

NINE PERSPECTIVES ON *LIVING ORIGINALISM*

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This Article responds to the nine contributions to the symposium on Living Originalism. It considers nine different aspects of the argument in the book: (1) why constitutions around the world contain vague and abstract language, and how a constitution's choice of language connects to the purposes of a constitution; (2) the book's theory of democratic legitimacy; (3) how the book's argument applies to constitutional cultures outside the United States, and the relationship between original and implied meanings; (4) the differences between the book's theory of constitutional interpretation and that of Ronald Dworkin; (5) whether the book's account of legal principles is consistent with legal positivism; (6) the book's account of the U.S. Constitution as both "fallen" and as "higher law"; (7) whether a "protestant" constitutional culture—in which citizens feel authorized to state what the Constitution means for themselves—benefits or harms democratic legitimacy; (8) the book's account of the original meaning of "commerce" as "intercourse," and Congress's power to regulate interstate networks of transportation and communication; and (9) the book's message for living constitutionalists and constitutional originalists.

I. INTRODUCTION

My thanks to the *University of Illinois Law Review*, and to Larry Solum and Kurt Lash, for assembling such an outstanding group of scholars to comment on *Living Originalism*.¹ To respond to everything in these excellent articles would require a book in itself and would certainly try any reader's patience. Instead, I have focused on a central idea in each of the nine essays. I begin by briefly outlining a few of the key themes in *Living Originalism*.

Living Originalism argues that the best versions of originalism and living constitutionalism, correctly understood, are compatible rather than

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1. JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

opposed. The best form of originalism, which I call framework originalism, holds that the Constitution is a basic plan for politics. It is a framework for government that is incomplete at the outset, and it must be built out over time by successive generations through the processes of constitutional construction.

What most people call “constitutional interpretation” actually combines two separate functions. The first function is ascertaining the meaning of the text. For example, is the meaning of “commerce” in Article I, Section 8 limited to the trade of goods or commodities, or does it mean, as John Marshall says in *Gibbons v. Ogden*, “intercourse?”² Does the word “writings” in the progress clause of Article I, Section 8 refer only to written materials, or is it a nonliteral usage that allows Congress to create copyrights in paintings and maps? This task is interpretation-as-ascertainment of meaning.

The second function—and perhaps the more important—is implementing the text through doctrines, practices, laws, and institutions. Examples of constitutional constructions are the actual malice rule of *New York Times v. Sullivan*,³ the Social Security Act of 1937,⁴ and the President’s ability to veto legislation due to mere policy disagreement rather than constitutional objection.⁵

When we study the practices of constitutional interpretation, therefore, we must pay attention both to interpretation as ascertainment of meaning and interpretation as construction. Moreover, we must also pay attention to state-building constructions created by the political branches that create new governmental powers and functions. Normally these rely, either implicitly or explicitly, on views about the proper interpretation and construction of the Constitution—for example, when Congress creates a new administrative agency, passes a new law premised on its constitutional powers, or establishes an understanding or convention with the executive branch. Together, all of the various constructions, institutions, laws, and practices that have grown up around the text over time form what we might call the “Constitution-in-practice.”

Originalism in its various forms maintains (1) that some feature of the Constitution is fixed at the time of adoption, (2) that this fixed element cannot be altered except through subsequent amendment, and (3)

2. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189–90 (1824).

3. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

4. Social Security Act of 1937, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.).

5. See KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 12 tbl.1.2, 99, 133 (1999). Whittington defines constitutional interpretation as the “process of discovering the meaning of the constitutional text,” whereas constitutional construction is “essentially creative, though the foundations for the ultimate structure are taken as given. The text is not discarded but brought into being.” KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 5 (1999).

that this fixed element matters for correct interpretation.⁶ Framework originalism argues that what is fixed is the basic constitutional framework. That framework consists of the original semantic meanings of the words in the text (including any generally recognized terms of art) and the adopters' choice of rules, standards, and principles to limit, guide, and channel future constitutional construction.

The U.S. Constitution contains hardwired rules, like the rule that each state is represented by two senators, and the rule that the President must be at least thirty-five years of age. It contains standards, like the Fourth Amendment's requirement that searches and seizures must not be "unreasonable." It also contains principles—for example, the First Amendment's guarantee of freedom of speech and the Fourteenth Amendment's guarantee of equal protection of the laws. And on many other issues the text is silent, leaving matters to future construction.

When the text states a determinate rule, we apply the rule today, because that is what the text says. Where the text states a standard, we apply the standard, because that is what the text says. Where the text states a principle, we apply the principle, because that is what the text says. And where the text is silent, we must build out the functions of government as best we can.

Framework originalism assumes that the choice of rules, standards, principles, and silences in the constitutional text is deliberate. It ascribes reasons to constitutional adopters for their choice of language. Constitutional adopters choose hardwired rules because they want to limit discretion. They choose vague standards or abstract principles because they want to channel political judgment but delegate the task of construction and application to future generations. And constitutional adopters usually remain silent about a subject because they cannot agree on how to resolve a particular issue and/or want to leave the question open to future political deliberations.

Fidelity to the Constitution requires fidelity to the original meaning of the text, and to the choice of rules, principles, and standards in the text. It requires us to be faithful both to the principles that are stated in the text and those that we understand to be presupposed by the text or underlie the text, and it requires us to build out constitutional constructions that best apply the text and its associated rules, standards, and principles to our current circumstances. We might call this approach to constitutional interpretation "the method of text, rule, standard, and principle;" however, as a convenient shorthand, I call it the method of text and principle. The method of text and principle is both originalist, because it requires fidelity to original meaning, and living constitutional-

6. See, e.g., Lawrence B. Solum, *Semantic Originalism 2* (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.

ist, because it gives a prominent role to constitutional construction by later generations.

The distribution of rules, standards, principles, and silences in the Constitution's text makes sense if a constitution is an initial framework for governance that sets politics in motion and that has to be filled out over time. Although the framework does not change without an Article V amendment, what is built on or around the framework can change, and has changed almost continually from the Founding to the present day.

The American people continually build new doctrines, practices, and institutions on top of the basic framework. These processes of constitutional construction are living constitutionalism. Thus, living constitutionalism is not a method of correct interpretation that is opposed to originalism. Rather, living constitutionalism is the process of building out the Constitution-in-practice through laws, doctrines, institutions, and practices. There is no contradiction between originalism and living constitutionalism. Originalism requires fidelity to the framework; the processes of living constitutionalism build on the framework. The two are opposite sides of the same coin.

Although fidelity to the framework requires fidelity to the original meaning of the text, the word *meaning* itself has multiple meanings. It could refer to the semantic meaning of the words of the text, how people expected the text would be applied to particular situations, the specific purposes people had in adopting the text, or the cultural associations of the text. Framework originalism argues that what is fixed at the time of adoption, and continues in force over time, is the original semantic meaning of the text—what the words meant at the time of adoption, taking into account any generally recognized terms of art. The original meaning does not include how people at the time of adoption would have intended or expected the text to be applied, or how broadly or narrowly they would have articulated the principles and standards found in the text. I call these views *original expected applications*.

Thus, the Eighth Amendment's cruel and unusual punishments clause is not limited to those punishments that people living in 1791 would have expected it would apply to. The First Amendment's guarantee of freedom of speech is not limited to protections that people in 1791 would have supported. These expectations are not part of the framework. They are the initial constructions of the text. They may be helpful in forming constructions for the present, but adopting these constructions is our choice—for which we must take responsibility—and not the adopters' command.

We always apply the rules, standards, and principles in the Constitution in our own circumstances. But hardwired rules normally will be applied in the same way over time. Standards like "unreasonable" or abstract principles like "equal protection," by contrast, may be applied

differently in different times and circumstances, especially if the standards are vague and the principles are abstract. Moreover, the Constitution permits the development of new institutions, laws, and practices—like the Federal Reserve Bank, the Central Intelligence Agency, the Civil Rights Act of 1964, and Social Security—that will shape constitutional and political understandings in the future, often in unexpected ways.

The method of text and principle does not treat the purposes, expectations, or intentions of the Framing generation as irrelevant. Rather, they are a resource for construction, which we use to create constructions in our own time. We look to the past for meaning, advice, and guidance. We want to know how others have understood the project and its entailments. We care about the views of Framers and Founders because our past is a source of shared meanings and collective memories as well as a set of judgments about how to go forward; and we adopt, modify, reinterpret, and reject these meanings, memories, and judgments given our own situation and circumstances.

The Constitution is an intergenerational plan for politics, and each generation must do its part to keep the plan going. Americans do this through constitutional politics. They mobilize and attempt to persuade each other about the best way to fulfill the Constitution's promises and commitments, realize its plan, and further its goals. Often they disagree about this, and the Constitution-in-practice provides a platform in which they can argue about its proper construction and the right way to go forward. Thus, the Constitution is not only an initial platform for building out a democratic state, it is also a platform for persuasion, in which successive waves of political and social mobilizations invoke the Constitution and its text and principles and seek to persuade their fellow citizens. Many of the most important features of our current constitutional regime are the result of these Many waves of mobilizations and counter-mobilizations, and the state-building constructions they gave rise to. Persuasion, both cultural and political, is a key feature in constitutional change.

Because people often disagree about the best way to implement the Constitution, the Constitution-in-practice will often seem unjust to many of its citizens. Sometimes it will seem unjust to both sides of a dispute, like gay rights or abortion. All constitutions are flawed and imperfect—the product of clashing interests and moral compromises—both at the outset and as they are built out. The U.S. Constitution is no different. For the constitutional project to be legitimate, people must believe that it is sufficiently worthy of respect to justify the state's coercion of themselves and others. Or, if it is not currently worthy of respect, people must have faith that, despite its current imperfections, it can become so over time.

For people who think the system is adequate just as it is, constitutional faith is not very difficult, or even very important. It is easy to be-

lieve in the Constitution's respect-worthiness if you believe that there are no serious injustices in the United States or that any injustices that exist are not the fault of the way people have interpreted and implemented the Constitution. But for those who find themselves on the losing side of an important constitutional debate, who believe that current injustices are serious and that the country is going dangerously in the wrong direction, constitutional faith is necessary. For such people, fidelity to the constitutional project—and to the Constitution itself—requires a certain degree of faith in the eventual redemption of the Constitution. This redemption is by no means guaranteed, and it is never complete and never perfect; but the possibility of constitutional redemption underwrites the legitimacy of the Constitution, especially for constitutional dissenters and those who feel that the Constitution-in-practice is imperfect and unjust. It is easy to have faith in a constitution that is treating you and those you care about well. It takes a leap of faith when you live in a country whose leaders are not listening to you and are committing serious injustices.

Framework originalism maintains that when the Constitution uses vague standards or abstract principles, we must apply them to present-day circumstances. And when adopters use language that delegates constitutional construction to future generations, fidelity to the Constitution requires future generations to engage in constitutional construction. Constitutional fidelity, in other words, requires that we take up the task of figuring out what the Constitution's promises mean in our time.

Constitutional fidelity is creative activity, not passive obedience. Each generation must take up the great work of constitutional construction, "in Order," as the Preamble tells us, "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."⁷ This task was not completed in 1787, or 1791, or 1868. It is not completed today. If the Constitution is to be our constitution, and not simply a law imposed on us by an alien past, we must put ourselves on its side, make its project our own, identify with it, and do our part, just as others have done before us and others will do after us. We do not stand in a privileged position in history. We do not know whether what we are doing now in the name of the Constitution will be judged good or evil by later generations. Much of what we do will be discarded in the future, just as we now view many past constructions as wrong or unjust. Nevertheless, we cannot shirk the responsibility of building out the Constitution—at least, if we continue to regard the Constitution as our plan for politics and seek to further it today.

Modern conservative originalists, fearful that vague standards and abstract principles in the text will give later generations too much discretion, have tried to limit the scope of the Constitution's standards and

7. U.S. CONST. pmb1.

principles by looking to how the adopters would have applied the text, or by deriving principles (and fixing their appropriate level of generality) based on evidence of original expected applications. In other words, they have tried to make vague standards and abstract principles into something a bit more like determinate rules. Doing so makes originalism unworkable, because original expectations are often inconsistent with the modern state, both with respect to constitutional powers and constitutional liberties. This leads many modern conservative originalists to admit a wide range of exceptions for precedents, practices, and institutions that are inconsistent with their theory of original meaning.

To maintain political credibility, therefore, conservative originalists have accepted a wide variety of precedents and practices they consider inconsistent with original meaning and have treated them as settled. This includes most of the modern administrative and regulatory state that came with the New Deal, the modern presidency, the National Security State, and significant portions of modern understandings about civil rights and civil liberties. Doing this requires what Justice Antonin Scalia has aptly called a “pragmatic exception” to originalism: “[t]he whole function of the doctrine” of *stare decisis*, he explains, “is to make us say that what is false under proper analysis must nonetheless to be held true, all in the interest of stability.”⁸

The difficulty, of course, is that as time goes on, these pragmatic exceptions proliferate, so that the Constitution-in-practice becomes further and further removed from what conservative originalism considers the legitimate basis of constitutional interpretation. If these deviations really are mistakes, they should be narrowly construed and certainly not expanded. But the problem is that contemporary Americans do not see most of these “mistakes”—like equal rights for women, the modern conception of free speech, the right of blacks and whites to marry each other, the federal government’s power to establish Social Security, and federal power to pass much of modern civil rights, environmental, consumer protection, and labor legislation—as mistakes at all. They regard these features of the Constitution-in-practice as valuable features of the American system of government. Treating women’s constitutional rights as a mistake that it is too late to go back and correct does not capture the way most Americans feel about their Constitution. It is a serious embarrassment for originalism.

Framework originalism does not encounter this problem because it does not agree that expected applications (or principles derived from expected applications) are part of original meaning. They are resources for construction, but not commands. Evidence of how the adopting generation would have understood and applied the text is simply one among

8. Antonin Scalia, *Response*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 129, 139 (Amy Gutmann ed., 1997).

many different modalities of argument that we are permitted to use when interpreting the Constitution and applying it to contemporary problems.

Fidelity to original semantic meaning is consistent with a wide range of possible future constitutional constructions that implement the original meaning and that add new institutional structures and political practices that do not conflict with it. Constitutional constructions implement the Constitution through developing judicial doctrines and building out political and legal institutions to serve constitutional purposes. Both judges and the political branches participate in constitutional construction. They develop doctrines and institutions that fill in the gaps of the constitutional system, build new capacities, create new government programs and functions, flesh out the Constitution's abstract standards and principles, and apply the Constitution to new circumstances. This process of constitutional construction is living constitutionalism.

II. WHY DO CONSTITUTIONS CONTAIN ABSTRACT AND VAGUE LANGUAGE?

Today most conservative originalists agree with me that we are not bound by original expected applications, only by original meaning. But the way they cash out original meaning often leads them to model it fairly closely on original expected applications—which includes not only how specific cases would be decided, but also how people at the time of adoption would have articulated the relevant constitutional principles.⁹ John McGinnis and Michael Rappaport's article in this symposium is a good example of how this conflation occurs.

McGinnis and Rappaport accuse me of committing what they call the "abstract meaning fallacy," that is, "conclud[ing] that possibly abstract language has an abstract meaning without sufficiently considering and weighing the alternative possibilities."¹⁰ When we look at their article more closely, however, we will discover that there is no fallacy in the sense of an error of logic. Rather, there is a *disagreement* between us about how to understand constitutional language. Behind that disagreement, in turn, is a deeper disagreement about the purposes of a constitution, and the sources of constitutional legitimacy. This becomes obvious when McGinnis and Rappaport restate the fallacy later in their article: "The fallacy involves an inference that a constitutional provision has an abstract original meaning that operates to delegate decision-making authority to future decision makers because the provision employs what seems to be abstract language."¹¹ That is, the fallacy involves adopting

9. See BALKIN, *supra* note 1, at 7.

10. John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 739.

11. *Id.* at 741.

the very theory of constitutions and constitutional language that I argue for in *Living Originalism*!

McGinnis and Rappaport agree with me that some terms in a constitution are generally recognized terms of art. An example would be “Letters of Marque and Reprisal” in Article I, Section 8.¹² We also agree that historical research may be necessary to determine whether the Constitution refers to generally recognized terms of art, and whether language that might appear abstract to us actually embraces a narrower or more specific concept. Of course, historical inquiry might have the opposite effect. As discussed below, I argue that the original meaning of “commerce” is “intercourse,” which has a somewhat broader meaning than “trade,” because it includes transportation and communication networks.¹³

Finally, the three of us agree that historical research may also be necessary to determine whether a legal norm is a rule, standard, or principle. McGinnis and Rappaport point out that some texts that look like abstract principles might actually be abstract or general rules.¹⁴ Conversely, I have argued that some texts that look like rules, like the compact clause, might actually be principles or standards.¹⁵

We part company in how we understand abstract terms like “equal protection” and “freedom of speech.” I believe that such language must be worked out through constitutional constructions that may change over time. Although the original semantic meaning of the words “equal protection of the laws” remains the same as it was in 1868, how we apply the guarantee may change. By contrast, McGinnis and Rappaport believe that abstract terms, like “cruel and unusual punishments,” “freedom of speech,” and “equal protection of the laws,” have a *legal meaning* that is also their original meaning. They believe that we should treat these terms in much the same way as “Letters of Marque and Reprisal.”

McGinnis and Rappaport’s concept of original legal meanings is really just another name for the initial constructions offered by people in the adopters’ generation. McGinnis and Rappaport, however, reject the distinction between interpretation and construction, and therefore believe that these contemporaneous constructions are part of original meaning.

McGinnis and Rappaport argue that original meaning includes what they call *original interpretive methods*, and, as we will see shortly, that theory in turn rests on a still deeper theory about how constitutions work and why originalism is the best method of interpretation for a constitution. McGinnis and Rappaport are not always very clear about what these original interpretive methods are—indeed, their interpretive theory

12. U.S. CONST. art. I, § 8, cl. 11.

13. See *infra* text accompanying notes 114–38.

14. McGinnis & Rappaport, *supra* note 10, at 747–51 (offering examples).

15. BALKIN, *supra* note 1, at 47–48, 349–50 n.12.

needs to be fleshed out in considerably more detail. Nevertheless, from the present article and from their previous writings,¹⁶ we can gather that original interpretive methods include the canons of statutory construction inherited from the common law as well as the common lawyer's toolkit of arguments and methods as they existed at the time of adoption for each particular part of the Constitution. That would be 1789 for the original Constitution, 1791 for the Bill of Rights, 1868 for the Fourteenth Amendment, 1961 for the Twenty-Fourth Amendment, and so on.

Now many of these methods are the same as the ones we have today. To be sure, there may be a few differences: for example, in 1787, arguments from legislative history or original intentions were not generally employed.¹⁷ Instead, lawyers generally looked to the intent or purposes of a statute through an inspection of its text. But the familiar categories of argument and the canons of construction are remarkably similar to the ones we use today.¹⁸

In *Living Originalism*, I argue that lawyers can and should use all of the traditional resources of lawyers both in ascertaining original meaning and in creating constitutional constructions that implement original meaning.¹⁹ So today, lawyers may make structural arguments, inspect dictionary definitions, invoke traditional rules of statutory construction, look to the history of previous readings and interpretations, build on previous precedents (both judicial and nonjudicial), make appeals to national ethos, and take into account prudence and consequences. All of these tools were available to common-law lawyers at the time of the Founding; indeed, as Philip Bobbitt has explained, the reason why we use these tools today is that they were inherited from the common law.²⁰ When contemporary lawyers use these traditional tools, however, they may develop constructions very different from those the adopters would have expected or desired. One reason is that contemporary lawyers may draw on precedents and constructions throughout history, not merely those contemporaneous with ratification. Another reason is that history will often look different to us as we move forward in time. So lawyers in

16. See, e.g., John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

17. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 897–98 (1985).

18. McGinnis and Rappaport might disagree with this last statement and insist that we do not use similar interpretive methods today. I would respectfully disagree—in my view, American lawyers are still very much in the common-law tradition and, with only a few exceptions, still use the same modalities and the same canons. But this merely suggests that there can be good-faith disputes about how exactly to characterize these interpretive methods and the proper level of generality to describe them. As a result, disputes about original interpretive methods will tend to replicate disputes about constitutional meaning at a different level of inquiry.

19. See BALKIN, *supra* note 1, at 17, 46, 89, 129, 205, 256–57, 333, 341–42 (explaining that interpreters should use all of the traditional modalities of constitutional argument).

20. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3–8 (1982); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 8, 12–13, 24 (1991).

2003 might conclude that gays deserve legal protection under the Fourteenth Amendment even though lawyers in 1868 would not.

McGinnis and Rappaport's theory of original-methods originalism, however, makes a different and much stronger claim than this. By "original methods," they do not simply mean that we should use the same methods and modalities of legal argument that well-trained lawyers at the time of the adoption of the text would have used. That in itself is not a very significant requirement, for these methods are part of our contemporary legal culture. What they mean is that we should use these methods *in the same way that lawyers at the time of adoption would have used them* to generate legal meanings. That is, the legal meaning of "Cruel and Unusual Punishments" is the construction that a hypothetical well-trained lawyer in 1791, using the interpretive methods of that time, would have produced.²¹ The goal is to retrace such a lawyer's steps and consider the same evidence that well-trained lawyers would have employed at the time of adoption in 1791 (or 1868) to generate legal meaning. As a result, the contemporaneous legal opinions of well-trained lawyers at the time of adoption, while not necessarily conclusive in all respects, are very strong evidence of original legal meaning.

That is why McGinnis and Rappaport can argue that the mere fact that constitutional language appears vague or abstract today is irrelevant. Vagueness arises because of uncertainty about "whether or not a term extends to a proposed application."²² But lawyers in 1791 might not have been uncertain. Moreover, the interpretive rules at the time of the Founding required that where language is vague or uncertain interpreters should pick the meaning that is most likely given "the relevant originalist evidence—evidence based on text, structure, history, and intent—and select the interpretation that was supported more strongly by the evidence."²³ Thus, if lawyers at the time of adoption would have understood constitutional language as more likely to reach some applications but not others, "there is no *legal* ambiguity or vagueness, regardless of whether there is vagueness or ambiguity in the ordinary language."²⁴

21. McGinnis & Rappaport, *supra* note 10, at 746 ("[T]he original meaning approach requires that [ambiguity or vagueness] be resolved based on the interpretive rules that existed at the time. This is how the reasonable and knowledgeable interpreter, employing the original meaning approach, would resolve the question.") (footnote omitted); *see id.* at 747–48, 764 (arguing that the due process clause has the meaning that was historically settled at the time of adoption); *id.* at 750 (arguing for "pin[ning] down" meaning by appealing to "the meanings developed through previous legal traditions and processes"); *id.* at 747 n.36 ("[W]e believe that the original-methods approach best captures the actual meaning of the Constitution, because the enactors would have understood the Constitution against the background of the relevant interpretive rules of the time."); *see also id.* at 748 nn.41–43 (listing examples of historically concretized legal meanings).

22. McGinnis & Rappaport, *supra* note 16, at 774.

23. *Id.*

24. *Id.* *See also* McGinnis & Rappaport, *supra* note 10, at 748 nn.41–43 (offering examples of historically informed interpretations that ask what the legal meaning of seemingly vague and abstract clauses would have been at the time of adoption).

This approach leads McGinnis and Rappaport to equate original meaning to something very close to original expected application. Original expected application, after all, concerns how adopters expected the constitution's language would be applied. And McGinnis and Rappaport are interested in whether a constitutional term extends to a proposed application.²⁵ Lawyers at the time of adoption might have had a range of different views on these questions, but some were more likely than others, and the most likely interpretation is precisely what we should be looking for. Modern constructions outside this range are not consistent with legal meaning. Thus, although McGinnis and Rappaport agree with me that original meaning is not the same thing as original expected applications, their model of original interpretive methods sticks fairly closely to original expected application, because it sticks closely to the views and expectations of adoption-era lawyers.

Under McGinnis and Rappaport's model, future interpreters may not create new constructions that vary from the legal meaning that well-trained lawyers in 1791 (or 1868) would have understood and recognized. Although not all lawyers would have agreed on all questions, we may not use that limited range of disagreement to impose interpretations that no well-educated lawyer at the time of adoption would have thought reasonable. Thus, the set of reasonable constructions (or legal meanings, in McGinnis and Rappaport's parlance) available at the time of adoption more or less fixes the scope of permissible interpretation today.

To be sure, changes in technology or factual context might be relevant to how we apply original legal meaning—for example, in the case of railroads, airplanes, or electronic media. Nevertheless, McGinnis and Rappaport insist that changes in *moral* judgments from time of adoption to the present day should not affect the original legal meaning—for example, changed moral views should not affect whether women or gays are protected by the Fourteenth Amendment or whether the right to use contraceptives is a privilege or immunity of citizens of the United States. As McGinnis and Rappaport explain, we are trying to understand the adopters' judgments about the proper boundaries of constitutional government, and if we treat too many of the adopters' moral judgments as mistaken, we have likely failed to grasp their legal meaning.²⁶

Thus, McGinnis and Rappaport reject *Living Originalism's* central distinction between interpretation and construction. They do not believe that anybody in 1787 thought that vague or abstract language either invited or required construction, either by the contemporaneous generation or by future generations. Rather, well-trained lawyers and judges would simply decide what the most likely reading was; this practice was

25. See McGinnis & Rappaport, *supra* note 16, at 774 (advocating narrow definitions of vagueness and ambiguity).

26. See John O. McGinnis & Michael Rappaport, *Original Interpretive Principles As the Core of Originalism*, 24 CONST. COMMENT. 371, 378–81 (2007).

legal interpretation, and the legal meanings generated by this practice, as part of original meaning, are still binding on us today.²⁷ For similar reasons, McGinnis and Rappaport reject my view that the use of standards and principles in a constitution delegates future construction to later generations. If well-trained lawyers and judges in 1791 (or 1868) using the generally accepted methods of the era would have generated narrower and more precise readings of the Constitution than we do today, those are the legal meanings—and hence the original public meanings—of this language.²⁸

I do not accept this model of original-meaning originalism for reasons I describe at length in *Living Originalism*. Some of my reasons are historical, and some are theoretical.

First, relying on work by Larry Kramer, Caleb Nelson, and Saul Cornell,²⁹ I argue that there was no consensus about the correct way to interpret the Constitution at the time of the Founding, in part because the idea of a federal constitution was so new, and analogies to trusts, treaties, contracts, and statutes pointed in very different directions. There were also disputes about the role of professional legal knowledge versus popular constitutional or plain meaning approaches.³⁰ The very assumptions that McGinnis and Rappaport make about the primacy of lawyers' interpretations in fixing constitutional meaning were hotly contested at the Founding and were not resolved by ratification.

Second and relatedly, original legal methods are not the same thing as original meanings; not everyone who ratified the Constitution was a lawyer, and not everyone who participated in the ratification debates assumed that the Constitution should be interpreted according to lawyers' views. Some believed, to the contrary, that the Constitution belonged to the public as a whole, including and especially those untutored in law, and that "The People Themselves" would enforce the Constitution through politics.³¹

Third, and perhaps most important, even if there was consensus about interpretive methods, it does not follow that to accept these methods we must also accept how lawyers in 1791 would have employed them. That is, we should not confuse *original methods* with the *original applications of original methods*. For example, take a key Founding-era principle offered by McGinnis and Rappaport: when in doubt, we should

27. See McGinnis & Rappaport, *supra* note 16, at 774–76 (arguing that vagueness and ambiguity is rare because judges are required to choose the most probable meaning).

28. See *id.*

29. See Saul Cornell, *The People's Constitution vs. The Lawyers' Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 *YALE J.L. & HUMAN.* 295 (2011); Larry Kramer, *Two (More) Problems with Originalism*, 31 *HARV. J.L. & PUB. POL'Y* 907, 912–13 (2008); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 *U. CHI. L. REV.* 519, 555–56, 561, 571–73 (2003).

30. See Cornell, *supra* note 29, at 304–20.

31. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 6–7 (2004).

choose the most probable meaning of abstract and vague language.³² We might employ the same principle today. But the evidence we would look to and the reasons we would offer to settle on the most probable meaning of a vague text like “freedom of speech” or “due process of law” today might be very different than in 1791 because we have lived through 220 more years of history and experience. Bernadette Meyler has pointed out that the incorporation of common-law concepts and common-law terms into a constitution might also include a common-law process of future development of those terms and concepts.³³

The differences between McGinnis and Rappaport and me are not primarily disputes about the philosophy of language. Nor are they disputes about the dictionary definitions of “original” or “meaning.” Rather, we disagree about how to cash out the idea of “original meaning” in practice, and the most sensible way to read abstract language in an ancient constitution that we hope will endure for centuries. Our disagreements, in short, are disagreements about how written constitutions work and what gives constitutions their contemporary democratic legitimacy. These questions matter greatly in the case of the U.S. Constitution, which is not only one of the oldest written constitutions in the world, but is also one of the most difficult to amend.³⁴

“Meaning” is a capacious concept, and indeed, it has many different meanings, including semantic content, purposes, intentions, practical entailments, and cultural associations. Conceived most broadly, “meaning” includes a vast array of cultural associations, traditions, conventions, and background assumptions. Any version of “original meaning” in legal interpretation must inevitably carve out a subset of these cultural meanings and treat this portion as remaining in legal force over time. Therefore, any version of “original meaning” will necessarily be anachronistic, because it will insert some portion of the vast array of past cultural meanings into a contemporary setting without bringing the other parts along with it.

Inevitably, then, we face a choice in the present about what aspects of cultural meaning should constitute “original meaning” for purposes of constitutional interpretation. There is no natural and value-free way to make this selection. It cannot be settled by the meaning of “meaning,” much less the meaning of “original.” It is a choice that is informed by the purposes of a constitution and the promotion of the kind of legitimacy

32. McGinnis & Rappaport, *supra* note 15, at 773–75.

33. See Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 566–67, 593–95, 600 (2006).

34. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 261 tbl.11, 265–67 (Sanford Levinson ed., 1995) (noting that in comparison with other countries, “the U.S. Constitution is unusually, and probably excessively, difficult to amend,” and arguing that the strategies of judicial revision are the likely consequence of such a constitution).

(democratic, social, procedural, or moral) we want our government to have.

Movement conservatives first turned to original-meaning originalism in the 1980s to avoid difficulties with theories of original intention and original understanding. They argued that what binds contemporary interpreters should be original public meaning, not psychological states and intentions. In fact, the interpretation of a legal text always involves an ascription of purpose or intention to an author. But the point is that this ascription of purpose or intention is invariably selective. People identify some aspects of what the adopters sought, intended, assumed, or desired as central to the goals of interpretation—that is, the interpretive enterprise they are currently engaged in—and treat other aspects as optional or even as irrelevant. When we engage in interpretation, we do not seek fidelity to all aspects of an author’s intentions or meanings. Rather, we seek fidelity to the relevant aspects of intentions or meanings, given how we understand the nature and purpose of the interpretive practice we are engaged in. Our practices of interpretation are therefore always anachronistic and selective because we are interpreting for a (present-day) purpose.

In *Living Originalism*, I focus on original semantic meaning (including generally recognized terms of art) and the adopters’ choice of basic technologies of linguistic constraint: rules, standards, principles, and silences. The remaining aspects of cultural meaning I treat as *resources* for construction, but not as part of the framework.

Why do I do this? My (selective) account of original meaning flows from my view about how written constitutions work over long periods of time and what makes them legitimate for generations long after their adoption.

Constitutions are basic plans for politics that have to be carried out over time by many different generations, who may not share the adopters’ cultural presuppositions and worldview. Not everything can be settled at the outset; therefore adopters must put their trust in later generations to carry out the plan and adapt it to new circumstances. That is, adopters *need* the contributions of later generations to keep the plan going. Later generations are not simply slavish followers of the adopters’ will; they have a crucial role to play in building out the plan and helping it succeed. The intelligence and creativity of later generations is just as important to the success of the plan over time as the initial insight of the adopters. Constitutions simultaneously constrain and enable political action by participants. But no constitution can be designed that is so perfect that it will succeed without the judgment and wisdom of later generations.

Adopters, recognizing this, choose different technologies of constraint based on how they wish to constrain or enable future generations. To use Scott Shapiro’s phrase, plans for politics involve an “economy of

trust” (and distrust).³⁵ To understand the contributions that different generations make to the plan, we must understand this economy. Therefore, if we accept the adopters’ plan as our plan and wish to carry it forward into the future, the adopters’ choice of rules, standards, principles, and silences should matter to us.

Rules minimize practical judgment by later generations; standards and principles channel judgment but also require it. Silences leave matters to be determined later on. For this reason, we should take seriously the use of abstract or vague language in a constitution, especially when adopters could have used more precise language or could have specified a historical standard—for example, they might have protected “freedom of speech as understood at the time of adoption of this Constitution.”

My account of original meaning assumes that adopters recognize that a great deal will have to be worked out through construction and that their choice of rules, standards, and principles is deliberate. It ascribes this understanding and these purposes to the adopters. They are creating a constitution not only for their time, but for a later time they cannot know much about.

This economy of freedom and constraint, trust and distrust is important for a second reason. The democratic legitimacy of the Constitution is not established at the moment of adoption. Rather, it derives from multiple sources. The first source of democratic legitimacy is the act of adoption or amendment. The second arises from the processes of constitutional construction over time. Constitutions cannot maintain their democratic legitimacy without contributions from multiple generations. For the Constitution to have democratic legitimacy in each generation it must succeed as “our law”: people must understand it as their accomplishment and as something that belongs to them. We make the Constitution “our law” by struggling over its meaning in constitutional politics, producing new constitutional constructions, and building on or revising older ones. Framework originalism argues that fidelity to the basic framework creates a space for constitutional construction, and that the framework allows—and requires—each generation to do its part in making the Constitution its own Constitution.

For many conservative originalists, my account of original meaning is too barebones, and my theory of framework originalism leaves too much to be built out later on. Nevertheless, conservative originalists must also make a choice about what aspects of cultural meaning to carry forward from past to present as binding on us today, what economy of trust and distrust to ascribe to the Constitution, and what degree of anachronism to accept. Their choice in these matters cannot simply be one of definitional requirement; it does not flow from the meaning of “original meaning.” Whether consciously or not, their choice must be

35. See SCOTT J. SHAPIRO, *LEGALITY* 331–52 (2011).

based on background assumptions about the purposes of a constitution, and how its legitimacy is maintained over time.

These considerations apply equally to McGinnis and Rappaport's theory of original legal methods. Although McGinnis and Rappaport urge lawyers to stick to the ordinary work of legal argument, their version of originalism is nevertheless backed by a distinctive constitutional and political theory.

What is that theory? They argue that originalism is the best theory of interpretation because it is likely to produce the best consequences over time.³⁶ Originalism produces the best consequences because the 1787 Constitution was adopted by a supermajority vote—nine of thirteen state conventions had to adopt the Constitution to ratify it—and because ever since then, amendments under Article V have required two-thirds votes of both houses of Congress and ratification by three-quarters of the state legislatures.

Supermajority ratification rules produce rules with superior consequences because adopters are naturally risk averse.³⁷ They will not vote to ratify a constitution or a constitutional amendment unless they are quite sure that the constitution or the amendment will produce good results in the future, as it will be difficult to change the provision later on. Moreover, adopters vote for laws that will affect their descendants in very different situations, so there is a sort of temporal “veil of ignorance” that leads them to choose optimal rules that will benefit future inhabitants even if adopters do not know what conditions will obtain later on.³⁸

36. John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 *GEO. L.J.* 1693, 1695 (2010).

37. *Id.* at 1735; McGinnis & Rappaport, *supra* note 10, at 774–75 (“Even in the rare instances where groups disagree and nevertheless would like a provision to be put in the Constitution, a delegation to the future would not represent a likely rational compromise because it would increase risks for everyone involved.”).

38. McGinnis & Rappaport, *supra* note 36, at 1697, 1702, 1708; McGinnis & Rappaport, *supra* note 10 at 779 (noting that veil of ignorance also helps to protect minority rights).

The central role that supermajority rules play in McGinnis and Rappaport's theory of originalism leads to a number of puzzles. If a three-quarters majority of states makes for better rules than a simple majority, why not require unanimity, as John Rawls does in his original position? In fact, the Articles of Confederation actually required unanimity for both adoption and amendment. Does this mean that its rules were *ex ante* more likely to be optimal than the procedures used to adopt the 1787 Constitution?

Presumably, McGinnis and Rappaport would agree that there is a “sweet spot” for supermajority rules: just enough difficulty to force optimal content, but not so much that the threat of holdouts wrecks the process or forces morally undesirable compromises—for example, rules protecting slavery. Because McGinnis and Rappaport do not focus on this particular question, however, they do not tell us how this sweet spot is properly measured or whether it might change over time. Perhaps equally important, given the many different kinds of supermajority rules that might have been chosen, they also do not explain why the Framers of the U.S. Constitution miraculously happened upon just the right balance in 1787 and why this optimal balance continues two centuries later.

In fact, there is reason to doubt that the adopters succeeded in picking supermajority rules best calculated to produce good consequences over time. The U.S. Constitution is among the most difficult to amend of any constitution in the world; if its procedures are optimal, this would suggest that the rest of the world's constitutions—and those of the fifty states—are suboptimal. More likely, given the experience of subsequent history, the U.S. Constitution is well beyond the magical sweet spot for optimal

In order to enjoy the benefits of supermajority ratification procedures, it is important that constitutional provisions be relatively clear and determinate; first, so that people can know in advance what they are voting for; and second, so that later generations cannot vary them, except through subsequent amendments that require supermajority support.

Although in theory adopters could delegate to future generations the role of working out the details later on—which is the central assumption of framework originalism—McGinnis and Rappaport believe that it is very unlikely they would do so because rational adopters are risk averse.³⁹ Rational adopters would not vote for provisions that are vague and abstract because they would not know how these provisions will be applied in the future. Moreover, delegation to future generations would not appeal to risk averse adopters because constructions by judges and the political branches will not be disciplined by supermajority procedures, and so their work will likely be inferior to that of adopters constrained by supermajority rules.

In particular, McGinnis and Rappaport believe that risk averse adopters would clearly reject the idea of “judicial updating” by unelected judges.⁴⁰ Judges do not even represent majorities; therefore there is no reason to think that the constructions they produce would have good consequences. Viewed from an *ex ante* perspective, the legal meaning of “equal protection” in 1868 is likely to be superior to anything the Warren Court or Congress in the 1960s could come up with. Similarly, the lawyerly consensus about the meaning of the First Amendment in 1791 is likely to be superior to judicial development of free speech jurisprudence a century and a half later, because the former required supermajority consent, and the latter required only five votes on the U.S. Supreme Court.

content. It is probably far too difficult to amend, which means that its rules are likely to be suboptimal. Equally likely, its amendment procedures are likely to lead to compromises that kick difficult and contentious issues down the road for others to solve. This is precisely what McGinnis and Rappaport deny.

Moreover, the methods for adoption and amendment of the U.S. Constitution have varied. The 1787 Constitution was adopted by simple majority votes of three-quarters of state ratifying conventions, while subsequent amendments have been adopted by two-thirds vote of Congress *plus* three-quarters of the states (which, except for Nebraska, has generally required ratification by two houses of the state legislature). Thus, the rules for amendment are considerably more onerous than the rules for initial ratification. Does this mean that rules appearing in the 1787 Constitution are *ex ante* more likely to be inferior to those in the Bill of Rights, or vice versa? Moreover, the Fourteenth Amendment was adopted by a rump Congress—Republicans refused to seat returning southern congressmen and senators—and southern states were not readmitted until they agreed to ratify the Fourteenth Amendment. Does this mean that judged *ex ante* the content of the Fourteenth Amendment is likely to be inferior to the content of the 1787 Constitution?

39. McGinnis & Rappaport, *supra* note 36, at 1735; John O. McGinnis & Michael Rappaport, *The Condorcet Case for Supermajority Rules*, 16 SUP. CT. ECON. REV. 67, 94, 112 (2008).

40. McGinnis & Rappaport, *supra* note 36, at 1737–43; McGinnis & Rappaport, *supra* note 10, at 771–74; *see also* McGinnis & Rappaport, *supra* note 16, at 775–76 (arguing that rational adopters would require resolution of ambiguity and vagueness to prevent discretion to future interpreters).

Moreover, McGinnis and Rappaport's point is that supermajority procedures that produce better consequences in 1791 will continue to provide these benefits in 2012, because supermajority rules force adopters to adopt rules that will be optimal for the future, and if this proves not to be the case, a contemporary supermajority can use an Article V amendment to make corrections. Judicial "updating" by contemporary judges, by contrast, loses the discipline—and therefore the benefits—of supermajority procedures.⁴¹

Accordingly, McGinnis and Rappaport do not believe that the existence of vague or abstract principles in the Constitution delegates to future generations the job of engaging in constitutional construction. Instead, they believe that supermajority provisions produce "determinate principles about which there is a broad consensus"⁴² at the time of ratification. They argue that political or social groups would rarely agree to place provisions in a constitution when there is significant disagreement about their content. Doing so is simply not rational, because "[t]here is an alternative when groups cannot agree: leave out controversial principles and entrench only consensus ones."⁴³ It follows that the consensus view as of 1787 (or 1791 or 1868) is what matters for interpretation, because that is what opposed groups will converge on—otherwise the provision would not even make it into the Constitution—and this consensus view is likely to produce the best results not only for the current generation, but for future generations as well.

Now we can understand why McGinnis and Rappaport believe that what they call "legal meaning" must be part of original meaning. Their background theory of supermajority rules explains and justifies their choices about what aspects of the past count as "original meaning." What makes a constitution valuable for them is its ability to generate good consequences over time. Rules created by supermajorities must be relatively determinate because only relatively determinate rules can be assured of producing good consequences; vague and abstract texts will be too easy for later generations (and later judges) to shirk, thus debilitating the Constitution's beneficial effects. Because adopters are rational and would seek to achieve good consequences over time, we must presume that they are risk averse and that they will agree only to relatively determinate rules.

Although some constitutional language may seem abstract or vague to us today, this is an illusion. The language was not unclear or vague to risk averse adopters because they relied on the interpretations of well-trained lawyers at the time of ratification, as well as the canon that when language is vague or unclear we should always choose the interpretation that was most likely the one intended.

41. McGinnis & Rappaport, *supra* note 36, at 1722–23, 1737–48.

42. McGinnis & Rappaport, *supra* note 10, at 772.

43. *Id.* at 774.

McGinnis and Rappaport, in short, argue that the Constitution's legitimacy comes from the fact that supermajority rules have produced a "good Constitution" in which ordinary politics can operate.⁴⁴ Ordinary politics, however, cannot change the Constitution's legal meaning; nor can "judicial updating" that is responsive to politics. Legitimate constitutional development can only occur through supermajority procedures that are calculated to produce superior results.

This model of originalism is a species of "skyscraper originalism."⁴⁵ Skyscraper originalism sees the Constitution as a more or less finished project for democratic politics, although it is always subject to later Article V amendment. The Constitution provides a space in which democratic politics occurs. Democratic lawmaking within this space, however, is not constitutional construction. It is ordinary law that is constitutionally permissible given the boundaries of the Constitution as adopted. It cannot change the Constitution, any more than everyday activity within a building can change the building's structure. Thus, no matter how much social mobilizations like the civil rights movement or the women's movement may have affected American political culture, they cannot legitimately change the meaning of the Constitution except through Article V amendment.

I do not accept this account of constitutional language for two reasons. First, I do not agree that because adopters are risk averse, they will use general or abstract language to articulate relatively concrete and consensus commitments. Especially where fundamental rights are concerned, constitutional adopters use vague and abstract language because they want to state basic commitments that they expect others to carry out in the future. They wish to channel and guide politics by placing basic values in the Constitution so that people can refer to them in subsequent political struggles. Written declarations of rights, even if phrased in abstract language, shape political struggles, and this, in turn, affects the law that is produced by politics.

James Madison offered a similar explanation when he introduced the initial draft of the Bill of Rights before Congress. Previously in the *Federalist Papers*, and in correspondence with Thomas Jefferson, Madison suggested that bills of rights were mere "parchment barriers" that might have little effect.⁴⁶ Declarations of vague and abstract rights would be easy to manipulate and would offer little protection against a determined majority. In his address to the First Congress Madison repeated this concern, but ascribed it to others: "It may be thought that all paper barriers against the power of the community are too weak to be worthy

44. McGinnis & Rappaport, *supra* note 36, at 1720–22.

45. BALKIN, *supra* note 1, at 21–23.

46. THE FEDERALIST NO. 48, at 308 (James Madison) (Henry Cabot Lodge ed., 1888); Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 THE WRITINGS OF JAMES MADISON 269, 272 (Gaillard Hunt ed., 1904) ("Repeated violations of these parchment barriers have been committed by overbearing majorities in every State.").

of attention. I am sensible they are not so strong as to satisfy gentlemen of every description who have seen and examined thoroughly the texture of such a defence.”⁴⁷

Despite this objection, Madison argued, written declarations of rights “have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community.”⁴⁸ These social and cultural effects “may be one means to control the majority from those acts to which they might be otherwise inclined.”⁴⁹ Similarly, in his correspondence with Jefferson, Madison noted that stating basic rights in a constitution might have a salutary influence on political culture: “The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.”⁵⁰

Madison surely understood, as we do today, that abstract rights language invites multiple and contrasting interpretations among constitutional adopters. But using more concrete language might undermine the possibility of agreement, or it might lead to narrow protections of specific examples of a freedom that become irrelevant as time passes. Using abstract and vague language naturally produces disputes about the true meaning of rights guarantees as new policy questions emerge. It thrusts discussion of constitutional rights into politics; in doing so, it begins the processes of constitutional construction that actually protect these rights in practice.

The First Amendment provides a good example. When the First Amendment was adopted in 1791, the standard legal view—the legal meaning, in McGinnis and Rappaport’s terms—was that the guarantee of freedom of the press banned prior restraints on publication but did not prevent subsequent punishments for libel or seditious advocacy.⁵¹ Nevertheless, the actual practices of freedom of expression during the period leading up to the adoption of the Bill of Rights were considerably more libertarian, and developing ideas of popular sovereignty—in contrast to parliamentary sovereignty—made it crucial for ordinary individuals to be able to criticize their government. In fact, as Akhil Amar points out, the

47. 1 ANNALS OF CONG. 455 (1789).

48. *Id.*

49. *Id.*

50. Letter from James Madison to Thomas Jefferson, *supra* note 46, at 273.

51. See 4 WILLIAM BLACKSTONE, COMMENTARIES *151–52. As Blackstone explained:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.

Id. (emphasis omitted). Leonard Levy famously argued that this limited, Blackstonian interpretation was the official legal meaning of free expression at the time of the Founding, while acknowledging the views of critics that the “law in action” was considerably freer. See LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985).

very process of ratifying the Constitution required that ordinary citizens be able to criticize government officials and the existing form of government—the Articles of Confederation.⁵²

The dispute over the Sedition Act of 1798 brought the traditional lawyer’s reading—defended by the dominant Federalist Party—into conflict with the views of an emerging political mobilization, the Jeffersonian Republican Party, which argued for a broader legal conception of free expression. Jeffersonians had criticized the government for its approach in the developing conflict with France. They thought Blackstone’s doctrine, in James Madison’s words, to be a “mockery” of free speech.⁵³ Nevertheless, Federalist judges, relying on traditional concepts of free expression, shut down five of the six most influential Republican papers.⁵⁴

McGinnis and Rappaport’s original legal methods approach argues that the legal meaning of the First Amendment today should rest on “determinate principles about which there is a broad consensus”⁵⁵ in 1791. The problem is that there was no broad consensus for the Republican position in 1791, and certainly not in 1798: the two parties were at each other’s throats over this very issue. Given that the Federalists dominated national politics in 1791 when the amendment was adopted, the broad consensus required by McGinnis and Rappaport’s theory would have to give strong weight to their position. A demand for consensus about rights provisions in 1791 would seem to suggest a lowest-common denominator approach, something closer to Blackstone’s view.⁵⁶ Because

52. See AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* (2012).

53. James Madison, *Report on the Resolutions* (Feb. 7, 1799), in 6 *THE WRITINGS OF JAMES MADISON* 341, 386 (Gaillard Hunt ed., 1906).

54. RON CHERNOW, *ALEXANDER HAMILTON* 575 (2004); Jeffery A. Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV. 439, 459–60 (1987). On Federalist prosecutions of Republican speech, see JAMES MORTON SMITH, *FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 256–270 (1966). The Federalist report on the bill in the House of Representatives likewise insisted that there was nothing unconstitutional about the proposed bill. It argued that the Sedition Act was consistent with the First Amendment because it did not impose a prior restraint, because it was merely declaratory of the common law (in fact, it was more speech protective than the common law because it allowed a defense of truth), and because states with free speech and press guarantees in their constitutions already punished seditious and malicious publications. See 5 *ANNALS OF CONG.* 2988–90 (1799).

John Marshall, who by the late 1790s was one of the Federalist Party’s leading figures, believed that the Sedition Act was bad policy and unwise; nevertheless, he defended its constitutionality in an anonymous report for the Virginia Legislature that responded to Madison’s famous report. See JOHN MARSHALL, *REPORT OF THE MINORITY ON THE VIRGINIA RESOLUTIONS* (1798), reprinted in 5 *THE FOUNDERS’ CONSTITUTION* 136–39 (Philip B. Kurland & Ralph Lerner eds., 1987) (attributed to Marshall); Kurt T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 *OHIO ST. L.J.* 435 (2007) (describing Marshall’s participation in the Sedition Act controversy).

55. McGinnis & Rappaport, *supra* note 10, at 772.

56. Indeed, this interpretation would satisfy two important criteria of McGinnis and Rappaport’s theory of original legal methods. It would have been the most likely meaning that would have generated a broad determinate consensus among both Federalists and their opponents, and it would have been the legal meaning that assumed the constitutionality of the relevant legislation and left disputes up to the political branches to resolve. See McGinnis & Rappaport, *supra* note 16, at 775.

McGinnis and Rappaport appear to treat the Sedition Act as an antiprecedent, rather than as an honored source of original legal meaning,⁵⁷ this is probably not what they had in mind. Yet, I must confess that, given this example, I am not sure how to operationalize their theory of determinate principles that enjoy broad consensus at the time of adoption. In fact, it is very unlikely that even the outer boundaries of the consensus on freedom of expression in 1791 would be consistent with our modern conceptions of free speech, free press, and freedom of association. If McGinnis and Rappaport are really serious about deriving original meaning in the way they say they are, they have a lot of explaining to do if they wish to justify modern civil rights and civil liberties protections. It is worth noting that, like many conservative originalists, McGinnis and Rappaport have had to devise an elaborate theory of nonoriginalist precedent to make their theory compatible with the modern state.⁵⁸

Because I do not share McGinnis and Rappaport's theory, I draw a very different conclusion from this evidence. The abstract language of the First Amendment left unresolved differing views about the meaning of freedom of speech and press; these disputes would break out into the open later on in the 1790s, just as unresolved disputes about the scope of federal power would lead to political struggles over a national bank. Positions on free speech divided along party lines because they were wrapped up in the French foreign policy crisis, leading the Jeffersonians to champion libertarian ideas that were connected to the right of the people, as popular sovereigns, to criticize their elected representatives. The same crisis, it should be noted, also led Jefferson to offer creative views about state interposition that are out of the mainstream today.

Here we can see Madison's point about the Bill of Rights in practice: having a text in the Constitution that guaranteed the freedoms of speech, press, and petition created additional respect for these principles in politics. It gave Republicans something to rally around in their dispute with the Federalists, even if the Jeffersonian position on free speech was controversial. The Republican victory in 1800 and the Jeffersonian revolution led to new constructions of the First Amendment that were confirmed by executive and legislative practices, including Jefferson's pardon of persons convicted under the Sedition Act.

The fight over the Sedition Act is the beginning of the processes of constitutional construction that we know as living constitutionalism. When the Supreme Court decided *New York Times v. Sullivan* in 1964, it looked to the later Jeffersonian construction of free speech, and not to the views of Federalist lawyers in 1791, as the appropriate resource for

57. See McGinnis & Rappaport, *supra* note 10, at 767 n.123.

58. See John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 *Nw. U. L. Rev.* 803 (2009).

constitutional construction.⁵⁹ At the same time, the Warren Court did not accept the Jeffersonian theory of interposition, a theory seized on by Southern critics of *Brown v. Board of Education*.⁶⁰

The Sedition Act controversy shows how constitutional construction grows naturally out of ordinary politics. Political controversies of the moment lead to disputes about vague or abstract constitutional language; the resolution of these disputes becomes part of the Constitution-in-practice, and a new set of resources for future generations in future controversies.

My second objection to McGinnis and Rappaport's theory of constitutional language flows from the first. McGinnis and Rappaport's theory argues that rational constitutional adopters are risk averse; therefore seemingly abstract or vague language must refer to a relatively determinate consensus position at the time of adoption. There is a natural experiment to test this claim. Many countries have adopted constitutions following World War II that have abstract rights guarantees. The Canadian Charter of Rights and Freedoms and the South African Constitution are two prominent examples, but there are many others.⁶¹ If constitutional adopters are naturally risk averse and want their constitutions to deliver the best consequences, we should expect to see widespread adoption of something like original-methods originalism around the world. In fact the opposite is the case, even in the United States. Among the nations of the world, American political culture is perhaps the most focused on originalism, but devotion to the Framers' wishes is honored more in the breach than the observance. Originalist conclusions are often rejected in practice, and American courts do not regularly employ anything like McGinnis and Rappaport's original-methods originalism to resolve most constitutional controversies.

Moreover, American ideas of originalism are not widely adopted outside the United States (although a few constitutional cultures employ originalist arguments in conjunction with other modalities).⁶² Looking

59. 376 U.S. 254, 274–77 (1964) (arguing that “[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history” and citing Jefferson’s and Madison’s views with approval).

60. 347 U.S. 483 (1953); see LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 58–60 (2000) (describing the role of James J. Kilpatrick and the *Richmond News Leader* in creating a theory to justify Southern resistance to *Brown*); Joseph J. Thorndike, “*The Sometimes Sordid Level of Race and Segregation*”: *James J. Kilpatrick and the Virginia Campaign Against Brown*, in *THE MODERATES’ DILEMMA: MASSIVE RESISTANCE TO SCHOOL DESEGREGATION IN VIRGINIA* 51, 51–71 (Matthew D. Lassiter & Andrew B. Lewis eds., 1998) (describing the evolution of interposition arguments as justifications for resistance to *Brown*).

61. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.); S. AFR. CONST., 1996.

62. See, e.g., Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 INT’L J. CONST. L. 633, 656, 656 n.83 (2004) (“In Europe . . . recourse to originalism is virtually nonexistent” and “even implicit references to originalism in substance are quite rare.”). David Fontana points out that originalist arguments or originalist rhetoric may sometimes appear in other countries, especially in those with a revolutionary tradition. See David Fontana, Response, *Comparative Originalism*, 88 TEX. L. REV. 189, 189–90 (2010). But Fontana does not argue

immediately to the north, there is no reason to think that Canadians are especially more daring or risk-loving when it comes to constitutions than Americans; yet Canada is famous for its “living tree” doctrine and, as Peter Hogg has put it succinctly, “Originalism has never enjoyed any significant support in Canada.”⁶³ Yet if McGinnis and Rappaport are correct about what rational adopters would demand for their constitutions, Canada should be just as much a hotbed of originalism as the United States.

In fact, scholars and jurists in other countries are often puzzled by the American debate over originalism and America’s originalist obsessions. They do not understand why vague and abstract language requires originalist methods. The dominant strategy for dealing with vague and abstract language in constitutions around the world is proportionality review, and not original-methods originalism.⁶⁴ It is possible that—and certainly many American politicians would like us to believe that—everyone else around the world is simply crazy, but perhaps there is a more charitable explanation.

The reason why a constitutional culture finds originalism attractive probably has little to do either with rationality or risk aversion. David Fontana has suggested that originalist rhetoric is most likely to appear in countries with a revolutionary tradition in which a constitution is strongly identified with the creation of the nation itself.⁶⁵ Ozan Varol, in his study of the secularism provisions of the Turkish Constitution, has suggested that “originalism blossoms when a political leader associated with the creation or revision of the nation’s constitution develops a cult of personality within the nation.”⁶⁶ More generally, it seems reasonable to think that a predilection for originalism stems from features of cultural memory characteristic of a particular political tradition, and does not follow from theories of language or rational choice.

Perhaps only “real Americans” possess the risk aversion that McGinnis and Rappaport insist is shared by all rational constitutional

that any country—including the United States—has adopted something like McGinnis and Rappaport’s model of original methods originalism. *See id.*

63. See Peter W. Hogg, *Canada: From Privy Council to Supreme Court*, in *INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY* 55, 83 (Jeffrey Goldsworthy ed., 2006).

64. See Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 *EMORY L.J.* 797, 799 (2011) (“[C]onstitutional courts in legal systems around the world have converged on a method for adjudicating rights claims—proportionality analysis . . .”).

65. Fontana, *supra* note 62, at 190 (arguing that “the most relevant” factor explaining a country’s view on originalism “is whether or not its constitution created the nation that lives under the constitution, or whether the constitution merely reorganized the institutions of the country but did not create the nation that lives under the constitution”).

66. Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 *VAND. J. TRANSNAT’L L.* 1239, 1246 (2011). If Varol and Fontana are correct, then originalism would not develop in revolutionary traditions like France, first because the French nation predated the French Revolution and the creation of the First Republic, and second, because the French Revolution itself, and not individual revolutionaries like Robespierre, is the object of civic devotion.

adopters. But there is a natural experiment even here. There are fifty American state constitutions, and they are constantly being updated and rewritten.⁶⁷ If McGinnis and Rappaport are correct, original-methods originalism, because it produces the best consequences, should have become the standard method of interpretation for state constitutions as well as the federal constitution, because risk averse adopters would demand it. But this does not seem to have occurred. Although state supreme courts, like federal courts, often make originalist arguments, they do not seem to be rigorously originalist in the way that McGinnis and Rappaport demand.⁶⁸ Indeed, state courts often seem to outdo federal courts in their embrace of living constitutionalism,⁶⁹ or as McGinnis and Rappaport call it, “judicial updating.” For example, many living constitutionalist claims about race relations, sex equality, and gay rights have originated in state courts before gradually being accepted by federal courts. The practice of state courts makes perfect sense in my model of how living constitutionalism operates. Mobilizations and countermobilizations naturally turn first to local venues to win converts, and many of the most important transformations in constitutional doctrine have occurred first in the state courts. But these practices are not consistent with McGinnis and Rappaport’s account.

Of course, what courts do is not necessarily the same thing as what rational adopters expect or demand. It is theoretically possible that courts around the world—and in the several states—have repeatedly and systematically acted in defiance of risk averse adopters. Adopters repeatedly insist on original-methods originalism, and the courts repeatedly ignore them. One would think that adopters, being both rational and risk averse, would eventually have figured this out by watching what happened in other jurisdictions, and would stop using such vague and abstract language, or else require constitutions to include qualifiers such as “as understood at the time of adoption.” Apparently, however, they never learn.

A more parsimonious explanation, however, is that constitutional adopters are not risk averse in the way that McGinnis and Rappaport imagine they are, and that they adopt vague and abstract language for reasons that are closer to the ones I offer: people use vague and abstract language in constitutions to state general commitments that they hope

67. See SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 331–35 (2012) (describing the frequency of amendment and the multiple constitutions that have existed in the various states).

68. See, e.g., Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1485 (2010) (noting that state constitutional courts generally dispense with elaborate canons of construction and that state uses of originalist argument may be quite different from those found in federal courts).

69. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (same-sex marriage); *Baker v. State*, 744 A.2d 864 (Vt. 1999) (same).

will guide and channel future politics but whose precise contours will have to be worked out by others over time.

III. DEMOCRATIC LEGITIMACY AND DEMOCRATIC PROCESSUALISM

Living Originalism argues that the processes of living constitutionalism that have developed in the United States contribute to democratic legitimacy over long periods of time. Fidelity and legitimacy, however, are distinct concepts, and neither guarantees the other. Moreover, as Mariah Zeisberg's article points out, neither concept is identical with political success or political dominance.⁷⁰ In fact, political success can undermine a constitution's democratic functioning and democratic legitimacy.

Fidelity means adherence to a plan for politics. Fidelity concerns (1) whether people are following the plan and (2) whether they are trying to work out the details of the plan in a way that best furthers the plan and its goals. One can speak of fidelity to the entire plan or fidelity to various aspects of the plan—for example, fidelity to the guarantee of the equal protection of the laws.

Participants in the constitutional system will often disagree about constitutional fidelity, especially as it relates to constitutional construction by the political branches and by the judiciary. Especially where issues of state-building construction are concerned (for example, how to construct cabinet departments or create institutions that deliver social services), a wide variety of constructions might be faithful to the plan. Nevertheless, participants will argue that some constructions are *more* faithful to the Constitution than others. Libertarians might argue that the creation of the modern post-New Deal state is less faithful to the constitutional plan than many pre-New Deal constructions; conservatives might insist that cases like *Roe v. Wade* and *Lawrence v. Texas* are not faithful interpretations but that robust presidential war powers are faithful to the plan; liberals might disagree, and so on. Fidelity is a judgment made within the constitutional system by the participants; it is often a comparative judgment (more or less faithful), and it is often highly controversial.

As a participant in the system, I have my own views on what constructions are most faithful to original meaning and underlying principles, and I articulate some of them in *Living Originalism*. In some cases, my views are mainstream, in others I am a constitutional dissenter. Moreover, people employing similar methods to mine may reach different conclusions; for example, Randy Barnett and I disagree about the proper interpretation and construction of national power.

70. Mariah Zeisberg, *The Politics of Constitutional Fidelity*, 2012 U. ILL. L. REV. 801, 804–07.

In contrast to fidelity, legitimacy is not a property of individual constructions or interpretations but rather of the constitutional and political system as a whole. Legitimacy concerns whether the constitutional and political system is sufficiently worthy of respect by its participants, that it is reasonable for them to consent to the state's power over them and others. If the system is not sufficiently worthy of respect at present, then legitimacy requires faith that it will eventually become so.

Legitimacy has several dimensions. Sociological legitimacy concerns the extent to which people accept the system as having the right and the authority to rule them. Procedural (or legal) legitimacy concerns the extent to which people clothed with state power (including, for example, government officials, jurors, and voters) make decisions according to official legal rules and procedures. Moral legitimacy concerns the extent to which the system is just or morally admirable, for example, because it protects human rights and makes just decisions about matters of social welfare and foreign policy.

Living Originalism is primarily concerned with democratic legitimacy. A system is democratically legitimate to the extent that it allows the members of the political community to govern themselves and makes government action accountable to public will, public values, and public opinion. Democratic legitimacy draws on aspects of the three other forms of legitimacy, although it is not identical with any of them. For example, democratic legitimacy may require that the state treat the members of the relevant political community as equal citizens or with equal and appropriate respect, which, in turn, will require the protection of basic human rights and regular legal procedures.

The Constitution and its amendments are acts of popular sovereignty that create a basic plan for a democratic politics that must be filled out over time. Constitutional construction is either directly produced by the political branches (through state building constructions) or is in the long run responsive to them because of institutional constraints on the federal judiciary. Thus, popular sovereignty is exercised directly through the creation of the constitutional framework (including amendments) and either directly or indirectly through constitutional construction. The processes of living constitutionalism are consistent with and promote democratic legitimacy in the medium to long run because they allow political and social mobilizations to change the Constitution-in-practice through constitutional construction as well as constitutional amendment.

The American model of constitutional development evolved over a long period of time, partly by design but mostly through successive political struggles. It does not guarantee justice or good outcomes. Indeed, it may produce very unjust results. That is one reason that constitutional faith is required by constitutional dissenters who see its defects all too clearly.

Although I believe that the system of living constitutionalism promotes democratic legitimacy, it does not guarantee it. The system has many flaws, and depending on one's substantive conception of democracy, its flaws may be quite significant. Moreover, there is no guarantee that people working within the system will not, over time, make it less democratically responsive.

This is Zeisberg's point: the mere fact that certain constitutional constructions succeed in winning widespread public acceptance or public support does not mean that they are the most faithful constructions or that they make the constitutional system democratically legitimate. Political success is not the same thing as constitutional fidelity. It is also not the same thing as democratic legitimacy.

The first point should be obvious. Political success produced the Jim Crow Republic following the 1896 election. A series of constitutional constructions rationalized racial apartheid in the United States, and the constructions, in turn, were supported by powerful political elites and either accepted or actively pursued by key players in the two major political parties. Jim Crow was a political success; it lasted for seventy years. But this does not make it the most faithful interpretation of the Constitution. Perhaps many people at the time thought that it was, but many constitutional dissenters disagreed. For them, the Constitution was being betrayed.

Even a democratically responsive Constitution-in-practice does not guarantee that people will further the constitutional plan in the way that best serves moral legitimacy or democratic legitimacy. A democratically responsive constitution can lead to antidemocratic practices, to great evils, or degrade into a tyranny or a dictatorship. Indeed, this is precisely why the Framers feared democracy in its simplest form.

The second point may seem more counterintuitive, but Zeisberg's basic claim seems correct. Political success does not by itself guarantee democratic legitimacy if certain features of constitutional development undermine democratic legitimacy. For example, the Senate's rules have evolved so that the filibuster is invoked on even routine legislation. This is the result of successful politics, but, in my view, it undermines democratic responsiveness. The Jim Crow Republic may have been established and reinforced by multiple electoral victories, but I believe it violated a key precept of democratic legitimacy: that the state must treat all of the members of the political community as equal citizens and with the equal respect that comes with that status. In our own day, perceived threats to national security have led the political branches to create an ever more powerful presidency with proliferating institutions and budgets that are shrouded in secrecy, and that are increasingly difficult to subject to either democratic or judicial scrutiny.

The famous *Carolene Products* footnote⁷¹ and John Hart Ely's theory of judicial review⁷² are premised on the idea that some constitutional constructions better serve the goals of democratic legitimacy than others, and that some constitutional developments can cripple democracy or cumulatively undermine self-government.

Zeisberg generalizes this familiar structural idea. She argues that we should judge actors within a constitutional system by how well they employ—and build out—their institutional capacities to further the purposes of their particular institution in the larger system of constitutional democracy. She calls this the criterion of democratic “processualism.”⁷³

Nevertheless, Zeisberg recognizes, the idea of processualism faces an endemic problem. Perhaps the different branches of government have a duty to stay true to the constitutional values that define their proper role in the larger system. But institutions are not always the best judges of their proper capacities and responsibilities. Zeisberg argues that the political branches have a duty of “institutional reflexivity”: “The branches are charged with, at a minimum, maintaining their own capacities to govern in ways that are disciplined by their animating constitutional functions.”⁷⁴ The difficulty is that although political actors should be self-reflective, their self-analysis is often skewed in their own favor. For example, the more they succeed in political struggles, the more they will tend to assume that they are helping the entire system work better as well. Conversely, when they lose in particular political struggles, they tend to see their failure as due to the failure of opposing institutions to behave according to their proper role. Disputes between the President and Congress, or between federal courts and state political officials, are familiar examples.

We may want the President continually to inquire whether the construction of the National Surveillance State⁷⁵ is the best way to harness the presidency's distinctive capacities and obligations to democracy. But the President is likely to think that protecting the country from harm is not only one of his primary duties, but an obligation that he will be judged most harshly for if he fails. In the long run, therefore, presidents will not be institutionally reflexive in the way that Zeisberg would want; they will err on the side of more secrecy and less democratic accountability. It is no accident that President Barack Obama has continued many of President George W. Bush's policies on detention and surveillance, and is now the primary beneficiary of the FISA Amendments Act of

71. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

72. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

73. Zeisberg, *supra* note 70, at 808.

74. *Id.* at 811.

75. Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 15, 24–25 (2008); Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 489–90 (2006).

2008,⁷⁶ which ratified several of the Bush Administration's practices and gave authority to expand surveillance programs.

As the Framers recognized, participants in a self-enforcing constitutional system must struggle with each other to keep the system functioning appropriately over time. Arguments about proper democratic functioning in such a system are in politics, not outside it. Therefore, Zeisberg concludes, "Since the constitutional politics of the branches is conducted in partisan ways, we can expect that applying the standard of processualism will lead to conclusions that will register as partisan in the broader political landscape."⁷⁷ I agree. This is one of the consequences of a self-enforcing constitutional system. To paraphrase what is often said in First Amendment law, in such a system of government, the only cure to the kind of politics we do not like is more politics.⁷⁸

IV. CONSTITUTIONAL CULTURES AND CONSTITUTIONAL IMPLICATIONS

Jeffrey Goldsworthy's article⁷⁹ is so rich that I cannot even begin to do it justice in this reply. He has at least five claims, each of which would merit (at least) a full article in response. In particular, I will have to leave unanswered his succinct and powerful critique of the American system of judicial review; his argument that a parliamentary system without judicially enforceable constitutional rights guarantees—like Australia's—is superior in terms of democratic legitimacy to the system of living constitutionalism that I describe in *Living Originalism*; and his doubts about why Americans should even have faith in their constitutional system, given its obvious imperfections. These are serious matters, but to give them the responses they deserve would turn this article into a second book. And, in many ways, Goldsworthy's criticisms are as much directed to American constitutional theory in general as they are to *Living Originalism*.

Even so, I was unable to limit myself to a single part of his interesting article to comment on. Instead, I chose two. The first concerns how the analysis in *Living Originalism* translates to other constitutional cultures. The second concerns the role that intentions and implications play in the interpretation of constitutional texts.

76. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436.

77. Zeisberg, *supra* note 70, at 812.

78. *Cf. Whitney v. California*, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring) (stating that "the fitting remedy for evil counsels is good ones" and "the remedy to be applied [to evil speech] is more speech").

79. Jeffrey Goldsworthy, *Constitutional Cultures, Democracy, Implications, and Underlying Principles*, 2012 U. ILL. L. REV. 683.

A. The Importance of Constitutional Culture

Living Originalism argues that in order to be successful, a constitution like America's must succeed simultaneously as *basic law*, *higher law*, and *our law*.⁸⁰ By *basic law*, I mean that the Constitution serves as a basic framework for governance that allocates powers and responsibilities, sets up a plan for ordering political life, and offers ways of implementing, expanding, or modifying the plan over time. By *higher law*, I mean that the Constitution serves as a source of aspiration and a reflection of values that stand above ordinary law and hold it to account. By *our law*, I mean that people are attached to the Constitution, feel a sense of ownership in it, and see it as the product of their collective efforts as a people. Viewing the Constitution as "our law" helps constitute Americans as a single people, dedicated to a political project that extends over time, in which past, present, and future generations participate. This collective identification, in turn, is a constitutional story that allows Americans to regard the Constitution as their own even if they never officially consented to it.

But what if a constitution is not like America's? Goldsworthy's article points out that constitutions in different political cultures may not serve these functions or serve them in the same way. Goldsworthy offers the United Kingdom, Australia, and Canada as examples.⁸¹ The British Constitution of precedents, customs, and ancient statutes may be basic law, but it can be changed by ordinary statute. Goldsworthy does not believe that Australia's Constitution serves an aspirational or higher law function because it does not contain rights guarantees (although the Australian Supreme Court has implied a few). Canada's Constitution is not "our law" in the same way as America's because it began as the British North America Act, created and imposed on Canadians by a colonial power.⁸² Nor, in Goldsworthy's view, do Australia's or Canada's constitutions form important—much less central—parts of their national narratives in the same way that the American Constitution does in the United States.

I agree with Goldsworthy's basic insight. *Living Originalism* is a book about the American Constitution, and about the distinctive features of American political culture that make the Constitution central to American political identity. To apply the arguments of *Living Originalism* to other political cultures, we must first ask what role a constitution plays in a country's political culture, and we must know something about that country's history of constitution making.

Most constitutions probably do serve as basic law in my sense; as the example of Britain's unwritten constitution suggests, however, they

80. BALKIN, *supra* note 1, at 59.

81. Goldsworthy, *supra* note 79, at 684–90, 694.

82. *Id.* at 694.

may do so in importantly different ways. Many constitutions may not serve as higher law in the same way that America's Constitution does; the idea of political aspiration may come from different features of a political culture and its history. People in other countries may not point to their constitutions as the symbol or embodiment of their political ideals and aspirations. They may point to national traditions, religious institutions, or past political struggles.

The U.S. Constitution and the history of its development serve a crucial role in the country's national narrative and in Americans' sense of themselves as Americans. But other constitutions—indeed, perhaps most—may not serve as “our law” in the same strong sense as the American Constitution. Much depends on the circumstances in which a constitution was created—imposed by a former colonial power, drafted under Soviet domination, promulgated by a former or current strongman or autocrat, or developed through a popular referendum or democratic process widely assumed to be fair and legitimate. Even in the latter case, a constitution may not have a significant role in national identity; for example, because the nation is much older than its current constitution, or because national identity is primarily ethnically or religiously defined. Moreover, few written constitutions are as durable as the American example; some are changed fairly often. Many never manage to obtain the sense of pride or reverence that Americans spontaneously show toward their ancient Constitution.

To apply the argument of *Living Originalism* to other constitutional systems, then, one must first look to differences before one can profitably examine similarities. It may be useful to ask at the outset whether a particular constitution serves, or even needs to serve, the functions I have described as basic law, higher law, and our law; and if not, why not. We may find that some of these aspects are distributed and realized elsewhere in the politics and culture of a nation. To be sure, many of the arguments in *Living Originalism* about interpretation and construction can be applied to other political systems. But in doing so, one must always take into account the circumstances of American constitutionalism and the many ways that American political history and political culture have shaped its Constitution, and vice versa.

B. Constitutional Intentions and Implications

The final part of Goldsworthy's article discusses the role of intentions in original-meaning originalism. Even though advocates of original-meaning originalism eschew reference to the intentions of the adopters, Goldsworthy points out that one cannot avoid ascribing purposes and intentions to constitutional adopters.

I agree. In *Living Originalism*, I argue that we ascribe purposes or intentions to the adopters when we attempt to ascertain original meaning. For example, we ascribe purposes or intentions to constitutional

adopters when we resolve ambiguities in the text in the following situations:

1. When we decide whether a certain word or phrase refers to one concept rather than another.
2. When we decide whether the text states a rule, a standard, or a principle.
3. When we decide whether the text employs a nonliteral usage or a generally recognized term of art. (Examples include the word “writings” in the progress clause or the words “Congress” or “speech” in the First Amendment.)
4. When we identify certain very basic assumptions in the text, for example, that the numerals in the Constitution are stated in base ten, not base two, and that the calendar employed is the Gregorian calendar, not the Jewish lunar calendar or the Mayan calendar.

We ascribe purposes or intentions in each of these cases because we are trying to identify the basic plan for politics on which we are trying to build, and we cannot do this without ascribing purposes or intentions to the drafters and adopters of the plan. In my discussion of McGinnis and Rappaport’s work, I point out that appeals to original meaning are always partly anachronistic. In constitutional interpretation, we do not include all aspects of the past as part of original meaning, only those parts that we think are relevant to the interpretive enterprise we are engaged in. In the same way, we are not interested in all aspects of the adopters’ purposes or intentions, only those that are relevant to our enterprise.

Goldsworthy is particularly concerned with the fourth category listed above. Constitutional texts, like other texts, contain implicit presumptions; these are tacit assumptions that are taken for granted and therefore are not explicitly expressed to the audience.⁸³ Sometimes they are not even consciously understood by the speaker or the audience. When we identify presuppositions we are ascribing intentions or purposes to the authors of a document. But this ascription of purpose or intention is not the same thing as a description of psychological states that people held, for three reasons.

First, people in the adopting generation might not have thought about whether the numbers they wrote down were in base two or base ten, or whether they were using the Gregorian calendar as opposed to an alternative calendar.

Second, not everyone in the relevant pool of adopters might have had the same psychological states (purposes, beliefs, or intentions)—or indeed, any at all—with respect to a particular question. Nevertheless, we ascribe purposes or intentions to the group as a whole.

83. *Id.* at 700.

Third, if we decide that a particular term—say “speech” in the First Amendment—is a nonliteral term, it might be reasonable to ascribe to the adopters the view that “speech” includes new forms of communications technology that were not invented at the time they wrote. Obviously, they could not have had psychological states of belief, purpose, or intention concerning those nonexistent forms of communications technology.

In each of these cases, we ascribe purposes and intentions to adopters, but we do not claim that they had certain psychological states. Rather, we are saying in effect that the adopters must have meant that, or that a contrary reading would make no sense given their purposes as we understand them.

When the relevant purposes or intentions of the adopters are unclear, we resort to the familiar lawyer’s toolkit, using the same tools and modalities we would use in constitutional construction, except that we employ the tools with the goal of identifying particular aspects of original meaning. Once again, in doing so, we are not trying to identify actual psychological states of particular historical individuals or groups of individuals, but rather, what we think the adopters must have meant, or, put another way, what it is reasonable to ascribe to them by their use of words.

Goldsworthy distinguishes between “genuine” and “spurious” implications (or presuppositions) that we might draw from a constitutional text.⁸⁴ Genuine implications, he argues, are those that properly form part of the original meaning of a communication, while spurious implications are those “which are not really part of the preexisting meaning of a communication, but are added to it by interpreters to improve it in some respect.”⁸⁵ Goldsworthy does not mean “spurious” in a pejorative sense; rather, he means that spurious implications are those that we cannot genuinely infer from a text as what the adopters must have meant. Therefore we cannot fairly ascribe these implications to the adopters as part of their original meaning.

Goldsworthy wishes to map the distinction between genuine and spurious implications onto the distinction between interpretation and construction. If we are trying to uncover tacit assumptions in a text—that is, genuine implications—Goldsworthy claims we are engaged in interpretation; if we are not, then we are engaged in construction.⁸⁶

While I agree that original meaning should include at least some implicit or tacit assumptions, I am not sure that it includes all of them. For that reason, I am not sure that Goldsworthy’s distinction between genuine and spurious implications maps perfectly onto the distinction be-

84. *Id.* at 701–03.

85. *Id.*

86. *Id.* at 701–02, 706–08.

tween interpretation and construction. That would work only if we define “genuine implications” far more narrowly than Goldsworthy does.

First, as a threshold matter, I worry that it may be very difficult in practice to identify the boundary between what is a “genuine” and what is a “spurious” implication, even though there may be many easy cases on both sides of the line. Second, I am also concerned that if we define genuine implications in terms of the “background assumptions” or “tacit presuppositions” of speakers at the time of utterance, we undermine the distinction between original meanings and original expected applications. Indeed, we reintroduce the ideas of original intentions and original understandings through the back door. I do not (yet) see a clear demarcation between tacit or background assumptions and original expected applications or original understandings. For Goldsworthy’s model to work, his class of “genuine implications” must form a fairly small subset of all the background assumptions of competent speakers in a language, and Goldsworthy has not yet offered an account of what defines that subset.

To see how the problem arises, consider one of Goldsworthy’s examples of a genuine implication: when I order a hamburger, I do not want it encased in plastic, I do want it to be made of edible materials, and so on.⁸⁷

Suppose, however, that the adopters order “equal protection of the laws” in 1868. What are their tacit assumptions and “the things that go without saying” at the time of this utterance? Should we include as part of their tacit assumptions that “equal protection of the laws” did not mean full equality for blacks, equality for married women, or equal rights for homosexuals (or, as they were known in those days, sodomites)? It is quite possible that most people assumed that the common-law coverture rules would remain in place, and never dreamed that homosexuals would be the beneficiaries of the new amendment. I would argue that these are original expected applications, and properly matters of constitutional construction. In other words, not everything that went without saying or was widely assumed at the time of adoption is part of original semantic meaning.

Moreover, the notion that things that “go without saying” are part of original meaning may be complicated by the fact that there is sometimes nontacit evidence of what the speaker means. If tacit assumptions are properly part of original meaning, why shouldn’t explicitly stated assumptions also count? Suppose that I order a hamburger and the waitress overhears me saying to my lunch companion “I really cannot stand hamburgers encased in plastic.” In this case, this is not only something that goes without saying—it is something I actually said, just not in my order to the waitress. Why shouldn’t these remarks be even stronger evidence of a speaker’s original meaning than mere tacit assumptions? Put

87. *Id.* at 699.

differently, if we adopt Goldsworthy's theory of implications, why should the fact that I said this out loud mean that my original meaning does not include my objection to a hamburger encased in plastic?

In the case of the Fourteenth Amendment, we know that many adopters did not wish the new amendment to undermine state bans on miscegenation, segregation of common schools, or the common-law coverture rules. What is the difference between these understandings and my explicitly saying: "I would like a hamburger, but I do not want my hamburger encased in plastic"?

Goldsworthy, like me, accepts the distinction between original meaning and original expected applications. So I await a more nuanced account before I can sign on to his proposed distinction between genuine and spurious implications.

This matters in part because Goldsworthy would like to associate genuine implications with what I call "underlying principles."⁸⁸ This would make underlying principles part of original meaning. He quickly sees, however, that my account of underlying principles is not really consistent with his distinction. That is because genuine implications must be intended meanings, and my account of underlying principles does not require that they have been intended by the adopters. This leads Goldsworthy to ask whether the idea of underlying principles—and fidelity to underlying principles—is consistent with original-meaning originalism. Indeed, at the close of his article, he says that what I have created is not a "pure" originalism, but a "mongrel cross" of originalism and nonoriginalism.⁸⁹

In *Living Originalism*, I argue that we must be faithful not only to the original meaning of the text of the Constitution, but also to "underlying principles." Underlying principles do not appear in the text. They are constructions that we use to make sense of the plan.

I distinguish two kinds of underlying principles. The first are structural principles. These principles describe the proper functioning of the constitutional system. In *Living Originalism*, I mention several examples: separation of powers, checks and balances, federalism, democracy, equal citizenship, and the rule of law. (This list is not meant to be exhaustive.) Structural principles do not have to be associated with a specific clause in the text. There is no separation of powers clause in the Constitution; rather, we derive this principle from how the various parts of the Constitution are supposed to work together.

The second kind of underlying principles are explanatory or implementing principles. These are principles that we use to flesh out standards and principles that actually appear in the text. Examples are the principles against class and caste legislation that explain and implement

88. *Id.* at 706–08.

89. *Id.* at 709–10.

the Fourteenth Amendment's equal protection clause. These principles also do not appear in the text. We use them to explain what the guarantee of equal protection means.

We look to history to develop underlying principles, but they do not have to be stated in precisely the way that the adopting generation would have stated them. We also do not have to focus only on the adopting generation; we can look to the nation's entire history, including, for example, the civil rights revolution.

Thus, underlying principles do not have to be originally intended principles, and even when versions of them actually were intended, they do not always correspond to the way that the adopters would have articulated them. In fact, the principles that we ascribe to the Constitution do not have to be intended by anyone in particular. For example, some structural principles might arise because of the cumulative effect of different amendments and new governmental institutions that nobody could have predicted. The way that we understand older structural principles intended by the adopters—like the separation of powers—might change as a result of institutional evolution and changing problems of governance.

Some other principles that we ascribe to the text today might have arisen after its adoption. For example, I believe that the principle of democracy is an important structural principle underlying the U.S. Constitution. But democracy, at least as we understand it today, was not an originally intended principle. The Founding generation believed in republicanism; they believed in representative self-government with various devices for limiting, controlling, and diffusing popular passions. They were suspicious of democracy, which they believed was likely to prove unstable. They would not have accepted our modern, egalitarian vision of democracy, even if we can see connections between today's views and their original rebellion against monarchy and social hierarchy.

In *Living Originalism*, I argue that we should be faithful both to the original meaning of the text and to underlying principles. Goldsworthy asks how this can be consistent with original-meaning originalism; if underlying principles are merely constructions that might change over time, why should we have to be faithful to them at all?

I believe that we must be faithful to underlying principles because they play a crucial role in implementing the Constitution; they are constructions on which other subsidiary constructions build. They are a little like the tendons and ligaments that connect the muscles to the bone.

Constitutional constructions require us to ascribe certain principles to the text, either to explain the proper functioning of the constitutional system or to explain particular abstract principles and standards that appear in the text. Thus, even though separation of powers and federalism are not explicitly stated in the text, I believe that we should ascribe these principles to the text to make sense of it. Even though the Fourteenth

Amendment does not specifically prohibit “class legislation” or “caste legislation,” I believe that these principles motivate and make sense of the concept of constitutional equality. Because we must ascribe these principles—or others of the same kind—to the text in order to further implement it through construction, we must be faithful to them as well as to the text.

To be sure, people may disagree about these principles. Some people might dispute that the principles against class or caste legislation are the best account of constitutional equality. Others might agree that separation of powers is an underlying principle but have a different account of it. But our disagreement about the content of these underlying principles does not obviate our need to use them to understand and construct the Constitution.

If we must ascribe certain principles to make sense of the constitutional plan, then it follows that to be faithful to the plan we must also be faithful to these constitutional principles. Moreover, even though these principles are constructions, they give us leverage to criticize the Constitution-in-practice. For example, suppose that I think that a certain existing construction violates the separation of powers. It is true that the separation of powers does not appear in the text, but it is a construction that helps me judge whether other, subsidiary constructions are faithful to the Constitution. Similarly, suppose that I believe an underlying principle of the First Amendment is that the government should not be able to discriminate based on political viewpoint. This principle gives me leverage to critique doctrines that do not respect this principle. When we say that we must be faithful to underlying principles, we are saying that we must also be faithful to the constructions that we believe are necessary to make sense of the constitutional plan and further it.

These principles might change over time, because we always articulate these principles from the present, and our perspective is always changing beneath our feet. History always looks different to us, and even the same historical materials look different as we move through history. That is why it makes sense to say, at one and the same time, that we must be faithful to underlying principles and yet recognize that people living in the past or the future might articulate these principles differently than we do today. It also makes sense that that people in the present might disagree about the nature and scope of the Constitution’s underlying principles and claim that they are being faithful to the Constitution (while denying that their opponents are).

V. MORAL READINGS AND CONSTITUTIONAL VISIONS

Jim Fleming argues that I offer a moral reading of the Constitution, but that this moral reading is not the same as that of Ronald Dworkin, who coined the term.⁹⁰

I agree with both points. As noted earlier, *Living Originalism* argues that the U.S. Constitution, to be successful, must succeed as basic law, higher law, and our law. To succeed as higher law, the Constitution must serve as a source of political and moral aspirations that critiques existing law and political arrangements and holds them to account. As I understand Fleming's definition, that is all that is required for my theory to be a moral reading.⁹¹

Fleming is also correct that Dworkin's account of the moral reading of the Constitution is different from my theory in important respects. Although, like everyone in my generation, I have been deeply influenced by Dworkin, we have different jurisprudential commitments, different methodological approaches, different ideas about the role of the judiciary, and different views about how American politics contributes to constitutional development.

It might be worth noting a few of these differences: Dworkin is a well-known critic of positivism, whereas I am a positivist. Dworkin rejects originalism because it is inconsistent with his theory of constructive interpretation; I argue that interpreters must always be faithful to the text's original meaning.⁹²

Dworkin has famously described courts as the "forum of principle," and views ordinary politics as the home of passion and will that wiser courts must restrain and correct. I argue that constitutional principles emerge out of constitutional politics and that courts legitimate the work of the political branches as much as they restrain or correct it.

90. James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 699, 676–77.

91. *Id.* at 674–76.

92. Dworkin's rejection of positivism is a major but perhaps unappreciated reason why Dworkin also rejects originalism. Dworkin argues that judgments about what the law is must flow from the best constructive interpretation of the social practice of law. Constructive interpretation includes two dimensions. First, we ask how well our interpretation fits with the history of the practice we are interpreting. Second, we ask which interpretation is most justified according to the best available moral theory. Depending on how we balance these two dimensions of fit and justification, we may conclude that some legal materials and some elements of legal practice are mistakes that are inconsistent with the law's deeper integrity.

Most originalists start from very different assumptions. They argue that some aspect or element of law (for example, the original semantic meaning) is fixed at adoption and cannot be altered without subsequent amendment. But Dworkin's model of legal interpretation cannot accept this assumption. The best constructive interpretation of law might reject some of those elements depending on the subsequent history of the practice of constitutional law and the best judgments of political morality. The balance of fit and justification might someday require us to disregard or jettison what originalists insist must be law because of the act of adoption. To be sure, if fidelity to the framework best serves the dimensions of fit and justification throughout history, Dworkin's model may be consistent with framework originalism, but the point is that it need not be.

Dworkin's account of constitutional interpretation views judges—and indeed, an ideal judge, Hercules—as the standard case and treats the views of citizens (and politicians) in light of that model; I view the perspective of the ordinary citizen as the standard case and treat interpretation by judges as a special case. Dworkin believes that there are right answers to hard cases and that constitutional interpreters normally have no discretion; I argue that much constitutional construction involves delegation of lawmaking to future generations—including the political branches—and that the political branches usually drive constitutional construction by courts. This important difference also affects the role that principles play in our respective accounts: Dworkin argues that the existence of principles within legal materials is a reason why judges lack discretion; I view principles as delegations that facilitate and channel discretion.

Dworkin's work has little to say about social and political mobilizations; I view them as central to constitutional development and I argue that courts legitimate the constructions of sustained national majorities over time. Dworkin spends relatively little time worrying about what political science teaches us about how courts actually operate, but these studies are central to my account of constitutional interpretation and constitutional development.

Dworkin's theory of constitutional change is based on the traditions of common-law decision making by judges; it analogizes constitutional development to the writing of a chain novel that seeks to maintain continuity with the past. I argue that constitutional change is driven by waves of political mobilizations and countermobilizations, and that courts often discard significant parts of previous jurisprudence in order to legitimate new constitutional regimes.

Finally, Dworkin's analyses of constitutional issues—while making obeisance to “fit” with the entire corpus of legal materials—usually move fairly quickly to discussions of political morality. I almost always start with—and emphasize—text, history, and structure in creating constructions.

Of course, if you abstract away enough of our theoretical and methodological commitments, our projects do resemble each other, because, after all, my framework originalism builds on the key insight of Dworkin's semantic originalism, and both of us seem to talk a lot about principles. If you remove enough letters from our names, we are both kin. But the differences, I think, are as important as the similarities in understanding our respective projects.

Fleming notes one other difference between Dworkin's theory and mine, which he views as a potential failing. He notes that although my work

justifies one's having a substantive vision of the Constitution, [it] is not itself a substantive vision. . . . [People] who have faith in the

Constitution and seek redemption of its aspirations have substantive visions of what the Constitution's core commitments are. . . .

But Balkin himself does not put forward a substantive vision of the Constitution's core commitments.⁹³

Fleming contrasts this to John Hart Ely's substantive vision of the Constitution as a theory of representative democracy, Cass Sunstein's vision of the Constitution as embodying a theory of deliberative democracy, Dworkin's constitutional vision of a republic of free citizens owned equal concern and respect, and Fleming's own vision of the Constitution "as embodying a constitutional democracy protecting basic liberties associated with deliberative democracy along with deliberative autonomy."⁹⁴ He wishes that I would announce my own substantive vision of the Constitution.

In fact, *Living Originalism* and *Constitutional Redemption* do offer a substantive vision of the Constitution, but perhaps it is not the kind of substantive vision that Fleming is looking for.

I do not try to connect the Constitution to a single overarching idea or attempt to subsume its multiple traditions and its many different features into a more general account of liberal political philosophy. I do not attempt this, even though I believe that the Constitution itself is a collective exercise in realizing a certain historical (and evolving) version of political liberalism over time. For me, political liberalism is a moving target anyway; it came into being at a certain point in human history, it will probably vanish at some point in the future, and who knows what it will look like in one hundred years? Instead of grounding constitutional theory in liberal political theory, it might be better to see our changing visions of liberal political theory evolving in the context of changing political, economic, and social institutions, one of which, of course, is constitutional government. Put differently, I think it is no accident that John Rawls' *Theory of Justice* is strongly influenced by the institutions and the aspirations of the liberal constitutional regime that dominated American politics in the late 1960s and early 1970s. This is not a criticism of Rawls; rather, it is a feature of how political theory develops in conversation with the evolution of actual political institutions.

What then, is the substantive vision of the Constitution offered in *Living Originalism*? I would say that it has three basic elements.

First, I argue that the Constitution is a basic framework or plan for politics. It is a plan that offers the possibility but not the certainty of decent politics, for it requires the work of many generations and it is never fully completed. The Constitution is open to the future, not closed by the past, and we are not certain whether its story will end well or badly.

93. Fleming, *supra* note 90, at 680.

94. *Id.* at 680–81.

The Constitution provides a platform for politics in three different respects: (1) it is a platform for articulating and enacting popular sovereignty in concrete practice (2) it offers a platform for people to build out the constitutional system and redeem it through amendment and construction and (3) it provides a platform for persuasion. It allows people to mobilize both in politics and in civil society to persuade each other about the meaning of America's experiment in self-government and to argue for the right way forward.

Second, I argue that the point of our particular system of government is to realize in history the promises made in the Declaration of Independence. As Abraham Lincoln explained, the Declaration is an "apple of gold" that is framed in a "picture of silver," which is our written Constitution.⁹⁵

Third, I argue that, in addition to the Declaration of Independence, the Constitution provides an account of its own substantive vision in its Preamble: "We the people of the United States," through successive acts of popular sovereignty, have "ordain[ed] and establish[ed] this Constitution for the United States of America," "in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."⁹⁶

To be sure, one cannot reduce what I have just said to a simple formula, for example, "deliberative democracy." But that is because historical projects like the Constitution are complicated affairs. They are not easily reduced to single ideas, and attempting to do so often leaves out important features. Moreover, as I point out in chapter eight (quoting Chief Justice Marshall and Justice Oliver Wendell Holmes, Jr.), a constitution like America's is designed to last very a long time, through many different crises and problems of governance that we cannot now foresee; it is designed to allow many different kinds of people with many different kinds of substantive views to live together and work together in peace.⁹⁷ Nevertheless, the vision of the Constitution described above is a substantive vision. In addition, as a participant in the system, I have my own views about the best reading of the Constitution's guarantees of liberty and equality, which, as Fleming notes, I offer in the various chapters of *Living Originalism*.

95. Abraham Lincoln, *Fragment on the Constitution and the Union*, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 168, 169 (Roy P. Basler ed., 1953) (internal quotation marks omitted).

96. U.S. CONST. pmbl.

97. BALKIN, *supra* note 1, at 135.

VI. AGAINST LEGAL PRINCIPLES IN PRINCIPLE?

The prominent role accorded to principles in *Living Originalism* leads Larry Alexander to doubt that my argument can be squared with legal positivism. Because I also regard myself as a legal positivist, this is news to me. Alexander has no quarrel with the fact that constitutions have rules and standards, or that standards authorize legal officials to engage in first order practical reasoning to apply them.⁹⁸ But he does not think that constitutional texts can state principles, because principles are *nonconclusive* legal norms. When rules and standards apply, they apply conclusively to the issue before them, even if they require legal decision makers to engage in practical reasoning to apply them. When principles apply to a situation, by contrast, they do not always control. Instead, we must balance principles against competing considerations, including other principles.⁹⁹ Thus, what distinguishes principles is that they only have “weight,” and therefore may not control even in situations in which they apply if they are outweighed. Alexander argues that this dimension of “weight” cannot be posited in advance by legal officials; therefore it is inconsistent with positivism, and therefore a positivist account of constitutional theory can have no place for principles.¹⁰⁰

I do not agree. Jeffrey Goldsworthy, I think, has offered the appropriate response to Alexander’s concern: “the distinction between interpretation and construction is an instance of the broader distinction drawn by legal positivists between identifying determinate law and exercising law-making discretion to cure underdeterminate law.”¹⁰¹ Principles are merely one example of legal norms in a mature legal system that direct legal officials but that require discretion and judgment in their articulation or application. (Canons of construction are another example.) For such legal norms to be valid, all that is necessary is that they offer some guidance to legal officials to apply the law—or create new law—in one way rather than another. Their weight in the particular situations in which they apply need not be precisely determined in advance, as long as their weight is not zero.

As Alexander knows, positivist theories of law can and do account for secondary rules in a legal system.¹⁰² These secondary rules delegate to various legal officials the authority to make new law or to use their discretion in developing and applying existing law.

Secondary rules also form part of the basic conventions of a legal system. Our current legal culture allows for the use of principles and other nonconclusive legal norms in legal decision making and legal ar-

98. Lawrence Alexander, *The Method of Text and ?*: Jack Balkin’s *Originalism with No Regrets*, 2012 U. ILL. L. REV. 611, 614–15.

99. BALKIN, *supra* note 1, at 349–50 n.12.

100. Alexander, *supra* note 98, at 616, 619–20.

101. Goldsworthy, *supra* note 79, at 697.

102. H.L.A. HART, *THE CONCEPT OF LAW* 77–79, 181–82 (1961).

gument. These legal conventions permit legal officials both to create and to implement nonexclusive legal norms. We use principles as we do because of the kind of legal culture we inhabit and the legal conventions we employ. Indeed, the ubiquity of arguments from principle is strong evidence that principles are not an illusory feature of legal practice, but part of the basic conventions of legal argument in the United States.

Two instructive examples are common-law courts and administrative agencies that engage in rulemaking and adjudication. Legal conventions create lawmaking authority in common-law judges, and congressional grants in framework statutes bestow rulemaking and adjudicatory authority to bureaucrats in administrative agencies.

The legal conventions operating in the United States authorize both courts and administrative agencies to employ nonconclusive legal norms whose weight is not posited in advance but whose legal consequences will have to be worked out through discretionary practices of reasoning, practices which are also authorized by existing legal conventions. In fact, common-law courts and administrative agencies are not only authorized to use nonconclusive norms stated in legal texts, they are also authorized to ascribe new principles to the existing body of law and to embed these ascriptions into future legal texts. Thus, common-law courts and administrative agencies are authorized to announce new principles of law from the examination of previous legal materials. Existing conventions require later decision makers to take these nonexclusive norms into account in future cases.

To be sure, these features of common-law courts and administrative agencies may be considered undemocratic because they delegate lawmaking to unelected judges or unelected bureaucrats. But that is a different concern from the claim that the use of principles is somehow inconsistent with legal positivism.

As noted above, principles are not the only nonconclusive legal norms in our legal system. The traditional canons of statutory construction are also nonconclusive legal norms that only have weight and that must be balanced against competing factors. For example, the canons that we should avoid redundancies in a statute, that words should have the same meaning throughout a statute, that the reach of a statute is limited to the examples specifically enumerated (*expressio unius*), or that statutes in derogation of the common law should be strictly construed do not always prevail; legal decision makers balance these canons against other considerations, including other canons of construction. Just as in the case of legal principles, the weight accorded to canons of construction cannot be posited in advance. Yet I have no reason to think that canons of statutory construction are not valid norms in the American legal system, much less that they are inconsistent with legal positivism.

The notion that such practices cannot form part of our legal conventions is mysterious to me. It is like the old joke about baptism. I not on-

ly believe that nonconclusive legal norms can be part of a conventionalist system of law, I have seen it done. Indeed, if such a ubiquitous feature of legal argument were really inconsistent with positivism and therefore had to be explained away as an illusion, that would be a serious problem for positivism, because positivism seeks to account for our actual practices of legal behavior. Of course, over the years Dworkin has tried to argue that positivism is inconsistent with the existence of nonexclusive legal norms; for some reason, Alexander seems eager to agree with him that the two cannot be reconciled. But I would not surrender this particular point so easily.

VII. A PERFECT CONSTITUTION OR A FALLEN CONSTITUTION?

Gerard Magliocca's interesting article, building on Walter Bagehot's theory of the British Constitution, argues that the U.S. Constitution has a dignified existence, which he compares to the role that the British monarchy plays. The Constitution must be perfect, mysterious, and, like Caesar's wife, above suspicion. Or, as Magliocca puts it in the title of his article, in order for our Constitution to work properly, people must believe that "The Constitution Can Do No Wrong."¹⁰³

As noted previously, I argue that in order to be successful, the U.S. Constitution (although not all constitutions) must simultaneously operate as "basic law," as "higher law," and as "our law." By higher law I mean that the Constitution—and especially its abstract statements of principle—presents itself as a symbol of aspiration that stands above current practices, critiques them, and holds them to account. Thus, I would agree with Magliocca that treating the Constitution as "higher law" performs an important symbolic function. Moreover, I also distinguish between the Constitution as a basic plan of government that must be filled out over time and the Constitution-in-practice, which is the set of institutions we currently live under. Distinguishing between the Constitution and the Constitution-in-practice, and viewing the Constitution as "higher law" helps us critique the Constitution-in-practice.

Nevertheless, I think that the analogy Magliocca wants to draw with the dignified role of the British Monarchy, while insightful, is also misleading in important respects. In *Living Originalism*, and in *Constitutional Redemption*, I argue that our Constitution, far from being perfect, is always "fallen."¹⁰⁴ That is, it is perpetually in need of redemption *because* it is imperfect. Both the Constitution as a basic framework for governance and the Constitution-in-practice always risk becoming—or already are—"a covenant with death, and an agreement with hell," to use

103. Gerard N. Magliocca, *The Constitution Can Do No Wrong*, 2012 U. ILL. L. REV. 723.

104. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 6-7, 16, 60, 119-23, 143, 249 (2011); BALKIN, *supra* note 1, at 62, 81.

William Lloyd Garrison's phrase.¹⁰⁵ Moreover, if the Constitution truly is "our law" it may be defective and evil because of defects and evils within the United States. This is the problem of constitutional evil, and it gives rise to the possibility of constitutional tragedy—that the American people, working through the forms and practices of the American Constitution, might pursue a course of action that leads to disaster.¹⁰⁶

The most obvious example of constitutional tragedy is the Civil War, in which hundreds of thousands of people died. In his second inaugural address Abraham Lincoln argued that the war was God's punishment for Americans' attempt—both in the North and the South—to profit from slavery:

if God wills that [the war] continue, until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord, are true and righteous altogether."¹⁰⁷

All of this suggests that the "higher law" function of the Constitution works differently than the dignified status of the British Monarchy.

In *Constitutional Redemption* I speak of the conceit of "Ideal Constitutionalism"—the belief that the real or true Constitution somehow avoids the evils of the Constitution-in-practice. But I do not endorse this way of thinking; quite the contrary, I believe that it is a form of constitutional idolatry that undermines our efforts at redeeming the Constitution-in-practice. My work argues that constitutional aspirationalism requires recognizing the presence and the possibility of constitutional evil. The Constitution can serve as higher law only because Americans must always see that the Constitution-in-practice is fallen and compromised. This drives them to redeem it. The Constitution-in-practice may be very unjust indeed, and it may be used to justify all sorts of terrible and evil policies. Many constitutional dissenters live in dark times when the Constitution-in-practice is far from an ideal or pure object of admiration. To accept the Constitution's legitimacy and its right to rule over them, they must have constitutional faith that constitutional redemption is possible. This vision of aspirationalism seems to be the opposite of what Magliocca is concerned with in his comparison to the British Monarchy.

Moreover, Magliocca's point is that the Constitution, like the British monarchy, operates successfully only if people regard it as mysterious and perfect. But in *Living Originalism*, and in *Constitutional Redemption*, my argument goes in the opposite direction. I argue that the fact

105. WALTER M. MERRILL, *AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON* 205 (1963) (internal quotation marks omitted).

106. BALKIN, *supra* note 104, at 7–8, 81–82.

107. Abraham Lincoln, *Second Inaugural Address*, in 8 *THE COLLECTED WORKS OF ABRAHAM LINCOLN*, *supra* note 95, at 332, 333.

that people are aggrieved, and see the Constitution-in-practice as imperfect, is what moves them to engage in constitutional politics and to persuade their fellow citizens to construct the Constitution differently, or, in some cases, to amend it.

In my account, therefore, the imperfections of the Constitution-in-practice—the fact that it is “fallen”—are just as important to the success of the constitutional system as the belief that the true Constitution, rightly interpreted, is basically just.

The British Monarchy does not appear to operate in this way. That is, the flaws and failings of the actual British royal family do not appear to act as a spur to the improvement of British institutions, based on the belief that this will redeem the royal family or achieve the “real” or “genuine” royal family. To understand how aspirationalism works in the American constitutional system, we must recognize that Magliocca’s analogies will take us only so far.

VIII. THE DANGERS OF TOO MUCH CONSTITUTION TALK?

Adam Samaha’s subtle article focuses on the effects for political legitimacy of what he calls “loose constitutional discourse,” by which he means a political system in which many if not most policy disputes can be argued as disputes about the Constitution.¹⁰⁸ Samaha is worried that in political cultures with this feature, the stakes of politics will seem higher, people will become more polarized, and people who lose political battles will feel less loyalty for the system because in their eyes the Constitution has been betrayed. He worries that a political culture with loose constitutional discourse will undermine democratic legitimacy in the long run. Samaha’s discussion of the pros and cons of loose constitutional discourse in a political culture is quite rich, and he shows how either too loose or too limited a space of constitutional discourse might have baleful effects.

Samaha characterizes me as a “discourse theorist” who believes that the way that we talk to each other matters for democratic legitimacy.¹⁰⁹ He assumes that my theory of text and principle is designed to enhance democratic legitimacy by declaring the ground rules of discourse in such a way as to produce certain effects, and therefore I should be particularly worried if the theory leads democratic legitimacy to be undermined.

Of course, I *would* be worried if America’s protestant constitutional culture undermined its democratic legitimacy. But I do not consider myself a “discourse theorist” of the kind Samaha imagines, and I am not advocating a form of proper discourse that, if adopted, will help ensure democratic legitimacy. To be sure, I offer a normative framework for

108. Adam M. Samaha, *Talk About Talking About Constitutional Law*, 2012 U. ILL. L. REV. 783, 785.

109. *Id.* at 784–85, 794–95, 798–99 (describing the aims of an originalist discourse theory).

constitutional interpretation and a positive description of the processes of constitutional change, in which protestant constitutionalism plays an important role. I also try to show how the processes I describe in the positive account further democratic legitimacy (although they do not guarantee it). Nevertheless, I do not think that my theory of text and principle causes people to talk in particular ways that enhance or undermine democratic legitimacy.

Instead, I believe that in theories of constitutional interpretation, “ought” implies “can”: a theory of interpretation should be broadly consistent with the kind of constitutional and political culture that America has actually developed. As just noted, America has a protestant constitutional culture: people often disagree about what the Constitution means in practice, they often move back and forth freely between policy arguments and constitutional arguments, and they use claims about the Constitution to talk back to political officials and especially judges. In this culture, there is no clear dividing line between political disagreement and constitutional disagreement, and the boundary shifts as a result of changing political concerns and mobilizations. Political entrepreneurs can sometimes convert what look like quotidian disputes about public policy into disagreements about constitutional interpretation, and, vice versa, turn what were once heated constitutional disputes into workaday discussions of policy.

This feature of American constitutional culture long predates current scholarly interest in popular constitutionalism. Indeed, that current interest is largely a rediscovery of a very basic feature of our constitutional culture that goes back to the Founding and has persisted to the present day. In the antebellum period, for example, many policy disputes over land, tariffs, slavery, and foreign policy were often stated in constitutional terms or in terms that were only one step removed. This practice continued after the Civil War; however, the increasing importance of the federal judiciary—due to the Reconstruction Amendments and the expansion of federal jurisdiction—created new layers of discussion about who had authority to pronounce on constitutional matters. The social mobilizations of the nineteenth and especially the twentieth century regularly either made constitutional claims or responded to such claims. Thus, mixing policy with constitutional politics is not the invention of *Living Originalism* or of the recent scholarly focus on popular constitutionalism; it is as American as apple pie.

It is important not to confuse the *theorization* of protestant constitutionalism with its *effects*. We would have a protestant constitutional culture regardless of whether I wrote *Living Originalism*. Even without the permission granted by scholarly tomes, social and political mobilizations throughout American history have felt authorized to elevate policy disagreement into constitutional disagreement and make claims on the Con-

stitution. As so often is the case, scholarship arises later to explain what has already happened.

Samaha sees—entirely correctly—that I am not purely neutral on this state of affairs. I think that our protestant constitutional culture is on the whole a good thing and that its existence, on the whole, helps promote democratic legitimacy. I also think that our protestant constitutional culture has shaped the kind of political and legal institutions we have, and that these institutions probably would work less well if our constitutional culture were not so assiduously protestant. (Of course, if the culture were different, so too might be the institutions.)

Nevertheless, the point of *Living Originalism* is not to argue that we *should* have a protestant constitutional culture. We already do, and there is little that *Living Originalism* could do to change that fact. Rather, *Living Originalism* asks what sort of interpretive theory makes the most sense given the sort of constitutional culture we have.

Academic theory might affect political practice at the margins, but in this case I am somewhat skeptical that the effect is very pronounced. *Living Originalism* argues that the choice of interpretive theory does not do very much work in constraining judges; it argues that institutional constraints on the judiciary come mostly from elsewhere in the system. In the same way, I assume that an academic theory of “appropriate” constitutional discourse probably does not do very much work in either spawning or preventing the proliferation of constitutional claims and the use of constitutional language in policy disputes. America’s protestant constitutional culture, and the loose nature of constitutional discourse that flows from that culture, is probably caused by far larger features of American history, culture, and politics. These are the real source of Samaha’s worries.

It is important, then, that we not confuse Samaha’s concerns with my goals in writing *Living Originalism*. Samaha assumes that I am interested in offering a discourse theory that will pacify conflict and smooth over hurt feelings. But that is not my project, first, because I do not believe that academic theories could do this sort of work even if they tried, and second, because my interest is in democratic legitimacy in the face of continuous change, and change is about disruption, disagreement, and dissensus. I am probably more sanguine than Samaha is about the long tradition—dating back to the Founding itself—of mixing constitutional questions with policy questions, and employing constitutional language in political disputes. For me, the life of the Constitution has been perpetual disagreement, not pacifying consensus. I do not ascribe to “dialogic” theories of constitutional change because “dialogue” is altogether too nice a term to describe much of democratic politics. A lot of what people are doing in a democracy is not dialogue: they are mobilizing, denouncing, sermonizing, pushing, and pushing back.

I am interested in how people make claims on the Constitution both to legitimate and to critique the Constitution-in-practice. For me, it is particularly important that dissenters can call on the Constitution to speak truth to power in dark times. But constitutional theories do not cause the dissent (although specific constitutional claims may help frame grievances), and constitutional theories do not ensure that dissenters will ultimately feel either comforted or alienated.

I believe that our different theoretical concerns may lead Samaha to misunderstand the point of Part II of *Living Originalism*, which shows how to apply the method of text and principle to concrete examples. He assumes that the chapters on the commerce clause and the Fourteenth Amendment are designed to calm people down by showing that the method of text and principle, in practice, leads to very establishment conclusions. That is, its basic function is conservative.¹¹⁰

But that is not the purpose of these chapters. They are designed to show other lawyers how to use the method in practice, and to show, in my opinion, how important features of the modern state have been faithful to the Constitution's original meaning and underlying principles. In these chapters, I am trying to persuade people as a participant in the practice of constitutional argument. Even so, in the introduction to Part II, I note that other people with different commitments could use the same methods to dissent from current arrangements, and I also note that some of my positions are not establishment at all—they are currently “off the wall.”¹¹¹

The most important part of Samaha's critique, at least for me, is his skepticism about the link between protestant constitutional culture and democratic legitimacy. I argue that a set of cultural, political, and institutional processes that produce new constitutional constructions—processes that have developed over long periods of time—make it possible for people with very different views to live together and claim the Constitution as their own even if their views do not win out.

Samaha is skeptical about these processes of constitutional development, especially in the current moment. He worries that the mere possibility of future constitutional redemption may not be sufficient to sustain democratic legitimacy, because change may not come quickly, or even at all. Given the polarized times in which we live, Samaha asks why people today should even have constitutional faith in America, or its Constitution. Moreover, in such angry times, why does protestant constitutionalism not enhance polarization, and therefore the fragmentation of society? Perhaps constitutional protestantism has made people feel even more alienated from their government. Perhaps the reason why the Tea Party is so angry is that the culture encourages them to use constitutional

110. *Id.*, at 789, 798–99.

111. BALKIN, *supra* note 1, at 130–31.

arguments and to insist that their Constitution is being hijacked by powerful forces they cannot control. Perhaps if the Tea Party did not invoke the Constitution so often, they would be less angry at Barack Obama and, to quote Rodney King, we could all just get along.

It is certainly possible that constitutional protestantism is undermining America's democratic legitimacy, but I doubt it. Americans have been invoking the Constitution in policy disputes since the Founding, and over the long haul it does not seem to have debilitated American democracy. Indeed, protestant constitutionalism seems to encourage a sense of ownership in the Constitution and the right to declare the direction that America should go.¹¹² This is not the first time that Americans have felt that powerful people have been abusing their charter of liberty; it is not the first time that they have elevated policy disagreements into calls for taking back the Constitution, and it is not the first time that people have insisted that their opponents are trampling on America's most hallowed document. Indeed, one might argue that continual recourse to the Constitution has been an important factor in many of the political and social mobilizations that have led to increased democratization (and therefore democratic legitimacy) over time.

Even so, Samaha also worries that constitutional language raises the temperature of political dispute and makes it more difficult for opposing sides to compromise. But American history does not seem to demonstrate this. Quite the contrary, on issue after issue—whether it be federalism, race, foreign policy, or civil liberties, people still seem to reach compromises even though they make constitutional arguments. Much of Reva Siegel's recent work concerns how social mobilizations adjust and redescribe their constitutional claims over time because of their need to appeal to the majority of Americans.¹¹³ Constitutional language, then, may not create an unbridgeable chasm, and surface appearances of irreconcilable differences may be deceptive. We may need to pay more attention to the deeper causes of polarization in contemporary society; conversely, we may need to explore, as Siegel has, how constitutional discourse that seeks majority support causes opposing sides in a constitutional controversy to borrow ideas from each other over time.

112. See BALKIN, *supra* note 104, at 235–38; Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, at 25, 26–29 (Jack M. Balkin & Reva B. Siegel eds., 2009); see also Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.–C.L. L. REV. 373, 378–79 (2007); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 300–01, 314–15 (2001).

113. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1409 (2006) (describing the effects of 1970s mobilizations and countermobilizations on sex-equality claims); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1475, 1545–46 (2004) (describing the effects of political struggle on the meaning of *Brown v. Board of Education*); Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1649, 1656–57, 1664–68 (2008) (describing changing forms of antiabortion arguments).

It is true, of course, that American democracy did break down in the 1860s. But I am not at all sure that a major reason was too much constitutional discourse. (One should remember that the *Dred Scott* case gave the South precisely what it wanted in constitutional terms, and the South still seceded following Lincoln's election.) Similarly, I do not think that the recent radicalization of the conservative movement and the contemporary Republican Party is due to its promiscuity in making constitutional claims.

The Constitution offers familiar tropes and a familiar language for arguing about where Americans have come from, where we are now, and where we should go. It is like a comfortable pair of shoes in which we are accustomed to walking. As I argue in *Constitutional Redemption*, this language is not neutral in its effects, and it can limit our political imaginations.¹¹⁴ At the same time, this language, from long use, has proven a supple, flexible, and adaptable tool in political disputes. I do not think that recourse to constitutional language is the cause of our current political problems; I rather think it is the manifestation of them.

IX. COMMERCE AND INTERCOURSE

I owe an enormous debt to Randy Barnett's work. I think it is safe to say that *Living Originalism* would not be possible without Barnett's 2004 book, *Restoring the Lost Constitution*.¹¹⁵ In an age when many people had given up on constitutional theory—as opposed to constitutional history—Barnett believed that it was possible to ground a theory of constitutional interpretation on a theory of constitutional legitimacy.

Although Barnett and I agree on many aspects of constitutional theory, we do not agree on everything. And one place we part company is the proper interpretation and construction of the commerce power.¹¹⁶ That should not be surprising. I am a liberal defending the modern state, while he is a libertarian trying to promote classical liberalism and limited government. I argue for a broad construction of federal power and a presumption of constitutionality, while he has argued for a presumption of liberty.

114. BALKIN, *supra* note 104, at 81–85, 103–07, 115–16.

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

116. I will not have time to address Barnett's discussion of the continuing relevance of Resolution VI of the Virginia Plan, which was the original basis of Congress's enumerated powers. My views—and my response to Barnett's arguments—are already adequately stated in *Living Originalism*. See BALKIN, *supra* note 1, at 143–47 & 376–77 n.27.

Kurt Lash, however, has offered a series of new arguments about my views on Resolution VI. See generally Kurt T. Lash, "Resolution VI": *National Authority to Resolve Collective Action Problems Under Article I, Section 8* (Univ. of Ill. Coll. of Law, Ill. Pub. Law & Legal Theory Research Paper Series No. 10-40, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1894737. I have responded to Lash's draft in a short essay. Jack Balkin, *Resolution VI As a Principle of Construction*, BALKINIZATION (Aug. 12, 2011, 5:55 AM), <http://balkin.blogspot.com/2011/08/resolution-vi-as-principle-of.html>.

Indeed, our differences on the question of federal power are worth noting because they show how two scholars using similar methods can nevertheless arrive at very different conclusions. I regard this as a feature, and not a disadvantage, of the method of text and principle. As I argue in *Living Originalism*, the point of a theory of interpretation is not simply to resolve all controversies, but to offer a platform for persuasion about the Constitution by people with different points of view.

The meaning of “commerce” in the Constitution is ambiguous; it might refer to several different concepts, and so we must bring the traditional lawyer’s tools—text, history, structure, precedent, ethos, and consequences—to bear to decide on the best account of its meaning. Applying these tools, Barnett and I reach different conclusions. Barnett adopts what I call the “trade theory” of the commerce clause. He argues that commerce involves the trade or exchange of commodities.¹¹⁷ I argue that in 1787 the word “commerce” meant “intercourse,” which meant exchange and movements back and forth.¹¹⁸ In 1787 the primary definition of “commerce” was “intercourse or exchange,” and the primary definition of “intercourse” was “commerce or exchange.”¹¹⁹ This suggests to me that the words “commerce” and “intercourse” were either synonyms or very close in meaning.

Under my model, which I call the “interaction theory,” the commerce clause gives Congress the power to regulate intercourse—exchanges of people, things, and communications—with foreign nations, with the Indian tribes, and among the several states.¹²⁰

Barnett’s theory has definite advantages. The major concern of the Framers that led to the commerce clause was rational regulation of trade, and allowing the new nation to present a unified front in negotiations with foreign powers. Barnett shows that the notion of commerce as trade of commodities was very common. He did a search in the *Pennsylvania Gazette* from 1728 to 1800 tracing every use of the word “commerce,” and he found no examples in which the word unambiguously referred to anything other than the exchange of commodities (or navigation—a point to which I will return momentarily).¹²¹

But Barnett’s theory also has significant disadvantages. As I show in *Living Originalism*, it cannot explain Congress’s expansive power over

117. BARNETT, *supra* note 115, at 278–91.

118. BALKIN, *supra* note 1, at 149; SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (9th ed. 1790) [hereinafter JOHNSON, 9th ed.] (defining “commerce” and “intercourse”); 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773) [hereinafter JOHNSON, 4th ed.] (defining “commerce” and “intercourse”).

119. See BALKIN, *supra* note 1, at 149 & 380 n.38; JOHNSON 9th ed., *supra* note 118 (defining “commerce” and “intercourse”); JOHNSON, 4th ed., *supra* note 118 (defining “commerce” and “intercourse”).

120. BALKIN, *supra* note 1, at 155 (arguing that under the interaction theory, Congress can reach commercial intercourse in all its branches and exchanges of people, communications, and things).

121. Randy E. Barnett, *Jack Balkin’s Interaction Theory of “Commerce,”* 2012 U. ILL. L. REV. 623, 636–37.

foreign relations and its plenary power over immigration.¹²² Since the late nineteenth century, this problem has been solved by postulating an unenumerated plenary power over foreign relations. We know the Framers believed that control over foreign relations was one of the central reasons for forming the new Constitution. If so, it is strange that they did not think to bestow a general power to regulate foreign relations in addition to the powers to declare war. But once we understand “commerce” in its eighteenth century sense of “intercourse,” the mystery is solved. Congress has the power to regulate commerce—that is, all interactions and intercourse—with foreign nations and with the Indian tribes. The fact that this overlaps with other powers is not a problem. Many of Congress’s enumerated powers overlap, especially in the area of war and foreign relations. The point of the list is to ensure that Congress has all the power it needs to deal with foreign questions, problems, and threats in which a unified national policy is necessary. The interaction theory of commerce achieves this crucial goal of the Constitution’s Framers.

There is a second major difficulty with the trade theory. As Barnett recognizes, the idea of trade or exchange of commodities does not literally include navigation.¹²³ But we know that the Framers used the terms “navigation” and “commerce” interchangeably.¹²⁴ Moreover, not all navigation was for purposes of trade or exchange of commodities.

There are two possible solutions. The first is that the word “commerce” as it appears in the Constitution is a nonliteral usage, like “speech” or “press” in the First Amendment, or “writings” in the progress clause. It is a metonym, where a thing stands for something related to it. Because international (and much interstate) trade was conducted in ships, “commerce” metonymically extends to navigation. The second solution is to argue that even if the Framers were wrong to identify commerce with navigation, Congress can reach navigation through the necessary and proper clause.

If “commerce” means “intercourse,” however, we do not have to assume that the word was used nonliterally. The power to regulate intercourse would include not only the power to regulate interstate and international trade but also the power to regulate interstate and international networks of transportation and communication.

Chief Justice John Marshall’s famous discussion in *Gibbons v. Ogden* supports my approach.¹²⁵ Counsel for Ogden argued that Congress had no authority to regulate navigation, because commerce meant the

122. BALKIN, *supra* note 1, at 157–59.

123. BARNETT, *supra* note 115, at 291–92.

124. See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 449–53, 631 (Max Farrand ed., rev. ed. 1911); see also BARNETT, *supra* note 114, at 292–93 (noting that at the Philadelphia Convention, regulation of navigation was debated in the context of the commerce power and the couplet “commerce and navigation” appeared four times during the ratification debate).

125. 22 U.S. (9 Wheat.) 1, 186–240 (1824).

trade of commodities and did not include navigation *per se*; moreover, not all navigation was for the purpose of trading commodities.¹²⁶ Marshall rejected this argument outright. He did not rely on the necessary and proper clause. Instead he argued that navigation was included in the concept of commerce as intercourse:

The counsel for the appellee would limit [the meaning of “commerce”] to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.¹²⁷

It is true that Marshall wrote these words thirty-seven years after the 1787 Philadelphia Convention. Yet, these were not novel ideas. We must remember that before he became Chief Justice, Marshall was a leader of the Virginia Federalist Party and helped lead the fight for ratification in Virginia.¹²⁸ He was one of the nation’s most accomplished lawyers during the early years of the Republic, a trusted friend and advisor to George Washington, and an almost indispensable member of the early Federalist Party, leading Presidents Washington and Adams to offer him positions as Attorney General, Minister to France, Associate Justice, Secretary of State, and Chief Justice (the last two of which he accepted).¹²⁹ If there is a dispute over whether the original meaning of “commerce” is “intercourse,” I am happy to ally myself with John Marshall on this question.

One might object that if “intercourse” includes exchanges of communications as well as people and things, it would seem to give Congress power over interstate and foreign communications (which in fact, it has today under the commerce power). Yet during the ratification debates James Wilson had reassured his listeners that, under the 1787 Constitution, and before the Bill of Rights, Congress would not have the power to interfere with the freedom of the press or the power “to regulate literary publications.”¹³⁰

126. *See id.* at 76–77 (argument of counsel for respondent).

127. *Id.* at 189–90.

128. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 5, 112–43 (1996).

129. *See id.* at 5–6, 7, 15.

130. James Wilson, Speech in the State House Yard (Oct. 6, 1787), *reprinted in* 2 RATIFICATION OF THE CONSTITUTION 167, 168 (Merrill Jensen ed., 1976) (“For instance, the liberty of the press,

Wilson surely did not mean that Congress could not regulate communications generally, as he immediately goes on to point out that Congress could regulate publications within the District of Columbia.¹³¹ His point, rather, is that Congress could reach communications only within its assigned powers. There is no reason to think that it could not; otherwise Congress would have been powerless to regulate fraud in defense appropriations, or the unauthorized communication of military secrets. Moreover, the First Amendment did not deny Congress the power to pass any law that concerned speech or press—compare the language of the Establishment Clause, which does prevent laws “respecting” establishments of religion. Rather, it prohibited laws that abridged the freedom of speech or the freedom of the press.

One of the early acts of Congress was the Postal Act of 1792—passed a mere two months after the ratification of the First Amendment.¹³² It subsidized the delivery of newspapers through the mails and regulated the ways that papers, letters, and other mail moved from ships to post offices. Despite what Wilson may have represented in 1787, this *was* a regulation of the press and of literary publications; the point, however, is that the Founders did not believe that these regulations violated the freedom of the press.¹³³ Similarly, today Congress can regulate telecommunications networks and establish technological standards and rules of the road—like the regular announcement of assigned call letters—even though protected speech travels through them, as long as the regulations do not “abridge” the “freedom of speech.” In the same fashion, Congress can punish the use of telecommunications networks for fraud or crime without abridging the freedom of speech or the press.

Even so, most of the 1792 Act was probably passed under the power to establish post offices and post roads; only part of it—regulating letters conveyed by ship—would have required Congress’s commerce power. Yet if “commerce” means “intercourse,” the postal power would have been superfluous; Congress should have been able to regulate the interstate delivery of newspapers under the commerce power. Doesn’t this undermine the argument that the power to regulate commerce includes the power to regulate interstate and international communications?

It does not. All forms of originalism must take technological change into account. Originalists have repeatedly rejected the idea that new communications technologies cannot constitute “speech” simply be-

which has been a copious source of declamation and opposition, what control can proceed from the Federal government to shackle or destroy that sacred palladium of national freedom? If, indeed, a power similar to that which has been granted for the regulation of commerce had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate, as that the impost should be general in its operation.”).

131. *Id.*

132. Act of Feb. 20, 1792, ch. 7, 1 Stat. 232.

133. On the other hand, the 1792 Act created a postal monopoly, which arguably limited the freedom of the press, although it was not so understood at the time. *Id.* § 14. Later sessions of Congress would offer less benign regulations to prevent abolitionist literature from moving through the mails.

cause the Framers did not know about them and could not have imagined them. Rather, as new technologies arise, we recognize that phenomena that the Framers understood were merely special cases of more general concepts of speech and press. The same reasoning, I believe, applies to the power to regulate “commerce.” As new technologies of transportation and communication arise, we see that situations well-known to the Founders were merely special cases of more general phenomena of interstate and international transportation and communications networks; these more general phenomena properly fall within the power to regulate commerce.

At the time of the Founding, most long distance travel and much long distance communication were conducted through ships, which were clearly subjects of regulation under the commerce power. Interstate and international networks of transportation and communication in the 1780s depended heavily on ships and shipping technology. That is why the 1792 Postal Act also regulated the delivery of letters by ship.¹³⁴ Overland transportation was difficult and dangerous. Hence, it was obvious to the Framers—and to John Marshall—that commerce—whether involving exchanges of goods, letters, or persons—included navigation.

Aside from letters delivered by ship, the most important example of interstate telecommunications technologies and telecommunications networks in 1787 was a system of post offices and post roads. Notably, the Framers did think that Congress *should* have power to regulate them, including the movement of newspapers through them.

Today, it is easy for us to see that all sorts of transportation networks—and not merely navigation—must fall within the commerce power. But that is because we live in a different technological era than the Framers. In fact, in the first part of the nineteenth century, some courts doubted that any transportation other than navigation was part of commerce.¹³⁵ Once railroads became commonplace, however, they reshaped people’s understandings, and courts eventually understood them to be instruments of commerce that fell within the commerce power.

The same point, I would argue, is true of telecommunications technologies. The Framers saw the need for a power to create a post office and post roads, as well as the need to regulate navigation, but they did not see these two things as aspects of a single phenomenon that we would call telecommunications networks. The general ideas of telecommunication technologies and telecommunications networks were not salient to the Framers, in part because telecommunications technologies were comparatively underdeveloped. There were no telephones, radios, or televisions, and telegraphs would not become commercially viable until well into the nineteenth century.

134. Act of Feb. 20, 1792, ch. 7, §§ 10, 12, 13, 26, 1 Stat. 232, 235–36, 239.

135. See BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE §§ 3.02, 3.03 (1999) (tracing the evolution of the Supreme Court’s doctrines).

Once telegraphs were invented, however, courts eventually came to recognize them as instruments of *commerce*—and not merely as an extension of post offices and post roads.¹³⁶ Rather, telegraphs were instruments of intercourse; they were for sending messages and intelligence back and forth.¹³⁷ Just as new communications technologies have gradually changed our ideas about what constitutes “speech,” so too they have changed our views about what constitutes “commerce.” That is why telecommunications networks fall within the meaning of commerce as intercourse even though the Framers never dreamed of the Internet.

Indeed, if “commerce” means only the trade of commodities, but not the exchange of persons and ideas, it is difficult to see how Congress can regulate new telecommunications networks and technologies, especially when they are used by private parties for conversation that is not for purposes of trade. At the beginning of the twentieth century, for example, much radio communication was amateur radio communication, and ham radio still exists today. It is true that Congress could regulate the sale and purchase of ham radio equipment across state lines, but this principle would not extend to regulating telecommunications generally.

If we adopt Barnett’s theory of the commerce clause, the only potential source for regulating new forms of telecommunications in the text of the Constitution would be the power “to establish post-offices and post-roads.” But then one would have to show that these terms were understood to be nonliteral usages like “speech” and that the term “establish” also included the power to regulate *private* methods of telecommunication.¹³⁸ This seems a bit of a stretch, especially if we adopt Barnett’s presumption of liberty that congressional power should be strictly construed in the interests of avoiding unnecessary regulation where possible.

On the other hand, if I am correct that the original meaning of “commerce” is “intercourse,” Congress would have the power to regu-

136. See, e.g., *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1 (1877).

137. As Chief Justice Waite explained:

Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.

Id. at 9.

138. Telegraph lines were often placed along railroad tracks, and railroad tracks were designated as federal post roads by statute. See *id.* at 3–4. Under this line of reasoning, some, but not all, telegraphs could fall under the power to regulate post roads. But this would not explain Congress’s power over newer forms of telecommunications, like radio or television, that do not make use of statutorily designated post roads.

late any new form of telecommunications technology and telecommunications network that extended interstate or internationally. Under my approach, it makes perfect sense that the first Federal Radio Act of August 13, 1912 was passed under the commerce power—not the power to establish post offices—and that early regulation of radio was originally placed in the Commerce Department before being handed off to an independent agency, the Federal Communications Commission.¹³⁹ To be sure, the early Radio Acts arose out of concerns about navigation—another form of intercourse—but they extended to all uses of radio. In short, we should think about communications networks as technologies that fall within the scope of the constitutional power to regulate “commerce” just as we have come to understand new communications technologies as falling within the constitutional protections afforded “speech.”

Barnett objects that if “commerce” means “intercourse,” then it would include the power to regulate sexual intercourse.¹⁴⁰ I do not think this is a very serious problem. Today “intercourse” primarily means sexual intercourse. In the eighteenth century, sexual intercourse was a special type of intercourse—hence the additional adjective—rather than the general concept of business, diplomacy, and interaction that the Framers were concerned with. People in the late eighteenth century also spoke of sexual relations as “sexual commerce” and “sexual congress.” But that does not mean that the words “commerce” or “Congress” in the Constitution refer to sexual intercourse or that the power to regulate “commerce” gave Congress a general power to regulate sexual relations. Nevertheless, Barnett is correct that the power to regulate commerce includes the power to regulate at least some sexual conduct. Congress can regulate interstate prostitution or interstate travel to facilitate sex because it crosses state lines or uses interstate telecommunications networks. At the same time, substantive guarantees of sexual autonomy limit how the federal government can regulate sexual relations.

139. See Act of Aug. 13, 1912, ch. 287, § 1, 37 Stat. 302, 302 (giving the Secretary of Commerce the power to issue broadcast licenses). Following the decision in *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926), Congress passed the Radio Act of 1927, ch. 169, 44 Stat. 1162, providing for a Federal Radio Commission and bestowing specific powers over licensing and regulation on the Secretary of Commerce. See *id.* § 5, 44 Stat. at 1164–65. This legislation, in turn, was repealed and replaced by the Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064, 1102 (codified as amended at 47 U.S.C. §§ 151–161, 201–276, 301–399b, 401–416, 501–510, 527–573, 601–615b), which created the present-day Federal Communications Commission. See also *Records of the Radio Service and the Radio Division 1910–34*, U.S. NAT’L ARCHIVES RECORDS ADMIN., <http://www.archives.gov/research/guided-records/groups/173.html#173.2> (tracing history from the original Radio Service to the Federal Communications Commission) (last visited Mar. 17, 2012).

140. Barnett, *supra* note 121 (manuscript at 114–15, 141).

X. THE AUDIENCE FOR *LIVING ORIGINALISM*

Sanford Levinson's article provocatively compares me to Pablo Picasso.¹⁴¹ He argues that although Picasso overturned existing assumptions about art, Picasso was, and remained, a representational artist rather than an abstract artist. Picasso's goal was to change the way we thought about how to represent life in our art. He shocked the art world in order to make people think again about the point of representationalist art. In the same way, Levinson argues, although I am overturning widely shared assumptions about originalism, I remain first and foremost committed to constitutional fidelity. My goal is to change how people think about fidelity to the Constitution, and in particular, to the original meaning of the text.

Levinson continues his comparison by asking whether, after *Living Originalism*, conservative originalists will have to change the way they do constitutional interpretation.¹⁴² This assumes, however, that the audience for the book is primarily conservative originalists.

It is true that at various points in the book I am critical of conservative originalism and show how conservative originalists must inevitably compromise their own theories of constitutional legitimacy in order to accommodate the modern state. But *Living Originalism* is neither an attempt to hoist conservative originalists on their own petards nor an attempt to show, once and for all, why originalism is a failure. Quite the contrary, I am attracted to originalism because it reveals things about our protestant constitutional culture that liberals, especially, have forgotten.

In this book, and in its companion volume, *Constitutional Redemption*, I have argued that originalism is a dissenter's theory, a theory for people in dark times. It gives people a place to stand and leverage to attack aspects of the Constitution-in-practice that they find unjust or untrue to their vision of the Constitution. Conservatives turned to originalism in the 1970s because they believed that the country had taken a wrong turn. Over the next several decades, conservative scholars attempted to theorize originalism, but the impetus for originalism was not scholarly but revolutionary; it sought to return the Constitution to the right path in the eyes of political conservatives.

In many respects, conservatives have succeeded. They have used the processes of living constitutionalism to build out—in many but not all respects—a version of the Constitution that is more conservative than the one we had in the early 1970s. The great irony of conservative attacks on living constitutionalism is that the Constitution-in-practice today reflects the living constitutionalism of movement conservatives.

141. Sanford Levinson, *Jack Balkin As the Picasso of Constitutional Theorists*, 2012 U. ILL. L. REV. 711, 711–13.

142. *Id.* at 717.

One of the goals of *Living Originalism* is to ask conservative originalists to reflect on their own practices and to see why a model of constitutional development consisting solely of ratification and Article V amendment is incomplete; it does not give an adequate account of why the Constitution enjoys its current democratic legitimacy or succeeds as our law today. Indeed, it cannot even account for modern constructions that conservatives themselves support. Although some conservatives may resist the account of originalism and living constitutionalism in *Living Originalism*, it is the best account of how the conservative movement changed the Constitution-in-practice during the last forty years.

Most of the constitutional theorists in the United States, however, are liberals, not conservatives. *Living Originalism* has a message for them too. And that message is not, “you were right all along.” Rather, it is that liberal living constitutionalists have become too conservative in a different sense, too risk averse and too defensive. They have become the old fogies of American constitutional theory. In a conservative age, many liberals have assumed an almost instinctive and reflexive posture against ideas like originalism, constitutional fidelity and the importance of text, structure, and history. They have assumed, without justification, that the past is against them, that the work of the adopters is incorrigible, that the constitutional text is unhelpful if not irrelevant, and that their only hope is to cling defensively to the precedents of the Warren and early Burger Courts and shield them against the ravaging hordes of conservative originalism. In so doing, liberals have unwittingly bought into the conservative critique of the past forty years: that the original meaning of the Constitution—the Constitution of the Founders, Framers, and Adopters—is inconsistent with the values that liberals treasure, and therefore must be gotten around, ignored, or replaced with beneficent precedents from the good old liberal days, when liberals dominated the national political process.

Such an approach is not only feckless, defeatist, and defensive, it is false to the great traditions of liberal constitutionalism that have secured liberty and equality for increasing numbers of Americans, and indeed, have been so successful that they have become central to the meaning of the Constitution for liberals and conservatives alike. One of the reasons why conservatives have had such difficulty making their versions of originalism work is that so much of the constitutional tradition we now hold dear owes so much to the previous struggles of liberal constitutional actors.

All of which is not, I repeat, intended to let my liberal colleagues off the hook. Liberal constitutionalists must relearn a lesson well understood by Hugo Black: originalism is their friend, not their enemy; and the Constitution and its text, its history, and its structure really is on their side.

The intended audience for *Living Originalism* is not restricted to conservative originalists, asking them to mend their ways. It is also aimed at liberal nonoriginalists, who have viewed originalism either as an intellectual joke or a dangerous contagion of thought. By running away from text and history, liberals have debilitated their natural strengths and undermined their deep connections to the American constitutional tradition.

It is high time that liberals recognized that the Constitution is more than the burdensome chains of ancient ancestors. Properly understood, it is a document of redemption. Focusing on judicial doctrine and the latest pronouncements of the Supreme Court places reverence in precisely the wrong place because it misunderstands the wellsprings of constitutional development. Liberal constitutionalism succeeded in the twentieth century because liberals once offered their fellow Americans a powerful political and constitutional vision that did not take existing precedents as sacrosanct, that was not content to rest with the comforts of common-law development but sought constitutional transformation, that did not perpetually worry about what Justice Kennedy would do, but sought to mobilize political constituencies for a more honorable vision of our Constitution.

Liberals must learn the lesson that conservatives learned during the dark days when they were out of power. Originalism is for dissenters, for reformers, for people discontented with the status quo who want their country back. If you care about the Constitution, you cannot run away from its text or history. If you want to redeem the Constitution, you must take its text seriously and stop worshiping at the shrine of judicial idolatry. Battered by a generation of conservative jurisprudence, American liberals have gradually come to realize that the Constitution is not simply the work of courts. Now they must realize that, as with all other citizens, the Constitution belongs to them, and always has.

