

SPECIAL CONTRIBUTION

ORIGINALISM AND THE LEGISLATURE

Abstract

While the extent to which Congress ought to be involved in interpreting the Constitution has been the subject of scholarly debate in recent years, the question of *how* Congress should interpret the document has been overlooked. This paper examines the justifications underlying several schools of originalist thought to tease out what these schools have to say about congressional constitutional interpretation. When the major originalist theories are scrutinized, the logical conclusion is that Congress ought to be originalist when engaging in constitutional interpretation. The paper thus breaks new ground in pointing out this radical implication of originalist thought, but its novel exploration of congressional interpretive methods makes it highly relevant to nonoriginalist scholars as well.

INTRODUCTION

*Contemporary interpretivists permit the electorally accountable officials substantial leeway. The Congress can interpret the tenth amendment and the necessary and proper clause virtually as it pleases [I]n the area of individual rights, the so-called interpretivists, by and large, presume that the legislature has virtually unfettered discretion unless there is a specific prohibition placed upon their powers by the Constitution.*¹

Much has been made in recent years of the reincarnation of originalism as a constitutional interpretive method. The literature on originalism, from nonoriginalists and originalists alike,² has described a

1. Gary C. Leedes, *A Critique of Illegitimate Noninterpretivism*, 8 U. DAYTON L. REV. 533, 539 (1983).

2. Stephen Griffin has argued, "Scholars today distinguish among forms of originalism, not between originalism and nonoriginalism." Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1193 (2008). However, I think the distinction is still valid as argued by Keith E. Whittington. See Keith E. Whittington, *Dworkin's "Originalism;" The Role of Intentions in Constitutional Interpretation*, 62 THE REV. OF POL. 197, 197 n.2 (2000). Thus, this paper does assume that a distinction exists between originalists and nonoriginalists, and the fact that Dworkin is excluded as an originalist should give the reader some idea of what originalism *does not* mean

rebirth of the methodology, terming it the “new originalism.”³ This theme in the literature indicates a desire among scholars to look with new eyes at originalist theory,⁴ and it provides the opportunity to take up questions that heretofore have received scant attention in originalist scholarship. For all the attention that has been paid to important questions of originalist theory—such as collective intentionalism⁵ or the dead-hand problem⁶—one that has been conspicuously overlooked is the question of what implications originalism has for congressional constitutional interpretation. While there has been a recent renewal of interest in extrajudicial constitutional interpretation,⁷ the literature has focused almost exclusively on the extent to which the national Legislature ought to have a role in interpretation⁸ while ignoring the question of *how* Congress ought to interpret. This paper contends that some of the principal schools of originalist thought require originalism in congressional constitutional interpretation, though it does not offer a descriptive account of how Congress interprets.⁹ Rather, it focuses on how Congress should interpret the Constitution in light of various

in this context.

3. See JOHNATHAN G. O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS 204-05 (2005); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620-29 (1999); Griffin, *supra* note 2, at 1188-96; Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004).

4. Of course, because this paper does not argue for what originalism is or should be, I use “theory” expansively in this context and do not mean to suggest that there is one theory of originalism.

5. The problem of collective intentionalism or the so-called summing problem argues that it is impossible to discern what multiple founders or ratifiers intended when they approved the constitutional text. The argument is that each ratifier had his own view of what the text meant, and that aggregating these views is analytically problematic. See generally RAOUL BERGER, CONGRESS V. THE SUPREME COURT 47-119 (1969); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 187-95 (1999); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

6. The dead-hand problem questions the idea that those living under the Constitution today are bound by the actions or intentions of their predecessors. This line of argument is deeply skeptical of originalism because it seeks to bind today’s citizens to the actions or textual commands of the Constitution’s ratifiers. See generally Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998); James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 20-29 (1991); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127 (1998); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?*, 73 CAL. L. REV. 1482, 1495-510 (1985).

7. See *infra* Section I.

8. Throughout the paper, I will refer to Congress or other branches participating in “interpretation.” Unless otherwise noted, I mean to say constitutional interpretation.

9. Such accounts have been offered before, though this field of research is still relatively new. See *infra* Section I. While the last section of the paper touches on the issue of whether Congress is capable of implementing originalism in its interpretations that is not the focus of this paper.

schools of originalist thought, which assumes that Congress does and should have a role in constitutional interpretation.¹⁰

The paper proceeds in five sections. Section I is a rough (and by no means comprehensive) sketch of the work that has been done relating to congressional interpretation. The Section also seeks to clarify how the purpose of this paper contrasts with the focus of past scholars. Sections II-V explain five schools of originalist thought and examine their implications for congressional interpretation. Section II focuses on the originalist theories of Robert Bork, William Rehnquist, and Edwin Meese; Section III on Raoul Berger's Intentionalist School; Section IV on Steven Calabresi, Saikrishna Prakash, and Michael Stokes Paulsen; and Section V on Randy Barnett and Keith Whittington. As will be shown, the justification for each originalist school logically leads them to embrace originalism in congressional constitutional interpretation. It is important to begin, however, with a look at what has been said about congressional interpretation in recent literature, which is the subject of Section I.¹¹

I. CONGRESSIONAL CONSTITUTIONAL INTERPRETATION

While the topic of how Congress should interpret the Constitution has

10. I take no sides in this paper in the dispute over how much interpretive authority Congress ought to have. I suggest only that the Legislature should have some role in the interpretive enterprise, however minute. Even the most ardent of judicial supremacists should be able to concede this rather modest claim, since Congress necessarily interprets whenever it passes legislation. See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 568-70 (2009) ("However, every Congressional enactment passed under the commerce power, and every appropriation under the General Welfare Clause, involves an implicit interpretation of these clauses, whether or not any court ever considers them.").

11. Obviously, I am leaving out many prominent and important figures involved in the originalism debates. Henry P. Monaghan, Michael McConnell, Antonin Scalia, and Jack Balkin are just a few of the numerous influential scholars who could have been included in this paper, but I necessarily had to limit the analysis to a few of the most prominent contributors to the development of originalist theory. For example, Justice Scalia is clearly important in the intellectual history of originalism, but as Paulsen and Kesavan have pointed out, "[E]ven though Justice Scalia remains the dominant figure in the shift to originalist textualism, his is not always the most refined or consistent version of the theory. In some ways, he is a leader whose followers have bettered the leader's own work." Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1140 (2003). While I am not as critical of Scalia's originalism as these two authors, I do think that scholars tend to articulate more consistent theories than practicing originalists in the courtroom, and so it is more useful to focus on those authors.

Balkin, while being prominent in recent originalist scholarship, professes a breed of originalism which is simply a more complicated case than I thought prudent to address in this paper. Whereas the originalists discussed in this paper all seemingly agree, in a broad sense, on a conception of what the original meaning is, Balkin's "framework originalism" is different in kind from these other authors. See Balkin, *supra* note 10, at 550. For this reason, I set him aside for the limited purpose of this paper.

not been fully addressed by scholars, some attention has been paid to congressional interpretation, especially in the context of debates about judicial review. Donald Morgan's book posits that judicial supremacy over interpretation (what Morgan calls the "judicial monopoly") ignores the very real historical basis for congressional involvement in interpreting the document and the need, in Morgan's view, for Congress to actively link policy and constitutional considerations, rather than viewing them as separable.¹² He employs several case studies to demonstrate the interconnectedness of constitutional issues with policy issues¹³ and analyzes numerous historical theories regarding the extent to which Congress ought to be involved in interpreting the Constitution.¹⁴

Keith Whittington and Neal Devins's compilation on the topic of extrajudicial constitutional interpretation largely continues in the same vein as Morgan in analyzing the extent to which Congress should be part of the interpretive enterprise.¹⁵ The book's greatest contribution is in breaking new ground by examining the machinery (committee system, etc.) of Congress in constitutional interpretation¹⁶ and the ways in which Congress might act as an interpreter.¹⁷ This work was followed by Richard Bauman and Tsvi Kahana's rich and valuable compilation on the legislative role in "the constitutional state."¹⁸ While certainly representing a substantial scholarly achievement, the essays contained in the book ignore the vital question of how legislatures should interpret fundamental law.

This topic is similarly passed over in the burgeoning literature on extrajudicial interpretation as it relates to judicial review. Mark Tushnet and Jeremy Waldron have argued against judicial review and in favor of the transfer of constitutional interpretation to the popular branches, principally in the form of the Legislature.¹⁹ While legislative interpretation is touched

12. DONALD MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY 331-44 (1966).

13. *Id.* at 101-330.

14. *Id.* at 71-98. For a much more extensive empirical and descriptive account of congressional constitutional interpretation, see David Currie's four-volume series, which ends just at the start of the Civil War. See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801 (1997); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829 (2001); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DESCENT INTO MAELSTROM, 1829-1861 (2005); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861 (2005).

15. See CONGRESS AND THE CONSTITUTION (Neal Devins & Keith E. Whittington eds., 2005).

16. *Id.* at 18-150.

17. *Id.* at 269-311.

18. See THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE (Richard Bauman & Tsvi Kahana eds., 2006).

19. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 129-76 (1999);

upon in these works, the issue of the method of interpretation is never discussed. For instance, Tushnet defends congressional interpretation from the charge that legislators have largely abdicated such a role. He points to what he calls “judicial overhang,”²⁰ by which he means, principally, that “[l]egislators may define their jobs as excluding consideration of the Constitution precisely because the courts are there.”²¹ Tushnet and Waldron then offer arguments for why Congress should interpret, but they do not explain how it should do so.

Perhaps the book that has generated the most attention in the literature has been Larry Kramer’s *The People Themselves*.²² Carefully reconstructing the history of judicial review, Kramer argues that American constitutionalism was originally driven by ordinary citizens and their elected representatives and only later evolved to ordain the Court with the supreme power over interpretation.²³ In arguing for “popular constitutionalism,”²⁴ Kramer advocates an anti-judicial supremacist view that allows for judicial review in tandem with vibrant and active popular branches and a watchful citizenry. The literature that has resulted from this book has been extensive,²⁵ but neither Kramer, nor those who have written in response to his work, have addressed the issue of congressional interpretive methodology.

Paul Brest’s 1974 article on legislative interpretation is well known. It focuses on “how a legislator seeking to assess the constitutionality of a proposed law can find guidance in judicial decisions.”²⁶ Thus, Brest is less concerned about how Congress ought to interpret in its own right, and instead works under the assumption that judicial decisions are a primary determinant of congressional interpretations. A more recent and comprehensive article is Neal Kumar Katyal’s *Legislative Constitutional Interpretation*, which advances the thesis that “constitutional interpretation

JEREMY WALDRON, *LAW AND DISAGREEMENT* 282-312 (1999).

20. TUSHNET, *supra* note 19, at 54-71.

21. *Id.* at 58.

22. LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

23. *See generally* LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

24. *Id.*

25. *See* Symposium, *A Symposium on the People Themselves: Popular Constitutionalism and Judicial Review*, 81 CHI.-KENT L. REV. 809 (2006); Symposium, *The Brennan Center Jorde Symposium on Constitutional Law*, 92 CAL. L. REV. 959 (2004) (making a case for some form of “popular constitutionalism,” rather than speaking to methodology). The Chicago-Kent symposium is especially extensive and highlights the great impact of Kramer’s book.

26. Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 589 (1975).

by Congress is, and should be, quite different from constitutional interpretation by courts.²⁷ While Katyal's argument may seem germane to this paper, he arrives at his conclusion via a nonoriginalist "living Constitution" perspective.²⁸ Because this paper operates under the different assumption that the best method of interpreting the Constitution is originalism, Katyal's claims have much less force. Furthermore, as mentioned above, the purpose of this paper is not to examine how interpretations differ among the various branches or whether originalism can be implemented in the Legislature; it is to look at whether, as a normative matter, various originalist theories mandate originalist congressional interpretation. Katyal's analysis, while important, is thus not directly relevant to this paper.

As stated earlier, this section is by no means exhaustive, as there are myriad other works that could be mentioned here. Certainly, Whittington's book on judicial supremacy is an important piece of the literature, as is his landmark book on the role of popular branches in constitutional construction.²⁹ However, the purpose of this section is not to provide a detailed account of the literature on congressional interpretation. Instead, it surveys the literature to illustrate the dearth of scholarship on the topic of this paper and discusses the reasons why this investigation is worthwhile. With this general background in mind, the first school of originalist thought is examined, along with its implications for congressional constitutional interpretation.

II. THE PROPER ROLE SCHOOL

Arguably, one way of teasing out the implications of originalism for congressional interpretation would be to present a more general originalist theory and proceed from there. This method is not viable because there is, in truth, no single theory of originalism, but rather many schools of originalist thought, at least from a purely descriptive perspective on the literature. Indeed, even those whose views seem counter to fundamental originalist tenets now call themselves originalists and contend that a

27. Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1335 (2001).

28. *Id.* at 1337-39.

29. KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999) [hereinafter WHITTINGTON, *CONSTITUTIONAL CONSTRUCTIONS*]; see also Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002) (offering reasons why extrajudicial constitutional interpretations should be regarded as authoritative and deserving of greater deference).

distinction between originalism and nonoriginalism does not exist.³⁰ As such, distinct originalist camps and their underlying justifications must be identified and explained. Scholars are grouped according to the justifications offered for their originalist theories, as well as the principal concerns they express about interpretation. Surely, these theorists could be grouped in alternative ways were the aim of this paper different. Only after such a taxonomic exercise is it possible to determine whether originalist theories lead to originalism in congressional interpretation.

The first school of thought is the Proper Role School. This school is exemplified by the writings of Judge Robert Bork, though it also includes former Chief Justice William Rehnquist³¹ and former Attorney General Edwin Meese.³² All three figures share an overriding concern with the proper role of the Supreme Court in the constitutional scheme. To them, originalism is seen as the best way of achieving the goal of a more modest Judiciary.³³ This somewhat crude characterization does not imply that these men do not have nuanced and well-developed political theories underlying their essentially pragmatic worldview, but it does mean that their rationale has a strong power balancing element.

In 1971, Robert Bork published his seminal *Indiana Law Review* article on the need for “neutral principles” in constitutional interpretation.³⁴ Bork’s originalism centers on the idea of the Supreme Court’s role in the “Madisonian Dilemma,”³⁵ by which he means the notion that the

30. See *supra* note 2. The relevant distinction between originalists and nonoriginalists is why I do not include, for example, Ronald Dworkin in this analysis. A very strong case could be made that several scholars currently identified as originalists are not, in fact, within the originalist fold, including Barnett. However, I have tried to refrain from excluding those scholars who are widely considered to be originalists from this analysis, and Barnett is certainly one of them. Dworkin, by contrast, has never really been embraced by originalists; nor has he made a strong claim to the label.

31. See generally William H. Rehnquist, *The Notion of the Living Constitution*, 54 TEX. L. REV. 693 (1976).

32. See ELDER WITT, A DIFFERENT JUSTICE: REAGAN AND THE SUPREME COURT 135-38 (1986) (describing Meese’s urging of a literal interpretation); Edwin Meese, III, *Speech Before the American Bar Association, Washington, D.C., July 9, 1985*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 47-54 (Steven G. Calabresi ed., 2007). Neither Rehnquist nor Meese have identical justifications for their views as Bork, but the overall idea of the need to constrain the Judiciary is the dominant theme for all three writers.

33. This power balancing theme in Bork’s writings in particular has been noted by Whittington. See WHITTINGTON, *supra* note 5, at 39, 45.

34. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1-7 (1971).

35. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 139 (1990). While Bork certainly articulates the idea of the Madisonian Dilemma in his article, see Bork, *supra* note 34, at 1-4, only in his book is this term used extensively to encapsulate his argument. *Id.*

Constitution protects minorities while at the same time empowering majorities, thus attempting to maintain a balance that prevents either majority or minority tyranny.³⁶ Because the Court is viewed as the supreme interpreter and arbiter between these two competing tyrannies, the “dilemma imposes severe requirements upon the Court. For it follows that the Court’s power is legitimate only if it has . . . a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom.”³⁷ For the Court to merely impose its own value system on any given constitutional dispute would require it to take sides in the struggle between tyrannies without any basis in the Constitution, thus undermining the legitimacy of both the constitutional decision and the Court.³⁸ Originalism, according to Bork, is the best constitutional interpretive method because of its ability to provide the judge with a neutral source upon which to base his decision.³⁹

The Proper Role School strongly embraces Thayer’s Rule, as stated by Bork: “Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution.”⁴⁰ Bork also relieves Congress of the responsibility to enforce the original meaning of the Constitution when it engages in constitutional interpretation by stating “[t]o be perfectly clear on the subject, I repeat that [the theory of neutral principles] is not applicable to legislatures. Legislation requires value choice and cannot be principled in the sense under discussion.”⁴¹ Because the Proper Role School views originalism as a means of restraining judges within the Madisonian system, it is consistent that these originalists would see no need for originalism in congressional interpretation.

The Proper Role School’s views on congressional interpretation converge in an interesting way. The school absolves Congress of the need for principled constitutional interpretation, but it also demands strict deference to legislative enactments. The logical result, in the words of Gregory Bassham, is a “clear-mistake originalism”⁴² that “requires judges in some cases not to enforce what seems on balance to be the best

36. Bork, *supra* note 34, at 3.

37. *Id.*

38. *Id.* at 4.

39. BORK, *supra* note 35, at 143-60. Both in his book and in the article, Bork goes into greater detail than is warranted here about why originalism provides neutral principles for adjudicating constitutional disputes. His concern is both with neutral “derivation” of principles as well as with the neutral “application” of those principles. *Id.* at 146-47, 51-53. None of this is terribly relevant for the purpose of this paper.

40. Bork, *supra* note 34, at 10-11.

41. *Id.* at 10.

42. GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION 40 (1992).

originalist reading of a particular constitutional provision.”⁴³ The Proper Role School thus allows Congress to take sides in the Madisonian Dilemma in a way that it finds unconscionable when done by the Court. One naturally wonders why it is appropriate for Congress to choose between majority and minority tyranny, but unacceptable for the Court to do so.

Proper Role supporters would likely respond in three ways. First, they might argue that, because they assume judicial supremacy in constitutional interpretation, only the Court faces the Madisonian Dilemma in any real sense. Congress can pass legislation untethered to neutral principles because the Court has ultimate responsibility for interpretation and can remedy any mistakes. Section V of this paper gives a more full response to this general line of argumentation, but with regard to the Proper Role School, such an argument lacks force. A theory cannot simultaneously demand strict deference to legislative enactments and claim that judicial oversight of legislation is a sufficient check on abuses of power. The latter claim requires a searching and vigorous judicial role, and that is incompatible with the judicial restraint at the heart of the Proper Role School.

Second, rather than implicitly concede this point, Proper Role advocates could make an affirmative case for congressional enactments of dubious constitutionality. The above response from the Proper Role School seems to concede that it is, at least in some important sense, unacceptable for Congress to stretch the limits of its constitutional authority. In response, the advocates might argue, as Bork would, that Congress is forced to make value choices as part of legislating and that these value choices are, by definition, not neutral.⁴⁴ However, the argument for an originalist Legislature does not deny that Congress makes value choices; it contends that those value choices must be made within the same interpretive framework expected of the Judiciary. The Bork argument about value choices, therefore, misses the point. The fact that Congress must make value choices does not mean that those decisions are without limits. Something more would be required to draw a distinction between Congress and the Court.⁴⁵

Finally, Proper Role supporters could argue that Congress is more legitimate than the Court in pushing constitutional boundaries by virtue of popular election. Because Congress reflects the will of the people, it theoretically has a mandate to make such decisions, or so the argument

43. BASSHAM, *supra* note 42, at 4-5.

44. *See* Bork, *supra* note 34, at 10.

45. *See* discussion *infra* Section V.

would go. The problem with the legitimacy argument is that, like the value choices argument, it does not provide a reason against imposing originalism on the Legislature. Even granting that Congress has more legitimacy in stretching constitutional limits than the Court does, originalism allows for reasonable actors to come to different conclusions about the meaning of a constitutional provision. Depending on the theory of originalism and the level of generality used to define the text, an originalist Congress might come to a much more permissive view of its powers under the Interstate Commerce Clause⁴⁶ than an originalist Supreme Court. Originalism, in other words, allows for the kind of congressional boundary-pushing that the Proper Role School claims is legitimate; the two are not necessarily in opposition to each other.

The only ways in which originalism would be diametrically opposed to this expansive view of congressional power would be if an especially restrictive theory of originalism were imposed on Congress or if the Proper Role School advocated a totally unrestrained Legislature. But members of the Proper Role School do, in fact, allow for some flexibility in interpretation. As Judge Bork has said: “Nothing about interpreting the Constitution can be precise . . . [Interpretation is] not a mathematical exercise. It’s a question of judgment.”⁴⁷ Indeed, Bork’s view of the Equal Protection Clause allows for a level of generality that might trouble originalists who advocate more narrow views of original meaning.⁴⁸ Furthermore, the Proper Role School does not go so far as to advocate unlimited congressional interpretive authority. Thus, there does not appear to be a viable argument for the school to require originalism of the Judiciary but not of the Legislature. That alone is not enough to require an originalist Legislature. But when coupled with the fact that Congress can just as easily impose majority (or even minority) tyranny as the Court, at least the Bork

46. U.S. CONST. art. I, § 8, cl. 3.

47. *Uncommon Knowledge: Robert’s Rules of Order: A Conversation with Robert Bork* (Hoover Institution & KTEH broadcast July 16, 2003) [hereinafter *Robert’s Rules of Order*], available at <http://www.youtube.com/watch?v=bRkhBav4ekA> (last visited June 23, 2010). For a transcript of the Robert Bork interview, visit the Hoover Institution’s website at <http://www.hoover.org/multimedia/uk/2940316.html> (last visited June 23, 2010).

48. See *Robert’s Rules of Order*, *supra* note 47. Bork has explained that the Equal Protection Clause was meant to establish a “basic principle of equality,” and that while the ratifiers of the Fourteenth Amendment might have thought school segregation satisfied that requirement, subsequent experience showed that segregation violated the principle of the Equal Protection Clause embodied in its words. *Id.* He argues that it was proper for the Court in *Brown v. Board of Education* to apply the principle in light of subsequent experience, rather than to remain bound by how the ratifiers expected the text to be implemented. *Id.* This level of generality would be contested by some scholars, and others would argue it is unnecessary to justify *Brown*. See generally Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

followers within the Proper Role School are obligated to accept originalism as the preferred method of congressional constitutional interpretation. Moreover, the other Proper Role advocates have to provide a much more compelling account than they have for why Congress ought not be originalist.

III. THE INTENTIONALIST SCHOOL

The Proper Role School is thus rooted in a distinct view of the appropriate and restrained role of the Court in the constitutional system, with originalism being justified by that role. By contrast, the Intentionalist School, best exemplified by Raoul Berger's originalism, is primarily grounded in the idea that the original intention of the Founders requires originalism. Berger's well-known and important debate with H. Jefferson Powell about how the Framers intended the Constitution to be interpreted was so important to Berger precisely because Powell's thesis undermined Berger's main justification for originalism.⁴⁹ Berger thus based his originalism principally on the Founders' intent—regardless of what that might be.⁵⁰

Berger's originalism led him to favor judicial restraint. He argued against the idea of judges taking a proactive role in settling constitutional controversies, instead seeing them as checks on clear abuses of legislative power. In his consideration of Thayer's Rule, Berger tried to show that the Founders had "refused to allocate a larger role to the judges than annulment of laws that plainly went out of bounds."⁵¹ The Founders' wariness of judicial power is demonstrated in "indications that judicial intervention was

49. See generally Raoul Berger, 'Original Intention' in *Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986) (disputing Powell's historical account and reaffirming intentionalism); Raoul Berger, *The Founders' Views—According to Jefferson Powell*, 67 TEX. L. REV. 1033 (1989); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that the Founders did not intend for their intentions about constitutional meaning to guide interpretation); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513 (1987). True, Berger argued that the reason the Founders preferred intentionalism was that they had a "profound fear" of judicial [independence and] discretion" and sought to confine it. Berger, *The Founders' Views—According to Jefferson Powell*, *supra*, at 1065. It could be argued that this implicitly demonstrates that Berger was a Proper Role originalist in the same vein as those mentioned above. But this argument is ultimately unconvincing. Berger was, quite simply, quintessentially intentionalist. See Raoul Berger, *New Theories of 'Interpretation': The Activist Flight from the Constitution*, 47 OHIO ST. L.J. 1, 16-27 (1986) [hereinafter *New Theories*].

50. One needs to look no further than his repeated argument that the Founder's intentions trumped even the text of the Constitution. See *New Theories*, *supra* note 49, at 36 ("Wrapped in a philosophical cocoon, Richards states, 'it is not a reasonable construction of the abstract language employed to limit it forever to its historic denotations,' utterly oblivious to the long-established rule that the intention of the lawmaker prevails over the letter of the law.") (footnotes omitted).

51. BERGER, *supra* note 5, at 343.

envisaged only when encroachments were plain.”⁵² A parallel can thus be drawn with the Proper Role School’s deference to legislative majorities and the Intentionalist School’s restraint of judicial authority.

The logic of the Intentionalist School, however, leads much more readily to the conclusion that Congress should be originalist than did the reasoning underlying the Proper Role School. The central argument made by Berger time and again was that the intent of the lawmaker is binding; or, as he stated in quoting the Supreme Court, “The intention of the lawmaker is the law.”⁵³ Berger was prolific in his attempts to show that this principle was historically treated as orthodoxy in Anglo-American jurisprudence prior to the twentieth century, arguing that “[r]espect for the intention of the draftsmen goes back to medieval times.”⁵⁴ Only once this principle was established could Berger point to the original intentions of the American Founders to argue for originalism in the Judiciary.

The crucial point to recognize here is that Berger began with a general theory of interpretation and *then* proceeded to argue for an originalist Judiciary. But if the theory he advocates is actually a binding rule of interpretation, there is no reason to demand that only the Court adhere to this principle. If the original intent is law and the Founders expected that the Constitution would be interpreted as such, then this must be the case for *all* interpreters. Berger himself seems to recognize this at times in his writings. Discussing Justice John Marshall’s opinion in *Marbury v. Madison*,⁵⁵ Berger wrote approvingly:

Illimitable power runs counter to the Founders’ determination to “limit” all delegated power If the Constitution is alterable at the pleasure of the Legislature (or the courts), [Marshall] continued, “then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.”⁵⁶

Berger’s efforts to show that the Founders specifically intended for the Court to be faithful to their intentions were therefore superfluous. Simply by showing that the original intention of the Founders was the binding mode of interpretation at the time of Ratification, Berger had a plausible

52. BERGER, *supra* note 5, at 344.

53. *New Theories*, *supra* note 49, at 20 (quoting *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903)).

54. *Id.* This is why Berger’s debate with Powell was so critical to his originalism. If Powell could have successfully shown that historically the intention of the lawmaker was not binding, or at least that the story was more complex than Berger portrayed it to be, the logic of the Intentionalist School would have largely collapsed.

55. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

56. Raoul Berger, *Some Reflections on Interpretivism*, 55 GEO. WASH. L. REV. 1, 4 (1987).

argument in favor of an originalist Judiciary. However, this same argument logically leads one to conclude that the Court is not the only branch bound by the Founders' intent; the Legislature must be subject to the same constraints. The implication of the Intentionalist School's logic is an originalist Legislature.

IV. THE CONSTITUTION-AS-STATUTE SCHOOL

Together, Saikrishna Prakash, Steven Calabresi, and Michael Stokes Paulsen form the Constitution-as-Statute School of originalism. The name is derived from their justifications for originalist theory. They assert that the Constitution is like a statute and must be interpreted using similar methods.⁵⁷ Paulsen arrives at this conclusion by pointing to the Supremacy Clause (he terms it the "Supreme Law Clause") as the primary justification for originalism.⁵⁸ According to this argument, the Supremacy Clause "establishes the text of the document—'this Constitution,' a written document—as that which purports to be authoritative [and t]he document itself thus appears to prescribe textualism (in some form or another) as the proper mode of interpretation and application of the Constitution by those holding office under it."⁵⁹ Calabresi and Prakash embrace this notion of the primacy of the text and state, "It follows that the Constitution is thus like other legal writings, including statutes. The meaning of all such legal writings depends on their texts, as they were objectively understood by the people who enacted or ratified them."⁶⁰

Because the Constitution-as-Statute School grounds its justification

57. Of course, this does not necessarily mean that these scholars agree on what those methods ought to be, only that they view the Constitution in much the same way and justify their originalism in light of this perspective. Prakash, for instance, while seeing the Constitution as being just like any other legal document, also sees nothing special about the fact that the document is a legal one. See generally Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 HARV. J. L. & PUB. POL'Y 485 (2008). He sees originalism as the proper method of interpretation for any historical document whatever. See *id.* at 486 ("Legal documents generally ought to be understood through the originalist lens Indeed, any text or utterance, legal or not, should be understood through the originalist lens."). The reader might wonder if it is appropriate, given that Prakash sees nothing special about legal texts in particular, to label him as though it were relevant to him that the Constitution was like a statute. I contend that it is appropriate because Prakash himself makes the comparison between the Constitution and statutes in terms of how to interpret the text. *Id.* The arguments for why he should apply originalism to the Legislature are very similar to those used in the case of Paulsen, for example, and so I think it is useful to group them together, even while keeping their interpretive differences in mind.

58. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127 (2003).

59. *Id.* at 1127-28.

60. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 551-52 (1994) (footnotes omitted).

for originalism in the nature of the Constitution itself, it is difficult to see how its members can argue for their originalism to apply only to the Judiciary. If the Constitution is like any other form of law and should be interpreted as such, then only by disregarding the law can the Legislature be justified in employing nonoriginalist methods of interpretation. It would fundamentally undermine the basis of this school to selectively ignore the text when the school is justified by reference to the nature of that very document.

Of course, the three scholars might argue that the text can apply to different branches in different ways, allowing for flexibility in interpretation. This argument has two main problems. First, if the text can be applied in different ways to different branches so as to justify nonoriginalist legislative interpretation, this raises the question of why originalism, specifically, should be applied to the Judiciary in the ways prescribed by the Constitution-as-Statute School. The three theorists have very specific methodologies that they claim follow from the status of the text as law and must apply to the Court. But if the nature of the Constitution means different things to different branches, then something beyond the text-as-law argument is necessary to justify why these specific methodologies naturally flow from the document with respect to the Judiciary in particular. None of the theorists offers such an account, and Paulsen's specifically disavows the need for one in declaring his theory "self-referential[]." ⁶¹

This leads to the second problem with the argument: the words of the authors themselves. Calabresi and Prakash declare that only in the case of textual ambiguity is "a constitutional interpreter" allowed to go beyond the text itself, and may do so only to seek out the original meaning. ⁶² They do not qualify their statement by restricting their reference of "a constitutional interpreter" to the Judiciary, and it is easy to see why they do not do so. ⁶³ If the Constitution is like a statute and must be interpreted as such, then how could these three scholars contend that the Court must interpret the text by traditional modes of legal interpretation but that Congress is free from such burdens? For Congress to interpret the Constitution in a manner other than the one prescribed would be to carve out an exception to treating the text as a statute. Paulsen's words are especially illuminating in this regard. He specifically declares that the Constitution's meaning cannot be changed "by any group or body" except by amendment. ⁶⁴ Paulsen then proceeds to say

61. Kesavan & Paulsen, *supra* note 58, at 1128.

62. Calabresi & Prakash, *supra* note 60, at 554.

63. *See id.*

64. Kesavan & Paulsen, *supra* note 58, at 1130.

that Congress “may not *de facto* alter the Constitution by ascribing its own, new meaning to a constitutional requirement or prohibition”⁶⁵ His words, as well as those of Prakash and Calabresi, place all three theorists in a tight bind to justify why Congress should be allowed to disregard originalism. The Constitution-as-Statute School’s arguments in favor of originalism and the words used by its members strongly imply an obligation on the part of Congress to adhere to originalism in its constitutional interpretations.

V. THE BARNETT AND WHITTINGTON SCHOOLS

While the Constitution-as-Statute School emphasizes the nature of the Constitution and assumes the legitimacy of the document, Randy Barnett justifies originalism by virtue of the Constitution’s *illegitimacy*, at least as far as legitimacy is understood to be derived from popular consent. In Barnett’s view, the “conditions necessary for ‘We the People’ actually to consent to anything like the Constitution or amendments thereto have never existed and could never exist.”⁶⁶ The reason why these conditions have never existed is that Barnett requires unanimous consent of those who would be governed under a compact for it to attain popular legitimacy.⁶⁷ Barnett suggests an alternative view of legitimacy “based on the existence of procedures that protect natural rights.”⁶⁸ This concept of legitimacy requires that whenever “we move outside a community constituted by unanimous consent, every freedom-restricting law must be scrutinized to see if it is necessary to protect the rights of others without improperly violating the rights of those whose freedom is being restricted.”⁶⁹ Barnett thus stresses originalism as “a vital means of subjecting lawmakers to limits on their lawmaking powers.”⁷⁰ Barnett continues, “[o]nly if lawmakers cannot change the scope of their own powers can the rights of the people be in any way assured.”⁷¹ Originalism becomes integral to preserving the lawmaking procedures which can assure the protection of rights and, therefore, the legitimacy of the Constitution. This unique originalist theory constitutes the Randy Barnett School.

Keith Whittington’s originalism, in contrast to Barnett’s, assumes the popular legitimacy of the Constitution. In examining constitutional

65. Kesavan & Paulsen, *supra* note 58, at 1130.

66. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 14 (2004).

67. *Id.* at 14-31.

68. *Id.* at 88.

69. *Id.* at 45.

70. *Id.* at 88.

71. *Id.* at 117 (2004).

interpretation,⁷² Whittington employs two primary arguments in favor of his originalism: the written nature of the Constitution mandates originalism and popular sovereignty also requires it.⁷³ Within the argument relating to the written nature of the Constitution, Whittington makes three sub-arguments. The first is a historical argument grounded in the American colonial experience under the unwritten British constitution.⁷⁴ Recognizing how the indeterminacy of the unwritten British constitution led to the abuses that precipitated the Revolution, the Founders sought to permanently define certain core principles and procedures, such that the Constitution “should not change with the passage of time, as the common law necessarily [did].”⁷⁵ The second sub-argument asserts that the Constitution can only be understood as fundamental “law” if its meaning is fixed and determinate.⁷⁶ This is due to the fact that an undefined Constitution would not lend itself to judicial enforceability and the idea that “[t]he process of ratification, the appeal to the sovereign people in convention, makes sense only in the context of a written document.”⁷⁷ Finally, the third sub-argument is that a law is necessarily connected with the intent of the lawmaker.⁷⁸ Whittington

72. Whittington distinguishes between constitutional interpretation and constitutional construction. Construction, in Whittington’s view, occurs when the Court or political branches give meaning to constitutional provisions whose original meaning is not discoverable or when the branches implement practices and procedures that give life to the original meaning. WHITTINGTON, *supra* note 5, at 5-14. Constructions are not “constitutionalized” in the sense that they are subject to being overturned at any time since they are not actually found in the text of the Constitution. *Id.* However, constructions cannot be inconsistent with the text. *Id.* For example, the Political Question Doctrine would be considered a constitutional construction. *Id.*; *see also* WHITTINGTON, CONSTITUTIONAL CONSTRUCTIONS, *supra* note 29.

The implication of Whittington’s notion of constitutional construction is that Congress (as well as the Court, to a lesser extent) may engage in construction, which is inherently nonoriginalist. Assuming Whittington is right about the need for constructions, I am in agreement with him on this point, but it is not immediately relevant to this paper. Here, I am addressing the issue of congressional constitutional *interpretation*, not construction. The fact that originalist theory leads to the conclusion that legislatures should be originalist in their interpretations does not mean that they cannot participate in construction that is consistent with the text.

For example, Congress may believe that an originalist reading of the Cruel and Unusual Punishment Clause allows the death penalty. That does not mean, however, that Congress could not forbid the death penalty in federal cases on the grounds that it believed capital punishment to be cruel and unusual. In other words, Congress could still invoke the Constitution’s provisions to engage in construction because those constructions would not be constitutionalized; they would merely be statutory and would not alter the original meaning or interpretation.

73. *See generally* WHITTINGTON, *supra* note 5.

74. *Id.* at 50-53.

75. *Id.* at 52.

76. *Id.* at 53-59.

77. *Id.* at 5.

78. *Id.* at 59-61. Whittington develops all three of these arguments in more detail in examining three nonoriginalist counterarguments, which he outlines in Chapter 3 and then refutes in Chapter 4. *See id.* at 61-109.

argues that intent is inseparable from the written word, particularly when it comes to legal texts. “To search for intent is not an attempt to avoid language in search of something hidden by it. Rather, meaning, or intention, is embedded in the language itself, is realized with the utterance.”⁷⁹ These three sub-arguments combine with refutations of related nonoriginalist counterargument to comprise Whittington’s defense of originalism on the grounds of the “writtenness” of the Constitution.

Whittington’s second argument in favor of originalism is rooted in popular sovereignty. Because this argument’s complexity makes it very difficult to describe in brief, and because Whittington’s arguments on the writtenness of the Constitution provide a sufficient basis for evaluating his view on congressional constitutional interpretation, the popular sovereignty claim will not be summarized.⁸⁰ However, in concluding this sketch of Whittington’s originalism, it is worth noting that he absolves the political branches from engaging in the necessary legal and scholarly research involved in originalist constitutional interpretation, stating that it is unlikely the branches would ever do so.⁸¹ In fact, Whittington goes even further by stating that “originalism already implicitly assumes that the legislature operates with a different interpretive standard from the judiciary’s, a result of its different role in a constitutional system.”⁸² Therefore, the Whittington and Barnett Schools both assume that Congress will operate under a different interpretive method than the Courts.

The use of originalism as a means of constraining legislative majorities and guaranteeing civil rights is central to Barnett’s thinking. Given that his purpose is to restrict legislative action using originalism, the most appropriate way to accomplish this would seemingly be for originalism to apply both to the Judiciary and the Legislature. Barnett’s proposed solution to the problem is only a half measure. If legislative majorities must be kept in check and their actions placed under intense scrutiny, would not originalism in legislative interpretation more readily achieve those goals? At first glance, Barnett’s own rationale impels him to impose originalism on the branches of government.

Barnett’s response to this argument would likely highlight what he would see as the needlessness of such a proposal. Because he assumes (indeed, he advocates) judicial supremacy over constitutional interpretation, so long as the Court is originalist, there is no need for the Legislature to be so. This is especially true since Barnett’s vision of the Court would be that

79. WHITTINGTON, *supra* note 5, at 59.

80. *Id.* at 110-59.

81. *Id.* at 78.

82. *Id.*

of an activist Judiciary, not one that deferred to legislative majorities to any significant extent. But this argument rests on two faulty assumptions. First, it assumes that every abuse of legislative power or every encroachment on civil liberties can be redressed by the Court. For Barnett to say otherwise would be to admit that his solution does not fully protect against legislative abuses, in which case the rationale for applying originalism to Congress is strong. But of course the Court cannot adjudicate every constitutional dispute. There are some that it has decided are beyond its purview, such as in the case of the Political Question Doctrine. There are also other legal constructions and procedures which limit what cases the justices will hear. For instance, the standing requirement leads to the dismissal of some cases that involve vital constitutional principles and fundamental civil liberties. One prominent and recent example was *ACLU v. NSA*, in which the federal government's secret surveillance program created a significant constitutional controversy and was alleged to have violated the civil rights of several individuals.⁸³ The case was, however, dismissed by the United States Court of Appeals for the Sixth Circuit for lack of standing, which demonstrates that even high-profile cases where courts are pressured to issue a decision may never be decided on the merits.⁸⁴

Barnett might argue that his model presumes a Court that substantially loosened or did away entirely with procedures that prevented cases from being heard by the Court. But even if this were the case, the second assumption inherent in his theory poses a real problem: it assumes that the Court will virtually always make the correct decision in a case. If he did not assume this to be true, then Barnett would have to concede that his system was inadequate or at least imperfect as it relates to protecting civil liberties and ensuring fair procedures. But if Barnett conceded that his system could use improvement then he would have little reason not to accept originalism in the Legislature. Instead, he assumes that the supremacist Court will make the correct decisions in almost every case. Of course, this assumption is entirely unrealistic. One need only highlight a few of the Court's questionable decisions to prove this point.⁸⁵ The result is a system in which disputes involving vital constitutional questions may be left unresolved by the Court; and even if these cases are addressed by the Court, it might erroneously favor the legislative majority and trample on the

83. *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644, 648-51 (6th Cir. 2007).

84. *Id.* at 657 ("Therefore, the injury that would support a declaratory judgment action (i.e., the anticipated interception of communications resulting in harm to the contacts) is too speculative, and the injury that is imminent and concrete (i.e., the burden on professional performance) does not support a declaratory judgment action."); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

85. Rehnquist, *supra* note 31, at 700-04.

rights of citizens. This result argues convincingly for applying originalism to legislative constitutional interpretation.

Interestingly, despite his substantial differences with Barnett in justifying originalism, Whittington's school could be criticized for implicitly making the same argument about judicial supremacy and for depending on the same two assumptions in making that argument. Two of Whittington's three arguments supporting his claim about the nature of a written constitution are equally applicable to the Legislature. If a written constitution was an attempt by the Founders to avoid the ambiguities of the unwritten English constitution, then why should only the Court guard that fixed meaning and why should Congress be allowed to violate that meaning when interpreting? If the intent of the lawmaker or ratifier is inseparable from the text, why should only the Court respect that intent when interpreting the Constitution? The most likely response to these questions would be that judicial supremacy renders legislative adherence to these two standards unnecessary. But, as shown above, this trust in the abilities of judicial supremacy is misplaced and unfounded. It is not difficult to conceive of a legislative act that violates the fixed meaning and the original intention of the ratifiers, but that is upheld by the Court or is never decided on its merits. Something more is required to draw the line between congressional and judicial interpretation.

There are two other potential arguments that Whittington might offer to justify this distinction between the interpretive methods of the two branches, each of which is suggested in his book. The first is the idea that legislatures are unlikely to undertake the kind of research necessary to engage in originalist interpretation and lack the expertise to do so.⁸⁶ The second is that the political branches operate under very different assumptions and pressures than does the Judiciary.⁸⁷ These arguments about Congress's capacity for originalist interpretation highlight the great weakness in the argument favoring the application of originalist theories to the Legislature—the political and historical realities indicate that legislators will not take this task seriously. That is not to say that legislators are lazy or unconcerned with the Constitution; rather, it is to acknowledge, as Whittington indicates, that different branches operate under different assumptions and incentives, and Congress has little institutional or political incentive to place itself under the direction of originalism when it interprets.⁸⁸ There is, therefore, a limit on how far an argument for

86. See WHITTINGTON, *supra* note 5, at 78.

87. See *id.* at 80.

88. It should be noted that the originalists from the other four schools might also make a similar argument, since up to this point this paper has essentially assumed that none of these

originalist interpretation in legislative actions can go. While it appears that, on a purely theoretical level, the originalist scholars presented in this paper are compelled to accept originalism as a natural feature of their schools of thought, the realities of legislative behavior indicate that such an argument may be confined to theory and divorced from practice.

It should be said, however, that originalists suffer from a similar problem when arguing for how their theories apply to the Judiciary. Stephen Griffin points out that modern originalism does not describe the Court's history of interpretation. "Pluralistic theories described accurately that the Supreme Court employs multiple methods of interpretation in deciding cases and does not observe a strict hierarchy of methods."⁸⁹ He further argues that "each contemporary method of interpretation is the result of a tradition that extends back at least to the adoption of the Constitution."⁹⁰ Johnathan O'Neill, in his history of originalist thought, comments that "[t]raditional textual originalism and contemporary originalism should not be ahistorically equated,"⁹¹ and it is incorrect to argue that modern originalism was once considered orthodoxy on the Court.

The fact is that the Court's interpretive history is mixed and is not one of strict adherence to originalist theory. It is possible that the institutional incentives of the Court preclude it from remaining originalist for any extended period of time. Bork's *The Tempting of America* was so named for a reason—because he views the Court as being under a constant temptation to utilize its power to achieve its own ends, regardless of the original meaning of the Constitution:

[W]hen a judge realizes that in the case before him his strongly held view of justice, his political and moral imperative, is not embodied in a statute or in any provision of the Constitution. He must then choose between his version of justice and abiding by the American form of government. Yet the desire to do justice, whose nature seems to him obvious, is compelling, while the concept of constitutional process is abstract, rather arid, and the abstinence it counsels unsatisfying. To give in to the temptation, this one time, solves an urgent human problem, and a faint crack appears in the American foundation.⁹²

schools would argue for a relevant distinction between the two branches as it relates to their capacities for originalist interpretation. It is possible the other four schools might argue, as Whittington would, that regardless of the logic of their justifications for originalism they simply assume that the Court is better able or more likely to implement originalist theories.

89. Griffin, *supra* note 2, at 1194-95.

90. *Id.* at 1196.

91. O'NEILL, *supra* note 3, at 13.

92. BORK, *supra* note 35, at 1.

Bork's argument is that a judge's almost plenary power over constitutional interpretation impels him toward interpretive methodologies that allow him to further his own authority and impose his personal views, something originalism cannot countenance. This was exactly the fear that Brutus raised in arguing against ratification of the Constitution: "The judges will be interested to extend the powers of the courts, and to construe the [C]onstitution as much as possible, in such a way as to favour it; and that they will do it, appears probable."⁹³ Brutus specifically foresaw that judges would have the power, in largely nonoriginalist fashion,⁹⁴ to "explain the constitution according to the reasoning spirit of it, without being confined to the words or letter."⁹⁵

Originalist theorists have to contend with the fact that, to the extent that originalism prevents judges from imposing their own personal views and increasing their authority as they desire, it conflicts with the institutional incentives and human impulses of the Court. While it might be argued that recent successes in advancing originalism in the Judiciary prove that originalist theory is not at odds with judicial incentives, Justice Scalia rightly reminds originalists:

[I]t would be foolish to pretend that [originalism] has become (as it once was) the dominant mode of interpretation in the courts, or even that it is the irresistible wave of the future It is no easy task to wean . . . the judiciary away from such a seductive and judge-empowering philosophy.⁹⁶

Just as institutional and political incentives beckon legislators to not take constitutional interpretation seriously, thereby making the prospect of applying originalism to the Legislature seem impossible, these same factors make daunting the task of imposing originalism on the Court. Political realities may argue for the difficulty of applying originalism to Congress, but those realities also augur ill for originalist attempts to bring about

93. THE LETTERS OF BRUTUS No. 11.

94. Whittington and other originalists have made the case that originalism "should not necessarily rule out a role for contemporary moral theorizing in realizing the promise of the Constitution, but it still must insist on the priority of historical inquiry in faithful constitutional interpretation." Whittington, *supra* note 2, at 208.

95. THE LETTERS OF BRUTUS No. 11.

96. Antonin Scalia, *Foreward*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 43 (Steven G. Calabresi, ed. 2007). I believe that Justice Scalia is incorrect in asserting that modern originalism was ever the dominant mode of interpretation. O'Neill and Robert Clinton have shown that a form of originalism was in place since Ratification, but it was a different kind of originalism than is argued for today. See Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of 'This Constitution,'* 72 IOWA L. REV. 1177, 1186-220 (1986-1987).

originalism in the Judiciary for extended periods of time. If these realities have not acted as fatal handicaps or serious flaws in originalist theory in the past when it was being applied to the Court, there is no reason why it should be so at the start of an argument in favor of originalism in the Legislature.

CONCLUSION

The rebirth of originalism in the form of new originalism has led to a reexamination of several originalist tenets by some of the most gifted originalist scholars. Despite this outgrowth of new scholarship, originalist literature continues to focus exclusively on the Judiciary and ignore the implications of originalist theory for the Legislature. This paper seeks to extend originalist theory to take Congress into account. The justifications and assumptions inherent in various originalist schools of thought create an obligation for the Legislature to interpret in-line with originalism. Because this paper represents the initial salvo in the debate over originalism in the Legislature, it is certain that important arguments and observations specific to Congress have not yet been considered. A comprehensive analysis of how originalism would apply to legislative actions and the internal machinery of Congress is far beyond the scope of this paper. Future scholars will likely undertake this task. It is the hope of this author that this paper has made that task seem worthwhile.

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