

A MATTER OF (HISTORICAL) INTERPRETATION: ORIGINALISM AND THE USE AND INTERPRETATION OF HISTORICAL EVIDENCE BY THE SUPREME COURT

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The Supreme Court's 2022 and 2023 terms have demonstrated that its jurisprudential outlook and methodology is solidly entrenched in the "original public meaning" school of originalism. This method of interpretation, exemplified in Justice Antonin Scalia's opinion in District of Columbia v. Heller, has risen rapidly to become a dominant strand of constitutional and statutory interpretation in the United States.

With recent cases like Dobbs v. Jackson Women's Health Organization and New York Rifle and Pistol Ass'n, Inc. v. Bruen, the Court has given much more weight to historical evidence in deciding cases, almost rising to the level of binding authority. While originalism purports to be a more neutral methodology because it adheres to the so-called "original public meaning" words had to society at the time they were written, major problems arise in attempting to discern a universalizable past meaning to apply to contemporary American society.

This Article argues that there was never a universalizable "original public meaning," neither at the ratification of the U.S. Constitution nor at the adoption of the postbellum amendments of the 1860s. Originalism, with its heavy emphasis on historical evidence, requires the exclusion of wide swaths of the American people from the historical record and creates an impoverished, incomplete, and inaccurate depiction of the past. Such a methodology is an insufficient basis for a school of jurisprudence and creates potential dangers for the legitimacy of the Court as an apolitical institution.

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“I was convinced of this important, though melancholy truth, ‘that the greatest men may err,’ and that their errors are sometimes of the greatest magnitude.” – John Dawson, speaking to the Virginia Ratifying Convention, June 24, 1788¹

I. INTRODUCTION

In his 1961 work *What is History?*, the British historian E.H. Carr sought to discredit the empiricist notion made popular in the nineteenth century that history was merely a compilation of facts that may be gathered up to understand the subject completely.² Carr later quotes the Cambridge modern historian Sir Frederick Powicke, saying: “[t]he craving for an interpretation of history is so deep-rooted that, unless we have a constructive outlook over the past, we are drawn either to mysticism or to cynicism.”³ In this term, the U.S. Supreme Court has fully embraced the jurisprudence of originalism and thus entered into the realm of both a “mystical” and “cynical” construction of law and of history.⁴ “Originalism” is a theory of interpretation which looks to the original meaning of the words in a constitutional provision or statute as they were understood when they were written, either by those who penned them or by those who received them.⁵ Since the 1971 publication of Robert Bork’s article castigating the Supreme Court’s “lack of theory”⁶ from the New Dealers to the Burger Court, originalism has grown from a fringe theory of a handful of legal scholars to perhaps the dominant theory in the United States of the early twenty-first

¹ JAMES MADISON, *John Dawson’s Fears for the Future*, in DEBATES OF THE CONSTITUTION: PART II 743 (Bernard Bailyn ed., 1993).

² E.H. CARR, *WHAT IS HISTORY?* 7-10 (Penguin 2nd ed. 1961).

³ *Id.* (quoting F. Powicke, MODERN HISTORIANS AND THE STUDY OF HISTORY 174 (1955)).

⁴ *See generally* *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct 2228 (2022); *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *Kennedy v. Bremerton Sch. Dist.* 142 S.Ct. 2407 (2022).

⁵ JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 1-2 (2013).

⁶ Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 257 (1971).

century.⁷ While even originalism's proponents have described it as a "lesser evil"⁸ when compared with theories like "living constitutionalism," it has been openly embraced by at least four of the Supreme Court's conservative Justices⁹ and praised by one of the Court's liberals.¹⁰ The newest Justice to join the Court, Ketanji Brown Jackson, was touted as a "progressive originalist" after her first week on the bench.¹¹

Originalism's philosophical and, for some, political faults have been widely noted by pundits and legal scholars alike, but it is necessary to explore and scrutinize in detail the Supreme Court's use of historical evidence and its interpretation of historical sources.¹² With former President Donald Trump's appointment of three new Justices to the Court between 2017 and 2020, and notably after the replacement of Justice Ruth Bader Ginsburg with the more conservative Amy Coney Barrett, the Court has gone from one of originalist leanings to one of outright originalist jurisprudence.¹³ While originalism has been a part of the lexicon and methodological thinking of the Supreme Court for decades, this most recent term, with cases like *Dobbs v. Jackson Women's Health*¹⁴ and *New York State Rifle & Pistol Ass'n, Inc. v.*

⁷ See Henry Gass, *Originalism moves from theory to high court. What that means for U.S.*, THE CHRISTIAN SCIENCE MONITOR (Dec. 21, 2021), <https://www.csmonitor.com/USA/Justice/2021/1221/Originalism-moves-from-theory-to-high-court.-What-that-means-for-US>.

⁸ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 862 (1989).

⁹ See generally John O. McGinnis, *Which Justices are Originalists?*, LAW AND LIBERTY (Nov. 9, 2018), <https://lawliberty.org/which-justices-are-originalists/>; ERWIN CHERMERINSKY, *WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM* 10 (2022).

¹⁰ Doug Kendall, *Do Kagan, Roberts actually agree?*, POLITICO (Aug. 4, 2010), <https://www.politico.com/story/2010/08/do-kagan-roberts-actually-agree-040600>.

¹¹ See Kaelan Deese, *KBJ's case for 'progressive originalism' in Supreme Court debut draws rebuke*, WASHINGTON EXAMINER (Oct. 6, 2022), [https://thehill.com/opinion/judiciary/3263173-ketanji-brown-jacksons-originalism/](https://www.washingtonexaminer.com/restoring-america/fairness-justice/jackson-progressive-originalism-14th-amendment-scrutiny#:~:text=KBJ's%20case%20for%20'progressive%20originalism'%20in%20Supreme%20Court%20debut%20draws%20rebuke&text=Supreme%20Court%20Justice%20Ketanji%20Brown,say%20is%20subject%20to%20debate; Andrew Koppelman, <i>Ketanji Brown Jackson's Originalism</i>, THE HILL (Oct. 4, 2022), <a href=).

¹² Scott Douglas Gerber, *The Supreme Court and the uses of history*, THE HILL (Sept. 17, 2022, 8:00 AM), <https://thehill.com/opinion/judiciary/3647200-the-supreme-court-and-the-uses-of-history/>; William Baude, *Of Course the Supreme Court needs to use history. The question is how*, THE WASH. POST (Aug. 8, 2022, 9:27 AM), <https://www.washingtonpost.com/opinions/2022/08/08/supreme-court-use-history-dobbs-bruen/>; Allison Orr Larsen, *The Supreme Court Decisions on Guns and Abortion Relied Heavily on History. But Whose History?*, POLITICO (July 26, 2022, 4:40 AM), <https://www.politico.com/news/magazine/2022/07/26/scotus-history-is-from-motivated-advocacy-groups-00047249>; see also John Paul Stevens, *Originalism and History*, 48 GA. L. REV. 691 (2014).

¹³ Gass, *supra* note 7; see also Kelsey Reichman, *America gets first taste of an originalist Supreme Court*, COURTHOUSE NEWS SERVICE (July 1, 2022), <https://www.courthousenews.com/america-gets-first-taste-of-an-originalist-supreme-court/>.

¹⁴ *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

Bruen,¹⁵ clearly illustrates how the Court has embraced this methodology. Therefore, analysis of the historical method and interpretation used in these cases will be a major focal point of this Article.¹⁶

As E.H. Carr noted over half a century ago, a historian creates a flawed history when perceiving the world of the past through a purely empiricist “fact-driven” lens, which creates an impoverished understanding of both the past and the present.¹⁷ A historian’s understanding and use of historical facts cannot be anchored to some perpetual touchstone of meaning that carries through every age but must instead be able to adjust to new knowledge and insights.¹⁸ To reach some relatively objective and non-purposivist understanding of a long-lost time period, the historian cannot rely on ossified interpretations of historical facts.¹⁹ By using history as the de facto ultimate binding authority in constitutional interpretation, this Supreme Court, not composed of historians, has engaged in exactly this flawed practice, which is often in contradiction to the majority opinion of revered professional historians.²⁰ Unlike historians, who necessarily leave themselves vulnerable to scrutiny by other historians, federal judges (and particularly those on the U.S. Supreme Court) give added weight and finality to their interpretation of the historical record through the force of law. This Article does not argue that legal analysis must be devoid of the use of history and historical evidence. Instead, it argues that the Court should treat historical analysis as persuasive argument, not a de facto binding authority. Through originalism, the Court is reshaping history as it shapes the law. Originalism’s use of historical evidence does not lead to more neutral

¹⁵ *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

¹⁶ There has been a wide range of scholarship dedicated to originalism and how best to define it. The goal of broadly defining originalism in all its forms is beyond the scope of this Article, and this Article will therefore narrow the scope of originalist methodology largely to what has been articulated in the recent Supreme Court decisions from the 2022 term, and to a lesser extent the 2023 term. Any other reference to alternative schools or interpretations of originalist jurisprudence will be cited for the purposes of refining, comparing, or contrasting the jurisprudential doctrines of the Court. *See generally* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996); JACK M. BALKIN, *LIVING ORIGINALISM* (2011); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); Larry D. Kramer, *When Lawyers Do History*, 72 *GEO. WASH. L. REV.* 387 (2003); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 *U. CHI. L. REV.* 101, 105-08 (2001). *See also* Bork, *supra* note 6.

¹⁷ E.H. CARR, *supra* note 2, at 7-12.

¹⁸ *Id.* at 7-9.

¹⁹ *Id.*

²⁰ *See* Logan Everett Sawyer III, *Method and Dialogue in History and Originalism*, 37 *LAW AND HIST. REV.* 847, 848 (2019); Christian Farias, ‘Originalism is intellectually indefensible,’ says noted historian about right-leaning Supreme Court, *BOSTON GLOBE* (Oct. 28, 2022, 11:11 AM), <https://www.bostonglobe.com/2022/10/28/opinion/originalism-is-intellectually-indefensible-says-noted-historian-about-right-leaning-supreme-court/>; Steven Seigel, *How many critiques must historians write?*, 45 *TULSA L. REV.* 823, 825 (2011).

opinions, and by engaging in this methodology, the Court threatens not only the legitimacy of the rule of law, but the integrity of historical analysis and understanding.

Part II tracks and discusses the history and development of originalism as a school of constitutional interpretation, beginning with its use by Hugo Black on the “New Deal” Court, continuing through Robert Bork’s “original intent” doctrine, and ending with Antonin Scalia’s “original public meaning” doctrine. Part III assesses the current status and interpretation of originalism by the most recent iteration of the Roberts Court. It also discusses the historical sources and methodologies of that Court and examines historiographical debates in *District of Columbia v. Heller*.²¹ Part IV argues that the current Supreme Court’s use of historical evidence and methodology are erroneous and fail to live up to the principles and judicial outcomes to which originalism purports to adhere. Finally, Part V briefly argues that originalism may threaten the legitimacy of the Court as an institution.

II. HISTORICAL BACKGROUND

A. *Black, Bork, and “Original Intent” of the Framers*

When the Supreme Court spoke of a “right to privacy” in *Griswold v. Connecticut*, Justice Black’s fiery dissent criticized his colleagues on the bench by invoking James Madison and the “founders.”²² After decades on the bench as a fervent “New Dealer” and “liberal,” his dissent was an early example of what the current legal field would recognize as modern originalism.²³ The approach used in Justice Black’s *Griswold* dissent²⁴ differed from the “originalist” approach taken up by future jurists and legal

²¹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

²² *Griswold v. Connecticut*, 381 U.S. 479, 509 (1965) (Black, J., dissenting) (“I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used.”) (emphasis added).

²³ NOEL FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES 144-145, 307 (2010); Ian Millhiser, *Originalism, Amy Coney Barret’s Approach to the Constitution, explained*, VOX (Oct. 12, 2020, 8:30 AM), <https://www.vox.com/21497317/originalism-amy-coney-barrett-constitution-supreme-court> (explaining in part the “three waves” of originalism, beginning with the opinions and dissents of Justice Black which harkened back to the “original intent” of the framers of the U.S. Constitution).

²⁴ *Griswold*, 381 U.S. at 509-11.

scholars and has largely been abandoned by most jurists, including to a large extent the Justices on the Supreme Court.²⁵

The so-called “first wave” of originalism, spearheaded by Justice Black, arose in the 1960s and early 1970s and advocated a jurisprudence based on the “original intent” of the framers.²⁶ This “Framers’ intent” methodology attempted to find the internal motivations and thought processes of those late eighteenth-century Americans who participated in the construction of the United States Constitution.²⁷ The writings of influential members of the Constitutional Convention, especially those of Hamilton and Madison, were natural sources of information to uncover the “original intent” of the “Framers” who drafted a particular constitutional provision.²⁸ While sources like *The Federalist Papers* and Madison’s detailed Convention notes were wellsprings of historical insight into this time period, an inevitable question arose: “Who should be awarded membership in this rarefied ‘Framers’ club?” When the obvious candidates like Madison, dubbed the “Father of the Constitution,” and Hamilton, seen as a chief architect of American industrialization, are exhausted, the issue of who deserves “official status” as a “Framer” becomes a bit murkier.

A figure like Thomas Jefferson might seem an obvious candidate for this group, except that he was in Europe at the time of the Convention, helping the Marquis de Lafayette write a new constitution for France.²⁹ In fact, when first confronted with the language of the new U.S. Constitution, Jefferson was horrified by many of its provisions and was decidedly in the anti-federalist camp during the ratification debates.³⁰ Members of the various state legislatures, prior to ratification, also proved a tricky point for “original intent” originalists because the title of “Framer” became an unwieldy one. The group of “Framers,” in the eyes of “original intent” originalists, would expand to not only include those at the Constitutional Convention of 1789,

²⁵ Millhiser, *supra* note 23. This Article will use the words “framers,” “founders,” and “founding generation” interchangeably to refer to that generation that held federal (and in some cases state/colonial) political power roughly between 1775 and 1820. When these terms refer also to the drafters of the Fourteenth Amendment and other important constitutional provisions and statutes, that fact will be explicitly stated.

²⁶ MCGINNIS & RAPPAPORT, *supra* note 5, at 121-23 (2013); Will Baude, *The greatness of Justice Hugo Black*, WASHINGTON POST (Apr. 16, 2014, 9:30 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/16/the-greatness-of-justice-hugo-black/> (“As a proto-originalist/textualist, Black...rejected a number of doctrines that it would have been easy and politically palatable for him to accept — like substantive due process.”)

²⁷ MCGINNIS & RAPPAPORT, *supra* note 5; while many of the “original intent” oriented originalists of the first waves of the movement tended to mine the historical sources of the eighteenth century, there was, albeit given a much smaller emphasis, work looking into the original intent of the drafters of the post-bellum amendments in the mid-nineteenth century.

²⁸ Bork, *supra* note 6.

²⁹ See JON MEACHAM, THOMAS JEFFERSON: THE ART OF POWER 198-201 (2013); JONATHAN ISRAEL, DEMOCRATIC ENLIGHTENMENT 459 (2013).

³⁰ Meacham, *supra* note 29, at 198.

but also those of the various state ratifying committees, public intellectuals and writers, anti-federalists opposed to ratification, and even perhaps foreign individuals with indirect but powerful intellectual influence over the construction and interpretation of the early Constitution.³¹ Did every member of the Constitutional Convention count as a framer? Did those members of the various state ratifying committees count? What about those who voted against ratification? How about those foreigners like Montesquieu, Locke, and Beccaria whose works shaped the thinking of the constitutional drafters? How could one discern the “intent,” even in a general sense, of a group so large and with so many different and contradictory opinions? Nonetheless, jurists like Hugo Black adhered to the somewhat nebulous notion of the “Framers’ intent” throughout the Warren and Burger Court eras, even if he had to do so in forceful dissenting opinions.³²

It was in the early 1970s that Robert Bork, a professor at Yale Law School and future Supreme Court nominee, took up the sword of “original intent” originalism by writing an article in the *Indiana Law Review* entitled “Neutral Principles and Some First Amendment Problems.”³³ In it, Bork argued that “a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society.”³⁴ The value choices “made” by the Court and deemed “deplorable” by Bork were exemplified in Justice Douglas’s groundbreaking opinion in *Griswold*, which identified a right to privacy derived from the edges of other protections assured in the Bill of Rights, such as the right to marital privacy deriving from freedom of association. According to Bork, the “penumbras,” or perceived emanations from the Bill of Rights, overtook the founder’s original intent.³⁵

While considered a judicial “conservative,” Bork’s search for a neutral ground on which to lay down constitutional principles fit neatly into the “original intent” framework articulated by the “liberal” Justice Hugo Black as far back as the 1930s.³⁶ Those neutral and unifying principles of the founding generation proved to be impossible to ascertain, however, as those men did not speak in one unified and neutral political voice.³⁷

³¹ CHEMERINSKY, *supra* note 9, at 17-18; Scalia, *supra* note 8, at 852 (members of the First Congress included as founders in originalist framework).

³² See *Griswold*, 381 U.S. at 509-11 (Black, J., dissenting); *Adamson v. California*, 332 U.S. 46 (1947) (Black, J., dissenting).

³³ See Bork, *supra* note 6.

³⁴ *Id.* at 262.

³⁵ *Id.* at 257.

³⁶ See FELDMAN, *supra* note 23, at 144-151.

³⁷ See NOAH FELDMAN, *THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT* 245-248 (2020).

B. *Antonin Scalia and the Rise of “New Originalism”*

Issues regarding the first originalists’ “original intent” principles were quickly recognized.³⁸ The workability of this school of judicial thought was questioned and openly criticized because the definition of “original intent” was too vague and too narrow in scope.³⁹ The question “who is considered a framer?” loomed large over the original intent proponents like Black and Bork who found it difficult to pinpoint a touchstone for the constitutional or judicial theory or doctrine.⁴⁰

With the defeat of Robert Bork’s nomination to the U.S. Supreme Court in 1987, the small contingent of supporters of his originalist theories seemed on their way out.⁴¹ Even before Bork’s 42-58 defeat in the Senate, the originalist movement, having not yet garnered many adherents, was already seen by some as a fringe and perhaps dangerous judicial movement.⁴² However, the words of Attorney General Edwin Meese had substantial staying power when he declared in a speech to the American Bar Association in 1985 that:

The intended role of the judiciary generally and the Supreme Court in particular was to serve as the “bulwarks of a limited constitution.” The judges, the Founders believed, would not fail to regard the Constitution as “fundamental law” and would “regulate their decisions” by it. As the “faithful guardians of the Constitution,” the judges were expected to resist any political effort to depart from the literal provisions of the Constitution. *The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution.*⁴³

Four years after Meese gave his speech in Washington, President Ronald Reagan appointed and the Senate unanimously affirmed a new Associate Justice to the Supreme Court who espoused a new form of

³⁸ Chemerinsky, *supra* note 9, at 17-18.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 18; Jeremy K. Kessler & David Posen, *Working themselves Impure: A Life Cycle of Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1845 (2016).

⁴² Terry Eastland, *The Power of Giving the Right Speech at the Right Time*, WASH. EXAMINER (Dec. 7, 2018, 4:57 PM), <https://www.washingtonexaminer.com/weekly-standard/edwin-meeses-speech-that-saved-originalism>.

⁴³ Edwin Meese, *Speech to The American Bar Association 7/9/85*, U.S. DEPARTMENT OF JUSTICE, <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf> (emphasis added).

originalism: Antonin Scalia.⁴⁴ While the previous conception of originalism, as advocated by Black, Meese, and Bork, waned in popularity, the majority of originalists began to rally around “New Originalism,” which shifted its focal point from “original intent” to the concept of “original public meaning.”⁴⁵ Adherents to the “original public meaning” school of originalism looked to dictionaries, treatises, and other contemporary documentary evidence in order to determine how the “average” American citizen living in the founding era might have thought of a particular subject or legal issue.⁴⁶ Even before Meese’s speech in 1985, there was chatter in the Reagan Justice Department on pursuing federal judicial restraint by switching the originalist focus to the “original public meaning” standard.⁴⁷ However, it took until 1989 for Scalia, the figure most associated with this new school of originalism, to be appointed to the Supreme Court bench.⁴⁸

Scalia’s opening salvo in defense of originalism attempted to sidestep the issue of determining the intentions of the long deceased “founders.”⁴⁹ Scalia expanded the definition of “intent” from one of specific meaning (i.e., the intent of the framers) to one of general meaning. He sought to discover what a particular word or text would have meant generally to those living at the time that the constitutional provision or statute was enacted.⁵⁰ Scalia thus expanded the category of the people who “counted” when it came to historical analysis to include thousands of people alive at the time of the founding. He created a “catch-all” historical figure that reflected an aggregated political and judicial viewpoint to replace the specific intent of the individual framers.⁵¹

During Justice Scalia’s tenure on the Supreme Court, the popularity and influence of the so-called “new originalists” grew while that of the

⁴⁴ Stuart Taylor Jr., *Rehnquist and Scalia Take Their Place on Court*, N.Y. TIMES (Sept. 27, 1986), <https://timesmachine.nytimes.com/timesmachine/1986/09/27/issue.html>.

⁴⁵ Chemerinsky, *supra* note 9, at 34.

⁴⁶ See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205-13 (1980); see generally Lawrence B. Solum, *Originalist Methodology*, 84 U. CHICAGO L. REV. 269 (2017); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARVARD L. REV. 778 (2022).

⁴⁷ Patrick Francis Gallagher, *The Conservative Incubator of Originalism: The Reagan Department of Justice* (Aug. 17, 2017) (M.A. thesis, University of Chicago) (on file with SSRN online database).

⁴⁸ Politico Magazine, *How Antonin Scalia Changed America*, POLITICO (Feb. 14, 2016), <https://www.politico.com/magazine/story/2016/02/antonin-scalia-how-he-changed-america-213631/>. (“Scalia was a colossal figure in American public law. He brought originalism into the constitutional mainstream, an achievement signaled as much by Justice John Paul Stevens’ heavily originalist dissent in *District of Columbia v. Heller*, the Second Amendment case, as by Scalia’s own majority opinion.”); Steven F. Hayward, *Two Kinds of Originalism*, NATIONAL AFFAIRS (Winter 2017), <https://www.nationalaffairs.com/publications/detail/two-kinds-of-originalism>.

⁴⁹ Scalia, *supra* note 8, at 856.

⁵⁰ *Id.* at 859-961.

⁵¹ See Chemerinsky, *supra* note 9, at 44-63.

Warren and Burger Court adherents' "living constitutionalism" began to wane.⁵² "New originalism" purported to bring the complexities of the law out of the realm of pure value judgements from the bench and into the more neutral ground of the era in which the relevant constitutional provision or statute was enacted.⁵³ Scalia himself spoke often and publicly about his vision of a "dead Constitution" that should not morph even in the face of swift and radical social change.⁵⁴

C. *The Task of Defining the Originalism of the Roberts Court*

Some difficulty arises with originalism when one paints its proponents with a single brush and attempts to define the movement at large.⁵⁵ While a wide variety of originalist frameworks exist that range from the strictest of strict constitutionalists to Jack Balkin's hybrid theory of "living originalism,"⁵⁶ there are now, roughly speaking, two major schools of originalist thought.⁵⁷ As referenced *supra*, the two schools are divided between those who adhere to the "original intent" of the framers of the Constitution and those who look to the "original public meaning" of the words found within the text of the document.⁵⁸ Both schools are prominent in the current judicial and political climate, although the dominant theory has markedly shifted toward the latter framework.⁵⁹

Several of today's U.S. Supreme Court Justices have openly declared themselves to be "original public meaning originalists,"⁶⁰ and a

⁵² Gass, *supra* note 7.

⁵³ Bork, *supra* note 6, at 257-59.

⁵⁴ Bruce Allen Murphy, *Scalia and the 'Dead' Constitution*, N.Y. TIMES (Feb. 16, 2016), <https://www.nytimes.com/2016/02/15/opinion/justice-antonin-scalia-and-the-dead-constitution.html> ("[Scalia] argued, 'The only good Constitution is a dead Constitution. The problem with a living Constitution in a word is that somebody has to decide how it grows and when it is that new rights are – you know — come forth. And that's an enormous responsibility in a democracy to place upon nine lawyers, or even 30 lawyers.'"); *Scalia Vigorously Defends 'Dead' Constitution*, NPR (Apr. 28, 2008, 4:00 PM), <https://www.npr.org/templates/story/story.php?storyId=90011526>.

⁵⁵ JACK BALKIN, LIVING ORIGINALISM 6-13 (2014) (Balkin's theory seeks to reach a middle ground by blending elements of originalism with those of "living constitutionalism" theory).

⁵⁶ *Id.* at 3-6.

⁵⁷ *Id.* at 6-16; *see also* MCGINNIS & RAPPAPORT, *supra* note 5, at 7-8.

⁵⁸ Chemerinsky, *supra* note 9, at 14-17.

⁵⁹ *Id.* at 17-18.

⁶⁰ Ilan Wurman, *What is Originalism? Did it underpin the Supreme Court's ruling on abortion and gun rights? Debunking the myths*, THE CONVERSATION (July 8, 2022, 8:17 AM), <https://theconversation.com/what-is-originalism-did-it-underpin-the-supreme-courts-ruling-on-abortion-and-guns-debunking-the-myths-186440>; Julie Asher, *Alito kicks off project on originalism, Anderson intellectual tradition*, CATHOLIC NEWS SERVICE (Sept. 30, 2022), <https://catholicnews.com/alito-kicks-off-project-on-originalism-catholic-intellectual-tradition/>; Michael Tarr, *Amy Coney Barrett, Supreme Court nominee, is Scalia's heir*, ASSOCIATED PRESS

majority on the Court seems to espouse, if not state openly, a strong affinity for this method of constitutional interpretation.⁶¹ Many legal scholars, jurists, lawyers, and pundits have already written in depth about originalism's methods, doctrines, and credibility.⁶² However, this Article focuses on the originalist jurisprudence of the current Supreme Court: principally, to the extent that it mimics or differs from the doctrines of earlier waves of originalism, its historical methodologies and textual interpretations, and whether this general school of originalism indeed fulfills its stated goals.⁶³

III. INTENT, MEANING, AND THE PROBLEM OF LAW OFFICE HISTORY

A. *Uncovering Original Meaning or Legislative Intent?*

In his early work, *Originalism the Lesser Evil*, Justice Antonin Scalia mentions that the theory of originalism as he understood it could be found not just in the then-present day of the early 1980s, but also in earlier eras of the Supreme Court.⁶⁴ He refers heavily to Chief Justice Taft's Supreme Court opinion *Myers v. United States*.⁶⁵ That case "declared unconstitutional congressional attempts to restrict presidential removal of executive officers,"⁶⁶ but the facts of the case are much less important to the study of originalism than Chief Justice Taft's analytical approach. Scalia wrote: "[i]t is a prime example of what, in current scholarly discourse, is known as the 'originalist' approach to constitutional interpretation."⁶⁷ Here, Scalia seems to conflate discerning "original public meaning," as he defines

(Sept. 26, 2020), <https://apnews.com/article/election-2020-ruth-bader-ginsburg-chicago-us-supreme-court-courts-547b7de5b6ebabedee46b08b5bb37141>; Neil Gorsuch, *Why Originalism is the best approach to the Constitution*, TIME (Sept. 6, 2019), <https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/>; Aaron Blake, *Neil Gorsuch, Antonin Scalia and Originalism, explained*, THE WASHINGTON POST (Feb. 1, 2017, 2:30 PM), <https://www.washingtonpost.com/news/the-fix/wp/2017/02/01/neil-gorsuch-antonin-scalia-and-originalism-explained/>. But see Richard Lempert, *Is Neil Gorsuch an Originalist? Impossible*, BROOKINGS INST. (Feb. 22, 2017), <https://www.brookings.edu/blog/fixgov/2017/02/22/is-neil-gorsuch-an-originalist-impossible/>.

⁶¹ See Sol Wachtler, *Brett Kavanaugh is an Originalist*, ALM (Sept. 20, 2018, 11:57 AM), <https://www.law.com/newyorklawjournal/2018/09/20/brett-kavanaugh-is-an-originalist/>; but see Eric Posner, *Is Brett Kavanaugh an Originalist?*, ERIC POSNER (July 18, 2018), <https://ericposner.com/is-brett-kavanaugh-an-originalist/>.

⁶² *Supra* note 16.

⁶³ See MCGINNIS & RAPPAPORT, *supra* note 5, at 22-24; see also Chemerinsky, *supra* note 9, at 30-31; Kim Wehle, *Justice Gorsuch is wrong—'originalists' judges make stuff up too*, THE HILL (Sept. 15, 2019, 5:00 PM), <https://thehill.com/opinion/judiciary/461496-justice-gorsuch-is-wrong-originalist-judges-make-stuff-up-too/>.

⁶⁴ Scalia, *supra* note 8, at 850-51.

⁶⁵ *Myers v. United States*, 272 U.S. 52 (1926).

⁶⁶ Scalia, *supra* note 8, at 851.

⁶⁷ *Id.* at 851-52.

it in his article, with determining the “legislative intent” (a judicial practice he castigated throughout his time on the Supreme Court) of the first Congress.⁶⁸

While it is true that the opinion uses many of the same techniques that originalists, including Justice Scalia,⁶⁹ applaud, the late Chief Justice is actually using the historical record in *Myers* for a different purpose than discovering the “original public meaning.”⁷⁰ Throughout the opinion, Chief Justice Taft cites many sources and delves into the eighteenth-century minutes and debate transcripts (to the extent that any were taken) to determine whether James Madison, John Adams, and others intended for the power to remove executive branch officials lay with the legislature or the executive.⁷¹

There is nothing in the *Myers* opinion that suggests that Chief Justice Taft was attempting to uncover some abstract and aggregate “original public meaning” of the words in the Constitution as related to the president’s powers to remove an executive branch official from office.⁷² Taft focuses instead on that first congressional record and gives little to no attention to what any person outside of that body had to say about the issue. There is no “public” element to Taft’s exploration of “meaning.”⁷³ He tries to ascertain the meaning of the constitutional provision by attempting to pull the intent and thought processes out of the minds of the drafters of that provision.⁷⁴ On its face, this would look like the “first wave” of originalism, the “original intent” of Bork and Meese, although the analysis in *Myers* is merely a cognate methodology.⁷⁵

There is a crucial difference between Taft and Scalia’s use of the historical record and their choice of sources in their respective opinions when it comes to the level of historical abstraction.⁷⁶ In *Myers*, Taft dives deeply into the primary source materials of the eighteenth century, and his opinion at times reads more like a historical analysis of the period than a judicial

⁶⁸ See SCOTUS Clips, *Justice Scalia: The Limited Usefulness of Legislative History*, YOUTUBE (Dec. 22, 2020), https://www.youtube.com/watch?v=inoarH_YdeE [hereinafter *Scalia Talk—Legislative History*]; see also *District of Columbia v. Heller*, 554 U.S. 570, 603 (2008) (wherein Justice Scalia criticizes Justice Stevens’ reference to legislative history of the drafting of the Second Amendment).

⁶⁹ MCGINNIS & RAPPAPORT, *supra* note 5, at 117-28, 133-38.

⁷⁰ *Myers*, 272 U.S. at 110-120.

⁷¹ Here, the historical record centers around the debates and minutes taken during the constitutional convention of 1789 found in the Annals of Congress, John Adams papers, and Diary of William Maclay.

⁷² See generally *Myers*, 272 U.S. at 110-20, 134-37; but see Scalia, *supra* note 8, at 851-52.

⁷³ *Myers*, 272 U.S. at 110-120.

⁷⁴ *Id.* at 110-20, 126-37.

⁷⁵ Chemerinsky, *supra* note 9, at 17-20, 25.

⁷⁶ See, e.g., *Myers*, 272 U.S. at 110-20; *District of Columbia v. Heller*, 554 U.S. 570, 591-96, 606-09 (2008).

holding.⁷⁷ The *Myers* case treats the historical record as a means to ascertaining the legislative intent of the Constitutional Convention and the first Congress, something that Justice Scalia consistently resisted as a legitimate method of interpretation.⁷⁸ Taft cites the records of the 1789 Convention and the minutes of the first Congress in order to ascertain what might be called the original intent of those who participated in drafting the language of Article II of the U.S. Constitution.⁷⁹ Nearly every historical document cited in that case comes from the *Annals of Congress* or the *Journals of the Continental Congress*, and the framers' quotes offered in the opinion are clearly meant to reinforce the idea that it is the *legislative intent* of the body, not the abstract public meaning or understanding of the provisions it is expounding, that really matters.⁸⁰ Compare this method to that of Justice Scalia in *Heller*, where legislative intent of the framers is sidelined to make room for a sort of "generally understood" idea of the period, discussed in further detail *infra* Part III.C.⁸¹

B. Pitfalls of the Lawyer-Historian

As is the case with every subject worth studying, both history and law have developed rich and diverse philosophies that underpin the subjects themselves and inform our understanding of both. These philosophies are what we would now call the philosophy of history and the philosophy of law.⁸² In the case of the former, there has never been a single monolithic theory that we might call a universal theory of history, though many have attempted to create one.⁸³ The study and recitation of history as a subject of intellectual curiosity has often had a normative quality meant to demonstrate the "universal" moral values of a society rather than a simple recording of

⁷⁷ See, e.g., *Myers*, 272 U.S. at 110-20, 130-32, 136-37.

⁷⁸ See *Scalia Talk—Legislative History*, *supra* note 68.

⁷⁹ *Myers*, 272 U.S. at 108.

⁸⁰ *Id.* at 110-20.

⁸¹ See discussion *infra* Part III.C.

⁸² It would be nearly impossible to write an exhaustive list of such works. However, many seminal works have been produced by historians, jurists, and philosophers over time which include some of the following. CARR, *supra* note 2; G. F. HEGEL, *THE PHENOMENOLOGY OF SPIRIT* (A.V. Miller, trans. 1977) (1807); E.L.A. HART, *THE CONCEPT OF LAW* (1961); RONALD DWORKIN, *LAW'S EMPIRE* (1986).

⁸³ See, e.g., FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992); KARL MARX, *DAS KAPITAL* (1867); VATICAN COUNCIL, GEORGE H. TAVARD, *DE DIVINA REVELATIONE: THE DOGMATIC CONSTITUTION ON DIVINE REVELATION OF VATICAN COUNCIL, PROMULGATED BY POPE PAUL VI* (Paulist Press 1966); FERNAND BRAUDEL, *THE MEDITERRANEAN AND THE MEDITERRANEAN WORLD IN THE AGE OF PHILIP II* (1949) (work pioneering the *longue durée* methodology promoted by historians of the *Annales* school of historiography); many other historians and philosophers like Hegel, Kant, Nietzsche, and Habermas have attempted to create a universalizable history throughout the centuries.

facts.⁸⁴ Michele Campopiano describes what he calls the “universal histories” across cultures and historical epochs, saying:

Different notions of totality have developed in different cultural contexts throughout history. Ideas of chronological totality, for example, make it possible to see the history of the world as a unity. Creation myths offer a point of departure for some narratives, with an act of the gods establishing the unity of the world. Some Babylonian histories, for example, begin their narratives with the creation of the world: the Royal Chronicle spans a period from the creation to the middle of the eighth century BC. Greek and Roman models provided the theoretical foundations of medieval notions of spatial and chronological totality. To achieve a sense of totality, Greek historians developed categories to narrate the history of the world as a series of events belonging to the same metaphysical order.... Plato, for example, argued that the whole is more than the sum of its parts; and Aristotle suggested that the whole has a cause that actually creates its unity or wholeness, and that eventually the wholeness of something becomes its purpose.⁸⁵

Works of history spanning the millennia, by authors from Thucydides to Francis Fukuyama, have often been infused on some level with a moral element that tries to demonstrate to their readers how the world ought to be or ought to have been, even when cloaked in descriptive terms

⁸⁴ Antonia Gransden, *Propaganda in English medieval historiography*, 1 J. OF MEDIEVAL HISTORY 363 (1975); Alex Pollok, *Roman Propaganda in the Age of Augustus* (2017) (Senior Thesis, Dominican University of California) (on file with Dominican Scholar, Dominican University of California).

⁸⁵ MICHELE CAMPOPIANO, *UNIVERSAL CHRONICLES IN THE HIGH MIDDLE AGES 4-5* (2017); *but see* ARISTOTLE, *POETICS* chapter IX (S.H. Butcher trans; Project Gutenberg 2008) (c.335 B.C.) (ebook).

The poet and the historian differ not by writing in verse or in prose. The work of Herodotus might be put into verse, and it would still be a species of history, with metre no less than without it. The true difference is that one relates what has happened, the other what may happen. Poetry, therefore, is a more philosophical and a higher thing than history: for poetry tends to express the universal, history the particular. By the universal, I mean how a person of a certain type will on occasion speak or act, according to the law of probability or necessity; and it is this universality at which poetry aims in the names she attaches to the personages.

which purport to tell how the world really is.⁸⁶ Even the great historians of the Enlightenment and Victorian eras like Gibbons and Carlyle, who purported to write history in a more “scientific” and unbiased manner, infused their works with the politics of their times and their own politics.⁸⁷ Some of the greatest modern historians who poured through thousands of primary source records to create their synthesized histories, such as Jules Michelet, Henry Adams, and Karl Marx, were positively dripping in contemporary political and social commentary and personal bias.⁸⁸ Does this mean that we must dismiss all history as useless for its lack of absolute objectivity? Certainly not.

What this tells us is that any attempt to create a truly objective and universalizable history, even of a very short time period or of a small group of people, is doomed to failure, despite the best efforts of the most seemingly objective historians.⁸⁹ This is because the diversity of opinion in any era, and the very presence of ideological divergence within a given society, necessarily negates any universalizable historical principle and forces the historian into, as Aristotle articulated, the realm of the “particular.”⁹⁰ Large-scale “universalist” accounts of history are therefore flawed because they cannot possibly contain even a fraction of the diversity of opinions within a given era and must be bound to a particular ideology of the author’s choosing.⁹¹ For there to be a history composed only of “great men” as described by Carlyle, for example, it becomes the historian’s job to universalize the particular and choose who belongs in the pantheon of so-called “great men.”⁹²

While we may still gain valuable knowledge from reading the works of the hundreds of historians who tried to, as E.H. Carr put it, “intone the

⁸⁶ See, e.g., Fukuyama, *supra* note 83, at 12 (“As we reach the 1990s, the world as a whole has not revealed new evils, but has gotten better in certain distinct ways. Chief among the surprises that have occurred in the recent past was the totally unexpected collapse of communism throughout much of the world in the late 1980s.”).

⁸⁷ See, e.g., EDWARD GIBBON, 4 THE RISE AND FALL OF THE ROMAN EMPIRE (1776); THOMAS CARLYLE, THE FRENCH REVOLUTION: A HISTORY (1837); THOMAS CARLYLE, ON HEROES, HERO-WORSHIP, & THE HEROIC IN HISTORY (1841).

⁸⁸ See, e.g., JULES MICHELET, *Histoire de France*, LES GRANDES MONUMENTS DE L’HISTOIRE (1874); JULES MICHELET, LA SORCIERE (1862); KARL MARX AND FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO: A MODERN EDITION (Eric Hobsbawm, trans; Verso 2012); HENRY ADAMS, THE HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATIONS OF THOMAS JEFFERSON AND JAMES MADISON (1889-1891).

⁸⁹ See *supra* notes 83-89 and accompanying text.

⁹⁰ ARISTOTLE, *supra* note **Error! Bookmark not defined.**

⁹¹ MCGINNIS & RAPPAPORT, *supra* note 5, at 7-8; Chemerinsky, *supra* note 9, at 44-46.

⁹² CARLYLE, *supra* note 87.

magic words ‘*Wie es eigentlich gewesen*’ like an incantation,”⁹³ problems arise when we apply historical analysis too strictly to the practice and interpretation of law. Because the historian has no duty to put his arguments into practice, the historian may avoid the “infinite depth to historical reality” and instead choose to focus solely on the particulars of history; this is not so in the case of a judge and their duties relating to the law.⁹⁴ The judge must take the law and interpret it in a way that universally impacts all within their jurisdiction; in the case of federal judges, potentially the entire nation.⁹⁵ Legal scholar David T. Hardy put it this way:

Historians are free to regard constitutional history as “an ongoing argument,” where one can conclude that the evidence is simply “too ambiguous to admit of a clear answer.” They do not “consider it their job to establish the correct or best readings of constitutional texts,” but “expect the meanings of texts to be ambiguous or indeterminate.” A court, in contrast, must find meaning. A historian can conclude that a constitutional phrase had multiple,

⁹³ CARR, *supra* note 2, at 9 (translated by Carr as to “show how it really was”); *see also* WILLIAM F. PATRY, 2 PATRY ON COPYRIGHT §4:4. Protection for historical facts and interpretations—Historical facts (for a brief explanation of the usage of Leopold Ranke’s line “*Wie es eigentlich gewesen*” by political historians and historiographers).

⁹⁴ *See* Daniel Little, *Philosophy of History*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter 2020), <https://plato.stanford.edu/entries/history/#HisRep>;

Undoubtedly, all evaluative ideas are “subjective.” Between the “historical” interest in a family chronicle and that in the development of the greatest conceivable cultural phenomena which were and are common to a nation or to mankind over long epochs, there exists an infinite gradation of “significance” arranged into an order which differs for each of us. And they are, naturally, historically variable in accordance with the character of the culture and the ideas which rule men’s minds. But it obviously does not follow from this that research in the cultural sciences can only have results which are “subjective” in the sense that they are valid for one person and not for others.

MAX WEBER, ON THE METHODOLOGY OF THE SOCIAL SCIENCES 83-84 (Edward A. Shils & Henry A. Finch trans; The Free Press 1949).

⁹⁵ *See* Spencer E. Amdur & David Hausman, *Nationwide Injunctions and National Harm*, HARVARD L. REV. 49, 49-50 (2017); Alan M. Tammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. R. 67, 87 (2019) (“For example, in *Brown v. Plata*, the Supreme Court affirmed an injunction that effectively compelled California to reduce its prison population.”); *But see* Amanda Frost & Samuel Bray, *One for all: Are nationwide injunctions legal?*, JUDICATURE (Fall/Winter 2018), <https://judicature.duke.edu/articles/one-for-all-are-nationwide-injunctions-legal/> (“No one doubts that a court can issue an injunction that prevents the defendant from enforcing the law against the plaintiff anywhere in the United States, or indeed in the world. The debatable question is a court’s power to enjoin the defendant from enforcing the law against entities and individuals not before the court.”).

inconsistent, understandings, none of which can claim primacy; a court cannot.⁹⁶

Looking to the modern American originalist model, as defined within the *Heller-Dobbs* “original public meaning” framework, the task for the lawyer or judge must be to not only seek out and find historical sources but also to determine which ones are most valuable and legitimate in helping to determine the legal issue in the case.⁹⁷ In many cases, the lawyer or judge must do the impossible and create consistency and order out of the inconsistent discord of conflicting opinions surrounding the historical record pertaining to a particular issue.⁹⁸ This inevitably means that, in making their case, the lawyer will discard historical facts and documents from the argument, and the judge will have to determine from an inconsistent historical record which sources and figures are most legitimate and worthy for setting the trajectory of the law centuries later.⁹⁹ The Supreme Court did exactly this in the *Heller* decision in 2008 and quite frequently throughout the 2022 term by shaking the sieve and allowing only certain figures and historical sources to remain in the opinion with the stamp of the Court’s authority and legitimacy.¹⁰⁰ The historiographical battle between Justices Scalia (majority) and Stevens (dissenting) in *Heller* illustrates how the use of contradicting historical evidence and differing interpretations of the same sources reduces the legal argument to value judgements and a power struggle over which history can garner five votes.¹⁰¹

⁹⁶ David T. Hardy, *Lawyers, Historians, and “Law Office History,”* 46 CUMBERLAND L. REV. 1, 3 (2015) (internal citations omitted).

⁹⁷ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 15-28 (2012).

⁹⁸ *Id.*

⁹⁹ CARR, *supra* note 2, at 15-16; Justice Holmes argued in the introduction of his seminal work, “The Common Law,” that the common law system in use in the United States is one that develops and cannot be so easily restrained, ossified, and boiled down to mere facts, whether about “mathematics” as Holmes put it, or in terms of historical facts in the case of originalism. Holmes wrote:

The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the actions and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternatively consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.

OLIVER WENDELL HOLMES, JR; *THE COMMON LAW & OTHER WRITINGS* 1 (Neil H. Alford, et. al; ed; The Legal Classics Library 1982) (1881).

¹⁰⁰ See discussion *infra* Part III.

¹⁰¹ *District of Columbia v. Heller*, 554 U.S. 570, 580-584, 642-644 (2008) (compare the use of historical materials in the majority opinion and dissent).

C. Historical Fallacies in *District of Columbia v. Heller*

The actual “arrival” of originalism on the national scene came in Justice Scalia’s landmark opinion *Heller v. District of Columbia* in 2008.¹⁰² In that decision, the Supreme Court held for the first time in its history that the Second Amendment contained an individual right to carry firearms.¹⁰³ The Court struck down certain provisions in the Firearms Control Regulations Act of 1975, which limited residents of the nation’s capital to only keeping handguns that were “unloaded and disassembled or bound by a trigger lock.”¹⁰⁴ For the purposes of this Article, the importance of that opinion is the fact that not only had the majority heavily engaged with historical evidence and rested most of its argument on an almost exclusive historical justification of the individual right to carry firearms, but the dissent written by Justice Stevens also took up the originalist methodology and leaned just as heavily on the historical record for its constitutional insights.¹⁰⁵ Throughout both the majority opinion and the dissent in *Heller* there are many references to history that are both problematic and inadequately argued, such as Justice Scalia’s blatantly erroneous claim that the British monarch Charles II was a Catholic¹⁰⁶ and Justice Stevens’ assertion that none of the framers of the Constitution had any interest in the shortcomings of the “right to bear arms” guarantee in the English Bill of Rights of 1689.¹⁰⁷ While

¹⁰² *Id.*; Ben Garrett, *A Breakdown of D.C. v. Heller, A Closer Look at the Supreme Court’s 2008 Landmark Second Amendment Ruling*, THOUGHTCO, <https://www.thoughtco.com/overview-of-dc-v-heller-case-721336> (last updated May 4, 2019) (“The U.S. Supreme Court’s 2008 decision in *District of Columbia v. Heller* directly impacted only a handful of gun owners, but it was one of the most significant Second Amendment rulings in the country’s history.”); Haley Britzky, *Flashback: How the Supreme Court’s Heller decision reshaped gun rights*, AXIOS (July 18, 2018), <https://www.axios.com/2018/07/06/the-supreme-courts-most-important-gun-control-ruling-was-10-years-ago-today>.

¹⁰³ *Heller*, 554 U.S. at 636.

¹⁰⁴ Firearms Control Regulations Act, D.C. CODE ANN. § 7-2507.02 (West 2001) (held unconstitutional in part by *Heller*).

¹⁰⁵ *Heller*, 554 U.S. at 641 (Stevens, J., dissenting).

¹⁰⁶ *Id.* at 593 (“Under the auspices of the 1671 Game Act, for example, the Catholic Charles II had ordered general disarmaments of regions home to his Protestant enemies.”); while Charles II spent considerable time in “Catholic kingdoms” during the time of the Commonwealth and Protectorate in the wake of his father, Charles I’s execution, there is no evidence that Charles II had reigned as a Catholic as would his brother and successor James II. The king is said to have converted to Catholicism on his deathbed just hours before his death. See Bryan Cathcart, *Rear Window: The Merry Protestant Who Died a Catholic: A Royal Conversion*, THE INDEPENDENT (Jan. 16, 1994), <https://www.independent.co.uk/voices/letters/rear-window-the-merry-protestant-who-died-a-catholic-a-royal-conversion-1400361.html>; REBECCA FRASER, THE STORY OF BRITAIN 351-365 (2003); JACQUELINE RIDING, JACOBITES: A NEW HISTORY OF THE ’45 REBELLION 1-8 (2016).

¹⁰⁷ *Heller*, 554 U.S. at 664 (Stevens, J., dissenting) (“...Article VII [of the English Bill of Rights] was enacted in response to different concerns from those that motivated the Framers of the Second Amendment....”); see also David B. Kopel, *The Natural Right of Self-Defense: Heller’s Lesson for*

these historical discrepancies may seem *de minimis*, their inaccuracy, aggregated together with the fact that the sources were very selectively chosen (or excluded) and interpreted through the lens of a particular worldview, blurs the plain meaning of the text, as understood in their contemporary time and setting, to the point of becoming a totally subjective value judgement.

In the wake of that decision, bona fide historians debated and criticized both the majority's and the dissent's use of history in terms of its accuracy and how well the Court's interpretation of the chosen historical record tracked with current understandings of the time period in the field.¹⁰⁸ If, as Scalia and Stevens seemed to strongly imply in their opinions, that history is the binding element that constitutes the body of American constitutional law, then the historical analysis must be able to pass expert scrutiny. Neither side in this case can say that their opinions met that burden.¹⁰⁹ Even many of those who praised Justice Stevens' dissent for its more accurate and more rigorous historical analysis still had gripes about the logic of his argument as to whether the Second Amendment pertains only to

the World, 59 SYRACUSE L. REV. 235, 244 (2008) ("Justice Stevens dismisses the English Declaration of Right, and Blackstone's description thereof, by contending that they addressed issues which were not of concern to the Founders, who according to Stevens were only thinking about the state ratification debates involving state vs. federal powers over the militia. Stevens' view is contrary to that of James Madison, the author of the Second Amendment.").

¹⁰⁸ Jeffrey Shaman, *The Wages of Originalist Sin: District of Columbia v. Heller*, AM. CONST. SOC'Y ISSUE BRIEF 4 (2008), <https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/Shaman%20Issue%20Brief.pdf>;

...Justice Scalia's justification of that decision, while rooted in an analysis of the amendment's eighteenth-century context, was based on a fundamental misconception of the way that gun rights and militia service were understood and debated during the eighteenth century. It is not inherently bad history to say that the Second Amendment protects an individual right to bear arms; it is, however, bad history to declare that such a ruling was a return to the "original understanding" of the amendment.

Noah Shusterman, *Why Heller is Such Bad History*, DUKE CTR. FOR FIREARMS LAW (Oct. 7, 2020), <https://firearmslaw.duke.edu/2020/10/why-heller-is-such-bad-history/>.

¹⁰⁹ "Justice Scalia mischaracterized eighteenth-century society in two key ways. His claim that 'The "militia" comprised all males physically capable of acting in concert for the common defense' whitewashed a history of not only excluding people of color from the militia – able-bodied or not – but of using that militia to police the actions of non-whites and especially of the enslaved population. His opinion also reads at portions as if unaware that the militia was an official government institution under state authority (and colonial authority before that), and under the command of those governments." Shusterman, *supra* note 108; "And while Stevens' dissent was notably better history than the majority opinion, it is not perfect; nor is it entirely clear that, as Stevens claimed, the "'right to keep and bear arms' protects *only* a right to possess and use firearms in connection with service in a state-organized militia[.]" *Id.*

military or nonmilitary purposes.¹¹⁰ Regarding the use of history by the majority, legal scholar Saul Cornell criticized Scalia's reasoning: "[r]ather than vindicate plain-meaning originalism, Scalia's decision demonstrates that plain-meaning originalism is not a neutral interpretative methodology, but little more than a lawyer's version of a magician's parlor trick[.] [A]dmittedly clever, but without any intellectual heft."¹¹¹

A glaring example of this selective historical analysis in the majority opinion is the bold claim that only a single voice in the legal wilderness of the nineteenth century claimed that the Second Amendment "clearly conditioned the right to keep and bear arms upon service in the militia."¹¹² Justice Scalia not only makes this claim in the majority opinion but continued to argue it for years afterwards in public lectures, interviews, and other events.¹¹³ If one digs a little deeper into this seemingly innocuous historical fact, they will discover that the lone voice Scalia refers to in *Heller* is Benjamin Oliver, one of the most learned and influential American legal scholars of his day.¹¹⁴ Additionally, while Justice Scalia asserted in *Heller* that Justice Joseph Story never believed the Second Amendment connected with military service, the historical record seems to show that he in fact agreed with Benjamin Oliver, with whom he was good friends.¹¹⁵ In fact, Justice Story wrote a commentary regarding Congress' control over the militia that aligned quite well with the ideas espoused by Oliver:

It was nevertheless made a topic of serious alarm and powerful objection. It was suggested, that it was indispensable to the states, that they should possess the control and discipline of the militia. Congress might, under pretence of organizing and disciplining them, inflict severe and ignominious punishments on them. The power might be construed to be exclusive in [C]ongress. Suppose, then, that [C]ongress should refuse to provide for arming or organizing them, the result would be, that the states would be utterly without the means of defence [sic], and prostrate at the feet of the national government. It might also be said, that [C]ongress possessed the exclusive power to suppress

¹¹⁰ Nicholas J. Johnson, *Rights versus Duties, History Department Lawyering, and the Incoherence of Justice Stevens' Heller Dissent*, 39 FORDHAM URB. L. J. 1503, 1505-1507 (2012); Saul Cornell, *Originalism on Trial: The Use and Abuse of History in the District of Columbia v. Heller*, 69 OHIO ST. L. J. 625, 633 (2008).

¹¹¹ Cornell, *supra* note 110, at 626.

¹¹² *Heller*, 554 U.S. at 610.

¹¹³ The Hoover Institute, *Uncommon Knowledge with Justice Antonin Scalia*, YOUTUBE (Oct. 3, 2012), <https://www.youtube.com/watch?v=DaoLMW5AF4Y>.

¹¹⁴ Cornell, *supra* note 110, at 627-28.

¹¹⁵ *Id.*

insurrections, and repel invasions, which would take from the states all effective means of resistance. The militia might be put under martial law, when not under duty in the public service.¹¹⁶

Yet, despite such glaring problems with Scalia's historical reading and interpretation, the "history" put forth by the majority is what ultimately won the day.¹¹⁷

In his analysis of the *Heller* opinion, famed libertarian legal scholar Richard Epstein seems to treat Scalia's "historical essay" on the Second Amendment more like dicta than anything substantive.¹¹⁸ He largely ignores the historical context that Scalia builds up and gives two primary reasons why the majority is incorrect: first, by arguing that the majority ignores or misinterprets the "Guarantee Clause" of the U.S. Constitution;¹¹⁹ and second, by referencing Congress's limited authority in controlling and even calling up state militias.¹²⁰ Judge Richard Posner came to this same conclusion by criticizing the opinion's historical interpretation, noting that "Scalia's entire analysis rests on this interpretive method, which denies the legitimacy of flexible interpretation designed to adapt the Constitution (so far as the text permits) to current conditions. The irony is that the 'originalist' method

¹¹⁶ *Id.* at 628 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1201 (Da Capo Press, New York, 1970) (1833)). See also U.S. CONST. art. I, § 8, cl. 15 & 16 ("To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress").

¹¹⁷ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹¹⁸ Richard A. Epstein, *The Libertarian Gun Fallacy*, HOOPER INST. (Jan. 31, 2012), <https://www.hoover.org/research/libertarian-gun-fallacy>.

¹¹⁹ U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."); U.S. CONST. art. I, § 15-16. ("(15) To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions; (16) To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress....").

¹²⁰ U.S. CONST. amend. XIV. ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); see also Epstein, *supra* note 118 ("The Fourteenth Amendment did not give the federal government the power to usurp state functions by passing laws that it could not pass prior to its adoption. But it did supply a major check against state laws that could be enforced both by Congress through "appropriate" regulation and through the courts.").

would have yielded the opposite result.”¹²¹ Instead, like Epstein, Posner turns to a more textualist approach that is unburdened by historical interpretation.¹²²

This act of parsing the Second Amendment’s language for its meaning is the type of “lawyers’ work” that courts are meant to engage in.¹²³ Unfortunately, what is increasingly happening at the Supreme Court and other appellate courts, both state and federal, is that the courts engage with the historical record in a shortsighted manner, thereby engaging in subjective “fact-finding” with facts that are often so temporally remote as to bear little insight on the matter at hand. For example, the historical analysis and interpretation in *Heller*, which takes up an overwhelming majority of the opinion, is in the end distilled to very little in terms of its usefulness, significance, and relevance to our understanding of the meaning of the Second Amendment.

IV. THE PROBLEMS WITH SEARCHING FOR MEANING IN THE HISTORICAL RECORD

A. *Originalist Jurisprudence and the Dobbs Court*

In the years since *Heller* was decided, the impact and influence of originalism has only increased.¹²⁴ Where at first Justice Scalia was the only espoused originalist on the Supreme Court, there are now at least three self-described originalists,¹²⁵ two who have strongly implied leanings towards that theory¹²⁶ and at least two who, while they seem to oppose its rationales,

¹²¹ Richard Posner, *In Defense of Looseness*, THE NEW REPUBLIC (Aug. 27, 2008), <https://newrepublic.com/article/62124/defense-looseness>.

¹²² *Id.*

¹²³ Pepperdine Caruso School of Law, *Conversation with Antonin Scalia*, YOUTUBE (Feb. 16, 201), https://www.youtube.com/watch?v=zPNxqr_5_gY.

¹²⁴ John O. McGinnis, *The Rise of the Culture of Originalism*, LAW AND LIBERTY (Mar. 30, 2018), <https://lawliberty.org/the-rise-of-the-culture-of-originalism/>; James R. Rogers, *Originalism’s Expanding Popularity*, LAW AND LIBERTY (Oct. 15, 2019), <https://lawliberty.org/originalisms-expanding-popularity/> (“...there’s an openness to identifying oneself as an originalist, even among liberal academics, that did not exist even a few years ago.”); Eric Posner, *Why Originalism is so Popular*, THE NEW REPUBLIC (Jan. 14, 2011), <https://newrepublic.com/article/81480/republicans-constitution-originalism-popular> (“...today originalism has made headway in the courts and ascended in the political scene, to the point where the leaders of the House of Representatives spent their first hours in session paying homage to it.”); Clifford Winston, *Why has Originalism Thrived while Supply-Side Economics Withered?*, BARRON’S (Oct. 3, 2022), <https://www.barrons.com/articles/originalism-supply-side-economics-constitution-51664812148>.

¹²⁵ Hayward, *supra* note 48; Tarm, *supra* note 60; Gorsuch, *supra* note 60.

¹²⁶ See Neil S. Siegel, *The Distinctive Role of Justice Alito: From a Politics of Restoration to a Politics of Dissent*, 126 YALE L. J. 164, 166-67 (2016) (“Although he has described himself as a ‘practical originalist’ on the ground that he believes ‘the Constitution means something and that

have nonetheless demonstrated their respect for it and have used its methodologies in their opinions.¹²⁷ Throughout his tenure on the Court, Scalia preferred to call himself a “faint-hearted” originalist, meaning that he would follow originalist jurisprudence only so far as the theory was workable, stating that there are some precedents and doctrines that are so well-entrenched that originalism must step aside and let *stare decisis* take the lead.¹²⁸ In contrast, this Court seems to be not so faint-hearted in its defense of originalism.¹²⁹ While divergences still exist between the Justices who adhere to this school of thought,¹³⁰ there remains a strong predictive trend to their methodologies and judicial outcomes that may allow us to speak of a distinct post-Scalia originalist jurisprudence that differs from the one touted by the late Justice.¹³¹ It then becomes necessary to discuss the differences manifest across the differing Justices and how the Court’s

that meaning doesn’t change,’ his conduct on the Court suggests that the emphasis should be placed on the qualifier ‘practical.’ The higher the level of generality of the originalist inquiry, the less actual difference there is between originalism and living constitutionalism.”) (internal citations omitted); see also Asher, *supra* note 60; Will Baude, *Kavanaugh on Halfway Originalism*, THE VOLOKH CONSPIRACY (Oct. 20, 2022), <https://reason.com/volokh/2022/10/20/kavanaugh-on-halfway-originalism/>. (“Justice Kavanaugh: . . . You couldn’t just say, oh, let’s get rid of all those cases because they’re mislabeled without thinking about the other clauses . . . [that] might pick up that same principle.”).

¹²⁷ Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg>; Adam Liptak, *Justice Jackson Joins the Supreme Court, and the Debate Over Originalism*, N.Y. TIMES (Oct. 10, 2022), <https://www.nytimes.com/2022/10/10/us/politics/jackson-alito-kagan-supreme-court-originalism.html> (“At her confirmation hearings in March, Ketanji Brown Jackson declared herself to be an originalist, meaning, she explained, that she would interpret the Constitution based on how it was understood at the time it was adopted.”).

¹²⁸ Scalia, *supra* note 8, at 864.

¹²⁹ Nina Totenberg, *The Supreme Court is the most conservative in 90 years*, NPR (July 5, 2022), <https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative> (“The data tell the story. The court produced more conservative decisions this term than at any time since 1931, according to statistics compiled by professors Lee Epstein of Washington University in St. Louis and Keven Quinn of the University of Michigan. In an astounding 62% of the decisions, conservatives prevailed, and more importantly, often prevailed in dramatic ways.”); Erwin Chemerinsky, *Chemerinsky: Originalism has taken over the Supreme Court*, ABA JOURNAL (Sept. 6, 2022, 8:00 AM), <https://www.abajournal.com/columns/article/chemerinsky-originalism-has-taken-over-the-supreme-court>. [hereinafter *Chemerinsky article*], see *supra* note 60 and accompanying text.

¹³⁰ See *Bostock v. Clayton County*, 590 U.S. ___ (2020) (Gorsuch and Alito part ways in their interpretation of Title VII of the Civil Rights Act of 1964 as to whether the word “sex” includes discrimination based on sexual orientation or transgender status).

¹³¹ Chemerinsky, *supra* note 129; Oriana Gonzalez & Danielle Alberti, *The political leanings of the Supreme Court Justices*, AXIOS (June 24, 2022), <https://www.axios.com/2019/06/01/supreme-court-justices-ideology>; Laura Bronner & Elena Mejia, *The Supreme Court’s Conservative Supermajority is Just Beginning to Flex Its Muscles*, FIVETHIRTYEIGHT (July 2, 2021), <https://fivethirtyeight.com/features/the-supreme-courts-conservative-supermajority-is-just-beginning-to-flex-its-muscles/>.

changing membership has affected its analysis of even long-standing judicial doctrines.¹³²

The Supreme Court's 2021 term has proven to be the most conservative lineup of Justices since the 1930s.¹³³ Until the appointment of Neil Gorsuch in 2017, there were only two Justices who openly adopted originalist beliefs and one who, while not openly stating his position as an originalist, very often sided with the originalists and their rationales. With the elevation of Gorsuch from the 11th Circuit Court of Appeals to the Supreme Court, and later, the appointment of Amy Coney Barrett, another self-described originalist, for the first time in its history the Court contained a powerful bloc of originalist Justices.¹³⁴ But is this Court that much different than the one that decided *Heller* in 2008? Has the Court altered its approach to its use and interpretation of historical sources?

The self-proclaimed originalists of the *Dobbs* Court in 2022 have all, in some form or another, expressed some manner of fealty to the judicial reasoning of Antonin Scalia, seemingly believing that they are his ideological heirs on the court.¹³⁵ Amy Coney Barrett said of the late Justice that “[h]is judicial philosophy is mine, too,”¹³⁶ and echoed his sentiments regarding the tension between originalism and *stare decisis* in repeating his statement: “I am a textualist. I am an originalist. I am not a nut.”¹³⁷ Her writings and public appearances have demonstrated her affinity for the constitutional leanings of the late Justice,¹³⁸ but some believe that she is willing to go even farther than Scalia on a number of issues.¹³⁹ Columbia Law professor Jamal Greene has said that “[w]hile Barrett has suggested she

¹³² Caitlin Clark, *How will Biden's Nominee Change the Supreme Court?*, TEX. A&M TODAY (Feb. 25, 2022), <https://today.tamu.edu/2022/02/25/how-will-bidens-nominee-change-the-supreme-court/>; Adam Liptak, *A Transformative Term at the Most Conservative Supreme Court in Nearly a Century*, N.Y. TIMES (July 1, 2022) <https://www.nytimes.com/2022/07/01/us/supreme-court-term-roe-guns-epa-decisions.html?searchResultPosition=8> [hereinafter *A Transformative Term*].

¹³³ Liptak, *supra* note 132; see also *supra* note 131 and accompanying text.

¹³⁴ See *supra* notes 129-131 and accompanying text.

¹³⁵ See Tarn, *supra* note 60.

¹³⁶ *Id.*

¹³⁷ Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1931 (2017).

¹³⁸ *Id.*; Bryan Naylor, *Barrett, An Originalist, Says Meaning of Constitution 'Doesn't Change Over Time'*, NPR (Oct. 13, 2020), <https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time>.

¹³⁹ Barbara McQuade, *Amy Coney Barrett is Even More Extreme than Antonin Scalia*, N.Y. MAGAZINE INTELLIGENCER (Sept. 26, 2020); Jason Windett et al., *Amy Coney Barrett is conservative. New data shows us how conservative*, WA. POST (Oct. 22, 2020), <https://www.washingtonpost.com/politics/2020/10/22/amy-coney-barrett-is-one-most-conservative-appeals-court-justices-40-years-our-new-study-finds/>; Amelia Thomson-Deveaux, *How Conservative is Amy Coney Barrett?*, FIVETHIRTYEIGHT (Oct. 14, 2020, 5:58 AM), <https://fivethirtyeight.com/features/how-conservative-is-amy-coney-barrett/> (looking at Coney Barrett's judicial record while on the U.S. Court of Appeals for the 7th Circuit).

is nearly perfectly aligned with Scalia . . . she may be farther to Scalia’s right and nearer to current conservative Clarence Thomas.”¹⁴⁰

Justice Neil Gorsuch has also demonstrated an originalist streak that tracks closer to the original public meaning absolutist Clarence Thomas than Antonin Scalia, his immediate predecessor.¹⁴¹ In his first term, Gorsuch sided with Thomas in 100% of all cases, and in the 2018 term sided with him in 90% of all cases.¹⁴² While it may be far too early to determine with any sort of detail the jurisprudential trajectory of these newly-minted Justices, Barrett and the other conservatives on the bench have demonstrated that they are willing to side-step *stare decisis* with more ease than Scalia and that they are more in line with stricter “original public meaning” principles.¹⁴³ While an analysis of the liberal or conservative political slant of the Court is beyond the scope of this Article, this shift in the collective ideology of the Court evinces a much stronger adherence to the original public meaning doctrine as a binding principle in constitutional interpretation than in the past.¹⁴⁴

This greater adherence to the doctrine of “original public meaning” has limited jurists’ available source materials to the works of people within certain pre-determined and narrow categories (i.e., “Framers,” educated elites of a certain time period, certain gender and racial groups, etc.). Meanwhile, the extent to which jurists may abstract broad historical

¹⁴⁰ Michael Tarm, *What would a Justice Barrett mean for the Supreme Court? Here’s a look at her legal writings at Notre Dame*, CHICAGO TRIBUNE (Oct. 29, 2020, 8:48 AM), <https://www.chicagotribune.com/nation-world/ct-nw-amy-coney-barrett-roe-vs-wade-20201009-15bjekggkrbbclx36hesqm25qi-story.html>.

¹⁴¹ Nina Totenberg, *Justice Neil Gorsuch Votes 100 Percent of the Time with Most Conservative Colleague*, NPR (July 1, 2017, 12:25 PM), <https://www.npr.org/2017/07/01/535085491/justice-neil-gorsuch-votes-100-percent-of-the-time-with-most-conservative-collea>.

¹⁴² Patrick L. Gregory & Kimberly Strawbridge Robinson, *Gorsuch Charts Course as Originalist with Independent Streak*, BLOOMBERG LAW (April 11, 2019, 4:55 AM), <https://news.bloomberglaw.com/us-law-week/gorsuch-charts-course-as-originalist-with-independent-streak>.

¹⁴³ Justice Scalia would later disavow his so-called “fainthearted” originalist stance by the end of his judicial career. Mike Rappaport, *Justice Scalia, Fainthearted Originalism, and Nonoriginalist Precedent*, LAW & LIBERTY (Oct. 12, 2013), <https://lawliberty.org/justice-scalia-fainthearted-originalism-and-nonoriginalist-precedent/>; Ariane de Vogue, *The Supreme Court just threw the idea of settled law out the window*, CNN (June 28, 2022), <https://www.cnn.com/2022/06/28/politics/supreme-court-stare-decisis-precedent/index.html> (“Last week, Trump’s three nominees, Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett, provided the necessary votes to overturn Roe in a 5-4 decision. In doing so, they have forever changed the calculations a judge will consider when contemplating whether to overturn precedent.”); Ann E. Marimow, et al., *How the Supreme Court ruled in the major decisions of 2022*, WASH. POST (June 30, 2022, 2:40 PM), <https://www.washingtonpost.com/politics/interactive/2022/significant-supreme-court-decisions-2022/>.

¹⁴⁴ *Supra* at 129-131 and accompanying text; Oriana Gonzalez, *Supreme Court’s next term could be just as contentious*, AXIOS (July 1, 2022), <https://www.axios.com/2022/07/01/supreme-court-cases-2022>.

interpretations from those sources and universalize this limited historical record expands enormously.¹⁴⁵

B. Was there an Originalism for the Framers?

If we are to discuss the idea of an “original intent” or “original public meaning” doctrine, we should ask ourselves if there was indeed a theory of originalist jurisprudence for the founding generation itself, and, if there was, what that theory of jurisprudence might have looked like. In terms of lineage, the Constitution seems to have not one but two foundings: the first being when it was ratified by three-fourths of the states in 1791, and the second with the 1868 passage of the Fourteenth Amendment in the wake of the Civil War, the nation’s bloodiest conflict up to that point.¹⁴⁶ This Section will look to originalist doctrine in both of these crucial junctures in constitutional history and analyze them separately.

When looking to original intent or original public meaning during the first constitutional period, roughly 1791-1864, a problem arises that has previously been expressed: it has proven exceptionally difficult to pinpoint what group, body, or individuals we are speaking of as reference points for “original intent” or “original public meaning.”¹⁴⁷ Paul Brest, an anti-originalist scholar, concedes that “[a]t least since *Marbury*, in which Chief Justice Marshall emphasized the significance of the Constitution’s form of a written document, originalism in one form or another has been a major theme in American constitutional tradition.”¹⁴⁸ Nearly two and a half centuries later, this theme persists with zeal, exemplified by Justice Scalia in *Heller*,¹⁴⁹ Thomas in *Bruen*,¹⁵⁰ and Alito in *Dobbs*.¹⁵¹ However, by engaging in meta-originalism, a thought experiment that applies an originalist approach to

¹⁴⁵ CARR, *supra* note 2, at 31-34; see also JACQUES DERRIDA, ON GRAMMATOLOGY (Gayatri Chakravorty Spivak, 2016) (1976); Leonard Lawlor, *Jacques Derrida*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/derrida/#Dec> (last edited Aug. 27, 2021) (“In ‘Force of Law,’ Derrida says that deconstruction is practiced in two styles.... These ‘two styles’ do not correspond to the ‘two phases’ in the earlier definition of deconstruction. On the one hand, there is the genealogical style of deconstruction, which recalls the history of a concept or theme. Earlier in his career, in *Of Grammatology*, Derrida had laid out, for example, the history of the concept of writing. But now what is at issue is the history of justice.”); MICHEL FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE: AND A DISCOURSE ON LANGUAGE (A.M. Sheridan Smith trans; Vintage Books, 1972) (1969).

¹⁴⁶ ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 256-257 (2019).

¹⁴⁷ Brest, *supra* note 46, at 204.

¹⁴⁸ *Id.* at 214-215.

¹⁴⁹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹⁵⁰ *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

¹⁵¹ *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022).

originalism, we find that the framers themselves largely rejected the use of their own words as a perpetual binding authority.¹⁵²

The place where many anti-originalists begin their arguments from history is a letter written by Thomas Jefferson to James Madison in 1789, in which the future president denigrates the idea of the perpetuity of constitutional provisions.¹⁵³ He writes:

I set out on this ground, which I suppose to be self evident, “that the earth belongs in usufruct to the living”: that the dead have neither powers nor rights over it. The portion occupied by an individual ceases to be his when [he] himself ceases to be, and reverts to the society... Each successive generation would, in this way, come on, and go off the stage at a fixed moment, as individuals do now. Then I say the earth belongs to each of these generations, during it's [sic] course, fully, and in their own right. The 2d. generation receives it clear of the debts and incumberances [sic] of the 1st. the 3d of the 2d. and so on... On similar ground it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. They are masters too of their own persons, and consequently may govern them as they please. But persons and property make the sum of the objects of government. The constitution and the laws of their predecessors extinguished then in their natural course with those who gave them being. This could preserve that being till it ceased to be itself, and no longer. Every constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right.¹⁵⁴

¹⁵² Erwin Chemerinsky, *Even the Founders Didn't Believe in Originalism*, THE ATLANTIC (Sept. 6, 2022), <https://www.theatlantic.com/ideas/archive/2022/09/supreme-court-originalism-constitution-framers-judicial-review/671334/>. [hereinafter *Chemerinsky—Founders*]; see also Ilan Wurman, *The Founders' Originalism*, NATIONAL AFFAIRS (Spring 2014), <https://www.nationalaffairs.com/publications/detail/the-founders-originalism> [hereinafter *Founders' Originalism*].

¹⁵³ Thomas Jefferson, *Letter from Thomas Jefferson to James Madison Sept. 6, 1789*, THE PAPERS OF THOMAS JEFFERSON (PRINCETON U. PRESS 1958) VOLUME 15:27 MARCH 1789 TO 30 NOVEMBER 1789 (Feb. 20, 2023), <https://jeffersonpapers.princeton.edu/selected-documents/thomas-jefferson-james-madison>.

¹⁵⁴ *Id.*

This statement from Jefferson, undoubtedly a figure considered to be in the pantheon of the “founding generation,” has been largely ignored or dismissed by originalists in their historicist interpretations of the Constitution.¹⁵⁵ One argument for the dismissal of Jefferson’s letter is the fact that he was not a member of the Constitutional Convention, nor a member of the first Congress that voted to ratify the Bill of Rights.¹⁵⁶ However, this argument is a particularly weak one as the most thoroughly originalist opinions from the most recent Supreme Court terms have cited historical figures much further removed from the 1789 proceedings in Philadelphia than was Jefferson.¹⁵⁷ A very short list of such figures cited in recent Supreme Court decisions includes William Blackstone (d. 1780), John Locke (d. 1704), Mathew Hale (d. 1676), Sir Edward Coke (d. 1634), and Henry de Bracton (d. c. 1268).¹⁵⁸ The omission of this source from the canon of legitimate sources by most originalists ignores not only the text of the letter itself but also the contextual background of the fact that as he wrote it, Jefferson was simultaneously helping to draft a new declaration of rights for France.¹⁵⁹ More so than any of the other founders, with the exception of perhaps Benjamin Franklin and John Adams, Jefferson had practical knowledge of the adverse effects of an unchanging and ossified political system as he observed the collapse of the Kingdom of France in the Revolution of 1789.¹⁶⁰

For there to be some non-purposivist reason to include some sources and dismiss others, there must exist some kind of objective standard outside of a value judgment by the Court with which we can determine the relational impact of the source on the drafting and original interpretation of the

¹⁵⁵ Donald F. Kettl, *Opinion: Thomas Jefferson has a clear message for the Supreme Court about the Constitution and ‘originalism,’* MARKET WATCH (last updated Oct. 31, 2020), <https://www.marketwatch.com/story/thomas-jefferson-has-a-clear-message-for-the-supreme-court-about-the-constitution-and-originalism-11603988774> (“Jefferson and the other founders never intended the Constitution to be frozen in stone as a perpetual artifact. James Madison, the Constitution’s principal author, wrote to Jefferson in 1790 that regular changes would prove “a salutary aid to the most rational Government in the most enlightened age.”); *but see Originalism: Historic and Philosophic Roots*, THE FEDERALIST SOCIETY, <https://fedsoc.org/no86/module/originalism-historic-and-philosophic-roots> (last visited Dec. 20, 2022) (“Thomas Jefferson wrote a letter to James Madison in 1789 in which he said that the earth belongs to the living. The earth belongs to the living, not to the dead. . . . Jefferson’s letter has often been quoted for the proposition that we should not be bound by the dead hand of the past, by the dead hand of the Constitution. . . . But what people forget is Madison’s response. In Madison’s reply to Jefferson, Madison wrote, “If the earth be the gift of nature to the living, then their title can extend to the earth in its natural state only. The improvements made by the dead like the Constitution form a debt against the living who take the benefit of them.”).

¹⁵⁶ Meacham, *supra* note 29, at 211-212.

¹⁵⁷ *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct 2228, 2249 (2022); *District of Columbia v. Heller*, 554 U.S. 570, 582-83, 594 (2008).

¹⁵⁸ *Dobbs*, 142 S. Ct. at 2249-2250.

¹⁵⁹ DUMAS MALONE, *JEFFERSON AND THE RIGHTS OF MAN* 222-225 (1951).

¹⁶⁰ *Id.* at xvi-xviii.

Constitution: a sort of proximate cause of constitutional interpretation.¹⁶¹ Whether we use the “original intent” or “original public meaning” framework, the issue arises as to whether or not the framers or the general population of eighteenth-century America actually looked to and took the interpretation of their statutes and constitutions from these distant sources.¹⁶² How much of an impact did Blackstone and others have on the collective legal mind of English America?¹⁶³

The historical research has shown that at the time of the ratification of the Constitution, there existed a dearth of English legal sources in British America.¹⁶⁴ Indeed, the first American printing of Blackstone’s *Commentaries on the Laws of England*, perhaps the most popular English legal treatise of its day, did not occur until 1771 in Philadelphia.¹⁶⁵ It is true that, as far back as 1687, there were those like William Penn who made comments in writing about works like Edward Coke’s *Institutes*, but these accounts are exceedingly rare until the early nineteenth century when a number of distinctly American scholars, like James Kent and Mathew Cooley, wrote their influential treatises.¹⁶⁶

In his study of colonial and early republican law libraries in America, historian Herbert Johnson documented the collections of the private law libraries of figures like Thomas Jefferson, John Adams, John Guest, and Theophilus Parsons.¹⁶⁷ He found that, in the twenty-two most prominent private law libraries, many of the volumes cited ad nauseum by the Supreme Court and other inferior courts simply did not appear in many

¹⁶¹ Chemerinsky—*Founders*, *supra* note 152.

¹⁶² Patricia Cline Cohen, *The Dobbs decision looks to history to rescind Roe*, WASH. POST (June 24, 2022, 11:02 PM), <https://www.washingtonpost.com/outlook/2022/06/24/dobbs-decision-looks-history-rescind-roe/>; *History, the Supreme Court, and Dobbs v. Jackson: Joint Statement from the AHA and the OAH (July 2022)*, AMERICAN HISTORICAL ASSOCIATION (July 2022), [https://www.historians.org/news-and-advocacy/aha-advocacy/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah-\(july-2022\)](https://www.historians.org/news-and-advocacy/aha-advocacy/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah-(july-2022)); *Explaining SCOTUS’s Abortion Decision in Dobbs v. Jackson Women’s Health Organization*, LEAGUE OF WOMEN VOTERS, <https://www.lwv.org/blog/explaining-scotuss-abortion-decision-dobbs-v-jackson-womens-health-organization> (last updated July 22, 2022).

¹⁶³ See LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 59-60 (1973); CHARLES WARREN, *HISTORY OF THE AMERICAN BAR* 157-161 (1911); ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* (1964); PAUL HAMLIN, *LEGAL EDUCATION IN COLONIAL NEW YORK* 73 (1939); *but see* KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 52 (1989).

¹⁶⁴ Morris L. Cohen, *Legal Literature in Colonial Massachusetts*, 62 *PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS* 243-45 (1984).

¹⁶⁵ *Id.* at 243.

¹⁶⁶ See, e.g., MATHEW COOLEY, *CONSTITUTIONAL LIMITATIONS* (Neill H. Alford, et. al; eds; The Legal Classics Library 1987) (1868); JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (Jon Roland ed. 2002) (1826).

¹⁶⁷ HERBERT JOHNSON, *IMPORTED EIGHTEENTH-CENTURY LAW TREATISES IN AMERICAN LIBRARIES, 1700-1799* xxxix-xlvi (1978).

of these collections.¹⁶⁸ For instance, William Blackstone's *Commentaries on the Laws of England* appear in less than half of the collections (11), Sir Edward Coke's *Commentary upon Littleton* appears a few more times (13), and Mathew Hale's *History of the Common Law* appears in far fewer (6).¹⁶⁹ A pattern of these "authoritative" works appearing in relatively few major private law libraries during the colonial period and early republic can be found throughout Johnson's compiled bibliographies and charts.¹⁷⁰ In the case of Blackstone, some have challenged his perceived doctrinal authority in America and argued that his influence (and that of his famous *Commentaries*) over the minds of the framers and the direction of American judicial and legislative life has been widely overblown.¹⁷¹ Martin Minot stated in one scholarly legal piece that:

Despite the differences in emphasis, sources, and styles, one conclusion is clear: Blackstone was far from the primary exponent of the common law, even years after 1772 and even among those with access to his work. The practical implications of this observation are equally clear. Blackstone was not the "oracle of the common law in the mind of the American Framers," and the legal community risks unrealistic distortions by continuing to rely on his work for understanding the Founding.¹⁷²

Thomas Jefferson himself denigrates the quality of Blackstone's work and expresses concern over its potential influence over young American lawyers in a letter to Judge John Tyler saying:

...Blackstone, whose book, altho' the most elegant & best digested of our law catalogue, has been perverted more than all others to the degeneracy of legal science. [A] student finds there a smattering of every thing [sic], and his

¹⁶⁸ *Id.* at 59-64. (In his work, Johnson lays out his methodology for research by saying, "This is a composite bibliography developed through the examination of extant eighteenth-century law libraries and the reconstruction of other libraries from surviving lists of estate inventories showing library holdings.... The books listed...are all part of identifiable collections of law books, either extant or represented by lists, which belonged to an American lawyer or judge.")

¹⁶⁹ *Id.* The presence of the 13th century treatise by Henry de Bracton which Justice Alito cited in *Dobbs* cannot be found in any of the collections that Johnson catalogued in his work. *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See Martin J. Minot, *The Irrelevance of Blackstone: Rethinking the Eighteenth-Century importance of the Commentaries*, 104 VA. LAW REV. 1360 (2019); see also Matthew Schafer, *William Blackstone is the Most Powerful Person You've Never Heard of*, MEDIUM (2020), <https://matthewschafer.medium.com/william-blackstone-was-not-that-great-b381d9554bac>.

¹⁷² Minot, *supra* note 171, at 1364.

indolence easily persuades him that if he understands that book, he is master of the whole body of the law.¹⁷³

What is interesting about Blackstone's influence on the modern U.S. Supreme Court is not its longevity but its surprisingly recent vintage.¹⁷⁴ Since 1990, the Supreme Court has cited Blackstone in its opinions at a rate not seen since a precipitous decline began in 1810, with its appearances "dwindling to obscurity" by the early twentieth century.¹⁷⁵ Blackstone appeared in about 2% of the Supreme Court's opinions between 1801 and 1830, and about 8% of the time when including references made in counsel's arguments.¹⁷⁶ The modern court, between 2000 and 2014, cited Blackstone's work approximately 8% of the time in just its opinions alone (not including arguments made by counsel).¹⁷⁷ In recent decades, the Supreme Court has seemingly created a distorted "fun house mirror" effect by misrepresenting the real level of influence the eighteenth-century legal scholar had.

However, even if we limit ourselves to the record of the Constitutional Convention and ratifying conventions and disregard the treatises and commentaries on the law available in colonial and early republican America, we encounter another challenge in finding a "binding original public meaning" doctrine at the time of the founding.¹⁷⁸ The problem arises when we scrutinize the source material of the period, as it shows that, among the small group of delegates and congressmen from 1789-92, there

¹⁷³ Letter from Thomas Jefferson to Judge John Tyler (June 17, 1812), U.S. National Archives, <https://founders.archives.gov/documents/Jefferson/03-05-02-0112>.

¹⁷⁴ Minot, *supra* note 171, at 1360.

¹⁷⁵ *Id.*

¹⁷⁶ Jessie Allen, *Reading Blackstone in the Twenty-First Century and the Twenty-First Century through Blackstone*, RE-INTERPRETING BLACKSTONE'S COMMENTARIES: A SEMINAL TEXT IN NATIONAL AND INTERNATIONAL CONTEXTS 3-4 (2014), https://scholarship.law.pitt.edu/cgi/viewcontent.cgi?article=1026&context=fac_book-chapters.

¹⁷⁷ *Id.*

¹⁷⁸ Brest, *supra* note 46, at 215-16;

How much discretion did an adopter intend to delegate to those charged with applying a provision? Consider, for example, the possible intentions of the adopters of the cruel and unusual punishment clause of the eighth amendment. They might have intended that the language serve only as a shorthand for the Stuart tortures which were their exemplary applications of the clause. Somewhat more broadly, they might have intended the clause to be understood to incorporate the principle of *eiusdem generis*-to include their exemplary applications and other punishments that they found or would have found equally repugnant.

Id. at 216; CHEMERINSKY, *supra* note 9, at 52-53; "Just what our forefathers did envision, or would have envisioned had they seen modern circumstances, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh." *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

was little which a majority of them could agree on.¹⁷⁹ Madison's notes from the Constitutional Convention, though somewhat unreliable, describe a scene where disagreement on nearly every issue was the norm.¹⁸⁰ While these records have been cited in countless opinions as evidence of the "will of the convention," it becomes clear when examining the fine details of the minutes and debates that there was no single "will" of the delegates except for that of the final text. Even here, many delegates poured in their conflicting opinions as to the "true meaning" of the provision.¹⁸¹

Andrew Bass, a delegate of the Virginia ratifying convention of 1788, observed in the debate surrounding the Constitution that "gentlemen of the law and men of learning did not concur in the explanation or meaning of the Constitution."¹⁸² Bass confessed that he could not understand it, although he flattered himself with the possession of common sense and reason.¹⁸³ Likewise, in that same convention, a debate broke out between James Iredell, a delegate and future Supreme Court Justice, and Timothy Bloodworth, a future Congressman and U.S. Senator from North Carolina, over the Supremacy Clause of the U.S. Constitution.¹⁸⁴ After a brief explanation and defense of the supremacy of the federal courts by Iredell, Mr. Bloodworth replies:

Mr. Chairman, I confess his explanation is not satisfactory to me—I wish the gentleman had gone further. I readily agree, that it is giving them [Congress] no more power than to execute their laws. But how far does this go? It appears to me to sweep off all the constitutions of the states.... It will produce an abolition of the state governments. Its sovereignty absolutely annihilates them.¹⁸⁵

¹⁷⁹ JAMES MADISON, *THE JOURNAL OF THE DEBATES IN THE CONVENTION WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES MAY-SEPTEMBER, 1787* (Gaillard Hunt ed; The Knickerbocker Press 1908) (1787).

¹⁸⁰ *Id.*

¹⁸¹ Brest, *supra* note 46, at 215-16; CHEMERINSKY, *supra* note 9, at 53 ("Virtually the entire record of the Constitutional Convention consists of James Madison's notes. Legal historian William Crosskey makes a persuasive case that there is a 'possibility that this testimony may have been, not inadvertently, but deliberately false and misleading as to what the various members had said.'").

¹⁸² Here the sentiments of Andrew Bass are summarized in the notes taken by James Madison at the Constitutional Convention on July 29, 1788. JAMES MADISON, *ANDREW BASS THINKS THE CONSTITUTION IS "UNCOMMONLY DIFFICULT, OR ABSOLUTELY UNINTELLIGIBLE"*; MACLAINE AND IREDELL RESPOND (1788), *reprinted in* THE DEBATE ON THE CONSTITUTION PART TWO 897 (1993) [hereinafter *Debates*].

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 899.

¹⁸⁵ *Id.* at 900.

Again, Iredell reiterates his defense of the Supremacy Clause and the power of the federal courts, to which Bloodworth replies:

This clause will be the destruction of every law which will come in competition with the laws of the United States. Those laws and regulations which have been or shall be made in this state, must be destroyed by it if they come in competition with the powers of Congress.¹⁸⁶

There are numerous accounts of similar and more heated debates in all the state conventions over various constitutional issues, but why mention them here if the document was ratified by every state?¹⁸⁷ Ultimately, these incidents demonstrate that, as Andrew Bass explained, even those people most learned in the law, who had the greatest access to interpretative resources and training, could not completely unify, and there was no abstract “will of the convention” as originalists tend to describe it.¹⁸⁸

Using this method to determine the true meaning of any single provision in the Constitution, let alone the whole document, becomes even more complicated when the scope is expanded to include the debates occurring within the individual state ratifying conventions. Those elected to attend were often at odds with the Constitution in its entirety.¹⁸⁹ What the current Supreme Court’s originalist jurisprudence seems to demand from the documents it cites as authorities is not in fact some Lockean empirical consensus as to the original meaning of various constitutional provisions but a sort of abstract Rousseau-esque “general will” of the convention.¹⁹⁰ It is clear from the historical record that for most provisions the delegates ratified, even those who voted in favor of them often held wildly different beliefs as to the “true meaning” of those clauses or provisions.¹⁹¹

¹⁸⁶ *Id.*

¹⁸⁷ “The time in which the constitution or government of a nation undergoes any particular change, is always interesting and critical. Enemies are vigilant, allies are in suspense, friends hesitating between hope and fear; and all men are in eager expectation to see what such a change may produce. But the state of our affairs at present, is of such moment, even to arouse the dead...” PHILANTHROPOS, ANTIFEDERALIST NO. 17 (1787), *reprinted in* The Antifederalist Papers 18-20 (Morton Borden, ed. 1965) (commenting on the level of disagreement and political discord surrounding the ratification of the federal Constitution among the several state ratifying conventions and invoking the specter of civil war) [hereinafter *The Antifederalist*].

¹⁸⁸ *Debates*, *supra* note 183, at 897.

¹⁸⁹ *Id.*; *The Antifederalist*, *supra* note 187.

¹⁹⁰ JOHN LOCKE, TWO TREATISES ON GOVERNMENT (David Berman ed; Orion Books 1993) (1698); J. J. ROUSSEAU, THE SOCIAL CONTRACT (The Easton Press 1991) (1762).

¹⁹¹ “Most previous founding seemed to have been the result of chance or edict of one all-powerful man, But the United States Constitution was framed by a numerous and diverse body of statesmen...” HERBERT J. STORING, WHAT THE ANTIFEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 3 (1995).

C. Justice Taney's Proto-Originalism in *Dred Scott*

Following the colonial and early republican period is the “second founding” of the Constitution with the ratification of the post-bellum amendments in the 1860s.¹⁹² The ratification of the Fourteenth Amendment fundamentally changed constitutional law and interpretation in the United States as it had been understood until that time.¹⁹³ The Amendment prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law...”¹⁹⁴ The incorporation of the states into the framework of the Bill of Rights, coupled with the existent Ninth Amendment, resulted in the notion that the Constitution afforded a “substantive due process” to those under its jurisdiction.¹⁹⁵ Under the “substantive due process” theory, “if a legislature passed any law that restricted vested rights or violated natural law, it exceeded all bounds of the social compact in restricting the freedom of some individuals.”¹⁹⁶ While some form of substantive due process had existed in the United States since at least the eighteenth century,¹⁹⁷ the first Supreme Court case that utilized a version of this theory to overturn an act of Congress was the anti-canon case of *Dred Scott v. Sandford*.¹⁹⁸ Because substantive due process first made its appearance in this universally reviled slave case, originalists have argued against the theory as a whole and pushed the idea that the Constitution protects only procedural due process when a person’s life, liberty, or property are placed in jeopardy by the government.¹⁹⁹

According to constitutional scholars Randy E. Barnett and Evan D. Bernick:

¹⁹² U.S. CONST. amends. XIII, XIV, XV.

¹⁹³ RANDY BARNETT & EVAN BERNICK, *THE ORIGINAL MEANING OF THE 14TH AMENDMENT: IT’S LETTER AND SPIRIT* 1, 41 (2022) [hereinafter *Original Meaning of 14th Amendment*]; see also RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 1-5 (1998); Thurgood Marshall Institute, *The 14th Amendment*, NAACP LEGAL DEFENSE FUND, <https://tminstitutelf.org/tmi-explains/thurgood-marshall-institute-briefs/tmi-briefs-the-14th-amendment/> (last visited March 15, 2023) (“The values embedded in the amendment represented a new beginning for our country....”).

¹⁹⁴ U.S. CONST. amend XIV.

¹⁹⁵ There is some debate among scholars as to whether a functional “substantive due process” doctrine in the modern sense existed in the pre-bellum United States (“Professor Ryan Williams... has argued that although before 1789 there was no substantive component to due process, antebellum courts developed a body of substantive due process law prior to the adoption of the Fourteenth Amendment by which courts would guarantee unenumerated rights deemed fundamental from infringement by the state or federal governments.”); see Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *YALE L. J.* 408, 454-70 (2010); but see John Hart Ely, *DEMOCRACY AND 18* (1980).

¹⁹⁶ JOHN E. NOWAK & RONALD D. ROTUNDA, *PRINCIPLES OF CONSTITUTIONAL LAW* 235 (2010).

¹⁹⁷ See *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

¹⁹⁸ *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

¹⁹⁹ Annenberg Classroom, *A Conversation on the Constitution: Judicial Interpretation*, YOUTUBE (Sept. 13, 2018), https://www.youtube.com/watch?v=5VNRxF_9VU8.

The dominant originalist view has long been that due process of law is solely a procedural guarantee that does not constrain the content of legislation. The proposition that the Due Process of Law Clauses of the Fifth and Fourteenth Amendments impose limits on the *content* or substance of federal and state statutes rather than merely guaranteeing a particular legal *process* prior to life, liberty, or property is called ‘substantive due process.’²⁰⁰

Justice Clarence Thomas’ concurrent opinion in the *Dobbs* decision demonstrated the trajectory of the current Court in the realm of Fourteenth Amendment substantive due process and how the “original public meaning” doctrine appears to be taking a front row seat in this development.²⁰¹ While Justice Alito gives some assurances in his majority opinion that most substantive due process rights gained under the Warren and Burger Courts are in little to no danger of being overturned, if the logic of the opinion is to be taken seriously and at its word, the argument must come out in Justice Thomas’ favor.²⁰² If the historical record is binding on the constitutionality of *Roe* and *Casey*,²⁰³ since there is no historical precedent for an unenumerated right to abortion in the Constitution, then there is little evidence lending itself to Justice Alito’s assertion that the right to an abortion is wildly different than the right to gay marriage,²⁰⁴ the right to engage in consensual sex acts,²⁰⁵ the right to privacy,²⁰⁶ or even the right of students to attend de-segregated schools.²⁰⁷ The methodology propelling this destruction of substantive due process in the courts has its foundation in the very selective historical analysis and interpretation of this new originalist Supreme Court.²⁰⁸

The case of *Dred Scott*, rightly viewed as an anti-canonical and shameful opinion, has been depicted as a counterpoint to critics of originalism. It is held up as a case in which the Taney Court’s racist values trumped the original meaning of the text and made a mockery of the

²⁰⁰ *Original Meaning of 14th Amendment*, *supra* note 193.

²⁰¹ *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct 2228, 2249 (2022) (Thomas, J., concurring).

²⁰² *Id.* at 2243.

²⁰³ *See id.*; *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

²⁰⁴ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

²⁰⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁰⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²⁰⁷ *Brown v. Board of Educ. of Topeka*, 349 U.S. 294 (1955).

²⁰⁸ *Supra* note 4 and accompanying text.

Constitution.²⁰⁹ However, a deeper look shows that the opinion's author, Chief Justice Roger B. Taney, had very much engaged in what today would be considered originalist methodology to come to his legal conclusions in that case.²¹⁰ Early in the opinion, Justice Taney channels the text of the Declaration of Independence to demonstrate that his opinion is in line with not only the original intent of the framers but also the original public meaning of the text.²¹¹ In it, he quotes the Constitution's soaring language: "[w]e hold these truths to be self-evident that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among them is life, liberty, and the pursuit of happiness."²¹² However, he immediately undercuts this line by stating:

But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; *for if the language, as understood in that day*, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation... This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language."²¹³

Even in the 1850s Taney appears to have a moment of clarity revealing that the fork in the road before him inevitably leads to two logical destinations: first, that the morality espoused by the framers in their writings and founding documents did not match the legal and constitutional reality of

²⁰⁹ Constitutional scholar Jamal Greene writes about the number of largely "debunked" Supreme Court cases known as the anti-canon, among which is *Dred Scott*, saying:

The degree to which we collectively renounce these decisions is not nearly in proportion to the outrageousness of their errors. Part of the reason for that is fundamental: the conceptual dichotomy described above, between judicial errors and damned judicial errors, is contingent and unstable in practice. What is surprising is that it is no less so with respect to the few cases that we all agree are wrong.

Jamal Greene, *The Anticanon*, 125 HARVARD L. REV. 405 (2011).

²¹⁰ *Dred Scott v. Sandford*, 60 U.S. 393, 410-11 (1857).

²¹¹ *Id.* at 410-11.

²¹² *Id.* at 410 (quoting the Declaration of Independence).

²¹³ *Id.* (emphasis added).

slavery that they created, or second, that the founders (and the general public at large during that era) were correct and even free black Americans were not entitled to citizenship under the Constitution.²¹⁴ Chief Justice Taney, to his shame, chose the latter.²¹⁵ His acknowledgement that the 1791 general public would have understood that the term “We the People” excluded African Americans was perhaps not the most outrageous historical claim to make in 1857, especially since it was based on the pro-slavery provisions of the Constitution and the various pro-slavery constitutional provisions and statutes enacted at the time.²¹⁶

In his work, *Southern Slavery and the Law 1619-1860*, legal historian Thomas Morris recalls the words of Reverend Morgan Godwyn in 1680: “[t]hese two words, Negro and Slave...[had] by custom grown Homogenous and Convertible; even as Negro and Christian, Englishman and Heathen, are by the like corrupt Custom and Partiality made Opposites.”²¹⁷ Morris’ extensively-researched work gives many further historical instances of just the type of historical thinking that Justice Taney cites in his opinion; the type of thinking that would have been generally accepted from the early seventeenth century to the time of the founding.²¹⁸ Justice Taney then cites the text of the Slave Importation Clause of the U.S. Constitution and reads a historical interpretation into it that buttresses his decision that black Americans could never be counted among its citizenry.²¹⁹ He writes that black Americans were “a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed,” given the plain meaning of the text of the document and the evidence of public opinion and understanding at the time of the founding.²²⁰ For these and many other reasons, which Justice Taney purports to back up with what appears to be the “historical record,” the Supreme Court denied any rights and privileges to any person of African

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Here, Justice Taney in his opinion alludes to the clauses of the Constitution that allow slavery as well as a series of state statutes which he claims proves the “otherness” of those of African descent living in the United States, both free and enslaved. He cites both early American and English history as evidence to support his argument. *Id.*; see also Maryland (ch. 13, section 5) (1717) (“that if any free negro or mulatto intermarry with any white woman, or if any white man shall intermarry with any negro or mulatto woman, such negro or mulatto shall become a slave during life....”), Massachusetts (ch. 6) (1705) (“if any negro or mulatto shall presume to smite or strike any person of the English or other Christian nation, such negro or mulatto shall be severely whipped, at the discretion of the justice before whom the offender shall be convicted”).

²¹⁷ THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW 1619-1860* 17 (1996).

²¹⁸ *Id.* at 17-57.

²¹⁹ U.S. CONST. art. 1, § 9 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight....”).

²²⁰ *Dred Scott v. Sandford*, 60 U.S. 393, 411 (1857).

descent in America, whether free or enslaved.²²¹ But why discuss this case that has been universally deemed a disgraceful anti-canon of Supreme Court history by legal scholars and practitioners of every political stripe? If nobody today accepts the truth of Justice Taney's reasoning or holding in the case, why should this case make an appearance in twenty-first century legal scholarship? It is because this case teaches an important lesson about methodology and evolving worldviews. Justice Taney accepted as true and legitimate only particular members of the eighteenth- and nineteenth-century American public, a narrow and artificially defined space,²²² so in order to reach the universally accepted conclusion that he was horrifically wrong, we must lean on a value system not of the nineteenth or eighteenth century but instead a more modern one.

D. Legitimacy and Historical Exclusion

Originalism engages in a modern and polite way of this practice of historical exclusivity when judges use historical sources from a narrow and largely unrepresentative portion of the American populace to write their opinions.²²³ One group that has been largely excluded from the aggregated "general will" of the period is African Americans.²²⁴ In all three of the aforementioned cases, there is extensive discussion of the legal opinions of

²²¹ *Id.* at 410-11.

²²² Justice Taney includes white Americans as obvious members of this legitimate group and conditionally and somewhat skeptically accepts members of Native American tribes into this group as citizens of foreign nations; although, as we have seen, he excludes black Americans of any status from this group on the basis of historical understanding and acceptance of this sub-section of the population within the United States from the 17th century. *Dred Scott*, 60 U.S. at 410-411. He refuses, however, to exclude other sub-sections of the population, like members of the Catholic faith, from the legitimate group worthy of citizenship, despite pronounced discrimination and exclusion from political processes throughout the 18th and 19th centuries. *Id.* Josh Zeitz, *When America Hated Catholics*, POLITICO (Sept. 23, 2015), <https://www.politico.com/magazine/story/2015/09/when-america-hated-catholics-213177/>;

It was never easy to separate the racial and religious components of anti-Catholic sentiment. Until the 1920s, America's doors were open to European immigrants, as long as they qualified under a statute passed in 1790 that reserved naturalized citizenship for "free white persons." Whether Southern and Eastern Europeans of darker hue—or all Catholics, whose presumed loyalty to Rome rendered them suspect candidates for democratic citizenship—qualified under the statute, seemed very much an open question.
Id.

²²³ CHEMERINSKY, *supra* note 9, at 92-105 ("Can the federal government blatantly discriminate based on race or sex or disability or sexual orientation? For an originalist, the answer *must* be yes.") (emphasis added).

²²⁴ Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. L. REV. 517 (2011); *see also* MCGINNIS & RAPPAPORT, *supra* note 5, at 107 ("The exclusion of most African Americans from the constitutional enactment process was undoubtedly an enormous failure of the supermajoritarian [sic] process.") [hereinafter *Originalism's Race Problem*].

the English common law treatise writers of the seventeenth and eighteenth centuries,²²⁵ yet very little attention is paid to the public opinion and the effect these constitutional provisions and statutes had on this sub-section of the American population.²²⁶ Legal scholar Jamal Greene writes that there is a central question as to “whether, and if so to what degree, a tension exists between African-American identity and originalism.”²²⁷ While he criticizes originalism, he veers clear of saying that African Americans cannot or should not be originalists and states: “I reject the illiberal notion that my own views should have much to say about the relationship between another’s race and her political or intellectual commitments.”²²⁸ Moreover, he briefly raises the issue of the legitimacy of a history-bound method of constitutional and statutory interpretation when that history all but banished African Americans and other significant groups from the law making process.²²⁹

We see examples of this historical exclusion in a series of history-laden “firearms” cases that have been decided by the Supreme Court since 2008, namely: *District of Columbia v. Heller*, *McDonald v. City of Chicago*, and *New York State Rifle and Pistol Association v. Bruen*.²³⁰ All of these opinions seek, and purport to find, the original public meaning of the Second Amendment and its limitations as the founding generation would have understood them to be.²³¹ In all of them, Justices Scalia and Thomas draw heavily from the traditional Anglo-American common law commentaries to direct their argument. However, like the jurists of the eighteenth and nineteenth century whom they so readily cite in their opinions, these and many other originalist judges ignore or distort the opinions of large segments of the population and their role in the formation of constitutional provisions and statutes.²³²

²²⁵ *Supra* notes 171 & 240-42 and accompanying text; *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct 2228, 2249-2250 (2022).

²²⁶ *Originalism’s Race Problem*, *supra* note 224, at 517.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 518 (“Accepting the authority of the original understanding of the Constitution requires one to accept that the ratifying process has significant democratic purchase.... The Constitution of 1787 was submitted to ratifying conventions intended to be representative of relevant members of the population, but, as we all know, those conventions largely excluded women, Indians, blacks, and those who did not own property.”).

²³⁰ *District of Columbia v. Heller*, 554 U.S. 570 (2008); *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Thomas, J., concurring) (although not a case directly about the Second Amendment but the Fourteenth Amendment Privileges and Immunities Clause, the case nonetheless revolves around the issue of firearms ownership and is heavily cited in the other two aforementioned cases).

²³¹ *McDonald*, 561 U.S. at 805-807 (Thomas, J., concurring).

²³² R. George Wright, *Originalism and the Problem of Fundamental Fairness*, 91 MARQUETTE L. REV. 687, 693-694 (2008).

For all the talk of the citizen militia's utility as a force against tyranny, seen in historical incidents from the English Civil War, Restoration, and Jacobite eras,²³³ originalist jurists only give a cursory mention, if any, to the near universal exclusion of both enslaved and free African-Americans from their American counterparts during the Revolution and later periods.²³⁴ As historians like Carol Anderson point out, these opinions ignore the militia's historic role in slave suppression activities, despite the fact that in many regions of the country, independence and union were considered to be reasonable sacrificial lambs for the preservation of racial hierarchy.²³⁵ This fact would be used as further ammunition by slave-holding legislators as the U.S. Constitution was being adopted. For example, Patrick Henry, in support of the Second Amendment, said that "the Continental Congress had asked for southern slaves to be armed."²³⁶

Notwithstanding the historical analyses of Justices Scalia, Alito, and Thomas in the cases mentioned *supra*, the historical record, when viewed through a wider lens, demonstrates that one of the biggest motivations for the inclusion of the Second Amendment was the fear that if the state militias were called up by Congress, they might leave slaves unopposed and better able to foment revolt.²³⁷ While some historians have criticized Anderson's work as overemphasizing the role of racial hostility in the creation of the

Our focus is instead on the intended virtual exclusion from any meaningful role in the constitutional adoption process of significant identified groups with basic interests at stake. This systematic virtual exclusion was intended to have particular results and, in any event, has systematically skewed constitutional law over time. *Id.* at 694.

²³³ *Heller*, 554 U.S. at 581-587.

²³⁴ MCGINNIS & RAPPAPORT, *supra* note 5, at 9-10.

²³⁵ CAROL ANDERSON, *THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA* 21 (2021) ("South Carolina's legislative assembly knew what it had to do a sit considered Lauren's proposal [to arm slaves] ...They were appalled and 'disgusted' that Congress would even recommend something so abhorrent as arming the enslaved. 'Not even imminent occupation could induce them to contemplate black enlistment.'").

²³⁶ *Id.* at 30 (2021); see also Elliot (ed.), *Speech by Patrick Henry on the role of state militias*, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, VOL. III 422 (1968) ("It [the Constitution] says, that 'no state shall engage in war, unless actually invaded.' If you give this clause a fair construction, what is the true meaning of it? What does it relate to? Not domestic insurrections, but war.... If there should happen an insurrection of slaves, the country cannot be said to be invaded."); Nicolaus Mills, *How Slave Owners Dictated the Language of the 2nd Amendment*, DAILY BEAST (Aug. 18, 2019), <https://www.thedailybeast.com/how-slave-owners-dictated-the-language-of-the-2nd-amendment> ("[Patrick] Henry feared that without checks upon it, Congress could undermine the ability of militias in Virginia and elsewhere in the South to suppress slave uprisings and pursue runaway slaves. The militia issue was important enough for Henry to see it as grounds for opposing ratification of the Constitution.").

²³⁷ ANDERSON, *supra* note 235, at 34-35 ("What the militia could do rather well...was keep slave owners safe....The Southern militias not only quelled rebellions; they were also there to prevent another Stono. They oversaw slave patrols and regularly searched the homes of the enslaved for weapons.").

Second Amendment,²³⁸ the corroborated historical evidence presented in her work at the very least weakens the idea of a universalizable contemporary “original public meaning.”

A similar exclusionary phenomenon was commented on at length after the release of Justice Alito’s opinion in *Dobbs v. Jackson Women’s Health Organization*, since many readers recognized a dearth of citations by women.²³⁹ Again, historical evidence makes up a great deal of this opinion, and the usual seventeenth and eighteenth century common law writings by Blackstone, Coke, and others make an appearance.²⁴⁰ However, not a single contemporary historical source cited in *Dobbs* has a female author, and only a single historical source even mentions an event that identifies a specific female (the alternative being generalized legal treatises on the subject of the legality of abortion).²⁴¹ Instead, the likes of Henri de Bracton, a legal scholar from the thirteenth century,²⁴² and Mathew Hale, a seventeenth-century Chief Justice of England who was infamous for executing women for witchcraft,²⁴³ are cited throughout the opinion.²⁴⁴ There is little questioning of what claim these figures have on the trajectory of modern American jurisprudence.²⁴⁵ As we have seen *supra*, even lauded scholars of the English common law like Blackstone had perhaps far less influence in dictating American common law at the time of the founding than they have been given credit for.²⁴⁶ As surveyed by historian Herbert Johnson, Hale’s work only

²³⁸ See Randall Kennedy, *Was the Constitutional Right to Bear Arms Designed to Protect Slavery?*, N.Y. TIMES (May 28, 2021), <https://www.nytimes.com/2021/05/28/books/review/the-second-carol-anderson.html> (“Because the centrality of racism to American history has often been obscured, revisions adding racial realism are urgently needed. Racism, however, for all its importance, is not the *only* major influence in the country’s affairs.”); Stephan P. Halbrook, *The Second Amendment was Adopted to Protect Liberty, Not Slavery: A Reply to Professors Bogus and Anderson*, 20 GEORGETOWN J. L. & PUB. POL’Y 575, 578-79 (2022).

²³⁹ See *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022); see also Alex Berke, *You know what’s missing from the Dobbs opinion? Women*, DAILY BEAST (Jun. 25, 2022, 5:11 A.M.), <https://www.thedailybeast.com/you-know-whats-missing-from-the-dobbs-opinion-women>; Saralyn Cruickshank, *Inside the ‘Dobbs’ Decision*, HUB (July 1, 2022), <https://hub.jhu.edu/2022/07/01/joanne-rosen-insight-dobbs-decision/>.

²⁴⁰ See generally *Dobbs*, 142 S. Ct. (2022) (citations to mid-19th century state statutes also constitute a fairly large portion of the historical sources in this opinion).

²⁴¹ The Court mentions that there are “few cases available from the early colonial period.” *Id.* at 2249-50 (“In 1732, for example, Eleanor Beare was convicted of ‘destroying the Foetus in the Womb’ of another woman and ‘thereby causing her to miscarry.’ For that crime and another ‘misdemeanor,’ Beare was sentenced to two days in the pillory and three years’ imprisonment.”).

²⁴² *Henry de Bracton*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/biography/Henry-de-Bracton> (last edited Jan. 01, 2022); Maxime Kovalewsky, *Sources et la Littérature de L’Histoire Sociale de L’Angleterre, au Moyen Age et a L’Epoque de la Renaissance*, *Les*, 6 REV. DROIT INT’L & LEGIS. COMP. 127 (1904).

²⁴³ Gilbert Geis, *Lord Hale, Witches, and Rape*, 5 BRIT. J. L. & SOC’Y 26, 26-27 (1978).

²⁴⁴ *Dobbs*, 142 S. Ct. at 2249-2251, 2254, 2268.

²⁴⁵ *Id.* at 2249.

²⁴⁶ Johnson, *supra* note 167, at 59-64.

appears in roughly half of the most prominent private law libraries in colonial America, and de Bracton's work does not appear on a single prominent colonial lawyer's shelf.²⁴⁷ Their inclusion in a modern American judicial opinion, at least in the case of de Bracton, would very likely have the framers of the Constitution scratching their heads in puzzlement and amazement.

However, even looking at some of the male authors that Justice Alito cites in his opinion, it seems that the majority took an even more extreme stance than those of the seventeenth or even thirteenth century.²⁴⁸ Reviewing the references to de Bracton, the purpose-driven historical interpretation becomes somewhat glaring, with the roles of jurist and historian collapsing in on themselves. In an attempt to demonstrate that the practice of criminalizing abortion was not just long-standing but positively antediluvian, Justice Alito quotes the medieval scholar's work saying, "Henry de Bracton's 13th-century treatise explained that if a person has 'struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide.'"²⁴⁹ Some historians have dismissed the Justice's narrowly tailored history by attacking both his construction of the quoted text (translated from Latin) and his legal interpretation of what the words would have meant when they were penned.²⁵⁰ Three such historians, Karl Shoemaker, Mireille Pardon, and Sara McDougall, said of Justice Alito's use of de Bracton:

The difficulty with the claim that "abortion was a crime" in the thirteenth century is that in the thirteenth century, and well beyond, neither the term "abortion" nor "crime" meant what Alito wants them to mean. When medieval authors defined the term 'aborsus' with any clarity or consistency, their definitions bore little resemblance to the modern definition of abortion... [de] Bracton's treatise, cited in the draft decision, deems abortion homicide only when the fetus is "already formed and animated."²⁵¹

²⁴⁷ *Id.* at 59-64.

²⁴⁸ Karl Shoemaker, et al., "Abortion was a Crime?" *Three Medievalists respond to "English cases dating all the way back to the 13th century corroborate the treatises' statements that abortion was a crime,"* LAW AND HISTORY REV. (Nov. 21, 2022), <https://lawandhistoryreview.org/article/abortion-was-a-crime-three-medievalists-respond-to-english-cases-dating-all-the-way-back-to-the-13th-century-corroborate-the-treatises-statements-that-abortio/>.

²⁴⁹ *Dobbs*, 142 S. Ct. at 2249.

²⁵⁰ Shoemaker, *supra* note 248.

²⁵¹ *Id.*

They also contest Justice Alito’s assertion that in medieval England, the common law classified abortion (especially that of a “pre-quickened fetus”) as a felony saying:

For medieval jurists and theologians the Latin “*crimen*” meant something more akin to sin. Medieval English lawyers used a different word for what we mean today by crime. They used the word “felony.” The difficulty this poses for Alito’s marshalling of the evidence is that there is no tradition, deeply rooted or otherwise, of prosecuting post-quickening abortions as felonies at common law in the medieval period.²⁵²

Given both the extreme remoteness of a legal scholar like de Bracton, even to those at the Constitutional Convention of 1788, and the historical dubiousness of Justice Alito’s interpretation of de Bracton’s work and of the legal framework of the late medieval period, it seems odd to include this source unless the goal is to create a manufactured image of temporal and ideological universality on the issue of abortion.²⁵³

While the scope of this Article is limited to the use and dangers of history as a superseding and binding authority and does not opine on the moral or judicial correctness of the various recent Supreme Court opinions, it should be said that the dissent in *Dobbs* at least places those most affected by the decision at the forefront of the argument.²⁵⁴ Like the cases mentioned above, the historical record cited in *Dobbs* illuminates the problems of historical exclusion and judicial legitimacy when it comes to originalist doctrine.²⁵⁵

²⁵² *Id.*; see also Sarah McDougall, *Pardoning Infanticide in Late Medieval France*, 39 LAW AND HIST. REV. 229, 232 (2021); IVO OF CHARTRES, DECRETUM 37-38 (ed. Martin Brett), https://ivo-of-chartres.github.io/decretum/ivodec_9.pdf (“*Si qua mulier per adulterium, absente marito, conceperit, idque post facinus occiderit, placuit vix in fine dandam esse communionem, eo quod geminaverit scelus. De illis mulieribus que male conceptos ex adulterio fetus, vel editos necare studuerint, vel in ventre matrum potionibus aliquibus colliserint, in utroque sexu adulteris post septem annorum curricula communio tribuatur, ita tamen ut omni tempore vite sue fletibus et humilitati insistant.*”) (internal citations omitted).

²⁵³ Maurizio Valsania, *Abortion decision cherry-picks history—when the U.S. Constitution was ratified, women had much more autonomy over abortion decisions than during 19th century*, THE CONVERSATION (July 6, 2022, 8:21 AM), <https://theconversation.com/abortion-decision-cherry-picks-history-when-the-us-constitution-was-ratified-women-had-much-more-autonomy-over-abortion-decisions-than-during-19th-century-185947>; see also *supra* note 243.

²⁵⁴ *Dobbs*, 142 S. Ct. at 2318 (Breyer, Sotomayor, and Kagan JJ., dissenting).

²⁵⁵ *Supra* notes 237-241 and accompanying text.

V. THE DANGERS OF CREATING HISTORY BY JUDICIAL FIAT

A. *The “Real Existence” of the Past*

In the mysterious “Room 101” of George Orwell’s fictitious Ministry of Truth, O’Brien says to the protagonist Winston Smith: “[w]ho controls the present controls the past... ‘Is it your opinion, Winston, that the past has real existence?’”²⁵⁶ Those words, written in an era when a grasp of historical truth in any sense was fleeting, can inform us over seventy years later of the pitfalls and dangers of history created by legislative or judicial fiat.²⁵⁷ While originalism ascribes to the notion that the historical record must not only inform our understanding of the Constitution but be a binding authority in its interpretation, the opposite may also ring true: judicial opinions that purport to declare the truth of the historical record may also unduly influence our understanding of our national past.²⁵⁸

Legal historian Alfred H. Kelly argued in 1965 that:

The most obvious and elementary way of accomplishing this objective was a simple declarative statement of a revelatory kind of what the original intent actually had been. As a rule this statement was allowed to stand without any supporting historical inquiry into the question at hand, an inquiry that, on occasion, might have proved distinctly embarrassing. By this means, the Court could maintain with a minimum of difficulty the myth of historical continuity, i.e., the conception of an essentially static and absolute Constitution. Once ultimate truth was thus affirmed, subsequent Courts, equipped with the aboriginal constitutional meaning, were quite content to quote the Court’s earlier affirmation without further historical inquiry. *In a sense, by quoting history, the Court made history, since what it declared history to be was frequently more important than what the history might actually have been.*²⁵⁹

²⁵⁶ GEORGE ORWELL, 1984 (1949).

²⁵⁷ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* xxxvi-xl (1976); F. A. HAYEK, *THE ROAD TO SERFDOM* 143 (Bruce Caldwell ed; University of Chicago Press 2007) (1944); RICHARD PIPES, *A CONCISE HISTORY OF THE RUSSIAN REVOLUTION* (1995); ROBERT O. PAXTON, *THE ANATOMY OF FASCISM* (2005).

²⁵⁸ Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965) (emphasis added).

²⁵⁹ *Id.* at 119 (emphasis added).

There have been numerous instances over the past centuries of both federal and state courts using this method of creating history as a justification for judicial outcomes.²⁶⁰ These decisions were then cited as binding precedent for other lower courts “without further historical inquiry,” as the assumption was that the higher court, to the extent historical evidence was relevant, had already gone through this analysis and the history affirmed as if in stone.²⁶¹

B. A Sign of What May Come in Moore v. Harper?

The fear that history would be used as “a device for activist judicial intervention, in particular as a precedent breaking mechanism,” is as alive today as it was when Alfred Kelly sounded the alarm nearly sixty years ago.²⁶² Justice Thomas, before diving deeply into an extended historical essay in *Bruen*, states that the Court “interprets the English history that respondents and the United States muster...”²⁶³ The assertion that the Supreme Court not only interprets the laws and Constitution of the United States but also wields the awesome power to shape and mold the historical past with its judicial opinions has the potential to lead to abhorrent outcomes and imperil our institutions and our liberties.²⁶⁴

We need not look any further than the upcoming cases for the 2022-2023 Supreme Court term to see the potential chaos and instability that this sort of assumed judicial-historical fiat power may have.²⁶⁵ In a case recently

²⁶⁰ See *Dred Scott v. Sandford*, 60 U.S. 393 (1856); *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896); *The Slaughterhouse Cases*, 83 U.S. 36 (1872); *Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 429 (1895).

²⁶¹ Kelly, *supra* note 258; see also *Patterson v. Taylor* 51 Fla. 275, 284 (1906) (citing *Plessy* in rejecting petitioner’s request for Habeas relief for violating a Florida state statute requiring “separation of the races” on street cars); *Commonwealth v. Pouliot*, 292 Mass. 229, 231 (1935) (citing *Plessy* and the *Slaughterhouse Cases*, stating, “[The Thirteenth Amendment] introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers.”).

²⁶² Kelly, *supra* note 258, at 126.

²⁶³ *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (emphasis added).

²⁶⁴ Michael Waldman, *Originalism Run Amok and the Supreme Court*, BRENNAN CENTER (June 28, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/originalism-run-amok-supreme-court>; Justin Dyer, *Wrong Then, Wrong Now: The Fake Abortion History of Roe v. Wade*, PUBLIC DISCOURSE (Sept. 29, 2021), <https://www.thepublicdiscourse.com/2021/09/78200/>; see also CHEMERINSKY, *supra* note 9, at 93 (“Originalists have three choices. One is to state the original meaning for a constitutional provision in a much more abstract way, following not the specific original meaning but the provision’s general goal.... If original meaning is stated generally enough, any result can be justified.”).

²⁶⁵ John Malcolm, *9 Cases Supreme Court Will Hear in 2022-2023 Session*, HERITAGE FOUNDATION (Sept. 21, 2022), <https://www.heritage.org/courts/commentary/9-key-cases-supreme-court-will-hear-2022-23-session>.

heard by the Court regarding the so-called (and now largely debunked) “independent state legislature theory,”²⁶⁶ the petitioners, finding little to no historical support for their legal claim, seem to have resorted to a fabricated historical source.²⁶⁷ The source in question is a document drafted by Constitutional Convention delegate Thomas Pinckney that says, in part, that the administration of congressional elections should be “assigned” to “each state.”²⁶⁸ The problem is that no less a figure than James Madison believed that the document submitted by Pinckney at the 1789 Convention was not the same document that resurfaced in 1818, which is the version cited in the petitioners’ brief.²⁶⁹ In response to petitioners’ arguments, former Principal Deputy Solicitor General Neal Katyal, arguing for respondents at oral argument, stated:

For 233 years, states have not read the Elections Clause the way you just heard... Petitioner's idea that state legislatures created by state constitutions are independent of them is wrong. It is rejected by the Articles of Confederation, rejected by the early state constitutions, rejected by the founding practice, especially New York, where judges vetoed federal election bills. It's also rejected by this Court in cases such as *Smiley* and *Hildebrant*.²⁷⁰

²⁶⁶ The independent state legislature theory is the proposed, although largely debunked, theory “that a state legislature’s power to regulate federal elections does not arise from its state constitution (like most of the legislature’s other powers) but rather from an independent grant of authority directly from the U.S. Constitution.” Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 503 (2021); see also *Moore v. Harper*, 600 U.S. 1 (2023).

²⁶⁷ *Harper v. Hall*, 380 N.C. 317 (2022), cert. granted, 142 S. Ct. 2901 (June 30, 2022) (No. 21-1271); see also Ethan Herenstein & Bryan Palmer, *Fraudulent Document Cited in Supreme Court Bid to Torch Election Law*, POLITICO (Sept. 15, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/09/15/fraudulent-document-supreme-court-bid-election-law-00056810>.

²⁶⁸ Herenstein, *supra* note 267.

²⁶⁹ Brief for Petitioner at 15, *Harper v. Hall*, 380 N.C. 317 (2022), cert. granted, 142 S. Ct. 2901 (2022); see also S. Sidney Ulmer, *James Madison and the Pinckney Plan*, 9 S.C. L. REV. 415, 423 (Spring 1957).

²⁷⁰ Transcript of Oral Argument at 70, *Harper*, 142 S. Ct.; see also *Smiley v. Holm*, 285 U.S. 355, 369 (1932); *State of Ohio, ex. rel. Davis v. Hildebrant* 241 U.S. 565 (1916). Former judge of the U.S. Circuit Court of Appeals for the D.C. Circuit, Thomas Griffith, makes a historical and textual argument supporting respondents’ position saying, “Just as a governor’s or referendum’s substantive veto of a legislative redistricting bill is compatible with the Elections Clause, so is a substantive state constitutional provision that constrains the legislature.” He also rejects petitioners’ use of an 1820-21 Massachusetts constitutional amendment in their argument, saying, “The amendment was not framed by the legislature and proposed a permanent rule for districting, not statutorily-authorized jurisdictional and conditional remedial authority for only one election.” Brief for Thomas Griffith as Amicus Curiae in Support of Respondents at 9-13, *Harper*, 142 S. Ct. 2901.

Despite the dubious history presented by petitioners and the overwhelming rejection of the theory from American legal scholars and jurists,²⁷¹ several of the Justices appeared to at least entertain the plausibility of this novel fringe theory.²⁷²

Justice Sotomayor attacked the petitioner's claim that he could "knock down" every argument supporting the long-accepted precedent that state constitutions maintain the authority to regulate the "time, place, and manner" of federal elections within that state.²⁷³ She responded, "Yes. If you rewrite history, it's very easy to do."²⁷⁴ She went on to cite numerous cases in which the history strongly supported respondents' position that the state constitutions have long held the power to regulate the "time, place, and manner" of federal elections in that state, saying:

We know that before the founding, at the founding of the Constitution, decades after, and even to today that state constitutions have regulated time, place, and manner. We have the voice votes. We have one constitution that set elections at the courthouse and not in the county where the legislature wanted it. We have laws about voice votes as opposed to ballot votes. It seems to me that if I'm a textualist and I read that the legislature in each state shall prescribe the time, place, and manner of elections that your argument would have to be that you can't regulate - the state constitution can't regulate that. But there is no substantive limitation in the Constitution.²⁷⁵

²⁷¹ *Smiley v. Holm*, 285 U.S. 355, 369 (1932) (a case that held that a state's governor, in contradiction to the will of the legislature, may veto a federal congressional district map created by that state's legislature); Brief for Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 6, *Harper*, 142 S. Ct. 2901; *The Independent State Legislature Theory's Radical Threat to Democracy*, BRENNAN CENTER (May 11, 2022 at 1:30 PM), <https://www.brennancenter.org/events/independent-state-legislature-theorys-radical-threat-democracy> (a talk in which Constitutional scholars Vikram D. Amar, Leah Litman, Kate Shaw, Carolyn Shapiro, and Wilfred U. Codrington III speak on the issue of the "independent state legislature theory").

²⁷² Adam Liptak, *Supreme Court Seems Split Over Case that Could Transform Federal Elections*, N.Y. TIMES (Dec. 7, 2022), <https://www.nytimes.com/2022/12/07/us/supreme-court-federal-elections.html> ("The three most conservative justices appeared prepared to embrace an expansive version of the theory, while the three liberal justices were adamant that it should be rejected. The remaining members of the court — Chief Justice John G. Roberts Jr. and Justices Brett M. Kavanaugh and Amy Coney Barrett — seemed to be searching for a compromise under which state supreme courts would generally have the last word on disputes over state laws governing federal elections but be subject to oversight from federal courts in rare cases.")

²⁷³ Transcript of Oral Argument at 17-18, *Harper*, 142 S. Ct. 2901.

²⁷⁴ *Id.* at 18.

²⁷⁵ *Id.* at 15-16.

Those who attempted to read the Justice’s “tea leaves” prior to publication of the *Moor* opinion correctly assumed that the Court would reject this novel theory. Nevertheless, a few of the Justices at oral argument had seemingly telegraphed their interest in it.²⁷⁶ This interest is all despite the overwhelming rejection of the “theory” by scholars, historians, and every state supreme court chief justice in the country.²⁷⁷ Even after the Court roundly rejected the petitioner’s arguments, there seemed to be enough skepticism from some Justices to revisit similar issues at a later date with the same methodology. The dissent of Justice Thomas, which Justice Gorsuch joined, focused largely on the mootness argument and argued its non-justiciability on those grounds.²⁷⁸ However, the dissent explicitly came down on the side of the petitioners arguing for the theory saying, “[i]n short, this case is over, and petitioners won.”²⁷⁹ Justice Kavanaugh’s concurrence likewise leaves the door open for similar arguments, although not quite so wide as the dissent, saying:

The Court today correctly concludes that state laws governing federal elections are subject to ordinary state court review, including for compliance with the relevant state constitution. But because the Elections Clause assigns authority respecting federal elections to state legislatures, the Court also correctly concludes that ‘state courts do not have free rein’ in conducting that review.”²⁸⁰

What this demonstrates is that while this theory has been largely rejected by the Court, it may not be entirely dead and buried, and the methodology used by petitioners is very much alive and well despite their defeat.

²⁷⁶ Amy Howe, *Court Seems Unwilling to embrace broad version of “independent state legislature” theory*, SCOTUS BLOG (Dec. 7, 2022, 5:22 PM), <https://www.scotusblog.com/2022/12/court-seems-unwilling-to-embrace-broad-version-of-independent-state-legislature-theory/> (“Justice Samuel Alito appeared squarely aligned with Thompson and the [petitioners], and he resisted any suggestion that a ruling for them would pose a danger to American democracy.... And Justice Clarence Thomas implied that opposition to the independent state legislature theory rested on partisanship, rather than constitutional principles.”).

²⁷⁷ See Brief for Conference of Chief Justices as Amici Curiae in Support of Neither Party at 6, *Harper*, 142 S. Ct. 2901; see also Brief for the Scholars of the Founding Era as Amici Curiae in Support of Respondents, *Harper*, 142 S. Ct. 2901; Brief of Scholars of State Constitutional Laws as Amici Curiae in Support of Respondents, *Harper*, 142 S. Ct. 2901; Brief of State Constitutional Historians Lawrence Friedman and Robert F. Williams as Amici Curiae in Support of Respondents, *Harper*, 142 S. Ct. 2901; Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. STATE U. L. REV. 731, 743 (2001); JOHN H. ELY, DEMOCRACY AND DISTRUST 125-127 (1980).

²⁷⁸ *Moor v. Harper*, 600 U.S. 1, 40 (2023) (Thomas, J., dissenting).

²⁷⁹ *Id.* at 44.

²⁸⁰ *Id.* at 38 (Kavanaugh, J., dissenting).

Katyal’s use of the colorful phrase “blast radius” during oral arguments to describe the widespread legal impact of the Court’s acceptance of this theory seems apt here.²⁸¹ Whether one supports or rejects this theory, it is clear that if the petitioners had been vindicated in this case (especially if the Court had supported the so-called “maximalist” version of the theory proposed by petitioners), the fallout would have left the judicial and political landscape in all fifty states in chaos.²⁸² It would have created the exact opposite of the outcome that originalism and binding historical precedent purport to deliver: stability and reliability in the law.

V. CONCLUSION

The Supreme Court’s use of historical source materials in its 2022 term opinions paints a stark and flawed picture of constitutional interpretation. Both major schools of originalism, the “original intent” and the “original public meaning” theories, are flawed interpretive methodologies and fail to reach the neutral outcomes they purport to produce. While there are several major issues with the theory of originalism, some of the most glaring ones revolve around the determination of an authoritative contemporary “meaning” as understood at the time and the historical exclusion of major groups within the Anglo-American legal tradition.²⁸³ Both of these issues tend to overemphasize certain writings and legal thinkers over others, creating value-based judicial determinations. Dangers lurk when judges are able to not only determine what the law is through a theory of some superlative and binding “dead-hand” of historical interpretation but also create history itself through judicial fiat in their opinions.²⁸⁴ A significant threat to the legitimacy of our institutions, particularly to our courts, is posed if flawed historical interpretations or even fraudulent history have the potential to sway courts and create historical facts *ex nihilo*.²⁸⁵ While the outright prohibition of the introduction of historical

²⁸¹ Transcript of Oral Argument at 71-72, *Harper*, 142 S. Ct. 2901 (“...by their theory – [the] blast radius by their theory starts at the size extra-large. It starts with invalidating 50 different state constitutions today. Elections clauses are in 27. All states have equal protection clauses, speech clauses, assembly clauses. Thirty of them guarantee the right to a secret ballot.”).

²⁸² Ari Savitzky & Kristi Graunke, *Explaining Moore v. Harper, the Supreme Court Case that Could Upend Democracy*, ACLU (Dec. 22, 2022), <https://www.aclu.org/news/voting-rights/explaining-moore-v-harper-the-supreme-court-case-that-could-upend-democracy> (“This theory must be rejected regardless of any short-term partisan implications — remember, state courts also struck down partisan gerrymanders this year in blue states as well as red ones.”). N. Y. Times Editorial Board, *This Case Should Never Have Made It to the Supreme Court*, N.Y. TIMES (Dec. 9, 2022), <https://www.nytimes.com/2022/12/09/opinion/supreme-court-moore-v-harper.html>.

²⁸³ See *supra* Parts III, IV.

²⁸⁴ See *supra* Part V.A.

²⁸⁵ See *supra* Part V.B; *Harper v. Hall*, 380 N.C. 317 (2022), *cert. granted*, 142 S. Ct. 2901 (June 30, 2022) (No. 21-1271).

evidence in judicial opinions goes much further than this Article advocates, it is erroneous to view those sources as supreme and binding interpretative authorities on our law in the twenty-first century.