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JUDICIAL REVIEW, CONSTITUTIONAL INTERPRETATION, AND THE DEMOCRATIC DILEMMA: PROPOSING A "CONTROLLED ACTIVISM" ALTERNATIVE

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Abstract

No problem generates more debate among constitutional scholars than how to approach constitutional interpretation. This Article critiques two representative theories (or families of theories), originalism and nontextualism, and offers a principled alternative, which we call "controlled activism." By candidly acknowledging the judge's creative role in constitutional lawmaking, controlled activism promises real limits on judicial discretion.

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INTRODUCTION

No controversy has dominated constitutional debate in recent years more than that over the origins, legitimacy, and methodology of constitutional interpretation. The stakes are high. The future of democratic government and the rule of law turn on the outcome. If we ultimately conclude that neither the Constitution's text nor its history restrains unrepresentative, unaccountable judges in checking the actions of the political branches of either federal or state governments, little will be left of our system of popular sovereignty. If, on the other hand, we select an interpretive methodology that leaves the political branches effectively unchecked, the essential values of counter-majoritarian constitutionalism, so central to our political structure, will be seriously undermined. Perhaps most alarming are methodologies that permit the judicial interpreter to covertly check the political branches when and only when the choices of those branches differ from the narrow political preferences of the interpreter herself.

Sadly, every one of these dangers is a realistic possibility. Various theories of interpretation advanced by respected scholars and jurists give rise to one or more of these harms. In a number of instances, scholars have openly advocated adoption of interpretive theories that allow the judiciary to sit in judgment on the political wisdom of choices made by the representative branches. Other theorists, while not openly advocating total judicial abstention in the face of constitutional challenges to the actions of the political branches, have urged adoption of interpretive models that effectively bring about this result. Numerous

approaches to constitutional interpretation have been suggested,[1] but at the risk of oversimplification, it is reasonable to posit predominant the existence of two major theoretical camps: originalism[2] and nontextualism.[3] Each camp includes within its boundaries a number of more narrowly defined theories of interpretation, though distinctions within these subspecies have often been blurred. To combat these dangers, we present a new model of constitutional interpretation—what we call "controlled activism"—a framework characterized by fundamental adherence to the outer contours of the Constitution's text and use of contemporary semantics to inform textual meaning, uniquely combined with a disciplined and candid form of normative judicial inquiry.

The intellectual thread common to most originalists is the belief that constitutional interpretation should be characterized exclusively by an effort to determine the Constitution's meaning by means of some form of historical inquiry. Included under the originalism umbrella over the years, however, have been both advocates of original meaning and advocates of an inquiry into Framers' intent, a now largely defunct interpretive paradigm from which original meaning evolved.[4] Although distinct, the two interpretive models are frequently conflated by both critics and advocates since evidence advanced to show understanding under both often is limited to statements of the Framers themselves.[5]

Original meaning requires the interpreter to ascertain the public understanding of text at the time of a given provision's adoption. For

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1. By focusing solely on originalism and nontextualism, we most certainly do not mean to imply that no other theories of constitutional interpretation exist. Indeed, some of those theories may well be closer to the interpretive model we propose than are either of the two theories on which we focus. *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) (developing theory of the "common law Constitution"). But since the primary goal of this Article is to develop our own "controlled activism" interpretive model, we have made the choice to point to what we deem the dominant theories of constitutional interpretation in order to highlight the need for pursuit of an entirely different approach.

2. The label "originalism" appears to have been coined by Professor Paul Brest. *See* Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 204 (1980). Other discussions have described the same analytical framework as "interpretivism" or "intentionalism." *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 886 (1985).

3. Bizarrely, there are some recent theories that, seemingly contradictorily, attempt to combine both. *See* discussion *infra* Part III.

4. *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999).

5. *See, e.g.*, Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 257 (2002) ("The originalist debate has progressed without a clear statement of the doctrine or an adequate account of the different versions in which it can manifest itself."); *see also*, Rebecca Zeitlow, *Popular Originalism? The Tea Party Movement in Constitutional Theory*, 64 FLA. L. REV. 483, 491–92 (2012).

example, if one seeks to interpret the words "privileges and immunities" in Article IV under an original meaning analysis,[6] one must determine the meaning of those words as they were commonly understood when they were originally promulgated into law. The same inquiry would be employed to interpret the words "commerce" in Article I's Commerce Clause,[7] "due process" in the Fifth and Fourteenth Amendments,[8] "freedom of speech" in the First Amendment,[9] or any other provision in the Constitution's text. For the most part—though here a fair degree of ambiguity appears to exist—this inquiry focuses on generally accepted usage, rather than merely the subjective understanding of those individuals who framed the words. Historical analysis is used as a dispositive measure of these meanings.

In contrast, advocates of original intent—an interpretive model that predates the original meaning approach and has largely fallen out of vogue—sought to unearth the subjective intentions of the Framers themselves. Original intent, then, was more concerned with an inquiry into the holistic, contextual purpose of the Framers—what "Point B" they sought to achieve from their starting "Point A." While inquiry into the contemporaneous general understanding of words embodied in the Constitution's text might well be relevant to this inquiry, it is not necessarily dispositive. Indeed, in extreme instances of original intent analysis, the Framers' intent has even overcome an absence of textual support entirely.[10] The inquiry is, instead, focused exclusively on an effort to ascertain the subjective intent of those involved in the drafting and ratification of a relevant constitutional provision, as determined by available documentary evidence.[11] Popular adherence to one or the

6. U.S. CONST. art. IV § 2.

7. *Id.* art. I § 8, cl. 3.

8. *Id.* amend. V, XIV.

9. *Id.* amend. I.

10. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 712–13 (1999) (holding that in the interest of state sovereignty, the Constitution provides Eleventh Amendment immunity for nonconsenting states from suits filed by citizens of that state or any foreign state despite the fact that sovereign immunity does not derive from the Eleventh Amendment). *Cf.* MICHAEL ZANDER, THE LAW-MAKING PROCESS 166 (6th ed. 2004) ("It is for the courts to construe [a statute's] words and it is the court's duty in so doing to give effect to the intention of Parliament in using those words."); EDWARD BEAL, CARDINAL RULES OF LEGAL INTERPRETATION 257 (2d ed. 1908) (quoting West Ham Churchwardens and Overseers v. Iles, [1883] 8 App. Cas. 386 (H.L.) 388–89 (appeal taken from Eng.) (Lord Blackburn)) ("[I]n construing an Act of Parliament where the intention of the legislature is declared by the preamble, we are to give effect to that preamble to this extent, namely, that it shows us what the legislature are intending; and if the words of enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case we prefer that meaning to one showing an intention of the legislature which would not answer the purposes of the preamble, or which would go beyond them. To that extent only is the preamble material.").

11. Exactly what is or is not to be included in this evidentiary category has been the subject of debate. *See* discussion *infra* Part I.

other form of originalism, the approach's advocates believe, will restrain activist judges from replacing the social policy choices of the political branches with their own.

Traditionally, originalism has been associated with constitutional scholars and jurists aligned with some category of the political right.[12] More recently, however, so-called progressive constitutional theorists have sought to capture the superficial legitimacy thought to come from professed adherence to original meaning by developing their own form of originalism known as progressive originalism.[13] Perhaps unsurprisingly, the progressive form of the interpretive model leads its proponents to doctrinal conclusions that are far more consistent with the political views of the left than those reached by politically conservative originalists.[14] Complicating the entire originalist inquiry is the more recent development by certain leading originalists of the so-called "interpretation–construction" dichotomy. In certain instances, their scholars concede, it is impossible to resolve modern constitutional controversies on the "interpretation" of the text's original meaning. In such instances, they believe, the Court should instead employ a process of constitutional "construction," whereby it seeks to ascertain the underlying purpose of the relevant constitutional provision and then extrapolate it to apply it to the modern situation.

While the underlying epistemological foundations of these approaches may differ in terms of application and desired policy outcomes, they share the similarity that, behind an often contrived and opaque veil of historical inquiry, originalist jurists are effectively empowered to engage in exactly the type of ideologically driven, outcome-determinative analysis that originalism claims to be designed to prevent. Judicial application of the model has, on a number of occasions,[15] exposed the paradigm's irreconcilable archeological and conceptual shortcomings, and, in so doing, has negated originalism's self-proclaimed status as a relevant, principled interpretive methodology.

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12. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 12–13 (1990); STEVEN G. CALABRESI, ORIGINALISM: A QUARTER CENTURY OF DEBATE 1 (2007); Barnett, *supra* note 4, at 612; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989).

13. *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293 (2007) [hereinafter Balkin, *Abortion and Original Meaning*]; Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 552 (2009) [hereinafter Balkin, *Framework Originalism and the Living Constitution*]; Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 428 (2007) [hereinafter Balkin, *Original Meaning and Constitutional Redemption*]; Jess Bravin, *Rethinking Original Intent*, WALL. ST. J., Mar. 14, 2009, at A3; Douglas T. Kendall & James E. Ryan, *How Liberals Can Take Back the Court*, THE NEW REPUBLIC, Aug. 6, 2007.

14. *See* discussion *infra* Section I.D.

15. *See* discussion *infra* Part I.

At the opposite end of the interpretive spectrum are those constitutional scholars and jurists who either believe in some form of linguistic deconstruction[16] or adhere to the notion that there are unstated constitutional directives that exist alongside the explicit text of the Constitution.[17] Together, these approaches make up what we broadly describe as the nontextualism school of constitutional interpretation. The former group of scholars, drawing upon the well-established counterpart to its interpretive theory in literary analysis,[18] asserts that words are inherently ambiguous and capable of infinite meanings, and thus naturally impose no practical restraint on interpreting courts.[19] In contrast, advocates of the unwritten Constitution model focus on the need for abandonment of the dead hand of the past and reaffirmation of the Constitution by each generation. This approach, in essence, permits nontextually grounded revision of the Constitution in order to satisfy the needs of contemporary society—however those needs are determined.[20] Although nontextualism is most commonly associated with scholars and jurists who adhere to some form of political liberalism, the model has also attracted political conservatives, who on occasion find its use appropriate to attainment of their own ideological objectives.[21]

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16. *See, e.g.*, Robert W. Gordon, *Nihilism, in "Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1, 2 (1985) ("[Critical Legal Studies] people do frequently say that law, or legal rights, are 'indeterminate.'"); Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 374 (1982).

17. *See* LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION (2008); Michael J. Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 691 (1976) (arguing in favor of an "organic" Constitution); *see also* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975) (arguing in favor of "acceptance of the courts' additional role as the expounder of basic national ideals of individual liberty and fair treatment even when the content of these ideals is not expressed as a matter of positive law in the written Constitution"). Professor Grey continues:

> The intellectual framework against which these rights have developed is different from the natural-rights tradition of the founding fathers—its rhetorical reference points are Anglo-American tradition and basic American ideals, rather than human nature, the social contract, or the rights of man. But it is the modern offspring, in a direct and traceable line of legitimate descent, of the natural-rights tradition that is so deeply embedded in our constitutional origins.

Id. at 717.

18. For a compelling survey of the law and literature school, see Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351 (1986); *see also Symposium: Law and Literature*, 39 MERCER L. REV. 739, 739–936 (1988).

19. *See* discussion *infra* Section II.A.

20. *See* Brest, *supra* note 2, at 225–26 (arguing that "[g]iven the questionable authority of the American Constitution . . . it is only through a history of continuing assent or acquiescence that the document could become law.").

21. *See* Lochner v. New York, 198 U.S. 45 (1905) (reading conservative economic principles into the Due Process Clause of the Fourteenth Amendment).

While the underlying theoretical rationales of these nontextualist approaches differ at the margins, they share a common bond: all effectively permit the interpreter to check the political branches totally freed from the strictures of the Constitution's text, no matter how seemingly unambiguous that text happens to be. The assertion that the Constitution is made up not only of notions of natural law, but also of historical lessons drawn from generations of thoughts about the Constitution itself,[22] underscores nontextualism's susceptibility to strategic manipulation. On its face, nontextualism permits selective manipulation of constitutional doctrine in order to advance narrow political goals. Its inexplicable rejection of Article V's formal amendment process and expansive reading of the Ninth Amendment expose the nation's foundations of law and liberty to boundless interpretation by anyone who professes the ability to discern directives supposedly implicit within the Constitution's interstices. The ominous threats that these interpretive models pose to democratic government cannot be overstated. Surely the Americans who fought a revolutionary war for independence from dictatorial rule would never have vested in nine unrepresentative, unaccountable judges the power to impose unguided, textually ungrounded limits on democratically authorized choices.

In short, neither originalism nor nontextualism offers a principled method of constitutional interpretation, consistent with the contours of the nation's version of constitutional democracy. Inasmuch as preservation of both the adjective and the noun in that phrase is critical to our system of government and justice, both paradigms suffer from countless theoretical and normative problems which ultimately render both models untenable. Originalism inherently suffers from fatal conceptual and archeological difficulties. When employed in a deferential manner, originalism ignores the adjective ("constitutional") in favor of the noun ("democracy") as a means of rejecting what its advocates perceive as the inherent and unacceptably antidemocratic nature of the very process of judicial review.[23] This, of course, undermines the fundamental structure of our counter-majoritarian system, which necessarily attempts to curtail subversion of the will of elected majorities by unelected minorities via judicial review of the actions of the political branches.[24] At the same time, originalism on

22. *See* TRIBE, *supra* note 17, at 211 ("In the end, it is the struggle itself—not any of the interim destinations to which it might lead—that the constitutional quest is all about.").

23. *See, e.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 156 (1893) (arguing that courts must not reject statutes as unconstitutional unless they unquestionably violate the Constitution and that judicial review is undemocratic since it undercuts popular responsibility).

24. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 2–3 (1959).

occasion also—paradoxically—has been employed to ignore the noun ("democracy") in favor of the adjective ("constitutional"). It does so when it employs pseudo-historical analysis as a means of imposing limitations on government above and beyond those placed on government by the document's unambiguous text.[25] Nontextualists, on the other hand, allow abandonment of the Constitution's text in favor of the interpreter's own notions of foundational value choices, thereby also ignoring the noun in the phrase "constitutional democracy."

Despite their differences, both interpretive schools are identical in their enormous susceptibility to abuse by those who seek to overlay their own sociopolitical views on the Constitution. Just as the "Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," to borrow from Justice Oliver Wendell Holmes's famous dissent in *Lochner v. New York*,[26] it also does not enact countless other interpretations of our Constitution based purely on the interpreter's personal political, social, or economic beliefs. Despite such alarming evidence of each model's failures, these schools of interpretation continue to be championed by prominent members of both the academy and the judiciary.

Our inquiry begins with the assumption that surely some acceptable alternative lies between the extremes of the often fruitless and strategically manipulative straightjacket of originalism's supposedly rigid historical inquiry on the one hand, and the linguistic chaos and epistemological arrogance of nontextualist inquiry on the other. In this Article, we seek to develop such an alternative model—what we call "controlled activism." The controlled activist framework that we fashion operates, at its most basic level, as a modest form of exclusionary textualism. Where the Constitution is unambiguous, interpreters look to the plain meaning of its text, as defined by contemporary understandings. Moreover, even in those instances in which textualist analysis fails to reveal a single, unchangeable meaning, it may nevertheless suggest an *exclusionary* form of plain meaning. In other words, while it may not be clear on the four corners of a provision what the words mean, it will be clear what the words do *not* mean. Our model thus summarily excludes a number of suggested constructions of the constitutional directive in question. Within this textual envelope, the controlled activist model openly recognizes the appropriateness of normative interpretation as an essential element of judicial review, restrained by the outer linguistic limits of the four corners of the

25. *See* discussion *infra* notes 67–86 and accompanying text (criticizing the Supreme Court's recognition of the individual right to bear arms).

26. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

Constitution's text. It also offers a salient set of guidelines by which principled normative inquiry may proceed.[27]

Unlike classic originalists, we reject the straightjacket of history as the only permissible means by which interpreters may arrive at the meaning of the Constitution's text. In a certain sense, we suppose, our approach is comparable to the recently developed "originalist construction" model, albeit absent the purported partial restraint imposed by historical inquiry. On the other hand, unlike nontextualists, we demand that interpretation be confined to the outer linguistic reaches of applicable constitutional text. Unlike both preexisting models, to the extent that the Constitution's text presents ambiguity, our controlled activist model advocates use of principled normative inquiry, informed and controlled by a transparent, candid explication of a constitutional provision's underlying meaning based on the intellectual normative framework chosen to be employed by the jurist. Controlled activism, then, endeavors to avoid the most significant practical shortcoming of the originalist and nontextualist paradigms—strategic, outcome-determinative manipulation. Our proposed model offers the only viable interpretive alternative to these extremes: it effectively prohibits all forms of nontextualist analysis that reject text completely, as well as all forms of originalism that relegate textual analysis purely and rigidly to the opaque trenches of historical inquiry.

We begin our efforts with the comfortable awareness that whatever flaws may plague our proposed model, the result will most assuredly be no worse than what has been employed to this point by leading constitutional theorists. While some critics may balk at our open acceptance of normative judicial inquiry, it is important to note that in many areas of constitutional law the Court already adheres to the framework we espouse, albeit without the candor or control imposed by formally expressed acceptance of our proposed paradigm.[28] The next two sections of this Article dissect originalism and nontextualism in order to demonstrate the fatal flaws in both. In the final section, we seek to develop the contours of the "controlled activism" model of constitutional interpretation as an alternate to the fatally flawed prevailing interpretive models.

I. ORIGINALISM AND THE MISLEADING SEARCH FOR CONSTITUTIONAL CERTAINTY

Over the past three decades, the epistemological merits and pitfalls of the originalist school of constitutional interpretation have been

27. *See* discussion *infra* Part III.

28. *See* discussion *infra* Part III.

rigorously debated.[29] The issue first came into public view during Attorney General Edwin Meese's 1985 speech to the American Bar Association in which he called, broadly, for a "Jurisprudence of Original Intention."[30] Originalism has subsequently come to embody a wide range of interpretive philosophies, including the original intent, original meaning, originalist construction, and progressive originalism schools. Indeed, the irony of the originalist school of interpretation is that an interpretive paradigm supposedly so committed to the unchanging goals of the Constitution has itself been subjected to more stylistic changes than spring fashion design. Nevertheless, at the core of originalist thinking lies a fundamental desire to ground constitutional interpretation in historical inquiry in an effort to preserve the democratic system,[31] promote judicial restraint and consistency of precedent,[32] and produce "good" results.[33]

Contemporary originalists posit that original understanding is the only mode of interpretation that meets the criteria that any theory of constitutional adjudication must satisfy in order to possess democratic legitimacy. According to most versions of originalism,[34] the Constitution may be changed only through resort to the formal amendment process set out in Article V. Proponents of originalism claim that the paradigm is superior to nontextualism[35] because it relies on a criterion—the meaning of the words exclusively as understood at the time of their ratification—entirely distinct from a judge's individual preferences. Originalism supposedly avoids the pitfall of asking judges—fallible humans, subject to prejudices and ideological preconceptions—to differentiate between unwritten values that are fundamental to our society and political values that they personally

29. *See* BORK, *supra* note 12, at 12; ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1998) (explaining Justice Antonin Scalia's views on orginalist construction of legal texts); CASS SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 63–65 (2005); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L. J. 1085 (1989) (providing an overview of how original intent developed).

30. CALABRESI, *supra* note 12, at 1; Attorney General Edwin Meese III, *Address before the American Bar Association* (July 9, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 9 (1986); *see also* Edwin Meese III, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925, 925–33 (1996).

31. *See, e.g.*, BORK, *supra* note 12, at 12–13; Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748 (1988); Scalia, *supra* note 12, at 861.

32. *See, e.g.*, BORK, *supra* note 12; Scalia, *supra* note 12, at 855; William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 882 (1995).

33. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 383–84 (2007).

34. *See* discussion *infra* Section I.C. (discussing theory of originalist construction).

35. *See* discussion *infra* Part III.

endorse. Since originalism is said to be animated by the belief that "the rule of law requires judges to follow externally imposed rules,"[36] strict adherence to dispositive historical inquiry is said to promote a systemic philosophical separation of personal and legal convictions.[37]

Notwithstanding its purported goal of promoting neutrality, restrained judicial decision making, and adherence to the Constitution's text, the originalist model inevitably lends itself to precisely the type of strategic political manipulation that it claims to avoid. Indeed, the very construct on which subdivisions of originalism agree—namely that analysis of history authoritatively settles textual meaning—is doomed by conceptual, archeological, and transparency problems, which render it as susceptible to manipulation of constitutional directives as do nontextual inquiries into the Constitution's supposedly implicit maxims.[38] In the final analysis, then, originalism suffers from all of the interpretive pathologies that it purports to cure: manipulation of superficially neutral and coherent interpretive criteria that often are inaccessible to nonmembers of the legal profession, much less to lay citizens, as a means of achieving politically or ideologically driven goals. In the following discussions, we examine each of the suggested subcategories of originalist analysis.

A. *Original Intent*

The original intent version of originalism,[39] which seeks to interpret the Constitution by reference to the subjective intentions of the Framers, suffers from myriad pragmatic and conceptual flaws. For one thing, it fails to answer whether the Framers even had a single intent, and, if they did, whether they themselves intended for that collective intent to be utilized as the sole guide in interpreting their words.[40] On the most basic

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36. Treanor, *supra* note 32, at 856.

37. *See, e.g.*, McGinnis & Rappaport, *supra* note 33, at 385–86 ("[T]he strict supermajoritarian rules that govern the Constitution's enactment make it socially desirable. . . . The supermajority rules of the Constitution's enactment . . . make them good enough to enforce when they conflict with mere majoritarian enactments.").

38. *See* discussion *infra* Part II.

39. This school of interpretation is also known as "intentionalism." *See* Powell, *supra* note 2, at 886. For descriptions of original intent, see RAOUL BERGER, GOVERNMENT BY JUDICIARY 363, 365–66 (1977) (concluding that "[c]urrent indifference to the 'original intention' . . . is a relatively recent phenomenon" so the intention of the framers should control interpretation, because it is only by examining their 'original intent' that the interpreter can determine the Constitution's normative meaning); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 13 (1971); Henry Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 699 (1976) (arguing that historically demonstrable intentions of the framers should be binding on modern interpreters of the Constitution).

40. *See, e.g.*, INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 62 (Jack N. Rakove ed., 1990); Brest, *supra* note 2, at 212–22; Powell, *supra* note 2, at 948

level, it is unclear even who originalists mean when they refer to "the Framers." What James Madison, Alexander Hamilton, and John Jay wrote in the *Federalist Papers*,[41] for example, while undoubtedly of great interpretive significance,[42] does not necessarily reflect the views of all of those involved in the drafting of the Constitution. Moreover, their statements most certainly cannot be presumed to reflect the understanding of each of the state ratifying conventions, since the *Federalist Papers* were written for the purpose of directly influencing only the New York Convention.[43] Similarly, while the writings of John Adams and Thomas Jefferson are considered evidence of the original intent of the Framers, neither man even attended the Philadelphia Convention.[44] Therefore, whether they even qualify as "Framers" for the purposes of an inquiry into Framers' intent is subject to debate.

The fundamental problem with any effort to discern Framers' intent is the impossibility of gleaning a single, coherent collective intention. Any assumption that all those involved in the drafting and ratification processes shared some single vision is either hopelessly naïve or shamefully disingenuous. Moreover, even were we able to suspend disbelief on this insurmountable interpretive difficulty, any attempt to ascertain Framers' intent suffers from a significant archeological defect: The simple reality is that there generally exists insufficient data upon which to determine intent with any reasonable certainty.[45] On occasion this problem has led even the most ardent originalists to concede the relative futility of historical inquiry in resolving a number of important contemporary issues of constitutional interpretation,[46] and has led to

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(arguing that originalist reliance on the "intent" of the Framers can gain no support from the assertion that such was the Framer's expectation, since the Framers themselves did not believe such an interpretive strategy to be appropriate).

41. THE FEDERALIST (1788).

42. As of 2000, *The Federalist* had been quoted at least 291 times in Supreme Court decisions. RON CHERNOW, ALEXANDER HAMILTON 260 (2004).

43. It has been pointed out, for example, that Alexander Hamilton, who wrote the majority of the essays in *The Federalist Papers*, was absent for parts of the Philadelphia Convention. John Jay did not attend at all, nor did John Adams, Thomas Jefferson, or John Henry. *See* JOSEPH A. MURRAY, ALEXANDER HAMILTON: AMERICA'S FORGOTTEN FOUNDER 89–110 (2007).

44. *Id.*

45. *See* Brest, *supra* note 2, at 221 ("The act of translation required . . . involves the counterfactual and imaginary act of projecting the adopters' concepts and attitudes into a future they probably could not have envisioned. When the interpreter engages in this sort of projection, she is in a fantasy world more of her own than of the adopters' making.").

46. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Scalia, J., concurring) (arguing that in the absence of dispositive historical evidence, "I must resolve this case in accord with our existing jurisprudence"). Justice Scalia admits that since some features of early American society are no longer acceptable to modern sensibilities, originalism, "[i]n its undiluted form, at least . . . is medicine that seems too strong to swallow," and therefore, "in a crunch [he] may prove to be a faint-hearted originalist." Scalia, *supra* note 12, at 861, 864. Accordingly, he considers it permissible to depart from a historical rule when an "evolution in

creation of far more flexible versions of originalism.[47] The proposal made by one respected advocate of originalism to deal with this archaeological problem—where the history of a constitutional provision is indeterminate, the answer is for the courts simply to decline to enforce the relevant provision[48]—ironically achieves the one result that common sense dictates the Framers did *not* intend: the total ineffectiveness of the provision.

As troubling as the archaeological difficulty is, in numerous contexts the problems with the original intent interpretive model go far deeper than that. In many situations, evidence of intent is unavailable simply because the interpretive problem in question occurred to no one at the time of the framing, either because it was unrecognized or because it was physically or politically unforeseeable.[49] In the absence

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social attitudes has occurred." *Id.* at 864. Without citing specific evidence, Justice Scalia has argued, for example, that he would be unlikely to sustain a legislative enactment of public flogging, since social mores has evolved beyond the practice. *Id.* He also is willing to "adulterate [originalism] with the doctrine of *stare decisis* . . . ." *Id.* at 861. Accepting the notion that stare decisis lies outside the boundaries of originalist analysis, this concession stands in stark contrast to Justice Scalia's traditionally unflagging outward commitment to dispositive historical inquiries. *See* David M. Zlotnick, *Justice Scalia and his Critics: An Exploration of Scalia's Fidelity to his Constitutional Methodology*, 48 EMORY L.J. 1377, 1411–13 (1999); Steven Presser, *Touting Thomas*, LEGAL AFFAIRS (Jan./Feb. 2005) ("For [originalists], and for Clarence Thomas, it's more important to get it right than to maintain continuity."). For further discussion of "faint-hearted originalism," see DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 43 (2002) ("Taken as a whole, Justice Scalia's jurisprudential thought is both engaging and disturbing. It is engaging because of his candid admission of the gap between his originalist rhetoric and the realities of law. As much as he emphasizes the importance of rules, he realizes that they cannot always govern; as much as he emphasizes originalism, he recognizes that theoretical positions about originalism are usually remote from the disputes in actual cases."). *Contra* ANTONIN SCALIA, A MATTER OF INTERPRETATION 47 (1998) ("By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.").

47. *See* discussion *infra* Sections I.B–D.

48. *See* BORK, *supra* note 12, at 166 ("The judge who cannot make out the meaning of a provision is in exactly the same circumstance as a judge who has no Constitution to work with. There being nothing to work with, the judge should refrain from working. A provision whose meaning cannot be ascertained [from history] is precisely like a provision that is written in Sanskrit or is obliterated past deciphering by an ink blot. No judge is entitled to interpret an ink blot . . . .").

49. Prior to *Beacon Theaters v. Westover*, 359 U.S. 500 (1959), for example, the Court had stated that a Seventh Amendment right to jury trial was determinable via historical analysis of common law practice prior to the year of the amendment's promulgation, 1791. *See* Dimick v. Schiedt, 293 U.S. 474, 490 (1935). Since a right to jury trial historically extended to suits at law, but not in equity, the applicability of the Seventh Amendment was generally determined by way of historical analysis—would the case have been deemed "law" or "equity" in 1791. *Id.* In *Beacon Theaters*, however, the Court held that where legal and equitable claims are joined in the same action, the legal claims must be tried by a jury before the equitable claims can be resolved. *Beacon Theaters*, 359 U.S. at 506–07. As such, the Court preserved the dynamic

of dispositive historical evidence, the result, not surprisingly, is that resort to original intent has a tendency to devolve into little more than a strategic means to buttress efforts to attain a desired political end.

Because of its numerous defects, original intent has largely been abandoned both by those who have always opposed it and by many who had originally championed it. The discussion that follows therefore focuses on the revised version of originalism that replaced it.

B. *Original Meaning*

The original meaning school,[50] which grew out of an attempt to avoid the vagaries of historical subjectivism and the resulting indeterminacy that plagued the original intent model, nevertheless manages not only to suffer from many of the same archaeological pitfalls and dangers of strategic selectivity as does original intent, but also to add additional conceptual and practical shortcomings. Admirably, advocates of the original meaning school recognize the futility of attempting to ascertain the subjective goals of a group of individual authors.[51] They also wisely recognize that to the extent that Framers' intent in adopting particular constitutional text differs significantly from widespread popular understanding of the meaning of the controlling text's words at the time of their adoption, it is that shared understanding, rather than the secret subjective understanding of the

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concept implicated by the Seventh Amendment's language, "the right of trial by jury shall be preserved," but did not confine its analysis to what existed in 1791. Because it never would have occurred to the drafters that reproducing divisions between law and equity would be so challenging in 1959, the Court was, as a practical matter, compelled to deviate from the Framers' intent while still preserving the directive embodied in the Seventh Amendment. *See, e.g.*, Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 496 (1975).

50. This interpretive model is also known as "Original Public Meaning Originalism" or "New Originalism." *See* Barnett, *supra* note 4, at 620; Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 607 (2004); *see also* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 817–32 (1994).

51. *See, e.g.*, BORK, *supra* note 12, at 144 ("If someone found a letter from George Washington to Martha telling her that what he meant by the power to lay taxes was not what other people meant, that would not change our reading of the Constitution in the slightest. . . . Law is a public act. Secret reservations or intentions count for nothing. All that counts is how the words used in the Constitution would have been understood at the time."); *see also* Antonin Scalia, Justice of the Supreme Court of the United States, Address at Catholic University of America (Oct. 14, 1996) ("You will never hear me refer to original intent, because as I say I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent, and I don't care if the Framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.").

Framers, that must control.[52] Otherwise, government could easily establish a framework of deception by implementing its policy choices without making the electorate aware of those choices—a practice hardly consistent with the foundational notion of rule by consent of the governed.[53] What matters to proponents of the original meaning model, therefore, is the public understanding of the Constitution's maxims at the time of ratification, rather than the Framers' private understandings of those terms.[54] As a practical matter, however, it has often turned out to be strikingly similar to an original intent inquiry, because the best evidence of public meaning at the time of drafting and ratification is often statements of those involved in the drafting and ratification processes.[55] To the extent the original meaning inquiry departs from total reliance on such statements, it runs into other serious problems.

Original meaning possesses neither a clear methodology for deciding which historical materials may be used to determine meaning nor rules for analysis once an appropriate historiography has been gathered.[56] Indeed, according to one professional historian, originalism

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52. BORK, *supra* note 12, at 144 ("Though I have written of the understanding of the ratifiers of the Constitution, since they enacted it and made it law, that is actually a shorthand formulation, because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean . . . . The search is not for a subjective intention.").

53. Some originalists also contend that the Framers themselves intended the meaning of their words to be what the public of that time would have understood their words to mean. *See, e.g.*, BORK, *supra* note 12, at 144 ("[T]he common objection to the philosophy of original understanding—that Madison kept his notes of the convention at Philadelphia secret for many years—is off the mark. He knew that what mattered was public understanding, not subjective intentions. Madison himself said that what mattered was the intention of the ratifying conventions.").

54. *Id.*; *see* Barnett, *supra* note 4, at 620; Monaghan, *supra* note 31, at 725–26 ("The relevant inquiry must focus on the public understanding of the language when the Constitution was developed. Hamilton put it well: 'whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction.'") (quoting Alexander Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), *reprinted in* 8 PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett ed. 1965)); Randy E. Barnett, *News Flash: The Constitution Means What it Says*, WALL ST. J., June 27, 2008, at A13; *see also* OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 204 (1920) (arguing that the relevant issue when interpreting law is "not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances they were used").

55. *See* discussion *supra* Section I.A.

56. The relevance of post-ratification evidence as to pre-ratification intent, for example, is a question that has resulted in some controversy. *Compare* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992) (arguing that, from a historical perspective, the President must have the authority to control all government officials who implement the laws), *with* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994) ("We think that the view that the framers constitutionalized anything like this vision of the executive

"is not a neutral interpretive methodology, but little more than a lawyer's version of a magician's parlor trick—admittedly clever, but without any intellectual heft."[57] The same scholar criticizes originalists' historical analysis for failing to meet the rigors of professional historical scholarship,[58] and accuses originalists of "cherry pick[ing] quotes and present[ing] this amateurish research as systematic historical inquiry."[59] Merely by conclusively declaring a historical source to be "influential," originalist jurists are able to rely on it.[60] Thus, this interpretive model, championed as a means of improving consistency and judicial neutrality, is susceptible to both unpredictability and manipulated, result-oriented analysis. The disparate conclusions regarding the meaning of the commerce power[61] advanced by, for example, Professor Akhil Amar[62] and Justice Clarence Thomas in his concurring opinion in *United States v. Lopez*[63] offer a straightforward illustration of this problem. In both instances, history was utilized to illuminate the original meaning of constitutional text. Justice Thomas surveyed historical usage of the term "commerce" at the time of the Philadelphia Convention and concluded that it encompassed only selling, buying, bartering, and transporting.[64] Professor Amar, in contrast, conducted an analysis which purported to employ an identical methodology, but arrived at a much broader view of the original meaning of "commerce" as embracing "all forms of intercourse in the affairs of life," whether economic or otherwise.[65] Emblematic of originalism's susceptibility to

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is just plain myth. It is a creation of the twentieth century, not the eighteenth. It derives from twentieth century categories applied unreflectively to an eighteenth century document."). *See also* Bravin, *supra* note 13 ("By applying methods blessed by conservatives to the neglected texts and forgotten framers of the Reconstruction amendments, liberals hope to deploy powerful new arguments to cement precedents under threat from the right and undergird the recognition of new rights. That upends Justice Scalia's technique, which focuses on the initial 18th-century constitutional text to find narrow individual rights and limited federal power to protect them.").

57. Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625, 626 (2008).

58. *Id.* at 627 (referring to use of "impressionistic scholarly methodology that is thirty years out of date").

59. *Id.*

60. *Id.* at 629–30.

61. *See* U.S. CONST. art. 1, § 8.

62. AKHIL AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107 (2005).

63. 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

64. *Id.* at 585; *see also* Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 849 (2003); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 101 (2001).

65. Congress's power to act would hinge, in other words, not on the question of whether an activity had a potential economic effect but whether "a given problem genuinely spilled across state or national lines." AMAR, *supra* note 62 (arguing that "commerce . . . had in 1787, and retains even now, a broader meaning referring to all forms of intercourse in the affairs of life"); *see also* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause:*

strategic manipulation is the fact that both analyses relied on the same historical source—the Oxford English Dictionary—as evidence supporting their conclusions.[66]

The failure of competing originalist analyses to agree on a single meaning evinces a basic failure of the model to succeed in its most fundamental pursuit: avoidance of uncertainty and ideologically driven outcome determination.[67] While reasonable people may, of course,

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Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues, 85 IOWA L. REV. 1, 5–6 (1999).

66. *Compare* AMAR, *supra* note 62, at 107 n.16 (citing "OED entry on 'commerce'"), *with* Lopez, 514 U.S. at 585–86 (1995) ("At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes. This understanding finds support in the etymology of the word, which literally means 'with merchandise.'" (citations omitted)) (citing 3 OXFORD ENGLISH DICTIONARY 552 (2d ed. 1989)).

67. The majority and dissent's competing uses of the diaries of St. George Tucker in *District of Columbia v. Heller*, 554 U.S. 570 (2008), gleaning an individual right to bear arms from an inquiry into two original meanings of the Second Amendment's words, offer another example of this difficulty. *See* ST. GEORGE TUCKER, TEN NOTEBOOKS OF WILLIAM AND MARY LAW LECTURES 126–29 (unpublished Tucker–Coleman Papers, located at the Earl Gregg Swem Library at The College of William and Mary) (copies on file with the *Northwestern University Law Review*). *Compare* Saul Cornell, *St. George Tucker's Lecture Notes, the Second Amendment, and Originalist Methodology: A Critical Comment*, 103 NW. U. L. REV. COLLOQUY 406, 406–07 (2009), *with* David T. Hardy, *The Lecture Notes of St. George Tucker: A Framing Era View of the Bill of Rights*, 103 NW. U. L. REV. COLLOQUY 272, 278 (2008). The majority invoked Tucker's writings to derive an individual-rights meaning from the text of the Second Amendment, arguing, in effect, that Tucker believed the Second Amendment enshrined a private right of individual self-defense. *Heller*, 554 U.S. at 594–95 ("[Tucker] understood the right to enable individuals to defend themselves . . . . Americans understood the 'right of self-preservation' as permitting a citizen to 'repe[l] by force' when 'the intervention of society in his behalf may be too late to prevent an injury.'") (quoting 1 BLACKSTONE'S COMMENTARIES 145–46, n.42 (1803)); *Heller*, 554 U.S. at 606 ("St. George Tucker's version of Blackstone's Commentaries . . . conceived of the Blackstonian arms right as necessary for self-defense. He equated that right . . . with the Second Amendment."). For preceding commentaries, see Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 461 (1995) and David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1368–70. In so doing, the majority dismissed, without further analysis, the ambiguities inherent in Tucker's viewpoint.

> Justice Stevens quotes some of Tucker's unpublished notes, which he claims show that Tucker had ambiguous views about the Second Amendment . . . . But it is clear from the notes that Tucker located the power of States to arm their militias in the Tenth Amendment, and that he cited the Second Amendment for the proposition that such armament could not run afoul of any power of the federal government . . . . Nothing in the passage implies that the Second Amendment pertains only to the carrying of arms in the organized militia.

Heller, 554 U.S. at 606 n.19. Writing for the dissent, however, Justice John Paul Stevens marshaled competing commentary on the Second Amendment that was also written by Tucker to demonstrate that Tucker's views were, in fact, unclear. *Id.* at 666 n.32 (Stevens, J., dissenting). In contrast to the majority's conclusion, Justice Stevens argued that Tucker "did not

disagree over interpretive matters, when reasonable people disagree over the fundamental original meaning of text based on identical historical source materials, the value of originalism as a means of authoritatively determining constitutional meaning becomes highly questionable.[68] The key point to recognize is that the entire goal of originalism is to find a conclusion on which reasonable people *cannot* differ. Once that goal is abandoned, the theory causes far more harm than good, for it puts a misleading veneer of certitude and neutrality on an interpretive enterprise that is anything but.

As if there were not already enough problems, two additional difficulties plague the inquiry into original meaning. Initially, there exists an overwhelming archaeological problem due to the simple lack of relevant data. The individual words in question were simply not employed in print often enough at the time of the framing to provide a useful sample size. As a result, as already noted, original meaning advocates have effectively been forced to rely on statements of the Framers themselves to demonstrate the contemporary understanding of the words.[69] But such an approach effectively collapses original meaning into the already discredited—and largely abandoned—inquiry into original intent. Secondly, the very notion that the words of a particular text may be dispositively ascertained by analysis of word use in entirely unrelated contexts ignores both the purposive nature of the terms' contextual use and the inherent ambiguity of many words.

Moreover, originalism ignores a second level of ambiguity that plagues originalist inquiry. Not only is there ambiguity as to a coherent single meaning at the time of ratification, there is also an ambiguity as to whether the term was understood to signal an understanding that the meaning of the words could in fact change over time.[70] This does not mean that the words failed to set outer linguistic limits on interpretation. It means, rather, that within those boundaries, original meaning fails to resolve this question of interpretive philosophy.

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consistently adhere to the position that the Amendment was designed to protect the 'Blackstonian' self-defense right." *Id.* He also "suggested that the Amendment should be understood in the context of the compromise over military power represented by the original Constitution and the . . . Tenth Amendment[]." *Id.* Tucker believed, Justice Stevens concluded, that the Second Amendment was adopted to protect the right to maintain state militias. *Id.* (Stevens, J., dissenting); *see also* Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123, 1123–24 (2006).

68. Under principled nonoriginalist textualism, we concede, reasonable people will inevitably differ over the proper normative guiding principle to be gleaned from ambiguous constitutional text. *See* discussion *supra* Part I. Unlike original meaning, however, we do not proclaim certainty and objectivity as the primary advantage of our theory.

69. *See* discussion *supra* Section I.B.

70. *See* RON CHERNOW, WASHINGTON: A LIFE 536–41 (2010).

As already noted, even if one were to suspend disbelief on these concerns, a more serious problem of interpretative philosophy remains. To define constitutional terms exclusively by reference to general usage of the term at the time of enactment necessarily ignores the political and purposive contexts in which those words were included in legally operative documents. When words are inserted into a legally operative document, it is presumably to reach some sort of "Point B"—to achieve an end, or to alter the legal or social topography in one or more ways. To be sure, the words may be plagued by ambiguity, or even by "second level" ambiguity as to how much interpretive discretion is intended. The fact remains, however, that the words do not exist outside of a structural and purposive context. To tie those words rigidly to some abstract meaning untied to the context in which the legal topography is being modified makes no sense. As a consequence of these systemic problems, the original meaning interpretative model ultimately gives rise to as many or more dangers of strategic manipulation as its interpretive predecessor, original intent.[71] Arguably, original meaning is even more dubious than original intent, given that the latter at least contemplates an inquiry into collective purpose, thereby avoiding the incoherence of non-contextual inquiry.

The Court's decision in *District of Columbia v. Heller*, which held unconstitutional a legislated prohibition against firearms and rejected the commonly accepted collective-right interpretation of the Second Amendment[72] in favor of an interpretation adopting an individual right to "self-defense,"[73] offers a compelling demonstration of originalism's susceptibility to strategic manipulation. This holding, predicated completely on originalist interpretive principles, was wholly inconsistent with an analysis tethered to the four corners of the Constitution's text.

Examination of the provision's text reveals that the Second Amendment is comprised of two indispensible components. The first clause, what linguists call an "absolute clause" and which the *Heller* majority considered to be a "prefatory clause," contextualizes the rule:

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71. Neither the original understanding nor the original intent of the Fourteenth Amendment, for example, is compatible with the result implicitly reached by the originalist Justices Thomas and Scalia in their willingness to join Chief Justice William H. Rehnquist's concurrence in *Bush v. Gore*, 531 U.S. 98, 111 (2000). Furthermore, while both Justices Scalia and Thomas have objected on originalist grounds to the use of foreign law by the court, both have allowed it to color their opinions at one time or another. *Compare* Thompson v. Oklahoma, 487 U.S. 815, 830–31 (1988), *and* Knight v. Florida, 528 U.S. 990, 990 (1999), *with* McIntyre v. Ohio Elections Commission, 514 U.S. 334, 381 (1995), *and* Holder v. Hall, 512 U.S. 874, 906 (1994).

72. U.S. CONST. amend. II ("A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.").

73. District of Columbia v. Heller, 554 U.S. 570, 584–85 (2008)

"A well regulated militia, being necessary to the security of a free state . . . ." The second clause concludes the statement of the rule: "the right of the people to keep and bear arms, shall not be infringed." The "well regulated Militia" language of the Second Amendment, therefore, necessarily qualifies and adds meaning to the phrase "keep and bear arms" by providing an unambiguous explanation for the latter clause's existence.[74] The first clause is just that—a *clause*. It is not a freestanding sentence. It therefore must be viewed as a modification and qualification of the second clause, lest it be rendered totally irrelevant or incoherent. The first clause is therefore rendered completely incoherent by a construction of the second clause as the creation of an individual, rather than a collective, right to own weapons. Indeed, the first clause represents the only point in the entire document where the Constitution's text explicitly explains the purpose for one of its directives. Arguments that the two clauses are effectively independent[75] or that "the Second Amendment has exactly the same meaning that it would have had if the preamble had been omitted"[76] are therefore contrary to uncontroversial principles of linguistic construction.[77] Inasmuch as an understanding of both components of a purposeful statement are essential to an assessment of a provision's meaning, exclusive reliance on the first clause of the Second Amendment cannot be omitted or wished away in favor of the second clause.[78] Yet the *Heller* majority, on the basis of strategically cherry-picked historical

74. *Id.* at 577–78.

75. *See Heller*, 554 U.S. at 577; Nelson Lund, *D.C.'s Handgun Ban and the Constitutional Right to Arms: One Hard Question?*, 18 GEO. MASON. U. C.R. L.J. 229, 237 (2008).

76. *Heller*, 554 U.S. at 577; *see also* Lund, *supra* note 75, at 237. As a matter of common sense, it is also worth noting that the prefatory clause of a statement and a "preamble," properly understood, are not fungible concepts. Individual directives of a piece of legislation, for example, are independently understandable in the absence of the document's preamble, which serves to explain the document's purpose and underlying philosophy. A sentence comprised of two clauses, on the other hand, is incoherent in the absence of its preface.

77. *Heller*, 554 U.S. at 665 ("Blackstone described an interpretive approach that gave far more weight to preambles than the Court allows. Counseling that '[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable,' Blackstone explained that '[i]f words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus, the proeme, or preamble, is often called in to help the construction of an act of parliament. In light of the Court's invocation of Blackstone as 'the preeminent authority on English law for the founding generation,' its disregard for his guidance on matters of interpretation is striking.") (quoting 1 COMMENTARIES ON THE LAWS OF ENGLAND 59–60 (1765) (internal citations omitted)); Brief for Professors of Linguistics and English, et al. as Amici Curiae Supporting Petitioners at 10 n.6, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290) [hereinafter Brief for Professors of Linguistics and English].

78. Brief for Professors of Linguistics and English, *supra* note 77, at 11 n.6.

materials, concluded that the "prefatory clause" of the Second Amendment[79] should effectively be ignored in favor of the "operative clause" of the Amendment.[80] It did so in order to justify an interpretation creating an individual right entitling Americans to possess firearms for purposes of their "self-defense." Solely on the basis of the four corners of constitutional text, however, there is no coherent way such an interpretive conclusion could be reached—at least in a principled manner. The *Heller* decision thus stands as an illustration of the ideologically manipulative nature of the originalist inquiry.[81] The "Point B" that the provision was designed to fulfill—explicitly revealed by the text itself—was ignored. Even individuals commonly associated with conservative scholarship and jurisprudence charged that the originalist opinion was politically motivated and wholly unprincipled as a matter of constitutional interpretation. They suggested that *Heller* was merely "faux originalism"[82] and that Justice Scalia's brand of originalism falls short of "true" originalist values.[83] But the holding's

79. U.S. CONST. amend. II.

80. The majority detached the "operative clause" of the Second Amendment from its "prefatory clause" in order to analyze each clause independently, arguing that "[t]he former does not limit the latter grammatically, but rather announces a purpose." *Heller*, 554 U.S. at 577. "[A]part from [a] clarifying function, a prefatory clause does not limit or expand the scope of the operative clause." *Id.* at 578. Then, on the basis of historical analysis of the original meaning of the textual elements within each separate clause, it concluded that the operative clause of the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation," while the prefatory clause exists to "prevent elimination of the militia." *Id.* at 592, 599 ("The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting."). The majority's dicta, however, stated that modern military weapons—"arms that are highly unusual in society at large"—are inappropriate for self-defense. *Id.* at 627. By creating a right to possess weapons that are irrelevant to militias, the majority, therefore, effectively divorced the right to bear arms from any concern for the militia, and, in so doing, decoupled the operative clause of the Second Amendment from its prefatory clause. *See* Richard Posner, *In Defense of Looseness*, THE NEW REPUBLIC, Aug. 27, 2008, *available at* http://www.tnr.com/article/books/defense-looseness (arguing that *Heller* is "evidence that the Supreme Court, in deciding its constitutional cases, exercises a freewheeling discretion strongly flavored with ideology").

81. *See, e.g.*, Heller, 554 U.S. at 570.

82. *See, e.g.*, Posner, *supra* note 80 ("Originalism without the interpretive theory that the Framers and the ratifiers of the Constitution expected the courts to use in construing constitutional provisions is faux originalism.").

83. Professor Steven Calabresi, for example, essentially refutes those aspects of originalism that lend themselves to undesirable results and, in so doing, fills those gaps that lend themselves to criticism. *See, e.g.*, Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism,* 103 Nw. U. L. Rev. 663, 664 (2009) ("In addressing these particular topics and constitutional provisions, Professor Calabresi has relied on, and tried conscientiously to apply, the theoretical framework of original public meaning textualism that I learned from Justice Scalia and Judge Robert H. Bork. Professor Balkin has now powerfully challenged that

key passage—"In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning'"[84]—is unquestionably originalist in methodology. The Court's use of originalist methodology to effectuate a strategic political outcome therefore evinces the untenable nature of the paradigm.

This danger is considerably more insidious in the case of originalism than for any other interpretive model. The primary reason for the unique susceptibility of originalist meaning inquiry to surreptitious ideological manipulation is the inherent intellectual inaccessibility of originalism's historical inquiry to most members of the legal profession. Lawyers are, of course, trained as attorneys, not as professional historians.[85] It is therefore difficult for them to assess reliance on historical sources. Indeed, the fact that Justice Scalia's opinion, which purported to employ originalist meaning inquiry, reached a conclusion consistent with his own ideological perspective while Justice Stevens, claiming to draw on the exact same body of historical data, reached the exact opposite historical conclusion, underscores this susceptibility.[86]

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framework."). Professor Calabresi thus attempts to distance originalist theory itself from questionable application by Justice Scalia.

> [Professor Balkin] says that the constitutional regime we actually live under is one of living constitution originalism, not Scalia-style originalism, and his implication is that we *ought* to be living constitution originalists because the Scalia project is unworkable . . . . Among the examples of unworkable conclusions that Scalia reaches, he cites the inability to justify the decision in *Brown v. Board of Education*, the incorporation of the Bill of Rights, and the extension of the Equal Protection Clause to apply to women. . . . [W]e think all these outcomes are correct applying Scalia-style originalism, even if Scalia himself has not realized that.

Id. at 687–88 (footnotes omitted). This argument seems akin to a rebranding effort with the goal of redefining the nature of originalism as distinct from Justice Scalia's interpretive philosophy. The admission that so-called "Scalia-style originalism" has not been applied correctly by "Scalia himself" is, itself, a compelling example of how the originalist model can be corrupted by even the most celebrated of its stalwarts.

84. *Heller*, 554 U.S. at 576.

85. Indeed, the selective nature of originalism's historical inquiry has been criticized by historians for its lack of professionalism. *See* Cornell *supra* note 57, at 639.

86. *See, e.g.*, Posner, *supra* note 80 ("The majority [in *Heller*] . . . was engaged in . . . 'law office history.' Lawyers are advocates for their clients, and judges are advocates for whichever side of the case they have decided to vote for. The judge sends his law clerks scurrying to the library and to the Web for bits and pieces of historical documentation. When the clerks are the numerous and able clerks of Supreme Court Justices, enjoying the assistance of the capable staffs of the Supreme Court library and the Library of Congress, and when dozens and sometimes hundreds of amicus curiae briefs have been filed, many bulked out with the fruits of

Despite its promises, originalism fails to provide a clear path to consistent, predictable, or neutral constitutional adjudication. The fact that, despite its glaring structural flaws, originalism has largely maintained its prominence among the conservative judiciary and has even been endorsed by opportunistic members of the progressive academy in order to validate progressive ends[87] speaks to the general paradigm's ultimate power not as a principled interpretive methodology, but rather as little more than a weapon of populist manipulation.[88]

C. *Originalist Construction*

Yet another form of originalist analysis has emerged in recent years—"originalist construction" (also referred to as "new originalism").[89] In the words of two leading observers of originalist development, "[m]any originalists believe that it is important to distinguish between two distinct aspects of constitutional practice:

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their authors' own law-office historiography, it is a simple matter, especially for a skillful rhetorician such as Scalia, to write a plausible historical defense of his position . . . . But it was not *so* simple in *Heller*, and Scalia and his staff labored mightily to produce a long opinion . . . that would convince, or perhaps just overwhelm, the doubters. The range of historical references in the majority opinion is breathtaking, but it is not evidence of disinterested historical inquiry. It is evidence of the ability of well-staffed courts to produce snow jobs."); *see also* Jeffrey M. Shaman, *The Wages of Originalist Sin:* District of Columbia v. Heller 1 (July 17, 2008), *available at* http://ssrn.com/abstract=1162338 ("[Justice Scalia's] lengthy exposition of the Second Amendment is bad history—simplistic "law-office" history that ignores the complexities of historical research."); Sanford Levinson, *Some Preliminary Reflections on* Heller, BALKINIZATION (June 26, 2008), http://balkin.blogspot.com/2008/06/some-preliminary-reflections-on-heller.html ("[Both] opinions exhibit the worst kind of 'law-office history,' in which each side engages in shamelessly (and shamefully) selective readings of the historical record in order to support what one strongly suspects are pre-determined positions."); Mark Tushnet, *More on Heller*, BALKINIZATION (June 27, 2008), http://balkin.blogspot.com/2008/06/some-preliminary-reflections-on-heller.html ("[B]oth Justice Scalia and Justice Stevens assert – laughably to a real historian – that the Second Amendment had only one meaning at the framing, and that that meaning was for all practical purposes universally shared.")

87. *See* discussion *infra* Section I.D.

88. *See, e.g.*, Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 661 (2009) ("[A] form of democratization of the market for constitutional ideas has broadened the audience of concern for constitutional methodologies, thereby making populist methodologies, and the populist features of individual methodologies, bear greater emphasis. Originalism's proponents have taken advantage of this dynamic by speaking of originalism in simple and transparent terms, by highlighting the putative limitations originalism places on judicial elites, and by emphasizing originalism's distinctively American character."); *see also* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 550, 554–55 (2006) (arguing that promoting originalism was a deliberate effort by President Ronald Reagan's Justice Department to rally Americans against a Federal Judiciary it perceived as a threat to the conservative political agenda).

89. Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM 12, 22 (Grant Huscroft & Bradley W. Miller eds., 2011).

constitutional interpretation and *constitutional construction*."[90] They explain that pursuant to this dichotomy,

> there are two different steps in the process of understanding and applying a legal text. The first is interpretation. When we *interpret* a legal text, we look for its linguistic meaning. The second step is *construction*. When we *construe* a constitutional provision, we determine the legal effect of the text: in other words, *construction* enables officials to apply the text.[91]

Originalists who favor this dichotomy believe that there often is a need to supplement original meaning analysis (interpretation) with a broader interpretive discretion of application, "because our Constitution contains provisions that are abstract and vague."[92] Why develop the "interpretation–construction" dichotomy? Why not simply employ a pure original meaning inquiry? The answer, according to Professor Lawrence Solum, is that recognition of the dichotomy by at least some leading originalist scholars "explicitly acknowledges what we might call *the fact of constitutional underdeterminacy*: The original meaning of the text does not fully determine constitutional doctrine or its application to particular cases."[93]

It would no doubt be possible to spend many pages exploring this "new" (or perhaps more accurate would be "even newer," or—in a manner reminiscent of advertisements for laundry detergent—"new and improved") originalism, by exploring the nuances in the arguments of all of those respected scholars who have advocated such a position.[94] Because this Article is about far more than just originalism, however, we have deemed such a detailed inquiry beyond the scope of our endeavor. Suffice it to say at this point that on its face, the interpretation–construction dichotomy effectively gives away the store for the entire originalist endeavor. For one thing, it implicitly concedes the failure of the entire originalist enterprise, because it expressly concedes the impossibility—at least for a significant number of important constitutional provisions—of performing the task that originalism sets out to perform in the first place. This concession renders suspect *all* conclusions of rigid historical understanding. While

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90. ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 3 (2011) (footnote omitted).

91. *Id.*

92. *Id.* at 4.

93. Solum, *supra* note 89, at 23 (footnote omitted).

94. Probably the leading work advocating such a position is KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION ix (1999).

it continues to employ the originalist label, the inquiry sanctioned under this approach is anything but originalist in its essence.

These points may be better grasped simply by returning to an examination of the goal of developing originalist analysis in the first place. Recall that originalism grew out of an understandable desire to cabin the interpretive discretion of unrepresentative, unaccountable judges who, under the guise of "interpreting" the counter-majoritarian Constitution, were all too often trumping the democratic process by superimposing their own social policy choices on the majoritarian political process. The means for restraining modern judicial review contemplated by originalist theory was to confine the interpretive options open to modern judges to the understandings of those alive at the time of the framing and ratification of the relevant constitutional provision. Yet, contrary to this asserted goal, the originalist construction school openly concedes the widespread impossibility of successfully performing the archaeological and translational task that is the sine qua non of true originalist analysis. It replaces it with an indeterminate mode of "construction" that permits the very results that originalism was designed to avoid—namely, the unrestrained judicial trumping of democratically authorized decision making and the implementation of textual understandings of which those alive at the time of ratification would have been totally unaware. This may well be an appropriate means of constitutional construction for those of us who have long categorically rejected the entire originalist endeavor as hopeless and often manipulative. But it is surely Orwellian to describe this theory as "originalist" in any meaningful sense of that term.

D. *"Progressive" Originalism*

The recent growth of the so-called "progressive" originalist movement[95] provides even stronger support for the view that the originalist paradigm is vulnerable to strategic political manipulation. Much like the recent "originalist construction" movement,[96] progressive originalists argue that since original meaning analysis is often indeterminate, it requires interpreters to look to sources other than constitutional text to determine the Constitution's meaning.[97] On the

95. *See, e.g.*, Balkin, *Original Meaning and Constitutional Redemption*, *supra* note 13; Balkin, *Abortion and Original Meaning*, *supra* note 13; Balkin, *Framework Originalism and the Living Constitution*, *supra* note 13.

96. *See* discussion *supra* Section I.C.

97. *See* Lawrence B. Solum, District of Columbia v. Heller *and Originalism* (Illinois Public Law Research Paper No. 08-14, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1241655 (arguing that "original meaning originalists explicitly embrace the idea that the original public meaning of the text 'runs out' and hence that constitutional interpretation must be guided by something other than semantic content of the constitutional

basis of this perceived duality, progressive originalists have sought to reconcile original meaning and nontextualism.[98] Progressive originalists contend that "[t]he choice between original meaning and living constitutionalism . . . is a false choice,"[99] and that "fidelity to original meaning and belief in a living Constitution are not at odds."[100] The model, however, is ultimately predicated on the notion that "each generation of Americans can seek to persuade each other about how the text *and its underlying principles* should apply to their circumstances, their problems, and their grievances."[101] Progressive originalism is thus consistent with notions of evolutionary constitutionalism. In this sense, it arguably deserves the descriptive label "progressive," though if that term is given its common modern left wing definition the phrase openly reveals an ideological grounding. We will therefore assume, for present purposes, that the word choice lacks its more common ideological association (though if so, then the word choice is unfortunately confusing). From the perspective of progressive originalist interpretation, the Court's decision in *Roe v. Wade*[102] is deemed compatible with the original understanding of the Fourteenth Amendment.[103] In addition, the Thirteenth Amendment's prohibition on involuntary servitude is viewed as a historical endorsement of radical redistribution of wealth.[104]

One may reasonably debate whether progressive originalism constitutes an effort to fashion a principled mode of constitutional interpretation or instead merely to provide a fig leaf for imposition of left wing ideological views on the electorate, whether it wants them or not. In that regard, it is interesting to note that we have yet to discover a single interpretive conclusion inconsistent with a progressive ideological agenda. More problematic, however, is that it is linguistically incoherent to refer to the approach as "originalist" in any meaningful sense of the term.

We do not mean to suggest that originalist interpretation cannot in any way take into account technological advances. For example, an

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text."); Lawrence B. Solum, *Semantic and Normative Originalism: Comments on Brian Leiter's "Justifying Originalism"*, LEGAL THEORY BLOG (Oct. 30, 2007), http://lsolum.typepad.com/legaltheory/2007/10/semantic-and-no.html.

98. Balkin, *Framework Originalism and the Living Constitution*, *supra* note 13, at 551–52.

99. Balkin, *Abortion and Original Meaning*, *supra* note 13, at 293.

100. *Id.* at 311.

101. *Id.* at 301 (emphasis added); *see also* Powell, *supra* note 2.

102. 410 U.S. 113 (1973).

103. Balkin, *Abortion and Original Meaning*, *supra* note 13, at 311–12.

104. Bravin, *supra* note 13 (quoting Professor Akhil Amar) ("[The] Constitution turns out to be way more liberal than conservative. The framers of the 14th Amendment were radical redistributionists. The 13th Amendment frees the slaves and there's no compensation . . . . It's the biggest redistribution of property in history.").

originalist could reasonably extend the First Amendment right of free expression to television, radio, or movies. But as we said in our criticism of originalist construction,[105] if originalism is to perform its intended function of restraining an unaccountable judiciary from disrupting democratic choices, historical understandings of constitutional text must place at least *some* meaningful restraint on the judicial review power. In contrast to interpretive modification adopted in light of technological developments, originalism cannot rationally produce a constitutional result that, while physically possible at the time of drafting, would have come as a complete shock to all those alive at that time. Thus, at a time when women could not even vote, it would no doubt have shocked everyone alive at the time of ratification to suggest, as Professor Jack Balkin does, that the Fourteenth Amendment's Citizenship Clause[106] may be construed to protect a woman's right to an abortion.[107] This is not necessarily to conclude that no plausible mode of constitutional interpretation could reach such a conclusion. We need not reach that issue for present purposes.[108] The main point is that it is Orwellian to characterize this conclusion as "originalist." In effect, use of the term appears to be designed to do little more than add a wholly undeserved veneer of legitimacy to a theory that in reality has little connection to the core concept of originalism. Progressive originalism is, then, originalism in name only.

Much has been written about the validity of progressive originalism.[109] Probably because progressive originalism bears a number of important similarities to the originalist construction approach, some of the most ardent originalists have embraced the paradigm as a positive development for constitutional interpretation.[110] A number of originalist stalwarts, for example, have endorsed progressive originalist contentions that "constitution makers from the American Constitution to the present day have . . . included rights guarantees that sound in the vague and abstract language of principles,"[111] or that "constitutional silences and open spaces reflect

105. *See* discussion *supra* Section I.C.

106. U.S. Const. amend XIV, § 1, cl. 1.

107. Balkin, *Abortion and Original Meaning*, *supra* note 13, at 311–12, 319.

108. *But see* discussion *infra* Section III.C.

109. *See, e.g.*, Randy Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405, 405 (2007); Mitchell N. Berman, *Originalism and Its Discontents (Plus A Thought Or Two About Abortion)*, 24 CONST. COMMENT. 383, 384 (2007); Dawn Johnsen, *The Progressive Political Potency of "Text and Principle"*, 24 CONST. COMMENT. 417, 417 (2007); Ethan Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 353 (2007); John O. McGinnis and Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 372 (2007).

110. *See, e.g.*, McGinnis & Rappaport, *supra* note 109, at 381; *see also* Calabresi & Fine, *supra* note 83, at 663–65.

111. Balkin, *Framework Originalism*, *supra* note 13, at 554.

the fact that adopters are not omniscient and cannot prepare for every eventuality."[112] In so doing, however, these commentators have effectively abandoned the core notions underlying originalist thought.

II. NONTEXTUALISM AS A THREAT TO DEMOCRATIC VALUES

At the opposite end of the interpretive spectrum are those scholars and jurists who believe that the Constitution's text should not restrict the judiciary in the exercise of the judicial review power.[113] If any of these approaches were to be accepted, those who interpret and enforce the Constitution would effectively be vested with unrestrained authority either to restrict or to empower government in its exercise of regulatory authority over its citizens. It is important to understand this potential two-way ratchet created by nontextualist versions of judicial review. If even the unambiguous dictates of controlling legal text may properly be ignored, there is nothing to prevent the judiciary from refusing to enforce textually imposed limits on majoritarian action, or from restricting the majoritarian branches even where text cannot be rationally construed to impose such a limit. Paradoxically, then, acceptance of one or another of the forms of nontextualism simultaneously threatens constitutional democracy with both too much and too little judicial review—either unduly interfering with majoritarian rule, or leaving majoritarian rule dangerously uncontrolled.

The theory of nontextualism embodies a broad range of interpretive philosophies and rationales. However, at its core nontextualism represents either a form of linguistic deconstruction—what we term "linguistic chaos"—or the notion of an "unwritten" constitution grounded in foundational moral premises drawn from one or another form of natural law.

A. *Linguistic Chaos and the Constitution*

Textual deconstructionists espouse the view that because words contained in even governing texts are capable of infinite plausible meanings, the words of the Constitution effectively place no limits on an interpreting judge.[114] On the basis of the epistemological assumptions underlying linguistic deconstruction, the Constitution's textual directives are, at their most fundamental level, capable of an infinite number of constructions. Proponents of such a theory draw their interpretive insights from the works of literary theorists of the

112. Calabresi & Fine, *supra* note 83, at 672.

113. The notion that the Constitution's linguistic boundaries may be formally ignored was first introduced in HOWARD LEE MCBAIN, THE LIVING CONSTITUTION 5 (1937).

114. *See, e.g.*, STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 43 (1980) ("The objectivity of the text is an illusion and, moreover, a dangerous illusion, because it is so physically convincing.").

"deconstructionist" school, who fashioned their theories in the context of interpreting literary texts.[115] Words perform a very different function, however, when employed in legally operative texts, such as the Constitution, which are designed to formally implement political will and to guide and control private and public behavior. If words are to provide absolutely no limits at all, neither function can be effectively performed. Under the deconstructionist model, our system of constitutional democracy would be relegated to a chaos not unlike Alice's encounter with Humpty Dumpty in Wonderland, where every word, untethered from predictable meaning, means just what an individual interpreter chooses for it to mean, "neither more nor less."[116] The most fundamental problem with the linguistic chaos theory is that the notion that words are capable of infinite construction simply defies common sense.[117] Indeed, there would hardly be a point to a written Constitution in the first place—much less explicit provision of a formal amendment process—if this were so.

To be sure, it does not automatically follow from a rejection of linguistic deconstruction that words have only a rigid, single meaning. Indeed, we have already demonstrated the fallacies of such an assumption in our critique of originalism. As Professor Gerald Graff has perceptively pointed out, recognition that words do not have fixed meanings does not logically lead to the conclusion that the choice of particular wording in text provides a total absence of linguistic limitation.[118] That words lack a single determinate meaning does not logically imply that they have no meaning. Most disturbing, from the perspective of American political theory, is that linguistic

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115. *See, e.g.*, Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 379 (1982) (discussing deconstruction). For a compelling survey of the law and literature school, see Richard Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351 (1986); *Symposium: Law and Literature*, *supra* note 18.

116. LEWIS CARROLL, THROUGH THE LOOKING GLASS, *in* THE COMPLETE WORKS OF LEWIS CARROLL 214 (First Modern Library ed. 1936) ("When *I* use a word, Humpty Dumpty said, in a rather scornful tone, it means just what I choose it to mean, neither more nor less."). This passage has appeared in 250 judicial decisions in the Westlaw database as of April 19, 2008, including two United States Supreme Court cases. *See, e.g.*, TVA v. Hill, 437 U.S. 153, 173 n.18 (1978) ("In dissent, Mr. Justice Powell argues that the meaning of 'actions' in § 7 is 'far from "plain,"' and that 'it seems evident that the "actions" referred to are not all actions that an agency can ever take, but rather actions that the agency is *deciding whether* to authorize, to fund, or to carry out.' [F]rom this bare assertion, however, no explanation is given to support the proffered interpretation. This recalls Lewis Carroll's class advice on the construction of language . . . ."); Zschernig v. Miller, 389 U.S. 429, 435 n.6 (1968).

117. In fact, if words are capable of infinite meaning, then no one could be certain what is meant when we say that such "theory makes no sense." Nor could anyone be sure what this footnote means.

118. Gerald Graff, *"Keep Off The Grass," "Drop Dead," and Other Indeterminacies: A Response to Sanford Levinson*, 60 TEX. L. REV. 405, 406 (1982).

deconstruction would effectively serve as an interpretive vehicle for the judicial implementation of the personal policy preferences of a wholly unrepresentative and unaccountable constitutional interpreter.[119] Our system of judicial review has never openly proceeded on such an interpretive philosophy—nor could it and still stay faithful to the democratic ideal.[120]

B. *The "Unwritten" Constitution: Alternative Rationales*

Of only marginal superiority to the "linguistic deconstruction" school of interpretation is the "unwritten Constitution" model. Advocates of this model need not resort to linguistic deconstruction because they believe that whatever the Constitution's text does in fact dictate, an interpreter may nevertheless find within it unwritten directives which possess the exact same legally trumping force as do its written provisions.[121] Since these directives are unwritten, the interpreter of course need not rely on the preposterously simplistic notion of linguistic chaos; instead, the "interpreter" can simply make it all up as he goes along, freed from the annoying restraint of a written text. Scholars rely on two alternative rationales to support recognition of so sweeping a power of judicial review, and it is to a description of both that we now turn.

1. Continual Reaffirmation

One group of scholars has argued that for the Constitution to have force in the present day, the document's directives must be constantly reassessed and reaffirmed.[122] Professor Paul Brest, for example, has suggested that because the Constitution's Framers long ago went to their final reward, what they wrote cannot reasonably be deemed

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119. *See, e.g.*, Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981). If Professor Tushnet were a judge, in each case, he would ask, "[W]hich result is, in the circumstances now existing, likely to advance the cause of socialism? Having decided that, [he] would write an opinion in some currently favored fashion of Grand Theory." *Id.*

120. For a history of the Constitution as a central feature of counter-majoritarianism in democratic theory, see MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER (1991).

121. *See* Grey, *supra* note 17, at 706 n.9, 717 (arguing that courts should be able "to articulate and apply contemporary norms not demonstrably expressed or implied by the Framers" because "there was an original understanding, both implicit and textually expressed [in the Ninth Amendment], that unwritten higher law principles had constitutional status").

122. *See, e.g.*, Bruce Ackerman, *Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984) (arguing that in "constitutional politics," the people speak, whether formally through constitutional amendments or informally through "constitutional moments" whereby a "mobilized mass of American citizens express their assent through extraordinary institutional forms" (footnotes omitted)).

binding on modern society.[123] A narrower alternative to the approach, associated with Professor Bruce Ackerman, suggests that in the rare instance in which a "constitutional moment" occurs—instances in which the nation implicitly bonds in its understanding of the need for fundamental change in the Constitution's DNA without proceeding through the formal amendment process set out in Article V[124]—the Constitution's text should be deemed to have been legally altered.[125]

Presumably, when judges fashion new constitutional directives not grounded in text, they are assumed to be engaging in something akin to this process of "continual reaffirmation." A constitutional right to personal privacy, for example, is found to exist because we as a society have deemed it so, even without recourse to the amendment process described in Article V.[126] It is, then, ultimately because—and only because—the Constitution is effectively re-ratified in the popular mind, that we may accept it without ceding unconscionable control to the dead

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123. *See, e.g.*, Brest, *supra* note 2, at 225 ("Even if the adopters freely consented to the Constitution . . . this is not an adequate basis for continuing fidelity to the founding document, for their consent cannot bind succeeding generations. We did not adopt the Constitution, and those who did are dead and gone.").

124. U.S. CONST. art. V.

125. BRUCE A. ACKERMAN, WE THE PEOPLE 47–50 (1991); Bruce A. Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 489 (1989); Ackerman, *supra* note 122, at 1050 (arguing that judges who act as agents of the people and legislate in rare constitutional moments act more democratically than legislators who serve special interests and escape from public accountability during the course of the ordinary political process); *see also* NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1, 1–2 (1937); West Cost Hotel Co. v. Parrish, 300 U.S. 379, 379–80 (1937); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 1, 10 (2000).

126. *See* TRIBE, *supra* note 17, at 32–34 (suggesting that while new propositions may be identified as part of the nation's Constitution, albeit not part and parcel of the Constitution's text, premises that are believed to abandon the "indissoluble character of the Union" may be unconstitutional even if they are adopted in absolute accordance with the Article V amendment process); *see also* Ackerman, *Constitutional Politics/Constitutional Law*, *supra* note 125, at 456–57. These perspectives seem suspiciously similar to Sir Edward Coke's obiter dictum in Dr. Bonham's Case:

> [T]he common law doth controll Acts of Parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against Common right and reason, or repugnant, or impossible to be performed, the common law will controll it, and adjudge such Act to be void; and, therefore . . . [s]ome statutes are made against Common Law and right, which those who made them, would not put them in execution . . . .

THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 275–76 (Steve Sheppard ed., vol. 1 2003). This notion—that constitutional law may be struck down based on nontextual principles of common law or natural justice not located within the constitutional text—has been rejected as a maxim of American constitutional law. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 160–62 (1996) (Souter, J., dissenting).

hand of the past.[127] Under this "continual reaffirmation" model, the Constitution is seen by nontextualists as a document that continuously moves beyond its text and its historical origins.[128] But there are serious problems with such a theory. The notion that a properly enacted law loses its controlling force once the last lawmaker involved in its enactment passes is a most curious one. Advocates of such a view provide no example of such a strange practice of law modification. Indeed, all of the examples that come to mind strongly suggest the exact opposite conclusion. For example, it is likely that the scholars who advocate this position do not believe that either the Civil Rights Act of 1871[129] or the Sherman Antitrust Act[130] have automatically lost their legal force merely because those involved in their enactment failed to obtain eternal life. But if that is so, it is unclear why the directives of the United States Constitution—under whose governing structure both statutes were executed—should be treated any differently.

Even if one were to suspend disbelief concerning this insurmountable flaw in the argument, serious problems continue to plague this "continual reaffirmation" theory of constitutional interpretation. Given the theory's logical premise, once the last framer or ratifier passes on, the *entire document* loses its force—not only those provisions which happened to be disliked by an ideologically driven group of scholars. For example, absent some form of societal "reaffirmation," neither the First Amendment's Free Speech Clause nor the Fourteenth Amendment's Equal Protection Clause continues to be binding law. Thus, we must find an acceptable method to determine whether such "reaffirmation" exists. This concern presumably is of enormous importance to the continued vitality of *all* the Constitution's provisions. Yet no one has even bothered to suggest a detailed procedure by which we are supposed to determine whether the Constitution's provisions have been reaffirmed. Absent dispositive proof of continued popular affirmation of all of the document's

127. *See, e.g.*, Brest, *supra* note 2, at 236. For a comprehensive treatment of so-called "dead hand arguments" see Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606 (2008).

128. *See* Ackerman, *Constitutional Politics/Constitutional Law*, *supra* note 125. Professor Ackerman argues that the public acceptance of the New Deal, given its inconsistency with the Constitution's text, effectuated a legally binding amendment to the Constitution. While Professor Ackerman concedes that this process of amendment is inconsistent with Article V, he contends that similar "constitutional moments" occurred when the post-Civil War amendments were adopted and at the time of the Constitution's ratification.; *See also* Brest, *supra* note 2; Samaha, *supra* note 127; *see also* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 448 (1987) (arguing that the New Deal "altered the constitutional system in ways so fundamental as to suggest that something akin to a constitutional amendment has taken place").

129. 42 U.S.C. § 1983.

130. 15 U.S.C. §§ 1–7 (2012).

provisions, then, we are left with complete constitutional chaos. No advocate of this approach appears ever to have recognized the inexorable implications of its premise.

The most logical method for determining reaffirmation, we suppose, would be some sort of periodic plebiscite—a process that (depending upon the percentage of favorable votes deemed necessary for reaffirmation) might well undermine the Constitution's inherently counter-majoritarian nature, and in any event would no doubt bring an enormous amount of uncertainty and unpredictability to constitutional law (far more than currently exists). At the very least, it would gut Article V's complex process of amendment. But the scholarly advocates of the continual reaffirmation model say nothing about any type of vote. To the contrary, they seem more than satisfied with a process that vests in the one governmental organ formally insulated from public accountability—the Supreme Court—final, unreviewable authority to determine whether a particular provision has been reaffirmed. Such an approach vests in the Court unlimited authority to ignore constitutional restrictions, authorizations, and protections solely on the basis of a conclusory assertion that a particular provision has not been "reaffirmed."

Even more puzzling is their apparent assumption that, through imposition of the requirement of continual reaffirmation, these scholars are able to condone the *creation* of *new* provisions, not merely the abandonment of preexisting ones. It is only by such an indefensible non sequitur that they can, for example, employ the process as a rationale for recognition of an entirely nontextual constitutional right of personal privacy.[131] Ultimately, then, the "continual reaffirmation" model amounts more to a result-oriented rhetorical device than a coherent theory of constitutional interpretation. This rationale, like linguistic deconstruction, fails to explain the purpose of either a written Constitution or its formalized amendment process.[132]

2. Implicit Maxims

Advocates of an unwritten Constitution have alternatively sought to ground their interpretive approach in the belief that somewhere in the interstices of the text are maxims that are implicit. Professor Thomas Grey, for example, has argued that numerous nontextual directives are necessarily implicit in what is expressly provided in the Constitution's text.[133] Protection of personal privacy, for example, while not included

131. *See* discussion *supra* Subsection II.B.1.

132. U.S. CONST. art. V.

133. *See, e.g.*, Grey, *supra* note 17; Thomas Grey, *Origins of the Unwritten Constitution*, 30 STAN. L. REV. 843 (1978); *see also* EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT (1948); Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L.

in the Constitution's text, has on occasion been rationalized as an individual right so fundamental to democratic government that it is necessarily protected as a constitutional axiom. Pursuant to this logic, absence from text is not deemed to be fatal. While these nontextualists concede the obvious—that the Constitution is written—they nevertheless consider the Court to be empowered to look beyond text to the network of ideas and long-term principles that are written nowhere but are nevertheless embedded in the "muscle memory of our country."[134]

The Invisible Constitution, by Professor Laurence Tribe, represents a recent explication of this form of nontextualism. It proceeds on the familiar premise that constitutional meaning resides in that which cannot be gleaned directly from the document's text. Professor Tribe contends that, unlike the "unwritten constitution" school, his concern is predicated on a desire to understand the substance of the Constitution, regardless of who attempts to interpret it, by exploring its "invisible, nontextual foundations and facets," rather than the complex superstructure of "rules, doctrines, standards, legal tests, judicial precedents, legislative and executive practices, and cultural and social traditions" that exist "around" it.[135] Distinguishing that which is "unwritten" from that which is "invisible," because the former purports to rely on concepts external to the Constitution, while the latter relies on concepts that are supposedly internal to the Constitution but which nevertheless do not appear in the explicit text, however, is not sufficient to differentiate this nontextualist theory from the seriously flawed versions that preceded it.[136] Accordingly, we classify the theories expounded in *The Invisible Constitution* as a subset of the "unwritten Constitution" school. The view that our highest law is fundamentally comprised of numerous indispensable rights and directives that cannot necessarily be derived from adherence to the four corners of the Constitution's text is,[137] we are asked to believe, irrelevant because

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REV. 247 (1914) [hereinafter Corwin, *Basic Doctrine*]; Edward S. Corwin, *'The Higher Law' Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928) [hereinafter Corwin, *Higher Law*].

134. *See, e.g.*, Grey, *supra* note 17; Grey, *supra* note 133; *see also* CORWIN, *supra* note 136; Corwin, *Basic Doctrine*, *supra* note 133; Corwin, *Higher Law*, *supra* note 133.

135. TRIBE, *supra* note 17, at 10–11.

136. *See* Eric J. Segall, *Lost In Space: Laurence Tribe's Invisible Constitution*, 103 NW. U. L. REV. COLLOQUY 434, 436 (2009) ("[I]f the word 'invisible' were replaced by the word 'unwritten' every time it appears in [Professor Tribe's] book, the meaning [of his theory] would not change."); *cf.* John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 22 n.82 (1978); Grey, *supra* note 17; TRIBE, *supra* note 17, at 21 (arguing that the Constitution's meaning "resides only in much that one cannot perceive from reading it").

137. TRIBE, *supra* note 17, at 28–29. Such maxims as: "Ours is a 'government of the people, by the people, for the people'"; "Ours is a 'government of laws, not men'"; "We are committed to the 'rule of law'"; "Courts must not automatically defer to what elected officials

supposedly an overwhelming majority of our society considers these rights to be binding.[138]

In critiquing the "implicit" unwritten Constitution theory, it is important to distinguish between what might be called "internal" and "external" implicit directives. Recognition of the former represents a principled, common sense form of "ancillary" textual analysis. The latter, on the other hand, constitutes nothing more than unprincipled, result-oriented rationalizations for implementation of the interpreters' ideological preferences. Internal implicit directives are concepts that, while not explicit on the face of the text, are both logically and practically necessary to assure viability of the textually explicit directive. For example, while the First Amendment right of free speech makes no explicit reference to either the freedom of thought or the freedom of association,[139] it is appropriate to infer these protections,[140] because purely as a common sense matter the freedom of speech cannot survive, much less flourish, absent corresponding constitutional recognition of these supporting freedoms. In contrast, external implicit directives are those that are not found to be essential to the successful implementation of an explicit provision, but instead represent nothing more than directives that the interpreter happens to conclude are foundational to a democratic society.

The rationale for recognition of this external form of implicit constitutional directive basically comes down to this curious argument: Certain directives are so "fundamental" that the Framers somehow forgot to mention them. This is so despite the Framers' conscious use of extremely broad terminology in much of the document's text. In effect, the nontextualists necessarily assume that the Framers omitted even the slightest textual reference to supposedly fundamental elements of our governing structure. But such a conclusion borders on the incoherent; if

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decide the Constitution means"; "Government may not torture people to force information out of them"; "In each person's intimate private life, there are limits to what government may control"; "Congress may not commandeer states as though they were agencies or departments of the federal government"; or "No state may secede from the Union" are, therefore, fundamentally constitutional, under this theory, despite the fact that they are found nowhere in the text of the Constitution. *Id. at* 28–29. In addition, Professor Tribe contends that the principles of substantive due process as well as nontextual interpretations of the First Amendment are included in the Constitution's "dark matter," despite the fact that the former are anti-textual and the latter are extra-textual. *Id.* at 29.

138. *Id.* ("None of these propositions may fairly be said to follow from the Constitution's language by anything like standard "legal" arguments . . . their apparent detachment and distance from the Constitution's text does not prevent any of these propositions from being identified by nearly everyone as binding elements of our nation's supreme law.").

139. U.S. CONST. amend. I (referring only to the freedoms of speech, press, petition, and assembly).

140. *See, e.g.*, NAACP v. Alabama, 357 U.S. 499 (1958) (recognizing First Amendment freedom of association).

the directive were deemed truly foundational at the time of the framing, it is inconceivable that the Framers would have omitted even the slightest reference to it. In any event, such supposedly implicit directives, unlike their textually explicit counterparts, were never subjected to the ratification process, and therefore cannot be deemed to legally trump decisions made by the democratic process.

The greatest threat of nontextualism is that it would authorize unrepresentative and unaccountable judges to act in a manner ominously reminiscent of Platonic philosopher kings. When the words of the Constitution's text are deemed to place no limitation, the interpreter is effectively empowered to superimpose his chosen value structure on the electorate and lawmakers. It is difficult to imagine a greater threat to the foundation of American democracy, grounded in precepts of representation and accountability.

C. *Expansive Construction of the Ninth Amendment*

On occasion, scholars have developed arguments that uniquely rationalize the nontextual extension of individual liberties, rather than more general constitutional directives. In their efforts to add implicit individual rights to the Constitution's text, nontextualists have relied on an expansive reading of the Ninth Amendment, which provides that the Constitution's enumeration of specific rights does not preclude recognition of "other" rights.[141] Unlike other arguments used to rationalize such directives, the argument grounded in the Ninth Amendment actually draws on explicit text. The idea that unenumerated rights may derive from the Ninth Amendment is, however, hardly an inevitable construction of the provision's text.[142] An interpretation of

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141. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *see* TRIBE, *supra* note 17, at 146 ("It is in that sense a cry from within that there is something without, a ray of light from an illuminated part of the constitutional galaxy pointing to the existence of constitutional dark matter, although not in defining what that dark matter might be.").

142. Professor Tribe suggests that anyone unconvinced that nontextual sources inform fundamental facets of the Constitution's meaning should look to the Ninth Amendment—"the most conspicuously visible evidence of invisibility in the Constitution's text." TRIBE, *supra* note 17, at 141. Whatever else that text might mean, Professor Tribe posits, "it certainly cautions against any reading of the rights 'enumerated' in the Bill of Rights that would treat those rights as a comprehensive and exhaustive list." *Id.* at 161. In other words, "there's more there than meets the eye." *Id.* at 8. While Professor Tribe claims that nontextualism does not go so far as to read rights, such as the right to privacy, directly into the Ninth Amendment, it nevertheless endeavors to utilize the provision as a source of law, if once removed by the interpretive constructs he offers. Professor Tribe explains:

> That the Ninth Amendment has been explicitly identified by the Supreme Court as a source of law in just two other plurality opinions . . . does not diminish the

the provision far more consistent with the concept of a limited judiciary is that the Ninth Amendment constitutes nothing more than an anti-preemption provision. In other words, it was included in the Bill of Rights exclusively to reinforce the notion that enumeration of constitutionally protected rights in Amendments I through VIII was not intended to preempt other lawmaking bodies from legislatively supplementing those enumerated constitutional rights.[143] When construed in this manner, the Ninth Amendment means only that the Bill of Rights should not be considered *expressio unius*[144] as a means of preempting sub-constitutional sources from creating additional rights. Rather, Congress and state legislatures may supplement that list.[145]

We do not mean to suggest that the broader construction of the Ninth Amendment suggested by nontextualists is linguistically untenable. One could, we suppose, construe the words "other rights" to mean any rights that the counter-majoritarian judicial interpreter happens to deem morally appropriate. But absent even the slightest textually grounded limitation on such right-creating authority, such an unrestrained license to preempt democratically based choices hardly seems consistent with either fundamental precepts of democracy or the system of checks and balances so important to the Framers. Indeed, those scholars on the political left who advocate such a construction should be very careful for what they wish. Such an unlimited directive could just as easily be employed by conservative jurists to invalidate all varieties of economic regulation as unconstitutional interference with economic freedom. If the words "other rights" can be construed in one direction, they can just as easily be construed in the ideologically opposite direction. Under this broader construction of the Ninth Amendment, constitutional interpretation is therefore rendered nothing more than a political war of all against all where, as Thomas Hobbes told us, life is "nasty, brutish, and short."[146]

> extent to which its "cry" [from within that there is something without] has shaped the Court's jurisprudence on questions of fundamental rights.

Id. at 146. Under this method of interpretation, however, any inquiry into the Constitution's "dark matter" inevitably becomes the font of substantive rights that the nontextualist paradigm claims to eschew. *Id.* at 147.

143. *See* MARK GOODMAN, THE NINTH AMENDMENT (1981); Kurt Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005) (arguing that early courts and commentators interpreted the Ninth Amendment as a means of preserving the retained right of local self-government); Kurt Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004) (arguing that the documentary history of the Ninth Amendment establishes that it and the Tenth Amendment were intended to serve as twin guardians of federalism).

144. BLACK'S LAW DICTIONARY 661 (9th ed. 2009).

145. *Id.*

146. THOMAS HOBBES, LEVIATHAN 84 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651).

The final difficulty with reliance on the Ninth Amendment as a textual basis for judicial recognition of nontextually grounded rights flows from the supposed source of such rights. According to the Ninth Amendment's strongest judicial advocate, Justice Arthur Goldberg, the rights whose existence the amendment recognizes do not flow directly from the Ninth Amendment itself. Rather, they are grounded in the traditions of our society.[147] The Ninth Amendment merely acknowledges their existence. But if that is so, then the Court's power as ultimate arbiter of the meaning of the counter-majoritarian Constitution logically fails to provide the Justices with final say as to the scope and meaning of these rights. Hence, even under the broader reading of the provision, it is by no means clear that the Court, rather than the political branches, possesses authority as ultimate expounder of such rights.

III. SEEKING A PRINCIPLED ALTERNATIVE: THE "CONTROLLED ACTIVISM" INTERPRETIVE MODEL

For all their supposed differences, the two major schools of constitutional interpretation share two fatal characteristics: first, the dubiousness of their foundational premise, and second, their inevitable degeneration into strategic manipulation. Contrary to the essential goals of originalism, which promises to deter judges from injecting personal values into the Constitution,[148] the archeological and conceptual problems inherent in that model offer an ideal smokescreen behind which judges may pursue their personal moral, political, or economic goals with relative impunity. On the other hand, nontextualism similarly degenerates into a situation in which judges are allowed to insert their own values in place of democratically sanctioned choices. Consequently, neither constitutes an appropriate method of adjudication for our system of constitutional democracy.

Proponents of these models have on occasion challenged critics to present alternative criteria for interpretation.[149] We accept that challenge, at the outset mindful of the futility of articulating a theory of constitutional interpretation that claims to yield determinate results.[150] The key to what we call the "controlled activism" model instead is to

147. Griswold v. Connecticut, 381 U.S. 479, 486–92 (1965) (Goldberg, J., concurring).

148. *See* Atkins v. Virginia, 536 U.S. 304, 338 (2002) (Scalia, J., dissenting).

149. *Id.* (arguing that before one can reject originalism, one must find another criterion for determining the meaning of a provision, lest the "opinion of this Court rest[] so obviously upon nothing but the personal views of its Members").

150. Erwin Chemerinsky, *Constitutional Interpretation for the Twenty-first Century*, ADVANCE: J. AM. CONST. SOC'Y ISSUE GROUPS, Fall 2007, at 25 ("It is misguided and undesirable to search for a theory of constitutional interpretation that will yield determinate results, right and wrong answers, to most constitutional questions. No such theory exists or ever will exist.").

candidly embrace the problem of textual ambiguity, and through such transparency to find some sort of means of controlling—or at least reducing—the risks of abuse. Accordingly, we seek to advance a new interpretive paradigm, one that mandates consistently principled results even though, on many occasions, reasonable interpreters may use our model to plausibly arrive at very different outcomes. Controlled activism at the outset confines interpretation to the outer linguistic reaches of the Constitution's text. In the event of linguistic ambiguity, the approach employs a principled, candid, and moderately restrained form of normative judicial inquiry.

A. *Determining the Outer Reaches of the Constitution's Words: Modest Exclusionary Textualism*

Limitations on the Court's role inherent in the concept of constitutional democracy require that its interpretation of the Constitution's provisions never contradict the document's unambiguous textual maxims, regardless of any particular Justice's agreement or disagreement with the sociopolitical value of those directives.[151] Because the Framers feared unchecked power, they established a written Constitution subject to a stringent super-majoritarian process of amendment and protected by a counter-majoritarian judiciary. In so doing, they shielded certain rights and powers from majority encroachment or abuse.[152] Our suggested method of interpretive analysis begins, therefore, with examination of the words that appear on the pages of the Constitution. At the outset, our model, whenever possible, seeks to decipher the words' plain meaning or, where no plain meaning may be determined, at least the outer limits of what the words could reasonably mean in light of a determination of what they *cannot* reasonably be construed to mean.

In certain instances, text's plain meaning is ascertainable. For example, despite Supreme Court precedent to the contrary,[153] when the Eleventh Amendment prohibits extension of the federal judicial power to suits by citizens of a state against "another" state,[154] the provision cannot rationally be construed, purely as a matter of textual construction, to prohibit suits against a state by its *own* citizens. In other

151. *See, e.g.*, Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 15–17 (1987).

152. *See* J. AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 52–55 (1984); THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic 2003) ("The interpretation of . . . law[] is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by . . . judges, as . . . fundamental law.").

153. *See* Hans v. Louisiana, 134 U.S. 1, 3–4, 6, 9 (1890).

154. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

instances, words in the Constitution's text will be found to have only *inclusionary* ambiguity. For example, while it will not always be easy to determine what the concept of "due process" requires, it should be obvious that on its face, it can require only some form of "process" or procedure. In other words, on its face the provision establishes only a *conditional* protection of life, liberty, and property; such interests *may* be taken from citizens, *as long as proper procedures are followed.* This must be what the provision means; the concept of "procedural process" is redundant—just as the concept of "substantive process" is oxymoronic.[155] Thus, whatever processes ultimately are or are not deemed required by the Due Process Clauses of the Fifth and Fourteenth Amendments, we can readily exclude from the provisions' scope any requirement not concerned with process. In this sense, the provision differs dramatically from the Fourteenth Amendment's Equal Protection Clause, which imposes a protection against substantive results. For example, if government were to enact a law providing that African-Americans are to receive reduced welfare benefits, it would be no answer to an equal protection challenge to assert that individuals are given a full and fair procedural opportunity to prove that they are not African-American. It is the *end result* of denying individuals benefits *because* they are African-American that constitutes the violation of the clause. For this very reason, the Supreme Court's decision in *Bolling v. Sharpe*[156] finding an equal protection component in the Fifth Amendment's Due Process Clause is textually impermissible—despite the unquestionably legitimate moral goals of such an extension.

Professor Frederick Schauer has aptly analogized this form of exclusionary textual interpretation to a blank canvas: "We know when we have gone off the edge of the canvas even though the canvas itself gives us no guidance as to what to put on it."[157] While we recognize that ours is a modest form of exclusionary textualism, confining interpretation to the outer linguistic limits of constitutional text would produce dramatic alterations in current constitutional interpretation, as our categorical, textually grounded rejection of substantive due process clearly demonstrates. The inquiry, in short, is likely to resolve more questions than might at first be thought.[158]

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155. *See* ELY, *supra* note 2, at 18 (famously comparing "substantive due process" to "green pastel redness").

156. 347 U.S. 497, 500 (1954).

157. Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 828 (1982).

158. *See infra* text accompanying note 27.

B. *The Limits of Textualism as a Restraint on Judicial Review*

In fashioning our proposed interpretive model, we employ a synthesis of a traditional plain meaning rule and our own form of modest exclusionary textualism. The plain meaning rule has long been applied in the field of legislative interpretation.[159] It dictates that when words are linguistically unambiguous, an interpreter may not resort to external sources to contradict the inexorable implications of that unambiguous meaning. In this sense, the analysis operates much like the parol evidence rule has long operated, free from controversy, in the law of contract interpretation. Under this rule of contractual interpretation, parties to a written contract are prevented from contradicting or amending the contract's plain terms by seeking to admit interpretive evidence extrinsic to that contract.[160] Similarly, in the face of a finding of textual unambiguousness, constitutional interpreters may not be permitted to suggest—in light of Framers' intent, original meaning, specious linguistics, or unwritten maxims—that words mean something other than what they say. In the interest of avoiding strategic manipulation and legislative deception, unwavering adherence to the Constitution's plain meaning is essential, whenever its words lend themselves to such a construction. As the Supreme Court has reasoned in the context of statutory interpretation, it "is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms."[161]

To be sure, there exist only a relatively few provisions of the Constitution that readily lend themselves to such a mode of construction. But acceptance of our form of modest exclusionary textualism would nevertheless significantly alter the current topography of constitutional law. For example, when the Tenth Amendment confines rights reserved to the states to those not granted to the federal government,[162] the text is unambiguously telling us that the *sole* constitutional basis for restricting federal power is the absence of constitutional authorization: States retain only those powers not granted to the federal government. Consequently, the question of whether a given power is reserved to the states must be resolved *exclusively* by determining whether that power is on the federal government's checklist

159. *See, e.g.*, Caminetti v. United States, 242 U.S. 470, 485 (1917) (holding that when statutory language is "plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion").

160. *See* Restatement (Second) of Contracts § 213 (1981).

161. *Caminetti*, 242 U.S. at 485.

162. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

of enumerated powers.[163] It is true that this conclusion does not tell us exactly what powers the constitutional grants of authority to Congress do or do not include. But it does tell us that this question provides the sole basis of debate. Thus, decisions such as *Hammer v. Dagenhart*,[164] where the Court rationalized its constitutional rejection of federal legislation exclusively on the basis of a finding that this particular exercise of Congress's commerce power invaded an area of protected states' rights, are improper, simply as a matter of four corners textual construction.

Under exclusionary textualism, the Court's controversial decision in *National League of Cities v. Usery*[165] is also improper, because the text of the Commerce Clause plainly protects the states against federal encroachment *only* when congressional action reaches beyond the limits specified in the Constitution's checklist of enumerated powers.[166] Since a reasonable construction of the commerce power, combined with the Necessary and Proper Clause, authorizes the federal government to regulate hours and wages of employees where interstate commerce is impacted, the explicit text of the Tenth Amendment unambiguously establishes the absence of any state insulation from federal regulation.

On the other hand, when Article I, Section 8,[167] enumerates specific powers, under the interpretive canon of *expressio unius est exclusio alterius*, the structure of the provision's text unambiguously rejects the notion that any one of those powers—for example, the commerce power—provides the federal government with unlimited legislative authority.[168] The meaning of Article I's enumeration of powers, combined with the Tenth Amendment, is that the federal government is designed to be one of limited powers.[169] Absent this conclusion, neither express reservation of all undelegated power to the states in the Tenth Amendment nor specific enumeration of congressional powers in Article I makes sense. As Chief Justice John Marshall noted, the concept of enumeration necessarily implies something not enumerated.[170]

The linguistic element of our controlled activism model accomplishes two things. First, it requires an interpreting court to

163. Redish & Drizin, *supra* note 151, at 9–10.

164. 247 U.S. 251 (1918). *Hammer* was overruled in *United States v. Darby*, 312 U.S. 100, 103, 115–17 (1941), but conservatives continue to argue for a constitutionally insulated sphere of states' rights.

165. 426 U.S. 833 (1976); *id.* at 851–52 (holding that the Tenth Amendment prohibits the application of federal minimum wage and overtime laws to state employees).

166. U.S. CONST. art. I, § 8.

167. *Id.*

168. *Id.*

169. Redish & Drizin, *supra* note 151, at 11.

170. *See* Gibbons v. Ogden, 22 U.S. 1, 195 (1824).

confine itself to the outer linguistic limits imposed by uncontroversial consensus usage of the terms—a requirement which, as we have already shown,[171] would have a significant impact on established constitutional doctrine. Second, it expressly abandons (and prohibits) any inquiry into the original meaning of the words of the text.[172]

It is important to understand the differences between our modest form of textualism and the theory of original meaning analysis, which we critiqued earlier.[173] For one thing, while originalist meaning analysis seeks a *single dispositive* meaning of constitutional text, our analysis, for the most part,[174] imposes a more modest form of *exclusionary* textualism. We generally do not find a single definitive meaning of words; rather, we seek primarily to exclude *particular interpretations* that cannot rationally be reconciled with the other linguistic reaches of the words. While it would be either naïve or disingenuous to believe that originalist analysis will often lead to a definitive understanding of text, an inquiry into the outer linguistic reaches of present meaning is far simpler and, usually, far less controversial or vulnerable to ideologically driven manipulation. To take an extreme example where plain meaning of text provides the primary focus, any judge who asserts that a fish qualifies as a tree will immediately be revealed as nothing more than a result-oriented manipulator and an abuser of his interpretive power. Moreover, we avoid many of the pitfalls of originalism because our plain meaning textualism employs *present meaning* analysis. Because we do not purport to seek out the definitive meaning of every word, we consider ourselves freed from a slavish obligation to explore obscure, arcane, and usually unresolvable debates over historical understandings of the text. We employ only a type of what can be described as "no brainer" textualism, where there necessarily exists a clear consensus as to contemporary understanding of the term or phrase in question—or at least what the phrase or term does *not* mean.

Is it conceivable that unambiguous historical interpretation of those terms differed dramatically from such current "no brainer" understandings? It is possible, we suppose—though at least as a general matter we seriously doubt this would prove to be a serious problem. But on the basis of an *ex ante* cost–benefit analysis, we have shaped our interpretive model to categorically prohibit *any* debate about historical understandings of the term. Such inquiries have been shown to be so rife with the potential for manipulative, result-oriented historical

171. *See supra* text accompanying note 27.

172. *See supra* text accompanying notes 92–93, 96–97.

173. Note that we do not here refer to the theory of "originalist construction," but for reasons already explained that theory is fatally flawed as a form of originalism. *See supra* text accompanying note 34.

174. *See supra* text accompanying notes 44–45.

selectivity by resort to generally inaccessible and esoteric inquiry that we are willing to suffer in a particular case the relatively unlikely departure from historical understanding of what are today consensus definitions. We do so in an effort to avoid the dangerous historical thicket of "original understanding."[175]

What if it could be established, not that the words of the text possessed different meanings at the time of the framing, but rather that those who drafted and ratified those words in reality intended a very different result from that dictated by a natural reading of the words? Our answer to that question is basically the same as that given by the originalist meaning school: as in the case of the parol evidence rule in the law of contracts, where the text is linguistically unambiguous the interpreting court is not permitted to consider extra-textual evidence of drafters' intent. It was, after all, the text, not some extraneous understanding of the text, that was subjected to the ratification process.[176]

It might be argued that the very idea of so-called "present-meaning textualism" is incoherent: Words are chosen by the drafters to get from their chosen "Point A" to their chosen "Point B," and therefore contemporary definitions of those words are irrelevant.[177] The fact that a particular word *today* means *X*, the argument might proceed, is of little importance. What matters instead is whether the word meant *X at the time it was drafted*.[178] But whatever the logical force of this argument were we to assume that uncontroversial ascertainment of historical understanding is generally feasible, it is of little force once one acknowledges that historical inquiry into the definitive meaning of words is all too often a fruitless and dangerous task. The only alternative to our "no brainer" exclusionary form of present meaning textualism, then, is the wholesale rejection of text as a limit on an

175. We should emphasize that once an interpreter passes beyond the stage of exclusionary textual analysis, we do not mean categorically to exclude an interpreter's resort to historical sources in shaping the meaning of ambiguous text. However, under the controlled activism model, such sources would be solely of persuasive value. For a discussion of that step in our model's analysis, see discussion *infra* Section III.C.

176. *But see* Alden v. Maine, 527 U.S. 706 (1999). In *Alden* the Court drew on the history, structure, and theory of the Constitution to protect nonconsenting states from citizen suits, even though the text of the Constitution does not grant such an immunity. Instead, the *Alden* Court relied on external sources of meaning that were not subject to the ratification process.

177. *See, e.g.*, Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104, 111–12 (1989) ("[T]he presentist insists that to be bound by the statute does not entail being bound by the actual human understanding or collective decision that brought the statute into being. But this view effectively separates the statute from the source of its authority . . . the fact that the words express a specific collective decision made by the designated political authority—is now de-emphasized or dismissed." (emphasis omitted)).

178. *See* discussion *supra* text accompanying notes 6–9.

interpreter's authority. But for reasons explored in detail earlier,[179] such nontextualist analysis provides a cure far worse than the disease it seeks to remedy. To escape the straightjacket of historical inquiry, then, the controlled activism model relies on the irrebuttable presumption that terminology today means, roughly, what it meant at the time the Constitution was drafted. While we concede that, on rare occasion, it is at least possible that the contemporary meanings of words may differ from eighteenth-century parlance, we are willing to take that risk in order to avoid the toxicity of the originalist paradigm and its one-sided manipulation of interpretive result.[180]

Some may question whether our present-meaning exclusionary textualism, untied to original understanding, might lead to constitutionally incoherent results. For example, the so-called "Republican Form of Government" Clause provides that the United States "shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature . . . against *domestic Violence.*"[181] Divorced from its historical origins, it might be argued, these words could reasonably be construed to authorize a state legislature to seek federal assistance to stop or prevent spousal abuse, because in today's parlance the words could be understood in this manner. This is so under our model, the argument would proceed, even though as a historical matter we can be certain that this is not what the words meant, because absolutely no one at the time of the framing would have understood "domestic violence" in this manner.[182] This criticism is flawed, however, because one need not resort to a search for originalist meaning in order to dispel the specious notion that the words "domestic violence" in Article IV could be properly construed to include spousal abuse. Rather, one needs merely to employ a form of *structural* textualism, a concept which we can comfortably include as an element of our version of "no brainer" exclusionary textualism. The entire context of Article IV, Section 4, expresses a concern with the need for federal protection of the states from invasion, and the need for the federal government to protect the states against violence or insurrection. The text of the provision reveals no other conceivable function or purpose for the provision as a whole. Thus, by examining exclusively

179. *See* discussion *supra* Part II.

180. *See* Powell, *supra* note 2, at 903–04 (arguing that even the Framers themselves "shared the traditional common law view—so foreign to much hermeneutical thought in more recent years—that the import of the document they were framing would be determined by reference to the intrinsic meaning of its words or through the usual judicial process of case-by-case interpretation").

181. U.S. CONST. art. IV, § 4 (emphasis added).

182. *See, e.g.*, ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 2 (2011).

the text of the relevant provision, we are able to conclude that a construction of the words "domestic violence" refer to a need for the federal government to protect the states from an activity that presents no existential threat to the state would render them incoherent, *in light of their textual context and structure* as determined on the provision's four corners.

There is no reason that a textualist analysis cannot take into account the words that appear *around* the words in question. Words included in a purposive text do not appear in a vacuum. Rather, they are intertwined within the structure of a provision whose textual four corners can give rise to common sense limitations on the scope of interpretation without any help from historical inquiry. Indeed, our illustrations of exclusionary textualism have already demonstrated such structural elements. We gave as an example of our exclusionary textualism the constitutional principle that the Commerce Clause in Article I, Section 8,[183] cannot be construed to include all activities, because such a construction would effectively undermine the textually derived notion that Article I, Section 8 leaves at least some private activity for exclusive state regulation.[184] We reached this conclusion, not because any specific words, viewed in a vacuum, said this, not because of an inquiry into the understanding of those at the time of the framing, but simply by examining the four corners of the relevant text. Similarly, our criticism of the originalist analysis in *Heller* focused on the majority's failure to focus on the modifying words in the prefatory clause of the Second Amendment.[185] Those words, we argued, rendered a conclusion that the operative clause of the provision intended to create a personal right incoherent, because such an interpretation rendered the words of the prefatory clause useless and therefore meaningless. Once again, our "no brainer" present-meaning exclusionary textualism dictates a conceptually coherent result without the need for a resort to historical–etymological analysis.

C. *Constitutional Interpretation in the Absence of Unambiguous Text: Shaping the Contours of the "Controlled Activism" Model*

To fill the void created by intractable linguistic ambiguity, we suggest resort to a far more candid, transparent, and principled approach to constitutional interpretation. To the extent not prohibited by the modest exclusionary textualism filter imposed by our model,[186] we cede to the reviewing court a significant degree of discretion to shape constitutional interpretation in accord with what they deem normatively

183. U.S. CONST. art. I, § 8, cl. 3.
184. *See* discussion *supra* Section III.B.
185. *See* discussion *supra* Section I.B.
186. *See* discussion *supra* Part III.

preferable values. We cede this authority because there exists no real alternative; to suggest otherwise—as preexisting models of constitutional interpretation have all too clearly shown—is to disingenuously disguise what ultimately amounts to value-driven decision making in any event. We do so in the hope that such transparency will confine constitutional debate to the real issues at stake.

This does not mean that we would impose absolutely no restraints on the exercise of the judicial review power in such instances. To the contrary, it is solely because we have candidly acknowledged the normativity inherent in constitutional interpretation that we are able to shape and impose essential restraints on that judicial authority. While we recognize that at some level judges inevitably must make discretionary calls where text is inescapably ambiguous, controlled activism does not constitute an endorsement of unfettered, outcome-determinative judicial policymaking. It is therefore important to understand exactly what restraints our controlled activism model imposes on this inevitable normative judicial discretion in construing and applying the Constitution. First, it should be recalled that our form of textualism, while not bound by the artificial (and often manipulative) strictures of originalism, nevertheless places a potentially significant restraint on the judiciary's ability to impose its naked political will on the populace by demanding adherence to the four corners of the Constitution's unambiguous text.[187] Second, in explicitly choosing a normatively driven interpretation of a particular provision, a court would be required to recognize the subtle but vitally important differences between what we label "Level I" and "Level II" forms of normative inquiry. Under the controlled activism model, it is solely the Level I form of normative analysis that is properly vested in the unaccountable judiciary.

A court employing Level II analysis asks only how its chosen constitutional interpretation of a particular provision alters the political topography in the manner most consistent with the chosen sub-constitutional political or ideological preferences. In undertaking a Level II inquiry, the judge effectively asks herself much the same question that a legislator asks herself before deciding how to vote on proposed legislation. In effect, both rely completely on their assessments of normative social policy—that is, the narrowly political choices of the decision makers. Under a Level II approach, therefore, constitutional interpretation amounts to nothing more than a strategic extension of the interpreter's personal political agenda. The Supreme Court's decisions in *Heller*, *Roe*, and *Lochner* are illustrative. In each of those decisions, the decision maker was not attempting to provide a

187. *See* discussion *supra* Section III.B.

coherent, principled, and linguistically plausible interpretation of ambiguous constitutional text, but rather simply seeking to trump the democratic process by employing the guise of counter-majoritarian constitutional analysis for what in reality was nothing more than ideological preferences.[188] This type of strategic manipulation is, as we have shown, the Achilles' heel of both originalism and nontextualism. Such purely politically driven interpretations on the part of judiciary, purposely insulated from the choices of the electorate, are wholly unacceptable in a democracy, because courts lack the portfolio of accountability and representativeness that provide legislators with their political legitimacy. Thus, while both legislators and judicial interpreters necessarily exercise a form of normatively based discretion, the core premise of democratic theory requires that there must be a fundamental difference between legislative choice and the judiciary's constitutional interpretation.

How can we be certain, without delving into the thicket of judicial motivation, that *Heller*, *Roe*, and *Lochner* were grounded in impermissible Level II analysis? Because, for reasons already discussed, none of them constitutes a plausible interpretation of constitutional text. *Heller* irrationally renders the qualifying clause of the Second Amendment irrelevant, thereby rendering its interpretation of the operative clause incoherent.[189] Both *Lochner* and *Roe*, on the other hand, fail the test of rational textual analysis, because both improperly construe the Due Process Clause to oxymoronically create substantive guarantees.[190]

In place of this narrow, purely political form of normative inquiry, our controlled activism model requires judges exercising the power of judicial review to employ only Level I normative analysis. While Level I analysis authorizes normative discretion, the normative inquiry applies solely to a determination of the values deemed to underlie a linguistically ambiguous constitutional provision, divorced from the judge's narrow, personal political preferences or assessment of immediate political consequences. Needless to say, occasions will arise where a judge's Level I inquiry will reach a conclusion that overlaps with her Level II normative conclusion. But the key point is that it very well may not. More importantly, the outcome-determinative question the judge asks herself will differ significantly under the respective levels. For example, a debate has long stewed among First Amendment scholars as to the ultimate purpose of the constitutional protection of free expression, and the values the protection should be deemed to advance. While some scholars have focused on the extent to which free

188. *See* discussion *supra* Part I.

189. *See* discussion *supra* Section I.B.

190. *See* discussion *supra* Introduction and Section I.D.

expression facilitates the political process,[191] others have emphasized the benefits of free expression to the development of the individual's human faculties.[192] Because both normative perspectives represent plausible constructions of the First Amendment's text, Justices could, under Level I analysis, reasonably choose either. To be sure, we may differ with their conclusion, but that fact does not render their interpretation implausible or illegitimate. Both represent reasonable efforts to explicate the underlying values of the relevant constitutional provision.

On the other hand, under the controlled activism model, a reviewing court employing Level I analysis would not be permitted to shape its First Amendment doctrine on the basis of its ideological approval of or distaste for the substance of the expression in question. Nor could the Court properly decide the question on the basis of its assessment of the strategic political impact of the speech sought to be regulated. Such decision making would fall within the impermissible Level II category as decisions driven by ideology or politics. In the place of strategic manipulation is *judgment*: a decision as to the appropriate normative ends of the constitutional directive in question. Under a Level I inquiry, courts may choose from a variety of plausible interpretations of numerous constitutional provisions. But in doing so, they must choose an underlying value framework that is both linguistically plausible and grounded in considerations that are something other than naked political or ideological precepts. To be sure, on occasion ideology may well influence the Level I inquiry. For example, a Justice's strong belief in the values of federalism may influence her Level I inquiry into the construction of the Commerce or Necessary and Proper Clauses. But to the extent the judge does so, it can only be when his chosen value structure is plausibly intertwined with an inquiry into the broader values underlying the constitutional provision in question, rather than narrower politically strategic goals or values wholly divorced from the four corners of that provision.

As in the case of Level II analysis, there will often be no obviously correct answer to the Level I inquiry. Reasonable judges with differing perspectives concerning the ends of constitutional law will often differ on such foundational issues. But while original meaning advocates disguise their normative inquiry behind a veil of historical camouflage, the controlled activism model openly acknowledges the creative role of

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191. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

192. *See, .e.g.*, C. Edwin Baker, *The Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Martin H. Redish, *The Value of Free Speech*, 130 U. PENN. L. REV. 591 (1982).

the judicial decision maker in fashioning guiding normative precepts. It does so, because the only realistic alternative is no judicial review at all, which would unacceptably remove one of the core constitutional checks of our system on majoritarian abuse and effectively render the Constitution's counter-majoritarian check all but meaningless. The preferable solution, we believe, is first, candid acknowledgement of the judiciary's inherent normative discretion in the exercise of its judicial review power, and second, an effort to fashion categorical guidelines to confine that discretion to the appropriate performance of the judiciary's function in a democratic society: consistency with the linguistic reaches of text and confinement to an assessment of broad constitutional values, rather than resort to narrow political purposes.

It might be suggested that a judge could disguise her Level II values as part of what purports to be a Level I inquiry. We certainly do not deny such a possibility. But at the very least, under our model the critique of the judicial decision's reasoning would focus on both the plausibility and coherence of what purports to be a Level I inquiry—a kind of check that lawyers may employ using the tools of their trade, rather than pursuing an obscure and often fruitless form of intellectual inquiry in which they are not trained, as originalism mandates.

The controlled activism model imposes yet another type of check on the court's sincerity in its use of Level I analysis. This requirement is associated most prominently with Professor Herbert Wechsler's famed "neutral principles" analysis.[193] In many ways, Professor Wechsler's framework imposes rather modest limitations on the exercise of the judicial review power. Wechslerian "neutral principles" are wholly agnostic as to the choices of guiding interpretive principle gleaned from a particular constitutional provision. However, under Professor Wechsler's approach, once that principle has been selected, the principle chosen may not be altered selectively when it arises in a subsequent case for no reason other than political distaste for the result that the principle would dictate.[194] For example, once a court has held that the First Amendment protects the right of conservatives to picket at a certain location, it may not in a subsequent case refuse to extend the same First Amendment protection to socialists who seek to picket, for no reason other than ideological disdain for the political position being expressed by the would-be picketers in the second case. In a certain sense, Professor Wechsler was laying the groundwork for the all-

193. *See* Wechsler, *supra* note 24, at 1, 16–17.

194. For a more detailed analysis of Wechsler's neutral principles, see Martin H. Redish, *Commercial Speech, First Amendment Intutionism, and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 76–79 (2007); *Taking a Stroll Through Jurassic Park: Neutral Principles and the Originalist-Minimalist Fallacy in Constitutional Interpretation*, 88 NW. U. L. REV. 165, 171–74 (1993).

important Level I–Level II distinction established by our controlled activism model.

This Wechslerian "neutral principles" requirement serves as the policeman for implementation of the Level I–Level II analysis. Where no rational basis—tied to the premises of the chosen Level I principle—for a court's distinction between one decision and another exists, the two decisions, grouped together, may be seen as a thinly veiled implementation of what in reality is an unacceptable Level II analysis.

Above all, the controlled activism model requires transparency and candor on the part of the constitutional interpreter. Rather than permit manipulation of constitutional text or the strategically selective imposition of history, controlled activism demands that interpreters openly acknowledge the Level I normative grounding of their proposed interpretive conclusions as a predicate to analysis of ambiguous text. When combined, these controls promote judicial humility and, by design, prevent the types of furtive, disingenuous, or manipulative resort to the superficially objective or political theories of constitutional analysis to which originalism and nontextualism have so frequently succumbed.

Legal realists will no doubt summarily dismiss what they will consider our naïve effort to restrain constitutional decision making by imposition of the requirements of principled analysis. And we readily concede that the harsh realities of the judicial review process render resort to a rigid notion of geometrical formalism impossible. But the realists' analysis is clumsy and superficial. The mere fact that difficult cases will arise does not mean that resort to principle as a measuring rod will not substantially impact the legitimacy of judicial review. Indeed, we have already demonstrated the unambiguous illegitimacy of numerous important Supreme Court decisions.

Would use of the controlled activism model force the Court to change its ways? Perhaps it would not. But the same could no doubt be said of any other scholarly critique of the Court's constitutional decision making. However, that concern clearly did not deter scholarly critiques in the past, nor should it in the future. At the very least, measuring the Court's constitutional decisions by reference to the controlled activism model would provide a coherent set of decision making directives by which the Court's mistakes and encroachments may be exposed. No more can be expected of any scholarly theory.

CONCLUSION

Reasonable disputes will undoubtedly arise over whether a particular constitutional decision complies with the terms of the controlled activism model. But the same has long been true of preexisting scholarly models. In any event, at the very least our model

would provide a reasonable and candid aspirational standard against which constitutional decision making may be measured.

The reaction of many observers to the controlled activism interpretive model will likely be one of skepticism as to whether courts would ever be willing or able to implement the model's terms. When one examines how the Supreme Court has actually approached the task of constitutional interpretation over the years, however, it becomes clear that in certain instances, at least, the Court's approach is already closer to our model than it is to any of its competitors.[195] Though aberrations no doubt exist, for the most part the Court has not deemed itself bound by any form of originalist inquiry, nor has it usually considered itself wholly freed from the constraints of text.[196]

Recognition of the relatively limited (though far from unimportant) ways in which traditional Supreme Court adjudication would need to be modified to bring it within the formalized framework of our model speaks to the ultimate feasibility of moving in this direction. As a practical consequence, use of controlled activism would facilitate greater transparency and accountability within a system of government committed as much to the Constitution as to the promise of democracy. Moreover, it would stem unfettered superimposition of political values over our highest law by advocates of the originalist and nontextualist interpretive models.

Most importantly, in a true constitutional democracy there exists no viable alternative to the controlled activism model. Originalism, to the extent it is assumed to be grounded in good faith, places unacceptably rigid and artificial restraints on the democratic process. To the extent originalism is revealed for what it all too often has been—namely, an ideologically driven, strategically manipulative use of cherry-picked

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195. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 332, 349 (1976) (holding that individuals have statutorily granted property rights via social security benefits and that termination of those benefits implicates due process, but that termination of Social Security benefits does not require a pre-termination hearing); New York Times Co. v. Sullivan, 376 U.S. 254, 279–83 (1964) (establishing the standard of "actual malice" which must be met before press reports about public officials or public figures may be considered defamation and libel); United States v. Carolene Products Co., 304 U.S. 144, 152, 154 (1938) (applying rational-basis review to hold that a federal law prohibiting filled milk from being shipped in interstate commerce was a legislative judgment).

196. *See, e.g.*, LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (2000). Professor Leonard Levy argued that it is a popular legal fiction that "conservative jurists have eschewed judicial activism," *id.* at 54, and that the notion of judges as figures who historically suppressed "their own policy preferences and impersonally decided as the law told them to . . . did not legislate . . . merely discovered and applied the appropriate law to the case at hand . . . [and] respected and enforced original intent" is a product of revisionist history. *Id.* In truth, "judicial activism has characterized the Supreme Court from its early history," *id.* at 56, beginning with the very first constitutional case decided by the Court in 1793, *Chisholm v. Georgia*, 2 U.S. 419 (1793).

historical data[197]—its harmful impact on the delicate balance inherent in constitutional democracy should be obvious. Moreover, the unlimited power vested in an unrepresentative, unaccountable judiciary by any interpretive model not bound by even the outer reaches of text smacks of government by authoritarian philosopher kings—hardly a political system consistent with foundational notions of democratic thought.

In contrast to these failed models, controlled activism seeks to strike the delicate balance between the adjective and the noun in the phrase "constitutional democracy." We readily concede that the model is far from perfect. But what Winston Churchill said about democracy itself may be paraphrased to describe controlled activism: It is the worst model of constitutional interpretation—except for all the others.[198]

197. *See* discussion *supra* Part I.

198. Winston Churchill, Speech to the House of Commons, Nov. 11, 1947, as quoted in THE OXFORD DICTIONARY OF QUOTATIONS 150 (3d ed. 1979) ("[I]t has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.").