

THE CHURCH OF ORIGINALISM

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“On every question of construction, [we] carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed Laws are made for men of ordinary understanding, and should, therefore, be construed by the ordinary rules of common sense. Their meaning is not to be sought for in metaphysical subtleties, which may make anything mean everything or nothing, at pleasure.”

Thomas Jefferson¹

INTRODUCTION

Thomas Jefferson wrote these words in 1823, long after the end of his public career and two years before his death. One hundred and fifty years later, a movement emerged that sought to recapture the spirit of Jefferson’s advice. Perceiving that judges were using metaphysical subtleties to remake the Constitution in their own image, the originalist movement called for a return to the framing generation’s understandings of constitutional text. The call did not go unanswered: scholars and judges leveled powerful criticisms against originalism that its scholarly adherents could not ignore. Since the first pitched battles in the 1970s and 1980s, this battle for the Constitution’s meaning has raged on. Originalism has matured from nascent antagonist to perhaps the dominant force in interpretive theory.

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¹ Letter from Thomas Jefferson to Judge William Johnson (June 12, 1823), in 15 THE WRITINGS OF THOMAS JEFFERSON, 439, 449–50 (Andrew A. Lipscomb & Albert Ellery Bergh eds., Mem’l ed. 1904). This maxim is part of a disquisition on jurisprudence in which Jefferson directly criticized Chief Justice John Marshall for his “very irregular and very censurable” behavior on the bench. *Id.* at 447.

Although originalism appears to be ascendant on the legal battlefield today, misconceptions abound regarding the theory's (or theories') content and the movement's history. On the standard telling, the "Old Originalism" was concerned primarily with original intent, asking what the actual enactors actually thought. This theory became encumbered by criticism and theoretical difficulties, like so many epicycles on a Ptolemaic system. Originalists responded by rejecting intent in favor of objective public meaning—that is, how the contemporaneous public would have understood the text. So it was that the "New Originalists," adherents to original public meaning originalism, displaced their outmoded ancestors. The sense is that the transition from intent to meaning was a sharp and total break from what had come before—a paradigm shift, to borrow from the epistemologists.

The common story overstates the trend from intentions to meaning, leaving the impression that originalism is gradually working toward a pure, platonic theory of constitutional meaning. This Comment proposes a different way of understanding originalism's history. Old Originalism did not encounter a Ptolemaic crisis, eventually dropping its epicycles in a fit of Kuhnian revolution.² Science is the wrong analogy: we should look instead to other belief communities. As originalism matured and gained a wider following, adherents adopted different modalities that eventually sorted originalists into different camps. The better model is to think of originalism like an early church which, when difficult questions arise, divides into sects.³ Rather than a paradigm shift, it may be more apt to speak of a schism. Like all analogies, this comparison to religion will fail at some level. The Constitution is not Holy Writ, so disagreement cannot become heresy; there is no magisterial edifice in legal theory, so those sects cannot be banished like recalcitrant Pelagians. For various reasons (not least because less is at stake than with sacred doc-

² See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed. 1996). For a Kuhnian perspective on republicanism in legal scholarship, see Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992).

³ Others have invoked a similar motif. See, e.g., Steven D. Smith, *That Old-Time Originalism*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 223, 244 (Grant Huscroft & Bradley W. Miller eds., 2011) (comparing the "plight" of Old Originalism to "that of the old-time religious believers"); Lee J. Strang, *The Most Faithful Originalist?: Justice Thomas, Justice Scalia, and the Future of Originalism*, 88 U. DET. MERCY L. REV. 873, 879 (2011) (using biblical language to refer to Justice Scalia's and Justice Thomas's relationships to originalism).

trine), the various camps of modern originalism are considerably more amicable than, say, the Anabaptists and the Zwinglians.⁴

Part I recounts the history of originalism in order to provide the context of the intentions/meaning distinction. In telling this story, this Comment is sensitive to parts of the narrative that are often marginalized, causing some of the misapprehension. Examining the narrative at a higher resolution allows lessons to be drawn from the Old about the New. Part II then takes a closer look at originalism as a family of theories, seeking an accurate account of how elements in the Old map on to the New. Identifying the chronological shift from Old to New is a helpful first step, but it is not a complete explanation. The central proposal of this Comment is that New Originalism contains a division between “High Originalism” and “Low Originalism,” based roughly on how great a role the actual human enactors play in originalist interpretation. This division was latent in the Old Originalism and, indeed, lurks beneath Jefferson’s words. This should make it clear that High and Low are not substitutes for Old and New.

I. THE STORY OF ORIGINALISM

In some quarters originalism brings with it preconceptions that may interfere with properly understanding it (let alone arguing its merits). It is possible to offer a reply brief, as it were, to these liminal objections and attempt to satisfy the reader that he should proceed to the merits. This Comment may accomplish some of that in what follows. But it is considerably easier and perhaps less contentious to begin with a narrative of originalism’s emergence. A quick sketch explains why originalism was largely *reactive* and *untheorized* when it emerged around the bicentennial of independence. This Part briefly describes the context out of which originalism emerged before reconstructing its history in greater detail.

A preliminary distinction is the one between the use of history and the search for original understanding on the one hand, and *originalism* as an “ism” on the other. It would be reasonable to define originalism as an *a posteriori* designation of interpretive methods that

⁴ When the Anabaptists repeatedly refused to acquiesce to infant baptism, the city council of Zurich finally issued an ironic edict: “He who dips, shall be dipped.” The leading Anabaptist Reformers were bound and cast into the river Limmat. 8 PHILIP SCHAFF, HISTORY OF THE CHRISTIAN CHURCH 55 (3d ed. rev. The Electronic Bible Society 1998) (1892).

meet certain criteria, for instance a focus on text and history,⁵ but this Comment will reserve the term for the organized expressions of theory and practice that began to emerge in the 1970s.⁶ Using the label in this way recognizes a lexical fact (the term itself dates to the 1980s⁷) and respects the historical implications of that fact. The term is also not applied loosely to any interpretive theory that has regard for original meaning. Using it this way⁸ dilutes it beyond usefulness. What follows, then, describes originalism in the United States.

A. Before Originalism

Whatever else their differences, English political theorists at the time of the American Revolution were united behind the principle that Parliament is sovereign: indeed, “[i]t can, in short, do everything that is not naturally impossible.”⁹ As the pamphlet wars leading up to Lexington demonstrate, the War of Independence was fought

5 O’Neill uses the term “textual originalism” to describe pre-New Deal interpretive methods. A feature of these methods is that they uncritically conflated what is now called textualism and originalism. JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 12–42 (2005).

6 This is in part to avoid conversational difficulty with those who may think that originalism claims too much for itself. See James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *FORDHAM L. REV.* 1335, 1347 (1997) (recognizing somewhat critically that originalism arose as a movement from conservative politics).

7 A Google NGram viewer inquiry is published as an appendix. Google Books Ngram Viewer, <http://books.google.com/ngrams> (last visited May 13, 2014). See also Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory* 2–5 (2011), available at <http://ssrn.com/abstract=1825543> (recounting the history of the word “originalism”).

8 E.g., Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 *GEO. L.J.* 1765, 1769–70 (1997) (labeling judicial use of history in nonoriginalist contexts as “ancestral originalism” and “heroic originalism”). But see James E. Fleming, *Original Meaning Without Originalism*, 85 *GEO. L. J.* 1849, 1851, 1855 (1997) (pointing out the confusion Dorf engenders by appropriating the term).

9 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 129 (4th ed.) (London, John Murray 1876). Blackstone’s description of Parliament sounds rather like he is describing a deity—“The power and jurisdiction of parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined either for causes or persons within any bounds,” and

[i]t has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power . . . is intrusted [sic] by the constitution of these kingdoms.

Id. at 128. It chills the American blood.

in large part over this very dispute.¹⁰ After the dust settled at Yorktown, the American political settlement rejected legislative sovereignty, adopting instead the apotheosis of social contract theory: popular sovereignty. The real disagreement between English and American conceptions concerns the locus of *sovereignty*. For the English, the people once, in time immemorial, spoke Parliament into existence and its rule on their behalf—and as their representatives—was then eternal. For Americans, the consent of the governed is the font of sovereignty and its *continuing* warrant. The “revolution principle” holds not only that “the supreme or sovereign power of the society resides in the citizens at large” but that “they always retain the right of abolishing, altering, or amending their constitution, at whatever time, and in whatever manner, they shall deem it expedient.”¹¹ The people spoke the Constitution into being, ordering their subservient government as they pleased. The government would not have the power to alter its metes and bounds without their consent.

The Constitution, then, was an instrument of the people to control their government just as an act of Parliament controlled the subjects of the realm. Blackstone may have said that Parliament was “uncontrollable,”¹² but he and the Americans shared a common view of how such instruments should be construed. Here the Lion and the Eagle converge: the intent of the lawgiver is paramount. Blackstone organized his canons of construction around the central goal of giving effect to the legislative undertaking.¹³ Influenced by Blackstone in its study of law and reacting to the abuses of a distant sovereign,¹⁴ the founding generation of the United States adopted a positive law constitution.¹⁵ Hamilton manifests this theme in the 78th Federalist; this is important because the Federalist is the means by which Publius

10 See C. Bradley Thompson, *The Revolutionary Origins of American Constitutionalism*, in *HISTORY ON PROPER PRINCIPLES: ESSAYS IN HONOR OF FORREST McDONALD* 1–18 (Stephen M. Klugewicz & Lenore T. Ealy eds., 2010).

11 1 JAMES WILSON, *Lectures on Law*, in *COLLECTED WORKS OF JAMES WILSON* 399, 440 (Kermit L. Hall & Mark David Hall eds., 2007).

12 James Wilson, Opening Address at the Pennsylvania Ratifying Convention, in 1 *THE DEBATE ON THE CONSTITUTION* (Bernard Bailyn ed., 1993).

13 Thompson, *supra* note 10, at 15.

14 See *THE DECLARATION OF INDEPENDENCE* paras. 2–3 (U.S. 1776) (expressing concern about tyrannical governments, especially that of the King of Great Britain).

15 *THE FEDERALIST* NO. 78 (Alexander Hamilton). Whatever else the Constitution is, it is at least that much. The claim here is not meant to provoke controversy over whether the Constitution is also a common law charter or an invitation to moral reasoning.

sought to allay fears of latent tyranny in the new Constitution.¹⁶ It is a strong bridge between Blackstonian intentionalism¹⁷ and America's founding generation.

Early American practice corroborates that the mindset successfully arrived in the new republic. The mode of argument is invoked in debates in the early congresses,¹⁸ in the judicial reasoning of the early Court,¹⁹ in scholarly treatises,²⁰ and even in Reconstruction era debates.²¹ As noted below, there is some question about what kind and whose intent these early jurists sought, but there is no real dispute that they sought to give the law the effect its words conveyed. But by the end of the nineteenth century, during and around the oft-criticized *Lochner* era,²² formalist logic and Progressive activism began to place a great strain on the text. For several decades the judiciary frustrated legislative efforts to regulate society on the basis of, for example, a "deduced" right of economic due process, leading even freemarketeers to sympathize with Justice Oliver Wendell Holmes's protest that the Constitution "does not enact Mr. Herbert Spencer's Social Statics."²³ *Lochner* and the jurisprudential debates surrounding it thus fueled the contention that constitutional interpretation was essentially a political task. Resonating with James Bradley Thayer's famous essay,²⁴ the *Lochner* Court became an icon of the counter-

16 Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 351 (1988) (describing how the federalists sought to reassure the ratifiers by downplaying both the power of the judges and the powers of the Presidency).

17 The word is enigmatic and there is disagreement about whether the colonial-era English theorists sought authorial or objective intent. See *infra* Part I.B.

18 See O'NEILL, *supra* note 5, at 16–17 (discussing early congressional debates over constitutional meanings).

19 An examination of the reports of the first several decades of Supreme Court decisions—especially the early seriatim opinions—will bear this out. *E.g.*, *Miller v. The Ship Resolution*, 2 U.S. (2 Dall.) 1, 3–4 (Fed. Ct. App. 1781) (interpreting an "ordinance of Congress" so as to avoid a "violence both to [its] terms and spirit, or intention"); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 437 (1793) (Iredell, J.) (referring to "the clear intention of the act"), *superseded by constitutional amendment*, U.S. CONST. amend. XI; *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6, 12 (1794) (seeking "the intention of the legislature").

20 *E.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Boston, Hilliard, Gray, & Co. 1833); THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS (Da Capo Press 1972) (1868).

21 See O'NEILL, *supra* note 5, at 21–24 (discussing originalism in the Reconstruction era).

22 See generally David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 MERCER L. REV. 563 (2009) (discussing the "misunderstood . . . forty-year period known as the 'Lochner Era'").

23 *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

24 James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 17 (1893).

majoritarian difficulty.²⁵ David Bernstein has chronicled the many failings with this view of *Lochner* and its Court; the subject is quite complex and his book is an important inoculation against breezy condemnations. Still, the politicization of the Constitution reached new heights in this crucible of “creedal passion.”²⁶

By the time President Franklin D. Roosevelt was elected, the traditional methods of interpretation “conflicted with modern intellectual trends and directly confronted the New Deal”²⁷ political forces. The confluence of new ways of thinking across large swathes of human thought is too large a subject even to summarize here, but it must suffice to say that the shift in jurisprudence was not an isolated phenomenon.²⁸ Against the arrayed forces of modernist thought and immense political pressure, the old order laid down its arms and was consigned to a supporting role over the next half century.²⁹

In the “good old days,” however, the Court was neither always faithful to its purported goals³⁰ nor especially rigorous in the execution of its task.³¹ Common law precedence over statutory enactments was an idea with some pedigree, as it was raised by Sir Edward Coke

²⁵ See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1962).

²⁶ See generally SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 85–90, 130–148 (1981) (describing the peculiarly American phenomenon of “creedal passion periods”); cf. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1054–55 (justifying, among other things, the New Deal as a legitimate “constitutional moment” during which the people move beyond ordinary politics).

²⁷ O’NEILL, *supra* note 5, at 28.

²⁸ Woodrow Wilson had brought a modern view to politics much earlier: “[G]overnment is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton.” WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 56 (1908). An iconic evisceration of modernism, tracing the degradation of culture since at least the Renaissance, can be found in RICHARD M. WEAVER, *IDEAS HAVE CONSEQUENCES* (1948). See also C. S. LEWIS, *THE ABOLITION OF MAN* (1947) (observing the incoherence of relativism); EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973).

²⁹ O’Neill notes that arguments from original intent and meaning continued to be persuasive even as they ceased to be authoritative. O’NEILL, *supra* note 5, at 37–39. See also Lorraine Updike Toler et al., *Pre-Originalism*, 36 *HARV. J.L. & PUB. POL’Y* 277, 318–19 (2012) (noticing that the Warren and Burger courts invoked historical meaning at a higher rate than others). But see Fleming, *supra* note 6, at 1347 (distinguishing between the “uses of history” as employed and discussed in the 1960s and originalism, and suggesting that the former is the norm).

³⁰ See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) [hereinafter BORK, *TEMPTING*] (tracing through history the impulse of judges to reach outside the constitution to enact their own political preferences).

³¹ See Toler et al., *supra* note 29, at 303 (acknowledging the nineteenth century Court’s use of history but pointing out its methodological inconsistencies).

in *Dr. Bonham's Case*.³² And in America, the specter of judicial usurpation in the name of natural justice presented itself in the very first decade in the famous scrap between Justices Samuel Chase and James Iredell.³³ Writing seriatim, Justice Chase volunteered his opinion that “the nature, and ends of legislative power will limit the exercise of it.”³⁴ Justice Iredell dressed him down with the argument for judicial review prominent in *Marbury* and Federalist 78.³⁵ Whatever the historical merits of originalism’s claim to an older orthodoxy, the important fact is that originalists perceive themselves as operating within this narrative.³⁶

Likewise, the new method of interpretation, while ascendant, was not unopposed. Judicial decisions came with strong dissents.³⁷ Moreover, it is counterproductive (and not only by virtue of being uncharitable) to ignore liberal criticisms of the Court in this era. Standing in a long stream of process theory, these began almost immediately³⁸ and political liberals continued to struggle with the prob-

32 (1610) 77 Eng. Rep. 646 (C.P.). Coke’s assertion that “in many cases, the common law will . . . controul Acts of Parliament” is the subject of controversy. *Id.* at 652. See generally John V. Orth, *Did Sir Edward Coke Mean What He Said?*, 16 CONST. COMMENT. 33, 34 (1999) (questioning whether Coke was “merely mouthing dicta” in *Dr. Bonham's Case*).

33 *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). See RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 274–75 (2d ed. 1997) (discussing Justices Chase and Iredell’s points of view in *Calder*); BORK, TEMPTING, *supra* note 30, at 19–20 (discussing the constitutional disagreement between Justices Chase and Iredell in *Calder*).

34 *Calder*, 3 U.S. (3 Dall.) at 388.

35 *Id.* at 398–99. (“The power, however, is judicial in its nature; and wherever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative, authority.”).

36 Robert Bork certainly did, and it is uncontroversial to say that political conservatives in the post-Reagan years regard Bork’s failed nomination as the climax of the first pitched battle. Justice Scalia likewise rejects Professor Gordon Wood’s invocation of *Dr. Bonham's Case* and asserts that “[t]he genuine orthodoxy is set forth in Blackstone[.]” Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 130 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Response*].

37 *E.g.*, *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 675–76 (1966) (Black, J., dissenting) (“[T]here is no constitutional support whatever for this Court to use the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written so as to add to it substantive constitutional changes which a majority of the Court at any given time believes are needed to meet present-day problems.”); *id.* at 686 (Harlan, J., dissenting) (“[I]t is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process.”).

38 See G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 280–82 (1973) (discussing the elements of Realism in American jurisprudence, which it is argued emerged in the 1930s). Interestingly, the sustained attacks from the left began in earnest in 1937, a year usually regarded as the mo-

lem of the Court as a “naked power organ.”³⁹ It is worthwhile for today’s originalists to take note of these criticisms: the call for “neutral”⁴⁰ or at least “principled”⁴¹ decision-making was not reserved to opponents of the Court’s substantive policy results.

The narrative provides the context for originalism’s imminent emergence—a context of the shared search for a principled and orderly jurisprudence. Writing in 1973, G. Edward White sought it in the interplay between realism and “reasoned elaboration.”⁴² White was either unaware or uninterested in another answer that had been latent for many years, but which had received a forceful articulation just a few years earlier: the principle of original understanding. It is to this that we now turn.

B. *Originalism Rising*

Gilbert Chesterton observed that the complexity of a belief is often an impediment to getting its defense underway, a torpor that “arises, oddly enough, from an indifference about where one should begin.”⁴³ In the case of Old Originalism, politics dictated where to begin: with the problem of judicial overreach.⁴⁴

When Richard Nixon ran for president in 1968 on a law and order platform, one element of his campaign was his promise to appoint “strict constructionists” to the bench.⁴⁵ But this was more of an impulse than a movement, an appeal to “irritable mental gestures”⁴⁶ rather than to a cogent theory. Nixon’s politicking would have been an appropriate target for Thomas Grey’s charge that conservative juris-

ment textualism was routed from the field. *Id.* at 282 (“The year 1937 marked the emergence of fullblown attacks on the Realists.”).

39 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12 (1959); White, *supra* note 38, at 288–93.

40 Wechsler, *supra* note 39, at 15 (“But must [courts] not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply?”).

41 *E.g.*, Alexander M. Bickel, *The Supreme Court 1960 Term*, 75 HARV. L. REV. 40, 41–42 (1961) (criticizing the Vinson Court for failing to develop discernible principles).

42 *See* White, *supra* note 38, at 296–302.

43 GILBERT K. CHESTERTON, ORTHODOXY 153 (1908).

44 Compare the confirmation hearings of Justices Marshall and Rehnquist, as reported in Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599–600 (2004) [hereinafter Whittington, *New Originalism*].

45 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 131–32 (1977); Whittington, *New Originalism*, *supra* note 44, at 600.

46 Lionel Trilling employed this phrase to describe conservatism when he famously argued that liberalism was not only the dominant tradition in America, it was the *only* tradition. *See* LIONEL TRILLING, THE LIBERAL IMAGINATION: ESSAYS ON LITERATURE AND SOCIETY, at ix (1950).

prudence amounted to little more than “ritualized repetition of the familiar slogans,”⁴⁷ but it played to the passions of an electorate that was frustrated enough to call for the impeachment of Chief Justice Earl Warren.⁴⁸ This early commotion culminated in originalism—as an ism—in the 1970s.

As the movement matured, these Old Originalists sorted themselves into new “original intent” and “original public meaning” camps, although the standard narrative overdraws the distinction between them. This Subpart traces originalism’s *intellectual* development from the emergence of Old Originalism until it graduated to New Originalism. It is not a comprehensive history, and old and New Originalists overlap. Old Originalist Robert Bork was an advisor to Mitt Romney’s 2012 presidential campaign.⁴⁹ Similarly, Raoul Berger continued writing responses until he was almost a century old.⁵⁰ And Michael McConnell is only one example of a “New Originalist” who was already new in the 1980s. Randy Barnett used the term “New Originalism” in 1999,⁵¹ but Keith Whittington’s important article contrasted it with “Old Originalism.”⁵² These constructs and Whittington’s descriptive analyses influenced the structure of what follows.

47 Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 2 (1984) (remarking that advocates espousing different theories of constitutional interpretation use appealing rhetoric to signify their ideological commitments).

48 See, e.g., Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 439–40 (2004) (“The decisions in *Mapp* and *Miranda* were attacked as coddling criminals, and the criminal justice system and the Supreme Court had become issues in the upcoming 1968 presidential election. ‘Impeach Earl Warren’ signs appeared along highways in most parts of the country.”); see also Elizabeth A. Starrs, *Protect Colorado Courts II*, 35 COLO. LAW. 5, 5 (2006) (describing calls for Chief Justice Warren’s impeachment as “a grassroots movement”).

49 Lloyd Grove, *Robert Bork on Obama, the Supreme Court, Nixon & Being Mitt Romney’s Adviser*, NEWSWEEK (Oct. 17, 2011, 1:37 AM), <http://www.newsweek.com/robert-bork-obama-supreme-court-nixon-being-mitt-romneys-adviser-68317>. See also Ethan Bronner, *A Conservative Whose Supreme Court Bid Set the Senate Afire*, N.Y. TIMES, Dec. 20, 2012, at A1 (discussing Bork’s conservative jurisprudence and legacy in the context of his role in the Romney campaign).

50 Berger was born in 1901. His last article on HeinOnline is *Reflections on Constitutional Interpretation*, 1997 BYU L. REV. 517 (1997).

51 Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 629–54 (1999) (describing the ascendancy of New Originalism and arguing for its merit).

52 Whittington, *New Originalism*, *supra* note 44, at 599–607; see also Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL’Y 29, 38–41 (2011) [hereinafter Whittington, *Is Originalism Too Conservative?*] (exploring the interplay between conservative ideology and originalist interpretation).

1. *Old Originalism*

The nature of the current project—constructing an understanding of originalism by tracing its origins—requires deferring a precise definition of originalism. But, at this point in the retelling, it is important to notice that the stirrings in the 1970s marked the emergence of something new. This something differed from what came before in that it was neither a general milieu of interpretive method nor the kind of simple textualism that was practiced in the decades prior. Originalism thus considered—as a movement—began in earnest in the 1970s. It is convenient to refer to this phase, ranging roughly from 1970–1990, as “Old Originalism.”⁵³

It will not surprise many readers that an early contender for originalism was Judge Robert Bork. His 1971 *Neutral Principles and Some First Amendment Problems* stood on the shoulders of Professor Herbert Wechsler,⁵⁴ who was troubled with the rationale of *Brown v. Board*.⁵⁵ Judge Bork’s article embraced Wechsler’s call for application of principles neutral as to the outcome but extended the demand for neutrality to the *derivation* and *definition* of the principles in the first place. He pointed out that it is no improvement if judges are free to pluck their principles from the jurisprudential aether and then define them so as to suit the judge’s predilections.⁵⁶ Bork cited *Shelley v. Kraemer*⁵⁷ and the state reapportionment cases as clear examples of non-neutrality, whatever the desirability of their outcomes.⁵⁸

Bork’s article did not make much headway on its own,⁵⁹ even if it is now clear that a movement was gathering.⁶⁰ One scholar, writing sev-

53 See Whittington, *New Originalism*, *supra* note 44, at 599 (providing a sketch of the evolution of originalism, beginning with “old originalism,” that roughly tracks what follows herein, though it is less narrative and more abbreviated).

54 Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2 (1971) (using Wechsler’s argument about Supreme Court power as a “starting place”).

55 Wechsler, *supra* note 39, at 34 (“[I]s there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion.”).

56 Bork, *supra* note 54, at 7 (advocating for neutral application of principles as well as a neutral definition of those principles in constitutional interpretation).

57 334 U.S. 1 (1948).

58 Bork, *supra* note 54, at 15–19.

59 A search for citations to the article in the five years after its publication yields approximately thirty results. Of these, many are confined to First Amendment scholarship or are bulletins and indexes. Searches conducted using HeinOnline’s ScholarCheck feature four articles citing to “47. Ind. L. J. 1” between 1970 and 1976. In one, the article is miscited and attributed to “Beck.” S. Mac. Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOK. L. REV. 290, 310 n.59 (1972).

eral years after Bork, suspected at least that Bork's article was a trickle that presaged an imminent flood of debate.⁶¹ His prediction was borne out almost immediately after it was made.⁶² In 1976, the case was made by someone harder to obscure: a new Supreme Court Justice named William H. Rehnquist.⁶³ In submitting Rehnquist's nomination, President Nixon had declared that a judge "should not twist or bend the Constitution in order to perpetuate his personal political and social views."⁶⁴ Rehnquist's articulation, strongly echoing Bork's, looked to the structure of constitutional government as articulated in *Marbury*, recounting the Court's troubled history in untethered moral philosophizing, and making an argument from democratic legitimacy.⁶⁵ Still, Rehnquist was Nixon's third nominee and so far his campaign promise to initiate a regime of strict construction on the Court had been toothless. It was, after all, Nixon appointee Blackmun who wrote the majority opinion in *Roe v. Wade*.⁶⁶

History affords little opportunity to evaluate the impact of Justice Rehnquist's article. The next year, Raoul Berger released *Government by Judiciary: The Transformation of the Fourteenth Amendment*, purporting to demonstrate that the framers of the Fourteenth Amendment did not intend to abolish segregation.⁶⁷ *Government by Judiciary* renounced

60 The article is now the tenth most cited law review article of all time. Fred R. Shapiro & Michelle Pearce, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012).

61 Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975) ("If the articles by Messrs. Bork, Linde, and Ely mark the emergence of an important trend—as I suspect they do—this basic theoretical issue will no longer be swept under the rug."). Grey's article was important in prompting a classification of the sides of the debate and in introducing early the idea of an unwritten constitution. Most of his article is taken up observing that interpretivism would undermine many Supreme Court doctrines, hardly a dealbreaker for originalists disturbed by judicial overreach. *Id.* at 710.

62 Of course, Professor Grey may have precipitated the debate with his article. See *infra* note 106 and accompanying text.

63 William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 699 (1976) (proffering many of the arguments that originalism marshals in its more mature forms).

64 President Richard Nixon, Address to the Nation Announcing Intention to Nominate Lewis F. Powell, Jr., and William H. Rehnquist to be Associate Justices of the Supreme Court of the United States (Oct. 21, 1971), in PUB. PAPERS OF THE PRESIDENTS OF THE U.S.: RICHARD NIXON 1971, at 1053, 1054 (1972).

65 Rehnquist, *supra* note 63, at 703–06.

66 410 U.S. 113, 116 (1973) (noting that Justice Blackmun wrote the opinion of the Court).

67 BERGER, *supra* note 33, at 18 ("No trace of an intention by the Fourteenth Amendment to encroach on State control—for example, of suffrage and segregation—is to be found in the records of the 39th Congress."). Berger completed the second edition when he was ninety-five years old, and the main text was unaltered "so that readers may in the future have before them what excited so much controversy." *Id.* at xxii. Thus all references in this article are to the second edition, which is available free online at <http://oll.libertyfund.org/title/675>.

as unwarranted *Brown vs. Board of Education*⁶⁸, what Pamela Karlan later called the “crown jewel of the *United States Reports*.”⁶⁹ Berger’s controversial claim would prove difficult to marginalize and impossible to ignore. His previous books had undermined the Nixon administration’s attempts at executive insulation, making it implausible to lump him in with Nixon and Rehnquist.⁷⁰ In addition, he was avowedly a “deep-dyed liberal and lifelong Democrat.”⁷¹ His political dissonance with other critics⁷² of living constitutionalism certainly bought him some credibility, but it was his sheer tenacity that made him a veritable force of nature over the next decade.

“Heresy sometimes becomes so pervasive that it becomes the new orthodoxy.” So wrote Robert Bork from his vantage in 1990.⁷³ This may explain why *Government by Judiciary* “stimulated an explosion of academic interest in the framers’ intent,”⁷⁴ some of which was described as “slipshod and semihysterical.”⁷⁵ The book itself was a compendium of history purporting to show that the Court had distorted the Fourteenth Amendment past what its words could bear, arguing almost by brute force that the intention of the framers must determine the meaning of the Constitution. Responses came from all quarters but fall into two general categories. The first, with which

68 347 U.S. 483 (1954).

69 Pamela S. Karlan, *What Can Brown Do For You?: Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1060 (2009).

70 See generally RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974); RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973).

71 Raoul Berger, *Robert Bork’s Contribution to Original Intention*, 84 NW. U. L. REV. 1167, 1167 (1990). Berger added that he was “at the opposite political pole from Bork.” *Id.* Berger elsewhere endorsed “the standard political principles of the moderate left of the Democratic party.” BERGER, *supra* note 33, at 336 (quoting Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1322 (1979)).

72 On school prayer he was “diametrically opposed to . . . the Jesse Helms coterie . . .” O’NEILL, *supra* note 5, at 131 (internal citation omitted).

73 BORK, TEMPTING, *supra* note 29, at 7.

74 Richard B. Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. 745, 753 (1983).

75 Forrest McDonald, *Foreword* to RAOUL BERGER, GOVERNMENT BY JUDICIARY, at xv, xviii (2d ed. 1997). Paul Brest, for example, repeatedly associated Berger with William Winslow Crosskey, who in the 1950s published two volumes arguing, among other things, that the president had power to enforce state law and that the Supreme Court had common law but not judicial review powers. See Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 231 (1980) [hereinafter Brest, *Misconceived Quest*]. The implication is that relying on history can lead to wild aberrations. *But see* Ken Kersch, *The Curious Case of William Winslow Crosskey, Part I*, LEGAL HISTORY BLOG (July 14, 2011), <http://legalhistoryblog.blogspot.com/2011/07/curious-case-of-william-winslow.html> (suggesting that Crosskey really was a proto-originalist in the sense of the term used herein).

this Comment is not concerned, contains arguments that Berger's approach was normatively undesirable and that his conclusions about original intent were interesting at best. These essentially normative objections marked out some tentative battle lines between originalists and nonoriginalists.⁷⁶

The second category shaped the contours of modern originalism and thus is relevant for this Comment. Two scholars have achieved iconic status as early and influential critics of Berger.

Paul Brest was first to arrive at the scene and first to use the term "originalism."⁷⁷ Brest surveyed the world of originalist ideas, starting with the more familiar "textualism," pointing out that language comes with both linguistic and social contexts.⁷⁸ His critique of intentionalism is much broader. It identifies the oddity of a lawmaker's mental state governing the scope of a law, the further problem of another party applying that indeterminate intent, the conflict between the lawmaker's intended rules of construction and his intent about the enactment, and the problem of group intent.⁷⁹ Further, in the context of our Constitution there is the additional problem of identifying the adopters.⁸⁰ Unimpressed, Berger called this "Paul Brest's Brief for an Imperial Judiciary."⁸¹ Brest's critique of originalism highlights originalism's *summing* or *aggregation* problem—the difficulty in ascertaining the intended meaning of a multimember body.

Another approach was to meet Berger on his own terms, "trying to out-Berger Berger."⁸² H. Jefferson Powell wrote an influential⁸³ article challenging original intent (or at least Berger's version of it) on its

⁷⁶ E.g., Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 (1981) (concluding that activists like himself should "acknowledge that most of our writings are not political theory but advocacy scholarship").

⁷⁷ Brest, *Misconceived Quest*, *supra* note 75, at 204. Though the terms "original meaning" and the like appear much earlier, originalism as a conceptual neologism appears to originate with Brest. See Solum, *supra* note 7, at 2.

⁷⁸ Brest, *Misconceived Quest*, *supra* note 75, at 205–09 (explaining the bounds of textualism used in originalist constitutional interpretation theories).

⁷⁹ *Id.* at 209–13 (examining the underlying concepts in intentionalism, which uses the adopter's perspective to support constitutional interpretation in contrast to textualism and its use of original intent).

⁸⁰ *Id.* at 213–15.

⁸¹ Raoul Berger, *Paul Brest's Brief for an Imperial Judiciary*, 40 MD. L. REV. 1, 1 (1981).

⁸² Saphire, *supra* note 74, at 753.

⁸³ The influence was inordinate. See generally Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007) (providing historical analysis that seriously undermines Powell).

own terms.⁸⁴ According to Powell, the founding generation was possessed of two animating forces. On the one hand, an unlikely alliance between Puritan theology and enlightenment philosophy conspired to promote deep distrust of the interpretations of texts.⁸⁵ Pulling against this distrust, the common law had developed a robust hermeneutic for conducting these kinds of interpretations.⁸⁶ Examining the evidence in light of these forces, Powell argued, it becomes clear that the founding generation was committed to a hermeneutic of *objective* intent.⁸⁷ The many instances of resort to legislative or drafters' intent are, upon close examination, really references to objective intent, a hermeneutic much like that applied to contracts.⁸⁸ Thus, goes the argument, those who cast their spear back to the founding generation are misunderstanding what they have dragged back. Berger did not lie down—his retribution was swift, and the evidence he marshaled in his response was tedious and relentless.⁸⁹ Berger enlisted the usual luminaries such as Coke and Blackstone; more effective, though, was his demonstration that Powell's own sources were not up to Powell's task. Powell responded at some length in reviewing⁹⁰ Berger's book⁹¹ on federalism. Berger, worried that "victory be 'adjudged not to him who had Truth on his side; but the last word in the Dispute,'" responded in full with "The Founder's Views—According to Jefferson Powell."⁹² The episode is typical of Berger's unyielding pugnacity. His critics were innumerable, so much so that one of them remarked that "responding to Berger's thesis has become somewhat of a cottage industry" for scholars.⁹³

84 H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

85 *Id.* at 888–94.

86 *Id.* at 894–902.

87 *Id.* at 902–24.

88 *Id.* at 948 (“[A]t the time, [intent] referred to the ‘intentions’ of the sovereign parties to the constitutional compact, as evidenced in the Constitution’s language and discerned through structural methods of interpretation; it did not refer to the personal intentions of the framers or of anyone else.”).

89 Raoul Berger, “*Original Intention*” in *Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986).

90 See generally H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987)).

91 RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987).

92 Raoul Berger, *The Founders’ Views—According to Jefferson Powell*, 67 TEX. L. REV. 1033, 1034 (1989) (quoting JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* 494 (P. Nidditch ed., 1975) (4th ed. 1700)).

93 Saphire, *supra* note 74, at 753 (noting that “[i]ssuing responses to his critics has become somewhat of a cottage industry for Berger” and citing some examples).

Berger authored over forty responses,⁹⁴ leaving the impression that he might singlehandedly fend off the academic countermobilization.⁹⁵ He was often “quite sharp in print to those with whom he disagree[d]”⁹⁶ responding vigorously with “relentless collation of quotations”⁹⁷ to his scholarly critics. And he was an equal-opportunity brawler, answering even his more sympathetic critics.⁹⁸ The firestorm, centered on a man once “a hero to Nixon’s political opponents,”⁹⁹ would set the course for originalism’s future. Berger’s forcefulness and ubiquity are a major reason why Old Originalists are identified as intentionalists, for Berger is indeed one of the few identifiable committed intentionalists.¹⁰⁰

Keith Whittington notes that the Old Originalism was marked by three characteristics. First, it was committed to judicial restraint.¹⁰¹ Originalism was sometimes defended in purely instrumental terms as the only way to constrain judges. This instrumental goal was spurred by the intuition that there was something unseemly about judges making sweeping national policy, thus leading to the second characteristic: deference to legislative processes.¹⁰² Finally, most importantly for the purposes of this Comment, Old Originalists were taken as intentionalists.¹⁰³ *Government by Judiciary*, like all of Berger’s ubiquitous writings, was a pandect of legislative history and forced the legal world to answer to the framers of the Fourteenth Amendment. The missiles from Brest, Powell, and others naturally honed in on Berger, who was happy to engage them with his particular form of intentionalism.

94 He compiled a list of his articles which number 114. See BERGER, *supra* note 33, 485–91 (providing a list of the articles). A search on HeinOnline reveals 136 results with Berger as “creator.” See HEINONLINE, <http://heinonline.org> (following “Resources” hyperlink; then “Law Journal Library” hyperlink; then “advanced search” hyperlink; then inputting “Raoul Berger” into the search by author field).

95 See BERGER, *supra* note 33, at xxi–xxii.

96 Sanford Levinson, *Raoul Berger Pleads for Judicial Activism: A Comment*, 74 TEX. L. REV. 773, 773 (1996); e.g., Berger, *supra* note 92, at 1033–34 (“In 1985, Jefferson Powell, then three years out of law school, attempted . . . to read ‘original intent’ out of the common law.”).

97 Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1485 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987)).

98 E.g., Raoul Berger, *The “Original Intent”—As Perceived by Michael McConnell*, 91 NW. U. L. REV. 242 (1996). In typical Berger fashion, his thirty-five-page response has nearly 300 footnotes. *Id.* at 277 (concluding with footnote number 298).

99 O’NEILL, *supra* note 5, at 115.

100 BERGER, *supra* note 33, at 403 (arguing for “[e]ffectuation of the draftsman’s intention”).

101 Whittington, *New Originalism*, *supra* note 44, at 602.

102 *Id.* at 602–03.

103 *Id.* at 603.

2. *From Old to New*

Originalism came of age in the mid-1980s. While some have offered that “[s]o thoroughly did Berger rout his critics that, after a decade or so, they virtually stopped trying,”¹⁰⁴ it is more plausible to say that originalism itself left Berger behind. Even as the dominance of the Warren and Burger Courts passed, Berger’s critics had convinced many sympathetic minds of weaknesses with intentionalism. Steady criticism combined with political and judicial gains to pressure originalists to refine their theory. This Subpart briefly recounts originalism’s arrival out of the wilderness, or what Professor Balkin would call from “off the wall” to “on the wall.”¹⁰⁵

In what must count as at least a minor concession, critics of originalism began to pledge fidelity to the text as a first principle; criticism of originalism was rooted in “how, not whether, to interpret”¹⁰⁶ the Constitution.¹⁰⁷ One of these developments is worth noting briefly. It was in this same period that Bruce Ackerman announced the prototype of his concept of “constitutional moments.”¹⁰⁸ In some ways, Ackerman’s work resonates with the liberals of the process-restraint tradition. Ackerman is hardly a reactionary,¹⁰⁹ and his work in part justified the New Deal settlement as “the legitimization of the activist welfare state.”¹¹⁰ But it did so by appeal to the Constitution’s actual meaning in order to provide “constitutional vindication

104 McDonald, *supra* note 75, at *xviii*.

105 The use of the phrase in this context comes from Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 309–11 (2007) [hereinafter Balkin, *Abortion*]. The essay was adapted as Jack M. Balkin, *Fidelity to Text and Principle*, in *THE CONSTITUTION IN 2020*, at 11 (Jack M. Balkin & Reva B. Siegel eds., 2009); it was popularized in Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, *THE ATLANTIC* (June 4, 2012, 2:55 PM) <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/>.

106 H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 659 n.1 (1987). Powell somewhat emptily accuses originalists of appropriating the term interpretivism for themselves, describing it as sheer propaganda. Although his article does not cite to Grey, it is unlikely he was unaware of the source of the label. *Id.*

107 *E.g.*, RONALD DWORIN, *A MATTER OF PRINCIPLE* 35 (1985) (“Any recognizable theory of judicial review is interpretive [The] distinction . . . between theories that insist on and those that reject interpretation . . . is more confusing than helpful.”).

108 Ackerman, *supra* note 26, at 1022.

109 Ackerman has written, among other articles, a liberal manifesto for a “liberal, progressive, lefty” magazine. *About Us*, AM. PROSPECT, <http://prospect.org/about-us>; Bruce Ackerman, *We Answer to the Name of Liberals*, AM. PROSPECT (October 22, 2006), <http://prospect.org/article/we-answer-name-liberals-0>.

110 Ackerman, *supra* note 26, at 1052.

[for] the activist welfare state.”¹¹¹ Against the prevailing Progressive narrative, Ackerman agreed with conservatives that the New Deal was problematic when measured against the Constitution of 1787 and Reconstruction amendments.¹¹² But, he argued, We the People had actually and legitimately changed the Constitution through sustained engagement.¹¹³ Ackerman’s thunderbolt¹¹⁴ meant that originalists would have to pay closer attention to constitutional theory—to what the Constitution *is* and *why* it binds—or risk losing more than just their method of interpretation.

The challenges to originalism pressed adherents to consider more closely the concept of *intent*. The focus first shifted from framers’ intent to *ratifiers’* intent,¹¹⁵ a move that reflected the sentiments of some founders¹¹⁶ and also responded to the movement’s critics.¹¹⁷ This refinement presaged a more fundamental one: a shift from subjective to objective intent, or from intent to public meaning. A powerful force in this transformation was “original meaning textualism’s patron saint,”¹¹⁸ Justice Antonin Scalia. In a 1986 speech, he exhorted his audience to “change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning” on the premise that “terminology is destiny.”¹¹⁹ As then-Judge Scalia finished his speech with

111 *Id.*

112 *Id.* at 1052–53.

113 *Id.* at 1055–56.

114 No claim is presented here as to whether Ackerman considers himself an originalist, though he is sometimes taken as one. *See, e.g.,* Fleming, *supra* note 8, at 1849 n.1 (classifying Ackerman as a “broad originalist[.]”).

115 Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 512 (1988) (“When we talk popularly about the framers’ intent, we really should be more precise and refer to the ratifiers’ intent”); M. E. BRADFORD, ORIGINAL INTENTIONS: ON THE MAKING AND RATIFICATION OF THE UNITED STATES CONSTITUTION 34–86 (1993) (calling attention to the divergent intentions of Massachusetts, South Carolina, and North Carolina in ratifying the Constitution) (originally delivered as a public talk commemorating the bicentennial in 1989); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 112 (1988) (“[H]ow the ratifiers understood the Constitution . . . defines its meaning. The act of ratifying cannot be dismissed with the adverb ‘merely.’”).

116 *See James Madison in the House of Representatives, April 6, 1796*, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 372, 374 (Max Farrand ed., 1911) (“If we were to look . . . for the meaning of the instrument beyond [its] face . . . we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.”).

117 *See, e.g.,* Rotunda, *supra* note 115, at 509 (criticizing the focus on original intent).

118 Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO L.J. 1113, 1139 (2003).

119 Antonin Scalia, Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C. (June 14, 1986) in ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 106 (U.S. Dep’t of Justice 1987), available at <http://babel.hathitrust>.

those words, a senior Reagan advisor symbolically accepted the advice on behalf of the Reagan coalition.¹²⁰ The moment marked “the formal ascendancy of the doctrine of original meaning in modern times.”¹²¹

These developments signaled an increasingly complex and coherent network undergirding originalism. The contemporaneous rise of the Federalist Society, an association of conservative law students and lawyers, helped make the political and intellectual climate more favorable for originalism, as did its embrace by the Reagan White House.¹²² Notably, when President Ronald Reagan’s attorney general—a political appointee—gave his now-famous speech to the ABA calling for “a Jurisprudence of Original Intention,”¹²³ the press¹²⁴ and members of the Supreme Court¹²⁵ were compelled to respond. The nomination of Robert Bork to the Supreme Court was a “crucial public test of originalism”¹²⁶ that took place in the “bloody crossroads . . . where politics and law meet.”¹²⁷ The lesson for present purposes is that although originalism was not first or primarily a political phenomenon, it was both “the instrument and the beneficiary” of conservative legal mobilization.¹²⁸

org/cgi/pt?q1=106;id=mdp.39015019842932;view=1up;seq=122;start=1;size=10;page=search;num=106#view=1up;seq=122.

120 See Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 n.10 (2006) (recounting Lawson’s memories of the speech, which include T. Kenneth Cribb, the Counselor to the Attorney General, accepting Justice Scalia’s recommendation shortly after he finished his speech).

121 *Id.*

122 See generally STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2010).

123 Edwin Meese III, U.S. Att’y Gen., Speech Before the American Bar Association (July 9, 1985), <http://www.justice.gov/ag/aghistorical/meese/1985/07-09-1985.pdf>, at 7.

124 See *Why Give That Speech?*, WASH. POST, Oct. 29, 1986, at A18.

125 See Justice William J. Brennan, Speech given at the Georgetown University Text and Teaching Symposium (Oct. 12, 1985) (transcript available at http://www.pbs.org/wnet/supremecourt/democracy/sources_document7.html).

126 O’NEILL, *supra* note 5, at 161.

127 BORK, *TEMPTING*, *supra* note 29, at 269. For insightful explorations of this dimension, see O’NEILL, *supra* note 5, at 133–60 (exploring “Originalism in the Era of Ronald Reagan”); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 191 (2008) (exploring originalism’s role in the 2008 Supreme Court decision *District of Columbia v. Heller*, 554 U.S. 570 (2008)); see also SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION: RACE, LABOR, AND CONSERVATIVE POLITICS FROM THE NEW DEAL TO THE NEW RIGHT* (forthcoming) (examining in chapter 14 the tension between Meese’s originalism and Solicitor General Fried’s strict constructionism). See generally TELES, *supra* note 122.

128 Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 13 (2009). Greene does not describe the relationship sympathetically.

Accounts of originalism's history often overstate the shift from intent to meaning. Though there is a discernible trend from intent to understanding to public meaning, "the shift . . . was not a clean break."¹²⁹ The untheorized nature of originalism in these years precipitated some loose language; intent and meaning are overlapping concepts and often used interchangeably. The next Part examines these conceptual problems in greater detail. A related qualification is that the concept of "intent" is by no means absent from modern originalism.¹³⁰ Not all originalists accepted (or accept) the validity of the Brest-Powell line of attacks,¹³¹ and the supposedly extinct intentionalists persist to this day (though I will call them Low Originalists).¹³² There is an upshot to this chapter, though: originalism disavows the relevance of anyone's "secret" intent. Whatever may have been the preference of the early intentionalists, no scholar now advocates "tak[ing] the top off the heads of authors and framers—like soft-boiled eggs—to look inside for the truest account of their brain states at the moment that the texts were created."¹³³ Thus, charges about the difficulty of examining particular mental states of particular individuals are averted from the outset.

3. Conclusion

It is fitting to end this story of Old Originalism where it began, with Judge Robert Bork. Bork emblematically stands between the Old Originalism and the New Originalism. An early intellectual figure in the movement, the Senate's rejection of his nomination marked the confluence of churning social, legal, and political currents. Shaped by that tumultuous spectacle, his 1990 book *The Tempting of America* provides a useful demarcation line between the eras of

¹²⁹ Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 *Duke L.J.* 239, 251 (2009).

¹³⁰ Compare Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *NW. U. L. REV.* 226, 230–33 (1988) [hereinafter Kay 1988] (criticizing the "text-by-itself" idea as having as "little resemblance to our[]" system of governance as "rules inferred from the entrails of sacrificed animals"), with Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 *NW. U. L. REV.* 703, 704 (2009) [hereinafter Kay 2009] ("[R]ecourse to the original intentions provides a link that is essential to the legitimacy of constitutional judicial review.").

¹³¹ As noted above, Berger's own arguments were never really answered. Kay 2009, *supra* note 130, at 705 n.9 (citing Natelson, *supra* note 83).

¹³² Richard Kay is probably the most prominent of these.

¹³³ Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 *HARV. L. REV.* 751, 759 (1987).

originalism.¹³⁴ As to the Old, Bork builds his normative case almost entirely on an appeal to judicial restraint.¹³⁵ Bork's positive argument is abbreviated, more powerful rhetorically than philosophically. Marking the transition, Bork is able to write,

Though I have written of the understanding of the ratifiers of the Constitution, since they enacted it and made it law, that is actually a shorthand formulation, because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean.¹³⁶

Characteristic of the New, he undertakes a more syllogistic and methodological exposition of his theory.

The story of originalism recounted herein presents a few salient details. First, originalists do not regard originalism as an innovation. Rather, it is a spirited expression of what was "the dominant form of constitutional interpretation during most of [this] nation's history."¹³⁷ This lineage is a sort of creation myth¹³⁸ for originalists.¹³⁹ But even leaving intact that myth, originalists should note that ambitious judges predate Chief Justice Vinson or even the *Lochner* Court. Likewise, originalism was not alone in its concerns about self-government; students and critics alike should regard it as an interlocutor in a broader intellectual endeavor. Democracy and the rule of law are concerns for all sides. While Old Originalists felt compelled to assert these historical bona fides, by 1989 Justice Scalia, with only some exaggeration, could describe originalism as the only game in town with no trace of the defensiveness that marked earlier writings.¹⁴⁰

Nevertheless, originalism did arise as a response to the emanation of liberal politics from the Supreme Court. It is unavailing to deny originalism's historical connection to and ideological affinity with po-

¹³⁴ Jack Balkin agrees with this demarcation. See Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 446 n.51 (2007) (calling Bork's book a "transitional document between original understanding and original meaning" and providing a summary of Bork's arguments).

¹³⁵ Bork makes arguments for the propriety of judicial restraint, but the tenor of the book is such that it is clearly a case against naughty judges. For example, Bork dedicates the first 130 pages to recounting examples of judicial misconduct throughout all eras of constitutional jurisprudence. BORK, TEMPTING, *supra* note 29, at 1–132.

¹³⁶ *Id.* at 144.

¹³⁷ *Executive Summary in ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK*, *supra* note 118, at i.

¹³⁸ The term is not pejorative. For a perspective on myth as truth, see C. S. Lewis, *Myth Became Fact*, in GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS 63, 64–67 (Walter Hooper ed., 1970). See also J.R.R. Tolkien, *Mythopoeia*, in TREE AND LEAF (1989).

¹³⁹ Appeals to *The Federalist*, Chief Justice Marshall, Joseph Story, etc., are legion. One can choose almost any originalist work cited herein and find an example.

¹⁴⁰ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989).

litical conservatism.¹⁴¹ The charge that this imperils the originalist argument is a kind of collective ad hominem or “Bulverism,”¹⁴² addressing the motives of the argument’s proponents rather than the argument itself.¹⁴³ It is, however, a prerequisite for credible and constructive dialogue that originalists admit this fact. As the conversation continued into the 1990s, libertarians¹⁴⁴ and progressives¹⁴⁵ crafted their own originalist theories. Thus, the strict identification with conservative politics has become more of a loose correlation.

II. NEW ORIGINALISM – A SYSTEMATIC JURISPRUDENCE: HIGH ORIGINALISM AND LOW ORIGINALISM

With the passing of the Old Originalism—reactive and restraintist, a loyal opposition—came a “boon tide of originalist scholarship”¹⁴⁶ that makes it impractical to continue the historian’s approach of the previous section.¹⁴⁷

Originalism, no longer off the wall, found itself a fledgling theory in a big legal world. Originalists responded by growing, adapting, evolving—a development some critics considered ironic given originalism’s commitment to historical meaning.¹⁴⁸ Michael McConnell, who would become “undoubtedly the most prominent New Originalist,”¹⁴⁹ warned against stultification in a review of Raoul Berger’s book.¹⁵⁰ McConnell criticized Berger’s work as “radically incomplete” and “fail[ing] to link[] discoveries about the issue at hand to any overarching understanding of the . . . Constitution.”¹⁵¹ McConnell was an early adopter of New Originalism, sensing the

141 See Whittington, *Is Originalism Too Conservative?*, *supra* note 52, at 29 (noting that originalism is often linked to conservative politics).

142 See C. S. LEWIS, ‘Bulverism’, in *GOD IN THE DOCK* 271, 273 (Walter Hooper ed., 1970) (“[Y]ou must show *that* a man is wrong before you start explaining *why* he is wrong. The modern method is to assume without discussion *that* he is wrong and then distract his attention from this (the only real issue) by busily explaining how he became so silly.”).

143 Cf. Whittington, *Is Originalism Too Conservative?*, *supra* note 52, at 34 n.13 (discussing an argument about judicial and political behavior).

144 Most notably, Randy Barnett.

145 E.g., Jack M. Balkin.

146 Barnett, *supra* note 51, at 650. The meaning of the term “boon tide” is itself a mystery.

147 A summary with useful citations appears in Kesavan & Paulsen, *supra* note 118, at 1140–41.

148 See, e.g., Colby & Smith, *supra* note 129, at 246 (“Originalists, who have long criticized the notion of a living constitution, have themselves followed a living, evolving approach to constitutional interpretation.”).

149 Whittington, *New Originalism*, *supra* note 44, at 608.

150 McConnell, *supra* note 97.

151 *Id.* at 1485–86.

need to connect originalism to a broader moral and political narrative.

In order to answer this *normative* challenge, originalism faced its greatest *methodological* challenge. Clearly the Constitution does not answer every question our politics raises. If judges should not engage in moral reasoning or rule based on well-reasoned policy conclusions, how then should they determine the Constitution's meaning where it is silent, ambiguous, or the application of the text runs out? In a 1989 survey of originalism, one commentator observed that "[t]houghtful originalists . . . concede that factors other than original intent must be given some weight in decisions."¹⁵²

As a preliminary matter, several unfamiliar concepts must enter the discussion. First, this Part presents a diversity of originalist theories, a diversity that has convinced some that "the inconsistency of originalism—the incoherence of the movement—runs much deeper. And it always has."¹⁵³ Though originalists disagree on much, and though there is no official gatekeeper, all of them hold what Lawrence Solum has dubbed the *fixation thesis*.¹⁵⁴ The fixation thesis states that the semantic meaning—as distinguished from the applicative meaning (what does the new tax code mean for my bottom line?) and the teleological meaning (the meaning of life, the meaning of a fence newly erected between neighbors)—of a text is fixed at the time of enactment.¹⁵⁵ A second concept is "speaker's meaning," especially as contrasted with "sentence meaning."¹⁵⁶ The distinction is a matter of complex philosophy of language, but for present purposes the speaker's meaning implicates the author or speaker in determining the semantic content of the utterance. It is closely related to the idea of intentions. Sentence meaning, in contrast, is determined by resolving "the words and phrases that constitute the utterance."¹⁵⁷ The source of the words is irrelevant to determining their meaning.

With these concepts in hand, this Part will undertake a more systematic survey of originalism as it stands now in the midst of originalism's "Thirty Years War."¹⁵⁸ The scholarly conversation has reflected a deficient taxonomy that has wasted resources, in part by discussing a

152 Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1105 (1989).

153 Colby & Smith, *supra* note 129, at 249.

154 Lawrence B. Solum, *Semantic Originalism 2* (Ill. Pub. Law & Legal Theory Research Paper Series, No. 07-24, 2008), available at <http://papers.ssrn.com/abstract=1120244>.

155 *Id.* at 2–3.

156 *Id.* at 34.

157 *Id.* at 35.

158 Kesavan & Paulsen, *supra* note 118, at 1135.

type of originalism—original methods originalism—that no one holds. Instead, the thesis of this Part is that the degree to which the “speaker’s meaning” is a relevant concept is the appropriate dividing line between two camps within originalism.

A. *How Not To Divide*

The previous Part described the shift from “original intent” to “original public meaning” as a historical matter. This move is best regarded not as an abandonment of original intent, but as a clarification as to which intent, or whose intent, is the object of the inquiry. The overlap and conflation of these two concepts has caused no end of trouble for originalists and their critics. The reason is partly historic, described above, but also partly owes to an underconceptualized account of the various flavors of originalism. In order to get an idea of the contours of modern originalism, it is useful to turn to a *locus classicus* of originalism and examine the exchange between two eminent legal scholars.

In the year 1997, originalism was ascendant enough that a constitutional historian could declare that “the turn to originalism seems so general that citation is almost beside the point.”¹⁵⁹ The same year, Princeton University’s Tanner Lecture featured Justice Antonin Scalia as its keynote speaker with comments by eminent scholars: historian Gordon Wood, constitutional law professor and litigator Laurence Tribe, comparative constitutional scholar Mary Ann Glendon, and renowned legal theorist Ronald Dworkin. The lectures were adapted to print as *A Matter of Interpretation*.¹⁶⁰ The exchange between Justice Scalia and Ronald Dworkin sends us on our way. Justice Scalia presented a familiar defense of originalism as the opening lecture:

[W]e do not really look for subjective legislative intent. We look for a sort of “objectified” intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*. . . . [I]t is simply incompatible with democratic government . . . to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated It is the *law* that governs, not the intent of the lawgiver.¹⁶¹

159 Jack N. Rakove, *Fidelity Through History (Or To It)*, 65 *FORDHAM L. REV.* 1587, 1592 n.14 (1997).

160 ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997).

161 Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 17 (Amy Gutmann ed., 1997).

Dworkin observed that Justice Scalia often repairs to legislative intent or purpose in avoiding “silly” consequences.¹⁶² Dworkin observed that there are two types of originalism based on the intention that one might seek.¹⁶³ The first is semantic originalism, which seeks the semantic intention or what the lawmakers “intended to *say* in enacting the language they used.”¹⁶⁴ The second is expectation originalism, which holds that the text “should be understood to have the consequences that those who made them expected them to have.”¹⁶⁵ Justice Scalia embraced Dworkin’s distinction and pledged fealty to semantic originalism.¹⁶⁶ Here Dworkin identified a first useful distinction: the conflation of semantic intention and expectation intention.¹⁶⁷

But Dworkin completely missed a second distinction: Justice Scalia’s finer point about the applicative scope of a semantically fixed meaning as compared with a principle whose *meaning* is subject to change.¹⁶⁸ It is easier to demonstrate this with their example: the Eighth Amendment’s prohibition on “cruel and unusual punishment.”¹⁶⁹ Justice Scalia’s position is that the death penalty cannot fall within the meaning of the Amendment because the framers obviously countenanced its use. Dworkin pointed out that Justice Scalia must choose between two translations¹⁷⁰ of the text: either it prohibits “punishments generally thought cruel at the time” or it “lay[s] down an abstract principle forbidding whatever punishments are in fact cruel and unusual.”¹⁷¹ Justice Scalia called the first alternative a caricature of his position and averred that the Amendment is indeed an abstract moral principle but it is *one whose content is fixed at its enact-*

162 Ronald Dworkin, *Comment, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 115, 115–16 (Amy Gutmann ed., 1997) [hereinafter Dworkin, *Comment*].

163 *Id.* at 119.

164 *Id.* at 116.

165 *Id.* at 119.

166 See Scalia, *Response, supra* note 36, at 144 (agreeing with Dworkin’s conception of “semantic intention” and claiming to follow it).

167 Justice Scalia and Dworkin may have been too hasty to agree that semantic intention is irrelevant. Semantic intention may implicate speaker’s meaning which may be relevant to interpretation.

168 I discovered that Michael McConnell beat me to this observation by fifteen years. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1284 (1997) (describing Dworkin’s “familiar fallacy of black and white reasoning”).

169 U.S. CONST. amend. VIII.

170 Dworkin has in mind a sophisticated philosophical notion of translation, though his footnote here states in its entirety “[r]eference to work of Quine, Grice, and Davidson.” Dworkin, *Comment, supra* note 162, at 117 n.6.

171 *Id.* at 120.

ment.¹⁷² Because Justice Scalia then inferred that meaning from the presence of capital punishment in eighteenth-century America, Professor Dworkin accused him of resorting to the caricature he just disowned.¹⁷³ But Justice Scalia explicitly disclaimed the dichotomy and argued that the moral principle is in the text and derives its meaning from the original period. Thus it applies “to all sorts of tortures quite unknown at the time the Eighth Amendment was adopted.”¹⁷⁴ The electric chair is perhaps an example—Justice Scalia is not rendered speechless because the founding generation had literally no opinion on it. There is, then, a difference between what a phrase—even an abstract one—means at the time of enactment and how its enactors would expect it to apply.¹⁷⁵

Old Originalism’s debate over intent and meaning maps onto this exchange, but here we view the overlapping concepts at a higher resolution. The idea of “intent” implicates semantic intent (what a speaker intended to say) as much as it does expectation intent (what a speaker intended his statement to accomplish). And, though not explicitly, a closer look clarifies the role of abstraction. If a statement is designedly an abstract principle, does that license future receivers to interpret it according to how their generation uses the words? Dworkin conflates “dated” with “concrete”¹⁷⁶: to say a principle is abstract does not require saying that it is also evolving or relative. How the original authors anticipated the law would apply—the original expected applications—is irrelevant in resolving the meaning of the text. Dworkin’s description of Justice Scalia was thus more than caricature. Anyone who used original expectations in that way would reduce “principle” beyond even the status of “category” to mere “sets” or “aggregations.”¹⁷⁷ Words, on this account, would be useful only to de-

172 Scalia, *Response*, *supra* note 36, at 145 (“What it abstracts . . . is not a moral principle of ‘cruelty’ that philosophers can play with in the future, but rather the existing society’s assessment of what is cruel.”).

173 See Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM L. REV.* 1249, 1256–57 (1997) (describing Justice Scalia’s arguments and arguing that “they endorse exactly the view that Justice Scalia . . . had rejected as caricature”).

174 Scalia, *Response*, *supra* note 36, at 145.

175 See McConnell, *supra* note 168, at 1284 (“Mainstream originalists recognize that the Framers’ analysis of particular applications could be wrong, or that circumstances could have changed and made them wrong.”). *But see* Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 *GEO L.J.* 569 (1998) (making an extended case for Dworkin’s dichotomy).

176 Dworkin, *Comment*, *supra* note 162, at 121–22 (categorizing “concrete [and] dated rules” together).

177 See Steven D. Smith, *Reply to Koppelman: Originalism and the (Merely) Human Constitution*, 27 *CONST. COMMENT.* 189, 195 (2010) (“Imagine an interpretive approach that tried to eschew ‘principles’ and categories in favor of some sort of radical nominalism in which

scribe a specific set of intended objects. The incoherence and impracticability of this position would hardly evade a first-year law student, let alone a lawyer of Justice Scalia's caliber.

Either through ellipsis or carelessness, originalists may sometimes sound like they are relying on original expected applications.¹⁷⁸ But the notion of an "original-expected-applications originalism" as a theoretical variant appears to be a construct of critics.¹⁷⁹ Lawrence Rosenthal's recent article is an excellent example. In purporting to show that originalism in theory and in practice devolves to non-originalism, Rosenthal provides a rough sketch of originalist camps. He first cuts the originalist world in half, dividing it between "'original-expected-applications' originalism" and "semantic originalism."¹⁸⁰ The discussion of the first is curiously lacking in citations to any of its theorists. Rosenthal charges Justice Scalia as such¹⁸¹ but then concedes that he is a semantic originalist.¹⁸² In the introduction to the section, Rosenthal names John McGinnis and Michael Rappaport as of a similar stripe,¹⁸³ but fails to discuss their original-methods originalism in the article.¹⁸⁴ His other category—semantic originalism—comprises, I suggest, the entirety of originalist thought. Rosenthal divides this world into liberal, libertarian, and conservative.¹⁸⁵ There is something to this division, since a scholar's normative com-

words are understood to refer not to universals or real categories, but only to the particular items or instances contemplated by the person uttering the words. . . . On this assumption, constitutional interpretation would be impossible.").

178 E.g., Justice Scalia's remarks that the death penalty was prevalent and thus could not have been prohibited.

179 Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1190 (2012); see also Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 390 (2007) ("[A] surprising number of other smart and careful scholars appear to believe, just as Balkin does, that expectation originalism enjoys vibrant support.") (citing as examples KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM* 47–58 (2006) and Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 265 (2002)).

180 Rosenthal, *supra* note 179, at 1189.

181 *Id.* at 1191.

182 *Id.* at 1210.

183 *Id.* at 1191.

184 See John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009) (defending their "original methods originalism").

185 Rosenthal, *supra* note 179, at 1213–32 (discussing the three types of semantic originalism).

mitments necessarily motivate him to different goals.¹⁸⁶ Nevertheless, the next Subpart pursues a different classification.

B. A Better Taxonomy

The stark divide between semantic originalism and original-expected-applications originalism is illusory. But this is not to say that originalist theories do not differ in significant ways. At risk of enlisting in the “small army of eager bouncers”¹⁸⁷ that polices the boundaries of originalism, this Comment proposes a different taxonomy, one that is politics-blind. Instead, originalism is roughly divided between “High Originalists” and “Low Originalists.” The High Originalists engage in abstractions and seek a kind of theoretical purity. Low Originalists take a more natural or organic approach to interpretation. High Originalists reject speaker’s meaning; Low Originalists think that is impossible or unwise.

As with any intellectual taxonomy, there are degrees of separation with overlap and migration along the spectrum. But in contrast to the prevailing division based on expectations, or the political taxonomy Rosenthal employs, this one accounts for Jack Balkin as easily as it accounts for Michael McConnell. I will even claim to explain the judicial riddle known as Justice Antonin Scalia.

1. The High Originalists

We begin with the High Originalists. At this end of the spectrum are those who adhere to a purer form of textual originalism. This mode of interpretation is called “semantic originalism”¹⁸⁸ and is commonly identified with “New Originalism.”¹⁸⁹ On these models, the product of the legislative process—the law—takes on an almost platonic status.¹⁹⁰ Once it takes its place in the code, an interpreter as-

186 See, e.g., Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1085 (2005) (charging Barnett with allowing his libertarian politics to skew his constitutional analysis).

187 Andrew Koppelman, *Why Jack Balkin is Disgusting*, 27 CONST. COMMENT. 177, 177 (2010).

188 The term seems to have originated with Dworkin as discussed above. See *supra* notes 162–67 and accompanying text.

189 E.g., Rosenthal, *supra* note 179, at 1210 (“Semantic originalism . . . is sometimes referred to as the ‘New Originalism.’”); Lawson & Seidman, *supra* note 120, at 48–49 (asserting that “the weight of originalist opinion today” employs an objective reasonable person standard).

190 E.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 552 (1994) (observing that originalists “give priority to [the plain dictionary meaning] . . . because it and it alone is law”).

certain its meaning only by engaging a technical linguistic analysis. Exponents of this view call for a reasonable person analysis, though that reasonable person may be “an ordinary user of the language”¹⁹¹ or “a skilled user of words”¹⁹² or even “the reasonable person of the law.”¹⁹³ The search for this meaning starts in contemporaneous dictionaries and grammar books and consults public statements only for additional evidence.¹⁹⁴ Contracts professor-*cum*-constitutional scholar Randy Barnett, among others,¹⁹⁵ offers a defense of this model based on the Constitution’s *writtenness*.¹⁹⁶ Barnett applies to the Constitution the four functions of formality in contract—evidentiary, cautionary, channeling, and clarifying—and shows that all apply to a written constitution.¹⁹⁷ These are at best consequentialist reasons for adhering to the text, a weakness Barnett senses as he then vindicates the Constitution’s writtenness with political theory.¹⁹⁸ Other semantic originalists legitimate the method in more lawyerly terms.¹⁹⁹

Larry Solum defends this position in abstruse philosophical detail, in what has been called “the outstanding manifestation” of a “highly theoretical enterprise.”²⁰⁰ Solum declares that “[w]hen we seek the meaning of a legal text . . . our aim is to discover the conventional semantic meaning of the expression type and to resolve vagueness and ambiguity by reference to context of the particular utterance token.”²⁰¹ The work is dense and unpolished, introducing a plethora of concepts from the philosophy of language that are too complex to recount here. A notable aspect of Solum’s work—and one that marks him out as a High Originalist—is his insistence that semantic originalism is purely descriptive: the text has an objective meaning as a mat-

191 *Id.* at 554.

192 Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J.L. & PUB. POL’Y 59, 61 (1988).

193 Lawson & Seidman, *supra* note 120, at 73. The reasonable person construct here is explicitly a “formidable intellectual figure.” *Id.*

194 Calabresi & Prakash, *supra* note 190, at 552–53.

195 *E.g., id.* at 552 (listing Professor Akhil Reed Amar, Robert Bork, Professor John Hary Ely, and Justice Antonin Scalia as endorsers of this methodology).

196 Randy E. Barnett, *supra* note 51, at 629–54. Barnett makes the same arguments in his book, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

197 Barnett, *supra* note 51, at 630–31.

198 *Id.* at 636–43.

199 *See* Lawson & Seidman, *supra* note 119, at 51–70 (dissecting Chief Justice Marshall’s intonation that “we must never forget, that it is a constitution we are expounding” as it relates to the meaning of the Constitution and constitutional interpretation (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819))).

200 Smith, *supra* note 177, at 198, 198 n.29.

201 Solum, *supra* note 154, at 33.

ter of logic.²⁰² Whether we should use that meaning is of course a normative question, but the claim is that determining the meaning is in this sense a highly rationalist endeavor. Solum explicitly concludes that speaker's meaning (framer's meaning in the constitutional context) is impossible and thus only the sentence meaning (clause meaning) can succeed.²⁰³

Joining the New Originalists is a merry band of heterodox originalists.²⁰⁴ Spurred in part by an appropriation of neorepublican historical scholarship,²⁰⁵ political liberals have developed their own versions of originalism.²⁰⁶ Dworkin advanced a "moral reading" of the Constitution rooted firmly in his understanding of semantic originalism,²⁰⁷ even as he claimed "opposition to any form of originalism."²⁰⁸ Dworkin is a prolific scholar²⁰⁹—his interpretive method is of a piece with his concept of "law as integrity"²¹⁰ and building a complete account of Dworkin's theory is quite difficult.²¹¹ He speaks in places of constitutional text as a speech act conforming to speaker's meaning theory, though he seems to allow this contextual reading to influence the meaning of the text only in limited circumstances.²¹² Dworkin thus advocates a version of High Originalism in which text that uses value-laden terms becomes an evolving moral principle for judges to apply.

202 *Id.* at 8.

203 *Id.* at 41–50.

204 See William Hogeland, *Founding Fathers, Founding Villains: The New Liberal Originalism*, BOS. REV., Sept.–Oct. 2012, available at <http://www.bostonreview.net/us/founding-fathers-founding-villains-william-hogeland> (describing the positions and arguments of modern liberal originalists).

205 Key figures are Bernard Bailyn and his principle students Jack Rakove and Gordon S. Wood.

206 See O'NEILL, *supra* note 5, 198–205, 213–15 (describing developments in liberal originalism). The strategy was at least partially self-conscious. See generally LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996); Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87 (1997).

207 RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

208 Dworkin, *supra* note 173, at 1258 n.18

209 Dworkin is the second most-cited legal scholar in the twentieth century. See Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 424 (2000) (listing Dworkin as the second most-cited legal scholar behind Richard A. Posner).

210 See RONALD DWORIN, *LAW'S EMPIRE* 94 (1986).

211 See Jeffrey Goldsworthy, *Dworkin as an Originalist*, 17 CONST. COMMENT. 49 (2000) (attempting to parse out Dworkin's changing arguments concerning originalism); see also McConnell, *supra* note 168, at 1270 ("It is not too much to say that there are two Dworkins . . .").

212 See Ronald Dworkin, *Reflections on Fidelity*, 65 FORDHAM L. REV. 1799, 1816 (1997) (analyzing a case in terms of "speech practice").

There are many others,²¹³ but Jack Balkin is the most conspicuous heterodox originalist. Playing to the same ambiguity Dworkin exploits, Balkin famously declared his commitment to “the method of *text and principle*” in a 2007 article.²¹⁴ Balkin’s method looks quite similar to Dworkin’s: where Dworkin finds an abstract moral principle, Balkin sees a “framework” that “delegate[s] the articulation and implementation of important constitutional principles to the future[.]”²¹⁵ Professor Balkin sounds not unlike Randy Barnett or even Justice Antonin Scalia in arguing for originalism from principles of writtenness, popular sovereignty, and fidelity to custom and nation alike.²¹⁶ And the hermeneutic of text and principle is a thoroughgoing originalist enterprise, traceable from John Marshall²¹⁷ through Robert Bork²¹⁸ to Justice Scalia.²¹⁹ The road seems safe, the way familiar—Balkin is not merely calling himself an originalist and then doing something else. Balkin deftly and cannily employs High Originalism to reach the conclusion that the Fourteenth Amendment enshrines a right to abortion in the Constitution.²²⁰

The High Originalists are characterized by a highly systematic approach to constitutional interpretation, an aspiration to “a theory working itself pure.”²²¹ On the premise that “documents can have meanings that are latent in their language and structure even if they are not obvious to observers at a specific moment in time,”²²² the theory avoids looking at individuals or communities in favor of an objective meaning of utterances. But it is also marked by an unsettling range of outcomes. Some High Originalists reach conclusions typi-

213 See generally 1 BRUCE ACKERMAN, *WE THE PEOPLE* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE* (1998); AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993); Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165 (1993); Cass R. Sunstein, *Five Theses on Originalism*, 19 *HARV. J.L. & PUB. POL’Y* 311 (1996).

214 Balkin, *Abortion*, *supra* note 105, at 293.

215 Jack M. Balkin, *supra* note 134, at 453.

216 *Id.* at 428–42.

217 *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language.”).

218 BORK, *TEMPTING*, *supra* note 29, at 146–53 (applying the principle of judicial neutrality).

219 Scalia, *Response*, *supra* note 36, at 145 (arguing that the Eighth Amendment is “rooted in the moral perceptions of the time”).

220 Balkin, *Abortion*, *supra* note 105, at 299–300 (“[E]qual rights for women are fully consistent with the original meaning of the Fourteenth Amendment and its underlying principles of equal citizenship and opposition to caste and class legislation.”).

221 Kesavan & Paulsen, *supra* note 118, at 1114.

222 Gary Lawson, *Delegation and Original Meaning*, 88 *VA. L. REV.* 327, 341 n.51 (2002).

cally associated with originalism.²²³ Others, though, conclude their systematization with perplexing results, ranging from a constitutional presumption of liberty²²⁴ to two different constitutional rights to abortion.²²⁵

2. *The Low Originalists*

Looking on aghast from the other pole are the Low Originalists. The term is not pejorative—indeed, the tenor of this Comment is that the Low Originalists have the better position. It also should not be taken to suggest a lower degree of academic or logical rigor. Low Originalism means an interpretive model that accords *some* level of relevance to speaker’s meaning or intent. The reason I do not label them “intentionalists” is to distinguish them from that strand of Old Originalism. Low Originalists do not seek private meanings, but they do look at the constitutional text as an act of human communication.

Some Low Originalists are designedly simplistic. Steven D. Smith offers a representative position. Acknowledging that he risks being charged with “obscurantism, anti-intellectualism, and yokelism,”²²⁶ he boldly proceeds to criticize the mess high theory has made of originalism. Himself an “originalist wannabe,”²²⁷ he is nevertheless deeply troubled by what has become of originalist theory.²²⁸ In his estimation, it has become that which it beheld, a writ for unrestrained judicial activism. Elsewhere, Smith frames the debate in broader ideological terms, lamenting the perfectionist tendencies among originalists.²²⁹ That Balkin is able to reasonably (if cleverly) declare himself an originalist is a product of removing the Constitution from the realm of human affairs.²³⁰ This broader cultural point can be made at great length; here it will have to suffice to mention that it is

223 *E.g.*, Calabresi, *supra* note 186, at 1097 (accusing Barnett of being unrealistic and “overlook[ing] some important originalist and normative arguments about judicial activism”).

224 *See generally* BARNETT, *supra* note 196.

225 Balkin, *Abortion*, *supra* note 105, at 319–36 (discussing arguments for the right to abortion from due process and the privileges or immunities clauses).

226 Smith, *supra* note 3, at 223; *see also* Larry Alexander, *Simple-minded Originalism*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 87 (Grant Huscroft & Bradley W. Miller eds., 2011).

227 Steven D. Smith, *The Writing of the Constitution and the Writing on the Wall*, 19 HARV. J.L. & PUB. POL’Y 391, 391 (1996).

228 Smith, *supra* note 3, at 224–27.

229 *See* Smith, *supra* note 177, at 192–93 (describing as naïve originalists’ belief “that their approach to interpretation ‘purges adjudication of discretion’ and that it delivers ‘fixity and determinacy’” (internal citations omitted)).

230 *Id.* at 190–91.

typically nonoriginalists who sought this kind of transcendence.²³¹ Like Daedalus of myth, High Originalists aspire to heavenly places; the Constitution, though, is a human artifice.

A more philosophical case is available for speaker's meaning or Low Originalism. The notion of a text standing above and outside any authorship is counterintuitive. An important article by Larry Alexander and Saikrishna Prakash identifies five different ways in which the reading of texts is impossible without inferring intent.²³² Given the impossibility of intentions-free interpretation, the article suggests that High Originalism's real problems stem from questions of evidentiary reliability or of constructing an idealized author.²³³

Elsewhere, proudly claiming the mantle of "simple-minded" originalist, Alexander presents a useful illustration.²³⁴ Imagine a person hands you a piece of paper and tells you that he has to follow the commands thereon.²³⁵ If he tells you that the paper fell from a moving vehicle and the marks are dirt and the like, you will have to conclude that there are no normative propositions on the paper.²³⁶ If he tells you that the paper was given him by some authority to which he was bound, you will want to know who the authors are and in what language they communicated.²³⁷

Resonating with these linguistic arguments, the arch-Low Originalist Richard Kay launches a multipronged attack on High Originalism.²³⁸ Like Alexander and Prakash, Kay challenges the concept of constitutional communication that underlies High Originalist theory, as well as the "supposed invulnerability" to the aggregation and original methods objections.²³⁹ As a response to these early criticisms, then, High Originalism unnecessarily cedes ground.²⁴⁰ Kay further notes that High and Low Originalism will often yield the same conclusions, but that when the models diverge, High Originalism misleads the interpreter.²⁴¹ Coming full circle in this outline of Low

²³¹ *Id.*

²³² Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?" *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 972–82 (2004) (outlining and explaining the five arguments).

²³³ *Id.* at 982–89.

²³⁴ Alexander, *supra* note 225, at 87.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 88.

²³⁸ Kay 1988, *supra* note 130.

²³⁹ Kay 2009, *supra* note 130, at 707.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 704, 714–19 (showing "that reliance on public meaning distracts the interpreter from the connection between the normative force of the Constitution and the founding

Originalism, Kay demonstrates that High Originalism “leads to an enlarged range of plausible outcomes.”²⁴² Imagine the power and range of a judge equipped with Jack Balkin’s method, and even a fraction of his acumen!

Low Originalism calls for understanding the Constitution as an inherently human enterprise, written in the actual language of an actual people. It rejects the metaphysical subtleties of High Originalism along with the sundry forms of nonoriginalism.

C. *The Crisis of High Originalism*

Interpretive theory is primarily concerned with what to do when the text is underdetermined—when its meaning runs out before it can resolve the case at hand. High Originalism appears to be particularly susceptible to this infirmity, coming under criticism from historians and legal theorists alike. One eminent historian, himself quite invested in what our foundational documents mean, details what he calls the “poverty of public meaning originalism.”²⁴³ And a prominent originalist scholar writes of the “impossibility” of “intention free interpretation.”²⁴⁴ This weakness of High Originalism is straining the denomination’s standing.

Some look for traction in distinguishing between interpretation and construction.²⁴⁵ “Construction” may mean the development of constitutional norms within an existing framework, which readers will recognize as the basis of all constitutional law curriculum.²⁴⁶ But the concept can be simply the science of judicial application and the rules that courts adduce to guide them in their work. This only restates the problem, if with more clarity: where should a judge look when the text admits of two interpretations that would resolve the case differently?

events, whereas recourse to the original intentions provides a link that is essential to the legitimacy of constitutional judicial review”).

²⁴² *Id.* at 704.

²⁴³ Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575 (2011).

²⁴⁴ Alexander & Prakash, *supra* note 231.

²⁴⁵ Barnett and Solum endorse the distinction. McGinnis and Rappaport reject it. Whittington uses the terms somewhat differently. As I explain below, Whittington is probably a Low Originalist.

²⁴⁶ Whittington uses the term this way. See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 35–36 (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL INTERPRETATION]; see also KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

A forthcoming article takes us back to the earliest days of the republic to explore the question. Donald Drakeman and Joel Alicea look at the very early case of *Hylton v. United States*²⁴⁷ and find the Justices running headlong into this problem almost immediately.²⁴⁸ After recounting the fascinating history of an early challenge to Congress's taxing power, the article exhausts the sources admissible to a High Originalist: dictionaries, grammars, highly-publicized usages. At the end of their thorough undertaking, the article's two authors, like the Justices in 1796, cannot agree on the objective meaning of the term "excise."²⁴⁹ The Justices must go beyond public-meaning sources and consult such low affairs as ratifying conventions and statements by contemporary lawmakers. The article concludes that "New Originalism" is inherently limited, and when its meaning runs out, it is useful to resort to "Old Originalism."²⁵⁰ The substance of the conclusion is exactly right, but the labels are misleading and unhelpful. What we know as New Originalism comprises both High and Low Originalists, so the fault illuminated by *Hylton* is not properly laid at its feet. It is High Originalism that leads to a dead-end, and the escape is in the Low Originalism of today, not the untheorized intentionalism of the past.

Another chief criticism of originalism is that it is just as "activist" as the theories it seeks to displace. This line of attack also comes from within and from without. Robert Post and Reva Siegel—certainly no reactionaries—have written that originalism is no less the fruit of popular constitutional impulses than any other theory.²⁵¹ Originalism's

247 3 U.S. (3 Dall.) 171 (1796).

248 Joel Alicea & Donald Drakeman, *The Limits of the New Originalism*, 15 U. PA. J. CONST. LAW 1162, 1163 (2013) (noting that the *Hylton* case might "be far more important for its lessons in originalism" because "[w]ith no clear precedents either on the tax issue itself or, more importantly, how judicial review should be done, the advocates in the case . . . battled over how to interpret the Constitution").

249 *Id.* at 1206–14; see also *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2598 (2012) (using the ambiguity of tax issues to avoid careful definition of types of taxes).

250 Alicea & Drakeman, *supra* note 248, at 1218–19.

251 See Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, at 25, 26 (Jack M. Balkin & Reva B. Siegel eds., 2009) (demonstrating "that claims of originalism asserted in the late twentieth century expressed such a substantive and mobilizing constitutional vision"); Robert Post & Reva B. Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545, 546 (2006) ("Originalism remains even now a powerful vehicle for conservative mobilization, as can clearly be seen in recent popular opposition to the citation of foreign law."); Siegel, *supra* note 127, at 192–94 (arguing that the "practices of democratic constitutionalism enable mobilized citizens to contest and shape popular beliefs about the Constitution's original meaning and so confer upon courts the authority to enforce the nation's foundational commitments in new ways").

most visible internal conflict is over the degree to which the Constitution licenses courts to override majoritarian decision-making. An increasingly strident band of libertarian originalists argues for an expansive, liberty-preserving originalism under which judges must “engage” rather than “abdicate.” More traditionalist conservatives view this as a call for outright activism in a libertarian guise.²⁵² An icon of the conservative judiciary, Judge Harvie Wilkinson, observed that originalism allows the judge to enact his own policy preferences no less than other interpretive models.²⁵³ Likewise, Nelson Lund, a well-known conservative scholar, wrote that “[t]he challenge for originalist theory . . . is to distinguish genuinely originalist interpretations from those that amount to living constitutionalism or judicial deferentialism dressed up in originalist clothing.”²⁵⁴ Professor Lund calls for a “conscientious originalism,” but his description of it is perfectly orthodox Low Originalism: “When the text does not supply an adequately precise answer, a conscientiously originalist court has no choice but to decide the issue in light of the purpose of the provision as that purpose was understood *by those who adopted it*.”²⁵⁵

Jamal Greene, a critical observer of originalism, seems to agree with this Comment’s diagnosis of High Originalism’s flagging strength.²⁵⁶ Greene reinforces Alicea and Drakeman’s argument that intentionalism has been a part of American judicial practice since the very beginning, but he bolsters the case by showing that it has never really left the courts.²⁵⁷ As here, Greene distinguishes “intentionalists” from “expectations originalist[s]” and acquits the Low Originalists of that recalcitrant charge.²⁵⁸ Though Greene’s authority-based justification for considering speaker’s meaning is not identical to their models, he explicitly and repeatedly agrees with Low Originalists.²⁵⁹ Pro-

252 This debate is becoming quite prominent. *E.g.*, Randy Barnett and Judge J. Harvie Wilkinson, Sixth Annual Rosenkranz Debate Resolved: Courts are Too Deferential to the Legislature (Nov. 14–16, 2013), *available at* http://youtube.com/watch?v=evp84_XcSwY.

253 *See* J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 33 (2012) (“Originalism, with its myriad virtues, has an important role to play in constitutional adjudication, but it suffers from that all-too-common infirmity of cosmic constitutional theory: a lack of judicial restraint.”).

254 Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1372 (2009).

255 *Id.* (emphasis added).

256 Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1685 (2012) (“[O]riginal intent not only matters but it matters more than original meaning.”).

257 *Id.* at 1689–1701 (discussing “the practice relevance of original intent”).

258 *Id.* at 1702.

259 He agrees with Kay specifically, with whose position Greene affiliates Alexander, Prakash, and Whittington. *Id.*

fessor Greene argues that “the time has come to bring intentionalists back into the constitutional mainstream.”²⁶⁰ His proposal has Low Originalists marching under the banner of intentionalism. But as we have seen, that term creates confusion about whose intent is sought and what role it plays, an involution that led to the earliest criticisms of originalism²⁶¹ and thereby contributed to the rise of High Originalism.

An early warning sounds when Alicea and Drakeman adopt Peter Smith’s categories of “Old Originalism, New Originalism, and New New Originalism[.]”²⁶² Is the original New Originalism now the Old New Originalism? One gets the impression that if originalism continues to evolve for much longer, it will adopt version numbers like software updates. Originalism’s critics have at times reveled in its pluralism, seizing on the diversity of thought as a hypocritical flaw; piling adjective upon adjective can only strengthen the critics’ claims.²⁶³ It is past time to abandon chronological labels. If it is helpful to organize the many varieties of originalism—syntactic textualism, original-methods originalism, semantic originalism—according to some fundamental attribute, let it be whether the text is written by real human hands, spoken by real human voices.

The label “Low Originalism” will itself comprise many diverse strains of originalist theory. It certainly will not end the misunderstandings of originalism’s history or current taxonomy. But it will avoid significant liminal perplexity and clean things up as the theory moves forward. Of course, Low Originalism itself is not invulnerable. Looking to the authors and enactors requires dealing with Old Originalism’s foes, and any such account will have to explain why the move to High Originalism was ill-begat. These High Originalists marshal many formidable arguments, none of which this Comment has treated in any depth. Like the Constitution, Low Originalism is a human affair fraught with human weaknesses. But it has the advantage of admitting that fact and living with it.

260 *Id.* at 1687.

261 *See supra* Part II.B.

262 Alicea & Drakeman, *supra* note 248, at 1164 (citing Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 707–08, 725 (2011)).

263 *See* Colby & Smith, *supra* note 129, at 305 (noting that originalism’s differences “undermine the rhetorical and normative claims that underlie much of the originalist enterprise”).

CONCLUSION

Part II of this Comment told a story of originalism in order to place the interpretive enterprise in context. It noted that the shift from intent to public meaning, while real, was not nearly so clear or decisive as is sometimes presented. Thus, Old Originalists were neither intentionalists nor original-public-meaning originalists. Part II then separated New Originalism into the High Originalists and the Low Originalists. The conceptual analysis of the New Originalism attempted to show that High Originalism, while dominant, is neither alone nor necessarily the most compelling model, and that its hegemony is beginning to crumble.

Originalism is besieged by claims of hypocrisy and inconsistency, by the charge that it has abandoned any pretense to judicial restraint. This Comment suggests that this is a phenomenon of High Originalism. The solution lies in speaker's meaning, or intent, or whatever name you want to give it. I call it Low Originalism, indicating its embrace of the humanness of our messy political lives. Abstracted-principles originalism—High Originalism—is too divorced from reality to do any good to constitutional communities. The call for a common sense understanding of meaning drawn from and accessible to citizens—We the People—is an urgent one that resonates with the words of Thomas Jefferson at the beginning of this Comment.

If this Comment accomplishes nothing else, I hope that it unscrambles the facile paradigm that identifies “Old” with “original intent seekers” and “New” with “public meaning seekers.” The New Originalism was not a triumph of the High Originalists over their unsophisticated Old Originalist opponents. Rather, when the High Originalists came onto the stage, they inaugurated the era of New Originalism wherein they were ascendant for a time. Originalists today are still synthesizing (and sometimes syncretizing) their creed.

In conclusion, I suggest that Low Originalism is the road plied by two of New Originalism's greatest figures: Keith Whittington and Justice Antonin Scalia. Whittington's originalism is quite thorough and he explicates it largely in objectivist terms. While he demands some level of publicity, he also insists that the communities who promulgated the text are not irrelevant.²⁶⁴ Justice Scalia's judicial practice is the subject of much Sturm und Drang,²⁶⁵ but in light of the discussion herein, it is easy to see how the dust-up over original expectations fits

²⁶⁴ WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 246, at 35–36.

²⁶⁵ See, e.g., Note, *Original Meaning and Its Limits*, 120 HARV. L. REV. 1279, 1282–83 (2007) (outlining critiques of Justice Scalia's arguments).

a model of Low Originalism without falling prey to Dworkin's caricature. It remains to another article—and to the reader in the interim—to examine originalist writers through the lens proposed herein.

APPENDIX: GOOGLE NGRAM VIEWER

