two extra seats with the most divisive, outrageous liberals in the federal judiciary.<sup>119</sup>

And one more:

[I]t would be very unwise for Democrats to rule anything out. They should be careful not to blow up the power of judicial review without good cause. But if desperate Republicans try to establish an anti-Democratic rearguard on the Supreme Court before they get swept out

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119. David Faris, "How Democrats can make Republicans pay for Justice Gorsuch," THE WEEK, Mar. 20, 2017, <http://theweek.com/articles/681352/how-democrats-make-republicans-pay-justice-gorsuchrch> [<https://perma.cc/N4MA-VJ93>].

of office, Democrats have to leave all options on the table.<sup>120</sup>

Pause just a moment to think about this statement. Serious consideration is being given to “*blowing up the power of judicial review*.” Does anyone believe that court packing by Democrats would be the last move? Is it remotely plausible to think that Republicans would not respond when they got the chance? The bottom of the downward spiral of politicization is not a pretty place. I leave it to the reader to imagine “the parade of horrors”—and I’m pretty sure that the parade you imagine will be horrible indeed.

### C. *The Promise of Imperfect Originalism*

An originalist Supreme Court that views itself as bound by the constitutional text lowers the stakes. The replacement of a swing justice no longer provokes a battle royal for the constitutional future of the republic. The original meaning of the constitutional text leads to a mixed set of outcomes, conservative, libertarian, liberal, and progressive. As it becomes apparent that constitutional change cannot be accomplished via judicially imposed constitutional constructions that are constitutional amendments in disguise, social movements and constitutional reformers refocus their energies on the constitutional amendment process. Originalism may not be your first choice—that might be a Supreme Court of Platonic guardians who agree with your political ideology across the board—but originalism can be everyone’s second choice.

We need to be realistic. Suppose that the court consists mostly of originalist Justices who believe that they are bound by the original meaning of the constitutional text and that they have an obligation to work hard to discover the original meaning in hard cases. These Justices attempt to control the temptation to engage in motivated reasoning. But they are not perfect. The world of *perfect* judicial neutrality is almost surely “pie in the sky.”<sup>121</sup> Some slippage is probably inevitable. There undoubtedly would be cases where the Justices’ values would influence their conclusions about original meaning. But when we compare imperfect

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120. Scott Lemieux, *Democrats: Prepare to Pack the Supreme Court*, THE NEW REPUBLIC, May, 10, 2018, <https://newrepublic.com/article/148358/democrats-prepare-pack-supreme-court> [<https://perma.cc/F2NX-ZJ7E>].

121. The phrase is from Joe Hill:  
You will eat, bye and bye,  
In that glorious land above the sky;  
Work and pray, live on hay,  
You’ll get pie in the sky when you die.  
JOE HILL, THE PREACHER AND THE SLAVE (1911).

originalism with living constitutionalist approaches that require the judges to rely on their own values when deciding constitutional cases, the result of the comparison is obvious. Imperfect originalism is better than a downward spiral of politicization that ends in the destruction of the rule of law.

One more thing: my impression is that some critics of originalist constitutional theory equate originalism as a theory with the decisions of Justice Antonin Scalia and Justice Clarence Thomas—and in the near future this equation might extend to Justice Gorsuch. This identification of originalism with specific decisions by three Justices is problematic at many levels, starting with the fact that judges on a multimember collegial court dominated by living constitutionalists (both liberal and conservative) cannot as a practical matter write originalist opinions in every constitutional case. In many constitutional cases, none of the briefs engage in originalist analysis. On many constitutional issues, the academy has yet to provide input in the form of high-quality originalist scholarship informed by contemporary originalist thinking on both theory and methodology. When I speak of the promise of imperfect originalism, I do not mean to suggest that this promise has already been realized or that Antonin Scalia was a perfect paragon of originalist virtue.

#### *D. But Wait, There's More*

The risk of politicization is one justification for originalism, but there are others.<sup>122</sup> Originalism is consistent with the rule of law values—stability, consistency, certainty, publicity, and uniformity of law. Living constitutionalism tends to undermine those values, especially in a nation closely divided along ideological lines where control of the presidency and the Senate can flip from election to election. If the Supreme Court is evenly divided, with four reliable liberals and four conservatives, then the replacement of the swing justice can lead to unpredictable changes in constitutional law. And any flip-flopping of the swing Justice will be especially damaging to the stability of the law. Moreover, a closely divided court is likely to produce compromise opinions with inconsistent reasoning—making it difficult for even excellent lawyers to say what the law actually is at any given point in time.

Another line of argument for originalism focuses on legitimacy. Democratic legitimacy is a matter of degree, not an on or off switch. Deciding constitutional questions on the basis of the original meaning of

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122. The case for originalism is examined in Solum, *The Constraint Principle*, *supra* note 1.

the text is not perfect: some parts of the constitution are very old and were adopted by democratic processes that excluded women, slaves, and others. But giving the authority to amend the Constitution to a majority vote of five members of a committee of nine individuals who serve life terms is even much worse—and by the way, Supreme Court Justices are hardly representative of America today. For one thing, this group only includes graduates of the Harvard and Yale Law Schools; for another, it fails to include members of dozens of important groups. If the right to vote were limited to citizens who resemble the Justices on the Supreme Court, we would not have a democracy in any meaningful sense of that concept.

Moreover, giving judges the authority to make the law is inconsistent with widely shared views about their legitimate judicial role: that is why no nominee for a seat on the Supreme Court will admit that they believe they will have the authority to override the original meaning of the constitutional text. Even a committed living constitutionalist will be likely to say something like, “We are all originalists now.”<sup>123</sup> Academics may write articles that openly advocate the view that the Supreme Court is not bound by the constitutional text,<sup>124</sup> but that view is inconsistent with any mainstream understanding of the legitimate function of judges. This leads to another problem with living constitutionalism. Because living constitutionalist judges want to preserve their own legitimacy, they are likely to disguise the true reasons for their decisions. Originalism leads to transparency, but living constitutionalism tends to produce the opposite—a jurisprudence of concealment and obfuscation.

Here is one final thought experiment:

*In times of national crisis, a popular President induces the nation to convene a Constitutional Convention. He circumvents the Article V process and instead has Congress enact ordinary legislation giving him the power to nominate the members of the convention, subject to Senate confirmation. The House and Senate quickly pass the legislation. To ensure swift action, the Convention has only nine representatives and its amendments to the constitution become law immediately, without ratification by the States.*

*Nine representatives to the Convention are nominated and confirmed. Five come from the President’s party, and four are from the opposition*

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123. See David Ingram, *On Day 2, Kagan Tries to Appease Republicans*, NAT’L. LAW JOURNAL, June 30, 2010, <https://www.law.com/nationallawjournal/almID/1202463159121/On-Day-2-Kagan-Tries-to-Appease-Republicans/> [ <https://perma.cc/4LND-BLQU>] (“Sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way, we apply what they tried to do false. In that way, we are all originalists.”).

124. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010);

*party. They all have graduated from Harvard or Yale Law School. There are five Roman Catholics, three Jews, one Protestant, one Latina, and one African American. Forty-five of the states are unrepresented at the convention. There are no Asians, no Native Americans, no one from the South or border states, and no one from the Pacific Northwest, Alaska, or Hawaii. There is no one who has ever held a job other than lawyer, judge, or law professor.*

*The assumption was that the Convention would end after proposing amendments, but the members of the Convention are unable to agree on the actual text of amendments. They seem to be serving for life terms. Instead of amendments, they issue decrees that resolve particular constitutional issues. Sometimes their decrees are very narrow: they actually decide a disputed presidential election but propose no rules to govern future elections. Sometimes their decrees are very broad: they issue rules for police interrogations that spell out the words that must be said before questioning begins. They turn out to be flip-floppers. One year they create a right to abortion, but a few years later they decree that reasonable restrictions on abortion are permissible. States can criminalize flag burning one year, but then the Convention changes its mind. Sometimes, they cannot even agree on the wording of the decree and two or three groups issue inconsistent decrees. Critics howl, but the President directs all the Departments of the national government to comply with the decrees of the perpetual Constitutional Convention.*

Does this way of deciding constitutional issues comply with the rule of law? Could a nine-person perpetual constitutional convention claim democratic legitimacy? Would you say that this convention has the breadth of experience and background to represent the American people as a whole? And a final question: how different is a living constitutionalist Supreme Court from the perpetual Constitutional Convention?

Originalism is imperfect. Living constitutionalism is imperfect as well. And I am sure that many opponents of originalism will object on the grounds that the version of living constitutionalism that I have been discussing is a caricature. Academics will complain that I have not discussed the sophisticated versions of living constitutionalism that have been developed by law professors. These include theories called “common law constitutionalism,”<sup>125</sup> “constitutional pluralism,”<sup>126</sup> and “moral readings.”<sup>127</sup> The trick that such theories seek to perform is to give

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125. *Id.*; David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 57 (2015).

126. Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1994).

127. JAMES FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS

the Supreme Court the power to override the original meaning of the constitutional text while simultaneously keeping the Court within the bounds of the rule of law and democratic legitimacy. This feat of legerdemain is not easy to perform. I am skeptical of the idea that telling the Court to engage in moral readings of the constitutional text will provide meaningful constraint.<sup>128</sup> I am dubious about the ability of the common law method to provide substantial restrictions on the policy views of the Justices.<sup>129</sup> I am suspicious of the claim that judges who consider text, history, structure, precedent, constitutional values, and pragmatic factors will not throw their own ideology into the mix of constitutional methods.<sup>130</sup> I am not convinced that living constitutionalism

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AND AGAINST ORIGINALISMS (2015); RONALD DWORKIN, *LAW'S EMPIRE* (1986); *see also* RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996); RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985).

128. Dworkin clearly states that he believes that the moral reading of the constitution can override the constitutional text:

“[Laurence’s Tribes statement of the constraining role of the constitutional text] is a stronger statement of textual fidelity than I [Dworkin] would myself endorse, because, as I said, precedent and practice over time can, in principle, supersede even so basic a piece of interpretive data as the Constitution’s text when no way of reconciling them all in an overall constructive interpretation can be found.”

Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 83 *FORDHAM L. REV.* 1249, 1259–60 (1997). Dworkin’s moral readings approach allows judges to adopt the “constructive interpretation” of the constitutional text that makes constitution law “the best that it can be”—and this method requires judges to rely on their moral beliefs. The full argument that Dworkin’s complex and shifting approach is unconstrained cannot be made on this occasion. *See generally* Solum, *The Constraint Principle*, *supra* note 1.

129. Defenders of common law constitutionalism might argue that precedent and the doctrine of stare decisis provide sufficient constraint, but Strauss’s understanding of the force of precedent makes it clear that these constraints are weak:

[P]rovisions of the text of the Constitution are, to a first approximation, treated in more or less the same way as precedents in a common law system. The effect of constitutional provisions is not fixed at their adoption—or, for that matter, at any other time. Instead, like precedents, provisions are expanded, limited, qualified, reconceived, relegated to the background, or all-but-ignored, depending on what comes afterward—on subsequent decisions and on judgments about the direction in which the law should develop.

David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 *HARV. L. REV.* 1, 57 (2015); Strauss offers no account of the constraining force of precedent in this article. He makes no mention of the doctrine of *stare decisis*. But as the quoted passage demonstrates, Strauss does make it clear that precedents can be “expanded, limited, qualified, reconceived, relegated to the background, or all-but-ignored, depending . . . on judgments about the direction in which the law should develop.” *Id.* (emphasis added).

130. Constitutional pluralism allows judges to consider a variety of factors, including text, history, structure, workability, and constitutional values (the list varies). Because pluralism denies that there is any hierarchy among the factors, decisions using this method can be justified as long as at least one of the factors supports that outcome. If constitutional values are on this list and because the identify, force, and priority of constitutional values will inevitably be influenced by the moral and political views of the judge, this approach does not provide meaningful constraint.

can be squared with the rule of law and democratic legitimacy, but I am prepared to be surprised.<sup>131</sup>

#### V. CONCLUSION: AN OPEN MIND

Contemporary originalists focus on the public meaning of the constitutional text—and not on the policy preferences of the framers. An originalist jurisprudence would lead to a mix of outcomes—conservative, liberal, progressive, and libertarian—if the original meaning of the constitution were fully implemented. The justifications for originalism can appeal to a wide range of the political spectrum: most Americans believe that the rule of law and democratic legitimacy are important political values. Very few Americans would support a thoroughly politicized Supreme Court.

Originalism! It is a surprising theory. It has surprising implications. And it is supported by surprising justifications. My aim in this Article and in the Regula Lecture upon which it is based is not to persuade you to become an originalist! Our views about originalism are deeply entrenched and difficult to dislodge. My own conversion to originalism from living constitutionalism began in the nineties and was not complete until ten years later. Conversions take time. I do hope that I surprised you. And if you are surprised, then, just maybe, you will approach originalism with curiosity and an open mind.

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131. For more on the comparison between public meaning originalism and various forms of living constitutionalism, see Solum, *The Constraint Principle*, *supra* note 1.