

LOYOLA LAW REVIEW

Volume 45, Number 4, Winter 1999

ARTICLES

AN ORIGINALISM FOR NONORIGINALISTS

*Randy E. Barnett**

I. INTRODUCTION: ORIGINALISM IS DEAD; LONG LIVE ORIGINALISM

The received wisdom among law professors is that originalism is dead, having been defeated in intellectual combat sometime in the eighties. According to this story, Edwin Meese¹ and Robert Bork² proposed that the Constitution be interpreted

* Austin B. Fletcher Professor, Boston University School of Law. Email: <rbarnett@bu.edu>. This Article was prepared as the basis of the Brendan Brown Lecture that was given at the Loyola University New Orleans School of Law in April 1999. In October 1999, it was also given as part of the distinguished lecturer series at the St. Thomas University School of Law. It is part of a larger work in progress entitled THE PRESUMPTION OF LIBERTY. I profited greatly from the written suggestions of Bob Bone, Gary Lawson, Gerry Leonard, David Lyons, Richard McAdams, Glenn Reynolds, and the students in my seminar on constitutional interpretation. I also wish to thank participants in the law faculty workshops at Boston University and the University of Florida for their most helpful comments.

1. See Attorney General Edwin Meese III, *Address before the American Bar Association* (July 9, 1985), in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 9 (1986); see also Edwin Meese, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925, 925-33 (1996).

2. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, IND. L.J., Fall 1971, at 1.

according to the original intentions of its framers. Their view was trounced by many academic critics, perhaps most notably by Paul Brest in his widely-cited 1980 *Boston University Law Review* article, *The Misconceived Quest for Original Understanding*,³ and by H. Jefferson Powell in his 1985 *Harvard Law Review* article, *The Original Understanding of Original Intent*.⁴ Taken together, these and other articles represent a two-pronged attack on originalism that was perceived at the time as devastating. As a method of constitutional interpretation, originalism was both unworkable and itself contrary to the original intentions of the founders.⁵ These criticisms are so familiar and widely accepted that I need only list them here.

According to Brest, originalism was unworkable because it was practically impossible to ascertain and then aggregate the "intention votes" of a multitude of framers, much less to carry them forward to apply to a current controversy.⁶

The act of translation required . . . involves the counterfactual and imaginary act of projecting the adopters' concepts and attitudes into a future they probably could not have envisioned. When the interpreter engages in this sort of projection, she is in a fantasy world more of her own than of the adopters' making.⁷

Powell, in turn, decisively showed that, to quote from the abstract preceding the article, "the modern resort to the 'intent of the framers' can gain no support from the assertion that such was the framer's expectation, for the framers themselves did

3. Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980). As of March 6, 2000, this article had been cited in 544 articles. (Westlaw search in Journals and Law Reviews database: [brest /s "misconceived quest"]).

4. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). As of March 6, 2000, this article had been cited 376 times. (Westlaw search in Journals and Law Reviews database: [powell /s "original understanding of original intent"]).

5. A useful collection of articles representing the arguments made on both sides of this issue in the seventies and eighties is INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (Jack N. Rakove ed., 1990).

6. See Brest, *supra* note 3, at 212-22.

7. *Id.* at 221.

not believe such an interpretive strategy to be appropriate.”⁸ This seemingly reduced originalists to a contradictory position: We should violate the original intentions of the framers by relying on their original intent.

Even those who get beyond the Brest and Powell criticisms still encounter two additional and seemingly insurmountable obstacles to originalism. If constitutions are based on popular sovereignty or consent, the framers and ratifiers of the U.S. Constitution represented only white males, not the People, and therefore could not legitimately bind those who were not parties. And even were the Constitution somehow binding when adopted, it was adopted by long-dead men who cannot rule us from the grave.

Moreover, a generation that countenanced slave-holders has not the moral legitimacy to rule us from the grave or from anywhere else. Because their intentions were racist, sexist, and classist, far from being bound by them, we ought loudly to denounce and reject them. According to this view, not only was the Constitution not a product of the consent, it was a product of original sin.

If ever a theory had a stake driven through its heart, it seems to be originalism. My purpose at this juncture is not to rehearse in detail the arguments against originalism or the responses of originalists to them. My purpose is merely to restate the consensus about how the debate came out as a prelude to making what for many will be a startling claim: Originalism has not only survived the debate of the eighties, but it has virtually triumphed over its rivals. Originalism is now the prevailing approach to constitutional interpretation. Even more remarkably, it has prevailed without anyone writing a definitive formulation of originalism or a definitive refutation of its critics.⁹

8. Powell, *supra* note 4, at 885.

9. Richard Kay is one defender of originalism, however, who deserves special mention for the thoughtfulness and cogency of his analysis. See Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 244 (1988). Kay defends an original intention version of originalism based on popular sovereignty which is not the version that I shall be presenting in this Article. Nevertheless, I will

This is a difficult claim to prove and, in the end, it is peripheral to my principal objective, which is to identify both a version and justification of originalism that would be satisfactory to many who consider themselves, as I did,¹⁰ nonoriginalists. So I will only offer a few items of evidence on its behalf, and these will also assist me in identifying the new, more acceptable originalism.

Exhibit A is the tenor of the popular debate over the meaning of disputed terms of the Constitution. Take, for example, the impeachment of President Clinton. When the issue of which offenses constituted impeachable “high crimes and misdemeanors” was raised, originalist evidence was commonly offered by the President’s academic defenders. In particular, oft-cited was Alexander Hamilton’s discussion in Federalist 65¹¹ where he wrote:

The subjects of [a well-constituted court for the trial of impeachments] are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated *political*, as they relate chiefly to injuries done immed-

rely on some of Kay’s arguments below. Since this Article was first drafted, Keith Whittington has published the most comprehensive and philosophically sophisticated defense of originalism to date. See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, & JUDICIAL REVIEW (1999). Whittington bases his justification of originalism on a version of popular sovereignty he calls “potential sovereignty.” See *id.* at 135–52. Though I do not find this justification ultimately persuasive, I shall use some of his other arguments concerning originalism below.

10. See, e.g., Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1210 (1996) (“Indeed, one of the authors of this article, Don Kates, takes an originalist approach to interpretation, while the other, Randy Barnett, does not.”); see also Randy E. Barnett, *The Relevance of the Framers’ Intent*, 19 HARV. J.L. & PUB. POL’Y 403, *passim* (1996) (distinguishing between interpretation based on a conception of the Framers as wardens and one that is based on a conception of the Framers as designers.).

11. See, e.g., Aaron Epstein, *Founding Fathers Dictated Outcome of Clinton Trial*, THE ARIZONA REPUBLIC, Sunday, February 14, 1999, at A15 (“If there are any laurels to be awarded, they must go to the likes of James Madison, Alexander Hamilton and George Mason. It was those men and their colleagues who wrote into the Constitution the central idea that virtually dictated the outcome of the 1999 impeachment trial of William Jefferson Clinton, and left the president intact but tainted, the nation shaken but stable.”).

ately to the society itself.¹²

While other forms of arguments were also used, originalist claims received a prominent place in the public and private statements of many law professors.

In a like manner, the arguments normally offered against interpreting the Second Amendment as protecting an individual right are almost exclusively originalist—though a highly implausible version of that intent—that the Second Amendment originally was intended to protect, not an individual right, but the organized militias that have since been superceded by the state National Guard. This form of argument extends beyond the scholarly literature. When I lecture on the Second Amendment, nearly all the arguments I hear from the very constitutional law professors who supposedly have rejected originalism are based on original intent. Putting aside the possibility that such arguments are exercises in cynicism, why analyze the meaning of “high Crimes and Misdemeanors”¹³ or “the right . . . to keep and bear Arms”¹⁴ in this manner unless some version of originalism matters?

Exhibit B is the tenor of current academic discussion of methods of constitutional interpretation. It was telling when Tom Grey, who in 1975 originated the much-used distinction between “interpretivist” and “noninterpretivist” methods,¹⁵ rejected it in 1988 in favor of the distinction between “textualist” and “supplementer.”¹⁶ “As I would frame the debate now,” he

12. THE FEDERALIST No. 65 (Alexander Hamilton) (Paul Leicester Ford ed., 1898).

13. U.S. CONST. art. II, § 4.

14. U.S. CONST. amend. II.

15. See Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705–07 (1975).

Where the broader view of judicial review diverges from the pure interpretive model is in its acceptance of the courts' additional role as the expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution.

Id. at 220.

16. See Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 220–21 (1988).

I now think that “noninterpretivism,” besides being stylistically barbarous, is a misleading term for the view that accepts the legitimacy of judicial enforcement of an unwritten constitution. It is better to treat all approaches to constitutional adjudication as constrained to the interpretation of the sources of constitutional law, and then to argue about what those sources are and how much relative

wrote,

some interpreters, textualists (Judge Bork and his allies for example), treat the constitutional text as the sole legitimate source of operative norms of constitutional law. Other interpreters, supplementers (my crowd, the good guys), treat the text as the overriding source where it speaks clearly, but supplemented by an unwritten constitution made up of principles that underlie precedent and practice as seen from the perspective of the present. The text itself authorizes resort to these unwritten sources through provisions like the ninth amendment and the due process clauses.¹⁷

Conceding that “the text [is] the overriding source where it speaks clearly” was significant, arguing that “[t]he text itself authorizes resort to . . . unwritten sources” underscored the concession to originalism being made.¹⁸

A similar shift occurred in Ronald Dworkin’s thinking between *Taking Rights Seriously* which had emphasized the relationship between background and institutional rights¹⁹ and *Law’s Empire* which emphasized “law as integrity” in which interpretation based on both fit and justification dominates.²⁰ The “fit” part of his approach seemingly requires that the text and historical understandings of the text figure into constitutional interpretation in a nontrivial manner. Most recently Dworkin has presented a very sympathetic and plausible version of originalism—a version he calls “semantic originalism”²¹ to which I will return—though he still does not endorse it himself.²²

weight they should have.

Grey, *supra*, at 220.

17. Grey, *supra* note 16, at 221.

18. *Id.*

19. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (4th prtg., 1977).

20. See generally RONALD DWORKIN, *LAW’S EMPIRE* (1986).

21. See Ronald Dworkin, *Comment*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 115, 119–27 (Amy Gutman, ed., 1997).

22. See Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM L. REV.* 1249, 1258 n.18 (1997) (“I did not mean, in my brief remarks, to abandon . . . my long-standing opposition to any form of originalism . . .”).

To these examples could be added others.²³ As Jack Rakove observed after listing those constitutional scholars who have offered originalist arguments, “[b]ut in truth, the turn to originalism seems so general that citation is almost beside the point.”²⁴ Though it is possible to characterize this intellectual movement as a shift, not to originalism, but to *textualism*, I think this distinction is hard to maintain. Once the importance of text or “writtleness” is conceded, some version of originalism becomes much harder to resist. For, as I will try to show, the reasons why text is important are also the same reasons that support some modest version of originalism, as well as a justification for originalism that should be acceptable even to many nonoriginalists. These reasons also place a kind of burden of persuasion upon anyone proposing to replace reliance on the text by some other method of interpretation.

And this also helps explain why the shift to originalism has occurred, if indeed it has.²⁵ It takes a theory to beat a theory and, after a decade of trying, the opponents of originalism have never congealed around an appealing and practical alternative. The inability of the most brilliant and creative legal minds to present a plausible method of interpretation that engendered enough confidence to warrant overriding the text helped make some version of originalism much more attractive.

Notwithstanding what I am calling the power of text or “writtleness,” this shift might still never have occurred if it threatened the political commitments of the dominant academic establishment. In this regard, the shift to originalism was made much easier, and perhaps even possible, by law professors’ discovery of the neorepublican historical scholarship on the founding

23. See, e.g., PHILIP BOBBIT, CONSTITUTIONAL INTERPRETATION 13–14 (1991) (counting both “historical” and “textual” as useful and legitimate “modalities” of constitutional argument).

24. Jack N. Rakove, *Fidelity Through History (or to it)*, 65 FORDHAM L. REV. 1587, 1592 n.14 (1997) (listing Bruce Ackerman, Akhil Amar, Chris Eisgruber, Daniel Farber, Martin Flaherty, Michael Klarman, Michael McConnell, Mark Killenbeck, Larry Kramer, Henry Monaghan, and William Treanor).

25. For another scholar who has noticed the shift to “broad originalism” by political progressives, see James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335 (1997). “In recent years, the originalist premise has also been manifested in the emerging strain of broad originalism in liberal and progressive constitutional theory.” *Id.* at 1344.

era, such as that by Gordon Wood.²⁶ If the founders were really proto-socialists or communitarians, then originalism seemed much less threatening.²⁷ Another discovery that eased the minds of progressive law professors, as reflected in the passages by Tom Grey already quoted, was the rediscovery of the Ninth Amendment²⁸ and Privileges or Immunities Clause of the Fourteenth Amendment.²⁹ If the Constitution's text explicitly authorized "supplementation" by moral principles, and originalism did not foreclose such appeals, then originalism was not so bad after all.

Also contributing to the comfort level of political progressives was the influential work of Bruce Ackerman in the eighties and nineties, culminating in *We the People: Foundations*³⁰ in 1991 and then with *We the People: Transformations*³¹ in 1998. In these works, Ackerman presents a plausible, though in my view ultimately unpersuasive, originalist defense of contemporary progressive political values. His theory of "dualism" distinguishes the "higher-law" made deliberately by the people from "normal lawmaking" by government, the servants of the people, who "re-present" but do not speak for the people.³² The critical job of judges interpreting the Constitution is the backward-looking responsibility of preserving the "higher-law" established by the people during rare constitutional moments.³³ "It is not the special province of the judges to lead the People onward and upward to new and higher values," he wrote. "What the judges are especially equipped to do is preserve the achieve-

26. See, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969); William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 819-25 (1995) (applying Wood's neorepublican historical account to the takings clause).

27. Cf. Fleming, *supra* note 25, at 1345 ("The broad originalists undertook the 'turn to history' to show that their constitutional theories, aspirations, and ideals are firmly rooted in our constitutional history and practice, and indeed provide a better account of our constitutional text and tradition than do those of the conservative narrow originalists.").

28. See generally *Symposium on Interpreting the Ninth Amendment*, 64 CHI.-KENT L. REV. 37 (1988).

29. See, e.g., MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

30. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

31. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

32. See 1 ACKERMAN, *supra* note 30, at 139.

33. *Id.*

ments of popular sovereignty during the long periods of our public existence when the citizenry is not mobilized for great constitutional achievements."³⁴ Respecting popular sovereignty means respecting judgments made by the People in the past. "[T]his ongoing judicial effort to *look backward and interpret the meaning of the great achievements of the past* is an indispensable part of the larger project of distinguishing the will of We the People from the acts of We the Politicians."³⁵

Originalists never denied the possibility of a constitutional amendment that would itself, in turn, be interpreted according to its original intent. Therefore, so long as it could be argued that the Constitution has been legitimately amended, a commitment to originalism is no insurmountable barrier to a progressive political agenda. If Ackerman could show that the New Deal comprised a "constitutional moment" that effectively amended the Constitution,³⁶ then modern conservatives and libertarians, both on and off the court, would be acting improperly to disregard the *original intent* of the New Deal judicial amendments. In this way, Ackerman's approach—though criticized in its particulars³⁷—helped make originalism safe for the politically progressive academic world. For, if his theory of constitutional moments was correct, one could be a genuinely originalist defender of the Welfare State against conservative or libertarian constitutional attack. And Ackerman's feat has been reinforced by the originalist writings of his protege and colleague Akhil Amar.³⁸ Other political progressives who appear to have taken the originalist turn, or have at least incorporated a fully-functioning

34. See 1 ACKERMAN, *supra* note 30, at 139.

35. 1 ACKERMAN, *supra* note 30, at 10 (emphasis added); see also 2 ACKERMAN, *supra* note 31, at 72 (seeking a method that does "justice to the complexities of the original understanding.").

36. See 2 ACKERMAN, *supra* note 31, at 345–49.

37. See, e.g., Elizabeth Price, *Constitutional Fidelity and the Commerce Clause: A Reply to Professor Ackerman*, 48 SYRACUSE L. REV. 139 (1998). But even if Ackerman is wrong to contend that the "switch in time" of 1937 represents an unwritten amendment to the Constitution meriting the same judicial respect as formally adopted written amendments, this would not undercut his "dualist" defense of interpreting the original Constitution as it has been formally amended from a historical or preservationist perspective.

38. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

originalism into their approaches, include Michael Perry,³⁹ Martin S. Flaherty,⁴⁰ Lawrence Lessig,⁴¹ and William Treanor.⁴²

II. THE NEW ORIGINALISM

Perhaps most important of all, however, originalism has itself changed—from original *intention* to original *meaning*. No longer do originalists claim to be seeking the subjective intentions of the framers. Now both Robert Bork and Antonin Scalia, no less than Ronald Dworkin and Bruce Ackerman, seek the original meaning of the text. As stated by Robert Bork:

Though I have written of the understanding of the ratifiers of the Constitution, since they enacted it and made it law, that is actually a shorthand formulation, because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean. It is important to be clear about this. The search is not for a subjective intention. If someone found a letter from George Washington to Martha telling her that what he meant by the power to lay taxes was not what other people meant, that would not change our reading of the Constitution in the slightest. Nor would the subjective intentions of all the members of a ratifying convention alter anything. When lawmakers use words, the law that results is what those words ordinarily mean.⁴³

By the same token Justice Scalia has written that “[w]e look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside

39. See MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* (1994).

40. See Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

41. While Lessig’s “translation” approach is not originalism *per se*, its starting point is originalist and this concedes, if nothing else, that originalism is possible. See, e.g., Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997). For a criticism of the what comes after the starting point, see Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig’s Theory of Translation*, 65 FORDHAM L. REV. 1435 (1997).

42. See Treanor, *supra* note 26, at 782–83 (using a “translation” approach to the Takings Clause, the first step of which is originalist).

43. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 144 (1990).

the remainder of the *corpus juris*. . . . Government by unexpressed intent is . . . tyrannical. It is the *law* that governs, not the intent of the lawgiver.”⁴⁴

Though I will be arguing below that the Constitution should not be viewed as a contract, the shift from original intention to original meaning is akin to the shift from a will theory to a consent theory of contract. It is a subtle shift to be sure since, in contract law, both approaches seek to respect and protect the “intentions of the parties” in some sense. However, whereas a will theory of contract invites an inquiry into the subjective mental state of the promisor, a consent theory seeks the objective meaning that would be understood by a reasonable person in the relevant community of discourse.⁴⁵ In constitutional interpretation, the shift is from the original intentions or will of the lawmakers, to the objective original meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.

This shift obviates some, but not all, of the most telling practical objections to originalism and can be very disappointing for critics of originalism—and especially for historians—when they read original meaning analysis. They expect to see a richly detailed legislative history only to find references to dictionaries, common contemporary meanings, and logical inferences from the structure and general purposes of the text. That is the way the objective approach to contract interpretation proceeds, and that is how the new originalism based on original meaning proceeds as well. Nowadays it is often critics of those advocating a particular original “objective” meaning who offer detailed historical examination of the true “subjective” original intentions of the framers.

44. SCALIA, *supra* note 21, at 17.

45. See Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 272–74, 300–09 (1986); see also Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022, 1027 (1992) (further distinguishing a consent from a will theory of contract).

But original meaning originalism is even more mundane or “wooden”⁴⁶ than merely a reliance on dictionaries, common meanings, and formal structural analysis. While some originalists still search for how the relevant generation of ratifiers expected or intended their textual handiwork would be applied to specific cases, original meaning originalists need not concern themselves with this, except as circumstantial evidence of what the more technical words and phrases in the text might have meant to a reasonable listener.

This aspect of the New Originalism is captured by Ronald Dworkin’s useful distinction between semantic-originalism and expectations-originalism.⁴⁷ “This is the crucial distinction between what some officials intended to say in enacting the language they used, and what they intended—or expected or hoped—would be the *consequence* of their saying it.”⁴⁸ In the context of statutory interpretation, this is the difference “between the question of what a legislature intended to say in the laws it enacted, which judges applying those laws must answer, and the question of what the various legislators as individuals expected or hoped the consequences of those laws would be, which is a very different matter.”⁴⁹ In the context of constitutional interpretation of the Bill of Rights, “semantic’ originalism . . . insists that the rights-granting clauses be read to say what those who made them intended to say”; whereas “expectation’ originalism . . . holds that these clauses should be understood to have the consequences that those who made them expected them to have.”⁵⁰ Dworkin concludes:

[I]f we read the abstract clauses of the Bill of Rights [and other rights-granting clauses such as the Fourteenth

46. See Gary Lawson, *In Praise of Woodiness*, GEO. MASON L. REV., Winter, 1988, at 21, 22 & n.8 (1988). See generally Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997).

47. See Dworkin, *supra* note 21, at 116.

48. *Id.*

49. *Id.* at 118. Expectations originalism sounds a lot like the “strict intentionalism” criticized by Brest: “Strict intentionalism requires the interpreter to determine how the adopters would have applied a provision to a given situation, and apply it accordingly.” Brest, *supra* note 3, at 222.

50. Dworkin, *supra* note 21, at 119. It may be, however, that seemingly abstract provisions had a narrower original meaning. See *infra* at notes 102-03.

Amendment] as they were written—if we read them to say what their authors intended them to say rather than to deliver the consequences they expected them to have—then judges must treat these clauses as enacting abstract moral principles and must therefore exercise moral judgment in deciding what they *really* require. That does not mean ignoring precedent or textual or historical integrity or morphing the Constitution. It means, on the contrary, enforcing it in accordance with its text, in the only way that this can be done.⁵¹

I relate this discussion by Dworkin for two reasons. First, because, whether or not he himself subscribes to the “semantic originalist” position,⁵² the distinction between “expectations” and “semantic” originalism helps to clarify the movement from original *intentions* originalism to original *meaning* originalism. It is not only a movement from subjective to objective meaning. Depending on the textual provision being interpreted—for some at least—it is also a movement, to employ another Dworkinian distinction, from relatively specific *rule*-like commands to more abstract *principle*-like injunctions, the approximate meaning of which we must still look to the past to discover. Second, it is another example of how originalism has been rendered safe enough to tempt even political progressives to adopt it.

But perhaps this shift should not have come as a surprise. For when you reread Brest and Powell in light of the New Originalism, you find that both critiques leave considerable room for originalism to survive and flourish. True, Brest berated strict *textualism* along with strict intentionalism, though his criticisms here are much more limited and less persuasive.⁵³

51: Dworkin, *supra* note 21, at 126.

52. He does not. See Dworkin, *supra* note 22.

53. He argues that one still needs to determine the “social context” which “refers to a shared understanding of the purposes the provision might plausibly serve.” Brest, *supra* note 3, at 206. “We understand the range of plausible meanings of provisions only because we know that some interpretations respond to the kinds of concerns that the adopters’ society might have while others do not.” *Id.* at 207. And this, he argues, “calls for a historical inquiry quite similar to the intentionalist interpreter’s.” *Id.* at 209. After that, however, he primarily considers only the practical obstacles to determining and aggregating historical intentions. When discussing textualism, his principal objection is the lack of our ability to situate ourselves adequately enough in the past to be accurate. See Brest, *supra* note 3, at 219. However, the well-known

But he also left the door open, however reluctantly, to what he terms “moderate intentionalism”—a passage that also reflects the closeness between textualism and originalism.

A moderate textualist takes account of the open-textured quality of language and reads the language of provisions in their social and linguistic contexts. A moderate intentionalist applies a provision consistent with the adopters’ intent at a relatively high level of generality, consistent with what is sometimes called the “purpose of the provision.” Where the strict intentionalist tries to determine the adopters’ actual subjective purposes, the moderate intentionalist attempts to understand what the adopters’ purposes might plausibly have been, an aim far more readily achieved than a precise understanding of the adopters’ intentions.⁵⁴

But if this method is not subject to the same practical objections Brest leveled at strict or original intention originalism, what is wrong with moderate originalism? Indeed, Brest concedes that “[m]oderate originalism is a perfectly sensible strategy of constitutional decisionmaking.”⁵⁵ (I’ll bet most of those who read Brest’s article do not remember he said *that!*) His principal remaining objection is that moderate originalism has “contributed little to the development of many doctrines [accepted] as legitimate.”⁵⁶ This hardly seems like a compelling argument for or against a particular method of constitutional interpretation—and certainly not of the same magnitude of those criticisms of original intention originalism for which he is so often cited. In the end, Brest rejects moderate originalism, not because it is impossible to achieve, but because it was not used by the Supreme Court to justify its modern doctrines and that, despite Brest’s claim that the text is “wholly open-ended,”⁵⁷ moderate originalism will not support every jot and tittle of constitutional

and widely-accepted reply to this is that we can be accurate enough for practical purposes, or “good enough for government work.” Cf. Ronald A. Cass, *Trade Subsidy Law: Can a Foolish Inconsistency Be Good Enough for Government Work?*, 21 LAW & POL’Y INT’L BUS. 609, *passim* (1990) (discussing interpretation of legislation).

54. Brest, *supra* note 3, at 223.

55. *Id.* at 231.

56. *Id.*

57. *Id.*

doctrine that Brest and others may like.

Similarly, a reexamination of Powell's now-classic historical treatment of originalism is also a bit surprising. For while he persuasively argues that the founding generation itself abjured from original *intention* originalism, what is generally overlooked or forgotten is that Powell equally persuasively establishes the founders' commitment to original *meaning* originalism:

When a consensus eventually emerged on a proper theory of constitutional interpretation, it indeed centered on "original intent." But at the time, that term referred to the "intentions" of the sovereign parties to the constitutional compact, as evidenced in the Constitution's language and discerned through structural methods of interpretation; it did not refer to the personal intentions of the framers or of anyone else.⁵⁸

This method of constitutional interpretation is closely akin to methods of contractual interpretation whence it came.

One construed a contract's 'intent' not by embarking on a historical inquiry into what the parties actually wished to accomplish, but by applying legal norms to the contract's terms—that is, by construing the contract in accordance with the common understanding of its terms, and in light of its nature and the character of the contracting parties.⁵⁹

In other words, the objective or publicly-accessible meaning of the terms is sought.

Powell examines in detail James Madison's theory of constitutional interpretation which "rested primarily on the distinction he drew between the public meaning or intent of a state paper, a law, or a constitution, and the personal opinions of the individuals who had written or adopted it."⁶⁰ Powell cites Madison's response to an alleged misuse of a veto message he had issued

58. Powell, *supra* note 4, at 948.

59. *Id.* at 931 (footnote omitted).

60. *Id.* at 935.

as President by his successor Andrew Jackson. Madison wrote:

On the subject of the discrepancy between the construction put by the Message of the President [Jackson] on the veto of 1817 and the intention of its author, the President will of course consult his own view of the case. For myself, I am aware that the document must speak for itself, and that that intention cannot be substituted for [the intention derived through] the established rules of interpretation.⁶¹

"Madison was quite insistent," writes Powell, "that a distinction must be drawn between the 'true meaning' of the Constitution and 'whatever might have been the opinions entertained in forming the Constitution.'"⁶² And, as Powell shows, Madison was not alone in adopting this approach, though it began to erode and be replaced by a subjective intentions approach as early as the 1820s.⁶³ "With the growing availability of original materials revealing the actions and opinions of the individual actors who played roles in the Constitution's framing and adoption," writes Powell, "popular and legal interest in that episode of history markedly increased."⁶⁴ Contrary, then, to how it is commonly used, the historical evidence presented in Professor Powell's path-breaking article does not undermine an adherence to the ascendent New Originalism based, not on original intent, but original meaning. It supports it.

As has been pointed out by others,⁶⁵ however, Powell's evidence that the founders opposed reliance on original intent, is actually evidence that they opposed reliance on the original intentions of *the framers* of the Constitution, as opposed to the understanding of the ratifiers and the people, though interest in the

61. Letter from James Madison to Martin Van Buren (July 5, 1830) as it appears in Powell, *supra* note 4, at 936 (bracketed words added by Powell).

62. Powell, *supra* note 4, at 938 (quoting Letter from James Madison to John Jackson (Dec. 27, 1821), reprinted in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 509, 509 (1865)).

63. See *id.* at 944-47.

64. Powell, *supra* note 4, at 945.

65. This deficiency in Powell's account was pointed out early on, forcefully, and independently by two different scholars. See Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177 (1987); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77 (1989).

intentions of the framers grew by the 1820's.⁶⁶ The rejection of framer's intent followed the Federalists' response to those who objected to the constitutional convention's having usurped its original authority to propose changes to the Articles of Confederation, rather than a complete replacement. Federalists responded that the convention could only propose a new constitution which would be a dead letter until ratified by the people through their state conventions. Their later antipathy to interpretation based on the original intent of the framers was just an extension of this earlier argument.

Instead, what Powell's sources actually show is support for interpreting the Constitution according to the understanding of the ratifying conventions and of the general public who they represented. As Madison wrote:

As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character. However desirable it be that they should be preserved as a gratification to the laudable curiosity felt by every people to trace the origin and progress of their political Institutions, and as a source, perhaps, of some lights on the science of Government, the legitimate meaning of the Instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must be, not in the opinions or intentions of the body which planned and proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions, where it received all the authority which it possesses.⁶⁷

Madison was not asserting here the complete irrelevance of the records of the Convention, but only their authoritative character. The public meaning of the words of the Constitution, as understood by the ratifying conventions and the general public, could be gleaned

66. See Powell, *supra* note 4, at 945 ("With the growing availability of original materials revealing the actions and opinions of the individual actors who played roles in the Constitution's framing and adoption, popular and legal interest in that episode of history markedly increased.").

67. Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), *quoted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 447-48 (M. Farrand ed. 1966).

from a number of sources, including the records of the convention, but where those intentions differed from the public understanding, it is the public meaning that should prevail.⁶⁸

Moreover, Powell underplays Madison's and others' commitment to an *originalist* objective meaning rather than to a public meaning that evolves over time.⁶⁹ As Madison wrote:

I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful, exercise of its powers. If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the government must partake of the changes to which the words and phrases of all living languages are constantly subject. What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense! And that the language of our Constitution is already undergoing interpretations unknown to its founders will, I believe, appear to all unbiased inquirers into the history of its origin and adoption.⁷⁰

As will become clear, I do not think we are bound by James Madison's opinions concerning constitutional interpretation. And as a politician, Madison was not always consistent in his

68. For a discussion of how the issue of "objective" original meaning versus "subjective" original intent played out in the debate between Lysander Spooner and Wendell Phillips in the 1840's over the constitutionality of slavery, see Randy E. Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation*, 4 PAC. L.J. 977 (1997).

69. See Clinton, *supra* note 65, at 1186-1220; Lofgren, *supra* note 65, at 113 ("[T]he original understanding of original intent most emphatically does not rule out a resort to the understandings and expectations of the ratifiers in 1787-88, or to the range of materials that may illuminate their views.").

70. Letter from Madison to Henry Lee (June 25, 1824), *reprinted in* 9 THE WRITINGS OF JAMES MADISON 191-92 (G. Hunt ed. 1910).

interpretive methodology.⁷¹ Nevertheless, in the balance of this Article we shall see that Madison's reasons for originalism—only an originalist method of interpretation would provide security for a consistent, stable and faithful exercise of the Constitution's powers—are still good reasons for adhering the original meaning of the text.

III. "WRITTENNESS" AND THE RELEVANCE OF ORIGINAL MEANING

Let me now shift my attention from the recent developments over originalism to the method itself. For even if you disagree with my claim that a New Originalism seeking original meaning rather than original intent is ascendant, what really matters is not its current popularity but its merit. I have long denied that I was an originalist because I was largely persuaded by the multifaceted critique that has been accepted by so many others. Now I am reconsidering my skepticism. To explain why, let me first identify the version of originalism that I am moving towards, why it is attractive, and how it resists the objections that have been made to original intent.

Because I will be relying on insights revealed by contract law theory, to avoid confusion, let me emphasize up front that I do not view the Constitution as a contract in a literal sense. Though I shall say more about this shortly, suffice it to say for now that, in my view, contracts require the unanimous consent of all its parties, and the Constitution, indeed any constitution, must lack this requisite consent. Nevertheless, the Constitution of the United States is a *written* document and it is its *writtenness* that makes relevant contract law theory pertaining to those contracts that are also in writing.⁷²

In short, I shall argue that the impetus behind original meaning is the same as that which lies behind the statute of frauds, the parol evidence rule, and the objective theory of con-

71. See JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* (1999) (detailing Madison's—and others'—shifts in interpretive method over the course of his congressional career).

72. For a discussion on the centrality of writtenness in our constitutional tradition, see Calabresi, *supra* note 41, at 1446–47.

tractual interpretation. All of these doctrines have been attacked by law professors as backwards and formalist, yet all remain with us today. Such is the power of written texts. My thesis is that the movement to textualism in constitutional law is motivated by the same sorts of considerations that lead to textualism in contracts. And original meaning follows naturally, though not inevitably, from the commitment to a written text.

Let us now examine each of these doctrines in turn to see why writtenness is thought important in contract law and why, despite the important differences between contracts and constitutions, a commitment to a written text entails something like an original meaning approach to both contractual and constitutional writings.

A. The Functions of Formality Performed by Writings

Though not all contracts must be in writing, the statute of frauds requires that agreements of a certain magnitude be in writing to be enforceable. Why? As Lon Fuller taught us some sixty years ago, the functions of formality are evidentiary, cautionary, and channeling.⁷³ To these three functions Professors Calamari and Perillo have added a fourth: the clarifying function. Here is their description of all four:

Formalities serve important functions in many legal systems. . . . Important among these is the *evidentiary function*. Compliance with formalities provides reliable evidence that a given transaction took place. A *cautionary function* is also served. . . . Before performing the required ritual the promisor had ample opportunity to reflect and deliberate on the wisdom of his act. . . . A third function is an earmarking or *channeling function*. The populace is made aware that the use of a given device will attain a desired result. When the device is used, the judicial task of determining the parties' intentions is facilitated. A fourth function is *clarification*. When the parties reduce their transaction to writing . . . they are more likely to

73. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 900-01 (1941).

work out details not contained in their oral agreement. In addition, form requirements can work to serve regulatory and fiscal ends, to educate the parties as to the full extent of their obligations, to provide public notice of the transaction, and also to help management efficiency in an organizational setting.⁷⁴

This is also a pretty good summary of why, from the Magna Carta forward, there has always been an interest in getting political commitments in writing. Though they differ in significant ways, putting a constitution in writing performs many of the same functions as written contracts. A written constitution provides good *evidence* of what terms were actually enacted, when they might later be disputed. The fact that the original constitution and subsequent amendments were in writing induced *deliberation* and *caution* in those considering whether to formally adopt the new text. (Depending on your views of why they failed to be ratified, the flag burning amendment or the equal rights amendment illustrate the value of deliberation and caution.) Formal methods of adding written amendments permit people seeking to modify the Constitution to *channel* their actions accordingly, knowing that if they satisfy the requisite procedures their actions will have a legally binding effect and the authoritative text will be changed. Finally, the act of hammering out the terms of the Constitution and later amendments in writing causes people to *clarify* their meaning and intentions in a way that a vague general agreement to informally expressed rules or principles could never do.

While the functions of formality help explain the appeal of a written constitution, the impetus for an original meaning method of interpretation is also suggested by the parol evidence rule. When a writing can be contradicted by oral testimony of a differing understanding, the purposes for which the agreement was put in writing in the first place would be undercut. In other words, for all its difficulties, something like a parol evidence rule is needed to preserve the *original meaning* of the writing and thereby enable it to fulfill the evidentiary, caution-

74. JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 294 (3d ed. 1987) (emphasis added).

ary, channeling and clarification functions of formality. If we let writings be contradicted by extrinsic evidence—even evidence of changed intentions—then they lose their ability to perform these functions.

A focus on the parol evidence rule and its value in preserving the function of a writing is helpful in other respects. First, as Tom Grey has noticed, while the parol evidence rule bars the use of extrinsic evidence to *contradict* a writing, unless the writing is completely integrated—that is, it is not only the *final* written expression of the parties' agreement, but is also the sole and *exclusive* statement of their agreement—it may be supplemented in ways that do not contradict its terms.⁷⁵ Contradicting the explicit provisions of a writing undermines its ability to satisfy the functions of formality in a way that supplementing it when it is incomplete or when it explicitly authorizes supplementation does not.

Whether the Constitution can be supplemented depends, then, on the nature of its terms. Grey argues that the Ninth Amendment explicitly authorizes supplementation, but I leave this important issue to one side because it bears only indirectly on the issue of the appropriate method of interpretation which is needed to tell us, among other things, what the Ninth Amendment really means. For we cannot know if the Ninth Amendment authorizes supplementation until we know how to interpret its words.

This then brings us to the issue of how the words of a writing are themselves to be interpreted. In contract law, the objective approach looks to the publicly-accessible meaning that a reasonable person would attach to these words in context. The reasons for this are important. Because people cannot read each other's minds, they must rely on appearances when making their decision whether to enter or refrain from entering into a contractual relationship. Thus, though we *are* concerned about the intentions of the parties, we are only concerned about those intentions which the parties have succeeded in manifesting to each other, and not with any subjective intentions that went uncommunicated. For this reason, we rely on the public or objective meaning

75. See Grey, *supra* note 16, at 223–29.

of the contractual terms.

The same is true of constitutions. The Constitution is a law that governs the lawmakers. They and those they govern are entitled to rely on the Constitution's appearances every bit as much as parties to private contracts, and for the same reasons. We cannot read other people's minds. Moreover, if it matters that a constitution is ratified by the people or any segment thereof, to what are they agreeing if the only meanings that exist are secret ones in their heads or in the heads of those who wrote the paper? As nineteenth century radical abolitionist and legal theorist Lysander Spooner observed:

We must admit that the constitution, *of itself, independently of the actual intentions of the people*, expresses some certain fixed, definite, and legal intentions; else the people themselves would express no intention by agreeing to it. The instrument would, in fact, contain nothing that the people *could* agree to. Agreeing to an instrument that had no meaning *of its own*, would only be agreeing to nothing.⁷⁶

In other words, "if the intentions could be assumed independently of the words, the words would be of no use, and the laws of course would not be written."⁷⁷

The seeming paradox of determining "intentions" without relying on evidence of particular subjective intent is routinely resolved by the fact that the English language contains words with generally accepted meanings that are ascertainable independently of any one of our subjective opinions about that meaning. The most common way of doing this is by resorting to dictionaries, and this is a useful starting point. But when interpreting the meaning conveyed by a writing, whether it is a contract or a constitution, one must take the context in which a word or phrase appears into account, combined with how these words are used elsewhere in the document and the general purposes for these clauses that can be ascertained from the document

76. LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 222 (enlarged ed. 1860).

77. SPOONER, *supra* note 76, at 220.

itself and from circumstances surrounding its formation. None of these interpretive inquiries, by the way, violates (or should violate⁷⁸) the parol evidence rule.

However, given that the meanings of words can change or evolve, in searching for the "generally accepted" or reasonable meaning within a particular community of discourse, at what point in time do we look for the meaning? Here is where textualism meets and melds with originalism. With a constitution, as with a contract, we look to the meaning established *at time of formation* and for the same reason: if either a constitution or contract is reduced to writing and executed, where it speaks it establishes a rule of law from that moment forward. Adopting any meaning contrary to the original meaning would be to contradict or change the meaning of the text in violation of the parol evidence rule and thereby to undermine the value of writtenness. Put another way, writtenness ceases to perform its function if meaning can be changed in the absence of an equally written modification or amendment.

For this reason, virtually all written contracts require modifications to be in writing.⁷⁹ The need for written modification or amendment is driven by the same desideratum of formality that recommends a written constitution in the first place.⁸⁰ In sum, meaning must remain the same unless it is changed, and changes require the same degree of writtenness and formality as the original writing. A commitment to textualism, therefore, begets a commitment to original meaning unless this meaning is altered by a written amendment.

78. See E. Allan Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L. J. 939, 951-65 (1967).

79. The issue of "waiver" clauses requiring express modification, while not exactly beyond the scope of this Article, would take us too far afield into the realm of contract law. Suffice it to say that waivers must be consented to by all the parties, and *such unanimous consent is unobtainable in this constitutional context for the same reason it is unavailable at the formation stage.*

80. The fact that amendments ought to be in writing does not necessarily entail the position that the method of ratification of written amendments need be limited to those specified in the original writing if they are not reasonably interpreted as exclusive. The functional desirability of ratifying written amendments by unwritten procedures is separate from the imperative that amendments, however ratified, themselves be in writing.

By this route, we have arrived at the original meaning position in just the way that Powell showed the founders did — by analogy to contract law. But as I have already emphasized, this analogy, like all analogies, has its limits. Contract law recognizes that a subjective agreement between the parties can trump the objective meaning either to show a mistake in integration, or to show that the parties attached an idiosyncratic meaning to a particular term.⁸¹ Even if the Constitution is a kind of contract, there are simply too many parties ever to find unanimous agreement to an idiosyncratic meaning.⁸²

Far from undermining originalism, though, this difference between contracts and constitutions bolsters its importance. For the “original” meaning of written contracts can be overridden, in a sense, by subsequent conduct that constitutes a *unanimous* consensual modification or waiver of its provisions. If, however, unanimous consent never exists to justify a constitution’s formation, neither can it exist to justify the modification or waiver of its written terms, for example by later acquiescence to judicial interpretations that contradict the original meaning. Later acquiescence to a change in meaning can no more be taken as unanimous consent, than acquiescence at the time of the founding. Unlike written contracts, then, in the absence of a unanimous consent to modify a constitution, a proper respect for the writtenness of the text means that those committed to this Constitution have no choice but to respect the original meaning of its text until it is formally amended in writing. Otherwise,

81. See E. ALLAN FARNSWORTH, *CONTRACTS* § 7.9, at 461 (3d ed. 1999):

In the rare cases of a common meaning shared by both parties, the subjectivists have had the better of the argument. Though it is generally safe to say that a party’s “secret intention” will not carry the day, this is not a safe assertion if it happens that both parties shared the same “secret intention.”

See also Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 *STAN. L. REV.* 1107, 1125 (1984) (“The rule that a mutually held subjective interpretation is determinative even if it is objectively unreasonable is well-supported by authority.”).

82. Since he viewed the Constitution as a contract, this argument figured in Spooner’s analysis of the unconstitutionality of slavery. Because the framers of the Constitution used euphemisms for the terms “slavery” or “slave,”

[i]f there were a single honest man in the nation, who assented, in good faith, to the honest and legal meaning of the constitution, it would be unjust and unlawful towards him to change the meaning of the instrument so as to sanction slavery, even though every other man in the nation should testify that, in agreeing to the constitution, he intended that slavery should be sanctioned.

SPOONER, *supra* note 76, at 123.

writtenness will fail to perform its vital functions.⁸³

Let me be very clear about the claim I just made. My argument, to this point is, that we are *not* bound to respect the original meaning of a text by the Dead Hand of the past. We are bound because we *today*—right here, right now—profess our commitment to a written constitution, and original meaning interpretation follows inexorably from that commitment. We can easily jettison that original meaning by disclaiming our commitment to a written constitution, but this is a choice both courts and scholars have been generally unwilling to make.

B. Original Meaning and Constitutional Legitimacy

But there is another reason why the so-called “Dead Hand” argument is not as powerful as it seems. To see this, we must distinguish between two different issues that are usually conflated *both* by originalists *and* by their critics. The first issue is why, given our commitment to a *written* constitution, we are committed to the original meaning of its text. This is the issue I have already addressed by analogy to written contracts. The second is whether and why we are committed to any particular written constitution (interpreted properly).

It is with the second of these issues that the analogy to contracts breaks down completely. Most originalists contend that the U.S. Constitution is binding solely because “the People” ratified or consented to it. But contracts require unanimous consent, a degree of consent no constitution can claim. Given the lack of unanimous consent, popular sovereignty originalists have taken the analogy to contracts too far.

In my view, with contracts, consent to be legally bound can create a binding obligation to pretty much anything short of an agreement to violate the rights of others or to transfer one’s

83. It is true, of course, that written amendments are never adopted by unanimous consent. It is not consent, however, but the fact that (a) changes have been ratified in conformity with procedures dictated by the original text, and (b) the changes are themselves in writing, that result in their incorporation into the text of Constitution—and then to be interpreted according to their original meaning at the time of ratification.

own inalienable rights.⁸⁴ Unlike a contract, however, a constitution purports to govern even those who did *not* consent to it at the founding—women, children, former slaves, resident aliens, disenfranchised prisoners, future generations, etc. Nor even today can resident aliens, children, future generations and the inevitably disenfranchised for reasons of criminality or mental incapacity, consent to amendments. Consent, therefore, cannot count in the way that the concept of popular sovereignty would require to impart legitimacy on any constitution.⁸⁵ For it has never been satisfactorily explained how a majority or minority calling themselves “the People,”⁸⁶ by exercising their will, can bind anyone but themselves.⁸⁷

The consensual difference between contracts and constitutions does not detract from the vital functions performed by a constitution’s writtenness, which entails, for the reasons given in the previous section, a commitment to originalism in both contractual and constitutional interpretation. But, while even a limited consent may play a very useful checking function that we would ignore at our peril,⁸⁸ consent does not *of itself* legiti-

84. See generally Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL’Y 179 (1986).

85. Anyone who wishes to argue to the contrary should begin by reading and responding to LYSANDER SPOONER, NO TREASON NO. VI: THE CONSTITUTION OF NO AUTHORITY (1870).

86. See, e.g., Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269, 1291 (1997) (“The people’s representatives have a right to govern, so long as they do not transgress limits on their authority that are fairly traceable to the constitutional precommitments of the people themselves . . .”).

87. Though I am aware of arguments based on tacit consent or on the voluntary receipt of benefits, an examination of these purported justifications is beyond the scope of this Article. I will merely say here that, while implied consent can result in a contract, the sort of extended amorphous “tacit” consent relied upon to justify constitutional obligation would not, like the mere receipt of a benefit conferred, support anything more than a “quasi-contract,” which is really a separate basis of restitutionary, not contractual, obligation. More importantly, on either these alternative accounts, it is not the consent *of the majority* that binds the minority.

88. On the other hand, the initial “consent of the governed” may contribute to the legitimacy of a resultant constitution by providing a prudential check against the imposition of a lawmaking system that is illegitimate because it is procedurally inadequate. Presumably, a large group of people would not consent to a system that did not provide the requisite assurances, though it is not at all clear that this presumption would equally reflect the probable justice of enacted laws imposed upon persons and groups who were never asked for their consent. Though, in my view, the consent of some does not of itself provide a sufficient assurance of legitimacy for everyone, a ratification process that includes a requirement of the “consent” of a large group of ratifiers

mate the terms of a constitution as it does (within limits) the terms of private contracts.⁸⁹ In this regard, then, I part company from the many originalists, both old and new, who base their originalism on notions of popular sovereignty.

Originalists who ground their interpretive theory in popular-sovereignty have confused a “rule of recognition”—a concept made famous by H.L.A. Hart—with the conditions of constitutional legitimacy. A rule of recognition is the way the population can *identify* the existence of an operating legal regime.⁹⁰ But just as knowing merely that a particular command is “the law” does not tell us whether it is binding in conscience, knowing that a legal regime “exists” as a result of some form of ratification is not the same thing as knowing there is a moral duty to obey its commands.

Of course, some form of general acquiescence is necessary for any constitution to be implemented and to maintain its continued existence as positive law. As Frederick Schauer has noted, this acquiescence distinguishes the Constitution of the United States from another document entitled, “The Constitution of the United States,” I might write and have my friends ratify.⁹¹

might serve to induce a deliberative process that does help assure that the resulting system has the procedural features that themselves are the source of legitimacy. The existence of that partial consent, however, is neither sufficient nor necessary (e.g. Japan’s constitution), to provide that legitimacy.

89. Some contract theorists see consent playing the same limited legitimating role in contracts as I see it playing in constitution making, insofar as the existence of consent provides rebuttable evidence of the fairness of a bargain. But this is a debate that is well beyond the scope of this Article. Conceptually, I am claiming that consent plays a justice-providing role in contract formation but only (part of) a legitimacy-providing role in forming a constitution, whereas they view consent as providing only a legitimacy providing role in contracts.

90. See H.L.A. HART, *THE CONCEPT OF LAW* 92–93 (1961) (A rule of recognition is “a rule for conclusive identification of the primary rules of obligation.”). Notice Hart’s reference here to the “rules of obligation.” Hart also contended that, if the rule of recognition was satisfied, citizens would then not only be compelled or “obliged” to obey the law, they would also be under an “obligation” or moral duty to obey. See *id.* at 80. This I reject for reasons I have given elsewhere. See RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 17–23 (1998). And this is conceded by those modern positivists who deny that the mere legality of a command entails a duty of obedience. See, e.g., JOSEPH RAZ, *THE AUTHORITY OF LAW* 233 (1979) (“[T]here is no obligation to obey the law [T]here is not even a prima facie obligation to obey it.”).

91. Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms* 17 HARV. J.L. & PUB. POL’Y 45, 52 (1994) (“[O]nly one of these ‘Constitutions’ would be the

Ratification by plebiscite or representative conventions can provide an effective rule of recognition to the population and help attain a general acquiescence to the constitutional regime. But mere acquiescence, however acquired, which *every* existing government and scheme of positive law can claim, and unanimous consent cannot be the same thing.

For what is at issue here is whether a particular constitutional regime is legitimate, by which I mean, is capable of issuing commands to the citizenry that bind individuals in conscience. If acquiescence, which every functioning regime can claim, equaled unanimous consent, even the most oppressive regime could claim to be entitled to a duty of obedience on the basis of such "consent." Clearly this proves too much. While some degree of acquiescence may be necessary to establish a command as positive law, then, more than acquiescence is needed to create a moral duty to obey such a command. Consent by the individual, were it to exist, would do the trick—but one individual or generation cannot consent for another, and unanimous consent, all concede, cannot and has never existed.

If the less-than-unanimous consent that actually exists cannot create a duty of obedience in those who have not consented, what can? This is a critical question that I have begun to address elsewhere and which I cannot fully address here. For the moment, let me state my thesis. What legitimates a constitution, if anything does, is the merits of the lawmaking process it establishes. In particular, does it establish a system of lawmaking that provides some assurance that laws demanding obedience passed under its auspices are both necessary and proper. By proper, I mean (among other things) that such laws are not unjust in the sense that they do not violate the background or "natural" rights of those upon whom they are imposed.⁹²

Constitution of the United States, because only one of these documents would have been accepted, socially and politically, by the people of the United States as their Constitution.").

92. For an extended treatment of what those background rights are, see BARNETT, *supra* note 84.

Legitimacy, on this view, is the conceptual lynchpin between legal *validity* and *justice*.⁹³ A constitution is *legitimate* if it regulates the lawmaking powers it authorizes in such a manner as to provide an assurance that validly-made laws are necessary and will not violate rights. Laws that are validly produced by such a system are not only valid; they are also legitimate and carry with them a *prima facie* duty of obedience.⁹⁴ Legitimacy does not require an unattainable perfect guaranty that every law will be just; only an assurance that, based on the way they are made and enforced, laws enacted pursuant to constitutional processes are necessary and not likely to violate the rights retained by the people and, therefore, such laws deserve the benefit of the doubt. In this way, legitimacy requires both substantive and procedural "due process" of law.⁹⁵

The relationship between a written constitution and legitimacy is two-fold. First, constitutional legitimacy depends on what the writing says. Are its provisions sufficient to create a lawmaking process that produces necessary and proper commands that bind in conscience even those who did not consent to it? For the laws that result from a constitutional process to be legitimately imposed on those who have not consented, the lawmaking procedures implemented by such a constitution

93. See Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENTARY 93, 98 (1995).

By "legitimacy," I do not mean the question of whether a particular law is "valid" because it was enacted according to the accepted legal process Nor do I equate the legitimacy of a law with its "justice" Rather, the concept of legitimacy that I am employing refers to *whether the process by which a law is determined to be valid is such as to warrant that the law is just*.

Id. Thus, a "law may be 'valid' because produced in accordance to all procedures required by a particular lawmaking system, but still be 'illegitimate' because these procedures are inadequate to provide assurances that a law is just." *Id.* at 98 n.19. And a "law might be 'legitimate' because produced according to procedures that assure that it is just, and yet be 'unjust' because in this case the procedures (which can never be perfect) have failed." *Id.* at 98 n.20; see also Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37 (1988).

94. By the same token, some form of ratification and acquiescence might render a constitution *valid*. But the validity of a constitution and its legitimacy, meaning the moral obligatoriness of the commands issued under its auspices, are two different things. Anything short of unanimous consent cannot bind non-consenting parties.

95. By "substantive" due process, I mean that legislatures should not have the final word on whether their commands violate the rights retained by the people. A citizen is entitled to seek the judgment of the judiciary on this question.

must give assurances that lawmaking and law enforcement will not violate the background rights retained by the people—whether or not they consented to its implementation.

Second, assuming that the lawmaking process initially established by a written constitution is legitimate, the fact that a constitution says the right things *in writing* helps assure that these provisions will be respected *over time*—an assurance that an unwritten constitution or a written constitution that can be freely modified by legislative practice or judicial opinion cannot provide. In this way, constitutional legitimacy, rather than popular sovereignty or consent, can ground a commitment to originalism.

An important reason why a written constitution is preferable to the alternatives then, is that it helps keep a legitimate legal regime legitimate over time. And this advantage can only be obtained if the meaning of the constitution does not change by mere judicial interpretation. In sum, unlike an “originalist” interpretation of a written contract which protects even bad choices by consenting parties, for an originalist interpretation of a written constitution to be legitimate, it must be in service of a constitution that makes the right choices by protecting the rights of non-consenting persons.

One feature of the lawmaking system that was established (for better or worse) in 1789 as a matter of positive law, and that differs from other legal systems, is the centrality of a written constitution that is supposed to perform evidentiary, cautionary, channeling, and clarifying functions—functions that would be entirely defeated if extrinsic evidence or considerations could be used to contradict its terms. We can imagine a legal system that was not based on a written constitution,⁹⁶ did not separate powers between the three branches of government,⁹⁷ did not preserve a federal system,⁹⁸ or did not contain a Bill of Rights,⁹⁹ but that is not the system that was established in 1789 and, as formally amended beginning in 1791, has been in continuous

96. For example, the United Kingdom.

97. For example, some state governments prior to the Constitution.

98. For example, the first French Republic.

99. For example, the U.S. Constitution between 1789 and 1791.

operation ever since.

To anyone who says that the written terms of the Constitution *have* been superceded by acquiescence to legislative practice or judicial opinion *as a matter of positive law*, I reply that this would only be the case if the legislature and courts explicitly renounce their reliance on the written Constitution. This they would dare not do, for by so doing they would renounce as well the authority they claim to be exercising and they could not safely predict acquiescence to that. By pledging fealty to a written constitution they deprive their interpretive subversion of any claim to consent by acquiescence.

Does originalism grounded on considerations of legitimacy (as I am using the term), rather than on popular sovereignty or consent, mean that the original meaning of a constitutional provision can be overridden whenever we conclude it conflicts with justice? If so, is this not a very weak justification of originalism and one that fails to control judicial activism? One answer is that legitimacy is not to be confused with justice. Legitimacy is the quality a legal system has to assure recipients of its commands that is performing necessary functions without violating individual rights; that is, its commands are both necessary and proper. If the process by which these commands are issued is legitimate, then there is a *prima facie* duty to obey any validly-made command even if it turns out that it is unjust.

Moreover, ordinary *legislation*, which potentially can be overridden by considerations of justice if the constitution so permits, should not be confused with a *constitution* which cannot. A system that fails to scrutinize statutes to ensure that they do not violate the background rights retained by the people might not be legitimate. Whether our system does or does not authorize such scrutiny, however, is to be determined by interpreting and construing a written constitution properly—and that means according to its original meaning.

In other words, because the original meaning and proper construction of the Constitution permit rights to trump statutes *within* the lawmaking system it establishes, this does not mean that rights trump the Constitution, as a matter of positive law. Nor does it mean that judges are authorized to disregard the

original meaning of *the Constitution* when, in their sole opinion, this meaning violates the background rights retained by the people. This would be to undercut the writtenness that is necessary to preserve an initially legitimate system.

In sum, to decide whether a particular written constitution creates a legitimate process of lawmaking requires, first, an interpretation of its meaning and, second, and evaluation of whether the process created by that meaning is “good enough” to impart legitimacy on validly made laws. Step two of this assessment of legitimacy does not entail any duty or power to disregard the meaning determined in step one. To the contrary, it takes that meaning as given and evaluates it.¹⁰⁰

Judicial “activism,” of the sort usually complained of, is only problematic when originalism is justified on grounds of popular sovereignty or consent and a judge’s actions are seen as “countermajoritarian.” When originalism is justified on grounds of constitutional legitimacy, however, some “activism” in pursuit of justice is not a vice. It may very well be a necessary component of a legitimate lawmaking system. But “activism”—whether by judges *or* by Congress—that conflicts with the original meaning of constitutional provisions, to the degree this meaning is ascertainable and unambiguous (more on this shortly), is forbidden by the commitment to preserve, protect, and defend a written constitution.

C. Some Caveats

Before I examine how original meaning originalism justified in this manner withstands the accepted critique of originalism, let me offer a few caveats on the limits of the analysis just presented. First, although I have claimed that the writtenness of a constitution entails a commitment to an original meaning that cannot be contradicted by later meanings or intentions, I have not claimed that the U.S. Constitution is a completely integrated writing. The original meaning of the terms of the Constitution as amended—such as the Ninth Amendment, the Privileges or Immunities Clause, etc.—might well authorize

100. Judges in a fundamentally illegitimate system might have different duties.

supplementation of its express terms in ways that do not contradict its original meaning. But to determine whether this is true, we must examine the original meanings of these open-textured provisions. About this originalists may differ among themselves.¹⁰¹

Second, with any theory of textual interpretation, not just originalism, there is a need to establish the appropriate degree of abstraction or generality which properly attaches to particular provisions. Obviously, some parts of the Constitution are more specific and rule-like, while others are more abstract and principle-like. The equal protection and due process clauses are good examples of the latter. Though these clauses do not authorize supplementation in the way that the Ninth Amendment and Privileges or Immunities clauses do, they might well require resort to teleological or purposive considerations to determine their appropriate meaning as applied to a particular problem in a manner that would be impermissible when interpreting, say, the age requirement for holding office.

To at least some extent, however, the degree of generality is itself an historical question. In light of the context and usage at the time, how general was a term or phrase at the time it was used? Answering this question is necessary to discover the "objective" or reasonable meaning of a term at the time of either contract or constitutional formation. In sum, determining original meaning entails determining the level of generality with which a particular term was used. As Keith Whittington has argued, "[t]he level of generality at which terms were defined is not an a priori theoretical question but a contextualized historical one. In some instances, the founders may have used terms quite expansively, and at other times seemingly broad terms

101. For an originalist who contests the view that the Ninth Amendment authorizes textual supplementation, see Thomas B. McAfee, *Prolegomena to a Meaningful Debate of the "Unwritten Constitution"* Thesis, 61 U. CINN. L. REV. 107, 149-50 (1992). It is more difficult to characterize the positions of those originalists who take issue with Michael Curtis' view of the Privileges or Immunities Clause, but a useful compendium is contained in Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909 (1998) (discussing the views of, among others, Raoul Berger, John Harrison, Earl Maltz, and William Nelson).

were conceptualized at a relatively narrow level.”¹⁰²

Interpreting the meaning of the Constitution requires an historical inquiry into the degree of generality or abstraction the framers meant to convey when using certain words or phrases.¹⁰³ Any lack of determinacy that remains, however, is one of the prices we (or the framers) pay for a writing that uses abstract principles in place of specific rules; it is also one of the well-known virtues of this particular writing.

Third, and somewhat relatedly, constitutional interpretation must be distinguished from, and does not preclude, constitutional construction.¹⁰⁴ Due to either ambiguity or generality, the original meaning of the text may not always determine a unique rule of law to be applied to a particular case or controversy. While not indeterminate, its meaning is underdeterminate.¹⁰⁵ When this happens, interpretation must be supplemented by constitutional construction—within the bounds established by original meaning. The preceding discussion of constitutional

102. WHITTINGTON, *supra* note 9, at 187. This claim is more elaborately explained in the context of Ronald Dworkin’s characterization of originalism in Keith E. Whittington, *Dworkin’s “Originalism”: The Role of Intentions in Constitutional Interpretation*, 62 *REVIEW OF POLITICS* (forthcoming Spring 2000). *See also*, McConnell, *supra* note 86, at 1280 (“A genuine commitment to the semantic intentions of the Framers requires the interpreter to seek the level of generality at which the particular language was understood by its Framers.”).

103. *But cf.* Ronald Dworkin, *Reflections on Fidelity*, 65 *FORDHAM L. REV.* 1799, 1808 (1997) ([T]here is no such thing as the level of generality at which someone’s moral opinions are most accurately reported, though there *is* such a thing as the most accurate report of the level of generality at which a person spoke on some particular occasion.” (emphasis added)).

104. On the distinction between interpretation and construction, *see* WHITTINGTON, *supra* note 9, at 7.

Constitutional interpretation is essentially legalistic, but constitutional construction is essentially political. Its precondition is that parts of the constitutional text have no discoverable meaning. Although the clauses and structures that make up the text cannot be simply empty of meaning, for they are clearly recognizable as language, the meaning that they do convey may be so broad and underdetermined as to be incapable of faithful reduction to legal rules. . . . Regardless of the extent of judicial interpretation of certain aspects of the Constitution, there will remain an impenetrable sphere of meaning that cannot be simply discovered. The judiciary may be able to delimit textual meaning, hedging in the possibilities, but after all judgments have been rendered specifying discoverable meaning, major indeterminacies may remain. The specification of a single governing meaning from these possibilities requires an act of creativity beyond interpretation. . . . This additional step is the construction of meaning.

Id.; *see also* KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 1–19 (1999).

105. *See* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 *U. CHI. L. REV.* 462, 473 (1987) (distinguishing between indeterminacy and underdeterminacy).

legitimacy suggests an important criterion for determining such constructions.

Because lawmakers acting pursuant to their constitutional powers govern those who did not consent, to be legitimate, the lawmaking processes must provide assurances that both the enumerated and unenumerated rights of those who are governed will not be violated. To enhance legitimacy, then, ambiguous terms should be given the meaning that is most respectful of the rights of all who are affected and rules of construction most respectful of these rights should be adopted to put general constitutional provisions into legal effect. An example of such a rule of construction (though statutory, not constitutional) is provided by Chief Justice Marshall, who stated that “[w]here rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with *irresistible clearness*, to induce a court of justice to suppose a design to effect such objects.”¹⁰⁶

One can call this making the Constitution “the best it can be,”¹⁰⁷ as Ronald Dworkin might, but this method of construction—as distinct from interpretation—is only appropriate when terms are genuinely ambiguous or when the original level of generality can be satisfied by more than one rule of law.¹⁰⁸ It should not be used to change the original meaning of the Constitution without adhering to the formalities governing amendments that are needed to preserve its integrity as a written constitution

Enhancing constitutional legitimacy, in the sense I am using the term, might also require construing abstract constitutional rights as broadly as the original meaning of the text permits, while construing narrowly the delegated powers.¹⁰⁹ Or one might adopt a “presumption of liberty” that places the onus of justification on the government to show that any interference with a

106. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 390 (1805) (emphasis added). Though Marshall uses the term “intention,” Powell makes clear that the founding generation took an “objective” approach to determining such intentions. See Powell, *supra* note 4, at 904. For a discussion of how Lysander Spooner used this as a canon of constitutional construction sufficiently powerful to call the constitutionality of slavery into question, see Barnett, *supra* note 63.

107. RONALD DWORKIN, *LAW'S EMPIRE* 62 (1986).

108. See Dworkin, *supra* note 22, at 1259–60.

109. See Randy E. Barnett, *Necessary & Proper*, 44 *UCLA L. REV.* 745, 786–87 (1997).

citizen's rightful exercise of liberty is both necessary and proper.¹¹⁰ In the words of St. George Tucker, a leading constitutional scholar and jurist at the time of the founding:

All the powers of the federal government being either expressly enumerated, or necessary and proper to the execution of some enumerated power; and it being one of the rules of construction which sound reason has adopted; that, as exception strengthens the force of a law in cases not excepted, so enumeration weakens it, in cases not enumerated; it follows, as a regular consequence, that every power which concerns the right of the citizen, must be construed strictly, where it may operate to infringe or impair his liberty; and liberally, and for his benefit, where it may operate to his security and happiness, the avowed object of the constitution. . . .¹¹¹

In sum, when the original public meaning of a term or provision in a written constitution fails to provide a unique rule of law to apply to a particular case, it still provides a "frame" that, while excluding many possibilities, requires choice among the set of unexcluded alternatives.¹¹² When such choices must be made, rules of construction that (1) are *consistent* with original meaning and (2) ensure the legitimacy of the lawmaking process ought to be adopted.

Finally, I do not claim to have answered all the questions concerning how one arrives at the original meaning of a particular constitutional provision, though the sorts of questions that need to be answered are as difficult for any other method of interpretation that purports to take the text seriously even where

110. See Barnett, *supra* note 109, at 787-88; see also Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 317-18 (1993).

111. St. George Tucker, *Appendix to 1 WILLIAM BLACKSTONE, COMMENTARIES* 307-08 (St. George Tucker ed., 1803). The passage quoted in the text is a portion of Tucker's commentary on the import of the Ninth and Tenth Amendments. See *id.*

112. See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 430 (1985) ("The language of a [constitutional] clause, whether seemingly general or seemingly specific, establishes a boundary, or frame, albeit a frame with fuzzy edges. Even though the language itself does not tell us what goes on within the frame, it does tell us when we have gone outside it." (footnote omitted)).

it does not result in "happy endings."¹¹³ My purpose is merely to identify a shift from a subjective originalism that cannot withstand the practical objections that have been offered against it to an objective originalism that can. And I believe I have also provided a justification for such a method of interpretation that can avoid the problems that attach to arguments based on consent and popular sovereignty and can appeal to those who consider themselves to be nonoriginalists. So let me now turn to these objections to see how fares the New Originalism based on original meaning and justified on grounds, not of popular sovereignty or consent, but of constitutional legitimacy.

IV. HANDLING THE OBJECTIONS TO ORIGINALISM

How does a New Originalism based on original meaning meet the several criticisms that have been leveled at theories based on original intent—criticisms that, as I already mentioned,¹¹⁴ persuaded me that I was not an originalist? The very same historical evidence offered by Powell in opposition to original intent supports original meaning based on "the public meaning or intent of a state paper."¹¹⁵ And this public meaning is "evidenced in the Constitution's language and discerned through structural methods of interpretation; it did not refer to the personal intentions of the framers or of anyone else,"¹¹⁶ including those who "adopted it."¹¹⁷

If the reasons I am offering for why original meaning should be the starting point of constitutional interpretation are correct, however, it ultimately does not matter if this was the method intended or practiced by the founders. There are independent normative reasons for adopting it anyhow. Nevertheless, the fact that the founding generation quickly settled on this method (before it was eventually abandoned) should give us confidence that it makes sense. And it undercuts any appearance of contradiction.

113. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 356 (1981); cf. RONALD DWORKIN, *FREEDOM'S LAW* 38 (1996) ("It is in the nature of legal interpretation—not just but particularly constitutional interpretation—to aim at happy endings.").

114. See *supra* note 10 and accompanying text.

115. Powell, *supra* note 4, at 935.

116. *Id.* at 948.

117. *Id.* at 935.

What of the objection against originalism made by Brest and others that it is simply too hard to discern the intentions of the Framers? We have already seen how, while arguing strenuously that establishing the sort of intentions required by a strict originalism was impractical, Brest conceded the efficacy of a more moderate originalism. Yet even his criticisms of strict original intent originalism have been answered with some persuasiveness by Richard Kay.

When making the binary decisions of whether a particular act of government is within or without its powers, or has or has not violated a background right, Kay contends that "all [we need] to do is decide which of the two possible answers . . . is *more likely* correct."¹¹⁸ Picking one of two alternatives, though sometimes difficult, is far from impossible.

It is true that we can never know the original intentions with certainty, but then we can never know any speaker's or writer's intent with certainty. Nevertheless, it is almost always possible to examine the constitutional text and other evidence of intent associated with it and make a reasonable, good faith judgment about which result is more likely consistent with that intent. Of course confidence in these judgments will be different in different situations, but one answer will almost always appear better than the other. Indeed, one of the two possible responses may be obviously incorrect because, while it is theoretically possible that the lawmakers held such an intention, the available historical evidence will be overwhelmingly against it.¹¹⁹

What is true of original intentions is true *a fortiori* of the concededly easier-to-discern original meaning.¹²⁰

Moreover, that which exists is possible to exist. Compelling analyses of the original meaning of even the most controversial

118. Kay, *supra* note 9, at 244.

119. *Id.*

120. See also WHITTINGTON, *supra* note 9, at 187-95 (discussing the problem of summing intentions).

provisions of the Constitution have been developed, from those where the evidence of original meaning is simply overwhelming—the Second Amendment, for example¹²¹—or closer but still persuasive as it is with the Ninth Amendment¹²² and the Privileges or Immunities Clause.¹²³ Indeed, the past fifteen years has yielded a boon tide of originalist scholarship that has established the original meanings of several clauses that had previously been shrouded in mystery primarily for want of serious inquiry.¹²⁴ Like any other form of legal argument, a commitment to original meaning requires us only to respect the meaning supported by the most persuasive evidence.

That original meaning originalism is possible is also evidenced by the respect we have seen that it receives from such scholars as Bruce Ackerman, Akhil Amar, Ronald Dworkin and, when speaking of moderate originalism, even Paul Brest himself. Though not all originalists themselves, these and other thoughtful scholars do not dismiss the original meaning originalism as impractical. There remains, of course, the difficult and important problem of producing a synthetic meaning of the Constitution from provisions enacted at different times by different generations. But, fortunately for me, this problem has received close attention from Bruce Ackerman and, at this point, I refer the interested reader to his analysis.¹²⁵

121. See Barnett & Kates, *supra* note 10 (summarizing this evidence and providing citations to the literature).

122. See Randy E. Barnett, *James Madison's Ninth Amendment*, in 1 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 1-49 (Randy E. Barnett, ed., 1989); Randy E. Barnett, *Implementing the Ninth Amendment*, in 2 THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 1-46 (Randy E. Barnett, ed., 1993).

123. See CURTIS, *supra* note 29.

124. Yet another reason for concluding that originalism is alive and well.

125. See ACKERMAN, *supra* note 30, at 131-62 (providing syntheses of the founding with the Reconstruction and alleged New Deal amendments to the Constitution). Though I generally approve of his approach to the issue of synthesis, I do not agree that *unwritten* changes to the Constitution are binding and therefore need be synthesized with those provisions that are in writing. The issue is not, as Ackerman believes, simply about whether the method of ratification conforms to the procedures detailed in Article V. See Bruce Ackerman, *A Generation of Betrayal?*, 65 *FORDHAM L. REV.* 1519, 1528 (1997). "The question, in short, is whether the reception debate will be structured by a formalist understanding that the only constitutional achievements the present generation is bound to notice are those monumentalized through the process of Article Five." *Id.* The issue *also* is whether the amendments or changes are put in a definitive writing along with the rest of the Constitution. I have given reasons here why writtenness is

But I must say that, for me, these were never the most persuasive arguments against originalism. I was always moved more by the “Dead Hand” objection. Why are we *bound* by the intentions, expectations, or original meanings of long dead ancestors—in my case and most others, someone else’s ancestors at that? Then and now, why are those who were excluded from the ratification process because of race, gender, age or the fact they had yet to be born or immigrate into this country bound to the commands of the Founders as expressed in the original Constitution or the commands of those who later amended it?¹²⁶

In one sense, the simple answer to these questions is that *we* are not. And this is true because the Constitution does not purport to bind citizens. Instead, with rare exception, it binds only the government itself.¹²⁷ It is easier to see how government officials, including judges, who take an oath to preserve, protect, and defend the Constitution are *consensually* bound to its provisions in a way nonconsenting citizens are not—and what would that oath signify if the Constitution had no meaning independent of that which these same government officials may give to it in their unfettered discretion?¹²⁸

important, and why the decision by Roosevelt to refrain from seeking a written amendment doomed the changes he wrought to a less than constitutional status. See 2 ACKERMAN, *supra* note 31, at 320–32 (discussing proposed amendments to the Constitution and Roosevelt’s decision to reject that means of constitutional change). In Roosevelt’s own words: “There are many types of amendments proposed. Each one is radically different from the other. There is no substantial group within the Congress or outside it who are agreed on any single amendment.” *Id.* at 326 (quoting THE PUBLIC PAPERS OF AND ADDRESSES OF FRANKLYN D. ROOSEVELT 132 (Samuel Rosenman ed., 1937)). The effort required to settle on a single formulation is one of the virtues of formality that exists apart from the method of ratifying that formulation.

126. See Dorothy E. Roberts, *The Meaning of Black’s Fidelity to the Constitution*, 65 *FORDHAM L. REV.* 1761, 1761 (1997) (discussing whether black Americans have any duty of fidelity to the Constitution).

127. The Thirteenth Amendment prohibits private persons, not just government, from enslaving another or holding them in involuntary servitude. See U.S. CONST. amend. XIII. Before its repeal, the Eighteenth Amendment prohibited private persons from manufacturing, selling, or transporting intoxicating liquors. See U.S. CONST. amend. XVIII. In my view, the former prohibition is so overwhelmingly compelled by justice and the need to stamp out completely a regime of government-imposed oppression that, though it violated the basic structure of the Constitution which binds government not us, it does not undermine the legitimacy of the enterprise. Too many provisions like the latter, however, puts that enterprise at serious risk.

128. See *supra* notes 76–77 and accompanying text.

Whether or not the Constitution is binding solely on government officials, however, I have tried to explain here why the relevant issue of constitutional legitimacy depends on whether the commands, not of the Constitution itself, but of government officials rendered pursuant to constitutional authority are binding in conscience on us. And the answer to this question will depend, as I have already argued, on the quality of the lawmaking and enforcement processes that the Constitution establishes—including the adherence by those who speak and act in its name to a written constitution.

Because the binding nature of laws made pursuant to constitutional processes governed by the original meaning of the Constitution is not based on popular sovereignty or consent, it is not undercut, except indirectly, by the fact that women, slaves, children, resident aliens, convicts, or all of us now living were excluded from the ratification process. I am bound in conscience by the laws produced pursuant to the Constitution if there is reason to be confident that the manner by which these laws were produced and enforced effectively ensures their necessity and guards against their *injustice*—*i.e.*, that there is reason to believe that such laws are not merely a product of faction and they do not violate my rights or the rights of others. If the provisions of the Constitution and the process by which they are administered and interpreted are “good enough” to merit a benefit of the doubt, we have that assurance and are bound independently of how this lawmaking process might have come about.¹²⁹ But this also means that, if those processes *are* good enough, then they need to be locked in and protected by an originalists interpretation of the document that established them. And this is a version and justification of originalism that I think even most nonoriginalist ought to accept.

To this consideration, we must add an analysis of how the Constitution has in fact been interpreted and construed over the years since its adoption and amendment. Suppose the original

129. Nevertheless, as was mentioned above, the fact that it was designed by some very smart, sophisticated and generally well-motivated persons and was subject to the ratification of representatives of a large segment of the population provides some reason for confidence—though not enough to establish its legitimacy standing alone. *See supra* note 84.

meaning of these provisions was “good enough” to establish a lawmaking process that imparts legitimacy upon the commands issued by government officials acting in its name. This would still not impart legitimacy on commands that emerge from the lawmaking process if the procedures and constraints mandated by the original meaning are not adhered to by these officials, including judges, or if (to say the same thing differently) these procedures and constraints have since been changed to something that is not “good enough” from the standpoint of legitimacy. If so many deviations have been made from the original meaning that the lawmaking processes no longer have the same legitimacy—providing integrity, then the binding nature of its products may be more dubious.

Some may argue that the original scheme as formally ratified was not “good enough” to create laws that bind in conscience or, even if it once was, it would be no longer in today’s world. Only because the system we now have *differs* in important respects from the original meaning of the written constitution does it provide that assurance. This appears to be Paul Brest’s position when he rejects moderate originalism on the ground that it cannot justify those aspects of current constitutional doctrine of which he and others today approve.¹³⁰

Whatever its merits, were this claim to be made explicitly, it would improve the quality of the discourse concerning the appropriate method of constitutional interpretation and the value of originalism. For those who make this claim would have to admit that they have deviated from the original meaning of the Constitution as formally ratified and then identify their criteria of legitimacy and how the resultant system can produce laws that are binding in conscience on the individual. Most importantly for the discussion of originalism, they would have to explain how the values provided by a written constitution can be preserved when the writing can be contradicted without formal amendment by legislatures and judges who object to its provisions. Moreover, those who would deviate from the written

130. See Brest, *supra* note 3, at 231; see also J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703 (1997) (discussing the implications of “constitutional evil” for a duty of fidelity to a constitution).

constitution in this manner would also have to explain why we bother to keep it around, except perhaps as a soporific for the masses.

V. CONCLUSION

Adhering to the original meaning of the written Constitution as it has been amended in writing is simply one aspect of a constitutional structure that either is or is not capable of producing and enforcing laws that are binding in conscience on the citizenry. Putting a constitution in writing is conducive to preserving the rights of the people from infringement by government officials, but only if its original meaning is not contradicted or altered without adhering to formal amendment procedures. A lot also depends on what the writing says. If what it says describes a structure that is good enough to have this binding effect, then that is a reason for judges to adhere to original meaning. If it does not describe such a system then an alternative that does so must be identified and defended. I do not rule out the possibility of a better system.¹³¹ But all things being equal, I have explained here why a lawmaking system that allows interpreters to make unwritten changes to the original meaning of a written constitution is likely to be less legitimate than and therefore inferior to one that excludes any such methods of interpretation.

131. For my suggestions, see BARNETT, *supra* note 84, at 257-97.