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# Interpretive Modesty

Heidi Kitrosser
*University of Minnesota Law School*, hdk@umn.edu

# ARTICLES

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*"New originalism" presents a profound challenge to originalist determinacy—that is, to the notion that original constitutional meanings alone can resolve most constitutional controversies. Although new originalists purport to seek out and adhere to original meanings of constitutional provisions, they acknowledge that some original meanings are too thin to fully resolve many constitutional questions. Such acknowledgment stands in sharp tension with traditional claims of originalist determinacy.*

*While new originalism improves on "old originalism" in important ways, the former's break from determinacy is not clean enough. New originalists are correct that it is neither epistemologically defensible nor normatively preferable to attribute complete answers to constitutional controversies to original textual meanings alone. This Article bolsters that point, responding to old originalists' newest defenses of determinacy. Yet the Article criticizes new originalists for their own, more limited determinacy. While new originalists maintain that original meanings alone often are insufficient to resolve constitutional controversies, they overlook the epistemic uncertainties intrinsic in ascertaining original meanings themselves.*

*This Article offers an "all the way down" critique of originalist determinacy. It challenges originalism's ability not only to answer all constitutional questions, but also to settle reliably on single original meanings in the first place. The Article proposes to build on two of new originalism's tools—its embrace of thin original meanings and its distinction between interpretation and construction—and to build as well on historicist critiques of originalism to create a new approach to epistemic uncertainty in constitutional interpretation. The approach is called "interpretive modesty."*

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## INTRODUCTION

During oral arguments in the same-sex marriage case *Hollingsworth v. Perry*, Justice Scalia asked plaintiffs' attorney Ted Olson to pinpoint the date at which "it [became] unconstitutional to exclude homosexual couples from marriage."[1] Justice Scalia implored, "how am I supposed to know how to decide a case . . . if you can't give me a date when the Constitution changes?"[2] The question appeared to be meant as a "gotcha" of sorts, designed to spotlight the absurdity of the notion that the same constitutional text might apply differently at different points in time. It implicitly channeled a long-standing caricature of constitutional arguments that do not purport to follow automatically from text and history. The caricature is that such arguments are explicable solely by result-orientation, bearing little, if any, relationship to the Constitution's text or original meaning. The flip side of that depiction is the view that originalism provides the only principled, value-neutral criteria to find and effectuate constitutional meaning. As Justice Scalia and his coauthor Bryan Garner put it in a recent book: "Originalism is not perfect. But it is more certain than any other criterion. And this is not even a close question."[3]

The well-known claim that originalism is a uniquely principled interpretive method comprises two smaller premises. The first, which I call the "reliability premise," is that originalism enables one to determine the meaning of constitutional provisions accurately and without bias by drawing upon objective semantic and historical information. The second, which I call the "determinacy premise," is that originalism suffices, on its own, to resolve most constitutional questions. It thus leaves little room for interpreters to inject their own values into the decision-making process.

Although critics have always challenged the reliability premise,[4] the determinacy premise long was taken as a given by originalism's friends and foes alike.[5] Such acceptance was usually warranted, because originalism has traditionally

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1. Transcript of Oral Argument at 38, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144).

2. *Id.* at 39–40.

3. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 402 (2012).

4. *See, e.g.*, Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 248 (2009) (citing early "savage criticism" of originalism and observing that it "focus[ed] most prominently on two fundamental weaknesses" of originalism in its earliest form, which entailed the search for original framing intentions: "First, it is nearly impossible to ascertain a single collective intent . . . [and s]econd, original intention is a self-defeating philosophy, insofar as much of the historical evidence suggests the Framers" did not themselves endorse original intentions originalism).

5. That is, critics acknowledged that originalism produced answers to constitutional questions that originalists deemed singularly accurate, and that it was determinate in that sense. What critics challenged was whether those answers indeed were correct. *See, e.g.*, Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714 (2011) (citing coexistence, in originalism's early days, of originalism's "promise of judicial constraint" with "theoretical flaws" identified by critics); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 222–23 (1980) (acknowledging that "strict intentional[ists]" purport simply "to determine how the adopters would have applied a provision to a given situation, and to apply it accordingly," but questioning the historical

exhibited a bias toward determinacy. To understand how this bias works, consider again Justice Scalia's oral argument query. It was grounded partly in the notion that the Equal Protection Clause's meaning has remained static since its framing in 1868—that is, its original meaning is its current meaning. More significant is the query's other underlying assumption, one about the meaning of "meaning."[6] Justice Scalia's query assumes that the original meaning of the Equal Protection Clause tells us not only how to define its words, but also how to apply them to specific cases. Hence, if "the equal protection of the laws"[7] did not encompass same-sex marriage equality in 1868, it does not do so today. Indeed, Justice Scalia recently made the point explicit in his dissent in *Obergefell v. Hodges*, the 2015 decision holding that same-sex marriage bans violate the Constitution.[8] There, he explained that "[w]hen the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases."[9]

This traditional, determinate approach to originalism remains deeply influential and retains much political appeal. Yet in what is perhaps the most important development in originalism over the last several years, the determinacy premise no longer goes unchallenged. "New originalists"[10] argue that the original meanings of some constitutional terms are thin rather than thick; that is, the terms' original meanings do not include enough information, on their own, to resolve many constitutional questions. New originalists urge a distinction between "interpretation" and "construction." They deem interpretation to occur when the original semantic meaning of the text is discerned—when courts determine, for example, the original definition of the term "equal protection of the laws" as it appears in the Fourteenth Amendment. Once the text runs out, that is, once it ceases to tell us precisely what to do—either because it encodes a standard or principle subject to multiple applications, or because it establishes a thin rule and beyond that is silent—originalist interpretation can do no more work. At that point, adjudicators must rely on tools of construction that entail

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legitimacy of the approach). For friends of originalism, of course, both reliability and determinacy were trumpeted as features of originalism. *See infra* Part I.A.

6. For discussions of the different meanings of "meaning" in the context of originalism, see Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 647 (2013); Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 940–41 (2009).

7. U.S. CONST. amend. XIV, § 1.

8. Obergefell v. Hodges, 135 S. Ct. 2584, 2628 (2015).

9. *Id*. at 2628 (Scalia, J., dissenting).

10. As Lawrence Solum points out, "[t]he phrase 'the New Originalism' could be used in a variety of ways." Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456–57 (2013). Indeed, in a recent book I use the term to refer to public meaning originalism as a whole, as opposed to actual understandings originalism. *See* HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION (2015). In this Article, however, to comport with an emphasis on the interpretation–construction distinction, I use the term in the same way that Solum uses it in the article just cited; that is, to denote public meaning originalist theories that embrace the interpretation-construction distinction. *See* Solum, *supra*, at 457.

acts of judgment beyond discovering original semantic meanings. In the "construction zone," adjudicators candidly acknowledge that there is no single correct answer to be gleaned from constitutional text and history.[11] They may, in this zone, review the relevant constitutional principles and grapple with how best to apply them to the facts at hand. They also may consider arguments based on normative considerations.[12]

For example, Jack Balkin famously argues from a new originalist perspective that the Equal Protection Clause's original meaning embodies a principle of "equality before the law."[13] Applications of that principle are delegated to future generations to resolve through acts of construction.[14] From this vantage point, the Equal Protection Clause's original meaning can encompass same-sex marriage equality, even if no one would have dreamt of this construction in 1868.[15] The construction depends not on the Clause's meaning having changed, but on its original meaning applying to new circumstances—specifically, to evolved understandings of same-sex relationships.[16] Balkin argues that in reasoning otherwise, Justice Scalia mistakes the Clause's original expected applications for its original semantic meaning and, in so doing, artificially thickens the Clause's original meaning.[17]

Most recently, Balkin and others directed such reasoning toward urging the Supreme Court to strike down same-sex marriage bans in *Obergefell*. For example, Professor William Eskridge, the Cato Institute's Ilya Shapiro, and Professor Steven Calabresi coauthored an amicus brief (the Cato brief), arguing that the original meaning of the Equal Protection Clause is a prohibition on caste legislation.[18] The history surrounding same-sex marriage bans makes clear, they explain, that such bans constitute caste legislation.[19] The bans are thus unconstitutional, regardless of whether the Clause's framers or ratifiers

11. *See* Solum, *supra* note 10, at 458.

12. *Id.* at 473.

13. *See* JACK M. BALKIN, LIVING ORIGINALISM 220–55 (2011).

14. *See, e.g.*, *id.* at 222 (explaining that some original constructions of the Equal Protection Clause "are not reasonable today and we do not have to accept them").

15. *See id.* at 267 (explaining that the constitutional "principle against class legislation protects homosexuals from discrimination even if nobody knew there were such things as homosexuals in 1868, or, if they knew what homosexuals were, would have opposed the extension of the principle to that social group"); *see also* Francis Wilkinson, *Originalism, Scalia, and Gay Marriage: An Interview with Jack Balkin*, BLOOMBERGVIEW (Mar. 26, 2013, 10:05 AM), http://www.bloombergview.com/articles/2013-03-26/originalism-scalia-and-gay-marriage-an-interview-with-jack-balkin (quoting Balkin as making a similar point in response to a question about originalism and same-sex marriage).

16. *See* BALKIN, *supra* note 13, at 267 (explaining that "[o]ne does not need a 'new' principle" to protect same-sex rights; one need only to apply an existing constitutional principle "to present-day circumstances given present-day understandings").

17. *See id.* at 7 (criticizing Justice Scalia for conflating original meaning with original expected applications); Wilkinson, *supra* note 15 (quoting Balkin explaining the reasoning that Justice Scalia might apply to same-sex marriage cases and disagreeing with that reasoning).

18. Brief for Cato Institute et al. as Amici Curiae Supporting Petitioners at 5, 15–17, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, -562, -571, -574).

19. *Id.* at 17–18, 23, 32.

could have imagined such an outcome.[20] Although the Cato brief does not explicitly mention construction, its debt to that concept and to new originalism is plain: it relies on the notion that the Equal Protection Clause's original meaning is too thin to embody all potential applications. Instead, the Clause establishes a principle to be filled out through acts of construction—that is, by applying the principle to new factual understandings.[21]

The *Obergefell* majority itself, while relying predominantly on the Due Process Clause[22] and not referencing construction directly, effectively embraces the new originalist notion that some original meanings are thin and must be filled out over time. Justice Kennedy writes for the majority that:

> The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[23]

New originalism makes two remarkably important contributions: first, it illuminates that some constitutional terms are too thin to fully resolve all constitutional questions, and second, it introduces construction as a tool to fill out thin meanings.

Yet new originalism's break from determinacy is not clean enough. Although proponents acknowledge the absence of single "correct" answers in the zone of construction, they give short shrift to the epistemic uncertainties also intrinsic in the interpretation zone. Indeed, as several critics have pointed out, a fundamental problem with much originalist work is its insistence on discerning single correct definitions for constitutional provisions, even though many provisions' meanings were deeply contested at the time of the founding. New originalists assume that a single original meaning can be isolated for each constitutional provision, even as they acknowledge that some of those meanings are too thin to resolve all constitutional questions. With respect to the Equal Protection Clause, for example, it is not clear from the evidence Balkin cites that a thin,

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20. *Id.* at 3–4.

21. Indeed, Balkin deemed the Cato brief "closest to [his] own position in *Living Originalism*." Jack M. Balkin, *Living Originalism and Same-Sex Marriage*, BALKINIZATION (April 7, 2015, 5:42 PM), http://balkin.blogspot.com/2015/04/living-originalism-and-same-sex-marriage.html.

22. The bulk of the *Obergefell* opinion focuses on the Due Process Clause and, particularly, on the meaning of the word "liberty" in that clause. *Obergefell*, 135 S. Ct. at 2597–2602. The majority also turns to the Equal Protection Clause, however, arguing that "[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws." *Id.* at 2602.

23. *Id.* at 2598. The *Obergefell* majority makes a similar point about equality, explaining that "in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." *Id.* at 2603.

open-ended equality principle is the sole plausible original meaning.[24] Similarly, the evidence cited in the Cato brief plausibly is consistent with anticaste principles of varying thickness.[25]

New originalists also under-theorize the content of the construction zone. Little light has been shed, for instance, on how to prioritize between different tools of construction. Furthermore, in keeping with their own brand of determinacy, new originalists fail to recognize the salutary role that construction can play in response to epistemic uncertainty in the interpretation phase itself.

This Article makes an "all the way down" critique of originalist determinacy. It challenges originalism's ability not only to answer all constitutional questions (for example, whether particular statutes are unconstitutional) through interpretation, but also to settle reliably on single original meanings, rather than multiple plausible meanings of constitutional provisions in the first place. As such, it critiques determinacy in old and new originalisms alike. This Article also proposes to build on two of new originalism's tools—its acknowledgment and embrace of thin original meanings and its use of construction—and to build on historicist critiques of originalism to create a new approach to epistemic uncertainty in constitutional interpretation. The approach is called "interpretive modesty."

Interpretive modesty consists of three steps. First, in the interpretation zone, interpreters should heed cautionary notes that critics have sounded with respect to the major forms of originalism, including new originalism. Roughly speaking, this amounts to rejecting the dichotomy drawn in most originalist work between "public meaning" and what I call "actual understandings." Instead, interpreters should draw both on evidence of actual understandings to avoid straying from historical reality, and on wider evidence of word usage and other relevant context to avoid the tunnel vision that may follow from relying solely

24. *See infra* notes 155–58 and accompanying text.

25. This may be most evident if we consider the implications of the anticaste principles on laws—such as public school financing schemes that lock poor children into relatively underfunded school systems—that entrench socioeconomic hierarchies. If we look at one important aspect of the anticaste principle described in the Cato brief—namely, a desire to enable members of future generations to rise or fall on their own merits, without being stymied by state measures that turn on the circumstances of their births—that principle should raise grave doubts about such state financing schemes, regardless of their purposes. *Cf.* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (addressing, and rejecting over dissents, an equal protection challenge to Texas' property tax-based financing scheme for public schools). On the other hand, much of the Cato brief's discussion lends itself to a somewhat thicker principle, one directed solely against policies that facially or intentionally single out particular groups for differential treatment. The thicker principle may simply have no bearing on a financing scheme that is neither facially discriminatory nor provably intentionally discriminatory, however caste-perpetuating its impact. *Cf.* Washington v. Davis, 426 U.S. 229 (1976) (holding that a city job requirement with a racially discriminatory effect was not a racial classification where plaintiffs did not show that the law was facially or intentionally discriminatory). Note, not incidentally, that these examples do not entail applying a single textual principle to facts, but rather debating the meaning of that principle. At the same time, the examples reflect the sometimes-fine line between defining and applying textual principles.

on particular persons' reported understandings. Interpreters also must remain mindful of the historical reality that many constitutional provisions—and indeed the meaning of constitutionalism itself—remained contested throughout and in the aftermath of framing and ratification. Interpreters ought not, in short, begin with the assumption that they can and must discern one correct (or even best) original semantic meaning. Rather, interpreters should discern and acknowledge all historically plausible original meanings of particular constitutional provisions.

This brings us to interpretive modesty's second and most radical step. Where more than one historically plausible meaning exists, interpreters should refrain from deeming one the "best" and therefore synonymous with the text itself. Given the fact of contested plausible meanings, anointing one the interpretive winner places a false veneer of certainty over an exercise that is inevitably somewhat ad hoc. Instead, to the extent that the contested meanings contain some common denominator, only that consistent thread should be deemed "locked in" as a matter of interpretation. This effectively means that only the thinnest strand of the plausible contested meanings should be deemed interpretively settled. Consider a situation in which one plausible contested meaning of the Equal Protection Clause is an abstract principle and other plausible contested meanings are thicker versions of that principle (or expected applications of that principle). In that case, only the thinnest version of the principle—the common denominator—should be deemed locked into the constitutional text. Similarly, there is agreement that the President is meant, under Article II, to supervise the carrying out of the legislature's laws, but disagreement over whether and how far his power extends beyond that point. Again, only the meaning on which there is agreement should be deemed locked in as a matter of interpretation. Alternatively, should a case arise in which there are multiple plausible meanings that lack a common core, interpreters should simply identify the contested meanings and leave the choice between them to the construction zone. Such a case would exist, for instance, if a provision's plausible meanings included competing principles that do not share a common core.

In the third step, we see the basis for and benefits of the second. The third step is construction. Here, partisans for meanings that go beyond the thin common denominator meaning adopted at step two (or for one among plausible contested meanings that lack a common core) can argue that their meaning should be adopted as a matter of construction because it best vindicates the principles and purposes underlying the relevant constitutional provision or provisions. For example, if an abstract equality principle were adopted at step two as the thinnest, common-denominator meaning of the Equal Protection Clause, partisans could argue in step three as to whether that principle demands heightened protections against discrimination based on sexual orientation. Or if the rule that the President retains at least supervisory power over the execution of federal laws were adopted at step two, but an unfettered presidential power to dismiss executive officials at will were not, partisans could still argue at step

three that the twin goals of presidential energy and accountability underlying Article II demand unfettered power in some or all cases.

Adopting only common-denominator meanings (or simply identifying plausible contested meanings where there is no common core of meaning) at the interpretation phase and hashing out the remaining contested meanings through construction has both epistemic and normative advantages. Two of these advantages mark improvements over old and new originalism alike because they stem from interpretive modesty's rejection of the interpretive overconfidence that plagues both forms of originalism. First, to the extent that one is committed to discerning original meanings as accurately as possible, it is counterproductive to overlook or minimize the complex reality of multiple plausible meanings where they exist. It is more conducive to precision to supplement semantic ambiguity by examining and applying underlying constitutional principles and purposes, rather than locking in one plausible definition over others as semantically correct. Second, as a normative matter, the relative candor of interpretive modesty—both in acknowledging the limits of interpretation and in facilitating open debate as to constitutional principles and their applications in the construction zone—has the potential to advance our constitutional culture. Indeed, it may lessen public cynicism about the perceived disingenuousness of constitutional reasoning were judges and other interpreters to acknowledge and grapple openly with areas of definitional uncertainty, and also to explain the bounded nature of their discretion. Such reasoning may well seem more plausible and accessible than confident pronouncements of certainty on matters that appear both logically contestable and suspiciously in line with interpreters' known political leanings.

Three additional features mark advantages of both interpretive modesty and new originalism over old originalism. First, interpretive modesty has the normative advantages of which Professor Balkin writes when he champions the interpretive adoption of principles embedded in text over relatively thick expected applications of the same. That is, interpretive modesty enhances constitutional legitimacy for present and future generations, connecting us to the past through original meaning and original principles, while giving us a role in the constitutional present and future in debating the application of those principles to modern conditions.[26] Second, in widening the construction zone, interpretive modesty makes room for candid consideration of other constitutionally and normatively important factors beyond the principles underlying the relevant provisions. In the construction zone, for example, a court can consider whether it is most prudent for the political branches, or instead for the court itself, to resolve the remaining questions of construction. Alternatively, political actors engaging in interpretation and construction might conclude that a provision's original meaning gives them leeway to take a particular action, but that constitutional principles or prudential factors counsel against it. Third, distinguishing

26. *See, e.g.*, BALKIN, *supra* note 13, at 60, 84–85, 130.

between interpretation and construction can play an educative role, illuminating that much constitutional decision making falls into a middle ground that is neither unconstrained nor dictated solely by constitutional text.

The remainder of this Article proceeds as follows. Part I provides background on the law and politics of originalism and its relationship to determinacy. Part II takes a closer look at determinacy in both old and new originalisms. It critiques determinacy's traditional manifestation among "old originalists" as a bias toward thick original meanings. It also assesses the value and the shortcomings of new originalism's more limited form of determinacy—its bias toward thin meanings. Part III elaborates on interpretive modesty as an alternative to old and new originalisms alike. Parts II and III draw from examples including the Equal Protection Clause, the Eighth Amendment's Cruel and Unusual Punishments Clause and the First Amendment's Free Speech Clause. Part IV considers determinacy and interpretive modesty as they relate to debates over Article II of the Constitution, particularly to the theory of the unitary executive. This example provides a useful contrast to those explored in Parts II and III. Determinacy's impact on interpretations of Article II's vesting of executive power in the President is less intuitively clear than its impact on interpretations of principles and standards. Perhaps for this reason, determinacy has been little discussed in relation to Article II.[27] The unitary executive example thus demonstrates how determinacy manifests itself outside of the realm of principles and standards. It also further illustrates the problems posed by determinacy and the advantages of interpretive modesty.

## I. ORIGINALISM'S POLITICAL AND METHODOLOGICAL TRAJECTORY AND THE ROLE OF DETERMINACY

The claims that originalism is uniquely principled, and that alternative theories offer little more than result orientation, have long been central to its appeal. The determinacy premise, with its promise that originalism alone can resolve most constitutional questions, is closely linked to these claims. Yet determinacy's relationship to originalism is not entirely straightforward. In particular, new originalists, with their embrace of thin constitutional meanings and construction, partly detach originalism from determinacy.

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27. The literature does contain some passing commentary relating to the issue. *See, e.g.*, Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 123–24 (2010) (deeming the presidential removal power "arguably" a "constitutional gap" that original meaning alone cannot resolve); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 257 (2001) (arguing in support of their reading of the constitutional allocation of foreign affairs powers that "every competing theory believes that the Constitution's text fails to address many key issues of foreign affairs power"). For a more extended discussion, see Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1189, 1226–29 (2012) (arguing that "originalism offers a workable and distinctive approach to constitutional adjudication only if it . . . reduc[es] the interpretive leeway claimed by nonoriginalists," and criticizing public-meaning originalists for failing to achieve this end with respect to the President's removal power).

Section A summarizes originalism's relatively static relationship to determinacy in public discourse. Sections B, C, and D explore the more complicated state of originalism in academia and in some judicial statements. Section B summarizes originalism's changing definitions in academic and judicial realms over the past few decades. Section C introduces determinacy's respective relationships to old and new originalism in these realms. Section D discusses historicist critiques of determinacy in old and new originalism alike.

### A. ORIGINALISM'S STATIC IMAGE IN PUBLIC DISCOURSE

When originalism first arose as a cohesive school of thought in the 1970s and 1980s, it was championed as a corrective to the unprincipled decisions of the Warren and Burger Courts. At the 1971 Senate hearing on his nomination to the Supreme Court, then-Judge Rehnquist promised not to "disregard the intent of the [F]ramers of the Constitution and change it to achieve a result that [he] thought might be desirable for society."[28] And in an influential article published that same year, Robert Bork argued that the framers' intended applications of constitutional text should govern in cases where those intentions are knowable. This plea was part of Bork's larger call to judges to apply "neutral principles" in constitutional cases, an approach that he contrasted with the "value-choosing role of the Warren Court."[29]

Although these early claims took place in the rarified settings of congressional hearings, academic journals, and writings and speeches to elite groups, they eventually trickled into the realm of public debate. Some trickling was inevitable given the intrinsically political forums, particularly congressional hearings, in which some early claims were made. This inevitability was bolstered by the early claims' focus on politically explosive social issues, including abortion and school desegregation. The trickling also was aided by a deliberate campaign by members of the conservative legal movement to gain acceptance for their views within the legal and political mainstreams and among the public.[30] Within the Reagan Administration in particular, advancing originalism was part of a larger project to reset the parameters of constitutional analysis in politics and

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28. Colby, *supra* note 5, at 716 (alterations in original) (quoting *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the S. Comm. on the Judiciary*, 92d Cong. 19 (1971) (question from Sen. John L. McClellan to William H. Rehnquist)).

29. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1–4 (1971) (contrasting neutral principles-based approach with Warren Court activism); *see also id.* at 13 (noting that the "words [of the Equal Protection Clause] are general but surely that would not permit us to escape the framers' intent [on how to apply the Clause] if it were clear").

30. *See, e.g.*, Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 STUD. AM. POL. DEV. 61, 75–82 (2009) (describing the "originalism project" of the Meese Justice Department); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659–61, 680–82 (2009) (noting the "deliberate effort by the Reagan Justice Department" to advance originalism among the public); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 549, 554–58, 561 (2006) (tracing the "political practice of originalism" to the 1980s and describing the Reagan Administration's important role in the same).

courts for the long term. The Reagan Justice Department, particularly during the term of Reagan's second Attorney General, Edwin Meese, became a think tank of sorts for developing conservative legal ideas and a forum for conveying those ideas to the wider legal community and the public at large. Of the ideas developed and conveyed, none were more central than originalism.[31]

Like other proponents of originalism, the Reagan Justice Department argued that there was no principled alternative means to interpret the Constitution. For instance, speaking at a Federalist Society convention in 1987, Attorney General Meese distinguished originalism from the view of "certain judges, politicians, and academics today . . . [that] the United States Constitution [is] a document virtually without legally significant, discernible meaning."[32] To these nonoriginalists, the Constitution "merely provides a starting point for philosophical adventurism."[33]

In depicting originalism as uniquely principled, Meese leaned implicitly on the determinacy premise. In his 1987 speech to the Federalist Society, for example, he asked rhetorically, how might "we know when a judge is acting properly in declaring an executive or legislative act unconstitutional?"[34] Answering his own question, he posited that we need only "look[] at the relevant written constitutional provision and check[] to see if it is being enforced according to its plain words as originally understood."[35] Similarly, in a 1985 speech, Meese promised that his Justice Department would "endeavor to resurrect the original meaning of constitutional provisions and statutes as the *only reliable guide for judgment*."[36]

Among academics and some jurists, originalism has undergone much rethinking since these early days. The most well-known change among many originalists is the shift from reliance on actual original understandings to an emphasis on original public meaning; that is, the meaning that "the words and phrases of the [constitutional] text . . . would have had at the time they were adopted as law, within the political and linguistic community that adopted the text as

31. *See, e.g.*, Teles, *supra* note 30, at 62–63, 75–81.

32. Edwin Meese III, U.S. Att'y Gen., Address at the Federalist Society (Jan. 30, 1987), *in* Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. PUB. POL'Y 5, 5 (1988).

33. *Id.* at 6; *see also* Colby, *supra* note 5, at 717 ("It would be difficult to overstate the extent to which the Old Originalism was characterized by its own proponents as a theory that could constrain judges and preclude them from reading their own policy preferences . . . into the Constitution.").

34. Meese, *supra* note 32, at 10.

35. *Id.*

36. Edwin Meese III, U.S. Att'y Gen., Speech Before the American Bar Association (July 9, 1985) (transcript available at http://www.fed-soc.org/publications/detail/the-great-debate-attorney-general-ed-meese-iii-july-9-1985) (emphasis added); *see also* Teles, *supra* note 30, at 75–79 (explaining that the Department's "originalism project" started as a series of speeches, of which the ABA speech was the first); Lawrence B. Solum, *Semantic Originalism* 13 (Ill. Pub. Law & Legal Theory Research Papers Series, No. 07-24, 2008), http://papers.ssrn.com/abstract=1120244 (observing that the ABA speech "put originalism on the political agenda").

law."[37] Public meaning originalists search for "objective" meaning, or the meaning that a reasonable founding-era reader *would* have assigned to the text in light of the linguistic and other relevant context of the time.[38] New originalists are a subset of public meaning originalists. New originalists seek out original public meaning as a matter of interpretation, but turn to construction when original meaning "runs out."

In the wake of these shifts in originalism, and particularly in light of new originalism, a number of legal academics have challenged the long asserted connections between originalism, reliability, and determinacy. Yet in the realm of public discourse about these connections, time has stood still. In the public realm, originalism's image as a uniquely principled, reliable, and determinate tool of constitutional analysis remains mostly intact.[39]

This conception of originalism is partly perpetuated by two of originalism's highest profile advocates—Justices Scalia and Thomas. Each regularly depicts originalism as deeply determinate, even quasi-mechanical in nature. For example, Justice Scalia has explained that his adherence to originalism makes it impossible for him to read his own moral preferences into the Constitution.[40] Invoking the example of the death penalty, Scalia wrote that "[f]or [him] . . . the constitutionality of the death penalty is not a difficult, soul-wrenching question. It was clearly permitted when the Eighth Amendment was adopted . . . [a]nd so it is clearly permitted today."[41] Striking a similar note, Justice Thomas has argued that "[s]trict adherence to [the originalist] approach is essential if we are to fulfill our constitutionally assigned role of giving full effect to the mandate of the Framers without infusing the constitutional fabric with our own political views."[42]

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37. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1131 (2003).

38. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 92 (2004) ("Whereas 'original intent' originalism seeks the intentions or will of the lawmakers or ratifiers, 'original meaning' originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment."); Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 7 ("[O]riginal meaning represents *hypothetical* mental states of a legally constructed reasonable person rather than *actual* mental states held by concrete historical persons.").

39. *See, e.g.*, Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 8 (2009) (describing originalism's "tendency to be deployed in the public square—on the campaign trail, on talk radio, in Senate confirmation hearings, even in Supreme Court opinions—to bolster the popular fable that constitutional adjudication can be practiced in something close to an objective and mechanical fashion"); *cf.* Tara Smith, *Originalism's Misplaced Fidelity: "Original" Meaning is Not Objective*, 26 CONST. COMMENT. 1, 1 (2009) ("[I]t is difficult to stray far from the pure, fair-minded appeal of the Originalist brand of respect for the rule of law.").

40. *See* Antonin Scalia, *God's Justice and Ours*, FIRST THINGS, May 2002, at 17, 17, http://www.firstthings.com/article/2002/05/gods-justice-and-ours.

41. *Id.*

42. *See* Colby & Smith, *supra* note 4, at 304 (alterations in original) (quoting Lewis v. Casey, 518 U.S. 343, 367 (1996) (Thomas, J., concurring)).

Such depictions of originalism are echoed and amplified by popular media figures. For instance, in a December 2005 edition of *The Limbaugh Letter*, Rush Limbaugh wrote:

> The only antidote to . . . judicial activism is the conservative judicial philosophy known as Originalism. As Supreme Court Justice Clarence Thomas explained in a February 2001 speech to the American Enterprise Institute: "The Constitution means what the delegates of the Philadelphia Convention and of the state ratifying conventions understood it to mean; not what we judges think it should mean." Hallelujah.[43]

Polling data also suggest that support for originalism coincides with the belief that it is a relatively mechanical interpretive tool that enables determinacy and judicial restraint. For example:

> A series of polls conducted annually by Quinnipiac University from 2003 to 2008 consistently found that roughly 4 in 10 Americans agreed that "[i]n making decisions, the Supreme Court should *only* consider the original intentions of the authors of the Constitution" as opposed to "consider[ing] changing times and current realities in applying the principles of the Constitution."[44]

Analysis by Professors Jamal Greene, Nathanial Persily, and Stephen Ansolabehere of three sets of surveys sheds additional light on popular associations between originalism and determinacy.[45] Among the traits that the professors find predictive of originalism is a desire to limit judicial discretion.[46] Another predictive trait is a set of cultural values that include moral traditionalism.[47] Although the professors acknowledge that further research is needed to determine cause and effect, these predictive traits suggest that an important part of originalism's popular appeal is the assumption that it drastically narrows judges' discretion by tying them to the mast of thick meanings as discerned through founding era intentions. This point is straightforward with respect to the first trait, a desire to limit judicial discretion.[48] With respect to the second trait—possession of cultural values such as moral traditionalism—the point is nearly as obvious. If the popular view of originalism is that it ties judges to precise historical expectations that yield thick meanings—precluding judges, for ex-

43. Rush Limbaugh, *Limbaugh Fundamentals: What is Originalism?*, LIMBAUGH LETTER, Dec. 5, 2005, at 12, 12 (quoting a February 2001 speech by Justice Thomas to the American Enterprise Institute) (on file with author).

44. Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 11 (2009) (alterations in original) (emphasis added) (quoting Press Release, Quinnipiac Polling Inst., American Voters Oppose Same-Sex Marriage Quinnipiac University National Poll Finds, But They Don't Want Government to Ban It (July 17, 2008), http://www.quinnipiac.edu/x 1284.xml?ReleaseiD=1194).

45. Jamal Greene et al., *Profiling Originalism*, 111 COLUM. L. REV. 356, 359 (2011).

46. *See id.* at 371, 385–411.

47. *See id.*

48. *See id.* at 387–91.

ample, from discerning rights to abortion or same-sex marriage in the Constitution—it follows that originalist judges are unlikely to block legislation that reflects traditional moral beliefs.[49]

### B. ORIGINALISM'S EVOLVING MEANINGS IN ACADEMIC AND JUDICIAL REALMS

In its early days, originalism was presented in public and scholarly forums alike as a call to apply the actual intentions of those who framed the Constitution. This is exemplified by some of the statements from Attorney General Meese, Justice Rehnquist, and Robert Bork cited in the previous section.[50] The emphasis on framing intent—sometimes broadened to include the intent or understanding of the document's ratifiers or even the "original public understanding"[51] (hence this Article's use of the term "actual understandings originalism" to reference these early methodologies)—eventually gave way, in academic and some judicial discourse, to a reliance on "original public meaning."[52] Not all academic and judicial originalists have made the methodological switch. Some continue to adhere to an actual-understandings-based approach,[53] and for others it is unclear what type or types of originalism they practice.[54] Original public meaning has, however, become the predominant approach to originalism among those academics and jurists to address the matter directly.[55]

The switch to public meaning is epitomized by a 1986 speech by Antonin Scalia, then a judge on the U.S. Court of Appeals.[56] It was one of many talks about originalism held at, and sponsored by, the Meese Justice Department.[57] Stephen Galebach, who worked in the Department at the time, recounts:

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49. *See id.* at 401. The authors also include libertarianism and comfort with inequality in the cultural values bundle and suggest similar ties between these views and an originalism steeped in narrow historical expectations. *Id.* at 401–02.

50. *See supra* text accompanying notes 29, 31–35.

51. *See, e.g.*, Colby, *supra* note 5, at 722–23; Solum, *supra* note 36, at 15–16.

52. *See, e.g.*, Colby, *supra* note 5, at 723–24; Solum, *supra* note 36, at 4–5, 18.

53. *See, e.g.*, Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009) (embracing subjective meaning approach); Larry Alexander, *Simple-Minded Originalism* (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Research Paper No. 08-067, 2008), http://ssrn.com/abstract=1235722 (same); *see also* Solum, *supra* note 36, at 2, 5 (summarizing major types of originalism currently followed).

54. *See, e.g.*, Colby, *supra* note 5, at 771–73 (citing examples of such lack of clarity in the work of Justice Thomas and others); Colby & Smith, *supra* note 4, at 300–03 (same). *But cf.* Solum, *supra* note 36, at 2, 9 (citing practical overlap between the various originalisms); Solum, *supra* note 10, at 463–64 (same).

55. *See, e.g.*, Colby, *supra* note 5, at 739, 749 ("[V]irtually every originalist has come at least a substantial way down the path from the Old [subjective-intentions-based originalism] to the New [objective-meaning-based originalism]."); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48–49 (2006) ("[T]he weight of originalist opinion today supports the view that the Constitution's meaning is to be found in the hypothetical mind of the reasonable person . . . .").

56. Teles, *supra* note 30, at 80.

57. *Id.* at 75.

> [A] lunch we had, maybe 25 or 30 of the political appointees in the department, with Nino Scalia. He was then on the DC Circuit, and he gave a talk against original intent. It was great. His point was, that judges are obligated to follow the original meaning of constitutional provisions and statutes. The subjective intent of the framers was irrelevant—it was the words they used as understood in light of context.[58]

Kenneth Cribb, who also worked in the Department, added "you could just tell by osmosis that everyone [in the audience] agreed with that. And so I wrote, 'stipulated,' and tacked it up on the podium while he was talking. We used original meaning more after that."[59]

By and large, public meaning originalists purport not to "concern themselves with how the words of the Constitution were *actually* understood by the Framers, the ratifiers, the public, or anyone else, but rather with how a hypothetical, reasonable person *should have* understood them."[60] Beyond his or her own reasonableness, the characteristics of this hypothetical person vary considerably. For example, whereas Justice Scalia emphasizes the hypothetical reader's ordinariness, explaining that the original meaning is that which would have "been known to ordinary citizens in the founding generation,"[61] Gary Lawson and Guy Seidman emphasize the hypothetical reader's extraordinariness:

> This person is highly intelligent and educated and capable of making and recognizing subtle connections and inferences. This person is committed to the enterprise of reason, which can provide a common framework for discussion and argumentation. This person is familiar with the peculiar language and conceptual structure of the law.[62]

Other public meaning originalists offer further variants; for example, Vasan Kesavan and Michael Paulsen refer to a "hypothetical, objective, reasonably well-informed reader . . . within the political and linguistic community in which [the relevant constitutional words and phrases] were adopted."[63] And Professor Randy Barnett refers simply to the meaning "that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment."[64]

Finally, new originalists are a subset of public meaning originalists who draw a distinction between interpretation and construction.[65] They acknowledge that

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58. *Id.* at 80 (quoting interview with Galebach, July 2007).

59. *Id.* at 81 (quoting interview with Cribb, August 2007).

60. Colby & Smith, *supra* note 4, at 254–55; *see, e.g.*, sources cited *supra* note 38.

61. District of Columbia v. Heller, 554 U.S. 570, 577 (2008).

62. Lawson & Seidman, *supra* note 55, at 73. *But see* Kay, *supra* note 53, at 722 (contrasting this characterization with Lawson's own earlier, less elaborate conception of the original reader).

63. Kesavan & Paulsen, *supra* note 37, at 1132.

64. BARNETT, *supra* note 38, at 92.

65. *See supra* note 10 and accompanying text (discussing different meanings of "new originalism").

in some cases the text's original meaning "runs out," and that construction ought to fill the remaining gaps. New originalists make clear that any permissible constructions must be consistent with original meaning. In other words, although original meaning may not dictate one correct answer to a constitutional question, it will preclude some answers. The construction zone does not extend beyond the range of permissible answers.[66]

### C. ORIGINALISM(S) AND DETERMINACY IN LEGAL ACADEMIC LITERATURE

There is a substantial scholarly consensus that actual understandings originalism is compatible with determinacy. When actual understandings originalism was the only game in town, it received scholarly pushback with respect to the reliability premise and to normative concerns.[67] The determinacy premise, however, typically was taken as a given.[68] With the switch to public meaning originalism, legal scholars have begun to debate whether such an originalism is compatible with determinacy, and whether indeterminacy is a good or bad development.[69]

Richard Kay, who adheres to actual understandings originalism, criticizes the new originalism as both unreliable and relatively indeterminate. He deems objective meaning deeply malleable, pointing to the broad range of potential hypothetical reasonable founding era readers. He observes that a chosen hypothetical reader may well "understand the constitutional language in a way congenial to the aspirations of whatever interpreter is charged with conjuring up that reader."[70] Kay also takes the view that an actual understandings approach can credibly supply much thicker original meanings than can objective originalism. The latter, he argues, "allows for multiple plausible interpretations of constitutional provisions, undermining the critical constitutionalist values of clarity and certainty in constitutional limits."[71] An actual understandings approach, on the other hand, offers

> more to investigate. . . . [T]here *was* an intention about [a given provision] and a raft of information about what that intention might have been. An interpreter ought to be able to arrive at a "better," if still uncertain, judgment about whether the enactors understood themselves to be prohibiting [a particular] kind of action.[72]

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66. *See, e.g.*, BARNETT, *supra* note 38, at 120–23; Solum, *supra* note 36, at 6–7; Whittington, *supra* note 27, at 121.

67. *See, e.g.*, Colby & Smith, *supra* note 4, at 248 (summarizing "savage criticism" heaped on original intent originalism).

68. *See supra* note 5 and accompanying text (explaining the logic by which critics accepted the determinacy premise but rejected the reliability premise).

69. *See* Colby, *supra* note 5, at 744–45 (referencing these scholarly reactions and deeming "objective meaning originalism" incompatible with determinacy).

70. Kay, *supra* note 53, at 723.

71. *Id.* at 719.

72. *Id.* at 720.

An actual-understandings-based interpreter thus is best equipped to discover thick original meanings that resolve constitutional questions, leaving relatively little room for judicial discretion.[73]

Others echo Kay's criticism of the thinness of new originalism's outputs. Tom Colby, for example, argues that new originalists have "effectively sacrificed [old originalism's] promise of judicial constraint."[74] And Martin Redish and Matthew Arnould consider the determinacy premise so central to originalism's legitimacy that they understand new originalists "implicitly [to] concede[] the failure of the entire originalist enterprise" by acknowledging a role for construction.[75] Indeed, Redish and Arnould deem it "Orwellian to describe [a theory that leaves room for construction] as 'originalist' in any meaningful sense of that term."[76]

The subset of public meaning originalists who are new originalists agree that the methodology lends itself to interpretive thinness, and celebrate this fact as a feature rather than a bug. Indeed, Jack Balkin refers to his approach as "framework originalism."[77] He deems the Constitution an initial "framework for governance" as opposed to a fully formed "skyscraper."[78] The Constitution's unfinished, framework-like nature is evidenced partly by the many questions that the text leaves unaddressed. Although the Constitution consists of some unequivocal rules (for example, the President must be at least thirty-five years old), it also relies on a host of standards and principles that cannot mechanically be applied and that are subject to change in application over time (for example, directives against unreasonable searches and seizures (a standard) and violations of equal protection (a principle)).[79]

Professor Randy Barnett similarly observes that original meaning originalists are "bound to interpret the text at its original level of generality."[80] Although he finds relatively thick meanings in some provisions—arguing, for instance, that the original meaning of the Commerce Clause precludes all but a narrow reading of the same—he deems other provisions thin.[81] He argues, for example, that the rights "retained by the people" under the Ninth Amendment cannot be reduced, as a matter of original meaning, to the founders' expected applications.[82]

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73. *Id.* at 721 ("[P]ublic meaning originalism will generate more cases of constitutional indeterminacy than will the originalism of original intentions. The discovery of indeterminacies in otherwise originalist interpretation has been the 'little gap' through which a broad range of judicial choice has been perceived.").

74. Colby, *supra* note 5, at 714.

75. Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1508 (2012).

76. *Id.* at 1509.

77. BALKIN, *supra* note 13, at 3.

78. *Id.* at 3–4, 14, 21–23.

79. *See id*. at 6, 14–15.

80. BARNETT, *supra* note 38, at 258.

81. *See generally id.*

82. *See id.* at 256.

Given the generality of the amendment's text, its meaning must be filled out through construction.[83] Taken as a whole, Barnett explains, his interpretations both recover lost original meanings and conduce to candid analyses of constitutional questions not resolvable through interpretation alone.[84]

Finally, some public meaning originalists acknowledge the potential thinness of original meanings, but advocate adjudicative approaches that produce determinate answers and obviate the need for construction. For example, Gary Lawson agrees that an originalist simply "finds whatever one finds,"[85] thin or thick. Yet he concludes that "[a] judge applying reasonable-person originalism will always be able to decide [a] case for one or another party in a principled and determinate fashion."[86] The judge must simply filter originalism through appropriate burdens of proof. If the party with the burden of proof is unable to prove that original meaning supports their claim, they lose.[87] The burden of proof should rest with whichever party asserts a constitutional claim. Because the Constitution is a "grant of certain powers to the federal government and a denial of certain powers to state governments," Lawson explains, "In practice . . . advocates of federal power will almost always bear the burden of proof while opponents of state power will (I think I can safely say) always bear the burden of proof."[88] Professor Michael Paulsen, too, supports an approach that combines original meaning with a default interpretive rule. Paulsen explains that "original-meaning textualism [itself] supplies a default rule: where the Constitution fails to resolve a particular issue, or leaves open a range of meaning or choice, it is open for popular, representative self-government to act" without judicial intervention.[89]

### D. ANTIDETERMINACY ALL THE WAY DOWN: HISTORICIST CRITIQUES OF ORIGINALISM

In much of the legal literature, then, particularly among originalist scholars, debates over determinacy center on the relative thinness or thickness of original meanings and the use of construction to fill in thin meanings. Historians and language scholars—as well as a handful of legal scholars writing from historicist[90] perspectives—challenge determinacy in a deeper way. These critics suggest that

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83. *See id.* at 255–57.

84. *Id.* at 353.

85. Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1560–61 (2012).

86. *Id.* at 1563.

87. *Id.* at 1564; *see also* Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411, 423–24 (1996).

88. Lawson, *supra* note 85, at 1564–65 (emphasis omitted); *see also* Lawson, *supra* note 87, at 425–28.

89. Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 915 (2009).

90. As Stephen Griffin puts it: "A historicist perspective focuses on the contexts in which historical events took place and how those contexts were later changed." Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1205. Such a perspective lends itself to recognizing the fluidity and politically contested nature of much language, particularly legal language. *Cf.* Martin S. Flaherty,

originalism is misguided to the extent that it assumes that there is a single original meaning, whether thin or thick, for many constitutional provisions in the first place.

For example, Bernadette Meyler critiques efforts by originalists to identify a single, settled common law meaning for particular constitutional terms. Meyler explains that "the common law was far from a unified field at the time of the Founding, nor was it so conceived, as both the writings of the Founders themselves and contemporaneous legal commentary demonstrate."[91] Common law disunity was a function of many factors. For one, the common law was widely understood as an intrinsically flexible and evolving body.[92] Furthermore, although Justice Scalia and other originalists turn to Blackstone as the primary source of common law doctrine, this ignores the "temporal disjunction between the moment of direct importation of the common law into the colonies at the time of their settlement and Blackstone's systematic formulation of the British common law in the middle of the eighteenth century."[93] More so, imported common law by no means fully mirrored British common law, and common law doctrines further diverged between the colonies and later the states.[94] Accordingly, Meyler concludes that "a single common law answer to a constitutional question often remains unavailable; instead, several distinct positions may present themselves."[95]

Historians make similar points about constitutional text more broadly. That is, they argue that originalists err to the extent that they assume the existence of single, correct meanings for constitutional provisions, including but not limited to the text's common law terms. This criticism is perhaps best known as it relates to actual understandings originalism. For example, Gordon Wood observes that "historically there can be no real 'original intention' behind the document. Not only were there hundreds of Founders, including the Anti-Federalists, with a myriad of clashing contradictory intentions, but in the end all the Founders created something that no one of them ever intended."[96]

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*History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 568 n.209 (1995) ("For present purposes, a historicist may be defined as one who thinks history is important.").

91. Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 556 (2006).

92. *Id.* at 578, 580–82.

93. *Id.* at 557; *see id.* at 561 ("Scalia usually looks first to Blackstone and then only subsequently and minimally elsewhere. Other Justices and judges who do not explicitly adopt an originalist method likewise tend to rely heavily on Blackstone's statements about the state of eighteenth-century common law.").

94. *See id.* at 556, 562, 572–80. Similarly, Kurt Lash observes that "[t]he status of the government and the role of its courts were different on American soil, rendering problematic any wholesale adoption of Blackstonian common law." Kurt T. Lash, *Originalism All the Way Down?*, 30 CONST. COMMENT. 149, 157 (2015) (reviewing JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013)).

95. Meyler, *supra* note 91, at 557.

96. Gordon S. Wood, *The Fundamentalists and the Constitution*, N.Y. REV. BOOKS, Feb. 18, 1988; *see, e.g.*, Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public*

Yet historians also have been quick to criticize public meaning originalism. These critics focus on both the ahistoricism and the inescapable, if ironic, subjectivity inherent in creating and gleaning insights from a hypothetical, objective founding-era reader. The latter criticism is shared by some legal scholars who continue to adhere to actual understandings originalism. For example, both Richard Kay and Larry Alexander have expressed concerns over the malleability of hypothetical readers.[97] Among historians, Jack Rakove protests that a hypothetical reader's "projected understanding of the Constitution will be cobbled together arbitrarily from some set of sources that true original readers might not have possessed or used in the way imagined and that can only be the product of a modern intelligence creating a figure who did not exist."[98] Saul Cornell similarly charges that public meaning originalists can "side step dealing with the actual beliefs of Americans and substitute the beliefs of a fictive reader, effectively turning constitutional interpretation into an act of historical ventriloquism," because they "[ignore] the real voices of eighteenth century Americans."[99]

Embedded in these criticisms is the notion that claims of definitive original public meanings are suspect at best. We saw, for example, Professor Meyler's assessment of the competing original meanings of common law terms used in the Constitution.[100] Jack Rakove suggests that the meaning of "constitution" itself was contested during the founding period.[101] He observes:

> When one is dealing with a period as politically and intellectually creative as the Revolutionary era obviously was, one could not possibly understand what the adopters of the Constitution were doing without reconstructing their debates in some detail. One would also have to recognize that the use of political language, like other forms of speech, is necessarily creative, and that key words develop and acquire new shades of meaning precisely because they are subjected to the pressures of active controversy.[102]

Saul Cornell agrees that "[e]arly American history was not characterized by broad agreement on constitutional matters, but rather was deeply divided on a

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*Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 583 (2011) (offering a similar criticism of efforts to discern definitive constitutional meanings through an actual understandings based originalism).

97. *See* Kay, *supra* note 53, at 723 (describing this "malleability" as possibly "provid[ing] for interpretations that may deviate from any plausible estimate of the original intentions" and "produc[ing] a hypothetical reader who would understand the constitutional language in a way congenial to the aspirations of whatever interpreter is charged with conjuring up that reader"); Alexander, *supra* note 53, at 7–8 (lamenting that academics such as Ronald Dworkin and David A.J. Richards have "hypothesiz[ed] authors" to produce the interpretations they want).

98. Rakove, *supra* note 96, at 586.

99. Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate Over Originalism*, 23 YALE J.L. & HUMAN. 295, 299, 301 (2011).

100. *See supra* notes 91–95 and accompanying text.

101. *See* Rakove, *supra* note 96, at 589–91.

102. *Id.* at 593.

variety of fundamental issues about constitutional interpretation and meaning."[103] Similarly, John Howe notes that the "linguistic demands generated by the rapidly changing circumstances of revolutionary politics . . . eroded . . . confident assumptions" of linguistic fixity.[104] Howe elaborates:

> As the language of monarchy was replaced by a new republican discourse, as the task of revolution-making set social and economic interests against one another, and as the universe of political writers expanded and conflicts over the control of political discourse increased, language became the object as well as the instrument of political struggle. In the midst of revolutionary change, the content, rhetorical purposes, and thus the signification of political language proved shifting and uncertain.[105]

Linguistic fluidity and contestation can be expected to reign in any period of great legal and political change and controversy. The higher the stakes in defining terms, the greater incentive that parties have to contest their meanings and that drafters have to foster the "ambiguity [that] enables compromise."[106] For example, Thomas Colby reminds us:

> [T]he Fourteenth Amendment was, of course, . . . enacted out of a sense of urgency in a highly political environment. Its rights-bearing clauses were "little discussed or debated at the time," and its language was, even then, recognized to be highly ambiguous and indeterminate. . . . [S]cholars have suggested that its authors and sponsors—whose remarks are most often looked to today as proof of its original meaning—may have intentionally misrepresented its meaning on the floor of the Congress, "endeavoring to bring a wooden horse into the Constitution" in order to commit "fraud on the nation."[107]

The absence of linguistic fixity does not render the words of the Constitution meaningless. To the contrary, historical inquiry can establish ranges of plausible meanings and set boundaries to exclude the implausible. As Jack Rakove writes: "[i]t is one thing to say that few interpretations of the more ambiguous and disputable clauses of the Constitution can be established conclusively, another to treat all interpretations as equally plausible or representative of the prevailing ideas of the time."[108] Drawing on a similar premise, Professor Meyler offers a

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103. Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 724 (2013).

104. JOHN HOWE, LANGUAGE AND POLITICAL MEANING IN REVOLUTIONARY AMERICA 63 (2004).

105. *Id.*

106. Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 593 (2008) (quoting Mark Moller, *Class Action Lawmaking: An Administrative Law Model*, 11 TEX. REV. L. & POL. 39, 91 (2006)).

107. *Id.*

108. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 10 (1996).

means to reconcile originalism and historicism as they relate to constitutional common law terms. She suggests that one could reconceptualize originalism not as a search for the one correct answer for each constitutional provision, but rather as a bounded "domain of contested meanings."[109]

## II. ASSESSING DETERMINACY IN OLD AND NEW ORIGINALISMS

In academic debates, then, determinacy's relationships to originalism and to interpretive reliability are considerably more complex and contested than they are in public discourse. This Part takes a closer look at those relationships. To facilitate in-depth examination of originalist arguments, this Part focuses on the work of just a few writers. With respect to new originalism, this Part looks at Jack Balkin's work, given its central and prolific presence in debates over thin versus thick interpretations. With respect to old originalism, this Part looks at commentary by Justice Scalia and at coauthored work by Professors John McGinnis and Michael Rappaport. It cites Justice Scalia's work in light of his longstanding and influential role as a proponent of a determinate version of originalism. It examines McGinnis and Rappaport's work, because they have written in great detail over the past several years about the relative merits of originalist determinacy.

Section A contrasts Balkin's thin principles-based version of new originalism with the thicker reading of constitutional principles and standards embraced by Justice Scalia and McGinnis and Rappaport. Section B critiques the bias toward thick, determinate meanings exhibited by Scalia, McGinnis and Rappaport. To the extent that this bias relies on the assumption that the founders surely intended to lock in thick meanings—an argument developed in particular by McGinnis and Rappaport—it flies in the face of history, text, and logic.

Section B also addresses the argument, recently accorded book-length treatment by McGinnis and Rappaport, that thick answers can and should be derived through whatever methods the founders would have used to resolve constitutional questions—that is, by adhering to "original methods originalism." It observes that McGinnis and Rappaport themselves fail to resolve what original methods are, concluding only that they entail "some form of originalism." And they reach this conclusion only by defining originalist methods so broadly as to include those more precisely characterized as tools of construction. This reflects a foundational failing of any approach devoted to resolving constitutional questions solely through original meaning. That is, such approaches inevitably wrap discretionary acts of construction in the cloak of objective linguistic excavation.

Section C looks at an approach biased toward thin meanings, particularly that developed by Balkin. It applauds his emphasis on construction as a vehicle for applying principles discerned through interpretation, and thus as a means to

109. Bernadette Meyler, *Accepting Contested Meanings*, 82 FORDHAM L. REV. 803, 806 (2013).

realize interpretation's fruits. It also agrees with Balkin on the normative advantages of thin versus thick constitutional meanings. It further observes that his assessment of the Constitution as a thin "framework" rather than a thick "skyscraper" is more in line with historians' assessments than the alternative. Yet section C also argues that Balkin is too quick to dismiss evidence of thick original meanings as historically plausible and to deem their thin alternatives the sole correct interpretations of particular provisions. A better approach would be to acknowledge where more than one plausible meaning exists, but explain why it is most reliable and normatively preferable to lock in only the thinnest, common core meaning through interpretation, while leaving room for thicker meanings in the construction phase. Or, where no common core meaning exists, why it is preferable to only identify the range of plausible original meanings in the interpretation zone, while choosing between those meanings in the construction zone.

### A. THE EXTANT DEBATE

#### 1. The Thinness Bias

Jack Balkin is the most prolific bearer of a thinness bias in constitutional interpretation. Much of his analysis hinges on the distinction between provisions' original public meanings and original expectations as to how those meanings would apply. Balkin, himself a public meaning originalist, criticizes other self-identified public meaning originalists for purporting to adhere to original public meaning while actually conflating public meaning with expected applications.

For example, Balkin criticizes Justice Scalia's view of the Eighth Amendment's prohibition on "cruel and unusual" punishments. Justice Scalia long has argued that the provision's original meaning cannot possibly demand abolition of the death penalty, because "capital punishment . . . was widely in use in 1791,"[110] and because language elsewhere in the Constitution specifically contemplates capital punishment's existence.[111] Echoing his challenge to Ted Olson to identify "when the Constitution change[d]" to encompass a right to same-sex marriage,[112] Justice Scalia chides those who believe that "the death penalty may," since the founding, "have *become* unconstitutional."[113]

Balkin builds on an objection to Scalia's view first made by Ronald Dworkin. As Dworkin put it:

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110. Antonin Scalia, *Response*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 145 (1997).

111. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION, *supra* note 110, at 3, 46.

112. Transcript of Oral Argument, *supra* note 1, at 40.

113. Scalia, *supra* note 111, at 46.

> The framers of the Eighth Amendment laid down a principle forbidding whatever punishments are cruel and unusual. They did not themselves expect or intend that that principle would abolish the death penalty, so they provided that death could be inflicted only after due process. But it does not follow that the abstract principle they stated does not, contrary to their own expectation, forbid capital punishment.[114]

Balkin, too, cites this example to illustrate why "Scalia's version of 'original meaning' is not original meaning in my sense, but actually a more limited interpretive principle, what I call original expected application."[115]

Balkin's distinction between original meanings and expected applications is part of a larger approach that he calls framework originalism. Framework originalism "views the Constitution as an initial framework for governance that sets politics in motion, and that Americans must fill out over time through constitutional construction."[116] The notion that original meanings often are thin is essential to framework originalism. Indeed, Balkin notes explicitly that framework originalism has a "'thin' theory of original meaning" and that it "thus leaves most important constitutional controversies in . . . the 'construction zone.'"[117]

Professor Balkin justifies framework originalism partly on normative grounds, and partly on the basis that it is the most accurate way to read the Constitution. As a normative matter, he deems framework originalism a stabilizing force insofar as it best describes and justifies existing constitutional doctrine.[118] More fundamentally, Balkin links framework originalism to the Constitution's democratic legitimacy. Constitutions, he posits, "cannot maintain [such] legitimacy without contributions from multiple generations."[119] Framework originalism facilitates such contributions. While it anchors the Constitution in tradition and history through interpretation, it enables current and future generations to connect it to their experiences through construction.[120] For example, Balkin explains that the Equal Protection Clause, which he reads to embody a broad equality principle, has been able to accommodate social change and learning.[121] Such change and learning are sparked through social movements, as groups

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114. Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION, *supra* note 110, at 120–21.

115. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 296 (2007) (emphasis omitted).

116. BALKIN, *supra* note 13, at 3.

117. Balkin, *supra* note 6, at 646.

118. *See* Jack M. Balkin, *Nine Perspectives on* Living Originalism, 2012 U. ILL. L. REV. 815, 820–21 (explaining that thick originalists, "to maintain political credibility . . . have accepted a wide variety of precedents and practices they consider inconsistent with original meaning," whereas "[f]ramework originalism does not encounter this problem"); Balkin, *supra* note 6, at 649–50 (explaining that framework originalism "make[s] much better sense of Americans' actual practices of constitutional interpretation" than does thick originalism).

119. Balkin, *supra* note 118, at 830.

120. *See id.* at 829–30.

121. *See id*. at 851–52.

mobilize to convince the public and elites—including the judiciary—that laws targeting their members are based on mistaken views of their abilities or characteristics. For instance, to the framework originalist:

> [I]t matters greatly that there was a women's movement in the 1960s and 1970s that convinced Americans that both married and single women were entitled to equal rights and that the best way to make sense of the Fourteenth Amendment's principle of equal citizenship was to apply it to women as well as men, despite the original expected application of the adopters.[122]

Balkin also maintains that framework originalism offers the most accurate means to interpret the Constitution. In making his case, he relies most heavily on the text itself, noting that the Constitution's provisions range from determinate rules to principles and standards.[123] Fidelity to the text demands that we "pay careful attention to the reasons why constitutional designers choose particular kinds of language."[124] This includes understanding that "[c]onstitutional drafters use rules because they want to limit discretion; they use standards or principles because they want to channel politics but delegate the details to future generations."[125] Framework originalism "ascribes . . . these purposes to [constitutional] adopters."[126]

2. The Thickness Bias

In the academic literature, an interpretive bias toward thickness is most explicitly defended in a book and a series of articles coauthored by McGinnis and Rappaport. Their work manifests the thickness bias in three ways. First, the authors suggest that originalist methods should suffice to answer all or most constitutional questions, rendering construction unnecessary. More precisely, McGinnis and Rappaport follow original methods originalism, whereby modern interpreters should apply the interpretive methods that founding era interpreters would have used. Although they do not offer detailed conclusions as to what those methods are, they deem them "broadly originalist in the modern sense of the term."[127] Most importantly for our purposes, they explain that original methods obviate the need for construction. At minimum, a best answer to any

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122. BALKIN, *supra* note 13, at 11.

123. *See id.* at 6.

124. *Id.* at 6.

125. *Id*. at 23–24.

126. Balkin, *supra* note 118, at 830. We see a similar move on the part of the *Obergefell* majority:

> The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.

Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015); *see also supra* note 22 and accompanying text.

127. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 133 (2013).

constitutional question can be discerned through such methods.[128] Second, although McGinnis and Rappaport reject Balkin's characterization of their work as embracing expected applications originalism, they deem "expected applications . . . strong," though not dispositive "evidence of the original meaning."[129] They elaborate that "while the original meaning may not be defined by the expected *applications*, these applications will often be some of the best evidence of what that meaning is."[130] More broadly, they conclude that "if there is uncertainty about whether [a] constitutional provision has a meaning congenial to the living constitution approach or whether it has a more constrained meaning, one should interpret it to have the more constrained meaning."[131]

Third, McGinnis and Rappaport's positive and normative views about originalism—that is, their conclusions that the founders embraced originalism and that it leads to good consequences—are tightly intertwined with the premise that originalism yields thick meanings. Normatively, the authors tie originalism's virtues to the constitutional ratification process. They explain that the supermajority votes required to ratify the Constitution and its amendments are likely to generate good substantive results. Only originalism—which adheres to the original meaning, and hence to the substantive bargains struck by supermajorities when they ratified the Constitution's provisions—captures these good results. Yet for originalism to produce good results, the original meanings that it yields must be thick. Otherwise, originalism leaves space to be filled through construction by judges or through ordinary, rather than supermajority-driven politics. Indeed, McGinnis and Rappaport make explicit their view that a constitution filled with thinly defined principles and standards is normatively undesirable. They explain that "[c]onstitutions have been traditionally understood as placing limits on the actions that ordinary governmental majorities can take. . . . But if constitutions have abstract meanings that allow ordinary government, including the courts, to alter their meaning over time, then the Constitution will no longer serve this function."[132]

McGinnis and Rappaport's normative views are closely linked to their historical understandings. They repeatedly invoke the assumption that the founders would have wished to anchor their choices as firmly as possible. As such, the founders would have favored provisions that would be interpreted thickly, leaving little discretion for future decision makers to veer from founding directives. Pointing to studies showing risk aversion among financial investors, McGinnis and Rappaport extrapolate that "citizens are risk-averse when it

128. *See id.* at 139–43, 150; *see also* John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 751–52.

129. John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 371 (2007).

130. *Id.* at 378 (emphasis added); *see also id.* at 380; MCGINNIS & RAPPAPORT, *supra* note 127, at 118.

131. McGinnis & Rappaport, *supra* note 128, at 762.

132. *Id.* at 766–67.

comes to constitutional provisions."[133] As such, "[s]upermajority rules are unlikely to lead to constitutional delegations to the future" through thin provisions.[134] McGinnis and Rappaport link their historical assumptions to their conclusion that provisions' original expected applications are substantial, if not conclusive, evidence of their meanings.[135] They explain that "discarding expected applications in favor of abstract principles . . . transfers tremendous power from the enactors of the Constitution to future interpreters. A Constitution that was established to place limits on future government actors would not delegate power so generously."[136]

McGinnis and Rappaport also bolster their historical assumptions with the more directly positive claim that founding era "interpretive rules were essentially originalist."[137] Although they acknowledged that "[n]othing guarantees" which, if any "of the prevailing modern approaches to originalism" were utilized, they conclude that "some form of originalism . . . is the correct approach."[138] To support this claim, they cite to several early American and English statements to the effect that written laws, whether statutes or constitutions, should be interpreted through methods designed to ferret out original meaning. These methods typically were textualist or intentionalist in nature, or some combination of the two.[139]

While McGinnis and Rappaport offer the most detailed academic case for a thickness bias, the most widely known proponent of the bias is Justice Scalia. Like McGinnis and Rappaport, Justice Scalia deems the distinction between original meaning and expected applications a false dichotomy. For example, Justice Scalia argues:

> [T]he Eighth Amendment is no mere "concrete and dated rule" but rather an abstract principle. . . . What it abstracts, however, is not a moral principle of "cruelty" that philosophers can play with in the future, but rather the existing society's assessment of what is cruel. . . . [O]therwise, it would be no protection against the moral perceptions of a future, more brutal, generation. It is, in other words, rooted in the moral perceptions *of the time*.

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133. MCGINNIS & RAPPAPORT, *supra* note 127, at 148–49, 259 nn.38–39. On the financial risk aversion analogy, McGinnis and Rappaport note that "[t]here are studies of risk aversion in finance, showing that the overwhelming majority of people are risk-averse in regard to financial investments. [Jack] Balkin has provided no reason to believe that they would feel otherwise in political investments, like a constitution." *Id.* at 259 n.38 (internal citation omitted). They add, with respect to the high stakes of constitutional ratification, that "[a]gain there is an analogy to finance: the more equity is at risk, the more risk-averse management will be." *Id.* at 259 n.39 (internal citation omitted).

134. *Id.* at 148; *see also id.* at 81–83; McGinnis & Rappaport, *supra* note 129, at 372–73, 378, 380–81.

135. McGinnis & Rappaport, *supra* note 128, at 772.

136. McGinnis & Rappaport, *supra* note 129, at 378.

137. MCGINNIS & RAPPAPORT, *supra* note 127, at 117.

138. *Id.* at 133.

139. *Id.* at 135.

> On this analysis, it is entirely clear that capital punishment, which was widely in use in 1791, does not violate the abstract moral principle of the Eighth Amendment.[140]

As with McGinnis and Rappaport, Justice Scalia's gravitation to thick, expectations-based meanings is grounded in a normative embrace of constitutional anchoring, and a rejection of the alternatives. Justice Scalia expresses the view that thickly defined provisions are safer for liberty than are provisions that are defined so thinly as to invite interpretive mischief in current and future generations. It is in this vein that Justice Scalia famously refers to originalism—an originalism plainly underscored by the determinacy premise—as "the lesser evil."[141]

### B. THE TROUBLE WITH THE THICKNESS BIAS

The deepest flaw that the thickness bias manifests is epistemic overconfidence, or overconfidence in the abilities of modern interpreters to discern a single correct or even best original meaning for any constitutional provision. McGinnis and Rappaport exhibit such sanguinity in writing:

> Under an original public meaning analysis that focuses on how a reasonable, well-informed reader would understand the language of a clause, language is ordinarily, if not always, reasonably understood as having a single meaning. In some cases, this language will have a clear meaning. In other cases, it may be ambiguous or vague, but there are various tools in the interpretive rules, such as history, structure, and purpose, that can be employed to resolve uncertainty as to the single meaning of a provision.[142]

To put a finer point on it, they explain that even extremely close cases, "where the evidence just slightly favors one interpretation (what we call a 51%–49% situation)" over another, can be resolved by selecting "the stronger interpretation."[143]

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140. Scalia, *supra* note 110, at 145. As this example suggests, it is not clear that there is any daylight, in practice, between expected applications and Justice Scalia's view of original meaning. *See, e.g.*, Greene, *supra* note 30, at 663 ("[I]n practice, Justice Scalia's originalism does not allow constitutional interpretations to prohibit what was permitted at the time of the relevant clause's enactment.").

141. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855–56, 863–64 (1989); *see also supra* text accompanying note 137; *cf.* Obergefell v. Hodges, 135 S. Ct. 2584, 2618 (2015) (Roberts, C.J., dissenting) ("[G]iven the few 'guideposts for responsible decisionmaking [in the substantive due process realm],' 'an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula.'" (third alteration in original) (citations omitted) (first quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992); and then quoting Moore v. East Cleveland, 431 U.S. 494, 503 n.12 (1977)).

142. McGinnis & Rappaport, *supra* note 128, at 751–52.

143. Mike Rappaport & John McGinnis, *Clarifying Originalism: A Response to Randy Barnett*, ORIGINALISM BLOG (Feb. 27, 2014, 11:06 AM), http://originalismblog.typepad.com/the-originalism-blog/2014/02/clarifying-originalism-a-response-to-randy-barnettmike-rappaport-john-mcginnis.html.

The first and most obvious problem with this view is its conflict with the substantial evidence collected by historians and scholars of language to the effect that much language, particularly political and legal language, tends to be deeply in flux during times of great political and legal change, including the founding. Given this backdrop, efforts to lock in a single thick original meaning for each disputed constitutional provision elevate the veneer of certainty over candor and accuracy. Second, the notion that one can discern precisely the "best" interpretation from multiple plausible ones assumes a capacity to quantify historical and linguistic evidence that flies in the face of interpretive experience. Originalists disagree widely among themselves even as to the evidence and methodology by which original meaning is discerned, let alone as to substantive interpretative conclusions. There is no indication in the copious judicial, scholarly, and political disputes over original meanings that the evidentiary support for such meanings can be quantified and ranked. McGinnis and Rappaport themselves offer little commitment to particular original methods beyond those embodying "some form of originalism."[144]

Indeed, the very evidence that McGinnis and Rappaport cite to demonstrate that original methods encompass originalism reveals the imprecision and variability of those methods.[145] For example, the authors turn first to Blackstone's approach to statutory interpretation to demonstrate that original methods "conformed to original public meaning originalism, original intent originalism, or something between the two."[146] They cite Blackstone's emphasis on "interpret-[ing] the will of the legislator . . . by exploring his intentions at the time when the law was made, by signs the most natural and probable."[147] As for Blackstone's means to discern these intentions, they explain:

> Blackstone gives pride of place to text, mentioning first that interpreters should look to the "usual and most known" meaning of the words of a statute. While Blackstone's intentionalism thus has a textualist component, he also authorizes interpreters, especially when the words are "dubious," to look to other considerations, such as context, subject matter, and effect. Most important, Blackstone states that judges should look to the reason and spirit of the law—that is, "the cause which moved the legislator to enact" the law. Under this last approach, judges can depart from the language of a statute if they believe it is necessary to further the legislature's intent.[148]

144. MCGINNIS & RAPPAPORT, *supra* note 127, at 133.

145. In other words, even if McGinnis and Rappaport were correct to focus on Blackstone and their other examples to demonstrate original methods, those very examples demonstrate the indeterminacy of such methods. Yet the premise that original methods can decisively be traced to Blackstone or some other interpreter or handful of interpreters itself is misguided. Kurt Lash details the historical problems with this premise in his review of McGinnis and Rappaport's book. *See* Lash, *supra* note 94, at 154–61.

146. MCGINNIS & RAPPAPORT, *supra* note 127, at 134.

147. *Id.* at 135 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *59).

148. *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *61).

This very description suggests a wide zone of discretion for judges, particularly in applying such concepts as the law's "context, subject matter, and effect," and its "reason and spirit."[149] The Blackstone example is consistent in this respect with other examples that McGinnis and Rappaport cite to demonstrate that original methods embodied some form of originalism.[150] The example is also consistent with those invoked by political scientist Howard Gillman, whose work McGinnis and Rappaport cite for support.[151]

It is only by defining originalism so broadly that McGinnis and Rappaport can confidently assert that it is, in some form or another, an original method. This is consistent with the abundant evidence that language itself, particularly much constitutional and political language, was in a state of flux around the time of the founding.[152] Thus, McGinnis and Rappaport's own evidence reinforces the core conundrum with which this section began; that is, thick and determinative original meanings often are not epistemologically defensible. This is not to say that modern adjudicators are helpless to resolve constitutional questions or must look entirely beyond the Constitution and its history to do so. It is to say, however, that the ability to answer these questions solely through the original definitions of the Constitution's words, rather than through broader considerations of structure, purpose, and constitutional principles, is limited at best. Such indeterminate—albeit not unbounded—inquiries entail far more than merely excavating the original definitions of the text's words. The concept of "construction" is useful precisely to distinguish more discretionary exercises—including the application of textual principles to modern circumstances and the articulation and application of structural constitutional principles—from the act of discerning original definitions. Collapsing both activities into the category of "interpretation" obscures the degree of uncertainty and discretion that interpretation, so broadly construed, entails. It also caricatures construction. If interpretation encompasses all considerations of constitutional reason, spirit, structure, purpose, and principle, then construction presumably must entail only "extraconstitutional principles." Indeed, McGinnis and Rappaport characterize construction in precisely this way. As such, they drape a normatively attractive broad tent around the concept of "interpretation," while still deeming interpretation determinate by its contrast with a caricatured version of construction.

Finally, the examples that commentators cite to demonstrate originalism's determinacy and normative benefits themselves reflect a broad discretion to choose and apply originalist methods. We have seen, for example, that Justice

149. *Id.*

150. *See id.* at 135–38.

151. *See id.* at 138, 253 n.96 (citing Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191, 200, 204–06 (1997) (referencing statements on interpretation by Madison, Hamilton, and Story, among others)).

152. It is also consistent with copious evidence to the effect that interpretive theories themselves abounded and competed with one another during the founding era. *See* Lash, *supra* note 94, at 154–61.

Scalia considers the Eighth Amendment's original expected applications, where known, to be determinative. Indeed, he deems this fact to drain any moral or policymaking aspects from the question of the death penalty's constitutionality under the Eighth Amendment. Justice Scalia also uses the Eighth Amendment to exemplify the notion that constitutional interpretations are most liberty-protective when they yield thick original meanings. By locking in "society's assessment of what [was] cruel" in 1791, the Eighth Amendment protects us against "the moral perceptions of a future, more brutal, generation."[153]

Yet when it comes to the First Amendment's Free Speech Clause, Justice Scalia and other commentators claim thick, liberty-protective results with no apparent consideration, or even acknowledgment, of original expected applications. Indeed, the "freedom of speech" is a notoriously vague term with notoriously unhelpful history.[154] To the extent that thick original meanings of the Free Speech Clause have been offered, the meanings are typically restrictive in nature. The most common thick original meaning proposed entails a right only to publish without prior restraint, not to be free from punishment post-publication.[155] Nonetheless, Justice Scalia, with his coauthor Bryan Garner, suggests that his vote to overturn an anti-flag-burning statute was originalist in nature.[156] As Judge Richard Posner observes, the example is a "curious [one] for a textualist originalist to give . . . since the eighteenth-century concept of freedom of speech was much narrower than the modern concept."[157] In other words, Justice Scalia appears unconcerned, in the flag-burning context, with discerning "society's assessment," in 1791, of the meaning of freedom of speech.[158]

McGinnis and Rappaport more explicitly link generous free speech protections to thick original meanings, writing:

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153. Scalia, *supra* note 110, at 145.

154. As Ashutosh Bhagwat explains: "What is clear, the only thing that is clear, is that any firm statements about the original intent of the First Amendment should be met with extreme skepticism given the paucity and contradictory nature of the historical evidence." Ashutosh Bhagwat, *Posner, Blackstone, and Prior Restraints on Speech*, 2015 BYU L. REV. (forthcoming 2016) (manuscript at 24), http://ssrn.com/abstract=2560473.

155. *See, e.g.*, Matthew D. Bunker, *Originalism 2.0 Meets the First Amendment: The "New Originalism," Interpretive Methodology, and Freedom of Expression*, 17 COMM. L. & POL'Y 329, 334–36 (2012); Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT'L SEC. L. & POL'Y 409, 421–22 (2013); Mark Tushnet, Heller *and the New Originalism*, 69 OHIO ST. L.J. 609, 613 (2008). In an important new essay, Ashutosh Bhagwat acknowledges that the "understanding of the First Amendment's history as reaching only prior restraints on speech has a long pedigree and strong support." Bhagwat, *supra* note 154, at 3. He argues, however, that "this understanding is wrong," and that some "aspects of it are clearly and obviously wrong." *Id.* at 4.

156. SCALIA & GARNER, supra note 3, at 17 (citing Texas v. Johnson, 491 U.S. 397 (1989)).

157. Richard A. Posner, *The Spirit Killeth, but the Letter Giveth Life*, NEW REPUBLIC, Sept. 13, 2012, at 18–19 (reviewing SCALIA & GARNER, *supra* note 3.

158. Scalia, *supra* note 111, at 44.

> By guaranteeing the right to criticize government, the First Amendment promotes political competition and effective democracy. But if the First Amendment were understood in abstract terms as delegating its content to future interpreters, its value would be greatly reduced. The First Amendment might then permit a party in power to suppress speech on various grounds, allowing the party to insulate itself from criticism.[159]

Yet for the reasons noted above, it is far from clear that "the right to criticize government" is the original meaning of the First Amendment. Nor do McGinnis and Rappaport offer any evidence to this effect. Rather, they appear simply to assume, whether in light of current doctrine, their own reading of the Free Speech Clause, or for some other reason, that this definition plainly is the Clause's original meaning.

### C. THE TROUBLE WITH THE THINNESS BIAS

New originalism, particularly that embodied by Balkin's framework originalism, substantially improves on more determinate approaches. First, the existence of constitutional provisions that are less than fully determinate—either because they are thin or because they bear more than one plausible meaning—is consistent with much historical evidence. Interpretative theories that reflect indeterminacy thus are more likely epistemologically defensible than competing approaches. Second, to the extent that any normative theories of interpretation depend on capturing the benefits of (epistemologically defensible) original meanings, those benefits will most likely be reaped through approaches that embrace indeterminacy. Third, new originalists, and Professor Balkin in particular, offer far sounder definitions of interpretation and construction than those relied on by Professors McGinnis and Rappaport. To Balkin, interpretation involves only ascertaining the original definitions, or original meanings, of constitutional provisions.[160] Everything beyond that is construction. In particular, implementing constitutional principles embodied in the text, and ascertaining and implementing constitutional principles revealed by constitutional structure, are important aspects of construction.[161] This narrow definition of interpretation is extremely useful. It enables interpreters and audiences alike to track when interpreters are simply ascertaining (or arguing amongst themselves) constitutional word meanings, and when they have moved beyond this stage. This helps to prevent the slipperiness with which interpreters might otherwise conflate the act of defining textual provisions with that of articulating or applying unwritten constitutional principles. Furthermore, in mushing together

159. McGinnis & Rappaport, *supra* note 128, at 767.

160. BALKIN, *supra* note 13, at 4–5 (distinguishing "interpretation-as-ascertainment" and "interpretation-as-construction" as two separate activities involved in "constitutional interpretation"); *see also id.* at 13 (explaining that "fidelity to 'original meaning' in constitutional interpretation" means fidelity to "the semantic content of the words in the clause").

161. *See id.* at 14–15.

various parts of the interpretive–constructive enterprise, interpreters also may muddle or gloss over individual pieces of that enterprise. They may, for example, simply assume that original expected applications are synonymous with original semantic meanings without digging into history to determine whether the two indeed were equated in debates over the provisions at issue. In contrast, a narrow vision of interpretation, coupled with a distinction between interpretation and construction, fosters relative candor and precision in interpretation and construction alike.

Yet new originalists themselves display some epistemic overconfidence in conducting the interpretation phase, and Balkin's work is illustrative in this respect as well. If the broad methodological tent stitched by McGinnis and Rappaport enables interpreters to veer toward or away from expected applications with little explanation, so Balkin's methodology imposes too rigid a bar on equating textual principles or standards with expected applications.[162] Just as McGinnis and Rappaport justified their commitment to thick original meanings through their views that such meanings are normatively desirable and thus likely to have been intended by the founders, so Balkin justifies eschewing expected applications with assumptions as to what the founders envisioned for their constitutional plan, which in turn is buttressed by Balkin's normative embrace of framework originalism. Indeed, Balkin contrasts the work of "serious intellectual history," in which "one must understand how vague and abstract concepts were used in their own time," with the goals of legal interpretation.[163] The latter understands laws not solely as the discretion-limiting tools envisioned by McGinnis, Rappaport, and Scalia, but as "plans for social action in the future as well as in the present."[164]

As is true of public meaning originalism more broadly, Balkin's approach is too dismissive of the interpretive significance of actual founding era understandings and expectations. It is too quick to assume that constitutional words indeed had "generally recognized semantic meanings" rather than meanings that were contested or that varied contextually.[165] More fundamentally, and again as with public meaning originalism in general, an emphasis on words' general meanings, as distinct from the particular understandings surrounding their drafting and ratification, invites interpretive mischief. Although actual framing and ratifying understandings of word meanings are not fully dispositive for interpretive purposes, they should play an important role in interpretive inquiries so as to tether modern interpreters to historical realities. More so, although Balkin is absolutely correct that expected applications are not necessarily synonymous with original meanings, it goes too far to say that the latter can never equal the

162. *See id.* at 12 ("[O]riginal expected applications are not part of the text and they are not themselves binding law.").

163. *Id.* at 44.

164. *Id.* at 45.

165. *Id.*

former.[166]

In some cases, the lines between founders' expected applications and their beliefs in the meanings of the words that they drafted or ratified may be blurred. For example, let us assume that the common usage of the terms "cruel and unusual punishment" was, at the time of the founding, as open-ended as it appears today, amounting to a standard with applications subject to reasonable dispute. However, let us also imagine, hypothetically, that there was robust discussion throughout the ratification debates to the effect that cruel and unusual was meant, in the Constitution, as a term of art. The term of art embodied a particular set of practices that were widely rejected by the founding generation. Suppose that this point was made repeatedly and publicly in ratification debates to quell concerns that the phrase was so open-ended that it might preclude the death penalty or other accepted practices, or, conversely, that the provision might one day be deemed to permit practices that the founders deemed abhorrent. Finally, suppose that there was another, equally active and high-profile strain of argument in the ratification debates to the effect that, Federalist promises aside, the term cruel and unusual punishment was intrinsically open-ended and subject to undesirable changes in application over the years.

This hypothetical scenario would present a genuinely tough call as to the "best" original meaning. This is because many among the ratifying generation likely believed, quite reasonably, that the term cruel and unusual in the Constitution was a term of art encompassing a definite set of rules. This is a very different thing from founding expectations as to how an open-ended term would be applied. The former is not simply a matter of expected applications, but rather entails reasonable beliefs as to the semantic meaning of cruel and unusual punishment as the term is used in the Constitution. On the other hand, there is an equally reasonable case for a thin, open-ended original meaning based on the same set of hypothetical facts.

Balkin recognizes the possibility—indeed, the historical reality—of such scenarios. He observes that open-ended constitutional provisions are sometimes drafted to paper over differences that would prevent supermajority coalitions from forming had more specific terms been used.[167] He illustrates this point by reference to Section 1 of the Fourteenth Amendment, which contains the Due Process, Equal Protection, and Privileges or Immunities Clauses:

> Congress chose general phrases in section 1 because of the conflicting interests and values of moderates and radicals within the Republican Party and because of concerns about how more specific guarantees of rights for blacks would play in the 1866 elections and the ratification campaign. The

166. *Cf.* Colby, *supra* note 6, at 582 ("[I]f there was public disagreement on expected application, then it is quite likely that there was no public agreement on original meaning either."); Griffin, *supra* note 90, at 1204 ("The meaning of a constitutional provision in the abstract is rarely at issue.").

167. Tom Colby writes at length about this aspect of constitutional drafting and ratification. *See generally* Colby, *supra* note 106.

> Fourteenth Amendment served as the Republicans' platform for the elections of 1866, and "[l]ike all American party platforms, the Republican Platform for 1866 had to be sufficiently ambiguous and broad to attract quite divergent segments of the nation's electorate." Moderates and radicals chose open-ended "language capable of growth" that papered over their differences and allowed them to present a unified front that would appeal to a wide range of constituencies. Moderates could report to their constituents that phrases like "privileges or immunities" and "equal protection" did not require integrated facilities and did not threaten laws against interracial marriage; radicals could point to the broad guarantees of equal citizenship to push for future reforms. By deliberately using language containing broad principles, specific applications would be left to future generations to work out.[168]

Although Balkin views these events as culminating in plainly thin textual principles, there is a more complex possibility from an actual-understandings-based perspective. From that perspective, the words adopted, in context, had different meanings to different constituencies. Some might have understood themselves to be supporting the ratification of terms of art that, informed by future interpreters' historical inquiries, would lock in thick meanings. Others might have understood themselves to be doing exactly what Balkin suggests—embracing broad principles with applications that would be filled out by future generations. Apart from these understandings, any credible public meaning evidence—for example, evidence of words' general usages at the time—might suggest still other plausible meanings or bolster the plausibility of one or more actual understandings. The breadth and malleability of the original methods cited by McGinnis and Rappaport also support the possibility of multiple, contested meanings.[169]

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168. BALKIN, *supra* note 13, at 26 (first quoting WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 143 (1988); and then quoting Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59–63 (1955)); *see also* Colby, *supra* note 6, at 596 ("Issues of racial equality and of federal constraints on the states' ability to interfere with personal liberty were so touchy and divisive in the aftermath of the Civil War that an amendment written in concrete terms, rather than soaring and ambiguous platitudes, would never have stood a chance.").

169. The 2015 Cato brief on same-sex marriage, cited in this Article's introduction, is open to similar critique. Looking solely at the evidence and argument presented in the brief, one sees a convincing case to the effect that "equal protection" embodies an anticaste principle. *See* Brief for Cato Institute et al., *supra* note 18, at 12–15. Yet the brief also acknowledges that the original meaning leaves room for legislatures to draw relevant, nonarbitrary distinctions between groups. *See id.* at 16–17. The sum of these two definitional pieces plausibly could be an anticaste principle thicker than that articulated in the brief. It could amount, for example, to a bar only on subordinating distinctions based on characteristics closely analogous to, or even proxies for race or a previous condition of servitude. To be clear, I find much of the Cato argument convincing. Yet it is most convincing if framed as a two-step argument to the effect that: (a) an abstract anticaste principle is one plausible interpretation of the evidence (more so, it is the thinnest common denominator meaning to the extent that the other plausible meanings are thicker versions of the same principle), and (b) in the construction zone, that principle, as applied to modern evidence and understandings, is consistent with striking down same-sex marriage bans.

None of this necessarily obviates the conclusion that textual provisions that appear to reflect open-ended standards or principles should be deemed to encompass such standards or principles as opposed to thicker standards and principles or their expected applications. Yet this conclusion cannot rely on the assumption that such interpretations are always the most historically plausible ones. As such, it also cannot be justified by the normative benefits said to flow from following historically accurate interpretations. The conclusion can, however, be justified partly through the normative benefits that Balkin identifies with thin constitutional provisions. Furthermore, and at the heart of this Article's analysis, the embrace of the thinnest common denominator meaning, or of all plausible meanings at the interpretation phase where there is no common core meaning, *is* the best way—or more candidly, the least bad way—to approach accuracy when it is combined with a construction phase that focuses first and foremost on applying underlying constitutional principles to the facts at hand. Additionally, this approach is a more democratically legitimate one in light of its candor relative to other, less epistemologically modest methods. Finally, interpretive modesty—specifically, the directive that one should choose the thinnest of plausible contested meanings at the interpretation phase (or identify all plausible meanings where there is no shared, common core meaning) and then apply underlying principles at the construction phase—is applicable to all constitutional provisions, not only those that textually consist of principles and standards. Interpretive modesty thus offers needed guidance in realms beyond those of textual principles and standards.

## III. INTERPRETIVE MODESTY

This Part elaborates on interpretive modesty and its epistemic and normative justifications. The discussion is broken into four parts. Section A defines original meaning and interpretation. Section B explains interpretive modesty's approach to discerning provisions' plausible original meanings and to choosing among those meanings. Section C explores the role and content of the construction zone. Section D explains why construction is a better means to supplement textual thinness than the default interpretive rules suggested by some public meaning originalists.

### A. THE MEANING OF ORIGINAL MEANING AND INTERPRETATION

This Article agrees with new originalists that original meaning encompasses nothing more than the original definitions of textual provisions. For example, suppose that we are evaluating the constitutionality of a statute imposing criminal penalties on anyone who "makes an untruthful statement about a candidate for political office within ten days of the election in which that candidate is running." The First Amendment bars any law "abridging the

freedom of speech."[170] Were it clear that the term "abridging," as used in the first amendment, were a term of art meaning only to impose a prior restraint, it would be equally clear, as a matter of original meaning alone, that the First Amendment does not invalidate the provision in question. Yet because it is at least plausibly disputable that the term "abridging" is not so limited, and because the light shed by history on the definitional parameters of the Clause is fairly dim, we cannot answer the question solely by discerning the text's original meaning.[171]

This is not to say that history and text cannot help us to evaluate the constitutionality of our hypothetical statute. Indeed, because the meanings of "abridging," "the freedom of speech" and "abridging the freedom of speech" are not self-evident, we must look—as theorists and judges have done for decades—to the values and goals underlying the Clause.[172] Among other things, it surely is relevant that a core concern of both Federalist and Anti-Federalist founders was ensuring that the deeds and misdeeds of governors would be detectable.[173] Of course, this does not resolve the law's constitutionality. We ought still to consider how these concerns apply to untruthful speech and what light if any founding views on untruthful speech and its value may shed on our inquiry. More so, we must consider how these various concerns apply logically to the facts. For instance, even if we were convinced that untruthful speech adds no value to the political marketplace of ideas and in fact taints it, we ought to weigh this conclusion against the difficulties of separating truth from falsehood in many instances and the risk of chilling the truthful speech of speakers fearful that they may be mistaken.

To resolve the statute's constitutionality, then, one must discern the original semantic meaning of "abridging the freedom of speech," assess the values underlying the Free Speech Clause, weigh any conflicting values, and consider how they should apply to the provision at issue. To place all of these steps under the umbrella of "discovering and applying original meaning" obscures more than it clarifies. As we have seen, there are political advantages to defining original meaning and its application so broadly. It enables one to deem originalism determinate by using it to embrace thick meanings in some cases (for

170. U.S. CONST. amend. I.

171. *See supra* notes 155–58 and accompanying text.

172. The literature exploring free speech values is vast. A small but eclectic sampling includes, for example, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990); Vincent Blasi, Samuel Pool Weaver Constitutional Law Essay, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; Bork, *supra* note 29; Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2011); Susan H. Williams, Essay *Feminist Jurisprudence and Free Speech Theory*, 68 TUL. L. REV. 1563 (1994).

173. For discussion and citations to this effect, see, for example, Kitrosser, *supra* note 155, at 422–26.

example, by defining the Cruel and Unusual Punishment Clause to permit punishments that were permitted at the founding) while applying underlying constitutional values in other cases, and deeming the exercise and its results (such as broad protections for free speech) originalist in nature.[174]

Yet by deeming original meaning no more and no less than the original definition of a provision's words, one lays the groundwork for relative candor and precision in constitutional decision making. This nomenclature does not prevent disputes over original definitions from arising. But it does clarify what is within—and what is outside—the parameters of such disputes. If one is truly arguing over the semantic definition of "abridging the freedom of speech," one can make their case as to why their definition is plausible and why other definitions are implausible. By the same token, one can point out when disagreements extend beyond questions of original meaning. For example, decision makers might agree that "abridging the freedom of speech" refers to more than imposing a prior restraint but does not include all acts that burden speech in any way. In looking for guidance from underlying principles, however, the decision makers might find that they disagree over the content of those principles or their application. For example, they might agree that false speech has no constitutional value but disagree over whether our hypothetical statute so threatens to chill truthful speech as to justify its invalidation.

Such candor and precision can make it more difficult for decision makers, whether consciously or unconsciously, to conflate those aspects of their decisions that are compelled by textual directives with those that are grounded in more discretionary judgments about the content and application of relevant constitutional principles. This can make for better judicial decision making by illuminating what is logically at issue at different stages of analysis. Such relative judicial candor also has democratic legitimacy benefits. Members of the public might perceive that judges are grappling with questions of original meaning while acknowledging and addressing those matters that cannot be resolved solely through definitional excavation. Indeed, Dan Kahan draws on social psychology research to posit that norms that "promote exaggerated certitude in judicial opinion writing"[175]—a feature that he points out is manifest in much originalist reasoning—amplify popular "suspicion and resentment."[176] They do so "because they evince a form of rectitude that implies bias or

174. Tom Colby and Peter Smith make a similar point. Citing Justice Thomas in particular, the authors charge that he "shift[s] back and forth" between different types of originalism to reach desired results, "all the while insisting that '[s]trict adherence to [the originalist] approach is essential if we are to fulfill our constitutionally assigned role of giving full effect to the mandate of the Framers without infusing the constitutional fabric with our own political views.'" Colby & Smith, *supra* note 4, at 304 (alteration in original) (quoting Lewis v. Casey, 518 U.S. 343, 367 (1996) (Thomas, J., concurring)).

175. Dan M. Kahan, *The Supreme Court Term 2010—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 61 (2011).

176. *Id.* at 8.

self-delusion on the part of those who see things otherwise."[177] The benefits of candor and clarity may extend beyond judicial writings as well, to public and political debates over the constitutionality of proposed legislative or executive branch actions.[178]

Finally, insofar as it enhances decision-making candor and clarity to define original meaning narrowly, so it is all the better to distinguish the act of discerning original meaning from the act of fleshing out thin original meanings to resolve constitutional questions. It is thus useful to adopt the new originalist nomenclature signaling this distinction. It is useful, in other words, to distinguish between discerning original meaning, which new originalists label "interpretation," and supplementing thin original meanings where necessary to resolve constitutional questions, which new originalists label "construction."

### B. DISCERNING AND CHOOSING BETWEEN PLAUSIBLE ORIGINAL MEANINGS IN THE INTERPRETATION ZONE

Having defined original meaning, one still must determine how to seek it out. Our lodestar in this venture is epistemic humility. Humility is called for in light of the originally fluctuating and contested meanings of many constitutional provisions. It is also called for in light of modern originalist analyses that reveal ongoing, apparently intractable disagreements and uncertainties as to both original meanings and original interpretive methods. Epistemic humility has two implications for the practice of seeking out original meanings. First, it demands attention both to evidence of actual understandings and to the type of evidence considered by adherents of original public meaning. Given the imperfections of both the actual understanding and public meaning approaches, each should be employed as a check on the other. Second, it counsels embracing, and

177. *Id*. Tim O'Neill suggests that a similar phenomenon might lead the Supreme Court's "hedgehogs"—like Scalia, who view constitutional questions as puzzles with indisputably correct answers—to alienate their colleagues more readily than its "foxes," such as Breyer, who view constitutional questions as mysteries without definitive conclusions. Timothy P. O'Neill, *Scalia's Poker: Puzzles and Mysteries in Constitutional Interpretation*, 24 CONST. COMMENT. 663, 676, 679–83 (2007).

178. An editor of this Article astutely asked how one might reconcile this democratic legitimacy argument with the survey findings, cited earlier, to the effect that four out of ten respondents believe that "[i]n making decisions, the Supreme Court should *only* consider the original intentions of the authors of the Constitution" as opposed to "consider[ing] changing times and current realities in applying the principles of the Constitution." *See* Greene et al., *supra* note 45, at 362 (emphasis added). This is an excellent question and I offer two responses. First, to the extent that a sizeable chunk of the public believes that original meanings are fully determinate, interpretively modest opinions would be directed in part toward attempting to persuade such persons otherwise. Second, I suspect—and the survey results themselves suggest—that a generally stated preference for determinate originalism is not purely abstract, but may be tied to particular outcome preferences. For persons with such preferences, the rationales in particular cases may matter much less than the outcomes. To the extent that the rationales do matter, those persons may be somewhat less resistant to opinions bearing unwelcome outcomes where the opinions are couched in interpretively modest terms, versus terms deeming the outcomes inescapably dictated by history and the opinions' authors disinterested servants of that history.

offering an interpretively modest means to address, the possibility that a provision will have more than one plausible original meaning.

In seeking out original meanings, then, interpretive modesty's first step is to look to evidence both of original public meanings and of actual understandings. With respect to original public meaning evidence, interpreters should look to evidence of the meaning of particular words and phrases not solely in the framing and ratification contexts, but "within the political and linguistic community that adopted the text as law" more generally.[179] By looking to this broader context, interpreters can guard against the risks of cherry-picking unrepresentative quotations from framing or ratification debates, of relying on private thoughts or intentions of founders that did not factor into the public framing or ratification dialogues, or of elevating subjective intentions over the text that was ratified as law. Yet public meaning evidence itself poses risks of manipulation or misunderstanding as great as, if not greater than, those posed by actual understandings evidence. Perhaps the most straightforward risk of public meaning analysis is that it will bear little if any relationship to actual understandings of the time. Recall Saul Cornell's warning, echoed by other critics, that "[i]gnoring the real voices of eighteenth century Americans . . . enables some [public meaning originalists] to side step dealing with the actual beliefs of Americans and substitute the beliefs of a fictive reader, effectively turning constitutional interpretation into an act of historical ventriloquism."[180] This admonition is well in keeping with historians' broader observations that much founding-era political and legal discourse was contested and in flux, and that it is thus vain to seek out single, objectively correct meanings for all constitutional provisions.[181] Attentiveness to actual understandings also helps to mitigate the risk of anachronistic uses of public meaning evidence. Cornell criticizes modern uses of founding-era dictionaries, for example, explaining that "[e]arly dictionaries, including the first American dictionaries, were not compiled according to the rules of modern lexicography. These texts were idiosyncratic products of their authors, who often had ideological and political agendas. As a general rule, such dictionaries were more prescriptive than descriptive."[182] Actual understandings evidence can provide a literal reality check against such pitfalls of public meaning originalism.

Of course, there is no magic formula for determining when actual understandings and public meaning evidence suffice to make an original meaning historically plausible. As a rule of thumb, however, a plausible original meaning is one that would have been unsurprising to someone involved in the ratification

179. Kesavan & Paulsen, *supra* note 37, at 1131.

180. Cornell, *supra* note 99, at 299, 301.

181. *See, e.g.*, Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625, 631 (2008); Cornell, *supra* note 99, at 296, 301; Rakove, *supra* note 96, at 588–93; Gordon S. Wood, *The Fundamentalists and the Constitution*, N.Y. REV. BOOKS, Feb. 18, 1988, at 33, pt.4.

182. Cornell, *supra* note 99, at 298 (footnote omitted).

debates, as evidenced by actual framing and ratification discussions, by broader word usage, and by broader historical context. Because the threshold of "unsurprising" is not terribly demanding, more than one contestable meaning surely will exist for some provisions. This is, of course, entirely consistent with the views of historians. At the same time, that a meaning should have been unsurprising to actual, not just hypothetical, founders will eliminate some more anachronistic meanings from the interpretation zone.[183]

Interpretive modesty's second step entails acknowledging and addressing the reality that more than one plausible original meaning will be discernible in some cases. In such cases, interpretive modesty counsels *against* deeming one meaning best and, thus, the interpretive "winner." As explained earlier, there is simply no basis in past, or present, original meaning inquiries or originalist methodological insights to believe that the relative correctness of historically plausible original meanings can be quantified and ranked in a principled way. Where more than one plausible original meaning exists, interpreters should candidly acknowledge that fact.

After acknowledging that more than one plausible meaning exists, interpreters should take one of two approaches. Where there is a common core of meaning as between plausible definitions, only that common core should be deemed locked into the text as a matter of original meaning. This leaves room for partisans of thicker meanings—those meanings that go beyond the relatively thin common core—to argue that their meanings should be adopted at the construction phase. For example, as the next section elaborates, there is a common core among plausible original meanings of "the executive power." That is, that the executive power means at least the power to oversee execution of the laws passed by the legislature. Whether the original meaning is thicker than that—specifically, whether it entails the power to personally execute all laws passed by the legislature and to fire executive subordinates at will—is highly contestable. Yet by locking in only the thin common core—that the executive power entails at least the power to oversee execution of the legislature's laws—we leave room for partisans of broader powers to argue at the construction phase that the principles underlying the Executive Power Clause demand greater powers.

This leaves us with the question of what to do in cases in which there are more than one plausible original meanings but no common core of meaning among those options. This scenario seems unlikely to arise often, given the requirement of historical plausibility. In other words, it seems unlikely that two meanings, so different from one another as to share no common core, will both

183. It bears reminding at this juncture that original meanings are not necessarily synonymous with expected applications. Hence, that a given provision stood for a broad principle might have been unsurprising to ratification debate participants, even if a proposed modern application of that same principle would have been surprising. At the same time, the notion that a broad textual principle was actually a term of art, or a synecdoche for the modern application, would be implausible if that application would have been surprising to ratification debate participants.

be historically plausible in the sense of consistency with broader word usage of the time and in terms of actual understandings. Logically, however, the scenario is certainly possible. For instance, the record might show that a particular open-ended provision could plausibly embody either one of two incompatible principles. Should such a case indeed arise, then interpreters should borrow a concept from Professor Meyler and deem the interpretation zone a "domain of contested meanings."[184] In other words, interpreters should identify the plausible definitions and leave the work of choosing between them to the construction zone.

### C. THE ROLE AND CONTENT OF THE CONSTRUCTION ZONE

Our work now brings us to the construction zone, and to the question of what ought to happen there. As we have seen, some commentators paint a caricatured picture of construction, suggesting that it has virtually no relationship to textual or historical inquiries. This caricature is the flip side of such theorists' expansive definitions of original meaning. If original meaning encompasses everything from text to the law's "reason and spirit," then there is little left to do in the construction zone that does not yank one away from the Constitution entirely.[185] To be fair, new originalists take differing approaches to the content of the construction zone, leaving critics without one clear meaning of construction to which to respond. Nonetheless, most new originalists do focus on identifying and applying constitutional principles in the construction zone, an enterprise entirely consistent with seeking out the law's "reason and spirit." For example, recall Jack Balkin's emphasis on the construction zone as a forum for applying the original principles embodied in textual provisions such as the Equal Protection Clause.[186] It is true that Balkin emphasizes the role of social movements in guiding courts and other interpreters in the construction zone. But his point is that these movements do and should play important roles in influencing the application of original principles, not that they should have a free hand in dictating new principles. Furthermore, some new originalists use construction to identify and apply constitutional principles inferable from the Constitution's text and structure more broadly, beyond the provision directly at issue. As Randy Barnett writes: "Most who engage in constitutional construction strive to take into account constitutional principles that underlie the text. The most important of these are the structural principles of separation of powers and federalism."[187]

This Article takes the view that the construction zone's first and most important role is as a forum for arguing which, among a provision's plausible

184. *See supra* note 109 and accompanying text.

185. MCGINNIS & RAPPAPORT, *supra* note 127, at 135 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *61).

186. *See supra* note 13 and accompanying text.

187. BARNETT, *supra* note 38, at 125.

meanings, best vindicates the principles and purposes underlying that provision. For example, because original meaning alone cannot resolve the free speech hypothetical posed in Part III.A, one must choose between those answers plausibly consistent with original meaning by considering the principles underlying the Free Speech Clause and how best to apply those principles to the facts. Such an exercise of construction is hardly alien to the interpretive search for original meaning. To the contrary, it is the logical next step in an effort to answer a single question: how to faithfully effectuate the constitutional text. Construction simply reflects the realization that original meaning alone cannot reliably resolve all constitutional questions, and that shielding one's eyes from this fact stymies, rather than advances, constitutional fidelity. Certainly, commentators may reasonably disagree over the relevant constitutional principles or their applications in the construction zone. But that is different from treating the construction zone as a realm in which constitutional text, structure, and principles do not matter. Furthermore, explicitly hashing out such questions in the construction zone, and distinguishing them from original meaning questions, bears the benefits of clarity and candor.

Apart from yielding first-order answers to constitutional questions—such as whether our hypothetical restriction on political lies passes constitutional muster—the judiciary can use construction to address second-order questions regarding who, as between it and the political branches, should resolve the first-order questions. Courts may, for instance, defer heavily or completely to legislative judgments on some first-order questions. Such deference might itself follow from constitutional principles. A court might, for example, decide that principles of federalism counsel deference to state legislatures on matters not fully resolved by original meaning. The court thus might decline to invalidate our hypothetical state statute restricting political lies. Conversely, a court may decide that free speech principles demand presumptive suspicion toward any restrictions on political speech, and thus deference is not warranted with respect to a state law restricting political lies.

Extraconstitutional factors, as well as factors partly constitutional and partly extraconstitutional, may be considered in the construction zone as well. For instance, among the factors that the Supreme Court says it considers in deciding whether to treat a first-order question as a "political question" that it will decline to resolve are the presence or absence of "an unusual need for unquestioning adherence to a political decision already made[,] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[188] Judicial precedent also provides central guidance to courts. Judicial precedent itself typically comprises some mixture of interpretation and construction. Respect for judicial precedent is partly a product of stare decisis, itself a tool of construction.

188. Baker v. Carr, 369 U.S. 186, 217 (1962).

Although the construction zone may include extraconstitutional or partly extraconstitutional factors, all such factors must be subordinate to constitutional ones. Indeed, interpretive modesty shares with new originalism the premise that original meaning constrains the construction zone. Above all else, any constructions must be consistent with original meaning. And in the construction zone itself, constitutional principles and their application have pride of place. Again, it is the candid attention to constitutional principles where original meaning runs out that makes interpretive modesty more constitutionally faithful than approaches that ignore competing original meanings or purport to resolve them through interpretation alone.

### D. CONSTRUCTION VS. DEFAULT INTERPRETIVE RULES

Some public meaning originalists agree that new originalism does not always yield thick, determinate meanings. They argue, however, that determinate answers always can and should be found through default rules of adjudication, obviating the need for construction. For example, Gary Lawson argues that judges should reject the claims of parties who have the burden of proof and are unable to meet it through original meaning. Lawson would place the burden of proof with whichever party asserts a constitutional claim. In practice, because the Constitution is a "grant of certain powers to the federal government and a denial of certain powers to state governments,"[189] "*advocates* of federal power will almost always bear the burden of proof while *opponents* of state power will . . . always bear the burden of proof."[190] Additionally, a party asserting that the Constitution affirmatively prohibits particular government action would bear the burden of proof on that claim.[191] Michael Paulsen finds a different default rule supplied by "original-meaning textualism [itself]." That is, "where the Constitution fails to resolve a particular issue, or leaves open a range of meaning or choice, it is open for popular, representative self-government to act" without judicial intervention.[192]

As Larry Solum notes, these default rules themselves are "paradigm cases of rules of construction,"[193] despite their framing as alternatives to construction's indeterminacy. They are rules of construction because they are not dictated by the original meaning of the text. Rather, they are means to "determine legal effect when the meaning of the text runs out."[194] That these default rules are tools of construction is significant not because the construction label matters in its own right. It is significant because it means that the rules stem from something outside of the constitutional text, such as normative preferences or views of constitutional structure, history, or principles. Yet because they are

189. Lawson, *supra* note 85, at 1565.
190. *Id.* at 1564; *see also* Lawson, *supra* note 87, at 425–28.
191. Lawson, *supra* note 87, at 426.
192. Paulsen, *supra* note 89, at 915.
193. Solum, *supra* note 10, at 516.
194. *Id.*; *see also* Rosenthal, *supra* note 27, at 1230–31, 1231 n.261.

presented as rules that transcend construction, they would obviate inquiry into countervailing considerations. The messy but important work of case-by-case construction grounded in underlying constitutional principles or candidly normative arguments would be replaced by sweeping default rules.

To consider default rules' potential impact in displacing construction, let us return to our hypothetical state law against political lies. As we saw in the previous section, construction enables us to supplement the Free Speech Clause's inconclusive original meaning, predominantly by looking to the purposes and principles underlying the Clause. Indeed, the Supreme Court, doing just that over the years, has deemed content-based laws, such as our hypothetical law, presumptively unconstitutional. The Court also deems laws restricting political speech particularly suspicious. And although it deems false speech largely worthless to the marketplace of ideas, it carefully assesses government restrictions on the same, lest such regulations chill truthful speech or nonfalsifiable ideas. These multiple points of construction weigh heavily against our hypothetical law.

This is not to say that there are no countervailing arguments from constitutional principle, such as the notion that state laws should be deemed presumptively constitutional because of federalist or popular sovereignty concerns like those raised by Lawson and Paulsen. But such competing points of construction are just that, competing points, grounded in constitutional principle, to be grappled with directly by weighing them against countervailing arguments. There is no principled basis on which to elevate one point of constitutional principle—such as that raised by Lawson or by Paulsen—into a default rule that trumps all other considerations whenever original meaning is inconclusive.

The core trouble with the proposed default rules, then, is quite similar to that which plagues the thickness bias. The rules create a sense of neutral precision and determinacy only by papering over genuine constitutional conflicts and bases for reasonable disagreement. More concretely, they sweep aside important first- and second-order questions, mostly questions of constitutional principle, arising case-by-case. In leaving these questions unacknowledged and unaddressed, the proposed default rules, like the thickness bias, would undermine constitutional values in service of the specter of certainty and neutrality.

## IV. THE EXECUTIVE POWER EXAMPLE

This Part applies interpretive modesty to the meaning of the executive power vested in the President by Article II of the Constitution. Earlier, this Article looked at individual rights provisions in part because they have been central to the handful of debates that explicitly acknowledge and address originalist determinacy. In contrast, there has been relatively little attention paid to determinacy as it relates to executive power.[195] More so, the term "executive power"

195. *See supra* note 27 (discussing a handful of references to this issue in the literature).

appears on its face to encompass a tangible role, or roles, rather than an abstract principle or standard. We thus can broaden our understandings of determinacy and interpretive modesty by examining their respective relationships to executive power.

The first sentence of Article II of the Constitution reads: "The executive Power shall be vested in a President of the United States of America."[196] Over the years, interpreters have derived remarkably thick original meanings from this Vesting Clause, meanings that would preclude Congress or the courts from curtailing presidential power in a number of respects.[197] This Part focuses on one theory of thick original meaning, known as "unitary executive theory," that some scholars, jurists, and executive branch lawyers derive from the Vesting Clause. To a unity proponent, the Constitution requires full presidential control over all discretionary executive branch decisions and actors.[198] From this perspective, a statute that limits the President to "good cause" dismissals of certain executive branch actors is unconstitutional, as is a statute that directs a specific administrator to make particular decisions and forbids the President from overriding the same.[199] Unity-based objections also have been made to statutes that require executive personnel to testify before Congress without first clearing their testimony with the White House.[200]

Section A provides a brief summary of major original meaning arguments for unitary executive theory. Sections B and C critique these arguments and explain that their failings reflect the flaws of determinacy and the relative merits of interpretive modesty. Section B responds to unity supporters' straightforward original meaning arguments—that is, their arguments as to the semantic meaning of the words in the Vesting Clause. Section C examines unity supporters' invocation of constitutional principles—particularly the principle of accountability—as a means to bolster their original meaning arguments. This examination demonstrates how thick original meanings, even where plausible as a semantic matter, can positively undermine constitutional principles.

### A. SUMMARY OF MAJOR ORIGINAL MEANING ARGUMENTS FOR UNITY

Unity proponents begin with the "Vesting Clause thesis," through which they maintain that the executive power vested in the President by Article II has

196. U.S. CONST. art. II, § 1, cl. 1.

197. For the book-length treatment I devote to explaining and criticizing these presidentialist arguments and their practical manifestations as they relate to government secrecy, see KITROSSER, *supra* note 10.

198. *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 595 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158, 1166 (1992).

199. *See supra* note 197. *But see* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1225 (2014) (differing from "other unitary theorists" in concluding that a presidential ability to remove all discretionary executive actors at will "provides the necessary and sufficient constitutional mechanism for ensuring [presidential] control").

200. *See* KITROSSER, *supra* note 10, 262 nn.29–33 and accompanying text.

substantive content. Although they make much of this thesis, they claim only that the power that it vests in the President is the power to carry out the laws of the legislature.[201] Their next analytical step bears the bulk of their position's weight. Specifically, they reason that "[i]f the [Vesting Clause] grants the power to execute the laws, absent some powerful textual reason or historical understanding to the contrary, it must enable the president to execute the laws himself."[202] They treat this point as intuitive. They also deem it bolstered by the fact that "[e]very other constitutional provision that grants a power to an entity permits the recipient to exercise the power personally. For instance, no one doubts that federal judges may exercise their federal judicial power over cases and controversies by rendering judgments regarding such cases."[203] To unity's proponents, then, the Vesting Clause plainly bequeaths full control of every executive decision and decision maker to the President. From this starting point, they find that other constitutional provisions—including the Take Care and Opinions Clauses—do not contradict this bequeathal, and in fact assume it.[204]

Unity proponents deem their textual understanding to be deeply supported by history. They draw first from evidence of original meaning to deem the executive power the power to execute the law. From there, they move to the bolder point that executive power belongs exclusively and indefeasibly to the President. The latter, they say, is overwhelmingly evidenced by the founding decision to create a single-headed presidency rather than a plural executive or one with an annexed advisory council. Unity proponents also rely on founding assurances of a singular presidency's accountability and energy, equating them with promises that a fully unitary executive would bear those traits.[205] They also cite the Decision of 1789 as further confirmation of their position.[206] In the

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201. *See* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 704; *cf.* KITROSSER, *supra* note 10, ch. 1, 4, 5 (describing the further reaching claims of "presidential supremacists").

202. Prakash, *supra* note 1, at 716; *see also* Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting); Calabresi & Prakash, *supra* note 198, at 579–82, 594–95.

203. Prakash, *supra* note 1, at 716; *see also Morrison*, 487 U.S. at 709–10 (Scalia, J., dissenting); Calabresi & Rhodes, *supra* note 198, at 1175–81.

204. *See* Prakash, *supra* note 1, at 721, 731; *see also* Calabresi & Rhodes, *supra* note 198, at 1167–68, 1184–85, 1206–08; Calabresi & Prakash, *supra* note 198, at 582–85.

205. In one representative discussion, for example, a pro-unity commentator writes:

> The Philadelphia Convention chose a unitary executive to secure vigorous, uniform, and responsible administration of the laws. Delegates understood that a plural executive might result in "uncontrolled, continued and violent animosities" in the executive branch. During the ratification struggles, many participants likewise understood the salutary consequences of a unitary executive. There would be no councils to hide behind; there would be no plural, divided executive that might lead to chaos. Instead, one responsible person would superintend the administration of federal law.

Prakash, *supra* note 201, at 783 (internal citations omitted) (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 96 (1937) (comments of James Wilson)); *see, e.g.*, Steven G. Calabresi, *Some Normative Arguments for The Unitary Executive*, 48 ARK. L. REV. 23, 42–45 (1995).

206. *See, e.g.*, Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1026 (2006).

latter case, the First Congress engaged in an epic debate over the removal power, culminating in legislation that assumed a presidential power to remove the Secretary of Foreign Affairs.[207]

### B. CRITIQUE OF UNITY ARGUMENTS FROM ORIGINAL MEANING; IMPLICATIONS FOR INTERPRETIVE MODESTY

Assume for the moment that the case against a categorical unity directive is at least as plausible, as a matter of original semantic meaning, as is the case for it. Interpretive modesty would counsel, then, against locking in the unity directive as a matter of original meaning. It would instead leave room for argument as to whether, and under what circumstances, a unity directive is warranted as a matter of construction. In the construction zone, decision makers could evaluate the constitutional values at stake and how best to serve those values in varying, often highly dynamic factual settings.

As it turns out, the original meaning case against a categorical unity directive is, at minimum, every bit as plausible as the case for a unitary executive. Even when the Vesting Clause is viewed in isolation, unity is but one reasonable reading of it. At least equally plausible is that the phrase, "[t]he executive power is vested in a President of the United States," demands that the President maintain the power to oversee or to supervise law execution—for example, that he retain the power to dismiss executive personnel "for good cause," if not to substitute his own decisions for theirs or to dismiss them for any reason. This is the view taken by Professor Peter Strauss, who argues that the President is the "overseer and not [the] decider" of the executive branch.[208]

The Vesting Clause was written, read, and debated in full awareness that the President would not and could not personally execute every aspect of every law. For one who read the Clause knowing of this common-sense inevitability, the Clause might still have implied that the President would personally control all law execution in that he could substitute his judgment for that of his subordinates or dismiss them for any reason at any time. But it would have been equally plausible for the Clause to mean that the President would have supervisory powers, enabling his substantial if not unfettered control over the executive branch.

When one widens one's view of constitutional text beyond the Vesting Clause, the case for the President as Straussian overseer becomes stronger still. Indeed, Strauss and other anti-unity scholars have looked predominantly beyond the Vesting Clause to make their respective textual cases.[209] For one thing, the

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207. *See generally id.* at 1029–34, 1067–68 (describing the timeline, debate, and resulting vote).

208. Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 705 (2007) [hereinafter Strauss, *Overseer or Decider*]; *see also* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 648–50 (1984) [hereinafter Strauss, *Place of Agencies*].

209. *See, e.g.*, David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 83–94 (2009); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1800–01

text refers to other officers and departments apart from the President himself. The text thus makes explicit the otherwise inferable point that the President will not personally execute the laws. Indeed, the text permits the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[210] Although the Opinions Clause is not flatly inconsistent with unity, it fits much more logically into a system whereby officers are not mere alter egos to the President but are subject to presidential oversight. The latter vision is also reflected in the Take Care Clause. The Take Care Clause does not order the President to execute all laws himself. Nor does it demand that he "assure" faithful execution of the laws, a command that would assume his full control over the same.[211] Instead, it admonishes him only to "take Care that the Laws be faithfully executed."[212] Furthermore, the textually dictated system for appointments—whereby all officers are nominated by the President but must be approved by the Senate, and whereby Congress can vest inferior officers' appointments in persons other than the President—also reflects a scheme consistent with limits on presidential control over particular executive branch decisions and actors. Article II's anti-unity aspects are complemented by Article I's "sweeping," or Necessary and Proper Clause. The latter explicitly grants Congress the power to pass legislation "necessary and proper for carrying into Execution" both Congress' own enumerated powers and "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[213]

Moving beyond text alone, history makes clear that unity at best was a thoroughly contested concept. For one thing, there was no founding consensus that the definition of executive power itself encompassed the power to remove subordinates. And even if the power were so encompassed, there was no consensus that the Constitution granted every aspect of it, undivided and indefeasibly, to the President. To the contrary, two prominent Federalists assured Americans during the ratification period that the President would not possess an unfettered removal power. Writing as "An American Citizen" in "the first substantive essay published anywhere in favor of the Constitution,"[214] Tench Coxe explained that the President could not "take away offices during good behaviour [sic]."[215] Alexander Hamilton expressed a similar view in *The*

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(1996); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 611 (1989); Strauss, *Overseer or Decider*, *supra* note 208, at 702–05; Strauss, *Place of Agencies*, *supra* note 208, at 597–99.

210. U.S. CONST. art. II, § 2, cl. 1.

211. Professor David Driesen makes this point about the passive nature of the Take Care Clause. *See* Driesen, *supra* note 9, at 83–84.

212. U.S. CONST. art. II, § 3.

213. U.S. CONST. art. I, § 8, cl. 18.

214. RAKOVE, *supra* note 108, at 275.

215. AN AMERICAN CITIZEN, AN EXAMINATION OF THE CONSTITUTION FOR THE UNITED STATES OF AMERICA 8 (Philadelphia, Zachariah Poulson, Junr. 1787).

*Federalist*, suggesting that senatorial consent would be needed to "displace as well as to appoint" officers.[216]

The lack of a founding consensus on removal was also reflected in the First Congress's 1789 debate over presidential removal power. Elsewhere, I discuss that debate and its implications in some detail.[217] For our purposes, it suffices to note that a number of participants expressed a belief similar to that expressed by Hamilton in *The Federalist*—the Senate had to consent to removals of executive officers. Still, some evinced the view that the President alone had constitutional discretion to effectuate such removals, and others expressed confusion and uncertainty on the matter. It is also important to remember that even those on the removal power side argued not for a categorically unfettered removal power, but for such a power over the Secretary of Foreign Affairs. Additionally, their position was framed in response not to a moderate restriction on the removal power, such as a good cause requirement, but to the relatively extreme proposals that removal could be effectuated only with Senate consent or through impeachment.[218] The Debate of 1789 thus corroborates the lack of founding consensus on the scope of the President's removal power, even with respect to the particular proposals at issue in that debate. And it certainly suggests no broader consensus on the topic of removal writ large.

History also cuts against the notion that the original meaning of the Vesting Clause vests an unfettered power in the President to control all discretionary executive activity beyond the power to remove. For example, in the period between the Revolution and the Founding, state constitutions regularly mixed formalistic references to separated powers with breaches of executive unity and independence.[219] "[S]tate constitutions not only permitted, but actually man-

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216. THE FEDERALIST NO. 77, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 1961). A recent article challenges the longstanding view that Hamilton's statement referred to the removal power. The article suggests that by "displace," Hamilton might have meant "replace," and thus might have been referring only to the Senate's role in confirming new appointees to replace those removed by the President. *See* Seth Barrett Tillman, *The Puzzle of Hamilton's* Federalist *No. 77*, 33 HARV. J.L. & PUB. POL'Y 149 (2010). Although this is a provocative thesis, I believe that it is an unlikely one, largely for reasons captured in a response essay by Professor Jeremy D. Bailey. *See* Jeremy D. Bailey, *The Traditional View of Hamilton's* Federalist *No. 77 and an Unexpected Challenge: A Response to Seth Barrett Tillman*, 33 HARV. J.L. & PUB. POL'Y 169 (2010). Even if Tillman's thesis were accurate, the record is clear that at least some founders understood Hamilton to have been referring to the removal power, and that others, including Tench Coxe, publicly expressed the view that the President's removal power was not unlimited. *See* Tillman, *supra*, at 165–167; *see also supra* notes 214–15 and accompanying text.

217. *See* Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 629–34 (2009).

218. *See id.*

219. This was famously observed by Madison in *Federalist 47*, who cited the examples of the states to demonstrate that it was neither possible nor desirable to completely separate the three "departments of power." THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961); *see also* M. J. C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 131–33, 146–49, 154–74 (2d ed. 1998) (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 153–56 (1969); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 217–19 (1989); Edward S. Corwin, *The Progress of Constitutional Theory Between*

dated legislative involvement in both personnel and superintendence. Nothing in the records of the Convention demonstrates that exclusivity suddenly became the norm in 1787," and that the Vesting Clause could only reasonably have been understood to encompass such a norm.[220] To the contrary, participants in the framing and ratification debates likened the U.S. President's proposed executive powers to those of state governors.[221] Post-founding practices, too, belie the notion that the Constitution conveyed a widely understood directive of undivided presidential control over all executive activity.[222] Professor Susan Low Bloch aptly describes the view of administration reflected in Congress' earliest actions: "The question was one of degree—the degree of presidential control. The First Congress established varying levels of presidential control over various officials depending on the function of the officer involved. The early legislators established gradations of presidential control along functional, flexible lines."[223]

To deem a categorical unity mandate the only reasonable interpretation of the Vesting Clause, one must deem unconvincing or irrelevant both the textual arguments made above and the substantial evidence against a founding consensus that the Vesting Clause embodied unity. Alternatively, a unity proponent could simply disregard the existence of a reasonable alternative reading on the basis that only one reading can be "best," as original meaning is determined on a winner-takes-all basis. Either approach also can be bolstered by the objective component of public meaning originalism. To a public meaning originalist, the objective original meaning of the executive power could embody unity even if not a single member of the founding generation realized this fact.

On the other hand, interpretive modesty counsels that if the unity and anti-unity interpretations both are reasonable, only the thin common core that those interpretations share—that is, that the president must retain at least a supervisory power over all executive officials and activities—ought to be deemed locked in as a matter of original meaning. The unity directive thus would not be imposed categorically as a matter of interpretation. However, unity-based arguments from construction could be made, case-by-case, against particular statutes and practices.

### C. THE ROLE OF PRINCIPLES IN AND PRECEDING THE CONSTRUCTION ZONE

Arguments about constitutional principle also play an important role in debates over unitary executive theory. Unity proponents argue that the constitu-

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*the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 514, 516 (1925); Flaherty, *supra* note 9, at 1765–71, 1776–77.

220. Flaherty, *supra* note 9, at 1791; *see also* sources cited *supra* note 198.

221. *See, e.g.*, Michael P. Riccards, *The Presidency and the Ratification Controversy*, 7 PRESIDENTIAL STUD. Q. 37, 38, 41, 44 (1977) (citing arguments made by Federalists during the ratification process to the effect that the President's powers were not meaningfully greater than those of state governors).

222. *See* KITROSSER, *supra* note 10, at 150–51 and sources cited therein.

223. Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 582.

tional value of accountability bolsters their original meaning arguments and also has independent significance. To the extent that they argue the point of independent significance, they are making something akin to a construction argument. That is, they implicitly argue that, even if the constitutional text alone did not encompass unity as a matter of original meaning, a categorical unity directive should be constructed to serve constitutional principles.

The accountability arguments for unity inadvertently reveal two additional points against determinacy and in favor of interpretive modesty. First, there are serious shortcomings in unity proponents' understandings of founding concerns about accountability. These problems undermine their claim that accountability-based reasoning bolsters their original meaning arguments. This provides yet another basis to doubt that a categorical unity directive is the only plausible interpretation of the Vesting Clause, and to favor the relative caution of interpretive modesty. Second, when the value of accountability is properly understood, it is easy to see how unity can hinder accountability in many cases. The construction zone thus is the proper place to evaluate, case-by-case, when given breaches of unity so undermine accountability that they ought to be invalidated, and when such breaches pass muster and perhaps even further accountability. This point, too, illustrates the relative constitutional protectiveness of interpretive modesty.

In arguing from accountability, unitary executive theorists note that the President is the only nationally elected figure in American politics. If he or she controls the execution of all laws in the United States, then the national electorate has a clear object of blame or reward for such activity. Unity supporters also argue that the founders shared their concerns about accountability. Evidence of such founding concerns, they say, further illuminates the founding decision to create a fully unitary executive.[224]

Yet a fuller consideration of accountability as it relates to the presidency reveals a far more complex historical picture. Although accountability indeed was a central founding preoccupation, conceptions of accountability extended well beyond the ballot-box mechanisms to which unity proponents refer. The founders assumed the need for myriad means to ensure sufficient information flow to make the franchise meaningful. Indeed, although Federalists extolled the accountability and energy of a single President, they coupled such analyses with assurances of the various checks that the President would encounter both within and outside of the executive branch.[225] Among other things, they asserted that the President would be unable to manipulate his subordinates so as to cloak his misdoings.[226]

224. *See, e.g.*, Calabresi, *supra* note 5, at 35–37, 59, 65–66; Prakash, *supra* note 201, at 701, 731–32, 751–52, 783–85.

225. *See* KITROSSER, *supra* note 10, at 152–61 and sources cited therein.

226. *See id.* at 153–55, 159–61 and sources cited therein.

Furthermore, accountability-based arguments about plans for the presidency were extremely fact specific, emphasizing the impact of particular proposals on accountability, rather than supporting a broad unity directive. For example, unity proponents rely partly on the founding decision against annexing an advisory council to the President. In so doing, unity proponents cite founding fears that the President would hide behind his council, blaming it for his own poor decisions and thus defeating accountability. From this, unity proponents leap to the conclusion that the founders wanted the President to fully control all discretionary executive decisions and executive officers.[227] Yet this conclusion massively oversimplifies the nature of the council debate. Council opponents focused on features specific to the proposed council, including its small size and its ability to collude with the President in relative secrecy. Notably, they also feared that the President and his council would seek to appoint executive branch officers who "possess[ed] the necessary insignificance and pliancy to render them the obsequious instruments of [the President's] pleasure."[228] At minimum, the council debate, centering as it did on the specific features of the proposed council, simply did not address whether the executive branch must in all respects be unitary. If anything, the accountability-related concerns articulated in the debate suggest that the founders feared full presidential control over executive branch decision making and officers. Unfettered control could, among other things, foster secretive collusions between the President and those in his thrall.

The divisions among the founders over presidential accountability thus were not about unity versus non-unity as those terms are used today. Rather, the founding disagreements were fact-specific ones over the nuances of particular proposals for the top of the executive branch—that is for the structure of the presidency itself—and over the proposals' predicted effects on meaningful accountability, including the ability of the people to discover misdeeds.

A careful look at accountability in founding-era debates over the presidency thus provides additional ground to argue that unity is, at most, one of two plausible interpretations of the original meaning of the Vesting Clause. This insight further illustrates the virtue of caution, through interpretive modesty, in deriving original meaning. It also takes us further still, to the affirmative value of constitutional construction. Just as the founders recognized that unfettered presidential control might help in some cases and hinder accountability in others, the same is true today. For example, presidential administrations for decades have taken the view that the Constitution demands an unfettered White House power to preclear public testimony or reports offered by anyone who exercises discretionary executive power.[229] Although such control surely has

227. *See id.* at 146 and sources cited therein.

228. THE FEDERALIST NO. 76, at 458 (Alexander Hamilton) (Clinton Rossiter ed.,1961); *see also* KITROSSER, *supra* note 10, at 152–55 and sources cited therein.

229. *See* KITROSSER, *supra* note 10, at 180–81 and sources cited therein.

advantages, it also poses obvious risks to accountability, enabling the White House to quash testimony that may be deeply informative to the public but politically damaging to the President. And as I have detailed elsewhere, there are many other forms of unitary presidential control that can undermine accountability in the administrative state.[230] Challenges to particular breaches of unity on the basis that such breaches hinder constitutional accountability are thus ideal subjects for construction. In the construction zone, courts and other interpreters can engage in functional analyses to determine whether accountability and other constitutional values are helped or hindered by particular breaches of unity. This is a different, considerably more cautious and fine-tuned approach than is an unyielding, categorical unity directive.

## CONCLUSION

Former Defense Secretary Donald Rumsfeld once famously said that "there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know."[231] Too often, constitutional interpreters appear *not* to know what they don't know. This Article is a plea to turn our unknown unknowns into *known* unknowns, and to do a better job of addressing the latter.

To face up to our epistemic limits about original meanings is not to abandon the Constitution or our faith in it. To the contrary, interpretive modesty is a better means to approach interpretive precision than its alternatives. By demanding attention to actual understandings evidence as well as public meaning evidence, it can help us to avoid anachronistic interpretations. And in acknowledging that we lack a principled means to choose the most correct from among plausible interpretations, interpretive modesty can keep us from making arbitrary choices about original meanings. Interpretive modesty also enables us to identify what we *do* know, that is, the range of plausible original meanings for given constitutional terms and any common denominator of thin meaning between them. And in the construction zone, interpretive modesty provides a forum within which constitutional principles and their application can be debated on their own terms, without couching the inquiry as a search for original textual definitions.

Beyond its epistemic advantages, interpretive modesty bears at least two sets of normative advantages. First, there are the advantages that Jack Balkin associates with thin constitutional meanings and a relatively wide construction zone. That is, such a scheme connects us to our constitutional past, present, and future by placing us within the Constitution's framework while enabling us to apply that framework and its underlying principles and purposes to current

230. *See id.* at 180–94 and sources cited therein.

231. Donald H. Rumsfeld, U.S. Sec'y of Def., Department of Defense News Briefing (Feb. 12, 2002) (transcript available at http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636).

conditions. Second, there are democratic legitimacy advantages to be gained through the candor that interpretive modesty facilitates. This point is intuitive, and also is bolstered by social psychology research finding that "exaggerated certitude in judicial opinion writing" fosters public cynicism.[232] Interpretive modesty pushes against these alienating judicial norms. It encourages interpreters to acknowledge the epistemic limits of discerning original meaning. And it supplements those limits with construction that is constitutionally bounded, and that is candid about the discretion that it does entail.

232. *See supra* notes 175–77 and accompanying text.