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THE PUZZLE OF PROCEDURAL ORIGINALISM

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ABSTRACT

On a daily basis, lawyers and judges consult and apply the rules of subject matter jurisdiction and personal jurisdiction. These doctrines—the workhorses of procedural law—ostensibly spring from the Constitution's text, but their substance owes more to considerations of fairness, efficiency, and sound policy than it does to original meaning. Indeed, these doctrines are among the most openly and obviously nonoriginalist doctrines in constitutional law. Curiously, the originalist movement has almost totally ignored this everyday terrain. That is beginning to change. Recent overtures by Supreme Court Justices suggest that originalists are now poised to advance into the field of civil procedure. Reorienting extant procedural doctrine around the polestar of original meaning could have dramatic effects: for example, it could oust corporations and D.C. citizens from suing or being sued in diversity while throwing into disarray the doctrines that govern the vast set of suits in which state and federal courts exercise personal

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jurisdiction over out-of-state defendants. In these and other respects, an originalist turn in procedure may have momentous consequences for our law.

This Article examines this emergent phenomenon of "procedural originalism"—its past, its present, and its prospects. It describes the intellectual backstory of originalism's engagement with civil procedure and remedies and the fresh uptick of attention to the originalist underpinnings of various procedural and remedial doctrines. It surveys the discrepancies between original public meaning and bread-and-butter staples of civil procedural doctrine while showing how civil procedural doctrine has drawn its substance from considerations beyond mere original meaning. And it sketches the challenging questions that procedural originalism poses for some of the many theories of originalism.

Above all, however, this Article explores what originalism's late arrival to the domain of civil procedure reveals about the construction of the originalist agenda. A prominent charge levied against originalism is the claim that originalism is not an apolitical legal interpretive methodology but rather a tool for selectively inscribing into constitutional law the political goals of the conservative legal movement. What is striking about civil procedure is that an originalist remodeling of procedural law would call for some outcomes that are nonaligned with, or even sharply adverse to, the aims of key conservative movement constituencies. The future course of procedural originalism therefore promises to throw light on the contours of originalism's constitutional politics and, ultimately, will offer a new test of the charge that originalism is a proxy for politics rather than a theory of law.

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INTRODUCTION

When the Supreme Court issued its ruling in *International Shoe Co. v. Washington*,[1] there were no front-page headlines proclaiming the fact the next day. Members of Congress did not give speeches denouncing the Court's holding in *Hertz Corp. v. Friend*.[2] Citizens did not mass in the streets to cheer or condemn the Court's decision in *National Mutual Insurance Co. v. Tidewater*.[3]

That dearth of political or legal mobilization—really, of any sort of meaningful contemporaneous public attention whatsoever—should come as no surprise: these cases addressed procedural or jurisdictional doctrines. The outcomes of such cases, momentous though they are, are hardly the stuff of protest marches, letter-writing campaigns, and stern speeches from the Senate floor.

Something else distinguishes these cases. Until quite recently, these cases, and the types of doctrine they enunciate, have eluded sustained examination or meaningful critique by the variegated set of scholars and judges who identify as constitutional originalists. In the founding texts of originalism, civil procedure is barely mentioned.[4] Judge Robert Bork didn't discuss civil procedure in his writings on originalism,[5] nor did Attorney General Edwin Meese.[6] Professor Raoul Berger—who wrote an entire book about the Fourteenth Amendment, the anchor of the constitutional law of personal jurisdiction—had

1. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945); George Rutherglen, International Shoe *and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 358 (noting that "[t]he immediate reaction to *International Shoe* was surprisingly subdued").

2. Hertz Corp. v. Friend, 559 U.S. 77 (2010).

3. Nat'l Mut. Ins. Co. v. Tidewater (*Tidewater*), 337 U.S. 582 (1949).

4. *See infra* notes 48–50 and accompanying text (discussing the definition of "civil procedure" and the aspects of civil procedure this Article addresses).

5. *See infra* note 72 and accompanying text. *See generally, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) [hereinafter BORK, TEMPTING OF AMERICA] (not discussing civil procedure); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) [hereinafter Bork, *Neutral Principles*] (same).

6. *See infra* note 73 and accompanying text. *See generally, e.g.*, Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5 (1988) [hereinafter Meese, *Original Intent*] (not discussing civil procedure).

nothing to say about the requirements of "fair play and substantial justice"[7] that the Court's decisions had engrafted upon that amendment's text.[8] With few exceptions,[9] Justice Antonin Scalia's famous originalist opinions did not engage with questions of civil procedure, and his works on originalism barely mentioned the subject.[10] Recent originalist scholarship is similarly lopsided. To take one notable example, the much-cited article that launched the "positivist turn" in originalism does not explore how *International Shoe* or any other civil procedure case fits with the positivist claim that originalism "is our law."[11]

This lack of engagement is surprising. It is not as though civil procedure has nothing to do with constitutional law or with questions of original meaning. Federal courts resolving issues of civil procedure routinely apply the Constitution—for example, when exercising subject matter jurisdiction over a suit or personal jurisdiction over a defendant. Yet originalists have overwhelmingly focused on the outcomes of cases, not on their procedural precursors or remedial sequelae; on the courts' holdings, not on why the courts had the jurisdiction to arrive at those holdings to begin with. And, by the same token, civil procedural scholarship has generally ignored originalism.[12]

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7. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

8. *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 221–44 (2d ed. 1997) (not discussing civil procedure).

9. *See infra* notes 78–85 and accompanying text.

10. *See infra* notes 76–80 and accompanying text. *See generally, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3–47, 129–49 (Amy Gutmann ed., 1997) [hereinafter SCALIA, A MATTER OF INTERPRETATION] (not discussing civil procedure); Antonin Scalia, *Foreword*, 31 HARV. J.L. & PUB. POL'Y 871 (2008) (same); Antonin Scalia, *Is There an Unwritten Constitution?*, 12 HARV. J.L. & PUB. POL'Y 1 (1989) (same); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) [hereinafter Scalia, *Lesser Evil*] (same).

11. *See generally* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) [hereinafter Baude, *Is Originalism Our Law*] (discussing originalism, but not civil procedure).

12. Despite the oceans of writing on civil procedure and originalism respectively, oddly little attention has been paid to the interactions between the two. A cluster of articles discusses originalism in the context of the Seventh Amendment jury trial right and summary judgment. *See generally, e.g.*, Brian T. Fitzpatrick, *Originalism and Summary Judgment*, 71 OHIO ST. L.J. 919 (2010) (examining whether summary judgment is compatible with originalism); Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811 (2014) (same); Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007) (same). For scholarship examining personal jurisdiction or subject matter jurisdiction through an originalist lens, see generally Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990); Jay Conison, *What Does Due*

Even as debates over constitutional interpretation continue to rage both in the public square and in the ivory tower, civil procedure has remained a relatively tranquil backwater.[13]

Change is now afoot. In tandem with a growing stream of recent originalist scholarship,[14] originalists on the Court are broadening their

Process Have To Do with Personal Jurisdiction?, 46 RUTGERS L. REV. 1071 (1994); Mark Moller, *A New Look at the Original Meaning of the Diversity Clause*, 51 WM. & MARY L. REV. 1113 (2009); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981); Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1 (2007); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169 (2004); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499 (1981); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735 (1981) [hereinafter Whitten, *The Constitutional Limitations (Part Two)*]; Earl M. Maltz, *Personal Jurisdiction and Constitutional Theory—A Comment on* Burnham v. Superior Court, 22 RUTGERS L.J. 689, 696–98 (1991). For a critique of *Erie*'s conclusion that the regime of *Swift v. Tyson* was unconstitutional, see Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 982–85 (2013). For more recent work on originalism in civil procedure, see *infra* note 14.

13. It is not unfair to observe that there is a general dearth of high constitutional theorizing of *any* kind regarding civil procedure. But the disinterest of originalists in civil procedure is still notable, even if it is not unique. A living constitutionalist or constitutional pluralist, for example, might feel little need to theorize or critique civil procedure, simply because civil procedure offers little to offend such theories. Originalists, on the other hand, have been leaving money on the table (until recently) by not critiquing and engaging with civil procedure. *See infra* note 14; *infra* Parts II–III. For a more general comment on the paucity of historical scholarship on civil procedure, see Linda S. Mullenix, *The Influence of History on Procedure: Volumes of Logic, Scant Pages of History*, 50 OHIO ST. L.J. 803 (1989). I am grateful to Professor William Baude for his thoughts on this point.

14. *See generally, e.g.*, Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 VA. L. REV. 447 (2022) [hereinafter Crema & Solum, *The Original Meaning*] (arguing that the modern understanding of the Fifth Amendment Due Process Clause is incorrect from an originalist perspective); Mark Moller & Lawrence B. Solum, *Corporations and the Original Meaning of "Citizens" in Article III*, 72 HASTINGS L.J. 169 (2020) [hereinafter Moller & Solum, *Corporations and the Original Meaning*] (examining the original public meaning of "citizens" in Article III); Mark Moller & Lawrence B. Solum, *The Article III 'Party' and the Originalist Case Against Corporate Diversity Jurisdiction*, 64 WM. & MARY L. REV. (forthcoming 2023) [hereinafter Moller & Solum, *The Article III 'Party'*] (supplying an originalist analysis of whether members of corporations may be considered the true "parties" to Article III cases); Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703 (2020) (examining the Founding-era understanding of personal jurisdiction doctrine); Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249 (2017) [hereinafter Sachs, *Pennoyer*] (defending the correctness of *Pennoyer* on originalist grounds); Lawrence B. Solum & Max Crema, *Originalism and Personal Jurisdiction: Several Questions and a Few Answers*, 73 ALA. L. REV. 483 (2022) [hereinafter Solum & Crema, *Originalism and Personal Jurisdiction*]

lens to take in questions not just of constitutional substance but of civil procedure as well. In the 2021 decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*,[15] Justices Neil Gorsuch and Clarence Thomas called upon "future litigants and lower courts" to help the Court understand how the constitutional law governing the exercise of personal jurisdiction might be reshaped in light of the "Constitution's original meaning or its history."[16] Challenging the foundational test for personal jurisdiction articulated seventy-five years ago in *International Shoe*, Justice Gorsuch wrote that "the right question" was "what the Constitution as originally understood requires, not what nine judges consider 'fair' and 'just.'"[17] Just over a year later, the Court granted certiorari in *Mallory v. Norfolk Southern Railway*[18]—still pending as of this writing—which presents the question whether the original public meaning of the Due Process Clause prohibits a state from requiring a corporation to consent to general personal jurisdiction to do business in that state.[19] The party and amicus briefs in *Mallory* devoted substantial attention to original meaning,[20] and so did the Justices at oral argument.[21] This sharply contrasts with the situation just a few

(evaluating whether the constitutional law of personal jurisdiction comports with original meaning); Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 FORDHAM L. REV. 633 (2019) (exploring personal jurisdiction over foreign states through an "originalist lens," *id.* at 636).

15. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021).

16. *Id.* at 1039 (Gorsuch, J., concurring).

17. *Id.* at 1036 n.2.

18. *See* Mallory v. Norfolk S. Ry. Co., 142 S. Ct. 2646 (2022) (granting certiorari).

19. Petition for a Writ of Certiorari at 26, *Mallory*, 142 S. Ct. 2646 (No. 21-1168); Brief in Opposition at 19, *Mallory*, 142 S. Ct. 2646 (No. 21-1168).

20. Brief for the Petitioner at 11–28, *Mallory*, 142 S. Ct. 2646 (No. 21-1168); Respondent's Brief at 39–48, *Mallory*, 142 S. Ct. 2646 (No. 21-1168); Reply Brief for the Petitioner at 5–15, 18–21, *Mallory*, 142 S. Ct. 2646 (No. 21-1168); Brief of Professor Stephen E. Sachs as Amicus Curiae in Support of Neither Party at 12–14, *Mallory*, 142 S. Ct. 2646 (No. 21-1168) [hereinafter Brief of Professor Stephen E. Sachs]; Brief of Scholars on Corp. Registration & Jurisdiction as Amici Curiae in Support of Neither Party at 9–15, *Mallory*, 142 S. Ct. 2646 (No. 21-1168); Brief of the Chamber of Com. of the U.S., Am. Tort Reform Ass'n, Coal. for Litig. Just., Inc., & Am. Trucking Ass'ns, Inc. as Amici Curiae in Support of Respondent at 23–30, *Mallory*, 142 S. Ct. 2646 (No. 21-1168) [hereinafter Brief of the Chamber of Com. et al.].

21. *See* Transcript of Oral Argument at 9, 45, 48, 49, 91, *Mallory*, 142 S. Ct. 2646 (No. 21-1168) [hereinafter *Mallory* Transcript].

years ago, when original meaning was not even raised in the briefing or argument regarding personal jurisdiction in *Walden v. Fiore*.[22]

The effort to bring originalist arguments to bear on questions of civil procedure is still crystallizing. But its contours are visible, and its potential momentum is perceptible. The stakes are high: a full-scale return to original meaning in civil procedure could jeopardize diversity jurisdiction over corporations,[23] *International Shoe* and its progeny,[24] summary judgment,[25] declaratory judgments,[26] and many other fixtures of extant procedural law.[27] And an embrace of originalism within procedure may have collateral consequences beyond the realm of civil procedure *simpliciter*. The principle that the Due Process Clause requires fairness[28] underpins not just *International Shoe*[29] but also twentieth-century icons such as *Goldberg v. Kelly*,[30] *Mathews v. Eldridge*,[31] and the many cases that followed in their wake. If the Court were to hold in the personal jurisdiction context that the original

22. Walden v. Fiore, 571 U.S. 277 (2014). None of the filings in *Walden* contains the terms "original meaning," "original public meaning," or "originalism," and no Justice asked questions concerning original meaning at oral argument.

23. *See infra* Part II.A.2.

24. *See infra* Part II.A.3.

25. *See generally* Thomas, *supra* note 12.

26. *See* Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 117–19 (2007) (describing the originalist case against the declaratory judgment action).

27. *See infra* note 178.

28. *See* JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 290 (2011) (tracing the gradual development of the "law of 'fair' procedures" as it slowly took shape in the post–Civil War period and ultimately became associated with the law of due process in the 1970s).

29. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (holding that the Due Process Clause requires exercises of personal jurisdiction to comport with "traditional notions of fair play and substantial justice").

30. Goldberg v. Kelly, 397 U.S. 254, 262 n.8, 264 (1970) (holding that welfare entitlements are "property" within the meaning of the Due Process Clause and that due process requires the state to provide welfare recipients with a pretermination hearing before depriving them of those entitlements).

31. Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976) (adopting a balancing test for the kind of hearing that must be afforded when the government terminates an entitlement); *see* Fred O. Smith, Jr., *Due Process, Republicanism, and Direct Democracy*, 89 N.Y.U. L. REV. 582, 601 (2014) (describing the *Mathews* balancing test).

meaning of the Due Process Clause does not require fairness or fair procedures,[32] these and other milestones might fall.[33]

Now is the time to analyze this movement to "procedural originalism" (as I will call it)—to reflect upon its emergence, its claims, and its prospects. This Article begins that examination. It traces some of the forgotten backstory of originalism's interaction with questions of civil procedure and remedies, begins to map the ruptures that procedural originalism would create with existing law, and identifies some of procedural originalism's implications for both originalism and its critics. Throughout, this Article stresses that the movement to procedural originalism must be assessed not simply as if it were a free-floating legal claim that has arisen in a vacuum. Instead, it insists that the movement to procedural originalism be situated within a thicker historical and political context, as a new and unfamiliar phase in the "political practice"[34] of originalism. The belated emergence of procedural originalism in itself tells us something noteworthy about the constitutional politics of originalism; where and how this movement gains force—or fizzles out—will tell us something more interesting still.

Let us begin with the basics. Much of the modern-day blackletter law of civil procedure is not rooted in original meaning in any straightforward sense. Elementary aspects of civil procedure doctrine—the doctrines that law professors drill into thousands of 1Ls' heads in the first weeks of law school every year—are nonoriginalist

32. For recent originalist scholarship challenging current understandings of procedural due process and personal jurisdiction, see Solum & Crema, *Originalism and Personal Jurisdiction, supra* note 14, at 495 ("The Fair Procedures Theory is the mainstream living constitutionalist understanding of the clause, reflected in *International Shoe* in the context of personal jurisdiction and decisions like *Goldberg v. Kelly*, *Mathews v. Eldridge*, and *Connecticut v. Doehr* in the context of the opportunity to be heard." (footnotes omitted)); *id.* at 485 ("[T]he original meanings of the Due Process of Law Clauses of the Fifth and Fourteenth Amendments were not general commands that all legal procedures (including the assertion of personal jurisdiction) conform to a conception of procedural fairness."); Crema & Solum, *The Original Meaning*, *supra* note 14, at 531 ("From an originalist perspective, the underlying premise of *Mathews* is mistaken. Administrative hearings are not 'process' within the original meaning of the Fifth Amendment Due Process of Law Clause.").

33. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 382 (1971) (holding that due process requires that indigent individuals have access to courts to seek dissolution of marriages); Sniadach v. Fam. Fin. Corp. of Bay View, 395 U.S. 337, 340 (1969) (holding that a statute allowing garnishment before judgment violates due process). I am grateful to Professor Judith Resnik and Professor Abbe Gluck for their thoughts on this paragraph.

34. Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 549 (2006).

from soup to nuts, both in their methodology and in their outcomes.[35] A mix of precedent, principle, and pragmatism undergirds the constitutional law of civil procedure—a body of doctrine that courts have consciously developed to respond to changing economic, political, and social conditions and shifting jurisprudential understandings. Reorganizing that system today around the polestar of original public meaning would entail disruption and confusion to a degree that even some originalists may be unwilling to stomach.[36] Indeed, what is perhaps most noteworthy about the movement to procedural originalism is not that it promises to supply a normatively attractive roadmap for procedural reform but rather that originalists are taking up questions of civil procedure at all.[37]

That is because examining the intersection of civil procedure and originalism offers a fruitful way to explore an important question: How is the originalist agenda constructed? Some areas of constitutional doctrine have drawn sharp criticism from originalists from the beginnings of the modern-day originalist movement (for example, abortion, affirmative action, and school prayer).[38] Other areas came under attack from originalists later in the day (for example, the nondelegation doctrine and gun rights).[39] And still other doctrines barely made a blip on the originalist radar until recently—among them, many commonplace doctrines of civil procedure.[40] The shifting content of the originalist agenda matters, if only because nowadays so many scholars and judges are, for better or worse, self-described originalists. For the same reason, it is important to understand what goes on that agenda, and why.

An extended debate concerning this precise issue has long simmered between originalists and their critics. The debate itself can be summarized quite simply. Originalism's self-portrayal has been that it is an apolitical working-out of legal conclusions from fundamentally objective facts about linguistic meaning, historical sources, and/or the ontology of legal rules and lawful methods of legal change.[41] That

35. *See infra* Part II.

36. *See infra* Part III.

37. *See infra* Part IV.

38. *See infra* notes 56–62 and accompanying text.

39. *See infra* note 86 and accompanying text.

40. *See infra* notes 65–87 and accompanying text.

41. *See* Edwin Meese III, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 29 (1985) ("A jurisprudence that seeks fidelity to the Constitution . . . is not a jurisprudence of political

account of originalism is resoundingly rejected by a common critique of originalism, which I will refer to as the "political account of originalism." That critique, which is broadly accepted in many quarters, asserts that originalism is best understood not as an apolitical, principled, and constraining theory of legal interpretation but instead as a method of implementing "conservative commitments that are not determined by objective and disinterested historical research into the circumstances of the Constitution's ratification."[42] The political account of originalism stresses that from its inception, originalism has been deployed to advance conservatism's aims and typically is accepted in doctrine only when a legal conclusion claimed to be supported by originalist sources happens to coincide with an outcome favored by the conservative political movement.[43]

Civil procedure, as this Article explains, now offers a fresh petri dish in which to observe the relative influence of principle and politics on originalism. Civil procedure is by no means a field that has been cordoned off from or immune to the influence of politics.[44] Yet when

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results. It is very much concerned with process, and it is a jurisprudence that in our day seeks to depoliticize the law."); Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 251 (2018) (describing originalism as "a theory that is ideologically neutral at its core. Originalism commits us to the idea that we must follow the Constitution wherever it leads, whether the destination is conservative or libertarian, liberal or progressive").

42. Post & Siegel, *supra* note 34, at 557; *see* ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM, at xi (2022) ("[O]riginalism is an emperor with no clothes. . . . Originalism . . . allows conservative justices and judges to pretend that they are following a neutral theory when in reality they are imposing their own values.").

43. *See, e.g.*, Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 391–92 (2000) (noting that Justice Scalia's views on original meaning "lead[] one to believe that the original meaning of the Constitution and the Republican platform are remarkably similar"); Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5, 20 (2011) [hereinafter Fallon, *Are Originalist Constitutional Theories Principled*] (noting "a series of well known correlations between originalist constitutional theories, on the one hand, and substantively conservative or libertarian political beliefs, on the other hand"); Post & Siegel, *supra* note 34, at 558 ("[Originalism] has ignored elements of the original understanding that do not resonate with contemporary conservative commitments."); Logan E. Sawyer III, *Principle and Politics in the New History of Originalism*, 57 AM. J. LEGAL HIST. 198, 203 (2017) (describing the literature contending that "originalism emerged to help conservative activists legitimate their political interests"); *cf.* Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL'Y 29, 30–31 (2010) (critiquing the critique).

44. Political scientists and legal scholars have documented the influence of the conservative legal movement in the areas of class action litigation, tort reform, and arbitration, among other procedural domains. For the leading treatment, see STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017). For a historical overview of the political and social forces that affected the development

juxtaposed with other areas of constitutional doctrine—think of gun rights, abortion rights, or gay marriage—constitutional civil procedure has a far lower degree of political salience.

To those who regard originalism as fundamentally an artifact of conservative politics, the low political salience of topics like diversity jurisdiction and personal jurisdiction would readily explain why originalists have typically paid little heed to such topics. By the same token, that understanding of originalism would predict that *without* that exoskeleton of conservative political interest outside the courts, there will be little to no appetite among originalist judges to reform these doctrines to conform to original meaning. If, however, originalism were in fact to gain traction on questions of constitutional civil procedure, that would raise more complicated questions. An originalist reworking of some civil procedure doctrines would produce outcomes that either are not aligned with, or run strongly athwart of, the preferences of key conservative political constituencies. If the Court, because of its commitment to originalism, nonetheless undertook that reworking, then that would offer new fodder for the debate over whether any daylight exists between originalism as implemented by the Court and conservative political commitments.

To be sure, it would not *disprove* the political account of originalism if originalism were to gain ground in the domain of civil procedure. As discussed below, originalism might well be used in civil procedure selectively or instrumentally, whether to assist in a bank-shot achievement of conservative aims, to destabilize stare decisis, and/or to burnish originalism's claims to neutrality and political autonomy.[45] Even so, tracking the future course of procedural originalism promises to shed fresh light on the dynamics of originalism's constitutional politics and will supply new terrain against which to test the charge that originalism is a proxy for politics rather than a theory of law.

The Article proceeds in four parts. Part I begins by setting out the modern originalist movement's inattentiveness to civil procedure. This Part also unearths and highlights an underappreciated facet of originalism's intellectual history. In the period in which the modern originalist movement crystallized, arguments about originalism *in*

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of corporate diversity jurisdiction, see generally EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958 (1992).

45. *See infra* notes 405–413 and accompanying text.

remedies formed a key strand of that project, for that strand of originalism formed part and parcel of the conservative movement's resistance to *Brown I*,[46] *Brown II*,[47] and the structural injunctions that followed in the wake of these decisions. That remedial aspect of the originalist project subsequently faded. This Part then describes the recent uptick in scholarly engagement with originalism concerning remedies and the still-more-recent debut of scholarly and judicial engagement with civil procedure and originalism.

Part II turns to setting out the fit (or, more precisely, the lack of fit) between the constitutional law of civil procedure and original public meaning, employing as illustrations quotidian components of extant civil procedural law. In areas ranging from the seemingly mundane (diversity jurisdiction over D.C. citizens) to the obviously momentous (diversity jurisdiction over corporations and personal jurisdiction), civil procedure would seem to offer rich fodder for criticism to the committed originalist—and yet (until recently) that criticism has been strangely muted.

Part III and Part IV work in tandem to explore the broader theoretical implications of civil procedure's nonoriginalism for originalists and for critics of originalism. Part III examines how various theories of originalism may respond to procedural law's nonoriginalism, placing particular emphasis on how it may challenge or complicate these theories. Part IV looks to the road ahead, explaining why tracking originalism's future engagement with civil procedure (or its selective engagement with it) may shed new light on the political dynamics that drive the construction of the originalist agenda.

Two points are worth noting at the outset—one on scope and terminology, and one on timing and aims. First, as to scope and terminology: drawing crisp boundaries around the domain of civil procedure is impossible. Abstention, conflicts of law, evidence, habeas corpus, procedural due process,[48] qualified immunity, remedies, sovereign immunity, and standing are just some of the vast constellation of subjects that may fairly be regarded either as procedural or as adjacent to procedure. In this Article, I use "civil procedure" to refer to subjects taught in the typical civil procedure

46. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954).

47. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

48. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Mathews v. Eldridge, 424 U.S. 319 (1976).

course,[49] rather than to subjects that have their own dedicated class (e.g., evidence, conflicts of law, and remedies) or that are typically covered in either a federal courts class (e.g., abstention, habeas corpus, qualified immunity, sovereign immunity, and standing) or in a class on administrative or constitutional law (e.g., procedural due process). The bulk of the discussion addresses originalism in relation to civil procedure as thus delimited, with some excursion into originalism's approach to remedies.[50] By interrogating originalism's relationship with these topics, this Article takes the first step in a larger project of examining how originalism's expanding purview may affect these and adjacent legal domains, however those areas of law are denominated.

Second, as to timing and aim: this Article calls attention to an emerging phenomenon at a potentially formative stage in its development. Justice Gorsuch's shot across the bow in his concurrence in *Ford* and the Justices' questions during the November 2022 oral argument in *Mallory*[51]—which is still pending as of this writing—have offered glimpses into what the movement to procedural originalism might portend. As matters stand today, though, procedural originalism has many possible futures. I can make no guarantee that originalism will produce any particular consequence as applied to civil procedure, because—as explored below—originalism as it is currently theorized is flexible and capacious enough to support a wide range of outcomes, including retention of the status quo.[52] It is still worthwhile, however, to think through the range of possible outcomes because some

49. Though there is substantial variation among professors, a typical civil procedure curriculum will devote substantial attention to doctrines of subject matter jurisdiction, personal jurisdiction, and venue, as well as to pleading, joinder of parties and claims, the *Erie* doctrine, the jury trial right, judgment, and claim and issue preclusion. *See* James E. Pfander, *Thomas Main, Global Issues in Civil Procedure (Thomson/West, 2006)*, 56 AM. J. COMPAR. L. 506, 507 (2008) ("Most law schools offer a 4–6 hour course or sequence in procedure that covers the basics of pleading and practice, discovery and preclusion, and such systemic issues as judicial and subject matter jurisdiction, *forum non conveniens*, and choice of law, at least in the *Erie* setting."). *See generally, e.g.*, JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON & HELEN HERSHKOFF, CIVIL PROCEDURE CASES AND MATERIALS (10th ed. 2009) (covering these topics); JOSEPH W. GLANNON, ANDREW M. PERLMAN & PETER RAVEN-HANSEN, CIVIL PROCEDURE: A COURSEBOOK (4th ed. 2020) (same). For a useful history, see generally Mary Brigid McManamon, *The History of the Civil Procedure Course: A Study in Evolving Pedagogy*, 30 ARIZ. ST. L.J. 397 (1998).

50. Some of my earlier scholarship has engaged with originalism concerning aspects of remedies and equity. *See* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 1002–06 (2020) [hereinafter Sohoni, *Lost History*]; Mila Sohoni, *Equity and the Sovereign*, 97 NOTRE DAME L. REV. 2019, 2048–54 (2022).

51. *See supra* note 21.

52. *See infra* Part III.

originalist conclusions concerning civil procedure, were they to be embraced by originalists on the Court, could take our law in a very different direction. In sum, this Article's aim is to foreground this incipient movement to procedural originalism—a movement that is noteworthy not merely because of the extent to which it breaks with originalism's past preoccupations, and not merely because of its potential to ramify across substantial swaths of law, but also because the *pattern* of originalism's future application in civil procedure will shed valuable light on the relationship between politics and originalism.

I. ORIGINALISM BEYOND SUBSTANCE

We naturally tend to focus on originalism when it succeeds in gaining traction. Conversely, we naturally neglect to pay attention to where and why originalist arguments *have not* gained traction. One important place in which it has not gained traction is the area of civil procedure.

Part I.A begins by pointing out the absence of attention to civil procedure by key figures of the modern-day originalist movement. It also points out an aspect of originalism's intellectual history to which legal scholars have paid little attention: in its formative years, modern-day originalism was concerned with both questions of substantive law *and questions of remedies*. Though that "sidecar" of remedial originalism soon receded, today the scene is shifting again. As Part I.B explains, themes of originalism have recently reemerged in the realm of remedies and are emerging for the first time with respect to civil procedure.

A. Originalism on Substance (and a Remedial Sidecar)

From the Founding onwards, courts and scholars have considered the Constitution's original meaning to be an important ingredient in constitutional adjudication.[53] But a significant challenge to prevailing modes of constitutional discourse occurred following *Brown v. Board*

53. *See, e.g.*, Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1756 (2015) [hereinafter Fallon, *Many and Varied Roles*]; Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 675 (2009); *see also* Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1766 (1997) ("Most, if not all, of us are . . . 'moderate' originalists; we are interested in 'the framers' intent on a relatively abstract level of generality.'").

of Education (*Brown I*),[54] when the modern originalist movement crystallized.[55] The originalist movement was a "reactive theory"[56] developed to criticize not just *Brown I* but a slew of momentous decisions from the Warren and Burger Courts concerning, among other topics, school prayer; criminal procedure; race, gender, and affirmative action; and sexual privacy and abortion.[57] Making a sharp break with the pluralistic mode of constitutional interpretation that had long prevailed, originalists threw down the gauntlet with the bold claim that adherence to original meaning was the "*only* legitimate way of interpreting the Constitution," while "all other approaches . . .

54. *Brown I*, 347 U.S. 483 (1954).

55. Richard Primus, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44, 50 (2016) ("Modern originalism arose largely as a critique of landmark twentieth-century decisions, from *Brown* to *Reynolds* to *Miranda* to *Roe*, all of which were said to betray original meanings."); BARRY FRIEDMAN, THE WILL OF THE PEOPLE 311–13 (2009); *see also* BERGER, *supra* note 8, at 25–26 (criticizing *Brown I*—"the sacred cow of modern constitutional law"—as a departure from the intent of the framers of the Fourteenth Amendment); *id.* at 26 ("Such a proposal [to bar segregated schools] was far from the framers' minds . . . ."). For more discussion of the reaction *Brown I* provoked, see *infra* notes 88–100 and accompanying text.

56. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 601 (2004) (calling modern originalism "a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts" and stating that "originalism was largely developed as a mode of criticism of those actions"); *see* Jesse Merriam, *A Sheep in Wolf's Clothing: The Story of Why Conservatives Began To Look Beyond Originalism*, 11 FAULKNER L. REV. 63, 81–82 n.56 (2019) (collecting *National Review* critiques of Warren Court decisions, including *Brown*); *id.* at 89–104 (tracing the path through which postwar conservative critiques of the Warren Court "migrated" to the legal academy).

57. *See* Greene, *supra* note 53, at 679 ("The originalist movement instead addresse[d] its critique primarily at the criminal procedure, First Amendment, and substantive due process precedents of the Warren and Burger Courts." (footnotes omitted)); Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485, 554 (2017) ("Modern originalism arose in direct response to the broad rights-granting decisions of the Warren and Burger Courts."); Whittington, *supra* note 56 ("Thus originalism's agenda was whatever was on the Court's agenda. Given the Court's constitutional agenda during this period, the focus was largely on civil rights and civil liberties."); Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 907–08 (describing how abortion opponents came to embrace originalist arguments).

[were] improper and unprincipled."[58] Cases such as *Roe*,[59] *Harper*,[60] and *Miranda*[61] obviously eschewed that methodology; to the originalists, these decisions and others proved that the United States had succumbed to a "government by judiciary."[62]

Civil procedure, as we shall see,[63] is one notable domain in which the label "government by judiciary" really isn't all that far from the mark. Yet the "original" originalists had little to say about civil procedure. To observe this point firsthand, one need only inspect the oeuvres of the formative figures who played the most important roles in shaping the nascent movement and in specifying its claims and agenda—men such as Raoul Berger, Robert Bork, Edwin Meese, and Antonin Scalia.[64] The originalist enterprise drew public attention and legitimacy from these "high-profile advocates,"[65] each of whom held prominent positions in the academy, in government service, and/or on the federal bench.[66]

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58. Post & Siegel, *supra* note 34, at 547; *see also* JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 95 (2005) ("At first haltingly and then with increasing theoretical self-consciousness, politicians, scholars, and some justices began to argue that the original meaning of the Constitution should be accorded more normative weight in Supreme Court adjudication."). I omit here a description of originalism's gradual transition from focusing on the subjective intent of the Framers (sometimes called "old originalism") to focusing on the original public meaning (sometimes called "new originalism"). For the relevant history, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620–29 (1999) (tracing the evolution of originalist thought from original intent to original meaning). *See generally* Whittington, *supra* note 56 (same).

59. Roe v. Wade, 410 U.S. 113 (1973).

60. Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966).

61. Miranda v. Arizona, 384 U.S. 436 (1966).

62. BERGER, *supra* note 8.

63. *See infra* Part II.

64. *See* Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 255 (2019) (describing Berger, Bork, Professor Lino Graglia, Meese, and Scalia as "[t]he oldest group of conservative originalists"); *see also* FRIEDMAN, *supra* note 55, at 311 ("Raoul Berger was the patron saint of originalism.").

65. Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 375–76 (2013) (noting that "[t]he Reagan Administration invited public debate over judicial philosophy" and that Meese, Bork, and Scalia "became the high-profile advocates for originalism"); *see* CHEMERINSKY, *supra* note 42, at x ("When Antonin Scalia joined the Supreme Court, in 1986, originalism gained a forceful champion who gave the theory legitimacy and a platform on and off the bench.").

66. *See* Calvin TerBeek, *"Clocks Must Always Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821, 822 (2021) (tracing originalism's development, "legal elites' legitimation of originalism as a

One scours their writings in vain for evidence of any concern with the subject of civil procedure or its compatibility with original meaning. Raoul Berger, for one, wrote an entire book about the original intent of the Fourteenth Amendment,[67] a volume that "had an explosive effect on constitutional debate in the late 1970s and 1980s."[68] The Due Process Clause of the Fourteenth Amendment, as every first-year law student learns, is the provision of the Constitution that delimits the exercise of general and specific personal jurisdiction by state courts.[69] Yet Berger's chapter on the Due Process Clause does not once mention that body of doctrine.[70] Nor does Berger elaborate on the implications for extant civil procedural law and practice of his view that this clause means merely that individuals must be afforded "an opportunity to answer by service of process."[71]

The scholarly writings of Robert Bork similarly are close to silent with respect to questions of civil procedure.[72] The same is true of the writings and public remarks of Edwin Meese.[73] The reason, to be clear,

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jurisprudential and academic theory," and originalism's "institutional[ization] by the GOP in the Supreme Court, the Department of Justice," and other locales of influence).

67. BERGER, *supra* note 8. Berger's book was written in 1977 and updated in 1996.

68. Greene, *supra* note 53, at 680 (quoting O'NEILL, *supra* note 58, at 123–24).

69. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). Because of Fed. R. Civ. P. 4, a federal district court's personal jurisdiction will typically extend only as far as the jurisdiction of a state court of general jurisdiction in the state in which the federal district court is located.

70. BERGER, *supra* note 8, at 211–44.

71. *Id.* at 224 ("It has been convincingly shown that due process was conceived in utterly procedural terms, specifically, that a defendant must be afforded an opportunity to answer by service of process in proper form, that is, in due course."). Although Berger's book does touch on *Erie*, he does not address whether the doctrine enunciated by that watershed decision is consistent with original meaning. Instead, Berger uses it only as an example of the Court rectifying an unconstitutional assumption of power. BERGER, *supra* note 8, at 370. *See generally* Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350 (1988) (not discussing implications of originalism for civil procedure); Raoul Berger, *"Original Intention" in Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986) (same). One of Berger's articles did critique standing doctrine as a "judicial construct . . . of relatively recent origin." Raoul Berger, *Standing To Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 818 (1969).

72. *See generally, e.g.*, BORK, TEMPTING OF AMERICA, *supra* note 5 (not discussing implications of originalism for civil procedure); Robert H. Bork, *Original Intent: The Only Legitimate Basis for Constitutional Decision Making*, 26 JUDGES J. 13 (1987) (same); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986) (same); Bork, *Neutral Principles*, *supra* note 5 (same).

73. *See generally, e.g.*, Edwin Meese III, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925 (1996) (not discussing implications of originalism for civil procedure); Edwin Meese III, *Is Originalism Possible? Normative*

cannot possibly have been these men's lack of familiarity with civil procedure doctrine. Bork was a judge on the D.C. Circuit, where he decided cases addressing issues of civil procedure.[74] Meese was Reagan's attorney general and in that role oversaw the civil litigation of the entire Department of Justice ("DOJ").[75]

Last, though not least, is Justice Scalia—perhaps still the most famous originalist, and surely the originalist with the most prominent bully pulpit. In a long career as a professor, government servant, and judge, he wrote prolifically on originalism and textualism.[76] He wrote one article about standing, but he wrote nothing about civil procedure.[77] In a thirty-year tenure on the Court peppered with his disquisitions on originalism, Justice Scalia offered but a few peppercorns with respect to originalism's implications for the law of civil procedure. In *Burnham v. Superior Court*,[78] he wrote for a plurality to sustain the constitutionality of tag jurisdiction on originalist grounds.[79] In a concurrence in *Pacific Mutual Life Insurance Co. v.*

Indeterminacy and the Judicial Role, 19 HARV. J.L. & PUB. POL'Y 347 (1996) (same); Meese, *Original Intent*, *supra* note 6 (same).

74. *See, e.g.*, Moncrief v. Lexington Herald-Leader Co., 807 F.2d 217, 221 (D.C. Cir. 1986) (Bork, J.) (affirming dismissal for lack of personal jurisdiction). As a D.C. Circuit judge, Bork wrote influential originalist opinions about standing. *See* Vander Jagt v. O'Neill, 699 F.2d 1166, 1177 (D.C. Cir. 1982) (Bork, J., concurring) (legislator standing); Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1984) (Bork, J., dissenting) (legislator standing); Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 811–16 (D.C. Cir. 1987) (third-party standing).

75. *Attorney General: Edwin Meese III*, U.S. DEP'T OF JUST. (June 26, 2017), https://www.justice.gov/ag/bio/meese-edwin-iii [https://perma.cc/Y72D-HBX5].

76. *See supra* note 10.

77. Then-Judge Scalia's article on standing assessed that doctrine on structural grounds and relied only slightly on originalist sources or historical evidence concerning the law of standing at the Founding. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). Subsequently, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and other standing decisions, Justice Scalia penned opinions that "occasionally refer[red] to history and tradition[] but . . . [did] not set out to discover the original meaning of Article III's extension of judicial power to specified 'cases' and 'controversies.'" James E. Pfander, *Scalia's Legacy: Originalism and Change in the Law of Standing*, 6 BRIT. J. AM. LEG. STUD. 85, 100 (2017).

78. Burnham v. Superior Ct., 495 U.S. 604 (1990).

79. *Id.* at 622 (plurality) (Scalia, J.). "Tag" jurisdiction is the colloquial term for personal jurisdiction over an out-of-state defendant acquired by serving the defendant with process when the defendant is physically present within the borders of the forum state. *See Jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "transient jurisdiction" in the entry on "jurisdiction"). For additional discussion of *Burnham*, see *infra* notes 286–293 and accompanying text.

Haslip,[80] he supplied an originalist analysis of the Due Process Clauses en route to concluding that these clauses posed no obstacle to the assessment of punitive damages by juries.[81] In a dissent in *Gasperini v. Center for Humanities*,[82] he contended that allowing federal appellate courts to reduce damages awards in diversity suits violated the Seventh Amendment's Reexamination Clause.[83] But Justice Scalia voiced no originalist objection to civil procedure decisions that applied the framework established in *International Shoe*[84] or that glossed the doctrines applicable to corporations suing in diversity.[85]

All in all, as originalism germinated and took hold as an interpretive methodology and a movement, it remained largely focused

80. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

81. *Id.* at 24, 29 (Scalia, J., concurring). Subsequently, Justice Scalia dissented in decisions that imposed due process limits on punitive damages awards, which he regarded as yet another unfortunate manifestation of substantive due process doctrine. *See, e.g.*, BMW v. Gore, 517 U.S. 559, 598–99 (1996) (Scalia, J., dissenting) ("I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against 'unfairness'—neither the unfairness of an excessive civil compensatory award, nor the unfairness of an 'unreasonable' punitive award."); *id.* at 599–600 (rebuking the Court for identifying "a 'substantive due process' right against a 'grossly excessive' award").

82. Gasperini v. Ctr. for Humans., 518 U.S. 415 (1996).

83. *Id.* at 448, 461 (Scalia, J., dissenting) ("[T]he Court frankly abandons any pretense at faithfulness to the common law, suggesting that 'the meaning' of the Reexamination Clause was not 'fixed at 1791,' . . . contrary to the view that all our prior discussions of the Reexamination Clause have adopted.").

84. *See* Walden v. Fiore, 571 U.S. 277 (2014); Daimler AG v. Bauman, 571 U.S. 117 (2014); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).

85. *See* Hertz Corp. v. Friend, 559 U.S. 77 (2010). In *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), Justice Scalia stated that "the rule regarding the treatment of corporations as 'citizens' has become firmly established," but he did not defend this "firmly established" rule by reference to original public meaning. *Id.* at 189. Rather, Justice Scalia obliquely acknowledged that the "special treatment for corporations" as citizens was the result of the Court's interventions. *See id.* at 196 ("[H]aving entered the field of diversity policy with regard to artificial entities once (and forcefully) in *Letson*, we have left further adjustments to be made by Congress."); *id.* at 197 ("We have long since decided that, having established special treatment for corporations, we will leave the rest to Congress; we adhere to that decision.").

on questions of substantive law[86]—while leaving civil procedure essentially untouched.[87]

There was, however, an important domain adjacent to civil procedure to which originalism *did* pay a notable amount of attention in its early years: the scope of equitable remedies. As the following discussion relates, originalists contended that the federal judiciary was routinely exceeding the powers conferred on it by the Constitution by engaging in (ab)use of equitable remedies and, in particular, by exorbitant use of the structural injunction.

As with the modern originalist movement more generally, the story here begins with *Brown I*.[88] As the political scientist Calvin TerBeek has written, "[T]he conservative *movement*—prominently, the high-brow conservatism of *National Review*—viewed *Brown* as an affront."[89] In response to this "affront," the conservative movement adopted "a proactive project of constitutional history purporting to demonstrate what Warren's opinion did not reflect: the original intent of the Fourteenth Amendment."[90] Invocation of "original intent," TerBeek writes, was an "ostensibly non-racialized first constitutional principle" that movement conservatives could use to delegitimize *Brown*, along with the rest of "the Warren Court's programmatic liberalism."[91] In the academy, first-generation originalists such as

86. By the 1980s and 1990s, originalist argumentation had developed concerning gun rights, the nondelegation doctrine and the administrative state, the Commerce Clause, and other areas of substantive constitutional law. *See, e.g.*, Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1141 (1996); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1455 (1987) (elaborating on the "original constitutional understanding" of the Commerce Clause); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 & n.1 (1994) (arguing that the "post-New Deal administrative state is unconstitutional" because it is "at variance with the Constitution's original public meaning").

87. Though beyond the scope of this Article, it is worth noting that originalist argumentation has made far deeper forays into the field of *criminal* procedure. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466 (2000) (addressing the right to a jury); Crawford v. Washington, 541 U.S. 36 (2004) (interpreting the Confrontation Clause); California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) (interpreting the Fourth Amendment). That set of opinions only underscores the oddness of the fact that *civil* procedure has not received originalist attention.

88. *Brown I*, 347 U.S. 483 (1954).

89. TerBeek, *supra* note 66, at 821.

90. *Id.* at 822.

91. *Id.*

Professors Lino Graglia[92] and Raoul Berger[93] argued with fervor that *Brown I* had departed from the original meaning of the Fourteenth Amendment. And if *Brown I* was wrongly decided, its companion case *Bolling v. Sharpe*[94] was utterly hopeless; there is no colorable way to contend that the Due Process Clause of the *Fifth* Amendment barred segregation.[95]

In relatively short order, however, the conservative movement muffled its criticisms of *Brown I* and *Bolling*—at least, that is, as to their substantive outcomes. By the late 1960s, TerBeek writes, the "neo-confederate constitutional arguments were increasingly driven to the fringes" of conservatism.[96] Originalist legal scholarship contending that *Brown I* and *Bolling* were wrongly decided as a matter of original meaning was mostly ignored.[97] By the 1980s, it became evident that "[p]olite company require[d] . . . that constitutional methodologies be

92. *See, e.g.*, LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS 17 (1976) [hereinafter GRAGLIA, DISASTER BY DECREE] ("[T]he country needs to understand . . . [that] compulsory integration . . . not only has . . . been imposed by the Supreme Court and not by the Constitution, but it has been imposed by the Court most improperly."); Lino A. Graglia, *"Constitutional Theory": The Attempted Justification for the Supreme Court's Liberal Political Program*, 65 TEX. L. REV. 789, 796–97 (1987). Graglia has been described as "a founding father of the modern originalism movement." Thomas B. Colby & Peter J. Smith, *The Return of* Lochner, 100 CORNELL L. REV. 527, 601 (2015).

93. BERGER, *supra* note 8, at 139 ("[T]he framers had no intention of striking down segregation.").

94. Bolling v. Sharpe, 347 U.S. 497 (1954).

95. *See* Lino A. Graglia, *Originalism and the Constitution: Does Originalism Always Provide the Answer?*, 34 HARV. J.L. & PUB. POL'Y 73, 79 (2011) ("Reasoning that would be rejected in a discipline with the intellectual integrity of, for example, astrology, is perfectly acceptable, the *Bolling* opinion illustrated, in the make-believe world of constitutional law.").

96. TerBeek, *supra* note 66, at 824. In 1966, L. Brent Bozell, Jr., the ghostwriter of Barry Goldwater's bestselling book *The Conscience of a Conservative* and the brother-in-law of *National Review* publisher William F. Buckley, Jr., published a book that harshly criticized *Brown* for, inter alia, ignoring "the views of the Constitution's framers" and the "intention[s]" of the states that ratified the Fourteenth Amendment. L. BRENT BOZELL, JR., THE WARREN REVOLUTION: REFLECTIONS ON THE CONSENSUS SOCIETY 41–57 (1966). Some originalists continued to press the case against *Brown I* well after the 1960s. *See, e.g.*, Earl Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811, 846 (1983) ("[T]he historical record indicates unambiguously that the Framers of the fourteenth amendment did not intend to outlaw state-imposed segregation per se.").

97. *See* Post & Siegel, *supra* note 34, at 558 ("No one paid any attention, for example, when Lino Graglia earnestly sought to prove that the Warren Court violated the basic tenets of the jurisprudence of originalism [in *Bolling*] . . . those who guided the political practice of originalism had no intention of assaulting *Bolling*, much less *Brown*.").

premised on *Brown*'s correctness."[98] Even an originalist as ardent and influential as Bork would, when pressed, defend *Brown I*'s outcome,[99] if only with "rather tortuous" reasoning.[100]

Yet—though it had become politically challenging to attack *Brown I* head-on—that decision's remedial sequel, *Brown II*,[101] remained a viable target. Following *Brown II*'s command to desegregate schools "with all deliberate speed,"[102] federal courts issued a dizzying array of injunctions that fundamentally reshaped public school systems around the country by mandating busing, pupil reassignment, and other measures.[103] The use of the "structural injunction" spread from there, to myriad decrees regulating state and local prisons, mental hospitals, public housing, and other areas.[104]

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98. Greene, *supra* note 53, at 679; *see* Lino Graglia, *Constitutional Law Without the Constitution*, *in* "A COUNTRY I DO NOT RECOGNIZE": THE LEGAL ASSAULT ON AMERICAN VALUES 1, 27 (Robert H. Bork ed., 2005) ("[I]t is not politically, socially, or academically permissible to disagree with *Brown*.").

99. *See* BORK, TEMPTING OF AMERICA, *supra* note 5, at 81–83.

100. Cass Sunstein, *What Judge Bork Should Have Said*, 23 CONN. L. REV. 205, 210 n.21 (1991) ("[M]any readers will emerge from [Bork's] discussion [of *Brown I*] with the firm impression that on Bork's own method, neutrally applied, *Brown* was wrongly decided."). Subsequent originalists have sometimes *defended* the outcome of *Brown I* on originalist grounds—with unclear success. *Compare* Michael W. McConnell, *Originalism and the Desegregation Decision*, 81 VA. L. REV. 947, 953 (1995) (arguing that "the best available evidence" indicates that school segregation violates the original meaning of the Fourteenth Amendment), *with* Michael J. Klarman, Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1883 (1995) (arguing that Professor McConnell's argument is "unpersuasive"), *and* Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENT. 223, 228 (1996) (making an "originalist case against *Brown*"). *Cf.* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1835 n.10 (2020) (Kavanaugh, J., dissenting) (stating, without citation, that "*Brown* is a correct decision as a matter of original public meaning").

101. *Brown II*, 349 U.S. 294, 300 (1955).

102. *Id.* at 301.

103. Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 47 (1982) ("In desegregation cases, relief has consisted of some combination of magnet schools, redrawn district boundaries, consolidation, remedial education, busing, and so on.").

104. *See, e.g.*, Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 468–72 (1980) (describing cases involving mental hospitals and prisons); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 637–41, 651–52 (1982) (describing cases involving mental hospitals, prisons, and schools); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1124–25 (1996) (describing cases involving prisons, public housing, and police and firefighting forces).

Originalists criticized these structural injunctions root and branch. In 1976, Graglia, for example, contended in a bestselling book that the desegregation decrees following *Brown II* were "unprincipled and unscrupulous," "heedless of fact and reason," and unfounded in the Constitution; caused endless "ad hoc, subjective decision-making by judges"; eroded "respect for law"; and "creat[ed] an inexhaustible source of conflict and litigation."[105] A few years later, in 1982, the originalist political scientist Gary McDowell produced a slim volume, *Equity and the Constitution*, in which he reached back to Aristotle and Blackstone to construct an originalist indictment of the Court's misuse of equitable remedies in *Brown II* and its successors.[106] As one perceptive student author noted, McDowell's book "on its face does not attack a line of substantive constitutional decisions" but nonetheless had a clear aim: to "target several aspects of *Brown* for attack."[107] Just as originalism as a whole offered an "ostensibly non-racialized first constitutional principle"[108] on which to critique the actions of the Warren and Burger Courts, remedial originalism in this era offered a politically palatable means to criticize *Brown*'s *implementation* without frontally attacking *Brown I* itself.

This remedial originalism soon found a receptive audience in the Reagan DOJ.[109] Headed by Edwin Meese, the DOJ published a series of "lengthy" but "little known" reports on originalism in the late 1980s.[110] These reports adopted "the framework of originalism" to set forth "goals for changes in constitutional and other legal doctrine on the great issues of the day."[111] While most of the reports focused on matters of substantive constitutional doctrine,[112] one report was entirely devoted to an originalist critique of the use of equitable remedies by the federal courts: *Justice Without Law: A Reconsideration*

105. *See* GRAGLIA, DISASTER BY DECREE, *supra* note 92, at 14–15, 88.

106. *See* GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY 97–124 (1982).

107. *See* Book Note, *Equity and the Constitution*, 96 HARV. L. REV. 555, 556 (1982).

108. TerBeek, *supra* note 66.

109. McDowell later became the associate director of the DOJ's Office of Public Affairs, where he served as an advisor to Meese. *See* Sawyer, *supra* note 43, at 207 n.78.

110. Dawn Johnsen, *Lessons from the Right: Progressive Constitutionalism for the Twenty-First Century*, 1 HARV. L. & POL'Y REV. 239, 244 (2007); *see also* Michael E. Solimine, Ex Parte Young: *An Interbranch Perspective*, 40 U. TOL. L. REV. 999, 1014–15 (2009).

111. Johnsen, *supra* note 110.

112. *See id.* (listing DOJ reports on the jurisprudence of original meaning, disparate impact and affirmative action, and judicial activism).

of the "Broad Equitable Powers" of the Federal Courts (1988).[113] Surveying materials from the Norman conquest of England in 1066 right on down to McDowell's 1982 book, *Justice Without Law* did not mince words in making its case that the federal courts' use of injunctive power had "strayed outside" the "historical development of equity and the original meaning of Article III's grant of equitable jurisdiction."[114] The reasoning of *Ex parte Young*,[115] "the keystone of federal judicial action against the states,"[116] the report said, was mere "sophistry."[117] *Brown II*, it argued, had no limiting principle: in Justice Warren's hands, "[e]quity becomes a special judicial superpower that gives little recognition to issues of jurisprudence, constitutionalism, separation of powers, or federalism."[118] And as for *Swann v. Charlotte-Mecklenburg Board of Education*[119]—a momentous decision in which the Court first approved a decree requiring school busing—the report contended that the Court's reasoning was "dubious" and self-contradictory and that the Court was "just inventing new remedies and new remedial doctrines—and calling them equitable."[120]

Subsequently, this strand of originalism faded from view in both scholarship and doctrine. For example, though histories of Reagan-era conservatism and its influence upon originalism abound, *Justice Without Law* has barely received mention. As structural injunctions receded,[121] the originalist objections to them concomitantly abated.

113. U.S. DEP'T OF JUST., OFF. OF LEGAL POL'Y, JUSTICE WITHOUT LAW: A RECONSIDERATION OF THE "BROAD EQUITABLE POWERS" OF THE FEDERAL COURTS (1988) [hereinafter JUSTICE WITHOUT LAW].

114. *Id.* at 5.

115. *Ex parte* Young, 209 U.S. 123 (1908).

116. JUSTICE WITHOUT LAW, *supra* note 113, at 82 (cleaned up).

117. *Id.* at 84.

118. *Id.* at 94.

119. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

120. JUSTICE WITHOUT LAW, *supra* note 113, at 95.

121. *See* Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 965 (1993) ("The fate of the structural injunction has also been tied to that of the civil rights movement. The remedy grew in power and scope over a twenty-year period, beginning in 1954 and continuing until 1974. Ever since, it has been under attack."); Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1192 (2009) (noting that by the 1980s, "the era of the big structural injunction was drawing to a close . . . . Judicial supervision of school desegregation had proved largely unworkable . . . . Reforms to doctrines of standing, ripeness, and comity had made the federal courthouse less a beacon for social activists disinclined to enter the political arena" (footnote omitted)).

Now and again, an opinion by an originalist Justice[122] or an article by a legal scholar[123] has fleetingly "re-upped"[124] an originalist critique of the structural injunction. All in all, however, and despite tracing its pedigree to the earliest days of the originalist movement, it can fairly be said that the *remedial* aspect of the originalist project commanded a noticeable level of interest only for a relatively brief stint of time—the period following *Brown II* in which the decrees of a mostly liberal federal judiciary were exciting political pushback. Rather than occupy itself with the arcana of equitable remedies, the originalist movement instead devoted the lion's share of its attention to developing substantive arguments about issues such as religious liberty, affirmative action, abortion, gun rights, and the structure of the administrative state. As the next Section will show, however, originalist discourse has lately begun to broaden its focus again.

B. Originalism's Spreading Focus: Remedies and Procedure

In the last few years, originalist arguments have played an increasingly prominent role in debates on the Court concerning various aspects of remedies.[125] And, in a surely related development, a call for originalism has rung out from originalist Justices for the first time with respect to a core doctrine of civil procedure: the doctrine of personal jurisdiction.

With respect to remedies, originalist arguments have created new undercurrents of tension—even among the Court's self-proclaimed originalists—in cases involving the use of severance as a remedy.[126] In

122. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 126–31 (1995) (Thomas, J., concurring).

123. *See, e.g.*, Yoo, *supra* note 104, at 1151–66.

124. *See, e.g.*, Brown v. Plata, 563 U.S. 493, 554 (2011) (Scalia, J., dissenting) (citing his own earlier opinion in *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 841–42 (1994) (Scalia, J., concurring)).

125. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring) (arguing that nationwide injunctions are unconstitutional as a matter of original meaning); DHS v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring); *infra* notes 129–135 (discussing originalist arguments concerning severability); Uzuegbunam v. Preczewski, 141 S. Ct. 792, 798–99 (2021) (Roberts, C.J., dissenting) (evaluating Founding-era law concerning nominal damages).

126. For scholarship that has played an important role in shaping this debate, see John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56, 82–88 (2014); Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 954–57 (2018) (describing the Framers' rejection of the "judicial veto" and a Council of Revision); Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 755 (2010) (describing "the original approach to partial unconstitutionality"); *id.* at 768 ("A basic principle governed: Statutes are invalid so far as they are repugnant to superior law, but no further.").

Murphy v. NCAA,[127] Justice Thomas protested that "modern severability precedents are in tension with longstanding limits on the judicial power."[128] In *Seila Law LLC v. CFPB*,[129] Justice Thomas, joined by Justice Gorsuch, contended that as a matter of Article III's original meaning, the federal courts lack the power to "excise, erase, alter, or otherwise strike down a statute."[130] In *Barr v. AAPC*,[131] Justice Gorsuch, joined by Justice Thomas, called for the Court to "reconsider [its] course" on severability.[132] But Justices Brett Kavanaugh and Samuel Alito and Chief Justice John Roberts resisted this invitation: "Justice Gorsuch suggests . . . that severability doctrine may need to be reconsidered. But when and how? As the saying goes, John Marshall is not walking through that door."[133] Justice Kavanaugh instead defended severability doctrine as "constitutional, stable, predictable, and commonsensical."[134] Subsequent decisions have only revealed more convoluted disagreements amongst the Justices concerning severability.[135]

In the area of equitable remedies, originalist arguments have played a still more prominent role.[136] A heated debate has recently

127. Murphy v. NCAA, 138 S. Ct. 1461 (2018).

128. *Id.* at 1485–87 (Thomas, J., concurring).

129. Seila L. LLC v. CFPB, 140 S. Ct. 2183 (2020).

130. *Id.* at 2220 (Thomas & Gorsuch, JJ., concurring in part and dissenting in part) (citing scholarship on "early American courts" and the "traditional understanding of the judicial power").

131. Barr v. AAPC, 140 S. Ct. 2335 (2020).

132. *Id.* at 2367 (Gorsuch & Thomas, JJ., concurring).

133. *Id.* at 2356 (Kavanaugh, J., joined by Roberts, C.J., and Alito, J.). Justice Kavanaugh was apparently making a lighthearted allusion to remarks by a coach for the Boston Celtics, a sports team. For an explanation of the reference, see Josh Blackman, *Part III:* Barr v. AAPC *and Stare Decisis*, REASON: VOLOKH CONSPIRACY (July 7, 2020, 10:00 AM), https://reason.com/volokh/2020/07/07/part-iii-barr-v-aapc-and-stare-decisis [https://perma.cc/9VPV-WCGB].

134. *Barr*, 140 S. Ct. at 2356.

135. *See, e.g.*, California v. Texas, 141 S. Ct. 2104, 2122 (2021) (Thomas, J., concurring); *id.* at 2124 (Alito, J., dissenting); Collins v. Yellen, 141 S. Ct. 1761, 1793 (2021) (Thomas, J., concurring); *id.* at 1797–98 (Gorsuch, J., concurring in part); United States v. Arthrex, Inc., 141 S. Ct. 1970, 1991 (2021) (Gorsuch, J., concurring in part and dissenting in part).

136. In its approach to construing the Judiciary Act of 1789, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), arguably marked the beginning of an originalism-influenced "turn to history and tradition" in the Court's treatment of equity. *See* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1004, 1011 (2015). Notably, however, the *Grupo Mexicano* majority decision, penned by Justice Scalia, eschewed a "rigidly originalist methodology." Sohoni, *Lost History*, *supra* note 50, at 1006 n.554 (noting that the *Grupo Mexicano* decision relied not only on "what English courts did in 1789" but also on

been raging concerning the legality and propriety of nationwide or "universal" injunctions.[137] A universal injunction blocks the enforcement of a law or regulation against not just the plaintiff bringing the lawsuit but nonplaintiffs as well.[138] When the enjoined defendant is a federal officer charged with enforcing the law or regulation nationwide, such an injunction will have nationwide effect.[139] For decades, federal courts issued universal injunctions and a cognate remedy—"universal vacatur"[140]—without occasioning much in the way of either comment or criticism.[141] Yet, at the tail end of the Obama administration and throughout the Trump administration, federal courts issued nationwide injunctions that blocked the implementation of some extremely high-profile, politically important executive branch policies.[142] These injunctions provoked a chorus of criticism from many quarters, including from prominent politicians, government lawyers, and legal academics.[143]

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decisions by American state and federal courts through the twentieth century and on the nature of the remedy at issue).

137. *See* Sohoni, *Lost History*, *supra* note 50, at 922–23.

138. *Id.* at 924 n.17.

139. *Id.* (noting that the term "'nationwide injunction' is often used to refer to an injunction against federal law that shields nonparties nationwide, even when the injunction stops short of shielding 'everyone'"); Alan Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977, 978 (2020).

140. Mila Sohoni, *The Power To Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1122–23 (2020) [hereinafter Sohoni, *Power To Vacate*].

141. *See* Milan Smith, *Only Where Justified: Towards Limits and Explanatory Requirements for Nationwide Injunctions*, 95 NOTRE DAME L. REV. 2013, 2023 n.54 (2020) (noting that "the frequency of nationwide injunction issuance appears to have been growing fairly steadily over several decades" but that "most of the scholarship . . . and the only Supreme Court opinions (minority concurrences) questioning their validity writ large, has emerged in just the past three or four years"); *id.* ("The reason why nationwide injunctions are drawing so much critical attention *now* is likely because President Trump and the [DOJ] have made it a *cause célèbre*."); Tessa Berenson, *Inside the Trump Administration's Fight To End Nationwide Injunctions*, TIME, Nov. 4, 2019 ("Members of the Trump administration have made it a mission at the highest levels of the White House and the Justice Department to put an end to nationwide injunctions." (cited and quoted in Smith, *id.*)).

142. Smith, *supra* note 141, at 2015–17, 2016 nn. 7–8; Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 992 (2022) ("Every modern case in which a federal court has issued a nationwide injunction involves presidential or administrative action; none includes an act of Congress. District courts have enjoined enforcement of executive orders, enforcement memoranda and other informal guidance, formal agency rulemaking, and combinations of these authorities.").

143. *See* Sohoni, *Lost History*, *supra* note 50, at 922–23; Sohoni, *Power To Vacate*, *supra* note 140, at 1186–89.

A core plank of the legal case against these injunctions is that they are inconsistent with the original meaning of Article III and its grant of power to federal courts to decide "Cases . . . in Equity."[144] Citing and adopting the conclusions of an article by Professor Samuel Bray,[145] Justice Thomas contended in *Trump v. Hawaii*[146] that the universal injunction was incompatible with "longstanding limits on equitable relief and the power of Article III courts,"[147] constraints that, like Professor Bray, he regarded as rooted in "'the body of law which had been transplanted to this country from the English Court of Chancery' in 1789."[148] Notably, Justice Thomas's opinion also cited McDowell's book *Equity and the Constitution*—a book that, as noted above, had levied an originalist case against post-*Brown* desegregation decrees and other structural injunctions.[149] Justice Thomas's originalist criticism of the universal injunction was later echoed by Justice Gorsuch,[150] who likewise claimed that universal injunctions "have little basis in traditional equitable practice" and questioned whether such decrees fell within "the scope of courts' equitable powers under Article III."[151]

Originalist arguments have also recently appeared in debates concerning other equitable remedies. For example, in *Liu v. SEC*,[152] Justice Thomas dissented from the Court's decision allowing the Securities and Exchange Commission ("SEC") to use disgorgement as a remedy.[153] Invoking his *Trump v. Hawaii* concurrence, Justice Thomas contended that the Securities Exchange Act of 1934 must be read in accordance with what he characterized as the Court's "usual interpretive convention," under which the term "equitable relief"

144. U.S. CONST. art. III, § 2, cl. 1.

145. Samuel C. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).

146. Trump v. Hawaii, 138 S. Ct. 2392 (2018).

147. *Id.* at 2425 (Thomas, J., concurring).

148. *Id*. (quoting Guar. Tr. Co. v. York, 326 U.S. 99, 105 (1945)).

149. *Id.* at 2426–27; *see supra* notes 106–107 and accompanying text.

150. Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay).

151. *Id. But cf.* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 315 n.377 (2022) (describing subsequent cases from 2021 and 2022 in which Justices Thomas and Gorsuch did *not* voice Article III concerns about relief, including injunctions, that extended beyond the plaintiffs).

152. Liu v. SEC, 140 S. Ct. 1936 (2020).

153. *Id.* at 1950 (Thomas, J., dissenting).

means only those "forms of equitable relief available in the English Court of Chancery at the time of the founding."[154] Because, in Justice Thomas's view, disgorgement was merely "a 20th-century invention"[155] and a "word with no history in equity jurisprudence,"[156] he concluded that this remedy fell outside the bounds of the SEC's statutorily conferred authority.[157] Justice Thomas also laid stress on a "[m]ore fundamental[]" problem: that the Court, by "permit[ting] courts to continue expanding equitable remedies," was "undermin[ing] our entire system of equity" and disregarding the Framers' understanding that equity would be confined to "traditional," "precise," and "specific" equitable remedies.[158]

In an important recent article, Professor James Pfander and his co-author Jacob Wentzel dubbed this emergent theme "equitable originalism."[159] They critique this tendency: "Times and contexts have changed; equitable forms tailored to an eighteenth-century English constitutional monarchy may not fit the remedial needs of suitors in a twenty-first century republic."[160] But it is far from clear that an originalist in the mold of Justice Thomas would accept the "evolutionary conception of federal equity"[161] that these authors would prefer. Originalists of Justice Thomas's ilk are not known for their receptivity to "evolutionary" accounts of law.[162]

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154. *Id.*

155. *Id.* at 1951.

156. *Id.* at 1953.

157. *Id.* at 1954 ("I would simply hold that the phrase 'equitable relief' . . . does not authorize disgorgement.").

158. *Id.* ("[T]he Founders accepted federal equitable powers only because those powers depended on traditional forms. The Constitution was ratified on the understanding that equity was 'a precise legal system' with 'specific equitable remed[ies].'" (alteration in original) (quoting Missouri v. Jenkins, 515 U.S. 70, 127 (1995))).

159. James E. Pfander & Jacob Wentzel, *The Common Law Origins of* Ex parte Young, 72 STAN. L. REV. 1269, 1269 (2020).

160. *Id.* at 1275.

161. *Id.* at 1357.

162. *See, e.g.*, Whole Woman's Health v. Jackson, 142 S. Ct. 522, 535 (2021) (relying on "historical practice" and "traditional equitable principles" to support its holding that *Ex parte Young* could not be read to permit injunctive relief against state court proceedings to enforce a novel state scheme for restricting access to abortion). *Contra id.* at 544–45 (Roberts, J., concurring in the judgment in part and dissenting in part) (explaining that "the principles underlying *Young* authorize relief against the court officials who play an essential role in that scheme"); *id.* at 545 ("Any novelty in this remedy is a direct result of the novelty of Texas's scheme.").

The Justices' interest in remedial and equitable originalism has itself been a noteworthy development. It was at least as noteworthy when originalist argumentation—for the first time in living memory—reared its head at the Court in a heartland area of civil procedure. In *Ford Motor Co. v. Montana Eighth Judicial District Court*,[163] the Court addressed the question whether personal jurisdiction existed over Ford Motor Company in two states in which drivers of Ford cars had been injured. Ford claimed that because the two cars were designed, manufactured, and sold outside these states, personal jurisdiction was improper.[164] Justice Elena Kagan, writing for the Court, rejected that argument, reasoning that the suits "relate[d] to" Ford's marketing, sales, and service activities in the two states.[165] The Court sustained the exercise of personal jurisdiction over Ford by applying and extending existing precedent, not by relying on original meaning.[166]

Justice Gorsuch, joined by Justice Thomas, concurred only in the judgment.[167] After criticizing the administrability of the majority's test for when minimum contacts relate to a suit, Justice Gorsuch appended a lengthy narration of the twists and turns of the doctrine of personal jurisdiction in which he stressed how *International Shoe* had transformed the preexisting doctrinal landscape by articulating a new test—"traditional notions of fair play and substantial justice"—to uproot and replace "nearly everything that had come before."[168] But "the right question," stated Justice Gorsuch, was "what the Constitution as originally understood requires, not what nine judges consider 'fair' and 'just.'"[169] Commenting that "[t]he real struggle here [is] . . . with making sense of our personal jurisdiction jurisprudence," he concluded with a frank request: "Hopefully, future litigants and lower courts will help us face these tangles and sort out a responsible way to address the challenges posed by our changing economy in light

163. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021).
164. *Id.* at 1022.
165. *Id.* at 1026.
166. *Id.*
167. *Id.* at 1034 (Gorsuch & Thomas, JJ., concurring).
168. *Id.* at 1038.
169. *Id.* at 1036 n.2.

of the Constitution's text and the lessons of history."[170] Justice Alito expressed openness to Justice Gorsuch's critique.[171]

Justice Gorsuch's *Ford* concurrence seemingly came completely out of left field. The parties had not urged the Court to revisit its jurisprudence on personal jurisdiction.[172] Nor had any of the roughly two dozen amicus briefs.[173] Lower court federal judges—many of them energetic originalists in other contexts—had not been agitating for the Court to plow up the field of civil procedure and replant it in originalist furrows. At the time, at least among judges and litigators, Justice Gorsuch's interest in the intersection of originalism with personal jurisdiction was at minimum unusual, and possibly unique.

It would have missed the forest for the trees, however, to view Justice Gorsuch's call to procedural originalism as if it were an isolated one-off. That call came amid a broader upsurge of attention by both federal courts and legal scholars to the originalist bona fides of the remedial and equitable powers exercised by Article III courts.[174] Much debate has recently swirled around the question whether today's federal courts are acting in ways consonant with Founding-era conceptions of judicial power and equitable relief.[175] In an intellectual milieu increasingly suffused with interest in remedial originalism and equitable originalism, it should not have been surprising for originalists on the Court to begin to wonder—indeed, it was only the natural next question to ask—whether *procedural* law is compatible with originalism.[176] Less than a year later, the Court's grant of certiorari in *Mallory* put paid to the notion that civil procedure might remain immune from originalist argumentation.[177]

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170. *Id.* at 1039.

171. *Id.* at 1032 (Alito, J., concurring) ("To be sure, for the reasons outlined in Justice Gorsuch's thoughtful opinion, there are grounds for questioning the standard that the Court adopted in *International Shoe* . . . .").

172. *See* Reply Brief for Petitioner at 10, *id.* (Nos. 19-368 & 19-369) (contending that because the *International Shoe* test shields constitutional values, the "Due Process Clause's original meaning is baked into the doctrine").

173. *See Ford Motor Company v. Montana Eighth Judicial District Court*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/ford-motor-company-v-montana-eighth-judicial-district-court [https://perma.cc/M98W-HTBW] (collecting party and amicus briefs); *Ford Motor Company v. Bandemer*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/ford-motor-company-v-bandemer [https://perma.cc/6CM5-VMNN] (same).

174. *See supra* notes 125–161 and accompanying text.

175. *See supra* notes 125–161 and accompanying text.

176. Indeed, after a sustained drought, a light drizzle of scholarship on procedural originalism has appeared in just the last five years. *See supra* note 14.

177. Mallory v. Norfolk S. Ry. Co., 142 S. Ct. 2646 (2022) (granting certiorari).

As originalism moves from substance to procedure, it will face some considerable challenges—the most obvious one being the conspicuous degree of nonalignment between commonplace doctrines of civil procedure and original public meaning. The next Part substantiates that point.

II. CIVIL PROCEDURE'S NONORIGINALISM

In key areas of civil procedure, blackletter law sits at a far remove from the best available understanding of the original public meaning of the relevant constitutional provisions. This Part illustrates this point by examining a core set of nuts-and-bolts doctrines concerning subject matter jurisdiction and personal jurisdiction. These illustrations serve simply to concretize a far broader phenomenon of open and notorious nonoriginalism in blackletter civil procedural law; many more examples of nonoriginalism in civil procedure could easily be added.[178] But because at least one of the doctrines addressed below (personal jurisdiction) is involved in the supermajority of civil actions in federal court—and a large chunk of cases implicates two of them (personal jurisdiction and corporate diversity jurisdiction)—these doctrines are a reasonable place to start.

Part II.A does the spadework to demonstrate the gap between these elements of the law of civil procedure and original meaning. Part II.B summarizes that discussion and comments on its significance.

178. Other places in which originalism may call for sharply revising extant procedural law include modern-day summary judgment and directed verdict practice, *see supra* note 12; the acceptance of the declaratory judgment action as consistent with Article III, *see* Siegel, *supra* note 26; *Gibbs*'s definition of a "case" for purposes of supplemental jurisdiction; and the treatment of the Full Faith & Credit Clause, *see* Kevin M. Clermont, *Civil Procedure's Five Big Ideas*, 2016 MICH. ST. L. REV. 55, 88. And originalism and textualism often go hand in hand. Though beyond the scope of this Article, it is worth noting that nontextualist *statutory* interpretation may also anchor key doctrines in civil procedure. *See, e.g.*, Suzanna Sherry, *Wrong, out of Step, and Pernicious:* Erie *as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 133–35 (2011) (examining the evidence that *Swift v. Tyson*, not *Erie v. Tompkins*, correctly implemented the original meaning of the Rules of Decision Act); Nelson, *supra* note 12, at 950–60 (contesting *Erie*'s reading of the Rules of Decision Act); F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 907–14 (2009) (arguing that the well-pleaded complaint rule does not comport with the original meaning of the federal-question statute). I am grateful to Professor Kevin Clermont for his thoughts on this point.

A. Illustrations

With respect to three staple aspects of civil procedure—the citizenship of D.C. residents in diversity suits, the citizenship of corporations in diversity suits, and personal jurisdiction—the discussion below describes current blackletter law and explains how it departs from original meaning.

The scope of that claim is worth clarifying at the outset. First, this Section only assesses the (in)compatibility of various civil procedural doctrines by reference to today's dominant version of originalism (public meaning originalism).[179] It does not claim that these aspects of civil procedure are impossible to reconcile with every account, or any possible version, of originalism. "[T]he range of originalist theories . . . [is] startlingly broad and diverse" and "is becoming more so all the time."[180] It is probably inevitable that some scholar will eventually propound an argument for why much of what is described below is, in fact, consistent with (what that scholar will regard as) some version of "originalism."[181] Part III returns to this issue in more detail.

Second, this Section brackets the argument, recently made by Professor Richard Fallon, that the concept of original public meaning is frequently "chimerical"[182] because—beyond the small core of "minimally necessary . . . or historically noncontroversial meaning"—an objectively identifiable original public meaning for constitutional text simply does not exist.[183] Professor Fallon criticizes the types of evidence originalists rely on to justify their conclusions and argues that

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179. *See* Lawrence Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1251 (2019) (noting that "public meaning" originalism "has been the dominant form of originalism since the mid-1980s").

180. Fallon, *Are Originalist Constitutional Theories Principled*, *supra* note 43, at 5 ("[E]ven a cursory review of recent scholarship reveals that the range of originalist theories has grown startlingly broad and diverse and is becoming more so all the time.").

181. For an example of how capaciously some scholars have defined "originalism," see JACK BALKIN, LIVING ORIGINALISM 3 (2011) (offering "a constitutional theory, *framework originalism*, which views the Constitution as an initial framework for governance that sets politics in motion, and that Americans must fill out over time through constitutional construction").

182. *See* Richard H. Fallon, Jr., *The Chimerical Conception of Original Public Meaning*, 107 VA. L. REV. 1421, 1476 (2021) [hereinafter Fallon, *Chimerical Conception*].

183. *Id.* at 1431; *see also* Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 534 (2008) (noting that originalism's "much more fatal" problem is that often "[t]here was no original public meaning to begin with" and that because it is "not possible to find and apply that which has never existed," originalism "is a nonstarter").

originalists have failed to sufficiently justify their approach to evaluating that evidence.[184] This Section proceeds along a different axis. With respect to each area of law it addresses, it points to evidence of original meaning of a quality and quantity that originalists (and many nonoriginalists, too) have accepted as capable of establishing original meaning.[185] Put another way, this Section stipulates *arguendo* to originalism's reigning standards of proof. The question whether this methodology should ever be regarded as satisfactory as a matter of first principles—that is, Professor Fallon's concern—is a separate question entirely, and one ably addressed by Professor Fallon.

1. *Diversity Jurisdiction and the District of Columbia*. In recent years, the movement for District of Columbia statehood has gathered steam.[186] If D.C. were admitted as a state,[187] the movement's adherents contend, then D.C. would be represented in Congress by two senators and a member of the House of Representatives.[188] Making D.C. into a state would rectify the centuries-old injustice of "taxation without representation" for D.C. residents and, at least in the short term, transform American politics at the federal level. But legislation to make D.C. into a state is mired in Congress and has little to no chance of passage.[189] It may therefore surprise some frustrated adherents of the drive for D.C. statehood to learn that D.C. is already treated as a state—or it is, anyway, for purposes of diversity jurisdiction.

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184. *See* Fallon, *Chimerical Conception*, *supra* note 182, at 1463 (citing the failure of public meaning originalists to supply "truth conditions" for their claims).

185. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2323 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) ("The majority says (and with this much we agree) that . . . [i]n 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one."); Citizens United v. FEC, 558 U.S. 310, 385–93 (2010) (Scalia, J., concurring) (citing historical evidence concerning the Framers' view of the First Amendment); District of Columbia v. Heller, 554 U.S. 570, 581–92 (2008) (reviewing "founding-era sources" to interpret the Second Amendment).

186. *See* Emily Cochrane, *For D.C. Statehood Advocates, a Hearing Marks Another Step Forward*, N.Y. TIMES (Sept. 19, 2019), https://www.nytimes.com/2019/09/19/us/politics/dc-statehood-hearing.html [https://perma.cc/3S5E-2EX5].

187. Congress must "admit[]" new states. U.S. CONST. art. IV, § 3, cl. 1 ("New States may be admitted by Congress . . . .").

188. *Id.* at art. I, § 2, cl. 1 (stating that the "People of the Several States" shall choose House members); *id.* at amend. XVII ("The Senate of the United States shall be composed of two Senators from each State . . . ."); Neil Weare, *Equally American: Amending the Constitution To Provide Voting Rights in U.S. Territories and the District of Columbia*, 46 STETSON L. REV. 259, 259 (2017).

189. *See* Cochrane, *supra* note 186.

To understand this point, we must begin with the Constitution's grant of diversity jurisdiction in Article III: "The judicial Power shall extend . . . to Controversies . . . between Citizens of different States."[190] In 1789, the first Judiciary Act implemented this provision by granting some of the inferior federal courts (the "circuit courts") concurrent jurisdiction over suits "between a citizen of the State where the suit is brought, and a citizen of another State."[191]

Is a citizen of D.C. a citizen of a "State" within the original meaning of either Article III or the 1789 Judiciary Act? No and no. As Chief Justice John Marshall reasoned in *Hepburn v. Ellzey*,[192] it was not enough to say that D.C. was "a distinct political society[] and is therefore 'a state' according to the definitions of writers on general law."[193] What *did* matter, Chief Justice Marshall said, was that the Judiciary Act of 1789 used the term "state" in the same way the Constitution did, and the Constitution clearly did *not* use the term "state" to mean D.C.: "[T]he members of the American confederacy only are the states contemplated in the constitution."[194] Citing the same constitutional provisions that to this day permit only states and not the District of Columbia to send senators and members of the House of Representatives to Congress, Chief Justice Marshall reasoned that "the word state is used in the constitution as designating a member of the union" and concluded that "[w]hen the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it."[195] As Chief Justice Marshall saw it, the Constitution's meaning was plain:[196] D.C. citizens, though citizens of

190. U.S. CONST. art. III, § 2, cl. 1.

191. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

192. Hepburn v. Ellzey, 6 U.S. 445 (1805).

193. *Id.* at 452.

194. *Id.*

195. *Id.* at 452–53.

196. James E. Pfander, *The* Tidewater *Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925, 1978 (2004) [hereinafter Pfander, *The* Tidewater *Problem*] ("Although not entirely clear, Justice Marshall seemingly based his opinion on a reading of the Constitution . . . . Short of a constitutional amendment that confers statehood upon the District of Columbia, or an amendment to Article III, *Hepburn* would have seemed to preclude the exercise of diversity jurisdiction . . . .").

the United States, could not sue or be sued in a federal court. The same was true of citizens of the territories.[197]

There matters rested from 1805 until the 1940s, when Congress enacted a law that extended diversity jurisdiction in federal courts to suits between "citizens of different States, *or citizens of the District of Columbia* . . . and any State or Territory."[198] In a badly fractured decision, the Court in *National Mutual Insurance Co. v. Tidewater*[199] upheld the statute and allowed citizens of D.C. to sue in diversity. The opinions in *Tidewater* are, notoriously, a mess.[200] But there really isn't much doubt that the result ultimately produced by *Tidewater* exceeds the original meaning of Article III. All nine Justices effectively acknowledged as much. Justice Robert Jackson wrote that "had [the Framers] thought of it, there is nothing to indicate that [D.C.] would have been referred to as a state . . . ."[201] Justice Felix Frankfurter wrote that long before the Constitution, the word "States" meant "the political organizations that form the Union and alone have power to amend the Constitution," and that "[a] decent respect for unbroken history since the country's foundation, for contemporaneous interpretation by those best qualified to make it, for the capacity of the distinguished lawyers among the Framers to express themselves with

197. *See* New Orleans v. Winter, 14 U.S. 91, 94–95 (1816) (Marshall, C.J.) (holding that the plaintiff, "being a citizen of the Mississippi territory, was incapable of maintaining a suit alone in the Circuit Court of Louisiana").

198. Act of Apr. 20, 1940, ch. 117, 54 Stat. 143, 143 (emphasis added).

199. *Tidewater*, 337 U.S. 582 (1949).

200. *See id.* at 655 (Frankfurter, J., dissenting) (noting that "[a] substantial majority of the Court agrees that each of the two grounds urged in support of the attempt by Congress to extend diversity jurisdiction to cases involving citizens of the District of Columbia must be rejected—but not the same majority," and pointing out the "paradoxical" consequence that "conflicting minorities in combination" had therefore produced an outcome that "differing majorities of the Court find insupportable").

201. *Id.* at 587 (majority opinion). Justice Jackson did not advance an originalist justification for his Article I argument either, *id.* at 599–603, an argument that Professor Pfander aptly described as "close to outright jurisdictional apostasy." Pfander, *The* Tidewater *Problem*, *supra* note 196, at 1926. Six Justices rejected the Article I argument. *See Tidewater*, 337 U.S. at 604 (Rutledge, J., joined by Murphy, J., concurring); *id.* at 626 (Vinson, C.J., joined by Douglas, J., dissenting); *id.* at 646 (Frankfurter, J., joined by Reed, J., dissenting). Subsequent commentators have developed intricate theories that would allow diversity jurisdiction for D.C. citizens, most notably the protective jurisdiction theory and Professor Pfander's Section 5 account. *See* Pfander, *The* Tidewater *Problem*, *supra* note 196, at 1937–40, 1966–67 (describing these theories). The proponents of these theories did not seek to justify them on the grounds of original public meaning. So far as I have been able to determine, an originalist defense of diversity jurisdiction for citizens of D.C. has yet to emerge.

precision when dealing with technical matters, unite to admonish against disregarding the explicit language" of the Constitution's text.[202] Justice Fred Vinson chastised the Court for playing an "amendatory function": "That we would now write the section differently seems hardly a sufficient justification for an interpretation admittedly inconsonant with the intent of the framers."[203] And the two Justices who said that *Hepburn* should be flatly overruled arrived at that conclusion *not* because they had found some better evidence of original meaning but because of the "substantial change" that had occurred in law *and in the Court's constitutional interpretive method* in the centuries after *Hepburn*. To Justice Wiley Rutledge, joined by Justice Frank Murphy, Marshall's methodology in *Hepburn* was "narrow and literal," and "the later and general repudiation of the decision's narrow and literal rule for construing the Constitution" had "cut from beneath the *Hepburn* case its only grounding."[204]

What Justice Rutledge in 1949 called an outmoded "narrow and literal rule for construing the Constitution" is, of course, what we nowadays call "originalism." Yet despite its rickety vote count and the announced originalist misgivings of a majority of the Justices, *Tidewater* lives on. Without anyone making an originalist fuss about it, federal courts routinely decide diversity cases involving citizens of D.C.[205]

Tidewater's lack of mooring in original meaning is as plain today as it was seventy years ago. Equally plain is the good practical sense of the result produced by *Tidewater*: Why, after all, would it make any sense to deny D.C. citizens access to federal diversity jurisdiction because of a constitutional provision written by Framers who gave no thought to the matter? This outcome—the continued allowance of diversity jurisdiction to D.C. citizens—is pragmatic. It is reasonable. It is fair. It is just not originalist.

2. *Diversity Jurisdiction and Corporations*. Article III, as just noted, states that "[t]he judicial Power shall extend . . . to

202. *Tidewater*, 337 U.S. at 653 (Frankfurter, J., dissenting).

203. *Id.* at 645–46 (Vinson, J., dissenting).

204. *Id.* at 624 (Rutledge, J., joined by Murphy, J., concurring); *id.* at 625 (arguing that overruling *Hepburn* would "remov[e] this highly unjust discrimination from a group of our citizens larger than the population of several states of the Union").

205. *See, e.g.*, Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1290 (D.C. Cir. 1988) (Bork, J.) (affirming summary judgment in a case involving a D.C. corporation suing in diversity).

Controversies . . . between Citizens of different States."[206] Today, the "single most important beneficiary of diversity jurisdiction" is "the American business corporation."[207] For diversity purposes, a corporation is a citizen of both the state (or foreign state) where its principal place of business—generally, its headquarters—is located and of every state (or foreign state) in which it is incorporated.[208]

But why do corporations even *have* citizenship "for diversity purposes" within the meaning of Article III? Corporations are not "citizens" for purposes of *all* constitutional provisions: they do not enjoy the "Privileges and Immunities" of citizenship within the meaning of Article IV, nor do they have the "privileges or immunities" of citizenship within the meaning of the Fourteenth Amendment.[209] Corporations are not "citizens" with the right to vote within the meaning of the Fifteenth Amendment.[210] Corporations are "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment[211]—an outcome, by the way, that itself arguably departs from the earliest constructions of that provision[212]—but "personhood" and "citizenship" are distinct legal concepts.

The answer to this puzzle is not to be found in the original meaning of Article III. Corporations, of course, existed at the Founding.[213] But

206. U.S. CONST. art. III, § 2, cl. 1.

207. Pfander, *The* Tidewater *Problem*, *supra* note 196, at 1972.

208. 28 U.S.C. § 1332(c)(1) ("[A] corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . . ."); Hertz Corp. v. Friend, 559 U.S. 77, 80–81 (2010).

209. *See* Pfander, *The* Tidewater *Problem*, *supra* note 196, at 1972–73 & n.196; Hemphill v. Orloff, 277 U.S. 537, 548 (1928); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177–78 (1869).

210. U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

211. W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 660 & n.12 (1981). But they are not "persons" within the meaning of, for example, the Fifth Amendment's Self-Incrimination Clause. *See* Hale v. Henkel, 201 U.S. 43, 74 (1906) ("[W]e are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state.").

212. *W. & S.*, 451 U.S. at 661–65. For a historical account of the evolution of corporate Fourteenth Amendment rights, see generally Evelyn Atkinson, *Frankenstein's Baby: The Forgotten History of Corporations, Race, and Equal Protection*, 108 VA. L. REV. 581 (2022).

213. Dudley O. McGovney, *A Supreme Court Fiction: Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts*, 56 HARV. L. REV. 853, 861 (1943) ("[T]he word 'corporation[]' [was] a word well-known to the framers of the Constitution in substantially all its present-day meaning . . . .").

when Congress first authorized federal courts to exercise diversity jurisdiction in 1789,[214] "[t]he statute said nothing about corporations."[215] In 1809, in *Bank of United States v. Deveaux*,[216] Chief Justice Marshall explained that a corporation was an "invisible, intangible, and artificial being" and "certainly not a citizen."[217] Diversity of citizenship could only be invoked, the *Deveaux* Court held, if the pleadings showed that the corporation's *shareholders* all had diverse citizenship from the defendants, for it was only the shareholders who could be citizens. "[T]he term citizen," Marshall wrote, "ought to be understood as it is used in the constitution, and as it is used in other laws . . . to describe the real persons who come into court, in this case, under their corporate name."[218] In other words, "real persons," not "artificial being[s]," were "citizens" within the meaning of Article III.[219] Or, as the companion case announced: "[A] body corporate as such cannot be a citizen, within the meaning of the constitution."[220]

Deveaux was faithful to the original meaning of Article III.[221] But it was a terrible way to run a system of courts. Then as now,

214. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

215. Hertz Corp. v. Friend, 559 U.S. 77, 84 (2010).

216. Bank of U.S. v. Deveaux, 9 U.S. (5 Cranch) 61 (1809).

217. *Id.* at 86.

218. *Id.* at 91.

219. *Id.* at 86; *id.* at 91 ("A trustee is a real person capable of being a citizen or alien, who has the whole legal estate in himself. . . . [H]e represents himself, and sues in his own right. But in this case the corporate name represents persons who are members of the corporation.").

220. Hope Ins. Co. of Providence v. Boardman, 9 U.S. 57, 61 (1809).

221. *See, e.g.*, Moller & Solum, *Corporations and the Original Meaning*, *supra* note 14, at 225–26 ("[M]odern diversity doctrine, applied to corporations, cannot be squared with the original public meaning of Article III. . . . This is not a close case."). Though Professors Mark Moller and Lawrence Solum reach the same bottom-line conclusion as earlier commentators on corporate diversity jurisdiction, *see, e.g.*, McGovney, *supra* note 213, their article is worth close examination for their exhaustive attention to detail and their application of new originalist methods, such as corpus linguistics. In a separate article, Professors Moller and Solum have argued that *Deveaux* strayed from original meaning in its determination that a corporation's shareholders could be treated as the true parties to corporate actions. *See* Moller & Solum, *The Article III 'Party*,*' supra* note 14, at 4 ("[D]iversity jurisdiction in corporate cases is a mistake. The entity isn't a 'citizen' of a state (or anywhere else) in the original sense of the term. And because controversies filed by or against corporations subsist 'between' the entity, not its members, . . . members' citizenship is textually irrelevant to diversity jurisdiction."). The modern diversity statute, of course, does not treat shareholders' citizenship as relevant to determining a corporation's citizenship. *See* 28 U.S.C. § 1332(c)(1); Moller & Solum, *Corporations and the Original Meaning*, *supra* note 14, at 225 (arguing that "the current statutory grant of diversity jurisdiction exceeds Congress's authority."). Though only of hypothetical significance at present, the correctness of this aspect of

corporations had many and shifting shareholders, and *Deveaux*, in combination with the complete diversity rule of *Strawbridge v. Curtiss*,[222] meant, in practical terms, that widely held corporations could rarely, if ever, sue or be sued in diversity. For the same reason, *Deveaux* generated opportunities for gamesmanship and forum shopping; a corporation seeking to keep out of federal court could do so if just one of its shares was held by someone who would destroy diversity.[223]

By 1844, the Court had seen enough. In *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*,[224] the Court held that for Article III purposes a corporation was "entitled . . . to be deemed" a citizen of the state that created it.[225] *Letson* explained that *Deveaux* and *Strawbridge* "have never been satisfactory to the bar" and that "[*Deveaux*] especially" was "not . . . entirely satisfactory" and "followed always most reluctantly and with dissatisfaction," and "not because it was thought to be right."[226] Tellingly citing "the policy of the Constitution"—not its text or any new evidence of original meaning—"the condition of our country," and "the spirit and purposes of the law," the *Letson* Court overturned *Deveaux*.[227]

A decade on, *Marshall v. Baltimore & Ohio Railroad*[228] reaffirmed *Letson* and augmented its effects by announcing a new proposition: a conclusive, fictional presumption that a corporation's shareholders were citizens of its state of incorporation. Though the Court candidly

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Deveaux as a matter of original meaning would come into play if Congress were to attempt to amend the law to provide for diversity jurisdiction in suits in which minimal diversity existed between a corporation's human shareholders and an opposing party—a move that might itself pose challenges for originalists. *See infra* note 392.

222. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

223. Charles Warren, *Corporations and Diversity of Citizenship*, 19 VA. L. REV. 661, 666 (1933) (noting that a corporate defendant "could escape from the jurisdiction by alleging and proving that one of its stockholders was a citizen of the State of which the plaintiff was a citizen"); *id.* at 666–67 (stating that "almost all of the cases were suits brought *against* corporations" in the first decades of the nineteenth century); *id.* at 670 (explaining that corporate diversity jurisdiction "was not a doctrine which the Supreme Court promoted for the benefit of the corporation, but rather to benefit the citizen suing the corporation by enabling him to keep out of the Courts of State which chartered the corporation").

224. Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. 497 (1844).

225. *Id.* at 555.

226. *Id.* at 555–56.

227. *Id.* at 556, 559.

228. Marshall v. Balt. & Ohio R.R., 57 U.S. 314 (1854).

accepted that "an artificial entity 'cannot be a citizen,'"[229] it rebuked the idea that Article III should be construed by "its very letter without regard to its obvious meaning and intention."[230] One dissenter, citing Chief Justice Marshall's opinion for a unanimous Court in *Deveaux*, chastised the Court for ignoring the "common sense" and "universal understanding . . . of the people" and extending federal jurisdiction beyond "the contemplation of the framers . . . ."[231] Another dissenter noted that Article III "prescribes citizenship as an indispensable requisite for obtaining admission to the courts of the United States—prescribes it in language too plain for misapprehension" and complained that the majority's decision proved "the mischiefs that must follow from disregarding the language, the plain words, or what may be termed the body, the *corpus*, of the Constitution, to ramble in pursuit of some . . . construction or implication, called its spirit or its intention . . . ."[232]

All this thumping on the podium of the original meaning of Article III—sporadically repeated by various Justices for a decade—proved to no avail. Corporations, though *admittedly* not "citizens" within the meaning of Article III, were thereafter "deemed" and "must be presumed"[233] to be citizens of their state of incorporation.[234] That rule, too, has had problems of its own in practical application.[235] But it has faithfully and reliably kept the doors of federal courts open to corporations in diversity suits—which is why, as noted at the outset, today the "single most important beneficiary of diversity jurisdiction" is "the American business corporation."[236] Corporations today are treated as citizens within the meaning of Article III; nobody cares even whether their shareholders are natural persons or only other

229. *Id.* at 327.

230. *Id*. at 329 (stating that Article III "has been construed too often, as if it were a penal statute, and as if a construction which did not adhere to its very letter without regard to its obvious meaning and intention, would be a tyrannical invasion of some power supposed to be secured to the States").

231. *Id.* at 351–52 (Campbell, J., dissenting).

232. *Id.* at 344 (Daniel, J., dissenting).

233. Ohio & Miss. R.R. v. Wheeler, 66 U.S. (1 Black) 286, 296 (1861).

234. *See* Hertz Corp. v. Friend, 559 U.S. 77, 85 (2010) (noting that the "practical upshot" of these cases was that "for diversity purposes, the federal courts considered a corporation to be a citizen of the State of its incorporation").

235. *See* James W. Moore & Donald T. Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1427 (1964).

236. Pfander, *The* Tidewater *Problem*, *supra* note 196, at 1972.

corporations,[237] let alone whether their shareholders are natural persons with citizenships completely diverse from those "across the *v*."

Nothing about this situation can really be jammed into consistency with the original meaning of Article III.[238] The entire doctrine rests on a "fiction" as artificial as the corporate form itself.[239] Corporations are "constructively" citizens within the original meaning of the Article III grant; they are citizens by "judicial baptism."[240] The discrepancy between this fiction-based doctrine and original meaning was apparent to contemporaneous observers and has been obvious ever since.[241] Equally obvious, however, are the suite of policy reasons that fortify the fiction of Article III corporate citizenship—reasons that persuaded a majority of the Justices in the 1840s[242] and eminent proceduralists in the 1950s[243] and that continue to sway twenty-first-century policymakers.[244] Treating corporations as citizens in diversity can claim on its behalf a slew of pragmatic benefits. What it cannot claim is fidelity to original meaning.

3. *Personal Jurisdiction*. Convention dictates that litigants arguing about personal jurisdiction cite as authority the Fourteenth Amendment's Due Process Clause, which states that no person shall be "deprive[d]" of "life, liberty, or property without due process of law."[245] If they are well advised, however, they quickly move on from that pro forma citation to mention the dichotomy between general

237. *Id.* at 1974 ("Today, we no longer think of the shareholders' states of citizenship as at all relevant to the inquiry into the citizenship of a corporation for diversity purposes.").

238. Nor, by the way, did the Fourteenth Amendment change anything. *See* Moller & Solum, *Corporations and the Original Meaning*, *supra* note 14, at 173 ("[T]he Fourteenth Amendment's definition continued to confine 'citizen' to natural persons . . . ."); *id.* at 215–22.

239. McGovney, *supra* note 213, at 895; Warren, *supra* note 223, at 661 (calling the doctrine an "invention" and "the introduction of a pure fiction . . . 'hardly true in a single instance'").

240. McGovney, *supra* note 213, at 874.

241. *See id.* (discussing the observations of various commentators on the matter); *see also* Moore & Weckstein, *supra* note 235, at 1445 (noting the "judicially created fiction" of corporate citizenship); Warren, *supra* note 223, at 621–62 (same).

242. Marshall v. Balt. & Ohio R.R., 57 U.S. 314, 328 (1853).

243. Moore & Weckstein, *supra* note 235, at 1449 (citing as reasons avoiding local prejudice, "foster[ing] interstate commerce," and preserving corporate access to the more streamlined procedures of federal courts); *id.* at 1449–50 (noting that if state courts handled "the mainstream of general tort and contract litigation," then "the federal courts might suffer a depreciation in the quality of their judges and in the perspective which they bring to their decisions").

244. *See, e.g.*, Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453(b).

245. U.S CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

personal jurisdiction and specific personal jurisdiction and—if the latter is implicated—to discuss, under *International Shoe*'s familiar rubric, whether the suit arises out of the defendant's minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.[246] What does the *International Shoe* framework have to do with the original meaning of the Fourteenth Amendment?

Surprisingly (or perhaps, by this point, unsurprisingly) little. Prior to the Fourteenth Amendment, questions of personal jurisdiction were of course not litigated under the rubric of "due process"—that clause didn't yet exist, at least as to the states.[247] Soon after the Fourteenth Amendment was adopted, however, the Court linked personal jurisdiction to the constitutional guarantee of due process in the 1878 decision of *Pennoyer v. Neff*.[248] In a famous dictum, *Pennoyer* stated that "[s]ince the adoption of the Fourteenth Amendment," litigants could question the validity of judgments and resist their enforcement "on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."[249] It evidently took time for that message to be absorbed,[250] but over time, "*Pennoyer*'s most important legacy"[251] sank in: the Fourteenth Amendment's Due Process Clause, "when applied to judicial proceedings," meant that a nonresident defendant "must be brought within [the state court's] jurisdiction by service of process within the State, or his voluntary

246. *See, e.g.*, any competently written brief on personal jurisdiction.

247. The question whether the rendering court had jurisdiction was instead litigated in the enforcement court under principles of "public law," specifically the law of interstate recognition of judgments. *See* D'Arcy v. Ketchum, 52 U.S. 165, 175–76 (1850) ("[A]mong States and their citizens united as ours are, judgments rendered in one should bind citizens of other States . . . ."); Lafayette Ins. Co. v. French, 59 U.S. 404, 406–07 (1855). For insightful analyses, see generally Conison, *supra* note 12; Sachs, *Pennoyer*, *supra* note 14; Weinstein, *supra* note 12.

248. Pennoyer v. Neff, 95 U.S. 714 (1878). For a fascinating discussion of *Pennoyer* and its relationship to substantive due process doctrine, see Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 504 (1987).

249. *Pennoyer*, 95 U.S. at 733.

250. *See* Conison, *supra* note 12, at 1140 ("For nearly forty years, courts, including the Supreme Court and even including Justice Field, largely failed to treat *Pennoyer* as a constitutional decision.").

251. Weinstein, *supra* note 12, at 209.

appearance."[252] In 1915, the Court squarely held that "the courts of one State cannot without a violation of the due process clause, extend their authority beyond their jurisdiction so as to condemn the resident of another State when neither his person nor his property is within the jurisdiction of the court rendering the judgment."[253] In other words, state courts could validly exercise personal jurisdiction consistent with due process if the nonresident defendant consented to jurisdiction or if the defendant or his property was present in the state.[254] Conversely, a state could not "exercise direct jurisdiction and authority over persons or property without its territory."[255]

From *Pennoyer* through the early part of the twentieth century, "the constantly increasing ease and rapidity of communication and the tremendous growth of interstate business activity" placed stress on the *Pennoyer* framework and produced "a steady and inevitable relaxation of the strict limits on state jurisdiction announced in [*Pennoyer*]."[256] The concepts of consent and presence sprouted curlicues and permutations. The Court upheld state statutes requiring motorists to "consent" to suit in state court—and then expanded that holding so that states could deem motorists to have given their "implicit consent"

252. *Pennoyer*, 95 U.S. at 733. Per *Pennoyer*, courts could also resolve questions of "status" for their domiciliaries—for example, by granting a divorce. *Id.* at 722.

253. Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 193 (1915); Patrick J. Borchers, Ford Motor Co. v. Montana Eighth Judicial District Court *and "Corporate Tag Jurisdiction" in the* Pennoyer *Era*, 72 CASE W. RSRV. L. REV. 45, 55–56 (2021) ("It was in the early 20th century—1915 to be exact—when the Court first held that due process *itself* limited state-court assertions of jurisdiction.").

254. *See* Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 391 (2012) ("The state's authority to bind the defendant to a judgment typically depended upon the physical presence within the state of either the defendant or the defendant's property that could be attached, the defendant's consent to the exercise of jurisdiction, or the defendant's allegiance to the forum."); *see also* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1036 (2021) (Gorsuch, J., concurring) (noting that "[b]efore *International Shoe* . . . a court's competency normally depended on the defendant's presence in, or consent to, the sovereign's jurisdiction" but that "once a plaintiff was able to 'tag' the defendant with process in the jurisdiction, that State's courts were generally thought competent to render judgment on any claim against the defendant, whether it involved events inside or outside the State").

255. *Pennoyer*, 95 U.S. at 722.

256. Hanson v. Denckla, 357 U.S. 235, 260 (1958) (Black, J., dissenting); Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292–93 (1980) ("The limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years. . . . [T]his trend is largely attributable to a fundamental transformation in the American economy . . . .").

if they drove on the state's roads.[257] Out-of-state corporate defendants could be treated as "present" in a state if they had in-state agents transacting business for them,[258] or "constructively present" if they were conducting transactions within the state.[259] As the Court jammed more holdings into the pigeonholes of "consent" and "presence," it became increasingly apparent that the ostensible requisites of "consent" and "presence" were "purely fictional."[260]

Then came *International Shoe Co. v. Washington*,[261] a decision that "cast those fictions aside."[262] The *International Shoe* Court acknowledged that "[h]istorically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person," and "[h]ence [the defendant's] presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him."[263] It then went on to note that the times had changed:

> "But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[264]

In justifying this test, the *International Shoe* Court did little more than vaguely allude to the "purpose" of the Due Process Clause—not its text or original meaning—and even that allusion was made in thoroughly opaque terms: "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and

257. Rhodes, *supra* note 254, at 392–93.

258. *Id.* at 394–95.

259. Cody Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. CHI. L. REV. 1589, 1607 (2018) ("[A] corporation could be subject to jurisdiction if it conducted actual transactions in the state—even if the transactions were completed entirely through the mail or by wire."); *see* Rhodes, *supra* note 254, at 395 ("A nonresident defendant 'doing business' in the state was deemed 'present' in the state and could be served through an appropriate in-state corporate agent, allowing the state to exercise jurisdiction over the defendant for any cause of action . . . .").

260. Burnham v. Superior Ct., 495 U.S. 604, 617–18 (1990) (Scalia, J.).

261. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

262. *Burnham*, 495 U.S. at 618 (Scalia, J.).

263. *Int'l Shoe*, 326 U.S. at 316.

264. *Id.*

orderly administration of the laws which it was the purpose of the due process clause to insure."[265]

Following *International Shoe*, the law of personal jurisdiction—which, it bears repeating, is constitutional law[266]—evolved to permit that which had been forbidden, and to forbid that which had been permitted. Applying the *International Shoe* framework, the Court has upheld personal jurisdiction over nonresident, nonconsenting individuals who are not physically in the forum state[267]—though that would have been barred under *Pennoyer*. The Court has upheld personal jurisdiction over out-of-state corporations when they had no in-state agents conducting business[268]—though that would likewise have been barred under *Pennoyer*.[269] Conversely, under the pre–*International Shoe* regime, a state court *could* "attach[] a defendant's forum property as a jurisdictional predicate for claims unrelated to the property."[270] Yet the Burger Court rejected jurisdictional attachment in *Shaffer v. Heitner*,[271] stating that *even though* such assertions of jurisdiction had historically been held to satisfy due process,[272] this type of jurisdiction was "an ancient form without substantial modern

265. *Id.* at 319.

266. *See* Redish, *supra* note 12, at 1113 ("[T]he Supreme Court's statements on personal jurisdiction are pronouncements of constitutional law. It is, ultimately, the due process clause . . . which the Court is expounding.").

267. Burger King v. Rudzewicz, 471 U.S. 462, 479 (1985); Calder v. Jones, 465 U.S. 783, 790 (1984).

268. *See, e.g.*, McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222–24 (1957); Travelers Health Ass'n v. Virginia, 339 U.S. 643–51 (1950).

269. *See, e.g.*, Minn. Com. Men's Ass'n v. Benn, 261 U.S. 140, 145 (1923) ("[A]n insurance corporation is not doing business within a state merely because it insures lives of persons living therein, mails notices addressed to beneficiaries at their homes and pays losses by checks from its home office."); Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 517–18 (1923) (holding that an Oklahoma corporation was not subject to personal jurisdiction in New York, where it purchased large amounts of merchandise).

270. Rhodes, *supra* note 254, at 409. *See* Pennoyer v. Neff, 95 U.S. 714, 720 (1878) (describing as "a principle of general, if not universal, law" the proposition that "in an action for money or damages where a defendant does not appear in the court, and is not found within the State, and is not a resident thereof, but has property therein, the jurisdiction of the court extends only over such property").

271. Shaffer v. Heitner, 433 U.S. 186 (1977).

272. *See id.* at 211–12 ("[W]e have never held that the presence of property in a State does not automatically confer jurisdiction over the owner's interest in that property."); Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 271 (1917) ("[G]arnishment or foreign attachment is a proceeding quasi in rem. . . . The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power." (citing Freeman v. Alderson, 119 U.S. 185, 187 (1886))).

justification," and "continued acceptance" of it "would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant."[273]

Very few, if any, have claimed that this evolving post–*International Shoe* regime can be defended on originalist grounds.[274] On the contrary, those observers who have troubled themselves to consider original meaning have uniformly stressed the mismatch between original meaning and extant personal jurisdiction doctrine, though they have clashed on whether *Pennoyer* got it wrong, *International Shoe* got it wrong, or both cases did.[275] Professor Martin Redish, for example, traces the fundamental error back to *Pennoyer*, contending that "nothing in either the language or purposes of the due process clause" supports restraining the jurisdictional reach of state courts on federalism grounds.[276] In contrast, Professor Stephen Sachs contends that "the reasoning of *Pennoyer* was and is legally correct," whereas *International Shoe* is a decision "with no better source than the pen of Chief Justice [Harlan] Stone."[277] Without objecting to *Pennoyer*, Justice Gorsuch too criticized "*International Shoe*'s increasingly doubtful dichotomy."[278] Disparaging the Court's "restrictive rulings" that have allowed corporations to be subject to general personal jurisdiction in "only one or two States . . . in a world where global conglomerates boast of their many 'headquarters,'" Justice Gorsuch stressed that "the Constitution has always allowed suits against

273. *Shaffer*, 433 U.S. at 212; *cf.* Maltz, *supra* note 12, at 696 ("From an originalist perspective, both *quasi in rem* and transient jurisdiction should doubtless be viewed as constitutionally unobjectionable.").

274. Solum & Crema, *Originalism and Personal Jurisdiction*, *supra* note 14, at 485 ("*International Shoe*'s adoption of the minimum-contacts and fairness standard as the test for compliance with the Due Process of Law Clauses is a paradigm case of living constitutionalism."). *Cf.* Rosenthal, *supra* note 12, at 44–45 (arguing that "the original meaning of due process" is "nonoriginalist," "countermajoritarian," and "evolutionary" while acknowledging that "the case for an original understanding of procedural due process as evolutionary and countermajoritarian is inferential and speculative" because no proponent of the clause "ever explicitly argued for an evolutionary common-law conception of due process").

275. *See, e.g.*, Whitten, *The Constitutional Limitations (Part Two)*, *supra* note 12, at 835–37 (arguing that both *Pennoyer* and *International Shoe* were wrongly decided).

276. *See* Redish, *supra* note 12, at 1121 ("There exists, however, not a shred of evidence that . . . due process analysis incorporated federalism considerations."); Weinstein, *supra* note 12, at 174 ("*Pennoyer*'s attempt to graft federal common law jurisdictional rules onto the Due Process Clause has proven problematic.").

277. Sachs, *Pennoyer*, *supra* note 14, at 1314.

278. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1039 (2021) (Gorsuch, J., concurring).

individuals on any issue in any State where they set foot" and argued that "the Constitution might tolerate similar results for 'nationwide corporations,' whose 'business is everywhere.'"[279] Though he did not set out clearly what he thought the original meaning of the Fourteenth Amendment would require, Justice Gorsuch did cite Professor Sachs's recent article,[280] in which Professor Sachs strikingly contends that "the Constitution imposes no direct limits on personal jurisdiction at all" and that federal courts should instead evaluate exercises of personal jurisdiction for their conformity with subconstitutional principles of "general law."[281]

A final objection to *International Shoe*, by the proto-originalist Justice Hugo Black, deserves special mention. To Justice Black, the trouble was not the linkage between constitutional due process and personal jurisdiction per se but instead the atextual laxity of the test announced in *International Shoe*: "There is a strong emotional appeal in the words 'fair play', 'justice', and 'reasonableness.' But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws . . . ."[282] Justice Black warned that "application of this natural law concept, whether under the terms 'reasonableness', 'justice', or 'fair play', makes judges the supreme arbiters of the country's laws and practices" and "alters the form of government our Constitution provides."[283]

One would have thought that more originalists would have taken to heart Justice Black's cautions about judges becoming the "supreme

279. *Id.* at 1038–39, 1039 n.5.

280. *Id.* at 1036 n.2 (Gorsuch, J., concurring) (citing Sachs, *Pennoyer*, *supra* note 14). Justice Gorsuch also cited older scholarship contending that "fights over personal jurisdiction would be more sensibly waged under the Full Faith and Credit Clause." *See id.* (citing Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 3 (1945)). While leaving open the question "[w]hether these theories are right or wrong," Justice Gorsuch praised both scholars for "at least seek[ing] to answer the right question—what the Constitution as originally understood requires, not what nine judges consider 'fair' and 'just.'" *Id.*

281. Sachs, *Pennoyer*, *supra* note 14, at 1252; *id.* at 1319–22 (explaining that "[o]n the domestic side, absent legislative intervention, the crucial question is determining what counts as American practice"). It is not wholly clear from Sachs's account what general law would require today or how courts would determine general law; what is clear, however, is what courts would *not* be doing: applying *International Shoe*. *See id.* at 1320 ("What courts would give up *would* be the general approach of *International Shoe* and its progeny, of requiring each remaining 'traditional practice' to conform to a court's '[f]reeform notions of fundamental fairness.'").

282. Int'l Shoe Co. v. Washington, 326 U.S. 325 (1945) (Black, J.).

283. *Id.* at 325–26.

arbiters" of the meaning of due process under the Fourteenth Amendment.[284] After all, many originalists became originalists purely *because* they regarded the Court as having wildly distorted the meaning of due process under the Fourteenth Amendment.

Yet, despite the murky originalist underpinnings of personal jurisdiction doctrine, originalists have (until very recently, that is[285]) held their peace with *International Shoe*. Consider, for example, Justice Scalia's opinion in *Burnham*, a fractured decision that sustained the constitutionality of "tag" jurisdiction.[286] Justice Scalia resoundingly rebuked Justice William Brennan for attempting to gauge due process by "each Justice's subjective assessment of what is fair and just,"[287] contending instead that practices (such as tag jurisdiction) accepted at the time of the adoption of the Fourteenth Amendment satisfied due process.[288] But Justice Scalia's own opinion, after briefly citing the Due Process Clause,[289] looked to tradition as its yardstick, not to evidence of that clause's original meaning, and even then did not treat tradition as the only yardstick that mattered. Rather, Justice Scalia observed that the Court had held, in the late nineteenth and early twentieth centuries, that "principles[] embodied in the Due Process Clause[] required" the defendant's in-state service or presence for personal jurisdiction to exist.[290] He then noted, however, that *International Shoe* had changed that regime[291] and that the Court had subsequently

284. For a noteworthy recent exception, see Solum & Crema, *Originalism and Personal Jurisdiction*, *supra* note 14, at 496–97 (engaging with Justice Black's opinion and associating it with a "dynamic" understanding of due process under which due process requires compliance with extant positive law).

285. *See Ford*, 141 S. Ct. at 1036 (Gorsuch, J., concurring); Sachs, *Pennoyer*, *supra* note 14, at 1326 (arguing that "[t]he American law of personal jurisdiction is [i]n intellectual shambles" and should be replaced by general law and *Pennoyer*); Solum & Crema, *Originalism and Personal Jurisdiction*, *supra* note 14, at 531 ("[T]he *International Shoe* minimum contacts approach to personal jurisdiction cannot be supported by the original meaning of the Due Process of Law Clauses.").

286. Burnham v. Superior Ct., 495 U.S. 604, 621 (1990) (Scalia, J.).

287. *Id.* at 623.

288. *Id.* at 622.

289. *Id.* at 627 n.5 (stating, in a footnote, that "'[d]ue process' (which is the constitutional text at issue here) [means] . . . that process which American society—self-interested American society, which expresses its judgments in the laws of self-interested States—has traditionally considered 'due'").

290. *Id.* at 617.

291. *Id.* at 609–10, 618 ("Due process does not necessarily require the States to adhere to the unbending territorial limits on jurisdiction set forth in *Pennoyer*.").

countenanced "deviations" from "the rules of jurisdiction applied in the 19th century."[292] He made no quarrel with these deviant outcomes; to Justice Scalia, the touchstone was simply the standard announced in *International Shoe*: "For new procedures, hitherto unknown, the Due Process Clause requires analysis to determine whether 'traditional notions of fair play and substantial justice' have been offended.'"[293] In subsequent cases, Justice Scalia voiced no objection to *Goodyear Tires v. Brown*,[294] *Daimler AG v. Bauman*,[295] or *Walden v. Fiore*,[296] each of which relied on doctrine rooted in *International Shoe* rather than applying *Pennoyer*'s "strict territorial approach."[297]

Scholars and judges have long disagreed over what considerations *should* drive personal jurisdiction doctrine.[298] What ought to be clear, though, is what does *not* drive it: original meaning. From *Pennoyer* onwards, the Court has made no effort to justify personal jurisdiction doctrine by reference to the original meaning of the Fourteenth Amendment. Indeed, in its most recent decision, the *Ford* Court said the quiet part out loud: "These rules [for personal jurisdiction] *derive from* and reflect two sets of values—treating defendants fairly and protecting 'interstate federalism.'"[299] For a minimum of seventy-five years (and probably longer), the constitutional law of personal jurisdiction has "derived from" the Court's assessment of these "values," rather than from the text or original meaning of the Due Process Clause.

B. Summary and Implications

As the foregoing discussion has illustrated, commonplace elements of today's law of civil procedure have wandered far afield from the original public meaning of the relevant constitutional

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292. *Id.* at 609–10.

293. *Id.* at 622.

294. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).

295. Daimler AG v. Bauman, 571 U.S. 117, 126 (2014).

296. Walden v. Fiore, 571 U.S. 277, 283 (2014).

297. *Daimler*, 571 U.S. at 126. For a discussion of Justice Scalia's approach to precedent and how it compares with the approaches of other originalists, see *infra* notes 317–325 and accompanying text.

298. *See* Sachs, *Pennoyer*, *supra* note 14, at 1316 (listing "convenience, fairness, federalism, liberty, tradition, consent, or all of the above").

299. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1025 (2021) (emphasis added).

provisions. Citizens of D.C. can sue in diversity even though they are not citizens of a state within the original meaning of Article III. Corporations can sue in diversity though corporations are not citizens within the original meaning of Article III. The doctrinal framework for personal jurisdiction adopted in *International Shoe* rests not on the original meaning of the Fourteenth Amendment but on "sets of values"[300] nowhere mentioned in the Due Process Clause or suggested by the history and context of its enactment.

Each of these shifts may be understood as a product or reflection of its time; "[t]he history of the federal courts is woven into the history of the times."[301] The corporate citizen was born in the antebellum era as it became apparent that powerful railroads and insurance companies would frustrate justice by gaming the diversity rules to forum shop for state courts.[302] *International Shoe*, decided the following century, accommodated the changed landscape of a modern, industrialized national economy by crafting a more flexible test for when state courts could exercise adjudicative power over out-of-state entities and people. A few years later, there came the last of the pack—*Tidewater*—an unruly case, but for that very reason entirely of a piece with the post–New Deal interlude in which courts struggled to define the appropriate judicial role in placing constitutional limits on the exercise of a newly muscular federal legislative power.

But because these divergences have not remained confined to their times but have become fixed elements of procedural law, each of these divergences also ought to be understood in a more transcendent, less historically confined way. They each serve as an illustration, or exemplar, of one or more of the many well-trodden pathways to infidelity to original meaning. The impulse to fend off absurdity or unfair results has helped to trump original meaning.[303] The Court's understanding of the "condition of the country" and the law's "spirit and purpose" has helped to override original meaning.[304] The need to keep legal doctrine up to pace with the evolving demands of technology and national commerce—air travel, cars, multistate corporations—has

300. *Id.*

301. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 59 (1928).

302. *See supra* note 223.

303. *See supra* note 204 and accompanying text.

304. *See supra* note 227 and accompanying text.

prevailed over original meaning.[305] Even something as ethereal as a perceived shift in interpretive philosophy—the notion that it was no longer tenable to construe the Constitution in a "narrow and literal" way—has helped to hammer a wedge between original meaning and modern-day law.[306]

In sum, rather than copying its content solely from evidence of original meaning, the law of civil procedure has drawn its substance from pragmatism and policy; from the impetus of changing times, technology, and philosophies; from values such as fairness; and from simple common sense. Procedural law's nonoriginalism may, then, provide a particularly vivid example of how in the face of old enough reasons or good enough reasons, and in the absence of any political pushback one way or the other, claims to the primacy of original meaning simply are not very compelling.

It would be tempting to say that all this has been hidden in plain view, but that would only be a half-truth. Civil procedure's nonoriginalism hasn't been hidden at all. And yet—until recently—few originalists have faulted procedural law for its infidelity to original meaning.

Various explanations might be hazarded for originalists' puzzling inattentiveness to matters of civil procedure. Originalists in the legal academy are usually constitutional law professors, not civil procedure professors; constitutional law professors naturally prefer to think and write about rights and structure rather than procedure or remedies.[307] Originalism may be especially challenging to do in civil procedure because there's often sparse information concerning the pivotal provisions of the Constitution and (where such information exists) little explicit discussion of how those provisions would apply to civil procedural questions.[308] Originalist legal scholars may prefer to devote

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305. *See supra* notes 256, 265 and accompanying text.

306. *See supra* note 204 and accompanying text.

307. *See* Solum & Crema, *Originalism and Personal Jurisdiction, supra* note 14, at 536 (noting that "[g]iven the division of academic labor," civil procedure scholars will "focus[] on the values and ideas that have shaped discourse about these issues among proceduralists," whereas originalists hail from "a different community of scholars whose perspectives are arguments that have been shaped by the study of . . . constitutional law").

308. *See, e.g.*, Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484 (1928) ("A search of the letters and papers of the men who were to frame the Constitution does not reveal that they had given any large amount of thought to the construction of a federal judiciary."); *id.* at 484 n.7 ("To one who is especially interested in the judiciary there is surprisingly little to be found in the records of the convention." (quoting MAX FARRAND, THE

their attention to questions with high political salience that command widespread public engagement because originalists, like most people, are more interested in things that are interesting to others—and, perhaps dismayingly, questions of civil procedure, including matters of subject matter jurisdiction and personal jurisdiction, are usually uninteresting to the public at large.

These explanations, though plausible, are ultimately unsatisfactory. They may go some way to explaining why originalist scholars did not attend to civil procedure in the past. But they really do not suffice to explain the near-total invisibility of civil procedure in originalist discourse. Nor do they sit easily with the fact that some originalists are *now* engaging with civil procedure. Originalists are still mostly constitutional law professors, not civil procedure professors. If doing originalist research was challenging then, it is still challenging today, and—with the development of new tools, such as corpus linguistics, and more exacting critiques of such scholarship by historians and legal academics—it might even be harder to do today than it was fifty years ago. To the extent that civil procedure is boring, it's as boring now as it ever was. These "supply side" factors have not changed, and yet today a small but important cohort of originalist scholars are venturing into civil procedure.[309] And as the *Mallory* case demonstrates,[310] litigators making originalist arguments are sure to follow.

In Part IV, we will return to the question of how originalists on the Court may respond to this influx. Before broaching that topic, Part III turns to assess the ramifications of civil procedure's nonadherence to original meaning for various theories of originalism.

III. IMPLICATIONS FOR ORIGINALISM

How much sleep should an originalist lose over procedural law's nonoriginalism? The answer likely depends on the school of originalism to which that originalist belongs. Although it is well beyond

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FRAMING OF THE CONSTITUTION OF THE UNITED STATES 154 (1913))). It is worth noting, though, that the paucity of historical materials concerning Article III did not deter early originalists from developing detailed arguments concerning topics adjacent to civil procedure—in particular, lengthy critiques of the legitimacy of the structural injunction. *See supra* notes 105–120 and accompanying text.

309. *See supra* note 14.

310. *See supra* notes 19–20.

the scope of this Article to map the full spectrum of possible responses, it is worthwhile to offer a rough cut of how procedural nonoriginalism may both challenge and inform different versions of originalism.[311]

Originalists come in many varieties, and new schools of originalism continue to emerge.[312] Most originalists are not "exclusive" originalists—that is, most originalists do not believe that evidence of original meaning is the "only consideration that ought to matter" in determining constitutional or statutory meaning.[313] Some originalists, for example, accept that original meaning can legitimately yield in the face of "transformative or longstanding" nonoriginalist precedent.[314] To the extent they regard civil procedural doctrine as backed by such precedent, these originalists might not fret over the disjoint between original meaning and current blackletter law. Many originalists also embrace a distinction between "interpretation" and "construction"[315]—that is to say, they accept that courts must sometimes "construct" legal meaning rather than "excavate" it from the text of the Constitution. Depending on how capaciously they conceive of (what they refer to as) "the construction zone," these originalists may believe that much of civil procedure's nonoriginalism can be housed within the rubric of "construction." A third family of originalists rests its commitment to originalism upon the belief that originalism has the functional benefits of stabilizing the law and constraining judicial discretion. To these "consequentialist" originalists, procedural law's nonoriginalism, however stark, may appear to be sufficiently stable and constraining upon judges and therefore not a practical concern.

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311. I am indebted to Professor Michael Ramsey for his thoughtful comments on this Part.

312. *See* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 14–15 (2009) (counting seventy-two different versions).

313. *See* Fallon, *Many and Varied Roles*, *supra* note 53, at 1754 ("[F]ew originalists are exclusive originalists . . . very few believe that evidence from the Founding era is the only consideration that ought to matter to constitutional adjudication.").

314. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 724 (1988) ("[T]he original understanding must give way in the face of transformative or longstanding precedent . . . originalism and stare decisis themselves are but two among several means of maintaining political stability and continuity in society."). *See generally* Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105 (2015) (arguing that precedent can be used as a fallback when consultation of the Constitution's text and historical evidence is insufficient to resolve a case).

315. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100 (2010); *see also* BALKIN, *supra* note 181.

Each of these three schools of originalism, then, has elements of an argumentative armament that might be used to domesticate or subsume various aspects of procedural nonoriginalism. Put another way, many originalists may, consistently with their respective accounts of originalism, come to conclude that these elements of the modern-day landscape of procedural law are legitimate notwithstanding their evident discrepancies with original meaning. With that said, attentiveness to civil procedure nonetheless has an important role to play for each of these schools of originalism because it offers untouched material against which to cross-check (or "gut-check") their theories. The discussion that follows addresses each of these three groups of originalists and then turns to address a fourth school of originalism—"positivist" originalism—and how it might relate to civil procedure's nonoriginalism.

(A) Precedent and Originalism—Upon considering the nonoriginalism of civil procedure, some originalists might respond by saying that adherence to precedent can legitimately allow departures from original meaning. But that response is not a complete one, because originalists have yet to formulate a theory for adjudicating whether nonoriginalist precedents should be retained or overruled.[316] On the one hand, Justice Scalia was not always willing to contest precedent simply because of its incompatibility with original meaning.[317] Originalism, he wrote, "must accommodate the doctrine of *stare decisis*; it cannot remake the world anew."[318] But, on the other

316. *See* Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 453, 470 (2018) (outlining "the problem of precedent for originalism" and concluding with a "call to action, urging constitutional scholars to return to the problem of precedent for originalism in a rigorous way"). This, by the way, is also true for nonoriginalists. Devising a theory for when to retain or overturn incorrect precedent is a challenge that extends beyond originalism. *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. PUB. POL'Y 23, 32 (1994) ("[T]he argument against precedent holds for any theory of interpretation that prescribes objective right answers to constitutional questions, regardless of how those answers are derived, as long as the theory ascribes supreme legal status to the Constitution." (footnote omitted)). I am grateful to Professor Fallon for his thoughts on this point.

317. *See* SCALIA, A MATTER OF INTERPRETATION, *supra* note 10, at 138 (defending adherence to various nonoriginalist decisions because in these cases "the Court has developed long-standing and well-accepted principles (not out of accord with the general practices of our people, whether or not they were constitutionally required as an original matter) that are effectively irreversible"); Scalia, *Lesser Evil*, *supra* note 10, at 861 ("[A]lmost every originalist would adulterate [adherence to originalism] with the doctrine of *stare decisis* . . . .").

318. SCALIA, A MATTER OF INTERPRETATION, *supra* note 10, at 138–39. As Scalia and Garner explain:

hand, many originalists do not accept that precedent can override fidelity to original meaning.[319] Justice Thomas, for example, has stated that "[w]hen faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it."[320] He explained that this rule "follows directly from the Constitution's supremacy over other sources of law—including our own precedents."[321] And as *Dobbs*[322] vividly illustrated, the Court's sitting originalists are perfectly willing to overturn precedent, even long-standing precedent, when they regard it as "erroneous" as a matter of original meaning.[323]

For originalists grappling with the problem of how to deal with nonoriginalist precedents, civil procedure poses a spectrum of challenging questions. Begin with specific cases, such as *International Shoe*—a decision that has shaped the law of personal jurisdiction for over seven decades. If that is a decision sufficiently hallowed by time and reliance to merit retention, as some originalists may be tempted to conclude, then must the same be said of *Home Building & Loan Ass'n v. Blaisdell*,[324] decided more than a decade beforehand—or of *Wickard v. Filburn*,[325] which predates *International Shoe* by three years?

> We do not propose that all the decisions made, and doctrines adopted, in the past half-century or so of unrestrained constitutional improvisation be set aside—only those that fail to meet the criteria for stare decisis. These include consideration of (1) whether harm will be caused to those who justifiably relied on the decision, (2) how clear it is that the decision was textually and historically wrong, (3) whether the decision has been generally accepted by society, and (4) whether the decision permanently places courts in the position of making policy calls appropriate for elected officials.

ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 412 (2012).

319. *See, e.g.*, Lawson, *supra* note 316, at 24; Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005).

320. Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring).

321. *Id.*; Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1728 (2013) ("I tend to agree with those who say that a justice's duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it."); *see* Baude, *Is Originalism Our Law*, *supra* note 11, at 2375–76 ("Indeed original meaning may be one of the most powerful bases for overturning precedent. . . . Invoking the text's original meaning allows overruling courts to say that a precedent was 'wrong the day it was decided,' which is a key to the Court's ability to overrule its precedents.").

322. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

323. *Id.* at 2278 ("The Court has no authority to decree that an erroneous precedent is *permanently* exempt from evaluation under traditional *stare decisis* principles."); *id.* at 2279 (overruling *Roe* and *Casey*).

324. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447–48 (1934) (upholding a Minnesota mortgage moratorium against a Contracts Clause challenge).

325. Wickard v. Filburn, 317 U.S. 111, 124–25 (1942) (holding that under the Commerce Clause, Congress may regulate activities that have a "substantial effect" on interstate commerce).

Originalists have long condemned both *Blaisdell* and *Wickard*.[326] To take the question from the other side, consider *New York Times Co. v. Sullivan*[327] and its sequelae, decisions that Justice Thomas has contended should be overturned because they were "policy-driven decisions masquerading as constitutional law."[328] If fidelity to original meaning requires jettisoning the *Sullivan* line of cases, then do the policy-driven constitutional holdings of, for example, *Letson* and *Marshall* likewise belong in the dustbin?

For originalists who contend that nonoriginalist precedents should be overruled, civil procedure's panoply of nonoriginalist doctrines offers an opportunity to think through how to implement those changes in a legal regime that is emphatically not originalist and that has not been originalist for a very long time. Some originalists, for example, seem to accept that an "originalist big bang" would not be desirable because it would cause instability and uncertainty,[329] and have in fact argued that nonoriginalist precedents in civil procedure may legitimately be retained during a "transition[] period" in which the legal system would gradually adjust to originalism's implementation.[330] Originalists who find that suggestion a sensible one in the context of civil procedure may wish to consider whether other areas of constitutional law (for example, nondelegation doctrine, the law of abortion rights, or Second Amendment law) similarly call for (or would

326. On *Blaisdell*, see, for example, Raoul Berger, *An Anatomy of False Analysis: Original Intent*, 1994 BYU L. REV. 715, 721 n.38; Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435, 1449 n.53 (1997). On *Wickard*, see, for example, United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (criticizing the "very notion of a 'substantial effects' test under the Commerce Clause" as a "rootless and malleable standard" that is "inconsistent with the original understanding" and urging the "replace[ment]" of "existing Commerce Clause jurisprudence with a standard more consistent with the original understanding").

327. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding that a public figure may not recover damages for defamatory statements about their official conduct unless they can prove that the statements were made with knowledge or reckless disregard of the statements' falsity).

328. McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of certiorari).

329. *See* Solum, *supra* note 316, at 461–62 (describing a thought experiment, dubbed an "originalist big bang," in which the Court suddenly decided every constitutional case purely on the basis of the Constitution's original public meaning).

330. *See id.* at 462 ("[E]ven a Supreme Court with nine originalist Justices might adhere to precedent during a transitional period."); Solum & Crema, *Originalism and Personal Jurisdiction*, *supra* note 14, at 535 (explaining how a "restoration of the *Pennoyer* regime could proceed gradually, allowing Congress, state legislatures, and rule-makers time to adjust personal jurisdiction statutes and the *Federal Rules of Civil Procedure* to the new requirements").

have benefited from) an extended "transition period" before originalism's sudden and disruptive application. Of course, if one were to proceed along this path, questions of justification will arise: From what derives the authority of an originalist judge to titrate out originalist outcomes gradually rather than administer them in gross? If the answer is that originalism, like all theories of constitutional law, is entitled to take into account concerns of practicality, societal changes, and fairness, then one may fairly ask why such concerns may rightfully have a place in the originalist constitutional calculus at the stage of administering originalist results when they are not eligible to be consulted at earlier points—namely, at the stage when one decides what the Constitution means.

More broadly, originalists will find in civil procedure a fruitful opportunity to consider whether fidelity to originalism in one domain may authorize infidelity to originalism in other domains. The general problem is not a new one; the subject of "compensating adjustments"[331] is a "familiar, if undertheorized, problem for constitutional originalists."[332] The pending *Mallory* case brings to the fore one such tension, inasmuch as it pairs a question of personal jurisdiction doctrine with a question of dormant Commerce Clause doctrine. In *Mallory*, the plaintiff contends that as a matter of original meaning, the state of Pennsylvania has the power to require by statute that an out-of-state business consent to general personal jurisdiction in the state as a condition of registering to do business there.[333] If the Court were to accept the plaintiff's argument, one consequence might be that states could impose substantial burdens on interstate commerce by enacting consent-by-registration statutes like Pennsylvania's—a result that would likely conflict with extant dormant Commerce Clause doctrine.[334] A follow-on consequence would be that courts in those

331. Adrian Vermeule, *Hume's Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421, 421 (2003).

332. Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 864–65 (2011) ("[C]onstitutional originalists must consider whether departures from original meaning might sometimes yield better overall outcomes in what they consider to be a second-best constitutional world—one shaped in substantial part by nonoriginalist precedents and practices.").

333. Brief for the Petitioner, *supra* note 20, at 2 ("A mountain of historical evidence demonstrates that consent to jurisdiction required as a condition of doing business in a State constitutes voluntary, valid consent for purposes of the Due Process Clause.").

334. *See* Brief of the United States as Amicus Curiae at 5, *Mallory*, 142 S. Ct. 2646 (No. 21-1168) ("Modern dormant Commerce Clause cases establish that States generally lack the power

states could exercise general personal jurisdiction in suits in which *Daimler* and *Goodyear* would otherwise forbid it. Now, some originalists, including Justice Thomas, made no objection to *Daimler* or *Goodyear*, but have roundly denounced dormant Commerce Clause doctrine as having no foundation in the text or original meaning of the Constitution.[335] It would seem to lie ill in the mouth of an originalist Justice to determine that the *Mallory* plaintiff is correct on original meaning grounds as to the constitutionality of the consent-by-registration statute but that *nonoriginalist* dormant Commerce Clause caselaw nonetheless renders Pennsylvania's law invalid. Yet, in view of the disruptions to general personal jurisdiction doctrine that might result if the Pennsylvania statute were upheld, perhaps such a Justice might decide that adhering to original meaning in one domain (personal jurisdiction through consent by registration) permits adherence to nonoriginalist precedent in the other (the dormant Commerce Clause). Supplying an account of why and when originalism allows such tradeoffs across doctrines remains an open challenge for originalists and raises hard questions concerning judicial competence[336] and consilience with originalism's claim to supply a neutral, apolitical tool for judging.[337] In these and other respects, originalists on all sides of the precedent question may find much fodder for reflection in civil procedure's nonoriginalism.

(B) Interpretation, Construction, and Originalism—To originalists who accept the legitimacy of "construction,"[338] civil procedure offers

to exclude out-of-state corporations . . . ."); Brief of Professor Stephen E. Sachs, *supra* note 20, at 25 ("Under current doctrine, Pennsylvania's registration requirement may turn out to be invalid as a matter of dormant commerce.").

335. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2477 (2019) (Gorsuch & Thomas, JJ., dissenting) ("Unlike most constitutional rights, the dormant Commerce Clause doctrine cannot be found in the text of any constitutional provision but is (at best) an implication from one."); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) ("The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.").

336. ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 158 (2011) (noting the possibility that judges may be "ill-suited to identify valid compensating adjustments" and that judicial attempts to do so could "have even more harmful consequences than would failure to adjust the constitutional rules to take account of systemic interaction between the originalist and nonoriginalist components of those rules").

337. William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 333 ("[O]riginalism professes to give judges a source of law outside their own will. Discretionary precedent—neither forbidden nor required—forfeits that justification for originalism." (footnotes omitted)).

338. *Cf.* Frederick Schauer, *Constructing Interpretation*, 101 B.U. L. REV. 103, 105–08 (2021) (describing the distinction between interpretation and construction and its role in debates over

rich material against which to gauge the extent of legitimate constitutional construction. Article III's references to "states" and "citizens," for example, are precise enough terms that their susceptibility to construction seems doubtful. If, however, one accepts that the Court could validly "construct" Article III as allowing someone other than a flesh-and-blood human being to be treated as a citizen for purposes of diversity, then may Article II be "constructed" to allow "purely executive power" to be vested in someone other than the president?[339] If the treatment of the District of Columbia as a "state" ought to count as a valid construction of Article III,[340] as contended by two Justices who supplied necessary votes for the judgment in *Tidewater*,[341] then may the very same word in Article I be "constructed" to allow the District of Columbia to send representatives and senators to Congress tomorrow?[342]

Analogous questions crop up around due process. The Due Process Clauses of the Fifth and Fourteenth Amendments may seem to leave open a broad "construction zone"—though some originalists have argued that apparent breadth is illusory.[343] Is the construction of these clauses by the civil procedure cases an indication of their breadth and flexibility across the board, or are those holdings good for civil procedure only? *International Shoe*, for example, glossed the terse language of the Due Process Clause in a fashion that has entailed

originalism); *id.* at 131–32 ("[T]o the extent that a legal document contains language that is technical, constitutive, or evaluative, this possibility of separating the tasks of interpretation and of construction is weakened to the point of collapse.").

339. *But see* Morrison v. Olson, 487 U.S. 654, 687, 705 (1988) (Scalia, J., dissenting) (arguing that the Constitution forbids any such power to be vested in someone other than the president).

340. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . .").

341. *Tidewater*, 337 U.S. 582, 623 (1949) (Rutledge, J., concurring) ("Marshall's sole premise of decision in the Hepburn case has failed, under the stress of time and later decision, as a test of constitutional construction. Key words like 'state,' 'citizen,' and 'person' do not always and invariably mean the same thing.").

342. *See* U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."); *id.* at amend. XVII ("The Senate of the United States shall be composed of two Senators from each State . . . .").

343. *See* Solum & Crema, *Originalism and Personal Jurisdiction*, *supra* note 14, at 487–88 ("[T]he 1791 technical legal meaning of 'due process of law' is quite different from the ordinary meaning of the phrase due process in the twenty-first century."); John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 919, 921–22 (2021).

invalidation of some long-standing state laws,[344] a pattern that the pending *Mallory* case may soon extend.[345] If the *International Shoe* "fair play and substantial justice" rubric is regarded as an acceptable instance of "construction" of the Due Process Clause, then should the "undue burden" test of *Casey*[346] likewise have qualified as an acceptable gloss of that selfsame text?[347] By the same token, why would an originalist Justice who accepts *International Shoe*'s construction of the Due Process Clause not similarly accept the construction placed on it by *Griswold*,[348] *Obergefell*,[349] or *Lawrence*?[350] For originalists who toil in the "construction zone," civil procedure tees up numerous similar questions about that zone's metes and bounds.

(C) Constraint and Originalism—Though this claim is less common nowadays than it used to be, some originalists continue to assert that judicial constraint is originalism's chief selling point.[351] For such "consequentialist" originalists, civil procedure offers a fresh angle from which to examine that proposition.[352] Many aspects of civil

344. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 211–12 (1977) (acknowledging "the long history of jurisdiction based solely on the presence of property in a State," noting that "[t]his history . . . is not decisive," and concluding that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny").

345. Although predictions are hazardous, following oral argument several commentators predicted a win for the defendant railroad. *See* Matt Hornung, *Recapping Media Coverage of* Mallory, TRANSNAT'L LITIG. BLOG (Nov. 16, 2022), https://tlblog.org/recapping-media-coverage-of-mallory [https://perma.cc/7UBK-HWBE].

346. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (holding that the right to terminate a pregnancy "derives from the Due Process Clause of the Fourteenth Amendment").

347. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022) (overruling *Casey*).

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

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

350. Lawrence v. Texas, 539 U.S. 558 (2003). *Compare Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (urging that *Griswold*, *Lawrence*, and *Obergefell* be overruled "[b]ecause the Due Process Clause does not secure *any* substantive rights"), *with* Walden v. Fiore, 571 U.S. 277, 283, 288 (2014) (Thomas, J.) (applying the *International Shoe* test without questioning its provenance in the original meaning of the Due Process Clause).

351. Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 750–51 (2011) (describing evolving originalist claims concerning judicial restraint and constraint).

352. I say "fresh" because the idea that originalism promises stability and constraint has already been subject to much critique. *See, e.g.*, Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329, 331 (2013) ("Whatever its merits . . . originalism often cannot fulfill its promises of fixation and constraint."); Colby, *supra* note 351, at 764 ("The New Originalism is thus no more constraining than other theories of constitutional interpretation. And it may even be less constraining."); David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969, 970 (2008) ("[O]riginalism . . . imposes only a very uncertain limit on judges and

procedural law are not originalist in their methodology or their outcomes, but they *have* proved to supply litigants and courts with a relatively stable, constraining body of rules—at least if one compares these areas of law to certain substantive doctrinal areas in which originalism has produced dramatic shifts in doctrine (and may soon produce more).[353] The observation that *non*originalism can generate comparatively predictable, stable law, whereas originalism can generate uncertainty and whiplash, may prompt some consequentialist originalists to consider anew whether originalism is really the sole methodological path to achieving the professed desiderata.

(D) Positivist Originalism—A final theory of originalism that deserves discussion is "positivist" originalism.[354] One strand of positivist originalism rests upon a kind of proof by inspection. On this view, originalism "is our law" because our "current legal commitments" make it our law: the Court justifies its rulings by relying on original meaning, and the Court never acknowledges that policy concerns or consequentialist arguments can legitimately trump original meaning.[355] The thesis that originalism "is our law" would falter, its proponents say, only if "cases that are currently important, uncontested, and/or broadly accepted" revealed that "our current legal commitments" are not originalist.[356]

What does the rich and varied tapestry of procedural nonoriginalism imply for the claim that originalism "is our law"? At a first cut, it might seem to undermine that claim. After all, many civil procedure cases and doctrines that are "currently important, uncontested, and/or broadly accepted" have little warrant in the original meaning of the relevant constitutional text. Procedural law has instead drawn its substance from other considerations, including

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leaves them a great deal of latitude to find, in the original understandings, the outcomes they want to find.").

353. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Citizens United v. FEC, 558 U.S. 310 (2010); District of Columbia v. Heller, 554 U.S. 570 (2008).

354. I am grateful to Professor William Baude and Professor Richard Re for their comments on this discussion.

355. Baude, *Is Originalism Our Law*, *supra* note 11, at 2371 ("First, in cases where the Court acknowledges a conflict between original meaning or textual meaning and another source of constitutional meaning, the text and original meaning prevail. Second, across the larger run of cases that do not feature an explicit clash of methodologies, the Court never contradicts originalism."); *id.* at 2375.

356. *Id.* at 2371–72.

policy-based reasoning and moral judgments.[357] Moreover, the pivotal decisions frequently reflect that in crafting these doctrines the Court has ignored or departed from original meaning not by accidental slippage but in a self-aware manner; Justices writing separately have usually made sure of that.[358] On the other hand, however, it is not clear that the procedure cases contain the express *repudiation* of original meaning by the Justices in the majority that positivists appear to demand as counterevidence to their thesis[359]—though some decisions, especially when read in conjunction with the separate opinions, come fairly close.[360]

Another strand of the positivist account is known as "original-law originalism."[361] That form of positivist originalism "presents originalism as a theory of legal change: Our law is still the Founders'

357. *See supra* Part II.B.

358. *See, e.g.*, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1025–26 n.2 (2021) (noting that Justice Gorsuch's concurrence "proposes instead a return to the mid-19th century—a replacement of our current doctrine with the Fourteenth Amendment's original meaning respecting personal jurisdiction," but then stating, "[t]his opinion, *by contrast*, resolves these cases by proceeding as the Court has done for the last 75 years—applying the standards set out in *International Shoe* and its progeny, with attention to their underlying values of ensuring fairness and protecting interstate federalism" (emphasis added)); Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (rejecting an exercise of personal jurisdiction as unconstitutional though it was "an ancient form" because it was "without substantial modern justification" and "unfair"); Int'l Shoe Co. v. Washington, 326 U.S. 310, 325 (1945) (Black, J.) (chiding the Court for adopting a standard for personal jurisdiction "not chosen by those who wrote the original Constitution or the Fourteenth Amendment"); Worldwide Volkswagen v. Woodson, 444 U.S. 286, 292–93 (1980) (explaining the "substantial[] relax[ation]" of personal jurisdiction doctrine as a "trend . . . largely attributable to" the "fundamental transformation in the American economy," including the "increasing nationalization of commerce" and the ease of "modern transportation and communication"); Marshall v. Balt. & Ohio R.R., 57 U.S. 314, 329 (1854) (claiming that Article III "has been construed too often . . . as if a construction which did not adhere to its very letter without regard to its obvious meaning and intention, would be a tyrannical invasion" of the states' powers and rights).

359. *See* Baude, *Is Originalism Our Law*, *supra* note 11, at 2384 (explaining that if the Court claimed that "dynamic interpretation, departing radically from the original understanding [was] required" to reach its holding, then "it would probably be a counterexample to originalism's legal status").

360. *See supra* note 358.

361. William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019) [hereinafter Baude & Sachs, *Grounding Originalism*] ("[E]xplaining how a legal rule enjoys good title today means explaining how it lawfully arose out of the government established at the Founding. This 'original-law originalism' . . . serves as a criterion for the rest of our constitutional law . . . ." (footnotes omitted)).

law, as it's been lawfully changed."[362] And "*[i]n principle*," say the positivists, there's a capacious set of ways that the Founders' law might have allowed legal change.[363] So, for example, if the Founders' law allowed precedent to override the Constitution's original public meaning, then a nonoriginalist decision could comport with original-law originalism even if that decision was itself inconsistent with the Constitution's original public meaning.[364] One would have to demonstrate "by historical evidence" that original law would have permitted such a thing, but such a demonstration is (on the original-law originalist view) at least possible "in principle."[365] An additional layer to this account is that it accepts the possibility that mistakes happen: "[W]hile originalism is the official story of our legal system, many individual cases may turn out to be wrongly decided under that standard."[366] Positivists contend that such mistakes, or even an extended period of "global error,"[367] do not meaningfully dislodge our law's overarching commitment to the "official story" of originalism; on this view, one can validly claim that "legal practice shows originalism

362. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 838 (2015) [hereinafter Sachs, *Originalism as a Theory*]; *id.* at 819 ("Whatever rules of law we had at the Founding, we still have today, unless something legally relevant happened to change them. *Our* law happens to consist of *their* law, the Founders' law, including lawful changes made along the way.").

363. Baude & Sachs, *Grounding Originalism*, *supra* note 361, at 1458 ("*In principle*, the Founders' law might have allowed for just about anything. It might have endorsed many different methods of interpretation or rules of legal change—from hyper-literal strict construction to the 'equity of the statute,' from Article V amendments to evolving bodies of customary law."); Sachs, *Originalism as a Theory*, *supra* note 362, at 820–21 ("What originalism requires of legal change is that it be, well, *legal*; that it be lawful . . . . This is a requirement of procedure, not substance. It makes originalism a 'big tent,' potentially allowing a wide variety of legal changes (judicial precedents, liquidation by practice, and so on) depending on how the law stood at the time.").

364. *See* William Baude & Stephen E. Sachs, *Originalism's Bite*, 20 GREEN BAG 2D 103, 104 (2016) [hereinafter Baude & Sachs, *Originalism's Bite*] (explaining that "originalism permits arguments from precedent, changed circumstances, or whatever you like, to the extent that they lawfully derive from the law of the founding").

365. Baude & Sachs, *Grounding Originalism*, *supra* note 361, at 1458 ("But to claim that, *in fact*, our original law actually permits or requires any of these things is to make an empirical and falsifiable claim, one that has to be supported by historical evidence and not only by modern policy preferences.").

366. *Id.* at 1468 ("The cases make claims to legal authority that sound in originalism, which is what matters for the official story . . . .").

367. *Id.* at 1473 ("[I]t's even possible for an entire society to be mistaken—to experience 'global error' about its law—if its members have thus far overlooked some fact of agreed-upon legal significance."); *see also* Baude, *Is Originalism Our Law*, *supra* note 11, at 2389 ("[P]ortions of the Warren and Burger Courts, for example, might be seen as a period during which the generally accepted constitutional law was something other than originalism.").

to be our law" even if, for an extended period, nobody thinks that originalism either is the law or ought to be the law.[368]

When these facets of original-law originalism are considered collectively, it should be clear why it is difficult—indeed impossible—to say whether procedural law's nonoriginalism is, or is not, compatible with that account. One difficulty is that original-law originalists have not yet explained what the Founders' law concerning legal change *was*.[369] If, at one extreme, the Founders' law of legal change was that the Court would sit as a "continuous constitutional convention,"[370] then procedural nonoriginalism would obviously be wholly compatible with original-law originalism.[371] (So, too, would anything else the Court has ever held or will ever hold.) If this seems implausible, an equal difficulty looms on the opposite path: *even if* extant procedural doctrine is *totally not* traceable back in time to "the Founders' law, as it's been lawfully changed,"[372] it might not matter anyway. At least as to civil procedure, our law may simply be riddled with "mistakes," "departures," or "universal misunderstandings"[373] or caught up in an ongoing state of "global error."[374] The bottom line is that original-law originalists may well feel justified in claiming that procedural nonoriginalism is wholly compatible with that account. But it appears

368. Baude & Sachs, *Grounding Originalism*, *supra* note 361, at 1477 ("An originalist rule can still be a legal rule, even if no court applies it . . . . [T]here's nothing impossible or paradoxical about saying that legal practice shows originalism to be our law—even if some widely accepted legal practices might turn out to be inconsistent with the original Constitution."); *id.* at 1473 (contending that "we can be surprised by, mistaken about, or disobedient toward the law without it ceasing to *be* law" and defending the proposition that "legal rules can remain in existence despite being overlooked, even explicitly rejected, by society and its officials").

369. *See supra* notes 363–365 and accompanying text.

370. JAMES M. BECK, THE CONSTITUTION OF THE UNITED STATES: YESTERDAY, TODAY—AND TOMORROW? 221 (1924) ("Thus the Supreme Court is not only a court of justice but, in a qualified sense, a *continuous constitutional convention*.").

371. *See* Sachs, *Originalism as a Theory*, *supra* note 362, at 864 ("Before concluding that originalism automatically unsettles decades of precedent, we first have to take a view on what our original law actually provides.").

372. *Id.* at 838.

373. Baude & Sachs, *Grounding Originalism*, *supra* note 361, at 1465 ("A legal system can tolerate frequent mistakes and departures from the law, conflicting claims of legal authority, and even universal misunderstandings of what the law happens to require. . . . [O]riginalism can be a correct *descriptive* account of our legal system, even if few people would currently describe our system that way." (footnote omitted)).

374. *Id.* at 1473.

impossible at present to state with certitude what that account rules out or rules in.[375]

The foregoing discussion has sketched in preliminary fashion the argumentative and conceptual moves that originalists may offer in response to procedural law's nonoriginalism. It lies well beyond the scope of this Article to attempt to provide an exhaustive description of how each type of originalism might respond to each instance of civil procedure's nonoriginalism. Instead, as this Part has explained, various accounts of originalism may be able to attempt a reconciliation with extant procedural law—if not without extracting a toll upon these accounts' ability to continue to claim the label of "originalism."[376] The process of performing that reconciliation, moreover, may have the salutary consequence of prompting originalists of different stripes to revisit and specify core facets of their theories or assumptions.

Having set out these theoretical ramifications for originalists, the Article's next and final Part turns to address procedural originalism's significance for a broader audience of scholars.

IV. PROCEDURE, POLITICS, AND ORIGINALISM

Every constitutional theory offers an answer to the dead-hand problem: How should courts—and, by extension, society—deal with the fact that the United States of America is both a democratic republic and a nation governed by a constitution written hundreds of years ago by those no longer living?[377]

There is no obvious reason that a given theory's resolution of this problem should vary depending on subject matter or—as relevant here—on the line between substance and procedure. If one believes originalism offers the right method for determining whether the Constitution protects an individual right to bear arms or the right to

375. *Cf.* Baude & Sachs, *Originalism's Bite*, *supra* note 364, at 108 ("Without having done the research ourselves, we . . . doubt the pedigree of [several important cases, including *Tidewater*]. Maybe these cases are right despite our doubts, or at least tolerable under original doctrines of stare decisis. (Again, we haven't done the research).").

376. *See* Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1844–47 (2016) (arguing that adjustments made to originalist theory to make it more academically "pure" have compromised its foundational principles).

377. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1127 (1998) ("The first question any advocate of constitutionalism must answer is why Americans of today should be bound by the decisions of people some 212 years ago. . . . Why should their decisions prevent the people of today from governing ourselves as we see fit?").

have an abortion, then one should in principle believe that the same interpretive theory offers the right method for determining whether, for example, the Constitution allows a D.C. corporation to be sued in diversity in a state in which it is not incorporated or headquartered but where a product it manufactured caused injury to a consumer. Originalists, at least, have not expressly cabined their theories in a way that would suggest they would analyze the last question differently than the first two. Yet the fact of the matter is that (until recently) originalists have nearly entirely ignored nonoriginalism within the field of civil procedure—even though many issues of civil procedure squarely implicate the original meaning of constitutional text.

That macrolevel pattern of originalist argumentation reflects how selectively originalist modes of argument can be deployed. And as the previous Part indicates, originalism is well supplied with avenues through which originalist judges might selectively reject or preserve particular nonoriginalist features of civil procedure, whether by discretionarily retaining nonoriginalist precedent, relying on construction, accepting that procedural law is adequately constraining on judges, or developing positivist claims concerning original law.[378] This naturally prompts the question whether originalist Justices will be selective in their application of originalism as the Court grapples with future cases that tee up originalist arguments concerning civil procedure.

This Part's aim is not to attempt to predict the future of procedural originalism at the Court. Rather, its aim is to highlight that originalism's engagement, or selective engagement, with civil procedure has the potential to shed fresh light on an important question: How is the originalist agenda constructed?

Critics of originalism have long offered a blunt answer to that question: they contend that the originalist agenda mirrors conservative movement politics. Professors Robert Post and Reva Siegel, for example, argue that originalists do not perform a disinterested evaluation of the Constitution's historical underpinnings but instead "strategically select[] and resurrect[] particular historical themes and events" and "ignore[] elements of the original understanding that do not resonate with contemporary conservative commitments."[379] Dean Erwin Chemerinsky wryly notes, on reviewing the opinions of Justice

378. *See supra* Part III.

379. *See* Post & Siegel, *supra* note 34, at 548, 556–58.

Scalia concerning, inter alia, affirmative action, abortion, and school prayer, that Justice Scalia's views would lead one to believe that "the original meaning of the Constitution and the Republican platform are remarkably similar."[380] Professor Michael Dorf points out that opinions ostensibly justified on originalist grounds frequently have reached outcomes that align with the political preferences of the originalist Justices writing those opinions.[381] Professor Aziz Huq observes that originalism "purports to be something that is moving outside politics, but it is—in its origins, and in the way that it has been applied in the courts . . . tightly linked to a particular partisan political orientation."[382] On this political account of originalism, originalism musters its forces only when the answers it produces coincide with positions supported by conservatism.

In response to this critique, originalists, or at least some of them, have freely admitted that conservatism is part of originalism's "origin story."[383] Even accepting, however, that conservatism contributed to the rise of originalism, they call it a "myth" that "originalist constitutional theory itself is inherently conservative."[384] Professor Lawrence Solum, for example, surely spoke for many originalists when he contended that originalism is "a theory that is ideologically neutral at its core," a theory that "commits us to the idea that we must follow the Constitution wherever it leads, whether the destination is conservative or libertarian, liberal or progressive."[385] More recently, Professor Stephanie Barclay similarly argued that "often, originalism leads to outcomes that cut across partisan divides."[386]

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380. Chemerinsky, *supra* note 43.

381. As Professor Dorf puts the point, "[O]riginalism is the rhetorical envelope into which people can fit their normative priors, but that doesn't mean that original meaning is actually doing the work." Dean Reuter, Thomas Hardiman, Amy C. Barrett, Michael C. Dorf, Saikrishna B. Prakash & Richard H. Pildes, *Why, or Why Not, Be an Originalist?*, 69 CATH. U. L. REV. 683, 703 (2020); *id.* ("The overwhelming empirical evidence we have from the political science literature on the Court tells us that the single greatest determinant of how Justices vote is their ideological priors. . . . That evidence strongly suggests that originalism is merely a rhetorical move. It's not a method for deciding cases.").

382. Tom McCarthy, *Amy Coney Barrett Is a Constitutional Originalist—But What Does It Mean?*, GUARDIAN (Oct. 26, 2020, 8:15 PM), https://www.theguardian.com/us-news/2020/oct/26/amy-coney-barrett-originalist-but-what-does-it-mean [https://perma.cc/XN2M-ZMP8].

383. Solum, *supra* note 41, at 250–51.

384. *Id.*

385. *Id.*

386. Stephanie Barclay, *Perspective: Why Constitutional Originalism Is Not Partisan*, DESERET NEWS, (June 28, 2021, 12:00 AM), https://www.deseret.com/2021/6/28/22552811/persp

The two sides of this dispute have largely been talking past each other. Originalism's proponents have emphasized that *in principle* or *in theory* the Constitution's original meaning, properly understood, may happen to support results that conservatives do not like. Originalism's critics have emphasized that *in practice* originalist arguments have been used (or abused) by originalist Justices to achieve conservative results. Because both things might be true at once, what has occurred is not so much a debate as an extended episode of crosstalk. What both sides should be interested in, however, is what happens when the Court confronts evidence of original meaning that would call for results that do not accord with (what we may reasonably infer to be) the originalist Justices' conservative ideological priors.

And that brings us to civil procedure. Consider the aspects of subject matter jurisdiction and personal jurisdiction canvassed earlier in this Article.[387] In these domains, the results called for by original meaning do not show any obvious alignment with conservative political goals. Conservatives have not been marshaling their forces to agitate for *greater* leeway in obtaining personal jurisdiction over corporations or *against* the treatment of corporations as citizens for diversity of citizenship purposes. Nor, for that matter, do conservatives seem to have argued that *Tidewater* should be overturned. Quite the contrary, in fact: on these issues, originalist results would either draw no support from conservatives or actively draw their strident opposition.

In the former bucket is *Tidewater*. Little need be said on that: conservatives would likely be indifferent to a reversal of *Tidewater*, except to the extent that conservatives who are citizens of the District of Columbia may prefer to retain it. In the latter bucket, though, are the much more consequential topics of corporate citizenship in diversity and personal jurisdiction. For a multiplicity of reasons, corporate defendants "almost always prefer federal courts."[388] Federal courts are thought by the corporate defense bar to offer "procedural homogeneity, professionalism, and predictable competence,"[389] whereas state courts have long been portrayed by conservatives and

ective-why-constitutional-originalism-is-not-partisan-legal-theory-amy-coney-barrett-gorsuch [https://perma.cc/4QSQ-WA42].

387. *See supra* Part II.A.

388. Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2183 (2019).

389. *Id.* at 2183–84.

tort reformers as plaintiff-friendly "judicial hellholes."[390] Conservatives are keenly attuned to this concern: Republican and conservative support for expanding corporate access to diversity jurisdiction is a major reason why the federal diversity docket has ballooned since the 1980s.[391] Resurrection of the originalist rule that only natural persons can be Article III citizens would seriously complicate, and could even obliterate, corporate access to the federal diversity docket,[392] and it would therefore draw staunch opposition from conservatives.

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390. *See* Edward Purcell, *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1872 (2008) (describing conservative and Republican criticisms of state courts as "not only inferior tribunals but horrifying 'judicial hellholes'"); Moller & Solum, *Corporations and the Original Meaning*, *supra* note 14, at 227 (explaining that "business conservatives" prefer diversity jurisdiction for corporations); *see also* ATR FOUND., JUDICIAL HELLHOLES 2022-2023, at 4–56 (2022), https://www.judicialhellholes.org/wp-content/uploads/2022/12/ATRA_JH22_FINAL-2.pdf [https://perma.cc/6XXA-AEFU] (providing reports on state courts that are considered excessively plaintiff friendly).

391. *See* Purcell, *supra* note 390, at 1861–62 (describing Republican and conservative support for the passage of the Class Action Fairness Act); Zambrano, *supra* note 388, at 2112 ("Republicans seem enamored of diversity jurisdiction as a way to fight plaintiffs' attorneys."); *id.* at 2134 ("[C]orporate defendants and conservative groups demanded federal intervention against 'out of control' state courts, and the federal government mostly complied. . . . [T]he partisan valence of federalism flipped at some point in the 1980s, when conservative forces began to see federal courts as friendlier to their claims."); Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495, 1504–11 (2017) (documenting, from 1991 to 2006, Republican sponsorship in Congress of legislative reforms increasing corporate access to federal diversity, including the Class Action Fairness Act).

392. If "corporations qua corporations are not Article III citizens," Moller & Solum, *Corporations and the Original Meaning*, *supra* note 14, at 225, then an effort to secure corporations' access to the diversity docket could proceed on the theory that a corporation's underlying human shareholders may be regarded as the real parties in interest in a suit brought by or against a corporation and that Article III requires only minimal diversity between one such shareholder and an opposing party. *But see* Moller & Solum, *The Article III 'Party*,*' supra* note 14, at 69 (rejecting the first proposition because "the original meaning of litigant parties . . . excludes members of corporations in suits proceeding in the corporate name"); Moller & Solum, *Corporations and the Original Meaning*, *supra* note 14, at 226 (doubting the second proposition because "[t]he supposition that the *Strawbridge* rule [requiring complete diversity] is not constitutional does not, as far as we are aware, seem to be grounded in a rigorous investigation of the original public meaning of Article III" but instead "seems to us to be an assumption made by contemporary courts and commentators who assumed a nonoriginalist framework"). If both propositions were to hold as a matter of original meaning, however, then an originalist might salvage corporations' access to diversity in most cases by persuading Congress to enact a statute allowing for diversity jurisdiction in corporate suits when minimal diversity exists between a human shareholder of the corporation and a party "across the *v*." Whether that would be a solution that any originalist would care enough to press for is another question—the current (nonoriginalist) system is so much simpler.

A remodeling of personal jurisdiction doctrine along originalist lines seems equally unlikely to appeal to conservatives. It is impossible to imagine the conservative political establishment favoring the regime of "tag" jurisdiction for nationwide corporations that Justice Gorsuch appeared to be envisioning in *Ford Motor Co. v. Montana Eighth Judicial District Court*[393] and at oral argument in *Mallory*[394]—a regime that would expose nationwide businesses to unlimited plaintiff-side forum shopping.[395] Equally distressing to business interests—which favor predictability and certainty—would be the prospect (also contemplated by Justice Gorsuch[396]) of a return to some sort of pre-*Pennoyer* regime in which nebulous, evolving, and poorly understood principles of "general law" had to be consulted before deciding if an exercise of personal jurisdiction was lawful.[397] The pending *Mallory* case offers another vivid example of how originalism concerning

393. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1038–39 (2021) (Gorsuch, J., concurring). Recall that Justice Gorsuch criticized modern doctrine for allowing corporations to be subject to general personal jurisdiction in "only one or two States . . . in a world where global conglomerates boast of their many 'headquarters,'" while "individual defendants remain subject to the old 'tag' rule." *Id.* at 1038. Questioning why "corporations continue to receive special jurisdictional protections in the name of the Constitution," he mooted the possibility that "the Constitution might tolerate" tag jurisdiction "for 'nationwide corporations,' whose 'business is everywhere.'" *Id.* at 1038, 1039 n.5; *see also id.* at 1027 n.3 (majority opinion) (noting and rejecting Justice Gorsuch's "apparent (if oblique) view that a state court should have jurisdiction over a nationwide corporation like Ford on any claim, no matter how unrelated to the State or Ford's activities there").

394. *See Mallory* Transcript, *supra* note 21, at 22 ("[W]hy wouldn't it also be relevant to look at how individuals were treated when we look at corporations?"); *id.* at 63 ("[W]hy is it unconstitutional conditions when we're talking about corporations but not persons?").

395. *See Ford*, 141 S. Ct. at 1027 n.3. While choice of law, venue transfer motions, and *forum non conveniens* doctrine might mitigate the adverse consequences to defendants of plaintiff-side forum shopping, those doctrines would not change the fact that plaintiffs would have the advantage of being able to select the initial forum that would decide whether and how to apply those mitigating doctrines. Substantial variation exists among various state and federal courts in the application of these doctrines. *See* William S. Dodge, Maggie Gardner & Christopher A. Whytock, *The Many State Doctrines of Forum Non Conveniens*, 72 DUKE L.J. (forthcoming 2023) (manuscript at 5), https://papers.ssrn.com/abstract_id=4060356 [https://perma.cc/ZT28-LJLC] ("[T]here is no single doctrine of forum non conveniens. Rather, there has always been and continues to be significant variation in how states have approached discretionary dismissals.").

396. *See Ford*, 141 S. Ct. at 1036 n.2 (Gorsuch, J., concurring) (citing Sachs, *Pennoyer*, *supra* note 14).

397. *See* Sachs, *Pennoyer*, *supra* note 14, at 1323 ("Reviving *Pennoyer* offers no guarantee of doctrinal certainty. The general law of jurisdiction is only as determinate as it is; and neither the general law, nor the customary international law that it incorporates, has any great reputation for clarity." (footnote omitted)); *id.* at 1319 ("General law is customary law, and custom can change over time—even due to actions that once violated the custom.").

personal jurisdiction may scramble the relationship between originalism and conservative political constituencies. Recall that the plaintiff in *Mallory* argues that as a matter of original meaning, a state may require a corporation to consent to general personal jurisdiction as a condition of registering to do business in the state,[398] a conclusion reached by no less an authority than Professor Sachs.[399] The filings tell the story: the plaintiff's amici include organizations representing the plaintiff's bar,[400] while the Chamber of Commerce, the National Association of Manufacturers, and the Washington Legal Foundation are all lined up on the defendant railroad's side.[401]

As these three examples illustrate (and others might, too[402]), civil procedure is a domain in which originalism and conservatism are far from wholly aligned. Observing whether the movement to procedural originalism fades away, or whether it only selectively succeeds, thus offers a lens through which to study the interactions between conservatism and originalism as they unfold. Originalism on civil procedure might remain, like the weather, something that originalist Justices *talk* about but that nobody ever *does* anything about[403]—a possibility that itself would raise troubling questions about whether the originalist Justices are inconsistent in their interest in originalism.[404]

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398. Brief for the Petitioner, *supra* note 20, at 11–28.

399. *See generally* Brief of Professor Stephen E. Sachs, *supra* note 20. Professor Sachs urged the Court to vacate and remand so that the court below could resolve the statute's validity under dormant Commerce Clause doctrine. *Id.* at 6–7.

400. *See generally* Brief of American Association for Justice as Amicus Curiae in Support of Petitioner, *Mallory*, 142 S. Ct. 2646 (No. 21-1168); Brief of the Pennsylvania Association for Justice as Amicus Curiae in Support of Petitioner, *Mallory*, 142 S. Ct. 2646 (No. 21-1168); Brief of Washington Legal Foundation as Amicus Curiae Supporting Respondent, *Mallory*, 142 S. Ct. 2646 (No. 21-1168) [hereinafter Brief of Washington Legal Foundation].

401. *See* Brief of the Chamber of Com. et al., *supra* note 20; Brief of Amici Curiae the Nat'l Ass'n of Mfrs. and Product Liab. Advisory Council, Inc. in Support of Respondent, *Mallory*, 142 S. Ct. 2646 (No. 21-1168); Brief of Washington Legal Foundation, *supra* note 400.

402. Other illustrations might include summary judgment practice and the declaratory judgment action. *See supra* note 178.

403. *See* Russell Baker, *Dumbness of the Smart*, N.Y. TIMES, Sept. 19, 1971, at E15, https://timesmachine.nytimes.com/timesmachine/1971/09/19/issue.html [https://perma.cc/4GNW-WC4Q] (discussing the quip, attributed to Mark Twain, that "[e]verybody talks about the weather, but nobody does anything about it").

404. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), recently offered a vivid example of how originalist scholarship cutting *against* conservative political preferences might simply be ignored by originalist Justices. In dissent, Justice Kagan noted a recent spate of scholarship that has levied an originalist case against reviving the nondelegation doctrine, *id.* at 2642 (Kagan, J., dissenting), an outcome that is not aligned with current conservative political commitments. *See* Craig Green,

Alternatively, and more troublingly, originalist arguments that further conservative aims might gain traction, but not originalist arguments that are contrary to those aims (for example, originalist limits on corporate diversity citizenship). Either development would lend support to the political account of originalism. Conversely, if originalist Justices were to embrace and apply procedural originalism even in cases in which originalist outcomes run sharply *adverse* to conservative preferences, then that may show some degree of disentanglement or daylight exists between originalist Justices and conservative political preferences.[405] For those interested in testing the political account of originalism, then, the overarching question is not just whether procedural originalism gains force but also how it does so.

Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics, 101 B.U. L. REV. 619, 660–61 (2021); Julian Davis Mortenson & Nicholas Bagley, *There's No Historical Justification for One of the Most Dangerous Ideas in American Law*, ATLANTIC (May 26, 2020), https://www.theatlantic.com/ideas/archive/2020/05/nondelegation-doctrine-orliginalism/612013 [https://perma.cc/57C5-DUF8] (describing conservative opposition to broad delegations to administrative agencies). Neither the Court nor the concurring opinion by Justice Gorsuch engaged on the merits with the originalist scholarly work cited by Justice Kagan.

405. In the wake of the 2021 Supreme Court Term, critics of originalism may feel skepticism that this latter scenario could possibly materialize. Interestingly, though, among those most invested in preserving the tight connection between originalism and conservative political outcomes, alarm bells rang in 2021 at the possibility that this linkage may be fraying. In these quarters, the perception of a gap between originalism and conservatism elicited a level of concern bordering on panic. *See* Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, HARV. J.L. & PUB. POL'Y 917, 917 (2021) (claiming that "the state of conservative jurisprudence in America has reached a crisis point"); Hadley Arkes, Josh Hammer, Matthew Peterson & Garrett Snedeker, *A Better Originalism*, AM. MIND (Mar. 18, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism [https://perma.cc/CY6K-FYMQ] (claiming that "[w]e are now in the midst of a crisis of a tottering regime"). The cause of the consternation was Justice Gorsuch's decision for the Court in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). *See* Josh Hawley, *Was It All for This? The Failure of the Conservative Legal Movement*, PUB. DISCOURSE (June 16, 2020), https://www.thepublicdiscourse.com/2020/06/65043 [https://perma.cc/K54H-DYMA] (calling *Bostock* "the end of the conservative legal movement, or conservative legal project, as we know it"); Hammer, *supra*, at 919–20 ("That a man like Justice Gorsuch . . . could write an opinion like *Bostock* ought to serve as a wake-up call . . . ."). In response, a movement emerged that is candidly aimed at reclaiming originalism and realigning it with conservative aims. This newest form of originalism—"common good originalism"—seeks to call originalism firmly back to heel and ensure it again becomes a means to promote substantive conservative ends. *See* Hammer, *supra*, at 920 (calling on "America's modern legal conservative movement to engage in sober, contemplative self-reflection—to reassess our first principles, retire our outmoded bromides, and rebalance prudence and dogma anew to reach a jurisprudence that actually serves our substantive goals"). *Bruen* and *Dobbs* probably greatly assuaged those worries, but this movement continues.

To be sure, for the Court to embrace originalism on discrete questions of civil procedure would by no means rule out the possibility that conservative political commitments are a driving force behind originalism as practiced by the Court. At least three other possibilities must be considered. One is that an embrace of originalism in civil procedure may collaterally undermine other cases that conservatives and originalists have long disapproved. Consider, for example, *Goldberg v. Kelly* and *Mathews v. Eldridge*, which some originalists contend rest on the same "living constitutionalist" understanding of due-process-as-fairness that underlies *International Shoe*.[406] These pillars of procedural due process have shaped the law at the state and federal level for millions of people with respect to entitlements, parental rights, civil commitment, and other critically important issues.[407] Yet many conservatives and originalists might celebrate their reversal,[408] perhaps even at the price of jettisoning *International Shoe*.

Another possibility is that an embrace of originalism in civil procedure may advance conservative legal commitments in an indirect way by (further[409]) destabilizing doctrines of stare decisis. For example, jettisoning the *International Shoe* framework—a framework that, in Justice Gorsuch's words, abruptly emerged in 1945 to replace "nearly

406. *See* Solum & Crema, *Originalism and Personal Jurisdiction, supra* note 14, at 495 ("The Fair Procedures Theory is the mainstream living constitutionalist understanding of the clause, reflected in *International Shoe* in the context of personal jurisdiction and decisions like *Goldberg v. Kelly*, *Mathews v. Eldridge*, and *Connecticut v. Doehr* in the context of the opportunity to be heard." (footnotes omitted)).

407. *See* Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1532 (2019) (noting that courts have relied on the *Mathews* test "to determine the appropriate procedural protections for state civil proceedings involving the termination of parental rights, involuntary commitment, maximum-security prisons, and incarceration for civil contempt—not to mention the federal procedures governing the detention of American citizens in prisons maintained by the U.S. military").

408. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 36 (1991) (Scalia, J., concurring) (stating that "our due process opinions in recent decades have indiscriminately applied balancing analysis to determine 'fundamental fairness,' without regard to whether the procedure under challenge was (1) a traditional one, and, if so, (2) prohibited by the Bill of Rights," and citing, inter alia, *Mathews*); Goldberg v. Kelly, 397 U.S. 254, 276 (1970) (Black, J., dissenting) ("Today's result doesn't depend on the language of the Constitution itself or the principles of other decisions, but solely on the collective judgment of the majority as to what would be a fair and humane procedure in this case."); John O. McGinnis, *Brennan's Best or the Court's Worst?*, LAW & LIBERTY (Mar. 19, 2020), https://lawliberty.org/brennans-best-or-the-courts-worst [https://perma.cc/QL7Q-UVTU] ("[*Goldberg*] embodies judicial overreach. The Court pretends that it can calibrate the procedures for determining continued eligibility for welfare benefits, although it has no expertise in the subject.").

409. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

everything that had come before"[410]—could make it incrementally easier to jettison the intelligible principle test that (in Justice Gorsuch's words) gained prominence in the "late 1940s" and "somehow displaced . . . all prior teachings in this area."[411] Logically speaking, the former is not a necessary precursor to the latter; the link is a softer one, more atmospheric than legal. An originalist repudiation of *International Shoe* would show that when the original meaning of the Constitution is at stake, any precedent is up for grabs—even cases (like *International Shoe*) that courts have cited tens of thousands of times. That, in turn, could have a percussive effect on stare decisis across different areas of law, some of which are deeply politically contested.

A third possibility is that an embrace of originalism in civil procedure may serve as a device that lends credibility to the originalist Justices' embrace of originalism in substantive areas of law that are more politically contested. Gestures at originalism in civil procedure might flow not from authentic concern about civil procedure's fit with originalism per se but instead from the impetus to burnish the credibility of originalism as an enterprise by emphasizing its political neutrality and general applicability. At least two originalist scholars have flagged this possible dynamic, noting that procedural originalist findings may "help shore up originalism against [the] common attack . . . that it is just a cover for 'conservative' preferences."[412]

For those interested in the relationship between conservatism and originalism—and we probably all should be—civil procedure is an area well worth watching. Some originalist outcomes in civil procedure, should they appear, would indeed be difficult to square with the view that originalism only succeeds insofar as it advances conservative aims. On the other hand, originalism may certainly be used in civil procedure selectively or instrumentally, whether to assist in a bank-shot achievement of conservative aims, to destabilize stare decisis, or to enhance originalism's claims to neutrality and political autonomy. Regardless of how matters unfold, the unexpected emergence of

410. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1038 (2021) (Gorsuch, J., concurring).

411. Gundy v. United States, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting) (urging the revival of the nondelegation doctrine and criticizing the evolution of the "intelligible principle" test).

412. *See* Moller & Solum, *Corporations and the Original Meaning*, *supra* note 14, at 227 ("By complicating the scope of corporate diversity jurisdiction, the results illustrate that originalism is a project that is orthogonal to any one set of partisan preferences.").

procedural originalism offers an opportunity for theorists of all stripes to reflect upon the past, present, and future of originalism's constitutional politics.[413]

CONCLUSION

Every day, in law offices and courthouses across the country, litigants and judges consult and apply the rules of subject matter jurisdiction and personal jurisdiction. These doctrines, the workhorses of civil procedural law, are ostensibly tethered to the Constitution's text. The fact is, however, that these doctrines have long operated in a way unmoored from original meaning. Yet, from its origins until very lately, the originalist movement has almost completely ignored the patent nonoriginalism of blackletter procedural law. Recent overtures suggest, however, that originalism is now poised to advance into the field of civil procedure—a development with potentially immense stakes both within civil procedure and beyond.

This Article has examined this incipient movement to procedural originalism and some of the puzzles it presents. It has mapped the backstory of procedural originalism and its cousins, equitable and remedial originalism, tracing the latter's roots to the post-*Brown* era of conservative resistance to structural injunctions. It has demonstrated the discrepancies between original meaning and staples of procedural doctrine and the noteworthy paucity—until recently—of originalist critiques of these discrepancies. It has set out the challenges and questions that procedural originalism poses for some of the many theories of originalism.

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413. The possibility of an originalist reworking of civil procedure offers a challenge to critics of originalism too: it prompts the question whether the political account of originalism is capable of falsification. In other words, what would it take to disprove the claim that "originalism is just an outgrowth of conservative politics"? Would it be enough if, on originalist grounds, the Court *did* hold that nationwide corporations were subject to tag jurisdiction in any state, or that corporations could *not* be citizens for purposes of diversity jurisdiction—each a result that conservatives would oppose? If such holdings would *not* be enough, what would? Originalist decisions by the Court in the area of civil procedure—should they ever occur—may induce those convinced by the political account of originalism to refine that theory's claims. For example, such decisions might suggest that originalism operates to inscribe the preferences of social conservatives—rather than business conservatives—into law. That would represent a meaningful modification of the political account of originalism, insofar as that account has also encompassed the claim that originalist arguments serve to promote an antiregulatory, probusiness conservative agenda. *See, e.g.*, Mortenson & Bagley, *supra* note 404 ("[I]t does seem awfully convenient that the Founders supposedly believed in a doctrine [the nondelegation doctrine] that aligns so neatly with the Republican Party's desire to bring the administrative state to heel.").

Throughout, this Article has highlighted the political factors that have influenced the development of originalist argumentation—factors that may now affect the future of the originalist turn in procedure. For decades, originalism's critics have pointedly noted the tight linkage between originalism and the political aims of conservatism. Procedural originalism now presents a rare opportunity to observe the dynamics of that linkage, because it may drive a wedge between originalism and conservatism. After all, the *Wall Street Journal* editorial page is hardly going to excoriate the Court for giving corporations "special jurisdictional protections in the name of the Constitution"—the protections that troubled Justice Gorsuch.[414] Overturning *Tidewater* will probably never be a plank of the Republican Party platform. And one can safely assume that as long as there is a federal diversity docket, the conservative movement will be committed to ensuring that corporations have access to it. It remains to be seen how such political headwinds will influence the future unfolding of procedural originalism. Whether procedural originalism flourishes or whether it fades away, procedural originalism will shed light on the dynamics of originalism's constitutional politics and its agenda—an agenda that affects us all, whether we are originalists or not.

414. *Ford*, 141 S. Ct. at 1038 (Gorsuch, J., concurring).