2017

The tempting of originalism

Dailey, Chris

BOSTON UNIVERSITY

GRADUATE SCHOOL OF ARTS AND SCIENCES

Thesis

THE TEMPTING OF ORIGINALISM

by

CHRISTOPHER M. DAILEY

B.A., Purdue University, 2014

Submitted in partial fulfillment of the

requirements for the degree of

Master of Arts

2017

Approved by

First Reader

James E. Fleming, J.D., Ph.D.
The Honorable Paul J. Liacos Professor of Law

Second Reader

Hugh W. Baxter, Ph.D., J.D.
Professor of Law
Professor of Philosophy

THE TEMPTING OF ORIGINALISM

CHRISTOPHER M. DAILEY

ABSTRACT

This thesis analyzes competing theories of constitutional interpretation. Originalism as traditionally understood maintains that proper constitutional interpretation involves consulting the historical record for what the words meant at the time of ratification. This position is in stark opposition to moral reading, which views certain constitutional provisions as embodying broad philosophical principles that must be interpreted according to the best understanding of our constitutional commitments. Originalism seeks historical truths of constitutional meaning whereas moral reading aims primarily toward ethical adjudication and constitutional perfection. I track the origins of originalism and its development in American legal scholarship while analyzing the interpretive shortcomings and ethical dilemmas the theory poses. I ultimately reject originalisms as traditionally conceived as antithetical to American constitutional ideals, as blind to the teachings of this Nation's jurisprudential history, and as more theoretically problematic than the moral reading it attempts to combat. I further contend that the newest wave of originalist thinking, which recognizes broad constitutional commitments, is no more than moral reading in disguise. I conclude that moral reading is a more defensible theory of constitutional interpretation and that new originalists ultimately agree.

TABLE OF CONTENTS

The Tempting of Originalism

The U.S. Constitution is largely a framework for how to structure our government. Most of the provisions deal with the particulars of our democracy; election procedures, impeachment powers, administrative duties, describing the responsibilities of, and limits upon, each governmental branch. Indeed, without the preamble, the Bill of Rights, and the Civil War amendments, the document is *mainly* a guidebook with limited ambiguities.[1] If the text as a whole operated in such a fairly specific and unambiguous fashion, it might appear obvious that in discerning meaning one would look to what the words *meant*, or what the authors *meant*, at the time the text was written and ratified. This process relegates interpretation to historical inquiry, but after all, what better place to look for the meaning of "necessary and proper" than those who penned the words or those who were present at that time? But of course, the Constitution is not entirely authored in such a determinate way. The rights and liberties enshrined in the Bill of Rights and Civil War Amendments denote broad philosophical commitments that cannot be shackled to historical fact. As a textual, pragmatic, ethical, and historical jurisprudential matter,[2] constitutional interpretation requires reasoned judgment regarding fundamental aspirations of liberty, equality, and justice.[3]

---

[1] Issues under the Commerce Clause, the Necessary and Proper Clause, the Appointments Clause, the natural born citizen requirement, preemption, and other not-so-specific phrases would undoubtedly persist.

[2] And indeed some commentators now argue as an original matter.

[3] As I hope to demonstrate in this paper, the reasoned judgment I reference is in the *Casey* sense, consistent with our historical jurisprudential practice, not merely in the

In this paper I will argue against originalisms as traditionally conceived as antithetical to American constitutional ideals, as blind to the teachings of this Nation's jurisprudential history, and as more problematic than the pragmatic moral reading it attempts to combat. The persuasiveness of such arguments is not lost on new originalists, and I hope to demonstrate as well that new inclusive originalism is in fact an exercise in moral reading. As a textual matter, the portions of the Constitution guaranteeing fundamental rights are written in exceedingly general terms and include no interpretive guide other than what we might infer from the character of the language. The document denotes such fundamental liberties as "freedom of speech," "equal protection of the laws," the freedom from "unreasonable searches and seizures," "cruel and unusual punishment," and freedom from the deprivation of "life, liberty, and or property, without due process of law." Broad terms necessitate interpretation, so what is the most defensible theory? I wish to argue for moral readings, a theory championed by Ronald Dworkin and largely exemplified by the Supreme Court throughout this Nation's constitutional history. This approach may take into account history or tradition, but does not ignore fundamental notions of justice. This approach understands the inherent ambiguous breadth of a sparsely written document, while respecting the general principles as such.

---

abstract sense. *See Planned Parenthood v. Casey*, 505 U.S. 833, 834 (1992) ("Neither the Bill of Rights nor the specific practices of States at the time of the Fourteenth Amendment's adoption marks the outer limits of the substantive sphere of… "liberty." [A]djudication… may require this Court to exercise its reasoned judgment in determining the boundaries between the individual's liberty and the demands of organized society.")

I. Framers' Intent and Original Public Meaning

Originalism rose to prominence due in no small part to the perceived activism of the Warren Court.[4] To some, the Warren Court seemed all too eager to strike down state and federal laws, and notably expanded traditional constitutional criminal procedure doctrine, which some commentators felt was not constitutionally mandated.[5] Originalism was seen as a potential methodological answer, designed to restrain judicial action by tethering constitutional meaning to the fixed point at which the document was written and ratified.[6] At first, the originalist inquiry focused on original intent sometimes referred to as Framers' intent.[7] This view drifted into the now all but discredited search for original expected applications of constitutional principles.[8] In this early stage of originalism, it was contended that originalism *just is* constitutional interpretation.[9]

---

[4] Keith E. Whittington*, Originalism, A Critical Introduction*, 82 FORDHAM L. REV. 375, 392 (2013).
[5] *See Gideon v. Wainwright*, 372 U.S. 335 (1966); *Miranda v. Arizona*, 384 U.S. 436 (1966).
[6] Whittington, *supra* note 4 at 393 ("Both the substantive content of the original Constitution and the high information requirements for an originalist judge to reach clear conclusions about constitutional meaning suggested to early originalists that democratic majorities would be empowered to act," rather than have their laws struck down by an unduly active court.)
[7] *See, e.g.* Robert H. Bork, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (Free Press 1990).
[8] Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).
[9] *See, e.g.* Gary Lawson, *On Reading Recipes… and Constitutions*, 15 GEO. L.J. 1823, 1834 (1997) ("[T]he Constitution's meaning is its original public meaning. Other approaches to interpretation are simply wrong.")

Thus, the argument goes, a theory not grounded in some sort of original meaning cannot claim the title of an interpretive theory.

The most basic criticism of this 'old' originalist theory is its misguided quest for subjective intent, both in discerning meaning and intended applications. First, old originalism engaged in the hopeless task of establishing a collective intent, purporting to transcend various Framers' intentions.[10] Second, the level of historical knowledge the constitutional interpreter must possess, and the extraordinary collective foresight required of (or assumed of) the Framers requires "heroic assumptions."[11] Most fundamentally however, the theory presupposes the existence of discoverable historical facts of meaning and or expected application. The shift in originalist scholarship from original intent to original public meaning is meant to address these concerns, though does so unpersuasively.

It is a semantic diversion at best to claim that shifting the terminology from "framers' intent" to "original public meaning" avoids problems with uncovering collective intent.[12] The term subject to criticism in 'collective intent' is not 'intent' but rather 'collective.' It is not that particular intentions are not discoverable; it is rather that subjective intentions *are* discoverable and *are disparate*. This leads to

[10] *Id*. at 382.
[11] Whittington, *supra* note 3 at 381.
[12] There is the *slightly* more cynical view that the change is a public relations ploy.

the potential problem of needing to count "intention-votes"[13] in constructing a singular collective meaning. Undoubtedly implicit in the phrase "original public meaning" is the word "collective" or "common," because the objective of new originalism, much like old originalism, is positive historical fact, just of meaning rather than intentions. The change from framers' collective intent to collective public meaning merely shifts what collection of individuals from whom meaning is to be derived. This strategy fails to address the core issue that there is potentially no such thing as collective intent *or* meaning, at least concerning the more broadly worded and aspirational constitutional provisions. This is of course indicative of deep disagreement about our fundamental constitutional commitments just as we see today. The shift from Framers' intent to original public meaning is also arguably a more unreliable one, because the collection of individuals from whom a positivist fact of meaning must be evinced becomes much larger when the public must be evaluated as opposed to a handful of Framers.

Second, no less than the search for original intent, the search for original public meaning requires comprehensive historical knowledge; so comprehensive as to be perhaps only theoretically plausible. To begin to illustrate this point, Justice Scalia described the originalist inquiry as requiring "an enormous mass of

[13] Whittington, *supra* note 3 at 382.

material."[14] Originalists like Professor Steven Calabresi hold that the originalist inquiry can draw a public meaning from myriad sources like "legislative history, newspaper accounts, speeches, and contemporary dictionaries."[15] In discussing the shortcomings of his own preferred constitutional theory, Justice Scalia aptly points out that the originalist inquiry not only relies on a faithful, objective review of the "mass of material," but also relies on the dependability of that material, which in some cases is admittedly dubious.[16] An originalist is supposed to survey these historical sources and conjure up a concrete original public meaning applicable to a contemporarily litigated issue? Consider the following: In making an originalist case for a broad interpretation of Section One of the 14th Amendment as an anti-caste principle not limited to race, capable of extending to prohibiting sex discrimination, Professor Calabersi primarily points to articles in the Chicago Tribune and Philadelphia North American Gazette from 1866, the remarks of various Senators (who are also Framers), and an assumed awareness of ratifying state legislatures that a broad anti-caste principle was contemplated by certain constituents.[17] Is it convincing to argue that because *some* commentators interpreted the meaning of the 14th Amendment as an anti-caste principle that therefore originalism supports such a proclamation?

---

[14] Antonin Scalia, *Originalism: The Lesser of Two Evils*, 57 U. CIN. L. REV. 849, 856 (1989).
[15] Steven G. Calabresi, Julia T. Rickert, *Originalism And Sex Discrimination*, 90 TEX. L. REV. 1, 6 (2011).
[16] Scalia, *supra* note 14 ("[M]any of the reports of the ratifying debates, for example, are thought to be quite unreliable.")
[17] Calabresi and Rickert, *supra* note 15 at 30-36.

Originalism offers at least an equally convincing case *against* the idea that the 14th Amendment embodies an anti-caste principle as a matter of original public meaning, and does not extend beyond racial discrimination.[18] If I were inclined to buy into originalism, how would I decide which historical account truly represents a factual original public meaning?

Moreover, the newspaper articles and additional commentary cited sound of an understanding of our constitutional commitments as abstract perfectionist principles, not positivist or determinative facts regarding true meaning. The Chicago Tribune spoke of "the evils of class legislation," the "spirit of our Government," and noted that class legislation is "based upon a principle of pernicious tendencies."[19] The Philadelphia Gazette described the 14th Amendment as it was still in deliberation as "terminating the discriminations made against sections and classes and races," which Professor Calabresi

[18] *See id.* at 2 ("It is a truism of modern constitutional law scholarship that originalism, the judicial philosophy propounded by Justice Antonin Scalia, Justice Clarence Thomas, former Judge Robert H. Bork, and former Attorney General Edwin Meese III, cannot justify the Supreme Court's sex discrimination cases of the last forty years. Justice Scalia confidently announced in a speech at Hastings College of Law recently that the Fourteenth Amendment does not ban sex discrimination because '[n]obody thought it was directed against sex discrimination.' Justice Ruth Bader Ginsburg once wrote that '[b]oldly dynamic interpretation, departing radically from the original understanding, is required to tie to the fourteenth amendment's equal protection clause a command that government treat men and women as individuals equal in rights, responsibilities, and opportunities.' The received wisdom is that the only kind of discrimination that the Fourteenth Amendment was meant to outlaw originally was racial discrimination and perhaps discrimination based on ethnic origin. Both Justice Ginsburg's majority opinion in United States v. Virginia (VMI) and Justice Scalia's strongly worded dissent in that case assume that, as a matter of original meaning, the Fourteenth Amendment does not ban sex discrimination.")

[19] *Id*. at 30.

interprets as a "constitutional amendment mandating equality."[20] Comments are included from Senator Howard speaking of the 14th Amendment as "do[ing] away with… injustice," and Senator Elliot likewise proclaimed he supported the Amendment because "the doctrine it declares is right."[21] Such comments sound of justice, injustice, equality, and governmental perfectionism. These are philosophical proclamations that one would expect from a moral reader, but they are seemingly used to bolster an originalist argument here. It seems to me that such an originalist argument is a tacit approval of moral readings, and by mere temporal frame the moral readings can be brought under the originalist tent. And it is inescapable, as evidenced by Professor Calabresi's arguments for a broadly interpreted 14th Amendment, that philosophical judgments of equality and justice produce the more defensible interpretation of the 14th Amendment's breadth. Reaching this conclusion may implicate the irrelevance of originalism as conventionally understood. News articles and congressional commentary only gets the originalist to the point that *some people at the time of ratification were considering such and such meaning as the true meaning*. That is no place to ground a constitutional decision, and that is also the limit of originalist authority.

When I say "the limit of originalist authority" I must confess that I am really arguing a larger and more fundamental criticism only touched on above: originalism cannot fully produce what it claims to produce. It is a tenet of

[20] *Id*.
[21] *Id*. at 34.

originalism that as a constitutional theory it grounds meaning in positivist historical fact.[22] But remember that there is arguably a stronger originalist case that the 14th Amendment's reach was originally meant or understood as limited to prohibiting explicit racial discrimination.[23] And such an interpretation is enshrined in the *Slaughter-House Cases*, where the Supreme Court, in interpreting the Equal Protection Clause, noted, "[i]n the light of the history of these amendments… The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause."[24] Most damningly the Court wrote, "[w]e doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[25] Keeping in mind that originalists wish to look at how "lawyers and jurists" originally understood constitutional meaning,[26] and assuming (correctly I hope) that the Supreme Court qualifies as such lawyers and jurists, it seems that statements of this sort a mere four years after the 14th Amendment's ratification would be a quite powerful source of historical meaning. Yet, as thoroughly

---

[22] Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism From Old: A Jurispurudential Take*, 82 FORDHAM L. REV. 545, 560 (2013) ("Many or most originalists… have relied… precisely on the fundamental legal view that the constitutional law is determined by, or is entirely a function of, certain unchanging historical facts.")
[23] *See supra* note 17 and accompanying text.
[24] 83 U.S. 36, 81 (1872).
[25] *Id*.
[26] Whittington, *supra* note 4 at 380.

documented by Professor Calabresi, there are several pieces of evidence pointing to a broader original public meaning.

My overall point is this: the originalist inquiry will at best churn up a majoritarian belief. That is, the limit of the originalist process is deducing a majority viewpoint as to a particular constitutional provision's original meaning over competing minority viewpoints. This limitation in originalist theory is mainly due to broad constitutional language and that the phrase "original public *meaning*" is often conflated with "original public *understanding*."[27] There is the cynical position that originalism is merely an exercise in historical cherry picking,[28] where facts can be gathered and regurgitated in a seemingly convincing manner to support a presupposed political ideal. Or less cynically, originalists seek to make good faith attempts to discover common understanding, whether it be Framers' intent or public meaning. But barring the seemingly impossible instance of an incontrovertibly determinative historical record as to the proper application of a constitutional provision, any historical discord reduces

[27] Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 725 (1988) ("[The] relevant inquiry must focus on the public understanding of the language when the Constitution was developed.")

[28] *See* Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008) available at: https://newrepublic.com/article/62124/defense-looseness (Describing the "richly deserved" derision of "law office history": "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 their authors' own law-office historiography, it is a simple matter, especially for a skillful rhetorician… to write a plausible historical defense of his position.")

originalism to the documentation of mere beliefs or opinions. This is disingenuous in the sense that originalism claims to derive positivist facts, when its limits are far below such a concept. And originalism is disingenuous in a way that a moral reading is not. A moral reading merely claims to do what it does; make reasoned judgments about the best conceptions of broad constitutional commitments within the confines of our jurisprudential tradition. It is a more defensible system of adjudication to make reasoned moral judgments regarding broad principles, and test the limits through common law adjudication and analogizing, than to pretend there are such things as discoverable, original facts of constitutional meaning that resolve our contemporary questions.

Taking a broad step back for a moment, it may be helpful to note a more basic, metaphysical divide between originalists and moral readers (or perhaps all nonoriginalists). I find that in originalism's most defensible form, the contention is that the Constitution at its basic level is a document, and in discerning any document's meaning one must inquire into what the words on that document meant when they were written.[29] Thus, in the search for constitutional *meaning*, certainly ambiguities (or broadness I suppose) should not be "resolved by construing the Constitution to be the best constitution that it can be," because "interpretation must precede evaluation."[30] So a theory claiming to *interpret meaning* that primarily seeks perfection instead of original public meaning is not

[29] *See generally*, Lawson, *supra* note 9.
[30] *Id*, at 1834.

really a theory of interpretation at all. It is but a political exercise clouded by "preconceptions about merit."[31]

This argument is persuasive on its own terms, but it depends on a crucial presupposition; that the Constitution, on a fundamental level, *is* a mere document analogous to any statutory law or indeed, as Professor Lawson puts it, a recipe for fried chicken.[32] This is a metaphysical position on the nature of the Constitution, but is it a persuasive one? Is the Constitution a mere document, analogous to a recipe that sets out the ingredients and instructions for our Republic? A document designed to be strictly adhered to so as to prevent making the wrong dish or an undesirable one?[33] Or perhaps the Constitution *is* an intentionally broadly worded charter; a framework for constitutional self-government to be built out over time on the basis of experience and moral progress about the best understanding of our constitutional commitments, and yet remain a steadfast symbol of this Nation's founding. Perhaps, as Justice Brennan once put it, "the Constitution embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being."[34] I align with Justice Brennan. Such a position on the fundamental nature of the Constitution is

---

[31] *Id*.
[32] *Id*. (As Professor Lawson in his prose of unmatched entertainment (and I mean that as a compliment) writes, "[i]nterpreting the Constitution is… no different in principle than interpreting a late-eighteenth-century recipe for fried chicken.")
[33] Apologies for keeping with the food references.
[34] William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, presentation at Georgetown University (October 12, 1985), later published in 27 S. TEX. L. J. 433 (1986).

most in keeping with the text, historical jurisprudential practice, and is pragmatically and normatively desirable in a pluralistic democracy. "The Declaration of Independence, the Constitution and the Bill of Rights solemnly committed the United States to be a country where the dignity and rights of all persons were equal before all authority… Like every text worth reading, it is not crystalline."[35]

II. New 'Inclusive' Originalism

The appeal of this constitutional conception is not lost on some originalists, which most likely accounts for the recent push toward a "living originalism"[36] or more "inclusive originalism."[37] Professor Jack Balkin, in his book *Living Originalism*, advocates for a textual understanding of the Constitution that is not tied down to concrete historical rules and expectations and recognizes abstract principles.[38] According to Professor Balkin, the Constitution contains "rules," "standards," and "principles."[39] And if the text states a general principle, we must apply the principle.[40] Similarly, Professor William Baude contends that an inclusive form of originalism is currently our law and is reflected in numerous

[35] *Id*.
[36] Jack M. Balkin, LIVING ORIGINALISM (Harvard Univ. Press 2011).
[37] William Baude, *Is Originalism Our Law?*, 115, COLUM. L. REV. 2349 (2015).
[38] Balkin, *supra* note 36 at 23-34.
[39] *Id*. at 6.
[40] *Id*.

precedents previously thought to be antithetical to originalism.[41] He argues that this form of new originalism allows "for some evolving construction of broad or vague language,"[42] because words can have "fixed" yet "abstract" meaning that can be applied to certain historical transformations.[43] And Professor Keith Wittington argues that the constitutional text may require faithful application of certain embodied principles.[44] These are remarkable concessions to moral readers' criticisms of conventional forms of originalism. And I fear that these arguments unconsciously (and irreparably) drift into the realm of moral reading.

Consider part of the argument Professor Calabresi makes in support of his originalist account of why *Loving v. Virginia*[45] was rightly decided. He argues that the Framers of the 14th Amendment designed it to be open to interpretation, intentionally employing broad language when speaking of liberty and equality due in large part to Supreme Court interpretive methods at the time.[46] The contention is, since the Framers knew *Marbury v. Madison* was established law they were aware that the Court could apply the 14th Amendment in ways contrary to

---

[41] Baude, *supra* note 37 at 2352-53.
[42] *Id*. at 2352.
[43] *See id.* at 2356-57 ("The standard legal examples are the word 'unreasonable' in the Fourth Amendment or the words 'cruel and unusual' in the Eighth. Even more obvious examples might be the reference to 'property' in the Fifth Amendment, which can extend to new forms of property that did not exist in 1791 (cars, not just carriages), or to 'armies' in Article I, which can include armies that have modern weaponry and vehicles (airplanes, not just muskets).").
[44] Whittington, *supra* note 4 at 386.
[45] 388 U.S. 1 (1967).
[46] Calabresi and Rickert, *supra* note 15 at 48-49.

expectation, like in *McCulloch v. Maryland*.[47] The Framers also knew, the argument goes, that the Court would essentially ignore legislative history in applying the amendment.[48] Thus, as reflected in the broad language, the Framers actually *invited* applications of the 14th Amendment that seem to go against the Framers' intent as a matter of original meaning.[49] This argument comes to a rather ironic result. It claims that as a matter of original meaning and intent the 14th Amendment sanctioned nonoriginalist interpretation, ensuring broader social protections than the Framers and the public originally understood or could possibly understand. In other words, in this instance, originalism specifically enables nonoriginalism. Perhaps to the chagrin of Professor Calabresi, this sort of originalist understanding entails a moral reading, as do all forms of inclusive originalism.

Further consider Professor Baude's initial characterization of inclusive originalism. He points to remarks made by Justices Kagan and Alito, arguing that inclusive originalism "is what Justice Kagan meant when she said that 'sometimes [the Framers] laid down very specific rules, sometimes they laid down broad principles. Either way, we apply what they say, what they meant to

[47] *Id.* at 48.
[48] *Id.* at 49.
[49] *Id*.

do. And so, in that sense, we are all originalists.'"[50] Is Justice Kagan really making a point about originalism here? And a further point that all jurists are really originalists? It seems the point is more about broad, indeterminate principles. And Justice Kagan is no originalist in any ordinary sense of the term. Professor Baude points to Justice Alito describing himself as a "practical originalist," where when applying a "broadly worded" provision, "all you have is the principle and you have to use your judgment to apply it."[51] The notion that there are broadly worded provisions requiring reasoned judgment is exactly the point moral readers make! The major thesis of (at least old) originalism is that there are ascertainable facts about original meaning. No need for, and indeed thoughtful avoidance of, reasoned judgment. If you must utilize judgment to apply a broadly worded principle, it seems you have no concrete original meaning of that principle. So functionally what is left? Can it really be called originalism? Or is the concession that broadly worded constitutional principles require reasoned judgment too great? Far from asking if we are all originalists now,[52] the proper question may be if we are all moral readers now.[53]

---

[50] Baude, *supra* note 37 at 2352; Clip: Kagan Confirmation Hearing, Day 2, Part 1 (C-SPAN television broadcast June 29, 2010), http://www.c-span.org/video/?c2924010/clip-kagan-confirmation-hearing -day-2-part-1 (on file with the Columbia Law Review).
[51] *Id*. at 2352-53; Matthew Walther, Sam Alito: A Civil Man, Am. Spectator (May 2014), http://spectator.org/articles/58731/sam-alito-civil-man [http://perma.cc/79PM-JETQ].
[52] Robert W. Bennet & Lawrence B. Solum, CONSTITUTIONAL ORIGINALISM: A DEBATE 1 (Cornell Univ. Press 2011).
[53] James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785, 1797 (2013).

To hone in on this point let us analyze how Professor Baude justifies certain canonical cases under his inclusive originalism. It is widely (and persuasively if not determinatively) argued that *Brown v. Board of Education*[54] is flatly contradictory to conventional originalist practice.[55] An originalist might look to congressional debates for any discussion of the issue, but "[v]irtually nothing in the congressional debates suggests that the Fourteenth Amendment was intended to prohibit school segregation."[56] Then an originalist might look to the ratifiers for whether such a meaning was intended, but "twenty-four of the thirty-seven states then in the union either required or permitted racially segregated schools."[57] It has been confidently stated that if "we [turned] back the clock" to ask the Framers of the 14th Amendment "whether the amendment outlawed segregation in public schools, they would answer 'No.'"[58] That *Brown* is incompatible with (at least old) originalism has largely been accepted as an unfortunate and "inescapable fact."[59]

But Professor Baude recognizes that "any particular [constitutional] theory [that] does not produce the conclusion that Brown was correctly decided… is

---

[54] 347 U.S. 483 (1954).
[55] Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 951-52 (1995) ("In the fractured discipline of constitutional law, there is something very close to a consensus that Brown was inconsistent with the original understanding of the Fourteenth Amendment, except perhaps at an extremely high and indeterminate level of abstraction.")
[56] *Id*. at 951.
[57] *Id*.
[58] Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 800 (1983).
[59] Bork, *supra* note 7 at 75 -76.

seriously discredited."[60] He attempts to re-cast *Brown* as a decision that, rather than defying originalism, actually comports with it. Professor Baude puts great weight in Chief Justice Warren's conclusion that the search for original meaning in the 14th Amendment as applied to segregation in schools proved "inconclusive."[61] Far from calling this characterization of the original evidence disingenuous, cursory, or less than candid,[62] and despite the evidence put forth in my previous paragraph, Professor Baude welcomes this characterization. The inconclusiveness is cast as an insight into the *true* original meaning of the 14th Amendment as a highly abstract and potentially evolving principle.[63] Professor Baude also maintains that *Lawrence v. Texas*[64] can be brought within his inclusive originalism because, as he characterizes it, the Court actively avoided a conflict with originalism, opting to settle for ambiguity in the originalist evidence much like in *Brown*.[65] This is in spite of *Bowers*, where the Court declined to extend a right of intimate associate to homosexuals specifically because such a right is inconsistent with original (and at the time contemporary) meaning and understanding.[66] Is it a persuasive characterization that both *Brown* and

---

[60] McConnell, *supra* note 55 at 952; Baude, *supra* note 37 at 2380.
[61] Baude, *supra* note 37 at 2381; *Brown*, *surpa* note 49 at 489.
[62] McConnell, *supra* note 55 at 951.
[63] Baude, *supra* note 37 at 2381.
[64] 539 U.S. 558 (2003).
[65] Baude, *supra* note 37 at 2381-82.
[66] *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986) ("Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.

Lawrence thoroughly evaluated original meaning and found the evidence inconclusive?[67] Or is the more defensible position that the decisions are profoundly anti-originalist and border on explicitly declaring themselves as such? Conceding Professor Baude's point as to inconclusiveness, these decisions at least proclaim that originalism does not resolve these important questions about our constitutional commitments.

Where Professor Baude really stretches the seams of inclusive originalism is his characterization of the recent decision in *Obergefell v. Hodges*[68] as an originalist opinion.[69] Consider this excerpt from Justice Kennedy's opinion in *Obergefell*:

> The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[70]

Does this sound of a reliance on original public meaning? Professor Baude says it does. But Justice Kennedy writes of how generations grow to "learn" the

---

(citation omitted). Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious.").

[67] And wouldn't that conclusion itself be heretical from the standpoint of conventional originalists like Judge Bork or Justice Scalia?

[68] 135 S. Ct. 2584 (2015).

[69] Baude, *supra* note 37 at 2382.

[70] *Obergefell*, *supra* note 68 at 2598.

meaning of broad constitutional promises, and he speaks of "new insights" about the fundamental commitment to liberty. *This* is an espousal of the original meaning of Equal Protection and the substantive liberty protected by the Due Process Clause? To the contrary, Justice Kennedy is engaged in moral reading. Rather than look to history for the original scope of the word "liberty" in the Due Process Clause, or whether the Equal Protection Clause extends to homosexuals as originally understood, Justice Kennedy invokes history to demonstrate "the transcendent importance of marriage."[71] He notes that the institution of marriage has "evolved over time," and that this is consistent with "a Nation where new dimensions of freedom become apparent to new generations."[72] Far from an originalist view of history, Justice Kennedy appeals to history only to inform his moral reading. It is a reading of learning from experience, recognizing moral progress and an evolving contemporary consensus. Justice Kennedy is expressing the notion that the constitutional principles enshrined in the Bill of Rights and Civil War Amendments are not tied down to the historical record of an age long gone, and must be informed by an ever-growing and developing moral understanding of our constitutional commitments. This is a profoundly anti-originalist sentiment. If Professor Baude's inclusive originalism is inclusive enough to encompass that sentiment and reach a fundamental right to same-sex marriage, he is engaged in moral reading as well. Nothing could be a clearer statement of fidelity to moral reading, and an

[71] *Id*. at 2594.
[72] *Id*. at 2596.

opposition to originalisms, than accepting the notion that constitutional provisions "set forth broad principles rather than specific requirements;"[73] principles that can be molded as our Nation discovers new insights as to the best understanding of liberty and equality.[74]

The temptation for originalists like Professors Calabresi, Baude, Whittingtin, and Balkin to bring these decisions within some form of originalism at all costs is clear: decisions like *Brown*, *Loving*, and *Lawrence* represent fundamental landmarks in American moral evolution that seem all but obvious to contemporary eyes. Old originalism received immense criticism for its incompatibility with these fundamental decisions.[75] But that is the great shame of originalism. As a strain of constitutional theory it cannot be squared with the greatest jurisprudential achievements in this Nation's history. And originalism, in any form, certainly did not produce the now celebrated results that new originalists go to great lengths to sweep under the title of inclusive originalism. So, rather than congratulate the Court for its compatibility with the original meaning of the Bill of Rights and 14th Amendment as embodying abstract moral principles, I would like to welcome new originalists into the moral readers camp.

---

[73] *Id.*
[74] Baude, *supra* note 37 at 2382.
[75] *See* James E. Fleming, FIDELITY TO OUR IMPERFECT CONSTITUTION 18 (Oxford Univ. Press 2015) ("Originalists in the generation after Bork and Scalia are weary of the baggage of the prior originalist criticisms of these landmark cases.")

III. New Originalism Requires Moral Reading

Conceding for the moment the originalist case for interpreting the Bill of Rights and 14th Amendment broadly as a manifestation of fundamental principles, my question is, where do you go from there? An inquiry into original public meaning reveals broad aspirational commitments that must be expounded over time, so be it, but how does one go about doing that? It seems that new inclusive originalism *necessitates* moral readings. If it is accepted by originalists that our fundamental rights and liberties are not tethered to historical practices and require reasoned judgment about theoretical principles, the only methodology remaining to make such judgments is a philosophical one. It requires reasoned judgment on the best understanding of our practice and precedents, furthering the moral development of our conceptions of liberty, equality, reasonableness, cruel and unusual, due process, and the like. New originalists wish to align themselves with the great nonoriginalist cases in history, and also wish to avoid morally indefensible results in the future. However, doing so drifts irreconcilably into the domain of moral reading. But that's a good thing!

If originalists are now open to abstract reasoning they can begin to rectify the short-comings of the theory such as claiming a vast historical knowledge of original public meaning or understanding of a constitutional principle as applied to a contemporary issue. They can also remedy the pick-and-choosiness entailed

in originalism. For example, I would make a hefty bet that there are very few originalists (if any at all) who defend an original understanding of the 1st Amendment. It is certainly telling that Justice Scalia, a self-proclaimed narrow originalist, does not author originalist opinions in the 1st Amendment realm.[76] Perhaps Professor Lawson would argue that as a matter of *constitutional interpretation*, original meaning is undoubtedly correct. But I daresay he would reject the notion that the 1st Amendment's original meaning is the optimal *social policy* and would admit that it is certainly a *good thing* the we have long abandoned adherence to it.

IV. The Anti-Originalist Lesson of the 1st Amendment

History reveals that speech protections we take for granted today undoubtedly fell beyond the boundary of the 1st Amendment at the time of the framing and ratification. Famed originalist Robert Bork pointed out that "[t]he framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject."[77] The Framers and state ratifiers saw the 1st Amendment as no barrier to laws punishing "dangerous" speech and sedition.[78] Thomas Jefferson is said to have held the view that the 1st

[76] *See e.g. R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *see also Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011).
[77] Robert H. Bork, *Neutral Principles And Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971).
[78] *Id*.

Amendment only applies to Congress (as it apparently does textually) leaving the States free to suppress whatever speech deemed ripe for suppression.[79] Judge Bork comes to the conclusion that the meaning of the 1st Amendment, as a hastily drafted provision, requires judicial construction[80] with the assistance of historical tools.[81] But one could plausibly argue that the freedom of speech enshrined in the 1st Amendment is limited to Blackstonian prior restraint, or political speech (as Judge Bork contends), and leaves no doubt as to the constitutionality of laws against seditious libel, "bad tendencies," flag burning, public forum censorship, and so on. What can be said without a doubt is that current 1st Amendment jurisprudence is in no way originalist in a conventional sense, and for good reason. That is, as this Nation built out our practice of self-government, we have come to appreciate the significance of, and necessity for, broad protection for freedom of expression.

Throughout the 20th Century, the Court struggled with its 1st Amendment jurisprudence, searching for the outer boundaries of constitutionally protected speech largely to no avail. During and after World War I the federal courts faced a wave of litigation under the Espionage Act of 1917, which provided: "Whoever,

---

[79] *Id*.
[80] It is a little amusing that Judge Bork concedes this point when his originalism is premised on the notion that Framers' intentions produce cognizable facts of meaning. He then goes on to construct what would be considered today as a horrifically underprotective 1st Amendment doctrine – one protecting political speech only – that has no recognizable footing in either Framers' intent or original public meaning.
[81] Bork, *supra* note 77 at 22-23.

when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever… shall be punished."[82] In *Schaffer v. U.S.*,[83] nine counts of violating the Espionage Act were brought against five individuals for offenses such as publishing an article entitled "Yankee Bluff," claiming that the American government was lying about the level of military support it could provide for England.[84] The Court affirmed the convictions under what is known as the "bad tendency" test, arguing that such speech has the tendency to make its readers unsupportive of the war effort. The Court feared that readers would take the statements as truth "and thereby chill and check the ardency of patriotism and make it despair of success."[85]

As the Court and the Nation came to realize that bad tendency was underprotective of speech, it was replaced by the "clear and present danger" test. Though, what constituted a clear and present danger and thus justified speech suppression was construed broadly. In some cases the test was construed as

---

[82] The statute has been revised over the years but can be found now at 18 U.S.C. § 792.
[83] 251 U.S. 466 (1920).
[84] *Id*. at 478 (According to the Court the article reads: "The army of ten million and the hundred thousand airships, which were to annihilate Germany, have proved to be American boasts, which will not stand washing. It was worthy of note how much the Yankees can yell their throats out without spraining their mouths. This is in accord with their spiritual quality. They enjoy a capacity for lying, which is able to conceal to a remarkable degree a lack of thought behind a superfluity of words.").
[85] *Id*.

functionally equivalent to bad tendency.[86] Clear and present danger was construed broadly enough to support imprisonment as a punishment for being a member of the Communist Labor Party.[87] This doctrine persisted[88] until *Brandenburg v. Ohio*[89] where the Court considerably sharpened its 1st Amendment doctrine, holding that to be proscribable, speech must expressly advocate for *imminent* unlawful action *and* be likely to produce such action.[90] Since, the 1st Amendment has been expanded to a near absolutist level (limited only by the *Chaplinsky* dicta)[91] broadly protecting symbolic conduct,[92] anti-government speech,[93] and protecting against content or viewpoint-based

[86] *See Gitlow v. New York*, 268 U.S. 652, 669-71 (1925).
[87] *Whitney v. California*, 274 U.S. 357 (1927).
[88] *See Dennis v. U.S.*, 341 U.S. 494 (1951) (holding that the clear and present danger test is satisfied when Communist Party members declare themselves as such and espouse anti-American sentiments).
[89] 395 U.S. 444 (1969).
[90] *Id*. at 447.
[91] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.")
[92] *See Texas v. Johnson*, 491 U.S. 397 (1989).
[93] *See R.A.V.*, *supra* note 76 at 388 ("To illustrate: A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience—i.e.,* that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages. (citation omitted). And the Federal Government can criminalize only those threats of violence that are directed against the President… since the reasons why threats of violence are outside the First Amendment… have special force when applied to the person of the President. But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities.")

censorship.[94] The modern Court even determined that the 1st Amendment is a shield against jury imposed tort damages.[95] It is no wonder, then, that the 1st Amendment is largely considered today as protecting the freedom of consciousness, part of a robust commitment to the free exchange of ideas.

You are probably reading this thinking, "good! I'm glad I'm not at risk of being jailed for utterances the government happens to declare are detrimental to society." What the foregoing paragraphs reflect is the growing understanding that the 1st Amendment, as originally conceived, was woefully underprotective. "Over time the Court came increasingly to understand that although each generation's effort to suppress its idea of 'dangerous speech'… seemed warranted at the time, each seemed with the benefit of hindsight an exaggerated and often pretextual response to a particular political or social problem."[96] As American society progressed and 1st Amendment doctrine developed, the Court came to understand the proper "meaning and breadth"[97] of speech protection in a glowingly unoriginalist manner. Retrospectively, it became plain to the Court that bad tendency was *wrong* (with all of that word's ethical content), clear and present danger without bite was *wrong*, and it is exceedingly difficult to set the

[94] *See Brown v. Entertainment Merchants Ass'n*, *supra* note 76.
[95] *See Snyder v. Phelps*, 562 U.S. 443 (2011).
[96] Lee C. Bollinger & Geoffrey R. Stone, ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 4 (U. of Chi. Press 2001) (Remarks of Professor Stone) ("The Court came to understand that there is a natural tendency for even well-meaning citizens, legislators, and judges to want to suppress ideas they find offensive or misguided, to inflate the potential dangers of such expression, and to under-value the costs of its suppression.")
[97] *Id*.

outer boundaries of protected speech. At first blush it seems rather arbitrary that the Court has shackled itself to Justice Murphy's *Chaplinsky* dicta, but it is my opinion (I'm sure I'm not the first to think this) that this move is to secure a near-absolute speech protection, permitting suppression for only the obscene, the libelous, and fighting words.

Is this construction consistent with Framers' intent or original public meaning and understanding? Certainly not. Is the development nonetheless *right* as a reflection of this Nation's development as to the best understanding of our constitutional commitment to free speech? Undoubtedly. Decades of moral learning on the meaning of justness and liberty clarified a fuller understanding of our commitment to free speech. And originalists do not fight the results of this moral reasoning; they embrace it as normatively valuable.[98] Why is constitutional development driven by moral reasoning on the best conception of liberty and justice accepted as *good*, producing *right* results, in 1st Amendment jurisprudence, but is rejected as inscribing nonoriginalist personal philosophies onto provisions like the Equal Protection or Due Process clauses? Such a position is rather inconsistent.

[98] *See R.A.V.*, *supra* note 76 (opinion authored by Justice Scalia).

V. Is Originalism Really The Lesser Evil?

As I mentioned previously, old originalism purported to be true axiomatically. Interpreting a written document *just is* an inquiry into original meaning. This argument proved unpersuasive and originalists saw the need to present normative arguments for why originalism *should be* the desired method of constitutional interpretation. In attempting to do just this, Justice Scalia described originalisms as the lesser of two evils, the greater evil being of course, nonoriginalisms or in my specific case moral readings.[99] Is this so? Two prominent arguments that I wish to focus on are that originalisms respect popular sovereignty and prevent subjective, politicized adjudication. Both arguments are said to be evidence that originalisms are more faithful to the Constitution than nonoriginalisms.

The argument that originalism respects popular sovereignty goes something like this: The Constitution derives its legal force from the ratifying sovereign, what the people ratified was what they understood they were ratifying at the time (i.e. original public meaning or understanding), thus originalism pursues the meaning of what We the People ratified. This is said to be preferable over a moral reading, which is perceived as revising what We the People originally ratified, showing less respect for the rule of law and of sovereignty. This

[99] Scalia, *supra* note 14.

line of argument has at least two major flaws. First, it assumes an authoritarianism of the Framers or ratifiers (depending on the originalist theory).[100] The argument presumes that the Framers or ratifiers arrogantly inscribed the concrete historical rules of their time onto a document that is exceedingly difficult to alter, insisting that future generations adhere to their understanding of constitutional commitments.[101] Second, the sovereignty argument ignores the text of what We the People stamped our name on; the preamble. There is perhaps no better indication of what We the People originally understood about this Nation's constitutional commitments than the words enshrined in the preamble to the Constitution. We the People sought "a more perfect Union" based on principles of "Justice," "Tranquility," "general Welfare," and "the Blessings of Liberty." It would be ironic indeed if We the People who ratified those words meant to use the rest of the document as a ball and chain, temporally limiting the pursuit of those goals.

As for the contention that originalism prevents subjective adjudication to a greater extent than moral reading, this claim is simply false. This argument is the cornerstone of originalisms, premised on the notion that any legitimate court

[100] Fleming, *supra* note 53 at 1789.
[101] James E. Fleming, *Fidelity To Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1354 (1997) ("[I]t is ironic if not absurd that originalists would impose the 'dead hand' of the past upon us in the name of popular sovereignty.").

"must be controlled by principles exterior to the will of the justices."[102] Moral reading on its face sounds rather philosophic, but *what* philosophy is meant to divine the true nature of constitutional values and their aspirational goals? "Are the 'fundamental values' that replace original meaning to be derived from the philosophy of Plato, or of Locke, or Mills, or Rawls, or perhaps from the latest Gallup poll?"[103] Moral reading arguably exacerbates the judicial temptation to claim that subjective political ideals are "fundamental to our society."[104] Thus, it is argued that originalism will lead to "more moderate" results grounded in history rather than "extreme result[s]" grounded in moral philosophy.[105] This line of argument relies on ignoring two fundamental characteristics of originalism. The first is the very equal temptation for originalists to construe the historical record to achieve a predetermined political result. In criticizing the originalist (and politically conservative) majority opinion in *District of Columbia v. Heller*,[106] Judge Posner calls the scope of the historical references "breathtaking, but it is not evidence of disinterested historical inquiry. It is evidence of the ability of well-staffed courts to produce snow jobs."[107] The second trait of originalism Justice Scalia ignores is

---

[102] Bork, *supra* note 77 at 6; Scalia, *supra* note 14 at 863 ("the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law— is that the judges will mistake their own predilections for the law.")
[103] Scalia, *supra* note 14 at 855.
[104] *Id*. ("It is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are "fundamental to our society.").
[105] *Id*.
[106] 554 U.S. 570 (2008) (Finding a personal right to bear arms in the 2nd Amendment.)
[107] *See* Posner, *supra* note 28 (Judge Posner writes: "This is strikingly shown by the lengthy discussion of the history of interpretation of the Second Amendment. Scalia quotes a number of statements to the effect that the amendment guarantees a personal

that a commitment to the distant past is a profoundly anti-progressive value choice, i.e. a conservative political stance itself. As Justice Brennan aptly pointed out, while originalism claims a detachment from politicization, "the political underpinnings of such a [theory] should not escape notice."[108] In resolving textual ambiguities as applied to contemporary litigation, to uphold constitutional claims only if they were either "within the specific contemplation of the Framers" or can be persuasively justified by majoritarian beliefs of original public meaning "is a choice no less political than any other; it expresses antipathy to claims of the minority to rights against the majority."[109]

Let us flesh out these ideas more fully. The notion that originalisms can claim more normative value than nonoriginalisms in part due to a foundation in the historical record, as opposed to mere philosophizing, tacitly recognizes and condones constitutional imperfection. It imagines a judiciary beholden to objective fact that must make politically unpopular decisions at best and ethically damaging decisions at worst. The charge against nonoriginalists is that theories like moral readings entail a perfect Constitution that, not so coincidentally,

---

right to possess guns--but they are statements by lawyers or other advocates, including legislators and judges and law professors all tendentiously dabbling in history, rather than by disinterested historians: more law-office history, in other words.").

[108] Brennan, *supra* note 34.

[109] *Id*. ("Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance.").

corresponds with a liberal political philosophy.[110] Originalism presumes no such perfect conservative Constitution, it is argued, thus originalist jurisprudence is more defensible. When an objective historical inquiry finds that the 14th Amendment does not extend to women, or finds that segregation and antimiscegenation were not considered unconstitutional at the time of ratification, originalism would have us accept these results as merely the price to pay for grounded, less-politicized adjudication. Even if jurists everywhere find these results detestable we are still bound to originalism as the supposed "lesser of two evils?" At least we are not aiming at constitutional perfection, right?

This aspect of originalism, indeed in constitutional theory generally, can be described as what Christopher Eisgruber dubs the "no pain, no claim" test.[111] The idea is that a theory of constitutional interpretation cannot be guided by what certain jurists decide is a good outcome.[112] Political philosophies must give way to interpretation at some point; otherwise so-called interpretation will only yield predetermined political results, which is not really interpretation at all.[113] Constitutional adjudication therefore *must be* imperfect because the Constitution

---

[110] *See* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U.L.REV. 353, 358 (1981) (Criticizing those who argue that "properly construed, the constitution guarantees against the political order most equality and autonomy values which the commentators think a twentieth century Western liberal democratic government ought to guarantee to its citizens.")

[111] Christopher L. Eisgruber, *Justice and the Test: Rethinking the Constitutional Relation between Principle and Prudence*, 43 DUKE L.J. 1, 7 (1993).

[112] *Id*., *see also* James E. Fleming, SECURING CONSTITUTIONAL DEMOCRACY 210 (U. Chi. Press 2006).

[113] *Id*.

itself so clearly is. Along these lines it is argued that moral readers are never compelled to break from political ideology because their theory of interpretation is not bound by transcendent principle.[114] That is, because moral readers would always adjudicate in pursuit of a perfect constitution, every decision will have a happy outcome and they suffer no ideological pain. No pain, no claim as a viable constitutional theory. This is a strong criticism with the goal of preventing subjective adjudication. But I am not convinced it changes the analysis on whether originalism is the lesser of two evils. First, I would challenge those who accept the "no pain, no claim" test to put forth a case in which a conservative originalist suffered any ideological hardship because the historical record disagreed with that judge's conservatism. Second, I find no compelling reason to exult in constitutional imperfection.[115] And third, American law generally resolves constitutional injustices through reinterpretation, which jurists then regard as the proper interpretation all along.

My first critique is simple and speaks for itself. I am not aware of any case in which an originalist judge decided a case in line with a liberal political ideology because he or she was compelled by an originalist inquiry to do so. Shackling constitutional theory to a bygone era is a politically conservative move. It all but ensures that a more progressive agenda cannot flourish. Originalism is also

---

[114] *Id*.

[115] *Id*. at 211 ("We should embrace a Constitution-perfecting theory of interpretation, which proudly aims at happy endings rather than reveling in the imperfections that the Constitution might be interpreted to embody.")

apparently ideologically flimsy enough to allow jurists to break from it when it suits more politically conservative ends. As discussed above, originalists abandon their theory in the 1st Amendment context in favor of a near-absolutist approach, rather than a more restrictive original approach.[116] This is consistent with the conservative trepidation that liberal legislators may impose political correctness through laws against hate speech and the like. Perhaps ironically, Justice Scalia's nonoriginalist 1st Amendment jurisprudence supports my second criticism of "no pain, no claim;" that constitutional imperfection is preferable to perfection. Imperfection breeds injustice. And when injustice is recognized we should not simply shrug our shoulders claiming it is the cost of a properly imperfect Constitution.[117] Justice Scalia is unwilling to allow originalism to hinder the free exchange of ideas, and he is right to do so. A more perfect Constitution requires a more robust freedom of speech than was originally imagined. Our jurisprudence developed in accord with this understanding.

This leads into my third point that constitutional injustices are not typically remedied by amendment or otherwise, but by reevaluation. When jurists and commentators decry particularly harmful decisions such as *Dred Scott*, *Plessy*, *Korematsu*, or *Bowers* that caused great harm to an unknowable number of citizens, it is not typically argued that those cases were rightly decided and our

[116] *See supra* notes 97-98 and accompanying text.
[117] Fleming, *supra* note 112 at 227.

Constitution sanctions this injustice.[118] Moreover, such decisions are not celebrated as evidence of "pain" that somehow supports the theory underlying the decisions' "claim" to legitimacy and appropriateness. Rather, it is most commonly argued that such cases were wrongly decided, and if only the Court had properly interpreted the Constitution the grave injustices that followed could have been avoided.[119] "[I]t would be a shame if constitutional scholars were to say that such interpretive tragedies could not have been avoided, or even to revel in the evil or injustice that the Constitution might be interpreted to allow, in order to avoid being charged with believing that we have a perfect Constitution."[120] Constitutional adjudication bends toward perfection. This is true as an historical matter and should be true as an interpretive matter as well.

VI. Conclusion

If the battle between originalisms and nonoriginalisms is essentially over which theory is more faithful to the Constitution, it is clear that originalism misunderstands the concept of fidelity. Originalisms assume that the claim of fidelity to the Constitution is rooted in a (perceived) greater theoretical defensibility. I contend that the claim to fidelity lies in ethically defensible adjudication. Where my position differs from the originalist assumption is that we

[118] *Id*. at 225.
[119] *Id*.
[120] *Id*.

have different answers as to what (or whom) we owe fidelity. Originalism presumes that we owe fidelity to the Constitution as a document and as originally understood, while I find that fidelity lies with the People. Constitutional interpretation should foster the People's fidelity *to* the Constitution, rather than to the Constitution as a document while disregarding the People's fidelity or lack thereof. A Constitution that sanctions, even requires, injustice deserves no fidelity. The Constitution earns the People's fidelity and the throne of highest law through its moral defensibility. A theory of interpretation that produces ethically indefensible results cannot be said to be more faithful to the document it is interpreting, for that professed faithfulness is precisely what is eroding the reasons to be faithful in the first place. New inclusive originalism tacitly understands this. Its acceptance of reasoned judgment regarding broad constitutional commitments aims to avoid ethical embarrassment through embracing the moral reading I advocate.

The moral reading I put forth is not philosophy in the abstract. Constitutional moral readings are bound by our deeply rooted jurisprudential practice, particularly reasoned judgment as to the best conception of *this Nation's* constitutional commitments, rather than boundless philosophical opining. It is a theory that encourages thoughtful deliberation as to our constitutional aspirations, and evaluates our history's fidelity (or lack thereof) to those aspirations. As Justice Brennan once put it, the Constitution "committed the

United States to be a country where the dignity and rights of all persons were equal before all authority," but "[i]n all candor we must concede that part of this egalitarianism in America has been more pretension than realized fact."[121] Moral reading encourages us to be critical of historically under-realized commitments to our enshrined principles in the hope that our constitutional culture develops, consistent with our jurisprudential practice, on the basis of experience and moral progress about the best understanding of our constitutional aspirations. Such an approach is not only substantially grounded in articulated external principles, it is most consistent with our jurisprudential tradition and has produced the greatest constitutional triumphs in our history.

In conclusion, it is not so clear that moral reading is a greater interpretive evil than originalism on a theoretical or political level. But it is certainly clear that originalisms as conventionally understood work a greater evil on fundamental notions of justice as evidenced by the general agreement that originalism cannot account for the most significant jurisprudential achievements in American history. Such is the impetus behind the new originalist movement, straining to bring those cases within its boundaries while recognizing a commitment to abstract (and even evolving) principles. The inclusive originalist recognition of the interpretative and normative value found in moral reading stands for the clear principle that "[i]t is the very purpose of a Constitution - and particularly of the Bill of Rights - to

[121] Brennan, *supra* note 34.

declare certain values transcendent."[122] That "[o]ne cannot read the [Constitution] without admitting that it embodies substantive value choices… To remain faithful to the content of the Constitution, therefore, an approach to interpreting the text must account for the existence of these substantive value choices, and must accept the ambiguity inherent in the effort to apply them to modern circumstances."[123] History must not be used to stifle constitutional development, but rather to expound on the ethical erudition of the American people as the best understanding of our constitutional commitments evolves. If moral readers and new originalists now agree on this point, our only difference is a lexical one.

[122] *Id*.
[123] *Id*.

LIST OF ABBREVIATIONS

BU. L. REV.	BOSTON UNIVERSITY LAW REVIEW
COLOM. L. REV.	COLUMBIA LAW REVIEW
DUKE L. J.	DUKE LAW JOURNAL
FORDHAM L. REV.	FORDHAM LAW REVIEW
GEO. L. J.	GEORGETOWN LAW JOURNAL
HARV. L. REV.	HARVARD LAW REVIEW
IND. L. J.	INDIANA LAW JOURNAL
N.Y.U. L. REV.	NEW YORK UNIVERSITY LAW REVIEW
S. CT.	SUPREME COURT REPORTER
TEX. L. J.	TEXAS LAW JOURNAL
TEX. L. REV.	TEXAS LAW REVIEW
U. CIN. L. REV.	UNIVERSITY OF CINCINNATI LAW REVIEW
U.S.	UNITED STATES REPORTS (when citing cases)
VA. L. REV.	VIRGINIA LAW REVIEW

BIBLIOGRAPHY

Balkin, Jack M., LIVING ORIGINALISM (Harvard Univ. Press 2011)

Baude, William, *Is Originalism Our Law?*, 115, COLUM. L. REV. 2349 (2015)

Bennet, Robert W. & Solum, Lawrence B., CONSTITUTIONAL ORIGINALISM: A DEBATE 1 (Cornell Univ. Press 2011)

Berman, Mitchell N. & Toh, Kevin, *On What Distinguishes New Originalism From Old: A Jurispurudential Take*, 82 FORDHAM L. REV. 545 (2013)

Bork, Robert H., *Neutral Principles And Some First Amendment Problems*, 47 IND. L.J. 1 (1971)

Bork, Robert H., THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (Free Press 1990)

Bowers v. Hardwick, 478 U.S. 186 (1986)

Brandenburg v. Ohio, 395 U.S. 444 (1969)

Brennan, William J., *The Constitution of the United States: Contemporary Ratification*, presentation at Georgetown University (October 12, 1985), later published in 27 S. TEX. L. J. 433 (1986)

Brest, Paul, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980)

Brown v. Board of Education, 347 U.S. 483 (1954).

Brown v. Entertainment Merchants Ass'n, 564 U.S. 786 (2011)

Calabresi, Steven G. & Rickert, Julia T., *Originalism And Sex Discrimination*, 90 TEX. L. REV. 1 (2011)

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)

Dennis v. U.S., 341 U.S. 494 (1951)

District of Columbia v. Heller, 554 U.S. 570 (2008)

Eisgruber, Christopher L., *Justice and the Test: Rethinking the Constitutional Relation between Principle and Prudence*, 43 DUKE L.J. 1 (1993)

Fleming, James E., *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785 (2013)

Fleming, James E., *Fidelity To Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335 (1997)

Fleming, James E., FIDELITY TO OUR IMPERFECT CONSTITUTION (Oxford Univ. Press 2015)

Fleming, James E., SECURING CONSTITUTIONAL DEMOCRACY (U. Chi. Press 2006)

Gideon v. Wainwright, 372 U.S. 335 (1966)

Gitlow v. New York, 268 U.S. 652 (1925)

Lawson, Gary, *On Reading Recipes… and Constitutions*, 15 GEO. L.J. 1823 (1997)

Loving v Virginia, 388 U.S. 1 (1967)

McConnell, Michael W., *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995)

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

Monaghan, Henry P., *Our Perfect Constitution*, 56 N.Y.U.L.REV. 353 (1981)

Monaghan, Henry Paul, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988)

Obergefell v. Hodges, 135 S. Ct. 2584 (2015)

Planned Parenthood v. Casey, 505 U.S. 833 (1992)

Posner, Richard A., *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008) available at: https://newrepublic.com/article/62124/defense-looseness

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)

Scalia, Antonin, *Originalism: The Lesser of Two Evils*, 57 U. CIN. L. REV. 849 (1989)

Schaffer v. U.S., 251 U.S. 466 (1920)

Slaughter-House Cases, 83 U.S. 36 (1872)

Snyder v. Phelps, 562 U.S. 443 (2011)

Stone, Geoffrey R. & Bollinger, Lee C., ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA (U. of Chi. Press 2001)

Texas v. Johnson, 491 U.S. 397 (1989)

Tushnet, Mark V., *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

Whitney v. California, 274 U.S. 357 (1927)

Whittington, Keith E.*, Originalism, A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013)