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LAYING CLAIM TO THE CONSTITUTION: THE PROMISE OF NEW TEXTUALISM

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INTRODUCTION

LIVING constitutionalism is largely dead. So, too, is old-style originalism. Instead, there is increasing convergence in the legal academy around what might be called "new textualism." The core principle of new textualism is that constitutional interpretation must start with a determination, based on evidence from the text, structure, and enactment history, of what the language in the Constitution actually means. This might not sound revolutionary, but it is. This Article explains how we have arrived at this point, why it is significant, and what work remains to be done.

Constitutional interpretation is an inevitably contested topic, and academics tend to emphasize differences rather than similarities between their theories and others. In addition, old debates die hard. Even when positions change, old battle lines remain visible even if no longer accurate. This is especially true when academic debates spill out into the public, as they have regarding constitutional interpretation.

These facts have obscured, at least from the public, an important shift in the legal academy regarding constitutional interpretation. For years, the dividing line was drawn between conservatives who favored looking to the framers' "original intent" when interpreting the Constitution and liberals who instead favored the idea of a "living Constitution." Conservatives like Professor Robert Bork viewed the Constitution as having a fixed and fairly precise meaning, which in conservative hands usually coincided with the preferences of contemporary conservatives.[1] Liberals, by contrast, argued that the Constitution must evolve to meet changing circumstances.[2]

Each side in this old debate faced withering criticism. Progressive academics pointed out the numerous problems with relying on original intent, ranging from the difficulty of ascertaining that intent to the historical fact that the framers themselves did not be-

[1] See, e.g., Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971); Robert H. Bork, The Constitution, Original Intent, and Economic Rights, 23 San Diego L. Rev. 823 (1986) [hereinafter Bork, Original Intent]; see also Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 1–10 (1977).

[2] See, e.g., Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204 (1980). See generally Ethan J. Leib, The Perpetual Anxiety of Living Constitutionalism, 24 Const. Comment. 353 (2007).

lieve that their intent should control constitutional interpretation.[3] Conservatives, in turn, chided liberals for suggesting that the Constitution lacked a determinate and fixed meaning and was thus sufficiently malleable to allow contemporary judges to read their own views into the Constitution.[4] More generally, conservatives pointed out that liberals did not have a genuine theory of interpretation—even if there were problems with original intent, liberals offered no principled alternative that would preclude judges from basically making it up as they went along.[5]

In response to these critiques, both conservative and liberal academics shifted their views and moved toward common ground. Conservatives generally abandoned original intent in favor of original meaning. Instead of attempting to divine the intent of the framers or ratifiers, the quest now is to determine the objective, original public meaning of the relevant constitutional text.[6] This shift, as explained in more detail below, has important consequences for constitutional interpretation—ones that are not always welcomed by conservatives. Progressive academics, for their part, have largely accepted the importance of text and history in constitutional interpretation.[7] Many, including prominent scholars like Professors Akhil Amar and Jack Balkin of Yale Law School, also agree that the original public meaning of the constitutional text must be the starting point in constitutional interpretation.[8]

Debates among scholars committed to original meaning still occur, though they do not neatly track ideological lines. The debates involve questions about the role of precedent, the level of generality at which constitutional provisions should be interpreted, and

[3] See, e.g., Brest, supra note 2, at 209–22 (pointing out obstacles to ascertaining original intent); H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885, 902–13, 948 (1985).

[4] See, e.g., Robert H. Bork, Styles in Constitutional Theory, 26 S. Tex. L.J. 383, 387–88 (1985).

[5] See, e.g., Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 855 (1989).

[6] See generally Keith E. Whittington, The New Originalism, 2 Geo. J.L. & Pub. Pol'y 599, 599–600, 607–12 (2004).

[7] See, e.g., Michael C. Dorf, Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning, 85 Geo. L.J. 1765, 1766 (1997).

[8] See, e.g., Akhil Reed Amar, Foreword: The Document and the Doctrine, 114 Harv. L. Rev. 26, 28–29 (2000); Jack M. Balkin, Abortion and Original Meaning, 24 Const. Comment. 291, 293 (2007).

the role—if any—that the expectations of the framers and ratifiers should play in determining the meaning of the text. More generally, disagreement lingers over the ability of the Constitution's text, structure, and enactment history to provide sufficiently precise answers to contemporary constitutional questions. And there remains disagreement about what to do when the text does not provide a concrete answer to a constitutional dispute.[9]

These debates are real but in many ways less important than the emerging consensus about the primacy of the text. Instead of talking past one another, academics from both sides of the political spectrum are increasingly debating what the text of the Constitution actually means. At first glance, this shift may not seem especially noteworthy, as everyone agrees that the text, where specific, should control. The Constitution says clearly, for example, that only those persons who are at least thirty-five years old can serve as President and that each state shall have two Senators. No one would seriously argue that those provisions should be ignored, even though they were adopted over two centuries ago. At some level, therefore, everyone is and always has been a textualist.

What is different now is the growing recognition that the Constitution's text speaks clearly about more subjects than simply the age requirement for the presidency or the number of Senators per state. Just as important, there is greater agreement about how to interpret the more abstract and open-ended provisions of the Constitution, whose meaning is not obvious from the text alone. Rather than looking to the framers' intent, as conservatives did in the past, or suggesting that determining the meaning of the text is largely hopeless, as progressives did in the past,[10] legal academics from the Right and the Left are looking increasingly to textual clues, the structure of the Constitution, historical context, and enactment history to provide as concrete a meaning as possible to these relatively abstract constitutional provisions. The academic debate, in short, is

[9] See generally Jack M. Balkin, Original Meaning and Constitutional Redemption, 24 Const. Comment. 427 (2007); Thomas B. Colby & Peter J. Smith, Living Originalism, 59 Duke L.J. 239 (2009).

[10] Some still do. See, e.g., Christopher Jon Sprigman, First Do No Harm: Why Judges Should Butt Out of the Fight Over Health Care Reform, Slate (Feb. 11, 2001, 5:21 PM), http://www.slate.com/id/2284664 (arguing that no one knows the real meaning of the Commerce Clause).

increasingly focused on what the text of the Constitution means, not whether the text should control.

This shift is especially important for progressives for two reasons: First, it enables them to rebut the still ubiquitous charge that they do not care about the text of the Constitution. Once progressives embrace rather than downplay the actual language of the Constitution, critics can no longer fairly accuse them of lacking a principled and disciplined approach to constitutional interpretation. Second, the shift has opened a rich vein of scholarship that sheds light on the best meaning of important and contested constitutional provisions, which singly and in combination challenge scholarship suggesting that the Constitution is a conservative document. Spurred by the path-breaking work of Amar,[11] progressive academics are engaging conservatives on their own turf and showing how numerous constitutional provisions are more in line with contemporary progressive values than conservative ones.[12]

Progressive academics are also emphasizing, as Amar has done, the importance of examining the *entire* Constitution as amended, as opposed to focusing solely on the original document. Instead of exclusively worshiping the wisdom of the Founding Fathers, progressives have rightly identified the flaws in the original Constitution, with the protection of slavery being the most obvious and odious. But they have also identified the ways in which those flaws have been fixed through amendments and, more broadly, how the amendments have made good on the Preamble's promise of a "more perfect union." Those amendments have promoted equality; expanded political participation for minorities, women, and younger adults; enhanced democracy by allowing for the direct election of Senators; and endorsed the redistribution of wealth by allowing for a progressive income tax. Along the way, the powers of the federal government have expanded through amendments that grant Congress enforcement powers. When one examines the arc of this constitutional story, it is impossible to say that the Constitution is fundamentally a "conservative" document, which may

[11] See, e.g., Akhil Reed Amar, America's Constitution: A Biography (2005); Amar, supra note 8.

[12] See infra Section V.A for a survey of this work.

be one reason why Tea Party activists ignore some constitutional amendments and call for the repeal of others.[13]

If successful, this "new textualism" movement will release the Constitution from the conservative stranglehold on it. No longer will conservatives be able to say that they alone care about the Constitution and that only conservative judges can be trusted to adhere to its meaning. No longer will conservatives be able to say that the Constitution is in line primarily or solely with conservative, not progressive, values. Groups like the Tea Party, for example, will not be able to use the Constitution as a justification for what is in reality a radical agenda, inconsistent with some of the Constitution's most important principles and values.

The good news for progressives, as suggested earlier, is that there is already a robust body of scholarship indicating that many constitutional provisions are best understood as perfectly consistent with progressive principles.[14] From the scope of the federal government's power to the protection of individual rights, scholars in the past decade have unearthed historical material that sheds light on the best meaning of the relevant constitutional language. They have also made arguments based on the structure of the Constitution, which sheds light on the meaning of provisions ranging from the Citizenship Clause of the Fourteenth Amendment to the federal government's power to treat resident aliens worse than citizens. Of course, not all constitutional provisions line up perfectly with a progressive agenda. But that is not surprising, nor is it reason to jettison the text altogether in search for just the right set of ad hoc interpretations to further a political agenda.

More work needs to be done both on specific provisions of the Constitution and to synthesize the work that has already been done. Progressives already are successfully waging a number of battles. But for progressives to take back the Constitution, more is required. Most importantly, progressive academics must establish

[13] See, e.g., Akhil Reed Amar, Rethinking Originalism: Original Intent for Liberals (and for Conservatives and Moderates, Too), Slate (Sept. 21, 2005, 12:36 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2005/09/rethinking_originalism.html; Elizabeth Wydra & David Gans, Constitutional Accountability Center, Setting the Record Straight: The Tea Party and the Constitutional Powers of the Federal Government (July 16, 2010), http://www.theusconstitution.org/upload/fck/file/File_storage/Setting%20the%20Record%20Straight%20Issue%20Brief%20formatted.pdf.

[14] See infra Part V for further discussion.

not simply that particular provisions are consistent with progressive values but also drive home the point that the document, as a whole, is actually quite progressive.

At the same time, progressives who remain resistant to the ideas of "new textualism" should engage those ideas directly. Too often, these critics simply equate original meaning with original intent and then fret creatively and dramatically about the dangers of following Robert Bork's version of originalism.[15] This is a little like opposing modern astronomy on the ground that Ptolemy was wrong about the sun revolving around the earth. Just as there is no longer a point to proving Ptolemy wrong, progressive holdouts should stop fighting the ghosts of original intent. This is not only beside the point but also plays into the hands of conservatives by wrongly conceding that following the text of the Constitution would lead to all sorts of conservative outcomes.

The Article that follows describes the rise of conservative originalism during the Reagan era and documents its success in shaping the conversation about the Constitution. It goes on to explain why the initial response by progressives was only partially successful and was in some ways counterproductive. The Article then explains the shift in the academy towards new textualism and reviews the important academic work that has been done to date. The Article ends with an outline of the work that remains.

I. THE RISE AND FALL OF ORIGINAL INTENT

The 1970s witnessed the birth of bad architecture, disco, the 8-track cassette, and Borkian originalism, all of which have largely—and thankfully—passed from view. Conservative academics, reacting to the perceived excesses of the Warren Court, argued that the Constitution must be interpreted according to the original intent of its framers.[16] Robert Bork, for example, argued that "original intent is the only legitimate basis for constitutional decisionmaking."[17] Professor Raoul Berger added that any method of constitutional

[15] See infra Section IV.B for further discussion.
[16] See, e.g., Colby & Smith, supra note 9, at 247.
[17] Bork, Original Intent, supra note 1, at 823.

interpretation not based on "original intention" was necessarily an invitation of "judicial power to revise the Constitution."[18]

These conservatives were motivated, at least in part, by a belief that the Warren Court's liberal decisions could not be squared with the intent of the framers—and for that reason were illegitimate. William H. Rehnquist, in his confirmation hearings for the Supreme Court, captured this view when he pledged that he would not "disregard the intent of the framers of the Constitution and change it to achieve a result that [he] thought might be desirable for society."[19] The implication, lost on no one, was that the Warren Court had indeed "changed" the Constitution when, for example, finding a right to privacy, limiting the power of law enforcement, and prohibiting the death penalty. These decisions, conservatives charged, were *creations* of the Court, not *interpretations* of the Constitution.

At the same time that academics were working out their theories, lawyers in the Reagan Justice Department also began advocating reliance on original intent in constitutional interpretation. Attorney General Edwin Meese was the most visible and important champion of this early form of originalism. In speeches and law review articles, he championed a jurisprudence of "original intention," stating that "[i]t has been and will continue to be the policy of this administration to press for a jurisprudence of original intention."[20] Like conservative academics, Meese was reacting to what he perceived as the excesses and lawlessness of Warren Court decisions. He, too, shared the belief that relying on original intent would push courts back toward conservative principles.

It did not take long for critics from both the Left and the Right to identify fatal flaws in original-intent originalism. To begin, there was confusion about whose intent mattered: the framers' or the ratifiers'. It was more natural in some ways to focus on the drafters because those who wrote the text presumably had a reason for choosing those particular words, and interpreting texts—from po-

[18] Berger, supra note 1, at 364.

[19] Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the S. Comm. on the Judiciary, 92d Cong. 55 (1971) (statement of William H. Rehnquist).

[20] Edwin Meese, III, The Supreme Court of the United States: Bulwark of a Limited Constitution, 27 S. Tex. L. Rev. 455, 465–66 (1986) (emphasis omitted).

etry to grocery lists—often involves a quest to identify the author's intentions. But to the extent originalism was grounded in the notion that only the text of the Constitution gives courts authority to overturn legislation, the ratifiers—those who rendered the text a legal document—mattered more than the framers. Thus, while some spoke of original intent, meaning the intent of the framers, others argued that original understanding, meaning the intentions and understanding of the ratifiers, mattered more.[21]

The problem, of course, was that there were multiple framers and even more ratifiers. This made discovering the original intent or understanding even more difficult than usual. It may be that identifying a single intent of a multi-member group that drafts or votes to adopt a legal text is always a fool's errand. Critics argued, correctly, that the framers and ratifiers may have had a slew of different intentions when crafting or voting for provisions in the Constitution.[22] Those intentions, moreover, may not have been expressed and therefore would remain beyond discovery. This was especially true with regard to intentions about the future. How could the framers or ratifiers of the original Constitution or any of its amendments have an intention about a future they never imagined? The original Constitution, for example, gives Congress the authority to create an army and a navy, but it says nothing about an air force, which is not surprising given that airplanes were more than a century away. It is silly to think that the framers or ratifiers had an intent or understanding regarding the question of whether Congress's authority to raise an army and navy would necessarily include authority to support another branch of the military that could scarcely be imagined at the time.

The crowning blow came from Professor H. Jefferson Powell, who identified an irresolvable dilemma at the heart of original-intent originalism. In a 1985 article that appeared in the *Harvard Law Review*, Powell amassed an impressive array of evidence indicating that the founding generation did not believe that their intent should control constitutional interpretation.[23] Looking to the original intent, in other words, went against the original intent of the

[21] See, e.g., Balkin, supra note 9, at 445.
[22] See, e.g., Brest, supra note 2, at 214.
[23] Powell, supra note 3.

founders. The founders instead believed that the meaning and purpose of the text should be derived from the public words of the text itself, not the subjective intentions of its framers or ratifiers.[24]

II. ORIGINAL MEANING AND ITS CRITICS

Picking up where Powell left off, conservative lawyers and academics switched their focus from original intent to original meaning. Justice Antonin Scalia helped lead the charge. He argued forcefully that subjective intent was irrelevant. What mattered instead was the objective, public meaning of the text at the time it was enacted. Scalia explicitly linked this focus to the status of the text as law, emphasizing that the text itself was law, not the subjective intent or purpose of those who drafted or ratified the text.[25]

For conservatives, the shift to original meaning provided a stronger theoretical base for originalism. Everyone could agree that the text of the Constitution, at least when clear, counted as law. Indeed, it counted as the supreme law of the land. By linking originalism to the text of the Constitution—rather than to the subjective intentions of the framers and ratifiers—conservatives could more credibly claim to be promoting the rule of law. Focusing on original public meaning also avoided the problems associated with uncovering the collective intent of the framers and ratifiers, and it was more consistent with the founding generation's own approach to constitutional interpretation.

Conservative originalists could also tie original-meaning originalism to the most common way of interpreting statutes, contracts, and other legal documents: courts typically look to the original meaning of the words and phrases used in those documents, even if the documents are quite old. The reason is straightforward: if the meaning of legal documents changed whenever the meaning of words change, the legal effect of documents would depend over time on completely arbitrary definitional changes. Again, it is hardly controversial, and completely sensible, to reject the idea that the meaning of a legal document should vary whenever the definition of words used in those documents change. How

[24] Id. at 887–88.

[25] See Scalia, supra note 5, at 854, 861–62; see also Office of Legal Policy, U.S. Dep't of Justice, Original Meaning Jurisprudence: A Sourcebook 14 (1987).

could those who drafted or agreed to the documents foresee definitional changes, and why would anyone subscribe to the notion that unpredictable changes in the meanings of words should also change the legal effect of statutes, contracts, or constitutions?[26]

Although the shift to original meaning was significant as a matter of theory, it often changed little in practice. Conservatives were often unwilling to follow this refined version of originalism when it would lead to liberal outcomes by courts. The goal of rolling back the Warren Court decisions remained the same.[27] More generally, conservative originalists continued to resist the undeniable truth that the Constitution was written to endure through the ages. It therefore contains many general and abstract phrases—like equal protection, cruel and unusual punishments, privileges and immunities, or the free exercise of religion—that necessarily have general and abstract meanings. The language actually used in these phrases establishes general principles, not specific rules or codes of conduct, which invite consideration of changed circumstances when applied to contemporary legal disputes.

The methodology also remained quite similar. In theory, uncovering the meaning of language used in the Constitution would require searching through contemporary dictionaries, looking for other lexical clues within the document, and understanding both the historical context in which the language was adopted and the more specific enactment history. The goal would be to understand the semantic meaning of the language and the purposes behind the language in order to clarify, where necessary, what the words and phrases mean.[28]

Conservatives, however, continued to rely on what the framers and ratifiers said about the Constitution. This is not in itself controversial, because the statements and understandings of the founding generations constitute some evidence of what the language meant when adopted. What was (and remains) controversial is that conservatives often relied exclusively on what the ratifiers and framers believed the Constitution required in certain contexts in order to establish the meaning of the text. Put differently, they

[26] For elaboration of this point, see, for example, Balkin, supra note 9, at 429–30.
[27] Id. at 446–49.
[28] See, e.g., Amar, supra note 8, at 28–33.

relied on the expectations of the framers and ratifiers rather than the actual language in the document.[29]

Justice Scalia is a good example. He has, at least in scholarly writings, agreed that the search for original meaning should entail a search for what the words in the Constitution meant when adopted.[30] In his opinions, however, he often places dispositive weight on the expectations of the framers and ratifiers. If the framing generation believed a practice was constitutional, for example, this is often enough for Justice Scalia to conclude that the practice must be constitutional today.[31]

This reliance is understandable but nonetheless indefensible, as Justice Scalia has tacitly acknowledged on some occasions. It is understandable because it is a way to constrain judicial discretion and to make the open-ended provisions of the Constitution more concrete. The Eighth Amendment, for example, bans "cruel and unusual punishments." That fairly general provision invites courts to determine whether a particular punishment is actually cruel and unusual, which offers courts a good deal of discretion and invites the possibility that some cruel punishments once common might later become unconstitutional if they become unusual. One easy way to avoid these difficulties and shifting outcomes is to ask whether a particular punishment was considered cruel and unusual at the time that the Eighth Amendment was adopted. If not, it should not be considered cruel and unusual today.

While this approach might constrain judges, it is difficult to square with the justification for original-meaning originalism. This form of originalism, after all, rests on the idea that the language of the Constitution is the only proper authority upon which courts can rely. Relying on the expectations of the framing generations substitutes their views of how to *apply* the Constitution for the *actual meaning* of the language in the Constitution. It converts open-ended provisions of the Constitution, which establish general prin-

[29] See, e.g., Balkin, supra note 9, at 442–43.

[30] Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 144–49 (1997) [hereinafter Scalia, A Matter of Interpretation]; Scalia, supra note 5, at 861–62.

[31] See Mitchell N. Berman, Originalism and Its Discontents (Plus a Thought or Two About Abortion), 24 Const. Comment. 383, 386 (2007) (noting that "much of Scalia's writing . . . does appear to endorse and rely upon the expectation originalism that he purports to reject").

ciples, into a specific and closed list of rights and powers. Indeed, relying on expectations in a sense pushes one right back toward the search for original intent. There is not much space, methodologically or theoretically, between a search for how the framers would have decided a constitutional question and a search for their original intent.

Some progressive academics, including Ronald Dworkin, identified this theoretical and methodological inconsistency quite early.[32] In doing so, they helped lay the groundwork for new textualism, which is described more fully below. Most liberals and progressives, however, at first simply heaped the same criticisms on original-meaning originalism that they applied to original-intent originalism.

Thus, throughout the 1980s and the 1990s, progressive critics of originalism charged that it remained difficult if not impossible to ascertain the original meaning of the Constitution. They also contended, somewhat inconsistently, that relying on the original meaning would require abandoning some landmark decisions, including *Brown v. Board of Education*[33] and *Roe v. Wade*.[34] In so doing, they tacitly accepted that originalism, properly followed, meant relying on the expectations of the framers and ratifiers. So if the framers or ratifiers did not expect the Equal Protection Clause to outlaw school segregation, for example, this was conclusive proof that school segregation was consistent with the original meaning of the Constitution. To this they added the familiar charge that following the original meaning of the Constitution would entail being governed by generations long dead. And they pointed out the instances where conservatives eschewed any reliance on original meaning or original expectations and thus did not practice what they preached.[35]

[32] See, e.g., Ronald Dworkin, Comment, *in* Scalia, A Matter of Interpretation, supra note 30, at 115–27. For the most thorough and erudite explication of the semantic originalism, see generally Lawrence B. Solum, Semantic Originalism (Ill. Pub. Law & Legal Theory, Research Paper No. 07-24, 2008), available at http://ssrn.com/abstract=1120244.

[33] 347 U.S. 483 (1954).

[34] 410 U.S. 113 (1973).

[35] For further discussion of these points and citations to relevant work, see, for example, Colby & Smith, supra note 9, at 291–92.

These criticisms were not especially effective. In fact, they were often counterproductive. In suggesting that landmark decisions favored by liberals and progressives could not be squared with the original meaning of the Constitution, these critics essentially conceded that conservatives were correct in charging that the Warren Court had gone beyond the Constitution.[36] They also continued to come up empty in offering an alternative theory. Suggesting that *Brown v. Board of Education* could not be justified under an originalist approach to the Constitution might be effective in scaring some liberals away from originalism, but it did not do much to establish a persuasive alternative theory of constitutional interpretation. To the contrary, it suggested that liberals were more interested in results than a legitimate method of constitutional interpretation.

Conservatives exploited this weakness and the general failure of progressives to offer a principled alternative to originalism. Ascertaining the original meaning of the Constitution might be difficult in some circumstances, conservatives happily admitted, but at least it was the right goal. If you are not looking for original meaning, conservatives repeatedly asked, what are you looking for? The title of an article by Justice Scalia—*Originalism: The Lesser Evil*—concisely captured the view of many conservatives. Arguing, essentially, that it takes a theory to beat a theory, Scalia contended that nonoriginalists agree "on nothing except what is the wrong approach."[37] He continued that "the central practical defect of nonoriginalism is fundamental and irreparable: the impossibility of achieving any consensus on what, precisely, is to replace original meaning, once that is abandoned."[38]

The failure to come to any consensus about an alternative to originalism also dampened liberal charges of conservative hypocrisy. When conservatives did not follow the original meaning of the Constitution, liberals could fairly criticize them for being results-oriented and unprincipled. They also rightly questioned how con-

[36] See James E. Ryan, Does It Take a Theory? Originalism, Active Liberty, and Minimalism, 58 Stan. L. Rev. 1623, 1659–60 (2006) (reviewing Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution (2005)); Cass R. Sunstein, Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America (2005)).

[37] Scalia, supra note 5, at 855.

[38] Id. at 862–63.

servatives like Justice Scalia could justify following precedent, even when they believed the precedent was inconsistent with the original meaning of the Constitution. But without a comprehensive and coherent account of how the Constitution should be interpreted, liberals were never on very strong ground when identifying deviations from originalism. After all, weren't liberals also in favor of deviating from the original meaning of the Constitution?

Charges of hypocrisy also failed to transcend the halls of the legal academy. Progressive law professors wrote countless articles pointing out the instances where conservative judges and Justices deviated from the original meaning in order to reach a politically conservative result.[39] They also punctured the oft-repeated claim that conservative judges were committed to judicial restraint, demonstrating that contemporary conservative Justices on the Court were more likely, not less, to strike down federal legislation than their predecessors on the supposedly "activist" Warren Court.[40]

Nonetheless, conservatives outside of academia still managed to control the terms of debate about constitutional interpretation and the meaning of the Constitution. Conservatives may not have always practiced what they preached, but they at least appeared to be saying the right things about the Constitution, even if at a high level of generality and in oversimplified terms. Progressives, by contrast, seemed to be saying a lot of different things at once and coming up with complicated explanations as to why the text of the Constitution could not actually be followed as written. The Left's real problem may have been that they were too intellectually honest to endorse simplistic slogans about constitutional interpretation. That said, as between an oversimplified commitment to the words of the Constitution and a sophisticated if somewhat opaque justification for departing from those words, it was no contest.

As Professor Dawn Johnsen recently observed:

[39] See, e.g., Ira C. Lupu, *Employment Division v. Smith* and the Decline of Supreme Court-Centrism, 1993 BYU L. Rev. 259, 260; Gene R. Nichol, Justice Scalia and the *Printz* Case: The Trials of an Occasional Originalist, 70 U. Colo. L. Rev. 953, 969–71 (1999); Eric J. Segall, A Century Lost: The End of the Originalism Debate, 15 Const. Comment. 411, 427–28 (1998); see also Philip Bobbitt, Constitutional Interpretation 101 (1991) (claiming that Bork "insists on 100% original understanding, 20% of the time").

[40] See, e.g., Thomas M. Keck, The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism 251 (2004).

> [T]he Right has achieved considerable success in shaping the terms of the public debate regarding constitutional interpretation and judicial appointments. Conservative senators routinely ask judicial nominees, "Will you interpret the law as written rather than impose your own values and legislate from the bench?" and nominees from across the political spectrum respond, "Yes."[41]

She continues: "Ideological conservatives hold themselves out [successfully] as faithful and strict constructionists and argue for their chosen interpretive methodologies—principally 'textualism' and 'originalism'—as a principled search for constitutional 'truth' unrelated to particular substantive outcomes."[42]

Johnsen goes on to argue, correctly, that the traditional response to originalism—which was to point out the epistemological difficulties and the inconsistent nature in which it is applied—was not sufficient to discredit originalism in the political sphere. What the Left needs, she contends, is a compelling alternative: "Meaningful progressive constitutionalism requires coherent, compelling, and accessible substantive ideas and core principles, including theories of constitutional interpretation and change."[43] One might add as well that the Left needs an approach to the Constitution that respects what the Constitution says—an approach, in other words, that embraces the Constitution's text rather than downplays or elides it.[44]

III. THE ORIGINS OF NEW TEXTUALISM

Enter new textualism. While some progressives were attacking originalism and arguing for its wholesale rejection, others sought to build upon some of its core insights. Here, two lines of work have been most important and, in some ways, mutually reinforcing. One is theoretical and the other is focused more concretely on the Constitution's text and history.

[41] Dawn Johnsen, Lessons from the Right: Progressive Constitutionalism for the Twenty-first Century, 1 Harv. L. & Pol'y Rev. 239, 241 (2007).

[42] Id.

[43] Id. at 242; see also Dawn Johnsen, The Progressive Political Power of Balkin's "Original Meaning," 24 Const. Comment. 417, 417–21 (2007).

[44] See Ryan, supra note 36, at 1655.

A. Theory

The theoretical strand focused on the fact that the ultimate justification for following the original meaning of the Constitution is that the enacted text is a legal document. It *is* the law and universally recognized as such. Where the text is clear, no one suggests that judges, legislators, or executive branch officials are free to ignore it because they disagree with what it requires or because they believe it is outdated. To this extent everyone is a textualist, meaning that everyone recognizes the authority of the text.

The problem, as mentioned, has always been what to do with provisions that lack precision. Conservative originalists, as just described, often looked to the expectations of the framers to give more precise content to general phrases. Liberals argued that the Constitution should not be frozen in this manner and instead had to adapt to changed circumstances. In doing so, some suggested that the meaning of the Constitution itself might change over time.

The key advance was to recognize that both arguments were wrong. The Constitution, properly understood, is not frozen in time and inextricably linked to the concrete expectations of the framers or ratifiers. But neither does its meaning change. Instead, the open-ended provisions of the Constitution establish general principles—equal protection, prohibitions on cruel and unusual punishment, and freedom of speech, among others. This is what the language means, and that meaning—and the general principles—do not change. What can change, however, is the application of those principles over time, based on technological, economic, and cultural changes.

Three prominent academics have been critical to promoting this view. The first was Ronald Dworkin, who engaged in a well-known debate with Justice Scalia about originalism, which was later reproduced as a book. Dworkin pressed Scalia on the distinction between what he called "semantic" originalism and "expectation" originalism.[45] The former seeks to unearth the original meaning of the words used in the Constitution. The latter focuses on how the framers and ratifiers expected those words to be applied in concrete situations. As Dworkin explained, and Scalia conceded,[46] only

[45] Dworkin, supra note 32, at 115–27.

[46] Scalia, A Matter of Interpretation, supra note 30, at 144.

the former is consistent with the justification for originalism, namely that the text is authoritative.[47]

The expectations of the Founding generations might shed some light on the meaning of the text, but those expectations do not establish the text's meaning. Indeed, these expectations might be inconsistent with the actual meaning of the words, or they might be the result of time-bound prejudices and beliefs that obscured the proper application of the text. As already mentioned, moreover, the language used in some constitutional provisions—the ones that generate the most litigation and controversy—establish principles that are meant to be enduring but nonetheless invite different applications in different contexts. To reduce those general principles to the specific expectations of a group of people long dead is to ignore, not respect, the language actually used in the Constitution.[48]

This insight answered one of the recurring liberal criticisms of originalism: that it allowed no room for growth and change. Once one recognizes that some constitutional provisions establish general principles and essentially demand consideration of the present context, it is possible to see how the Constitution can be at once both enduring and flexible.[49]

To see the full power of this approach, a statutory example might be useful, one drawn from an opinion by Justice Scalia.[50] Title VII of the 1964 Civil Rights Act famously prohibits employment discrimination "because of . . . sex."[51] Those who voted for the law undoubtedly expected it to ban discrimination by men against women. Perhaps some might have expected it also to ban discrimination by women against men. It seems fair to say, how-

[47] Although Justice Scalia acknowledged this principle, he has not consistently followed it as a judge. As described earlier, he is just as likely to reason along the lines of "if it was good enough for them, it's good enough for me," meaning anything constitutional in 1795 must be constitutional today, except perhaps flogging. See id. at 145.

[48] See Ryan, supra note 36, at 1628–29.

[49] As Caleb Nelson put it, "members of the founding generation certainly expected some of the Constitution's rules to have different applications in different contexts. . . . In drafting rules for inclusion in the Constitution, the framers deliberately sought to use language that was general enough to accommodate relevant future changes." Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 543–44 (2003) (emphasis omitted).

[50] See Ryan, supra note 36, at 1629–30.

[51] 42 U.S.C. § 2000e-2(a)(1) (2006).

ever, that at the time the law was passed, no one voting for it thought it prohibited discrimination *by* men against *other* men.

Yet that was precisely the issue presented in the 1998 case of *Oncale v. Sundowner Offshore Services, Inc.*[52] The male plaintiff, Joseph Oncale, had worked on an oil rig and complained that his male co-workers and supervisors sexually harassed him. As the Court described, "Oncale was forcibly subjected to sex-related, humiliating actions against him" and was also "physically assaulted" and "threatened . . . with rape."[53] Oncale testified that he quit because he feared that if he did not leave, he "would be raped or forced to have sex" with other men on the rig.[54]

These were despicable actions, to be sure. But had the Court relied on the expectations of the Congress that enacted the 1964 Civil Rights Act, it would have rejected Oncale's claim that the actions constituted sex discrimination. Instead, the Court relied on the plain meaning of the text and, in an opinion by Justice Scalia, ruled for the plaintiff. "[I]t is ultimately the provisions of our laws," Justice Scalia wrote, not the expectations and hopes of the lawmakers, "by which we are governed."[55]

Precisely the same can be said of the Constitution. Another example from Justice Scalia, this time of what *not* to do, helps illustrate the point. Justice Scalia recently drew attention for contending in an interview that the Equal Protection Clause does not prohibit sex discrimination. The reason? Because "[n]obody ever thought that that's what it meant. Nobody ever voted for that."[56] The Justice Scalia of this recent interview, however, should have read the opinion of the Justice Scalia who wrote *Oncale*. The point is not whether anyone "ever voted for" prohibiting sex discrimination specifically. No one ever voted precisely to ban same sex discrimination in 1964 either, yet as Justice Scalia recognized, the language of the Civil Rights Act is sufficiently broad to encompass that kind of discrimination. The same is true of the Equal Protection Clause. Simply because those alive in the late 1860s did not

[52] 523 U.S. 75 (1998).
[53] Id. at 77.
[54] Id. (internal quotation marks omitted).
[55] Id. at 79.
[56] The Originalist, California Lawyer (Jan. 2011), http://www.callawyer.com/story.cfm?pubdt=NaN&eid=913358&evid=1.

expect the Clause to outlaw sex discrimination, it hardly follows that a provision that demands "equal protection" could *never* bar sex discrimination.

In some ways, Justice Scalia and others who rely on expectations rather than the text are asking the wrong question. The question is not: "Dear Framer, how would you have ruled if presented with a case of sex discrimination?" The question instead is: "Dear Framer, did you use general language whose application might change over time, even if the principle remains the same?" Those are very different questions, yielding very different answers. Dworkin's insight, essentially, was that the first question is irrelevant.

Professor Larry Lessig, in turn, helped supply an answer to the second question. Lessig focused on constitutional change and offered a sophisticated, though slightly obscure, theory of fidelity and translation.[57] Stripped to its essentials, Lessig argued that fidelity to original meaning not only permits but requires different applications and outcomes in different contexts. To be faithful to the original meaning, in other words, sometimes demands reaching different outcomes to take account of changed circumstances. To show fidelity to the Constitution thus requires translating the meaning of the text to apply to the present context.

An example used by Lessig helps illustrate the point. Public flogging was a permissible punishment for a number of crimes at the time that the Eighth Amendment's ban on cruel and unusual punishment was enacted. It may have been cruel, but it certainly was not unusual. Today, however, nearly everyone would agree that flogging is *both* cruel and unusual. Indeed, Justice Scalia famously pronounced himself a "faint-hearted" originalist because he would not condone flogging today, even though it was perfectly constitutional at the time of the Eighth Amendment's adoption.[58] Justice Scalia meant this essentially as a laugh line, but as Lessig explains, it exposes the weakness of relying on the framers' expectations rather than the meaning of the text. If flogging is both unusual today and widely considered cruel, it is "cruel and unusual"

[57] Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165, 1165 (1993); Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 Stan. L. Rev. 395, 395 (1995).

[58] Scalia, supra note 5, at 864.

punishment, period. To allow flogging simply because it was *not* cruel and unusual two hundred years ago is inconsistent with, not faithful to, the language used in the Constitution.[59]

Lessig's central contribution was thus to reconcile constitutional change with fidelity to original meaning. Just as applications of the Eighth Amendment might change as some punishments become unusual over time, so, too, might the applications of other constitutional provisions. Congress's power to regulate interstate commerce, for example, might initially have been fairly narrow for the simple reason that, two hundred years ago, there was not much interstate commerce. But as our economy has expanded and become more national and connected, so, too, has Congress's power to regulate expanded. Similarly, as new technologies have developed, the scope of some constitutional provisions has expanded to incorporate them. The Fourth Amendment's prohibition on unreasonable searches and seizures, as originally conceived, did not cover wiretaps because telephones did not exist. Yet surely it was more faithful to constitutional principle to expand the Fourth Amendment to encompass wiretaps than to conclude that they could not be covered because the Fourth Amendment, when originally enacted, could not possibly have applied to wiretaps.

The third, and currently most prominent, progressive constitutional theorist is Professor Jack Balkin. Balkin has made explicit what is implicit in Lessig's approach: originalism, properly understood, is not really in tension with the idea of a "living" Constitution, insofar as fidelity to original meaning still allows for changed applications.[60] In establishing this general point, Balkin has made three independent contributions.

First, he has addressed what is often called the "level of generality" problem. Critics of originalism correctly observed that original meaning depends on the level of generality at which the language in the text is interpreted. They then argued—or simply asserted—that there was no principled way to identify the right level of generality. This meant, in turn, that originalism was just a game and that any answer to essentially any constitutional question could be

[59] Lessig, Fidelity in Translation, supra note 57, at 1187–88. For recent work along the same lines, see, for example, Goodwin Liu, Pamela S. Karlan & Christopher H. Schroeder, Keeping Faith with the Constitution (2010).

[60] See, e.g., Balkin, supra note 9, at 432–36.

given depending on the level of generality at which the language is interpreted.[61]

Balkin, along with others, pushed back against the idea that it is impossible, or necessarily arbitrary, to identify the right level of interpretive generality. As Balkin argued, the level of generality at which provisions should be interpreted is indicated by the text itself.[62] If the text itself is precise and narrow—requiring, for example, that someone be at least thirty-five years old to be President—the interpretation of that text should be similarly confined. Where the text is more abstract, by contrast, it ought to be interpreted at a higher level of generality. As Balkin put it, "the fact that adopters chose text that features general and abstract concepts is normally the best evidence that they sought to embody general and abstract principles of constitutional law."[63] This followed logically, Balkin argued, from the commitment to determining the objective, original meaning of the text: the text should be interpreted at the level of generality at which a reasonable person would have interpreted it.[64]

The second point followed from the first: the Constitution does not provide precise answers to all contemporary constitutional disputes. Constitutional *adjudication* is thus distinct from constitutional *interpretation*, which means that resolving some cases involves two steps, not one.[65] The first step is to ascertain the meaning of the relevant provision. If that meaning is somewhat abstract or general, it follows that it might be consistent with a range of outcomes. In order to decide a particular case involving a general or abstract provision, courts will have to choose among those

[61] See, e.g., Michael J. Klarman, Antifidelity, 70 S. Cal. L. Rev. 381, 408–09 (1997).

[62] Balkin, supra note 9, at 488.

[63] Balkin, supra note 8, at 305.

[64] See id.; see also Michael W. McConnell, The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution, 65 Fordham L. Rev. 1269, 1280 (1997) (arguing that the interpreter should "seek the level of generality at which the particular language was understood by its Framers").

[65] The term "construction" rather than "adjudication" is often used in the literature simply to signify that legislators and other political actors also have occasion to interpret and apply the Constitution. See, e.g., Randy Barnett, Interpretation and Construction, 34 Harv. J.L. & Pub. Pol'y 65, 69 (2011); Lawrence B. Solum, Semantic Originalism (Ill. Pub. Law, Research Paper No. 07-24, 2008), available at http://ssrn.com/abstract=1120244.

acceptable outcomes, but that choice cannot be determined by the original meaning of the text itself.[66]

Though certainly not the first to make the point,[67] Balkin's emphasis on the difference between interpretation and adjudication comes at a useful moment in the current academic debate. Many progressives argued against relying on the text because the text cannot provide precise answers to a number of contemporary constitutional issues. While rightly criticizing conservatives for pretending that text and history almost always supply concrete answers to today's constitutional questions, progressives threw out the baby with the bath water by seeming to disregard the text altogether. Simply because some provisions enshrine general principles is not in itself reason to abandon all efforts to discern the meaning of those principles. Though a range of outcomes might be consistent with those general principles, it does not follow that any and all outcomes are consistent. Nor does it mean that no single outcome is truer to the text than any other.

This is where Balkin's third, and perhaps most important, contribution comes into play. In three articles, Balkin has presented evidence and arguments regarding the original meaning of the Commerce Clause, the Fourteenth Amendment's protection of abortion, and the Reconstruction Amendments (the Thirteenth through the Fifteenth).[68] In each, he has taken on and refuted conservative readings of the original meaning of the Constitution, showing instead how the Constitution supports a broad power of the federal government to regulate commerce, protects a right to abortion, and grants Congress extensive authority in the Reconstruction Amendments to enforce the individual rights protected by those amendments. These articles, of course, are not immune

[66] See Jack M. Balkin, Framework Originalism and the Living Constitution, 103 Nw. U. L. Rev. 549, 569–75 (2009); Kermit Roosevelt, Justice Scalia's Constitution—And Ours, 8 U. Pa. J. L. & Soc. Change 27, 32 (2005).

[67] See, e.g., Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning 8–9 (1999); Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review 7 (1999). See generally Peter J. Smith, How Different Are Originalism and Non-Originalism?, 62 Hastings L.J. 707 (2011).

[68] Balkin, supra note 8; Jack M. Balkin, Commerce, 109 Mich. L. Rev. 1 (2010); Jack M. Balkin, The Reconstruction Power, 85 N.Y.U. L. Rev. 1801 (2010) [hereinafter Balkin, Reconstruction Power].

from criticism, nor will they likely persuade everyone. But the articles require the attention of anyone working in the field. They create a hurdle to a conservative academic or politician who would like to establish a contrary claim. And they help establish a solid constitutional foundation, one anchored in text and history, for rights and powers too often thought of as beyond the constitutional pale.

Conservatives, for their part, have largely agreed with the theoretical contributions of Dworkin, Lessig, and Balkin, though they may disagree with their application in a particular context.[69] There is broad agreement, for example, that the meaning of the language must control over the expectations of the framers, and conservative academics have explicitly rejected Justice Scalia's continued reliance on expectations over meaning. There is also agreement that applications of general principles can change over time. And there is consensus that the language of the Constitution provides guidance regarding the level of generality at which to interpret that language.[70]

B. Text and History

The theorists offered reasons for progressives to rethink their unflinching resistance to original-meaning originalism. In showing that a commitment to original meaning did not demand reliance on the framers' expectations nor preclude the possibility of constitutional change, these theorists suggested that reliance on original meaning *could* support progressive results. But aside from the recent articles by Jack Balkin, they did little to prove that it *would* do so.

That crucial work was done by progressive historians; and here, no single scholar has been more important than Akhil Amar.[71] Professor Amar is an unapologetic textualist and originalist, but he strongly disagrees with the view that the Constitution is a conservative document. And he has forcefully argued that progressives

[69] See, e.g., Steven G. Calabresi & Livia Fine, Two Cheers for Professor Balkin's Originalism, 103 Nw. U. L. Rev. 663 (2009).

[70] See Smith, supra note 67, at 723.

[71] Professor Amar has also made important contributions to constitutional theory, fleshing out what it means to be a principled textualist. See, e.g., Amar, supra note 8, at 28–33. These contributions are described in more detail below.

should embrace, not run away from, the text and its original meaning. As Amar puts it, "there are many reasons to question the idea that modern liberals should abandon constitutional history rather than claim it as their own."[72]

The first reason is that the framers of the original text and subsequent amendments were hardly conservative. As Amar explained in 2005:

> The framers themselves were, after all, revolutionaries who risked their lives, their fortunes, and their sacred honor to replace an Old World monarchy with a New World Order unprecedented in its commitment to popular self-government. Later generations of reformers repeatedly amended the Constitution so as to extend its liberal foundations, dramatically expanding liberty and equality. The history of these liberal reform movements—19th-century abolitionists, Progressive-era crusaders for women's suffrage, 1960s activists who democratized the document still further—is a history that liberals should celebrate, not sidestep.[73]

Second, Amar forcefully rejects the idea, repeatedly offered by progressive critics of originalism, that *Brown v. Board of Education*[74] cannot be reconciled with the original meaning of the Constitution.

> The Constitution's text does not say that all citizens are equal "except for segregation laws." Rather, it uncompromisingly demands equality of civil rights—no ifs, ands, or buts. In fact, most Reconstructionists understood that a law whose statutory preamble explicitly proclaimed whites superior to blacks would be plainly unconstitutional. The question in both *Plessy v. Ferguson* (in 1896) and *Brown v. Board* (in 1954) was thus a simple one, and simpler than these constitutional scholars might suggest: Was Jim Crow in fact equal? Or was it instead a law whose obvious purpose, effect, and social meaning proclaimed white supremacy in deed rather than in word? For any honest observer in either 1896 or 1954, the question answered itself: Jim Crow was plainly

[72] Amar, supra note 13.
[73] Id.
[74] 347 U.S. 483 (1954).

> designed to demean the equal citizenship of blacks—to keep them down and out—and thus violated the core meaning of the 14th Amendment. So, *Brown* is in fact an easy case for those who take text and history seriously.[75]

Finally, Amar reminds us that there is nothing inevitable about the modern connection between originalism and political conservatism. Today, the most prominent originalists on the Court—Justices Scalia and Thomas—are conservative. But it was not always so. As Amar points out, "perhaps the [C]ourt's most influential originalist in history was the great Hugo Black—a liberal lion and indeed the driving force behind the Warren Court."[76]

Amar has backed up these claims in a series of brilliant articles and two landmark books.[77] In each, he painstakingly examines the document's text and historical context to make the case for a more progressive reading of the Constitution. He also illustrates how often the Court has strayed from the best understanding of the Constitution to reach conservative results at odds with the original meaning of the text. In the *Foreword* to the *Harvard Law Review*'s 2000 Supreme Court edition, for example, Amar explains in detail how a faithful reading of the text leads to more progressive results than those achieved by the Supreme Court over issues ranging from free speech to racial segregation, jury service, voting, and women's rights.[78]

Amar's approach is holistic. He relies on text, history, and the structure of the Constitution and the government it establishes to elucidate the best and truest meaning of the language contained in the document. His examination of history includes not simply the specific enactment history, but the broader historical context surrounding the enactment, which is crucial to understanding the purpose behind and reason for the inclusion of particular language. And his examination of text and structure includes consideration of how later amendments shed light on, and sometimes modify, the

[75] Amar, supra note 13.

[76] Id.

[77] See Amar, supra note 11; Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction (1998); Amar, supra note 8; Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747 (1999); Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425 (1987).

[78] Amar, supra note 8.

meaning of earlier ones. The Nineteenth Amendment, for example, specifically gave women the right to vote, but Amar argues that in so doing it made clear that women fell within the scope of the protections offered in the Fourteenth Amendment. Amar's overarching aim is to establish "not merely a modestly plausible reading of the Constitution, but the most plausible reading, the reading that best fits the entire document's text, history, and general structure."[79]

In addition to his work on specific constitutional provisions, Amar has forcefully reminded readers to consider the overall progression of the document: to consider, in other words, not simply the original Constitution of 1787, but the document as amended in the nineteenth and twentieth centuries. The amendments over the course of two centuries, as Amar correctly emphasizes, have often been the result of liberal and progressive reform efforts. These amendments have expanded our democracy by making citizens of former slaves, expanding the right to vote to include women and eighteen year-olds, and abolishing the poll tax. The amendments also strengthened individual rights by protecting the privileges and immunities of citizens against state interference. The Sixteenth Amendment endorsed progressive taxation by authorizing the income tax. The Seventeenth Amendment increased the voice and power of ordinary citizens by allowing for the direct election of senators. Many of these amendments, at the same time, expanded the power of Congress to protect and enforce the substantive rights granted by the amendments.[80]

The importance of Amar's work, and in particular his overarching narrative of the progression of the Constitution, extends beyond the courtroom and the classroom. It serves as a critical counterweight to the distorted history pedaled by many conservative politicians and activists, including the members of the Tea Party. These activists seek to portray themselves as the true defenders of the Constitution, but they are selective in their defense and in their vision. They incorrectly portray the powers of the federal government established by the original Constitution as exceedingly lim-

[79] Id. at 54.

[80] See Amar, supra note 8, at 48–53; Amar, supra note 13. See generally Wydra & Gans, supra note 13, at 4–6.

ited, which ignores both the language of the Constitution and the crucial fact that it was adopted in response to the flawed Articles of Confederation, which failed to establish a strong national government. In addition to distorting the original Constitution, Tea Partiers often pretend the Constitution was never amended and therefore ignore the expansion of individual rights and federal power accomplished by those amendments.[81] When selective amnesia fails, they call for jettisoning portions of the Constitution they dislike, including the Fourteenth Amendment's guarantee of citizenship to all born on American soil.[82] Indeed, Justice Scalia jumped on the Tea Party bandwagon last year in suggesting that the Seventeenth Amendment was a bad idea.[83]

Put simply, the rise of the Tea Party has led to a national debate over the meaning of the Constitution, which has focused recently on the constitutionality of health care reform. The distortions, selective reading of the Constitution, and calls for constitutional amendments by the Tea Partiers demand a response from progressives, and Amar's work outlines a devastating one. There is a further lesson here for progressives who remain uncertain about the wisdom of embracing the Constitution. If the Tea Partiers have to monkey around so much with the actual Constitution in order to claim that it supports their positions, it follows that the *real* Constitution is not nearly as conservative as the Tea Partiers would like. Progressives should trumpet and celebrate that fact rather than shrink from a debate with conservatives over the meaning of the Constitution.

Amar's work has inspired a number of younger, progressive scholars. These scholars have continued along the path Amar has marked, and they have made important contributions to our understanding of the Constitution, described in more detail below.[84]

[81] See, e.g., Kate Zernike, On Day Devoted to Constitution, Fight Over It, N.Y. Times, Sept. 15, 2011, at A13 (describing views of Tea Party and its critics); Wydra & Gans, supra note 13.

[82] See Wydra & Gans, supra note 13, at 4–5.

[83] See David Gans, Antonin Scalia—The Tea Party's Court Justice, Huffington Post (Nov. 16, 2010), http://www.huffingtonpost.com/david-gans/antonin-scalia-justice-fr_b_784428.html. Justice Scalia has also referred to the Privileges or Immunities Clause of the Fourteenth Amendment as "flotsam." See Robert Barnes, Gun Case Presents Quandary for Court, Wash. Post, Mar. 1, 2010, at A1.

[84] See infra Part V.

Just as importantly, Amar's work has earned the respect of conservative academics. In a review of Amar's latest book, *America's Constitution: A Biography*, self-described "conservative Republican" legal scholar Michael Stokes Paulsen lavished praise on "Amar's magnificent scholarship on the Constitution's original meaning."[85] Calling it "the best book about the Constitution in two hundred years," Paulsen described it as "encyclopedic in its knowledge, dazzling in its insights, [and] definitive (or nearly so) in its treatment of topic after topic."[86] He specifically praised Amar's "faithfulness to the Constitution's text," despite the fact that Amar often reads that text to support more progressive than conservative causes.[87]

Perhaps most importantly, Paulsen recognizes that "original-meaning textualism" does not lead ineluctably to conservative results. What he says in this regard is worth quoting in full:

> Amar's interpretive methodology is one of original-meaning textualism, of a generous but still rigorous type. His approach places him, oddly, in common cause with judicial and legal conservatives, not freewheeling liberals. Although Amar is a political liberal, he does not let his politics drive his textual interpretation. "Liberals" can learn a lesson from this. They can learn the further lesson that original-meaning textualism is no mere cover for conservative political principles, that it can yield surprisingly liberal political results on occasion, and that the methodology cannot fairly be reduced to a caricature. Amar's book demonstrates, quite the contrary, that originalist methodology often produces a range of possible fair interpretations and that there will often be room for reasonable differences as to result as among persons purporting to be, and struggling faithfully to be, textualists. But so too "conservatives" can learn from this book the lesson that principled textualism does not invariably support their preferred substantive outcomes either. One may recognize that originalism is frequently hijacked by its own purported adherents for their own political purposes; and one may recognize that originalism

[85] Michael Stokes Paulsen, How to Interpret the Constitution (and How Not to), 115 Yale L.J. 2037, 2037, 2040 (2006).
[86] Id. at 2038.
[87] Id. at 2041.

> sometimes does not dictate clear answers but merely frames the legitimate bounds of disagreement, without rejecting the methodology itself.[88]

In Paulsen's insightful description of Amar's work and the academic context surrounding that work, one sees the basis for the emerging consensus regarding constitutional interpretation.

IV. NEW TEXTUALISM: CONSENSUS AND STRAW MEN

A. The Consensus

The growing consensus revolves around the primacy of the text in constitutional interpretation. Hence the name "new textualism." It is not a moniker currently in fashion, nor have many academics self-identified as new textualists.[89] But the name is apt insofar as it describes the shared goal that unites this group of scholars: a commitment to elucidate, as best possible, the original meaning of the text.

Some might be tempted to label this movement "new originalism," but that is a misleading and weighted phrase, given the political baggage associated with the term originalism. The term originalism also deemphasizes the text and emphasizes the document's history, whereas new textualists tend to have an unrelenting focus on the text as opposed to the expectations of the framers. Originalism also suggests that the drafting history of text is the best evidence of meaning, but as Amar and others have shown, the historical context and structure of the text itself can often provide equally good if not better evidence of a provision's meaning. Last, the term "originalism" naturally directs attention back to the original Constitution at the expense of the amendments. At a time

[88] Id. at 2049–50.

[89] Although not in apparent use among constitutional theorists, the term "new textualism" has been in use in the related field of statutory interpretation. William Eskridge introduced the phrase in 1990 to describe the lack of interest among some Justices in legislative history, at least where the statutory language is plain. William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 623 (1990). This parallel use further supports the accuracy and utility of the phrase in the field of constitutional interpretation, insofar as new textualists care more about the text and less about "legislative" history than original-intent originalists.

when the Tea Partiers are pretending that the Constitution was not really amended, this is not an oversight to encourage.

The "new" part of new textualism signifies how it differs from earlier approaches to the text, both by those on the Left and those on the Right. New textualists reject the facile assertion of liberal academics that the text is hopelessly indeterminate and therefore essentially useless when it comes to deciding modern constitutional issues. Instead, there is increasing recognition that some readings of the text are more plausible than others, and that the most plausible reading of the text can at least narrow the range of possible outcomes, even if it cannot settle every single question.

At the same time, new textualists reject the equally facile assertion of some conservatives that the text, properly interpreted, yields precise answers to just about every question imaginable. They reject, in other words, Justice Scalia's cheery but surely false assertion that interpretation is usually "easy as pie" because the Constitution dictates only one correct outcome.[90] In rejecting this simplistic view, new textualists remain faithful to the general language used in some constitutional provisions and insist that that language and the principles it embodies must prevail. Expectations among the founding generations of how that language might apply to a given situation can help elucidate the meaning of the text, but they cannot substitute for the text itself.[91]

In short, new textualists recognize that the text is both more determinate than some have claimed and less determinate than others have claimed. Their commitment is to take the text on its own terms. And their aim is to elucidate the meaning of the text, which often requires understanding its purpose.

As suggested above, this consensus includes academics from the Left and the Right. There is agreement among conservatives and liberals alike that the semantic meaning of the text, rather than the expectations of the framers, is authoritative. Conservative academics, in this respect, have distanced themselves from Justice Scalia's "it was constitutional then so it must be constitutional now" ap-

[90] See, e.g., Dahlia Lithwich, Justice Grover versus Justice Oscar: Scalia and Breyer Sell Very Different Constitutional Worldviews, Slate (Dec. 6, 2006, 4:31 PM), http://www.slate.com/id/2154993/ (quoting Justice Scalia).

[91] See, e.g., Smith, supra note 67, at 718–19.

proach to judging.[92] There is also agreement that the text itself indicates the level of generality at which to interpret the language and that general principles can lead to different applications over time. And there is agreement, finally, that history can shed important light on the purposes and principles underlying the more general and abstract phrases in the documents.[93]

This is not to suggest that all debates over constitutional interpretation have ended or will end anytime soon. Even among those committed to new textualism, questions remain over the proper role of stare decisis and what to do when text and history dictate not a single answer to a contemporary dispute but a range of possible outcomes.[94] Scholars also disagree about the meaning of the text and, more generally, about how *much* meaning one can derive from text and history.[95] Some of these debates, like those about the specific meaning of the text, have a clear ideological edge, but many do not.

These open questions and differences of opinion, while significant, should not overshadow the important agreement regarding basic principles. More and more, academics are searching for the same thing: the most plausible interpretation of the meaning of the Constitution. Rather than talking past one another, academics from the Left and the Right are having the same conversation. This is a significant step, and it ought to be recognized as such rather than discounted because some points of disagreement remain.

In addition, debates regarding the details of various theories of constitutional interpretation may, in the end, be less significant than persuasive accounts of constitutional meaning.[96] Theorists can and likely will debate endlessly the precise role of stare decisis or the sources to which judges should turn when the Constitution fails to give a single answer to a contemporary question. But it is unlikely that the niftiest theory imaginable will be more influential than a truly persuasive account of what the text of the Constitution

[92] See Colby & Smith, supra note 9, at 254.
[93] See Smith, supra note 67, at 723–24.
[94] For discussion of these points, see, for example, Amar, supra note 8, at 78–89.
[95] See, e.g., Calabresi & Fine, supra note 69, at 700.
[96] Cf. Paulsen, supra note 85, at 2037 (asserting that "questions of the Constitution's meaning must precede theories about its application—and . . . the document must direct and constrain constitutional theory and practice, not the other way around").

actually means. Scholarly work that establishes the most plausible reading of a constitutional provision will likely exert more influence, both within courts and outside of them, than will sophisticated refinements regarding the details of a constitutional theory.

A good illustration of this point is Reva Siegel. Siegel is a sophisticated critic of originalism whose most famous piece, ironically, seeks to establish the original meaning of the Nineteenth Amendment. Appearing in the 2002 volume of the *Harvard Law Review*, this article takes an historical look at the women's suffrage movement and the ideas behind it, which ultimately resulted in passage of the Nineteenth Amendment.[97] And she explains how the Nineteenth Amendment, which essentially granted women full citizenship rights, sheds light on the Fourteenth Amendment, making it plain that women were fully entitled to Fourteenth Amendment protections. She then uses this historical understanding of the meaning of the Nineteenth Amendment to criticize current doctrine, in particular *United States v. Morrison*,[98] in which the Court struck down portions of the Violence Against Women Act.

Deep within this lengthy article, on three pages, Siegel seems to disavow the significance of original meaning and suggests that we all have to make our own choices regarding the significance of history.[99] This tepid and somewhat obtuse protest runs contrary to the tenor of the rest of the article, which essentially relies on history, text, and structure to elucidate the original meaning of the Nineteenth Amendment and to show why *Morrison* is inconsistent with that meaning. It seems fair to say that the ninety-seven pages of history and textual analysis have proven more influential than the three pages of theory, and not simply because of the relative attention paid to each. The history and structural analysis are forceful, compelling and concrete; the theory, by contrast, is vague and elusive. What is true of this one article, I would contend, is often true of the field more generally: an ounce of history is not always worth a pound of theory, but that is a pretty typical exchange rate.

[97] Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 947 (2002).

[98] 529 U.S. 598 (2000).

[99] Siegel, supra note 97, at 1032–34.

B. Straw Men

The consensus described above is emerging. It is not complete, as Siegel's article reveals. There are some outliers on the Right who continue to argue for original-intent originalism.[100] They do so primarily out of concern that the Constitution will otherwise remain too open-ended and leave courts with too much discretion. But because the problems with original intent, which were made obvious decades ago, have not disappeared, it seems unlikely that it will attract many new adherents.

More numerous and significant are those on the Left who continue to resist the turn toward new textualism. This group includes some of the leading constitutional law scholars, such as Professors Cass Sunstein, David Strauss, Geoff Stone, Reva Siegel, and Robert Post.[101] These scholars, individually and collectively, have produced path-breaking work that commands respect. On this particular issue, however, they are largely missing the point.

The chief problem with these critics is their collective failure to confront and engage directly with the ideas of new textualism and the common ground among liberals and conservatives regarding the importance of the text. Instead, these scholars are effectively beating a dead horse by attacking the views that Robert Bork held in the 1970s regarding the importance of original intent. While even Bork himself has moved past original intent as the touchstone for constitutional interpretation,[102] these progressive critics remain stuck in the past. To them, serious reliance on the original meaning of the Constitution necessarily entails relying on the original intent of the framers, which means turning the clock back a century or more so that the Constitution corresponds to the intent and expectations of the framers and ratifiers. It follows from this premise

[100] See, e.g., Steven D. Smith, Reply to Koppelman: Originalism and the (Merely) Human Constitution, 27 Const. Comment. 189, 197 (2010).

[101] See, e.g., David Strauss, The Living Constitution (2010); Cass R. Sunstein, Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America (2005); Robert Post & Reva Siegel, How Liberals Need to Approach Constitutional Theory, The New Republic, Sept. 18, 2007, at 14; Geoffrey R. Stone, Op-Ed, Our Fill-in-the-Blank Constitution, N.Y. Times, Apr. 14, 2010, at A27.

[102] See, e.g., Robert H. Bork, The Tempting of America: The Political Seduction of the Law 144 (1990) ("The search is not for subjective intention. . . . When lawmakers use words, the law that results is what those words ordinarily mean.").

that embracing the text necessarily entails embracing conservative—indeed, disastrous—results.

A good recent example is work by Professor David Strauss from the University of Chicago Law School. Strauss is a first-rate scholar. He has produced truly superb work on a range of issues, but his best-known work may be in the arena of constitutional theory. He argues in favor of common-law constitutionalism.[103] Under this view, the Supreme Court acts like a common-law court, slowly building upon earlier precedent in order to allow for growth and change. He has tied this idea to the more general notion of a living constitution and recently produced a book with the title *The Living Constitution*.

As a descriptive matter, Strauss's theory is hard to refute. The Supreme Court undoubtedly acts like a common-law court insofar as it most often relies on past precedent to guide current decisions. Strauss, however, also seeks to defend this approach normatively as the best means of constitutional interpretation. Here he is on shakier ground, as Stanley Fish explained in a recent *New York Times* review of Strauss's book.[104] To the extent Strauss argues that the Court should follow precedent that is not itself anchored in the meaning of the constitutional text, the Constitution basically disappears altogether. Strauss fails to offer a convincing explanation of why constitutional interpretation need not concern itself with the meaning of the Constitution. As the title of Fish's review puts it: "Why Bother with the Constitution?"

In defending his approach, Strauss first acknowledges that there are different versions of originalism. But rather than explore these versions, he fixates on original-intent originalism as the definitive version and goes on to explain why he rejects what he then calls, simply, "originalism." The main basis for his objection is that "originalism" would lead to bad outcomes. Follow "originalism," he argues, and the sky starts to fall: racial segregation in schools would be constitutional; the government would be free to discriminate against women; the federal government could discriminate against "racial minorities (or anyone else) pretty much anytime it

[103] See David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877 (1996).

[104] Stanley Fish, Why Bother with the Constitution?, N.Y. Times Blog (May 10, 2010), http://opinionator.blogs.nytimes.com/2010/05/10/why-bother-with-the-constitution.

wanted to"; the bill of rights would not apply to the states; the principle of one person, one vote would be out the window; and many federal labor, environmental, and consumer protection laws would be unconstitutional.[105]

This is a parade of horribles, to be sure, and Strauss is not alone in conjuring them. Other progressive academics have made similar claims. In a 2005 book, for example, Cass Sunstein argued that adhering to the original meaning of the Constitution would mean that states could ban the sale of contraceptives; one could bid farewell to federal environmental and health and safety laws; states could establish official churches; modest gun control laws would be invalid; segregation and discrimination would be legal; states could sterilize criminals; there would be no right to privacy; and commercial speech would be protected to the same extent as political speech.[106]

These are scary lists, but they are also fictional. Strauss and Sunstein are arguing against straw men.[107] More precisely, they are arguing against old-style, Borkian original-intent originalism. The first, critical step in their argument is to present a caricature of originalism, to borrow Professor Paulsen's term.[108] In arguing that following the original meaning of the Constitution would lead to horrible results, they are really arguing that following original intent would lead to horrible results. But with few exceptions, no one is arguing in favor of original intent anymore. The debate about constitutional meaning has progressed well beyond the days of Robert Bork and Edwin Meese.

Strauss and Sunstein, like other critics of original meaning, simply fail to engage with the tenets of new textualism. The Constitution, in the hands of academics like Balkin, Amar, and other progressive new textualists, is certainly *not* a blueprint for antediluvian outcomes. Progressive critics who continue to maintain that the actual meaning of the constitutional text demands regressive and sometimes horrific results are simply ignoring the work of their contemporary colleagues in favor of Robert Bork's work in the

[105] Strauss, supra note 101, at 10–18.

[106] Sunstein, supra note 101, at 1–3, 18–19, 63–65.

[107] Strauss anticipates this objection but never explains why it is wrong. Strauss, supra note 101, at 10.

[108] See Paulsen, supra note 85, at 2049.

1970s, an approach that is becoming less and less defensible by the day. Worse, they are inevitably buttressing the conservative claim that the text of the Constitution, if embraced faithfully, is more in line with conservative rather than progressive values.

Attempting to scare progressives away from the text of the Constitution is thus both unnecessary and unwise. It is unnecessary because the Constitution is not, as these progressive critics imply, a thoroughly conservative document. It is unwise for exactly the same reason. Decisions like *Brown v. Board of Education*,[109] those upholding civil rights legislation, and those striking down discrimination against women can be defended as perfectly consistent with the best meaning of the constitutional text.[110] It is hard to understand the attraction of arguing to the contrary, especially without even seeking to engage the work of Amar and others. More generally, it is difficult to see the attraction of readily conceding that so many of the progressive Court decisions of the twentieth century cannot be linked to the original meaning of the Constitution.

Were the Constitution a thoroughly conservative document, looking for ways to downplay the text might be the only option for progressives worried about bad results. But following in Professor Amar's footsteps, a large contingent of progressive academics have produced a substantial body of work that shows that the text does not inexorably command conservative outcomes. If Strauss, Sunstein, and other critics want to argue against following the meaning of the text, it is *this* body of work that they should engage, not the musty musings of Robert Bork and Edwin Meese.

More generally, these progressive critics seem to give the public—to whom their arguments are ultimately meant to appeal—both too little and too much credit. They give them too little credit by assuming that the public only cares about results and not at all about how those results are reached—and not at all about the actual text of the Constitution. That explains the parade of horribles.

[109] 347 U.S. 483 (1954).

[110] See, e.g., Amar, supra note 8, at 51–52, 61–66, 103–09; Balkin, supra note 9, at 450–51. It is ironic that, despite considerable hand-wringing among academics regarding the correctness of *Brown*, one of the most admired law review articles of the twentieth century was Charles Black's eleven-page essay explaining why *Brown* was a laughably easy case. See Charles Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421 (1960).

It also explains the arguments of Geoff Stone, Robert Post, and Reva Siegel, all of whom suggest that constitutional interpretation has little or no attractive force independent of the results it produces.[111]

At the same time, these critics sometimes err in the opposite direction by giving in to the fiction that the average American is familiar with various "modes" of constitutional interpretation that are only tenuously connected to the language of the Constitution. In Post and Siegel's view, for example, "*Americans routinely* use many other forms of persuasion to convince one another about the Constitution's meaning. They appeal to text, precedent, history, structure, tradition, purpose, principle, prudence, and ethical ideals."[112] Perhaps the term "Americans" was meant only to refer to a small subset of Americans, like lawyers or law professors. Otherwise, the assertion is a little difficult to believe.

It seems fairer to assume that Americans are at least slightly more principled and less academically inclined than these progressive critics suggest. There appears to be little basis for assuming that Americans care only about results and not about following the text of the Constitution.[113] It seems equally implausible to assume that "Americans" spend enough time thinking about constitutional interpretation to be drawn to appeals to a potpourri of interpretive modalities like "precedent[,] . . . structure[,] . . . principle, prudence, and ethical ideals" over appeals to the meaning of the text.

To be clear, those who embrace new textualism do not, as some argue, insist that looking to text and history is the *only* legitimate way to decide cases.[114] Most new textualists make room for, among other things, stare decisis. In addition, most new textualists admit that text and history do not provide precise answers to *every* constitutional question. Thus, as I have said, they recognize that constitutional adjudication often requires two steps—determining the meaning of the constitutional provision at issue as precisely as pos-

[111] See sources cited supra note 101.

[112] Post & Siegel, supra note 101, at 14 (emphasis added).

[113] For reports of relevant polling and discussion of public attitudes towards orginalism—which bolster the point that Americans care about more than just results, see, for example, Jamal Greene, Selling Originalism, 97 Geo. L.J. 657 (2009); Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, Profiling Orginialism, 111 Colum. L. Rev. 356 (2011).

[114] See, e.g., Post & Siegel, supra note 101, at 14.

sible and then applying that meaning to the issue at hand. That second step may entail following precedent, or it may entail reliance on broader theories of adjudication like judicial restraint or political process theory.[115]

All that new textualists are suggesting, essentially, is that courts and scholars take the first step more seriously—that they linger a little longer than they do now over the text and history. Scholars from across the spectrum agree that text and history have an important role to play in constitutional interpretation and adjudication.[116] New textualists, and the work they have produced, suggest that scholars and courts should give more than lip service to this universally supported principle. This does not entail caving to the Right. It instead entails taking these sources seriously and mining them for the meaning they contain, rather than sailing right past them in the often mistaken belief that they offer little of value.

In sum, it seems fair to assume that most Americans want an understandable and persuasive explanation of what the Constitution actually means, in whole and in part. More and more law professors would like precisely the same thing, and some are working to provide such explanations. It is to their work that this Article now turns.

V. THE PROGRESS MADE AND THE PATH AHEAD

A. A Brief Survey of Existing Work

In just the last decade or so, progressive scholars have produced an impressive body of work that seeks to elucidate the best meaning of a range of critically important constitutional provisions, from Article I to the Nineteenth Amendment. Relying on text, history, and structure, these academics have made a persuasive case for a progressive reading of the Constitution across a range of topics. While space does not permit a complete and

[115] See supra Section IV.A.

[116] See, e.g., Richard H. Fallon, Jr., The Political Function of Originalist Ambiguity, 19 Harv. J.L. & Pub. Pol'y 487, 488 (1996) (acknowledging that "most views—my own included—assume that original understanding and purpose are relevant to constitutional interpretation"); Strauss, supra note 103, at 880–81 (acknowledging that "[v]irtually everyone agrees" that text and original meaning have a role to play in constitutional interpretation).

thorough review of this entire body of work, a brief sampling should suffice to give an idea of its breadth and depth.

Starting with congressional power, important work has been done to establish the propriety of reading Congress's commerce clause powers broadly. The power to regulate interstate commerce is perhaps the most important power of Congress and has been the basis for federal legislation concerning the environment, the workplace, and most recently, healthcare. Professor Jack Balkin's recent article offers a powerful constitutional defense, based on the original meaning of that Clause, of an expansive power to regulate commerce.[117] Professor Jill Hasday contributed a thoughtful piece that refutes the conservative claim (suggested in *United States v. Lopez*,[118] among other places) that family law has traditionally been beyond federal control, pointing out that the federal government in the past protected the status of black families during Reconstruction and that it outlawed polygamy.[119] Neither Balkin nor Hasday suggests, as a matter of policy, that Congress should regulate broadly or within the specific arena of family law; their articles instead argue that these *are* questions of policy, not constitutional law.

A number of scholars, both progressive and conservative, have studied Congress's powers to enforce the Reconstruction Amendments and have concluded that these are much broader than the current Court is willing to admit. Professors Jack Balkin, Evan Caminker, Paul Finkelman, Michael Gerhardt, Steven Heyman, Robert Kaczorowski, Doug Laycock, Michael McConnell, and Rebecca Zeitlow have all examined the history surrounding these amendments in order to place the relevant power-granting language in its proper context.[120] The conclusion: Congress has as

[117] Balkin, Commerce, supra note 68.

[118] 514 U.S. 549 (1995).

[119] Jill E. Hasday, Federalism and the Family Reconstructed, 45 UCLA L. Rev. 1297 (1998).

[120] See Balkin, Reconstruction Power, supra note 68; Evan Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 Stan. L. Rev. 1127 (2001); Paul Finkelman, John Bingham and the Background to the Fourteenth Amendment, 36 Akron L. Rev. 671 (2003); Michael Gerhardt, The Ripple Effects of *Slaughter-House*: A Critique of the Negative Rights View of the Constitution, 43 Vand. L. Rev. 409 (1990); Steven J. Heyman, The First Duty of Government: Protection, Liberty and the Fourteenth Amendment, 41 Duke L.J. 507 (1991); Robert Kaczorowski, The Supreme

much power to enforce those amendments as was given in the Necessary and Proper Clause, which, as Justice Marshall explained famously in *McCulloch v. Maryland*,[121] is indeed a broad grant of power. More specifically, these scholars make clear that Congress's powers extend to protecting citizens against discrimination and mistreatment by other citizens as a way of enforcing the guarantee of citizenship and the equal protection of the laws enshrined in the Fourteenth Amendment. This scholarship casts serious doubt on the Court's recent efforts, in cases like *Boerne*[122] and *Morrison*,[123] to place severe limits on Congress's authority while simultaneously consolidating the Court's authority. On a proper understanding of the Reconstruction Amendments, this is exactly backwards.

Other scholars have used text, history, and structure to establish Congress's power to regulate the speech of corporations, including their campaign finance contributions. Professors Zephyr Teachout[124] and Adam Winkler[125] have each written articles that cast serious doubt on the Court's subsequent decision in *Citizens United v. FEC*, in which the Court struck down a federal law limiting the campaign contributions of corporations.[126] As Teachout and Winkler explain, there can be little doubt that Congress has the constitutional authority to regulate campaign contributions made by corporations, and the First Amendment does not grant corporations immunity from such legislation.[127]

Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly, 73 Fordham L. Rev. 153 (2004); Douglas Laycock, Conceptual Gulfs in *City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 743 (1998); Michael W. McConnell, Institutions and Interpretation: A Critique of *City of Boerne v. Flores*, 111 Harv. L. Rev. 153 (1997); Rebecca Zietlow, Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship, 36 Akron L. Rev. 717 (2003).

[121] 17 U.S. (4 Wheat.) 316 (1819).

[122] City of Boerne v. Flores, 521 U.S. 507 (1997).

[123] United States v. Morrison, 529 U.S. 598 (2000).

[124] See Zephyr Teachout, The Anti-Corruption Principle, 94 Cornell L. Rev. 341 (2009).

[125] See Adam Winkler, Corporate Personhood and the Rights of Corporate Speech, 30 Seattle U. L. Rev. 863 (2007) [hereinafter Winkler, Corporate Personhood]; Adam Winkler, "Other People's Money": Corporations, Agency Costs, and Campaign Finance Law, 92 Geo. L. Rev. 871 (2004).

[126] Citizens United v. FEC, 558 U.S. 50 (2010).

[127] Teachout, supra note 124, at 408–13; Winkler, Corporate Personhood, supra note 125, at 863.

While some scholars have worked to make clear the wide scope of some of Congress's powers, others have worked to clarify important *limits* on those powers, especially in the area of immigration and the treatment of aliens. Arguing against the conventional wisdom, Professor Neal Katyal contends that Congress does not have wide discretion to treat aliens differently from citizens when they are tried for terrorism.[128] Professors James Pfander and Theresa Warden rely on historical evidence to question Congress's currently broad powers over immigration, including the power to grant broad discretion to executive branch officers.[129] Nor can Congress, they explain, properly shield immigration and naturalization decisions from the oversight of federal courts.[130] In a separate article, Pfander relies on the text of Article I to explain why Congress cannot deprive the Supreme Court of appellate jurisdiction over certain cases, as it has considered doing in the past.[131]

Professor Caleb Nelson wrote an important article about Congress's power to preempt state law.[132] The article is a model for liberal and conservative new textualists alike. Nelson follows the evidence where it leads and concludes that the Court has been too willing to recognize preemption in certain circumstances (so-called obstacle preemption) and too stingy in others (for example, in establishing a presumption against preemption).[133] Perhaps most importantly, Nelson also shows by example that it remains possible, for those willing to do the hard work, to shed new and persuasive light on the meaning of provisions thought hopelessly opaque or vague. His work will not be the final word nor convince all scholars working in the area, but that is true of most scholarship and does not detract from the significance of the piece.

Professor Julian Davis Mortenson, in the meantime, has taken on the conservative view of expansive executive power, championed by Professor John Yoo and others. In a recent article in the

[128] Neal Katyal, Equality in the War on Terror, 59 Stan. L. Rev. 1365 (2007).

[129] James Pfander & Theresa Wardon, Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity & Transparency, 96 Va. L. Rev. 359, 413–41 (2010).

[130] Id.

[131] James Pfander, Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation, 101 Nw. U. L. Rev. 191, 198–200 (2007).

[132] Caleb Nelson, Preemption, 86 Va. L. Rev. 225 (2000).

[133] Id. at 303–05.

University of Chicago Law Review, Mortenson shows how Yoo's claims regarding executive power are not actually tethered to a plausible historical analysis.[134] Whether regarding the question of presidential power versus Congressional power, the President's power to avoid judicial supervision, or the power of the President to start armed hostilities, Mortenson shows how the historical evidence illustrates an American tradition wholly at odds with Yoo's arguments and the positions advanced by the Bush administration.[135]

Equally important work about individual rights has been produced in the last two decades. Although the topic itself is old, scholars continue to produce work establishing that the purpose of the Privileges or Immunities Clause of the Fourteenth Amendment was to incorporate the Bill of Rights against the states and also to protect unenumerated fundamental rights.[136] Similar work has been produced regarding the Ninth Amendment, which scholars contend does indeed protect fundamental unenumerated rights.[137] Still other work, by scholars that include Professors John Hart Ely and Laurence Tribe, establishes a strong historical foundation for recognizing a substantive component in the due process clause, which gives lie to the claim made repeatedly by conservatives that "substantive due process" is an oxymoron.[138]

[134] See Julian David Mortenson, Executive Power and the Discipline of History, 78 U. Chi. L. Rev. 377 (2011). Important work on the limits of executive power over military campaigns also includes David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding, 121 Harv. L. Rev. 689 (2008).

[135] See supra note 134.

[136] See, e.g., Daniel Farber, Retained by the People (2007); Richard Aynes, Ink Blot or Not: The Meaning of Privileges and/or Immunities, 11 U. Pa. J. Const. L. 1295 (2009); Michael Kent Curtis, Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States, 78 N.C. L. Rev. 1071 (2000); Michael Anthony Lawrence, Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses, 72 Mo. L. Rev. 1 (2007); Bryan Wildenthal, Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67, 68 Ohio St. L.J. 1509 (2007).

[137] See, e.g., Amar, supra note 11, at 328–29; Farber, Retained by the People, supra note 136; Randy Barnett, The Ninth Amendment: It Means What It Says, 85 Tex. L. Rev. 1 (2006).

[138] See, e.g., John Hart Ely, The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process, 16 Const. Comment. 315, 326–27 (1999) (concluding that founding-era "American statesmen accustomed to viewing due process

All three lines of scholarship show the possibilities and limitations of new textualism. Each offers a solid foundation for the argument that the Constitution, properly understood, protects certain unenumerated rights. But the specific identification of those rights is beyond the reach of historical materials. History can provide some clues, but it does not establish—indeed, it cannot establish—a precise, concrete list of rights. For some, this is enough to pretend that these rights are not protected by the Constitution. Robert Bork, for example, famously called the Ninth Amendment an "inkblot" that should be ignored because it was not sufficiently precise.[139] But this is obviously an insufficient response, as judges and Justices have the authority and responsibility to enforce the text, not ignore it.

Given the Court's recent Second Amendment cases, it is not surprising that a good deal of recent work has focused on the original meaning of the "right to bear arms." Scholars continue to debate whether the Amendment granted an individual right, independent of service in the militia.[140] Perhaps more importantly, however, there appears to be some consensus that reasonable regu-

through the lens of [Sir Edward] Coke and [William] Blackstone could [not] have failed to understand due process as encompassing substantive as well as procedural terms"); Frederick Mark Gedicks, An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment, 58 Emory L.J. 585, 594 (2009) (arguing "that one widely shared understanding of the Due Process Clause of the Fifth Amendment in the late eighteenth century encompassed judicial recognition and enforcement of unenumerated substantive rights"); Earl M. Maltz, Fourteenth Amendment Concepts in the Antebellum Era, 32 Am. J. Legal Hist. 305, 317 (1988) (explaining that in the antebellum era a "substantial number of states," as well as antislavery advocates, "imbued their [constitutions'] respective due process clauses with a substantive content"); Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221, 1297 n.247 (1995) ("[T]he historical evidence points strongly toward the conclusion that, at least by 1868 even if not in 1791, any state legislature voting to ratify a constitutional rule banning government deprivations of 'life, liberty, or property, without due process of law' would have understood that ban as having substantive as well as procedural content, given that era's premise that, to qualify as 'law,' an enactment would have to meet substantive requirements of rationality, non-oppressiveness, and evenhandedness.").

[139] Robert H. Bork, The Tempting of America: The Political Seduction of the Law 166 (1990).

[140] This scholarship features prominently in the majority and dissenting opinions in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

lations of firearms are perfectly consistent with the meaning of that Amendment, even if it is read to protect an individual right.[141]

Progressive scholars have also produced important work that sheds light on other hot-button issues. Professor Gabriel Chin wrote a recent article that focuses on the Fifteenth and Fourteenth Amendments to argue that there is not a constitutional basis—as has been widely assumed—for felon disenfranchisement laws.[142] Professor Christina Rodriguez examined the history and purpose of the Fourteenth Amendment to make a strong case that the Citizenship Clause in that Amendment establishes that children of unauthorized immigrants who are born in this country are indeed citizens.[143] In the spirit of Charles Black's famously elegant defense of *Brown v. Board of Education*, H. Jefferson Powell wrote in defense of *Romer v. Evans*,[144] in which the Court struck down a Colorado law that deprived homosexuals of the right to seek local protection against discrimination.[145] Powell relied on a basic principle of the Fourteenth Amendment—that states cannot identify a class of individuals and make it harder for them to seek legal protection against cognizable injury—to offer a straightforward and powerful defense of the Court's decision.[146]

Other scholars are revisiting issues and Amendments long ignored and breathing new life into constitutional provisions now

[141] See, e.g., Robert H. Churchill, Gun Regulation, The Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment, 25 Law & Hist. Rev. 139 (2007); Saul Cornell, Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence, 25 Law & Hist. Rev. 197 (2007); Carole Emberton, The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South, 17 Stan. L. & Pol'y Rev. 615, 621–22 (2006); Adam Winkler, Scrutinizing the Second Amendment, 105 Mich. L. Rev. 683 (2007).

[142] Gabriel Chin, Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?, 92 Geo. L.J. 259 (2004).

[143] Christina Rodriguez, The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment, 11 U. Pa. J. Const. L. 1363 (2009); see also Garrett Epps, The Citizenship Clause: A "Legislative History," 60 Am. U. L. Rev. 331, 339 (2010) ("In my view, the history of the [Fourteenth] Amendment's framing lends no support to the idea that native-born American children should be divided into citizen and non-citizen classes depending on the immigration status of their parents.").

[144] 517 U.S. 620 (1996).

[145] H. Jefferson Powell, The Lawfulness of *Romer v. Evans*, 77 N.C. L. Rev. 241 (1998).

[146] Id. at 243.

dormant. Professor James Gray Pope wrote a recent article, which appeared in the *Yale Law Journal*, in which he argued that the Thirteenth Amendment's prohibition on involuntary servitude encompasses a robust protection for labor rights, including the right to quit, to fair wages, and to organize.[147] Professors Michael Gerhardt and Steven Heyman have each taken on the conventional wisdom that the Constitution guarantees only negative rights, protecting citizens not from each other but only from the government.[148] A key purpose of the Fourteenth Amendment, they argue, was to protect citizens from private violence, and to give the federal government the authority—if not the duty—to step in where states are inadequate to the task.

Still other scholars have focused attention on the Citizenship Clause of the Fourteenth Amendment and have argued that the conception of citizenship protected by that Clause is broader than conventionally thought.[149] Professor Goodwin Liu, for example, has argued that Congress has an obligation, stemming from the Citizenship Clause, to ensure an adequate education for all citizens, as education was considered then—as it is now—a key component for a responsible citizenry.[150] And a number of scholars have produced work explaining that a key principle of the Fourteenth Amendment, and in particular the Equal Protection Clause, was to prevent the denigration of African-Americans—not to enshrine an absolute principle of colorblindness.[151] If this is correct, it follows that the Court's recent affirmative action decisions, as well as its decision regarding voluntary integration, are inconsistent with the original meaning of the text.

Scholars have also argued that later amendments can alter the meaning of earlier ones. Amar and Siegel, for example, have ar-

[147] James Gray Pope, Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude," 119 Yale L.J. 1474 (2010); see also Risa L. Goluboff, The Lost Promise of Civil Rights (2007).

[148] Gerhardt, supra note 120; Heyman, supra note 120.

[149] See, e.g., Amar, supra note 11, at 380–85.

[150] Goodwin Liu, Education, Equality, and National Citizenship, 116 Yale L.J. 330 (2006).

[151] See, e.g., Balkin, supra note 8, at 313–16; Melissa Saunders, Equal Protection, Class Legislation, and Colorblindness, 96 Mich. L. Rev. 245 (1997). Older work on this topic includes Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753 (1985).

gued that the Nineteenth Amendment effectively altered the scope of the Fourteenth Amendment.[152] Similarly, Professor Kurt Lash has argued that the Fourteenth Amendment not only incorporated the First Amendment but effectively altered the meaning of its religion clauses. In separate articles, Lash shows how understandings and concerns about religious freedom changed from the founding to the reconstruction.[153] He argues that, when incorporated, the meanings of the Free Exercise Clause and the Establishment Clause have expanded to protect general interferences with individual religious rights and to bar state-sponsored and state-supported religion.[154]

All of these articles, singly and in combination, can be challenged. Many have been. The debate will continue, as it should. This is a debate worth having, as it is fundamentally a debate about the meaning of the Constitution. The body of work produced thus far is substantial. It requires similarly substantial efforts by those inclined to disagree with the conclusions reached by the authors. It is no longer enough for conservatives to claim, without supporting scholarship, that the Constitution is a fundamentally conservative document.

There is a lesson for progressive scholars as well. Too often those who claim that certain constitutional provisions are hopelessly indeterminate have not bothered to investigate the history or to examine the text closely. It is an unfortunate feature of the legal academy that one way to appear sophisticated is to suggest that the Constitution is hopelessly ambiguous and indeterminate, and to suggest further that only politics determines outcomes. The title of a recent *New York Times* Op-ed, "Our Fill-in-the Blanks Constitution," aptly captures this view.[155] Only knaves or fools, it is often thought, would suggest that real meaning can be found within the

[152] See Amar, supra note 8, at 51; Siegel, supra note 97, at 147–48.

[153] Kurt Lash, The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle, 27 Ariz. St. L.J. 1085 (1995) [hereinafter Lash, Establishment]; Kurt Lash, The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment, 88 Nw. U. L. Rev. 1106 (1994) [hereinafter Lash, Free Exercise].

[154] See Lash, Establishment, supra note 153; Lash, Free Exercise, supra note 153.

[155] Stone, supra note 101.

document itself.[156] The recent and growing body of work just reviewed, however, indicates that this is far too facile a stance.

More generally, perhaps it is time to recognize that it is anomalous within academia, if not perverse, to suggest that further scholarly inquiry into important questions is futile. One could hardly imagine historians, astronomers, or biologists congratulating their colleagues or themselves for claiming that shedding new light on important phenomena is a hopeless enterprise. Why, then, is it so accepted within the legal academy to shun further inquiry into the meaning of the Constitution as a hopeless enterprise?

B. The Path Ahead

In truth, more work can and should be done to illuminate the most plausible reading of the Constitution, in whole and in part. The path ahead, therefore, has already been marked by the work described above. Simply put, there ought to be more like it—more articles that seek to elucidate the meaning of important constitutional provisions that remain shrouded in mystery or obscured by current doctrine.

In addition, synthetic work that draws together the findings of scholars who have examined specific constitutional provisions is also important. Akhil Amar has produced an outstanding example in *America's Constitution: A Biography*, the only modern attempt to provide a comprehensive account of the Constitution's original meaning. Amar's book is a tough act to follow, but still more could be done to link together the work of individual scholars in order to rebut the assertion that the Constitution is essentially a conservative document.

Some open questions regarding constitutional adjudication, described earlier, also could benefit from more sustained attention. Work that establishes the proper scope of stare decisis would be invaluable. Similarly useful would be work that establishes principles for courts and judges to follow when the Constitution itself does not dictate the outcome in contemporary constitutional cases. It may be that no one can improve on John Hart Ely's classic but

[156] For a perfect example of this perspective, see Adrian Vermuele's condescending essay, Adrian Vermuele, Living It Up, The New Republic (Aug. 2, 2010, 12:00 AM), http://www.tnr.com/book/review/living-it.

nonetheless somewhat flawed political process theory.[157] But attempts ought to be made to clarify what, exactly, courts should do when they get to the second step in constitutional adjudication.[158]

Working on these two topics is important because it could produce useful guideposts for courts deciding constitutional cases. If judges have some principled way to decide cases in which the Constitution does not provide a clear answer, they might be less tempted to attribute an incorrect meaning to the constitutional text. The same is true for scholars debating the meaning of the Constitution.

At the same time, it is important to recognize that the meaning of the Constitution exerts an influence beyond the courtroom. It helps shape legislative agendas. It is often the stuff of politics, as the ascendancy of the Tea Party reminds us. And it is front and center in debates over judicial appointments. The scholarly work already done, which provides a sound basis for a progressive reading of a number of constitutional provisions, should be embraced by progressives as should the text of the Constitution itself. But more work can and should be done to translate this work for broader consumption by the public. Progressive legislators, in particular, should be made aware of this fairly large body of scholarship, which is growing all the time.

CONCLUSION

The text of the Constitution, properly read, will not always guarantee a progressive outcome, to be sure. But neither will it always guarantee a conservative one. The Constitution belongs to both parties and to all citizens. For too long, however, liberals and progressives have allowed conservatives to co-opt the Constitution, both within and outside the courtroom. The academic convergence on "new textualism" is an important first step in releasing the Constitution—the real one—from the grip of conservatives.

[157] John Hart Ely, Democracy and Distrust, A Theory of Judicial Review (1980).

[158] Kermit Roosevelt has done some excellent work on this issue. See Kermit Roosevelt III, The Myth of Judicial Activism (2006); Kermit Roosevelt III, Constitutional Calcification: How the Law Becomes What the Court Does, 91 Va. L. Rev. 1649 (2005).

The academic work to date should also give progressives the confidence to provide a simple and persuasive response to the claim that the Constitution is conservative. In the past, the liberal response was neither simple nor persuasive, focusing on the indeterminacy of the text, the complications of interpretation, and the need for change and adaptation to new circumstances. Now, when conservatives claim that the Constitution, in whole or in part, is a conservative document, progressives can and should say: "Not true, and I'll show you why."