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THE CONSTRUCTION OF ORIGINAL PUBLIC MEANING

*Jack M. Balkin**

I. A THEORETICAL PUZZLE—AND SIX SOLUTIONS

In January of 2014, lawyers assembled at the Supreme Court to argue *NLRB v. Noel Canning*.¹ One of the questions before the Justices was whether the President could only make recess appointments between official sessions of the Senate (inter-session recesses), or could also make appointments within an official session when the Senate had adjourned for some substantial period of time (intra-session recesses).

As the case moved through the courts, lawyers debated the original meaning of Article II, Section 2, Clause 3, which gives the President power “to fill up all Vacancies that may happen during the Recess of the Senate.”² Did “the Recess” refer to the single recess between official sessions, or did it refer to any extended period of time in which the Senate was not sitting? Because transportation between home states and Washington D.C. was quite difficult for many Senators in the early Republic, the Senate did not take any significant intra-session recesses—other than for the period between Christmas and the beginning of January—until after the Civil War.³ Therefore the meaning of its early practice was ambiguous. “[T]he Recess” could refer to a single event that occurred only between official sessions, as Justice

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1. 134 S. Ct. 2550 (2014).
2. U.S. CONST. art. II, § 2, cl. 3.
3. See *Noel Canning*, 134 S. Ct. at 2652 (“In 1867 and 1868, Congress for the first time took substantial, nonholiday intra-session breaks, and President Andrew Johnson made dozens of recess appointments.”); *id.* at 2579 (chart of congressional intra-session recesses).

Scalia insisted,⁴ or it could refer to an instance of a larger class of similar things or events, as in the sentence “the elephant is the largest land mammal.”⁵

Suppose, however, that just before the oral argument, it had been discovered that multiple versions of the Constitution had been distributed in September 1787 in states whose assent was crucial to its eventual adoption—for example, Pennsylvania. Some of these texts said, “during the Recess of the Senate.” Other texts said “while the Senate is not sitting.” Amazingly, however, no one noticed the discrepancy during the ratification debates, and the Constitution was eventually adopted.

If this had happened, what would be the original public meaning of Article II, Section 2, Clause 3? Would it be “during the Recess of the Senate,” which could—but need not—confine recess appointments to those made between official sessions? Or would it be “while the Senate is not sitting,” which could—but need not—empower the President to make intra-session appointments? Or would we conclude that, at least as to this question, there was no single original public meaning? In that case, we would simply note that the participants took different public meanings from the different versions of the text they read, and we would have to rely on other resources to implement the Constitution.

Remarkable as it may sound, something like this actually happened. Christina Mulligan, Michael Douma, Hans Lind and Brian Quinn (hereinafter MDL&Q) have pointed out that in 1787, the population of Pennsylvania was about a third German-speaking,⁶ and a significant percentage of New Yorkers spoke Dutch, “especially in the rural areas around New York City.”⁷ As a result, MDL&Q explain, in late September 1787, a week after the English version was submitted to the states for ratification, the Pennsylvania Assembly commissioned a German translation for the state’s German speakers. It sent out 3,000 English copies and

4. *Id.* at 2595–96 (Scalia, J., dissenting).

5. *See id.* at 2561 (citing U.S. CONST. art. I, § 3, cl. 5) (noting that “The Constitution, for example, directs the Senate to choose a President pro tempore ‘in the Absence of the Vice-President.’” (emphasis added)).

6. Christina Mulligan, Michael Douma, Hans Lind and Brian Quinn, *Founding Era Translations of the Constitution*, 31 CONST. COMM. 1, 4 (2016) [Hereinafter MDL&Q, *Founding Era Translations*].

7. *Id.*

1,500 German copies “to be distributed throughout th[e] state for the inhabitants thereof.”⁸ Pro-ratification forces in New York commissioned a Dutch translation in 1788,⁹ “presumably printed before voting for convention delegates began on April 29.”¹⁰

The German version of Article II, Section 2, Clause 3 reads “da der Senat nicht sitzt;” that is, “when the Senate is not sitting,” while the Dutch version reads “gedurende de afweezenthyd van de Senaat,” or “during the extended absence of the Senate.”¹¹ The German version, and to a lesser extent, the Dutch version, seem compatible with recess appointments when the Senate is adjourned during an official session, if the absence is sufficiently substantial.

Although Pennsylvania and New York were only two of the original thirteen ratifiers of the Constitution, Pennsylvania’s early ratification on December 12, 1787, was widely acknowledged to be crucial to the success of the enterprise. New York ratified on July 26, 1788, shortly after the ninth state, New Hampshire, on June 21st, 1788, and the tenth state, Virginia, on June 25th, 1788. Hence, under Article VII, the Constitution was already guaranteed to come into operation even without New York’s assent. Nevertheless, its acceptance was also crucial as a practical matter. Without ratification by New York, then as now a key commercial center of the nation, and situated strategically between New England and the rest of the country, the new union of states would likely flounder.

For these reasons, the understanding of a significant proportion of the ratifying public in both states cannot easily be disregarded.

If one is a conscientious originalist, and believes that constitutional interpretation should begin with ascertaining the original public meaning of the text, what is to be done? There are a number of possible solutions.

First, we might concede that, as to this particular question, there is no original public meaning of Article II, Section 2, Clause 3. More than one version of the text circulated among the ratifying public; and the people whose assent was necessary for ratification

8. *Id.* at 3.

9. *Id.* at 4.

10. *Id.* at 9.

11. *Id.* at 43.

in key states were working with different texts. This argument is based on a theory of popular sovereignty. What makes the Constitution law is the consent of the ratifying public—We the People—who give assent to the text presented to them. Because different members of the public read different texts, when the texts differ significantly with respect to a particular question, there is no single original public meaning. Therefore a court today should treat the text as irreducibly ambiguous as to this particular question and turn to constitutional construction, resolving the controversy based on other modalities of constitutional argument, including precedent, inter-branch convention, structure, and consequences. This is perhaps closest to what the majority actually did in *Noel Canning*; it argued that the English text was ambiguous and then resolved the case based on other considerations.¹²

Second, we might draw on analogies to countries that have more than one official language in which laws and judicial opinions are written, or to treaties between countries written in multiple languages. Accordingly, we might compare the English, German, and Dutch versions to see if they shed light on the underlying goals of the law, with the hopes of producing a single compromise version that we will henceforth treat as the original public meaning.¹³ This approach treats the German and Dutch versions as co-equal with the English printed version, at least in Pennsylvania and New York, even though they were not officially enrolled as part of U.S. law. The justification for this approach would also be a theory of popular sovereignty. Significant parts of We the People in crucial states voted for adoption the Constitution based on these versions. These versions are part of the ground of authority for making the Constitution law. Hence we must consider all of them in determining the original public

12. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2561 (2014).

13. See Nial Fennelly, *Legal Interpretation at the European Court of Justice*, 20 *FORDHAM INT'L L.J.* 656, 656, 664–65 (1997) (noting that given multiple official languages, courts tend to focus on the underlying purpose of a statute); Lawrence M. Solan, *The Interpretation of Multilingual Statutes by the European Court of Justice*, 34 *BROOK. J. INT'L L.* 277, 279 (2009) (arguing that because “the goal of the court is to construe statutes to effectuate the intent of the legislature and to further the goals of the enacted directive or regulation, the existence of so many versions of the law makes this task easier [T]he Babel of Europe facilitates communication.”); see also MDL&Q, *Founding Era Translations*, *supra* note 6, at 16 (arguing that multiple translations of the Constitution offer “[t]he same potential to ‘triangulate’” and therefore provide an opportunity to “clarify rather than muddy the document’s meaning”).

meaning.

Third, we might simply ignore any differences between the texts and focus solely on the English version because most speakers who participated in the ratification debates were English speakers, because the German and Dutch versions affected the ratification of only two states out of thirteen, and because the Philadelphia Convention does not appear to have specifically authorized or produced any official translations when it distributed the proposed Constitution to the states.

To be sure, the German text was commissioned by the Pennsylvania Assembly.¹⁴ If the procedural niceties of ratification were left up to individual states, the German text might arguably qualify as an official version within Pennsylvania. The New York translation, however, was commissioned by proponents of ratification, rather than by the New York Legislature.¹⁵ In any case, we might justify looking only to the English version based on the need to converge on a single official text, and the fact that thirteen states eventually ratified, far more than the nine required by Article VII.

Fourth, we might use the German and Dutch translations as evidence of or as a commentary on what the real or official text—that is, the English text—meant at the time to English speakers. This is closest to MDL&Q’s general approach. They treat the English text as the sole official text of the law and view the German and Dutch translations as commentaries on the real Constitution—the printed English version.¹⁶ This approach makes these versions, in theory, no different than a particularly comprehensive pamphlet or newspaper article on what the proposed constitution said.¹⁷ Indeed, it puts the translations on the same footing as the celebrated commentaries in *The Federalist*, which paraphrased and expounded the Constitution’s meaning to New Yorkers. It follows then, that the situation of German and Dutch speakers who read only the translated versions are like the

14. MDL&Q, *Founding Era Translations*, *supra* note 6, at 3.

15. *Id.* at 4.

16. *See id.* at 10 (treating the translations as commentaries and “the considered analyses of intelligent observers”); *id.* at 13 (“[T]he translations constitute, therefore, commentaries or ‘considered analyses’—an additional source to access the original public meaning of the Constitution *as translated* in the late 1780s.”) (emphasis added).

17. *See id.* at 15 (arguing that translations are even better than most commentaries in that “these translations are *both* contextual and comprehensive”).

situation of English speakers who never actually read the text but who supported or opposed the Constitution based on what they heard from their neighbors or read in the newspapers.

To the extent that the German and Dutch translations are incorrect, or misguided, those commentaries are simply mistakes.¹⁸ Along the same lines, on some issues even *The Federalist* itself may be mistaken, although because it has amassed such symbolic and cultural authority over the years, many people may be loath to disregard it. Perhaps if the German and Dutch translations had become more widely known and celebrated (or if substantial numbers of Americans spoke German and Dutch today), their authority as commentaries might also be enhanced. Indeed, one possible result of MDL&Q's article is that people will pay more attention to these founding-era translations in the future.

Fifth, we might argue, by analogy to the enrolled bill rule for legislation,¹⁹ that the only text that matters is the official text that became part of U.S. law. That version was based on the September 28, 1787 version printed in English, itself a reprint of a September 18, 1787 printed version.²⁰ In fact, that official printed version differs in slight ways (in matters of capitalization and punctuation)²¹ from the engrossed parchment version actually

18. See *id.* (noting that the translations contain “clear mistakes” and “more subtle errors” in relation to the English text, which is the standard of authority).

19. See *Field v. Clark*, 143 U.S. 649, 672 (1892) (“The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress,” and “when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable.”).

20. Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 *YALE L.J.* 281, 283–84, 298 (1987); see S. DOC. NO. 87-49, at 49, 52, 55–56, 69 (1961) (presenting detailed historical notes regarding the text of the Constitution by Denys P. Myers).

21. See Amar, *supra* note 20, at 291, 296–97. For example, there is one obvious typo in the September 28th print. Its version of Article III, Section 1, Clause 2 states that “The judges, both of the supreme and inferior court, shall hold their offices during good behaviour.” See S. DOC. NO. 87-49, at 13 (emphasis added). In the September 17th parchment copy, Article III, Section 1, Clause 2 states that “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.” See “S. DOC. NO. 92-82, at 583 (1972). Given that in the previous sentence the printed version speaks of “such inferior courts as the Congress may from time to time ordain and establish,” the text is an obvious misprint. I do not believe that one can reasonably read the text to suggest that Congress has the power to create only one inferior court, or that the judges of only one court hold their offices during good behavior. But legal battles have been waged over

signed by the delegates to the Constitutional Convention in Philadelphia, which is currently on display in the National Archives.²²

According to this view, original meaning originalism actually rejects the conception of popular sovereignty I described earlier. It is not concerned with people's actual understandings of the text they actually voted on. Rather, it is concerned only with the understanding that a hypothetical reasonably informed speaker of the language in which the official law was composed would have of the official version ultimately enrolled. The relevant language is therefore English, and so we are only interested in what reasonably informed ordinary speakers of English at the time understood the official text to say. When we say that the text is made law by an act of popular sovereignty, we are really ascribing the authority of We the People to this hypothetical understanding of the text by a hypothetical person.

It follows, then, that the views of German and Dutch speakers are irrelevant except to the extent that they were also part of the community of English speakers at the time and would have influenced our judgment about what a reasonably informed speaker of English would have understood the official text to mean. Moreover, to the extent that English was their second language, the views of German and Dutch speakers were somewhat less relevant to this hypothetical judgment than the views of native speakers who were, presumably, fluent and fully competent.

Sixth, we might argue that the original meaning of the text is the meaning that well-trained lawyers, using the interpretive methods generally employed at the time of adoption, would have gleaned from the official text. This approach, called "original

far less.

22. Ironically, although the September 28th version was the official enrolled text, it is not the official text today. No master copy of the September 28th printed version was preserved, and as the text was reprinted numerous times, additional errors crept in. See S. DOC. NO. 87-49, at 49, 60; Amar, *supra* note 20, at 284. As a result, when Congress sought a corrected copy, it turned to the signed parchment manuscript, which was not, in fact, the official copy. Since 1878, the parchment copy has been treated as the official copy, and a version of its text now appears in the House and Senate Manuals and the U.S. Code. See ORGANIC LAWS OF THE UNITED STATES: CONSTITUTION OF THE UNITED STATES AND AMENDMENTS, U.S.C. (2012); S. DOC. NO. 87-49, at 49, 54, 91-92; Amar, *supra* note 20, at 285. Thus, even the "official" English language version of the Constitution has mutated a bit over time.

methods,” has been championed by John McGinnis and Michael Rappaport.²³ The legal understandings of ordinary individuals are not part of the original public meaning except to the extent that they would be incorporated into the views of well-trained lawyers using original legal methods. Therefore the understandings of German and Dutch speakers who read the Constitution in translation, are, for the most part, irrelevant to the original public meaning. Only the views of German and Dutch speakers who were also well-trained lawyers would be relevant, and only to the extent that they, as well-trained lawyers, had opinions about the English text that became law.

II. ORIGINAL PUBLIC MEANING AS A THEORETICAL RECONSTRUCTION OF THE PAST

All of these six solutions have points in their favor. And there are probably other solutions one could imagine that I have not mentioned here.

But my purpose in listing these possible approaches is not to arbitrate among them. My goal is to point out that, whichever solution we adopt, the “original public meaning” that emerges is a theoretical construction. It selects certain features of the past as relevant, and renders other features of the past irrelevant. It reconfigures the features of the past it selects as relevant through the perspective of a theory of law. It then dubs that reconfiguration “the original public meaning of the text,” and it does so because of theoretical and practical commitments in the present.

No matter which of the above six approaches we choose—or indeed, any other—the original public meaning of Article II, Section 2, Clause 3 is not a simple fact of the matter that existed on a particular day in 1787. Rather, it is a constructed entity that is shaped by our present-day need to understand the Constitution and to resolve present-day controversies. To be sure, that constructed entity hopefully rests on facts that we know or believe to be true. Moreover, it can be challenged and altered if some of the relevant facts that it assumes to be true are not actually true. But articulating the original public meaning is not a simple job of reporting what happened at a certain magical moment in time. It

23. See JOHN O. MCGINNIS & MICHAEL RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 14, 116–17 (2013).

is a theoretical and selective reconstruction of elements of the past, brought to the present and employed in the present for present-day purposes. Each of the solutions that I have presented does this, but does so in a different way, and based on a different legal theory.

MDL&Q's article shows why that must be the case when we face multiple versions of a text distributed to the ratifying public. But the same point applies even if there had been only one text, in English, and there had never been any other versions distributed to the public, in English or in any other language. That is because, even with only one text, there are almost certain to be multiple understandings of the meaning of that text among the ratifying public. In a political process like the ratification of a constitution, different people will take away different things even from the same document.

This feature of legal texts was as true in 1787 as it is in our own day. Think only, for example, about the vehement disagreements about the meaning of “an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act”²⁴ that led to the litigation in *King v. Burwell*.²⁵ The law in question had been passed only five years previously, and yet people held diametrically opposed views about what the language of the statute actually said. Indeed, some participants in the debate insisted that if their view was not vindicated, “[w]ords no longer have meaning.”²⁶

To be sure, those disagreements were no doubt enhanced by the ideological controversies of our day. But the period of ratification was filled with ideological disagreements every bit as fierce as those of the present. The notion that the late 1780s were a period of placid consensus about the meaning of words in legal texts, about the political principles behind them, or about their proper application to real-world controversies, is more than naive—it is simply ridiculous.²⁷

24. 26 U.S.C. § 36B(b)(2)(A) (2012).

25. 135 S. Ct. 2480 (2015).

26. See *id.* at 2497 (Scalia, J., dissenting).

27. See Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 588 (2011) (“It is one thing, after all, to suppose that words fraught with political content retain a relatively fixed meaning in quiet times, but it is quite another to apply that assumption to a period like the late 1780s or the Revolutionary era more generally.”); *id.* at 593 (“The adopters of the

Thus, if our account of original public meaning is at all sensitive to the actual understandings of actual people living at the time of adoption, it will pick up these disagreements about meaning, and it will have to decide what to do with them. One way we might deal with this problem is to pick a version of original public meaning that is the least sensitive to these differences in understanding, and that focuses as much as possible on areas of likely and overwhelming agreement. That is why, for example, I have argued for a relatively “thin” theory of original public meaning—essentially confined to the original semantic meaning of the words, but taking into account any generally recognized terms of art, and any background context necessary to understand the text.²⁸

What a thin theory excludes from original public meaning is the original expected application of the text—how people at the time of adoption would have expected that the text would be applied to concrete situations, as well as the way that members of the adopting generation would have expected the relevant constitutional principles and justifications would be articulated and applied. These aspects of meaning are precisely the ones that would most likely generate differences of opinion among the ratifying public.

These features of the past remain fully relevant for constitutional construction. The point of the thin theory is that they are not binding on us today in the way that the (thin version of) original public meaning is binding. It follows that the original public meaning, by itself, will significantly underdetermine how to apply the Constitution. Lawyers and judges must also build out

Constitution inhabited a world that was actively concerned with . . . the instability of linguistic meanings, and . . . arguments about the definitions of key words and concepts were themselves central elements of political debate.”); see also Saul Cornell, *Conflict, Consensus & Constitutional Meaning: The Enduring Legacy of Charles Beard*, 29 CONST. COMMENT. 383, 405 (2014) (“Given the contentious nature of Founding era legal culture it seems unreasonable to assume that one can identify a single set of assumptions and practices from which to construct an ideal reasonable reader who could serve as model for how to understand the Constitution in 1788.”).

28. See Jack M. Balkin, *Must We Be Faithful to Original Meaning?*, 7 JERUSALEM REV. LEGAL STUD. 57, 70, 77 (2013) [hereinafter *Must We Be Faithful to Original Meaning?*]; Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 646 (2013). The semantic meaning of a word or phrase is its dictionary definition or to definitions that are in common use among the population; hence “original semantic meaning” refers to dictionary definitions or to definitions in common use at the time of adoption.

doctrines and institutions on top of the basic framework of the Constitution's original public meaning.

My theory of constitutional interpretation thus distinguishes between the task of constitutional interpretation—ascertaining original public meaning—and constitutional construction—building doctrines and institutions that give effect to the Constitution's provisions.²⁹ Most of what we call constitutional interpretation is actually constitutional construction.

It should be obvious that the thin theory of original meaning is not the only possible version. Like every other lawyers' theory of original public meaning, the thin theory is a choice, not a description. It focuses on only certain features of the past and declares them, and not others, as binding in the present, leaving other features of the past as a resource for constitutional construction.

A thin theory of original public meaning is not unique in this regard. All theories of original public meaning must do this to one degree or another; they simply do it in different ways with different theoretical justifications for their approach. Not surprisingly, disputes about original public meaning are usually more than simple disputes about facts; they are also usually disputes about theories and normative assumptions.

MDL&Q's study is valuable precisely because it makes clear what is always at work in original public meaning originalism. Faced with multiple translations of Article II, Section 2, Clause 3, we must view history through the prism of legal theory and practical considerations to arrive at the original public meaning. This seems obvious to us because the situation they describe is so unexpected and unusual; but we must do so even in the standard case. Through their work on Founding-era translations, MDL&Q have revealed to us more clearly the problem that occurs whenever we impose the requirements of legal theory and legal justification on the messy facts of history.

We originalists may like to assert—perhaps as a convenient shorthand—that in our search for original public meaning, we are simply reporting objectively and dispassionately on the facts of the past.³⁰ Objectivity and dispassion are important virtues in

29. See JACK M. BALKIN, *LIVING ORIGINALISM* 4–5 (2011) [hereinafter *LIVING ORIGINALISM*].

30. See, e.g., Randy E. Barnett, *The Gravitational Force of Originalism*, 82

historical investigation, and we should embrace them. But inquiries into original public meaning do much more. The choice of which facts are relevant and important, and how and why they are relevant and important, are shaped by our theoretical and practical commitments. Those commitments prefigure what we look for in the past, how we evaluate what we find, what we discard as peripheral or not germane, and what we will do with the evidence that we bring forward with us into the present. Theories of original public meaning—for there are more than one—produce carefully constructed configurations of the past that serve theoretical and practical values of the present. And there is nothing wrong with that, as long as we are candid about those values, and willing to defend them openly.

We can see this most clearly in a frequently quoted test of original public meaning—what a hypothetical speaker of the English language at the time of adoption would understand the officially adopted text to mean.³¹ Under this approach, the actual views of actual speakers of the English language, (and the actual text that they might have confronted) are evidence of this hypothetical speaker’s views, but they are not conclusive. We must sift through history to imagine and construct what this hypothetical speaker of English would have thought. We must filter historical evidence through the sieve of a jurisprudential theory that hopes to connect the meaning of the text to lawful authority.³²

FORDHAM L. REV. 411, 417 (2013) (“We are searching for an empirical fact: what information would these words on the page have conveyed to the reasonable speaker of English in the relevant audience at the time of enactment?”); *id.* (“[H]aving stressed that the original public meaning is an empirically objective fact, I now acknowledge that the New Originalism does *also* make a *normative claim*, and it is this: the original meaning of the text provides the law that legal decisionmakers are bound by or *ought* to follow.”).

31. See, e.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001) (“‘[O]riginal meaning’ refers to the meaning a reasonable speaker of English would have attached to the words, phrases, sentences, etc. at the time the particular provision was adopted.”); Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar’s Unwritten Constitution*, 81 U. CHI. L. REV. 1385, 1440 (2014) (“[T]he true, original public meaning of the language employed . . . [is] the objective meaning the words would have had, in historical, linguistic, and political context, to a reasonable, informed speaker and reader of the English language at the time that they were adopted.”).

32. Gary Lawson has been perhaps the most explicit about this point. See Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006) (“[W]hen interpreting the Constitution, the touchstone is not the specific thoughts in the heads of any particular historical people—whether drafters, ratifiers, or commentators, however distinguished and significant within the drafting and ratification

This theory of original public meaning filters and reconfigures the past because it is designed to produce a legal meaning that lawyers living today might actually use. If, as originalists believe, original meaning should be binding on later generations, it cannot be plural and diverse. It must be unitary, or at the very least, significantly bounded. A test of original public meaning that regularly produced a plethora of original public meanings for every important controversy before the courts would be far less useful to lawyers today. Many originalists hope to use their theory of interpretation to constrain judges—but a theory that regularly generated multiple original public meanings would simply not do the trick.

John McGinnis and Michael Rappaport's theory of original legal methods offers another good example. They argue that we should determine the meaning of the Constitution by using the interpretive rules and methods that well-trained lawyers would have deemed applicable to the Constitution at the time of adoption.³³ Their theory imposes several different frames and filters on history. First, it focuses on the views of lawyers, not citizens.³⁴ Second, it assumes the existence of—and therefore looks for—a consensus, both about legal methods for interpretation at the time of the Founding, and about how those

process they may have been—but rather the hypothetical understandings of a reasonable person who is artificially constructed by lawyers. The thoughts of historical figures may be relevant to the ultimate inquiry, but the ultimate inquiry is legal.”); *see also* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002). Lawson argues:

[S]tatutes of early Congresses are at best weak evidence of original meaning. Originalist analysis, at least as practiced by most contemporary originalists, is not a search for concrete historical understandings held by specific persons. Rather, it is a hypothetical inquiry that asks how a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world, would understand a particular provision. Actual historical understandings are, of course, relevant to that inquiry, but they do not conclude or define the inquiry—nor are they even necessarily the best available evidence. Enactments of early Congresses are particularly suspect because members of Congress, even those who participated in the drafting and ratification of the Constitution, are not disinterested observers. They are political actors, responding to political as well as legal influences, who are eminently capable of making mistakes about the meaning of the Constitution. Their work product constitutes post-enactment legislative history that ranks fairly low down on the hierarchy of reliable evidence concerning original meaning. Accordingly, whatever evidence can be gleaned from early statutes—and there is evidence in both directions—is minimally relevant.

Id. at 398.

33. MCGINNIS & RAPPAPORT, *supra* note 23, at 118.

34. *Id.* at 126.

original legal methods would have been applied (hypothetically) by well-trained lawyers to particular questions.³⁵

This theory of original meaning is connected to a larger theory of why judges should be originalists. McGinnis and Rappaport believe that originalism is the best theory of interpretation because it produces the best consequences.³⁶ It produces the best consequences because constitutional provisions must be ratified by supermajorities, and McGinnis and Rappaport argue, for various reasons, that supermajorities tend to produce rules that will produce the best consequences over time.³⁷ But in order to enjoy the benefits of supermajority rules, the rules must have determinate content and not be subject to what McGinnis and Rappaport call “judicial updating.”³⁸ They believe that once we take original legal methods into account it is very unlikely that most constitutional provisions will turn out to be vague. That is because “citizens are risk-averse when it comes to constitutional provisions”³⁹ and would not likely agree to adopt abstract or vague provisions that would delegate responsibility for implementation to later generations. “[W]hat supermajority rules encourage are not broad delegations to the future, but determinate principles about which there is a broad consensus.”⁴⁰ For this reason, they argue that once we apply the appropriate original legal methods, there is very little about the Bill of Rights

35. *Id.* at 128–29.

36. *Id.* at 19.

37. *Id.* at 33, 81–85. To be sure, this assumes that the Constitution was ratified by a supermajority of We the People. In 1787, women (among others) could not vote and African-Americans were held in slavery. The Fourteenth Amendment poses other problems: it was proposed by Congress only after Southern Representatives and Senators were excluded so that Northern Republicans could secure a two-thirds majority for an amendment. Southern states were not readmitted to the Union until they agreed to ratify the proposed amendment. McGinnis and Rappaport, however, maintain that the passage of the Fourteenth Amendment was a lawful and appropriate supermajority decision. *Id.* at 70–71. They further argue that the Reconstruction Amendments and the Nineteenth Amendment cured any potential problems for their theory. These amendments, they contend, provide the Constitution with all of the provisions that African Americans and women would have obtained if they had participated fully in the ratification of the Constitution in 1789. *Id.* at 107–08, 111–12.

38. *Id.* at 85.

39. *Id.* at 149.

40. *Id.* This echoes Justice Scalia’s assertion in *District of Columbia v. Heller*, 554 U.S. 570, 604–05 (2008), that there is no reason to believe “that different people of the founding period had vastly different conceptions of the right to keep and bear arms. That simply does not comport with our longstanding view that the Bill of Rights codified venerable, widely understood liberties.”

that is vague or requires constitutional construction because these amendments “did not focus on deeply contested matters.”⁴¹

McGinnis and Rappaport’s theory of interpretation thus depends on an account of original legal methods that is likely to generate the kind of determinate content that will, in turn, produce the admirable benefits of supermajority rules. Their theory of how to interpret the Constitution, in other words, is designed to mesh with their theory of why constitutions produced through supermajority rules produce good results.⁴² And it depends on their assumption that when we go back in history there will prove to be a consensus, both about original legal methods at the time of adoption and about how well-trained lawyers would have applied those original legal methods to the constitutional text.

It may well be—and indeed I have argued—that this search for consensus is illusory.⁴³ First, there was no general agreement in 1787 that lawyers’ views rather than the views of the general public determined the legal meaning of the new Constitution.⁴⁴ Second, there was no consensus about the legal methods to be used to interpret the new Constitution.⁴⁵ Third, there is no reason to think that lawyers—even hypothetical lawyers—would have reached consensus on how to read the new Constitution, judging from the constant disputes between well-trained lawyers about virtually every important question that arose both before and after ratification. Among well-trained lawyers, interpretive

41. MCGINNIS & RAPPAPORT, *supra* note 23, at 149.

42. *See id.* at 118 (arguing that “the Constitution will produce the beneficial effects” of supermajoritarian rules “only if it is given its original meaning,” and that this “suggests that the document should be interpreted using the original interpretive rules”); *id.* at 150–51 (“[J]udicial discretion to resolve matters of construction is less likely to produce good results than the supermajoritarian constitution-making process.”).

43. LIVING ORIGINALISM, *supra* note 29, at 353–56 & n.18; Jack Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 827–28 (2012).

44. *See* Saul Cornell, *The People’s Constitution vs. The Lawyers’ Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 304 (2011); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 6–7 (2004). MDL&Q’s history supports this conclusion. They point out that the Dutch translation “suggests that at least some members of the educated, founding-era public might not have always recognized each of the legal or specialized terms in the Constitution” and “failed . . . to defer to a lawyer’s interpretation.” MDL&Q, *supra* note 6, at 52.

45. *See* Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL’Y 907, 912–13 (2008); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 555–56, 561, 571–73 (2003).

controversies immediately broke out over the Jay Treaty, the First Bank of the United States, and the Alien and Sedition Acts.⁴⁶ The dispute between the Federalists and Jeffersonians about what the First Amendment meant seems to undermine McGinnis and Rappaport's assurance that risk-averse citizens will only adopt "determinate principles about which there is a broad consensus."⁴⁷

If all that is so, then McGinnis and Rappaport's theory of original methods originalism can't really get off the ground. But even assuming that I am wrong about this and that the theory can be made workable, what the theory offers is not a mere description of original public meaning, but a carefully constructed reconfiguration of the past that serves their larger theoretical project.

McGinnis and Rappaport, like many other conservative original meaning originalists, view constitutions primarily as constraints on politics. I call this a skyscraper view of constitutions.⁴⁸ In this model, the Constitution is like a more or less finished building, and people engage in politics within its structures. They can only change the building through the supermajority rules of Article V amendment. By contrast, I view constitutions as frameworks—they are a basic set of rules, standards and principles that are designed to create institutions and channel political action in order to make politics possible.⁴⁹ Constitutions are designed to put politics in motion and cause people to solve their problems through politics as opposed to through violence and civil war. But because constitutions are only

46. See JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* 6 (1999) (noting that in the early Congresses, disputes over policy produced continual interpretive disagreements, with no consistency in interpretive methods); RAY RAPHAEL, *CONSTITUTIONAL MYTHS: WHAT WE GET WRONG AND HOW TO GET IT RIGHT* 156–58 (2013) (listing interpretive controversies in the first decade of the new Constitution).

47. MCGINNIS & RAPPAPORT, *supra* note 23, at 149; see also Jack Balkin, *Nine Perspectives on Living Originalism*, *supra* note 43, at 835–38 (arguing that fundamental disputes about the meaning of the First Amendment during the debate over the Sedition Act cast doubt on McGinnis and Rappaport's assumptions).

48. See *LIVING ORIGINALISM*, *supra* note 29, at 21–22.

49. *Id.* at 21–25; see generally Jack M. Balkin, *The Framework Model and Constitutional Interpretation*, in *PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW* (David Dyzenhaus and Malcom Thorburn, eds.,) (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2607105 [hereinafter *The Framework Model*].

frameworks, they need to be built out over time through constitutional construction by both the judiciary and the political branches.

For conservative originalists like McGinnis and Rappaport, the Constitution is mostly finished, and we engage in ordinary politics within its boundaries. For originalists like me, the Constitution is never finished, and we continue to construct many of its features through constitutional politics even as we live and work within it. For originalists like McGinnis and Rappaport, the constitution's legitimacy comes from its adoption and amendment through supermajority rules. For originalists like me the Constitution's legitimacy comes from two sources. The first is the initial act of popular sovereignty; the second is from constitutional constructions that respond, in the long run, to the forces of democratic politics—including, but not limited to, successive waves of democratic mobilization.

By now it should be clear that the way we construct our concept of original public meaning has a lot to do with our background assumptions about what constitutions are and how they work. If you hold to the skyscraper view of constitutions, you will be attracted to a relatively thick view of original public meaning, because you assume (or you hope) that original meaning can and will resolve a relatively high percentage of constitutional questions. Accordingly, there will be relatively less need for constitutional construction. In fact, McGinnis and Rappaport take this point to its logical conclusion. They oppose the very idea of constitutional construction. For them everything, or almost everything, can be achieved through interpretation—that is, interpreting original public meaning through original legal methods. Once again we see how their model of original public meaning coheres with their underlying political and theoretical vision of what constitutions are and how they work.

Conversely, if you view the Constitution as a framework, always unfinished, and always being built out through constitutional construction, you will be more attracted to a thin theory of original public meaning. A barebones account of original public meaning makes the most sense given that the democratic legitimacy of the Constitution, over time, depends on more than the initial act of law-making. It also depends in part on each generation's contribution to the constitutional project. The initial framework guides and channels how those contributions

may be made, but it leaves a great deal to be worked out in the future. A contrasting theory of original public meaning, in other words, meshes well with a contrasting political and theoretical vision of what constitutions are and how they work.

The nature of language alone will not tell us which version of original public meaning we should choose. Instead, our view of original public meaning—and therefore the way we will use history to discover and expound that meaning—will depend on deeper debates about the nature of constitutions and the sources of their legitimacy.

McGinnis and Rappaport hopefully describe their historical investigation as purely positive—that is, concerned only with the facts of original meaning, and distinct from a normative theory of interpretation.⁵⁰ But it is anything but that. Their account is a carefully constructed version of original public meaning that fits well—and is designed to fit well—with their larger normative theory of what constitutions are for, why constitutions produce good consequences, and how best to interpret them in order to ensure that they do. Although McGinnis and Rappaport argue that their positive theory of interpretation is separate from their normative theory of constitutionalism,⁵¹ this really isn't the case. The two are linked and each supports the other.⁵² Nor is this an unusual example. It is how theories of original public meaning work.

III. THE ADVANTAGES OF A THIN THEORY OF ORIGINAL PUBLIC MEANING

I believe that originalists—and indeed, all constitutional theorists—should be candid and self-conscious about the relationships between how they use and investigate history and their normative theories of constitutionalism and legitimacy. It goes without saying that constitutional theorists should pursue historical accuracy and make use of the best historical accounts.

50. MCGINNIS & RAPPAPORT, *supra* note 23, at 117–18 (arguing that original methods originalism is a positive theory of what the Constitution means regardless of whether this is normatively desirable.)

51. *Id.* at 116.

52. As they note, “[o]ur normative and positive theories converge because they are linked by an insistence that both positive meaning and the normatively desirable interpretation are generated by the interpretive rules obtaining at the time the Constitution was enacted.” *Id.*

But legal theorists should also acknowledge how their theories of constitutional law, filter, shape and configure the history they look to and the ways that they employ history.

In my own work, I have tried, as best I can, to practice what I preach. As noted above, my theory of constitutional interpretation distinguishes between the task of constitutional interpretation—ascertaining original public meaning—and constitutional construction—building doctrines and institutions that give effect to the Constitution’s provisions.⁵³ With respect to constitutional interpretation, I have argued for a thin theory of original public meaning. This theory focuses on only a selection of all of the various shades of meaning and understanding that circulated during the adoption of the Constitution and its amendments. That does not, mean, however, that I regard all of these other meanings and understandings as irrelevant. Far from it. They are important, if not crucial, to another task—the task of constitutional construction. Historical evidence that is less important to a thin version of original public meaning may be very important in deciding how best to create doctrines and practices to build out the Constitution over time.

Note, moreover, that a thin theory of original meaning does not purport to reflect the actual experience of people participating in ratification debates. People in these debates do not say to themselves, “now I am engaged in arguing about semantic meaning and now I am engaged in constitutional construction.” Nor, for that matter do most lawyers arguing about the Constitution today. The work of interpretation and construction is seamless. Rather, the distinction is one that is imposed on events in hindsight.⁵⁴

My approach features *both* a thin theory of original public meaning *and* a division of labor between interpretation and construction. This constitutional theory shapes how I use history in constitutional argument; conversely, my understanding of how history works shapes my constitutional theory.

In previous work, I have defended a thin theory of original

53. See LIVING ORIGINALISM, *supra* note 29, at 4–5; see also Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 455–56 (2013).

54. See Solum, *supra* note 53, at 495–99 (explaining that the logical distinction between interpretation and construction need not correspond to the experience of decisionmakers).

meaning explicitly in terms of constitutional theory. For example, I have argued that a thin theory of original meaning is most consistent with how written constitutions work and what they are for.⁵⁵ A constitution is an intergenerational project of governance that seeks to preserve a decent politics but is never fully completed.⁵⁶ I have also argued that, when contrasted to thicker accounts of original meaning, a thin theory best preserves the democratic legitimacy of the Constitution over time.⁵⁷

Let me offer two additional reasons for adopting a thin theory of original public meaning. Both concern the way that constitutional theory uses history.

First, a thin theory is justified because during periods of constitutional adoption and amendment we are likely to find a variety of different views circulating, along with an almost complete lack of attention to many questions that turn out to be important to later generations. On many issues, including both issues that people paid little attention to as well as issues about which people cared the most, a consensus about constitutional meaning is likely to be an illusion. (Here I use “meaning” in the broadest sense—not in the narrow sense employed by the thin theory.) With respect to these questions, it is misleading to assume that there would be a single view held by all reasonable persons, even hypothetical reasonable persons. And if we construct our hypothetical individual to so as to create consensus where there is none, we do both ourselves and the past a disservice.

No theory of original public meaning, I think, can ever fully eliminate this problem. MDL&Q show how the problem will pop

55. *Must We Be Faithful to Original Meaning?*, *supra* note 28, at 57, 71 (arguing that the thin theory follows from the framework model of constitutions); 77–80 (arguing that the thin theory is necessary for democratic legitimation over time); *see also* Andrei Marmor, *Meaning and Belief in Constitutional Interpretation*, 82 *FORDHAM L. REV.* 577, 593–96 (2013) (explaining that how we should interpret constitutions depends on what we think constitutions are and what they are for.). *Cf.* John Danaher, *The Normativity of Linguistic Originalism: A Speech Act Analysis*, 34 *L. & PHIL.* 397, 428–31 (2015) (arguing that even the most basic assumptions about constitutional interpretation depend on normative views about the nature of constitutional speech acts.).

56. *See The Framework Model*, *supra* note 49, at 4.

57. *Must We Be Faithful to Original Meaning?*, *supra* note 28, at 77–80 (arguing that the “constitutional constructions of successive generations give the Constitution its continuing democratic legitimacy,” that “the efforts of successive generations are necessary to compensate for the limited institutional capacity of any single generation,” and that a thick theory of original meaning “will exacerbate the democratic deficit of a long-lived constitution, and . . . will undermine democratic legitimacy as time goes on”).

up even within a thin theory of original meaning. Nevertheless, a thin theory of original public meaning deals best with the problems of dissensus and differing understandings among the ratifying public, as well as the many kinds of questions that the adopting public never considered or even imagined. A thin theory works best because it deliberately focuses on those aspects of constitutional meaning that are most likely to be widely shared among the general public. Like all versions of original public meaning, it is a selective reconstruction of original meaning, motivated by practical and theoretical concerns.

Professional historians are particularly sensitive to the ways that the present reconstructs the past for its own purposes. For that reason, they are sometimes critical of lawyers' concepts of original public meaning. Jack Rakove, for example, has criticized original public meaning as an appeal to the views of imaginary people who never existed.⁵⁸ He points out that the framers themselves understood that understandings of texts are rarely unitary, and that people's views about what terms mean are likely to evolve in the heat of political confrontation.⁵⁹ Participants in constitutional debates will differ not only as to party and ideology, but also class, education, experience, skill, and interest.⁶⁰ Moreover, their understandings emerge from a complex history of readings and counter-readings, traditions and counter-traditions, goals and motivations, which reach backwards indefinitely into the past.⁶¹ What original public meaning offers us, Rakove argues, is but a pale copy of that rich historical texture.

I take these critiques to heart. In fact, they are an important motivation for a thin theory. The thicker we make our accounts of original public meaning, and the more that we demand of it to resolve contested questions in the present, the more disagreement and the more variations of understanding we will discover among the actual populations that ratified the Constitution and its amendments. (And we may also discover that there was no

58. Rakove, *supra* note 27, at 586; *see also* Cornell, *supra* note 27, at 405 ("Given the contentious nature of Founding era legal culture it seems unreasonable to assume that one can identify a single set of assumptions and practices from which to construct an ideal reasonable reader who could serve as model for how to understand the Constitution in 1788.").

59. Rakove, *supra* note 27, at 593.

60. Cornell, *supra* note 27, at 405.

61. *See* Rakove, *supra* note 27, at 581–82 (describing the multiplicity of sources that influenced debates over the framing).

consideration of certain issues at all.) We may hope to discover what a reasonable person would have understood the constitutional text to mean. But in any age or era—as in our own—reasonable people often differ about many things, especially where politics is involved.

If, undaunted, we nevertheless insist on a thick version of original meaning, we will discover that we will only be able to draw out a single answer from the past by reading the evidence selectively and opportunistically, by ignoring many participants in the ratification process, or by declaring that their views were not in fact reasonable. Or we may have to make contestable analogies to deal with situations and contexts never considered or imagined. Insisting on a unitary *and* thick account of original public meaning under these conditions is an invitation to anachronism, special pleading and the worst sort of “law office history.”

This brings me to my second reason for employing a thin theory of original public meaning. A thin theory does not assume that an inquiry into original meaning exhausts all of the different ways that history might be useful to law. It does not disdain the serious enterprise of intellectual, political, and social history as developed by professional historians. Quite the contrary: this approach embraces all of history as a resource for construction. Original public meaning gives us but the bare bones. For fleshing out the Constitution, and making it work in practice, we require far more nourishment.

Arguments about constitutional meaning and principle emerge in the context of a particular time; it is often difficult—and controversial—to decide how apply those debates and concerns to the constitutional issues of our day. Simply put, the generations who adopted the Constitution were trying to grapple with their problems in their world, not our problems in our world. The inherent indeterminacy of translating their concerns into our world is a genuine problem if we must treat history as imposing binding commands on the present. But those problems are greatly lessened—and in fact, may become positive virtues—when we confront them in the context of constitutional construction. Constitutional construction is a matter of judgment; it uses all available modalities of argument as sources of wisdom or insight about how to continue the constitutional enterprise in the present. The pursuit of constitutional fidelity through translation, as

Lawrence Lessig likes to call it,⁶² is the work of constitutional construction. And it is precisely the terrain in which history can be most helpful.

But, you may object, isn't history also relevant to even a thin account of original public meaning? Surely it is. But by scaling down our ambitions, we can have far greater hope that history will converge on a relatively small range of original public meanings. If we ask for more, by contrast, we are far more likely to encounter divergence and disagreement. These issues are best left to constitutional construction.

Thus, the division of labor between interpretation and construction is deliberate. Most inquiries about the legal relevance of history will turn out to be questions of constitutional construction because they touch on aspects of history that are likely to be—as professional historians remind us—the most complicated and complex. Far from excluding these complications from constitutional argument, the thin theory embraces what is rich and diverse as a resource for the present.

In the narrower task of constitutional interpretation, discovering a multiplicity of original public meanings is usually a problem. In the task of constitutional construction, however, it is not. In constitutional construction, we are permitted, even encouraged, to favor some opinions over others—even minority opinions in their day—and render judgments on the past. In the practice of constitutional construction, we employ history not as a command but as a resource. Hence we may be more willing—and better able—to take sides in disagreements among constitutional participants in the past, and to say that some constructions were better than others, and more faithful to the Constitution rightly understood. We can say forthrightly that we prefer Hamilton's reading of the spending power to Madison's, or vice-versa. We need not pretend that there was always a single correct answer to this question—our job is to choose the best answer for us in our own time. That is because the project of constitutional construction is different than the project of ascertaining original meaning. Constitutional construction employs the past as a dialectical tradition of readings and counter-readings that might help us understand how to continue the constitutional enterprise in the present. Constitutional construction views the past as a

62. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1179 (1993).

resource that we draw on in the present to forge a narrative connection between ourselves and the best and most admirable parts of our political traditions as we now understand them.

Take, for example, the question of the original public meaning of the Fourteenth Amendment. Some originalists, taunted by generations of non-originalist critics, have tried to show that originalism can explain *Brown v. Board of Education*⁶³ and *Loving v. Virginia*.⁶⁴ They have sought to demonstrate that the framers and ratifiers of the Fourteenth Amendment actually sought to ban segregated public schools and outlaw restrictions on interracial marriage. There is evidence that some Republicans did believe that this was the best interpretation of the Fourteenth Amendment.⁶⁵ But many more people who participated in the ratification process did not; and had supporters made clear that integrated public schools and racial intermarriage were the legal consequence of ratifying the Fourteenth Amendment, it is very unlikely that the amendment would have been adopted.⁶⁶

The difficulty arises from the way that originalists have framed the task before them. Originalists would like to show that the results in *Brown* and *Loving* were part of the *original public meaning* of the document, and therefore binding on all future generations. If this is the goal, I do not think that they can succeed, at least as I read the history. Reasonable people reading the text at the time of adoption would have disagreed on precisely these issues. Nevertheless, once we are engaged in constitutional construction, this same evidence is both useful and powerful in a

63. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995).

64. See David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CON. L. REV. Q. 213 (2015).

65. On congressional Republicans' attitudes concerning desegregation of public schools, see McConnell, *Originalism and the Desegregation Decisions*, *supra* note 63; on the views of Republicans about interracial marriage, see PETER WALLENSTEIN, *TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY* (2002); Upham, *supra* note 64.

66. See McConnell, *The Originalist Justification for Brown*, *supra* note 63, at 1938–39 (arguing that integrated schooling was deeply unpopular at the time the Fourteenth Amendment was ratified, but that the Amendment was pushed through “with little regard for public opinion”); see also Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1885–94 (1995); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 25–26, 146 (2004) (“the original understanding of the Fourteenth Amendment plainly permitted school segregation”).

different way. It shows us that, from the outset, there were supporters of the Amendment who read it in a broadly egalitarian way. That fact is especially important: For if there was no consensus in favor of integrated schools and a right to racial intermarriage, there was also no consensus against these results either.

When we develop our doctrines of the Fourteenth Amendment today, we can and should be proud to point for authority to these early, far-sighted Republicans, and to their belief in racial equality. We should be happy to argue that these people correctly understood the Constitution, and not their contemporaries—perhaps far more numerous—who insisted on a more limited construction. When we do this, however, we follow the example of these early Republicans not because we are *required* to by a permanently fixed original public meaning, but because we *choose* to, given our present-day understanding of what is most faithful to the Constitution and its purposes. We honor them because we think that they were right.

This difference in framing the problem is quite important. It recognizes that the past takes on new meaning to us as we proceed through history and that what we want from history changes as our political circumstances change. The reason why contemporary originalists want to show that *Brown* and *Loving* were *always* correct is the intervening history of the Civil Rights Revolution, which transformed Americans' understanding of constitutional equality and constitutional justice. As a result, today the legitimacy of constitutional theories depends on these theories' ability to explain *Brown* and *Loving*, and not the other way around.

An earlier generation of originalists, like Alfred Avins and Raoul Berger, felt no great urgency to demonstrate that *Brown* and *Loving* had always been correct,⁶⁷ and that *Plessy v. Ferguson* was “wrong the day it was decided.”⁶⁸ But later generations of

67. See Alfred Avins, *De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875*, 38 MISS. L. J. 179 (1967); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 117–33, 245 (1977); see generally Earl Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMM. 223 (1996).

68. See JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 174 (2011) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S.

originalists did—because the world they lived in had changed, and the conditions of political and constitutional legitimacy had changed. By the 1980s, it became increasingly important to reconcile originalism with *Brown* if not *Loving*. This led many originalists, led notably by Robert Bork and Michael McConnell, to rethink older assumptions about whether *Brown* could be explained on originalist grounds.⁶⁹ The fact that the vast majority of originalists moved in this direction strongly suggests, by the way, that the framework model of constitutions, with its dual sources of democratic legitimacy, is the best account of how the American Constitution actually works.

One should not assume that later originalist scholars were being disingenuous in attempting to prove that *Brown* was an originalist result. Originalists, like all other serious scholars, hope to improve on the work of their predecessors, and to correct the mistakes of previous generations. My point, however, is that what constitutes “improvement” in originalist argument—and indeed, legal argument generally—is not altogether independent of changes in politics and public opinion. Originalist scholars are part of the processes of living constitutionalism like everyone else.

The same point applies, with suitable modifications, to sex equality, or the rights of gays and lesbians. As these results enter the constitutional canon, alter the conditions of constitutional legitimacy, and reconstruct constitutional common sense, originalists will be increasingly motivated to prove to skeptical audiences that these results, too, always followed from the original public meaning of the text.

It is worth noting that Steven Calabresi has already begun this project of originalist reclamation for sex equality and gay rights.⁷⁰ But it is equally important to note that to do this, Calabresi has adopted a comparatively “thin” version of original public meaning—although not in all respects identical to my own.

In general, Calabresi argues that we should understand the

833, 863 (1992) (joint opinion of Kennedy, O'Connor, and Souter, JJ.).

69. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 81–83 (1990); McConnell, *Originalism and the Desegregation Decisions*, *supra* note 63.

70. See Steven G. Calabresi & Hannah M. Begley, *Originalism and Same Sex Marriage* (Northwestern Public Law Research Paper No. 14-51), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2509443; Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).

original public meaning of the constitutional text in terms of general principles and purposes gleaned from history, and understood at a fairly abstract level of generality.⁷¹ He does not feel bound by original expected applications, although he does not ignore them. Rather, he argues that we should understand and apply constitutional text and principles in light of the facts as we understand them today, and not in terms of what the adopting generation believed.⁷² Although he does not explain his views in terms of the distinction between interpretation and construction, his arguments have tended to converge with this approach in practice.

It is no accident, I think, that Calabresi's recent work has employed a relatively thin theory of original public meaning. If we insist on a thick conception of original public meaning, the project of shoring up the legitimacy of originalism becomes increasingly fantastical as time goes on. But these obstacles are entirely unnecessary if we adopt a thin theory of original meaning, accept the basic distinction between interpretation and construction, and recognize the different roles that history plays in each endeavor.

71. See, e.g., Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393, 1398 (2012) (rejecting original expected applications and arguing that "it is the semantic original public meaning of the enacted texts that should govern"); *id.* at 1413 ("In the second sentence of Section 1 [of the Fourteenth Amendment], citizens are protected from caste-or class-creating state laws, and all persons are protected from arbitrary and capricious executive and judicial action and from the failure of state executives and judges to provide the equal protection of those laws already on the books.").

72. See, e.g., Calabresi & Rickert, *supra* note 70, at 9–10 ("Sex discrimination, although not generally understood to be a form of caste in 1868, had come to be recognized as a form of caste by 1920, when the Nineteenth Amendment was ratified. The definition of caste had not changed; rather, the capabilities of women and the truth of their status in society had come to be better understood and that new understanding was memorialized in the text of the Constitution."). Calabresi and Rickert explain:

Did the Framers and ratifiers of the Fourteenth Amendment understand sex discrimination to be a form of caste or of special-interest class legislation? Certainly not. But then they also did not understand when they enacted the Civil Rights Act of 1866 banning race discrimination in making contracts that they were also banning antimiscegenation laws, which made it a crime for a white person to contract to marry a black person. The point is that sometimes legislators misapply or misunderstand their own rules. For this reason, although the Framers' original expected applications of the constitutional text are worth knowing, they are not the last word on the Fourteenth Amendment's reach. This was recognized at the time, which is precisely why some legislators worried that the Amendment would have unanticipated effects.

Id. at 7.

IV. CONCLUSION

In this essay I have argued that the original public meaning is not something that lawyers simply find in the past. Rather, it is a theoretical construction that lawyers have made in order to do the work of constitutional theory and engage in constitutional interpretation. There is no single way to construct original public meaning from the materials of the past. What we do construct depends in part on what we think constitutions are for and how they are supposed to work. It also depends on the practical needs of lawyers in search of a distinctively legal meaning that they can employ in legal argument.

I have also argued that a thin version of original public meaning, coupled with a division of labor between interpretation and construction, is the best approach. MDL&Q remind us, however, that even a thin theory of original meaning is not perfect. For one thing, it cannot forestall all problems of disagreement among the ratifying public. In some cases, and on some questions, there will simply be no single original public meaning that we can treat as binding today. In those cases, the best we can do is offer a theory that allows us to stipulate to an original public meaning; or we can move directly to constitutional construction. We should accept this lesson with grace and humility. And we should remember—with openness and even with delight—that the past always contains the ability to surprise us, and reveal that what we thought was natural and obvious is far more complicated and interesting than we had ever imagined.