JUSTICE SCALIA, JUSTICE THOMAS, AND FIDELITY TO ORIGINAL MEANING

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Justices Antonin Scalia and Clarence Thomas have helped to elevate originalism from the fringes of academic debate to the center of the resolution of constitutional controversies before the United States Supreme Court. Originalism deserves re-examination in light of their judicial practice. This article analyzes the jurisprudence of Justices Scalia and Thomas to advance three conclusions about originalism. First, the competing methodologies adopted by Justices Scalia and Thomas expose the unresolved fault lines within originalism. Second, Justices Scalia and Thomas deviate from their own interpretive principles, demonstrating that originalism, in practice, has failed to deliver on the promise of a consistent methodology that limits judicial discretion. Third, the deficiencies in Justice Scalia's and Thomas's jurisprudence expose the inherent weaknesses of originalism, as fidelity to original meaning cannot be easily reconciled with other values defended by originalists such as certainty, stability and judicial constraint.

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I. INTRODUCTION

Originalism is an influential theory of constitutional interpretation. Justices Antonin Scalia and Clarence Thomas have helped to elevate originalism from the fringes of academic debate to the center of the resolution of constitutional controversies before the United States Supreme Court. Originalism deserves re-evaluation in light of their judicial practice.

This article provides the first comprehensive comparison of the jurisprudence of Justices Scalia and Thomas from an originalist perspective. Originalism is not a unified theory, and Justice Scalia and

Thomas's methodological differences expose the fault lines within originalism. Significantly, they have deviated from their own interpretive principles, highlighting the difficulty of reconciling fidelity to original meaning with other values defended by originalists such as certainty, stability and judicial constraint.[1] This suggests that originalism fails to deliver on its promise of subjugating judicial discretion to the rule of law.

Part II outlines the scope of this article, provides a background for contemporary originalism, and highlights Justice Scalia and Thomas's shared commitment to originalism. Part III examines the competing definitions of original meaning adopted by the two justices, contrasting Justice Scalia's "original public meaning" approach with Justice Thomas's "general original meaning" approach. Part IV compares Justice Thomas's willingness to use the natural law principles of the Declaration of Independence as the background to his originalist analysis with Justice Scalia's positivist approach. Part V situates Justices Scalia and Thomas within the debate between originalists concerning the extent to which the original expected applications of constitutional provisions should be dispositive. Part VI contrasts Justice Scalia's pragmatic approach to precedent with Justice Thomas's refusal to allow precedent to trump original meaning. Part VII concludes by evaluating the implications of the jurisprudential differences between Justices Scalia and Thomas for originalist theory. Originalism does not meaningfully constrain judicial discretion unless it compromises fidelity to original meaning.

II. BACKGROUND

A. Contemporary Relevance of Originalism

Originalism merits detailed consideration. After Robert Bork's failed nomination to the Supreme Court in 1987, he lamented that originalism "is usually viewed as thoroughly passé, probably reactionary, and certainly — the most dreaded indictment of all — 'outside the mainstream.'"[2] However, originalism's image has been rehabilitated. Within the legal academy, originalism has won prominent converts including Randy Barnett and Jack Balkin.[3] Self-professed originalists

[1] This article adopts the distinction drawn by Thomas Colby in *The Sacrifice of the New Originalism* 99 GEORGETOWN L.J. 713, 751 (2011), between judicial restraint ("deference to legislative majorities") and judicial constraint ("narrow[ing] the discretion of judges"). Originalism will be measured against the benchmark of judicial constraint.

[2] ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143 (1990).

[3] *See, e.g.,* Randy Barnett, *An Originalism for Nonoriginalists* 45 LOYOLA L.REV. 611 (1999); JACK BALKIN, LIVING ORIGINALISM (2011). *See also* Laurence Tribe, 'Comment' in Amy Gutmann (ed.), A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 65, 67, (1997),

Justices Scalia and Thomas hold two of the nine votes on the Supreme Court. In *District of Columbia v. Heller* ("*Heller*")[4] Justice Scalia's majority opinion adopted originalist methodology to invalidate a statute prohibiting the possession of handguns.[5] Originalism has justifiably been described as the "prevailing approach to constitutional interpretation."[6]

B. Scope of this Article

Originalism has not been universally accepted. It has been described as "results-oriented historical fiction"[7] and a vehicle for the conservative policy agenda.[8] Prominent criticisms of originalism include that it is self-defeating on historical grounds,[9] incompatible with democratic self-governance,[10] and incapable of promoting judicial constraint.[11] Nonoriginalists have advanced alternative theories denying dispositive force to the Constitution's original meaning.[12]

This article will not contrast originalism with nonoriginalist theories of constitutional interpretation. Irrespective of the accuracy of nonoriginalist critiques, originalism is an influential theory with prominent adherents. Originalism is riven by a series of internal divides, the resolution of which will influence its future direction. The primary focus of this article will be the evaluation of contemporary debates *within* originalism, with

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who paraphrases Ronald Dworkin as arguing that, "[w]e are all originalists now."

[4] District of Columbia v Heller, 554 U.S. 570 (2008).

[5] *Id.* at 576. *Heller* will be discussed in detail in Part III.

[6] Barnett, *supra* note 3, at 613. *See also* Lawrence Rosenthal, *Originalism in Practice* 87 INDIANA L.J. 1 (2012) who states that "[o]riginalism is ascendant."

[7] William Merkel, *The District of Columbia v. Heller and Antonin Scalia's Perverse Sense of Originalism* 13 LEWIS & CLARK L. REV. 349, 376 (2009).

[8] *See, e.g.,* CASS SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHTS-WING COURTS ARE WRONG FOR AMERICA 217 (2005), who notes that the constitutional views of originalists are "eerily close to the political judgments of conservative politicians;" SAMUEL MARCOSSON, ORIGINAL SIN: CLARENCE THOMAS AND THE FAILURE OF THE CONSTITUTIONAL CONSERVATIVES 6 (2002) who argues that originalist judges adopt views that "bear a closer resemblance to those taken by the contemporary Republican Party than with those of the framers of the constitutional text."

[9] H. Jefferson Powell, *The Original Understanding of Original Intent* 98 HARVARD L. REV. 885, 948 (1985). Powell argues that the Framers did not intend for the Constitution to be interpreted in light of their own intentions.

[10] STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 131 (2005), points to the tendency of textualist and originalist approaches "to undermine the Constitution's efforts to create a framework for democratic government."

[11] Marcosson, *supra* note 8, at 119.

[12] *See, e.g.*, Breyer, *supra* note 10, at 15–16 (advocating interpretation guided by the principle of active liberty); Mitchell Berman, "Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural-Born Citizenship Clause" in Grant Huscroft and Bradley Miller (eds), THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 246, 246 (2011) (arguing for the adoption of the "Rawlsian method of reflective equilibrium"); Sunstein, *supra* note 8, at 249–51 (defending minimalism).

reference to the jurisprudence of Justices Scalia and Thomas.

This article will make three contributions to the existing literature. First, it will outline the most significant contemporary debates within originalism. Originalism is fragmented. The "voluminous" literature about originalism catalogued by Daniel Farber in 1989[13] has expanded as new fault lines have emerged. Technical refinement has come at the cost of accessibility. This article seeks to clarify the key points of contention within originalism.

Second, this article will provide the first comprehensive analysis that situates Justices Scalia and Thomas within these debates. With the exception of Lee Strang's brief comparison of Justice Scalia and Thomas's jurisprudence,[14] the debates within originalism have progressed without a detailed analysis of the competing conceptions of originalism advanced by its most significant practitioners, updated to account for their most recent jurisprudence and extra-judicial writings.[15] Justices Scalia and Thomas are key influences on the future direction of originalism, and this article will critically analyze their judicial record, falsifying certain assumptions and reinforcing others.

Third, this article will assess the promise of originalism against the jurisprudential record of Justices Scalia and Thomas. Originalism, in practice, has failed to constrain judicial subjectivity. Fidelity to original meaning has come at the expense of stability, certainty and the rule of law.

C. Defining Originalism

Defined broadly, originalism is the view that the interpretive obligation is to discern and apply the Constitution's original meaning to current cases.[16] Parts III–VI outline the competing originalist approaches to

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[13] Daniel Farber, *The Originalism Debate: A Guide for the Perplexed* 49 OHIO STATE L.J. 1085, 1085 (1989).

[14] Lee Strang, *The Most Faithful Originalist?: Justice Thomas, Justice Scalia, and the Future of Originalism* 88 UNIVERSITY OF DETROIT MERCY L. REV. 873 (2011). Strang concludes that Justice Scalia is the more faithful originalist.

[15] There have been individual critiques of Justices Scalia and Thomas from an originalist perspective. *See, e.g.*, Randy Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism* 75 UNIVERSITY OF CINCINNATI L. REV. 7 (2006); SCOTT GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS (1999); FRANK CROSS, THE FAILED PROMISE OF ORIGINALISM (2013).

[16] *See, e.g.*, JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 2 (2005) (arguing that originalism "insists that interpreters be bound by the meaning the document had for those who gave it legal authority"); Mitchell Berman, *Originalism is Bunk* 84 NEW YORK UNIVERSITY L. REV 1, 5 (2009) (describing originalism as the "theory that judges 'should be guided by' the original meaning"); Lawrence Solum, *District of Columbia v. Heller and Originalism* 103 NORTHWESTERN UNIVERSITY L. REV. 923, 926 (2009) (describing originalism as the "theory that 'original meaning' should guide interpretation of the Constitution"). Farber, *supra* note 13, at 1086, notes that originalists and nonoriginalists

fulfilling this obligation.

D. History of Contemporary Originalism

Originalism is not a novel phenomenon. As Johnathan O'Neill notes, originalism was an established feature of American constitutional law until it was displaced by legal realism and a broader conception of judicial power during the New Deal era.[17] This article will exclusively examine the history of contemporary originalism, reflecting its greater significance for originalism's trajectory.[18]

Contemporary originalism emerged in the early 1970s as a response to the perceived "ungrounded jurisprudence" of the Supreme Court headed by Chief Justice Earl Warren (1953 – 1969).[19] In 1971, Robert Bork published an influential article attacking milestone Warren Court decisions, such as *Griswold v. Connecticut* ("*Griswold*"),[20] as "unprincipled" and failing "every test of neutrality."[21] The development of contemporary originalism accelerated in 1976 with the publication of an article by (then Supreme Court Associate Justice) William Rehnquist criticizing the notion of a "living constitution" for failing to reflect the "language and intent of the framers."[22] In 1977, Raoul Berger attacked the "Government by Judiciary" that had emerged, by detailing the divergence between the original intent of the Framers of the Fourteenth Amendment and judicial practice.[23]

However, originalism only gained prominence outside the confines of academic debate in the 1980s. Steven Calabresi suggests that the discussion of originalism "had been proceeding quietly in American law

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generally accept that original meaning is relevant, but differ as to whether it is "authoritative."

[17] O'Neill, *supra* note 16, at 5–6. *See also* Bork, *supra* note 2, at 51, who describes the New Deal Court as ushering in a "constitutional revolution."

[18] A concise analysis of the history of contemporary originalism is provided in Vasan Kesavan and Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History* 91 GEORGETOWN L. J. 1113, 1134–47 (2003).

[19] Richard Kay, *Original Intention and Public Meaning in Constitutional Interpretation* 103 NORTHWESTERN UNIVERSITY SCHOOL OF LAW 703, 703 (2009). SOTIRIOS BARBER AND JAMES FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 14 (2007). Note that by the time of Chief Justice Warren's retirement, the "Court had gone on to forbid religious observance in public schools, trim Congress's power to investigate alleged Communist subversion, strengthen the rights of defendants in criminal proceedings ... and enhance the rights to vote and to have one's vote counted equally."

[20] Griswold v. Connecticut, 381 U.S. 479 (1965).

[21] Robert Bork, *Neutral Principles and Some First Amendment Problems* 47 INDIANA L. J. 1, 9 (1971). Solum, *supra* note 16, at 927, notes that this article "is sometimes considered the opening move in the development of contemporary originalist theory."

[22] William Rehnquist, *The Notion of a Living Constitution* 54 TEXAS L. REV. 693, 695 (1976).

[23] RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1997).

schools [but] burst into noisy and public view" after a speech by Attorney General Edwin Meese III in 1985.[24] In a speech to the American Bar Association, General Meese advocated a "jurisprudence of original intention" to counter the "radical egalitarianism" of the Warren Court.[25] The Supreme Court appointments of Justice Scalia (1986) and Justice Thomas (1991) entrenched the contemporary relevance of originalism.

E. Normative Justifications for Originalism

Originalists agree that constitutional interpretation should be guided by the Constitution's original meaning. However, there are important differences concerning the normative case for affording original meaning this standing. This article will examine the most prominent normative justifications for originalism: popular sovereignty, consequentialism, and democratic legitimacy.[26]

1. Popular Sovereignty

The popular sovereignty justification treats the Constitution's legitimacy as deriving from its creation as an expression of popular will. General Meese typifies this view, arguing that the Constitution is morally authoritative as it "represents the consent of the governed to the structures and powers of government."[27] In light of its popular ratification, the Constitution's original meaning is authoritative.[28] Amendments should only

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[24] Steven Calabresi, 'Introduction' in Steven CALABRESI (ed), ORIGINALISM: A QUARTER-CENTURY OF DEBATE 1 (2007).

[25] Edwin Meese, 'Speech before the American Bar Association' (Speech delivered at the American Bar Association, Washington, D.C., 9 July 1985).

[26] These justifications often overlap but are distinguished in the interests of clarity. Other justifications are advanced by RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 9–10 (2004); Lee Strang, *The Clash of Rival and Incompatible Philosophical Traditions within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition* 28 HARVARD JOURNAL OF LAW & PUBLIC POLICY 909, 983 (2005) (the promotion of human flourishing); Balkin, *supra* note 3, at 35–6 (the significance of the choice of a written Constitution).

[27] Meese, *supra* note 25. *See also* Keith Whittington, 'On Pluralism within Originalism' in Grant Huscroft and Bradley Miller (eds), THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 70, 73 (2011), who argues that the Constitution is binding because it was "drafted and ratified by those democratically selected to do so;" Kurt Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis* 93 VIRGINIA L. REV. 1437, 1446 (2007), who argues popular sovereignty provides a democratic basis for judicial review; BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6 (1993), who claims that the Framers won the right to speak with the authority of "[w]e the people."

[28] KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 111 (1999), argues that originalism "enforces the authoritative decision of the people acting as sovereign."

occur in accordance with the procedures specified in the Constitution.[29]

However, the founding generation's moral authority is hotly contested. Paul Brest challenges the notion of consent underpinning the popular sovereignty justification, arguing that "[w]e did not adopt the Constitution, and those who did are dead and gone."[30] Citizens did not consent to be bound by the "dead hand" of the past.[31] Furthermore, the founding generation's claim to perpetual obedience is undermined by the democratic deficiencies of the ratification process, such as the denial of voting rights to women and slaves.[32]

2. Consequentialism

Consequentialist justifications rely on the beneficial outcomes produced by interpreting the Constitution based on its original meaning. John McGinnis and Michael Rappaport argue that the Constitution's supermajority requirements "produce desirable entrenchments by generating constitutional provisions that are widely supported and are likely to produce net benefits."[33] If judges depart from the original meaning that survived the scrutiny of supermajority ratification, they undermine the beneficial outcomes produced by these procedures.[34] Lawrence Solum argues that originalism is superior to its alternatives because it creates a "stable core of fixed meaning."[35] Consistent judicial application of this meaning safeguards rule of law values such as "predictability, stability, and certainty."[36]

3. Democratic Legitimacy

The democratic legitimacy justification is underpinned by a specific conception of the judicial role within a majoritarian democracy.[37]

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[29] Lash, *supra* note 27, at 1444. The relevant amending procedure is *U.S. Const*. art. V.

[30] Paul Brest, *The Misconceived Quest for the Original Understanding* 60 BOSTON UNIVERSITY L. REV. 204, 225 (1980).

[31] For a description of this argument see Farber, *supra* note 13, at 1104. For five plausible responses to the dead hand objection see Michael McConnell, *Textualism and the Dead Hand of the Past* 66 GEORGE WASHINGTON L. REV. 1127, 1128–35 (1998).

[32] Barnett, *supra* note 26, at 20.

[33] John McGinnis and Michael Rappaport, *Original Interpretive Principles as the Core of Originalism* 24 CONSTITUTIONAL COMMENTARY 371, 374 (2007).

[34] *Id* at 371, 374.

[35] LAWRENCE SOLUM, 'We Are All Originalists Now' in Lawrence Solum and Robert Bennett (eds), CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 40 (2011).

[36] *Id.* at 41.

[37] Berman, *supra* note 16, at 70, notes this approach can be distinguished from the popular sovereignty approach as it emphasises "rule by the contemporary people" rather than the founding generation's consent.

Bork argues that only originalism "meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy."[38] In a majoritarian democracy, social change should only be achieved through representative mechanisms such as the elected legislature or popular participation in constitutional amendments.[39]

The democratic legitimacy justification seeks to resolve what Alexander Bickel famously described as the "counter-majoritarian difficulty."[40] Judicial review is counter-majoritarian as it allows unelected judges to invalidate statutes passed by elected legislatures.[41] In order for judicial review to be justified, judges must remain faithful to the Constitution's popularly endorsed original meaning, rather than undermine the separation of powers by imposing their own policy preferences.[42] Contrary to the legal realist view, law "has a meaning independent of our own desires" and judges must attempt to discern and apply this meaning.[43]

F. Unifying Themes within Originalism

Parts III–VI will detail originalism's fragmentation. However, originalism's theoretical coherence depends on the acceptance of common features guiding the interpretive task.

Solum highlights the two important commonalities within originalism: the "fixation thesis"[44] and the "contribution thesis."[45] The fixation thesis is the view that "the meaning of a given constitutional provision is fixed at the time the provision was framed and ratified."[46] Part III outlines the competing definitions of original meaning adopted by originalists. However, they agree that the original meaning, where it is determinate, does not evolve or alter.

The contribution thesis is the view that a provision's original meaning should contribute to its interpretation.[47] Originalists agree that

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[38] Bork, *supra* note 2, at 143.
[39] Antonin Scalia, *Originalism: The Lesser Evil* 57 UNIVERSITY OF CINCINNATI L. REV. 849, 854 (1989).
[40] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).
[41] The significance of the counter-majoritarian difficulty is contested. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 17–18 (1996) justifies judicial review on the basis of an alternate account of democracy that values equal participation above majority control.
[42] Thomas Colby and Peter Smith, *Living Originalism* 59 DUKE L. J. 239, 243 (2009).
[43] Bork, *supra* note 2, at 143. *See also* JEFFREY GOLDSWORTHY, 'The Case for Originalism' in Grant Huscroft and Bradley Miller (eds), THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 42, 44–5 (2011).
[44] Solum, *supra* note 16, at 944.
[45] *Id.* at 954.
[46] *Id.* at 944.
[47] *Id*. at 953.

original meaning is an important interpretive consideration, but differ about the extent to which it should be binding. Part VI highlights the competing views concerning the legitimacy of trumping original meaning with precedent.

G. The Promise of Originalism

Originalism defies simple characterisation. Despite contemporary originalism's roots as a conservative reaction to the liberal Warren Court,[48] originalism has been adopted by academics from across the political spectrum.[49] Once conceptualized as a theory promoting judicial deference to elected majorities,[50] originalism is now used to justify the expansive exercise of judicial power to restore original meaning.[51]

However, at its irreducible core, the promise of originalism is that it provides a consistent methodology that meaningfully constrains judicial discretion. As Thomas Colby argues, "[o]riginalism was born of a desire to constrain judges."[52] Judges are to be constrained by the obligation to discern and apply the Constitution's original meaning, limiting the intrusion of their subjective policy preferences.[53]

Originalism's normative justifications hinge on the idea that

[48] Colby, *supra* note 1, at 716, notes that originalism "arose as a by-product of the conservative frustration with the broad, rights-expansive decisions of the Warren and Burger Courts."

[49] *See, e.g.*, Barnett, *supra* note 3, at 623, who argues that "originalism has been rendered safe enough to tempt even political progressives to adopt it;" Steven Smith, 'That Old-Time Originalism' in Grant Huscroft and Bradley Miller (eds), THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 223, 230 (2011), who describes Balkin's "surprising" conversion to originalism given his "general tendencies and preferred conclusions."

[50] *See, e.g.*, Lino Graglia, *Interpreting" the Constitution: Posner on Bork* 44 STANFORD L. REV. 1019, 1044 (1992), who argues that "[j]udicial invalidation of the elected representatives' policy choices should be permitted only when ... the choice is clearly disallowed by the Constitution." This view builds on the famous article by James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* 7 HARVARD L. REV. 129 (1893).

[51] *See, e.g.*, Keith Whittington, *The New Originalism* 2 GEORGETOWN JOURNAL OF LAW & PUBLIC POLICY 599, 609 (2004), who notes that originalism "requires judges to uphold the original meaning of the Constitution – nothing more, but also nothing less;" Barnett, *supra* note 26, who rejects the presumption of constitutionality in judicial review.

[52] Colby, *supra* note 1, at 751. *See also* Bork, *supra* note 2, at 5, who argues that "judges must consider themselves bound by law that is independent of their own views of the desirable;" Marcosson, *supra* note 8, at 9, who argues that originalism's "legitimacy depends ... on a mechanism that constrains judges from imposing their own personal views on the rest of us."

[53] This is not to suggest that all originalists believe that original meaning is always simple to identify and determinate. A number of originalists have recognised a distinction between interpretation and construction, accepting the scope for interpreters to supplement original meaning where the text is indeterminate or underdeterminate. *See, e.g.*, Goldsworthy, *supra* note 43, at 60; Whittington, *supra* note 51, at 611; Solum, *District of Columbia v. Heller*, *supra* note 16, at 933, 973. For the distinction between determinacy, indeterminacy and underdeterminacy see Lawrence Solum, *On the Determinacy Crisis: Critiquing Critical Dogma* 54 UNIVERSITY OF CHICAGO L. REV. 462, 473 (1987).

original meaning constrains judicial discretion. Popular sovereignty is undermined if judges can depart from original meaning without prior consent. The virtues of predictability, stability, and consistency stressed by consequentialists are undermined by broad judicial discretion to make interpretive choices, circumventing the Constitution's super-majority requirements. Democratic legitimacy and the separation of powers are therefore undercut by the counter-majoritarian judicial appropriation of the power to advance social change in accordance with subjective preferences.

This article will assess whether originalism, in practice, has successfully realized the promise of judicial constraint in light of the performance of Justices Scalia and Thomas.

H. Justice Scalia's and Thomas's Shared Commitment to Originalism

1. Justice Scalia

Justice Scalia has consistently advocated for originalism. As Jamal Greene notes, "[p]erhaps no one bears greater responsibility for the current prominence of originalism in case law and political and legal discourse than [Justice] Scalia."[54] Prior to assuming office as a Supreme Court Justice, he made an influential address to the Attorney General's Conference on Economic Liberties by arguing for the adoption of the "Doctrine of Original Meaning."[55] During his Senate confirmation hearings, he stated that, "the original meaning is the starting point and the beginning of wisdom."[56]

As a Supreme Court Justice, Justice Scalia has described himself as an originalist.[57] In the 1997 book *A Matter of Interpretation: Federal Courts and the Law*,[58] he provided a detailed defence of his "originalist philosophy."[59] More recently, his textualist exposition of the principles of statutory interpretation in *Reading Law* affirmed originalism and criticized

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[54] Jamal Greene, *Heller High Water? The Future of Originalism* 3 HARVARD LAW & POLICY REVIEW 325, 332 (2009).

[55] Antonin Scalia, 'Address before the Attorney General's Conference on Economic Liberties' (Speech delivered at the Attorney-General's Conference on Economic Liberties, Washington, D.C., 14 June 1986). This address is significant as it was included in the United States Department of Justice, Office of Legal Policy, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK (1987), which is intended to provide an authoritative outline of principles of constitutional interpretation to guide Department of Justice employees.

[56] Committee on the Judiciary, United States Senate, Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States, 99th Cong., 2nd sess. 108 (testimony of Judge Antonin Scalia) (August 1986).

[57] *See, e.g.*, Scalia, *supra* note 39, at 862, in which he states his preference for originalism above nonoriginalism.

[58] Amy Gutmann (ed), A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

[59] Antonin Scalia, 'Response' in *Id.* at 129, 140.

proponents of a "Living Constitution."[60] His resolution of constitutional controversies often hinges on his conclusions regarding original meaning.[61]

2. Justice Thomas

Justice Thomas has also professed fidelity to originalism. During his tenure as Chairman of the Equal Employment Opportunity Commission, Justice Thomas defended the notion that the Constitution should be interpreted in light of its original intention.[62] As a Supreme Court Justice, he has argued that the judicial role is to discern and apply the "original understanding" of the constitutional text.[63]

3. Conclusion

Justices Scalia and Thomas are self-professed originalists. Both have vocally subscribed to originalism's promise of constraining judicial discretion.

Justice Scalia's defence of the "rule of law as the law of rules" is premised on his rejection of "judicial arbitrariness."[64] He argues that judges should not allow their "intellectual, moral, and personal perceptions' to influence the interpretive task."[65] Originalism is the methodology that is best able to confine judicial discretion and maintain democratic legitimacy, he asserts.[66]

Justice Thomas argues that judges must act as "impartial referees," insulating their personal preferences from the interpretive task.[67] He states that originalism constrains judicial practice, as it works "to reduce judicial discretion and to maintain judicial impartiality," by "tethering" the analysis of judges to the understanding of the founding generation.[68]

Justice Scalia's and Thomas's shared commitment to originalism and judicial constraint deserves re-examination. This article will examine the fault lines within originalism illuminated by their judicial practice, before analysing the implications of the deficiencies in their respective

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[60] ANTONIN SCALIA AND BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 403–10 (2012).
[61] *See, e.g.*, Heller; Thompson v. Oklahoma, 487 U.S. 815, 864.
[62] Clarence Thomas, *Toward a "Plain Reading" of the Constitution – The Declaration of Independence in Constitutional Interpretation* 30 HOWARD L. J. 983, 984–5 (1987).
[63] Clarence Thomas, *Judging* 45 UNIVERSITY OF KANSAS L. REV. 1, 6 (1996).
[64] Antonin Scalia, *The Rule of Law as a Law of Rules* 56 UNIVERSITY OF CHICAGO L. REV. 1175, 1182 (1989).
[65] Callins v. Collins, 510 U.S. 1141.
[66] Scalia, *supra* note 39, at 862.
[67] Thomas, *supra* note 63, at 4.
[68] *Id*. at 7.

approaches.

III. DEFINING ORIGINAL MEANING

A. Background

The central fault line within contemporary originalism has been drawn by competing definitions of original meaning. Original meaning may be defined by the Framers' intentions ("original intentions originalism"),[69] the Ratifiers' understanding ("original understanding originalism"),[70] or the understanding of a reasonable observer at the time the provision was adopted ("original public meaning originalism").[71] This section examines these approaches and contrasts the definitions adopted by Justices Scalia and Thomas.

1. Original Intentions Originalism

Original intentions originalism is the view that the Constitution should be interpreted according to the Framers' "real subjective intentions."[72] Richard Kay has offered the most compelling account of the application of this methodology. He contends that the Framers' intentions concerning the content of constitutional provisions should be determinative, but only to the extent that "they were directed to the content of the enacted rule."[73] Therefore, the Framers' personal beliefs regarding particular issues are irrelevant unless they concern the content of the rule.[74]

Original intentions originalism has three unique justifications. First, Stanley Fish has advanced a linguistic defence of the intentionalist approach. He argues that texts "have been created by a purposive agent," and therefore determining meaning requires an understanding of the intentions of that agent.[75] Second, Berger, a prominent early advocate of

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[69] *See, e.g.*, Kay, *supra* note 19; Raoul Berger, *Original Intention in Historical Perspective* 54 GEORGE WASHINGTON L. REV. 296 (1986).

[70] *See, e.g.*, Charles Lofgren, *The Original Understanding of Original Intent?* 5 CONST. COMMENT. 77, 111–13 (1988); Larry Alexander, 'Simple-Minded Originalism' in Grant Huscroft and Bradley Miller (eds), THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 87, 93 (2011).

[71] *See, e.g.*, Kesavan and Stokes Paulsen, *supra* note 18, at 1132; Gary Lawson and Guy Seidman, *Originalism as a Legal Enterprise* 23 CONST. COMMENT.47, 48 (2006).

[72] Kay, *supra* note 19, at 704. *See also* Raoul Berger, *An Anatomy of False Analysis: Original Intent* BRIGHAM YOUNG UNIVERSITY L. REV 715, 719 (1994), who notes that the enquiry seeks objective manifestations of subjective intent.

[73] Kay, *supra* note 19, at 710.

[74] *Id.* at 710.

[75] Stanley Fish, 'The Intentionalist Article Once More' in Grant Huscroft and Bradley Miller (eds), THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 99,

original intentions originalism, has defended this approach on the grounds of judicial constraint. He argues that, "[a]dherence to the long-established doctrines that judges have no law-making power, that they must effectuate the clear intention of the Framers, would far more effectively serve to restrain the courts' exercise of extra-constitutional power [than nonoriginalist approaches]."[76] Third, Kay has defended treating the Framers' intentions as dispositive on the grounds of legitimacy. According to this view, the "normative force" of the Constitution is derived from contemporary acceptance of the authority of the Framers.[77] Therefore, unlike other approaches, "recourse to the original intentions provides a link that is essential to the legitimacy of constitutional judicial review."[78]

Original intentions originalism was sharply critiqued in the 1980s. In an influential article, Brest highlighted the difficulty of ascertaining "the institutional intent of a multimember body."[79] The challenge of aggregating potentially conflicting intentions undermined originalism's practicability.[80] H. Jefferson Powell went further by suggesting that original intentions originalism was self-defeating on historical grounds. He argued that the Framers did not intend the Constitution to be interpreted in line with their intentions.[81] Powell's methodology and conclusions have been vigorously challenged by original intentions originalists.[82] However, the cumulative effect of these attacks was to discredit an intentions-based approach to discerning the Constitution's original meaning.[83]

2. Original Understanding Originalism

Original understanding originalism is the view that the Constitution should be interpreted according to the Ratifiers' understanding of the text's meaning. Treating the Ratifiers' understanding rather than the Framers'

105 (2011).

[76] Raoul Berger, *New Theories of "Interpretation": The Activist Flight from the Constitution* 47 *OHIO STATE L. J.* 1, 12 (1986). Kay, *supra* note 19, at 721, argues that original public meaning originalism's emphasis on discerning the understanding of a hypothetical eighteenth-century reasonable person produces more indeterminacy than original intentions originalism.

[77] Kay, *supra* note 19, at 715.

[78] *Id*. at 704.

[79] Brest, *supra* note 30, at 212. Kay, *Original Intention and Public Meaning*, *supra* note 19, at 707, refutes this criticism by pointing to the "very common fact of shared intention" in multi-member bodies.

[80] Barnett, *supra* note 3, at 612. Farber, *supra* note 13, at 1088, notes that this challenge is accentuated by inadequate and unreliable documentary evidence.

[81] Powell, *supra* note 9, at 948.

[82] *See, e.g.*, Raoul Berger, *The Founders' Views – According to Jefferson Powell* 67 TEXAS L. REV. 1033 (1999); Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intentions* 68 OHIO STATE L. J. 1239 (2007).

[83] Barnett, *supra* note 3, at 612, notes that the attacks on originalism were "perceived at the time as devastating."

intentions as dispositive is justified because the Ratifiers' assent conferred legal force to the text.[84]

However, original understanding originalism gained limited traction. The relevant original understanding may be defined in accordance with the subjective understanding of the Ratifiers or the objective understanding of a reasonable Ratifier.[85] If original understanding is defined by the subjective understanding of the Ratifiers, the practical difficulties associated with ascertaining institutional intent that undermined original intentions originalism apply with equal force.[86] Alternatively, if original understanding is defined by the objective understanding of a reasonable Ratifier, this approach is almost identical to the original public meaning approach that has been dominant since the mid 1980s.[87]

3. Original Public Meaning Originalism

Original public meaning originalism is the view that the Constitution should be interpreted according to the original public meaning of a provision, defined by the objective understanding of a reasonable, well-informed observer at the time the provision was ratified.[88] Solum notes that this approach requires an inquiry into the "conventional semantic meaning that the words and phrases had at the time the provision was framed and ratified."[89] Dubbed the "new originalism," the original public meaning approach has commanded widespread acceptance among originalists and is the most convincing of the three approaches.[90]

Original public meaning originalism has three primary justifications. First, Jeffrey Goldsworthy outlines the linguistic case for seeking the conventional semantic meaning. He argues that the original meaning of a provision is not the literal meaning ("sentence meaning"), because a literal approach "maximizes indeterminacy, absurdity, and the frustration" of the intentions of the authors.[91] Furthermore, the Framer's intended meaning ("speaker's meaning") is not determinative in a legal context, as behaviour is shaped by the objectively understood meaning of

[84] Kesavan and Stokes Paulsen, *supra* note 18, at 1138.
[85] *Id.* at 1138.
[86] Solum, *supra* note **Error! Bookmark not defined.**, at 19.
[87] *Id.* at 20.
[88] *See, e.g.,* Kesavan and Stokes Paulsen, *supra* note 18, at 1132, who describe this approach as seeking the meaning to a "hypothetical, objective, reasonably well-informed reader;" Barnett, *supra* note 3, at 621, who refers to the "objective original meaning that a reasonable listener would place on the words used ... at the time of its enactment."
[89] Solum, *supra* note 16, at 926.
[90] Barnett, *supra* note 3, at 620. However, original public meaning originalism is not without its critics. *See, e.g.*, Kay, *supra* note 19, at 704; Smith, *supra* note 49, at 227–33.
[91] Goldsworthy, *supra* note 43, at 46.

the words used rather than the unexpressed intentions of the speaker.[92] Therefore, interpreters should seek the original public meaning ("utterance meaning") of a provision "which depends on what was in some sense publicly known of the founders' intended meaning."[93] Although sentence meaning and speaker's meaning are relevant to this inquiry, the utterance meaning can be discerned independently through considering "linguistic facts."[94]

Second, original public meaning originalism is justified on practical grounds. It is not hampered by the difficulty of discerning the collective intent of the Framers or Ratifiers. In determining the original public meaning, interpreters may consider historical evidence from the time in which the provision was ratified, such as Convention Debates, dictionaries and newspaper articles.[95] Therefore, Barnett argues that the shift towards this approach "obviated much of the practical objection to originalism."[96]

Third, original public meaning originalism is justified on the basis that it is incompatible with the public character of the law to treat the subjective intentions of the Framers or Ratifiers as dispositive. Bork, who has adopted original public meaning originalism after previously arguing for an intentions-based approach,[97] argues that, "[l]aw is a public act. Secret reservations or intentions count for nothing."[98] Furthermore, Keith Whittington argues that as the Constitution gained its force through popular ratification, the public meaning of provisions carries greater significance than subjective intentions.[99]

B. Justice Scalia's "Original Public Meaning" Approach

Justice Scalia has been described as the "patron saint" of original public meaning originalism, having played a central role in shifting mainstream originalist theory away from original intentions and original understanding originalism.[100] His interpretive focus is "the original

[92] *Id*. at 48.
[93] *Id*. at 50.
[94] Solum, *supra* note 16, at 941.
[95] Bork, *supra* note 2, at 144.
[96] Barnett, *supra* note 15, at 9. *Contra* Kay, *supra* note 19, at 720–2, who suggests that original public meaning originalism creates more indeterminacy than original intentions originalism, as interpreters are given broad latitude to construct the hypothetical reasonable person.
[97] Bork, *supra* note 21, at 13.
[98] Bork, *supra* note 2, at 144.
[99] Whittington, *supra* note 27, at 72. However, Kay, *supra* note 19, at 707, argues that "[t]he fact that the general public might have understood the proposed text in a particular way, however, does not mean that any particular number of them approved of the text."
[100] Kesavan and Stokes Paulsen, *supra* note 18, at 1139–40.

meaning of the text, not what the original draftsmen intended."[101]

Justice Scalia adopts an objective approach to meaning. He refuses to treat the subjective intentions of the Framers or Ratifiers as dispositive, arguing that it is "incompatible with democratic government ... to have the meaning of a law determined by what the lawmaker meant, rather than what the lawmaker promulgated."[102] Reliance on unexpressed intent allows the judiciary to subvert the democratic process by substituting its preferred outcome for the democratically adopted text.[103] Evidence of the intentions of Framers such as Alexander Hamilton is relevant in discerning original public meaning, but carries no more weight than evidence of the intentions of non-Framers such as Thomas Jefferson.[104]

Justice Scalia describes himself as a "textualist."[105] However, he rejects the notion that textualism is synonymous with "strict constructionism"[106] The constitutional text should be construed reasonably and with a full awareness of its context, with the overarching aim of establishing "how the text of the Constitution was originally understood."[107]

Justice Scalia's textualism relies on a particular conception of the constitutional text. Although the constitutional text is unusual, it is "in its nature the sort of 'law' that is the business of the courts — an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law."[108] Therefore, the judiciary must apply the usual principles of statutory interpretation when interpreting the Constitution.[109] Justice Scalia rejects the existence of a "Living Constitution," which changes to meet the needs of society and requires judicial interpretation in light of current social values.[110]

Justice Scalia's constitutional opinions are largely consistent with original public meaning originalism. He uses historical evidence to justify

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[101] Antonin Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws' in AMY GUTMANN (ED), A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (1997).

[102] *Id.* at 17. *See also*, Scalia and Garner, *supra* note 60, at 407, who suggest that "[j]udges have no expertise whatever in assessing public opinion."

[103] *Id.* at 21–2.

[104] *Id.* at 38. Justice Scalia details this approach in Tome v. United States, 513 U.S. 150, 167 (1995).

[105] Scalia, *supra* note101, at 23.

[106] *Id.* at 23. He does not define what he means by strict constructionism, but it has been elsewhere described as "a construction that narrows the scope of coverage or application of a statute": Bradley Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction* 17 HARV. J. L. & PUB POL'Y 401, 403.

[107] *Id.* at 38.

[108] Scalia, *supra* note 39, at 854.

[109] Scalia, *supra* note 101, at 37.

[110] *Id.* at 38–9. *See also* Scalia and Garner, *supra* note 60, at 403–10. The notion of a "Living Constitution" is defended in David Strauss, THE LIVING CONSTITUTION (2010).

his interpretive conclusions. In *Heller*, Justice Scalia's majority opinion relied extensively on period dictionaries to determine the Second Amendment's original meaning, invalidating a statute prohibiting the possession of handguns.[111] As Solum notes, "it is hard to imagine finding a clearer example of original public meaning originalism in an actual judicial decision."[112] In *Maryland v. Craig* ("*Craig*"),[113] Justice Scalia drew upon the 1791 meaning of the term "witness" to justify his conclusion that the Confrontation Clause requires direct confrontation between a witness and accuser.[114] In *Arizona v. United States* ("*Arizona*"),[115] he defended the right of states to exclude aliens on the basis of the Naturalization Clause's original public meaning, discerned from evaluating the Federalist Papers.[116] Finally, in *Pacific Mutual Life Insurance v. Haslip* ("*Haslip*"),[117] he referred to the writings of prominent 18th century legal commentators Sir William Blackstone and Sir Edward Coke to support the view that the Due Process Clause's original public meaning does not limit the size of punitive damage awards.[118]

Justice Scalia consistently resolves constitutional controversies with reference to original public meaning. However, his judicial method is justifiably criticised for its inconsistent invocation of historical evidence. In *Texas v. Johnson* ("*Johnson*"),[119] he joined Justice William Brennan's majority opinion holding that the burning of the American flag was expressive conduct protected by the First Amendment, without demonstrating the consistency of this view with the First Amendment's original public meaning. As Ralph Rossum argues, there is no evidence that the society adopting the First Amendment understood it to cover all communicative activity.[120] Furthermore, Cass Sunstein attacks Justice Scalia (and Justice Thomas) for voting to invalidate affirmative action programs "without devoting so much as a sentence to the original

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[111] *Heller*, 570, 581–7. *Heller* invalidated the DC Code §§ 7–2501.01(12), 7–2502.01(a), 7–2502(a)(4) (2001). Period dictionaries are also relied upon in the joint dissent (Scalia, Thomas, Alito, and Kennedy JJ) in National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2644 to define the scope of the Commerce Clause and rule the Individual Mandate provision in the *Patient Protection and Affordable Care Act*, 26 USC § 5000A (2010) unconstitutional.

[112] Solum, *supra* note 16, at 940.

[113] 497 US 836 (1990).

[114] *Id*. at 864. The Confrontation Clause is listed in *U.S. Const*. amend. VI.

[115] 132 S. Ct. 2492 (2012).

[116] *Id*. at 2512. The Naturalisation Clause is listed in *U.S. Const*. amend. XIV § 1.

[117] Pacific Mutual Life Insurance Company v. Haslip, 499 U.S. 1 (1991).

[118] *Id*. at 28–9. Justice Scalia is referring to the Due Process Clause in *U.S. Const.* amend. XIV § 1.

[119] 491 U.S. 397 (1989).

[120] Ralph Rossum, 'Text and Tradition: The Originalist Jurisprudence of Antonin Scalia' in Earl Maltz (ed), REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 34, 39 (2003).

understanding of the Equal Protection Clause."[121]

The historical accuracy of Justice Scalia's conclusions is questionable. Judge Richard Posner has described Justice Scalia's opinion in *Heller* as "faux originalism," which misconstrues the historical record to advance conservative policy preferences.[122] Irrespective of the accuracy of Judge Posner's critique, contested historical conclusions raise broader questions regarding the capacity of original public meaning originalism to confine judicial discretion. As Mark Tushnet argues, "[h]istory is replete with ... 'contested truths.'"[123] Therefore, Justice Scalia's approach does not necessarily limit judicial subjectivity, as judges can deploy historical evidence that conforms to their policy preferences.

Justice Scalia is alert to this risk. He accepts that, "it is often exceedingly difficult to plumb the original understanding of an ancient text."[124] However, he defends originalism as the "lesser evil."[125] He argues that original public meaning is usually "easy to discern and simple to apply."[126] In these instances, treating original meaning as dispositive limits the judicial imposition of policy preferences. However, Justice Scalia underplays the difficulty of discerning a singular original public meaning. Conflicting historical records afflict almost all litigated constitutional provisions, reflecting their contentious pathway to ratification.[127] Judicial choices are ultimately necessary to resolve historical indeterminacy. Justice Scalia does not provide a compelling justification for judicial authority to make these choices. Judges are rarely trained historians capable of making "credibility judgments" differentiating between conflicting historical evidence.[128] Reliance on "law-office history" allows judges to shield their value choices under the cloak of objectivity.[129] Therefore, original public meaning originalism rarely constrains judicial subjectivity, undermining the purported virtue of this approach.

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[121] Sunstein, *supra* note 8, at 134. At 138–40, he details the evidence supporting the view that affirmative action is consistent with the original understanding of the Equal Protection Clause. *See also* Stephen Siegel, *Federal Government's Power to Enact Color-Conscious Laws: An Originalist Enquiry* 92 NORTHWESTERN L. REV. 477 (1998).

[122] Richard Posner, *In Defence of Looseness*, THE NEW REPUBLIC 27 August, 2008 http://www.tnr.com/article/books/defense-looseness?page=2,1.

[123] Mark Tushnet, *Heller and the New Originalism* 69 OHIO STATE L. J. 609, 610 (2008).

[124] Scalia, *supra* note 39, at 856.

[125] *Id.* at 864.

[126] Scalia, *supra* note 101, at 45.

[127] See Tushnet, *supra* note 123, 617, who argues that "meanings – at least the meaning of interesting constitutional terms – are contested."

[128] Farber, *supra* note 13, at 1089. Plausibly, Justice Scalia could respond by questioning judicial authority to make philosophical judgments about contested moral principles. However, as originalists are more likely than nonoriginalists to emphasise a narrow conception of judicial authority, the failure of this approach to achieve historical objectivity is particularly damaging.

[129] Alfred Kelly, "*Clio and the Court: An Illicit Love Affair*" (1965) SUPREME COURT REVIEW 119, 122.

Justice Scalia argues that even if the historical record is indeterminate, originalism is superior to non-originalism because of the common point of departure for originalists. He argues that "the originalist at least knows what he is looking for: the original meaning of the text."[130] However, this interpretive focus fails to meaningfully constrain judicial discretion, in light of the historical indeterminacy detailed above. Contrary to Justice Scalia's account, nonoriginalists rarely argue for unfettered judicial discretion and defend other constraining mechanisms, such as precedent.[131] Furthermore, Justice Scalia argues that errors in historiography are likely to lead to moderate results, in light of the tendency of judges to project their own, current values onto the constitutional text.[132] However, he does not provide a compelling justification for this tendency towards moderation. The projection of current values may not lead to moderate results and even if it does, judges may choose to reject current values. Regardless of whether this is a good outcome, a contested historical record does not increase the likelihood of moderation.

C. Justice Thomas's 'General Original Meaning' Approach

Justice Thomas, unlike Justice Scalia, has never outlined a detailed methodology of constitutional interpretation. This has contributed to the simplistic depiction of Justice Thomas as "[Justice] Scalia's pawn."[133] However, this article will establish that Justice Thomas has adopted a distinctive approach to defining original meaning.

Imprecision in terminology may explain the confusion about Justice Thomas's preferred approach to identifying original meaning. In his Wriston Lecture, Justice Thomas argued that interpretive conclusions must be tied to the "intent of the Framers."[134] He consistently relies on a provision's "original understanding" to justify his interpretive conclusions, without clarifying whether he is referring to the public's understanding or the Ratifiers' understanding.[135] This section will assess Justice Thomas's jurisprudence to determine whether he adopts original intentions, original understanding or original public meaning originalism in practice.

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[130] Scalia, *supra* note 119, at 45.
[131] *See, eg,*. Breyer, *supra* note 10, at 118-19, who notes that nonoriginalist judges are "aware of the legal precedents, rules, standards, practices, and institutional understanding that a decision will affect."
[132] Scalia, *supra* note 39, at 864.
[133] Jeffrey Toobin, The Nine: Inside the Secret World of the Supreme Court 126 (2007).
[134] Clarence Thomas, "Judging in a Government by Consent." Speech delivered at the Manhattan Institute for Policy Research, New York City (October 16, 2008).
[135] *See, eg,*. Baze v. Rees, 553 US 35, 94 (2008); Printz v. United States, 521 U.S. 898, 937 (1997).

Justice Thomas has relied on a variety of different sources to establish original meaning. Gregory Maggs has advanced the theory that Justice Thomas has adopted a unique approach in which he looks for the "general original meaning" of the Constitution.[136] Maggs notes that on different occasions Justice Thomas has relied upon original intentions, original understanding and original public meaning to justify his conclusions.[137] Without a discernible hierarchy to evaluate these potentially conflicting sources, Maggs's conclusion is that Justice Thomas determines the general original meaning by searching for "agreement among multiple sources of evidence of the original meaning."[138]

Since the publication of Maggs's article in 2009, Justice Thomas has clarified his approach. In *McDonald v. Chicago,*[139] the Supreme Court considered whether the Second Amendment right to keep and bear arms was fully applicable to the States. In a concurring opinion, Justice Thomas stated that, "the goal [of constitutional interpretation] is to discern the most likely public understanding of a particular provision at the time it was adopted."[140] Evidence of original intentions is "useful not because it demonstrates what the draftsmen of the text may have been thinking, but only insofar as it illuminates what the public understood the words chosen by the draftsmen to mean."[141] This approach is identical to Justice Scalia's original public meaning approach.[142] Like Justice Scalia, Justice Thomas supports using evidence of original intentions merely to clarify original public meaning.

Justice Thomas's statement in *McDonald* appears to establish that he is an original public meaning originalist, reinforcing the convergence within contemporary originalism detailed in Part II. However, his jurisprudence demonstrates that his approach is not identical to Justice Scalia's approach in practice. This section will demonstrate that Maggs correctly argues that Justice Thomas has adopted a distinctive general original meaning approach since commencing his Supreme Court tenure. Further research is necessary to determine whether *McDonald* marks a shift

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[136] Gregory Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas* NEW YORK UNIVERSITY JOURNAL OF LAW & LIBERTY 494, 495 (2009).
[137] *Id.* at 494, 495.
[138] *Id.* at 494, 495.
[139] McDonald v. Chicago*,* 130 S. Ct. 3020 (2010).
[140] *Id.* at 3072. The term "public understanding" in this context appears to be identical to "original public meaning."
[141] *Id.* at 3072.
[142] However, it is noteworthy that despite applying the same interpretive methodology, Justices Scalia and Thomas reached different conclusions. Justice Thomas agreed with the plurality that the right to keep and bear arms applies to the States but did not agree that the constitutional foundation for this conclusion was the Fourteenth Amendment's Due Process Clause. Justice Scalia expressed "misgivings" with the plurality's view but ultimately joined the opinion. An explanation for this divergence will be provided in section VI.

in his jurisprudence.

Justice Thomas's constitutional opinions regularly treat original public meaning as dispositive. He has advocated a narrow reading of the Commerce Clause on the basis of its original public meaning.[143] In *United States v. Lopez* ("*Lopez*"),[144] his concurring opinion striking down a law prohibiting gun possession in school zones urged the Court to adopt an approach to the Commerce Clause that is "more faithful to the original understanding of that Clause."[145] Justice Thomas relied on dictionaries in use at the time of ratification to narrowly define "commerce" and justify his view that the Court's expansive construction of the Commerce Clause since the New Deal was inconsistent with its original public meaning.[146] In *Gonzales v. Raich* ("*Raich*"),[147] he dissented from the Court's opinion upholding a law regulating marijuana because "[i]n the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana."[148]

Furthermore, Justice Thomas's dissenting opinion in *U.S. Term Limits v. Thornton* ("*Thornton*")[149] demonstrates his reliance on original public meaning. In the absence of an explicit prohibition on State-imposed term limits on members of Congress, he argued that there must be historical evidence that the "[Qualifications] Clauses were generally understood at the time of the framing to imply such a prohibition."[150] Historical evidence consulted by Justice Thomas, including records of the Philadelphia Convention and Samuel Johnson's dictionary, did not support this implied prohibition.[151]

However, although Justice Thomas often treats original public meaning as dispositive, his judicial method is not identical to Justice Scalia's. Justice Thomas has been more likely than Justice Scalia to rely on the Framers' intentions to define original meaning.

In *McIntyre v. Ohio Elections Commission* ("*McIntyre*"),[152] Justice Thomas concurred with the Court's decision that a law prohibiting the distribution of anonymous campaign literature violated the First Amendment.[153] He reiterated his conventional commitment to applying the

[143] The Commerce Clause is listed in *U.S. Const*. art. 1 § 8.
[144] United States v. Lopez, 541 U.S. 549 (1995).
[145] *Id.* at 584.
[146] *Id.* at 586.
[147] Gonzalez v. Raich, 545 U.S. 1 (2005).
[148] *Id.* at 59.
[149] U.S. Term Limits v. Thornton, 514 U.S. 779 (1995).
[150] *Id. at 916*. The Qualifications Clause is listed in *U.S. Const.* art. 1 § 2.
[151] *Id. at* 858–61.
[152] McIntyre v. Ohio Elections, 514 U.S. 334 (1995).
[153] *Id. at* 358. Justice Thomas held that the law violated the Free Speech and Press Clauses listed in *U.S. Const.* amend. I.

"original understanding."[154] Significantly however, he described the appropriate methodology by stating that, "[w]hen the Framers did not discuss the precise question at issue, we have turned to 'what history reveals was the contemporaneous understanding of [the Establishment Clause's] guarantee.'"[155] Therefore, primacy is granted to the Framers' discussion of the issue. Later in his opinion, Justice Thomas stated that, "what is important is whether the Framers in 1791 believed anonymous speech sufficiently valuable to deserve the protection of the Bill of Rights."[156] The "intent of those who drafted and ratified" the Constitution is central to his opinion.[157] By contrast, Justice Scalia's dissent underplayed the significance of the Framers' intentions.[158]

Justice Thomas has relied heavily on the Framers' intentions to justify his conclusions in a number of other cases. In *Rosenberger v. Rector and Visitors of University of Virginia* ("*Rosenberger*"),[159] Justice Thomas detailed Framer James Madison's views to justify the conclusion that the Establishment Clause did not preclude religious entities from participating on neutral terms in government programs.[160] Although Justice Thomas conceded that "the views of one man do not establish the original understanding of the First Amendment,"[161] he criticized the dissenting opinions for identifying "no evidence that the Framers intended to disable religious entities" from receiving neutrally allocated government funds.[162] In *Missouri v. Jenkins* ("*Jenkins*"),[163] Justice Thomas rejected a broad construction of the federal equitable power because "the Framers did not intend federal equitable remedies to reach as broadly as we have permitted."[164] Finally, in *Saenz v. Roe*,[165] Justice Thomas argued that interpreting the Fourteenth Amendment requires judges to "endeavour to understand what the Framers ... thought that it meant."[166]

Consulting the Framers' intentions is not necessarily inconsistent with the original public meaning approach. As noted above, Justice Scalia has argued that the Framers' statements are evidence of the semantic meaning of a provision when it was adopted. However, Justice Thomas's discussion of the Framers' intentions in the passages listed above appears

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[154] *Id.* at 359.
[155] *Id.* at *359*.
[156] *Id.* at 370.
[157] *Id.* at *370*.
[158] *Id.* at *373*.
[159] Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995).
[160] *Id.* at 854–7. The Establishment Clause is listed in *U.S. Const.* amend. I.
[161] *Id.* at 856.
[162] *Id.* at 863.
[163] Missouri v. Jenkins, 515 U.S. 70 (1995).
[164] *Id.* at 126.
[165] Saenz v. Roe, 526 U.S. 489 (1999).
[166] *Id*. at 528.

to treat original intentions as inherently dispositive.

A possible explanation for Justice Thomas's emphasis on original intent is a lack of rhetorical precision in failing to highlight the primacy of original public meaning. However, Justice Thomas's consistent willingness to determine cases by reference to original intentions suggests that his approach is substantively different from Justice Scalia's approach. Rossum argues that Justice Thomas "incorporates Scalia's narrower original public meaning approach ... by asking, when necessary, to make his case more persuasive, the ends the framers sought to achieve, the evils they sought to avert, and the means they employed to achieve those ends."[167] Justice Thomas's consistent invocation of the Framers' intent coupled with a failure to adopt a clear original public meaning approach until *McDonald* points to an inconsistent approach.

Further research is needed to determine whether *McDonald* marks a substantive shift in Justice Thomas's methodology. In his 2011 opinion in *Brown v. Entertainment Merchants Association* ("*Entertainment Merchants*"),[168] he reaffirmed the methodology outlined in *McDonald* and relied on historical evidence concerning the "original public understanding of the First Amendment" to justify California's ban on the sale of violent video games to minors.[169] However, he has not referred to his methodology in *McDonald* or the original public understanding in any other opinions. Furthermore, in two opinions decided a month before *McDonald*, Justice Thomas reinforced the uncertainty concerning his treatment of the Framers' intentions. In *United States v. Comstock* ("*Comstock*"),[170] Justice Thomas justified a limitation on the Necessary and Proper Clause on the basis of its "utmost importance to the Framers."[171] In *Graham v. Florida* ("*Graham*"),[172] he rejected the Court's authority to undertake a proportionality assessment of sentencing because the Framers were familiar with this concept and chose not to embody it in the text of the Cruel and Unusual Punishments Clause.[173] Neither of these cases is necessarily inconsistent with an original public meaning approach that uses evidence of the Framers' intent to clarify semantic meaning, but they demonstrate the uncertainty created by Justice Thomas's jurisprudence.

Regardless of the version of originalism adopted, Justice Thomas deserves the same criticism as Justice Scalia for inconsistently applying

[167] Ralph Rossum, *Clarence Thomas's Originalist Understanding of the Interstate, Negative, and Indian Commerce Clauses* 88 UNIVERSITY OF DETROIT MERCY LAW REVIEW. 769, 774 (2011).
[168] Brown v. Entertainment Merchants Association, 131 U.S. 2729 (2011).
[169] *Id.* at 2751. Justice Thomas justified this view on the basis of a detailed assessment of the conventional 18th century relationship between parents and children.
[170] United States v. Comstock, 130 U.S. 1949 (2010).
[171] *Id*. at 1972. The Necessary and Proper Clause is listed in *U.S. Const*. art. 1 § 8.
[172] Graham v. Florida, 130 U.S. 2011 (2010).
[173] *Id.* at 2044. The Cruel and Unusual Punishments Clause is listed in *U.S. Const*. amend. VIII.

historical evidence.[174] In *Grutter v. Bollinger* ("*Grutter*"),[175] his withering attack on affirmative action notably fails to include any evidence of its incompatibility with the Equal Protection Clause's original meaning.[176] In *Citizens United v. Federal Election Commission* ("*Citizens United*"),[177] he rejected the compatibility of campaign finance disclosure requirements with the First Amendment on the basis of "real-world, recent examples" of damage caused by these requirements, without any attempt to tether this view to the original understanding.[178] Furthermore, Justice Thomas has voted to afford First Amendment protection to commercial speech "even though no scholar claims that the persons responsible for the First Amendment intended to protect advertising."[179] As Mark Graber argues, Justice Thomas does not provide "nonpartisan criteria" for choosing between conflicting historical evidence.[180] His approach fails to constrain judicial discretion.

D. Conclusion

In light of Justice Scalia's sustained advocacy and Justice Thomas's recent outline of his interpretive methodology, the academic convergence within originalism towards the original public meaning approach has been accompanied by a judicial convergence. However, Justices Scalia and Thomas fail to adequately account for the inconsistencies in their approaches, undermining original public meaning's claim to promote judicial constraint in practice.

Justice Scalia offers a detailed justification for original public meaning originalism. His jurisprudence evidences a consistent methodology focused on discerning and applying original public meaning. However, his responses to criticisms of his approach are unconvincing. His failure to resort to historical evidence in certain cases and unconvincing historical conclusions undermine his claim to have insulated the interpretive task from his policy preferences.

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[174] See, e.g., Andrew Koppelman, *Phony Originalism and the Establishment Clause,* 103 NORTHWESTERN UNIVERSITY LAW REVIEW. 727, 749 (2009). Koppelman argues that Justices Scalia and Thomas employ a "phony originalism which is opportunistically used to advance substantive positions that the judges find congenial."

[175] Grutter v. Bollinger, 539 U.S. 306 (2003).

[176] *Id.* at 378. Justice Thomas criticises the majority for undermining the "principle of equality embodied in the Declaration of Independence and the Equal Protection Clause," without linking this view to evidence of original meaning. The Equal Protection Clause is listed in *U.S. Const*. amend. XIV § 1.

[177] Citizens United v. Federal Elections Commission, 132 U.S. 876 (2010).

[178] *Id*. at 981.

[179] Mark Graber, 'Clarence Thomas and the Perils of Amateur History' in (ed. Earl Malt) REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 70, 88 (2003).

[180] *Id.* at 89.

In *McDonald*, Justice Thomas echoed Justice Scalia's commitment to original public meaning originalism. However, his jurisprudence has demonstrated a consistent willingness to treat the Framers' intentions as dispositive, manifesting a distinctive approach. Maggs's general original meaning description of Justice Thomas's methodology is accurate. Future cases will demonstrate whether *McDonald* marks a rhetorical or substantive shift.

Justice Thomas fails to provide either a compelling justification for affording the Framers' intentions primacy or a hierarchy to evaluate competing sources of meaning. The uncertainty created by this approach undermines its capacity to constrain judicial discretion, as it empowers judges to select the form of original meaning that buttresses their policy preferences. Justice Thomas's inconsistent application of historical evidence reinforces the limitations of his approach.

However, Justice Thomas's general original meaning approach may be a more intellectually honest version of originalism. The new originalism advocated by Justice Scalia allows subjective intentions to be consulted as relevant evidence of meaning. Therefore, the practical differences between these approaches are likely negligible.[181] Original public meaning originalism has a stronger principled justification than the other approaches discussed but yields similar outcomes in practice.

IV. ORIGINALISM AND NATURAL LAW

A. Background

Originalists differ about the legitimacy of interpreting the Constitution in light of the natural law principles embodied in the Declaration of Independence.[182]

The Declaration was adopted by the Continental Congress in 1776, prior to the ratification of the Constitution in 1788 and the Bill of Rights in 1791.[183] The most famous passage of the Declaration states: "[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[184] The Declaration is a

[181] Kay, *supra* note 19, at 712. See also Tushnet, *supra* note 123, at 612, who notes that "nearly everything examined by old originalists is relevant to the new originalist enquiry."
[182] This article will not provide a detailed overview of natural law. For an overview of competing theories of natural law see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 23-5 (1980).
[183] The United States Constitution was approved by the nine states required for ratification after New Hampshire ratified the Constitution on 21 June 1788. The Bill of Rights (U.S. 1791) contains the first ten amendments to the United States Constitution.
[184] The Declaration of Independence (U.S. 1776).

powerful statement of natural law principles, claiming authority for the American Revolution from "the Laws of Nature and of Nature's God."[185] Originalists must determine whether and to what extent these principles should influence the interpretation of the written Constitution.

The Declaration presupposes the existence of certain unalienable, or natural, rights. Originalists adopting a positivist approach reject the notion that the Constitution should be interpreted to protect these rights to the extent that they are unenumerated.[186] Bork is the most prominent advocate of this view. He argues that there is insufficient evidence to support the view that the Framers intended *judicial enforcement* of natural law, regardless of the influence of natural law on the Constitution's content.[187] Furthermore, he argues that judicial enforcement of natural law would have harmful outcomes, considering the tendency of judges "to confuse their strongly held beliefs with the order of nature."[188] Recourse to natural law has the potential to undermine originalism's emphasis on judicial constraint.

However, the relationship between natural law and judicial authority is complex. Prominent natural law theorist Robert George rejects the view that recognizing an interpretive role for natural law presupposes judicial power to override positive law. He argues that the "issue of the scope and limits of judicial power is not resolved by natural law; it is settled, rather, by the positive law of the Constitution."[189] The Constitution allocates power to the legislature to determine the implications of natural law for positive law and the rule of law is violated when the judiciary appropriates this power.[190] Judicial enforcement of natural law is limited to the extent the original understanding of constitutional provisions reflects natural law principles.[191] George's emphasis on judicial deference to legislatures in the interpretation of natural law reconciles his approach with

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[185] *Id. See also* John Baker, *Natural Law and Clarence Thomas,* 12 REGENT UNIVERSITY LAW REVIEW 472, 473 (2000), who notes that the natural law principles underpinning the *Declaration* are complex and draw from different philosophical traditions..

[186] The most famous exposition of positivism is H.L.A. Hart, *The Concept of Law* (2012 ed). A detailed outline of positivism is beyond the scope of this article.

[187] Bork*, supra* note 2, at 209. See also Raoul Berger, *Natural Law and Judicial Review: Reflections of an Earthbound Lawyer* 61 UNIVERSITY OF CINCINNATI LAW REVIEW 5, 17 (1992), who cites the Framers' narrow conception of judicial authority to support the view that they did not intend judges to apply "extra-constitutional" natural law norms.

[188] *Supra* note 2, at 66, 209, attributes infamous cases such as Dred Scott v. Sandford, 60 U.S. 393 (1856) and Lochner v. New York, 198 U.S. 45 (1905) to the judicial enforcement of natural law.

[189] Robert George, *The Natural Law Due Process Philosophy*, 69 FORDHAM LAW REVIEW 2301, 2304 (2001).

[190] Robert George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM LAW REVIEW 2269, 2282 (2001). He states that the Constitution "places primary authority for giving effect to natural law and protecting natural rights to the institutions of democratic self-government, not to the Courts."

[191] George, *supra* note 189, at 2309.

Bork's view.

Philip Hamburger advances a historical justification for George's view that natural law need not have expansive implications. He argues that "[l]ate eighteenth-century Americans typically assumed that natural rights ... were subject to natural law."[192] Natural law was considered to be a "type of reasoning about how individuals should use their freedom," thereby operating as a "limitation on natural liberty."[193] Importantly, Hamburger argues that founding era Americans "sacrificed a portion of their natural liberty to civil government," limiting their enforceable rights to those that are constitutionally entrenched.[194] Therefore, Hamburger's view precludes the judicial enforcement of unenumerated rights. However, natural law remains relevant as a process of reasoning when interpreting constitutional provisions. Under this account, translating natural law into judicial practice requires an "appreciation for moral reasoning" in constitutional interpretation.[195]

By contrast, other originalists sympathetic to natural law embrace a broader conception of judicial authority. Barnett argues that natural rights are judicially enforceable and extend beyond the rights that are enumerated in the Constitution, as the "founding generation universally believed that enactments should not violate the inherent or 'natural' rights of those whom they are directed."[196] Timothy Sandefur endorses the use of the Declaration's natural law principles to reshape the Supreme Court's jurisprudence on issues such as civil rights, federalism and economic regulation.[197] Ronald Dworkin is famously a "moving target" whose views defy classification.[198] However, it is arguable that he adopts a similar approach to Barnett and Sandefur, through urging the judiciary to undertake an "abstract, principled, moral reading" of the constitutional

[192] Philip Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102. YALE LAW JOURNAL 907, 913 (1993).
[193] *Id.* at 923. Hamburger, at 927, uses this reasoning to justify the lack of a contradiction between freedom of speech as a natural right and constraints on freedom of speech.
[194] *Id.* at 930.
[195] Baker, *supra* note 185, at 498. Hamburger, *supra* note 192, at 908, argues that natural law was historically understood to "consist of reasoning – reasoning about how humans should use or enjoy their natural liberty."
[196] Barnett, *supra* note 26, at 54.
[197] Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARVARD JOURNAL OF LAW & PUBLIC POLICY 489 (2004).
[198] Berman, *supra* note 12, at 259. For different characterisations of Dworkin's approach see Jeffrey Goldsworthy, *Dworkin as an Originalist* 17 CONSTITUTIONAL COMMENTARY 49, 49 (2000), who argues that Dworkin endorses a version of originalism; Sunstein, *supra* note 8, at 32, who describes Dworkin as a "perfectionist;" James Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation* 69 FORDHAM LAW REVIEW 2285, 2292 (2001), who notes the similarities between Dworkin's moral reading of the Constitution and the natural rights approach.

text.[199]

B. Justice Thomas as a Natural Lawyer?

Justice Thomas has urged that the Constitution be interpreted in light of the natural law principles underpinning the Declaration. Natural law is at the core of Justice Thomas's originalist philosophy. Prior to his Supreme Court confirmation, Justice Thomas advocated a "true jurisprudence of original intent" which placed the "moral and political teachings" of the Declaration at the centre of the interpretive inquiry.[200] As the original intent of the Constitution is "the fulfilment of the ideals of the Declaration,"[201] insulating these principles from the interpretive task is inconsistent with originalism. Justice Thomas seeks to apply the Framers' conception of natural law. Constitutional interpretation should "bring out the best of the Founders' arguments regarding the universal principles of equality and liberty."[202]

However, Justice Thomas's professed acceptance of natural law requires interrogation in light of his other extra-judicial statements. In his Confirmation Hearings, he stated that, "I don't see a role for the use of natural law in constitutional adjudication."[203] He explained his support for natural law and natural rights prior to his nomination as emerging "purely from a political theory standpoint."[204] In a 1996 speech, Justice Thomas appeared to adopt a positivist approach, stating that "[t]he duty of the federal courts is to interpret and enforce two bodies of positive law: the Constitution and the body of federal statutory law."[205] The judiciary must apply "authoritative texts," which secure their authority from their democratic adoption.[206]

Reconciling these statements requires the recognition that Justice Thomas is more accurately described as an originalist than a natural lawyer. Consistent with George and Hamburger, Justice Thomas does not claim a judicial mandate to override the written text. He reads the text in light of the principles of the Declaration, claiming authority to do so on the

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[199] Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve* 65 FORDHAM LAW REVIEW 1249, 1253 (1997). See also Fleming, *supra* note 198, at 2292.

[200] Clarence Thomas, 'Notes on Original Intent' quoted in Committee on the Judiciary, United States Senate, *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States*, 102nd Cong., 1st sess. (September 1991) 124.

[201] Thomas, *supra* note 61, at 985.

[202] *Id*. at 993.

[203] Committee on the Judiciary, United States Senate, *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States*, 102nd Cong., 1st sess. (September 1991) 112 (testimony of Judge Clarence Thomas) ('*Thomas Confirmation Hearings Testimony*').

[204] *Id*. at 116.

[205] Thomas, *supra* note 61, at 5.

[206] *Id.* at 5.

basis of the "explicit reference" to the Declaration in the Constitution.[207] From this perspective, "the Constitution is a logical extension of the principles of the Declaration of Independence."[208] This interrelationship provides a textual basis for examining the Framers' understanding of natural law.[209] As Justice Thomas argues, "[w]ith the Declaration as a backdrop, we can understand the Constitution as the Founders understood it."[210] Therefore, presuming that the founding generation intended the Constitution to be interpreted in accordance with the natural law principles of the Declaration, he acts consistently with originalism in seeking to do so.

In *Lawrence v. Texas* ("*Lawrence*"),[211] Justice Thomas illustrated this restrained approach to natural law. He voted to uphold a law criminalizing consensual homosexual sodomy despite its apparent conflict with the principle of inherent equality underpinning the Declaration. Justice Thomas noted that the impugned law was "uncommonly silly" and claimed that he would vote to repeal it if he were a member of the Texas legislature.[212] However, his duty to decide cases according to the Constitution precluded him from striking down the law, in the absence of an enumerated right of privacy.[213]

Sandefur has criticized Justice Thomas's opinion in *Lawrence*, arguing that is "inconsistent with his basic jurisprudential framework."[214] However, Justice Thomas appears to have adopted George's view that natural law does not justify judicial recognition of novel rights and that the legislature has exclusive authority to resolve disputes about the proper application of natural law.[215] This emphasis on judicial deference is consistent with his statement that "[t]he best defence ... of the judicial restraint that flows from our commitment to limited government is the

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[207] Thomas, *supra* note 61, at 987. The *United States Constitution* art VII states that the Constitution is presented for ratification "the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth."

[208] Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment* 12 HARVARD JOURNAL OF LAW & PUBLIC POLICY 63, 64 (1989).

[209] *Id.* at 63.

[210] *Id*. at 65.

[211] *Lawrence v. Texas,* 539 U.S. 558 (2003).

[212] *Id*. at 605.

[213] *Id*. at 605–6.

[214] Timothy Sandefur, *Clarence Thomas's Jurisprudence Unexplained,* 4 NEW YORK UNIVERSITY JOURNAL OF LAW & LIBERTY 535, 545 (2009).

[215] *See, e.g.* Saenz v. Roe, 526 U.S. 489, 528 (1999), in which Justice Thomas warned of the risk that the "Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the 'predilections of those who happen at the time to be Members of this Court;'" National Aeronautics and Space Administration v. Nelson, 131 S. Ct. 746, 769,, in which Justice Thomas rejected the notion that the Fifth Amendment's Due Process Clause "is a wellspring of unenumerated rights."

higher law political philosophy of the Founding Fathers."[216]

However, Justice Thomas has used the natural law principles of the Declaration to vote to invalidate legislation that differentiates on the basis of race. Equality, manifested through the principle of a "color-blind" Constitution, is at the core of Justice Thomas's opposition to affirmative action programs.[217] In *Adarand v. Pena* ("*Adarand*"),[218] Justice Thomas stated in his concurring judgment striking down an affirmative action program that the "paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution."[219] In *Grutter*, his dissent emphasized the incompatibility of the University of Michigan's admissions policy with the "principle of equality embodied" in the Declaration.[220] Furthermore, in *Parents Involved in Community Schools v. Seattle School District* ("*Seattle*"),[221] he relied on the principle of a color-blind Constitution in a concurring opinion striking down race-based student-assignment programs.[222]

Justice Thomas's approach in these cases is inconsistent with the restrained approach to natural law adopted in *Lawrence*. In *Adarand*, he argued that "[t]here can be no doubt" that the relevant program conflicted with principles of equality, detailing the pernicious consequences of racial paternalism without providing any evidence that the Framers' understanding conformed to this view.[223] In *Grutter*, Justice Thomas asserted that the Constitution "abhors classifications based on race," without citing any historical basis for this assumption.[224]

Reconciling the conflicting approaches adopted by Justice Thomas is challenging. His commitment to originalism explains his unwillingness to rely on natural law except to the extent that it influences the Constitution's original understanding. However, his use of the principle of equality to justify his conclusions in cases concerning race is not tethered to the original understanding. Therefore, he appears to have adopted a Dworkinian approach in this context, undertaking a "moral reading of the

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[216] Thomas, *supra* note 208, at 63. Alternatively, Justice Thomas's judgment may be understood from an originalist perspective as upholding the Framers' intention not to proscribe discrimination against homosexuals, although this justification is not raised in his judgment.

[217] The Constitution was first described as "color-blind" by Justice Harlan in Plessy v. Ferguson, 163 U.S. 537, 559 (1896).

[218] Adarand v. Pena, 515 U.S. 200 (1995).

[219] *Id.* at 240. Justice Thomas cites the *Declaration,* supra note 184, as authority for this proposition.

[220] Grutter v. Bollinger, 539 U.S. 306, 378 (2003).

[221] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

[222] *Id.* at 748.

[223] *Adarand,* 515 U.S. at 200 (1995). Justice Thomas, at 241, relies on assertions such as the statement that "[i]nevitably, such programs engender attitudes of superiority."

[224] *Grutter,* 539 U.S. at 306, (2003).

Constitution" and imposing his own conception of equality.[225] His approach in affirmative action cases is praised by Sandefur and Gerber, in line with their endorsement of judicial authority to interpret natural law principles to invalidate legislation.[226]

Justice Thomas's unwillingness to use the principle of inherent equality to invalidate the impugned statute in *Lawrence* is therefore inconsistent with his approach in race cases.[227] Therefore, judicial deference does not consistently constrain his jurisprudence. His failure to reconcile these competing conceptions of judicial authority to enforce natural law raises valid questions about the consistency of his judicial method.

Gerber explains the inconsistency in Justice Thomas's jurisprudence with reference to his dichotomy between "liberal originalists" and "conservative originalists."[228] Liberal originalists interpret the Constitution in light of the natural law principles underpinning the Declaration, whereas conservative originalists interpret the Constitution in light of the Framers' intent.[229] Gerber argues that Justice Thomas is a liberal originalist on civil rights issues and a conservative originalist on issues concerning civil liberties. Arguably, Justice Thomas's personal experiences and religious background influence this divergence.[230] Justice Thomas is inconsistent in his application of natural law.

C. Justice Scalia's Positivism

Justice Scalia refuses to interpret the Constitution in light of the natural law principles in the Declaration. He differs from Justice Thomas regarding "whether originalism is limited to an interpretation of the Constitution's language only, or whether the political-philosophical context

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[225] Ronald Dworkin, Freedom's Law, *supra* note 41, at 317 outlines Justice Thomas's adoption of an objective moral reading of the Constitution. Dworkin, at 319, outlines his disagreement with the moral conclusions advanced by Justice Thomas and his failure to respect the integrity of the law.

[226] Sandefur, *supra* note 214, at 554; Gerber, *supra* note 15, at 111.

[227] MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 96 (2005). Tushnet argues that Justice Thomas's inconsistencies can be understood as a compromise, in which the "courts enforce only some inalienable rights, leaving others for legislatures." However, he concedes that "[Justice] Thomas never spelled out this account."

[228] Gerber, *supra* note 15, at 193.

[229] *Id.* at 193.

[230] *Id.* at 194–5. See also Marcosson, *supra* note 8, at 29. Justice Thomas's trenchant opposition to affirmative action is detailed in his memoir CLARENCE THOMAS, MY GRANDFATHER'S SON 74 –5 (2007) and coincides with his constitutional opinions. This is not to suggest that Justice Thomas's jurisprudence is definitively linked to his personal experiences, but is a plausible explanation for his inconsistent application of natural law.

of the Constitution's framing should also factor into the analysis."[231]

Justice Scalia adopts a positivist approach. He argued in a speech at Gregorian University that "I have been appointed to apply the Constitution and positive law. God applies the natural law."[232] He recognizes that the Constitution embodies moral precepts with religious foundations, but denies judicial authority to draw upon extra-textual moral values to interpret its provisions.[233] The Constitution is a "practical and pragmatic charter of government," which can be distinguished from the aspirational character of the Declaration.[234] Therefore, Justice Scalia's approach to constitutional interpretation is divorced from the natural law principles embodied in the Declaration, denying both the scope for moral reasoning advanced by George and the enforcement of unenumerated natural rights advocated by Barnett.

Justice Scalia's positivist approach is underpinned by a majoritarian conception of democracy. He has stated that "the whole theory of democracy ... is that the majority rules."[235] Positive bodies of law are authoritative because they have been popularly endorsed. Minorities do not possess rights independent of majority assent, and "it is up to the people to identify those minorities that are worthy of special consideration."[236] Therefore, judicial recognition of natural rights, distinct from the rights enumerated in positive law, is incompatible with democracy.

Justice Scalia has consistently rejected the relevance of natural law in his opinions. In *Troxel v. Granville* ("*Troxel*"),[237] Justice Scalia dissented from the Court's decision striking down a law which authorized state courts to overturn parental decisions concerning visitation rights.[238] Justice Scalia recognized the right of parents to direct the upbringing of their children as among the unalienable rights affirmed by the Declaration.[239] However, he stated that the Declaration "is not a legal prescription conferring powers upon the courts."[240] Justice Scalia's dissent in this case is consistent with his view that the judiciary does not have the authority to override positive law based on its assessment of natural rights.[241] In *Grutter*, Justice Scalia refused to join the portion of Justice

[231] Sandefur, *supra* note 214, at 553.
[232] Antonin Scalia, 'The Common Christian Good,' speech delivered at the Gregorian University Symposium on Left, Right and the Common Good (June 13, 1996).
[233] Justice Scalia adopts the same attitude as Bork, *supra* note 2, at 66, by not denying the existence of natural law but rejecting judicial authority to enforce it.
[234] Scalia, *supra* note 59, at 134.
[235] Scalia, *supra* note 2, at 66.
[236] Antonin Scalia et al, *A Dialogue on Rights* NEW ZEALAND LAW REVIEW 547, 549 (1999).
[237] Troxel v. Granville, 530 U.S. 57 (2000).
[238] *Id.* at 91.
[239] *Id.* at 91.
[240] *Id.* at 91.
[241] See, e,g. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, (1992), in

Thomas's opinion that invoked the underlying principles of the Declaration.[242] Finally, on the rare occasions that Justice Scalia has invoked the Declaration, this has occurred for the purpose of providing linguistic clues as to the original public meaning.[243]

D. Conclusion

Justice Thomas outlines a compelling originalist justification for interpreting the Constitution in light of the natural law principles embodied in the Declaration. Provided that the Constitution's original meaning supports the continued interpretive relevance of natural law principles, Justice Thomas acts consistently with originalism in recognizing their significance. However, he undermines the credibility of his methodology by selectively applying these principles in a manner that appears to be consistent with his political preferences. Justice Thomas has failed to delineate clearly the instances in which it is legitimate to allow natural law principles to invalidate legislation. He has failed to tether his application of natural law to the Constitution's original understanding. Therefore, Justice Thomas's methodology has failed to constrain his discretion.

Justice Scalia evades consideration of natural law by invoking a positivist approach. However, he fails to grapple with the evidence suggesting that the Constitution's original public meaning assumed an interrelationship with the principles outlined in the Declaration. Drawing a contrast between the aspirational principles of the Declaration and the concrete provisions of the Constitution is insufficient, as this does not preclude the Declaration from forming the background to the interpretation of these concrete provisions. Kmiec argues that the Constitution was framed "with a given conception of created humanity in mind."[244] Justice Scalia's refusal to uphold that conception is inconsistent with original meaning.

Justice Scalia's reticence to apply natural law appears to be pragmatic. He believes that the judicial function in a majoritarian democracy would be compromised by affording judges the authority to

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which Justice Scalia criticises the Court's reliance on a "value judgment" to strike down restrictions on abortion in light of societal disagreement about the moral standing of a human fetus.

[242] *Grutter,* 539 U.S. 306, 347 (2003).

[243] See *Heller*, 554 U.S. 570, (2008), in which the Declaration's use of the term "bear arms" is used to clarify the Second Amendment's original public meaning.

[244] Douglas Kmiec, *Natural Law Originalism for the Twenty-First Century – A Principle of Judicial Restraint, Not Invention*, 40 SUFFOLK UNIVERSITY LAW REVIEW 383, 395 (2007). Kmiec details the evidence supporting the view that influential founding-era Americans Thomas Jefferson and James Madison intended the Declaration to have "continuing interpretive significance."

apply aspirational principles. Therefore, Berman is right to describe Justice Scalia as a "rulist," willing to ignore original meaning when it fails to confirm with his conception of legal rules.[245] Justice Scalia's commitment to judicial constraint may be justified on the grounds of democratic legitimacy, but does not fit neatly with original meaning.

V. ORIGINAL EXPECTED APPLICATIONS

A. Background

Originalists differ about the extent to which the original expected applications of the constitutional text should be dispositive. Dworkin famously outlined the fault line between "semantic originalism" and "expectation originalism."[246] Semantic originalists interpret constitutional provisions with reference to what the Framers "intended to say" and expectation originalists interpret constitutional provisions with reference to "the consequences that those who made them expected them to have."[247] Dworkin argues that semantic originalism is more faithful to the constitutional text, as the Framers meant to outline "abstract principles rather than concrete or dated rules to govern future generations."[248]

More recently, Balkin has built on Dworkin's work and posited that there is a dichotomy between original meaning and original expected application. The Constitution's original meaning is binding, as textual fidelity requires preserving the choices embodied in the text.[249] However, the Constitution's original expected application is not embodied in the text and is therefore not binding.[250] From Balkin's perspective, although the constitutional text and its underlying principles do not change, its contextual application may change.[251] Therefore, the principle embodied in the Equal Protection Clause must be applied in light of contemporary understandings and the application of these principles is not confined to the expectations of people in 1868.[252]

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[245] Berman, *supra* note 69, at 35. See also Barnett, *supra* note 15, at 11–12.
[246] Ronald Dworkin, *Comment*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 119 (Amy Gutmann ed., 1997).
[247] *Id.* at 115, 119. He makes a similar distinction between the Framers' "linguistic" and "legal" intentions in *Freedom's Law*, *supra* note 41, at 291.
[248] Dworkin, *supra* note 247, at 122. This approach builds on the distinction Dworkin draws between "concepts" and "conceptions." THE JURISPRUDENCE OF RICHARD NIXON (1972) 18, *New York Times Book Review* 27.
[249] Balkin, *supra* note 3, at 36. Balkin, at 13, defines the original meaning of a constitutional provision as the "semantic content of the words" in the provision.
[250] *Id*. at 12.
[251] Jack Balkin, *Abortion and Original Meaning* 24 CONSTITUTIONAL COMMENTARY 291, 303 (2007).
[252] Balkin, *supra* note 3, at 44.

The contemporary significance of the distinction between original meaning and original expected application is debatable. Steven Smith questions this distinction, arguing that "meaning and application are not identical, exactly, and yet they are inextricably comingled."[253] As Balkin himself recognizes, original meaning is not limited to semantic meaning and also encompasses "the meaning of words in use or context."[254] Furthermore, even to the extent that there is a difference between meaning and application, most originalists accept that expected applications are not dispositive and are merely useful evidence of meaning.[255] Mitchell Berman, who undertakes a detailed examination of contemporary originalism, argues that, "almost nobody espouses fidelity to the original expected applications."[256]

However, Justices Scalia's and Thomas's jurisprudence suggests that original expected applications continue to be treated as dispositive of original meaning. This approach has had important implications for the resolution of a number of contentious constitutional cases, highlighting the contemporary relevance of this debate.

B. Reliance on Original Expected Applications

1. Justice Scalia

Justice Scalia often treats original expected applications as dispositive. He determines original meaning with reference to traditional practices. As Mark Greenberg and Harry Litman note, Justice Scalia relies "on the view that practices that were well established at the time the Constitution was adopted must be constitutional today."[257] Traditional practices offer the best evidence of original expected applications.[258] Therefore, in *United States v. Virginia* ("*Virginia*"),[259] Justice Scalia argued that the continued existence of all-male military colleges after the Equal

[253] Smith, *supra* note 50, at 240. See also McGinnis and Rappaport, *Original Interpretive Principles*, *supra* note 33, 371.
[254] Balkin, *supra* note 251, at 304.
[255] See, e.g., Solum, *supra* note 16, at 935; McGinnis and Rappaport, *supra* note 33 at 371.
[256] Mitchell Berman, *Originalism and Its Discontents (Plus a Thought or Two about Abortion)* 24 CONSTITUTIONAL COMMENTARY 383, 384 (2007). See also Michael McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution* 65 FORDHAM LAW REVIEW 1269, 1284 (1997), who describes the position that original expected applications are dispositive "as a straw man."
[257] Mark Greenberg and Harry Litman, *The Meaning of Original Meaning* 86 GEORGETOWN LAW JOURNAL 569, 572 (1998).
[258] In Michael H v. Gerald D, 491 U.S. 110, 128 (1988), Justice Scalia notes that he supports defining traditions 'to the most specific level' that can be identified, rather than relying on "general traditions" that fail to constrain judicial discretion.
[259] United States v. Virginia, 518 U.S. 515 (1996).

Protection Clause was adopted in 1868 suggest that this provision was not intended to invalidate these colleges.[260] In *Planned Parenthood of Southeastern Pennsylvania v. Casey* ("*Casey*"),[261] he voted to uphold a state law restricting abortion as the "longstanding traditions of American society have permitted it to be legally proscribed."[262] Historical traditions often influence Justice Scalia's determination of the original expected application and define the ultimate conclusion regarding original meaning.

Justice Scalia has relied on original expected applications to justify his conclusions in other contexts. He has rejected the view that capital punishment violates the Cruel and Unusual Punishments Clause on the basis of its original expected application. References to capital punishment in other constitutional provisions manifest the expectation that it is constitutionally valid.[263] Adopting this approach, the Cruel and Unusual Punishments Clause has limited scope and only prohibits the modes of punishment that were expected to contravene this provision at ratification.[264] In *Crawford v. Washington*,[265] Justice Scalia stated that as the Confrontation Clause was only satisfied by formal cross-examination in 1791, formal cross-examination alone is necessary today.[266] Finally, in *McCreary County v. American Civil Liberties Union of Kentucky*,[267] he narrowly defined the scope of the Establishment Clause on the basis that the Founders' public statements and actions "show what it meant."[268] Therefore, original expected applications are treated as dispositive.

Justice Scalia provides three justifications for treating original expected applications as dispositive. First, he rejects the distinction between semantic originalism and expectation originalism advanced by Dworkin. He argues that "the import of language depends upon its context, which includes the occasion for, and hence the evident purpose of, its utterance."[269] However, even though he collapses the distinction between original meaning and original expected application, he claims common

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[260] *Id*. at 568–9. Justice Scalia, at 568, argues that interpretive principles should reflect "those constant and unbroken traditions that embody the people's understanding of ambiguous constitutional texts."

[261] *Planned Parenthood v. Casey,* (1992).

[262] *Id.* at 980.

[263] Scalia, *supra* 102, at 46. Capital punishment is referred to in *U.S. Const. amend. V, amend. XIV*.

[264] See Harmelin v. Michigan, 501 U.S. 957, 994–5 (1991). Scalia, *supra* 59, at 145, has stated his willingness to apply the Eighth Amendment to new punishments without stipulating the instances in which this is justified.

[265] Crawford v. Washington, 541 U.S. 36 (2004).

[266] *Id.* at 54.

[267] McCreary County v. ACLU, 545 U.S. 844 (2004).

[268] *Id.* at 895. Justice Scalia notes that the views of founding-era Americans who envisaged a broader application of the Establishment Clause were rejected. The Establishment Clause is listed in *U.S. Const.* amend. I.

[269] Scalia, *supra* note 59, at 144.

ground with Dworkin in seeking semantic meaning.[270] Under Justice Scalia's account, the original expected application fixes the semantic meaning of the broad language used in the Constitution.

Secondly, Justice Scalia advances a textualist justification for assessing constitutional provisions at a lower level of abstraction than Dworkin. He agrees with Dworkin that the Eighth Amendment contains an abstract principle, but suggests that what is abstracted is "not a moral principle of cruelty" but rather "the existing society's assessment of what is cruel."[271] He justifies this view through a contextual reading of the text, arguing that "[i]t would be most peculiar for aspirational provisions to be interspersed randomly among the very concrete and hence obviously nonaspirational prescriptions" in the Bill of Rights.[272]

Thirdly, Justice Scalia argues that his approach maintains democratic legitimacy. He argues that the Constitution was intended to entrench a concrete set of rights rather than moral principles to be reinterpreted by future generations.[273] The judiciary lacks the authority to impose its moral philosophy, as its obligation is to "preserve our society's values ... not to revise them."[274] Judicial discretion is confined by the obligation to apply original expected applications. Furthermore, he argues that broad judicial discretion to make moral judgments has the potential to limit rights.[275] He argues that the Framers "were embedding in the Bill of Rights *their* moral values, for otherwise all its general and abstract guarantees could be brought to nought."[276]

Justice Scalia's justifications for interpreting the language of the Constitution to merely constitutionalize original expected applications are problematic. First, original meaning and original expected applications are not inextricably linked. As Balkin argues, the classification of a term as a principle demonstrates that it can be separated from competing conceptions of its application.[277]

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[270] *Id.* at 144.

[271] *Id.* at 144. See also Bork, *supra* note 2, at 214, who takes a similar approach and asks "[w]hy should we think that the ratifiers of 1791 legislated a concept whose content would so dramatically change over time that it would come to outlaw things that the ratifiers had no idea of outlawing?."

[272] Scalia, *supra* note 59, at 135.

[273] *Id.* at 135.

[274] *Virginia*, 518 U.S. 515, 568 (1996).

[275] Scalia, *supra* note 102, at 40. Justice Scalia argues that a constitution's "whole purpose is to prevent change – to embed certain rights in such a manner that future generations cannot readily take them away."

[276] Scalia, *supra* note 59, at 146 (emphasis in original). See also Bork, *supra* note 2, at 214.

[277] Balkin, *supra* note 3, at 44. Balkin states that "[p]rinciples are norms that are normally indeterminate in reach, that do not determine the scope of their own extension, that may apply differently given changing circumstances, and that can be balanced against other competing considerations."

Secondly, the textualist justification for Justice Scalia's approach is flawed. As Berman notes, Justice Scalia's narrow reading of broad language is "hardly the text's most natural or obvious rendering."[278] It is certainly plausible that the Framers intended to entrench their own conceptions rather than license future judges to reinterpret the language.[279] However, Dworkin's justification for reading the text to express moral principles that require future interpretation is compelling. He notes that the Framers had a proven capacity to draft concrete provisions and the fact that some of the provisions were drafted in broad terms undermines the notion that it was intended merely to constitutionally entrench existing practices.[280] Furthermore, even if Justice Scalia rightly argues that original expected applications were expected to govern future interpretation, relying on historical traditions to establish these expectations is flawed. As Chemerinsky argues, the existence of a tradition "does not establish that the Constitution was meant to enshrine that behaviour."[281] Provisions may have been adopted to disapprove of existing traditions.[282] Therefore, Justice Scalia's historical analysis and methodology for applying this analysis are flawed.

Thirdly, Justice Scalia's democratic legitimacy argument is problematic. Even if the Framers expected that their conception of rights should be perpetually binding, this does not in itself justify affording these expectations dispositive force.[283] Furthermore, this section will demonstrate that Justice Scalia's methodology fails to achieve the purported benefit of judicial constraint.

Justice Scalia's jurisprudence demonstrates the incoherence of relying on original expected applications. In *Rutan v. Republican Party*

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[278] Berman, *supra* note 256, at 387. See also Jack Balkin, *Nine Perspectives on Living Originalism* UNIVERSITY OF ILLINOIS LAW REVIEW 101, 106 (2012), who argues that this approach is an attempt to turn "abstract principles into something a bit more like determinate rules."

[279] See, e.g., McConnell, *supra* note 256, at 1287, who argues that it is implausible that the Framers "would delegate virtually unbridled authority to future courts, at the expense of future legislators." Scalia and Garner, *supra* note 61, at 405, suggest that "the idea that legal texts might be subject to semantic drift was alien to [the Framers] modes of thought."

[280] Dworkin, *supra* note 246, at 122. Keith Whittington, '"Dworkin's Originalism: The Role of Intentions in Constitutional Interpretation" (2000) 62 REVIEW OF POLITICS 197, 214, who correctly notes that Dworkin's textual analysis "is a presumption without further historical investigation" that relies on his own linguistic conventions. However, Justice Scalia's failure to refute this presumption with a detailed historical justification for the Framers' concurrent use of broad and specific language means that Dworkin's account remains plausible.

[281] Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW L. REV. 285, 295, (200).

[282] *Id.* at 396, notes that "is possible that the Framers meant the amendment to outlaw the practice, but the political realities were that in governing they saw no alternative but to engage in the forbidden behaviour."

[283] See Dworkin, *supra* note 41, at 292, who describes the "circularity" of defining the Framers' authority with reference to their own conception of their authority.

("*Rutan*"),[284] he limits the use of original expected application, suggesting that they are only relevant when the text is "ambiguous."[285] If the text is unambiguous, it is irrelevant whether the original expected applications contradict the text. Therefore, he argues that the Court in *Brown v. Board of Education* ("*Brown*")[286] correctly struck down segregation for violating the Equal Protection Clause, even though it is unlikely that this provision was originally expected to proscribe segregation.[287] According to this account, the phrase "no state shall ... deny to any person within its jurisdiction the equal protection of the laws" unambiguously prohibits segregation.[288]

Justice Scalia's reliance on ambiguity to define the interpretive significance of original expected applications is somewhat flawed. As Greenberg and Litman note, the broad language of the Equal Protection Clause may prohibit segregation, but it is difficult to argue that it unambiguously does so.[289] In *Virginia*, Justice Scalia argued that the Equal Protection Clause does not apply to preclude discrimination against women in an educational context, relying on the original expected application to justify this claim.[290] He does not provide a compelling justification for why the Equal Protection Clause is ambiguous in this context and permits recourse to original expected applications, but is unambiguous in the context of race. Therefore, Justice Scalia appears to be shifting between different degrees of abstraction in his approach to the Equal Protection Clause. He relies on the broad principle of racial equality to justify *Brown* and *Loving* and on narrow traditional practices to justify *Virginia*. He does not ground these competing principles in the Constitution's text or original understanding. Therefore, Justice Scalia's invocation of ambiguity is unconvincing.

Furthermore, the broad language in the Constitution undermines

[284] Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990).
[285] *Id.* at 95. Justice Scalia may more accurately be referring to "vagueness." See Solum, *District of Columbia v. Heller, supra* note 16, at 974, who outlines the distinction between vagueness and ambiguity.
[286] *Brown,* 347 U.S. 483 (1954).
[287] See *Rutan*, 497 U.S. at 95–96 (1990). Justice Scalia uses the same logic in *Casey*, 505 U.S. 833, at 980 (1992) to justify the decision in Loving v. Virginia, 388 US 1 (1967) which struck down anti-miscegenation laws for contravening the Equal Protection Clause.
[288] *U.S. Const. amend IV.*
[289] Greenberg & Litman*, supra* note 257, at 595–96. In *Rutan*, 497 U.S. at 95 (1990), Justice Scalia argues that the text of the Equal Protection Clause, coupled with the abolition of slavery in the Thirteenth Amendment, "leaves no room for doubt" that differential treatment on the basis of race is unconstitutional. However, prohibiting one form of discrimination on the basis of race (slavery) does not unequivocally mean that all forms of discrimination on the basis of race are unconstitutional. See Michael Klarman, *Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell, 81 VA. L. REV. 1881, 1884, who rejects the notion that the original understanding of the Fourteenth Amendment proscribed segregation.
[290] *Virginia*, 518 U.S. at 568

Justice Scalia's invocation of ambiguity. Original expected applications are always potentially relevant to clarifying the meaning of broad language and Justice Scalia's selective refusal to consider these is problematic.[291] His approach raises questions about the extent to which his policy preferences influence his definition of ambiguity.[292]

Significantly, Justice Scalia does not rigidly apply original expected applications. In *McIntyre*, Justice Scalia refused to afford First Amendment protection to anonymous publications despite the evidence marshalled by Justice Thomas concerning the Framers' reliance on anonymity.[293] In *Richmond v. J.A. Croson Co*,[294] Justice Scalia supported overturning an affirmative action scheme without any reference to the Framers' expectations.[295] In *Minnesota v. Dickerson* ("*Dickerson*"),[296] he voted to uphold the constitutionality of a frisk search even though it would have been considered impermissible in 1791, noting that the advent of concealed weapons may have changed what constitutes an "unreasonable" search.[297] Finally, in *Kyllo v. United States*,[298] he held that the use of a thermal imaging device to detect drug usage within a house was an unreasonable search, even though this practice could not have been contemplated by the Framers and they could not have had any relevant applicative intentions.[299]

Justice Scalia has attempted to justify his inconsistent reliance on original expected applications. He has denied supporting a "narrow and hidebound methodology" that precludes the law from accommodating modern developments.[300] In *Rutan*, Justice Scalia argued that, "traditions are themselves the stuff out of which the Court's principles are to be formed." Traditional practices are prima facie constitutional and the validity of new practices is evaluated by reference to these original practices through a process of analogical reasoning.[301]

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[291] This inconsistency may be explicable if Justice Scalia advanced historical evidence justifying his reading of the original meaning of the Equal Protection Clause, but he does not do so.

[292] Marcosson, *supra* note 8, at 43, argues that Justice Scalia selectively "pretends to care" about the Framers' understanding to justify his policy preferences.

[293] *McIntyre*, 514 U.S. at 373.

[294] City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989).

[295] *Id.* at 520. Justice Scalia refers to the "fatal" tendency to classify individuals on the basis of race, without adducing any evidence that the Fourteenth Amendment's Framers expected to prohibit affirmative action schemes.

[296] Minnesota v. Dickerson, 508 U.S. 366 (1993).

[297] *Id.* at 382. The constitutional prohibition of "unreasonable searches" is found in *U.S. Const. amend. IV*.

[298] Kyllo v. United States, 533 US 27 (2001).

[299] *Id.* at 34. Justice Scalia recognizes that the "advance of technology" shapes the Fourth Amendment's contemporary application.

[300] Scalia, *supra* note 59, at 145.

[301] *Id*. at 140. See *Rutan*, 533 U.S. at 34, in which Justice Scalia uses the "minimal expectation of privacy" in the home traditionally protected as the touchstone to justify prohibiting a thermal

However, the process of analogical reasoning justified by Justice Scalia undermines his methodology's capacity to foster judicial constraint. Limiting the interpretive enquiry to identifying and applying original expected applications constrains judicial discretion. However, the process of analogical reasoning allows broad judicial discretion to apply constitutional principles in new contexts. Speculating about how the founding generation may have responded to modern developments allows judges to draw analogies conforming to their policy preferences.[302] A more defensible approach may be to recognise that original expected applications cannot adequately define contemporary meaning and interpret constitutional provisions at the degree of abstraction supported by the text.

2. Justice Thomas

Justice Thomas has consistently relied on original expected applications to justify his conclusions. In *McIntyre*, the Framers' beliefs concerning anonymous publications were decisive in justifying First Amendment protection.[303] In *Morse v. Frederick* ("*Morse*"),[304] Justice Thomas referred to the practices of 19th century public schools to justify his view that First Amendment protection did not extend to a student displaying an offensive banner.[305] In *Michigan v. Bryant* ("Bryant"),[306] he upheld the admissibility of out-of-court statements as the relevant interrogation "bears little if any relevance to the historical practices that the Confrontation Clause aimed to eliminate."[307] Finally, in *Entertainment Merchants*, he explicitly tethered the "original public understanding" of the First Amendment to the "practices and beliefs of the founding generation," demonstrating his willingness to fix semantic meaning through evidence of original expected application.[308]

Therefore, Justice Thomas has consistently relied on original expected applications to bolster his conclusions. However, he has not offered a judicial or extra-judicial exposition of the extent to which expected applications are dispositive and has not outlined a normative justification for consulting them.

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imaging search that infringed upon privacy in the home.

[302] The analogical reasoning approach may constrain judicial discretion more effectively than nonoriginalist approaches. Regardless, it undermines the purported virtues of Justice Scalia's approach.

[303] *McIntyre*, 514 U.S. at 367.

[304] Morse v. Frederick, 551 U.S. 393 (2007).

[305] *Id*. at 411–16.

[306] Michigan v. Bryant, 131 S. Ct. 1143 (2011).

[307] *Id*. at 1167.

[308] *Entertaining Merchants*, 131 S. Ct. at 2751.

C. Conclusion

Contrary to Berman's view, the extent to which original expected applications should define original meaning is a debate with contemporary significance. The most prominent practitioners of originalism on the Supreme Court rely on original expected applications to resolve constitutional controversies. However, the fact that almost all originalists differ from Justice Scalia's and Thomas's approach suggests that the reliance on original expected applications cannot be considered an inherent weakness of originalism.

Justice Scalia has outlined a detailed justification for treating original expected applications as dispositive. He has resolved cases with reference to the original expected applications, evidenced by the existence of traditional practices. This approach simplifies the judicial task.[309] However, he does not provide a compelling justification for affording original expected applications this degree of deference. The narrow conception of the constitutional text that he uses to justify this approach is unconvincing in light of the broad language of key provisions. To avoid the objectionable consequences of being bound by original expected applications, Justice Scalia relies on two escape routes: ambiguity and analogical reasoning. However, his invocation of ambiguity does not withstand scrutiny in light of his inconsistent jurisprudence. Furthermore, his willingness to deploy analogical reasoning preserves flexibility, at the expense of undermining judicial constraint.

Justice Thomas has consistently relied upon original expected applications. However, he has failed to offer a normative justification for this approach or a limiting principle constraining its application. Future originalist judges must provide a more compelling defence for the resort to original expected applications.

VI. ORIGINALISM AND PRECEDENT

A. Background

Originalism's normative force is derived from privileging original meaning above other sources of meaning. Precedent poses a significant challenge to this commitment to original meaning.[310] As Judge Posner

[309] See Dworkin, *supra* note 199, at 1253, who notes that the abstract reading of the Constitution he advocates makes "the task of adjudicating contemporary constitutional disputes much more difficult than it would be" if Justice Scalia's approach was adopted.

[310] See Randy Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST.. COMMENT. 257-58 (2005), who suggests that "the biggest single challenge facing originalists is reconciling originalism with precedent."

suggests, "the unflinching embrace of originalism would require overturning many cases that have achieved canonical status."[311] The Supreme Court has upheld the constitutionality of a number of practices that may be incompatible with original meaning, such as judicial review[312], paper money,[313] and Social Security.[314] Originalists must provide a normative justification for accommodating these precedents through the doctrine of *stare decisis*[315] or accept immense disruption to the existing social order as the price for interpretive purity.

Originalists seeking to reconcile originalism with precedent are confronted with two key questions. First, should precedent be admissible? Secondly, if precedent is admissible, what weight should it be afforded?

1. Admissibility of Precedent

There are three broad views within originalism concerning the admissibility of precedent.[316] First, the "no-precedent view" suggests that allowing precedent to trump original meaning is incompatible with the Constitution's original meaning.[317] Secondly, the "compatibility view" suggests that *stare decisis* is compatible with the Constitution's original meaning.[318] Thirdly, the "pragmatic view" suggests that adherence to precedent is incompatible with the Constitution's original meaning, but

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[311] Richard Posner, *How Judges Think* (Harvard University Press, 2008) 342 (*How Judges Think*). The unconvincing attempt by Bork, *The Tempting of America, supra* note 2, at 81–82 to justify the outcome in *Brown*, 347 U.S. 483 may be driven by the desire to reconcile originalism with key constitutional milestones.

[312] Marbury v. Madison, 5 U.S.137 (1803). *See* Philip Kurland, Judicial Review Revisited: "Original Intent" and the "Common Will" 55 U. CIN. L. REV. 733, 735, who notes that it is unclear whether the Framers "meant to confer broad powers of judicial review of the kind exercised."

[313] *Legal Tender Cases,* 79 U.S. 457. *See* Kenneth Dam, *The Legal Tender Cases* SUP. CT. L. REV. 367, 411 (1981), who notes the "Framers' distaste for paper money."

[314] Helvering v. Davis, 301 U.S. 619 (1937). *See* Henry Monaghan, *Stare Decisis* and Constitutional Adjudication 88 COLUM. L. REV. 723 (1988), who argues that the constitutionality of the New Deal is "highly questionable."

[315] *Stare decisis* is defined in Bryan Garner (ed), *Black's Law Dictionary* (Thomson/West, 9th ed, 2004) 1537 as "[t]he doctrine of precedent, under which it is necessary for a court to follow earlier decisions when the same points arise again in litigation." This article will use precedent and *stare decisis* interchangeably.

[316] These classifications are adopted to clarify the competing views within originalism.

[317] *See*, e.g., Gary Lawson Mostly Unconstitutional: The Case Against Precedent Revisited 5 AVE MARIA L. REV. 1 (2007); Michael Stokes Paulsen, The Intrinsically Corrupting Influence of Precedent 22 CONST. COMMENT. 289 (2005).

[318] *See*, e.g., John McGinnis & Michael Rappaport, *Reconciling Originalism and Precedent* 103 NW. U. L. REV. 803 (); Lee Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent* BYU L. REV. 1729 (2010); Lawrence Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights* 9 U. PA. J. CONST. 155 (2006).

accepts selective recourse to precedent because of the beneficial values promoted by *stare decisis*.[319]

a. No-precedent View

The no-precedent view suggests that allowing precedent to trump original meaning conflicts with originalism. Fidelity to original meaning cannot be reconciled with giving dispositive force to the competing legal norms derived from precedent. Michael Stokes Paulsen argues that *"[s]tare decisis* contradicts the premise of originalism — that it is the original meaning of the words of the text, and not anything else, that controls constitutional interpretation."[320]

The no-precedent view is commonly justified by a textual and historical analysis of the Constitution's original meaning. The Supreme Court is vested with "[t]he judicial power of the United States."[321] However, the Constitution does not stipulate the content of "the judicial power" and there is no explicit textual justification for judicial power to follow precedent.[322] Furthermore, Stokes Paulsen argues that the historical record does not support affording precedent dispositive effect. He suggests that the founding generation did not contemplate "an autonomous judicial power to assign binding precedential weight to their decisions."[323]

Gary Lawson relies on the Supremacy Clause in article VI of the Constitution to defend the no-precedent view.[324] The Supremacy Clause states:

> [t]his Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.[325]

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[319] *See*, e.g., Bork, *The Tempting of America*, *supra* note 2, at 155–56; Monaghan, *supra* note 314, at 723.
[320] Stokes Paulsen, *supra* note 317, at 289.
[321] *U.S. Const. art III*.
[322] Lawson, *supra* note 317, at 5.
[323] Michael Stokes Paulsen, *Abrogating Stare Decisis By Statute: May Congress Remove the Precedential Effect of Roe and Casey?* 109 YALE L. J. 2000 (2000). *See also* Steven Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey* 22 CONST. COMMENT. 311, 315–25 (2005), who relies on the controversy concerning the constitutionality of a national bank that was not conclusively settled by the Supreme Court's decision in McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819) to reject the modern doctrine of precedent.
[324] Lawson, *supra* note 317, at 6–7.
[325] *U.S. Const. Art. VI*.

The Supremacy Clause makes the Constitution, federal statutes and treaties the supreme law of the United States. Prior judicial decisions are not listed in the Supremacy Clause and the judiciary cannot allow them to trump the Constitution's classification of supreme law.[326] Furthermore, the hierarchy implied by the Supremacy Clause grants primacy to the Constitution above democratically adopted sources of law such as federal statutes and treaties.[327] Lawson argues that it is illogical to suggest that a prior judicial decision "could have a more exalted legal status" than a federal statute which is declared law by the Constitution.[328]

b. Compatibility View

The compatibility view suggests that *stare decisis* is compatible with the Constitution's original meaning. McGinnis and Rappaport argue that "the judicial power" in article III incorporates precedent, in light of founding-era expectations that precedent would apply to the Constitution.[329] Therefore, the '"no precedent position" is unconstitutional.[330] The Supremacy Clause is inconclusive and does not override the historical evidence that the judicial power was understood to incorporate a role for precedent.[331] Strang argues that "the Constitution's original meaning requires that, under limited circumstances, judicial misinterpretations may displace the original meaning."[332] Judges are required to afford respect to nonoriginalist precedents in light of this original meaning.

Akhil Amar advances a structural reason for reconciling the Constitution's original meaning with *stare decisis*. The Supreme Court is created by the Constitution as a "continuous body."[333] Therefore, Amar argues that it is "ideally structured to think about what it has done in the past, and to anticipate what it is going to do in the future."[334] A presumption of continuity in decision-making is justified in light of the

[326] Lawson, *supra* note 317, at 6.
[327] *Id. at* 7. Lawson cites *Marbury*, 5 U.S. 137 (1803) as authority for this proposition.
[328] *Id.* at 8. Lawson, at 12–13, argues that the Supremacy Clause is determinative even if there was historical evidence supporting a strong doctrine of precedent.
[329] McGinnis & Rappaport, *supra* note 318, at 823. See also Strang, *supra* note 14, at 880, who argues that "the universal practice among litigants, courts, and even court reporters was to engage in the practice of precedent."
[330] McGinnis & Rappaport, *supra* note 318, at 803. At 804, they accept that historical evidence does not support a strong modern notion of precedent but argue that the founding generation accepted a "weak notion" of precedent which is modifiable by statute.
[331] *Id.* at 808.
[332] Strang, *supra* note 14, at 880.
[333] Akhil Amar, *On Text and Precedent* 31 HARV. J. L & PUB. POL'Y 961, 965 (2008).
[334] *Id.* at 961, 965.

Court's permanence.[335]

c. Pragmatic View

The pragmatic view accepts that *stare decisis* is incompatible with the Constitution's original meaning. However, the beneficial values promoted by *stare decisis* justify precedent operating as an exception to originalism. Lawson describes this approach as "economic deference" to precedent, resulting from a "cost-benefit analysis."[336]

Originalists who advance this approach have different conceptions of the factors that influence the cost-benefit analysis. First, stability and predictability are important values associated with *stare decisis*. Bork argues that erroneous decisions may "have become so embedded in the life of the nation ... that the result should not be changed now."[337] Monaghan extends Bork's analysis by suggesting that the "viability of the constitutional order itself" is threatened if established norms are overturned.[338] Therefore, pragmatic originalists may uphold precedent to maintain stability.

Second, judicial constraint may be advanced by allowing precedent to trump original meaning. Merrill argues that *stare decisis* is an important principle that should be defended by originalists, because it constrains judges, increases predictability and strengthens the likelihood that social change might be advanced through the political process.[339] To the extent that nonoriginalist precedents do not "threaten or frustrate majoritarian government," upholding these precedents is consistent with principles of popular sovereignty.[340]

Third, deference to settled precedent promotes fairness. Precedents create expectations about legal norms and induce the creation of reliance interests. Departures from settled precedent may lead to costs being incurred by people who acted on these expectations.[341] Furthermore, a refusal to adhere to precedent may be inconsistent with the rule of law, as identically situated litigants receive differential treatment.[342] Therefore,

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[335] *Id.*.at 961, 965.
[336] Lawson, *supra* note 317, at 11.
[337] Bork, *supra* note 2, at 158. Bork argues that overturning entrenched governmental structures from the New Deal would "plunge us into chaos."
[338] Monaghan, *supra* note 314, at 750. Thomas Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint* 22 CONST. COMMENT. 271, 278 (2005), argues that precedent creates a "thicker body of legal norms" to constrain the judiciary.
[339] Merrill, *supra* note 338, at 287–88.
[340] Lash, *supra* note 28, at 1442.
[341] McGinnis & Rappaport, *supra* note 318, at 834.
[342] Cass Sunstein, *Book Review: Justice Scalia's Democratic Formalism* 107 YALE L. J. 529, 560 (1997).

fairness requires judges to limit their departures from precedent.

2. Weight afforded to precedent

Originalists who accept a role for *stare decisis* differ about the weight that it should be afforded. Opponents often draw a distinction between legal deference and epistemological deference to highlight this fault line.[343]

Legal deference involves "giving weight to another actor's decision because some controlling legal authority requires it."[344] From this perspective, the Constitution requires that prior decisions have interpretive weight. However, originalists who afford legal deference to precedent differ about the class of decisions that merits this deference. Richard Fallon distinguishes between different types of precedents, arguing that "superprecedents — defined by their landmark status or repeated reaffirmations — enjoy immunity from overruling."[345] Ordinary precedents are not afforded the same legal deference.[346] Solum, adopting a formalist approach, rejects the distinction between ordinary precedents and super-precedents and argues that "the Supreme Court should regard its own prior decisions as binding."[347] Caleb Nelson develops a theory of *stare decisis* that respects those precedents which are not "demonstrably erroneous."[348]

Epistemological deference "results when one treats prior decisions as good evidence of the right answer."[349] Originalists, including adherents of the no-precedent view, generally agree that epistemological deference is justified.[350] Prior judicial decisions may be the best evidence of original meaning. However, originalists differ about the class of decisions that merit epistemological deference. Bork argues that precedents reflecting a "good-

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[343] *See*, Lawson, *supra* note 317, at 9–10; Kesavan & Stokes Paulsen, *supra* note 18, at 1173; Amar, *supra* note 332, at 965.

[344] Lawson, *supra* note 316, at 9.

[345] Richard Fallon, *Constitutional Precedent Viewed through the Lens of Hartian Positivist Jurisprudence* 86 N.C. L. REV. 1107, 1111 (2008). The term "superprecedent" was coined in William Landes & Richard Posner, *Legal Precedent: A Theoretical and Empirical Analysis* 19 J. L. & ECON. 249, 251 (1976).

[346] Fallon, *supra* note 345, at 1149.

[347] Solum, *supra* note 318, at 190. Solum suggests that a precedent can be overruled or confined to its facts "for formalist reasons, including because a precedent is no longer consistent with preceden."

[348] Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents* 87 VA. L. REV. 1, 3 (2001).

[349] Lawson, *supra* note 317, at 10. The notion of epistemological deference, or epistemological modesty, reflects the maxim c*ontemporanea exposito est optima et fortissima in lege* (a contemporaneous exposition is the best and most powerful in the law).

[350] *See*, e.g., Lawson, *supra* note 317, at 18–19; Barnett, *supra* note 319, at 267; Amar, *supra* note 333, at 965; Kesavan & Stokes Paulsen, *supra* note 18, at 1173.

faith attempt" to discern the original understanding merit respect.[351] Lawson outlines "indicia of reliability" which should be considered in determining whether to consult precedent, including the motives and intelligence of the prior decision-makers and the extent to which they are "better situated" to discern the original meaning.[352] Furthermore, originalists differ about the implications of epistemological deference. As Kesavan and Stokes Paulsen note, there are different views within originalism concerning whether a precedent is "strongly presumptive or weakly presumptive of original public meaning."[353]

Therefore, there is an important debate within originalism concerning the admissibility of precedent and the weight that it should be afforded. This section will situate Justices Scalia and Thomas within this debate.

B. Justice Scalia's Pragmatic Accommodation of Precedent

Justice Scalia adopts the pragmatic view. He has stated that "stare decisis is not part of my originalist philosophy; it is a pragmatic exception to it."[354] Understanding Justice Scalia's adoption of precedent as a pragmatic exception helps reconcile his approach with his withering attack on the common law's reliance on *stare decisis*.[355]

Justice Scalia approaches his role with a keen awareness of the consequences of Supreme Court decisions. He describes himself as a "faint-hearted originalist,"[356] noting that originalism "[i]n its undiluted form ... is medicine that seems too strong to swallow."[357] *Stare decisis* limits the objectionable consequences of originalism.[358] Significantly, Justice Scalia's willingness to temper original meaning with precedent is driven not just by rule of law values such as stability, but also by his interest in maintaining originalism's viability. He argues that requiring

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[351] Bork, *supra* note 2, at 157. *See also* Strang, *supra* note 318, at 1732, who uses the term "Originalism in Good Faith" to characterise precedents that merit respect.

[352] Lawson, *supra* note 317, at 19.

[353] Kesavan & Stokes Paulsen, *supra* note 18, at 1173. *See*, e.g., Solum, *supra* note 318, at 187, who argues that a displaceable presumption in favour of precedent is largely meaningless.

[354] Scalia, *supra* note 59, at 140. In Federal Election Commission v. Wisconsin Right to Life, 551 U.S. 449, 500 (2007), Justice Scalia quoted with approval the statement in Payne v. Tennessee, 501 U.S. 808, 828 (1991) that *stare decisis* is not an "inexorable command" but is rather a "principle of policy."

[355] Scalia, *supra* note 101, at 8–9.

[356] Scalia, *supra* note 39, at 864. Justice Scalia, at 861, notes that he would vote to overturn an objectionable law (such as a law imposing the penalty of lashing) even if *stare decisis* does not apply and the original meaning does not contradict this law. However, his jurisprudence does not disclose any obvious instances in which this has occurred.

[357] *Id.* at 861.

[358] *Id*.

originalists to renounce precedent would "render their methodology so disruptive of the established state of things that it will be useful only as an academic exercise and not as a workable prescription for judicial governance."[359] Therefore, originalists should focus on rejecting the creation of new constitutional rights, rather than "rolling back ... accepted old principles of constitutional law."[360] Justice Scalia's interest in preserving originalism's viability influences his willingness to accommodate *stare decisis*.

Justice Scalia has relied on *stare decisis* in a number of his opinions. In First Amendment cases such as *Johnson* and *R.A.V. v. City of St. Paul* ("*R.A.V*"),[361] he voted to strike down laws restricting freedom of expression on the basis of "long-standing and well-accepted principles ... that are effectively irreversible."[362] In *Lawrence*,[363] his dissent criticized the majority for being "manipulative" in ignoring *stare decisis* and overturning the decision rendered only 17 years earlier in *Bowers v. Hardwick* ("*Bowers*").[364] He has afforded legal deference to precedents that he disagrees with. In *Department of Revenue of Kentucky v. Davis*, ("*Davis*"),[365] he stated that, "I will apply our negative Commerce Clause doctrine only when *stare decisis* compels me to do so."[366] Finally, his refusal to join Justice Thomas's explicitly originalist opinions in a series of Commerce Clause cases suggests a pragmatic willingness to allow precedent to trump original meaning.[367] Justice Scalia does not explicitly rely on *stare decisis* in these cases. However, Barnett correctly points to the significance of Justice Scalia's "complete refusal to confront and refute Justice Thomas's originalist analysis, something it would seem incumbent on a [J]ustice truly committed to originalism to do."[368] In light of Justice Thomas's willingness to use original meaning to overturn entrenched precedent, it is likely that *stare decisis* underpinned Justice Scalia's refusal to do the same.

However, Justice Scalia has refused to uphold precedent in other cases. In *Casey*,[369] he voted to overrule the constitutionally protected right

[359] Scalia, *Response*, *supra* note 59, at 139.
[360] *Id*.
[361] R.A.V. v. St Paul 505 U.S. 377 (1992).
[362] Scalia, *supra* note 59, at 138.
[363] *Lawrence*, 539 U.S. 558, at 587.
[364] Bowers v. Hardwick, 478 U.S. 186 (1986).
[365] Dept. of Revenue of Kentucky v. Davis, 553 US 328 (2008).
[366] *Id.* at 359.
[367] *See*, e.g., *Lopez*, 541 U.S. 549 (1995); United States v. Morrison, 529 US 598 (2000); *Raich*, 545 U.S. at 1.
[368] Barnett, *supra* note 15, at 15.
[369] *Casey*, 505 U.S. 833, at 999.

to abortion declared in *Roe v. Wade* ("*Roe*").[370] In *Citizens United,*[371] he joined the majority opinion overturning the campaign finance rules established in *Austin v. Michigan Chamber of Commerce* ("*Austin*").[372] Finally, in *Dickerson v. United States* ("*Dickerson*"),[373] Justice Scalia rejected the majority's reliance on *stare decisis* and supported overturning the procedural rule imposed by *Miranda v. Arizona* ("*Miranda*").[374]

Justice Scalia's selective accommodation of *stare decisis* risks undermining his commitment to confining judicial discretion. He has addressed this concern by outlining the factors guiding his decision to uphold precedent. In his confirmation hearings, he noted that "the length of time [since a prior decision] is a considerably important factor" in determining whether to uphold the decision.[375] Furthermore, mistakes that are "woven in the fabric of the law" merit deference.[376] However, in *Casey*, Justice Scalia suggested that a decision that was "plainly wrong" should not be followed.[377] Furthermore, he is less likely to overrule precedents that implicate property or contract rights, because of the reliance interests that would be affected.[378] Finally, he does not consider himself bound by precedents that are inconsistent with the objectives of *stare decisis*. In *Walton v. Arizona* ("*Arizona*"),[379] he refused to uphold a precedent that failed to create "certainty and stability" in the law.[380] In *BMW of North America v. Gore* ('*BMW*'),[381] he stated that he would not uphold doctrine that was "not only mistaken but also insusceptible of principled application."[382]

Justice Scalia's discretionary approach to precedent has come under sustained attack. In an influential article, Barnett argued that "Justice Scalia is simply not an originalist," as he resorts to precedent to achieve the consequences he prefers rather than applying a consistent methodology.[383] Justice Scalia's methodology of consulting precedent is arguably results-driven. Contrary to his claim that "consistent rules" govern his deployment

[370] *Roe,* 410 U.S. 113 (1973).
[371] Citizens United v. FEC, 130 S Ct 876, at 913 (2010).
[372] Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).
[373] Dickerson v. U.S., 530 U.S. 428, 461–65 (2000).
[374] Miranda v. Arizona, 384 US 436 (1966).
[375] Committee on the Judiciary, *supra* note 56, at 45.
[376] *Id*. at 38.
[377] *Casey*, 505 U.S. 833, at 983. Justice Scalia argued that *Roe* was "plainly wrong" in light of the text and tradition of the Constitution.
[378] Federal Election Commission v. Wisconsin Right to Life, 551 U.S. 449, 502 (2007). *See also*, Scalia and Garner, *supra* note 60, at 412.
[379] 497 US 639 (1990).
[380] *Id.* at 673. *See also*, Hein v. Freedom from Religion Foundation, 551 U.S. 587, 638 (2007), in which Justice Scalia voted to overturn a precedent that he labelled "random and irrational."
[381] BMW of North America v. Gore, 517 U.S. 559 (1996).
[382] *Id.* at 599.
[383] Barnett, *supra* note 15, at 13.

of precedent,[384] the factors guiding his decision to overturn precedent can be interpreted in a number of different ways in any particular case.[385] The assessment of whether a precedent is "plainly wrong" or "insusceptible of principled application" affords a broad degree of discretion. Balkin correctly argues that Justice Scalia's approach "allows judges to impose their political ideology on the law — the very thing that the methodology purports to avoid."[386]

C. Justice Thomas's Rejection of Precedent

Justice Thomas does not afford deference to precedent, despite claiming to respect the value of *stare decisis*. In his Confirmation Hearings, Justice Thomas accepted that *stare decisis* constrains judicial practice. The burden on a party challenging a prior decision is to "demonstrate more than its mere incorrectness."[387] In *McDonald,* Justice Thomas claimed that he acknowledges "the importance of *stare decisis* to the stability of our Nation's legal system."[388] Responding to Justice Scalia's quip that Justice Thomas "does not believe in *stare decisis*,"[389] Gerber has argued that the conventional assessment of Justice Thomas is incorrect and he is willing to temper original meaning with precedent.[390]

Justice Thomas has made it clear that he does not believe that precedent always has dispositive effect. He argues that there is no "precise calculus" to determine whether to overturn a precedent.[391] Judges should consider factors such as: the length of time the precedent has existed; institutions developed on the basis of the precedent; and the difficulty of passing constitutional amendments to overturn the incorrect precedent.[392] In practice, however, his willingness to overturn established precedent suggests that he does not view *stare decisis* as a meaningful constraint.

Justice Thomas has consistently voted to overturn established precedents that he deems inconsistent with original meaning. His Commerce Clause opinions support replacing the "substantial effects" test

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[384] Scalia, *supra* note 59, at 140.
[385] *See also* Sunstein, *supra* note 8, at 77, who argues that Justice Scalia's approach "leaves a lot of vagueness" and undermines the "goal of binding judges through clear rules."
[386] Balkin, *supra* note 3, at 9. *See also* Greene, *supra* note 54, at 341, who labels Scalia's approach as "not so much faint-hearted as selective originalism."
[387] Committee on the Judiciary, *supra* note 203, at 246.
[388] 130 S. Ct. 3020, 3062 (2010).
[389] Antonin Scalia quoted in KEN FOSKETT, JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS 281 (2004).
[390] Scott Gerber, *Justice for Clarence Thomas: An Intellectual History of Justice Thomas's Twenty Years on the Supreme Court* 88 U. DET. MERCY L. REV. 667, 673. However, Gerber does not cite any examples of Justice Thomas allowing precedent to trump original meaning.
[391] Thomas, *supra* note 203, at 399.
[392] *Id.*at 246, 339.

that has been at the heart of Commerce Clause jurisprudence since the New Deal with the narrow original understanding.[393] In *McDonald*,[394] he rejected the narrow reading of the Privileges and Immunities Clause, which had been adopted by the Court since the 1873 *Slaughter-House Cases*.[395] In *Kelo v. New London* ("*Kelo*"),[396] he dissented because precedent on the Takings Clause was "misguided."[397] In *Nixon v. Shrink Missouri Government PAC* ("*Nixon*"),[398] he was willing to overrule the campaign finance precedent in *Buckley v. Valeo* ("*Valeo*").[399] Finally, in *Eastern Enterprises v. Apfel* ("*Apfel*"),[400] he noted his willingness to overturn the 1798 precedent of *Calder v. Bull* ("*Calder*").[401]

Justice Thomas adopts an extremely broad standard for judicial review of precedent, arguing that "where the Court has wrongly decided a constitutional question, the force of *stare decisis* is at its weakest."[402] In light of this approach, his professed acceptance of *stare decisis* is largely meaningless. Consistent with the no precedent view, he is unwilling to allow precedent to trump original meaning. Therefore, precedent is not afforded legal deference. At most, he affords epistemological deference to precedent by seeking to demonstrate continuity between his decisions and prior decisions.[403]

D. Conclusion

There are significant differences between originalists concerning the admissibility of precedent and the weight it should be afforded. The no precedent view, compatibility view and pragmatic view are frameworks that help to clarify these key theoretical divides.

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[393] *See Lopez*, 541 U.S. at, 584–85 (1995); *Morrison*, 529 U.S. at 627 (2000); *Raich*, 545 U.S. at 58 (2005); *Sebelius*, 132 S. Ct. at 2677 (2012). In *Lopez*, Justice Thomas at 601 was hesitant to overturn the established interpretation of the Commerce Clause (and was not required to do so on the facts), although in *Morrison*, *Raich* and *Sebelius* this reticence was abandoned.

[394] 130 S. Ct. at 3062. Justice Thomas sought to restore the original meaning of the Fourteenth Amendment despite acknowledging the "volume of precedents" to the contrary.

[395] *Slaughterhouse Cases* 83 U.S. (16 Wall) 36 (1873). The Privileges and Immunities Clause is listed in *U.S. Const. amend. XIV* § 1.

[396] Kelo v. New London, 545 U.S. 469, 519 (2005).

[397] *Id*. at 519. The Takings Clause is listed in *U.S. Const. amend. V*.

[398] Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 410 (2000).

[399] *Buckley v. Valeo* 424 U.S. 1 (1976).

[400] Eastern Enterprises v. Apfel, 524 U.S. 498, 539 (1998).

[401] Calder v. Bull, 3 U.S. (3 Dall) 386 (1798). Gerber, *supra* note 15, at 288, argues that "[a] better illustration of his willingness to overrule precedent would be difficult to find."

[402] Harris v. United States, 536 U.S. 545, 581 (2002). Justice Thomas, at 583, stated that "adherence to *stare decisis* in this case would require infidelity to our constitutional values."

[403] *See*, e.g., Helling v. Kinney, 509 U.S. 25, 39 (1993) in which Justice Thomas noted that decisions prior to Estelle v. Gamble, 429 U.S. 97 (1976) were consistent with his view of the Cruel and Unusual Punishments Clause*; Morse,* 551 U.S. at 414 (2007) in which Justice Thomas referred to the 19th century judiciary's unwillingness to restrict school discretion to enforce order.

Justices Scalia and Thomas both claim to respect *stare decisis*. However, their jurisprudence has illustrated different approaches. Justice Scalia adopts the pragmatic view and selectively upholds precedent, consistent with his goal of maintaining originalism's acceptability but inconsistent with his commitment to minimizing judicial discretion. Justice Thomas renders precedent virtually meaningless. The disruptive effect of his interpretive purity undermines originalism's credentials as a workable theory of constitutional interpretation.[404]

Therefore, precedent marks a crucial divergence in judicial practice between Justices Scalia and Thomas. Their different approaches have been central to critical evaluations of their performance by originalists. Barnett has argued that Justice Scalia's pragmatic view of precedent means that "if any justice can fairly be described as a committed originalist, it is Justice Thomas and not Justice Scalia."[405] By contrast, Strang argues that Justice Scalia's acceptance of *stare decisis* as a meaningful constraining force means that he is a "more faithful originalist" than Justice Thomas.[406] Precedent remains an unresolved fault line within originalism.

VII. CONCLUSION

Originalism deserves re-examination in light of Justice Scalia's and Thomas's judicial practice. This article has provided the first comprehensive evaluation of their jurisprudence from an originalist perspective, analyzing the fault lines within originalism that are illuminated by their competing approaches.

This article advances three conclusions. First, the divergences in Justice Scalia and Thomas's judicial philosophies demonstrate originalism's continued fragmentation. Secondly, Justices Scalia and Thomas have failed to employ a consistent methodology that constrains their discretion. Thirdly, their deficient approaches have broader implications for originalism, exposing its inability to deliver on the promise of judicial constraint while remaining consistent with original meaning.

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[404] *See* McGinnis & Rappaport, *supra* note 318, at 803, who argue that, "if originalism cannot employ precedent, it would appear to be a seriously defective theory because it would ignore precedent even when doing so has enormous costs." Justice Thomas does not appear to have upheld his commitment to "prudence" and "practical wisdom" outlined in Clarence Thomas, "The Virtue of Practical Wisdom" (Speech delivered at the Claremont Institute, Claremont, 9 February 1999).

[405] Barnett, *supra* note 15, at 15.

[406] Strang, *supra* note 14, at 882.

A. Originalism's Fragmentation

Originalism is not a unified theory of constitutional interpretation. This article has clarified the most significant debates within contemporary originalism: defining original meaning; the role of natural law; the divergence between original expected applications and original meaning; and the role of precedent.

This article has demonstrated that these theoretical divides have practical significance. Justices Scalia and Thomas adopt distinctive positions on these issues that shape the resolution of constitutional controversies.

Part III outlined the competing definitions of original meaning adopted by Justices Scalia and Thomas. Justice Thomas has adopted a distinctive approach that affords greater significance to the Framers' intentions, justifying Maggs's general original meaning hypothesis and falsifying the notion that he is "[Justice] Scalia's pawn."[407] In light of *McDonald*, further research is necessary to determine whether Justices Thomas has now adopted Justice Scalia's original public meaning approach. Part IV contrasted Justice Thomas's willingness to integrate the natural law principles of the Declaration in his originalist methodology with Justice Scalia's refusal to consult natural law. Part V outlined Justice Scalia's and Thomas's willingness to define original meaning by reference to original expected applications, demonstrating that questions about the legitimacy of this approach have contemporary significance. Finally, Part VI contrasted Justice Scalia's pragmatic view of precedent with Justice Thomas's unwillingness to afford precedent dispositive force.

B. The Inconsistent Jurisprudence of Justices Scalia and Thomas

Justices Scalia and Thomas have outlined a dual commitment to judicial constraint and original meaning. However, the inconsistencies in their jurisprudence demonstrate their failure to achieve these goals.

Justice Scalia is more pragmatic than Justice Thomas. He has deviated from original meaning in order to advance his conception of the judicial role. Therefore, he has consistently emphasized narrow rule-based interpretation that promotes judicial constraint. Original public meaning originalism is preferred because it seeks an objective meaning, distinct from the manipulability of original intentions originalism. Broad natural law principles are excluded from the interpretive enquiry, even if they informed the Constitution's original public meaning. Original expected applications are relied upon to limit judicial discretion to interpret the

[407] Toobin, *supra* note 133, at 126.

Constitution's broad language.

However, Justice Scalia's deviations from original meaning have failed to achieve judicial constraint. Historical uncertainty precludes his original public meaning approach from limiting judicial discretion. Ambiguity as the touchstone for applying original expected applications fails to promote their consistent application and is dissonant with the broad language of constitutional provisions. Malleable rules governing the deployment of precedent do not constrain a results-oriented jurisprudence, particularly when tied to an extraneous purpose of preserving originalism's acceptability.

Justice Thomas is more of a purist than Justice Scalia. He places fidelity to original meaning above pragmatism. The sweeping natural law principles of the Declaration infuse his opinions. Precedents that conflict with original meaning are overturned. Although Justice Thomas has not justified his general original meaning approach or his recourse to original expected applications, he demonstrates a stronger commitment to original meaning than Justice Scalia.

However, Justice Thomas's interpretive purity comes at a cost. The implications for certainty, stability and the rule of law of the Court's application of his methodology are significant, which likely explains the small number of majority constitutional opinions he has authored.[408] Justice Thomas's fidelity to original meaning undermines mainstream acceptance of originalism.

Furthermore, Justice Thomas's approach has failed to achieve judicial constraint. His general original meaning approach lacks a discernible hierarchy of meaning and gives him the flexibility to choose the source of meaning that he prefers, undermining the consistency of this methodology. He applies natural law inconsistently and in a manner that conforms to his stated policy preferences.

Both Justices Scalia and Thomas have failed to achieve their stated purpose of applying a consistent methodology that constrains judicial discretion.

C. Originalism and Fidelity to Original Meaning

Originalism promises to meaningfully constrain judicial discretion through restoring the primacy of the Constitution's original meaning. However, it has not delivered on this promise. Justice Scalia and Thomas's failures expose the inherent incapacity of originalism to achieve judicial constraint.

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[408] Graber, *supra* note 179, at 73, notes that Justice Thomas wrote "substantially fewer majority opinions in constitutional cases" than other conservatives on the Rehnquist Court.

Asserting the primacy of original meaning does not promote judicial constraint unless a strained historical analysis is adopted. Historical indeterminacy precludes original meaning from eliminating judicial subjectivity. The natural law principles underpinning the Constitution cannot be insulated from future interpretation consistent with the search for original meaning. Broad principles cannot be read to merely constitutionalise the Framers' expectations. Fidelity to original meaning fails to achieve judicial constraint.

Originalism must therefore be reconceptualized. Fidelity to original meaning has been superseded by a commitment to judicial constraint in a majoritarian democracy on political theory grounds. Justice Scalia's rule-based methodology (with the exception of his approach to precedent) is capable of promoting judicial constraint in the hands of a more disciplined judge. However, adopting this approach requires originalists to cast off the illusion that they are upholding the Constitution's original meaning, undermining the primary normative justifications for originalism: popular sovereignty; consequentialism; and democratic legitimacy. Originalists cannot rely on the facade of objectivity to justify value choices to restrict judicial discretion.[409]

Originalism has failed to deliver on the promise of promoting judicial constraint. However, this article has not contrasted originalism with nonoriginalist theories. It is possible that originalism remains "the lesser evil,"[410] achieves superior outcomes and best preserves democratic legitimacy. However, originalism's primary purported virtue of judicial constraint is an illusion. Originalists must defend narrow rule-based interpretation on political theory grounds or accept judicial discretion as the price of fidelity to original meaning.[411]

[409] See Chemerinsky, *supra* note 281, at 385, who argues that the pretence of objectivity means that "value choices are not defended, but rather hidden behind a claim that the results have been discovered not chosen."

[410] Scalia, *supra* note 39.

[411] Whittington, *supra* note 51, at 611, has accepted that "interpretive results cannot be rigidly determined" and originalism "is not uniquely capable of ... hemming in judicial discretion." However, most originalists persist in the fiction that originalism advances judicial constraint.