A DEEPER ORIGINALISM: FROM COURT-CENTERED JURISPRUDENCE TO CONSTITUTIONAL SELF-GOVERNMENT*

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Originalism has substantially reoriented constitutional discourse since it first reemerged in response to the Warren Court of the 1960s. A measure of its success is that today interpretation is typically treated as the process of discerning what the constitutional text meant to those who created it—no longer do we much hear that interpretation is fundamentally something else. Originalism has also come to better acknowledge that original meaning will not always be clear or available to answer contemporary questions. The theory has arrived at this point due to several now well-recognized developments from the last few decades that need only be briefly restated here. After having done so, this article will consider the challenges originalism currently faces and the resources in the contemporary theoretical environment it might call on to become a more fully constitutional theory that reaches beyond lawyers, judges, and courts. A deeper originalism points toward constitutionalism as form of political order that is oriented toward deliberative self-government. If originalism is to move in this direction, it must avoid the exploitation of judicial discretion as the entrée to judicial supremacy, first by reining in judicial "construction," and then by revisiting the merits of intentionalism in interpretation. Finally, originalists should move beyond jurisprudence to rediscover the legislative virtues and to contribute more directly to the reform of Congress.

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* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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A deeper, more constitutional originalism would avoid overstating what can be achieved by originalist methods or courts as institutions. This direction would reconnect originalism with the opposition to judicial overreach characteristic of earlier figures such as Raoul Berger and Robert Bork. To be sure, originalist jurisprudence has made large advances on their pioneer efforts, but its initial goal was always to limit courts so that basic public policy on controversial issues would be made in legislatures, as the American founders originally intended. By better acknowledging its own limits given the Constitution's separation of powers, this originalism would better consolidate the reorientation of legal interpretation it has achieved and simultaneously allow more constitutional space for legislatures as the primary forums for democratically legitimate decision making.

I. A SUMMARY OF CONTEMPORARY ORIGINALISM

The version of originalism that is currently ascendant is called "new originalism." New originalism developed in response to perceived weaknesses in and continual attacks on the older originalism associated with figures such as Berger and Bork.[1] A primary shift was from the earlier focus on the "intent" of the drafters (or ratifiers) of the Constitution as the object of interpretation to the "original public meaning" (OPM) of the text when it was enacted—how it would have been understood by a reasonably informed reader at the time. This move was seen as necessary to avoid the seemingly impossible task of "summing" multiple individual intentions or recapturing the mental states of historical actors. Equally important was the emergence of the "interpretation-construction" distinction. To *interpret* was to ascertain the original meaning of words in the text, while *construction* was the creative, political activity of building or elaborating constitutional meaning when the text was underdetermined (for whatever reason). Judges engaged in construction employ discretionary choice to address constitutional problems in ways that are

[1] This paragraph draws on the overviews presented in Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013); Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Constitutional Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12-41 (Grant Huscroft & Bradley W. Miller eds., 2011); DONALD L. DRAKEMAN, THE HOLLOW CORE OF CONSTITUTIONAL THEORY: WHY WE NEED THE FRAMERS 11-18 (2020); LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION 26-33, 34-42 (2019). The earlier history of originalism through the 1990s is treated in JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2005).

consistent with the text but not settled by it. The interpretation-construction distinction emerged in recognition of the reality that original meaning would sometimes "run out" and be unable to answer very specific or distinctly modern questions. Finally, new originalists have deemphasized judicial restraint and judicial deference to legislatures in comparison to their predecessors. New originalists are more likely to affirm judicial "fidelity" to the original constitutional meaning when it can be known, not a posture of automatic deference to lawmakers. On this view, a duty to abide by recoverable constitutional meaning overcomes any mere tradition of deference to the legislature.

Numerous versions of originalism have proliferated amid these general trends. Theorists differ in their understanding of how precisely to define the original meaning being sought, the appropriate methodology for finding it, and the normative justification for doing so at all, however originalism might be defined or practiced. One response to the issue of quick growth and sometimes incompatible variety has been offered by Lawrence B. Solum, a leading new originalist. He has proposed that the originalist enterprise be understood as a "family" of related theories that can have both resemblances and differences along a number of metrics, but that almost universally agree on two core claims: the ideas (or theses) of "fixation" and "constraint." Most contemporary originalist theories, whatever their differences, affirm 1) that the meaning of the Constitution was fixed and thus limited at the time of its enactment, and 2) that this meaning should contribute to and constrain the legal and constitutional doctrines of later interpreters who act under its authority.[2] Abjuration of the fixation and constraint theses likely indicates that a theory is on the "living constitution" end of the judicial-philosophical spectrum usually associated with progressive liberalism, not originalism.[3]

Despite widespread acceptance of the ideas of fixation and constraint, theoretical developments and new originalist labels continually appear. Some originalists argue that meaning can be delimited by appealing to the interpretive rules that the Constitution's creators would have applied to it, an approach termed "original methods originalism."[4] Another originalist theory

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[2] Solum, *supra* note 1, at 32-37. These theses are accepted as the core of originalism in Whittington, *Critical Introduction*, *supra* note 1, at 378, and STRANG, *supra* note 1, at 41-42.

[3] Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019).

[4] John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009). *See also* The Legal

and neologism, "original law originalism," emerged from analysts who mapped onto the existing discourse aspects of the long-standing debate between legal positivism and natural law, particularly their disagreement about the source of law and how it is legitimately changed.[5] Originalist natural lawyers are returning to the Thomistic concept of determinatio to establish limits on judicial authority amid the larger goal of reconciling natural law with the written Constitution. Their core idea is that one can both affirm the substantive morality of the natural law tradition while also insisting that, according to the legitimate allocation of legal authority in the Thomistic sense, judges in the American constitutional system cannot rightfully decide cases based on their own views of morality over and against those of the political community as stated in its law.[6]

But other serious thinkers of both the natural law conservative type and the libertarian type claim the mantle of originalism to urge courts on to vigorous—should we say activist?—exercises of power. Witness now calls for "common good originalism" and a "better originalism" that invoke the teachings of Harry Jaffa and Abraham Lincoln. And there is also libertarian "judicial engagement" that would have courts measure statues against a conception of individual-sovereignty-as-autonomy that is very robust indeed. Likewise, we have progressive "living originalism" in versions that can accept *Griswold*, *Roe*, and *Obergefell*. (These several developments are addressed in more detail in the next two sections.)

Turn, LAW & LIBERTY FORUM (Apr. 2, 2018), https://lawliberty.org/forum/legal-turn-constitution-originalism-original-methods-law/.

[5] *Compare* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2015) *and* William Baude, *Is Originalism Our Law?* 115 COLUM. L. REV. 2349 (2015) *with* Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016). Solum raises questions about the relationship of "original methods originalism" and "original law originalism" to the principles of fixation and restraint. Solum, *Originalism Versus Living Constitutionalism*, *supra* note 3, at 1286-88, 1296.

[6] Pojanowski & Walsh, *supra* note 5, at 121 n.40, 121-22; STRANG, *supra* note 1, at 234-36, 268-70; J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 22, 29, 56, 57 (2022). Retrieved by the influential scholarship of John Finnis, the concept of determinatio seems to have been first brought into the originalism debate by Robert P. George. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 284-90 (1980); ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 108, 110 (1999). *See also* Russell Hittinger, *Natural Law in the Positive Laws: A Legislative or Adjudicative Issue?*, 55 REV. OF POL. 5 (1993).

For some time now, it has been unclear whether this level of activity indicates a fecund theory that is advancing toward some as-yet-unrealized coherence, or whether it constitutes utter disarray and chaotic incompatibility.[7] No attempt is made here to add to or adjudicate the various forms of contemporary originalist theory. There is no denying that today originalism is a large and active endeavor being conducted by many very intelligent people. It shows no signs of abating. This is certainly a significant change from the dominant themes of constitutional discourse in 1937, or 1965, or 1985.

Despite its marked success and ongoing development, originalism is now being attacked by a new set of critics. Some analysts—who might be termed Catholic rejectionists—condemn American constitutionalism for having encouraged a morally bankrupt modern culture of materialism and radical individualism, one beyond repair by originalism or any other jurisprudence. On this view, the Constitution is a mere "Lockean" document (not a compliment) born of the Enlightenment. The Constitution's "privatiz[ation]" of religion made it into a matter of individual choice that reflected John Locke's conception of the "autonomous individual." America's early, Christian culture initially had fostered virtue and shared norms, but the Constitution's modern liberal template had fostered the demise of all that.[8] The advance of progressive liberalism and the kind of society it had produced could not be redeemed by "Conservatism's tale that American greatness will be restored when we reclaim the governing philosophy of our Constitution." On the contrary, the Constitution had proceeded from fundamentally modern liberal premises and thus encouraged a "liberal society—one that commends self-interest, the unleashed ambition of individuals, an emphasis on private pursuits over a concern for public weal." The result was profound self-involvement that was antithetical to the authentic human bonds of family and community.[9] A notable response to this predicament was the promulgation of the "Benedict option." It consisted of withdrawal from the corruption of main-

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[7] Steven D. Smith, *That Old-Time Originalism*, *in* CHALLENGE OF ORIGINALISM, *supra* note 1, at 223-45; Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011).

[8] ROD DREHER, THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN WORLD 36 (quotes), 37 (2017).

[9] PATRICK DENEEN, WHY LIBERALISM FAILED 18, 165 (2018). *See also id.* at 101-02, 162-66, 173.

stream American society and the politics encoded by its too-liberal Constitution, and then small-scale, countercultural renewal of community at the local level.[10]

While such thinking might seem far distant from constitutional discourse as such, it grounded Harvard Law professor Adrian Vermeule's subsequent call to move "beyond originalism" to "common good constitutionalism."[11] This project and the massive critical response it generated cannot be fully engaged here, but Vermeule made plain his view that originalism had "outlived its utility." It was now "an obstacle to the development of a robust, substantively conservative approach to constitutional law and interpretation." Common good constitutionalism would no longer be "content to play defensively within the procedural rules of the liberal order." Instead, it would reorient American constitutionalism toward "substantive moral principles that conduce to the common good," according to Vermeule's reading of natural law and the classical legal tradition he said it informed. To reach this goal, "officials (including but by no means limited to, judges) should read into the majestic generalities of the written Constitution" the proper morality—for example via the "general welfare" clause or the Preamble.[12] Although Vermeule well understood that the natural law itself did not determine which specific institutions or offices might be authorized to operationalize its general principles, he valorized the administrative state as defender of the common good, alienating the many conservatives and originalists who had been attacking its constitutional legitimacy for decades. Indeed, in jettisoning originalism, Vermeule was far more concerned to anchor common good constitutionalism in premodern sources of law than in the distinctive achievement of the American founding and the written Constitution it produced. He treated originalism as a spent force because its defining orientation toward historical and textual limitations on judges had not adequately delivered the substantive moral results conservatives wanted.

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[10] DREHER, *supra* note 8; DENEEN, *supra* note 9, at 191-98. For an example of a more traditionally conservative response to what he describes as the "'radical' Catholic critique," see Vincent Phillip Muñoz, *Defending American Classical Liberalism*, NAT'L REV. (June 11, 2018), https://www.nationalreview.com/2018/06/american-classical-liberalism-response-to-radical-catholics/.

[11] Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/; ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

[12] Vermeule, *Beyond Originalism*, *supra* note 11 (all quotes).

Such intense theoretical activity and root-and-branch criticism raise questions about the overall health and direction of originalism. In its first iteration, originalism was a claim about what the Constitution originally meant and an attempt therewith to limit judges' interpretive discretion to overturn the acts of legislative majorities. Thus understood, it presented empirical-historical claims about the content of original meaning, and then a series of normative propositions about how specifically or generally that meaning should be restated and applied in the present—and by what institutions and political actors. But the concern now is that originalism may be either exhausted, or morphing into a pro-judicial doctrine meant simply to encourage judges to reach conservative or libertarian—or maybe even progressive liberal—ends. Let us now turn to some recent developments that highlight the problems and opportunities originalism faces should it attempt to become something more than what lawyers and judges say about the Constitution.

II. JUDICIAL SUPREMACY AND CONSTITUTIONAL CONSTRUCTION

Today, judicial supremacy is well entrenched. Even though it is not constitutionally required and has been famously contested at various points, Americans today usually assume that what the Supreme Court says about the Constitution is equivalent to the thing itself. Judicial decisions are treated as binding on citizens and officeholders not before the court. It is abundantly clear that this is the way the Supreme Court understands its role. Likewise, citizens and elected officials now accept that nearly every major legal or policy question will eventually end up at the Supreme Court. As judicial supremacy has become normal, the old idea that there are "political questions" insusceptible to judicial resolution has all but disappeared.[13]

Here we need not trace the full history of this development or explicate the several reasons for it, which include the post-*Brown v. Board of Education* heroic image of the Court as defender of civil rights, and the reality that elected officials often prefer to avoid making their own constitutional judgments and to defer to those of the Court.[14] Testimony to the seeming insuperability of judicial supremacy is further confirmed by the recent report of

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[13] Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy,* 102 COLUM. L. REV. 237 (2002).

[14] PAUL D. MORENO, HOW THE COURT BECAME SUPREME: THE ORIGINS OF AMERICAN JURISTOCRACY (2022); KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007).

the Presidential Commission on possible reform of the Supreme Court, which concluded that the effort was fraught with uncertainty and likely to be resisted as both illegitimate and impractical.[15] American history contains several examples of such challenges to the Court that have been transitory, contested, and unsuccessful.[16]

In the context of entrenched and secure judicial supremacy, theorists normally assume and defend it—as if obeisance to the Supreme Court was the only thing necessary for the maintenance of constitutional government. Supposedly if courts are properly armed with the theorist's preferred interpretive method, "constitutional maintenance becomes a bloodless and technical enterprise best conducted by the legal intelligentsia."[17] Indeed, prominent originalists of both the intentionalist and OPM varieties have explicitly defended judicial supremacy.[18] While such arguments valorize settlement by an ultimate arbiter as crucial to a sound legal system, it is clear enough that the American founders did not originally intend to create a regime of judicial supremacy.[19] Nevertheless, libertarian-originalist "judicial engagement," with its "presumption of liberty," urges the Court to superintend acts of the legislature in the name of the autonomous individual.[20] Quasi-Straussian/natural law "common good originalism" calls for the Court to act as our "republican

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[15] PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT, chap. 4 (2021).

[16] WILLAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937 (1994); GARY L. MCDOWELL, CURBING THE COURTS: THE CONSTITUTION AND THE LIMITS OF JUDICIAL POWER (1988).

[17] WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY, *supra* note 14, at 26. *See also* Richard H. Fallon Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 544 (2018).

[18] Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?* [book review], 118 HARV. L. REV. 1594 (2005); Michael Ramsey, *Originalism and Judicial Supremacy*, THE ORIGINALISM BLOG (May 29, 2015), https://originalismblog.typepad.com/the-originalism-blog/2015/05/originalism-and-judicial-supremacymichael-ramsey.html.

[19] This problem is highlighted in William Baude, *The Court, or the Constitution? in* MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER 260-70 (Heidi M. Hurd ed., 2019).

[20] *See especially* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016); CLARK M. NEILLY III, TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT (2013).

schoolmaster" in effectuating timeless principles of justice beneath or beyond the Constitution, or perhaps from its Preamble.[21] These two approaches, though strongly politically opposed to one another, agree in wanting an assertive Court to exercise judicial review for their preferred ends, and against the constitutional judgments of others (legislatures most especially).[22]

Here we should pause briefly to state the well-known but still grave pathologies of judicial supremacy. In addition to undermining the republican understanding that power must be accountable and limited, judicial supremacy erodes constitutional self-government. By violating the separation of powers to make law without constitutional warrant, the Court truncates political deliberation about the application of shared principles for the public good—deliberation that should take place in legislatures and civil society. Today, decisions about the nation's most pressing issues are typically made by an unrepresentative and unaccountable judicial elite based on its recondite and putatively more enlightened insights. Citizen-subjects are meant simply to obey, while their elected representatives are further encouraged to evade their own responsibilities for constitutional judgment and political choice.[23] Judicial supremacy surely realizes moral and political victories for some (and losses for others), but only by furthering the decline of the nation's capacity for deliberative self-government under the rule of law.

Some originalists have carefully noted that the logic of their theory does not directly address judicial supremacy. As a claim about the meaning of the

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[21] *See especially* HADLEY ARKES, BEYOND THE CONSTITUTION (1990); Hadley Arkes, Josh Hammer, Matthew Peterson, & Garrett Snedeker, *A Better Originalism*, THE AMERICAN MIND, (Mar. 18, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism/; Josh Hammer, *The Telos of the American Regime*, THE AMERICAN MIND (Apr. 7, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/the-telos-of-the-american-regime/.

[22] An insightful treatment that puts Barnett, Neilly, and Arkes squarely in the camp of judicial supremacy is GREG WEINER, THE POLITICAL CONSTITUTION: THE CASE AGAINST JUDICIAL SUPREMACY (2019). The most recent theories promoting judicially-led natural law originalism have been described as "Flight 93 Jurisprudence," a call for judges to save the country from the brink of moral doom after the fashion of its supposed savior in the presidential election of 2016. John G. Grove, *Against a Flight 93 Jurisprudence*, LAW & LIBERTY (Mar. 31, 2021), https://lawliberty.org/against-a-flight-93-jurisprudence/.

[23] These themes are forcefully elaborated in WEINER, *supra* note 22. *See also* WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY, *supra* note 14, at 294, 295; Christopher L. Eisgruber, *Judicial Supremacy and Constitutional Distortion, in* CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE 70-90 (Sotirios A. Barber & Robert P. George eds., 2001).

text and the nature of legitimate interpretation, originalist jurisprudence cannot determine the proper role of the Court any more that it can say what should be done when original meaning is exhausted, or remains vague or ambiguous.[24] But it does seem that many new originalists accept that the Court will rule the nation on the most important topics. This marks a substantial shift in orientation from the first wave of originalism. A consideration of originalism's relationship to the much discussed "construction zone" will further clarify this development.

The distinction between interpretation as central and construction as a supplement or aid to it existed earlier in nonconstitutional contexts, primarily in the realm of contracts. There is some disagreement about how deeply rooted it was there, as well as whether that context gave it any relevance to constitutional law.[25] The distinction was initially reworked and made central to originalist constitutional theory by Keith E. Whittington. He defined it as "the method of elaborating constitutional meaning in this political realm" beyond courts, a realm separate from the one where "judges are assumed to possess a monopoly on constitutional understanding and deliberative capacity." Constitutional constructions showed "the degree to which the Constitution operates through and with elected officials and their actions."[26] Only briefly and in passing did Whittington acknowledge that courts too might undertake construction.[27] But the entire thrust of his enterprise was to contrast interpretation—the legal-jurisprudential discovery of the text's meaning by courts—with construction—the building and elaboration of meaning by nonjudicial actors. Construction was an "essentially political task" for whatever institution conducted it, and it was repeatedly distinguished from "jurisprudential interpretation." Constructions did not "pursue a preexisting if deeply hidden meaning in the founding document; rather, they elucidate[d] the text in the interstices of discoverable interpretive meaning, where the text

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[24] Whittington, *Critical Introduction*, *supra* note 1, at 400, 401, 403, 406; ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 26 (2011) (Solum's argument in his chapter entitled, *We Are All Originalists Now*); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 69-70, 72 (2011).

[25] Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 103-10 (2010); Richard Kay, *Construction, Originalist Interpretation, and the Complete Constitution*, 19 U. PA. J. CONST. L. ONLINE 1, 3-7 (2017).

[26] KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1, 2-3 (1999).

[27] KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 10-11, 224 n.29 (1999); WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 26, at 16, 237-38 n.43.

is so broad or underdetermined as to be incapable of faithful but exhaustive reduction to legal rules."[28] In another sense, constructions stood in for the action of the sovereign people unless and until they formally amended the Constitution. Constructions filled in legal gaps with political judgments beyond and external to the text, and such "action in areas of indeterminacy can only be regarded as contingently legitimate . . . The introduction of this external element indicates the political nature of the task and the inappropriateness of its pursuit by the judiciary with its limited access to external sources of authority."[29] Finally, Whittington pointedly rejected the judicial supremacy so entrenched in American political culture and so readily assumed in the realm of lawyers and courts.[30] His version of the interpretation-construction distinction sought to open up more space for constitutional deliberation outside that realm.

But originalists of various descriptions soon turned construction to their own purposes. Randy E. Barnett quickly seized on it as a way to make constitutional law more protective of individual rights. "Ambiguous terms should be given the meaning that is most respectful of the rights of all who are affected and rules of construction most respectful of these rights should be adopted to put general constitutional provisions into legal effect."[31] In his fully developed theory, the "presumption of liberty" was the central rule of construction that courts should use to restore the "lost constitution" from the statist growth that the "presumption of constitutionality" had fostered via deference to legislatures.[32] For his part, Jack M. Balkin saw construction as a way to draw originalism closer to progressive living constitutionalism. He regarded the original meaning of the text as quite sparse and said that the Constitution was a framework that allowed broad space for construction by judges, other officials, and citizens. They could use a variety of sources, including general principles underlying the text, contemporary public opinion, or the objectives of social and political movements.[33] The "resources for constitutional construction" included not only familiar lawyerly modalities of argument, but also the "national ethos" and "narrative understandings of the

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[28] WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 26, at 6, 5.

[29] WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 27, at 158.

[30] WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 26, at 1, 209, 228; WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 27, at 12, 171-74, 211-12, 218-19.

[31] Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 646 (1999).

[32] RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 20, at 5, 411.

[33] JACK M. BALKIN, LIVING ORIGINALISM 4-6, 10-12, 21-23 (2011).

trajectory and meaning of national history."[34] Even more recently, the natural law-oriented call for a "better originalism," which holds that "moral truth is inseparable from legal interpretation," sees judges as "republican schoolmasters" who have work to do in the "'construction zone.'"[35] It is no overstatement to observe that the "possibilities of constitutional construction" are "wide" indeed.[36]

Lawrence B. Solum somewhat redirected the interpretation-construction distinction, which he agreed was integral to originalism. He urged that construction be defined as the activity of giving legal effect to a portion of the constitutional text. It might happen immediately upon interpretation of a precise or settled text, or it might take place once interpretation was undertaken and there still remained vagueness, ambiguity, or other imprecision. Understood in this way, judges undertook construction every time they applied the text as law, as they or other officials also did when acting on or applying terms that were unclear.[37] Such constructions were necessary because originalism—which insists that interpretation be an effort to comprehend original meaning—could not resolve the question of what should be done, and by whom, when that meaning was exhausted. Therefore, theories of construction ultimately were normative. But this did "not entail the conclusion that individual judges have discretion to make decisions based on their own views of political morality."[38] That might be a position advanced by a particular normative theory of construction, but it was also possible to advocate one based on "canons of construction or default rules that constrain judicial discretion."[39] As described below, Solum carefully acknowledged that containment of judicial discretion in the construction zone via judicial deference to the choices of elected officials—perhaps along the lines associated with James Bradley Thayer—was itself a construction with both a long tradition and able advocates. Thus, judges in the construction zone, now admitted there more or less automatically, should be guided by a normative theory. This was a notable alteration of Whittington's original formulation, in which

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[34] *Id.* at 256. *See also* ERIC J. SEGALL, ORIGINALISM AS FAITH 92, 96-97 (2018).

[35] Arkes et al., *A Better Originalism*, *supra* note 21, at 7, 8, 10.

[36] Kay, *Construction, Originalist Interpretation, and the Complete Constitution*, *supra* note 25, at 11 (quotes), 24.

[37] Solum, *The Interpretation-Construction Distinction*, *supra* note 25, at 103-04; Solum, *All Originalists*, *supra* note 24, at 3-4.

[38] Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 523 (2013). *See also* Solum, *The Interpretation-Construction Distinction*, *supra* note 25, at 104-05.

[39] Solum, *Originalism and Constitutional Construction*, *supra* note 38, at 523.

construction was a definitively political task undertaken almost exclusively by elected officials or other nonjudicial actors. Originalists concerned about the latitude involved in judicial construction have rightly noted that the term has shifted meaning.[40]

Indeed, despite Solum's own careful conceptual distinctions, he also suggested judges and courts normally would be the ones doing the constructing, and toward whom theories of construction would be properly directed.[41] To his credit, Solum saw the potential problem in normalizing judicial construction: "if originalists allow judges to make law in the construction zone," they might simply "reintroduce the problem of ideological judging driven by the personal morality and politics of individual judges," perhaps even to the extent "that the difference between originalists and living constitutionalists [would be] only a matter of degree."[42]

When later revisiting the concept of construction, Whittington himself accepted more of a role for courts than he had at first, but he continued to so do with caution. Judges' "particular expertise and institutional authority" was "undoubtedly lessened when operating in the zone of construction than when on the firmer, traditionally legal ground of interpretation." As a matter of empirical fact, judges did undertake construction, but normatively the "arguments that justify judicial review on the basis of interpretation are not satisfactory to demonstrate that the courts should also exercise judicial review on the basis of constitutional constructions." Even more fundamentally, just as the concept of interpretation could not dictate how construction was to be done once interpretation ran out, neither could the concept of construction settle who was to undertake it and for what reasons. Whittington concluded:

> There is nothing about the idea of constructions that settles the issue of whether judges, for example, should engage in them. Distinguishing between interpretation and construction does focus attention on such important normative questions as whether (and under what circumstances)

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[40] Richard Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 721, 721 n.76 (2009); JOHN O. MCGINNIS & MICHAEL RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 139-41, 254 n.5, 255 n.7 (2013); DRAKEMAN, *supra* note 1, at 153; STRANG, *supra* note 1, at 31-33.

[41] Solum, *All Originalists*, *supra* note 24, at 69-70; Solum, *Originalism Versus Living Constitutionalism*, *supra* note 3, at 1279-80; Solum, *Originalism and Constitutional Construction*, *supra* note 38, at 523, 535.

[42] Solum, *All Originalists*, *supra* note 24, at 151, 150.

> judicial judgments should trump legislative judgments when constitutional meaning is indeterminate or about how constitutional gaps are to be filled.[43]

Originalism will have gone seriously awry if its notion of construction is transmogrified into just another thing that judges do—and everyone else obeys—under cover of supposed constitutional authority. As the intentionalist-originalist Richard Kay has noted, in an era of judicial supremacy, robust judicial construction augurs a form of constitutionalism "substantially committed to a series of fresh political choices made by judges in the court of last resort."[44] This potential is real insofar as "by definition binding decisions emerging from constitutional construction must be founded on considerations *not* exclusively derivable from the original constitution."[45] Anti-originalists too made this point with relish. Judicial construction appeared to license the vast discretion that could enable putatively originalist judges to reach results not based on the Constitution—that is, the very problem that originalism first arose to contest.[46]

Consequently, another insightful critic urged that, if and when originalists conceded that apprehensible original meaning could resolve few modern cases, they likely would have to "attach a high priority to the elaboration of fuller theories of constitutional construction."[47] Prominent originalists are indeed attending more carefully to how judicial discretion might be disciplined within the construction zone, though it is worth pondering the extent to which such efforts again simply assume judicial supremacy instead of challenging it. Solum has suggested that to constrain judicial discretion in affirmation of democratic legitimacy and the rule of law, originalists might advocate judicial deference to democratic institutions via a "Thayerian default rule." They might also develop more detailed methods of "sorting borderline cases" for coverage or exclusion from a vague portion of text, or perhaps rely

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[43] Keith E. Whittington, *Constructing a New American Constitution* 27 CONST. COMMENT. 119, at 128, 127, 135-36 (2010).

[44] Kay, *Construction, Originalist Interpretation, and the Complete Constitution*, *supra* note 25, at 25 (quote), 8, 10-13.

[45] *Id.* at 13 (emphasis in original).

[46] SEGALL, *supra* note 34, at 89-102; Colby, *Sacrifice of the New Originalism*, *supra* note 7, at 771, 777.

[47] Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1481 (2021).

on "precedent and historical practice" to settle meaning in the face of vagueness or ambiguity.[48]

A more elaborate effort by Randy E. Barnett and Evan D. Bernick also responded directly to the problem of judicial discretion in the construction zone, acknowledging that it "ought to be deeply troubling to anyone who values the rule of law."[49] Their solution was to draw from contract law and analogize judges to fiduciaries vis à vis citizens. Adapting this framework to the constitutional context, judges owed citizens a duty of good faith in exercising their discretion in accord with the original purpose of particular textual provisions, and with the overall structure and function of the Constitution at the time of its enactment. Applied in this way, the established doctrine of "good-faith performance" would prohibit "parties from using the discretion accorded them under the letter (the text) of the agreement to defeat the spirit (the original purpose) of the agreement."[50] Judges undertaking construction to formulate a doctrine or rule that implemented and specified a textual provision were duty-bound to inquire into its original purpose, as revealed by historical investigation into its context. A good-faith construction accounted for the "text, structure, and history of the provision" to explain the function it was originally meant to have. It sought to avoid "rendering the text a nullity, of little or no practical significance, thereby eliminating it as a constraint on the fiduciary agents of the people."[51] This approach aimed to bring the constraining logic and historical method of originalism into the practice of construction: "an originalist theory of constitutional construction."[52] If judicial construction was inevitable, some such effort is required to prevent originalism from devolving into another form of judicially-updated living constitutionalism.

It is notable that some originalists concerned about judicial discretion in the construction zone have cautioned that historical research might reveal that construction was unnecessary. A textual provision might have a sufficiently precise meaning that could be identified by interpretation alone. Whether the bare text confronted by a 21st century reader was in fact vague or ambiguous, by design or in the absence of evidence, was at least initially a

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[48] Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 295 (2017). *See also* Solum, *Originalism Versus Living Constitutionalism*, *supra* note 3, at 1279-80.

[49] Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO L.J. 1, 16 (2018).

[50] *Id.* at 26 (quote), 32.

[51] *Id.* at 34-37, quotes at 36, 37 (italics removed).

[52] *Id.* at 5.

matter for historical investigation. Historical evidence might show that some provisions were written with the intention that interpreters would fill in the details; or it might show "that the Framers used language that appears ambiguous to us, at least on its face, but, in fact, was expected to convey a particular decision that resulted from negotiations over ends and means, even in those cases where we may initially think that the language can speak for itself."[53] Judicial movement into the construction zone was illegitimate prior to a showing that historical evidence required that it be done.[54]

Even more explicit concern with the separation of powers and the associated limitations on judges was apparent in Lee J. Strang's treatment of construction. In fact, he said, the fundamental principles of the constitutional order meant that there was "no authority for judicial review in the construction zone." The Constitution was the only legitimate basis for the Court to overturn an act of Congress, the institution charged by the Constitution with deliberating about the common good and legislating to advance it. "When the Constitution's original meaning is underdetermined, federal courts have no authority to second guess congressional actions . . . Congress's determination of what the common good requires—its construction—prevails because there is nothing in the Constitution that is superior to and inconsistent with it."[55] This "deference conception of construction" envisioned courts as legitimately empowered only to undertake interpretation. They had no legitimate authority to make law in the vast realm of contested policy options pertaining to the common good in the construction zone. The separation of powers reserved that role to Congress.[56]

Originalist concern about how to constrain construction is clearly growing. Even if the practice is inevitable, originalists need not assume that it is automatically or even legitimately the responsibility of judges. On the contrary, to the extent that originalists allow judges to monopolize or manipulate construction, their theory will have reversed its original goal of limiting and disciplining judicial discretion.

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[53] DRAKEMAN, *supra* note 1, at 153. *See* Barnett & Bernick, *supra* note 49, at 33.

[54] Other originalists concerned about judicial discretion argued that construction could be eliminated entirely by recourse to the interpretive methods and rules that the founders would have understood as applicable to the Constitution they created. MCGINNIS & RAPPAPORT, *supra* note 40, at 139-53.

[55] STRANG, *supra* note 1, at 84, 87.

[56] *Id.* at 87-88.

III. THE REVIVAL OF INTENT

The interpretation-construction distinction (and its problems) became central to originalism just as OPM originalism also ascended. But OPM never entirely effaced intentionalist originalism. A small but determined band of originalists continued to develop and defend it, both amid the rise of OPM in the 1990s, and now in the current era of OPM's dominance.[57] In fact, intentionalism appears to be experiencing something of a renaissance. Just as OPM responded to criticism of old-style intentionalism, new-style intentionalism is now addressing concerns that OPM originalism, particularly when aligned with judicial construction, gives interpreters too much discretion. This return to and refurbishment of intentionalism shows that originalism remains a vibrant body of jurisprudence despite the vulnerabilities of OPM. It is worth considering this development in some detail.

Intentionalists (old and new) hold that writing, like speech, is an attempt to communicate. The goal of an author or speaker is to convey meaning to a reader or hearer. Texts do not spring up ex nihilo—their authors choose words they think capable of expressing their intended meaning. To be sure, communication always occurs in a social-historical context and against a background of linguistic conventions, and speakers or authors sometimes fail to communicate their intended meaning. But interpretation can be nothing other than an inference about what the author or speaker intended within the surrounding context and convention, themselves things that might be manipulated or abandoned better to convey intended meaning. Moreover, a text that is a law cannot have authority as such if its content does not carry the meaning that the legitimate lawgiver intended. Such understandings stood behind the many centuries of English jurisprudence that accepted—as did its inheritors in the American founding—that the aim of legal interpretation was to understand and apply the intent (or will) of the lawgiver as found primarily but not exclusively in the text.

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[57] For the 1990s, see O'NEILL, *supra* note 1, at 194-98. A few more recent and admirably direct statements are Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539 (2013); Larry Alexander, *Simple-Minded Originalism*, *in* CHALLENGE OF ORIGINALISM, *supra* note 1, at 87-98; Richard Ekins, *Objects of Interpretation*, 32 CONST. COMMENT. 1 (2017). Ekins's article transports into the American constitutional context his extensive defense of intentionalism in RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT (2012). *See especially id.* at 193-96, 205-11. *See also* Richard Ekins & Jeffrey Goldsworthy, *The Reality and Indispensability of Legislative Intentions*, 36 SYDNEY L. REV. 39 (2014).

From this basic view, intentionalists insist that "public meaning originalism is mistaken about the nature of meaning and language use." The reality about human language use is that "if there is no agent, then what appears to be language use (say, marks on the beach or shapes in the clouds) is not."[58] OPM's hypothesized reader was beside the point. Although one could intelligibly impose "on a form of words some meaning that a possible or imagined language user might use the words to convey . . . in such imposition the nominal interpreter is in truth the speaker or author."[59] The rather limited truth of OPM was that "linguistic conventions that prevail at that time [of the promulgation of a document] help frame the formation and inference of intended meaning."[60] But OPM was incorrect to think that semantic or conventional meaning was the object of interpretation because "particular instances of language use do not have a public meaning in any sense other than the best inference about intended meaning."[61]

Equally important, intentionalists argued that OPM has what we might call "authority issues" vis à vis the Constitution as law. In dispensing with the notion that the text is a deliberate act of lawmaking by identifiable human authors, OPM cannot explain why the Constitution should be recognized and obeyed as law. In identifying meaning with how a hypothetical reader would have understood the text, OPM faced "the puzzle [of] why anyone would find a constitution imbued with that denatured meaning—one worked out without considering the real historical circumstances of the text's creation—to have normative force."[62] In reality, the authority of a governing text exists because the people subject to it accept the legitimacy of those who created it. Hence the absurdity of attempting to interpret and abide by the proverbial constitution "'put together by a tribe of monkeys with quills.'"[63] OPM failed in this way because it "sever[ed] the connection between the Constitution's rules and the authority that makes us care about those rules in

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[58] Ekins, *Objects of Interpretation*, *supra* note 57, at 9.

[59] *Id.*

[60] *Id.* at 9-10.

[61] *Id.* at 9 (quote), 17. *See also* DRAKEMAN, *supra* note 1, at 40. Very similar arguments "on the nature of texts" as those in this paragraph are contained in Alexander's summary of his own work. Larry Alexander, *Conclusion: Appreciation and Responses*, *in* MORAL PUZZLES AND LEGAL PERPLEXITIES, *supra* note 19, at 415-17.

[62] Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, *supra* note 40, at 718.

[63] *Id.* (quoting Walter Benn Michaels). *See also* DRAKEMAN, *supra* note 1, at 27-30.

the first place."[64] Only intentionalist originalism was "authority-preserving" because "any meaning [the text] is given other than its authorially intended meaning renders nonsensical the idea of designating its authors as having the authority to determine norms to govern us."[65]

Intentionalists have also pointed out that discerning the meaning supposedly understood by OPM's hypothetical reader of the Constitution is not as straightforward as its advocates claim. There are a variety of criticisms here. Probably the deepest is that the conventional semantic meaning of a text, its literal or sentence meaning, is frequently underdetermined in ways that cannot be resolved without knowing something more about authorial intent in its broader context. Richard Ekins described this point as widely held in the philosophy of language and gave numerous illustrations from everyday language and statutory drafting. Texts can use ambiguous terms, imply something literally unstated, involve compressed content, or refer to their circumstances to assert more meaning than is written.[66] Interpreters must investigate the context and purpose of the text's creation in order to know its intended meaning, "but context does not settle meaning. The context grounds inference as to what the speaker intends."[67] Neither the most frequent conventional usage of a word nor the context of its usage necessarily determines what an author or speaker intended to convey by using it.

A version of this challenge, as Donald Drakeman has emphasized, emerged when historical research into original public meaning revealed that a word or phrase in the Constitution was used or understood in multiple ways. For example, was the annual tax on ownership of a carriage at issue in *Hylton v. U.S.* an "excise"—essentially a tax on sales or consumption that need only be uniform—or a "direct" tax that, according to Article I, section 8, must be apportioned by population? At the time of the framing, "excise" was being used and understood in ways that could support either result. Sim-

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[64] Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, *supra* note 40, at 714.

[65] Alexander, *Conclusion: Appreciation and Responses*, *in* MORAL PUZZLES AND LEGAL PERPLEXITIES, *supra* note 19, at 417; Alexander, *Why and What*, *supra* note 57, at 540. *See also* Ekins, *Objects of Interpretation*, *supra* note 57, at 22, 23, 24-25; Larry Alexander, *Connecting the Rule of Recognition and Intentionalist Interpretation: An Essay in Honor of Richard Kay*, 52 CONN. L. REV. 1515 (2021).

[66] EKINS, LEGISLATIVE INTENT, *supra* note 57, at 196-205.

[67] *Id.* at 208 (quote), 209. *See also* Ekins & Goldsworthy, *Reality and Indispensability*, *supra* note 57, at 58; Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 REV. OF POL. 197, 212 (2000).

ilarly, did "establishment respecting religion" mean only a statutorily mandated creed and ritual, or did it also include nondenominational taxes in support of various sects? Again, both understandings were in use at the time.[68]

The same problem was magnified in OPM's recent turn to corpus linguistics, the computer-based "big data" assembly and querying of multiple historical texts to count the frequency of word usage as a supposedly data-driven and thus objective way to establish meaning. While this project had some utility for historical research, it also had several problems. The sample of digitized texts was skewed sociologically toward elites and geographically toward the Northeast, while it also included multiple reprintings of the same text (a frequent occurrence in the 18th century) that therefore were not unique usages. Nor could the mere existence of a term or phrase in a text establish the way it was being used. That required a researcher's subjective judgment. More fundamentally, simply counting the most frequent usage of a term among multiple usages was not proof that it had been used in that way in the Constitution.[69] Only investigation of and recurrence to the intended meaning of the text could resolve such problems.

Finally, OPM's imagined reader presented problems of its own, namely that this "hypothetical person cannot be nonarbitrarily constructed: Is the person a he or a she? Does he or she live in the city or the country? How much education and of which kind has he or she had? How much information does he or she possess about the law in question and the reasons behind its promulgation, etc.?"[70] OPM had no shared definition of this reader, let alone any method for "averaging" the views of various types of readers or determining how their "representative" qualities would yield agreement on the meaning of the text. Consequently, the device licensed a good deal of discretion in the contemporary "interpreter's" discernment of meaning. As Richard Kay put it, "it would not be surprising if a judicial interpreter were to hit upon a reasonable speaker who might view the relevant language as

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[68] DRAKEMAN, *supra* note 1, at 99-114. *See also* Joel Alicea & Donald L. Drakeman, *The Limits of New Originalism*, 15 J. CONST. L. 1161 (2013).

[69] DRAKEMAN, *supra* note 1, at 115-36.

[70] Alexander, *Why and What*, *supra* note 57, at 541 (quotes); Alexander, *Simple-Minded Originalism*, *supra* note 57, at 89, 89 n.6. For an anti-originalist historian's statement of the point, see Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 584-86 (2011).

supporting a rule that the interpreter thinks a proper constitution ought to have."[71]

Intentionalists thus criticized both OPM's understanding of the nature of language use and its attempt to establish textual meaning and authority without reference to authorial intention. Nevertheless, a major reason for the rise of OPM in the first place had been the rejection of intentionalism understood as a group mental state somehow aggregated from the individual intentions of a multimember body like the Philadelphia or state ratifying conventions (often referred to as the "summing" problem).[72] The very notion of group authorship was dismissed as impossible and absurd. That view has now been jettisoned and group intent reconceptualized in Richard Ekins's 2012 book, *The Nature of Legislative Intent*, a major contribution to jurisprudence that originalism has only begun to account for.[73]

Ekins built on Thomas Aquinas's classical understanding of social action as coordinated group activity for a defined end, plus allied ideas in the modern philosophy of action. On his view, a group formed for a purpose takes that purpose as its definitive end. The individuals who compose the group intend to act for themselves and with others in the group to realize the group's end, and individuals in the group recognize this fact about one another. Their individual intentions thus "interlock" as they adopt and cohere subplans and institute procedures designed to achieve the overall end of the group. "The joint intention on which the group acts is the plan of action that coordinates and structures the joint action of the members of the group."[74] Individual intentions are not aggregated into some phantasmagorical group mind; rather, each group member's individual intention is to adopt the joint plan of action to realize the group's purpose. Another way to state the idea is in terms of means and ends: the group intention "is a plan of joint action adopted by all members as a means to the shared end that defines the group."[75]

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[71] Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, *supra* note 40, at 722. For an anti-originalist elaboration of this point, see Fallon, *supra* note 47, at 1465-71.

[72] Whittington, *Critical Introduction*, *supra* note 1, at 380-82.

[73] EKINS, LEGISLATIVE INTENT, *supra* note 57. *See also* Donald L. Drakeman, *Charting a New Course in Statutory Interpretation: A Commentary on Richard Ekins'* The Nature of Legislative Intent, 24 CORNELL J.L. & PUB. POL'Y 107 (2014). The contribution of Ekins and related work as a "potential solution to the summing problem" is briefly discussed in Barnett & Bernick, *supra* note 49, at 50-51. *See infra*, text associated with note 86.

[74] EKINS, LEGISLATIVE INTENT, *supra* note 57, at 47 (quote), 52-57.

[75] *Id.* at 52.

Conceived in this way, a legislature is a group whose "standing" intention—its definitive purpose—is to create new law for the common good of the political community. Its "particular" intention is deliberately to change the state of the law, when there are good reasons to do so, by means of a reasoned proposal open to all members. This plan, in the form of a statutory text, is created through procedures that structure and focus deliberation about its content. The product is the joint action of the members of the group—the reasoned choice of the group as an agent—in the form of the statute that the legislature makes.[76]

Drakeman has recently adapted Ekins's arguments to the American constitutional context, offering a powerful rejoinder both to the OPM understanding of the source of authoritative constitutional meaning, and to the earlier dismissal of group intent that had undergirded the shift from intentionalism to OPM. The Framers at the Philadelphia convention created and proposed a text that contained a process by which the ratifiers would adopt the Constitution as law on behalf of the people, whose delegates they were. Once it is fully appreciated that a group can have a shared intention as expressed primarily in the text, Drakeman urged, further evidence surrounding its creation (akin to legislative history) should be consulted to illuminate its content as the reasoned choice of means to its creators' shared ends. He was aware of the dangers of selection and bias inherent in using the drafting history of a text, particularly an old one, but was more willing to do so than Ekins. Drakeman argued that the various records from the founding era were where "we need to look for the best evidence that tells us what the Framers actually understood the provision to mean—what were its ends and means." The records of the Philadelphia convention, evidence from the ratifiers, *The Federalist*, as well as other sources were germane because they documented "the issues, disagreements, debates, negotiations, and decisions" on the way to production of the final text. "Looking for what the Framers, acting together *as a group*, understood regarding the meaning of the text is the goal of interpretation."[77] Moreover, as noted above with respect to "excise" tax and "respecting an establishment of religion," "the multiple candidates for the

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[76] *Id.* at 218-24, 242-43. In response to the "summing" of mental states conception of intent, Solum affirms the basic idea of group agency as acting on a shared and deliberated plan—and then states pointedly, "I am not an original-intentions originalist, and these remarks are not intended as an endorsement of the intentionalist approach to constitutional interpretation." Lawrence B. Solum, *Living with Originalism, in* CONSTITUTIONAL ORIGINALISM, *supra* note 24, at 161-63, quote at 163.

[77] DRAKEMAN, *supra* note 1, at 45, 48 (emphasis in original).

original public meaning represent the universe of choices the Framers might have made, and the evidence from the speeches and debates show which one of those choices is correct."[78] The search for the Framers' intent as the "end-means choice" aimed not to dispense with original public meaning tout court, but to allow "interpreters to identify which of the multiple viable semantic possibilities actually represents the Framers' constitutional choice."[79] Neither the meaning of the Constitution nor its authority could be derived from or reduced to the various ambient meanings that surrounded it.

The reassertion and elaboration of the intentionalist position has been accompanied by attempts to reconcile it with other forms of originalism, at least at a practical and operational level, if not at a wholly integrated theoretical level.[80] One aspect of this development is the claim, made by both intentionalists and OPM advocates, that in practice the methods are highly likely to reach the same conclusions about constitutional meaning.[81] Ultimately, that question is empirical, and investigation cannot say which meaning to abide by if and when they diverge. Other prominent originalists have argued that original intent and OPM can be unified by basing the overall theory on the "original methods" of legal interpretation inherited from England at the time of the founding. On this view, intentionalists could be understood as holding that "each enactor intends that the provision have the meaning that it would have under the applicable interpretive rules," while OPM "would use the conventionally applicable legal interpretive rules" that "were then thought to apply to" the Constitution to establish how informed readers would have understood it.[82] In this theory, the two versions still differently conceive the object of interpretation, but the hope was for a "truce rooted in the original interpretive rules."[83]

A version of original intent also had a place in Barnett and Bernick's "unified theory of originalism" as it sought to discipline the discretion of judges

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[78] *Id.* at 137.

[79] *Id.* at 138.

[80] *See* Whittington, *Critical Introduction*, *supra* note 1, at 396 (stating that the goal has not been achieved).

[81] Solum, *What is Originalism?*, *supra* note 1, at 38; Lawrence B. Solum, *Simple-Minded Originalism? Simply Wrong! in* MORAL PUZZLES AND LEGAL PERPLEXITIES, *supra* note 19, at 199; Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, *supra* note 40, at 712.

[82] John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1385, 1373 (2019).

[83] *Id.* at 1418. *See also* MCGINNIS & RAPPAPORT, *supra* note 40, at 121-38. Strang appreciates the relevance of original intent in the context of "original methods." STRANG, *supra* note 1, at 61-62, 56. *See also* DRAKEMAN, *supra* note 1, at 16.

who undertook constitutional construction (described above). These authors disclaimed any loyalty to what they called "proto-originalism" and defined as a "*counter*-factual thought experiment" that in essence asked "'What would the Framers do?'" Instead, they advocated adherence to empirically verifiable facts about "the original functions of the Constitution's provisions and structural design elements" that could be found in "private as well as publicly available evidence."[84] This "'Framers-as-Designers' approach" attended carefully to the evidence they left because "they had unique insight into the functioning of the system they helped design."[85] Pushing this analogy further, the authors also deployed recent developments in philosophy about how to understand group agency and jointly made artifacts. Without recapitulating the analysis above, the tentative judgment of these originalists was that now there was a

> potential solution to the summing problem. Those who gathered at Philadelphia can be said to have organized themselves so as to constitute a group agent. The intentions of the Convention, the group agent, can be understood as the functions of the artifact they designed, the Constitution, as a whole and of its constituent parts (rather than the personal motives of each individual designer).[86]

As intimated here, the group agency conception of intent may be considered a solution to the summing problem that for so long undergirded the rejection of intentionalism and the turn to OPM. Recent attempts pragmatically to integrate these two versions of originalism, or to subsume intentionalism within still other versions, may be early steps toward a more fully rendered theoretical reconciliation.

IV. A MORE RESTRAINED AND HUMBLE COURT

Whether or not intentionalism and OPM can be reconciled, or the various other components of contemporary originalism integrated into a fully unified structure, the theory's overall limitations should be forthrightly acknowledged. Interpretation as the restatement of original meaning (however defined) necessarily entails that the resulting meaning is limited—and thus that originalism can fail to settle or even address issues of current concern. What originalists should avoid is "constitutional perfectionism," whereby original

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[84] Barnett & Bernick, *supra* note 49, at 46 (emphasis in original).

[85] *Id.* at 47.

[86] *Id.* at 51.

meaning is ignored or "skewed" to reach favored political results. The Constitution is not perfect, and "originalism as a method of constitutional interpretation cannot be expected always to produce constitutional law or applications of constitutional law that win plaudits from conservative political actors."[87] Of course, the concern that underdetermined meaning would be unable to answer modern questions is what helped produce the idea of "construction" in the first place. But as noted above, construction has developed in a way that tends to keep all important questions in the hands of judges and courts. Construction in this form replays the perfectionist fallacy and tends toward a conservative-libertarian version of the living constitution that assumes and exploits judicial supremacy.

Nevertheless, the kinds of arguments that justify originalist constitutional interpretation do not justify judicial restraint or a posture of deference to elected officeholders. This is because they cannot establish what should be done in instances of interpretive indeterminacy or disagreement.[88] While first-wave originalists did often run together claims about interpretation with claims about the judicial role, recent originalists have rejected that conflation. Yet originalism directly implicates questions about the role of judges because, in asserting that the Constitution contains recoverable but limited meaning that courts apply as law, it points to the distinction between law and politics that is so central to the separation of powers. That distinction was crucial to John Marshall's defense of judicial review and explication of its limits in *Marbury v. Madison*. From that distinction and that defense came the classic conception of judicial restraint, although subsequently modern epistemological skepticism transformed it into mere "self-restraint."[89] Rejecting that weak reed, the new originalism initially clarified that courts should apply the Constitution as law according to its original meaning. And, it said, citizens and elected officials should undertake construction outside the courts, debating constitutional principles and political issues that are open to a range of reasonable and defensible meanings. Defenders of judicial review—or judicial construction—who assume judicial supremacy, including originalists, bear

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[87] Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL'Y 29, 36, 37 (2011).

[88] Whittington, *Critical Introduction*, *supra* note 1, at 391-94, 406, 408.

[89] EVAN TSEN LEE, JUDICIAL RESTRAINT IN AMERICA: HOW THE AGELESS WISDOM OF THE FEDERAL COURTS WAS INVENTED 4-11, 18, 41-58 (2011).

the burden of explaining "why constitutional politics is better conducted in the courthouse than in the legislature."[90]

Having pushed matters to this fundamental point, originalism now should question more directly the judicial supremacy it has too often acquiesced in or affirmed. "Originalism as a political theory,"[91] buoyed by its influence in the realm of jurisprudence, should advance a more modest, humble role for judges of the kind long associated with the concept of judicial restraint. That role would be more truly in keeping with both the founding principle of republican consent, and with the political science of separation of powers central to the founders' Constitution. Judicial restraint has a long and principled history in American constitutionalism, even though appeals to it are often dismissed as a matter of "whose ox is being gored." It has remained attractive and enduring because the ideas "associated with judicial restraint are firmly rooted in the philosophy of the constitution."[92]

An originalism that affirms more restrained courts characterized by judicial modesty and humility? One could scarcely name more untimely virtues amid modern American culture and the era of judicial supremacy. They even seem out of place in "new" and "better" originalism, let alone in libertarian judicial engagement and progressive living constitutionalism. But this complex of ideas has garnered some renewed attention, and it is worth briefly considering a few recent arguments. A basic point is that the founders had a far more realistic and limited conception of politics than do proponents of the various ideological enthusiasms that abound today. For them, prudent governance and reasonable accommodation were possible, but human nature could not be perfected through a constitution, and courts had a concomitantly modest role that did not include policymaking or social reform.[93]

Judicial humility need not be understood as purely negative—automatic deference to others or self-abnegating restraint that declines to exercise con-

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[90] Keith E. Whittington, *The Death of the Legalized Constitution and the Specter of Judicial Review*, *in* COURTS AND THE CULTURE WARS 39 (Bradley C.S. Watson ed., 2002); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 848-51 (2002).

[91] Whittington, *Is Originalism Too Conservative?*, *supra* note 87, at 38.

[92] Stanley C. Brubaker, *Judicial Self-Restraint*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 543 (2d ed., Kermit L. Hall ed., 2005). *See generally*, LEE, *supra* note 89.

[93] Michael P. Federici, *Judicial Power and Modest Republicanism*, *in* THE CULTURE OF IMMODESTY IN AMERICAN LIFE AND POLITICS: THE MODEST REPUBLIC 49-62 (Michael P. Federici, Richard M. Gamble, & Mark T. Mitchell, eds., 2013).

stitutionally mandated authority. Indeed, a recent theoretical advance on earlier efforts conceptualizes judicial humility as a disposition of character, one that is sensitive both to the judge's own human limitations and to the judge's institutional position in relation to others. Such humility is a "virtue of moderation" in a generally Aristotelian sense, a "mean between judicial hubris and judicial servility."[94] While asking judges to accept their inevitable fallibility and the limited role of courts alongside other offices, this version of judicial humility still "prompts judges to act on their legal knowledge and to exercise the constitutional authority that they do possess."[95]

While it is no excuse for shirking judicial duty, the "epistemological humility" appropriate to judges urges "an awareness of limitations regarding one's ability to acquire knowledge."[96] Judges have no particular competence in the vast realms of knowledge that a case might involve, nor can they rule on the basis of knowledge they lack. Caution is appropriate in such cases, as it is where longstanding precedent or a divided court are at issue, and when determining how widely or narrowly the ground of a decision should be stated. Judicial humility as epistemological humility "presses judges to remain within the confines of their legal expertise."[97]

Another aspect of judicial humility is relational: "institutional humility" asks judges to appreciate their own limited role in relation to the Constitution itself and the authority of other actors who operate under it. Judges who claim an "outsized role in the constitutional order" risk "improperly interfering with the people's self-governance and distorting the order as a whole."[98] Again, the proper judicial role does not always dictate deference or restraint—it depends on the situation. But it is clear that judicial humility is incompatible with contemporary judicial supremacy. The operation of both aspects of humility together make the point: "epistemological humility (the awareness of one's proneness to error) coalesces with institutional humility (the awareness of one's limited place in the constitutional order) to foster an attitude of caution in overturning the decisions of other constitutional actors."[99]

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[94] Zachary K. German & Robert J. Burton, *Constitutional Humility: The Contested Meaning of a Judicial Virtue*, 10 AM. POL. THOUGHT 238, 245, 251 (2021). *See also* Amalia Amaya, *The Virtue of Judicial Humility*, 9 JURIS. 97 (2018).

[95] German & Burton, *supra* note 94, at 253.

[96] *Id.* at 254

[97] *Id.* at 258.

[98] *Id.* at 259

[99] *Id.* at 262.

This analysis raises anew consideration of James Bradley Thayer's seminal work, which oriented the 20th-century tradition of judicial restraint prior to its defenestration by the Warren Court.[100] Thayer famously argued that American thought and practice supported the rule that courts should only disregard a law "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question."[101] This view was based on the primacy of the legislature in lawmaking in America's separation of powers system and a recognition that, within that context, people could in good faith reasonably disagree about what the Constitution required or permitted. The work of modern courts proceeded amid problems of governance that presented "great, complex, ever-unfolding exigencies." But in reviewing legislative acts, "the courts are revising the work of a co-ordinate department, and must not, even negatively, undertake to legislate."[102] Amid this reality, Thayer's rule accepted that

> much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.[103]

This approach would have courts less frequently opposing or revising the constitutional judgments of legislatures. Indeed, Thayer concluded that, in his time, legislatures seemed *too* willing to cede to courts questions of law, justice, and right, and that his announced rule could help avert this trend's threat to self-government:

> The safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the

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[100] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Wallace Mendelson, *The Influence of James B. Thayer Upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71 (1978); *One Hundred Years of Judicial Review: The Thayer Centennial Symposium* 88 NW. U. L. REV. 1 (1993). Thayer's relevance to the project of judicial humility is limned but not developed in German & Burton, *supra* note 94, at 264.

[101] Thayer, *supra* note 100, at 144.

[102] *Id.* at 144, 150.

[103] *Id.* at 144.

> legislatures, and of the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs.[104]

Thayer has been subjected to a variety of criticisms, especially because his position was said to depend on an unrealistically rosy conception of legislatures. Legislatures did not always deliberate about the public good or consistently and conscientiously consider the constitutionality of the statutes they passed. Matthew J. Franck has sought to restore Thayer's case for judicial restraint in part by responding that Thayer's critics confused an "argument about constitutional principles (answering the question, what does a particular constitution establish by way of institutional authority?) with an argument about institutional performance in practice (answering the question, does the legislature in fact take constitutionality seriously?)."[105] Thayer's position did not depend on universal constitutional rectitude from legislators. But the reality, said Franck, was that "every constitution that calls a legislature into being and empowers it to pass laws necessarily presumes that the legislature will pass laws it has the authority to pass, and no others. The legislature's conformity with this expectation is a rebuttable presumption."[106]

Franck further argued that a deeper understanding of the importance of a "presumption" in Thayer's thought would clarify Thayer's overall claim. A presumption was not an argument or evidence, but it located where the burden of proof should be placed. The amount or type of evidence necessary to overcome a presumption (the weight of the burden) was itself a separate question. Thayer's presumption of constitutionality for acts of the legislature did not claim to be based on any evidence about what the legislature had done in any particular instance; it "simply mark[ed] the beginning of all reasoning on the matter before the court."[107] And the presumption of constitutionality, rebuttable to be sure, was quite sensible given that the legislature was created to empower elected representatives to legislate for the objects authorized by the Constitution.[108] Thus, Thayer's doctrine accepted that there was a sub-

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[104] *Id.* at 156.

[105] Matthew J. Franck, *James Bradley Thayer and the Presumption of Constitutionality: A Strange Posthumous Career*, 8 AM. POL. THOUGHT 393, 403 (2019). Another longstanding criticism of Thayer is that judicial deference to legislatures improperly imperils individual rights. This evaluation of Thayerian restraint is not the exclusive preserve of progressive liberals or living constitutionalists. *See* Steven G. Calabresi, *Originalism and James Bradley Thayer*, 113 NW. U. L. REV. 1419 (2019).

[106] Franck, *supra* note 105, at 405.

[107] *Id.* at 408.

[108] *Id.* at 409.

stantial range of valid opinion about constitutionality and that the legislature's action may not have been premised on what *judges* would take to be the best argument for constitutionality. Nevertheless, the question was: "'Is this law grounded in a reasonably defensible interpretation of the constitution?'" That "is the kind of question Thayer believes courts should ask."[109] Expressed in this way, there appears to be a substantial affinity between Thayer's core position and the newer doctrine that combines epistemological humility (accepting that there is a range of reasonable interpretation on which judges do not have a monopoly) with institutional humility (not claiming an outsized role in the constitutional system and being willing to defer to other actors in cases of reasonable doubt). A return to this kind of thinking would be necessary if judicial supremacy is ever to be pared back to allow more space for legislative decision making.

But, to repeat, a more modest and constitutionalist conception of the judicial role that better respects the authority and responsibility of Congress does not entail judicial abnegation or automatic deference to whatever other institutional actors might do. This point is well illustrated by the ongoing reconsideration of the role of courts in relation to the administrative state. This huge subject can only be touched upon here, but originalist thinking about the judicial role must contend with it.

At the most basic level, some delegation is inevitable insofar as Congress is not built for regularly administering the myriad details of what it may constitutionally legislate. For over a century, Congress has delegated portions of its legislative authority to regulatory bureaucracies of its own creation. As Chief Justice John Marshall put it long ago, "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[110] Currently, there is a lively originalist dispute about the nature and extent of congressional delegation at the founding and its bearing on the modern administrative state.[111] Just how much authority can be legitimately delegated to bureaucracies, and how much courts should defer to them, is continually disputed. And the positions

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[109] *Id.* at 413.

[110] Wayman v. Southard, 23 U.S. 1, 43 (1825).

[111] *Compare* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021) *with* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021).

of liberals and conservatives have shifted over time. In the 1980s, conservatives often endorsed judicial deference to agencies on the model elaborated from *Chevron*.[112] This was in response to aggressive judicial supervision and even direction of agencies in the 1960s and 1970s, whereby judges mandated generally liberal policy results whose legal bases conservatives found suspect. Institutionally, this conservative call for deference was nearly indistinguishable from the position held by Progressives and New Dealers when they created the modern administrative state in part to circumvent judicial resistance to regulation in the early 20th century.[113]

Today, positions have again shifted, with conservative criticism of judicial deference having markedly increased in the past decade or so. Conservatives now argue that deference has enabled politically unaccountable bureaucracies to rule on many momentous subjects by permitting them to exploit overly vague delegations. Given this circumstance, a defense of the originally intended separation of powers requires courts to limit the reach of agencies in the hope of impelling Congress to act. Such "judicial fortitude" is directed ultimately at stimulating democratically accountable decision making in the legislature so that, in Thayer's words, "responsibility may be brought sharply home where it belongs."[114] This cannot be equated with the kind of judicial power originalism historically arrayed itself against. A court seeking to limit the reach of bureaucratic discretion for the sake of legislative responsibility is not the same as one that invents new rights to seize controversial issues from legislative control, nor one that routinely equates its own contestable interpretation of the Constitution with the thing itself.

This is the appropriate perspective for understanding the growing conservative criticism of *Chevron* deference and the current Supreme Court's willingness to reconsider it. To take only one recent example, in *West Virginia v. Environmental Protection Agency*, the Court considered an agency claim that the Clean Air Act empowered it to make significant policy changes.[115] It decided that the EPA had leaned too heavily on obscure and supposedly vague statutory provisions in seeking to transform the domestic energy industry by

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[112] Chevron USA v. National Resources Defense Council, 467 U.S. 837 (1984).

[113] *See generally* JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT (2017).

[114] PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE (2018); Thayer, *supra* note 100, at 156.

[115] 597 U.S. __ (2022).

making the use of coal cost-prohibitive. The Court rejected this interpretation and invalidated the agency's action because such a "major question" with such far-reaching effects could not legitimately rest on such a flimsy interpretive foundation. A change of this magnitude would require more direct authorization from Congress.

While critics allege that the Court invented the major questions doctrine out of whole cloth to obstruct good public policy, it is really trying to get Congress to take more responsibility for directing the administrative state. In the *West Virginia* decision, Chief Justice John Roberts said the doctrine "refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[116] This seems an apt statement of the situation. To the extent that the Court is reasserting itself to claw back some of the power it ceded to agencies in the recent era of deference, it is doing so in the name of limited and accountable government and as a prod to the democratic legitimacy of Congress.[117]

V. DEFENDING LEGISLATURES

Even though judicial supremacy has largely displaced the older tradition of judicial deference and restraint, it has been challenged intermittently by presidents and by conceptions of "departmental" review and constitutional "dialogue."[118] Deeper engagement with such thinking might persuade our lawyerly originalists that constitutionalism need not reduce to whatever the Supreme Court says. Rather, it is a system of institutions whose purposes, interactions, and contestations facilitate and order a political community's self-government. But today's originalism remains almost entirely directed to judges and courts, largely ignoring theoretical treatment of legislatures and

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[116] *Id.*, slip op. at 20.

[117] *See infra*, Section VII, for a discussion of how Congress might reform itself internally to become a more responsible and deliberative body that could better govern and better control the administrative state.

[118] LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS A POLITICAL PROCESS (1988); NEAL DEVINS AND LOUIS FISHER, THE DEMOCRATIC CONSTITUTION (2004); GEORGE THOMAS, THE MADISONIAN CONSTITUTION (2008); WEINER, *supra* note 22.

historical attention to Congress.[119] Having achieved some success in countering the jurisprudence of progressive living constitutionalism cum judicial supremacy, originalism is in danger of becoming just another judicial tool to achieve certain results. In doing so, it would profit from and encourage judicial supremacy's continued corruption of the constitutional order. Or it could change course and broaden its conception of constitutionalism, continuing to discipline the reach of courts so that Congress can regain its footing as the nation's primary institution of republican self-government. Arguing recently along these lines, Yuval Levin observed that "the Right's court-centered constitutionalism was born to free Congress to act, but in practice it has too often under-emphasized the importance of Congress." Meanwhile, "Republicans have taken every opportunity to cut Congress down and keep it under-resourced and have taken very little interest in reforms that might modernize the institution and strengthen it in relation to the other branches."[120] Here is the crossroads at which originalism's successes and limitations have arrived.

What might originalists see if they paid more attention to legislatures in general, to Congress in particular, and to constitutionalism as a form of political order that extends beyond mere jurisprudence? A fuller inquiry into this topic would entail at least the following: a richer appreciation of Congress as the place where representation, deliberation, and compromise make legislating possible amid the disagreement inherent in a free society; examination of historical and recent episodes in which Congress has successfully acted in accord with these norms of sound legislation; and consideration of proposals for how Congress might be reformed and strengthened better to fulfill its constitutional functions.[121]

Despite the founders' concerns about majority faction and democratic inconstancy, they intended for Congress to make law by conciliating and accommodating competing interests for the sake of the common good. As such, it was made to be the place where representatives gathered to deliberate and compromise.[122] This view places Congress, though made for a modern liberal

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[119] Joel Alicea, *An Originalist Congress?*, NAT'L AFFAIRS, Winter 2011, at 31; Joel Alicea, *Forty Years of Originalism*, 173 POL'Y REV. 69 (2012). Keith E. Whittington is an exception, defending originalism but opposing judicial supremacy.

[120] Yuval Levin, *The Future of Conservative Constitutionalism*, NAT'L REV. (Sept. 17, 2021), https://www.nationalreview.com/2021/09/the-future-of-conservative-constitutionalism/.

[121] The following discussion is informed by the best recent defense of Congress, PHILLIP A. WALLACH, WHY CONGRESS (2023).

[122] Greg Weiner, *'The Cool and Deliberate Sense of the Community:'* The Federalist *on Congress*, *in* THE CAMBRIDGE COMPANION TO THE FEDERALIST 400-25 (Jack N. Rakove & Colleen A.

republic, well within the Aristotelian conception of politics. People assemble to discuss and debate, fashioning from their varied interests laws that stand as legitimate general rules—rules that are comprehensible and serviceable, though inevitably imperfect. There is no expectation of universal agreement, yet rule by mere force is inadmissible.[123] Such anti-utopian realism about the nature and limits of politics has long recommended itself to people who expect government to act for the common good and to provide a modicum of peace and stability, but not perfect justice.

The most sustained philosophical defense of legislation, undertaken by Jeremy Waldron, accepts ineliminable disagreement as constitutive of the political. We need not adopt Waldron's confidence in popular rule unto complete rejection of judicial review in order to appreciate his insights. Underscoring the inevitability of disagreement, he argues that the elected, relatively large representative assembly is the central lawmaking institution in a free society of equal citizens. Only this kind of legislature is suitable for representing, debating, and accommodating society's numerous and conflicting interests and beliefs. Presuming the disagreement it encompasses, the legislature orders its procedures and formalities to produce law as a written text that embodies the agreement that can be reached. While rarely attaining unanimity, the process produces law that is rightly accepted as legitimate and authoritative. Understood in this way, legislation constitutes a remarkable, often delicate, and typically imperfect act of collective self-government.

Waldron well understood that the fact of moral disagreement was not proof of moral relativism—a doctrine he disavowed—yet that it did constitute the "circumstances of politics" in which legislation must be fashioned. The core problem of lawmaking, then, was one of legitimacy and authority. "Any laws that we enact must do their work in a community of people who do not necessarily agree with them and who will therefore demand that something other than the merits of their content—something about the way they were enacted—be cited in order to give them an entitlement to respect."[124]

Sheehan eds., 2020); JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT 1-39 (1994).

[123] David Resnick, *Justice, Compromise, and Constitutional Rules in Aristotle's* Politics, *in* NOMOS XXI: COMPROMISE IN ETHICS, LAW, AND POLITICS 69-86 (J. Roland Pennock & John W. Chapman eds., 1979); BERNARD CRICK, IN DEFENCE OF POLITICS 17-18 (4th ed., 1993); JEREMY WALDRON, THE DIGNITY OF LEGISLATION 98, 106-07, 115-18 (1999).

[124] JEREMY WALDRON, LAW AND DISAGREEMENT 101-2 (1999); JEREMY WALDRON, POLITICAL POLITICAL THEORY 166 (quote). For a similar but more abstract argument that likewise emphasizes the distinction between legitimacy and justice (though not in the context of legislation),

Waldron has done much to explain why and how legislation answers the need for general rules with legitimate authority amid the diversity and disagreement characteristic of a free society. Political realists should welcome his core argument that the legislature is an instrument of self-government in the everyday world of political contestation, not something made for the anti-political utopia of universal consensus.

Waldron emphasizes that it is the output of the legislature's fair processes that establishes legal legitimacy. He denies that the legislature can aggregate the intentions of its members in a statute; rather, he claims that individual legislators simply vote—whatever their reasons—to enact the text's conventional meaning. We have seen above how Richard Ekins responded directly to the supposed "summing" problem of group intent in legislation. In reconceptualizing legislation as a form of joint action based on reasons and purposes held in common—the interlocking and coordinating of individual intentions to adopt a shared plan in the form of a text—Ekins brings into sharper relief the centrality of deliberation and compromise among elected representatives who together agree on a text that stands as law.[125] Representatives' identification and discussion of problems to be addressed, and the subsequent drafting, debating, and revision of a proposed text into a form acceptable to a majority—a majority that represents a variety of interests and beliefs about the common good as understood at the time—all require legislators to deliberate and compromise as a matter of course. Only in this way can the text as their joint action be brought into existence.

Indeed, representation, deliberation, and compromise must be philosophically defended and consciously practiced if legislation for the public good is to emerge amid political disagreement. Of course, these ideas were central to *The Federalist*'s treatment of Congress and in its famous theory of faction. Scholars too have plumbed them at length and from a variety of perspectives, often at the level of abstract theory and with sometimes hairsplitting attention to conceptual definition. Here is not the place for a detailed engagement with these arguments, but we can aver some of their principal findings. Lawmaking by elected representatives can indeed elevate the quality of political deliberation above mere advocacy of localism or self-interest, and toward reasoning

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see Steven Wall, *Political Morality and Constitutional Settlements*, 16 CRITICAL REV. INT'L SOC. & POL. PHIL. 481 (2013).

[125] EKINS, LEGISLATIVE INTENT, *supra* note 57, at 13, 93, 102, 146-54, 161, 175, 223, 240, 241.

and compromise for the common good.[126] Congress has proven itself capable of such deliberation, in different ways and to various degrees.[127] And Congress has likewise legislated via compromise, a political activity its members and their constituents typically support despite its increased difficulty in the current era of polarization.[128] Accepting the reality that Congress cannot create political agreement where there is none, we should acknowledge that, in every era, it has legislated based on its members' ability to deliberate and compromise.

VI. FOCUS ON COMPROMISE

While representation and deliberation have long concerned political theorists (though mostly without direct reference to legislatures or Congress), the philosophical definition and specification of compromise has lately received increased attention. Relevant points from this often recondite literature can illuminate evaluation of compromise in the American constitutional experience. Compromise can be understood as both a process of reaching agreement and the content of the agreement reached. It seems unrealistic to

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[126] BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT (1997); WALDRON, POLITICAL POLITICAL THEORY, *supra* note 124, at 125-44; Nadia Urbinati, *Representation as Advocacy: A Study of Democratic Deliberation*, 28 POL. THEORY 758 (2000); David Weinstock, *Compromise, Pluralism, and Deliberation*, 20 CRITICAL REV. OF INT'L SOC. & POL. PHIL. 636 (2017).

[127] BESSETTE, *supra* note 122, chs. 4, 5, 6; GARY MUCCIARONI & PAUL J. QUIRK, DELIBERATIVE CHOICES: DEBATING PUBLIC POLICY IN CONGRESS (2006); ARTHUR MASS, CONGRESS AND THE COMMON GOOD (1983); ESTEEMED COLLEAGUES: CIVILITY AND DELIBERATION IN THE U.S. SENATE (Burdett A. Loomis ed., 2000); J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM (2004); Jane Mansbridge, *Motivating Deliberation in Congress*, *in* E PLURIBUS UNUM: CONSTITUTIONAL PRINCIPLES AND THE INSTITUTIONS OF GOVERNMENT 59-86 (Sarah Baumgartner Thurow ed., 1988); Daniel Palazzolo, *A Return to Deliberation? Politics and Lawmaking in Committee and on the Floor*, *in* IS CONGRESS BROKEN? THE VIRTUES AND DEFECTS OF PARTISANSHIP AND GRIDLOCK 57-83 (William F. Connelly Jr., John J. Pitney Jr., & Gary J. Schmitt eds., 2017).

[128] BARRY JAY SELTSER, THE PRINCIPLES AND PRACTICE OF POLITICAL COMPROMISE: A CASE STUDY OF THE UNITED STATES SENATE (1984); AMY GUTMANN & DENNIS THOMPSON, THE SPIRIT OF COMPROMISE: WHY GOVERNING DEMANDS IT AND CAMPAIGNING UNDERMINES IT (2012); JOSH M. RYAN, CONGRESSIONAL ENDGAME: INTERCHAMBER BARGAINING AND COMPROMISE (2018); JENNIFER WOLAK, COMPROMISE IN AN AGE OF PARTY POLARIZATION (2020); Sarah A. Binder & Frances E. Lee, *Making Deals in Congress*, *in* POLITICAL NEGOTIATION: A HANDBOOK 91-117 (Jane Mansbridge & Cathie Jo Martin eds., 2015); SARAH E. ANDERSON, DANIEL M. BUTLER, & LAUREL HARBRIDGE-YONG, REJECTING COMPROMISE: LEGISLATORS' FEAR OF PRIMARY VOTERS (2020).

reify this distinction in the context of legislation. In practice, legislators establish the content of the law by negotiating (and bargaining and deliberating, which can be conceptually distinguished). More generally, most definitions hold that a compromise is an agreement in which the parties make mutual concessions so that they may act together despite their disagreement, which to some extent always remains and endures. The compromise agreement is not the best (morally or politically, or both) that could be imagined, but it is what the parties can accept. Thus, compromises are inherently suboptimal from the perspective of each of the parties to them, and they are always open to moral or political criticism, and to abandonment or renegotiation. Yet, paradoxically, parties to a compromise have both reasons to agree to its content and reasons not to be fully satisfied with it. Moreover, compromise as a political activity is highly contextualized, so there is no way to say precisely and ahead of time whether and to what extent one should be undertaken.[129] Compromise is valuable—it might even be morally defensible despite its inherent imperfections—if it ensures peace or avoids greater evil. Likewise, compromise can enlarge the set of people who have varying reasons to regard an agreement as a justifiable course of action from their particular perspectives. Law resulting from this kind of compromise is likely to have wider acceptability and thus conduce to social stability and peace.[130] Finally, a recurrent theme among students of compromise is that, whatever its shortcomings, it is an unavoidably necessary means of democratic governance under conditions of pluralism and disagreement. If a political community of any

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[129] COMPROMISE AND DISAGREEMENT IN CONTEMPORARY POLITICAL THEORY (Christian F. Rostbøll & Theresa Scavenius eds., 2017); COMPROMISES IN DEMOCRACY (Sandrine Baume & Stéphanie Novak eds., 2020); GUTMANN & THOMPSON, *supra* note 128; AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES (2010). *See also* Patrice Canivez, *Democracy and Compromise*, *in* APPROACHES TO LEGAL RATIONALITY 97-118 (Dov M. Gabbay et al. eds., 2010). Helpful earlier works include MARTIN BENJAMIN, SPLITTING THE DIFFERENCE: COMPROMISE AND INTEGRITY IN ETHICS AND POLITICS (1990); J. PATRICK DOBEL, COMPROMISE AND POLITICAL ACTION: POLITICAL MORALITY IN LIBERAL AND DEMOCRATIC LIFE (1990); NOMOS XXI: COMPROMISE, *supra* note 123; RICHARD BELLAMY, LIBERALISM AND PLURALISM: TOWARDS A POLITICS OF COMPROMISE 93-114 and *passim* (1999). Alin Fumurescu traces the genealogy of compromise in European thought in COMPROMISE: A POLITICAL AND PHILOSOPHICAL HISTORY (2013) and seeks to apply this framework to America in COMPROMISE AND THE AMERICAN FOUNDING: THE QUEST FOR THE PEOPLE'S TWO BODIES (2019).

[130] This view is defended in Fabian Wendt, *Compromise and the Value of Widely Accepted Laws*, *in* COMPROMISE AND DISAGREEMENT, *supra* note 129, at 50-62; FABIAN WENDT, COMPROMISE, PEACE AND PUBLIC JUSTIFICATION (2016).

complexity is to endure, the collective action required to address the problems it confronts will make compromise indispensable.[131]

Of course, the Philadelphia convention of 1787 wrote several famous compromises into the Constitution. The idea of compromise was consciously practiced and affirmed throughout the gathering.[132] Likewise, compromise was a valued political norm throughout the antebellum era, and as in Philadelphia, several compromises accommodated slavery to preserve the union.[133] Now that compromise is receiving more attention in our era of polarization, we might ask whether the constitutional system that fostered and facilitated compromise with slavery was thereby delegitimized and in need of refounding or rejection.[134] At stake in this question, as in the assessment of any momentous compromise, is the exercise of prudence to judge political decisions made in circumstances that are never ideal and often unjust.

This point can be clarified with one example from among many that might be chosen from our history: Daniel Webster's defense of the Compromise of 1850 in his "Seventh of March" speech. Webster, a legislator, expressed what he viewed as the proper standard of judgment precisely in the morally fraught context of slavery. Webster had long publicly condemned slavery as a moral evil and had opposed its westward expansion. Yet he accepted that, per the Compromise, New Mexico was allowed to determine the question for itself according to the doctrine of popular sovereignty. This was partly because he doubted slavery would be economically viable there, and partly because he did not want to antagonize the South just when, under the terms of the Compromise, California was coming into the union as a free state. He likewise defended the fugitive slave law as a central element of the Compromise from the South's perspective, noting that it was permissible under the Constitution (Article IV, Section 2) and was necessary to keep the peace (as Lincoln too later agreed). In this speech, Webster was purposefully expending some of his hard-earned anti-slavery political capital on behalf of

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[131] *See, e.g.*, GUTMANN & THOMPSON, *supra* note 128, at 1, 22, 24, 204; DOBEL, *supra* note 129, at 3, 9, 80-84; BENJAMIN, *supra* note 129, at 139-43, 149; Joseph H. Carens, *Compromises in Politics*, *in* NOMOS XXI: COMPROMISE, *supra* note 123, at 123-41.

[132] William E. Nelson, *Reason and Compromise in the Establishment of the Federal Constitution, 1787-1801*, 44 WM. & MARY Q. 458 (1987); DAVID BRIAN ROBERTSON, THE ORIGINAL COMPROMISE: WHAT THE CONSTITUTION'S FRAMERS WERE REALLY THINKING (2013).

[133] PETER B. KNUPFER, THE UNION AS IT IS: CONSTITUTIONAL UNIONISM AND SECTIONAL COMPROMISE, 1787-1861 (1991).

[134] NOAH FELDMAN, THE BROKEN CONSTITUTION: LINCOLN, SLAVERY, AND THE REFOUNDING OF AMERICA (2021). *See also* Lena Zuckerwise, '*There Can Be No Loser': White Supremacy and the Cruelty of Compromise*, 5 AM. POL. THOUGHT 467 (2016).

a compromise that he thought could secure the union so that ultimately slavery could be ended without civil war. To critics who rejected compromise, he responded with this defense of it:

> There are men who, with clear perceptions, as they think, of their own duty, do not see how too eager a pursuit of one duty may involve them in the violation of others, or how too warm an embracement of one truth may lead to a disregard of other truths equally important. . . . They deal with morals as with mathematics; and they think what is right may be distinguished from what is wrong with the precision of an algebraic equation. They have, therefore, none too much charity towards others who differ from them. They are apt, too, to think that nothing is good but what is perfect, and that there are no compromises or modifications to be made in consideration of difference of opinion or in deference to other men's judgment. If their perspicacious vision enables them to detect a spot on the face of the sun, they think that a good reason why the sun should be struck down from heaven. They prefer the chance of running into utter darkness to living in heavenly light, if that heavenly light be not absolutely without any imperfection.[135]

Webster understood, as did the best of the founders before him and Lincoln after him, that preserving the union was the only realistic hope of eradicating slavery. Its permanent destruction was more likely in a nation based on natural rights and consent than in one that, like the Confederacy, rejected those principles. Prudence determined the right course according to circumstance: move toward freedom, compromise with slavery when necessary, and preserve the constitutional order of the union. An absolute demand for freedom in 1787 or 1850 likely would have caused disunion or civil war, and then perhaps a permanent slave-owning nation adjacent and antagonistic to the free one. This is not to deny that various compromises perpetuated the injustice of slavery, nor that war ultimately was required to put down secession.[136] Rather, the point is that the inevitable moral remainder of any serious compromise is not a sound argument against the practice of compromising,

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[135] Daniel Webster, *The Constitution and the Union*, Mar. 7, 1850, *in* THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER 604 (Edwin P. Whipple ed., 1879).

[136] This conclusion builds on the classic teaching of HARRY V. JAFFA, CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES (1959). *See also* Greg Weiner, *Lincoln and the Moral Dimension of Compromise*, 11 AM. POL. THOUGHT 253, 262-63 (2022).

which is normal and unavoidable if a diverse and pluralistic society is to govern itself.[137]

Compromise is not a virtue as such, nor an end in itself (though it is required in law and constitution making). But compromise can conduce to the ancient virtue of moderation. We might be intrepid in our philosophy or faithful in our religion, but moderation is usually the wiser course in politics. Often it is all that can be expected. Indeed, American constitutionalism can justifiably be understood as promoting—even requiring—the political moderation that emerges from compromise, given the different constituencies of its officeholders, its detailed mechanisms for distributing and recombining power, and its multiple points of delay, veto, and required agreement. As revealed especially in its complex system of checks and balances, the Constitution has been called "an attempt to institutionalize moderation."[138] Analysis that sees conciliation and coordination as integral to politics treats constitutionalism as a system of institutional interactions that first assumes disagreement, and then induces deliberation and compromise to produce policy rooted in shared social norms.[139] Politics in a healthy constitutional regime thus tends to be moderate and decent because the regime's structures encompass and accommodate political conflict. Such a constitutionalized politics is inevitably imperfect and open to criticism, yet it is also open to improvement. Those who want more from political life become immoderate, tending toward utopia or tyranny.

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[137] GUTMANN & THOMPSON, *supra* note 128, at 55-58 (making this point in the context of compromise with slavery).

[138] TOWARD A MORE PERFECT UNION: WRITINGS OF HERBERT J. STORING 320 (Joseph M. Bessette ed., 1995). *See also* LEO STRAUSS, LIBERALISM ANCIENT AND MODERN 24 (1968).

[139] For a sampling of analyses supporting this general view of constitutionalism, see CRICK, *supra* note 123, at 146-51; WALDRON, POLITICAL POLITICAL THEORY, *supra* note 124, at 36, 13-14, 21-22, 62-65, 283-84, 298-300; PETER BERKOWITZ, CONSTITUTIONAL CONSERVATISM: LIBERTY, SELF-GOVERNMENT, AND POLITICAL MODERATION 39-75 (2013); DOBEL, *supra* note 129, at 48, 52-53, 90; KNUPFER, *supra* note 133, at x, 10, 15, 17, 44, 51, 129; Jeffrey K. Tulis, *Deliberation Between Institutions*, *in* DEBATING DELIBERATIVE DEMOCRACY 200-11 (James S. Fishkin & Peter Laslett eds., 2003); Keith E. Whittington, *Constitutional Theory and the Faces of Power*, *in* THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY 163-90 (Kenneth D. Ward & Cecelia R. Castillo eds., 2005); Johnathan O'Neill, *Carl J. Friedrich's Legacy: Understanding Constitutionalism as a Political System*, 14 THE EURO. LEGACY 283, 288-90 (2009); Jonathan Rauch, *Rescuing Compromise*, NAT'L AFFAIRS, Fall 2013, at 115, esp. 120, 126.

VII. REFORMING CONGRESS

A healthier constitutionalism requires a healthier Congress. Its rules, structures, and procedures significantly affect the quality of deliberation that goes into lawmaking, even though Congress rarely acts directly to improve its methods and few scholars have concentrated on the subject.[140] How might Congress reform itself to become a more responsible and deliberative legislature? There is a lively and ongoing scholarly discussion on this and related topics. Earlier such discussions preceded the congressional reorganization and reform episodes of the 1940s and 1970s (which themselves had some unintended negative consequences that shape today's landscape). As in the past, the political and party contexts both incentivize and constrain any changes that might occur: reform of a political institution is inevitably a political process. Likewise, previous reforms in Congress did not wipe the slate clean and begin anew, but instead were typically laid over existing institutional forms and procedures. This complexity and contingency make reform inherently contested and incremental. Nevertheless, earlier Congresses did adapt to changed circumstances to defend the institution's constitutional authority as the national legislature.[141] The numerous and varied proposals of recent years cannot be treated comprehensively here, nor can we consider fully how changes in the party system, especially increased polarization, have altered the functioning of Congress and limited the potential for change. Described below are only a few of the more salient ideas that have been raised with some frequency and that seem constitutionally sound in principle.

Often driven by Congress itself, the administrative state has corrupted American constitutionalism.[142] The most basic thing Congress could do to reclaim its rightful authority and responsibility would be to assert more control over the regulatory bureaucracies it has created and empowered. This would entail less congressional delegation and deference to agencies via vague legal standards that allow them to govern of their own accord, and recovery

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[140] Paul J. Quirk & William Bendix, *Deliberation in Congress*, *in* THE OXFORD HANDBOOK OF THE AMERICAN CONGRESS (George C. Edwards III, Frances E. Lee, & Eric Schickler eds., 2011, online edition); Paul J. Quirk, *Deliberation and Decision Making*, *in* THE LEGISLATIVE BRANCH 314-48 (Paul J. Quirk & Sarah A. Binder eds., 2005). *See also* WALLACH, *supra* note 121.

[141] Eric Schickler, *Institutional Development of Congress*, *in* LEGISLATIVE BRANCH, *supra* note 140, at 35-62.

[142] *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); POSTELL, *supra* note 113.

of some of what has already been given away.[143] Not only would this change be in accord with Congress's authority and responsibility to set legal norms, but less delegation and deference likely would induce more compromise and moderation in the laws that are passed. This would be an improvement from the swings in policy that occur as each incoming administration exploits regulatory-bureaucratic discretion in the opposite direction from its predecessor. If Congress recaptures or simply refrains from ceding more of its legislative discretion, the compulsion to arrive at clearer legal standards from amid diversity and disagreement would precipitate the classic legislative practices that produce compromise; the resulting compromise bill would contain more moderate content than what extremists on either side would prefer.[144]

Another proposal that has recurred for over a decade now is the Regulations from the Executive in Need of Scrutiny (REINS) Act. It would require prior congressional approval for a major agency regulation before it could take effect. REINS would be a significant tool in the congressional arsenal, and although it has not passed, it also has not disappeared, because the constitutional issues it addresses are real and substantial.[145]

Related to control of the administrative state is the more general need for Congress to reassert its governing authority via its power of the purse. A prime example is the decay of the budgeting and appropriations process. Whereas the longstanding practice was for Congress to consider usually a dozen separate appropriations bills and thus to maintain some control and oversight over what it funded, now the norm is for it to consider one or a few immense "omnibus" bills that are typically passed at the end of a session. Usually their contents are little discussed and little understood, but they become law for fear of a government shutdown or debt default. A return to the older system

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[143] Yuval Levin, *Four Steps for Reviving the First Branch*, *in* RESTORING CONGRESS AS THE FIRST BRANCH 11 (R Street Policy Study No. 50, Jan. 2016); SAIKRISHNA BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS 256-58 (2020); John O. McGinnis & Michael B. Rappaport, *Restoring a Constitution of Compromise*, NAT'L AFFAIRS, Spring 2022, at 83, 88-89; Melanie M. Marlowe, *Reclaiming Institutional Relevance Through Congressional Oversight*, *in* IS CONGRESS BROKEN?, *supra* note 127, at 117-18.

[144] McGinnis & Rappaport, *Restoring a Constitution of Compromise*, *supra* note 143, at esp. 83-84, 89, 90.

[145] Kevin R. Kosar, *How to Strengthen Congress*, NAT'L AFFAIRS, Fall 2015, at 59; McGinnis and Rappaport, *Restoring a Constitution of Compromise*, *supra* note 143, at 88; Levin, *Four Steps*, *supra* note 143, at 11; Joseph Postell, *From Administrative State to Constitutional Government*, HERITAGE FOUND. SPECIAL REPORT 26 (Dec. 7, 2012). *But see* Philip A. Wallach, *Losing Hold of the REINS: How Republicans' Attempt to Cut Back on Regulations has Impeded Congress's Ability to Assert Itself*, BROOKINGS SERIES ON REGULATORY PROCESS AND PERSPECTIVE (May 2, 2019), https://www.brookings.edu/research/losing-hold-of-the-reins/.

would be a return to both more responsible government spending and much needed oversight of regulatory agencies and the executive branch.[146]

The appropriations process illustrates that the way Congress conducts its business has changed substantially over the past several decades—too often for the worse. Scholars have long noted the shift from the "regular order" of conducting legislative business to "unorthodox lawmaking." The first is essentially the civics book version of "how a bill becomes a law": a bill is introduced and referred from the floor to a committee, which holds hearings, considers and revises a text, and reports it to the full chamber. There it is debated, possibly amended, and then voted on. A conference with the other chamber is held to resolve any differences. This system was designed to produce considered and deliberated legislation that had been thoroughly vetted in committee, that accrued support by accounting for minority party input, and that was open to fine-tuning through amendment.

Unorthodox lawmaking can take a variety of forms that to some extent disrupt or circumvent the regular order. In the House, the Rules Committee, controlled by the majority, can interrupt the day's order of business, severely limit debate on the floor, and restrict or prohibit amendments to a bill. The leadership also can bypass committee referrals altogether (no hearings or reports) and draft a bill behind closed doors, or it can substitute its own language for a committee draft. In the Senate, the once infrequent invocation of a supermajority (cloture) to end debate has now become a regular event that often kills legislation. The huge omnibus bills discussed above, often dealing with budget matters, are negotiated by leaders and passed so quickly that members often do not know what is in them.[147]

Regular order prevailed in the middle decades of the 20th century. During that period, both parties incorporated broad swathes of opinion, yet were more ideologically homogeneous vis à vis one another. In the recent era of greater intraparty unity and cross-party polarization, unorthodox lawmaking is frequently how legislation happens. Nevertheless, law made in the now-common unorthodox fashion is not necessarily more partisan or extreme. In fact, use of such methods is often the only way to legislate under severe time

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[146] *See* Peter C. Hanson, *Ending the Omnibus: Restoring Regular Order in Congressional Appropriations*, *in* IS CONGRESS BROKEN?, *supra* note 127, at 175-88; Marlowe, *Congressional Oversight*, *in id.* at 118; Levin, *Four Steps*, *supra* note 143, at 11. *See also* Walter J. Oleszek, *The "Regular Order": A Perspective*, CONGRESSIONAL RESEARCH SERV., at 27, 54 (Nov. 6, 2020).

[147] *See generally* BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (5th ed., 2017); Oleszek, *supra* note 146.

constraints, to prevent the destruction of laboriously fashioned compromises on the floor, or to stop minority party obstruction that would keep anything from being done. Legislative leaders can use unorthodox lawmaking to privately negotiate deals that are able to garner the necessary votes for passage, and also to build grand bargains beyond the reach of one or a few committees.[148]

While polarization has normalized unorthodox lawmaking, and though it is not always pernicious, observers concerned about the quality of congressional deliberation continually affirm the need to value and support the work of committees that has suffered in the new era. It is in committees that authentic deliberation historically has occurred; such deliberation is far rarer on the floor. In committees, members hold hearings, use mark-up sessions to hone language, and consider amendments from the minority party. Before the drive for transparency, television, and publicly recorded votes, committees provided more of the privacy that facilitates negotiation, persuasion, and deal making across party lines. Likewise, prior to the contemporary practice of three-day work weeks, committees encouraged deliberation by fostering among members the repeated interactions through which people come to know each other on a humane and social level. Furthermore, committees' substantive knowledge and deliberative ability have been undermined by Republican-imposed term limits on chairs, inadequate staffing levels, and frequent staff turnover. Finally, committee deliberation is sabotaged or made irrelevant when party leaders substitute new language for the committee's work, or else bypass the committee entirely. Advocates of reform argue that reversal of some or all of these trends likely would improve congressional deliberation.[149]

Additionally, it has been well documented that for decades Congress has underinvested in itself and its capacity as an institution. The number of congressional staff has substantially declined over time, and their salaries are low,

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[148] Sinclair, *supra* note 147, at 268-69; James M. Curry & Frances E. Lee, *What is Regular Order Worth? Partisan Lawmaking and Congressional Processes*, 82 J. OF POL. 627 (2020); Oleszek, *supra* note at 146, at 26-27.

[149] Quirk, *Deliberation and Decision Making*, *supra* note 140, at 330-33; Palazzolo, *Return to Deliberation*, *in* IS CONGRESS BROKEN?, *supra* note 127, at 74; Marlowe, *Congressional Oversight*, *in id.* at 120-22; Donald R. Wolfensberger, *Changing House Rules: From Level Playing Field to Partisan Tilt*, *in id.* at 101-02; Kathryn Pearson, *The Constitution and Congressional Leadership*, *in id.* at 167-68; Binder & Lee, *supra* note 128, at 109-10; Kosar, *How to Strengthen Congress*, *supra* note 145, at 55-56; Molly E. Reynolds, *Will Ryan's Reforms Strengthen the House?*, *in* RESTORING CONGRESS, *supra* note 143, at 9. *See also* SINCLAIR, *supra* note 147, at 264-67.

leading to frequent turnover and the loss of experience and expertise relied upon by members and committees. A similar trend is reflected in the staff and funding levels at support agencies like the Congressional Research Service and the Government Accountability Office.[150] Consequently, Congress has come to rely on the information it receives from the executive branch and lobbyists, who have their own interests that may not align with those of members or their constituents. There is near universal agreement among advocates of reform that the time has come to reverse this decline.[151] While Congress has often shied away from investing in itself for fear of voter reprisals, this issue may not be as salient as previously thought, especially if the action is cast as a response to an overreaching executive and self-interested lobbyists.[152] Additionally, "members also ought to realize the reason Congress is so unpopular is because it's unable to accomplish much, in part because it lacks the capacity."[153] There may be some "reason for optimism" because, as in past eras of reform, there are indications that members themselves are growing more discontent with the constraints of severely limited resources and the confinement of procedures that diminish meaningful participation in the legislative process.[154]

Related to the issue of capacity, Congress lacks the deep constitutional knowledge of the judiciary and the numerous legal offices in the executive branch and the administrative state. To bolster its ability to consider constitutional issues from its own institutional perspective—not simply those of the executive or judicial branches—it should consider creating something like an office for constitutional issues akin to the Office of Legal Counsel in the Department of Justice. This could be done on the model of the research,

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[150] This trend is documented in detail in Molly E. Reynolds, *The Decline in Congressional Capacity*, *in* CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND THE PROSPECTS FOR REFORM 34-50 (Timothy M. LaPira, Lee Drutman, & Kevin R. Kosar eds., 2020).

[151] PRAKASH, *supra* note 143, at 253-54; Kosar, *How to Strengthen Congress*, *supra* note 145, at 55, 56-58; Paul Glastris, *Congress Lobotomizes Itself*, *in* RESTORING CONGRESS, *supra* note 143, at 3-5; Kevin R. Kosar, *No Longer the First Branch*, *in id.* at 3; Lee Drutman, *A Congress Without Its Own Knowledge is a Dependent Congress*, *in id.* at 5-6; Marlowe, *Congressional Oversight*, *in* IS CONGRESS BROKEN?, *supra* note 127, at 122-24; Daniel Stid, *Two Pathways for Congressional Reform*, *in id.* at 31.

[152] Anthony Madonna & Ian Ostrander, *Dodging Dead Cats: What Would It Take to Get Congress to Expand Capacity?*, *in* CONGRESS OVERWHELMED, *supra* note 150, at 274-76.

[153] Drutman, *supra* note 151, at 6.

[154] Lee Drutman & Timothy M. LaPira, *Capacity for What? Legislative Capacity Regimes in Congress and the Possibilities for Reform*, *in* CONGRESS OVERWHELMED, *supra* note 150, at 32; Madonna & Ostrander, *supra* note 152, at 274 (quote) 275; Stid, *supra* note 151, at 32; Philip Wallach, *Congress Indispensable*, NAT'L AFFAIRS, Winter 2018, at 31-32.

investigative, and advisory institutions it already relies on, such as the Congressional Research Service and the Government Accountability Office.[155] This new constitutional office could produce opinions on constitutional questions, advise on the constitutional basis and implications of proposed legislation, and evaluate the constitutional arguments of the other branches. Such an institution would help Congress think for itself about its own authority instead of compelling it to rely on and defer to other entities whose facility in constitutional argumentation—from their own perspectives—currently far surpasses that of the legislature.

VIII. CONCLUSION

Originalism has successfully altered the landscape of constitutional jurisprudence and affected the direction of constitutional law since its initial reemergence in the last part of the 20th century. In the first few decades of the 21st century, it has responded to criticisms and made new advances. During this evolution, the theory has become more variegated and diffuse. Although originalism initially criticized the basis and scope of modern judicial review, gradually it has become more accommodated to the American practice of judicial supremacy. This development has raised questions about originalism's overall purpose and direction as thinkers grapple with whether and how to constrain judicial discretion in the "construction zone." That problem will have to be addressed in depth, and a more modest judicial role embraced, if originalism is to avoid becoming a new version of the judicially-updated living constitutionalism it first arose to contest. An originalism more concerned to constrain judicial discretion than to exploit it would return to the concept of intent as the core of legal meaning. It likewise would turn to the philosophical and constitutional defense of the representative and deliberative legislature. It is the institution originally designed to undertake the negotiation, deliberation, and compromise by which a free people makes law from its plural and contending interests. Accordingly, originalism would better serve constitutional self-government if its focus were widened to account for the legitimacy and authority of the legislature and the need to address the many ills of today's Congress. An originalism renewed along these lines would accept that the discourse of jurisprudence and constitutional law is limited in

[155] Versions of this general proposal appear in Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1313-19 (2001); Alicea, *Originalist Congress*, *supra* note 119, at 46; PRAKASH, *supra* note 143, at 254-55.

its capacity to legitimately resolve political problems, and therefore conclude that less should be demanded of it. In doing so, originalism would be building on the deepest purposes of the first modern originalists, who sought to sustain the separation of powers and constitutional self-government by defending the prerogatives of the legislature from judicial overreach.