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PRAGMATIC ORIGINALISM?

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There has been no more substantial change in constitutional law in the past twenty-five years than the ascendance of "originalism" as a fundamental way of understanding the Constitution. This quarter century is exactly the amount of time that I have been a lawyer, and the contrast between the presentation of constitutional issues today and the way they were taught when I was a law student is striking. While the extent to which the Supreme Court's jurisprudence is in any true sense originalist can be debated, the sheer weight of originalism in briefs, arguments, and the rhetorical style of constitutional cases cannot be disputed. The scholarly literature is filled with claims about the bona fides of the originalist turn, questioning whether the Framers were themselves originalists[1] or, more provocatively, whether the whole enterprise is "bunk."[2] Even among those inclined to credit the originalist turn, its application remains a source of dispute, as does the relative weight of different aspects of the Constitution in the originalist enterprise.[3] And, if imitation be the highest form of flattery, the sheer intellectual weight of the originalist claim

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[1] *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

[2] *See* Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

[3] Berman presents the debates well, if somewhat contentiously. *See id.* at 9.

has prompted the emergence of the progressive alternative enterprise, a People's Park comes to Philadelphia, if one will.[4]

The gravitational weight of originalism was recently on full display in *District of Columbia v. Heller*, as both the majority and dissent claimed the original meaning of the Second Amendment to be at least persuasive authority in addressing the constitutionality of a D.C. gun control ordinance. In fact, the vast majority of the debate centered on which interpretation was intended by the founding generation and was most faithful to the language as understood in eighteenth century America.[5] *Heller* was instructive because the Second Amendment had not been subject to a significant body of case elaboration, and, perhaps as a result, the entire Court was willing to engage the issues as being primarily determined by some form of original meaning. For instance, in attempting to illuminate the common meaning of "the people" or "to keep and bear arms" in eighteenth century American society, both the majority and dissent brought forward definitions from a variety of contemporary dictionaries,[6] other laws from the time period containing similar language,[7] as well as a whole host of founding-era literature from England and the United States.[8] Similarly, both the majority and the dissent cited the debates surrounding the state ratifying conventions in order to further support their respective interpretations.[9] Completing the triumvirate, both sides—although the majority to a

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[4] *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009) (promoting an interpretive theory of "framework originalism," which allows for more desirable social outcomes); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663 (2009).

[5] *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2816 (2008) ("We conclude that nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment."). In his dissent, Justice Stevens also focused his argument on the original meaning of the Second Amendment. *See id.* at 2847 (Stevens, J., dissenting) ("The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials . . . I could not possibly conclude the Framers made such a choice.").

[6] *Id.* at 2791 (majority opinion); *id.* at 2828 (Stevens, J., dissenting).

[7] *See id.* at 2790 n.6 (majority opinion) (citing contemporary state laws); *id.* at 2794 ("[W]e have been apprised of no source that indicates that it carried that meaning at the time of the founding.").

[8] For the citations to contemporaneous literature, legal and otherwise, supporting the majority's claim, see *id.* at 2792 n.7. For similar use of such sources by the dissent, see *id.* at 2828 n.9 (Stevens, J., dissenting).

[9] *See id.* at 2803–04 (majority opinion); *id.* at 2831–32 (Stevens, J., dissenting).

lesser extent—examined James Madison's original draft of the Second Amendment in light of several proposals he received from the ratifying states.[10] Yet despite a professed shared commitment to the original meaning in its various forms, the two sides reached opposing conclusions on what it meant for the D.C. ordinance. And the originalist cast of the arguments did little to obscure the familiar five-to-four divisions along seemingly predetermined responses.[11]

Nonetheless, *Heller* brought into sharp relief not only the force of originalism in constitutional law at present but the uncertainty in its application, both in doctrine and in the academic commentary. Indeed, so extensive is the academic literature on originalism at this point, that one can only enter the debate reluctantly, particularly since, as debates become ironbound, the positions take on the quality of articles of faith. Further, the discussion often turns on nuanced distinctions between original intent and original public meaning,[12] each claiming to be the superior heuristic for ferreting out the underlying commands of the canonical text.[13]

But I want to take the opportunity of the symposium on "The Unknown Justice Thomas" to comment on the constitutional underpinnings of the originalism propounded by Justice Thomas, particularly in light of the insightful contribution of Professor Gregory

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[10] *Id.* at 2835 (Stevens, J., dissenting). The majority admittedly questioned the persuasiveness of previous drafts in determining legislative intent, but nonetheless engaged in the debate. *See id.* at 2796 (majority opinion).

[11] The divisions and the predictable political alignments are well examined in Reva B. Siegel, Heller *& Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1414 (2009). *See also* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 215 (2008) [hereinafter Siegel, *Dead or Alive*]. Randy E. Barnett distinguished the originalism of Justices Scalia and Stevens in *Heller*, describing the former as being grounded in "original public meaning" and the latter in "original intent." *See* Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13.

[12] "Original public meaning" is the term most commonly employed in the literature describing the meaning that the written words of the text had in eighteenth century society. *E.g.*, Siegel, *Dead or Alive*, *supra* note 11, at 193. Professor Maggs uses the term "objective meaning" to describe essentially the same idea. Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas?*, 4 N.Y.U. J.L. & LIBERTY 494 (2009).

[13] *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999) (arguing for an originalism based on original public meaning); Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1186 (2008); *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 89–130 (2004).

Maggs.[14] I come to this discussion having spent a significant amount of time in recent years thinking about the problem of constitutional design in nascent democracies, indeed in democracies characterized by the fractured legacies of ethnic violence or autocratic rule. The need to forge a constitutional template for tolerant democracy in these conditions forces a reexamination of the nature of a constitutional pact. And, since many of these countries are playing out the first stages of implementing constitutional oversight over the democratic process, the question of how to assess and implement the initial constitutional accord is a question of great moment.[15]

From this perspective, there are two features of originalism that stand out. The first is the underlying idea that a constitution is indeed a pact, a social contract designed to create legitimate governing institutions responsive to the political and social divides of a society.[16] The second is that originalism provides some level of determinacy as to how power is to be administered, reining in the boundaries of democracy. Both of these elements are critical since the nature of a constitutional accord among rivals for political power is that one will soon get to exercise state power over the other. An original constitutional pact bestows power on the first set of democratic rulers, but constrains them by limiting the scope of their power and—ideally—ensuring that they will have to stand for reelection and ultimately cede power to the subsequent choices of the populace.

To this may be added a third concern about the nature of policing the constitutional pact. All modern constitutional democracies, particularly those created since the fall of the Soviet Union, have assumed the importance of a constitutional court to prevent excesses of majoritarian power. In the United States, the wellspring of

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[14] Maggs, *supra* note 12 (providing different sources of authority that all fit within the framework of "originalism").

[15] For a discussion in the context of South Africa and Bosnia-Herzegovina, see Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 TEX. L. REV. 1861 (2004).

[16] There are some accounts of constitutionalism that draw on its role as a social contract. *See, e.g.*, RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY (1999). Nonetheless, this is a relatively underexamined claim in constitutional scholarship in the United States, with some exceptions. *See, e.g.*, Barnett, *supra* note 13; David McGowan, *Ethos in Law and History: Alexander Hamilton,* The Federalist, *and the Supreme Court*, 85 MINN. L. REV. 755, 756 (2001).

the idea of a court as the guarantor of the constitutional pact, originalism serves the role of channeling the power of judicial review within acceptable boundaries. In effect, originalism not only validates the importance of the original constitutional accord, it limits the power of the judiciary against the political branches that emerge more directly from popular choice.

For originalism to serve these complicated purposes, there have to be two preconditions. The first is that originalism is a faithful form of public contract law, essentially carrying forward the consensus that created the constitutional enterprise. The second is that the answers it gives should be relatively determinate so that its implementation can be thought to carry forward faithfully the intentions of the creators of the original constitutional enterprise.

Now let us suppose, as does Professor Maggs, that, at least as applied in American constitutional law and as forcefully espoused by Justice Thomas, originalism takes as its point of departure the original meaning of constitutional commands, but that there are in turn three distinct types of original meaning all claiming the mantel of originalism: (1) the meaning intended by the Framers at the Constitutional Convention in Philadelphia (original intent); (2) the meaning as understood by the delegates to the state ratifying conventions (original understanding); and (3) the objective meaning of the Constitution's text at the time of its adoption (objective public meaning).[17] Assuming that originalism can import these different sources of authority, there must be some mechanism, perhaps simple pragmatic consideration, for choosing among them.

In other words, what happens to originalism if there are multiple sources of potential originalist authority and they yield distinct or even conflicting answers to contemporary problems?[18] Presumably the simplest answer would be to turn to the originalist sources themselves for guidance. But there is little in the writings of the founding generation as to how they understood the issue of their

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[17] Maggs, *supra* note 12. Mitchell Berman similarly acknowledges that there is an active debate among originalists over which feature of the Constitution demands fidelity. Berman, *supra* note 2, at 9.

[18] *See* Steven Knapp & Walter Benn Michaels, *Not a Matter of Interpretation*, 42 SAN DIEGO L. REV. 651, 667 (2005) ("[N]othing in the logic of interpretation itself can tell us which of those stages [of drafting, ratification, and judicial review] should count as the one that confers on the text the meaning we are trying to interpret . . . .").

original intent. Indeed there is little in their writing that presupposed that their views would have the force that many attribute to them today.[19] In this regard, an analysis of the founding generation's own understanding of what they were doing does not yield a satisfactory answer and neither does analyzing the Constitution through the prism of contract law, as I will develop below. Accordingly, from the first moment in the debate over originalism, it appears that one must import some normative theory or metric to justify this mode of analysis and to guide the interpretive exercise.

It should hardly be surprising when writing in the twenty-first century to acknowledge that all texts will ultimately be in need of interpretation. In this regard, there is nothing particularly distinct or problematic in having to rely on interpretive tools to construe the Constitution's open-textured commands (e.g., due process, equal protection, privileges and immunities, cruel and inhuman punishment). Nor does the need for interpretation necessarily push beyond the constitutional text itself, as some interpretive mileage may be found in structural or "intratextual"[20] accounts of how to construe the imprecise commands of the Constitution. The need for interpretive guidance alone is not a critique of originalism or of any other methodology chosen to resolve constitutional issues.

Rather, the question addressed here is whether the possibility that there are multiple competing strains of originalism may compromise the claim that originalism is either more faithful to the original constitutional pact or more principled in its application than any other methodology. It may be that the strongest argument made on behalf of originalism lies not in its interpretive fidelity but on consequentialist justifications for constraining legislatures and cabining judicial discretion, which in effect mirrors the instrumental policy debates that originalists wish to banish from constitutional law. If we were to credit Professor Maggs's account of Justice Thomas's pragmatic or "general original meaning," we could generate a theory of why it might best achieve these instrumental goals, but

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[19] *See* Hans Baade, "*Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1014–23 (1991); Kent Greenwald, *Original Penumbras: Constitutional Interpretation in the First Year of Congress*, 26 CONN. L. REV. 79, 134–35 (1993); Powell, *supra* note 1.

[20] *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

we would do so on terms quite different from those set forward in the underlying premises of originalism.[21]

Political Foundations of a Constitution

The understanding of constitutions as a pact resolving political conflict has longstanding roots. One can go back to Aristotle to see constitutions described not as a transcendent set of principles, but as an agreement that works out the conflicts within particular societies:

> Politics has to consider which sort of constitution suits which sort of civic body. The attainment of the best constitution is likely to be impossible for the general run of states; and the good law-giver and the true statesman must therefore have their eyes open not only to what is the absolute best, but also to what is the best in relation to actual conditions.[22]

But even on this view, the interpretive question remains. There are longstanding debates within the common law tradition as to the permissibility of looking beyond the text of a document and considering parol evidence to determine the contractual objectives of the parties—as opposed to the intent to enter into a contract. At the time of the framing, nowhere was the exclusion of parol evidence as strongly held as in matters of statutory interpretation. As Hans Baade well summarizes the historic evidence, "the English common-law rule barring recourse to legislative history in aid of statutory construction prevailed in the American common-law colonies of Great Britain before the Declaration of Independence (1776), and that the decision laying down the 'English rule' was well known at the time of the framing of the Constitution of the United States."[23] Baade goes on to show that the issue of original intent, as opposed to textual arguments based on the Constitution itself, arose in the challenges to President Washington's authority to execute the Jay Treaty in 1796. Amid debates about the intent of the Framers, and

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[21] Maggs, *supra* note12, at 511–14.
[22] ARISTOTLE, THE POLITICS 181 (Ernest Barker trans., Oxford Univ. Press 2d ed. 1948).
[23] Baade, *supra* note19, at 1009.

against the backdrop of the invocation of the intent of the ratifiers at the state constitutional conventions, Madison himself rose to argue that, "he did not believe a single instance could be cited in which the sense of the [Philadelphia] Convention had been required or admitted as material in any Constitutional question."[24]

While the *Federalist Papers* began to be cited as evidence of the intent of the framing generation as early as *Cohens v. Virginia* in 1821,[25] it is difficult to escape the argument that, for the Framers at least, the use of non-textual sources to provide binding guideposts to interpretation would have been an alien concept. The Framers did not formalize the notes of their proceedings and did not publish any formal account of their deliberations.[26] Indeed, as Jacobus tenBroek summarizes in the first systematic study of the use of the Framers' intent as constitutional authority in the Supreme Court, "while the high tribunal frequently utilizes convention debates and proceedings to rationalize and buttress a stand taken, the intention of the framers thus disclosed will not control the decision rendered."[27] This was perfectly in keeping with the prevailing rules on interpretation of the nineteenth century, as formulated in the leading treatise of the time: "It seems to be settled in regard to constitutions as to statutes, that no extrinsic evidence can be received as to their intent or meaning."[28]

Nonetheless, the rule of construction for most of the twentieth century was to the contrary. Beginning at least in 1940, the Supreme Court accepted that legislative history was an acceptable tool in statutory construction: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"[29]

The weight of historical evidence—or at least my reading of the work of others—indicates that the use of extrinsic sources of the intent of the framing generation as a guide to constitutional interpretation is

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[24] 5 ANNALS OF CONG. 776 (1796), *quoted in* Baade, *supra* note 19, at 1020.

[25] 19 U.S. 264, 295.

[26] Madison's Notes of the Convention were not published until 1840. JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Gaillard Hunt & James Brown Scott eds., Prometheus Books 1987) (1840).

[27] Jacobus tenBroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction: Debates and Proceedings of the Constitutional and Ratifying Conventions*, 26 CAL. L. REV. 437, 448 (1938).

[28] THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 489 (John S. Voorhies 1857), quoted in Baade, *supra* note 19, at 1058.

[29] United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543–44 (1940) (footnote omitted).

of relatively recent constitutional vintage. There is little in the original constitutional framework that speaks to the use of interpretive texts, nor for that matter, can direction be found from the influential commentaries of the non-founding generation, as with the great treatises of Justice Story and Chancellor Kent.[30] This is by no means a major strike against originalism. The argument is only that there needs to be some interpretive methodology invoked to claim dispositive authority for original understandings, particularly when such original understandings come from different sources and are capable of yielding conflicting results. Put another way, if the interpretive move underlying the originalist turn in constitutional thought is of relatively recent vintage, and if its use of secondary sources to determine original constitutional objectives is permitted, there must be some underlying normative justification.

Constitutions as Political Contracts

Among these normative theories, the strongest argument for originalism in my view comes from the idea that a constitution is essentially a contract. At base, it is a societal pact created at a moment in time that resolves certain kinds of political debates and establishes institutions based upon that contractual understanding. If we accept this fundamental concept of a contractarian notion of a constitution, then a contract must have terms of agreement, terms of enforcement, and legitimacy that is drawn from the instrument that compels future performance by the affected parties. This is not a flawless theory of constitutions by any means. Contracts are intended to bind the parties to the agreement and are applied with difficulty to successive generations whose consent is increasingly an abstraction. The contracting parties to a "constitutional moment"[31] typically try to leave themselves room to maneuver politically while binding their successors.[32] And formal contract doctrines, such as the requirement of consideration to make the exchange binding, fit

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[30] *See* Wyeth v. Levine, 129 S. Ct. 1187, 1206 (2009) (Thomas, J., concurring) (citing Story's Commentaries for interpretive guidance on the Supremacy Clause); Cuomo v. Clearing House Ass'n, 129 S. Ct. 2710, 2725 (2009) (Thomas, J., concurring in part, dissenting in part) (citing Kent's Commentaries for guidance as to historic sovereign power over civil corporations).

[31] *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

[32] *See* JON ELSTER, ULYSSES UNBOUND 88–140 (2000).

poorly to the cross-generational fixing of political institutions in more or less binding fashion—what Lawrence Sager calls the "obduracy" of American constitutional design.[33] Yet despite these limitations, the contract notion of constitutions provides some insight into both why the original design has particular force and why the intentions of the founding parties should be entitled to particular weight in interpreting the instrument.

Perhaps ironically, if one were to take classic contract doctrine at the time of the Founding, reliance on the unincorporated intent of the signatories to the document would not have been an acceptable interpretive move. Contract doctrine was premised on the integrity of the writing—what is known as the four corners rule[34]—and extrinsic evidence of the intent of the parties was barred by the parol evidence rule. Classic contract interpretation would not have permitted parties to, in effect, shift the cost of their incomplete agreement onto a subsequent interpreter. This was not a matter of accident; rather "[m]any traditional rules of contract interpretation, such as the parol evidence rule, can be understood as forward-looking judicial efforts to discourage incomplete contracting."[35] After all, one of the advantages of the contractarian approach is that it is supposed make it easier to move forward in the future. The more parties agree to, the less need there is for interpretive maneuvering, and the easier it is to comply with the objectives that the contracting parties set forward. It is only with the modern relaxation of the formalities of contract law that there has been an increased judicial willingness to examine parol evidence not only for the intent of the parties to enter into a contract, but also as a guide to the meaning of the contract itself.[36]

If the original constitution is seen through the prism of contract law, then the evolution of contract doctrine helps significantly in turning to evidence of the intentions of the founding generation.

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[33] LAWRENCE SAGER, JUSTICE IN PLAIN CLOTHES: A THEORY OF CONSTITUTIONAL PRACTICE 82 (Garvin Lewis ed., 2004). This argument is further developed in John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929 (2003).

[34] For the modern form of the classic rule, see 11 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 32:5 (4th ed. 1999).

[35] Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 947 (1990).

[36] *See* Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 534, 537–49 (1998) (evaluating both "hard" and "soft" versions of the parol evidence rule).

Modern contract law has generally abandoned formalist rules that rendered contracts unenforceable when significant gaps in material terms existed in favor of a more liberal rule that permits courts to serve a gap-filling role.[37] The Uniform Commercial Code ("UCC"), for instance, expressly accepts as enforceable a "contract with open terms" that allows gap filling with reasonable or average terms.[38] Similarly, the *Restatement (Second) of Contracts* also favors liberal application of incomplete contracts when it is clear that the parties intended to be bound by the agreement.[39] There is a strong tradition at this point of majoritarian defaults, as ratified in the UCC, that comes from a basic understanding that parties cannot contract fully to all unknown future contingent events.[40] Likewise, parties sometimes have strategic reasons for why they cannot overcome certain issues and thus must postpone them in order to get the institutions of their contractual agreement, or in governance terms, the structures of government in place.

The analogy to contract may help with the recourse to evidence of the intent of the founding generation, but it does not by itself secure the originalist move in constitutional interpretation. First off, there are inherent difficulties in fashioning any comprehensive theory of interpretation, even at the level of commercial contracts.[41] As we move from private to public law, however, the difficulty is compounded by the lack of any clear metric for measuring the object of

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[37] *See, e.g.*, Omri Ben-Shahar, *"Agreeing to Disagree": Filling Gaps in Deliberately Incomplete Contracts*, 2004 WIS. L. REV. 389, 389 (2004). While there has been a general shift toward a lax application of the indefiniteness doctrine, the common law rule has not completely fallen by the wayside. *See* Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1641–44 (2003).

[38] U.C.C. § 2-204(3) (amended 2003) ("Even if one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.").

[39] RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. a (1981).

[40] *See* Larry T. Garvin, *The Changed (and Changing?) Uniform Commercial Code*, 26 FLA. ST. U. L. REV. 285, 339–40 (1995) (discussing a shift to majoritarian defaults in U.C.C. § 5-108(i)(1) (1995)). For a broader discussion of the function of majoritarian defaults, see Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISC. L.J. 1, 12 (1993); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 93–95 (1989) (questioning the "received wisdom" of majoritarian defaults).

[41] *See* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003) (arguing that modern contract law has neither a descriptive nor normative theory that is sufficiently complete to apply across the spectrum of private contracts).

the underlying political accord. In the context of ferreting out the intent behind legislation, for example, Elizabeth Garrett persuasively argues that many canons of statutory interpretation falter precisely because of the limited "institutional capacity of judges" to apply the canons.[42] The difficulty is again compounded when we move one step higher to the plane of constitutional interpretation. Unlike contracts, there is not a relatively accessible economic presumption that the parties seek to maximize their joint welfare. And, unlike statutory interpretation, the canons of construction do not operate against the customary presumption—even if difficult to realize in practice—that the legislature in its continuing capacity is free to override improper court interpretations of its objectives.

Approaching a constitution as a contract cannot, as a result, overcome the tremendous interpretive difficulties in trying to discipline the task of filling in gaps without substituting judicial conjecture. Accompanying this gap -filling would be all of the questions currently debated in contract law: the scope of default rules, whether gap -filling should be practiced on the principle terms or minor terms, excuses for a breach and the appropriateness of efficient breach theory—all played out against the more difficult normative objectives of contracts across the broad domain of political agendas, rather than the simpler metric of wealth maximization.

More problematically, a turn to modern contract law would also bring with it the question of how to handle what is termed the "course of dealing" of parties over the run of long-term relational contracts.[43] As courts have come to accept and enforce incomplete contracts, the question of how to fill in the gaps takes on great significance. One approach is to have courts fill in the gaps as they believe the parties would have at the time of the original negotiations. This in turn prompts arguments either for majoritarian default rules (as under the UCC) that create a baseline in what most parties would likely bargain to, or various kinds of defaults, including penalty defaults, to try to overcome strategic incentives that may prevent full disclosure of the aims of the parties. Once the parties have begun to act under the terms

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[42] Elizabeth Garrett, *Preferences, Law, and Default Rules*, 122 HARV. L. REV. 2104, 2137 (2009) (reviewing EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION (2008)).

[43] *See* E. ALLEN FARNSWORTH, CONTRACTS § 7.13 (4th ed. 2004); *see also* U.C.C. § 1-205 (defining course of dealing).

of the contract, however, a distinct modern approach is to look to the revealed practices of the parties themselves under the contract as a central guide to contract interpretation. If the parties have worked out a *modus vivendi* under their contractual relation, there appears little reason for courts to overturn that with necessarily imprecise tools for trying to divine their intentions at the time of contract formation. Thus, with the acceptance of incomplete contract terms has come the rise of court willingness to enforce into such incomplete contracts the arrangements that parties have worked out to accommodate each other's interests.[44]

Arguably, a turn to this course of dealing may put pressure even on the more specific terms of the Constitution. For example, the Constitution has quite specific language regarding the role of the branches during military undertakings.[45] It is also quite clear that right from the beginning this language was largely disregarded. The United States has fought many wars throughout its history but has formally declared war only a handful of times.[46] The Founders themselves engaged in the Quasi-War with France without, for the most part, a formal declaration of war.[47] They did not resort to the formalities of the declaration of war in the face of a perceived sense of military expediency. In place of the declaration of war, the founding generation launched military undertakings relying on informal mechanisms, including the modern authorization for the use of military force. If the "general original meaning" allows for consulting the text, the dictionaries, and the debates at the ratification and among the Framers, it could conceivably also

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[44] *See*, *e.g.*, Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971) (identifying a clear course of conduct in a contract to purchase phosphate); Grace Label, Inc. v. Kliff, 355 F. Supp. 2d 965, 971–73 (S.D. Iowa 2005) (admitting evidence of course of dealing in dispute over trading card contract).

[45] U.S. CONST. art. I, § 8, cl. 11 ("Congress shall have the power . . . to declare war.").

[46] Despite a large number of military engagements, the United States has only issued eleven formal declarations of war in its history. The first of these formal declarations was against Great Britain commencing the War of 1812. *See* Jennifer K. Elsea & Richard F. Grimmett, Congressional Research Serv., Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications (2007), *available at* http://www.fas.org/sgp/crs/natsec/RL31133.pdf.

[47] In 1798, Congress authorized the Navy to take armed French ships anywhere and authorized the President to commission privateers, but fell short of a formal declaration of war. *See* ALEXANDER DECONDE, THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797–1801, at 103–08 (1966).

allow for institutional adaptations that come immediately after the signing. After all, these early kinds of accommodation to political exigencies were already occurring in the 1790s, decades before the writings of Justice Story and Chancellor Kent.

Applied in the domain of constitutional law, modern contract law generates the ample room for the sort of "dynamic" interpretation[48] that underlies the living constitution theories of Justice Brennan[49] or the active liberty pursued by Justice Breyer.[50] Ultimately, the problem is that, while constitutional law has made a strong turn towards originalism as a means to definitively settle meaning at the time of the Founding, contract law has become much more subtle in its understanding of the intent of the parties and the likely incompleteness of the initial bargain. Contract law neither sufficiently confines the evolving contextual issues that constitutional law faces, nor does it capture the unique problems of organizing effective political governance under constitutional authority.

Originalism as a Prudential Doctrine

At one level, the difficulty of generating a precise meaning for the open-textured commands of the Constitution should come as a surprise to no one. Not only are many of the commands stated without great specificity, there is every reason to believe that constitutional terms were deliberately vague so as to garner agreement when the specifics could not be worked out.[51] For example, Andrew Kull has surveyed the legislative history of the adoption of the Fourteenth Amendment to reveal that the term "equal protection" was chosen precisely to avoid unresolved discord on the extent of the integrative rights to be afforded the former slaves.[52] Terms such

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[48] I borrow here the formulation used in the context of statutory interpretation by William Eskridge. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

[49] *See* ROGER GOLDMAN & DAVID GALLEN, JUSTICE WILLIAM J. BRENNAN, JR.: FREEDOM FIRST 102–11 (1994) (discussing Brennan's theory of constitutional interpretation); William J. Brennan, Jr., *Construing the Constitution*, 19 U.C. DAVIS L. REV. 1, 7 (1985) ("For the genius of the Constitution rests not in any static meaning it might have had in a world dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.").

[50] *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (2002).

[51] *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 340–65 (1996).

[52] ANDREW KULL, THE COLOR-BLIND CONSTITUTION 67–69 (1992).

as "due process" were unlikely to be any more self-defining in the eighteenth century than they are now, if we leave aside two centuries' experience in application.

Contemporary commentators, such as Professor Maggs, have demonstrated that even in the hands of the most committed advocates of originalism, a search for original understandings yields distinct and perhaps rival "original meanings." One could of course select the original understanding of the Framers over the ratifiers, or vice versa, but to do so requires a refinement of the interpretive methodology to explain why this choice is made. The ability of each of these different interpretive approaches to claim the mantle of originalism and to be used as foundational tools by proponents such as Justice Thomas puts pressure on the underlying argument for originalism. It is not enough simply to say that there is a Constitution that serves as a social contract when that approach does not generate a set of determinate answers as to how to apply the Constitution to contemporary problems.

The single most forceful argument emerging from originalism is its reassertion of the primacy of the text, which places a burden of justification on proponents of any claim that cannot be rooted in the text itself. Admittedly, most judges called upon to interpret any document start with what is contained within the four corners of the document and must often exclude parol evidence in the absence of ambiguity. Yet, as discussed above, even within the bounds of formal application of the common law, the last half-century of U.S. contract law has admitted far more into the resolution of contractual disputes than just the language of the text. But at this point, the comparison of the Constitution to a contract comes under tremendous pressure. The Framers were embarking on a bold venture into representative democracy, with few historical milestones to guide how the various pieces would hold together. They were specific when they could be and aspirational when they reached the limits of their understandings or their ability to agree. Their efforts at dual sovereignty, at evading the explosive slave question, at anticipating the expansion of the Republic, at creating a unified Navy but protecting state militias at home, at protecting life and liberty and property as against not just the executive as under the Magna Carta, but against all governmental encroachments, including those of the legislature—all were monumental undertakings whose dimensions at the time could only be hazily sketched out. A constitution is a

social pact, but its similarities to a futures contract to deliver pork bellies trivializes the undertaking. As Chief Justice Marshall quickly had to add, "it is a constitution we are expounding."[53]

Perhaps the strongest argument on behalf of originalism then is not that it comports to the original understanding of how the Constitution was to be interpreted or applied, nor that it is the most faithful account of how to judge a constitution if interpreted in contractual terms. Rather, the argument could be that originalism emerges as a pragmatic response to problems in constitutional governance that have revealed themselves over time. Here the argument rests on a utilitarian claim that this methodology, more than any other principled alternative, achieves a desirable outcome with regard to the institutional structures of constitutional governance. Like Churchill's backhanded praise of democracy, originalism may be an unsatisfying form of constitutional interpretation—except by comparison to all others. This argument shows originalism to be a modern response to the revealed problems of constitutionalism, even if its methodology assumes the founding of the Republic as its point of departure.

There are two primary concerns that prompt the turn to originalism. The first is the dramatic expansion of the federal government in general and of the federal administrative power in particular. The second is a reaction against the more far-reaching judicial interventions associated with the Warren Court. On this reading, there is a consequentialist justification for originalism, one that turns not so much on fidelity to the original interpretive design or to the best understanding of the contractual nature of a constitutional accord. Rather, the defense is a pragmatic one. Originalism appears to offer a refuge against two of the signal—and, for many proponents, disturbing— developments in constitutional law in the twentieth century. I do not believe myself to be the first to contemplate that originalism's true force may be its role in constraining twentieth century constitutionalism rather than in implementing the constitutional vision of the eighteenth century.[54] I add only that

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[53] McCulloch v. Maryland, 17 U.S. 316, 407, 415 (1819).

[54] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129 (Amy Guttman, ed., 1997) (indentifying the line between originalism and fidelity to precedent as a pragmatic one); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009) (tracing the public acceptance of originalist claims to the political valence of the arguments);

the diverse sources of originalist argument, as manifest in *Heller* and as carefully chronicled by Professor Maggs, lend weight to this argument.

In concluding, it is worth asking how well originalism has served this objective to date. It is certainly conceivable that if one were to raise the cost of legislation by forcing legislatures, like contracting parties, to realize more of the terms of what they are trying to achieve, then it becomes all of a sudden more difficult to actually legislate or expand the scope of government. One of the structural failures of the original constitution as set forth by the founding generation is the assumption that the federal government would be relatively weak compared to the States. In the wake of the post–Civil War amendments and the expanded authority of the Commerce Clause, that has not proven true. In this respect, originalism could serve an instrumental function for its proponents by protecting against the expansion of the powers of the federal government.

To date, however, the originalist turn has had little force in reshaping the scale of the federal government. Originalist arguments resuscitated the concept of state sovereign immunity as against federal regulation,[55] but operated only on the margins of attempted federal regulation of the internal workings of state government. So long as the Commerce Clause was interpreted expansively,[56] and so long as the Constitution imposed no restriction on the use of Spending Clause quid pro quo as a source of federal authority,[57] the power of the federal government has gone largely unchecked.

The second consequentialist argument is that originalism may serve to cabin the role of the judiciary. There are two problems here.

John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007) (arguing for originalism in terms of likely prudential effects of the doctrine); John O. McGinnis & Michael B. Rappaport, *The Desireable Constitution and the Case for Originalism*, 98 GEO. L.J. (forthcoming 2009) (making an expressly consequentialist argument for originalism); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 600–02 (2004) (tracing sources of originalism to critique of Warren Court and subsequent court doctrines).

[55] *See, e.g.*, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 72–73 (2000); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 669–670 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996).

[56] *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005).

[57] This point is forcefully made in Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995).

The first is that the use of multiple sources of authority for the original intent invites manipulation of the doctrine to achieve pre-ordained results. Professor Maggs may document three sources of original authority in the opinions of Justice Thomas, but that is unlikely to be the last word. Not only do three sources invite the addition of others, but these sources can be combined in different ways to yield increasingly diverse results.[58]

Further, and perhaps ironically, the rise of originalism has not cabined the rate of intervention by the Supreme Court, and has, if anything, provoked a greater willingness than at any previous time in American history for the Court to strike down federal statutes.[59] This should not be surprising if the aim of originalism is both to limit the scope of the judiciary's reach and the scale of federal regulatory endeavors. More troubling, however, is the fact that originalism does not necessarily limit the need for judges to choose among competing sources of non-textual authorities. So long as originalism includes rival sources of authority, including nineteenth century treatises, there is still a strong element of "looking over a crowd and picking out your friends,"[60] even if in this case, the crowd died two hundred years ago.

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[58] Indeed, this trend seems to have already been underway. Mitchell Berman has devised a taxonomy of originalism based on four dimensions (object, strength, status, and subject) consisting of seventy-two distinct theses. *See* Berman, *supra* note 2, at 14–15.

[59] *See* Jeb Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 894–95 (2003) (noting the "unprecedented" scope of Court willingness to strike down federal legislation in the Rehnquist Court). For an empirical tally of the number of statutes struck down by the Rehnquist Court on constitutional grounds, see THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 40–41, 204–07, 209–14 (2004).

[60] Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (quoting the famous quip by Judge Leventhal).