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The Sixth Amendment as Constitutional Theory: Does Originalism Require that Massiah be Abandoned

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COMMENT

THE SIXTH AMENDMENT AS CONSTITUTIONAL THEORY: DOES ORIGINALISM REQUIRE THAT *MASSIAH* BE ABANDONED?

I. INTRODUCTION

Questions of constitutional interpretation long have been the focus of volumes of legal scholarship. In recent years, however, the American public has increasingly confronted these questions as well, first during the tumultuous events which surrounded the nomination of Robert Bork to the United States Supreme Court in 1987,[1] and again as the Supreme Court handed down a triad of controversial decisions concerning abortion,[2] flag-desecration,[3] and a person's right to die.[4] These difficult cases have reminded many that constitutional law often has grave implications.

Presumably, the public outcry that swirled around Judge Bork's failed nomination had something to do with his belief that the original intention of the framers and ratifiers of the Constitution should be binding upon future interpreters of the document.[5] Rightly or

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[1] *See* Saphire, *Enough About Originalism*, 15 N. KY. L. REV. 513, 514 (1988) ("Perhaps more than any single event in modern American history, the[] [Bork] hearings focused public attention on the practical implications of a methodology of constitutional interpretation. . . .") The book in which Mr. Bork described his experiences as Supreme Court nominee as well as his philosophy of constitutional interpretation, R. BORK, THE TEMPTING OF AMERICA (1990), remained on the New York Times best seller list for several weeks.

[2] *See* Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) (statutory ban on use of public employees and facilities for performance or assistance of nontherapeutic abortions held not to be violative of the Constitution).

[3] *See* Texas v. Johnson, 109 S. Ct. 2533 (1989) (burning American flag held to be protected expression under the first amendment).

[4] *See* Cruzan v. Director, Missouri Dept. of Health, 110 S. Ct. 2841 (1990) (state requirement that evidence of an incompetent person's wishes concerning withdrawal of life-sustaining treatment be proven by clear and convincing evidence held to be constitutional).

[5] *See* Perry, *Why Constitutional Theory Matters To Constitutional Practice (And Vice Versa)*, 6

wrongly, both the American people and the Senate Judiciary Committee concluded that Judge Bork's theory of constitutional law would lead to unacceptable results.[6]

Bork's constitutional jurisprudence—"originalism"—is not self-evident. What is an originalist interpretation of the Constitution, and what results does it compel in particular cases? This Comment examines the originalist theory of constitutional interpretation by applying it to a series of cases in which the Supreme Court established and refined "the *Massiah* doctrine." *Massiah* holds that an individual formally accused of a crime may not to be questioned by government agents in the absence of an attorney. The constitutional provision which the doctrine is based upon, the sixth amendment right to counsel, is silent as to the scope of its protections and the moment those protections attach. Critics of *Massiah* contend that the doctrine has no foundation in either the text or the history of the Constitution. In order to determine whether this contention is true, the *Massiah* doctrine must be examined against the larger backdrop of constitutional theory. Part II of this Comment discusses the cases which comprise *Massiah*. Part III examines the need for constitutional theory and argues that, given this need, originalism is the least problematic theory of constitutional interpretation. Part IV applies the originalist method to the sixth amendment cases examined in Part II, an effort that ultimately reveals more about originalism then it does about the correctness of the Court's decisions. This Comment argues that originalism, in its most sophisticated form, leaves room for precisely the kind of jurisprudential disagreement which currently exists concerning the *Massiah* doctrine. Given the flexibility of the current originalist project, *Massiah* cannot be criticized as being an implausible reading of the protection mandated by the right to counsel.

II. THE SIXTH AMENDMENT AND THE PRETRIAL RIGHT TO COUNSEL

The sixth amendment to the United States Constitution pro-

CONST. COMM. 231, 241 (1989) (Bork was rejected as unfit for membership on the Supreme Court "principally because of his originalist position on issues contested in constitutional theory," and because of the "*disturbing* implications" that many felt his jurisprudence had for judicial practice).

6 No matter how one feels about Judge Bork's theory of constitutional law, there is little doubt that many of the charges leveled against him during his confirmation hearings were distorted and unfair. *See* Kay, *The Bork Nomination and the Definition of "The Constitution,"* 84 NW. L. REV. 1190, 1191 (1990) ("No one can read the voluminous record of the proceedings before the Senate Judiciary Committee without being impressed by the unrelenting and sometimes reckless ferocity with which the campaign against him was raged.").

vides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[7] Like most constitutional provisions, the sixth amendment provides little guidance for determining the outer boundaries of its protections. Specifically, the sixth amendment remains silent as to when the right to counsel attaches and the scope of protection afforded by the right when it has attached. In addition, the sixth amendment says nothing about what the Constitution requires to remedy its violation. These ambiguities have caused numerous problems for the Supreme Court as it has struggled to fill in the parameters of the constitutional right to counsel. This section examines one aspect of this struggle: the development of the *Massiah* doctrine. *Massiah* holds that once formal adversary proceedings have commenced against an individual, that person's sixth amendment rights are violated if the government attempts to deliberately elicit incriminating information from him or her.[8] This doctrine has proven to be both controversial and confusing for the police and members of the Court, who have been unable to agree on whether *Massiah* is grounded in the sixth amendment or is merely the product of judicial usurpation of power.

The doctrinal history of the constitutional right to counsel largely has been shaped by the vicissitudes of selective incorporation. For nearly eighty years after the Constitution was ratified, no federal constitutional limitations on the states' administration of criminal justice were recognized; the Bill of Rights only constrained the actions of the federal government.[9] The Reconstruction amendments which followed the Civil War fundamentally altered the relationship between the federal government and the states, because, for the first time, national constitutional protection was provided fundamental individual rights against state aggression.[10] Despite this intended realignment, the Supreme Court steadfastly adhered

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7 U.S. CONST. amend. VI.

8 Massiah v. United States, 377 U.S. 201 (1964).

9 *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833); Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1326 (1977). The decision by the framers not to make the Bill of Rights applicable to the states reflected both a concession to state power and a belief that preserving state autonomy was essential to the protection of individual rights. *See* G. STONE, L. SEIDMAN, C. SUNSTEIN, & M. TUSHNET, CONSTITUTIONAL LAW 709 (1986). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 3-4 (1988).

10 *See* A. COX, THE COURT AND THE CONSTITUTION 111-14 (1987). *See also*, Currie, *The Constitution in the Supreme Court: Limitations on State Power, 1865-1873*, 51 U. CHI. L. REV. 329, 348 (1983) (it is "quite arguabl[e]" that the ratifiers of the fourteenth amendment intended to radically change the relationship between state and federal governments); L. TRIBE, *supra* note 9, at 547.

to a pre-Civil War notion of federalism and, in two important decisions, drastically limited both the scope of the fourteenth amendment and Congress' power to implement it through legislation.[11] Thus, for the first sixty years of the fourteenth amendment's existence, all claims of infringement on individual rights by a state's criminal procedures were rejected.[12]

Powell v. Alabama,[13] the infamous "Scottsboro boys" case, altered this pattern of complete deference to state authority. There, for the first time, the Court read the due process clause of the fourteenth amendment to include the right to counsel in a state criminal proceeding.[14] In *Powell*, eight black youths were charged with the rape of two white women. Indicted and arraigned amidst a swirl of racial animus, the defendants remained unrepresented by counsel until the morning their trials began, at which time a local attorney reluctantly agreed to represent them.[15] Each of the trials were completed in one day, and all resulted in conviction.[16] Pursuant to Alabama law, a jury had the discretion to fix the punishment for rape from ten years imprisonment to death;[17] the juries in *Powell* imposed the death penalty upon all eight defendants.[18]

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11 *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (effectively rendering the privileges or immunities clause of the fourteenth amendment a dead letter only five years after its ratification), and The Civil Rights Cases, 109 U.S. 3 (1883) (striking down the public accomodation sections of the Civil Rights Act of 1875).

12 *See* Allen, *The Judicial Quest For Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L. FORUM 518, 522 (1975). Three important cases that came before the Court during this time period were Hurtado v. California, 110 U.S. 516 (1884); Maxwell v. Dow, 176 U.S. 581 (1900); and, Twining v. New Jersey, 211 U.S. 78 (1908). Each of these cases involved claims that state criminal proceedings were violative of the fourteenth amendment's due process clause; in each, the state action was upheld. *See* Allen, *supra*, at 522.

13 287 U.S. 45 (1932).

14 *See id* at 68-71. *Powell* has been described as initiating the end of "the 'stone age' of American criminal procedure." *See* Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later— Some Comments on a Remarkable Article*, 73 MICH L. REV. 15, 16 (1974); *see also*, Allen, *supra* note 12, at 521 (*Powell* ushered in "the modern law of constitutional criminal procedure"). The case has also been described as raising "[o]ne of the intriguing questions of constitutional history": "[W]hy the Court . . . first undertook to impose limitations on state power in the administration of criminal justice." *Id.* at 522. Professor Allen sees the Court's decision in *Powell* as, at least in part, a reaction to the rising tide of fascism in pre-World War II Europe: "The European dictatorships, once installed, taught graphic lessons in the uses of the institutions of criminal justice as instrumentalities for the systematic destruction of political values upon which free societies rest." *Id.* These "graphic lessons" led the Court to begin to view the administration of criminal justice less as a local matter and more as an essential component of a national strategy of freedom. *Id.*

15 *Powell*, 287 U.S. at 52-56.

16 *Id.* at 50.

17 *Id.*

18 *Id.*

The Supreme Court, in a 7-2 decision, reversed the defendants' rape convictions, stressing the "casual fashion" in which the matter of counsel had been disposed of in a capital case.[19] In the majority opinion, Justice Sutherland emphasized that effective assistance of counsel was a crucial ingredient to any defendant's fair trial.[20] Furthermore, a court's duty to assign counsel for a defendant was not discharged by an assignment so late in the proceedings as to preclude the effective aid of counsel in the prepararation and trial of the case.[21] The Court noted:

> [D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.[22]

Although the holding in *Powell* was narrow and carefully limited to the facts,[23] the Court for the first time recognized the existence of a constitutional right to pretrial assistance of counsel.

Although *Powell* may have taken a small chunk from the armor of dual sovereignty, the Court continued to view the obligations of federalism as a major constraint on its role in the criminal cases which arose in the next three decades.[24] In *Betts v. Brady*,[25] the Court reiterated that due process mandated the appointment of counsel for indigents in noncapital cases only under special circumstances.[26] By the late 1950s and early 1960s, however, the Court

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19 *Id.* at 56.

20 *See id.* at 69. Justice Sutherland stated:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . Left without the aid of counsel [the defendant] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. [The defendant] lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, [the defendant] faces the danger of conviction because he does not know how to establish his innocence. *Id.* at 68-69.

21 *Id.* at 71.

22 *Id.* at 57.

23 *See id.* at 71:

> In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants of the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.

24 *See* Allen, *supra* note 12, at 526.

25 316 U.S. 455 (1942).

26 *See id.* at 471-473. *See also, id.* at 473:

increasingly began to treat state criminal proceedings with less deference. Thus, in *Hamilton v. Alabama*,[27] the Court ruled that arraignment was a critical stage of Alabama state procedure and, therefore, denial of counsel at that stage of a capital case violated the defendant's due process guarantees.[28]

The case which most directly effected development of the pretrial right to counsel was *Spano v. New York*,[29] which came to the Court in 1959. In *Spano*, the defendant was indicted for murder, retained counsel, and then surrendered to police.[30] After his surrender, the defendant was interrogated by the police for nearly eight hours, during which time he repeatedly requested, and was denied, an opportunity to meet with his lawyer.[31] He eventually succumbed to the persistence of the officers and confessed to the murder.[32] The confession was admitted into evidence at trial, and Spano was convicted and sentenced to death.[33]

The Supreme Court reversed the murder conviction, holding the appellant's confession inadmissable because it was the result of overly zealous police conduct inconsistent with the standards of due process. The Court found that the dubious manner in which Spano's confession had been secured led to his will being "overborne by official pressure, fatigue and sympathy falsely

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> [W]hile want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the [Fourteenth] Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.

Betts exemplifies the Court's due process jurisprudence as it existed from *Powell* in 1932 until the early sixties. During this time, the Court applied the due process clause of the fourteenth amendment only to rights regarded as "fundamental" to the achievement of justice. *See* Israel, *supra* note 9, at 1327 (1977); *see also*, Palko v. Connecticut, 302 U.S. 319 (1937). Therefore, constitutional guarantees "did not necessarily have the same content in their application to state proceedings under the fourteenth amendment as they had in their application to federal criminal proceedings under the Bill of Rights." Israel, *supra* note 9, at 1326-27.

27 368 U.S. 52 (1961).

28 *Id.* In *Hamilton*, the Court viewed the arraignment as a critical stage because state law mandated that defenses not raised at that point be considered abandoned. *See* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 484 (1985). *See also*, Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 76 (1986).

29 360 U.S. 315 (1959).

30 *Id.* at 316-17.

31 *Id.* at 317-19.

32 During the interrogation, a superior police officer instructed a boyhood friend of the defendant, then "a fledgling police officer," to pretend that a phone call from the defendant had gotten him into much trouble and that his job as a policeman was in danger, thereby seeking "to extract sympathy" from the defendant, because his friend had a "pregnant wife and three children." *Id.* at 319. The young officer's job was, in actuality, "in no way threatened." *Id.*

33 *Id.* at 320.

aroused. . . ."[34]

In a concurring opinion, Justice Stewart, joined by Justices Douglas and Brennan, argued that the conviction be overturned purely on due process right to counsel grounds:

> [I]t is my view that the absence of counsel when this confession was elicited was alone enough to render it inadmissible under the Fourteenth Amendment. . . .
>
> Our Constitution guarantees the assistance of counsel to a man on trial for his life in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law. Surely a Constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station.[35]

According to Stewart, it was not the disingenuous manner in which Spano's confession was extracted that made it invalid, but rather that the post-indictment interrogation occurred in the absence of counsel.[36]

In 1963, the Supreme Court made the sixth amendment right to counsel applicable to the states through the fourteenth amendment.[37] The importance of this step should not be underestimated; an incorporated provision of the Bill of Rights was subsequently viewed by the Court as applying to the states in exactly the same manner in which it applied to the federal government.[38] This in turn contributed to the significance of a case decided one year later, *Massiah v. United States*,[39] where the Supreme Court adopted the constitutional interpretation of the right to counsel offered by Justice Stewart in *Spano*. After being indicted for a narcotics violation,

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[34] *Id.* at 323.

[35] *Id.* at 326-327 (Stewart, Douglas, & Brennan, JJ, concurring). In a separate concurrence, Justice Douglas also relied exclusively on the right to counsel:

> Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. . . . .
>
> . . . [W]hat use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses? In that event the secret trial in the police precincts effectively supplants the public trial guaranteed by the Bill of Rights.

Id. at 325-326 (Douglas, Black, & Brennan, JJ, concurring).

[36] *Id.* at 327 ("Under our system of justice an indictment is supposed to be followed by an arraignment and a trial.").

[37] *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that indigent defendants have a sixth amendment right to representation by counsel in all felony trials).

[38] *See* Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 N.W. L. REV. 100, 118 n. 99 (1985) ("Because an incorporated provision thus [came] to the states with both its incidental and 'fundamental' interpretations, due process through the vehicle of incorporation [could] impose on the states what due process by itself [could not].").

[39] 377 U.S. 201 (1964).

Massiah retained counsel, pled not guilty, and met bail.[40] After being released, Massiah's codefendant invited him to discuss the case pending against them. During the ensuing conversation, Massiah, unaware that the codefendant had agreed to cooperate with federal agents, made several incriminating statements.[41] A government agent overheard and recorded the statements through a radio transmitter.[42] At Massiah's trial the statements were entered into evidence, and the jury returned a conviction.[43]

On appeal, the Supreme Court reversed the conviction. Speaking for the Court, Justice Stewart held that Massiah's sixth amendment rights were violated when at trial his own incriminating words were admitted as evidence, because those statements had been "deliberately elicited from him after he had been indicted and in the absence of his counsel."[44] Although the Court acknowledged the factual distinction between *Spano*, where the defendant was interrogated in a police station, and *Massiah*, where the damaging testimony was elicited from the unaware defendant while he was free on bail,[45] it nevertheless held that, to be effective, the constitutional right to counsel "must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse."[46]

Massiah proved to be a sixth amendment watershed—the Court there read the right to counsel to apply to a situation previously not constitutionally protected.[47] In so doing, the constitutional role of counsel was extended from the traditional function of trial preparation and participation to include the counseling and representation of persons formally accused of a crime.[48] The magnitude of this extension was not lost on the dissenters. Justice White contended that the majority's opinion was based on unsound logic: merely because an accused had a right to counsel before and during the trial,

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40 *Id.* at 201.

41 *Id.* at 202-03.

42 *Id.* at 203.

43 *Id.*

44 *Id.* at 206.

45 *Id.*

46 *Id.*

47 *See* Uviller, *Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1157 (1987). Professor Uviller contends that *Massiah* for the first time took the sixth amendment right to counsel out of the courtroom, "the forum in which lawyers have special training and competence," and expanded the postaccusation critical stages doctrine "into new precincts whose dimensions are ill-defined and not readily ascertainable." *Id.* at 1159. *But cf.* Milton v. Wainwright, 407 U.S. 371, 382 (1972) (Stewart, J., with Douglas, Brennan & Marshall, JJ., dissenting) ("The rule in [*Massiah*] has been settled law ever since *Powell v. Alabama*.").

48 *See* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does it Matter*, 67 GEO. L.J. 1, 24 (1978).

it did not necessarily follow that his or her out-of-court admissions must be also excluded if obtained in the absence of counsel.[49] White argued that "[t]he right to counsel has never meant as much before . . . and its extension in this case requires some further explanation, so far unarticulated by the Court."[50]

Massiah's significance largely is due to this apparent shift in the Supreme Court's fundamental understanding of what the sixth amendment right to counsel entails. The case established an important new function of the right to counsel: it could now be used, once formal proceedings had been initiated, as an effective bar to state efforts to obtain evidence.[51]

Massiah was also a crucial right to counsel case for another important reason. The *Massiah* Court held that the violation of the right to counsel was not complete until the evidence obtained from the defendant was admitted at trial.[52] The failure to exclude evidence obtained in a manner inconsistent with *Massiah* was not "collateral" to a separate constitutional violation. Because the sixth amendment specifically addresses procedural aspects of prosecution and trial, it was the admission at trial of evidence acquired in violation of the right to counsel which infringed the constitutional right.[53] This placed the *Massiah* exclusionary rule on "very different footing"[54] than the exclusionary rules established in *Mapp v. Ohio*[55]

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49 *Massiah*, 377 U.S. at 207-13 (White, J., with Clark & Harlan, JJ., dissenting).

50 *Id.* at 209.

51 *See* Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 9-10 (1979).

52 *Massiah*, 377 U.S. at 207 ("All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial."). The dissent in *Massiah* also described the Court's holding as creating "a constitutional rule . . . barring the use of evidence." *Id.* at 208 (White, J., dissenting).

53 *See* Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 889 (1981).

54 Wasserstrom & Mertens, *The Exclusionary Rule on the Scaffold: But Was it a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 175 (1984).

55 367 U.S. 643 (1961). *Mapp*, the precursor to *Gideon*, held that evidence taken by state officials in violation of the fourth amendment guarantee against unreasonable searches and seizures was inadmissible in state court proceedings, *id.* at 655, thereby overruling the twelve-year-old case, Wolf v. Colorado, 338 U.S. 25 (1949). The exclusionary rule which attaches to a *Mapp* violation is not, however, compelled by the Constitution:

> The current conception of *Mapp* is that a fourth amendment violation is complete when the police withdraw from the area they have searched. The evidentiary fruits of that illegal search may, later, be excluded from court, but the point is not that their admission would violate any personal right of the person aggrieved. . . . It is, rather, that excluding this evidence today will tend to discourage the police from violating somebody else's fourth amendment rights tomorrow.

Wasserstrom & Mertens, *supra* note 54, at 175.

and *Miranda v. Arizona*,[56] the landmark Supreme Court decisions ordering the suppression of evidence obtained in violation of the fourth and fifth amendments.

Although controversial when decided, *Massiah* largely laid dormant for over a decade; overshadowed by *Miranda*, *Massiah*'s potential was "lost in the shuffle."[57] The case's likely divisive effect, however, was evidenced by its first major application in one of the most well-known cases in constitutional criminal procedure, *Brewer v. Williams*.[58] There, the defendant was arraigned on an arrest warrant in connection with the Christmas Eve disappearance of a young girl in Des Moines, Iowa.[59] The defendant had consulted with attorneys in both Davenport (where he had surrendered to police) and Des Moines, who advised him not to make any statements concerning the charges.[60] When one of the attorneys learned that a detective would be transporting Williams back to Des Moines, he insisted upon, and received, an assurance from the police that no interrogation would take place.[61] On the subsequent trip, one of the accompanying police officers delivered a speech in which he mentioned to the defendant that the victim's parents were "entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered."[62] In response, Williams, whom the officer knew to be a deeply religious man, made several incriminating statements and led the police to the girl's body.

On appeal, the Supreme Court ruled the defendant's statements inadmissible. Again, Justice Stewart wrote the opinion for the 5-4 majority, stating that Williams' right to counsel under the

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56 384 U.S. 436 (1966). The legendary *Miranda* held the self-incrimination privilege of the fifth amendment to apply to police questioning at the station house and that, in order to protect that privilege, police must inform suspects by reciting to them the warnings which came to bear the case's name. *See* White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 2 (1986), reprinted in Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE, *supra* note 28, at 568. As is the case with *Mapp*, evidence acquired in violation of *Miranda* can be used as evidence against a defendant without violating the Constitution. *See* Michigan v. Tucker, 417 U.S. 433, 444 (1974) (holding that the procedural safeguards established in *Miranda* "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected."). *See also* Grano *supra* note 38, at 106-11.

57 Schulhofer, *supra* note 53, at 884, quoting Y. KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 160 (1980). *See also* Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun?*, 62 IND. L.J. 273, 277 (1987) (*Brewer* "resurrected" *Massiah*).

58 430 U.S. 387 (1977).

59 *Id.* at 390-91.

60 *Id.*

61 *Id.* at 391.

62 *Id.* at 393.

sixth and fourteenth amendments was activated because judicial proceedings had begun before the fateful journey to Des Moines.[63] Because Williams had not validly waived his right to counsel, the Court affirmed the reversal of his conviction.[64]

Chief Justice Burger, writing in dissent, exerted little effort in masking his displeasure with the holding in *Brewer*: "The result in this case ought to be intolerable in any society which purports to call itself an organized society."[65] Burger insisted that the the sixth amendment was meant to serve as a constitutional guarantor of an incorrupt factfinding process and a fair trial.[66] Because the facts surrounding Williams' statements implicated "no issue either of fairness or evidentiary reliability," Burger concluded that the suppression of those statements was unjustified.[67]

In *Brewer*, the majority went to considerable effort to establish that the Christian burial speech was "tantamount to interrogation."[68] There was disagreement among the Justices over this conclusion, but even the dissenters agreed that it was important to determine whether the officers' conduct had risen to the level of interrogative behavior.[69] The Court, however, appears to have been engaged in superfluous behavior—nothing, in fact, turned on whether Williams had been interrogated. This inquiry was simply irrelevant because, as Professor Kamisar has noted, *Massiah* actually stood for the proposition that, once formal adversarial proceedings had been commenced against an individual, that person had the right to legal representation "*whether or not* the government 'interrogates' him."[70] The Court in *Massiah* read the sixth amendment to draw a line at which any further police questioning of the accused in

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63 *Id.* at 399:

> There can be no doubt in the present case that judicial proceedings had been initiated against Williams. . . . A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge in a Davenport courtroom, and he had been committed by the court to confinement in jail.

64 *Id.* at 404-406.

65 *Id.* at 415 (Burger, C.J., dissenting).

66 *Id.* at 426.

67 *Id.* In a separate dissent, Justice White also emphasized the absence of conditions which he felt the right to counsel was designed to protect against. Because "the officers' conduct did not, and was not likely to, jeopardize the fairness of [Williams'] trial or in any way risk the conviction of an innocent man" White saw no reason to suppress the incriminating statements which were the fruits of that conduct. *Id.* at 437 (White, J., with Blackmun & Rehnquist, JJ., dissenting).

68 *Id.* at 400.

69 *Id.* at 440 (Blackmun, J., with White & Rehnquist, JJ., dissenting) ("I would say it is clear there was no interrogation."); *see also id.* at 434 (White, J., dissenting) (arguing that the Christian burial speech was not interrogation because "it was accompanied by a request that [Williams] not respond to it.").

70 Kamisar, *supra* note 48 at 33.

the absence of counsel is not tolerated. This is the case whether or not that questioning is "interrogation," or something less. Therefore, although the result in *Brewer* was consistent with the dictates of *Massiah*, much of its reasoning was not. The doctrine had experienced a rather inauspicious debut; in its first major application of *Massiah*, the Court largely got it wrong.[71]

The next important application of *Massiah* occurred in 1980. In *United States v. Henry*,[72] an incarcerated defendant made incriminating postindictment statements to a cellmate who was acting as a government informant.[73] The statements subsequently were used as evidence at trial.[74] Although the informant had been instructed not to initiate conversation with the defendant, he also was told that he would be remunerated for any incriminating information which he was able to relay to the prosecution.[75] The Court, surprisingly speaking through Chief Justice Burger,[76] held that the defendant's sixth amendment right to counsel had been violated because the government had "intentionally [created] a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel."[77] *Henry* thus extended *Massiah* by applying the doctrine, not only to situations in which the government deliberately elicited statements from an accused person, but also to those where the police intentionally created a scenario likely to induce incriminating statements by a criminal suspect in the absence of counsel.[78]

Justice Blackmun, joined by Justice White, wrote a formidable dissent in *Henry*,[79] contending that the decision "cut[] [itself] loose from the moorings" of *Massiah*.[80] While not arguing against *Massiah* itself, Blackmun rejected the belief that the doctrine could be legitimately extended any further: "*Massiah* certainly is the decision in

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71 *See Brewer*, 430 U.S. at 401 ("[T]he clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation *when the government interrogates him.*") (emphasis added). Clearly, this is not the rule enunciated in *Massiah*.

72 447 U.S. 264 (1980).

73 *Id.* at 266.

74 *Id.* at 266-67.

75 *Id.*

76 *See* Kamisar, *Police Interrogation and Confessions*, *in* J. CHOPER, Y. KAMISAR, & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS, 1979-1980 at 99.

77 *Henry*, 447 U.S at 274.

78 *See* Saltzburg, *Foreward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 206 (1980).

79 *See* Kamisar, *supra* note 76, at 101.

80 *Henry*, 447 U.S. at 277 (Blackmun and White, JJ., dissenting). *See also id.* at 280 ("[T]he Court's 'likely to induce' test fundamentally restructures *Massiah*.").

which Sixth Amendment protections have been extended to their outermost point."[81] Blackmun argued that there was a fundamental difference between the facts of *Massiah* and those of *Henry*. In *Massiah*, a government agent had organized the pretrial rendezous between the accused and the turncoat co-defendant;[82] in *Henry*, however, the agent instructed the informant "*not* to elicit statements from [the defendant], but merely passively to receive them."[83] Thus, because the record in *Henry* failed to show any indication that the informant had "stimulated" the incriminating remarks, Blackmun contended that *Henry* failed to satisfy the "deliberately elicit" requirement of *Massiah*.[84]

In a separate dissent, Justice Rehnquist seized the chance to question the constitutional legitimacy of the *Massiah* doctrine.[85] Rehnquist urged that the sixth amendment right to counsel was based upon a traditional understanding of the role of the attorney as "legal expert and strategist."[86] Therefore, whether or not deliberate elicitation had occurred after formal proceedings had been initiated was not determinative of whether the right to counsel had been violated.[87] Justice Rehnquist argued that *Massiah* "rest[ed] on a prophylactic application of the Sixth Amendment" which was not constitutionally mandated:[88]

> If the event is not one that requires knowledge of legal procedure, involves a communication between the accused and his attorney concerning investigation of the case or the preparation of a defense, or otherwise interferes with the attorney-client relationship, there is in

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81 *Id.* at 282.

82 *Id.* at 279.

83 *Id.* at 278.

84 *Id.* at 287-88. *See also id.*, at 279 (claiming that the Court's ruling in *Henry* "saps the word 'deliberately' of all significance.").

85 *Id.* at 290 (Rehnquist, J., dissenting).

86 *Id.* at 293. Rehnquist beckoned back to the Court's opinion in *Powell* for support of his reading of the traditional nature of the right to counsel protection:

> Historically and in practice, in our country at least, [a hearing] has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel every step in the proceedings against him. Without it, he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id. at 291-92 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

87 *Id.* at 293.

88 *Id.* at 289.

> my view simply no constitutional prohibition against the use of incriminating information voluntarily obtained from an accused despite the fact that his counsel may not be present.[89]

Although Rehnquist obviously felt that the Court had wrongly interpreted the constitutional mandates of the sixth amendment, he was wrong to characterize the *Massiah* rule as "prophylactic" in nature.[90] The Court had been quite explicit in *Massiah*,[91] *Brewer*,[92] and *Henry*[93] that the rule it established and refined in those cases was not merely a judicial creation designed to deter government misconduct, but rather, was required by the sixth amendment itself. The exclusionary rule attached to the sixth amendment through *Massiah*, unlike those that attach to the fourth and fifth amendments, was a matter of constitutional right.[94]

The last piece of the *Massiah* doctrinal puzzle was put into place by the Court in *Maine v. Moulton*,[95] a case which presented a factual pattern quite analogous to that of *Massiah*. In *Moulton*, the defendant was indicted for theft, retained counsel, and, upon release on bail, made incriminating remarks to his codefendant, who was cooperating with the prosecution.[96] The *Moulton* scenario, however, was unique in two ways: the defendant himself had arranged for the meeting where the self-incrimination took place,[97] and the government was using the *Moulton* informant to investigate a crime other than the one for which the defendant had been indicted.[98]

The Court, unpersuaded that these were important factual distinctions, held that the case fell under the rubric of *Massiah*. The majority opinion, written by Justice Brennan, stated that the identity of the party who engineered the meeting where the incrimination took place was irrelevant to the Court's holdings in *Massiah* and *Henry*.[99] Brennan held that the right to counsel, at least after formal

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89 *Id.* at 293-94.

90 *See* Grano, *supra* note 38, at 123.

91 *See* 377 U.S. 201, 205 ("Here we deal . . . with a federal case where the specific guarantee of the Sixth Amendment directly applies. . . . We hold that the petitioner was denied the basic protections of that guarantee. . . .").

92 *See* 430 U.S. 387, 398 ("[T]he right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been intiated against him. . . .").

93 *See* 447 U.S. at 274 ("By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel.").

94 *See supra*, notes 51-56, and accompanying text.

95 474 U.S. 159 (1985).

96 *Id.* at 162-66.

97 *Id.* at 174.

98 *Id.* at 178.

99 *See id.* at 174-75 ("[T]he identity of the party who instigated the meeting at which

charges have been brought, required that an accused's attorney serve as a "medium" between her and the government.[100] One aspect of such a requirement is an affirmative obligation on the part of the government not to act in a manner that might circumvent the protections accorded one who has invoked their right to counsel.[101] Although this constitutional requirement is not violated if incriminating information is obtained from the accused through mere "luck or happenstance" (even when the right to counsel has already attached), Brennan strongly emphasized that this was not the case in *Moulton*, where the state had knowingly exploited the opportunity to confront the defendant in the absence of his counsel.[102] Capitalizing on the opportunity to circumvent an accused's right to counsel, Brennan argued, was the equivalent of intentionally creating that opportunity and, therefore, breached the government's sixth amendment obligation.[103]

The dissenters in *Moulton*, speaking through Chief Justice Burger, reiterated Justice Blackmun's argument that *Massiah* marked the outermost boundaries of the constitutional right to counsel and should be extended no further.[104] In addition, even if the protections of the sixth amendment had extended to the facts in *Moulton*, Burger argued that applying the exclusionary rule to suppress the garnered evidence was unnecessary.[105] Because the purpose of the exclusionary rule was to deter police misbehavior, it did not need to extend to cases such as *Moulton*, where "it is impossible to identify any police 'misconduct' to deter. . . ."[106] Absent any need for deterence, Burger concluded that the costs outweighed the benefits of suppressing inherently trustworthy evidence.[107]

This analysis again evidences the confusion which surrounds *Massiah*, particularly with regard to its exclusionary rule. A cost-benefit approach to the suppression of evidence is appropriate when the exclusionary rule being applied is a "prophylactic" rule designed to serve as a protective safeguard against the violation of a constitutional right.[108] Because such a rule is not constitutionally

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the Government obtained incriminating statements was not decisive or even important to our decisions in *Massiah* or *Henry*. . . .").

100 *Id.* at 176.

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.* at 190 (Burger, C.J., joined by White, Rehnquist, and O'Connor, JJ., dissenting).

105 *Id.*

106 *Id.* at 192.

107 *Id.* at 191 (quoting United States v. Leon, 468 U.S. 897, 907 (1984)).

108 *See* Grano, *supra* note 38, at 105.

mandated, if the costs of suppressing evidence under it outweigh the benefits of doing so, that evidence may be admitted into trial without violating the Constitution.[109] However, as noted above, a violation of *Massiah* is not complete until the evidence gathered is used against the defendant at trial.[110] Therefore, it is the sixth amendment itself that requires that the evidence be suppressed.[111] Because the *Massiah* exclusionary rule is compelled by the sixth amendment, it must be applied regardless of the costs of doing so.

After *Moulton*, the *Massiah* doctrine was largely in place.[112] The doctrine holds that the sixth amendment right to counsel attaches once formal adversary proceedings are commenced against an individual. After that point, the police must respect the right to counsel by refraining from deliberately eliciting information from the accused, absent the presence of his or her attorney. If statements are obtained in the absence of counsel, the sixth amendment requires that they not be used against the defendant at trial.

Massiah and its progeny have come to represent a particularly confused constitutional doctrine. Some members of the Supreme Court see the doctrine as a valid application of the sixth amendment right to counsel, others see the *Massiah* decision itself as correct but criticize further extensions of its reasoning, while still others criticize the Court's work in *Massiah* as going far beyond what the sixth amendment requires. In addition, the Court's inconsistent application of the exclusionary rule to suppress evidence gathered by the government in violation of *Massiah* has further contributed to the confusion. In order to determine whether the *Massiah* doctrine is or is not compelled by the sixth amendment right to counsel, it must be examined against the larger backdrop of constitutional theory. According to what guidelines should the language of the sixth amendment be construed?

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109 *Id.*

110 *See supra* note 52, and accompanying text.

111 *See* Schulhofer, *supra* note 53, at 889:

> [T]he *Massiah* "exclusionary rule" is not merely a prophylactic device; it is not designed to reduce the *risk* of actual constitutional violations and is not intended to deter any pretrial behavior whatsoever. Rather, *Massiah* explicitly permits government efforts to obtain information from an indicted suspect, so long as that information is not used "as evidence against *him* at his trial." The failure to exclude evidence, therefore, cannot be considered *collateral* to some more fundamental violation. Instead it is the admission at trial that in itself denies the constitutional right.

112 Recent *Massiah* cases have mainly addressed the issue of waiver. *See e.g.*, Patterson v. Illinois, 487 U.S. 285 (1988) (*Miranda* warnings administered by law enforcement officials were sufficient to support a waiver of right to counsel for post-indictment confession); Michigan v. Harvey 110 S. Ct. 1176 (1990) (statement taken subsequent to defendant's invocation of right to counsel may be used for purposes of impeachment).

Although the debate over contrasting theories of constitutional interpretation have generated tens of thousands of pages of legal scholarship in the last two decades, very little of this work has focused on the constitutional provisions that concern the administration of criminal justice: "Even those who *are* intimately acquainted with the criminal procedure aspects of constitutional law tend to give relatively little attention to criminal procedure when they concentrate on constitutional theory."[113] With this omission in mind, the remainder of this Comment examines the dominant theory of constitutional interpretation (at least in terms of the attention it has generated from both proponents and critics), originalism, and then applies the theory to the controversies surrounding *Massiah* in an effort to determine whether the originalist method offers any insights into the proper scope of the sixth amendment right to counsel.

III. THE INTERPRETIVE CHALLENGE OF ORIGINALISM

A. WHY THE NEED FOR CONSTITUTIONAL THEORY?

Although several aspects of the Supreme Court's decision in *Marbury v. Madison*[114] are prone to criticism,[115] there is no doubt that once the jurisprudential dust had settled, the Court possessed the authority to render invalid actions by legislative and executive officials which it deemed to be inconsistent with the United States Constitution.[116] How the Court should conduct itself in carrying out this endeavor has been the source of conjecture since that time. Issues of constitutional interpretation and proper judicial role are inextricably linked in this determination. The interpretive methodology of constitutional adjudication that one finds to be most correct will, in large part, be a reflection of how much or how little discretion that person feels the judicial branch should be accorded when applying the fundamental law in a constitutional democracy.[117]

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113 Schauer, *Easy Cases*, 58 S.CAL. L. REV. 399, 400 n.4 (1985). *But cf.*, Wasserstrom and Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19 (1988).

114 5 U.S. (1 Cranch) 137 (1803).

115 *See* Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989) (arguing that the *Marbury* Court erred in interpreting section 13 of the Judiciary Act of 1789 as conferring on the Court original jurisdiction); A. BICKEL, THE LEAST DANGEROUS BRANCH 1-14 (1962) (the Court's opinion in *Marbury* is "very vulnerable."). The most-cited examination of the shortcomings of the *Marbury* decision is Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1 (1969).

116 "It is, emphatically, the province and duty of the judicial department, to say what the law is." 5 U.S. at 176.

117 *See* Chemerensky, *The Price of Asking the Wrong Question: An Essay on Constitutional*

In the *Marbury* opinion, Chief Justice John Marshall represented the processes of judicial review to be largely mechanical in nature.[118] Constitutional adjudication, however, quickly proved to be a much more discretionary and indeterminate endeavor.[119] The constitutional provisions implicated by cases reaching the Supreme Court are invariably expressed in "delphic or ambiguous" language.[120] These open-textured provisions permit a range of plausible linguistic meanings.[121] Judges in turn must ask "where should

Scholarship and Judicial Review, 62 TEX. L. REV. 1207, 1210 (1984) ("The real question for debate is how much discretion the Court should have in interpreting the meaning of the Constitution.").

118 In *Marbury*, Marshall offered three examples of legislation that would be violative of the Constitution: Congressional enactment of a bill of attainder or taxation on a state's export of cotton, tobacco, or flour, both clear violations of article I, section 9, and legislation allowing that a conviction for treason be based on one witness's testimony or an out-of-court confession, an act that would be inequivocably inconsistent with the textual mandate of article III, section 3. Marshall shrewdly chose three of the least ambiguous constitutional provisions for his examples. *See* G. STONE, L. SEIDMAN, C. SUNSTEIN, & M. TUSHNET, *supra* note 9, at 31 (describing this sort of analysis as "mechanical"); J. ELY, DEMOCRACY AND DISTRUST 186 n.11 (1980) (Marshall's reasoning in *Marbury* "depends heavily on the assumption that constitutional review involves merely the traditional judicial function of comparing one legally prescribed mandate with another to see if they conflict. . . .") The quintessential statement representing judicial review to be simply mechanical in nature is Justice Roberts' opinion for the Court in United States v. Butler, 297 U.S. 1, 62 (1936) (judicial review requires the Court "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.").

119 *See* Saphire, *The Search For Legitimacy in Constitutional Theory: What Price Purity*, 42 OHIO STATE L.J. 335, 338 (1981) ("[A] court, in exercising the power of review in constitutional cases, must do what it is supposed to do—interpret. But it must *really* interpret, and that function can be somewhat more complex and sophisticated than Chief Justice Marshall first led us to believe."). One indication that this is so is that, in the other two cases that, along with *Marbury*, comprise the trilogy of constitutional adjudication which made Marshall legendary, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) and Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), Marshall applies constitutional reasoning bearing little resemblance to that which he described in *Marbury*. In *McCulloch* and *Gibbons*, Justice Marshall gave broad readings to the commerce clause (article I, section 8, clause 3), and the necessary and proper clause (article I, section 8, clause 18), respectively; neither result, however, was compelled by the text of the Constitution in the same sense as those reached in Marshall's hypotheticals.

120 Saphire, *supra* note 119, at 338. *See also*, J. ELY, *supra* note 118, at 13 ("Constitutional provisions exist on a spectrum ranging from the relatively specific to the extremely open-textured."). The constitutional provisions at issue in cases that animate the Supreme Court are rarely phrased in language so clear as to render one outcome inarguably correct: "Decisions *either way* in *Plessy v. Ferguson* [163 U.S. 537 (1896)], *Lochner v. New York* [198 U.S. 45 (1905)], *Brown v. Board of Education* [347 U.S. 483 (1954)], and *Roe v. Wade* [410 U.S. 113 (1973)] would have fallen within the boundaries marked by the constraints in question." Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation"*, 58 S. CAL. L. REV. 551, 566 (1985).

121 *See* Simon, *The Authority of the Constitution and its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 613 (1985). Sanford Levinson offers perhaps the most radical version of this statement: "There are as many plausible read-

we go in search of guiding principles for interpreting the linguistically open-ended clauses of the Constitution . . . ?"[122] This search constitutes the enterprise of constitutional interpretive theory,[123] and is necessary because of the unique role that a judiciary plays in a constitutional democracy:

> Some theory of our Constitution—more particularly, when we talk of judicial review, some theory of the appropriate constitutional role of an appointed judiciary in a government like ours—must be developed and defended unless we are content simply with a Court that grinds whatever political ax it prefers on a particular day.[124]

Such a Court would not do because of America's commitment, to popular sovereignty: "[R]ule in accord with the consent of a majority of those governed is the core of the American governmental system."[125] The doubts that are most often expressed about the institution of judicial review rest upon a concern that, in interpreting the Constitution, judges will be influenced by their own views about how society should be ordered.[126] The most famous characterization of the tension that exists between judicial review and democracy when an unelected judiciary invalidates the work of an electorally accountable legislature is Alexander Bickel's countermajoritarian difficulty.[127] Absent a theory of constitutional interpretation, judicial review could easily erode into government by judicial fiat, a notion antithetical to the concept of majority rule.[128]

It seems, however, that the countermajoritarian specter of judi-

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ings of the United States Constitution as there are versions of *Hamlet*, even though each interpreter, like each director, might genuinely believe that he or she has stumbled onto the one best answer to the conundrums of the text." Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 391 (1982).

122 Schauer, *supra* note 113, at 399.

123 *See* Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 281 (1985):

> Legal reasoning—reasoning done by judges in deciding particular cases—is special in ways demanding that any complete theory of adjudication include some subtheory called a theory of interpretation. Legal reasoning has a text to deal with in the same way that theology, dream theory, or literary criticism deal with various texts. All such "hermeneutic" enterprises are distinct from the normal scientific enterprise of explaining phenomenon, natural or social, in that they depend upon the existence of a text that requires interpretation.

124 Ely, *Foreward: On Discovering Fundamental Values*, 92 HARV. L. REV. 1, 5 (1978).

125 J. ELY, *supra* note 118, at 7.

126 *See* G. STONE, L. SEIDMAN, C. SUNSTEIN, & M. TUSHNET, *supra* note 9, at 33.

127 *See* A. BICKEL, *supra* note 115, at 16-17 ("[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.").

128 *See* Chemerensky, *Foreward: The Vanishing Constitution*, 103 HARV. L. REV. 44, 46 (1989) ("For several decades, the scholarly literature . . . has been dominated by . . . a conviction that judicial review is a deviant institution in a democratic society.").

cial review has been exaggerated. The Constitution does not establish untrammeled majority rule; many aspects of the document itself are countermajoritarian.[129] Therefore, although judicial review is undoubtedly countermajoritarian in nature, this fact does not mean that the institution is inconsistent with the political values expressed in the Constitution.[130] This recognition that the Constitution contains both democratic *and* countermajoritarian aspects, however, does not in any way lessen the need for constitutional theory. Although the document does not provide for unconstrained majority rule, neither does it allow for arbitrary, unlimited judicial discretion; ideally, "judges do not check the people, the Constitution does."[131]

B. WHY ORIGINALISM?

The necessity of constrained constitutional judgment, born from judicial review's potentially devastating effect on constitutional democracy, continues to motivate scholarly attempts to define the parameters of the Court's role in constitutional enforcement.[132] Originalism has been *the* major theory offered as a safeguard against judicial subjectivity.[133] Originalists posit that judges should apply constitutional rules "*in the sense in which those rules were understood by the people who enacted them.*"[134] Originalism purports to be the theory that best reconciles the tensions between democracy and judicial review. The Constitution is authoritative fundamental law because it was ratified by the people;[135] therefore, it only makes sense to interpret constitutional language as it was understood by those who had the authority to make it law—its enactors. Problems arise, of course, because those who framed the Constitution and its amendments often chose nebulous, open-ended phraseology.[136] But

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129 *See id.*, at 74-77. *See also* Brennan, *The Constitution of the United States: Contemporary Ratification, reprinted in* INTERPRETING LAW AND LITERATURE 13 (S. Levinson & S. Mailloux eds.) (1988) ("It is the very purpose of a Constitution—and particularly of the Bill of Rights—to declare certain values transcendent, beyond the reach of temporary political majorities.").

130 *See* Chemerensky, *supra* note 128, at 75.

131 J. ELY, *supra* note 118, at 8.

132 *See* Schlag, *Framer's Intent: The Illegitimate Uses of History*, 8 U. PUGET SOUND L. REV. 283, 289 (1985).

133 *See* Saphire, *supra* note 1, at 518 (proponents of originalism argue that it is "instrumentally superior" to other theories of constitutional interpretation "because it is the most successful in imposing constraints on the judicial decisionmaking process.").

134 Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226, 230 (1988) (emphasis in original).

135 *See* McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 99 (1988).

136 *See* A. Cox, *supra* note 10, at 68 (when the Court comes to apply "such majestic

originalists contend that an honest reading of the historical record will yield a relatively determinate indication of what constitutional language was intended to mean.[137]

Although the shortcomings of originalism are well-documented,[138] it remains a compelling theory of constitutional interpretation because it seemingly is more consistent with traditional American political values than nonoriginalist theories. Nonoriginalist constitutional theory can take one of two forms. One such form is nonoriginalist nontextualism, which posits that constitutional adjudiciation should produce the "best" results, as understood by the person doing the adjudicating; text and original intent seem to matter little to proponents of this approach. One wonders, however, if it is even necessary to bother with nonoriginalist nontextualism, in that it seems rather incredible that any serious constitutional theorist would advocate such an approach.[139] This is so because nonoriginalist nontextualism is an interpretive theory which is elitist,[140] unprincipled, and completely antithetical to the American

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ideals" as 'freedom of speech,' 'due process of law,' and 'the equal protection of the laws,' the words alone do not suffice in determining an outcome). *See also*, Brennan, *supra* note 129, at 13 ("Like every text worth reading, [the Constitution] is not crystalline. The phrasing is broad and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure.").

137 *See* Kay, *supra* note 134, at 244 ("[I]t is almost always possible to examine the constitutional text and other evidence of intent associated with it and make a reasonable, good faith judgement about which result is more likely consistent with that intent."); Meese, *Address Before the D.C. Chapter of the Federalist Society Lawyers Division, reprinted in* LAW AND LITERATURE 27 (S. Levinson & S. Mailloux eds. 1988) ("[T]he meaning of the Constitution can be known.").

138 A sample of the legal scholarship criticizing originalism includes Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Brest, *The Misconceived Quest For the Original Understanding*, 60 B.U.L. REV. 204 (1980); Chemerinsky, *supra* note 117; Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984); Schlag, *supra* note 132; M. TUSHNET, RED, WHITE, AND BLUE (1988). Some scholars have criticized the political-moral justifications for an originalist theory of constitutional interpretation; *see generally*, Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482 (1985). This paper, however is less concerned with the problems associated with *justifying* originalism than with the problems entailed by *applying* the theory.

139 *See* Moore, *Do We Have An Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 113 (1989) ("[N]o one seriously believes that noninterpretive review is legitimate."). *See also*, Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 687 (1991) (it is very difficult to locate any nonoriginalist nontextualists among contemporary jurists and academic commentators).

140 *See* McConnell, *supra* note 135, at 105:

> [T]here is no reason to believe that judges are likely to be more reliable than representative bodies in discovering and enforcing natural right. Judges are grossly unrepresentative of the population. All are lawyers, most are middle-aged or older, all are upper-middle class or above, most are white males, most are secular and skeptical in their philosophical orientation, in common with the professional elite in this

conception of a constitutional democracy:

> [R]ule by judges is objectionable in this society because it is inconsistent with the principles of self-government. The tradition of this political community cannot accept the proposition that the elite make better decisions than the people, or that popular institutions are inferior to electorally unaccountable ones. The cure to republican diseases must themselves be republican.[141]

While nonoriginalist nontextualism may have occasionally occupied the crevices of constitutional law, rarely, if ever, has a judge explicitly announced this to be his or her approach. The theory stands in polar opposition to the American conception of government and thus seems doomed to fail.

The second category of nonoriginalist theory, nonoriginalist textualism, provides a more plausible approach to constitutional interpretation. According to this theory, the words of the constitutional text "should be interpreted as they are now understood, or as they have been understood, by the American political community."[142] This approach is an improvement over nonoriginalist nontextualism because it provides a mode of decisionmaking at least somewhat akin to principled constitutional adjudication. Judges are constrained by the words of the Constitution; the text of the document is authoritative, but not its original meaning. Rather, constitutional provisions are interpreted to convey whatever contemporary meaning they may reasonably bear.

Ultimately, nonoriginalist textualism is also a theory too flawed to be seriously advocated. Its most cogent critics argue that the results of a nonoriginalist textualist approach to interpretation turn "less on mind—on conscious human thought expressed through actual decisions—than on historical accident";[143] constitutional outcomes of such interpretation depend upon "the fortuity of the authors' choice of words," a choice that may have been the result of stylistic preference or mere happenstance.[144] It certainly seems odd to accord such linguistic randomness the status of fundamental law.

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country. Rather than natural right, judges are more likely to impose upon us the prejudices of their class.

141 McConnell, *Book Review*, 98 YALE L.J. 1501, 1538 (1989). *See also*, Perry, *supra* note 139, at 687-88 ("Nonoriginalist [nontextualist] judicial review seems fundamentally antithetical to basic axioms of modern American political-legal culture.").

142 McConnell, *supra* note 141, at 1524. *See also* Alexander, *Of Two Minds About Law and Minds*, 88 MICH. L. REV. 2444, 2444 (1990) ("Present-oriented interpretation is an interpretive approach to legal texts that assigns them the best meaning, in terms of contemporary social policy, that they could plausibly convey were they written today rather than at the actual times of their enactment.").

143 Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 115 (1989).

144 Alexander, *supra* note 142, at 2449.

Apart from causing constitutional law to depend on fortuitous choices of language rather than thoughtful political deliberation, nonoriginalist textualism makes little sense when one considers why the Constitution is authoritative in the first place, that is, why we perceive that document to be the supreme law of the land, rather than the Ten Commandments, the Koran, or Grimms' Fairy Tales: "We look to a constitution because it is already regarded as law and that brings us back to the process by which it was created, to the will of the constitutionmakers."[145] The reason we regard the Constitution as fundamental law is inextricably linked with "something about the way it was uttered";[146] nonoriginalist textualism fails as a theory of constitutional interpretation because it does not comprehend the reason *why* it is the Constitution we are interpreting.[147]

In summary, nonoriginalist nontextualism is a bankrupt constitutional theory because it stands in polar opposition to American conceptions of popular sovereignty and constitutional democracy. Nonoriginalist textualism, while at least providing some constraints on judicial discretion, likewise cannot be defended as a sound theory of constitutional interpretation for two important reasons. First, such an interpretive approach would often result in "governance by linguistic accident" rather than by deliberative politics.[148] Secondly, such an approach is seemingly at odds with the very determination to treat the Constitution as law.[149] Therefore, originalism seems to be a more satisfying constitutional theory because it potentially provides rules for principled judicial decision-making that are sensitive

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145 Kay, *Original Intentions, Standard Meanings, and the Legal Character of the Constitution*, 6 CONST. COMM. 39, 50 (1989). *See also*, Smith, *supra* note 143, at 111-12:

> [Nonoriginalist textualism] effectively separates [the provision at issue] from the source of its authority. To be sure, the words of the enacted law may continue to constrain the judge. But the essential fact that made *those words* (and not a science fiction novel, or even a law review article) efficacious to bind the judge—i.e., the fact that the words express a specific collective decision made by the designated political authority—is now de-emphasized or dismissed. The legal text is methodically dissociated from the phenomenon upon which its power to constrain depends.

146 Kay, *supra* note 145, at 45.

147 *See* Smith, *supra* note 143, at 113 (arguing that, once untethered from their original meaning, "the pertinent question" is no longer "whether the words *can* constrain, but rather why in the world they *should*."). *See also*, McConnell, *supra* note 141, at 1528:

> If one necessary (even if not sufficient) condition for the Constitution to be authoritative is that it was adopted by the people, then it follows that principles never adopted by the people cannot be authoritative, even if they have some linguistic plausibility. Functionally, to apply an unintended meaning is no different from introducing a principle that has no textual basis whatsoever. The only difference between the unintended meaning and the extratextual principle is verbal happenstance. . . . None of these principles were the product of the people's "reflection and choice." None of these principles properly can be said to be law.

148 McConnell, *supra* note 141, at 1526.

149 *See* Kay, *supra* note 145, at 45.

to the reasons why the Constitution is our fundamental law.[150] Whether originalism in fact provides any more significant constraints on judicial discretion than do its theoretical competitors remains to be seen.

C. WHAT IS THE ORIGINALIST METHOD?

Given the need for constitutional theory and the inherent shortcomings of nonoriginalist interpretive methodologies, it becomes important to examine the contours of the originalist project. The way in which originalists define their interpretive mission has been largely influenced by the 1954 Supreme Court decision *Brown v. Board of Education*.[151] In *Brown*, the Court overruled *Plessy v. Ferguson*[152] and held that separate educational facilities based on race were inherently unequal and thus violated the equal protection clause of the fourteenth amendment. The decision has generally come to be seen as representing the work-product of the Supreme Court at its finest.[153]

Because *Brown* is so firmly regarded as being a "correct" decision,[154] any constitutional theory which hopes to be taken seriously in America must provide an explanation that shows *Brown* to be consistent with its premises.[155] This theoretical need to explain *Brown* as having been correctly decided, however, poses a problem for the originalist. Segregated educational facilities were in existence when the fourteenth amendment was ratified and much historical evidence suggests that the amendment was not intended to outlaw such practices.[156] The *Brown* decision seems to be difficult to square

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150 *See* McConnell, *supra* note 141, at 1525:

> The appeal of originalism is that the moral principles so applied [during judicial review] will be the foundational principles of the American Republic—principles we can all perceive for ourselves and that have shaped our nation's political character—and not the political-moral principles of whomever happens to occupy the judicial office.

151 347 U.S. 483 (1954).

152 163 U.S. 537 (1896) (upholding Louisiana's racial segregation of railroad passengers).

153 *See* M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 1 (1982).

154 *See*, Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONT. PROB. 57, 70 (1978) (contending that *Brown* is "as well justified a constitutional decision as any ever rendered by the Supreme Court"); *see also*, A. COX, *supra* note 10, at 259 (applauding the Court in *Brown* for not ignoring "the emerging moral sense of civilization.").

155 *See* Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1374 (1990) ("No constitutional theory that implies that *Brown v. Board of Education* . . . was decided incorrectly will receive a fair hearing nowadays. . . .").

156 In 1868 eight northern states permitted segregated schools and five additional northern states excluded black children entirely from public education. . . . The Reconstruction Congress itself permitted the District of Columbia schools to re-

with originalism.

Originalists have reconciled *Brown* with their theory of constitutional interpretation by differentiating between two possible ways of defining original intent. One way is to limit the definition to the specific, historically identifiable goals of the constitution-makers.[157] This approach attempts to ascertain the specific, subjective intentions of the ratifiers of a particular constitutional provision through historical facts, and then "reason from psychological generalizations on these facts to conclusions about how the Framers would have understood these textual phrases in present contexts."[158]

The original intentions of the constitution-makers can also be defined in a less concrete, more abstract manner. This mode of originalist interpretation "attempts to discern the principles the Framers enacted, the values they sought to protect."[159] The distinction between an originalist project based on the specific intentions of the constitution-makers and one based on more general constitutional principles is made more clear when *Brown* is considered. As noted above, it seems quite uncontroversial that those who enacted the fourteenth amendment did not view segregated educational facilities as violating the immediate mandate of the equal protection clause.[160] Originalism based upon the specific intent of those enactors, therefore, necessarily would lead to the conclusion that *Brown* was wrongly decided. Originalism based on the broader constitutional principle signified by the equal protection clause, however, need not arrive at the same conclusion. This is the case because the clause is phrased in broad, nonexhaustive language; its textual mandate speaks only in terms of equality:

> [T]he [*Brown*] Court in 1954 understood, as the *Plessy* Court in 1896 did not, that racial segregation in public schools and other public facilities in fact subjugates blacks, despite its appearance of symmetry, because it stands for and reinforces white supremacy—a regime we now recognize to be utterly at odds with the concept of "equal protection of the laws." It was not the concept embodied in the equal protection clause that changed between 1896 and 1954, but only our relevant

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main segregated . . . and even the spectators in the gallery listening to the Senators debate the fourteenth amendment were segregated by race.

G. STONE, L. SEIDMAN, C. SUNSTEIN, & M. TUSHNET, *supra* note 9, at 463 (citing R. KLUGER, SIMPLE JUSTICE 633-634, Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, 1972 WASH. U. L.Q. 421, 460-462, and R. BERGER, GOVERNMENT BY JUDICIARY 123-125 (1977)).

157 *See* Simon, *supra* note 138, at 1483 n.10.

158 Hoy, *A Hermeneutical Critique of the Originalism/Nonoriginalism Distinction*, 15 N. KY. L. REV. 479, 481 (1988).

159 Bork, *Original Intent and the Constitution*, HUMANITIES, Feb. 86, at 22, 26.

160 *See supra* note 156; *see also*, Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

perceptions and understandings.[161]

When the intentions of the enactors of the equal protection clause are stated in terms of the principles they sought to constitutionalize, rather than the actual practices they meant to prohibit, *Brown* can reasonably be explained as being consistent with the originalist project.

Originalism based on constitutional principles rather than specific intent is also immune from the major criticism levelled at the latter version of the theory. Critics of originalism often contend that the theory requires projection of the constitution-makers' intentions over time.[162] They argue that this entails a determination of how the ratifiers would have decided the case today, if they had survived to do so. Because originalists must ascertain how the ratifiers would have dealt with issues they did not actually confront,[163] nor could have possibly foreseen, theorists critical of originalism conclude that the theory is simply untenable.[164]

Critics of originalism who attack the theory on these grounds largely are taking on a "straw man."[165] As we have seen, the originalism taken seriously today is not based on the premise that the specific intentions of the framers are authoritative and binding on future policymakers. Instead, the focus of the originalist inquiry is the principles or values that the ratifiers meant to establish as supreme law; it is those principles which are then applied in deciding cases that involve situations which the framers could not possibly have foreseen:

> The originalist project is not to speculate about what the ratifiers' beliefs would have been in our day, were they still living, and then to decide the case on the basis of those beliefs. Rather, the originalist project is to discover what belief(s) the ratifiers constitutionalized, and then to decide the case on the basis of that belief (in conjunction with whatever beliefs are supplemental to it).[166]

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161 L. TRIBE, *supra* note 9, at 1477-78. *See also*, A. COX, *supra* note 10, at 260 ("[T]he Desegregation Cases of the 1950s faithfully projected the general intent of the sponsors of the Equal Protection Clause upon a more particular set of circumstances as to which the sponsors left no adequate record of their particular intent."); R. BORK, *supra* note 1, at 82 ("The ratifiers probably assumed that segregation was consistent with equality but they were not addressing segregation. The text itself demonstrates that the equality under law was the primary goal.").

162 *See* Bennett, *supra* note 138, at 457 (1984).

163 *Id.* at 465.

164 *See* Brest, *supra* note 138, at 221 ("[Originalism] involves the counterfactual and imaginary act of projecting the adopters' concepts and attitudes into a future they probably could not have envisioned. When the [originalist] interpreter engages in this sort of projection, she is in a fantasy world more of her own than of the adopters' making.").

165 *See* M. PERRY, MORALITY, POLITICS & LAW 125 (1988).

166 *Id.* at 126.

Originalism, therefore, is immunized from the objection that contemporary jurists cannot possibly discover how the enactors of the Constitution would have resolved unforeseen modern situations.[167]

The originalism which is advocated by its most insightful and reflective proponents, one that focuses on the principles signified by the constitutional text rather than the specific intentions of those who ratified that text, therefore appears to be a more plausible theory of constitutional interpretation than any other. Originalism is superior to nonoriginalist theories because it requires judges to apply principles constitutionalized by the ratifiers of the document rather than invent new ones. The originalist project therefore allows for constitutional adjudiciation that is at least potentially consistent with the political norms that America steadfastly adheres to, namely democratic government and the supremacy within that government of the United States Constitution. This form of originalism is also superior to its intra-theoretical competitor, one which is based upon a very specific reading of original intent. An originalist project which focuses on constitutional values and principles is able to explain *Brown* as being correctly decided, and, because it does not entail the futile attempt to discern how the ratifiers would have decided cases they could not possibly have foreseen, also avoids the objection that originalism is irrelevant and unworkable because of societal and technological change.[168]

That a sophisticated originalist approach to constitutional interpretation is less problematic than its nonoriginalist competitors matters little, however, if there is no significant difference between the two approaches to constitutional law (in the sense that originalism does not compel constitutional rulings that are different from those compelled by nonoriginalism).[169] Increasingly, commentators have came to question whether a distinction actually exists between these theoretical approaches.[170] Professor Lawrence Solum contends that the very sophistication that has made originalism a worka-

167 *See* Bork, *supra* note 159, at 22.

168 *See* Hoy, *supra* note 158, at 482 ("A major reason Bork formulates his position by appealing to the Framers' principles and values is to avoid the objection that originalism is irrelevent because society has changed so significantly.").

169 As *Brown* aptly demonstrates, a "constitutional principles" originalism definitely compels judicial decisions different than those compelled by a "specific intent" originalism. Because this latter version of originalism requires psychological excursions into the minds of those long dead, it truly is an unworkable constitutional theory. More interesting are the differences (if any) between a sophisticated originalism and nonoriginalist textualism.

170 *See* Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599 (1989). *See also*, Hoy, *supra* note 158, at 484 ("[I]t is hard to see whether there is a genuine difference between originalism and nonoriginalism in judicial practice.").

ble theory of constitutional interpretation also has led to its becoming increasingly indistinguishable from nonoriginalist theories.[171] Solum contends that both originalists and nonoriginalists now are engaged in the same endeavor: uncovering the principles that are signified by the Constitution.[172]

Because an originalist project based upon constitutional principles operates at a higher level of abstraction than does one which focuses on a much narrower notion of original intent, its efficacy in constraining constitutional adjudication legitimately can be called into question. Untethered from the specific intentions of the ratifiers, originalism appears to be potentially as malleable and indeterminate as nonoriginalism. Distinctions between the two theories may therefore be largely illusory.[173] According to Professor Solum, those who adopted the originalist approach in the hope that it would provide a theoretical stronghold from which "activist" constitutional decision-making could be criticized will be sorely disappointed: "As originalism has been clarified in response to its critics, it has gradually become more and more evident that it has no force as a critique of the kind of constitutional interpretation practiced by the Warren Court."[174]

This characterization of originalism is surely one which its most famous proponent, Robert Bork, would resist.[175] Bork views originalism as providing much more constraint on judicial discretion than do Solum and those in agreement with him. In fact, originalism represents such a constraint that, according to Bork, never in its history has the Supreme Court been able to maintain consistent allegiance to the theory.[176] Judge Bork views the originalist position as a transcendental perch from which much of the Court's work product over the last two hundred years can safely

171 *See* Solum, *supra* note 170, at 1601-03. *See also, id.* at 1603 ("There is no meaningful distinction between originalist and nonoriginalist theories of constitutional interpretation.").

172 *See id.* at 1613; *see also, id.*, at 1629 ("In the end, I think both originalists and nonoriginalists are after the same thing when they interpret the Constitution. They seek the truths that the Constitution conveys to us.").

173 *See* Sherry, *Book Review*, 84 Nw. U.L. REV. 1215, 1222 (1990) ("[O]riginalism leaves as much room for interpretive discretion and manipulation as any other theory of judicial review. . . ."); Saphire, *supra* note 1, at 520 ("[N]onoriginalists argue that originalism is hopelessly unconstrained and unconstraining.").

174 Solum, *supra* note 170, at 1602.

175 Bork certainly sees originalism as providing the theoretical scaffolding from which many decisions rendered by the Warren Court (and all other Courts, for that matter) can be criticized. *See* R. BORK, *supra* note 1, at 69-100.

176 *Id.*

be criticized.[177]

What is the reason for these disparate viewpoints of the determinancy (or lack thereof) of the originalist project? An answer requires a return to what that project entails. Originalist constitutional methodology is comprised of two "interpretive moments":[178] the first occurs when the principle signified by the constitutional provision at issue is ascertained, the second occurs when that principle is applied to the facts at hand.[179] Mr. Bork fails to see the inherent indeterminancy of the sophisticated originalist approach because, while acknowledging room for disagreement among originalists when a constitutional principle is applied to a particular set of facts, he refuses to admit to the broad range of plausible constitutional readings that can be generated at the initial interpretive moment.

Bork certainly understands that there is room for disagreement among originalists as to the results of applying a constitutional principle to a particular set of facts: "[T]wo judges equally devoted to the original purpose may disagree about the reach or application of the principle at stake and so arrive at different results. . . ."[180] However, he steadfastly refuses to acknowledge that room for legitimate debate is also present when the authoritative principle is derived from a textual provision.[181] When Bork states that "[t]he principles of the actual Constitution make the judge's major moral choices for him,"[182] he indicates a lack of sensitivity to the inconclusive nature of much constitutional historical inquiry.[183] Constitutional provi-

177 *Id.*

178 Perry, *supra* note 5, at 236.

179 *Id.*

180 R. BORK, *supra* note 1, at 163.

181 Bork seems to suggest that any disagreement at this stage of the originalist inquiry is due largely to disingenuousness: "[E]ven a judge purporting to be an interpretivist can manipulate the levels of generality at which he states the Framers' principles." R. BORK, *Foreward* in G. MCDOWELL, THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY xi (1985).

182 BORK, *supra* note 1, at 252; *see also, id.* at 4 ("The intended function of the federal courts is to apply the law as it comes to them from the hands of others.").

183 For example, Bork contends that there "is almost no history that would indicate what the ninth amendment was intended to accomplish," *id.* at 183. This assertion belies the impressive scholarship which suggests that, on the contrary, there is a great deal of contradictory historical evidence concerning that amendment's intended scope. For a collection of essays that presents "a diverse cross-section of opinion" concerning the ninth amendment, see THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (R. Barnett ed. 1989). *See also* Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987). *Compare* Grey, *The Uses of An Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 213 (1988) (arguing that "the historical evidence is equivocal" as to whether the ninth amendment was "originally meant to give constitutional force to unenumerated rights") *with* Berger, *The Ninth Amendment: The Beckoning*

sions often were the product of hard-nosed political compromise. It should not be particularly surprising to find that historical evidence is often available to support opposite conclusions when deciding a constitutional case, nor that there is sometimes no evidence to support any conclusion.[184]

In addition to the often indeterminate nature of the historical inquiry, another problem with Bork's high confidence in originalism's ability to discover the "correct" constitutional principle signified by a particular provision of the text has to do with the proper level of generality at which these principles should be stated.[185] This is an issue of the highest order for any interpreter of the Constitution, for it is precisely the degree of generality that a principle is stated at that dictates the outcome of applying that principle to any specific case.[186] For Bork, however, this does not constitute a problem; an originalist judge merely should "state the principle at the level of generality that the text and historical evidence warrant."[187] This conclusory assertion, however, largely begs the jurisprudential question with which originalist theorists must grapple: what *is* the level of generality that is most consistent with the text and history of a constitutional provision? Along with historical conflict over varying political positions among the ratifiers regarding the meaning of a particular constitutional provision, there is also conflicting evidence about the interpretive attitude which the ratifiers intended future Justices to adopt.[188] When there is doubt concerning the level of generality that a constitutional provision should be stated at, Mr. Bork always chooses the narrowest plausible interpretation and crit-

Mirage, 42 RUTGERS L.J. 951 (1990) (arguing that the historical evidence reveals that the ratifiers did not intend to constitutionalize unenumerated rights through the ninth amendment). Bork also argues that the original meaning of the privileges or immunities clause of the fourteenth amendment "is largely unknown." BORK, *supra* note 1, at 39. *But cf.*, Ackerman, *Book Review*, 99 YALE L.J. 1419, 1428-30 (1990) (chiding Bork for failing to confront the fact that many of the drafters of the fourteenth amendment *intended* to give constitutional status to Judge Washington's reading of the identically worded privileges or immunities clause of article IV, which he enunciated in Corfield v. Coryell, Fed. Cas. No. 3,230 (Cir. Ct. E.D. Pa. 1823)).

184 Doubts as to the reliability of the historical record tend to exacerbate these difficulties. *See* Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986).

185 *See* G. STONE, L. SEIDMAN, C. SUNSTEIN, & M. TUSHNET, *supra* note 9, at 34-35.

186 *See* Perry, *supra* note 139, at 678-79.

187 R. BORK, *supra* note 1, at 149.

188 H. Jefferson Powell has produced the seminal scholarship discussing this point; *see generally*, Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Powell, *Rules For Originalists*, 73 VA. L. REV. 659 (1987). *See also* Sherry, *supra* note 183, at 1127 (the constitution-makers "intended something independent of their own [specific] intent to serve as a source of constitutional law."); D. FARBER & S. SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 378-80 (1990).

icizes others for not doing the same.[189] This, however, is not a choice that is mandated by originalism: "The Constitution does not say, 'Read me broadly,' or 'Read me narrowly.'"[190] Bork must defend his interpretive choice as being the one which is "most correct," rather than simply make conclusory judgements that are often based on rather shabby historical research.[191]

Despite the theoretical shortcomings of originalism, it still remains the most satisfactory interpretive approach to reading the Constitution.[192] However, valuable insight is gained through an understanding of the many times "originalism runs out," before yielding a "right" answer to a constitutional question.[193] Part IV will apply the originalist method to the cases that have established the *Massiah* doctrine. This analysis reveals several plausible readings of the sixth amendment right to counsel, none of which can be dismissed solely on originalist grounds.

IV. APPLYING THE ORIGINALIST METHOD TO THE SIXTH AMENDMENT

A. THE HISTORY OF THE RIGHT TO COUNSEL

At English common law, persons accused of felony crimes had no right to representation by counsel.[194] Oddly, those accused of lesser misdemeanor charges were provided with the right to make a legal defense through the assistance of counsel.[195] This anachronistic state of affairs was apparently due to the Crown's understanding that its interests were seriously threatened by criminal felony prose-

189 *See* R. BORK, *supra* note 1, at 187 (most prominent constitutional theorists "have generalized th[e] [original] understanding so greatly, stated it at such a high level of abstraction, that virtually no one who voted to ratify the document would recognize the principles of the theorists as his own.").

190 Posner, *What Am I? A Potted Plant?*, THE NEW REPUBLIC, Sept. 28, 1987, at 25. *See also*, D. FARBER & S. SHERRY, *supra* note 188, at 383 ("Rather than look to history, Bork looks to his own political theory" to resolve issues of constitutional interpretation).

191 *See* Sherry, *supra* note 173, at 1223 ("Bork's historical scholarship shows perhaps his weakest and most manipulative side. . . ."); *see also*, *id.* at 1226 ("Indeed, most of Bork's historical citations are stock excerpts from *The Federalist Papers* and Supreme Court cases that appear in every constitutional law casebook. He appears to have read very little else—neither the historical sources themselves nor the legal historians who have studied them.").

192 *See supra*, notes 139-49, and accompanying text. *See also*, Scalia, *Originalism: The Lesser Evil*, U. CIN. L. REV. 849, 862 (1989) (although not without its own difficulties, originalism is the preferred theory of constitutional interpretation because nonoriginalism's defects are "fundamental and irreparable.").

193 *See* Perry, *supra* note 139, at 710-19.

194 W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 9 (1955).

195 *See id.* at 8.

cutions.[196] This rule was abandoned in 1836 when all persons accused in English courts were allowed to retain the aid of counsel.[197] The English common law right to counsel was immediately seen as being inconsistent with American conceptions of fairness.[198]

At least twelve of the thirteen American colonies rejected the English common law rule and fully recognized the right to counsel in all criminal prosecutions, except for one or two instances where the right was limited to capital offenses or to more serious crimes.[199] In the period immediately preceding adoption of the Constitution, the right to counsel was seen largely as providing the opportunity to retain counsel only if a defendant was capable of doing so.[200] Four states did provide for the appointment of counsel, but, in three of those states, appointments were limited to capital cases.[201] At the very least, the historical materials suggest an early awareness in American courts that one accused of a crime was at a severe disadvantage without legal counsel.[202]

Against this historical backdrop, the sixth amendment was ratified by the states, with nearly no debate, in 1791.[203] The silence surrounding ratification of the sixth amendment is apparently attributable to a general understanding on the part of the ratifiers that the federal courts would have jurisdiction of only an insignificant number of criminal cases.[204]

The fragmented historical record seems to be of limited aid for one wishing to discover the principle embodied by the sixth amendment right to counsel, as originally understood. The English common law right to counsel was rejected early on. Most states recognized the right to counsel but understood it only to mean that a defendant could not be precluded from retaining an attorney.

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196 *See id.* In cases involving misdemeanors, such as libel, perjury, battery, and conspiracy, "the state's interest was apparently deemed so slight that it could afford to be considerate toward defendants." *Id.*

197 *See id.* at 12. *See also* Betts v. Brady, 316 U.S. 455, 466 (1942); Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1018-1028 (1964); Powell v. Alabama 287 U.S. 45, 60 (1932).

198 *See* W. BEANEY, *supra* note 194, at 1.

199 *See Powell*, 287 U.S. 45, 64-65. *See also* OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE, 'TRUTH IN CRIMINAL JUSTICE' SERIES REPORT NO. 3, *The Sixth Amendment Right to Counsel Under the Massiah Line of Cases* [hereinafter Report No. 3] *reprinted in* 22 U. MICH. J. L. REV. 671, 673 (1989).

200 *See* Report No. 3, *supra* note 199, at 673 n.11; *see also* W. BEANEY, *supra* note 194, at 21; *Betts*, 316 U.S. at 466-71.

201 *See* Report No. 3, *supra* note 199, at 673 n.11.

202 W. BEANEY, *supra*, note 194, at 25.

203 *See* Report No. 3, *supra* note 199, at 673. *See also*, Note, *supra* note 197, at 1030-31; *Powell*, 287 U.S. at 61-65.

204 *See* W. BEANEY, *supra* note 194, at 25.

The scope of the right was also limited exclusively to the presentment of a defense at trial. It probably should be assumed that the ratifiers of the sixth amendment intended to constitutionalize the right to counsel as it was then understood by the states.[205]

Although the historical evidence suggests the ratifiers' specific intentions concerning the right to counsel, the principle those specific intentions emanated from, i.e., the principle that is accorded authoritative constitutional status, is much more difficult to discern. Because federal jurisdiction over criminal prosecutions was expected to be of a very limited nature,[206] the ratifiers seemingly spent little time thinking through the implications of the constitutional principle embodied in the right to counsel.[207] More so than perhaps any other provision of the Bill of Rights, the contours and parameters of the sixth amendment right to counsel were left to be shaped by the courts.[208]

The right to counsel, therefore, offers the originalist with a different historical dilemma than that presented by some other constitutional provisions.[209] Rather than yielding large amounts of contradictory evidence, the historical inquiry into the right to counsel provides little or no evidence of the significance that right was accorded by its creators.[210] It initially is unclear what implications

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205 *See* Report No. 3, *supra* note 199, at 673:

> In the absence of illumination from [the debates surrounding the ratification of the sixth amendment right to counsel], and given the actual words and context of the sixth amendment right, it must be assumed that the right to counsel clause was simply a restatement of the right already recognized by the individual states.

206 *See* Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 559 (1990) (prior to adoption of the Constitution, it was assumed that federal criminal jurisdiction "would be confined to a small class of cases dealing with treason, revenue offenses, counterfeiting and crimes committed on the high seas or against the law of nations.").

207 *See* W. BEANEY, *supra* note 194, at 25 (because of the understanding of the ratifers that federal criminal jurisdiction would be quite limited, "the logical assumption is that no great thought was given to the precise nature of the federal right to counsel.").

208 *See id.* ("Perhaps the strongest conclusion which can be derived from the English development in its entirety and from early American practices is that the courts, and not the legislatures, had within their hands the capacity and the power to shape the right to counsel into whatever mold seemed best.").

209 *See supra* note 183.

210 Pierre Schlag sees this as a significant problem for an originalist; *see*, Schlag, *supra* note 132, at 307:

> [T]here are some situations in which there is no evidence of framers' intent. This possibility haunts the reconstructive enterprise, for the [originalist] must have some criteria to determine when the evidence of framers intent is indeed so doubtful, so incomplete, or so indeterminate that reconstruction is not warranted and reference must be made to some other source of constitutional interpretation. The framers cannot supply any principle on this issue: it is one that we must construct and justify. What is required of the [originalist], therefore, is nothing short of a theory of what can count as meaning and what cannot.

this sketchy historical record has for the originalist interpreter. The lack of attention paid to the right to counsel by its enactors could itself convey a message about the original understanding,[211] indicating that the principle invoked by the sixth amendment right to counsel was intended to be read very narrowly. This is mere speculation, however, because the ratifiers themselves spent precious little time considering the issue.

Originalism does not offer a definitive answer to the questions surrounding the principle constitutionalized by the ratifiers of the sixth amendment right to counsel. This being the case, an originalist could conclude that the provision is judicially unenforceable: "The judge who cannot make out the meaning of a provision is in exactly the same circumstance as a judge who has no Constitution to work with. There being nothing to work with, the judge should refrain from working."[212] When this logic is applied to the right to counsel, a constitutional guarantee deemed essential to the administration of criminal justice in a civilized society, its ramifications seem radical. It also seems odd to allow a silent historical record to trump the fact that the ratifiers included the provision in the very document that is being interpreted: "[I]t is difficult to imagine anything more at odds with a framer's intention than that the constitutional provision she has just helped to enact will be meaningless and unenforced."[213]

Certainly, an originalist such as Robert Bork would contend that this is an unfair characterization of his interpretive methodology, at least as it applies to the sixth amendment right to counsel. Bork perhaps would argue that the provision itself is much more clear and self-defining than more nebulous constitutional provisions such as the fourteenth amendment privileges and immunities clause or the ninth amendment, thereby providing a judge with guidelines for its application. As we have seen, however, the sixth amendment is far from self-defining; in fact, the right to counsel poses especially difficult problems of application because the scope of the right must

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Another constitutional provision with a sparse historical record is the first amendment freedom of speech clause; *see* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971) ("The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject."). *See also*, M. REDISH, FREEDOM OF EXPRESSION 13 n.27 (1984) ("[H]istorical reference has been of limited value in first amendment analysis."); M. PERRY, *supra* note 153, at 63-66. Not surprisingly, Bork resolves this dilemma of ambiguity in favor of a very narrow reading of the scope of first amendment freedom of speech protection: "Constitutional protection should be accorded only to speech that is explicitly political." Bork, *supra*, at 20.

211 *See* D. FARBER & S. SHERRY, *supra* note 188, at 376.

212 R.BORK, *supra* note 1, at 166.

213 Nichol, *Bork's Dilemma*, 76 VA. L. REV. 337, 342 (1990).

be determined in terms of when, to whom, and to what degree the right attaches. As *Massiah* and its progeny aptly demonstrate, the sixth amendment remains stubbornly silent with regard to how the right to counsel is to be applied.

B. DEFENDING *MASSIAH* ON ORIGINALIST GROUNDS

Given that it is untenable to read the right to counsel out of the Constitution, the originalist must find some plausible way to defend a particular reading of the principle constitutionalized by the textual provision. Perhaps we can say with reasonable certainty that the right to counsel originally was meant to guarantee only that one could not be barred from retaining counsel for the purpose of presenting a defense at trial. This being the "specific intent" of the ratifiers, how does one begin to extract from it the principle that guided the practice, especially in light of the inadequacies of the historical record?

One way of going about this task would be to examine the right to counsel within the larger context of the sixth amendment itself. Along with the right to counsel, the sixth amendment guarantees an accused the right to a speedy and public trial by jury, the right to notice of charges, and the right to both confront and compel witnesses.[214] These protections, when considered in conjunction with the fifth amendment's guarantee against self-incrimination,[215] offer proof that the ratifiers *intended* to establish a constitutionally mandated system of criminal procedure that valued the rights of the accused and the integrity of the prosecutorial system over the untrammelled pursuit of truth.[216] They implemented this intention by establishing an "accusatorial" system of justice.[217] There are as-

214 *See* U.S. CONST. amend. VI.

215 "No person shall . . . be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V. Professor Grano notes that the constitutional protection against compulsory self-incrimination, although sometimes protecting the innocent, also "prevents courts from employing even humane inquisitorial procedures to learn the truth from an accused." Grano, *supra* note 51, at 23 (citing Murphy v. Waterfront Comm'n, 372 U.S. 52, 55 (1964), as a case that lists protection of the innocent as but one value underlying the fifth amendment privilege against self-incrimination).

216 *See* Grano, *supra* note 51, at 23:

> Certainly these rights and rules seem to reflect something more than a rationale that this is the best way to determine truth. Viewed together, they evidence the Framers' firm resolve to preserve the accusatorial tradition in judicial criminal proceedings. Although the reasons for this are not altogether clear, the Framers apparently believed that individual liberty is best protected by a judicial system that imposes limits on governmental authority, reduces the temptation to take evidentiary shortcuts, and minimizes the appearance of unfairness.

217 *See id.* at 22 (citing Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1016 (1974)). Professor Goldstein defines

pects of the prosecutorial system that have "inquisitorial" characteristics:[218] police interrogation, investigative grand juries, and undercover surveillance are but three examples.[219] Once the protections of the sixth amendment are triggered, however, the adverse positions of the government and the defendant have "solidified,"[220] and government must subsequently proceed according to the amendment's accusatorial guarantees.[221] One of these guarantees is the right to counsel.

Obviously, this argument is not compelled by the historic record; the ratifiers never considered the issue.[222] In addition, categories such as "inquisitorial" and "accusatorial" themselves are suspect and prone to manipulation. These shortcomings notwithstanding, the argument represents a plausible originalist interpretation of the sixth amendment right to counsel. By its very terms, the sixth amendment limits the government's prosecutorial power—it establishes a standard of procedural integrity against which subsequent governmental action will be measured. Before the amendment attaches, pre-judicial investigative procedures are subject to the less stringent standards of due process and the privilege against self-incrimination. But once the sixth amendment comes into play, its protections, now in combination with those of the fifth and fourteenth amendments, offer an accused the full panoply of constitutional protection: "*Massiah* operates on the premise that 'by its

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the term "adversarial" as describing a system for determining facts within the context of a contested trial. *Id.* The term "accusatorial" comprehends the adversarial universe, but also includes other fundamental premises. *Id.* The right to pretrial release, the presumption of innocence, and the requirement of proof beyond a reasonable doubt are attributes of our accusatorial system. *Id. See also* Rogers v. Richmond, 365 U.S. 534, 541 (1961): "[O]urs is an accusatorial and not an inquisitorial system- a system in which the State must establish guilt by evidence independently and freely secured. . . ."; Watts v. Indiana, 338 U.S. 49, 54 (1949):

> Ours is the accusatorial as opposed to the inquisitorial system. . . . The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands.

218 *See Rogers*, 365 U.S. at 541 (inquisitorial system is one in which the state, through "coercion, prove[s] its charge against an accused out of his own mouth.").

219 *See* Grano, *supra* note 51, at 23 n.148.

220 *See* Kamisar, *supra* note 76, at 98.

221 *See id.*:

> At this point, hopefully, the government has built its case. But if it has not, it cannot expect to elicit any more information from the defendant. It is too late. From this point on, the defendant is entitled to counsel and the agents of government may proceed against him only through counsel.

222 *See* Grano, *supra* note 51, at 24.

history, language and function, the [sixth amendment] sought to draw a starting point after which counsel's assistance is generally required as an element of an adversary system.' "[223] After sixth amendment protections are triggered, extrajudicial investigatory proceedings "must shed their inquisitorial attributes and take on the procedural protections of the accusatorial system. The principle protection, of course, is the right to counsel."[224]

Massiah is most problematic for originalists because, by holding that the right to counsel precluded government attempts to obtain evidence from a defendant, it extended the right far beyond traditional conceptions of the role of counsel at trial.[225] If that extension cannot be justified, "*Massiah* [and its progeny] simply have no constitutional moorings."[226] It is difficult to imagine the materials an originalist would rely on to support a conclusion that *Massiah* illegitimately broadens the scope of the right to counsel beyond what was originally intended. It is again important to remember that any contemporary reading of the sixth amendment requires some sort of expansion on the original intent, at least any reading that recognizes the constitutional necessity of appointment of counsel for those who cannot afford it.[227] The originalist project accomodates such expansion, at least to some degree. With a record devoid of evidence concerning the broad fundamental values the ratifiers meant to establish through the right to counsel, the best an originalist seemingly can do is to come up with a range of plausible interpretations of the constitutional provision. At this stage, the materials have run out; which interpretation of the right to counsel one adopts at this point is a decision to which originalism is largely silent.

When read in conjunction with the guarantees of the sixth amendment and the other provisions that establish constitutional criminal procedures, the principle underlying the right to counsel might be stated as such: the right to counsel shall extend to one who is the subject of a criminal prosecution, to the extent necessary to ensure a fair fact-finding process and trial.[228] Although this may be

223 Kamisar, *supra* note 76, at 98, quoting Israel, *supra* note 9, at 1368 n.224.

224 Grano, *supra* note 51, at 24.

225 *See* Report No. 3, *supra* note 199, at 683; *see also*, *supra* notes 47-48, 85-89, and accompanying text.

226 Grano, *supra* note 51, at 25.

227 *Gideon* is another case that seemingly has come to be seen as having been "correctly" decided, and has therefore been defended on originalist grounds; *see* Grano, *Introduction—The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, 22 U. MICH. J.L. REF. 395, 396 n.5 (1989) (arguing that *Gideon* is eminently defensible from a constitutional perspective).

228 *See* Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger*

a hopelessly vague characterization of the right to counsel, it is difficult to conceive of any other characterization that would be more "correct" in terms of originalism. Put another way, the right to counsel ensures the integrity of a criminal prosecution by guaranteeing that the legal resources available to prosecution and defense will be, to some degree, equal.[229]

In applying this principle, the ratifiers specifically believed that the fairness mandated by the sixth amendment was satisfied by the assistance of counsel only at trial, "when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor."[230] As cases such as *Powell*[231] came to demonstrate, the changing nature of the prosecutorial system rendered the assistance of counsel "less than meaningful" when it was limited to the formal trial itself.[232] This realization was born out of an understanding that the right to counsel must be applied to a criminal prosecutorial system that the ratifiers scarcely could have imagined:

> When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might settle the accused's fate and reduce the trial itself to a mere formality.[233]

In recognition of the realities of modern criminal prosecutions, the Supreme Court has broadened the scope of the right to counsel by applying it to all stages subsequent to the commencement of formal adversary proceedings. There certainly is nothing about this that is inconsistent with originalism. On the contrary, it can be argued that the *Massiah* doctrine is quintessentially originalist. The Court has applied the constitutional principle signified by the sixth amendment right to counsel (promotion of fundamentally fair criminal proceedings) to a situation unforeseen by the constitution-makers

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Courts' Competing Ideologies, 72 GEO. L.J. 185, 202 (1983) ("American constitutional criminal procedure values and protects fair process norms even when they impair procedure's guilt-determination function.").

229 *See id.* at 201 ("The sixth amendment's right to counsel promotes procedural fairness, regularity, and rationality by ensuring formal equality of access to the system.").

230 United States v. Ash, 413 U.S. 300, 309 (1972).

231 *See supra*, notes 13-23, and accompanying text.

232 *See Ash*, 413 U.S. at 310:

> Th[e] extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered part of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both.

233 United States v. Wade, 388 U.S. 218, 224 (1967).

(modern law-enforcement prosecutorial machinery) and have arrived at a result that the enactors may not have agreed with at the level of specific subjective intent (fundamental fairness mandates that the government be precluded from deliberately eliciting information from an accused, once adversary proceedings have formalized). Although *Massiah*'s reading of the right to counsel is not absolutely compelled by the history and text of the Constitution, it is certainly a "plausible" interpretation in terms of the values and principles constitutionalized by the makers of the sixth amendment.

There is also a strong textual basis for *Massiah*'s right to counsel guarantees attaching immediately after the initiation of formal adversary proceedings. Although the Court has not always been clear as to when this occurs,[234] it nevertheless seems to be the proper juncture of the proceedings to activate the right to counsel, given the express language of the sixth amendment:

> The requirement that there be a "prosecution" means that this constitutional "right to counsel attaches only at or after the time that the adversary judicial proceedings have been initiated against [an accused]. . . ." "It is this point . . . that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.[235]

At first glance, this point would seem rather uncontroversial. By stating that the right to counsel attaches "in all criminal prosecutions," the sixth amendment strongly suggests that the right should be activated at the moment "the Government has committed itself to prosecute."[236] Despite this seemingly logical adherence to constitutional language, this aspect of *Massiah* also has been criticized by those who contend it draws a line at an "arbitrarily fixed point,"[237] which is unsatisfactory because an accused's need for

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234 *See* Brewer v. Williams, 430 U.S. 387, 398 (1977) ("[T]he right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)). *See also*, Moore v. Illinois, 434 U.S. 220 (1977) (applying the right to counsel at a preliminary hearing); Michigan v. Jackson, 475 U.S. 625, 629 (1986) (arraignment signals the initiation of adversary judicial proceedings). Of the *Massiah* cases, only *Brewer* involved the question of whether formal proceedings had begun, *see supra* note 63.

235 United States v. Ash, 413 U.S. 300, 321-22 (1973) (Stewart, J., concurring) (quoting *Kirby*, 406 U.S. at 688, 690) (plurality opinion).

236 *Kirby*, 406 U.S. at 689:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the Government has committed itself to prosecute, and only then that the adverse positions of Government and defendant have solidified.

237 Kamisar, *supra* note 76, at 112.

counsel is often as great before the commencement of formal proceedings as after.[238] These critics argue that *Massiah* is "fundamentally unsound" because unscrupulous police practices do not somehow become more improper upon commencement of judicial proceedings.[239]

This criticism fundamentally misreads the constitutional logic upon which *Massiah* is built. The *Massiah* doctrine has nothing to do with the propriety, or lack thereof, of police tactics. Inquiries into the character of the police behavior in question, while often appropriate when other constitutional provisions are at issue,[240] simply are irrelevant for sixth amendment purposes. *Massiah* is based on the premise that the sixth amendment was *originally meant* to draw a firm distinction between the pre-judicial stage of investigation and fact-finding and the accusatorial judicial stage itself.[241] The right to counsel applies to the latter, regardless of the character of police conduct. Rather than throwing up a barrier to police questioning at an arbitrarily fixed point, *Massiah*'s insistence on the initiation of formal judicial proceedings to activate sixth amendment protection is, at least arguably, constitutionally mandated.

The *Massiah* doctrine recently has been criticized again as being inconsistent with the originally intended scope of the right to counsel.[242] This Comment has argued that this contention is untrue. Although the ratifiers did not contemplate the need for the right to counsel prior to trial, it is no longer controversial that the right extends to at least some stages of prosecution that precede the trial. Commentators who generally agree that the Constitution guarantees some degree of pretrial assistance of counsel, but who contend that *Massiah* has gone too far, cannot demonstrate the point at which the doctrine no longer is consistent with original intent. The ratifiers may have specifically intended the sixth amendment right to counsel to be a narrow protection. More importantly, for purposes of the originalist, however, the enactors of the Bill of Rights also constitutionalized a system of criminal procedure of which funda-

238 *See id.* at 112-13. *See also*, Saltzburg, *supra* note 78, at 207.

239 W. LaFave & J. Israel, *supra* note 28, at 282.

240 When a suspect's confession is examined under the due process "voluntariness" standard, that confession will be suppressed if the conduct of the police was "inherently coercive." *Id.* at 266. Police misconduct is also relevant to determinations made under the fifth amendment's privilege against self-incrimination. *See id.* at 283-319.

241 *See* Grano, *supra* note 51, at 28.

242 *See* Report No. 3, *supra* note 199, at 684-85. *See also, id.* at 665 (*Massiah* has no basis in either the history or text of the Constitution, and therefore constitutes "merely a cover for a judicially-imposed policy against the use of post-indictment confessions and admissions.").

mental fairness and the integrity of the fact-finding process were central elements. These principles laid the groundwork for *Massiah*, and, in that sense, the doctrine remains consistent with the originalist project. Because there is no definitive method of deriving the principle embodied in the sixth amendment right to counsel, originalism simply cannot rule out the *Massiah* doctrine as an implausible reading of that provision.

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