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ORIGINALISM: A THING WORTH DOING . . .

D. A. Jeremy Telman*

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

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I. Introduction: Originalism and Its Discontents

This Article presents a slice of a larger project with the working title “Originalism and Its Discontents.” The title alludes to Freud’s classic sociological work, *Civilization and Its Discontents*.¹ Freud there contended that there is an inescapable malaise associated with human psychology² – although we strive for happiness,³ we suffer continuously from feelings of frustration and incompleteness, even as our cultural and technological accomplishments mount.⁴ We mistake absences for losses and thus feel perpetually cheated out of what we never had.⁵

I contend that a similar sociological phenomenon underlies the movement that favors originalism in constitutional interpretation. We see the familiar confusion between absences and losses in the titles of some classics of originalist scholarship, such as Robert

¹ SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* (James Strachey, transl., 1961). Freud insists that *Civilization and Its Discontents* is not a work of psychoanalysis, and he claims not to share with his readers any insights drawn from psychoanalysis until Chapter 7. *Id.* at 90 (“And here at last an idea comes in which belongs entirely to psycho-analysis and which is foreign to people’s ordinary way of thinking.”). See Leo Bersani, *Speaking Psychoanalysis*, in *WHOSE FREUD? THE PLACE OF PSYCHOANALYSIS IN CONTEMPORARY CULTURE* (Peter Brooks & Alex Woloch, eds., 2000) [hereinafter *WHOSE FREUD?*] 154, 154-55 (characterizing Freud as complaining that the argument of *Civilization and Its Discontents* largely derives from information that is “universally known” and does not rely on the insights of psychoanalysis).

² See, e.g., FREUD, *CIVILIZATION*, at 20 (arguing that people seek solace in religion in order to escape the feelings of helplessness they experience as infants); *id.* at 26, 37 (contending that humans’ ability to experience happiness bumps up against three insuperable barriers: nature’s superior powers, our own bodily feebleness, and other people).

³ See *id.* at 25 (contending that people strive for happiness and that “purpose of life is simply the programme of the pleasure principle”).

⁴ *Id.* at 44-45 (observing that even as we attain an almost god-like character we remain unhappy).

⁵ For an extended discussion of the complicated relationship between absence and loss, see Dominick LaCapra, *Reflections on Trauma, Absence, and Loss*, in *WHOSE FREUD?* at 178-204 (treating the relationship of absence and loss as akin to that between structural and historical trauma).

Bork's *A Country I Do Not Recognize*⁶ and Randy Barnett's *Restoring the Lost Constitution*.⁷ The question at the heart of the project of which this Article is a part is why originalism arose when it did in the 1960s and why it has had such appeal beyond the legal profession and the legal academy and grown into a cultural movement that is still going as strong as ever half a century later. While this Article hopes to shed some light on the broader issue, the focus here is on the practice of originalism in constitutional interpretation in the early 21st century.

This Article will proceed as follows. In Part II, I briefly sketch the history of originalism since the 1960s by highlighting what I regard as the two most striking developments in originalist methodology. Part III sketches what is in my view the unavoidable tension between the compelling and perhaps even inescapable logic of the originalist credo and its epistemological limits. In Part IV, I highlight these epistemological limits in the work of two of originalism's greatest contemporary practitioners, Justices Scalia and Thomas. Part V concludes with some thoughts about what lies ahead for originalism.

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

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

⁷ RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PREUMPTION OF LIBERTY* (Rev'd ed. 2013).

II. Originalism's Journey

This argument of this section is simple. First, the history of originalism shows that this approach is a 20th-century innovation in constitutional interpretation, and it has developed and changed very rapidly in the half-century since it was first articulated as a radical departure from the dominant approach to constitutional adjudication of the 1960s and 70s. Second, as originalism has grown in sophistication and persuasive power, it has also become more self-confident. As a consequence of that confidence, contemporary originalism no longer eschews judicial activism, opposition to which inspired the early originalists. Rather, contemporary originalists at times embrace activism and urge judges to reject legislative enactments that they believe exceed legislative power according to the Constitution's original meaning.

Two important aphorisms by the two leading practitioners of Originalism capture this second, less appreciated development in Originalism. Justice Antonin Scalia's defense of originalism relied crucially on his argument that "a thing worth doing is worth doing badly,"⁸ a motto that captures early originalism's self-consciousness of its own limitations as a methodology of constitutional interpretation. Justice Clarence Thomas counters in his autobiography with his own motto: "Any job worth doing is worth doing right."⁹ Justice Thomas's motto articulates the self-confidence with which originalist scholars and judges, including Justice Scalia, currently proceed. However, while Justice Thomas's motto better captures the originalist movement in its present form, this Article illustrates (in Part IV) through a close reading of the two Justices' originalist slogans that Justice Scalia's motto is more in keeping with the modest capabilities of originalist jurisprudence.

A. Originalism's Precursors

⁸ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U CIN. L. Rev. 849, 863 (1989).

⁹ CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 38, 424 (2007).

Originalism seems obvious and inescapable to us now, but it was almost unheard of until the 1960s. Contemporary originalism had its antecedents in the Four Horsemen of the judicial reaction during the *Lochner* era.¹⁰ According to legal historian G. Edward White, the jurisprudence of those who resisted the New Deal entailed the view that:

[T]he Constitution was not designed to change with time. Its principles were universal, and thus its “meaning” at a generalized level was fixed. Its structure and language were not altered by events but accommodated events. Events were seen as precipitating restatements of fundamental constitutional principles.¹¹

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

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

¹⁰ The “Four Horsemen” label did not become common until the 1950s. G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000), 285. Barry Cushman, a leading historian of the New Deal, sets out a caricatured narrative of the “switch in time” in which he describes the Four Horsemen (Justices Van Devanter, McReynolds, Sutherland and Butler) as pursuing a jurisprudence “driven by their devotion to the anachronistic tenets of laissez-faire economics and their sympathetic subservience to the interests of rich and powerful people and institutions.” BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 3 (1998). Cushman has promoted a far more nuanced assessment of the “Four Horsemen,” noting that they were by no means united on all issues, nor were their votes always best understood as promoting political conservatism. See Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 *VIRG. L. REV.* 559 (1997).

¹¹ WHITE, *THE CONSTITUTION AND THE NEW DEAL* 205.

whole experience and not merely in that of what was said a hundred years ago.¹²

Justice Holmes's words, perhaps because they are Justice Holmes's words, exude self-confidence and serenity, as though he were merely reminding his readers of truths as self evident as those enumerated in the Declaration of Independence. Two dissenting Justices filed no opinion.

The New Deal Supreme Court extended this outlook as early as 1934,¹³ when Chief Justice Hughes upheld a state law that enabled courts to postpone mortgage deadlines in the face of a challenge based on the Constitution's Contracts Clause.¹⁴ Chief Justice Hughes was well aware that the Contracts Clause was enacted to prevent states from passing legislation just like that being challenged.¹⁵ Invoking Chief Justice John Marshall's famous reminder that "we must never forget that it is a *constitution* we are expounding,"¹⁶ Chief Justice Hughes rejected the notion that "the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them."¹⁷ If the "meaning" of the Contracts Clause entails "the social implications of its application," then the mortgage crisis of the 1930s was not the same as the debt crisis that the Framers contemplated when they ratified the Constitution.¹⁸ Not surprisingly, Justice Sutherland wrote a vigorous dissent, in which the other three Horsemen joined.¹⁹

¹² 252 U.S. 416, 433 (1920)

¹³ *Home Bulding & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934).

¹⁴ *See* U.S. Const., Art. I, § 10 ("No State shall . . . impair the Obligation of Contracts.").

¹⁵ *See* WHITE, *THE CONSTITUTION AND THE NEW DEAL* at 212 (noting that the "Contracts Clause was unambiguously designed to prevent the very legislative intervention being challenged" in the case).

¹⁶ *McCulloch v. Maryland*, 4 Wheat. 315, 415 (1816)

¹⁷ *Home Bulding & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 442-43 (1934).

¹⁸ WHITE, *THE CONSTITUTION AND THE NEW DEAL* at 214.

¹⁹ *Blaisdell*, 290 U.S. at 448-49 (Sutherland, J., dissenting) ("A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time.").

According to Noah Feldman, Justice Hugo Black was the first “to frame originalism as a definitive constitutional theory.” Feldman calls Justice Black “the inventor of originalism.”²⁰ Justice Black called version his version of originalism “absolutist” on the subject of individual rights.²¹ Unlike the academics who popularized originalism in the 1960s and 1970, he is generally considered to have been a liberal Justice and often considered an activist,²² in that he would not hesitate to vote down legislation that violated his understanding of the Constitution’s meaning.²³ While he certainly adhered to the notion that fidelity to the written

²⁰ NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES 145 (2010).

²¹ The term derives from Black’s inaugural James Madison lecture at NYU in 1960 in which he stated, “It is my belief that there *are* ‘absolutes’ in our Bill of Rights, and that they were put there by men who knew what words meant, and meant their prohibitions to be ‘absolute.’” ROBERT K. NEWMAN, HUGO BLACK: A BIOGRAPHY 492 (1994); *See also* HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 122-123 (stressing Justice Black’s belief in the need for courts to invalidate legislative enactments that threatened individual liberties).

²² *See* Arthur J. Goldberg, *Attorney General Meese vs. Chief Justice John Marshall and Justice Hugo L. Black*, 185, 193, in JUSTICE HUGO BLACK AND MODERN AMERICA (Tony Freyer, ed., 1990) [hereinafter FREYER] (calling into question characterizations of Justices as “liberal” or “conservative” but referring to Justice Black as “that outstanding ‘liberal’ jurist”); Akhil Amar, *America’s Constitution and the Yale School of Constitutional Interpretation*, 115 YALE L.J. 1997, 2008 n.33 (2006) (describing Justice Black as “a liberal lion and a confessed textualist-originalist”). Justice Black himself would not have appreciated the “activist” label. He considered the *Lochner* era, during which the courts struck down business regulation, as a regrettable period of activism. *See* Goldberg, in FREYER, at 193 (citing Justice Black’s opinion in *Ferguson v. Skrupa*, 372, U.S. 726, 731-32)).

²³ Some prominent example of Justice Black’s use of originalism include: *In re Winship*, 397 U.S. 358, 377 (1970) (Black, J., dissenting) (contending that the Constitution does not require that states apply the “beyond a reasonable doubt” standard in criminal cases); *Wesberry v. Sanders*, 376 U.S. 1 7-18 (1964) (construing Article I, § 2 of the Constitution, with the help of historical materials from the period of the 1787 Constitutional Convention, to require that electoral districts have similar populations within a given state); *Adamson v. California*, 332 U.S. 46, 74-78, 92-122 (1947) (Black, J., dissenting) (contending that the 14th Amendment was intended to make the Bill of Rights applicable against the States and appending an appendix chronicling the Amendment’s history). *See also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 2 (1980) [hereinafter DEMOCRACY AND DISTRUST] (recognizing Justice Black as the quintessential originalist).

constitution was a mechanism for restraining judicial activism,²⁴ his voting record is hard to reconcile with some versions of contemporary originalism.²⁵ Moreover, he was an outlier in his jurisprudential approach throughout his time on the Court. His originalism did not sway others.²⁶

The current vogue for originalism thus did not originate in the minds of our 18th-century Framers.²⁷ Leaders of the new Republic did not contemplate originalism for many reasons, but the most obvious is that the source materials that make originalism possible were not available to them. George Washington held on to the official record of the debates, which is incomplete, and eventually handed them over to John Quincy Adams, who published them in 1819.²⁸ That document was edited and more widely circulated in 1830.²⁹ James Madison's influential account of the Constitutional

²⁴ See NEWMAN, HUGO BLACK, at 349 (describing the aim of limiting judicial discretion as being the root of Justice Black's judicial tree).

²⁵ See Goldberg, *Attorney General Meese*, at 185-89 (contrasting Attorney General Meese's originalist opposition to incorporation through the 14th Amendment with Justice Black's originalist insistence on incorporation).

²⁶ See Anthony Lewis, *Justice Black and the First Amendment*, in FREYER, at 237, 237-38 (suggesting that Justice Black wrote for the majority in only one First Amendment case); *id.* at 251 ("The fact is Justice Black's oft-proclaimed belief in First Amendment absolutes never commended itself to a majority of his colleagues.").

²⁷ See, e.g., Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1194-96 (noting that various contemporary methods of non-originalist constitutional interpretation are rooted in traditions that extend back to the time of the adoption of the Constitution and were employed by Justice John Marshall); Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J. L. PUB. POL'Y 907, 908 (2008) (citing Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 6 (2006)) ("The idea of originalism as an exclusive theory, as the criterion for measuring constitutional decisions, emerged only in the 1970s and 1980s."); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004) (conceding that, for much of U.S. history, originalism "was not a terribly self-conscious theory of constitutional interpretation").

²⁸ See Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?* 80 GEO. WASH. L. REV. 1620, 1663-1680 (2012) (recounting battles during the Washington administration over the meaning of the Constitution and the struggle over the extent to which the men involved in the Convention could rely on the written record of that Convention).

²⁹ *Id.* at 1623.

Convention was first published in 1840.³⁰ The first scholarly edition of the Convention did not appear until 1911.³¹ Powerful criticisms have been raised with respect to the accuracy of Madison's account³² and as to the scholarly neglect of the official records of the Constitutional Convention.³³ Such accounts are most relevant to intentionalists and since, as we shall see, most 21st-century originalists are more concerned with original public meaning than they are with original intent, the more important documents relate not to the drafting of the Constitution in Philadelphia but to its ratification in the several States.

But there the situation is no better. The first comprehensive scholarly account of the ratification was published in 2010.³⁴ Even today, the documentary record relating to ratification is incomplete.³⁵ We have detailed records of some ratification assemblies and almost none relating to others.³⁶ The situation for the Bill of Rights is far worse, as the final text was the product of a

³⁰ JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 (Gordon Lloyd, ed., 2015).

³¹ THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911).

³² See MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015) (contending that Madison revised his account of the Convention in the years after the Convention to reflect his evolving views of the Constitution in action and of the men responsible for drafting it).

³³ See Bilder, *How Bad?* 80 GEO. WASH. L. REV. at 1623 (2012) (defending the usefulness of the official records and the competence of the recording secretary against Max Farrand's assessment that the records are flawed and the secretary incompetent).

³⁴ PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787-1788 (2010). See *id.* at x (discussing previous scholarship on ratification, the best of which consisted of two edited collections that appeared in 1988 and 1989 but which devoted separate chapters to the ratification process in each state and thus missed part of the story).

³⁵ See *id.* at xiii-xiv (describing the way Federalists conspired to create a one-sided record of the ratification debates that favored their perspective).

³⁶ See *id.* at xii (noting that in the 21-volume collection, *The Documentary History of the Ratification of the Constitution*, the records for Delaware, New Jersey, Georgia and Connecticut take up one volume, while four volumes are devoted to Virginia and five to New York).

committee that kept no minutes of its proceedings and of a vote in the Senate, whose deliberations were secret by design.³⁷

If it claims to be the original understanding of the Framers, originalism is a twentieth-century invention, not without its historical antecedents, but not realized as a comprehensive approach to interpretation until about 200 years after the Framing. Justice Scalia acknowledged as much:

It would be hard to count on the fingers of both hands and the toes of both feet, yea, even on the hairs of one's youthful head, the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean.³⁸

We do not even know whether the Framers, had the question been put to them, would have wanted their intentions or their understandings to govern our approach to constitutional conundrums that the Framers could not have contemplated. That is, we do not know whether originalism was originally intended.

B. From Intentionalism to Textualism

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

³⁷ See RICHARD LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS* 234 (2006) (noting that “little is known about the debate” in the Senate that winnowed the Bill of Rights down from 17 Amendments to 12 because “the Senate met behind closed doors until 1794, and thus the record of their discussion is sparse”).

³⁸ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U CIN. L. Rev. 849, 852 (1989).

meaning what its original intended audience understood it to mean.³⁹

Originalism, as an academic movement in constitutional interpretation with a popular following, began as a response to the Warren and Burger Courts.⁴⁰ Judge Robert Bork's contribution was to expand upon Herbert Wechsler's "neutral principles" approach. In Bork's view, the judge's task was to apply "neutral principles" articulated in the Constitution.⁴¹ Originalism was at this point a reactive theory that sought to reign in judicial activism by forcing judicial attention to the original meaning of the Constitution.⁴² As Judge Bork explained,

Though there have been instances of judicial perversity throughout our history, nothing prepared us for the sustained radicalism of the Warren Court, its wholesale subordination of law to an egalitarian politics that, by deforming both the

³⁹ For excellent, succinct summaries covering the history of originalism, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611–29 (1999); Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 530–33 (2008); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599–603 (2004); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

⁴⁰ Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. at 1188; see also Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L. J. 239, 247 (2009) (explaining that the "sweeping decisions of the Warren Court" led conservatives to insist that "the Constitution be interpreted to give effect to the intent of the framers"); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 550–54 (2006) (describing modern conservative jurisprudential thought as a response to the judicial activism of the liberal Warren Court). John Hart Ely makes the more precise claim that the Supreme Court's decision in *Roe v. Wade* forced constitutional law professors to decide where they stood in relation to the division between originalists and non-originalists. DEMOCRACY AND DISTRUST, at 2–3.

⁴¹ See, e.g. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971) (reflecting on the implications of Wechsler's concept of neutral principles and applying that concept to some First Amendment issues).

⁴² See *id.* at 4–6 (criticizing Judge Wright and the claim that the Supreme Court must unavoidably make fundamental value choices in interpreting the Constitution).

Constitution and statutes, reordered our politics and our society.⁴³

Given the focus of early originalism on the Supreme Court's perceived liberal, judicial activism, originalism had a clear, if purely negative, political agenda, and it assumed that its agenda could be realized if judges respected the wills of legislatures.⁴⁴

Early academic practitioners of originalism described their project as one of fidelity to the original *intentions* of the Framers.⁴⁵ Although contemporary academic and judicial originalists sometimes lapse into the language of intentions,⁴⁶ originalism largely abandoned the intentionalist project in the 1980s, when legal scholars published compelling criticisms of the original intentions approach.⁴⁷ Stanford Law School's Paul Brest exposed

⁴³ Robert Bork, *Introduction*, in A COUNTRY, at ix, ix-x.

⁴⁴ Dennis Goldford provides a nuanced reading of the relationship between political conservatism and originalism. He concedes that originalism was a conservative reaction to the perceived liberalism of the Warren and Burger Courts but rejects the notion that originalism and the principle of judicial restraint could be tied to any particular political ideology. DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 20-54 (2005). Raoul Berger, one of the leading academic originalisms of the 1960s and 70s, was a principled originalist who abhorred judicial activism, but he did not have a political axe to grind. He may well have agreed with the politics of the Warren and Burger Courts but he opposed government by judiciary. For an appreciation of Berger's work and of his enduring influence, see Jonathan G. O'Neill, *Raoul Berger and the Restoration of Originalism*, 96 NORTHWESTERN L. REV. 253 (2001).

⁴⁵ See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 364 (1977) (contending that any jurisprudence not bound by original intent amounts to judicial re-writing of the Constitution); Edwin Meese, *Toward a Jurisprudence of Original Intent*, 11 HARV. J. L. & PUB. POL'Y 5 (1988) (; Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986) ("original intent is the only legitimate basis for constitutional decisionmaking.").

⁴⁶ See Clarence Thomas, *How to Read the Constitution*, excerpt from the 2008 Wriston Lecture delivered to the Manhattan Institute, in THE WALL ST. J. (Oct. 20, 2008), at A19 ("[T]here are really only two ways to interpret the Constitution – try to discern as best we can what the framers intended or make it up.").

⁴⁷ See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611-12 (1999) (describing the original intentions approach as having been

the extraordinary difficulty in reconstructing the Framers' original intentions with respect to any particular constitutional provision,⁴⁸ a very strong position, given the state of historical research at the time. Brest's critique established the foundations for the "instability thesis," that is, the idea that the contestations that emerge from the historical record render futile originalism's attempts to fix constitutional meaning.⁴⁹

It is very difficult to know the intentions of the Framers, beyond what we can discern from the text itself, based on the legislative history of the Constitution. The complex ratification process involved hundreds of actors, and records of the ratification process are spotty at best.⁵⁰ However, some contemporary originalists are increasingly confident of our ability to discern the

"trounced" by its critics); *id.* at 613 ("If ever a theory had a stake driven through its heart, it seems to be originalism.").

⁴⁸ See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 222 (1980) (concluding that an "interpreter's understanding of the original understanding may be so indeterminate as to undermine the rationale for originalism" in the case of many controversial constitutional provisions).

⁴⁹ See, e.g., DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 146-49 (2005) (discussing both empirical and theoretical difficulties with the attempt to reconstruct the intention of the Framers); Patrick J. Charles, *History in Law, Mythmaking, and Constitutional Legitimacy*, 63 CLEV. ST. L. REV. 23, 26-27 (2014) (describing historians as having exposed original intents originalism as an instance of the pathetic fallacy and pointing out that the move to textualism does little to prevent subjective outcomes); Joel Alicea & Donald L. Drakeman, *The Limits of the New Originalism*, 15 U. PENN. J. CONST. L. 1161, 1170-82 (2013) (using the early case of *United States v. Hylton* to demonstrate the varied understandings among the Framers of the meaning of "excise tax").

⁵⁰ See PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787-1788* 122-23 (2010) (describing the journal of the New Jersey ratifying convention as not "very revealing" and noting that "[t]here were no published debates or newspaper accounts of the New Jersey convention"); *id.* at 124 (observing that Georgia unanimously ratified the Constitution after one day of deliberations and that the journal of those deliberations records only the result with no explanation); *id.* at 457 (observing that "[n]o record survives of the debates at Fayetteville, . . ." where North Carolina held its ratifying convention). Delaware approved the Constitution unanimously after a four-day convention. *Id.* at 122. Records are so spotty that Pauline Maier mentions Delaware on only eight pages in her 500-page history of ratification, and she recounts the ratification on only one of those pages. *Id.*

original understanding of the Constitution through the use of computer-assisted research techniques.⁵¹

Duke Law's H. Jefferson Powell emphasized the framers' reluctance to have interpretations of the Constitution depend on claimed knowledge of their own original intentions.⁵² Anticipating contemporary textualism, Powell argued that in the early Republic, references to "intention" were akin to the common law tradition whereby one discerns the intention of a legal text from the text itself.⁵³ Joseph Ellis concludes that the Constitution does not embody "timeless truths" and that the Framers' humility, in knowing that they did not have all the answers, has enabled their Constitution to survive.⁵⁴ They aimed instead to "provide a political platform wide enough to allow for considerable latitude within which future generations could make their own decisions."⁵⁵ According to Ellis, Jefferson spoke for of the most prominent Framers when he urged that constitutions ought not be

⁵¹ See Lee Strang, *Blunting the Instability Critique: Original Meaning Originalism and Computer-Assisted Research Techniques*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2665131 (arguing that computer-assisted research techniques enables originalism to overcome the instability thesis); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003) (reviewing all instances of the word "commerce" in the Pennsylvania Gazette from 1720-1800 and finding that the word's conventional meaning is relatively narrow, connoting only "trade" or "exchange"); but see Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1199-1200 (2003) (noting a broader understanding of the term "commerce" in writings, such as those of Adam Smith and Daniel Defoe with which the Framers were familiar and that some Framers express broader understandings of "commerce" at the Convention itself).

⁵² See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 906-07 (1985) (pointing out the Federalists' view that the intentions of the drafters of the Constitution would not be legally relevant because they were "mere scribes" appointed to draft an instrument for the people).

⁵³ See *id.* at 895-902 (describing the evolution of the objective approach to common law interpretation in which one gave effect to the will of the parties to a contract or the drafters of the statute through interpretation of the text intended to give expression of those wills)

⁵⁴ JOSEPH J. ELLIS, *THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION, 1781-1789* 218 (2015) [hereinafter ELLIS, *THE QUARTET*].

⁵⁵ *Id.* at 219.

regarded with “sanctimonious reverence” and that law and institutions must develop “hand in hand with the progress of the human mind.”⁵⁶ Statements by the drafters as to their intentions formed no part of 18th- or early 19th-century attempts to discern the Constitution’s meaning.⁵⁷

In response to critiques of intentionalism, originalists refined their methodology and shifted their focus from the original intentions of the Constitution’s drafters to the understandings of the men who ratified it, as a shorthand for the original public understanding of the constitution’s text.⁵⁸ This made more sense, because we are less interested in what the Framers thought they were saying at the constitutional convention in Philadelphia than we are with what those who voted for ratification in the thirteen separate ratification processes thought they were agreeing to.⁵⁹ From there, the shift to textualist originalism was not far. Justice Scalia is largely credited with spearheading the shift in the originalist movement from intentionalism to textualism – that is, the shift from a focus on the intent of the drafters or ratifiers of the Constitution to a focus on the original public meaning of the document as it would have been understood by educated people living in the late 18th century.⁶⁰ We care about that understanding

⁵⁶ See *id.* at 219-20 (quoting a letter from Thomas Jefferson to Samuel Kercheval, written July 12, 1816 and conveniently available in *The Portable Thomas Jefferson* 558-59 (Merrill D. Peterson, ed., 1975).

⁵⁷ See Powell, 98 HARV. L. REV. at 888 (“This original ‘original intent’ was determined not by historical inquiry into the expectations of the individuals involved in framing and ratifying the Constitution . . .”).

⁵⁸ See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990) (clarifying that the search for the original meaning is not the search for the drafters subjective intention but for “what the public of that time would have understood the words to mean”).

⁵⁹ See Powell, 98 HARV. L. REV. at 888 (“To the extent that constitutional interpreters considered historical evidence to have any interpretive value, what they deemed relevant was evidence of the proceedings of the state ratifying conventions, not of the intent of the framers.”); Charles Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77, 79 (1988) (contending that the Framers “were clearly hospitable to the use of original intent in the sense of ratifier intent, which is *the* original intent in a constitutional sense”).

⁶⁰ See Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 9 (2006) (“Justice Scalia was perhaps the first defender of originalism to shift the theory from its previous focus on the

because the ratification process was a founding moment, at which the states through their representatives (eventually) all agreed to bind their wills through a common text.⁶¹ So what judges ought to be trying to reconstruct is not what the drafters thought they said but what a reasonable, educated person would have understood the constitutional text to mean.

We have now come full circle, with a group of originalist scholars embracing the intentionalist label in full awareness of the debate over its adequacy.⁶² In fact, the difference between textualist approaches or original-public-meaning approaches and intentionalist originalism should not be overstated. Regardless of nomenclature, originalists of all stripes consult the same sources in determining the meaning of the text.⁶³ The Framers whose

intentions of the framers of the Constitution to the original public meaning of the text at the time of its enactment.”); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 554-55 (2003) (crediting Justice Scalia with the suggestion, accepted by most originalists, to change the label of the doctrine from original intent to original meaning).

⁶¹ See Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 417-18 (2013) (articulating new originalism’s normative claim that original meaning should presumptively govern constitutional interpretation).

⁶² See e.g., LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 131-232 (2008) (elaborated a theory of interpretation whose goal is to capture the lawmaker’s intended meaning). Others, while not embracing intentionalism, have pointed out that the new originalism fares not better in its attempts to escape the subjectivism associated with non-originalist mechanisms of constitutional interpretation; Heidi M. Hurd, *Why Would Anyone Care About Original Intent?* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612115 at 4-5 (contending that if Alexander and Sherwin’s defense of intentionalism fails, other versions of originalism are unlikely to be more persuasive); Joel Alicea & Donald L. Drakeman, *The Limits of the New Originalism*, 15 U. PENN. J. CONST. L. 1161, 1208-09 (2013) (advocating a “descriptivist” version of intentionalism and permitting courts to allow the Framers’ intention to break “ties” when original public meaning is unclear); Tara Smith, *Originalism’s Misplaced Fidelity: “Original” Meaning Is Not Objective*, 26 CONSTITUTIONAL COMMENTARY 1, 55-56 (2009) (concluding that both original public understanding approaches and Randy Barnett’s attempt to ground originalism in the importance of the “writtleness” of the constitution fail to escape subjectivism).

⁶³ See, e.g., Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 741-42 (2011) (noting that even so-called New Originalists concede that recourse to evidence of original intent or original expected applications is the best method for establishing original public meaning); Richard S. Kay,

intentions shaped the text were among the most prolific writers who opined on the text's meaning and thus provided evidence of the Constitution's original public meaning. They also often numbered among the ratifiers, whose understanding of the text matters the most.⁶⁴

In this context, it is worth noting that the leading historians of the founding period, including Gordon Wood and Jack Rakove, are not originalists.⁶⁵ Joseph J. Ellis, a Pulitzer Prize-winning historian who has written nine books about the founding era, decries the pointlessness of trying to imagine what George Washington's view might be of contemporary constitutional

Original Intention and Public Meaning in Constitutional Interpretation, 103 NW. L. REV. 703, 712-13 (2009) (concluding that the public meaning of the constitutional text almost always follows the intentions of those who drafted and adopted it).

⁶⁴ See, e.g., SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 79 n.1 (2007) ("The distinction between intention and meaning is a refinement that cuts no ice with us."); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 375 n.130 (1981) ("[T]he difficulties of ascertaining the intent of the ratifiers leaves little choice but to accept the intent of the Framers as a fair reflection of it."); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 557 (2003) (pointing out that original intent and original meaning most likely align in most cases and where they do not, modern readers are not well positioned to discern original meaning).

⁶⁵ See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 6 (1996) (calling the idea that the Constitution had a fixed meaning at the time it was adopted "a mirage"); Gordon S. Wood, *The Supreme Court and the Uses of History*, 39 OHIO N.U. L. REV. 435, 443-44 (2013) (distinguishing real history from "law office history" or "history lite" and arguing that no historian who wants to maintain her reputation among her peers should engage in the latter); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 578-79 (2011) ("Historical answers may be just as indeterminate as other forms of legal reasoning, allowing judges to pick and choose the evidence that satisfies their predispositions."); Jack M. Balkin & Sanford Levinson, Essay, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 165 (2006) (noting that most academics with degrees in both law and history are "highly skeptical" of originalism because they tend to have more nuanced views of history events); Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 351-58 (1989) (marshaling evidence that the Framers did not intend for the Constitution to be interpreted according to their intentions and raising questions about who should be included among "the Framers").

controversies. He compares the exercise to “planting cut flowers.”⁶⁶ Ellis concludes his most recent book by noting that the one original intention that the Framers all shared “was opposition to any judicial doctrine of ‘original intent.’” The Framers wished to be remembered, Ellis concedes, “but they did not wish to be embalmed.”⁶⁷

C. The Return of Originalist Judicial Activism

There is a second development in originalist theory that is at least as significant as the move from intentionalism to textualism. Originalism began in the 1960s as a theory of judicial humility. As Thomas Colby put it, “Originalism was born of a desire to constrain judges. Judicial constraint was its heart and soul—its *raison d’être*.”⁶⁸ It was a response to what was at the time regarded as a period of unprecedented judicial activism. Today, originalism thrives as a far more robust, sophisticated and self-confident theory that contemporary judges may overrule legislative enactments and court precedents based on originalist methods, which may be intentionalist or textualist, as the occasion dictates.⁶⁹ Originalism now enacts judicial activism rather than resisting it.⁷⁰

Just to take a few examples: the Supreme Court recently recognized for the first time that the Second Amendment protects

⁶⁶ ELLIS, *THE QUARTET*, at xvii.

⁶⁷ *Id.* at 220.

⁶⁸ Colby, *The Sacrifice of the New Originalism*, 99 *GEO. L.J.* at 714.

⁶⁹ See Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411, 420-32 (2013) (arguing that, even where recent Supreme Court cases were decided on other grounds, originalism still exerts a “gravitational force” influencing those opinions).

⁷⁰ See, e.g., Eric J. Segall, *The Constitution According to Justices Scalia and Thomas: Alive and Kickin’* 91 *WASH. U. L. REV.* 1663 (2014) (discussing recent constitutional decisions in which Justices Scalia and Thomas have voted to overturn precedent or struck down legislation); Colby, *The Sacrifice of the New Originalism*, 99 *GEO. L.J.* at 714-15 (noting that the “new originalism” has abandoned the emphasis on judicial constraint that inspired its original popularity); Geoffrey Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 *TULANE L. REV.* 1533, 1548 (2008) (noting that originalism can be passivist or activist and criticizing the Roberts Court for ignoring precedent).

an individual right to bear arms and struck down state⁷¹ and federal⁷² gun control enactments that had been in place for decades.⁷³ In so doing, the Court overturned 70-year-old constitutional precedent (a McReynolds opinion, no less) that had specifically rejected the claim that the Second Amendment protected an individual right to bear arms outside the context of a well-regulated militia,⁷⁴ and which had been subsequently relied on in hundreds of cases.⁷⁵

In its first Obamacare decision,⁷⁶ the Supreme Court was willing to draw on originalist jurisprudence⁷⁷ and set aside decades of precedent during which the scope of Congress's powers under

⁷¹ McDonald v. City of Chicago, 130 S.Ct. 3020 (2010)

⁷² District of Columbia v. Heller, 128 S.Ct. 2783 (2008)

⁷³ See McDonald, 130 S.Ct. at 3026 (noting that Chicago's ordinance that was challenged in the case dated from 1982); Heller 128 S.Ct. at 2854 (Breyer, J., dissenting) (discussing the original version of the challenged legislation, which was passed in 1976).

⁷⁴ See United States v. Miller, 307 U.S. 174. 178 ("In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.").

⁷⁵ See Heller 128 U.S. at 2823 * n.2 (Stevens, J., dissenting) (citing cases and noting that until a Fifth Circuit decision in 2001, every Circuit Court had followed *Miller* in holding that the Second Amendment does not protect an individual right to possess and use weapons for private purposes).

⁷⁶ National Federation of Independent Business v. Sibelius, 132 S.Ct. 2566 (2012).

⁷⁷ See ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM 114 (2013) (specifying Chief Justice Roberts' unacknowledged reliance on Gary Lawson and David Kopels' narrow reading of the Necessary and Proper Clause based on historical evidence from the eighteenth century); *id.* at 118 (characterizing the opinion of the dissenting Justices who joined in Justice Scalia's opinion as adopting an interpretation of the Necessary and Proper Clause that Justice Marshall specifically rejected in *McCulloch v. Maryland*); Randy Barnett, *A weird victory for federalism*, SCOTUSblog (June 28, 2012), available at <http://www.scotusblog.com/2012/06/a-weird-victory-for-federalism/> (proclaiming that the Court had "accepted all of our arguments" in adopting the novel action/inaction distinction in *NFIB v. Sibelius*).

the Commerce Clause was nearly unfettered.⁷⁸ The Court first began its retreat from deference in 1995 with *United States v. Lopez*,⁷⁹ but in all but one of the cases in which the Court struck down laws as exceeding Congress's Commerce Clause powers, it did so by a 5-4 votes with the Court's five most conservative Justices in the majority. In so doing the Justices "most commonly associated with advocating judicial restraint . . . abandoned almost 60 years of deference to the legislature under the commerce clause."⁸⁰

Finally, in *Citizens United*,⁸¹ the Court ordered rehearing and decided issues that were not raised in the first oral argument before it in the case.⁸² It then overturned recent precedent and invalidated long-standing campaign finance regulation.⁸³ All of these decisions might be on solid ground and well reasoned, but they are not the actions of a minimalist court. As a result, some originalists see in its moment of triumph, especially in the context of the Court's Second Amendment jurisprudence, the seeds of corruption.⁸⁴

III. Originalism as Inescapable and Doomed

It is now very difficult to imagine or to defend a theory of constitutional interpretation that would be indifferent to the original meaning of the text. Thus some proponents of originalism

⁷⁸ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 262-71 (5th ed. 2015) (discussing the Court's extremely broad understanding of Congress's Commerce Clause powers between 1937 and 1995).

⁷⁹ 514 U.S. 549 (1995)

⁸⁰ CHEMERINSKY, CONSTITUTIONAL LAW at 281.

⁸¹ *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010).

⁸² See Jeffrey Toobin, *Annals of Law, Money Unlimited: How Chief Justice John Roberts orchestrated the Citizens United decision*, THE NEW YORKER (May 21, 2012), available at <http://www.newyorker.com/magazine/2012/05/21/money-unlimited>.

⁸³ See *Citizens United*, 130 S.Ct at 886 (2010) (holding that the doctrine of *stare decisis* does not compel adherence to *Austin v. Michigan Chamber of Commerce* (1990) or *McConnell v. Federal Election Commission* (2003)).

⁸⁴ See J. Harvie Wilkinson, III, *Of Guns, Abortions and the Unraveling Rule of Law*, 95 VIRG. L. REV. 253 (2009) (likening the activism informing the *Heller* decision to that of *Roe v. Wade*).

have confidently declared that we are all originalists now.⁸⁵ And both originalism and originalists have made great advances. Originalism has largely addressed the concerns of its early critics, and as a result it has become a far more robust interpretive approach. As more and more legal scholars engage in originalist research, the amount of information we have about the background to the Constitution steadily grows. This historical research into original intent and original meaning in turn informs judicial opinions and scholarship, effecting a fundamental reorientation of the interpretive task.

The last few decades have produced an incredible outpouring of high-quality legal-historical scholarship. As a result, originalists can now claim much greater and more specific knowledge of the original meaning of, sampling just some of the recent scholarship: the Commerce Clause;⁸⁶ the Necessary and Proper Clause;⁸⁷ foreign affairs;⁸⁸ the scope of Executive power;⁸⁹ Article IV's Privileges and Immunities Clause;⁹⁰ the Supremacy Clause;⁹¹

⁸⁵ ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1 (2011).

⁸⁶ Mark R. Killenbeck, *The Original(?)*, *Public(?)* Meaning of “Commerce”, 16 J. CONST. L. 289 (2013); Randy E. Barnett, *Jack Balkin’s Interaction Theory of “Commerce”*, 2012 U. ILL. L. REV. 623; Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001)

⁸⁷ GARY LAWSON, *ET AL.*, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (2010); John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L. J. 1045 (2014); John T. Valauri, *Originalism and the Necessary and Proper Clause*, 39 O.N.U. L. REV. 773 (2013); Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003).

⁸⁸ MICHAEL D. RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS (2007). Ingrid Wuerth, *An Originalism for Foreign Affairs?* 53 ST. LOUIS U. L. J. 5 (2008).

⁸⁹ ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010); David Fontana, *The Second American Revolution in the Separation of Powers*, 87 TEX. L. REV. 1409 (2009); Robert G. Natelson, *The Original Meaning of the Constitution’s “Executive Vesting Clause”—Evidence from Eighteenth-Century Drafting Practice*, 31 WHITTIER L. REV. 1 (2009).

⁹⁰ Stewart Jay, *Origins of the Privileges and Immunities of State Citizenship under Article IV*, 45 LOY. U. CHI. L. J. 1 (2013); Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117 (2009); Kenyon D. Bunch, *The Original Understanding of the Privileges and Immunities Clause: Michael Perry’s Justification For Judicial Activism Or Robert Bork’s Constitutional Inkblot?* 10 Seton Hall Const. L.J. 321 (2000).

foreign affairs;⁹² the First Amendment's Free Speech Clause;⁹³ the First Amendment's religion clauses;⁹⁴ the Second Amendment;⁹⁵ the Fourth Amendment;⁹⁶ the Fifth and Fourteenth Amendments'

⁹¹ Michael D. Ramsey, *The Supremacy Clause, Original Meaning, and Modern Law*, 74 OH. ST. L. J. 559 (2013); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731 (2010); D. A. Jeremy Telman, *Medellin and Originalism*, 68 MD. L. REV. 377 (2009); Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

⁹² MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* (2007). Ingrid Wuerth, *An Originalism for Foreign Affairs?* 53 ST. LOUIS U. L. J. 5 (2008).

⁹³ Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L. J. 1 (2011); Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L. J. 1057 (2009);

⁹⁴ Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489; Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727 (2009); Vincent Philip Munoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083 (2008); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1416 (1990).

⁹⁵ Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343 (2009); David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295 (2009); Nathan Kozuskanich, *Originalism, History and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?* 10 J. CONST. L. 413 (2008); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487 (2004); Saul Cornell, *Commonplace Or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMM. 221 (1999).

⁹⁶ Fabio Arcilo, Jr., *A Response to Professor Steinberg's Fourth Amendment Chutzpah*, 10 U. PA. J. CONST. L. 1229 (2008); David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 U. PA. J. CONST. L. 581 (2008); Akhil Reed Amar, *Fourth Amendment, First Principles*, 107 HARV. L. REV. 757 (1994); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000).

Due Process Clauses;⁹⁷ the Eight Amendment;⁹⁸ the Ninth Amendment;⁹⁹ the Tenth Amendment;¹⁰⁰ the Fourteenth Amendment's Equal Protection Clause;¹⁰¹ and the Fourteenth Amendment's Privileges or Immunities Clause.¹⁰² Judges who want to give originalist interpretations to specific constitutional clauses can now draw on this extremely rich trove of research in order to do so.

⁹⁷ Natalie M. Banta, *Substantive Due Process in Exile: The Supreme Court's Original Interpretation of the Due Process Clause of the Fourteenth Amendment*, 13 WYO. L. REV. 151 (2013); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010); Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1 (2007); Edward J. Eberle, *Procedural Due Process: the Original Understanding*, 4 CONST. COMM. 339 (1987).

⁹⁸ John Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM & MARY L. REV. 531 (2014); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, (2008).

⁹⁹ Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?* 5 NYU J. L. & LIB. 1(2010); Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2009-10 CATO SUP. CT. REV. 13; Kurt T. Lash, *Three Myths of the Ninth Amendment*, 56 Drake L. Rev. 875 (2008).

¹⁰⁰ Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty and "Expressly" Delegated Power*, 83 NOTRE DAME L. REV. 1889 (2008); Gary Lawson, *A Truism with Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME L. REV. 469 (2008).

¹⁰¹ Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71 (2013); Chistrophe R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219 (2009); Christopher R. Green, *The Original Sense Of The (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1 (2008); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VIRG. L. REV. 947 (1995).

¹⁰² Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866*, 101 GEO. L. J. 1275 (2013); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J. 329, 337 (2011); Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J. 1241 (2010); Phillip Hamburger, *Privileges or Immunities*, 105 NW. L. REV. 61 (2011).

Nonetheless, our attempts to discern the original meaning have not produced greater certainty or predictability in constitutional interpretation, which is still claimed as one of the advantages of the originalist approach.¹⁰³ In *Heller*, the majority and the dissent used nearly identical interpretive methods to arrive at opposite conclusions regarding the meaning of the Second Amendment.¹⁰⁴ Self-proclaimed originalists are divided on every conceivable issue,¹⁰⁵ as is clear from the number of times that Justice Thomas has written separately from Justice Scalia often only to arrive at the same conclusion by a separate originalist path.¹⁰⁶

¹⁰³ See, e.g. Richard S. Kay, *Adherence to Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. L. REV. 226, 286-87 (1988) (defending originalism as “about as stable and objective as human beings can contrive while still working with a constitution sufficiently complex to be a workable instrument of government”); Randy E. Barnett, *An Originalism for Non-Originalists*, 45 LOY. L. REV. 611, 641 (1999) (linking the legitimacy of a written constitution to the fact that its provisions will be respected over time).

¹⁰⁴ *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008).

¹⁰⁵ See, e.g. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269, 1282 (1997) (finding historical support for a range of views on the original understanding of the Fourteenth Amendment’s Equal Protection Clause). Compare Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 668–70 (2009) (defending substantive due process as consistent with public meaning originalism) with John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 542–55 (1997) (questioning the propriety of substantive due process based on an examination of the historical record). Compare ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 39, 166 (1990) (declaring the meaning the Privileges or Immunities Clause largely unknown and unascertainable) with Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 NW. U. L. REV. 663, 694-95 (2009) (finding that the Privileges or Immunities clause has a clear, specific meaning).

¹⁰⁶ See, e.g. *National Federation of Independent Business v. Sibelius*, 132 S.Ct. 2566, 2677 (2012) (Thomas, J., dissenting) (adhering to the view that “the very notion of a ‘substantial effects’ test under the Commerce Clause is inconsistent with the original understanding of Congress’ powers and with this Court’s early Commerce Clause cases.”); *Gonzales v. Raich*, 125 S.Ct. 2195, 2235 (2005) (Thomas, J., dissenting) (calling the “substantial effects” doctrine rootless because tethered to neither the Commerce Clause nor the Necessary and Proper Clause); *United States v. Morrison*, 120 S.Ct. 1740, 1759 (2000) (Thomas, J., concurring) (writing separately to opine that precedents establishing Congress’s power to

One critic of originalism has identified 72 different theoretical strains within the originalist camp.¹⁰⁷ That camp has become so broad as to encompass the very people whom some originalists identify as their arch-nemeses.¹⁰⁸ And in some cases, originalists add so many caveats to their insistence on originalism that they end up sounding a lot like living constitutionalists.¹⁰⁹ Moreover, because of the adversarial nature of the common law, as Richard Primus has pointed out, the more people become adept at originalist arguments, the less helpful originalist arguments become in adjudication.¹¹⁰

regulate economic activities that substantially affect interstate commerce should be overturned) *Lopez v. United States*, 115 S.Ct. 1624, 1642-43 (1995) (Thomas, J., concurring) (same); *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 879 (2010) (Thomas, J., concurring and dissenting) (writing separately to insist that the Constitution protects *anonymous* political speech); *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3058 (2010) (Thomas, J., concurring) (rejecting the majority's substantive due process reasoning and finding that the Fourteenth Amendment's Privileges or Immunities Clause protects an individual right to bear arms against state interference). *See also* Timothy Sandefur, *Clarence Thomas's Jurisprudence Unexplained*, 4 NYU J. L. & LIBERTY 535, 553 (2009) (questioning why Justices Thomas and Scalia, both regarded as originalists, so often differ on constitutional issues).

¹⁰⁷ Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009). Berman does not number them. The tally is provided in James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL L. REV. 669, 671; *see also id.* at 670 (contending that the only thing the various originalisms have in common is their rejection of moral readings of the Constitution). *See also* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEORGETOWN L. J. 713, 716-36 (2011) (discussing various strains within originalism, including original intent, original meaning, subjective and objective meaning, actual and hypothetical understanding, standards and general principles, differing levels of generality, original expected application, original principles, interpretation, construction, normative and semantic originalism).

¹⁰⁸ *See* Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197, 201 (2000) (construing Ronald Dworkin's approach as a commitment to the "abstract principles" that the Founders wrote into the Constitution).

¹⁰⁹ *See* James E. Fleming, *Are We All Originalists Now? I Hope Not!* 91 TEX L. REV. 1785, 1796 (2013) (providing a quotation from Robert Bork in which he incorporates positions that one more readily associates with Ronald Dworkin or Jack Balkin).

¹¹⁰ Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 207 (2008).

There are some constitutional provisions with respect to which we are all originalists. When it comes to the rule that the President “shall have attained to the age of thirty-five Years,”¹¹¹ nobody argues that this should be read to mean anything other than what it meant to the Framers. There have been no serious attempts to argue that, for example, because the Constitution is a living document, and because life expectancy in the 18th century was about 37 years, only people on death’s door should be eligible for our nation’s highest office.¹¹² Similarly, when the Constitution speaks of “domestic violence,”¹¹³ we all understand that the reference is to civil unrest and not to spousal abuse.¹¹⁴ In such contexts, if we want to be taken seriously, we are all originalists.

In other contexts, however, nobody can claim that all constitutional difficulties can be resolved through originalist interpretive methods, because some of our most fundamental constitutional traditions have no textual basis. Thus the so-called “new originalism” distinguishes between constitutional interpretation and constitutional construction.

Constructions do not pursue a preexisting if deeply hidden meaning in the founding document; rather, they elucidate the text in the interstices of discoverable, interpretive meaning, where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules.¹¹⁵

Keith Whittington has identified scores of fundamental institutions that are integral to our actual, lived constitution but about which

¹¹¹ U.S. Const., Art. II, § 1, ¶ 5.

¹¹² See Andrew B. Coan, *Talking Originalism*, 2009 B.Y.U. L. REV. 847, 850-51 (listing “precise” constitutional provisions about which there is no controversy, including “the presidential age requirement, equal state representation in the Senate, proportional representation in the House of Representatives, and the procedures for appointing and confirming federal judges”).

¹¹³ U.S. Const., Art IV § 4.

¹¹⁴ See Thomas B. Colby, *The Sacrifice of New Originalism*, 99 GEORGETOWN L. J. 713, 753 (2011), but see Mark S. Stein, *The Domestic Violence Clause in “New Originalist” Theory*, 37 HASTINGS CONST. L.Q. 129, 133–35 (2009) (arguing that a new originalist reading of the clause could permit such an understanding of “domestic violence”).

¹¹⁵ See KEITH WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 5 (1999)

the Constitution itself is silent. These include what Whittington calls “organic structures,” such as the various agencies of the administrative state, the nine-Justice Supreme Court, the creation of inferior courts and the President’s cabinet.¹¹⁶ They also include structures of political participation and citizenship structures, such as the party system and voting processes.¹¹⁷ Here, interestingly enough, Whittington includes the regulation of campaign finance,¹¹⁸ which the Supreme Court has treated as an issue of interpretation rather than construction.¹¹⁹ Whittington includes as constitutional constructions principles of delegation and distribution of federal powers, such as executive and congressional/executive agreements and judicial review of legislative enactments.¹²⁰ He also includes economic infrastructural elements, such as the federal reserve and the federal treasury,¹²¹ to which we might add federal bankruptcy courts and the national highway system.¹²² Nobody can seriously claim that the constitutional text can determine whether all of these things should or should not be part of our constitutional system.¹²³

In addition to the Constitution’s silences, there are also numerous key constitutional words and phrases that defy clear definition. These include, to name some of the Constitution’s “majestic generalities”:¹²⁴ “due process of law,”¹²⁵ “equal protection of the laws,”¹²⁶ “cruel and unusual punishment,”¹²⁷ and “necessary and proper.”¹²⁸ As Randy Barnett, one of the most

¹¹⁶ *Id.* at 9-10, 12.

¹¹⁷ *Id.* at 10.

¹¹⁸ *Id.* at 12.

¹¹⁹ *Citizens United v. Federal Election Comm’n*, 130 S.Ct. 876 (2010).

¹²⁰ WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION*, at 12.

¹²¹ *Id.*

¹²² *See id.* at 11 (noting that his list of constitutional constructions only scratches the surface but is intended to indicate their nature and range).

¹²³ *See* Jack Balkin, *Framework Originalism and the Living Constitution*, 103 *NW. U. L. REV.* 549, 604-05 (2009) (“[O]riginalism does not dictate the results of constitutional construction, and for a very large number of disputed cases, construction is the name of the game.”)

¹²⁴ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

¹²⁵ U.S. Const., am. V, XIV, § 1.

¹²⁶ U.S. Const., am. XIV, § 1.

¹²⁷ U.S. Const., am. VIII.

¹²⁸ U.S. Const., Art. I, § 8, ¶ 18. *See* Thomas B. Colby, *The Sacrifice of the New*

persuasive originalists, concedes, there are times when we are unable to discern what the constitutional meaning is, or as he puts it, there are times when “constitutional meaning runs out.”¹²⁹ To some extent the difference between originalists and non-originalists are differences with regard to the frequency with which original meaning runs out.

As a result, the difference between originalists and non-originalists is not that originalists think the constitutional text is controlling and that non-originalists think that the constitutional text is irrelevant. In almost all cases, contemporary judges faced with a constitutional issue now start with an attempt to discern the original meaning, and if the original meaning can be discerned, it is controlling absent some strong reason to abandon it.¹³⁰ Justice Scalia has acknowledged that the differences between his own originalism and moderate non-originalism are small and that most non-originalists are moderate.¹³¹ As we shall see, although several Justices have proclaimed themselves as adherents of originalism, Justice Thomas is the only one who writes opinions in which he arrives at a conclusion as to the Constitution’s original meaning

Originalism, 99 GEORGETOWN L. J. 713,

¹²⁹ See Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J. L. & PUB. POL’Y 65, 69 (2011) (acknowledging that the meaning of the constitution sometimes runs out and acknowledging that “[o]riginalism is not a theory of what to do when original meaning runs out”); see also Lawrence B. Solum, *Semantic Originalism* 19 (Univ. of Ill. Coll. of Law Ill. Pub. Law & Legal Theory Research Paper Series, No. 07-24, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 (observing that when the meaning of the constitutional text is underdetermined, original meaning “runs out” and must be supplemented with constitutional construction);

¹³⁰ See, e.g., Stephen Breyer, *Active Liberty* (The Tanner Lectures on Human Values) 8 (2004), available at http://tannerlectures.utah.edu/_documents/a-to-z/b/Breyer_2006.pdf (contrasting his approach to interpretation, which places greater emphasis on consequences to other approaches that place greater weight on language, history and tradition); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 229 (1980) (observing that text and original understanding are important for the non-originalist but not determinative).

¹³¹ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

and then ends the analysis.¹³² But as Scott Gerber noted early on, even Justice Thomas’s originalism is also not entirely consistent.¹³³

IV. Two Originalist Approaches: Scalia and Thomas

It is now time to look more closely at the methodologies of the Supreme Court’s self-proclaimed originalist Justices. The two men could not be more different in their temperaments. The combative Justice Scalia has transformed oral arguments with his frequent questions¹³⁴ and made “vitriol” a featured component of the Supreme Court Justices’ dissents.¹³⁵ Justice Thomas is the quietest Justice.¹³⁶ In 2013, Justice Thomas spoke from the bench for the first time in seven years, but even then his comment was not a question relating to the case but a joke at the expense of Yale

¹³² See, e.g., Christopher E. Smith, *Rights Behind Bars: The Distinctive Viewpoint of Justice Clarence Thomas*, 88 UNIV. DETROIT MERCY L. REV. 829-30 (2011) (citing approvingly Linda Greenhouse’s observation that Justice Thomas’s jurisprudence is characterized by “the impressive consistency of the views that he actually expresses in his written opinions”); Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 15 (2006) (contending that Justice Thomas and not Justice Scalia is a committed originalist). But see Lee J. Strang, *The Most Faithful Originalist: Justice Thomas, Justice Scalia and the Future of Originalism*, 88 U. DET. MERCY L. REV. 883 (2011) (contending that Justice Scalia is the more consistent originalist).

¹³³ See SCOTT DOUGLAS GERBER: FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 193 (1999) (summarizing Justice Thomas’s jurisprudence as “liberal originalist” on civil rights and “conservative originalist” on civil liberties and federalism).

¹³⁴ See Timothy R. Johnson, et al., *Pardon the Interruption: An Empirical Analysis of Supreme Court Justices’ Behavior during Oral Arguments*, 55 LOY. L. REV. 331, 341 (2009) (finding that Justice Scalia “asks significantly more questions that the Court average as well as significantly more questions than each of his colleagues”).

¹³⁵ A Westlaw search (Scalia /s dissent /s vitriol!) turned up 34 results, accounting for nearly one-third of all results in with the words “vitriol” and dissent appeared in the same sentence. The latter search captured dissents from beyond the realm of the U.S. Supreme Court.

¹³⁶ See J. Richard Broughton, *The Loudness of Justice Thomas*, 88 U. DET. MERCY L. REV. 737, 738 (2011) (contrasting Justice Thomas’s silence during oral argument with the impact of his written opinions)

Law School.¹³⁷ However, like Justice Black, he is not afraid to write separately to stand up for his principled version of originalism in constitutional interpretation.

A. Justice Scalia: Originalism “Done Badly”

In his most extended essay on originalism,¹³⁸ Justice Scalia recognized that the originalist enterprise really requires training in historical research, a task for which most judges are ill prepared.¹³⁹ Even a professional historian, Justice Scalia concedes, would need more time to undertake the originalist task properly than a judge typically has to decide a case.¹⁴⁰ Still, Justice Scalia wrote that originalism is the best approach because any other approach would involve judges deciding cases by their own lights rather than by the lights of those who agreed to be bound by the Constitution’s provisions.¹⁴¹ Even if determining the meaning of those provisions is difficult for a judge, Justice Scalia concluded that a “thing worth doing is worth doing badly.”¹⁴²

Justice Scalia mentions that the statement comes from G.K. Chesterton, but he does not mention that it comes from Chesterton’s 1910 book, *What’s Wrong with the World*.¹⁴³ Justice Scalia would likely find much to admire in the book. To the extent that Chesterton highlights a lot of things that are wrong with the

¹³⁷ See Mike Sacks, *Justice Clarence Thomas Speaks After Almost 7 Years Of Silence*, HUFF POST (Jan. 14, 2013) (noting that Justice Thomas is well known as a “smiling, jovial presence” and thus finding his outburst of wit unsurprising); Jeffrey Toobin, *Clarence Thomas Speaks, Finally*, THE NEW YORKER (Jan. 14, 2013), available at <http://www.newyorker.com/news/news-desk/clarence-thomas-speaks-finally> (characterizing the joke at Yale’s expense as evidencing the Justice’s still-simmering bitterness and resentment over his treatment at Yale)

¹³⁸ Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

¹³⁹ See *id.* at 860-61 (conceding that the Supreme Court is not the ideal environment in which to undertake the sorts of historical research necessary to originalist jurisprudence, nor does it have the appropriate personnel).

¹⁴⁰ See *id.* at 857-60 (reviewing one decision by Justice Taft and elaborating on how difficult it would have been for any Supreme Court Justice to undertake a full historical inquiry into the relevant issues).

¹⁴¹ See *id.* at 863 (contending that non-originalism exacerbates the danger that judges will “mistake their own predilections for the law”).

¹⁴² *Id.*

¹⁴³ G.K. CHESTERTON, 4 COLLECTED WORKS 33-218 (1987)

world, the book evokes a version of Catholic Romantic Conservatism that would resonate with Justice Scalia.

However, context matters. The passage in question comes at the end of a chapter in which Chesterton advocates separate and decidedly distinct education for women.¹⁴⁴ Here, I have to quote Chesterton at length, both because I am happy to have the opportunity to introduce him to new readers and because there is no way to do justice to his manner of reasoning without extended quotation.

There was a time when you and I and all of us were all very close to God; so that even now the color of a pebble (or a paint), the smell of a flower (or a firework), comes to our hearts with a kind of authority and certainty; as if they were fragments of a muddled message, or features of a forgotten face. To pour that fiery simplicity upon the whole of life is the only real aim of education; and closest to the child comes the woman – she understands. To say what she understands is beyond me; save only this, that it is not a solemnity. Rather it is a towering levity, an uproarious amateurishness of the universe, such as we felt when we were little, and would as soon sing as garden, as soon paint as run. To smatter the tongues of men and angels, to dabble in the dreadful sciences, to juggle with pillars and pyramids and toss up the planets like balls, this is that inner audacity and indifference which the human soul, like a conjurer catching oranges, must keep up forever. This is that insanely frivolous thing we call sanity. And the elegant female, drooping her ringlets over her water-colors, knew it and acted on it. She was juggling with frantic and flaming suns. She was maintaining the bold equilibrium of inferiorities which is the most mysterious of superiorities and perhaps the most unattainable. She was maintaining the prime truth of woman, the universal mother: that if a thing is worth doing, it is worth doing badly.¹⁴⁵

¹⁴⁴ *Id.* at 197-99.

¹⁴⁵ *Id.* at 199

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

One of Chesterton's themes was the importance of maintaining the distinction between professionals and amateurs, or between generalists and specialists.¹⁴⁶ There are occasions in life when men must adopt the role of experts and interact with others based on the status attached to their qualifications as experts.¹⁴⁷ But most of the time, we partake of what Chesterton calls mankind's "comrade-like aspect."¹⁴⁸ That is, we deal with one another as peers pursuing a common interest. Chesterton supported an educated amateurism, and viewed specialization as the "peculiar peril" of his time giving rise to imperialism, tyranny and a host of other evils.¹⁴⁹

For women, he advocated only educated amateurism.¹⁵⁰ Indeed, as indicated in the passage quoted above, he thought that women's superiority lay precisely in their unconstrained amateurism. He thought that women were the last link that men had to a time when all of us could engage in civilized amateurism.¹⁵¹ Indeed, it is clear from the passage quoted above that Chesterton placed great stock in amateurism and regarding

¹⁴⁶ See *id.* at 110-114 (lamenting specialization not only of human activities but of things, while associating univeralism with religion and specialization with separation and divorce); American Chesterton Society, *A Thing Worth Doing*, <https://www.chesterton.org/a-thing-worth-doing/> (explicating Chesterton's defense of amateurism against professionalism).

¹⁴⁷ See *id.* at 100-101 (associating specialization with the need for efficiency and quick action and pointing out that soldiers obey their military officers not in recognition of the officers' superior moral or intellectual qualities but as a result of discipline and in recognition of their rank).

¹⁴⁸ *Id.* at 101.

¹⁴⁹ *Id.* at 102; see also *id.* at 103 ("The essential argument is 'Specialists must be despots; men must be specialists. You cannot have equality in a soap factory; so you cannot have it anywhere. You cannot have comradeship in a wheat corner; so you cannot have it at all. We must have commercial civilization; therefore we must destroy democracy.'")

¹⁵⁰ See *id.* at 119 ("observing that "the essential of the woman's task is universality").

¹⁵¹ See *id.* at 114 ("But for women this ideal of comprehensive capacity (or common-sense) must long ago have been washed away. It must have melted in the frightful furnaces of ambition and eager technicality.").

women as the guardians of the realm of amateurism. The most important things in life are the things worth doing badly. In its original context, Chesterton was advocating the raising and educating of one's own children – or at least, he argued that women should raise and educate their own children, rather than working and sending their children to daycare.¹⁵²

Chesterton's advice, quoted by Justice Scalia, applied to things like writing one's own love letters and blowing one's own nose. Such things, Chesterton argued, are worth doing badly.¹⁵³ However, Justice Scalia applies the motto to his activities as a specialist. And there the motto does not inspire confidence. Chesterton acknowledged the role of professions and understood that specialists have to do their jobs well.

The democratic contention is that government (helping to rule the tribe) is a thing like falling in love, and not a thing like dropping into poetry. It is not something analogous to playing the church organ, painting on vellum, discovering the North Pole (that insidious habit), looping the loop, being Astronomer Royal, and so on. For these things we do not wish a man to do at all unless he does them well.¹⁵⁴

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

If Justice Scalia has lost track of Chesterton's argument in *What's Wrong with the World*, we need not be concerned that the quoted aphorism comes in the context of an argument that would flunk the sniff test of constitutional Equal Protection and in a book

¹⁵² See *id.* at 119 (arguing that “woman set to guard” two primary things: “one's own children, one's own altar” and that women went wrong when they transferred their “sacred stubbornness” for those things to the world of work).

¹⁵³ See G.K. CHESTERTON, *ORTHODOXY* 83-84 (1933) (linking doing such things for oneself to the common conception of democracy).

¹⁵⁴ *Id.* at 83.

that devotes one quarter of its pages to opposition to women's suffrage.¹⁵⁵ Originalism need not entail a formalism that would limit the meaning of the aphorism to Chesterton's original meaning. However, that context may matter to us a great deal if Justice Scalia knew exactly the context in which the quotation appears: that is, in a book in which Chesterton rails against feminism, homosexuality, women's suffrage, birth control, and divorce, among other things.¹⁵⁶ Perhaps Justice Scalia's invocation of Chesterton *sotto voce* is a signal to those in the know that he wishes that he could vent his frustrations on these topics as freely as Chesterton did.

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

B. Justice Thomas: Originalism “Done Right”

Being a Supreme Court Justice is something that even G.K. Chesterton would want to see done right. But what does it mean to do such a thing right? For Justices Thomas and Scalia, doing

¹⁵⁵ G.K. CHESTERTON, 4 COLLECTED WORKS, at 107-47.

¹⁵⁶ See *id.* at 9 (General Editors' Introduction) (“[Chesterton] knew that relaxed moral standards, eugenics, behavioral psychology, divorce, the feminist movement, birth control, scientism and abortion would lead to the dehumanization of man and the annihilation of the family.”); James V. Schall, S.J., *Introduction*, in *id.* at 11, 12 (regretting that many of the ideas against which Chesterton wrote – “from divorce to feminism to euthanasia to homosexuality to abortion have gained much of the day”).

constitutional adjudication right involves originalism, but for reasons discussed above in Part III, doing originalism right is challenging. This brief discussion of Justice Thomas illustrates the interpretive challenges raised by Justice Thomas's principled originalism.

Justice Thomas invokes the slogan “any job worth doing is worth doing right” twice in his autobiography.¹⁵⁷ The first iteration comes when Justice Thomas is describing the refusal of his revered grandfather (to whom Justice Thomas refers as “Daddy”) to demonstrate any warmth or affection for Thomas or his brother, Myers.

He never praised us, just as he never hugged us. Whenever my grandmother urged him to tell us that we had done a good job, he replied, “That’s their responsibility. Any job worth doing is worth doing right.”¹⁵⁸

This statement was on Justice Thomas’s mind, he tells us, as he took his oath of office and became a Justice of the Supreme Court.

Struggling to control my surging emotions, I repeated the oath, thinking as I did so how Daddy and Aunt Tina [Daddy’s wife]¹⁵⁹ had raised me to fulfill it. Any job worth doing, they had told me, is worth doing right. This, I knew, was a job worth doing.¹⁶⁰

Justice Thomas clearly wants us to know that he aims to live by his grandfather’s words but also that he will not forget who his grandfather was and the milieu that his own determination helped him escape.¹⁶¹

¹⁵⁷ CLARENCE THOMAS, *MY GRANDFATHER’S SON: A MEMOIR* (2007).

¹⁵⁸ *Id.* at 38.

¹⁵⁹ Although Justice Thomas refers to Aunt Tina as his grandmother, she was not a blood relation. Justice Thomas’s mother was Daddy’s daughter, born out of wedlock with another woman. Aunt Tina’s real name was “Christine,” and “Tina” is pronounced “Teenie.” *Id.* at 13.

¹⁶⁰ *Id.* at 424.

¹⁶¹ *See id.* at 39-40 (crediting Daddy, Aunt Tina and the nuns at his Catholic school for “opening doors of opportunity leading to a path that took me far from the cramped world into which I had been born.

Justice Thomas relates his experience upon reading Robert Frost for the first time, and he excerpts for us a passage that he read as if it told his own story: *Two roads diverged in a wood, and I -- / I took the one less traveled by, / And that has made all the difference.*¹⁶² Justice Thomas tells us that reading the poem “comforted me as I drifted farther from home,” reflecting his sense of himself as “the odd man out.”¹⁶³

Justice Thomas’s reading of the poem certainly resonates with his reading of his life. He was a poor Black boy who aspired to be a Catholic priest and then went on to serve on the U.S. Supreme Court. He also joined that Court as its most conservative member, hardly the road one would expect an African-American to take. Unfortunately, his reading of the poem does not resonate at all with the poem itself. That is, Justice Thomas’s interpretation is at odds with clear markers of contrary meaning in the poem.¹⁶⁴ Here it is in full:

Two roads diverged in a yellow wood,
And sorry I could not travel both
And be one traveler, long I stood
And looked down one as far as I could
To where it bent in the undergrowth;

Then took the other, as just as fair,
And having perhaps the better claim,
Because it was grassy and wanted wear;
Though as for that the passing there
Had worn them really about the same,

And both that morning equally lay
In leaves no step had trodden black.
Oh, I kept the first for another day!
Yet knowing how way leads on to way,
I doubted if I should ever come back.

¹⁶² *Id.* at 50.

¹⁶³ CLARENCE THOMAS, *MY GRANDFATHER’S SON: A MEMOIR* 54 (2007).

¹⁶⁴ *See, e.g.*, WILLIAM H. PRITCHARD, *FROST: A LITERARY LIFE RECONSIDERED* 127-28 (1984) (“For the large moral meaning which ‘The Road Not Taken’ seems to endorse . . . does not maintain itself when the poem is looked at more carefully. . .”).

I shall be telling this with a sigh
Somewhere ages and ages hence:
Two roads diverged in a wood, and I—
I took the one less traveled by,
And that has made all the difference.¹⁶⁵

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

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

Yes Justice Thomas follows the more-traveled-by reading of Frost.¹⁶⁶ Frost's poem is often excerpted in precisely the way that Justice Thomas has done.¹⁶⁷ People, seeking to reaffirm their commitment to their self-conception as mavericks who follow their self-appointed paths, place the last stanza of Frost's poem (or parts of it) on greeting cards or pin it to bulletin boards. But the fact that that Justice Thomas's interpretation of Frost is a common misreading should give this originalist little solace. Excerpting the poem as Justice Thomas has done violates contextual canons enunciated by none other than Justice Scalia,¹⁶⁸ and there is no reason to think the two men differ as to canons of construction.

¹⁶⁵ THE POETRY OF ROBERT FROST 105 (Edward Connery Lathem, ed. 1979).

¹⁶⁶ See DAVID ORR: THE ROAD NOT TAKEN: FINDING AMERICA IN THE POEM EVERYONE LOVES AND ALMOST EVERYONE GETS WRONG 3-7 (2015) (compiling evidence of the poem's popularity but noting that "almost everyone gets it wrong").

¹⁶⁷ See, e.g., PRITCHARD, at 125-26 (citing the high-minded use of the poem Alexander Meiklejohn of Amherst College in his essay "What the College Is").

¹⁶⁸ ANTONIN SCALIA & BRYAN A. GARNER, THE INTERPRETATION OF LEGAL TEXTS (2012).

Texts should be construed as a whole,¹⁶⁹ every word and provision should be given effect,¹⁷⁰ and the words of a text should be interpreted so as to make them compatible, not contradictory.¹⁷¹ One might object that we are dealing here with a literary and not a legal text, but it is hard to imagine why these particular interpretive canons would not apply with the same force to a literary text.

The poem clearly mocks the narrator's self-regard in the final stanza and in fact, as the critic William Pritchard points out, the complicated twists of the poem are what make it "un-boring."¹⁷² The poem is not at all about what Justice Thomas takes it to be about – choosing the unusual path for oneself. It is more about what Justice Thomas, in writing his autobiography, is engaged in – self-mythologizing¹⁷³ – but Justice Thomas lacks Frost's ironic frame of mind, at least in this context. And *that* makes all the difference.

Questioning Justice Thomas's skills as a literary critic may seem uncharitable, but Justice Thomas's approach to constitutional interpretation places a premium on the judge's ability to discern the meaning of texts. His misreading of Frost illustrates the sorts of hermeneutic slip-ups to which the judge as critic or as law-office historian will often be vulnerable. His misreading of Frost suggests that Justice Thomas might be capable of misreading other texts, including the text of his own life. To take just one example, I want to look a bit more carefully at Justice Thomas's relationship to Yale Law School.

In his autobiography, Justice Thomas introduces the theme of the contrast, learned from Daddy, between rattlesnakes and water moccasins. Both are deadly, but rattlesnakes warn you with their rattle, while water moccasins strike without warning.¹⁷⁴ This distinction becomes Justice Thomas's key metaphor for

¹⁶⁹ See *id.*, Canon 24 (whole text canon)

¹⁷⁰ See *id.*, Canon 26 (surplusage canon)

¹⁷¹ See *id.*, Canon 27 (harmonious reading canon)

¹⁷² PRITCHARD, at 128.

¹⁷³ See ORR, at 9 (summing up the scholarly consensus that poem is not "a salute to can-do individualism" but "a commentary on the self-deception we practice when constructing the story of our own lives").

¹⁷⁴ THOMAS, MY GRANDFATHER'S SON, at 68.

understanding the different types of bigotry to which he is subjected throughout his life. He could deal with the open bigotry of the segregated South, but the deception of the liberal white establishment posed the far greater danger.¹⁷⁵ At the height of the Anita Hill controversy, Justice Thomas reflects on lynch mobs (rattlesnakes) and sanctimonious liberals (water moccasins):

As a child in the Deep South, I'd grown up fearing the lynch mobs of the Ku Klux Klan; as an adult, I was starting to wonder if I'd been afraid of the wrong white people all along. My worst fears had come to pass not in Georgia but in Washington, D.C., where I was being pursued not by bigots in white robes but by left-wing zealots draped in flowing sanctimony. For all the fear I'd known as a boy in Savannah, this was the first time I'd found myself at the mercy of people who would do whatever they could to hurt me. . . .¹⁷⁶

Yale Law School appears in Justice Thomas's memoir as the biggest water moccasin of them all.¹⁷⁷

He provides no concrete examples of discriminatory conduct, but he tells us that, right from the start, he felt out of place.¹⁷⁸ Although he recognized that he was out of place more because he was disadvantaged than because he was Black, Justice Thomas

¹⁷⁵ See *id.* at 109-10 (preferring white southerners' "open bigotry" to that of the "ostensibly unprejudiced whites who pretended to side with black people while using them to further their own political and social ends").

¹⁷⁶ *Id.* at 378.

¹⁷⁷ See *id.* at 110 (regretting that, having gotten in to Yale while disclosing his race, he "had stepped within striking distance" of the water moccasin). After not being able to find a job during his third year in law school, a failure Justice Thomas attributes to the fact that his Yale degree "bore the taint of racial preference," Justice Thomas observes, "The snake had struck." *Id.* at 126.

¹⁷⁸ *Id.* at 107. His antipathy towards Yale Law School at times takes in all of New England, which he found subject to a "herd mentality" when it came to political perspectives. *Id.* at 142. But Justice Thomas also provides evidence that Yale was not the ideological monolith he paints it to be. It was there that he met John Bolton, and his key Republican supporter, John Danforth, is also a Yale Law School alumnus. While working for Danforth in Missouri, Thomas reads Thomas Sewell with interest for the first time, but he had already been introduced to Sewell while he was at Yale. Someone gave him a Sewell book at Yale, which he "skimmed angrily and threw . . . into the trash, furious that any black man could think like that." *Id.* at 155.

believed that ultimately the stigma that attached to his admission to law school based on affirmative action¹⁷⁹ could never be eliminated regardless of his academic success.¹⁸⁰ After graduating, Justice Thomas boasts that he “peeled a fifteen-cent price sticker off of a package of cigars and struck it to the frame of” his Yale law degree to symbolize his “disillusionment” with the fact that “Yale meant one thing for white graduates and another for blacks.”¹⁸¹

Yet his memoir also provides ample evidence of the benefits he derived not from his Yale Law School education but from having gone to Yale. He landed his first summer job during law school – the only one he applied for and the only one he wanted¹⁸² – because his Yale classmate, Lani Guinier, helped him “obtain a \$60-a-week Law Students Civil Rights Research Council grant from the Legal Defense Fund” so that he might do so.¹⁸³ During his third year in law school, Justice Thomas applied to work for Missouri’s Attorney General John Danforth because he had heard that Danforth was “looking for other Yalies to work for him.”¹⁸⁴ John Danforth also found a place for Thomas to live rent-free while he was studying for the bar¹⁸⁵ and secured a loan for him when he defaulted on his student loans.¹⁸⁶

Through John Danforth’s contacts, and now on the strength of his fine performance in the Missouri Attorney General’s office, Justice Thomas was able to move into a far better-paying job with the Monsanto Corporation.¹⁸⁷ That job proved short-lived. Justice Thomas expresses some concern about the harms corporations like

¹⁷⁹ Contemplating liberal opposition to his nomination to become a Supreme Court Justice, Justice Thomas muses, “Had I been a liberal, they would have overlooked my youth and comparative inexperience, not to mention the fact that I’d been admitted to Yale Law School in part because I was black.” *Id.* at 340.

¹⁸⁰ *See id.* at 108 (“As much as it stung to be told that I’d done well in the seminary *despite* my race, it was far worse to feel that I was now at Yale *because* of it.”).

¹⁸¹ *Id.* at 144.

¹⁸² *Id.* at 117-118.

¹⁸³ *Id.* at 117. The law firm paid an additional \$40/week. *Id.*

¹⁸⁴ *Id.* at 127.

¹⁸⁵ *Id.* at 129.

¹⁸⁶ *Id.* at 147.

¹⁸⁷ *Id.* at 159-60.

Monsanto caused to ordinary working people, but it seems he was simply not interested in the work at Monsanto – and there wasn't enough for him to do there to keep him occupied.¹⁸⁸ In any case, John Danforth, now a Senator, once again rescued Justice Thomas by inviting him to join the Senator's staff in Washington, D.C.¹⁸⁹ A few years after moving to the capital, Justice Thomas determined that he could no longer remain in his marriage. With great reluctance and tormented by guilty feelings, he left his wife and child. He moved in with a friend from Yale Law School.¹⁹⁰ As Scott Gerber put it, "Thomas's association with Danforth would later prove to be the most important in his professional career."¹⁹¹ Without Yale, Justice Thomas's career would have looked very different.

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

Aside from the obligatory acknowledgement of youthful indiscretions, Justice Thomas's autobiography does not evidence

¹⁸⁸ *See id.* at 166-70 (explaining how he realized that one of his neighbors when he was a child likely suffered symptoms associated with exposure to creosote, complaining that there was not enough work for him to do at Monsanto, and noting that even when he worked hard, he felt empty at Monsanto).

¹⁸⁹ *Id.* at 173-74.

¹⁹⁰ *Id.* at 197.

¹⁹¹ SCOTT GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* 12 (1999). Professor Gerber alerted me in private conversation that, having spoken with Justice Thomas, he now shares Justice Thomas's negative assessment of the importance of Yale Law School in the latter's career trajectory.

extensive self-critical reflection. Not coincidentally, the self-critical moment is precisely what is missing in today's originalism. The result can be a form of robust judicial activism that differs from older forms of judicial activism in its justification but not in its results: the reversal of legislative enactments by five men (the women dissent) in robes. As Judge J. Harvie Wilkinson noted in his critique of *Heller*,¹⁹² conservatives may win certain battles in overturning legislation that they find objectionable, but in doing so, they undermine the very conservative principles that gave rise to the ideology of originalism in constitutional interpretation – separation of powers, judicial restraint, textualism and federalism.¹⁹³ Now only originalism remains.¹⁹⁴

V. Conclusion: The Future of an Illusion

In Freud's *Civilization and Its Discontents*, he summarizes his earlier work, *The Future of an Illusion*, which is on the subject of religious belief.¹⁹⁵ Freud calls religious belief "patently infantile" and "foreign to reality," but he also concedes that "the great majority of mortals will never be able to rise above this view of life."¹⁹⁶ So the non-originalist might conclude with respect to originalism. Even as originalism in its scholarly form grows more sophisticated and multi-valent, popular originalism thrives as a blunt instrument used to constrain activist (read "liberal") judges.¹⁹⁷ As Thomas Colby points out, "Originalism somehow continues to thrive as both a political movement and as a scholarly theory, even though the features that make it attractive as a political movement render it impotent as a scholarly theory and

¹⁹² J. Harvie Wilkinson, III, *Of Guns, Abortions and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009).

¹⁹³ See *id.* at 254 (characterizing *Heller* as showing inadequate commitment to textualism, judicial overreach, disregard for legislative processes, and a rejection of the principles of federalism).

¹⁹⁴ See *id.* at 256 (contending that *Heller* has swept away "counsels of caution" leaving originalism as the only foundation for a conservative jurisprudence).

¹⁹⁵ See SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 22-23 (1961) (summarizing Freud, *Die Zukunft einer Illusion* (1927)).

¹⁹⁶ *Id.* at 22.

¹⁹⁷ See Jamal Greene, *Selling Originalism*, 97 GEO L. J. 657, 661 (2009) (noting that "[o]riginalism's proponents have taken advantage of this dynamic by speaking of originalism in simple and transparent terms.").

vice versa.”¹⁹⁸

My conclusion is somewhat different. The future of originalism as a popular movement that exerts a normative pull on judges to adhere to the written text of the Constitution is bright but illusory. Politicians and judges can easily adjust their rhetoric to nourish that populist notion of what constitutional adjudication ought to be. However regardless of their rhetoric, judges will continue to be constrained, not by the written text of the Constitution, but by the main sources of human malaise that Freud identified in *Civilization and Its Discontents*: the outside world, their own bodily infirmities (here of the cognitive variety), and other people.¹⁹⁹

The world will continue to confront judges with novel situations and textual meaning will continue to run out, leaving the judges to their own devices for constitutional adjudication. Judges of good will and intention will continue to render decisions in the name of originalism that will be subject to lively criticisms. Some of those criticisms will focus on the faulty methodology, subjectivism, tendentious interpretation, and incomplete historical evidence and thus point out the judge’s intellectual limitations. Other criticisms will evidence the continuing debate between originalism and non-originalism. People on both sides of the divide have entrenched positions, and neither side is going away. Originalism’s rhetorical advantages suggest that its adherents will become increasingly confident of the judiciary’s ability to do the job right. Increasingly, its chief practitioners have lost sight of Justice Scalia’s fundamental insight that originalism is something that federal judges can only do badly.

¹⁹⁸ Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 716 (2011)

¹⁹⁹ See FREUD, *CIVILIZATION*, at 26, 37.