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The Present Public Meaning Approach to Constitutional Interpretation

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THE PRESENT PUBLIC MEANING APPROACH TO CONSTITUTIONAL INTERPRETATION

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Originalists often respond to critics by claiming that originalism is worth pursuing because there are no feasible alternatives. The thinking goes that even the most scathing critiques of originalism fall flat if critics fail to propose a preferable alternative to originalism. After all, it takes a theory to beat a theory.

This Article proposes such a theory. While most variations of originalism require that the Constitution be interpreted based on its original public meaning, this Article proposes that the Constitution should instead be interpreted based on its present public meaning. This alternative has attracted surprisingly little discussion in the originalist literature until Frederick Schauer's recent article, Unoriginal Textualism. While Schauer devotes much of his article to the claim that the present public meaning approach is theoretically possible, his discussion of why such an approach is preferable to originalism is limited.

This Article picks up where Schauer leaves off and argues that the present public meaning approach is preferable to originalism. The present public meaning approach better constrains judges and promotes transparent and predictable decision-making. It also better achieves goals of democratic legitimacy by accounting for modern views on indeterminate, value-laden language in the Constitution and by accounting for expansions of voting rights since the founding. Additionally, the present public meaning approach avoids significant implementation obstacles and is more likely to lead to desirable results.

This Article does not contend that the present public meaning approach is the best approach to constitutional interpretation. But it is preferable to originalism—avoiding numerous shortcomings of originalist methodology, and achieving many normative

considerations that originalists claim to honor. Originalists must therefore confront the present public meaning approach.

INTRODUCTION

The debate over originalism needs little introduction. Coverage and commentary regarding the notion that the Constitution should be interpreted based on its original public meaning erupted during the presidency of Donald Trump when he appointed Justice Neil Gorsuch to fill Justice Antonin Scalia's former seat on the Supreme Court.[1] Trump's appointment of Justice Brett Kavanaugh to the Supreme Court revived these discussions, although Kavanaugh's decisions and writings did not appear to warrant such discussion.[2] When Trump appointed Justice Amy Coney Barret to take Justice Ruth Bader Ginsburg's former seat, however, originalism once again took center stage as supporters and critics rushed to cite, evaluate, and make predictions based on her academic writing on the subject.[3]

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1. *See, e.g.*, Aaron Blake, *Neil Gorsuch, Antonin Scalia and Originalism, Explained*, WASHINGTON POST (Feb. 1, 2017, 2:30 PM), https: //www.washingtonpost.com/news/the-fix/wp/2017/02/01/neil-gorsuch-antonin-scalia-and-originalism-explained/; Nina Totenberg, *Judge Gorsuch's Originalism Contrasts With Mentor's Pragmatism*, NPR (Feb. 6, 2017, 4:37 AM), https: //www.npr.org/2017/02/06/513331261/judge-gorsuch-s-originalism-philosophy-contrasts-with-mentors-pragmatism; Richard Lempert, *Is Neil Gorsuch an "Originalist"? Impossible*, BROOKINGS (Feb. 22, 2017), https: //www.brookings.edu/blog/fixgov/2017/02/22/is-neil-gorsuch-an-originalist-impossible/.

2. *See* Eric Posner, *Is Brett Kavanaugh An Originalist?*, ERIC POSNER (July 18, 2018), https://ericposner.com/is-brett-kavanaugh-an-originalist/ ("But there is, in fact, no evidence—at least, none I can find—that Kavanaugh considers himself an originalist ... [i]n fact, in his writings, Kavanaugh hardly mentions originalism at all. A textualist, yes. An enthusiastic fan of Justice Scalia, yes. But also a fan of William Rehnquist, no one's idea of an originalist.")

3. *See, e.g.*, Ian Millhiser, *Originalism, Amy Coney Barrett's Approach to the Constitution, Explained*, VOX (Oct. 12, 2020, 8:30 AM), https: //www.vox.com/21497317/originalism-amy-coney-barrett-constitution-supreme-court (taking a critical approach to then-Judge Barrett's support for originalism and prior writings on the subject); Brian Naylor, *Barrett, an Originalist, Says Meaning of Constitution "Doesn't Change Over Time"*, NPR (Oct. 13, 2020, 10:08 AM), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time; Lawrence B. Solum, *Judge Barrett is an Originalist. Should We Be Afraid?*, L.A. TIMES (Oct. 14, 2020, 1:31 PM), https://www.latimes.com/opinion/story/2020-10-14/amy-coney-barrett-supreme-court-originalism-conservative (taking a positive view of then-Judge Barrett's originalist philosophy: "[t]he core of originalism is the rule of law. And that is not something we should fear").

Originalism retained its prominence after Joseph Biden took office, with then-nominee Ketanji Brown Jackson stating that she would take an originalist approach to constitutional interpretation.[4]

Modern political sparring over judges' interpretive methodologies and the implications of interpreting the Constitution based on its original meaning reflect earlier debates and controversies dating back to the appointment of Judge Robert Bork, a Reagan nominee whose contentious confirmation hearing and support for originalism is reflected in modern debates over Supreme Court nominations.[5] On a separate level, legal academics have written volumes on the theories and issues underlying these debates. The scholarly dimension of these disputes includes arguments among originalists over how originalist theories should be formulated and debates between originalists and their critics over whether originalism is a proper method for interpreting the Constitution.[6]

Most modern theories of originalism incorporate the notion that the Constitution should be interpreted based on its original meaning and often, more specifically, its original public meaning.[7] For ease of reference, this Article will refer to this general form of originalism as "original public meaning" originalism.

A common line that most originalists employ against their critics is that "it takes a theory to beat a theory."[8] Justice Scalia's writing on the topic is a prominent example of the tactic:

Apart from the frailty of its theoretical underpinning, nonoriginalism confronts a practical difficulty reminiscent of the

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4. *See* Adam Liptak, Justice Jackson Joins the Supreme Court, and the Debate Over Originalism, N.Y. Times (Oct. 10, 2022), https://www.nytimes.com/2022/10/10/us/politics/jackson-alito-kagan-supreme-court-originalism.html.

5. *See* Sarah Pruitt, *How Robert Bork's Failed Nomination Led to a Changed Supreme Court*, HISTORY (Oct. 28, 2018), https://www.history.com/news/robert-bork-ronald-reagan-supreme-court-nominations; Nina Totenberg, *Robert Bork's Supreme Court Nomination "Changed Everything, Maybe Forever"*, NPR (Dec. 19, 2012, 4:33 PM), https://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever.

6. *See* Part II.

7. *See* LAWRENCE B. SOLUM, WE ARE ALL ORIGINALISTS NOW, CORNELL UNIVERSITY PRESS 2-3, 10 (2011) (describing the view that the original meaning of the constitution is the original public meaning of the text as the "mainstream" of originalist theory); *see also* ANTONIN SCALIA, COMMON-LAW COURTS IN A CIVIL-LAW SYSTEM: THE ROLE OF UNITED STATES FEDERAL COURTS IN INTERPRETING THE CONSTITUTION AND LAWS 3, 38–39 (Amy Gutmann ed., 1997) (arguing that originalism is concerned with determining the original meaning of the Constitution, whether or not it is derived from founders' intents or public meaning, and juxtaposing this with the "Living Constitution" approach, which he claims is based around the current meaning of the Constitution).

8. Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 617 (1999).

truism of elective politics that "You can't beat somebody with nobody." It is not enough to demonstrate that the other fellow's candidate (originalism) is no good; one must also agree upon another candidate to replace him.[9]

This Article supplies the candidate. Rather than interpreting the Constitution based on its original public meaning, this Article proposes that the Constitution be interpreted based on its present public meaning.

Both the original public meaning approach and the present public meaning approach to interpretation prioritize the text of the Constitution and its amendments.[10] Both theories adopt what Lawrence Solum describes as the "constraint principle," the notion that the meaning of the Constitution should constrain actors who interpret and apply the Constitution.[11] Both theories also seek to determine the "public meaning" of the Constitution—that is, how the Constitution's terms would be read by a member of the general public.[12]

Where the theories differ is on what Solum refers to as the "Fixation Thesis"—whether the meaning of the Constitution is fixed at the time of its ratification.[13] Solum (and most, if not all, originalists) argue that the meaning of the Constitution is fixed at the time of its ratification.[14] The present public meaning approach rejects this thesis, holding that judges, attorneys, political actors, and the general public should interpret the constitution based on present public meaning.

The present public meaning approach may seem simple or obvious, but it has received little attention as an alternative theory to originalism. A few legal scholars have suggested it as a potential interpretive approach.[15] However, it hasn't been until a recent article by Frederick Schauer that more scholars have started to pay attention

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9. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 855 (1989).
10. SOLUM, *supra* note 7, at 2–3.
11. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013).
12. *Id.* at 457.
13. *See id.* at 456.
14. *Id.*
15. *See* Tom W. Bell, *The Constitution as if Consent Mattered*, 16 CHAP. L. REV. 269, 278 (2013); Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1106 (2012); *see also infra* Section III.A (detailing Levin and Bell's contributions to the present public meaning approach).

to this approach as a feasible alternative to originalist theories.[16] Beyond these limited writings, few have suggested the present public meaning approach as a viable alternative to originalism.

This Article takes on that task. Picking up where Schauer leaves off, this Article moves beyond whether the present public meaning approach is theoretically feasible and argues that it is normatively preferable to the original public meaning approach. After a brief survey of originalism and its development in Part II and a discussion of the limited literature on the present public meaning approach in Part III, Part IV of this Article isolates various normative considerations that are often raised in debates between potential theories. I compare the present public meaning approach with the original public meaning approach under the rubric of each separate normative consideration: constraint, predictability, democratic legitimacy, transparency, feasibility of implementation, desirable results, and positivist considerations.

I conclude that, for the most part, the present public meaning approach is preferable to the original public meaning approach under each of these normative criteria. The present public meaning approach tends to be a more transparent approach to constitutional interpretation—more likely to be recognized and applied properly by Justices, judges, and attorneys, as well as those outside the legal sphere. As a result, the present public meaning approach tends to better constrain judges and better achieves democratic goals. It is more feasible for Justices and judges to implement when compared to the intensive historic analysis required for proper originalist methodology.[17] Additionally, it is more likely to achieve results that are desirable for present-day society by incorporating modern norms and meanings.[18] Part V addresses a potential objection that the Constitution's text itself mandates an original public meaning approach to interpretation and concludes that the argument is unsupported.

I. ORIGINALISM: A BRIEF BACKGROUND

16. *See* Frederick Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825, 826–30 (2022); Michael Ramsey, *The Year in Review: Originalism Articles of 2021 (Part 2) – The Top 25 Most Downloaded New Papers*, THE ORIGINALISM BLOG (Jan. 10, 2022), https://originalismblog.typepad.com/the-originalism-blog/2022/01/the-year-in-review-originalism-articles-of-2021-part-2-the-top-25-most-downloaded-new-papersmichael-.html (listing Schauer's article as the fifteenth most downloaded article on originalism in 2021).

17. *See* Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1649 (2017).

18. *See infra* Part IV.

While there are numerous formulations and approaches to originalism, most of its advocates generally argue that it requires that the Constitution be interpreted based on its original public meaning. Lawrence Solum provides a bit more detail on originalism's "core ideas":

The first of these ideas (the "Fixation Thesis") is that the original meaning ("communicative content") of the constitutional text is fixed at the time each provision is framed and ratified. The second idea (the "Constraint Principle") is that constitutional actors (e.g. judges, officials, and citizens) ought to be constrained by the original meaning when they engage in constitutional practice (paradigmatically, deciding constitutional cases, but also including constitutional decision-making outside the courts by officials and citizens).[19] Solum argues that the "view that originalism is a family of theories organized around" these two ideas is "widely accepted."[20]

It hasn't always been this way. Early theories of originalism tended to focus more on the original intentions of the Constitution's framers.[21] While he was Attorney General in the Reagan Administration, Edwin Meese was a prominent advocate for adopting "a jurisprudence seriously aimed at the explication of original intention" to push back against the "radical egalitarianism and expansive civil libertarianism of the Warren Court."[22] Before Meese's advocacy of original intent originalism, Raoul Berger also argued that the "'original intention' of the framers" should bind the Supreme Court, which he accused of constitutional revisionism.[23]

Interpreting the Constitution based on the original intent of the founders was not necessarily a new idea when its Reagan-era proponents began pushing for it. Johnathan O'Neill notes that interpreters of the Constitution applied this approach in the

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19. Solum, *supra* note 11, at 456.

20. Solum, *supra* note 11, at 456 n.7 (citing various examples of other originalist scholars recognizing this point).

21. Edwin Meese III, Speech Before the American Bar Association, 2 (July 9, 1985) (available at https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf) (describing Alexander Hamilton and James Madison's intentions for the role of the Constitution).

22. Edwin Meese III, Speech Before the American Bar Association 6–7 (July 9, 1985) (available at https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf).

23. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 3–4 (2d ed. 1997).

eighteenth and nineteenth centuries.[24] He further notes that this approach dates back to Blackstone, who advised in his commentaries that discerning the meaning of a particular law often requires looking at the intentions of the legislators who enacted it.[25] The text was one means of determining these intentions, but so was the spirit of the law or the circumstances that motivated the enactment of the law.[26]

As time went on, originalists shifted from attempting to determine the original intentions of the founders to focusing on the original public meaning of the Constitution's text. Justice Scalia was an influential figure in this transition, urging originalists to seek out the original meaning of the Constitution.[27] This "original public meaning" originalism, or some version of the theory, is now the dominant form of constitutional interpretation urged by originalist scholars.[28] Some originalist scholars still advocate for an original intent approach to constitutional interpretation, but most adopt a version of the theory that seeks to uncover the original public meaning of the text, rather than what the various framers intended the Constitution to mean.[29] According to the original public meaning version of originalism, "the meaning of a constitutional provision is the meaning the public that ratified the Constitution would have understood it to have."[30] Interpreters aren't required to determine and unify the varied intentions of the Constitution's framers or those who ratified the constitution—instead original public meaning originalism requires interpreters to determine what members of the public understood the Constitution's provisions to mean at the time of ratification.[31]

While determining the original public meaning of the Constitution's text remains a central tenet of most originalist

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24. JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 15 (Sanford Levinson et al. eds., 2005).

25. *Id.* at 14 (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1764–69 (1st ed. 2009).

26. *Id.* (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1764–69 (1st ed. 2009).

27. ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK, OFFICE OF LEGAL POLICY 106 (1987) (quoting Justice Antonin Scalia's Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. on June 14, 1986).

28. *See, e.g.*, Ilya Somin, *Originalism and Political Ignorance*, 97 MINN. L. REV. 625, 625–26 (2012) (surveying various scholars who support the original public meaning approach and suggesting that it "may now be the most popular version of constitutional theory in the legal academy").

29. *See* ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 15–17 (2017) (describing the evolution of originalist theory from original intent originalism to original public meaning originalism).

30 *Id.* at 16.

31 *Id.* at 16–17.

theories, there are numerous versions of originalism that generate debate among originalists. Lawrence Solum, mentioned above, argues for an interpretive approach that distinguishes determining the linguistic meaning of the text, and applying it to particular factual circumstances through a process that he calls "construction."[32] Other originalist scholars apply a similar framework but reach vastly different conclusions. Randy Barnett and Evan Bernick, for example, accept the distinction between interpretation and construction but argue that the process of constitutional construction can be guided and constrained by looking to the original spirit or function of the constitutional provisions.[33] Jack Balkin argues for an approach in which the original meaning is treated as broad and minimally constraining and therefore gives future generations after the founders' broad leeway in applying the Constitution's text to changing factual circumstances.[34] John McGinnis and Michael Rappaport take issue with the notion that constitutional interpretation requires construction, arguing instead for an "original methods" originalism in which modern interpreters employ the "interpretive rules that the enactors expected would be employed to understand their words."[35]

Despite disagreements between originalists over what variety of originalism is proper, almost all modern originalists argue that their approach to constitutional interpretation is preferable to "living constitutionalism." What "living constitutionalism" means is anyone's guess. Frequently, the phrase refers to an alternative to originalism that is defined by little more than the permissiveness it grants to interpreters.[36] Lawrence Solum makes a thorough effort to categorize and describe variations of living constitutionalism.[37] Versions of alternative theories include constitutional pluralism, in which multiple interpretive theories guide practical constitutional

32. Solum, *supra* note 11, at 457.

33. *See* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 1–3 (2018).

34. *See generally* JACK M. BALKIN, LIVING ORIGINALISM 27 (2011).

35. *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 752 (2009).

36. See, e.g., Randy E. Barnett, *Common-Good Constitutionalism Reveals the Dangers of Any Non-Originalist Approach to the Constitution*, ATLANTIC, Apr. 3, 2020 https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/ (characterizing Adrian Vermeule's "common good constitutionalism" as a rejection of the Constitution's text and pursuit of conservative policy goals as "nothing but conservative living constitutionalism").

37. Lawrence B. Solum, *Originalism versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1271–76 (2019).

interpretation.[38] Another option is common law constitutionalism, in which the meaning of the constitution is determined through common law or a precedent-based process.[39] Solum even recognizes the beginnings of the present public meaning approach set forth in this Article, describing it as an approach that accepts the constraint principle—the notion that constitutional actors ought to be constrained by the meaning of the Constitution—but rejects the fixation thesis—the meaning of the Constitution is fixed at the time of ratification.[40] Solum describes this approach as "Contemporary Ratification Theory," a label that I will not adopt because, among other reasons, there is no need to assume that ratification takes place in modern times if the fixation thesis is being rejected.[41]

This Article will not sift through the varieties of originalism or living constitutionalism theories. Instead, I focus on the present public meaning approach to constitutional interpretation and compare it with the alternative approach to determining the original public meaning. While there are a variety of originalist theories, the task of determining the original public meaning is a key component of most mainstream modern originalist theories.[42] For purposes of this Article, understanding originalists' focus on determining original public meaning is sufficient. It is the public meaning at the time of the founding that will be contrasted with the present public meaning in determining which interpretive approach is preferable.

II. PRIOR THEORIZING REGARDING THE PRESENT PUBLIC MEANING APPROACH

For a simple alternative to original public meaning originalism, the literature on the present public meaning approach is surprisingly brief. This Section first addresses Hillel Levin's 2012 article arguing that statutes ought to be interpreted based on their contemporary meaning.[43] While Levin does not address issues of constitutional

38. *Id.* at 1271 (for an example of one such approach, *see* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 79 (2001)).

39 Solum, *supra* note 37, at 1272 (for a more in-depth discussion of this approach, *see* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

40. Solum, *supra* note 37, at 1275–76.

41. Solum, *supra* note 37, at 1275.

42. *See, e.g.*, Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, CONSTITUTION CENTER (accessed December 28, 2021) https://constitutioncenter.org/interactive-constitution/white-papers/on-originalism-in-constitutional-interpretation (asserting that "[o]riginalists believe that the constitutional text ought to be given the original public meaning that it would have had at the time that it became law" and that this meaning exists independent of the Framers' intentions).

43. *See* Levin, *supra* note 15, at 1105.

interpretation, the considerations and arguments made in his article are relevant to interpreting constitutional provisions.[44] This Section then turns to a 2013 article by Tom Bell in which he proposes, as part of a broader argument, that the Constitution be read according to its "present, plain, public meaning."[45]

Next, this Section addresses Frederick Schauer's recent article in favor of "Contemporary Meaning Textualism," a theory that is mostly in line with the present public meaning approach that this Article advocates.[46] I describe Schauer's theory in detail, as well as the reasons he sets forth for accepting his theory. As will become apparent, Schauer's primary focus is on whether the present public meaning approach is theoretically possible rather than justifiable, and he largely leaves open the task of setting forth a systematic set of normative arguments in favor of the present public meaning approach to interpretation (although he does make several important points about constraint).[47] Section IV of this Article takes on that task.

A. *Steps Toward the Present Public Meaning Approach*

As Tom Bell notes, the notion that the Constitution be read based on its present public meaning may "strike legal academics as too simple-minded to guide the subtleties of Constitutional jurisprudence."[48] This may explain the lack of serious discussion over the present public meaning approach to constitutional interpretation.

Indeed, the first article suggesting an approach similar to the present public meaning theory of interpretation does not address constitutional interpretation at all. Hillel Levin, writing in 2012, proposes that "judges interpreting ambiguous statutes should be constrained by the understanding and expectations of the contemporary public as to the law's meaning and application."[49] Levin notes that "as a descriptive matter . . . we often look to communal behavior for guidance on how we ought, or must behave," and that such an approach seems just—as it would seem unfair for common behavior in a particular community to suddenly become subject to penalties simply based on the preferences of a new law enforcement

44. *See generally* Levin, *supra* note 15 (discussing considerations and arguments relevant in interpreting constitutional provisions but lacking actual discussion of issues of constitutional interpretation).
45. *See* Bell, *supra* note 15, at 275.
46. Schauer, *supra* note 16, at 830.
47. *Id.* at 840–41.
48. Bell, *supra* note 15, at 275.
49. Levin, *supra* note 15, at 1105.

officer.[50] Levin argues that interpreting the law based on its contemporary meaning renders the law more predictable to those who are required to follow the law.[51] Additionally, this approach avoids "an unhealthy stasis," through permitting "incremental change by respecting the ability of officials to nudge the public understanding of the law in new directions."[52]

Levin notes that interpretations of the law must remain reasonable and that, "[w]here the statute is ambiguous, however, a pattern of behavior that contravenes the unambiguous statutory language cannot be said to represent a reasonable understanding of what the law requires."[53] Confronting an objection that a contemporary meaning approach robs statutes of their democratic legitimacy, Levin argues that lawmaking tends to prioritize certain interest groups over others, suggesting that the claimed democratic legitimacy of many laws may not exist to the extent potential critics may claim.[54] Levin further argues that the contemporary meaning approach is democratic, as it accounts for "the apparent understanding of the statute adopted by the community of people and entities represented by the state[.]"[55] Levin notes that even if some democratic legitimacy is sacrificed by this approach, "a different set of rule-of-law benefits" is achieved, including "stability, predictability, [and] not upsetting settled expectations and reliance interests."[56]

While Levin discusses the interpretation of statutes rather than constitutional provisions, the normative considerations in play are like those cited in debates over theories of constitutional interpretation. Concerns over democratic legitimacy, weighing these concerns against predictability and reliance interests, and focusing on the need for a legal regime that may be understood, followed, and implemented by public officials and the public mirrors debates for and against originalism.[57]

Tom Bell takes Levin's arguments a step further by proposing that the Constitution should be read according to its present public meaning.[58] This is part of his broader argument that government and the courts should be structured, and that law should be interpreted,

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50. *Id.* at 1116.
51. *Id.* at 1118–19.
52. *Id.* at 1120.
53. *Id.* at 1131.
54. *Id.* at 1133–34.
55. *Id.* at 1135.
56. *Id.*
57. Bell, *supra* note 15, at 286 (discussing why the "legal meaning of the Constitution" should comport with public expectations and provide reliable expectations for a constitutional government).
58. Bell, *supra* note 15, at 275.

in a manner that "maximize[s] the consent of the governed" to the laws by which they are bound.[59] With this maximization of consent as Bell's overarching concern, reading the Constitution based on its present public meaning makes sense, as people who are presently governed by laws and guaranteed particular rights under the Constitution ought to interpret these laws and provisions on their own terms—that is, based on their present interpretations.[60] Bell argues that the Constitution should be interpreted in a manner similar to a contract to which people in the present are parties.[61] Bell argues that interpreting the Constitution in this manner is preferable to originalism because "it is not so evident that originalism offers the best way to maximize liberty."[62] While Bell does not engage in a systematic, normative analysis of his proposed interpretive method, these claims suggest that Bell's primary considerations are desirable results (which he takes to be maximization of liberty) and democratic legitimacy—at least to the extent that that Bell's concern with consenting to a system of laws overlaps with the normative value of democratic legitimacy.[63] This approach, Bell argues, "offers all the textual fidelity of originalism without getting stuck in the imagined understandings from long, long ago."[64]

Bell's preoccupation with consent to laws and Constitutional provisions leads him in some unconventional directions, which infers that there may be limits to pursuing normative goals to their extreme ends. For example, Bell suggests that "[w]e should explore using citizen courts as an alternative to courts where only federal employees do the judging," implying that proceedings before federal courts are analogous to being a party to a contract of adhesion.[65] Bell proposes something akin to certain forms of modern commercial arbitration in which three adjudicators decide disputes—one who is chosen by one party, the other by the other party, and a third by those two adjudicators.[66] He does not specify the range of cases that should be submitted to such citizen courts—but he does recommend that these courts should oversee "disputes between the federal government and those of us subjected to its authority." [67] This implies that Bell is

59. *Id.* at 271–72.
60. *Id.* at 275.
61. *Id.*
62. *Id.* at 277.
63. *See generally* Bell, *supra* note 15.
64. *Id.* at 278.
65. *Id.* at 276.
66. *Id.* at 276–77.
67. *Id.* at 276.

arguing for any case implicating the limitation of individual rights by the government—including criminal cases—ought to be converted into a three-arbitrator citizen court proceeding. How such an approach maintains "textual fidelity" to the Constitution remains unexplained.

Despite these unconventional suggestions, Bell's article contains the beginnings of arguments in favor of the present public meaning approach, as well as responses to potential objections. For example, Bell contemplates originalists' concerns with "linguistic drift," the notion that the meaning of words changes over time and that such changes will result in shifting of the constitutional meaning as a result of external linguistic trends and forces.[68] Many originalists cite linguistic drift as a basis for requiring the fixation of the Constitution's meaning at a certain point rather than permitting the constantly changing reference point that the present public meaning approach entails.[69] Bell argues that the risks of linguistic drift can be minimized by reading particular terms and phrases of the Constitution in the context of the document as a whole.[70] Article IV, Section 4 states that

> The United States shall guarantee to every state in this Union a Republican Form of Government and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the legislature cannot be convened) against domestic Violence.[71]

Bell argues that, when read in context, Article IV, Section 4's reference to "domestic Violence" cannot reasonably be understood as referring to violence between partners or family members, as it

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68. *Id.* at 283–84.

69. *See Confirmation Hearing on the Nomination of the Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States*, 115th Cong. 730 (2017) (statement of Lawrence B. Solum, Professor, Geo. Univ. L. Ctr.) (noting that the meaning of terms and phrases like "domestic violence" change over time and that such terms should be understood as they were at the time the Constitution was written, as linguistic drift "is not a valid method of constitutional amendment"); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 23–24 (2015) [hereinafter *The Fixation Thesis*] (describing additional examples of linguistic drift); *see also* BALKIN, *supra* note 34, at 36–37 (noting "domestic violence" as an example of linguistic drift and arguing that the Constitution represents a plan to be implemented by America's government and society, and that permitting the adoption of different meanings due to linguistic drift will result in the implementation of a different plan).

70. Bell, *supra* note 15, at 284.

71. U.S. CONST. art. IV, § 4.

addresses a state-level request for assistance and is situated alongside terms like "Invasion," which indicates that "domestic Violence" refers to unrest arising from within a state, rather than from beyond the state's borders.[72] That this term appears in the context of a guarantee for a republican form of government suggests that the level of violence must be widespread or of a significant enough threat to pose a risk to the state's republican form of government.[73] All of this ameliorates concern that linguistic drift will prompt modern day readers to read Article IV, Section 4 as permitting states to request federal protection from violence between partners or family members.[74]

Bell and Levin's articles take several steps in the direction of a present public meaning approach to constitutional interpretation, although both are limited in various senses. Levin's article is not directly on point because it addresses statutory interpretation rather than constitutional interpretation.[75] But it does argue for interpreting statutes—some of which may be quite old—based on their present meaning.[76] As the remainder of this Article will demonstrate, some of Levin's normative arguments for taking this interpretive approach apply with equal (and sometimes greater) force to arguments over how the Constitution should be interpreted.

Bell advocates for a present public meaning approach to interpreting the constitution and provides several arguments why concerns with this approach—such as linguistic drift—are overblown.[77] Despite this, his arguments for this approach are overshadowed—and often eclipsed—by his greater goal of maximizing the consent of the governed.[78] The present public meaning approach to constitutional interpretation arises as something of a side effect of this overt focus, which ultimately results in several rather extreme conclusions.[79] Still, these articles lay a useful foundation for more

72. *See* Bell, *supra* note 15, at 284.
73. *Id.*
74. *Id.*
75. *See generally* Levin, *supra* note 15.
76. *Id.* at 1115.
77. Bell, *supra* note 15, at 284–85.
78. *Id.* at 272.
79. *See, e.g.*, *id.* at 276–77 (arguing that, instead of federal judges, "citizen courts" or three-judge arbitration panels should be employed in any dispute between the government and "those of us subjected to authority," including, presumably, criminal cases).

direct, systematic treatment of the present public meaning approach, to which this Article now turns.[80]

B. *Frederick Schauer's "Contemporary Meaning Textualism"*

Frederick Schauer's recent article, *Unoriginal Textualism*, is the most detailed treatment of the present public meaning approach to date.[81] Schauer notes that when determining the meaning of statutes, judges and attorneys frequently interpret those statutes "according to the plain or public meaning of their language now and not at the time of enactment."[82] Schauer suggests that a similar approach could be taken with constitutional interpretation and labels the approach "contemporary meaning textualism."[83] Under this approach, the text is "genuinely authoritative and constraining," but "treats the meaning of the text as the meaning at the time of interpretation" rather than the meaning at the time of enactment or ratification.[84]

Schauer first addresses potential concerns about whether the intention of the Constitution's drafters needs to be considered to have a coherent theory of interpretation in the first place. If this is the case, the present public meaning approach runs into problems. But this does not seem to be much of an obstacle, as the dominant versions of contemporary originalist theories tend to look to public meaning, rather than the intentions of the drafters.[85]

Schauer then addresses potential objections that the context of a word or phrase in the Constitution may be necessary to uncover its meaning.[86] While Schauer recognizes that historic inquiries may help readers determine a "full" or "full-er" meaning of words or phrases, the text without these inquiries still has at least some meaning—albeit a potentially sparse meaning.[87] All of this demonstrates that

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80. Cary Franklin's article, "Living Textualism," deserves a brief mention as well, as Franklin argues that modern moral and political views tend to pervade a textualist approach to interpretation despite judicial claims to the contrary. *See generally* Cary Franklin, *Living Textualism*, 2020 SUP. CT. L. REV. 119 (2020). Unlike Levin and Bell, Franklin employs this approach in the context of critiquing textualism rather than advancing it as a theory of interpretation. *Id.* Still, Franklin's approach touches on similar themes and suggests that a present public meaning approach may well be inevitable, even if judges and justices claim to take a different approach. *See id.* at 201-02.

81. *See generally* Schauer, *supra* note 16.

82. *Id.* at 829.

83. *Id.* at 830.

84. *Id.* at 838.

85. *See id.* at 840–41.

86. *Id.* at 842–43.

87. *Id.* at 844–45.

"textualism not tethered to original public meaning is, at the very least, possible."[88]

While Schauer does not engage in a systematic evaluation of the normative considerations discussed below, he does address the notion of constraint. Schauer recognizes that one significant function of a constitution is to constrain the actions of government officials.[89] Schauer finds that the Constitution constrains officials most effectively when its clauses are clear—noting that presidents tend not to run for third terms, the vote typically is not denied to those who are nineteen years old, and presidential pardons are rarely challenged.[90] This is in contrast to other constitutional provisions that are operationalized through opinions of the Supreme Court, such as the First Amendment (and whether it invalidates legislation prohibiting flag-burning) and the Fifth Amendment (and whether it requires a Miranda warning to suspects in custody).[91] Schauer argues that the Constitution should be treated to speak "not only to judges but also directly to those whose behavior the Constitution purports to control and constrain" like the President, police officers, members of Congress, and other officials at various levels of federal and state government.[92] For this audience, the constraint function of the Constitution is best served if its language is understood to mean what it "means *now* to its addressees."[93]

Schauer recognizes that changes in language may result in changing meanings to constitutional provisions over time, but suggests that these instances are the exception rather than the rule and "will turn out to be inconsequential."[94] Examples he cites include the meaning of "twenty dollars" in the Seventh Amendment and freedom of the press in the context of the First Amendment.[95] He also recognizes that the present public meaning approach will not lead to clear conclusions in all cases, but argues that "these indeterminacies exist in the text as originally written" and that similar challenges exist in determining the original public meaning of those provisions.[96]

Schauer briefly suggests other normative reasons for preferring a present public meaning approach. He notes that this interpretive

88. *Id.* at 846.
89. *Id.* at 848–49.
90. *Id.* at 853.
91. *Id.* at 851.
92. *Id.* at 857.
93. *Id.* at 858.
94. *Id.* at 861.
95. *Id.* at 860–61.
96. *Id.* at 862.

approach will require judges to act as judges rather than "amateur historians" and that this is a particular benefit for judges who do not have the resources of Supreme Court Justices.[97] The present public meaning of the Constitution also provides more effective guidance to non-judges, including officials "whose actions are genuinely the direct object of constitutional constraint."[98] Schauer notes that:

> [t]he foregoing focus on what we might call direct—i.e., not mediated by judges—constitutional constraint highlights the major virtue of a contemporary public meaning textualism. More than a focus on historical meaning that requires the interpreter to engage in historical inquiry, a focus on contemporary meaning requires the interpreter only to do what the subjects of law—and, indeed, the interpreters and enforcers of law—do on a routine basis.[99]

Schauer's discussion of the present public meaning approach to constitutional interpretation will likely place this method on the scholarly map. Still, Schauer's decision to focus on whether the present public meaning approach is a possible interpretive method, and to discuss how this approach constrains and guides government officials results in a somewhat limited discussion of why the present public meaning approach is more desirable than originalism. The remainder of this Article engages in a more exhaustive discussion of whether the present public meaning approach is normatively desirable—and does so by listing them and proceeding through them seriatim, rather than through a mixing and merging approach that is characteristic of most originalist literature.

III. COMPARING THE PRESENT PUBLIC MEANING APPROACH WITH ORIGINALISM

It isn't enough for originalists or other scholars to present a theory of interpretation—there must be some reasons why a particular interpretive theory ought to be accepted. Debates between originalists and living constitutionalists, as well as between originalists themselves, employ various normative considerations as criteria against which interpretive theories are judged. Volumes have been written on these normative criteria, including what normative reasons are worth considering, which theories measure up under

97. *See* Schauer, *supra* note 16, at 863–64.
98. *Id.* at 864.
99. *Id.* at 864–65.

various criteria, and whether reasons for accepting a theory outweigh other reasons that may urge against accepting the theory.[100] No one normative consideration dominates in the debate over whether to accept originalism or an alternate theory of interpretation.[101]

While many who argue for a particular theory appeal to one or more normative considerations, they are often presented in a mishmash fashion or are selected based on their fit for the needs of the moment. This Article avoids these approaches and instead, presents normative considerations in an organized and systemic manner to adjudicate between the present public meaning approach and the original public meaning approach to constitutional interpretation. Isolating normative considerations and applying them to theories leads to a more clear and direct evaluation of theories and avoids a muddled discussion that merges or ignores relevant considerations.

This Article addresses the following non-exhaustive list of normative considerations when weighing whether to accept the present public meaning approach over the original public meaning approach:

- Constraint: whether the theory will prevent the policy preferences of judges from determining the outcomes of their decisions.
- Predictability: whether the theory will lead to consistent results that judges and the public will be able to predict. Additionally, this factor considers whether future results in cases that have not yet arisen may be accurately predicted based on the interpretation of the Constitution under a particular theory.
- Democratic legitimacy: whether a theory of interpretation respects democratic processes, including those that gave rise to the Constitution and its amendments, the processes in place for changing laws and amending the constitution, and the will of the people at the present time.
- Transparency: whether an interpretive theory and its implementation can be clearly explained to and evaluated by other

100. *See, e.g.*, Bell, *supra* note 15, at 286–88 (discussing normative considerations in a consensualist approach to interpretation).

101. *See* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 396 (2013) [hereinafter Whittington, *Originalism*] ("[p]roponents of originalism have in recent years developed a variety of alternative justifications [other than restraint] for the theory, and at least for the moment these alternatives have not yet been reconciled with one another or reduced to a common core").

judges, attorneys, and—perhaps most importantly—actors outside the judicial sphere, including government officials and the public.

- Implementation: whether an interpretive theory may be consistently and conveniently applied by judges and attorneys, particularly considering time constraints and the knowledge levels of those actors expected to apply the theory.
- Desirable Results: whether an interpretive theory tends to lead to results that have a greater positive impact on society in general.
- Positivist Considerations: whether the considered theory is, in fact, our law.

Many of these considerations are drawn from existing debates over originalism and other theories of interpreting the Constitution. Some of these considerations have been discussed at greater length than others. This Section addresses each of these normative considerations, first by including some of the key literature on each of them and describing how they have been employed in debates over interpretive theories. Next, this Section evaluates the original public meaning approach and the present public meaning approach under each of these normative considerations to determine which theory is preferable.

A. *Constraint*

1. Constraint as a Normative Consideration for Interpretive Theories

For originalism in particular, constraint is one of the most longstanding and popular normative reasons cited for adopting it as a theory of constitutional interpretation.[102] Modern originalist theory stems in significant part from a reaction to the Warren Court—the decisions of which were criticized by political conservatives as examples of judicial overreach.[103] Such overreach, the argument goes, consists of unconstrained judges and Justices who may decide cases

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102. *See* Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 578 (2011) ("[o]riginalism is often described and justified as a means of preventing modern courts from imposing their moral preferences on cases").

103. *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 545, 554–56 (2006) (noting originalists' critique of the Warren Court and arguing that the Reagan Administration's "use of originalism marked, and was meant to mark, a set of distinctively conservative objections to the liberal precedents of the Warren Court"); *see also* Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 191 (2007) (describing popular and political criticism of the Warren Court).

before them based on little more than their political and policy preferences.[104]

Supporters of living constitutional theories also recognize constraint as a normative consideration when seeking to justify their theories. In arguing for a common law constitutional approach based on reasoning from precedents, David Strauss recognizes the need to avoid "human manipulation" of the Constitution's meaning, but argues that the common law system of analogizing to precedents and other traditions of this system "allow room for adaptation and change, but only within certain limits and only in ways that are rooted in the past."[105] In arguing that the common law approach constrains judges from deciding cases based on personal preferences, Strauss recognizes the importance of constraint as a normative goal of interpretive theories.[106]

Other scholars argue that constraint is of little concern for originalists when compared with other normative considerations like democratic legitimacy. Keith Whittington, for example, asserts that "[l]imiting judicial discretion has rarely been offered as a compelling justification for the adoption of originalism in the recent literature."[107] Other self-proclaimed originalists have adopted theories of originalism that promote interpretations of constitutional text that provide minimal restraint, so as to allow for broad discretion in interpreting the text to account for social and political changes that have occurred since ratification.[108] Jack Balkin argues that constraint considerations may not be all that necessary for a theory of constitutional interpretation, as constraint "comes from institutional features of the political and legal system" rather than from the interpretation theories themselves.[109] Accordingly, he argues against prioritizing constraint, noting that such an approach is contrary to the

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104. *See, e.g.*, BERGER, *supra* note 23, at 465 ("[i]t should not tolerate the spectacle of a Court that pretends to apply constitutional mandates while in fact revising them in accord with the preference of a majority of the Justices who seek to impose *their* will on the nation").

105. STRAUSS, *supra* note 39, at 2–3.

106. *Id.*

107. Whittington, *Originalism*, *supra* note 101, at 392. *But see* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714–15 (2011) (providing a more critical view of the motivations behind modern originalist theories' avoidance of constraint as a justification and arguing that "[o]riginalism has sold its soul to gain respect and adherents" by sacrificing its original promise of judicial constraint).

108. The most prominent example of such an approach is Jack Balkin's "living originalism" approach to constitutional interpretation. *See generally* BALKIN, *supra* note 27.

109. BALKIN, *supra* note 34, at 19.

"vague and abstract language of principles" set forth throughout the Constitution and its amendments.[110] The shift from constraint as the all-encompassing normative consideration for accepting originalism may be explained, in part, by the general trend away from original intent originalism to original public meaning originalism—as the latter theory is less determinate and may permit broad initial readings of the text which then can be applied in a flexible manner to factual circumstances.[111]

Despite some scattered claims against the importance of constraint by self-proclaimed originalists, these calls against prioritizing constraint do not amount to outright denials or rejections of constraint as a normative consideration for theories of interpretation.[112] Additionally, many originalists continue to cite constraint as a feature of originalism or a reason for adopting originalism as a theory of interpretation. [113] The outright denial of constraint as an important normative consideration appears to be an outlier view, at least for originalist scholars.[114]

Even if constraint were de-emphasized in academic discussion of originalism, it would be a mistake to count it out without considering its treatment in the political sphere. Political discussions, for the most part, do not involve the precision or detail of academic discussions of constitutional theory. But concerns over "judge-made law," "judicial activism," "legislating from the bench" and other vaguely-defined derogatory terms are frequently employed as the alternative to originalist interpretation in the political context.[115] Other political

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110. BALKIN, *supra* note 34, at 25.

111. *See* William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2221–22 (2018).

112. *Id.*

113. *See* Lawrence B. Solum, *supra* note 11, at 453, 456 (2013) (continuing to press the claim that constraint is a common feature of all originalist theories); *see also* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 781 (manuscript at 2022) ("[t]he [originalist] theory comes in many flavors, but each flavor aims, in its own way, to preserve a preexisting Constitution against ill-disguised attempts at revision").

114. *See* John W. Compton, *What is Originalism Good For?*, 50 TULSA L. REV. 427, 434–35 (2015) ("[i]f there is a point on which virtually all originalists agree, it is that originalism constrains judicial behavior . . . [f]or many well-known originalists, including Justice Scalia, this attribute alone effectively settles the interpretive debate in favor of original meaning").

115. *See, e.g.*, 162 CONG. REC. S1435 (daily ed. Mar. 10, 2016) (statement of Sen. David Vitter) (stating that originalism, "the theory that the clear meaning given to words in the Constitution by our Founding Fathers should be honored, was prevalent in Justice Scalia's decisions" and that Justice Scalia "abhorred judicial activism, and he correctly understood that the place for instituting laws was in the legislature, where the will of

representatives explicitly recognize the value of constraint or restraint as a reason to adopt originalism.[116] In doing so, political supporters of originalist theory cast it as a neutral principle that limits judges and Justices' ability to impose personal and political views on the cases before them.[117]

All of this is evidence of constraint as a reason for selecting a particular approach to constitutional interpretation. Under a constraint rubric, a goodtheory is one that is neutral, and which constrains judges' and Justices' from using their personal preferences to dictate the outcomes of their decisions. Indeed, even critics of originalism implicitly recognize the importance of constraint as an important normative consideration as well in claiming that originalism is not neutral and that it does not, in fact, constrain judges

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the people is democratically represented"); 153 CONG. REC. H14245 (daily ed. Dec,5, 2007) (statement of Rep. Steve King) [("w]ithout originalism, without textualists, without the original intent of the Constitution as the foundational criterion for determining the constitutionality of current law, without that, the Constitution is no guarantee at all, except a guarantee to the justices to be able to manipulate their decisions to move this society in the direction they choose, as if they were legislators"); 157. CONG. REC. S8359 (daily ed. Dec. 6, 2011) (statement of Sen. Orrin Hatch) (claiming that DC Circuit Court of Appeals Nominee Caitlin Halligan demonstrated "judicial activism at its worst" by arguing that "evolving standards of decency today forbid the execution of individuals who committed murder before the age of 18" and contrasting this purported activism with her statement at her confirmation hearing where she stated that the Constitution "should be interpreted based on the people's original meaning rather than on judges' evolving understanding," and describing Halligan as a "convert to originalism"). *See generally* Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185 (2007)(providing a thorough, academic treatment of legislators' invocation of the phrase, "legislating from the bench").

116. *See, e.g.*, 160 CONG. REC. S4867 (daily ed. July 24, 2014) (statement of Sen. Charles Grassley) (contrasting the prior statement of Fourth Circuit Court of Appeal judicial nominee Professor Pamela Harris that she is not an originalist with her statement to Senator Grassley on the record in which she stated that she does not believe that "the Constitution's provisions and principles change or evolve, other than by the amendment process in Article V . . . judges are not free to change them"); 152 CONG. REC. S10122 (daily ed. Sept. 26, 2006) (statement of Sen. Orrin Hatch) (quoting Justice Scalia as stating that originalism means giving "that text the meaning that it bore when it was adopted by the people").

117. *See, e.g.,*, 152 CONG. REC. S2060 (daily ed. Mar 29, 2017) (statement of Sen. John Cornyn) (claiming that the Founders believed that the judiciary would play the role of an umpire who "calls balls and strikes" based on the "fixed meaning" of the Constitution and that this approach, "sometimes . . . called originalism" is "not a political doctrine or an excuse to get certain outcomes").

and Justices.[118] Arguments that a lack of constraint is a reason to reject originalism implies that an approach that results in constraint would be a preferable interpretive theory.

2. Originalism's Empty Claims of Constraint and the Preferability of the Present Public Meaning Approach

Originalists, particularly early originalists and those who support originalism in the political context, frequently sing the praises of originalism's ability to constrain judges.[119] A strong focus on the text of the Constitution ensures that judges will be constrained from asserting their own personal and political beliefs through their decisions.[120] Justice Scalia certainly thought so—asserting that supporters of living constitutionalism simply have no other criterion to apply to control judges.[121] And this is the impression one gets from the assertions of politicians who support originalism, as many of them define originalism to be essentially synonymous with the constraint it supposedly provides.[122]

But there are problems with these assertions. First, originalists' claims of constraint assume a diligent and honest application of

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118. *See, e.g.*, 163 CONG. REC. S2395 (daily ed. Apr. 6, 2017) (statement of Sen. Ron Wyden) ("[t]he originalist says that our rights as a people are contained within and linked to our founding documents. But that viewpoint is plainly incorrect. In practice, originalism becomes a cover for protecting the fortunate over the poor, corporations over individuals, and the powerful over virtually every other American. It is a political agenda that masquerades as philosophy, an agenda whose sole intent is reserving power for those in power and limiting the recognition of the rights reserved to the people").

119. *See* Antonin Scalia, Constitutional Interpretation the Old Fashioned Way, remarks given at the Woodrow Wilson International Center for Scholars in Washington, D.C. (March 14, 2005) (transcript available at https://www.bc.edu/content/dam /files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf) ("If you don't believe in originalism, then you need some other principle of interpretation. Being a non-originalist is not enough. You see, I have my rules that confine me. I know what I'm looking for. When I find it--the original meaning of the Constitution--I am handcuffed").

120. *Id.*

121. *Id.*

122. *See, e.g.*, 162 CONG. REC. S1654 (daily ed. Apr. 5, 2016) (Statement of Sen. John Cornyn) ("Justice Scalia was what was sometimes called an originalist. In other words, he believed the Court had an obligation to apply the Constitution and the law as written, not based on some substituted value judgment for what perhaps the unelected, lifetime-tenured judges would have preferred in terms of policy"); 133 CONG. REC. E4061-01 (1987) (statement of Rep. Gerald B.H. Solomon) ("Judge Bork maintains an 'originalist' view of the Constitution. In other words, he believes that Supreme Court justices are charged with deciding the cases before them according to guidance that the Constitution itself provides. For him, the Constitution is something definite, and he would rely on it to guide the nation into the future").

originalist theory.[123] Time constrained, generalist judges who are, for the most part, not academics and are not familiar with the intricacies of various originalist theories are in a poor position to take on this task. The fact that judges decide between arguments presented to them by advocates—who inevitably characterize or frame these theories in motivated ways exacerbates this issue. Second, and more importantly, original public meaning originalism requires judges to discern the original public meaning of the Constitution—a complex task that, if done thoroughly, requires extensive historical research and reliance on historic sources.[124] This process of locating and applying the relevant historic data is a specialized task beyond the expertise of most judges and attorneys, meaning that judges may impose their own biases in their interpretation by picking and choosing particular primary sources, gravitating toward secondary sources that may have agendas of their own, or, if confronted with originalist arguments from multiple parties before them, defaulting to the party that fits the judge's political preferences.[125]

The present public meaning approach does not require a deep dive into historic sources to determine the original meaning of constitutional provisions. Instead, judges and attorneys are required to apply and argue the contemporary meaning of those provisions. Of course, there will be chances for disputes over meaning—alternate definitions may be trotted out by counsel, and fights may be had over which alternate contemporary definitions ought to be accepted. But these are all obstacles faced by originalists as well, to the extent that there are multiple potential original public meanings.[126] The

123. *See* Antonin Scalia, *supra* note 119 (explaining the propositions that originalist Justices must seek out the original meaning of the Constitution and that they are absolutely bound to follow whatever they find).

124. *See* Rebeca Piller, History in the Making: Why Courts are Ill-Equipped to Employ Originalism, 34 REV. LITIG. 187, 194–95 (2015) ("[I]t is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material.").

125. *See, e.g., Id.* at 199–200 (2015) (highlighting the danger of partisan bias in non-attorney experts and describing selective reliance on amicus briefs); *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 10 (A.A. Knopf ed., 1st ed. 1997); Saul Cornell, *Heller, New Originalism, and Law Office History: Meet the New Boss, Same as the Old Boss*, 56 UCLA. L. REV. 1095, 1111–12 (2009) (noting examples of scholars and judges using nineteenth-century texts to understand texts from the founding era, and describing how such a method ignores profound changes that occurred in the interim).

126. For examples of how language may have multiple meanings, particularly when employed in a political context to convince audiences with varying interests, *see* Leah

difference with the present public meaning approach, though, is that judges adopting this method cannot obfuscate their decisions with cherry-picked references to historic sources that best support their preferred outcomes.[127]

Originalists may respond that the present public meaning approach to originalism lacks constraint because under this approach, constitutional law may change with changes in present public meaning. Originalists point to the notion of changing meanings or "linguistic drift" as a concern for approaches that employ present public meaning—noting that this phenomenon may result in unpredictable changes in constitutional meaning.[128] How can a theory of constitutional interpretation claim to be more constraining than originalism when it permits such changes?

This objection fails to acknowledge that judges and other constitutional interpreters—rather than the body of constitutional law—are the focus in arguments for the normative value of constraint. With interpreters as the focus, the present public meaning approach is still effective. While the public meaning of constitutional terms or provisions may change over time, that public meaning still constrains the judges, politicians, and members of the public who interpret these provisions. Indeed, as noted above, present public meaning is like most theories of originalism to the extent that it accepts the "constraint principle"—the notion that the meaning of the Constitution's text constrains those who interpret it.[129]

Originalists may also respond that the constraint critique of originalism derives at least some of its force from misapplications and abuses of originalism—and that the theory itself, if properly implemented, provides sufficient constraint. Every interpretive theory must eventually be applied by people, all of whom may make mistakes and some of whom may seek to use the theory as a means of achieving a preferred end.[130] While originalism may be abused, this

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Ceccarelli, *Polysemy: Multiple Meanings in Rhetorical Criticism*, 84 Q. J. SPEECH 395, 404–06 (1998) (describing "strategic ambiguity," and how such ambiguity may be employed to elicit favorable responses from opposing factions within a speaker's audience); *see also* Alexander Hiland, *Polysemic Argument: Mitt Romney in the 2012 Primary Debates*, in DISTURBING ARGUMENT: NCA/AFA CONFERENCE ON ARGUMENTATION 168–173 (Catherine Palczewiski ed, 2014).

127. *See* Schauer, *supra* note 16, at 835–39 (demonstrating incidents where Scalia, a well-known originalist, ignored legislative history when interpreting statutes).

128. *See The Fixation Thesis*, *supra* note 69, at 23–24)..

129. *See* Solum, *supra* note 11 at 456.

130. *See* Stephen E. Sachs, *supra* note 89, at 796 ("*every* legal rule might be misapplied through motivated reasoning or dishonesty, or might be openly abandoned later on").

doesn't make it different from any other theory of constitutional interpretation.[131]

The problem with this defense is that originalism both lends itself to abuse and provides tools for those intentionally abusing the theory to cover their tracks. To the extent that originalism forces judges, attorneys, politicians, and members out of their wheelhouse by requiring them to engage in historic analysis, the biases of these actors may end up directing the scope and direction of their investigation—whether they intend to reach certain policy goals or not.[132] The present public meaning approach does not require this historic analysis, and therefore does not involve the same dangers of misguided historic investigation.

Additionally, judges and others who *intend* to reach conclusions will likely present cherry-picked examples of historic use of terms to support their conclusions regarding original meaning.[133] Other judges, politicians, and members of the public without the requisite historic knowledge may not be able to readily discern that these decisions are based on such selective references. This is not the case where constitutional meaning is explicitly based on the present public meaning of the Constitution's provisions. Attempts to advance an incorrect or outdated meaning are far more likely to be discovered, criticized, and potentially undone by other judges or political actors.[134]

All of this supports the conclusion that the present public meaning approach is preferable as a means of constraining judges. At first, the originalist appears to have the upper hand—they may argue that meaning can change over time and that judges can take advantage of such shifts in meaning to adjudicate cases based on their policy preferences.[135] But this argument does not address constraint. Even if meaning shifts over time, judges are still constrained by that meaning when interpreting the Constitution. A judge making a good

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131. *See* Scalia, *supra* note 95 (explaining that, both after the rise of living constitutionalism and in the era before it, judges and Justices often imposed their own beliefs when interpreting the Constitution).

132. *See* Piller, *supra* note 124, at 200–01 (explaining how Justice Scalia's opinion in Heller notoriously excluded founding era texts when writing about the role of prefatory clauses and preambles in the founding era documents).

133. *Id.* ("As Lawrence and Heller demonstrate, originalism leaves judges with plenty of room to interpret history in a manner that produces their desired outcomes. In choosing between competing sources and interpretations, judges are able to select the accounts of history that will best serve their biases.").

134. *See* Section IV.D (addressing the transparency of the present public meaning approach).

135. *See* Bell, *supra* note 10, at 283–84; The Fixation Thesis, *supra* note 69, at 23–24.

faith effort to interpret the Constitution is more likely to adhere to the present public meaning of the Constitution's terms because there are simply fewer opportunities for bias to insert itself into the interpretive process—compared with the numerous complex steps required for a rigorous historic investigation and the chances of unconscious bias invading each step of that process.

What's more, under the present public meaning approach, judges and Justices are more likely to face backlash for decisions that are plainly contrary to the present public meaning of terms. A Justice purporting to apply the original public meaning of a constitutional provision may couch his or her analysis in dry, unapproachable historic terminology and will likely find plenty of citations to further mask a results-oriented approach to interpretation.[136] A present public meaning approach leaves that Justice with nowhere to hide, and subject to the scrutiny of political actors and the general public who are more likely to be aware of the present public meaning of the words in the provisions at issue. This, in turn, may prompt judges and Justices to maintain fidelity to present public meaning, whether it is to avoid political backlash, legislative action or Constitutional amendments undoing the outcomes of decisions, or the loss of professional credibility that a transparently motivated decision is likely to cause.

Finally, Schauer, in advocating the present public meaning approach to interpretation, notes that it constrains the behavior of those political actors who the Constitution is meant to constrain.[137] The Constitution speaks not only to judges but to Presidents, legislators, and law enforcement officials.[138] Schauer notes that, in many cases, there is no precise precedent or legal rule set forth to guide behavior, so these parties must interpret the Constitution themselves.[139] Moreover, Schauer notes, if the Constitution is to effectively constrain these actors, that "constraint function can be served only if we understand the Constitution to mean now what its language means *now* to its addressees."[140] The present public meaning approach therefore helps constrain and guide governmental actors so that their behavior remains consistent with what the Constitution requires.

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136. *See* Adam S. Chilton & Eric A. Posner, *An Empirical Study of Political Bias in Legal Scholarship*, 44 J. LEGAL STUD. 279 & 288–91 (2015) (finding that the ideology of tenured professors, as measured by contributions to candidates to political office, is correlated at a statistically significant level with "the ideological valence" of those professors' research).

137. Schauer, *supra* note 16 at 857.

138. *Id.* at 857.

139. *Id.* at 857–58.

140. *Id.* at 858.

B. *Predictability*

1. Predictability as a Normative Consideration

A related, but distinct, normative consideration for accepting a theory of interpretation is whether adopting the theory leads to predictable results. This high-level consideration underlies not just originalism, but legal rules in general, which are "typically designed to promote certainty and predictability."[141] Justice Scalia cited predictability as a desirable aspect of a judicial decision-making process, noting that an absence of predictability undermines the rule of law and that "[t]here are times when even a bad rule is better than no rule at all."[142] In other contexts, this consideration may be alternately referred to as "consistency," but this Article opts for the somewhat more nuanced "predictability" terminology.

Originalists argue that interpreting the Constitution based on its original public meaning will lead to predictable results because the original public meaning may be ascertained and the correct interpretation of the Constitution may therefore be predicted.[143] In theory, such an approach may allow actors to predict a ruling by the Court in factual circumstances that have not arisen before.[144] Originalists also argue that their approach is preferable to an alternate scenario where judges and Justices make decisions based on their political or policy preferences—in such situations, the law of the land may end up shifting depending on the political whims of several,

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141. Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1692 (2016).

142. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989); *see also* NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 125 (2019) ("[b]y interpreting the text according to its ordinary public meaning, and accepting that it cannot be changed outside the amendment process, originalism ensures that citizens know with some predictability the content of their constitutional rights").

143. *See* Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 37–38 (2009) (noting that stability and predictability are two of several values that originalists cite in support of originalism); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 391 (1985) ("[i]ndeed, according to the textualists, abandonment of the textualist rule by the Court will yield a Constitution whose meaning will be neither certain nor predictable"); Lawrence Solum, *The Case for Originalism, Part Five: The Argument for Originalism from the Rule of Law*, LEGAL THEORY BLOG (Apr. 7, 2017, 3:06 PM), https://lsolum.typepad.com/legaltheory/2017/04/the-case-for-originalism-part-five-the-argument-for-originalism-from-the-rule-of-law.html.

144. Scalia, *supra* note 142, at 1179. (noting that "uncertainty is incompatible with the Rule of Law" and that justice requires that the citizenry have predictability as to what the law prescribes).

or even one, Justice.[145] Such a scenario, originalists warn, may lead to unpredictable shifts in law as a result of changes in the makeup of the Court or changes in the views of one or two Justices.[146]

Critics of originalism also recognize predictability to be a desirable feature of a theory of interpretation. These critics, however, contend that the original public meaning approach leads to unpredictable results.[147] One line of criticism relates to the potential for originalist interpretations of constitutional provisions to undermine well-established precedents.[148] If an originalist Justice believes that prior precedents are inconsistent with the original public meaning of the Constitution, originalism would require that the Justice strike down that prior precedent—resulting in a change to the law.[149] Some originalists recognize this concern. Indeed, the normative strength of predictability sometimes prompts originalists to propose limitations or qualifications to an otherwise uniform originalist approach.[150]

Another line of criticism relates to the concern that originalism references uncertain and undetermined historic understandings of what the Constitution's text means, and that where the text of the Constitution is particularly abstract, the text is "*not actually the law*, which is instead hidden in a set of extra-legal historical norms and conceptions."[151] This concern may be exacerbated when considering the divide between original public meaning of constitutional provisions and changes that have occurred since the text was written—such as technological changes. While originalists may contend that determining and applying the original public meaning of terms is a clear, and therefore predictable, approach to take, profound

145. *Id.* ("If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle.").

146. *Id.* at 1179–180 (noting that such a scenario would lead to inconsistent results on a case-by-case basis depending on who was on the court).

147. *See* Berman, *supra* note 143, at 77 ("it's a contingent question whether an originalist approach will dictate that challenged actions be upheld or struck down.").

148. *Id.* at 77–78 ("In fact, Justices have often invoked originalist arguments to strike down action that their colleagues, relying more on non-originalist considerations, have upheld.").

149. *Id.* at 77–79.

150. *See* Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1475–76 (2007) (proposing that originalists follow non-originalist precedent that has longstanding support from the legislative branch); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 837–38 (2009) (proposing that originalism requires the enactment of constitutional amendments if certain key precedents are reversed, and citing *Brown v. Board of Education* as an example).

151. Ian Bartrum, *Originalist Ideology and the Rule of Law*, 15 U. PA. J. CONST. L. HEIGHTENED SCRUTINY 1, 5–6 (2012).

advances in social mores and technology complicate the process. This may require far more work to be done on what some originalists describe as "constitutional construction," the process of translating the semantic meaning of constitutional provisions into actionable legal rules or decisions.[152]

Predictability is also mentioned in the political sphere as an important consideration when considering judicial nominees' interpretive philosophies. In the contentious nomination debate over Judge Robert Bork, senators opposing Bork's nomination referenced prior statements in which Bork suggested that non-originalist precedents should be overturned.[153] Senators who opposed the nomination of Justice Samuel Alito argued that Alito's originalist approach to interpretation could result in the undermining or reversal of longstanding precedent.[154] Still others argue against originalism itself on the basis that it may result in the overturning of longstanding precedent.[155] The one instance I could readily locate of a representative endorsing the abandonment of longstanding precedent was a hyperbolic rant by Steve King, a former congressional representative who suggested that *Marbury v. Madison* should be reversed if the circumstances demand.[156]

This summary of debates over precedent and constitutional construction is brief, but it demonstrated a consistent theme that predictability as a goal of any constitutional interpretive theory. Theories that undermine predictability (most often by underlying

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152. Solum, *supra* note 11, at 469–72.

153. 133 CONG. REC. S13116-02 (statement of Sen. Alan Cranston) (1987) ("In [a 1987 speech before the Federalist Society], Judge Bork also reiterated his longstanding opposition to decisions that do not comport with his 'originalist' theory of constitutional requirements and declared that an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy has no legitimacy").

154. *See* 152 CONG. REC. S339 (daily ed., Jan. 31, 2006) (statement of Sen. Joseph Biden) ("[a]ccording to originalist logic, many Supreme Court decisions that are fundamental to the fabric of our country are simply wrong").

155. *See* 164 CONG. REC. S5020 (daily ed., July 17, 2018) (statement of Sen. Ron Wyden) ("[c]olleagues, *Roe [v. Wade]* is settled law—it has been that way for 45 years—but it is the right-wing agenda, wrapped in the cloak of originalism, that seeks to overturn it").

156. *See* 164 CONG. REC. H3831 (daily ed., May 8, 2018) (statement of Rep. Steve King) ("[w]e don't accept as sacrosanct a decision made by a previous Congress, and neither should we accept a decision as sacrosanct made by a previous Supreme Court. They should all be open to question. Yes, we should respect their judgment, their jurisprudence, but we can't allow ourselves to be bound by those decisions, even if we have to go all the way back to challenge [*Marbury*] at some point").

longstanding precedent) are thrown into doubt, and theories that result in predictable outcomes are preferred. All things considered, if a theory of constitutional interpretation leads to predictable and consistent results, it is preferable to alternative theories that do not lead to such predictability.

2. The Present Public Meaning Approach Keeps Law Consistent with Expectations and Avoids the Chaos that Strong Originalism Mandates

As noted above, critics of originalism frequently argue that originalism may lead to unpredictable results by requiring the overturning of precedents that are contrary to originalism. Originalists take varying approaches to this objection. Some bite the bullet and accept that, for the most part, precedents that are inconsistent with originalism can and should be reversed by judges and justices who apply originalist theories of constitutional interpretation.[157] Others argue that instances where originalists undo prior decisions that are inconsistent with originalism should occur only under certain circumstances. For example, if a prior decision engaged in a "good faith" attempt at originalist analysis, it should be afforded greater deference.[158] Still others argue that originalism itself should be limited in scope where disruption of precedent is likely, suggesting that the canon of constitutional avoidance may be employed to avoid overturning non-originalist precedent.[159]

All these approaches are, in different ways, unsatisfactory. The more extreme originalist approach of rejecting inconsistent precedent all but rejects the normative goals of predictability and consistency in favor of establishing a consistent originalist doctrine of constitutional law.[160] This may be acceptable (or even mandated) in the eyes of those who would prefer to see precedents like *Roe v. Wade* overturned.[161]

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157. *See* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 258–59, 266 (2005); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 20–21 (2007).

158. *See* Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 466 (2018).

159. *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV.. 1921, 1939–41 (2017).

160. *See* Barnett, *supra* note 157 at 259 ("Were precedent to be rejected, the stability of constitutional law might be undermined as each Court considers itself completely free to reach different conclusions about the meaning of the text as time goes by.").

161. *See, e.g.*, Hadley Arkes, *"Originalist" Judges Lose Sight of Truths that Precede Law*, WALL ST. J. (Sept. 29, 2021, 1:42 PM), https://www.wsj.com/articles/originalist-

However, there is no denying that these outcomes would have profound negative impacts on predictability and stability in the law.

When stepping beyond particular precedents and political issues, it quickly becomes clear that a strong, consistent originalist approach would have more substantial consequences than most originalists tend to admit. For example, a truly originalist approach to amendments that have been incorporated against the states via the Fourteenth Amendment would carry the possibility of overturning vast swathes of precedent.[162] This is because the Supreme Court, since the early days it began incorporating Amendments against the states, has concluded that incorporated amendments provide the same constraints against state governments as they do against the federal government.[163] In *Malloy v. Hogan*, the Court justified this approach in the context of the right against self-incrimination on the basis of avoiding inconsistent sets of constitutional law:

> It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.[164]

Originalists should be concerned with this approach, however, as the Fourteenth Amendment was ratified in 1868—long after the first eight amendments to the Constitution. During that time, there were changes in society, politics, and the law, meaning that the content of the broadly worded, value-laden language in those amendments

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judges-truths-precede-law-textualism-supreme-court-abortion-marriage-11632931440 (criticizing originalist jurisprudence as being "truncated" and overly focused on questions of decision making procedures rather than achieving conservative ends).

162. *See, e.g.*, Everson v. Board of Education, 330 U.S. 1 (1947) (incorporating the establishment clause of the First Amendment against the states); McDonald v. City of Chicago, 561 U.S. 741 (2010) (incorporating the second Amendment against the states).

163. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) ("[t]his Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government"). It is worth noting that this opinion is by Justice Gorsuch, a self-proclaimed originalist. *See Id.*

164. Malloy v. Hogan, 378 U.S. 1, 11 (1964).

would have likely meant something different to the 1868 public.[165] The fact that the Court has repeatedly emphasized the need for a uniform interpretation of these amendments rather than taking a different approach in state law cases is evidence enough that it, at least, believes there are differences between the meaning of these amendments as interpreted at the time of the founding and as interpreted at the time of reconstruction.

But the uniform approach rejects this approach—requiring that amendments be read as giving no greater or lesser constraints against state governments compared with the federal government. If the Court were to uniformly adopt and apply originalism, it would need to rewrite most of the law regarding the scope of protections afforded by the amendments in the Bill of Rights to the extent that the law was applied against state governments. This dramatic change to the law would greatly undermine the predictability of the law.

The present public meaning approach, on the other hand, largely avoids these issues. To the extent that precedents exist that are inconsistent with originalism, if those precedents resulted from the use of present-day meanings in interpreting the constitution, those precedents would remain unchanged. And even if the Court were to determine that a precedent did not conform with the present-day meaning of a constitutional provision, the change to that constitutional provision would at least be in line with what the public takes that provision to mean—rather than a reversion to a long-forgotten quirk of historic meaning.[166]

As for change attributable to linguistic drift, this change would likely be slow and minimal, occurring over the course of generations rather than as a result of sudden developments in scholarship or historic analysis, or a change in the makeup of the Court's justices.[167]

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165. *See* KERMIT ROOSEVELT III, THE NATION THAT NEVER WAS: RECONSTRUCTING AMERICA'S STORY (2022) (discussing Founding-era sentiments regarding slavery and revolution and contrasting these sentiments with Reconstruction-era political trends and events).

166. *See* Schauer, *supra* note 16 at 838 ("[A] commitment to being bound by the past is consistent with (but does not logically entail) the original-intent-originalism that prevailed implicitly for many generations and explicitly in the 1950s, 1960s, and 1970s.").

167. *But see* Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PENN. L. REV. 287, 296–300 (2019) (claiming that the definition of "domestic violence" developed to encompass familial disputes over the course of two decades). Lee and Phillips' support for this conclusion is questionable, though. They assert that "[w]e never found a clear use of the family abuse sense of the term until the 1980s" but fail to describe what measures they took to search for such uses of the term, beyond conducting a "collocation analysis" of terms appearing near the "domestic violence" phrase, without explaining the parameters for determining the collocates (e.g., how

While originalists warn of the nightmare of linguistic drift leading to uncontrolled changes to the Constitution's meaning, the examples that they offer in support of these concerns are often benign or unrealistic. Take, for instance, the mention of "domestic Violence" in Article IV of the Constitution—discussed earlier in the context of Tom Bell's argument in favor of a similar present public meaning approach.[168] Originalists frequently cite this term as an example of linguistic drift.[169] But the context of the "domestic Violence" phrase in Article IV of the Constitution makes it clear that the Constitution is addressing a scenario that involves an uprising that occurs within the boundaries of a particular state (distinct from an invasion from beyond that state's borders).[170]

Other examples of linguistic drift may not be resolved by context—but their impact is so negligible that they should not raise concerns. Lawrence Solum notes that the original meaning of "dollar" meant a Spanish coin, so the Seventh Amendment's reference to the right to a jury trial in cases where the value in controversy exceeds "twenty dollars" refers to the value of twenty Spanish "'peso[s] or piece[s] of eight'" rather than twenty US federal reserve notes.[171] Linguistic drift may indeed mean that the present public meaning approach would require a trial by jury in more cases, but there seem to be no

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far away the collocated terms appeared from "domestic violence," and what sampling was done to determine collocate frequency). *Id.* at 300. Some rudimentary Google research reveals that the phrase "domestic violence" was at least employed in the 1970s. Joan Zorza, *Criminal Law of Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 46, 54 (1992) (quoting Scott v. Hart, Hart, No. C-76-2395 (N.D. Cal, filed Oct. 28, 1976) (Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandamus 1) (describing a class action lawsuit filed against the Chief of the Oakland Police Department on behalf of "women in general and black women in particular who are victims of domestic violence"). While domestic violence may not have been the subject of much discussion, writing, or policy debate until the 1970s, this lack of written discussion does not itself prove that the term was not part of the language. When "domestic violence" came to mean familial abuse is beyond the scope of this Article, but it certainly is not adequately demonstrated in Lee and Phillips' article either. *See generally* Lee & Phillips, *supra* note 167.

168. *See* Section III.A (addressing U.S. CONST. art. IV, § 4).

169. *See* Lee & Phillips, *supra* note 167, at 296–97; *The Fixation Thesis*, *supra* note 69, at 16–17.

170. U.S. CONST. art. IV, § 4; *see also* Bell, *supra* note 15, at 284 (making this argument).

171. Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1651 (2017) [hereinafter *Triangualting Public Meaning*] (quoting *Dollar*, OXFORD ENG. DICTIONARY, http://www.oed.com/view/Entry/56602? redirectedFrom=dollar#eid (last visited Sept. 10, 2022); *see also* U.S. CONST. amend. VII.

concerning or negative consequences as a result of this. Moreover, this shift in the meaning of the Seventh Amendment was gradual and has likely not caused substantial unpredictability for any actors.[172]

Moreover, to the extent that linguistic drift has, and continues to take place, it will most likely serve to bring the meaning of the Constitution in line with what the general public understands it to mean. Say someone did indeed think that they had a right to a jury trial against someone who had defrauded them out of twenty-one US dollars,[173] that person would likely be shocked to find that they were out of luck under the Seventh Amendment unless they had lost an amount close to two hundred US dollars.[174] But that is what originalism would demand. And, as noted above, were originalism to truly take hold, the gradual and minor changes of linguistic drift would likely be an idyllic daydream compared with the dramatic changes in the doctrine of incorporated constitutional rights and other areas of the law that would likely take place.

This illustrates the clearest argument in favor of the present public meaning approach under the predictability rubric: interpreting the Constitution based on the present public meaning of its terms is more likely to effectively guide the behavior and expectations of the general public. Hillel Levin has already argued that this is a key argument for interpreting statutes based on their present public meaning.[175] The Constitution is no different in this regard, as it sets forth the powers and limits on government and describes the rights that people may use to defend themselves from government overreach and abuse. Keeping the law in line with the public's expectations and understandings is crucial for giving members of the public the ability to govern their behavior in accordance with the law and their rights, and to hold the government to account when it oversteps its bounds.

C. *Democratic Legitimacy*

1. Democratic Legitimacy as a Normative Consideration

172. See Triangulating Public Meaning, supra note 171 at 1621 (noting that many, if not nearly all, modern readers of the Seventh Amendment are unaware of the original eighteenth century meaning of the dollar).

173. Imagine that this is somehow a federal cause of action, or we live in an alternate reality in which the Seventh Amendment has been incorporated against the states. It is not hard if you try. If this seems too outlandish, then this still supports the alternate argument that the implications of linguistic drift are in fact quite limited, which also supports my overall point.

174. *See* Jay Marshall Wolman, *The Seventh Amendment Calculator*, THE LEGAL SATYRICON (Dec. 3, 2015, 2:24 PM), https://randazza.wordpress.com/2015/12/03/the-seventh-amendment-calculator/.

175. Levin, *supra* note 15, at 1120.

In debates between theories of constitutional interpretation, another common consideration is whether a particular theory best upholds the will of the people. This Article refers to this consideration as "Democratic Legitimacy," but it may also be referenced in other literature as "popular sovereignty," "democracy," or other similar terms or phrases.

Some originalists argue that originalism is mandated by concerns of democratic legitimacy because of the "special status of the authorized lawmakers who established the fundamental rules to govern the polity."[176] Keith Whittington argues that the Constitution's framers and those who ratified it were the only ones "democratically authorized to create fundamental law, and the goal of constitutional interpretation therefore should be to uncover the content of the rules laid down by those lawmakers and faithfully apply them."[177] Michael McConnell, another originalist, makes a similar argument:

> All power stems from the sovereign people, and the authority of the Constitution comes from their act of sovereign will in creating it. It follows that the Constitution should be interpreted in accordance with their understanding. This is the theoretical foundation of originalism. If the Constitution is authoritative because the people of 1787 had an original right to establish a government for themselves and their posterity, the words they wrote should be interpreted—to the best of our ability—as they meant them.[178]

As with the previously discussed normative considerations, critics of originalism also invoke democratic legitimacy in their critiques of the original public meaning approach. Thomas Colby, for instance, argues that originalists face a serious problem when arguing that the Fourteenth Amendment should be interpreted based on its original public meaning because it was a "purely partisan measure" that was

176. Whittington, *supra* note 101, at 399.
177. *Id.*
178. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1132 (1998).

ratified "at gunpoint" and "can claim no warrant to democratic legitimacy through original popular sovereignty."[179]

Some of the most common critiques of originalism appeal to democratic legitimacy. The "dead hand" argument against originalist claims of popular sovereignty was initially raised by Thomas Jefferson, who argued that "'*the earth belongs in usufruct to the living*': that the dead have neither powers nor rights over it," and that from this logic "it may be proved, that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation."[180] The objection has continued, in one form or another, for centuries—into the modern day, and originalists have amassed a variety of responses to it.[181] I will not survey those debates here. Instead, for present purposes it is enough to note Jefferson's claim appeals to the notion that it is undesirable for the democratic will of those alive today to be subordinated to the will of long dead generations. Accordingly, proponents of originalism who favorably cite the democratic will of the founding generation and the dead hand objectors who attack them both share the view that the democratic will of the people is important.[182]

Political discussions do not explicitly treat popular sovereignty or democracy as a normative reason for accepting or rejecting originalism. However, some political critics of originalism at least imply that these concerns are in play—particularly those critics who argue that originalism calls for a return to outdated practices and undoes progress that has been made in the centuries since the nation's founding.[183] These arguments draw at least a portion of their strength from the policy outcomes that they purport originalism will bring

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179. Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1629, 1641–61 (2013) (discussing the lack of widespread and nationally distributed support for the enactment of the Fourteenth Amendment).

180. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 395–96 (Julian P. Boyd ed., 1958).

181. *See* Coan, *The Dead Hand Revisited*, 70 EMORY L. J. ONLINE 1, 3 (2020) (describing originalist arguments against dead hand control).

182. *See* McConnell, *supra* note 178, at 1131–32.

183. *See* 152 CONG. REC. S152 (daily ed. Jan. 26, 2006) (statement of Sen. Dianne Feinstein) ("originalists look to evaluate the Constitution based on what the words say as written and what the Framers intended those words to mean at the time they were written . . . [i]f an originalist analysis were applied to the 14th Amendment, women would not be provided equal protection under the Constitution, interracial marriages could be outlawed, schools could still be segregated, and the principle of one man, one vote would not govern the way we elect our representatives"); 166 CONG. REC. S6457 (daily ed. Oct. 25, 2020) (statement of Sen. Dick Durbin) ("[w]omen could not vote in that original Constitution. African-Americans were not even counted as whole people; they were three fifths of a citizen . . . the Founding Fathers could [not] possibly intuit where we are in America at this moment").

about—a concern that implicates the normative consideration of desirable or undesirable results rather than democratic considerations.[184] But, to the extent that these arguments contend that the adoption of originalism leads to outcomes that modern day majorities would reject, these arguments sound in democracy, suggesting that a desirable theory of constitutional interpretation is one that is consistent with the values of modern day majorities.

2. Present Public Meaning Avoids Dead Hand Objections and Ensures the Present Relevance of Constitutional Content

There are some ready counterarguments to originalists' claims that originalism best respects the will of the people by giving effect to the will of a supermajority of people as expressed through the Constitution and Amendments that they ratified. First, as noted above, a common objection to the democratic legitimacy of originalism is the "dead hand" objection. An originalist approach gives force to the will of a long-dead group of people who initially redacted the Constitution. It does not seem democratic for people today to be governed by the whims of those long dead.

A second objection to claims of originalism's democratic legitimacy is to note that most of the Constitution's provisions and most constitutional amendments were ratified at times when substantial subsets of the population weren't permitted to vote. It was not until the Fifteenth Amendment was ratified in 1870 that states and the federal government were prohibited from restricting the right to vote based on race.[185] And it wasn't until the Nineteenth Amendment was ratified in 1920 that women were guaranteed the right to vote.[186] While the ratification of the Constitution and its amendments call for a supermajority of votes, if the people who could vote at the time were only from a subset of the population, the overall process was lacking in democratic legitimacy—at least by today's standards.

Originalists have raised several responses to these objections, although the dead hand objection tends to be the center of discussion. Some originalists argue that the dead hand objection goes too far and would justify a critique of any written law.[187] They contend that the dead hand critique suffers from a bright line problem as well, as the objectors cannot provide a clear account of when a constitutional

184. *See infra* Section III.F.
185. *See* U.S. CONST. amend. XV.
186. *See* U.S. CONST. amend. XIX.
187. GORSUCH, *supra* note 142, at 113.

provision becomes too old.[188] Other originalists, citing James Madison, argue that drafting and ratification of the Constitution was a significant enough undertaking that it creates a "debt against the living" that can only be repaid by leaving their work unchanged.[189] This Article will not exhaustively rehash the arguments that have been made on either side of the dead hand debate, many of which often boil down to rhetorical devices designed to sway the instincts of the listener. Still, some points are worth noting.

Keith Whittington attempts to counter versions of these objections by arguing that the Constitution grants the people "potential popular sovereignty" by giving them the power to amend it.[190] Because the Constitution includes mechanisms for altering itself, those whom it governs today have the "authority to remake" the Constitution and, therefore, have a meaningful level of authority even if the Constitution and its Amendments were ratified long before they were born.[191] From this, Whittington argues that originalism must be adopted to preserve the popular sovereignty behind the Constitution's enactment and to preserve this potential sovereignty framework for continuing constitutional authority.[192]

To the extent that Whittington argues that potential popular sovereignty reconciles originalism with changes to the electorate in the centuries since the Constitution's enactment, there are several objections. First, those in the present day may wish to keep the provisions of the Constitution and its amendments the same, but that the meaning of the provisions should be updated to match present political, moral, and linguistic norms. People today, for example, may agree with the sentiment that cruel and unusual punishment be prohibited, but a far broader range of punishments (both old and new) may fall under this umbrella.[193] Reading the Eighth Amendment in a modern context would achieve this goal and ensure that modern views of punishment are read into the broad, morally-charged language of the amendment.[194]

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188. GORSUCH, *supra* note 142, at 113.

189. *See* Wurman, *supra* note 29, at 77 (citing Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 176, 177 (Marven Meyers ed., rev. ed. 1981)).

190. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 127 (1999).

191. *Id.* at 132–33.

192. *Id.* at 154–59.

193. *See* U.S. CONST. amend. VIII.

194. Originalists may argue that the original meaning of the Eighth Amendment permits such an approach by, for example, providing that punishments that have long been out of use are cruel or unusual. *See* John F. Stinneford, *The Original Meaning of*

Second, Whittington notes that the nature of ratifying and amending the Constitution involves a supermajoritarian process—indeed, he lauds this feature as a bulwark against the majority oppression of political minorities.[195] The advantages of this supermajoritarian requirement for constitutional change are lost on those who lacked the ability to vote on the initial enactment of constitutional provisions or amendments. Had these people received the opportunity to vote on the enactment of particular constitutional provisions, they would have had greater power to affect the content of the Constitution—as their votes would have been courted to obtain a true supermajoritarian consensus. Conversely, when these people are not able to vote until after the provisions have already been enacted, exercising this heightened influence is impossible.

What's more, these people now face the obstacle of supermajoritarian requirements to change any aspects of the Constitution that they may have rejected had they the opportunity to participate in the initial votes on enactment. These heightened requirements for amending the Constitution give its provisions and Amendments a level of inertia that require dramatic efforts to overcome.[196] Claiming that the sovereignty of those who now have the

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"Unusual": The Eighth Amendment as a Bar to Cruel Innovation, 102 NW. U. L. REV. 1739, 1745 (2008) ("[a]s used in the Eighth Amendment, the word 'unusual' was a term of art that referred to government practices that are contrary to 'long usage' or 'immemorial usage'"). Such a response is lacking. First, this reading does not settle whether the amendment is to be read in the present or original context in determining which punishments have long been out of use. Second, this reading is contrary to statements of Justice Scalia—one of the most highly regarded originalists to have sat on the Court—who placed far more of an emphasis on practices at the time of the founding era. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (confessing to be a "faint-hearted originalist" who would not uphold a law permitting flogging and, in doing so, indicating that he believes such a statute is consistent with the Eighth Amendment). Originalists may dispute Scalia's heavy reliance on founding-era practices, but it is folly to claim that there is no possibility that the Court may adopt a similar approach in practice.

195. *See* WHITTINGTON, *supra* note 190, at 147–48.

196. In an article that reminds us of a simpler time, Akhil Amar and Vik Amar contemplate a scenario in which a presidential candidate wins the popular vote but loses in the electoral college, suggesting that this would result in a "serious crisis of democratic legitimacy," and that the Constitution would likely be "swiftly amended in favor of de jure popular election" should such a "democratic nightmare" occur. Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913, 944 (1992). They accuse "inertia—blind inertia, stupid inertia" of preventing an amendment to preempt such a scenario. *Id.* Two such elections later and demands for such an amendment are virtually nonexistent—inertia indeed. *See also* Joshua P. Davis, *How Democratic is the*

ability to vote and seek to potentially amend the Constitution equates to the power held by those who first put the relevant provisions into place is therefore misleading.

Originalists may continue to raise arguments against these concerns, but they cannot bypass these objections altogether. The present public meaning approach to constitutional interpretation can. Interpreting the Constitution based on its present public meaning respects the democratic legitimacy of the Constitution's ratification as it is still based on the Constitution's text, but it also avoids the dead hand problem because it applies the present day meaning of the text. In doing so, progress and development which have occurred since the ratification of the original terms is taken into account.

Moreover, the present public meaning approach also accounts for the difficulties that originalists face in justifying fixing the meaning of the Constitution at a time when significant portions of the electorate lacked the right to vote. If originalists are to seriously account for the systemic disenfranchisement of wide swathes of the modern electorate over history, they must seriously consider rethinking the point in time at which constitutional meaning becomes "fixed" for interpretive thesis. Recall the earlier discussion above of Lawrence Solum's "fixation thesis"—he argues that a key component of most originalist theories is that the meaning of the Constitution and its amendments is fixed at the time of their ratification.[197] Originalists face a difficult choice between sticking with this approach despite the fact that large portions of the population were not guaranteed a right to vote at the time of ratification, or attempting to pick and choose provisions that should be read based on the public meaning of those provisions at different times in light of subsequent constitutional developments.[198] While this latter approach may be more attentive to democratic legitimacy concerns, it may result in charges of arbitrariness and lead to a piecemeal theory that is even more difficult to implement due to a lack of uniformity. The present public meaning approach avoids the need to adjust certain interpretive reference points depending on the content of provisions and historic developments by fixing the meaning of the Constitution to the present.

United States Supreme Court?, 37 U.S.F. L. REV. 1, 2 n.2 (2002) ("[i]n reality, inertia itself makes changes to the Constitution rare").

197. *See* Solum, *supra* note 11, at 456.

198. *See* Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 10–15 (2011) (arguing that the Fourteenth Amendment should be interpreted with an eye to the Nineteenth Amendment's guarantee of the right to vote for women).

Originalists may object that a present public meaning approach invites judges and Justices to decide cases based on their own preferences. By failing to tie constitutional meaning to a fixed point in the past, Justices are invited to apply their own preferences by concluding that their personal opinions equate to present public meaning. But this objection is simply incorrect. As noted above, judges and justices are still constrained by present public meaning, even if that meaning may gradually change over time. Additionally, the present public meaning approach fixes the meaning of the Constitution at a time that is most approachable to other actors in the present day—meaning that members of the public and other political actors may more readily evaluate the Court's interpretation of the Constitution and check any abuse by those seeking to apply their personal preferences.

D. *Transparency*

1. Transparency as a Normative Consideration, and Its Relationship to Predictability and Democratic Legitimacy

Theories of Constitutional interpretation that are transparent—the application and reasoning of which can be easily tracked by professional, and even lay, observers—are generally preferable to theories that lack transparency. Appeals to transparency aren't often explicit, as transparency considerations are often folded into discussions of judicial constraint.[199]

To illustrate, take the concern that judges may decide cases based on their personal political preferences.[200] Such a concern is certainly relevant to those worried about the normative value of constraint, as these judges could decide cases without being held to any particular standard of interpretation. But part of the alarm with this scenario also rises from the lack of transparency that such a regime would entail, as attorneys, politicians, and the general public would be unable to read the minds of these judges to derive how they go about deciding these cases. Perhaps, over time, a pattern would emerge from

199. *See, e.g.*, Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1692 (2016) ("[s]unshine may disinfect constitutional reasons no better than it disinfects wounds; still, ceteris paribus, one can expect self-consciously narrow examinations of constitutional meaning to offer greater prospects for constraint than self-consciously broad ones").

200. A concern that is not without support and scholarly attention. *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

repeated decisions that would permit educated guesses as to what actual considerations motivate these judges' decisions. But assuming judges and Justices continue to present their opinions in the traditional manner of applying precedent and legal arguments to facts—no matter how selective or off-base these arguments and citations may be—the system would largely remain a black box.

Concerns over transparency also overlap with the normative consideration of democratic legitimacy. As much as certain commentators and participants in the system would like to pretend otherwise, the judiciary is a political branch of government, and its decisions should be rendered in a manner that politicians and the public can understand and interrogate. Greater transparency helps achieve this goal.

Transparency considerations should be part of a discussion of whether to accept originalism because it is already a significant part of the debate between originalists and their critics. In the academic sphere, originalists appeal to transparency as a normative consideration, typically to argue that various forms of originalism are more transparent than alternate methods.[201] Critics of originalism argue that originalist theories do not result in transparent decision-making processes. Some argue that the original public meaning that originalism is meant to derive and apply are not transparent.[202] Others argue that the methods required to determine original public meaning result in a loss of transparency.[203] Still, others argue that the originalist endeavor as a whole focuses more on achieving conservative outcomes rather than the democratic will underlying the Constitution.[204]

This explicit focus on transparency in debates over originalism warrants treating transparency as an independent normative consideration. This treatment is further supported by norms of transparency built into the process of judicial decision-making. The practice of writing written opinions, for example, largely serves to make judicial reasoning more transparent by setting forth the reasoning underlying an ultimate ruling. Judges themselves

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201. *See, e.g.*, William Baude & Stephen E. Sachs, *Originalism's Bite*, 20 GREEN BAG 2d 103, 105 (2016) (arguing the fact that commentators may dispute whether historic claims in a purportedly originalist opinion illustrates originalism's transparency over alternative methods like pragmatism).

202. Berman, *supra* note 143, at 78.

203. *See* Christopher J. Peters, Originalism, Stare Decisis, and Constitutional Authority 7 (Sept. 3, 2013) (manuscript) (available at https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1914&context=all_fac).

204. *See* Post & Siegel, *supra* note 103, at 569.

recognize the importance of transparency in rendering decisions.[205] Politicians also recognize the importance of transparency, and criticize theories like originalism for a lack of transparency when they perceive that advocates of originalism overstate the neutrality of the theory.[206] All of this supports an approach to normative debates over interpretive theories that treats transparency as a separate consideration. Still, the parallel impacts of increased transparency on considerations like predictability and democratic legitimacy should not be ignored, and there will likely be some overlap between normative arguments relating to transparency and arguments relating to predictability and democratic considerations.

2. Originalism and Historic Analysis as Obfuscation

While judges and justices may claim that their opinions are anchored in original public meaning, discerning that meaning in cases involving broad, morally-charged language requires a rigorous historic analysis that many judges cannot, or will not, undertake.[207]Cherry-picking citations and shaping historic investigations based on preferences and opinions is therefore likely.[208]

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205. *See, e.g., Sykes, Hamilton Give Insights on Theories of Interpretation, Disclose Philosophies*, 6 INSIDE TRACK 13 (June 27, 2014), https://www.wisbar.org/newspublications/insidetrack/pages/article.aspx?Volume=6&Issue=13&ArticleID=11644 (recounting speeches given by Judges David Hamilton and Diane Sykes of the Seventh Circuit Court of Appeals in which both emphasized the importance of transparency, with Judge Hamilton stating that providing "a transparent, public explanation of the reasons for our decision is by far the most important constraint, far more important than a commitment to textualism or originalism or any other 'ism' that you like in reaching a decision that the public can understand and accept").

206. *See* 163 CONG. REC. S613 (daily ed. 2017) (statement of Sen. Dick Durbin) ("[t]ime and again, whether it is the nominee for Attorney General or nominees for the High Court, here is the cliché we are given: We are just going to apply the rule of law, whatever the law says. That is what we do. We are originalists . . . Yet we know better. We know judges make decisions based on a variety of concerns, and they weigh some facts more carefully and give some facts more strength than others").

207. *See* Piller, *supra* note 124 at 194–95 ("[I]t is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material.").

208. *See, e.g.*, CATHERINE L. LANGFORD, SCALIA V. SCALIA: OPPORTUNISTIC TEXTUALISM IN CONSTITUTIONAL INTERPRETATION 56–57 (2017) (noting Justice Scalia's use of Blackstone, rather than founding era documents, to purportedly uncover the meaning of the Eighth Amendment's prohibition on cruel and unusual punishment, as well as his focus on practices rather than contemporaneous textual

To an extent this may be intentional, as even originalists recognize that an interpretive theory is unlikely to provide a meaningful obstacle to a judge whose primary motivation is to reach a particular outcome.[209] But this may be unintentional, as unconscious biases may influence how someone in the present day interprets unfamiliar historic writing and events from hundreds of years ago. Explanation bias, for instance, may cause present-day judges and lawyers to believe that the founders could have more easily foreseen the practical outcomes of the Constitution's provisions when, in fact, there may have been far more uncertainty at the time.[210] Present day biases may also color historic readings and explanations of events or old texts.[211]

Judges and Justices who engage in original public meaning analysis—particularly those who have a goal in mind—may use purported historic investigations as a shield in an attempt to convince other political actors and the general public that the opinion is based on something other than personal or political preferences. Originalism has prompted a great deal of history-centered legal scholarship on various constitutional provisions on all sides of the aisle. While many of these legal writers themselves tend to be law professors rather than trained historians, there is no denying that their writing forms a body of citations for judges' reasoning.[212] Moreover, the historic sources cited within these articles provide a source for primary, or more specialized secondary, source citations for judges and justices seeking to present the appearance of a well-supported opinion.[213] And for higher courts, especially the Supreme Court, collections of these citations are served up through outcome-

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sources to reach conclusions justifying the capital punishment of minors and the mentally disabled).

209. *See* Sachs, *supra* note 89, at 786.

210. *See, e.g.*, Aroop Mukharji & Richard Zeckhauser, *Bound to Happen: Explanation Bias in Historical Analysis*, 1 J. APPLIED HIST. 5, 8 (2019) (defining explanation bias as "the tendency of historical accounts to take a clear causal path when contemporary forecasts would have recognized massive uncertainties," and noting that such a bias tends to "distort even the nature of history and events themselves").

211. *See generally* C. Behan McCullagh, *Bias in Historical Description, Interpretation, and Explanation*, 39 HIST. & THEORY 39 (2000) (warning of "unfair accounts of the past" resulting from historians' biases and noting that biases, such as cultural bias, may be harder to detect than personal bias).

212. *See* Saul Cornell, Heller, *New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss"*, 56 UCLA L. REV. 1095, 1109–10 (2009)

213. *Id.* at 1109–10 (criticizing Justice Scalia's reliance on non-American sources to determine the original meaning of "bear arms" in District of Columbia v. Heller, 554 U.S. 570 (2008) and noting that many of these sources were derived from a law review article published in a conservative-leaning specialized law journal).

oriented amicus briefs.[214] The audience of court opinions—primarily other judges, politicians, and the general public—are generally not trained historians. This means that they may be convinced that courts do indeed apply a rigorous and unbiased method of historic investigation in reaching their decisions. And even if these observers determine that the investigation was inaccurate and goal-oriented, explaining this to a broader lay audience is complicated, as it requires a dive into the historic inaccuracies to get the point across.

3. Present Public Meaning as a Transparent Approach to Judging

Justices relying on present public meaning cannot hide behind the intricacies of historic analysis to keep the public in the dark over the true basis for their decisions. A Justice hoping to reach a preferred outcome that is contrary to the present public meaning of the Constitution's terms must convince the public that the meaning supporting their decision is, indeed, the present public meaning of the term. Under a present public meaning rubric, throwing out a smokescreen of historic citations is simply not an option for a judge who wants to reach a result based on personal or political preferences. In this way, the present public meaning approach is not only superior to originalism on the basis of transparency, but also promotes democratic legitimacy, as members of the public and political actors are more likely to spot instances where judges or Justices seek to decide cases based on their own opinions rather than on the present meaning of the Constitution.

Some tactics to obscure the true basis of opinions may still be available under the present public meaning approach. Judges and Justices may resort to selected dictionary definitions of terms that support their preferred outcome even if there is no basis for selecting among alternate definitions that may lead to differing outcomes in a particular case.[215] Judges, Justices, and many of the attorneys who

214. *See* Ellena Erskine, *We Read All the Amicus Briefs in New York State Rifle so You Don't Have To*, SCOTUSBLOG (Nov. 2, 2021, 4:41 PM), https://www.scotusblog.com/2021/11/we-read-all-the-amicus-briefs-in-new-york-state-rifle-so-you-dont-have-to/ (providing summaries of the amicus briefs filed in N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2020), divided by subject matter, and including numerous briefs filed by challengers purporting to survey the contents of historical laws, views of the founders, and other topics targeted towards guiding the Court's originalist analysis of a firearm restriction).

215. *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 807 (2018) (quoting State v. Rasabout, 2015 UT 72, ¶ 53, 356 P.3d 1258,

argue before them are typically members of upper-class society, with high incomes, elite social circles, and life experiences that are likely far different from many people in America.[216] The elite status and experiences of many in the legal sphere may lead legal actors to hold views of what the present public meaning is that differ substantially from the wider public.[217]

While these concerns are certainly something that advocates of the present public meaning approach should consider, they apply with equal force to originalists as well. Cherry-picking sources has already been discussed, and biases arising from membership and experiences in elite circles may just as easily guide a justice's historic investigation as it does a justice's view on the present public meaning of terms. Moreover, while other political actors and the public are not trained historians, they are still members of modern society who participate in modern day linguistic conventions and are more likely to see through unusual or incorrect statements of present public meaning that are prompted by political preferences or personal biases. This is not to say that it is impossible for the Supreme Court and other courts to dupe their audiences, but it is certainly more difficult to do so without the ability to resort to citation-heavy, technical obfuscation that biased historic research and citation allows.

E. *Implementation*

1. Implementation as a Normative Consideration

As the preceding discussion demonstrates, academic debates over originalism often focus on high-level, theoretical considerations about constitutional interpretive theories. The downside of these discussions is that they often give short shrift to the fact that whatever interpretive theory is adopted, it will need to be applied by judges, attorneys, and other political actors—as well as the public. All too frequently, the practical considerations of implementing an originalist theory are ignored altogether in these discussions, or are

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1274 (Lee, Assoc. C.J., concurring in part and concurring in the judgment) (arguing that dictionaries are commonly used for cherry-picking particular definitions and citing examples where courts choose particular definitions over other existing definitions with little or no explanation)

216. *See generally* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1516 (2010) (arguing that Supreme Court justices are social and economic elites and tend to prioritize the opinions of other elites in rendering their opinions).

217. *See id.* at 1516–17.

relegated to underdeveloped afterthoughts.[218] Other scholars outright deny that questions of implementation are relevant to debates over originalism—suggesting that originalism should be treated as a standard for determining whether a particular interpretation is correct, rather than a decision-making procedure to arrive at such a determination.[219] This move suggests that problems with implementation are not problems with originalist theory itself, and are therefore not a concern for originalists.[220]

The lack of attention paid to implementing originalism should not lead us to conclude that implementation is not an important consideration when deciding what interpretive theory to employ. A theory of constitutional interpretation that can be easily and conveniently implemented by judges, attorneys, and the public is preferable to a theory that is not as easy to implement. Presumably, the goal of this, and other discussions over constitutional interpretive theory is to arrive at conclusions and guidelines for what courts, attorneys, political actors, and the general public should do to interpret the Constitution. For these discussions to have any such real-world impact, a theory of interpretation should be implementable by these actors. If it is not, all of the arguments, effort, and paper devoted to debates over the theory will ultimately have no bearing on the real world and will be of little relevance beyond the self-contained world of such scholarly debates.[221]

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218. *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 197–207 (2013) (addressing, within the book's final 10 pages, how to implement "a culture of originalism," with much of the discussion devoted to implementing originalist theory and research in the legal academy); Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 331–32 (2019) (addressing in the final section of an article on corpus linguistics methodology the concern that judges may not be able to engage in this method, recognizing that the concern is legitimate, and doing very little else to suggest how this concern may be addressed).

219. *See* Sachs, *supra* note 89, at 828.

220. This is an inference that is reflected in both Sachs' previously cited article, and in his discussions of the issue in less formal settings. *See id.* at 793; Stephen E. Sachs (@StephenESachs), TWITTER (Dec. 20, 2021, 5:42 PM), https://twitter.com/StephenESachs/status/1473061250305253377. It is an inference that I challenge in more depth elsewhere. *See* Michael L. Smith, *Originalism and the Inseparability of Decision Procedures from Interpretive Standards*, 58 CAL. W. L. REV. 273, 273 (2022) (arguing that treating originalism as a standard fails to alleviate the challenges of historical analysis required to determine "the Constitution's original public meaning").

221. *See* Smith, *supra* note 220, at 273.

Despite a widespread lack of attention to implementation concerns, some originalists have given serious thought to how originalism may be implemented. Lawrence Solum provides one of the most thorough examples of such an approach through his explanation of the "triangulation" method of originalist interpretation, which combines three separate methods of originalist interpretation and calls for the adoption of findings that each of these methods have in common.[222] Other scholars, including myself, argue that the original public meaning of constitutional provisions may be difficult, if not impossible, to determine and that this implementation problem warrants the abandonment of originalism or, at the very least, significant limitations on the theory's application.[223] All of this supports treating implementation as a normative consideration that should be addressed when debating between alternate theories of constitutional interpretation.

2. Problems with Implementing Originalism, and Avoiding These Problems with Present Public Meaning

Originalism's implementation problem is a subject that I address exclusively and in far greater length elsewhere.[224] As I highlight above, originalist scholars tend to give short shrift to how their theories are to be implemented—often ignoring the subject altogether or quickly assuming that courts and attorneys will engage in proper originalist analysis. A few originalists, notably Lawrence Solum, have made efforts to describe how originalism may be implemented—with Solum suggesting a triangulation method that applies three independent implementation methods, with the correct original interpretation likely lying where those three methods' results converge.[225]

This section will not exhaustively rehash the various problems with implementing originalism, but it presents some highlights. Solum proposes three separate methods to implement originalism:

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222. *See* Solum, *supra* note 171, at 1667–77.

223. *See* Michael L. Smith & Alexander S. Hiland, *Originalism's Implementation Problem*, 30 WM. & MARY BILL RTS. J. (forthcoming 2022) (manuscript at 4–5) (arguing that challenges to implementing originalism warrant abandonment of the theory); *see also* Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L. J. 459, 465 (2016) (arguing that difficulties in interpreting the original meaning of constitutional provisions warrant the adoption of a limited, deferential theory of originalism).

224. *See generally* Smith & Hiland, *supra* note 223 (addressing the problem of originalism's implementation in greater length in another article I authored).

225. *See* Solum, *supra* note 171, at 1667–77; *see also* Lee & Phillips, *supra* note 167, at 267 (describing how corpus linguistics methodology may be employed to undertake originalist analysis).

examining the constitutional record, immersing oneself in history, and using corpus linguistics techniques to determine the original meaning of constitutional provisions and terms.[226]

Examining the constitutional record is one method that Solum proposes, and it consists of reviewing various documents related to the drafting, ratification, and early implementation of the Constitution.[227] Solum notes numerous caveats and limitations to this approach, for example, that debates over constitutional provisions during ratification may frame terms in an argumentative manner, rather than in the manner those terms were commonly used.[228] Solum also warns against overreliance on early practices, suggesting that this may reflect the original expected applications of constitutional provisions rather than the actual original public meaning of the terms.[229]

As suggested above, the adversarial system is structured in a manner that guarantees that judges and Justices will be confronted with one-sided submissions that seek to advocate the ends of the attorneys' clients.[230] Judges lack the time and expertise to engage in a full-blown review of these submissions to determine whether they are accurate, thorough, and comport with actual original public meaning.[231] As a result, originalism cannot be implemented in a

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226. Solum, *supra* note 171, at 1624.

227. *Id.*, at 1655–63.

228. *Id.*, at 1657–58.

229. *Id.*, at 1663–64. For more on originalist warnings against conflating historic practices with original public meaning, *see* Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 559–60 (2006).

230. *See* Rebecca Piller, *History in the Making: Why Courts are Ill-Equipped to Employ Originalism*, 34 REV. LITIG. 187, 198–200 (2015) (describing selective reliance on amicus briefs).

231. *See* Lorianne Updike Toler, Law Office Originalism (Mar. 2, 2021) (unpublished manuscript at 20–21) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659611) (noting Supreme Court Justices' persistent failures to cite primary historic sources (and their frequent failure to cite any historic sources at all)); *see also* Alejandre-Gallegos v. Holder, 598 F. App'x 604, 605 (10th Cir. 2015) ("[i]n our adversarial system, neutral and busy courts rely on lawyers to develop and present in an intelligible format the facts and law to support their arguments . . ."); Martin S. Flaherty, *Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning*, 84 FORDHAM L. REV. 905, 912–13 (2015) (arguing that courts, attorneys, and law professors lack the time to perform research at the same level as professional historians); Dolores K. Sloviter, *In Praise of Law Reviews*, 75 TEMP. L. REV. 7, 9 (2002) (arguing that limits on judges' time leave them unable to read legal scholarship and suggesting that "most academics have no appreciation of the time pressures under which conscientious federal appellate judges are working these days").

rigorous manner that achieves the goal of constraining judges based on original public meaning—the advocacy inherent in litigation and the lack of time and expertise by judges to engage in the necessary analysis dooms the project from the start.

The same is generally true of the second approach that Solum describes—historic immersion. It is unclear what, precisely, immersion entails. Solum describes a practice of reading a wide variety of sources from the founding period and taking months, if not years, to become acquainted with the linguistic practices of the time.[232] Indeed, Solum suggests that full immersion may not have been achieved by any originalist scholars yet.[233]

For attorneys and judges, time constraints are even more of a problem for the immersion approach—as judges certainly do not have the months and years necessary to adequately immerse themselves in a broad range of founding era writings.[234] Additionally, the danger remains that judges, attorneys, and even academics who attempt to undertake this immersion without the appropriate historic training will engage in goal-oriented immersion—selecting sources that they think are particularly relevant based on personal biases or present-day needs. Solum himself claims that the work of professional historians is ill-suited to originalist methodology, claiming that historians seek to uncover narratives and causal connections, while originalists have the end goal of determining constitutional meaning.[235] But this response reveals the problem: Solum all but admits that originalists are taking a goal-oriented approach to their analysis, and as a result they are likely to exclude seemingly irrelevant documents that may well be of crucial importance in revealing the original public meaning of particular terms and phrases.

Deriving the present public meaning of constitutional language does not raise these problems, which necessarily flow from the rigorous historic investigation originalism requires and judges' and attorneys' lack of the expertise necessary to engage in this analysis. Present public meaning analysis does not require historic expertise, it requires an ability to make and evaluate arguments over the common meaning of terms. This is something that attorneys and judges are well versed in—indeed it is what nearly all contractual litigation boils down to.[236] Advocacy and arguments will certainly

232. Solum, *supra* note 171 at 1649.

233. *Id.*, at 1652.

234. *See* Sloviter, *supra* note 231, at 9 (describing judges' inability to read "long, dense, and obscure" law review articles due to time constraints).

235. Solum, *supra* note 171 at 1652–54.

236. Well, that and finding the smoking gun that wins the case after 500 hours of doc review.

remain, but no more so than the many other cases that likely make up much of the judges' dockets.

The final method of Solum's suggested methods, corpus linguistics analysis, involves conducting searches or samplings of search results in a database of documents to determine trends and patterns in the meaning of particular words or phrases.[237] Originalists propose using databases of founding era or reconstruction era documents in which searches may be conducted. For the founding era, the Corpus of Founding Era American English (COFEA) is the database of choice.[238] The database consists of books, pamphlets, and periodicals from the founding era, as well as collections of letters, records, and diaries from several of the founders.[239]

However, there are some problems with corpus linguistics analysis. First, the contents of the databases themselves may be skewed, and lead to skewed results. COFEA's contents, for example, consist overwhelmingly of papers from only six individual founders.[240] As a result, the contents of this database skew towards white, male, elites of the founding era and may therefore underrepresent how words were used by the general public—particularly disadvantaged and disenfranchised members of the public.[241] Second, to apply corpus linguistics methodologycorrectly is a daunting task, requiring determinations of the meaning of dozens, if not hundreds, of uses of a particular word or phrase in various documents.[242] The lack of historic expertise and danger of present biases to skew readings of these documents is not undone just because more documents are introduced to the equation.

The present public meaning approach minimizes both of these problems and enhances the utility of methods like corpus linguistics.

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237. Lee & Phillips, *supra* note 167 at 290–93.

238. *See id.* at 293.

239. *See generally Corpus of Founding Era American English (COFEA)*, BYU L., https://lcl.byu.edu/projects/cofea/ (last updated July 13, 2022) [hereinafter *COFEA*] (listing variety of sources included in the database); *see also* Solum, *supra* note 171 at 1645.

240. *See COFEA*, *supra* note 239.

241. Matthew Jennejohn, Samuel Nelson, & D. Carolina Nunez, *Hidden Bias in Empirical Textualism*, 109 GEO. L.J. 767, 798 (2021) (noting trends of bias against women in adjective use in the mid-1800s); John S. Ehrett, *Against Corpus Linguistics*, 108 GEO. L.J. ONLINE 50, 67 & n.62 (2019) (noting the impact that the contents of a corpus has on analysis and the tendency of corpora made up of text from elite speakers to entrench "existing power relations").

242. Jeffrey W. Stempel, *Adding Context and Constraint to Corpus Linguistics*, 86 BROOK. L. REV. 389, 401-02 (2021) (noting the amount of time required to engage in serious corpus linguistics analysis)

For the problem of skewed datasets, the existence of the internet and a far greater volume and range of texts from a wider range of demographics means that databases may be constructed that are much more extensive and representative than founding and reconstruction era databases. This is not to say that there is no potential for abuse, and present-day databases should be constructed with an eye towards maintaining a broad range of sources that are geographically, racially, and economically diverse. But it is much more likely that a present-day database will be more representative than, say, COFEA and its 115,000 documents from six well-to-do, white, male politicians.[243]

Additionally, the present public meaning approach avoids the dangers of present biases skewing readings of historic documents. By definition, documents that are reviewed in a corpus linguistics analysis of contemporary documents are reviewed based on the present public meaning of the documents. There is no need for judges and attorneys to attempt to put themselves in the shoes of historical writers and readers to avoid misapplying present conventions to the documents. While highly qualified, unbiased, and rigorous originalists may be able to undertake successful corpus linguistics analysis, the risk of bias remains and can never be completely obviated as it is with present public meaning analysis.

Problems remain with corpus linguistics. Goal-oriented readings and imprecise coding of results may lead judges and (more likely) attorneys advocating for readings to interpret results in a skewed manner. Vague coding and imprecise approaches to sampling may result in botched and misleading analysis and conclusions[244]. But these problems are common to both present public meaning and originalism. At worst, a present public meaning approach that employs corpus linguistics analysis carries the same set of common problems as originalism, while removing or reducing the impact of other problems simply by virtue of the approach itself and the scope of documents that may be reviewed.

F. *Desirable Results*

1. Desirable Results as a Normative Consideration

243. *See COFEA*, *supra* note 239.

244. Stefan Th. Gries, *Corpus Linguistics and the Law: Extending the Field from a Statistical Perspective*, 86 BROOK. L. REV. 321, 353-55 (2021) (surveying numerous methodological errors and shortcomings in legal corpus linguistic analysis); Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 795-97 (2020) (describing various fallacies that often arise in the context of legal corpus linguistics analysis).

Another consideration when debating between theories of constitutional interpretation is whether the results of a particular theory will lead to generally desirable results. This consideration takes various forms. Some theorists describe welfare on an abstract level—separate from particular policy goals.[245] Another manifestation of this consideration is the notion that certain precedents must be upheld under an interpretive theory if the theory is to have any feasibility of adoption—*Brown v. Board of Education* being the most prominent example of such a precedent.[246] Indeed, *Brown* has prompted its own cottage industry of originalist scholars attempting to justify the decision on originalist grounds.[247] The normative consideration of desirable results is also in play in arguments for and against originalism to the extent that advocates believe that originalism will reach certain policy results.

John McGinnis and Michael Rappaport are the most prominent and consistent advocates of the notion that originalism leads to generally beneficial results. They argue that the Constitution and its Amendments are adopted through supermajoritarian procedures, which tend to lead to good results for a variety of reasons, including an absence of partisan preferences, enhanced concern for minority rights resulting from forward-looking considerations of how long the constitutional provisions will remain in place, and the need for a broad consensus on whatever provisions eventually go into effect.[248] Because these supermajoritarian processes are more likely to result in positive outcomes, a constitution "enacted under supermajority rules should be interpreted according to its original meaning" as "the enactors would have voted for or against the constitution based on the meaning they attributed to it."[249]

Reliance interests also play a role in whether a particular theory of constitutional interpretation is desirable. Even for those supporters

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245. *See* MCGINNIS & RAPPAPORT, *supra* note 218, at 23–24.

246. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995) ("[s]uch is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited").

247. Ronald Turner, *On* Brown v. Board of Education *and Discretionary Originalism*, 2015 UTAH L. REV. 1143, 1185–96 (2015) (describing and critiquing efforts by original public meaning originalists to argue that "*Brown* is an originalist decision"); Mike Rappaport, *The Growing Originalist Case for* Brown v. Board of Education, L. & LIBERTY (Mar. 10, 2014), https://lawliberty.org/the-growing-originalist-case-for-brown-v-board-of-education/.

248. *See* MCGINNIS & RAPPAPORT, *supra* note 218, at 33–58.

249. *Id.* at 82.

of originalism who take a dim view of contrary precedent and an even dimmer view of claimed reliance interests are willing to hesitate in implementing the originalist vision where such action would result in the collapse of long-standing, pervasive institutions upon which numerous members of American society depend. A clear example of such an institution that gives even devout originalists pause is the provision of social security—while some originalists contend that America's Social Security regime is unconstitutional, they acknowledge that originalist judges should not take action to destroy the institution, as doing so would have catastrophic effects for many who depend on Social Security.[250]

While McGinnis and Rappaport's theory and the discussion above over reliance interests focuses on abstract considerations of good or bad results rather than identifying policy outcomes, other advocates for particular interpretive theories may argue for a particular approach based on specified outcomes of such an approach. Keith Whittington notes that a potential approach to justifying a theory of interpretation may be to "view liberty to be the highest priority of constitutionalism," meaning that the interpretive approach that best "enhanc[es] liberty" should be the approach to adopt.[251] Whittington identifies Ronald Dworkin's "moral reading" approach to constitutional interpretation as focusing on liberty in such a manner.[252] Others take the position that an interpretive theory must have specific political outcomes, and argue for a particular theory on the basis that it will most likely achieve such outcomes. A prominent example of such an approach is Adrian Vermeule's "common good constitutionalism," in which he argues that originalism has "become an obstacle to the development of a robust, substantively conservative approach to constitutional law and interpretation," and argues for an alternate interpretive approach that will achieve such conservative ends.[253]

Debates over interpretive theories that are based on specific outcomes often overlap with political debates. Vermeule's approach, which explicitly advocates for various conservative outcomes (but also a few which may be supported by liberals) certainly prompted its

250. *See* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. 257, 266 (2005); *see also* MCGINNIS & RAPPAPORT, *supra* note 218, at 179.

251. Whittington, *supra* note 101, at 398.

252. *Id.* at 398.

253. *See* Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.

share of criticism from the right and the left.[254] Such political tussles may seem beneath the abstract and theoretical discourse that pervades debates over originalism and other interpretive theories. But it would be a mistake to ignore these debates. Political considerations are of concern to the general public and politicians when it comes to debates over constitutional theories, and at least one senator has proposed abandoning originalism due to its failure to deliver desired conservative results.[255] While the variety of political considerations that may influence debates over originalism are too numerous for this Article to address in great depth, this should not be taken as an assumption that these considerations are of lesser relevance to debates over constitutional theory simply because they tend to be the province of politicians rather than professors. Still, in the interest of simplicity and generalizability, this Article will focus on the more abstract notions of generalized desirable results (as referenced by McGinnis and Rappaport) and reliance interests, as achieving these goals may be more universally desirable than other, politically charged goals.

2. Present Public Meaning and Desirable Results for a Modern Society

254. For criticism from the left, *see, e.g.*, Eric Levitz, *No, Theocracy and Progressivism Aren't Equally Authoritarian*, INTELLIGENCER (Apr. 2, 2020), https://nymag.com/intelligencer/2020/04/vermeule-catholic-integralism-theocracy-progressives-conservatives-constitution.html ("the theocrat's call for conservatives to embrace 'political domination and hierarchy,' as a means of coercing all of society into a singular moral purpose dictated from above—a moral purpose that would bring low the (((urban-gentry liberals))) whose sexual licentiousness and financial machinations have corrupted the spirit of the people—is quite plainly more evocative of fascism than, say, a liberal op-ed defending affirmative action with appeals to the common goods of diversity and equality"). For criticism from the right, *see, e.g.*, David B. Rivkin Jr. & Andrew M. Grossman, *The Temptation of Judging for "Common Good,"* WALL ST. J. (July 23, 2021, 1:58 PM), https://www.wsj.com/articles/supreme-court-conservative-liberal-originalist-vermeule-11627046671 (arguing that the "Constitution doesn't codify the common good, let alone appoint judges as its inquisitors" and that "originalism delivers [conservative] results").

255. In Bostock v. Clayton County, the Court, in a majority opinion by Justice Gorsuch, held that firing employees merely for being gay or transgender violated Title VII of the Civil Rights Act. 140 S. Ct. 1731, 1754 (2020). In the wake of this ruling, Senator Josh Hawley remarked that the decision marked the "end of the conservative legal movement" and that textualism and originalism had no meaning if such an opinion could be reached. *See* 166 Cong. Rec. S2998 (daily ed., June 16, 2020) (statement of Sen. Josh Hawley).

Discussions of which approaches to interpretation have the most desirable results are perilous, as they carry a high risk of devolving into arguments over policies and political positions. A party on one side of the debate who prefers an interpretive approach that favored overturning *Roe v. Wade*[256] may contend that originalism is a poor or hopeless theory if it fails to bring about that result.[257] A party to the debate who favored *Roe v. Wade* may argue that originalism is an unacceptable theory if it *does* bring about that result. Different policy preferences therefore may lead to different conclusions about the desirability of a particular policy.

On an abstract level, however, the argument for the present public meaning interpretive approach should be apparent. Courts that apply the present public meaning of constitutional terms are more likely to take into account present day circumstances and the needs of modern society when interpreting the Constitution. Things have changed a great deal since the founding—new technologies have developed, groups of formerly disenfranchised people now have the vote, and communication and development of domestic and international trade have led to greater economic interconnectivity, among countless other examples. While originalists claim that original public meaning may be adapted to present circumstances, this is far from apparent and, in any event, comes at the cost of constraint and predictability as judges must engage in extensive analogizing and analysis (also known as

256. 410 U.S. 113 (1973).

257. *See* Nathanael Blake, *If the Supreme Court Whiffs on Abortion, They'll Blow Up the Conservative Legal Movement*, THE FEDERALIST (Dec. 7, 2021), https://thefederalist.com/2021/12/07/if-the-supreme-court-whiffs-on-abortion-theyll-blow-up-the-conservative-legal-movement/?utm_source=rss&utm_medium=rss&utm_campaign=if-the-supreme-court-whiffs-on-abortion-theyll-blow-up-the-conservative-legal-movement (contending that originalists are swayed to drift toward liberal conclusions because of their association with elites who tend to be hostile toward conservative opinions and outcomes); Edwin Meese III, *Did the Conservative Legal Movement Succeed? That All Depends on Whether the Supreme Court Overrules* Roe v. Wade, WASH. POST (Nov. 29, 2021, 9:48 AM), https://www.washingtonpost.com/opinions/2021/11/29/did-conservative-legal-movement-succeed-that-all-depends-whether-supreme-court-overrules-roe-v-wade/ ("[b]ecause the errors of *Roe* and *Casey* are not self-contained, failing to reverse them in *Dobbs* would threaten to destroy the 40-year effort to restrain the court with the Founders' interpretive principles"). While this example is now a moot point in the wake of Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022), which overruled Roe v. Wade, it remains debatable whether the Dobbs decision was an originalist one. *See* Michael L. Smith, *Abandoning Original Meaning*, 36 ALB. L. REV. (forthcoming 2023) (manuscript pp. 36-38) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4211660).

constitutional "construction") for this to be possible.[258] Applying the present public meaning of constitutional provisions is more likely to account for modern circumstances and, in doing so, will better apply the broad, principled language of the Constitution to today's America.

McGinnis and Rappaport oppose this approach and present their own abstract argument for originalism as a theory likely to reach good results by focusing on the need for compromise and supermajoritarian agreement that led to the ratification of the Constitution and its Amendments.[259] They argue that originalism is still preferable even though hundreds of years have passed since the Constitution's enactment because only the original meaning of the Constitution can preserve the benefits that gave rise to the consensus on the terms.[260] McGinnis and Rappaport argue that the Constitution was designed to endure, pointing to its limited nature and arguing that it sets forth general principles that can be adapted to diverse factual circumstances.[261] They further assert that attempts by judges to "update" the meaning of the Constitution to match present circumstances is undesirable because: (1) it does not carry the same probability of benefits as a supermajoritarian amendment to the Constitution; (2) judges are likely to write their own preferences into the opinions they issue in updating the Constitution's meaning; and (3) the potential for further change by future Justices with different views will render law unpredictable.[262]

But each of these reasons to preserve the original meaning of the Constitution in a quest for better overall outcomes is mistaken. To start, McGinnis and Rappaport's concern over predictability drifts into the territory of the normative goal of predictability itself, rather than the separate normative consideration of desirable results. This Article has already demonstrated how originalism, if fully implemented, will upend predictability and stability in the legal system, and why the present public meaning approach is not as arbitrary and unpredictable as its opponents make it out to be.[263] I will not repeat those same arguments here.

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258. *See* ERIC J. SEGALL, ORIGINALISM AS FAITH 91–98 (2018) (describing the process of constitutional construction and demonstrating how it may be used to arrive at a variety of results—particularly if the underlying text is read in a highly general manner).

259. *See* MCGINNIS & RAPPAPORT, *supra* note 218, at 33–58.

260. *Id.* at 82.

261. *Id.* at 84–85.

262. *Id.* at 85–87.

263. *See supra* Section IV.B.

Preserving the original meaning of the Constitution pays homage to the supermajoritarian requirements for those provisions, and the consensus and compromises necessary to enact those terms. But the benefits these provisions have to society are, in large part, dependent on the course that society follows, and changing technologies, shifts in geopolitical power, and moral sentiments all may cause those old, supermajoritarian provisions to become less than ideal in modern America. While McGinnis and Rappaport suggest that constitutional amendments may resolve this problem, amendments only become feasible when the problems are so severe that they can overcome the inertia of existing provisions and prompt the cumbersome, difficult process of an amendment to occur.[264] Moreover, the present public meaning approach to interpretation does preserve at least some of the end results of the supermajoritarian processes of ratification by remaining dependent on the text that was enacted—the only thing that this approach changes when compared with originalism is the reference point for the meaning of that text.

As for judges writing their own preferences into the Constitution, this problem is only unique to living constitutionalism if one assumes that judges faithfully follow the originalist approach. But as has already been addressed above, this is unrealistically optimistic. Originalism lends itself to abuse by allowing judges and justices to obfuscate their opinions in the guise of historic legitimacy through cherry-picked sources.[265] The adversarial system makes it more likely that judges will be drawn toward a particularly favored outcome and simply adopt the reasoning and citations of those parties.[266] And, as just noted, judges remain constrained under the present public meaning approach—both by the text of the Constitution, and the greater likelihood of other political actors or the general public taking issue with interpretations that are too far afield of the present public meaning of constitutional provisions.

Beyond this, endless arguments may be had over the policy goals that a present public meaning approach would advance in comparison to an originalist approach. Whether these arguments are convincing boils down to a matter of policy preference. These arguments are therefore better left for a separate article or series of articles that proceed with assumptions regarding desirable and undesirable policy outcomes.

G. *Positivist Considerations*

264. *See* Amar & Amar, *supra* note 196; Davis, *supra* note 196.
265. *See supra* Section IV.D.2.
266. *See supra* Section IV.E.2.

1. The Positive Turn: Relevant, but Not a Normative Consideration?

The final normative consideration to consider in debates over interpretive theories is whether the theory at issue is, in fact, our law. Recent discussion of this issue tends to stem from William Baude's article, *Is Originalism Our Law?*[267] Baude suggests that whether originalism is our law is a question apart from conceptual and normative debates over originalism, suggesting that this "positive turn" may "reorient the debates and allow both sides to move forward."[268] Stephen Sachs argues for the positive turn as well, and suggests that, if originalism is indeed our law, this is an argument for originalism.[269] He does distinguish this from normative arguments, though, framing normative arguments as debates over whether a certain theory of interpretation is a "good idea" from a certain normative perspective, while framing the positivist argument for originalism as being based on certain social facts—that is, whether originalism is in fact our law.[270] The difference between the approaches becomes apparent by combining positivist and normative considerations: for example, one might accept that originalism is our law, but *should* originalism be our law?

Considering the differences between normative and positive considerations set forth by Baude and Sachs, I am hesitant to label the notion of whether originalism is our law as a normative consideration for or against accepting originalism. But, as Sachs notes, if originalism is indeed our law, this may constitute a reason for employing originalism, albeit a positivist reason rather than a normative reason.[271] If originalism indeed is the approach that courts have adopted in determining the outcome of constitutional cases, this may well constitute a reason to accept the theory that overlaps with some other normative considerations, such as predictability. If, however, courts tend to use interpretive methods other than looking to the original public meaning of the Constitution's text, this reason for accepting originalism is undermined. This may not be a normative reason against adopting originalism—an originalist could still

267. *See* generally William Baude, *Is Originalism Our Law*, 115 COLUM. L. REV. 2349 (2015) (providing "a new framework for criticizing originalism or its alternatives").
268. *Id.* at 2351.
269. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 835–58 (2015).
270. *Id.* at 824, 835–38.
271. *See id.* at 835–58.

contend that originalism *should* still be the theory courts should use—but it would undermine the positive turn in originalist theory.

The positivist turn remains relatively limited in its influence and acceptance, with Baude and Sachs as the primary proponents of the theory battling off their fair share of critics.[272] However, it is still worth mentioning considering the attention it has received. Additionally, as will be noted further along in the article, whether a method of interpretation is, in fact, employed by courts is treated as a relevant consideration in arguing over whether the method should be accepted. For this reason, this article will address positivist considerations, although it does so with the recognition that these issues may not operate at the same level or in the same way as the normative considerations discussed above.

2. The Present Public Meaning Approach May Constitute More of Our Law than Originalists Realize

For the positivist considerations dimension of discussing original public meaning versus present public meaning, the relevant question is whether our law reflects the use and application of originalist methodology or present public meaning methodology. There may be some trickiness in parsing out answers to this. Baude, for instance, argues that it is possible for a court to be wrong as a matter of textual or originalist analysis, but still ask the right questions to the extent that a wrong outcome may still count as an example of an originalist opinion.[273]

Whether this maneuver by those in favor of the positivist turn is permissible is the subject of a debate over that approach. Here, it is only one of several considerations that are worth giving to the theory. Indeed, whether it is even important if the normative considerations weigh in favor of a particular theory may be up for debate. If originalism is our law, but all pertinent normative considerations weigh in favor of the alternate present public meaning approach to constitutional interpretation, this seems to be a convincing reason to reject originalism in favor of present public meaning.

Moreover, even if a judge gets originalist analysis wrong, *how* that analysis goes wrong may still have bearing on whether originalism or

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272. *See* Guha Krishnamurthi, *False Positivism: The Failure of the Newest Originalism*, 46 BYU L. REV. 401, 406 (2021) (arguing that the positivist turn fails because, among other reasons, originalism is not in fact our law, and the obligation to follow the law is an insufficient basis to accept positivist originalism); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1464 (2019) (responding to criticism of the positivist account of originalism).

273. *See* Baude, *supra* note 267, at 2378.

present public meaning is indeed our law. If a purportedly originalist opinion reaches an incorrect result, and does so on the basis of applying present-day meanings or assumptions in the analysis, such an opinion ought to provide positivist support to the present public meaning approach despite its originalist trappings.

As noted above, judges that purport to apply originalist methodology may do so in a manner that is based on assumptions and biases grounded in the present day. Critics point out that several decisions that are often hailed as originalist decisions are, in fact, non-originalist opinions.[274] Justice Scalia's opinion in *District of Columbia v. Heller*, for example, has been subjected to criticism for relying on modern sources as well as writings from well after the ratification of the Second Amendment in determining the original public meaning of the Second Amendment.[275] These issues are apparent on the fact of the opinion—for instance, to the extent that the Court found that Second Amendment rights are limited for weapons that are not in "common use" or that are "dangerous and unusual."[276] The Court goes on to suggest that this category of weapons may include "weapons that are most useful in military service—M-16 rifles and the like," and deals with an objection that this results in the right having less to do with service in a militia.[277] But the Court does not address why these weapons are so unusual or uncommon—which is because the law prohibits the possession of these weapons.[278] Assuming that illegal weapons are uncommon weapons that are beyond the protection of the

274. *See* Lawrence Rosenthal, *Originalism In Practice*, 87 IND. L. J. 1183, 1232–42 (2012) (arguing that Crawford v. Washington, 541 U.S. 36 (2003), Apprendi v. New Jersey, 530 U.S. 466 (2000), and District of Columbia v. Heller, 554 U.S. 570 (2008) are all inconsistent with various forms of originalism).

275. *See* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 196–97 (2008) (flagging Scalia's citations to 1998 sources and other post-ratification sources in support of a nonmilitary meaning of the Second Amendment); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 272 (2009) (accusing both the majority and the dissent in *Heller* of a "freewheeling enterprise"—gathering citations from varying times in history in support of advocated interpretations of the Second Amendment).

276. *See* District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (drawing the "common use" language from United States v. Miller, 307 U.S. 174, 179 (1939) and the "dangerous and unusual weapons" language from 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 148 (1769)).

277. *Id.*

278. *See, e.g.*, 18 U.S.C. § 922(o)(1) (prohibiting the possession or transfer of machineguns); *see also* United States v. Miller, 307 U.S. 174, 178 (1939) (finding no evidence that the Second Amendment protected the right to keep and bear short barreled shotguns).

Second Amendment applies a modern perspective to reading the amendment.

The Fourteenth Amendment's incorporation of the first eight amendments of the Constitution is another example of where the Court appears to have rejected an originalist reading of amendments in favor of practical considerations. Prior to the enactment of the Fourteenth Amendment, people could raise the protections of the first eight amendments to challenge actions by the federal government, but not state governments.[279] After the Fourteenth Amendment was enacted, the Court began to hold that various "rights enumerated in the first eight Amendments" were protected by the Fourteenth Amendment—specifically the Due Process Clause of the Amendment which prohibits states from depriving people of "life, liberty, or property, without due process of law."[280]

Incorporating the rights in this matter raises the following question for originalists: should those provisions of the first eight amendments that are incorporated against the states be read based on their original public meaning when they were first enacted, or should they be read based on their original public meaning in 1868 when the Fourteenth Amendment was first enacted? Justice Thomas raised this precise question at oral argument in *New York State Rifle & Pistol Association Inc. v. Bruen*.[281] Originalist scholars have considered the implications of reading the first eight amendments from the perspective of a reader in 1868 for certain amendments as well.[282]

But the Supreme Court has explicitly rejected reading the first eight amendments based on their meaning in 1868—at least to the extent that the 1868 reading would have any practical effect on the protection that the amendments provide. In *Malloy v. Hogan*, for example, the Court stated:

> The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a "watered-down, subjective version of the individual guarantees of the Bill of Rights," *Ohio ex rel. Eaton v. Price*, 364 U. S. 263, 275 (dissenting opinion). If *Cohen v. Hurley*, 366 U. S. 117, and *Adamson v.*

279. *See* McDonald v. City of Chicago, 561 U.S. 742, 754 (2010).

280. U.S. CONST. amend. XIV, § 1; Malloy v. Hogan, 378 U.S. 1, 4–5 (1964) (citing Twining v. New Jersey 211 U.S. 78, 99 (1908)).

281. *See* Transcript of Oral Argument at 8, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2021) (No. 20-843).

282. *See* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1099–1100 (1995).

> *California, supra,* suggest such an application of the privilege against self-incrimination, that suggestion cannot survive recognition of the degree to which the Twining view of the privilege has been eroded. What is accorded is a privilege of refusing to incriminate one's self, and the feared prosecution may be by either federal or state authorities. *Murphy v. Waterfront Comm'n, post,* p. 52. It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.[283]

Here, the Court explicitly rejects applying different standards because protections operate through the Fourteenth Amendment rather than solely the original amendment to avoid "incongruous" protections. While avoiding such incongruity may be an admirable goal, it is not consistent with originalism—it is instead informed by other normative considerations such as predictability and perhaps by desirable results.

Lest critics argue that this example is outdated and that modern originalists would take a different stance given the chance, prominent modern originalists have either written, or signed onto, opinions consistent with that set forth in *Malloy*. In *McDonald v. City of Chicago*, for example, the Court rejected the notion that protections against state infringement of rights are different from protections against infringements by the federal government, explicitly raising stability and predictability as its reason for doing so:

> [Justice Stevens] would hold that "[t]he rights protected against state infringement by the Fourteenth Amendment's Due Process Clause need not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights." *Post*, at 866. As we have explained, the Court, for the past half century, has moved away from the two-track approach. If we were now to accept Justice STEVENS' theory across the board, decades of decisions would be

283. *Malloy*, 378 U.S. at 10–11.

> undermined. We assume that this is not what is proposed. What is urged instead, it appears, is that this theory be revived solely for the individual right that *Heller* recognized, over vigorous dissents.[284]

Justice Scalia, then the Court's most prominent originalist, signed onto this portion of the opinion.[285] Fast forward ten years to 2020, and Justice Gorsuch, another noted originalist who took Scalia's seat on the Court, emphasized the Court's historic rejection of the notion that the Fourteenth Amendment provides a different level of protection against state governments.[286] Rather than seriously grapple with the question of whether founding era or reconstruction era public meaning should be used to interpret the scope of protections against state governments, the Court, and originalists on it, consistently choose the uniform approach instead—for no reason other than avoiding incongruous protections. All of this suggests that originalism, at least in this context, is not, and has not been our law for some time.

At first glance, the present public meaning approach may not have much of an edge over originalism on positivist grounds. The Court does not explicitly choose the present public meaning of the Constitution's language over the original public meaning. But while a present public meaning advocate may face an uphill battle, originalists should not think that their positivist claims are without obstacles. Moreover, for every originalist opinion that smuggles in present-sense perspectives or biases in interpreting the constitution, this not only counts against originalism as our law, but counts in favor of the present public meaning approach being our law. Positivists may argue that attempts at originalism still support a claim that originalism is our law. But if the precedent that these methods put into place is, in fact, based on present public meaning, the purported intentions and originalist buzzwords used by the Justices deciding these cases is of little practical import.

Originalists may attempt to deny this—suggesting that under a broad framing of originalism, originalism is, in fact, our law.[287] Such a broad formulation of originalism, however, becomes almost impossible to prove or disprove—as alternate methodologies may just

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284. McDonald v. City of Chicago, 561 U.S. 742, 788 (2010).

285. *Id.* at 748–49.

286. Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020).

287. *See* Baude, *supra* note 267, at 2354–63 (arguing that originalism should be conceptualized as an "inclusive" theory and suggesting that, while a catalog of originalist approaches would likely be "a book-length project," they can be unified under the broad notion of an approach that rejects methods or interpretations that originalism meaning would prohibit).

as easily be deemed originalist approaches under such a broad umbrella.[288] Moreover, such a broad approach is inconsistent with how most non-positive-turn scholarship operates, with originalists critiquing decisions or Justices that are inconsistent with originalism as not being originalist.[289]

IV. DOES "THIS CONSTITUTION" REQUIRE AN ORIGINAL PUBLIC MEANING APPROACH TO INTERPRETATION?

In his article, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, Christopher Green argues that the text of the Constitution itself provides direction for how it should be interpreted.[290] Much of Green's discussion concerns instances in which the Constitution refers to itself as "this Constitution," and how these references warrant textual approaches to constitutional interpretation.[291]

Of particular relevance to this article, Green argues that the Constitution's text warrants an interpretive approach based on the original public meaning of the Constitution. Green starts by claiming that the Constitution's reference to "We the People" should be read as "We the People at the time of the Founding."[292] Green presents this reading of the Constitution's author in contrast to the alternative of an "intergenerational constitutional author," in which the Constitution's author is to be viewed as the people of the United States from the founding to the present.[293] The thrust of Green's argument draws on language in the Constitution's Preamble which states that one of the Constitution's purposes is to "secure the Blessings of Liberty to ourselves and our Posterity."[294] Green argues that the reference to "our Posterity" is not consistent with an

288. Krishnamurthi, *supra* note 272, at 458–59 ("Baude seems to contend that any reference to original meaning or text evinces an original-law originalist methodology. But this commits the mistake of ambiguation: pluralist methodologies can, and often do, take advantage of arguments from text and original meaning").

289. *See* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 14–15 (2006) (suggesting that various examples of opinions by Justice Scalia demonstrate that he is not a committed originalist).

290. Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1607 (2009).

291. *Id.* at 1641–66.

292. *Id.* at 1662.

293. *Id.* at 1657–58 (contrasting his conception of the Constitution's author with that set forth by Jed Rubenfeld in *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1146 (1995)).

294. *Id.* at 1658.

intergenerational author, as there would be "no need to refer separately to 'our Posterity,' because they would already be included within the constitutional author."[295] Green also cites other instances of state constitutions using similar language.[296] He then cites examples where state constitutions "make it fully explicit, usually in their preambles, that the constitutional author is the convention assembled at the time of the Founding."[297] All of this, Green argues, supports the conclusion that the Constitution's author, "We the People," should be read as "We the People" at the time the Constitution was ratified.

Green's next argument draws on the text of Article I, Section 9 of the Constitution:

> The Migration or Importation of such Persons as any of the States *now existing* shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.[298]

Green argues that the "now existing" language in this constitutional provision—a provision that notably restricts Congress from imposing restrictions on the importation of slaves, but that permits the imposition of taxes on such slaves—requires that the Constitution be read based on its original meaning.[299] Reading "now existing" based on a present context is nonsense, Green argues, as this same provision refers to "now" as a time before the year 1888.[300]

Green's final argument draws on Article II, Section 1, Clause 5 of the Constitution, which states that "No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . . "[301] Green contends that "[a]n intergenerationally adopted constitution could not use 'the time of the adoption of this Constitution' as a particular time, as the Constitution does."[302]

Green claims that, because of all of this, "this Constitution" is "located at the time of the founding."[303] But the evidence Green cites

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295. *Id.*
296. *Id.* at 1658–60 & nn.165–66.
297. *Id.* at 1661 & n.173.
298. *Id.* at 1662 (quoting U.S. CONST. art. I, § 9, cl. 1) (emphasis added).
299. Green, *supra* note 290, at 1662.
300. *Id.*
301. *Id.* at 1665 (quoting U.S. CONST. art. II, § 1, cl. 5).
302. *Id.* at 1666.
303. *Id.*

is insufficient to establish this bold claim. To start, Green's focus on the alternative of an "intergenerationally adopted constitution" ultimately undermines the strength of his affirmative claims. While Green argues against this foil to his own interpretive approach, he does not sufficiently address the possibility that the people at the time of the founding could have authored a document that was meant to be interpreted based on changing public meanings. While the *author* of the Constitution may be fixed, rather than intergenerational, this does not lead to the conclusion that the Constitution's *meaning* remains fixed at the time of authorship. Indeed, the People who authored the Constitution, knowing that they were authoring the Constitution not just for themselves, but for their Posterity, explicitly state that the Constitution is to be interpreted by future generations.[304] This approach to interpretation is further confirmed by the Constitution's references to rules and procedures that are to apply to future events, thereby confirming that it will need to be read in the context of some undetermined future event.[305] These forward-looking provisions include references to "this Constitution," which undermines any attempt to assert that such a reference implies a unified reference to a present public meaning approach.[306]

With the issue of a fixed constitutional author addressed, all Green has left in support of his time-constrained approach to interpretation are two instances where the Constitution's text purportedly requires an original public meaning approach.[307] But one of his examples, Article II, Section 1, Clause 5, does not support this conclusion, as it merely refers to a particular point in time: "the time of the Adoption of this Constitution," rather than stating that such a

304. *See* U.S. CONST. pmbl.

305. *See, e.g.*, U.S. CONST. art. I, § 3, cl. 6 (setting forth procedures to be followed by the Senate in impeachment proceedings during the trial of a President).

306. *See* U.S. CONST. art. VI, cl. 2 ("[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"). Elsewhere, Green asserts that singular references to "This Constitution" imply that a single instance where the Constitution uses the word "now" means that an original public meaning approach must be imputed to the entire document. Christopher R. Green (@crgreen24601), TWITTER (Mar. 24, 2022, 10:40 p.m.), https://twitter.com/crgreen24601 /status/1507185609902895113. The Constitution's explicit reference to the application and legal status of "This Constitution" in future contexts undermines this assertion. *See* U.S. CONST. art. VI, cl. 2.

307. Green, *supra* note 290, at 1657–64.

point is to serve as the interpretive reference point for the Constitution.[308]

This provision, in fact, undermines the strongest evidence Green presents in favor of the present public meaning approach: the reference to the states "now existing" in Article I, section 9.[309] Green reads "now existing" expansively, asserting that the entire Constitution is to be read in the context of "now"—that is, the time of ratification.[310] But if this were the case, Article II, Section 1, Clause 5 would not need to refer explicitly to "the time of the Adoption of this Constitution." [311]

Additionally, Article II, Section 1, Clause 5 demonstrates the vagueness of the "now" language. While Green contends that this language means that the Constitution must be read as of the "time of the founding," he does not elaborate on what particular time this is—because he cannot.[312] Is it the time of drafting? Is it the time of ratification? Is it any time before the year 1808? Any of these readings are feasible under the language of Article I, Section 9, yet the language remains too vague and imprecise to confirm any of them.

Moreover, the Constitution elsewhere refers to "this Constitution" as something that will be established in the future, with Article VII setting forth sufficient conditions to be met to effectuate the ratification of the Constitution.[313] If "this Constitution" does not have legal effect "now," but will only be established upon ratification by a certain number of states, this further undermines a uniform reading that the Constitution's text refers to a particular point in time.

Beyond the textual issues raised with Green's argument, Green does not sufficiently establish why a single reference to the "now existing" states warrants reading the entire Constitution in the context of founding era meaning. Because the Constitution contains multiple references to events that have yet to occur and because it is explicitly drafted "to secure the Blessings of Liberty to ourselves and our Posterity," the text lends itself to the present public meaning approach instead, as such an approach best allows for interpretation and application by those subject to the Constitution in the future.[314]

And one must not forget the most significant problem with Green's reliance on Article I, Section 9, clause 1 of the Constitution—it restricts Congress's power to prohibit importing slaves and permits

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308. *See* U.S. CONST. art. II, § 1, cl. 5.
309. U.S. CONST. art. I, § 9, cl. 1.
310. *See* Green, *supra* note 290, at 1663; *see also* Green, *supra* note 306.
311. U.S. CONST. art. II, § 1, cl. 5.
312. *See* Green, *supra* note 290, at 1666.
313. *See* U.S. CONST. art. VII.
314. *See* U.S. CONST. pmbl.

the taxation of imported slaves.[315] This provision no longer has any effect in light of the Thirteenth Amendment's prohibition on slavery.[316] Accordingly, the single instance in which the Constitution uses the term, "now," is in the context of a clause permitting slavery that has long been stricken by amendment.[317] This is hardly a sufficient basis to claim that the Constitution's text requires that the meaning of the Constitution be historically confined to the time of the founding.

CONCLUSION

Under the normative theories (and positivist considerations) set forth above, the present public meaning approach to originalism is superior to the original public meaning approach. Judges are more likely to be constrained when they base their decisions on the present public meaning of the Constitution's provisions. Judges with agendas are unable to hide motivated reasoning behind technical historic analysis and flurries of citations that advocates in the legal and academic spheres readily provide. And judges who earnestly seek to reach the correct results are less likely to let their biases interfere when they avoid the foreign, technical steps required for the rigorous historic investigation that originalism requires. Moreover, judges are more likely to be checked by the broader public for their decisions, as the public will be more likely to understand the present public meaning of the Constitution rather than its original public meaning. This is more likely to result in desirable and democratically legitimate results.

This Article is not meant to demonstrate that the present public meaning approach to constitutional interpretation is the best approach to interpretation overall. But the present public meaning approach is preferable to originalism largely because it can sidestep numerous defects with originalism and its implementation. Whether there are alternate approaches that may be even more preferable under the normative considerations outlined above, and what doctrinal implications the present public meaning approach may have are the subjects for future research, articles, and perhaps litigation.

Instead, this Article sets forth just one potential theory that beats the theory of original public meaning originalism. Originalists may well take issue with the normative discussion above—although there

315. *See* U.S. CONST. art. I, § 9, cl. 1.
316. *See* U.S. CONST. amend. XIII.
317. *See* U.S. CONST. art. I, § 9, cl. 1, amended by U.S. CONST. amend. XIII.

has been little serious effort to dismiss the present public meaning approach beyond overwrought concerns about the perils of linguistic drift. If originalists wish to defend their theory on these normative grounds, they are welcome to—but this article suggests that they will face an uphill battle. At the very least, originalists cannot contend that there simply is no feasible alternative to their theory. The present public meaning approach exists, is more than feasible, and presents a genuine threat to overconfident originalists.