REBOOTING ORIGINALISM†

*Stephen M. Griffin**

A number of constitutional scholars have been trying to "reboot" originalism by addressing previous criticisms of the theory—for example, shifting focus from original intent to original public meaning—and announcing the result to be a "new originalism," despite a failure to address many serious objections to the "old" originalism. In this article, the author provides a critique of the new originalism and an examination of the existing alternative theories of constitutional interpretation. Rather than "nonoriginalism," these alternatives are traditional or conventional constitutional interpretation, which features a variety of forms, modes, or methods.

Following his discussion of alternatives to originalism, the author argues that an overlooked and serious concern with originalism is its lack of historicism, its dependence on historical evidence without acknowledging the historical context of that evidence. Understanding American constitutionalism requires an appreciation of changing contexts, something originalism has difficulty acknowledging.

In response to this failing, the author offers an alternative termed "developmental theory." Although developmental theory is not a method of constitutional interpretation, it does have implications for how those methods, especially historical interpretation, are carried out. Unlike originalism, developmental theory is capable of explaining and justifying the persistence in the federal courts of alternative legitimate forms of constitutional interpretation and the reality and legitimacy of informal constitutional change.

In the world of serial fiction, a "reboot" denotes a fresh start for a famous character such as Batman or James Bond.[1] Previous storylines, even aspects of character considered crucial, can be rearranged wholesale or simply ignored. In similar fashion, a number of constitutional

* Rutledge C. Clement, Jr. Professor in Constitutional Law, Tulane Law School. E-mail: sgriffin@tulane.edu.

1. *See Reboot (Fiction)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Reboot_(continuity) (last visited May 15, 2008); *see also* David M. Halbfinger, *Pushing 'Batman' into New, Darker Directions*, INT'L HERALD TRIB., Mar. 13, 2008, at 9; Alex Billington, *Casino Royale: A Successful Bond Reboot*, FIRST SHOWING, Nov. 18, 2006, http://www.firstshowing.net/2006/11/18/casino-royale-review-a-successful-bond-reboot/.

scholars have been trying to reboot originalism. Despite earlier substantial critiques, they have announced the advent of the "new originalism."[2]

One of the prominent features of the new originalism is the insistence on following original *public meaning* rather than original *intent*.[3] New originalists claim that focusing on the public meaning of the Constitution addresses the chief flaws of originalism exposed in earlier debates.[4] This claim is questionable. Many serious objections were lodged against earlier forms of originalism and the new originalism does not purport to deal with them all.[5] It is apt to describe the new originalism as a "reboot" to the extent that its proponents wish for a fresh start, despite the reality that earlier storylines remain unresolved.

In this article, I provide a critique of the new originalism. It is worth noting that the objections presented here were advanced in the 1990s,[6] but I will not belabor the point that new originalists might have overlooked earlier objections. The debates over methods of constitutional interpretation in the 1980s and 1990s were massively intricate,[7] and it is reasonable that new originalists focus selectively on a few lines of ar-

2. *See, e.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620–29 (1999); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004).

3. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 87–152 (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT AND JUDICIAL REVIEW 1–17 (1999); *see also* Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998); Kesavan & Paulsen, *supra* note 2, at 1127–33; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006); Michael W. McConnell, *Originalism & the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

For a useful reader on originalism, see ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007).

For a distinctly different take on a "newer" originalism, see the method of "text and principle" presented in Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295–311 (2007). See also the symposium on Balkin's article and his response, Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007) [hereinafter Balkin, *Original Meaning*].

4. *See, e.g.*, BARNETT, *supra* note 3, at 89–100.

5. For reviews of objections to originalism, see, for example, SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS (2007); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997). For a recent critique of originalism in the Court's federalism decisions, see EDWARD A. PURCELL JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY (2007).

6. I will note this as appropriate below. Part of my motivation in writing this article is that the objections to originalism I find most persuasive are not listed in many standard accounts. *See, e.g.*, sources cited *supra* note 5.

7. See, for example, INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (Jack N. Rakove ed., 1990) [hereinafter INTERPRETING THE CONSTITUTION], and the comprehensive bibliography concerning the debate in the 1980s and 1990s in Kesavan & Paulsen, *supra* note 2, at 1124 n.39. See also the discussion of the debate in JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 111–216 (2005).

gument.[8] On the positive side, I provide a theory that, unlike originalism, is capable of explaining and justifying the persistence in the federal courts of alternative legitimate forms of constitutional interpretation and the reality and legitimacy of informal constitutional change.

I understand originalism as a specific approach to U.S. constitutional interpretation that is distinct from relying on appeals to history in general. Originalism insists that only certain sorts of historical evidence, such as the understandings of constitutional meaning of the Philadelphia framers or ratifiers of the Constitution, are legitimate in constitutional interpretation. But in the long-running debates over originalism, its *status* has been left unclear. When the case for originalism is pressed, are its advocates claiming its legitimacy as *one* form of interpretation among others, or that it is the *only* (or at least primary) legitimate method of interpretation? My critique is directed solely against the latter view, which I will call *exclusive originalism*.[9] Exclusive originalism (hereinafter simply "originalism") has real bite as a constitutional theory. It asserts that other methods of interpretation are wrong or illegitimate and thus that some long-standing constitutional doctrines are wrong or illegitimate. Exclusive originalists claim that the Supreme Court should use public meaning originalism as the sole way of interpreting the Constitution.[10] I maintain that exclusive originalism should be rejected.

I develop my critique in four parts. In the first, I describe the new originalism, focusing especially on recent comprehensive works by Keith Whittington and Randy Barnett.[11] I also discuss the differences between the new originalism and the originalism of the 1980s. In Part II, I devote attention to defining the alternative to originalism, a topic that seems neglected of late. As earlier debates should have made apparent, the alternative to originalism is *not* "nonoriginalism," but rather traditional or conventional constitutional interpretation, which features a variety of forms, modes, or methods.

The reminder I provide in Part II of how the debate evolved provides a natural transition to my first objection to originalism in Part III. I argue that because originalism is offered as an alternative to the status quo of constitutional interpretation in the federal courts, it must be justified. The justification must match the significance of the change being advocated, which means the justification must be quite substantial indeed. To date, no originalist has offered such a justification. Originalist

8. *See* BARNETT, *supra* note 3, at 89–100 (focusing on Brest and Powell). *But see* WHITTINGTON, *supra* note 3, at 160–208 (detailed consideration of thirteen objections to originalism).

9. I borrow this term from debates in jurisprudence. *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 47–50 (1996) (distinguishing between inclusive and exclusive legal positivism).

10. As the critique below implies, I assume the authors cited above are exclusive originalists (with the exception of Balkin). *See supra* notes 2–3. For an important recent critique of originalism that focuses on "strong" (exclusive) originalism, see Mitchell N. Berman, *Originalism Is Bunk* (Working Paper, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1078933.

11. *See* BARNETT, *supra* note 3; WHITTINGTON, *supra* note 3.

scholars have thus depended on an equivocation between advocating *greater use* of a current method of interpretation and advocating that we adopt *only one* method.

In Part IV, I present a second objection to originalism that has been relatively ignored in recent scholarship. I argue that originalism depends on using history without historicism, the use of evidence from the past without paying attention to historical context. Understanding American constitutionalism requires an appreciation of changing contexts, something originalism has difficulty acknowledging. The alternative to originalism here is not the now somewhat nebulous idea of the "living Constitution," but rather what I call "developmental theory" or historicist theories of constitutional change. Although developmental theory is not a method of constitutional interpretation, it does have implications for how those methods, especially historical interpretation, are carried out. I explore those implications in the last section of Part IV.

I. THE NEW ORIGINALISM

The advent of the new originalism implies that there was an old originalism. In Keith Whittington's helpful summary, the old originalism was "a reactive and critical posture."[12] Whittington lists several differences between the new originalism and the old. The old originalism was driven by concerns that the Warren and Burger Courts had gone too far in reshaping constitutional law, particularly in reviving substantive due process in *Griswold v. Connecticut*[13] and extending the Equal Protection Clause.[14] It was committed to judicial restraint, and "methods of constitutional interpretation were understood as a means to that end."[15] The old originalism also tended to rely on the subjective intentions or mental states of the founders as the most relevant evidence of the meaning of constitutional provisions.[16]

It is important to understand that the old originalism was not solely a method of interpretation. It had several goals that competed with each other, such as balancing judicial restraint with the implicit commitment to follow the intent of the framers no matter what the result. From Whittington's perspective, the new originalism "is more concerned with providing the basis for positive constitutional doctrine than the basis for subverting doctrine."[17] In a world dominated by the more conservative jurisprudence of the Rehnquist and Roberts Courts, the new originalism is not concerned primarily with criticizing Supreme Court decisions.[18]

12. *See* Whittington, *supra* note 2, at 604.
13. 381 U.S. 479 (1965).
14. *See* Whittington, *supra* note 2, at 601–03.
15. *Id.* at 602.
16. *See id.* at 603.
17. *Id.* at 608.
18. *See id.* at 603–04.

Further, the emphasis on judicial restraint has been dropped.[19] The new originalism is less a theory of judicial review, one that concentrates on the role judges should have in a democracy, and more a theory of legitimate interpretation that emphasizes the rule of law aspects of American constitutionalism. "It requires judges to uphold the original Constitution—nothing more, but also nothing less."[20] This implies that judges must stand ready to be "activist"—to strike down legislation inconsistent with the intent of the framers when necessary.

However, the nature of "intent" has also undergone a significant shift. The new originalism emphasizes public meaning, not private intentions.[21] There is little doubt that this "objective" theory of intent has been an option for a long time in debates over originalism.[22] The difference is that new originalists have made this approach a central feature.[23] As Whittington states, "What is at issue in interpreting the Constitution is the textual meaning of the document, not the private subjective intentions, motivations or expectations of its authors."[24]

If judicial restraint was a primary goal of the old originalism, what is the goal of the new originalism? Whittington's 1999 book-length defense of originalism made clear that what was at stake was the status of the Constitution as a rule of law: "In order for the text to serve as law, it must be rulelike. In order to be a governing rule, it must possess a certain specificity in order to connect it to a given situation."[25] The most interesting argument Whittington advanced to justify originalism connected the nature of a written constitution with the need to follow original meaning.[26] Whittington relied on three interconnected arguments: the revolutionary appeal to the text as fixed principle, the need to rest the legitimacy of judicial review on the understanding of fundamental law as a fixed text, and the text as a symbol of the intent the writers tried to convey.[27] Each argument was grounded in the reality that the Constitution has always been treated as enforceable law.

Relatively abstract rule of law values are thus quite important to the new originalism.[28] The new originalism tends to have an austere and

19. *See id.* at 608–09.

20. *Id.* at 609.

21. *See id.* at 609–11.

22. For an important example that predates the new originalism, see Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 725 (1988).

23. Barnett attributes this shift to advocacy by Justice Scalia. *See* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); *see also* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 553–55 (2003).

24. *See* Whittington, *supra* note 2, at 610.

25. WHITTINGTON, *supra* note 3, at 6.

26. *See id.* at 50.

27. *See id.* at 50–61. I am bypassing the argument Whittington made for originalism based on the concept of popular sovereignty. *See id.* at 110–59.

28. *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 551–59 (1994).

academic cast when compared with the concrete case concerns of the old originalism. It is less concerned with offering a full-blooded attack on particular mistaken precedents.[29] This greater degree of abstraction is clear in the recent work of Randy Barnett.[30] Barnett abstains from trying to illustrate the implications of his theory of original meaning for constitutional doctrine. We might call Barnett a hard-core constitutionalist: get the structure right, he thinks, and let the results take care of themselves.[31]

Like Whittington, Barnett emphasizes the fundamentality of the Constitution as written law. Barnett argues that the original meaning approach to constitutional interpretation follows from "the commitment to a written text."[32] He highlights the importance of "locking in" legal meaning. Constitutions are put in writing in order to restrict future lawmakers and thus lock in a particular legal order.[33] Here Barnett develops a useful counter to those who see the Constitution as a living document. He brings contract principles and constitutional interpretation together in a fruitful way:

> With a constitution, as with a contract, we look to the meaning established at the time of formation and for the same reason: If either a constitution or a contract is reduced to writing and executed, where it speaks it establishes or "locks in" a rule of law from that moment forward. Adopting any meaning contrary to the original meaning would be to contradict or change the meaning of the text and thereby to undermine the value of writtenness itself. Writtenness ceases to perform its function if meaning can be changed in the absence of an equally written modification or amendment.[34]

Barnett provides valuable insight into why new originalists think the "original meaning" approach is superior to the emphasis of the old originalism on subjective intent. He argues that the change to public meaning answered the most devastating critiques launched against originalism in the 1980s.[35] As Barnett tells the story, originalism was thought to have been refuted in the 1980s, chiefly by criticisms offered by Paul Brest and Jefferson Powell.[36] Brest focused most of his fire on the implausibility of relying on subjective intentions, while Powell argued that the framers did not themselves resort to original intent to interpret the Constitution.[37]

29. For a contrast, see ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

30. *See* BARNETT, *supra* note 3. I provided a review and critique of Barnett's book in Stephen M. Griffin, *Barnett and the Constitution We Have Lost*, 42 SAN DIEGO L. REV. 283 (2005).

31. *See* BARNETT, *supra* note 3, at 345.

32. *Id.*

33. *See id.* at 103–05.

34. *Id.* at 105–06.

35. *See id.* at 89–100.

36. *See id.* at 89–90.

37. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209–17 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

According to Barnett, a turn to original meaning, understood as *public* original meaning, solves most of the problems identified by Brest and Powell.[38] Problems caused by the search for subjective private intentions are no longer relevant, and Powell's evidence of the framer's interpretive intent did not invalidate reliance on public meaning, especially the meaning of the ratifiers of the Constitution.

Reasonable doubts have been raised as to whether the search for the public meaning of constitutional provisions is qualitatively different from searching for the intentions of the framers.[39] By saying this, I do not mean to suggest that Brest's and Powell's objections to originalism should be reinstated. My criticisms of originalism go in a different direction. To conclude this part, I will note two interesting differences between the new originalism and the old.

First, Whittington and Barnett avoid specifying the consequences of the new originalism for constitutional doctrine. Although the aim of avoiding a purely results-driven theory is laudable, in practice this leads to a curious disconnect between theory and ground-level constitutional law. One could read Whittington's entire book, for example, without gaining an understanding of how a lawyer is supposed to analyze a given constitutional case or a judge is supposed to render a decision. The *practice* of constitutional law is not addressed.

Another curious point is that it is not clear whether any federal judge, alive or dead, has ever followed as a matter of consistent judicial philosophy what new originalists recommend. We may assume there are some existing decisions consistent with originalism and some judges who have therefore acted rightly. But has any judge or justice been able to follow new originalist tenets consistently?[40] Without knowing this, it becomes more difficult to judge the plausibility of the new originalism.

II. DEFINING THE ALTERNATIVE

New originalists believe that the only alternative to originalism is an ill-defined theory called nonoriginalism. Whittington thinks the alternative to originalism is nonoriginalist analyses of constitutional meaning.[41] Barnett asserts: "It takes a theory to beat a theory and, after a decade of trying, the opponents of originalism have never converged on an appeal-

38. *See* BARNETT, *supra* note 3, at 94–100.

39. *See, e.g.*, BARBER & FLEMING, *supra* note 5, at 79 n.1; Nelson, *supra* note 23, at 556–60.

40. Barnett has argued that Justice Scalia does not qualify, despite his well-known advocacy of originalism. *See* Barnett, *supra* note 23. Careful analyses of the opinions of Justices Scalia and Thomas have shown that they have not been able to follow originalism consistently. This means there is no consistent originalist currently on the Court (nor probably anywhere on the federal bench). *See* THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATIVISM 256–68 (2004); Mark A. Graber, *Clarence Thomas and the Perils of Amateur History*, *in* REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 70 (Earl M. Maltz ed., 2003).

41. *See* WHITTINGTON, *supra* note 3, at 61–76; *see also* Kesavan & Paulsen, *supra* note 2, at 1126.

ing and practical alternative."[42] In another recent example of the use of the distinction, constitutional scholar Michael Ramsey made clear that he thought scholars were still divided into originalist and nonoriginalist camps.[43] Ramsey relied on Justice Scalia[44] in contending that nonoriginalism "is united only in agreement that originalism is not the right approach; it would substitute a bewildering array of proposals, yet agrees upon none."[45]

This is disheartening. The idea of structuring the debate over constitutional interpretation in terms of a hard and fast distinction between originalism and nonoriginalism was criticized effectively by David Hoy and Lawrence Solum almost twenty years ago.[46] It is understandable that Justice Scalia, as conservative standard-bearer, might wish to promote an "us against them" storyline. But it is puzzling that scholars persist in making this distinction without taking account of earlier cogent criticisms.

In brief, Hoy and Solum denied that any meaningful distinction existed between originalism and nonoriginalism because no theory of American constitutional interpretation can ignore the context in which the Constitution was written and the later contexts in which it was applied.[47] Hoy and Solum attacked the distinction mostly from the nonoriginalist end, although they did have interesting things to say about originalism. Hoy noticed that by focusing overwhelmingly on either original meaning (originalism) or "present meaning" (nonoriginalism), these views ignored the role of other methods of interpretation, such as precedent, that were connected to the intervening history of the American constitutional tradition.[48] Hoy continued:

> The connectedness of tradition explains an important reason why we still find the original text authoritative in our present context, despite differences from the original context. That we feel that the constitutional provisions are still very much *present* law suggests that we understand ourselves as having a single tradition (however

42. BARNETT, *supra* note 3, at 92.

43. *See* Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450, 1473–74 (2006) (book review). Ramsey was reviewing JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005). For another recent example of the use of the originalist-nonoriginalist distinction, see John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 396 (2007).

44. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of The United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997).

45. Ramsey, *supra* note 43, at 1474.

46. *See* David Couzens Hoy, *A Hermeneutical Critique of the Originalism/Nonoriginalism Distinction*, 15 N. KY. L. REV. 479 (1988); Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599 (1989). Hoy and Solum were criticizing the use of the distinction in MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW (1988).

47. While they relied on Gadamer's hermeneutical theory to make their arguments, their main point can be understood independently. *See* HANS-GEORG GADAMER, TRUTH AND METHOD (1975).

48. *See* Hoy, *supra* note 46, at 497.

complex and polysemous), stretching back and including the context in which the provisions were first written down and ratified.[49]

Solum also pointed to the inescapable importance of our constitutional tradition.[50] In fact, all plausible theories of constitutional interpretation make some appeal to understanding the Constitution in a historical context,[51] even if that appeal would not satisfy conservative originalists such as Justices Scalia and Thomas. It is thus understandable that one of the chief scholarly developments since the debates of the 1980s is reflected in the statement "we are all originalists."[52] Scholars today distinguish among forms of originalism, not between originalism and nonoriginalism.[53]

Let's recall the last time a noted legal scholar published a book defending nonoriginalism. Can't come up with the title?[54] That's because the scholars Justice Scalia and other originalists call "nonoriginalists" stopped thinking the distinction was important in the 1990s.[55] Perhaps originalists won the argument without noticing, although I doubt they would see it that way. To advance the argument of this article, I will have to depart from the conventional storyline in which originalism battled with nonoriginalism in the 1980s and was reformulated in the 1990s to the extent that the reboot of the "new originalism" became possible.[56] With due regard to Justice Scalia and Professors Whittington, Barnett, and Ramsey, we should consider the possibility that there is a different way to view the course of constitutional theory in the 1990s and after.

From this alternative perspective, in the wake of Judge Bork's failed nomination to the Supreme Court, scholars began reflecting on the narrow character of the debate over theories of interpretation in the 1980s. The debate seemed motivated by a few especially controversial decisions of the Warren and Burger Courts such as *Brown v. Board of Education*,[57] *Reynolds v. Sims*,[58] and *Roe v. Wade*.[59] Most of the decisions concerned the Due Process and Equal Protection Clauses of the Fourteenth Amendment. What about the rest of the Constitution? Was all of constitutional law in turmoil? Inspired in part by Philip Bobbitt's appeal to

49. *Id.*

50. *See* Solum, *supra* note 46, at 1603–10.

51. *See* STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 155 (1996).

52. Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 677 (1999).

53. *See* BARBER & FLEMING, *supra* note 5, at 99–101.

54. There is a recent work by a political scientist who defends nonoriginalism. *See* DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM (2005).

55. For a notable counterexample to the sources cited below, see Michael Dorf's complex and insightful article, Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765 (1997). I respond to Dorf's arguments below.

56. *See* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 257–58 (2005); Kesavan & Paulsen, *supra* note 2, at 1134–48.

57. 347 U.S. 483 (1954).

58. 377 U.S. 533 (1964).

59. 410 U.S. 113 (1973).

the legitimacy of various well-grounded modes (traditions) of constitutional interpretation,[60] various scholars began thinking about a more pluralistic approach to the theory of constitutional interpretation.[61] Other scholars began revitalizing particular modes of interpretation in ways not compatible with originalism of the Bork-Scalia variety.[62] In addition, Bruce Ackerman, Sanford Levinson, and others impressed upon constitutional scholars the importance of questions of constitutional amendment and change as ways of structuring the inquiry into methods of interpretation.[63]

These various inquiries made evident the point previously mentioned—by the end of the 1990s, most scholars did not reject "originalist" appeals to history as one mode of constitutional interpretation among others.[64] However, these theories also made clear that the alternative to originalism[65] was *not* a "non" anything, but rather the conventional, historically grounded, traditions of constitutional interpretation. I have defended elsewhere what I call a "pluralistic" theory of constitutional interpretation, and it would unduly lengthen this article to repeat my earlier analysis.[66] To promote understanding of this theory, and to respond to earlier criticisms,[67] it is worth noting a few key points.

Essentially, pluralistic theories described, explained, and justified contemporary modes of interpretation such as text, history, structure, and precedent by linking them to the Constitution and the multiple sources of law that existed when the Constitution was ratified and went into operation. First, pluralistic theories described accurately that the

60. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) [hereinafter BOBBITT, CONSTITUTIONAL FATE]; *see also* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); Symposium, *In Praise of Bobbitt*, 72 TEX. L. REV. 1703 (1994) (symposium on Philip Bobbitt's constitutional interpretation).

61. *See* GRIFFIN, *supra* note 51, at 143–52; Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13 (1990). I would also place Laurence Tribe in this group. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 30–89 (3d ed. 2000).

62. *See, e.g.*, Akhil Reed Amar, *Intratexualism*, 112 HARV. L. REV. 747 (1999); Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000) [hereinafter Amar, *The Document and the Doctrine*]; Akhil Reed Amar, *Textualism and the Bill of Rights,* 66 GEO. WASH. L. REV. 1143 (1998); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); *see also* Symposium, *Textualism and the Constitution,* 66 GEO. WASH. L. REV. 1081 (1998). Amar's project eventually resulted in AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005).

For a good example of a transitional work in the 1990s, see CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993). Sunstein rejected originalism and advocated a common sense pluralistic approach without endorsing the originalist-nonoriginalist dichotomy. *See id.* at 93–122.

63. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998) [hereinafter ACKERMAN, TRANSFORMATIONS]; BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) [hereinafter ACKERMAN, FOUNDATIONS]; GRIFFIN, *supra* note 51; RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995).

64. *See infra* text accompanying notes 282–87 (discussing the Clinton impeachment).

65. Not for the last time, I will make clear that when I say "originalism," I mean the position I defined as *exclusive* originalism.

66. *See* GRIFFIN, *supra* note 51, at 143–52.

67. *See* Dorf, *supra* note 55.

Supreme Court employs multiple methods of interpretation in deciding constitutional cases and does not observe a strict hierarchy of methods. Next, each method was linked to a source of law that preexisted the Constitution, such as statutes and the common law. These sources of law provided the ground for the emergence of multiple legitimate methods of interpretation in the early republic.[68] This also explained why these non-constitutional sources of law exert a hold over the contemporary theoretical debate. Scholars today continue to ground their preferred method of constitutional interpretation by appealing to analogies based on sources of law, such as the common law, understood to be legitimate.[69] Finally, pluralistic theories justified the use of multiple methods as the most practical way to implement the Constitution, that is, give it legal force in courts of law.[70]

Originalists have not come to grips with pluralistic theories as the chief alternative to their single-method approach. In particular, it would be hard to deny the superiority of pluralistic theories along the descriptive-explanatory dimension.[71] The normative basis of pluralistic theories has been questioned, largely because of Bobbitt's denial that methods of interpretation require external justifications.[72] There is no doubt that Bobbitt pushed this argument to the limit, but this approach to justification is not essential to pluralistic theories. As just mentioned, a pluralistic theory can be justified as the best way to implement the Constitution as law.

Moreover, the need to justify methods of interpretation externally in the course of deciding constitutional cases can be overstated. Michael Dorf has argued that the quest to justify particular methods of interpretation is driven by the interpretive process itself and cannot be avoided.[73] As Dorf notes, originalists claim aggressively that reliance on original meaning is the only legitimate form of interpretation.[74] However, at bottom, the quest for external justification so familiar to scholars is not reflected in the ordinary practices of the federal courts. Judges and justices are not typically self-conscious about the method(s) they use, and opinions are not dominated by arguments over whether the correct method of interpretation was used to decide the case. Instead, judges just decide.

The alternative to originalism is thus the array of traditional methods of constitutional interpretation, including arguments based on the text and structure of the Constitution, appeals to history (understood as

68. *See, e.g.*, Nelson, *supra* note 23, at 560–78.

69. For examples, see GRIFFIN, *supra* note 51, at 147.

70. I refer here to the process I have described as the "legalization" of the Constitution. *See id.* at 147, 206–09; *see also* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

71. *See* Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 902–03 (2003).

72. *See* BOBBITT, CONSTITUTIONAL FATE, *supra* note 60, at 5–6; Dorf, *supra* note 55, at 1788–96.

73. Dorf, *supra* note 55, at 1794–95.

74. *See id.*

any argument based on relevant historical evidence, not only original meaning), and precedent. I should make clear, consistent with the arguments of Hoy and Solum, that each contemporary method of interpretation is the result of a tradition that extends back at least to the adoption of the Constitution. Although each contemporary method would likely be recognized by adept eighteenth-century lawyers such as John Marshall, this is not to say that each method has remained the same over the intervening period. There is evidence that the methods have changed over time while keeping faith with their origins.[75]

III. ORIGINALISM AND THE INTERPRETIVE STATUS QUO

Having identified the alternative to originalism, I advance a critique of the new originalism in this part and the next. Before beginning, it is useful to review the conventional understanding of the main objections to originalism. There are catalogs of standard criticisms and I will quote Whittington's:[76]

> First, critics point to methodological problems associated with identifying the specific scope beliefs of the founders, especially the so-called "summing problem" of identifying a "single coherent shared or representative intent" from the "varying intentions of individual framers." They also cite problems with the possible ambiguity of original intent and with identifying the appropriate level of generality at which constitutional principles are to be understood. Moreover, critics claim there are problems of circularity in the justification for originalism and the possibility that the "interpretive intentions" of the founders were non-originalist. Finally, critics of originalism argue that there are "dead hand" problems related to the authority of the long-dead founders over present political actors and the potential undesirable outcomes of substantive originalist interpretations of the Constitution.[77]

By and large, my critique of originalism does not draw on any of these standard criticisms. I do not necessarily view them as flawed, but I have a different understanding of the structure of the debate. It should be understood that it would be quite difficult to vanquish a traditional method of interpretation such as consulting the historical meaning of the Constitution. Given its firm grounding in American constitutionalism, this would be roughly like telling lawyers to ignore the text. We can all appreciate that there are theoretical difficulties in stating the intent or

75. In the case of originalism or historical argument, see O'NEILL, *supra* note 7, at 2, 13; Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001 (1991). Dorf's discussion of "ancestral" and "heroic" originalism in Dorf, *supra* note 55, at 1800–10, is also suggestive.

76. Note that Whittington thinks most of these objections are flawed. *See* Whittington, *supra* note 2, at 605.

77. *Id.* at 605–06 (footnotes omitted).

original meaning of a constitutional provision with confidence.[78] But if these objections are understood as efforts to eliminate originalist interpretation from the canon,[79] they have little practical value.

As I stated, this is a critique of exclusive originalism. I believe it is worth confronting this particular form of originalism if only because its proponents are persistent in advancing it as the *sole* legitimate method of constitutional interpretation.[80] My first objection is thus developed around the intuition that reliance on one method of interpretation, no matter how legitimate, would be a significant and unjustified departure from the interpretive status quo defined in Part II. The second objection advanced in Part IV goes in a different direction, examining the relationship of originalism with history.

Begin with a point that is often overlooked. Is originalism the status quo?[81] If originalism were the status quo, it would be recognized as the sole (or at least primary) method of constitutional interpretation by all courts in the United States. Plainly, originalism is not the status quo.[82] As discussed in Part II, the status quo involves the use of a variety of interpretive methods by the federal courts, including the Supreme Court.

Nonetheless, originalists start with the assumption that originalism has been the sole method of constitutional interpretation followed by courts and commentators from the beginning of the republic.[83] Originalism thus *appears* to be the status quo. Any deviation from originalist practice is seen as grounds for criticism, not as evidence that other methods of interpretation have been employed by the Supreme Court or that originalism itself has assumed different forms at different times.[84]

When promoting their theory, originalists do not typically focus on the actual interpretive practice of the Supreme Court. Without rooting their theory firmly in an accurate description of past and present interpretive practice, however, originalists have no way to demonstrate that their assumption is correct. If the adoption of originalism as the sole or primary method of constitutional interpretation would therefore be a significant departure from the status quo, originalists must assume a

78. The difficulties are acknowledged by new originalists. *See* WHITTINGTON, *supra* note 3, at 4, 209–11.

79. *See* LEGAL CANONS 413–22 (J.M. Balkin & Sanford Levinson eds., 2000).

80. *See* BARNETT, *supra* note 3, at 89; WHITTINGTON, *supra* note 3.

81. See discussion in GRIFFIN, *supra* note 51, at 157–58.

82. *See* KECK, *supra* note 40, at 270 (no justice has held that originalism is the only legitimate source of meaning). For a critique of the new originalism that concentrates on the reality that it is something of a moving target, see Thomas B. Colby & Peter J. Smith, *Originalism's Living Constitutionalism* (George Wash. Univ. Law Sch. Pub. Law Research, Paper No. 393, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090282.

83. *See, e.g.*, GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION 1–7 (1992); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 363–72 (1977); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 226–29 (1988); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 374–81 (1981).

84. *See* O'NEILL, *supra* note 7; Baade, *supra* note 75, at 1103–07.

heavy normative burden. They must show why such a departure would be justified.

Originalists think they have good reason to suppose originalism is the status quo. Any number of founding era authorities can be cited for the proposition that the duty of a court in interpreting the Constitution is to discover and give effect to its original meaning.[85] The conceptual problem in assuming this supports a contemporary version of originalism is that such statements most likely relate to the *purpose or ends* of constitutional interpretation rather than the *methods* used. There seems little doubt that many authorities thought the purpose of the interpretive process was to reveal the intent or meaning of the Constitution. There is also little doubt that there were a variety of legitimate means to ascertain the Constitution's meaning.

This becomes clear in histories of the Marshall Court. In G. Edward White's summary, "the Justices drew upon a range of sources to justify their decisions: the text of the Constitution, the plain or ordinary meaning of words, common law definitions or principles, natural law, local practices and rules, principles of equity, and what they termed 'general principles of republican government.'"[86] Many famous decisions of the Marshall Court, including *Marbury v. Madison*,[87] *McCulloch v. Maryland*,[88] and *Barron v. Mayor of Baltimore*,[89] show Marshall employing a variety of methods in interpreting the Constitution, presumably all legitimate.[90]

In *Barron*, for example, Marshall made three distinct arguments, each leading to the conclusion that the Bill of Rights applied only to the federal government. He began by relying on the structure of the constitutional order.[91] States had adopted their own constitutions, and the limitations stated in those constitutions were most naturally construed as applying only to those states. This implied that when the people of the United States adopted the Constitution, any limitations contained within it would apply only against the federal government.[92] Next, Marshall made an argument which relied on the text of Article I, Section 9, specifying limitations on the power of the federal government.[93] Limitations on the states were specified separately in Section 10. Marshall inferred that the framers intended a distinction between the limitations applicable to the federal government and the limitations applicable to the states and

85. *See* BASSHAM, *supra* note 83; O'NEILL, *supra* note 7, at 38 (quoting tenBroek).

86. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835, at 114 (1988).

87. 5 U.S. 137 (1803).

88. 17 U.S. 316 (1819).

89. 32 U.S. 243 (1833).

90. See the discussion in CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 181–214 (1996).

91. *See Barron*, 32 U.S. at 247.

92. *See id.* at 247–48.

93. U.S. CONST. art. I, § 9.

that without express language applying a given limitation to the states, it must be construed as applying to the federal government.[94] Finally, Marshall referred to the history of the ratification of the Constitution, noticing that many amendments were introduced to limit the power of the new federal government, but none were to apply against the states. Marshall inferred that the amendments which became the Bill of Rights were thus intended to apply to the federal government.[95]

We can thus see Marshall using a variety of methods of interpretation that are still used today.[96] The first argument can be described as structural; the second as textual, leading to a conclusion about the intent of the Constitution; and the third as historical. As Marshall probably saw it, the overall purpose of the different methods was to explicate the original meaning of the Constitution. We can appreciate that original meaning in this sense is an overarching goal or result of a complex interweaving of different methods of interpretation. Many Marshall Court decisions, as well as decisions of the Court today, are similar in this respect.[97]

As established by the Constitution and the Marshall Court, judicial review was a complex institutional practice.[98] As such, elements of the institution could take on a life of their own, so to speak.[99] Once the methods of decisions like *Barron* were accepted by federal and state courts as authoritative, those methods could be employed in a freestanding sense to decide other cases.[100] Indeed, the methods themselves could begin evolving as judges and commentators tried to work out their implications.[101] To be clearer, once textual and structural approaches (as well as precedent) were perceived as separate from historical argument, cases could be decided legitimately by those methods alone, without recourse to evidence from the founding period. I am not suggesting that this became the common practice of the Court. The point is that the process of working out how to interpret the Constitution led naturally to the idea that each method was legitimate and could therefore constitute the sole basis for the exercise of judicial review in a given case.

In this light, consider the importance of *Brown v. Board of Education*[102] and the subsequent development of the law of equal protection. I

94. *See Barron*, 32 U.S. at 248–49.

95. *See id.* at 250.

96. For a recognition of this point by an originalist, see BORK, *supra* note 29, at 27.

97. For more contemporary examples of the use of different methods of interpretation, see, for example, Clinton v. Jones, 520 U.S. 681 (1997); Nixon v. United States, 506 U.S. 224 (1993); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

98. *See* Stephen M. Griffin, *The Age of* Marbury*: Judicial Review in a Democracy of Rights*, *in* ARGUING *MARBURY V. MADISON* 104, 107–17 (Mark Tushnet ed., 2005).

99. *See* J.M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 931–39 (1988) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDER'S DESIGN (1987)).

100. See the discussion in Monaghan, *supra* note 22, at 770–72.

101. *See* Baade, *supra* note 75.

102. 347 U.S. 483 (1954). For insights on *Brown* and the arguments among the justices, see ROBERT J. COTTROL ET AL., *BROWN V. BOARD OF EDUCATION*: CASTE, CULTURE, AND THE

suggest the theoretical significance of this epochal case has been somewhat misunderstood. The relevance of *Brown* to the debate over originalism is not so much that the decision is likely inconsistent with the original meaning of the Equal Protection Clause.[103] The relevant point for exclusive originalism is that one of the most celebrated Supreme Court decisions in U.S. history,[104] a decision that helped underwrite the legitimacy of the contemporary constitutional order,[105] especially for racial and ethnic minorities, was *deliberately and unanimously* not based on any version of original intent or meaning, despite the clear understanding of the justices that originalism was an option.[106] By itself, then, *Brown* showed that originalism was not the status quo—it was not the sole or even primary method of interpretation that the Court must always follow.[107]

In *Brown*, Chief Justice Warren noted early in the opinion that the case had been reargued in an attempt to discover the meaning of the Fourteenth Amendment on the question of the constitutionality of state-segregated public schools.[108] Warren termed the results of the reargument and the Court's own investigation "inconclusive."[109] Warren noted that, at the time of the adoption of the Fourteenth Amendment, there was no system of public schools in the South, the region that would be most affected by the ruling.[110] When Warren came to the question presented, he stated:

CONSTITUTION (2003); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 290–312 (2004); RICHARD KLUGER, SIMPLE JUSTICE (1975); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994).

103. Jack Balkin comments: "Critics of the philosophy of original intention have pointed to *Brown* as a counterexample, arguing that the framers and ratifiers of the Fourteenth Amendment wanted only limited equality for blacks." Jack M. Balkin, *Preface* to WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID ix, xi (Jack M. Balkin ed., 2001) [hereinafter *BROWN*].

There has been a well-known debate on this score between Michael McConnell and Michael Klarman, with McConnell defending *Brown* as consistent with original meaning, although using evidence from the post-ratification period. *See* McConnell, *supra* note 3. Because Klarman approached the issue from a historicist perspective, he had the better case. *See* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995).

104. *See* Jack M. Balkin, Brown v. Board of Education—*A Critical Introduction*, *in BROWN*, *supra* note 103, at 3, 4.

105. *See id.* at 16.

106. *See* KLARMAN, *supra* note 102, at 303–07. As Justice Jackson's clerk, Barrett Prettyman, put it: "[Warren's] opinion took the sting off the decision, it wasn't accusatory, and it didn't pretend that the Fourteenth Amendment was more helpful than the history suggested—he didn't equivocate on that point." Balkin, *supra* note 104, at 38. For a similar argument, see David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 304–06 (2005).

107. *See* Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 753–56 (1992) (by the time of Brown, Justice Frankfurter rejected original intent as a method of interpretation). Justice Frankfurter was a pillar of the legal establishment and it would be hard to explain how he could reject original intent if it was, as originalists claim, the sole legitimate method of interpretation.

108. 347 U.S. 483, 489 (1954).

109. *Id.*

110. *Id.* at 489–90.

> [W]e cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[111]

If evidence of original meaning was not relevant, how did Warren justify holding state segregated schools unconstitutional? There has been a long controversy over the soundness of the legal reasoning in Warren's opinion.[112] Critics focused on Warren's argument that segregated schools caused psychological harm to black children.[113] But another argument is at least suggested by the authorities Warren offered. In the only lengthy quotation in the opinion, taken from a lower court in Kansas, there is a reference to *moral* harm as well.[114] The Kansas court reasoned that placing "the sanction of the law"[115] behind segregation conveys the message that blacks as a whole are an inferior race.[116] That is, the official advancement and protection of segregation in society and public institutions guarantees second-class citizenship for black citizens.[117]

I do not wish this detour to distract from my main point. Basing *Brown* on a historical argument was one legitimate option, but not the only legitimate option. Warren followed the observation quoted above, denying the originalist method was helpful, with an argument that established the importance of education as a government function[118] and concluded that it "must be made available to all on equal terms,"[119] thus invoking the language of the Equal Protection Clause. After stating the question presented, Warren employed the most relevant recent precedents,[120] *Sweatt v. Painter*[121] and *McLaurin v. Oklahoma State Regents*,[122] to show that segregated schools could not provide "equal educational opportunities."[123] After making the argument on psychological and moral harm, Warren drew the famous conclusion: "Separate educational facilities are inherently unequal."[124]

111. *Id.* at 492–93.
112. *See* sources cited *supra* note 102.
113. *See Brown*, 347 U.S. at 494; COTTROL ET AL., *supra* note 102, at 214.
114. *See Brown*, 347 U.S. at 494.
115. *Id.*
116. *Id.*
117. See the remarks on the reasoning of *Brown* in Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 361–63 (1987).
118. *Brown*, 347 U.S. at 493.
119. *Id.*
120. *See id.* at 493–94.
121. 339 U.S. 629 (1950).
122. 339 U.S. 637 (1950).
123. *Brown*, 347 U.S. at 493.
124. *Id.* at 495.

By writing the opinion in this way, Warren suggested that text and precedent supported the result.[125] I say "suggested" because, as in many persuasive Supreme Court opinions, Warren interwove different methods to achieve an opinion that would stand the test of time. Using methods of interpretation other than historical interpretation did not place the legitimacy of the decision in jeopardy.[126] Here we must distinguish between academic criticism of the opinion and the legal and political reality of an illegitimate decision. *Brown* was criticized in the 1950s, but, generally speaking, the legal system obeyed the decision after some hesitation.[127] The failure to use historical argument or originalism to justify the result did not affect the political legitimacy of the decision. Southern politicians did use originalist arguments to attack the opinion, but without much success.[128]

It is a shame that originalists still apparently regard the opinion as poorly reasoned.[129] Was Warren's reasoning really that bad? Here hindsight has yielded greater wisdom than the hasty criticisms made in Brown's immediate aftermath.[130] After running an experiment that showed the difficulty of "rewriting" *Brown*, Jack Balkin recently concluded:

> In many respects Warren did less harm with his words than others, less gifted and less able, might have done. It became fashionable, especially among academic elites, to criticize Warren's opinion for either its lack of legal analysis or its lack of political passion. But from the perspective of fifty years, Earl Warren's work deserves no small degree of admiration.[131]

The problem for originalism posed by equal protection law goes far beyond *Brown*.[132] The development of vast tributaries of equal protection law owes little to historical or originalist argument. We can examine basic, jurisgenerative precedents concerning school desegregation,[133] in-

125. *See* WILLIAM M. WIECEK, THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, at 685–93 (2006); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 14–31, 43–44 (1979).

126. For an excellent example of a (mostly) textual argument in favor of *Brown*, see Amar, *The Document and the Doctrine*, *supra* note 62, at 60–66.

127. *See* KLARMAN, *supra* note 102, at 321–43.

128. *See* "*Declaration of Constitutional Principles" [The Southern Manifesto]*, *in* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 902, 903 (5th ed. 2006).

129. *See* O'NEILL, *supra* note 7, at 56.

130. *See* LEARNED HAND, THE BILL OF RIGHTS (1964); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). It would require a lengthy article to explain why such eminent jurists had trouble justifying *Brown*. *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 33–37 (1996).

131. Balkin, *supra* note 104, at 71. The opinions Balkin solicited "rewriting" *Brown* support the idea that the opinion can be based on text and precedent alone. See the opinion of "Justice" John Hart Ely, *Concurring in the Judgment (Except as to Remedy)*, *in* BROWN, *supra* note 103, at 135. For another favorable judgment on Warren's opinion, see COTTROL ET AL., supra note 102, at 177–80.

132. *See* Klarman, *supra* note 103, at 1919–20.

133. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County Sch. Bd., 391 U.S. 430 (1968).

terracial marriage and adoption,[134] voting rights,[135] racially disproportionate impact,[136] affirmative action,[137] and gender discrimination[138] without finding any significant use of originalist argument. Equal protection law is a good demonstration of how doctrines can evolve legitimately without recourse to historical argument. This celebrated branch of law thus demonstrates that originalism is not the status quo.

If exclusive originalism is not the status quo, what would justify *changing* the interpretive world described in Part II to one in which the only legitimate method of interpretation was recourse to the original public meaning of the Constitution? What would we gain? Surprisingly, originalists have avoided this question, instead referring to the many examples of the use of historical evidence in constitutional interpretation and its status as a traditional method. This does not advance the theoretical debate because no one disputes these points. The debate concerns the normative status of originalism *relative* to other methods of interpretation (and how best to carry out historical argument).

What can originalists say? My impression is that they have two lines of response. The first is that originalism must be the sole or primary method of interpretation because it is the only *legitimate* method of interpretation. To reply, we need an explanation and justification of how other legitimate methods could emerge from the founding period. I provided a summary of such a theory in Part II, but it is worth repeating that I have provided more detail elsewhere[139] and that the emergence of multiple legitimate methods of interpretation in the early republic has been well documented by many able scholars.[140]

A second response might be to wonder how the original public meaning of the Constitution could be placed second or third to other methods of interpretation, no matter how legitimate. Do we not owe fidelity to the Constitution?[141] This popular but misleading way to frame the issue conceals several unexamined assumptions, including that we have a direct pipeline to original meaning. However, the most important

134. *See* Palmore v. Sidoti, 466 U.S. 429 (1984); Loving v. Virginia, 388 U.S. 1 (1967).

135. *See* Reynolds v. Sims, 377 U.S. 533 (1964).

136. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

137. *See* Grutter v. Bollinger, 539 U.S. 306 (2003); Adarand Constructors v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

138. *See* United States v. Virginia, 518 U.S. 515 (1996); Frontiero v. Richardson, 411 U.S. 677 (1973).

139. *See* GRIFFIN, *supra* note 51, at 143–52.

140. *See, e.g.*, SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828, at 221–45 (1999); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 224–34 (1993); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 340–65 (1996); WHITE, *supra* note 86, at 111–19; Nelson, *supra* note 23.

141. *See, e.g.*, Symposium, *Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997). The rhetorical framing of the debate over constitutional interpretation as one of "fidelity" was unproductive because it was unavoidably biased in favor of originalism and anachronistic.

covert assumption is that because the Constitution is enforceable law it can operate in the same manner as other laws. This assumption is not borne out by either theory or practice in the early republic.

Constitutions are fundamentally different from other laws in that they are self-enforcing.[142] When an ordinary law is violated, some external agency stands ready to enforce the law and remedy the violation. In the constitutional sphere, there is no external agency available (if there were, it would not be subject to the constitution). Lacking an external agency, constitutions must ultimately be enforced by the operation of the entire political system, or, one might say, by the people as a whole.[143]

What the fidelity frame misses is that the Constitution had to be operationalized within the political system rather than simply in courts of law. Framers and ratifiers became politicians and government officials. Original meaning was not scanned directly from the document by individuals but was mediated through institutional interaction. In crucial debates in the 1790s, such as over the national bank and the Alien and Sedition Acts, constitutional meaning was hammered out informally through political contestation.[144]

In addition, it is useful to bear in mind some practical points about the circumstances of constitutional interpretation. The meaning of a constitutional provision in the abstract is rarely at issue.[145] What matters is the meaning of a provision to a specific contemporary set of facts, something quite different. Practical experience shows that federal judges often find evidence of original meaning absent, inadequate and fragmented, or too cryptic and equivocal to use to decide the concrete rights of parties.[146] Judges have required other methods of interpretation and our constitutional tradition has provided the tools they need to resolve actual cases.[147] Those methods in turn created their own traditions which means legitimate interpretation is typically more a matter of how a judge should respond to them rather than an attempt to time-jump, in an unmediated fashion, back to the eighteenth century.[148]

What *should* originalists say? What would justify abandoning traditional methods of constitutional interpretation such as text, structure,

142. For discussion, see GRIFFIN, *supra* note 51, at 14; Stephen M. Griffin, *Constituent Power and Constitutional Change in American Constitutionalism*, *in* THE PARADOX OF CONSTITUTIONALISM 49, 51–53 (Martin Loughlin & Neil Walker eds., 2007) [hereinafter Griffin, *Constituent Power*]; RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 89, 98 (1999).

143. There is evidence that the founding generation understood this point. See Larry Kramer's discussion of "popular constitutionalism." KRAMER, *supra* note 70, at 91.

144. *See* ELKINS & MCKITRICK, *supra* note 140; RAKOVE, *supra* note 140.

145. The very idea of such abstract interpretation is criticized in Hoy, *supra* note 46, and Solum, *supra* note 46.

146. For a famous statement see Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 (1952).

147. For an important statement of this point, see STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 7–8 (2005).

148. *See* Balkin, *supra* note 99, at 953.

and precedent? Obviously, I do not believe originalists can meet this burden. Because the change would be so radical, originalists confront a heavy burden of justification. The advocacy of originalism has been premised implicitly on avoiding this burden.

Perhaps originalists believe that over the last few decades, standard methods of interpretation have failed to produce persuasive rationales in important cases relative to the rationales available through historical argument. However, as the example of *Brown* demonstrates, this would justify only working to improve our understanding of those methods and the traditions of which they are a part, rather than abandoning them. Or perhaps originalists think it is enough if their method became *prima inter pares*. But this would require an argument that confronts the well-grounded legitimacy of other methods of interpretation. Given the ambition of new originalists to promote originalism as the exclusive legitimate means of constitutional interpretation, I do not see how a sound argument can be made on this score. The new originalism should be rejected on this basis alone.

IV. HISTORY WITHOUT HISTORICISM

Does originalism depend on history without historicism? In this part I argue that originalism cannot properly use evidence from the past without considering the reality of historical change. For originalists, having your cake and eating it too means using evidence from the eighteenth century selectively to decide cases in the present without taking into consideration relevant changes in context. Why is this a problem for originalism?[149] By refusing to exit from the eighteenth century and privileging one particular set of historical contexts, originalism is unable to cope with legitimate constitutional change outside the Article V amendment process and cannot provide a meaningful connection to our constitutional past. It thus lacks perspective on the constitutional system we actually have.

"Historicism" can be defined in a number of ways, but the definition I employ here is fairly standard.[150] A historicist perspective focuses on the contexts in which historical events took place and how those contexts were later changed. According to William Nelson, "[t]he essence of history is the identification of continuities and discontinuities between past and present."[151] Michael Les Benedict helpfully continues the point: "Historians are particularly concerned with how institutions and ideas

149. Again, I refer here to exclusive originalism.

150. For an important recent discussion, see G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 490–91 & n.8 (2002). White makes the useful point that "one can be a historicist without accepting the melioristic assumption that the path from the past to present to future is one of continuous improvement in the human condition." *Id.* at 491 n.8.

151. WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 11 (1988).

have changed over time: A key purpose of history is to describe how past ideas and institutions differed from those of the present."[152] Despite vigorous advocacy by some legal scholars,[153] a historicist perspective is still not standard among constitutional theorists.[154]

To further describe the historicist perspective and lay the groundwork for the objection I advance in this part, I will call attention to a somewhat forgotten article by Gordon Wood,[155] who for decades has been one of the leading historians of the early republic.[156] Wood's article was written during the Constitution's bicentennial and criticized various works written by "Straussians," scholars who write about the creation of the Constitution from the perspective of political theory, especially the theories advanced by Leo Strauss, who taught at the University of Chicago.[157] For my purposes, what is relevant is that Straussians (most of whom have backgrounds in political science), express a point of view that is consistent with originalism.

I should note initially that, because Wood was critical of the Straussians, one might assume he was taking a "nonoriginalist" point of view. To the contrary, Wood was trying to explain how historians approach the origins of the Constitution. This perspective is what makes his article useful for my argument. Wood was not advocating a particular method of constitutional interpretation, but rather a historicist perspective on how to approach the thought of the founding generation.[158]

One of Wood's themes was that taking the eighteenth-century debates of the framers and applying them uncritically to the problems of the present missed the different character of their world.[159] "They still saw themselves ideally as a leisured, cosmopolitan, liberally educated gentry bound by a classical patrician code of disinterested public leadership. However much they prepared the way for the individualistic, egali-

152. Michael Les Benedict, Book Review, 10 LAW & HIST. REV. 377, 379 (1992).

153. *See, e.g.*, ACKERMAN, FOUNDATIONS, *supra* note 63, at 34–66; GRIFFIN, *supra* note 51; KRAMER, *supra* note 70; Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115 (1999) [hereinafter Griffin, *Transformed*]; Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996).

154. Indeed, one might refer to the dominant approach (shared by many theorists who do not count themselves originalists) as "nonhistoricism." But I digress.

155. *See* Gordon S. Wood, *The Fundamentalists and the Constitution*, N.Y. REV. BOOKS, Feb. 18, 1988, at 33.

156. See his magisterial works: GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969) [hereinafter WOOD, CREATION] and GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992) [hereinafter WOOD, RADICALISM]; *see also* GORDON S. WOOD, REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT (2006).

157. It is not my intention to discuss the accuracy of Wood's critique of the Straussians. I am appropriating his argument for my own purposes.

158. It is also worth noting that Wood wrote before an emphasis on "original meaning" became prominent.

159. *See* Wood, *supra* note 155, at 37–38.

tarian, and democratic future of America, they were not modern men."[160] They could sense their world was in transition and many of the most influential framers, including Washington and Madison, thought the Constitution would not work.[161] Obviously they were wrong, and to our benefit. However, this makes it difficult to decide contemporary legal cases through a recovery of "original intention." Wood remarked, "Not only were there hundreds of Founders, including the Anti-Federalists, with a myriad of clashing contradictory intentions, but in the end all the Founders created something that no one of them ever intended."[162] Wood also maintained that "[m]any of our most cherished principles of constitutionalism associated with the Founding were in fact created inadvertently."[163]

Another relevant theme sounded by Wood was the implausibility of trying to fix legal meaning as if the Constitution were a contract.[164] To Wood, this ignored the incontrovertible reality usually referred to as "the living Constitution:"[165]

> [B]ecause the text of the Constitution is so general and so brief . . . all its interstices have been filled in by two hundred years of judicial interpretation and experience. The president's cabinet, the independent regulatory agencies, the structure and practices of political parties, the practice of judicial review, indeed most of the means by which we carry on our governmental business, are all unmentioned in the Constitution and are the products of historical experience.[166]

Wood's final point was that ignoring a historicist perspective meant that originalists cannot account for the meaningful constraining role played by tradition in American constitutionalism: "Giving up a timeless absolute standard does not necessarily lead to moral and political chaos. History, experience, custom are authentic conservative boundaries controlling our behavior."[167] Ignoring the reality of historical change and the constraining role of tradition had a tendency to "cut us off 'from the benefit of a historical tradition, properly speaking.'"[168] Wood called for seeing "our institutions, our culture, [and] our society as the products of incremental developments through time."[169] All of these observations are important in understanding a historicist perspective.

160. *Id.* at 38; *see also* ELKINS & MCKITRICK, *supra* note 140, at 5.
161. *See* Wood, *supra* note 155, at 38.
162. *Id.* at 39.
163. *Id.*
164. For this approach, see BARNETT, *supra* note 3, at 22–25. For criticism, see Griffin, *supra* note 30, at 290–92.
165. Wood, *supra* note 155, at 39.
166. *Id.* at 39–40.
167. *Id.* at 40.
168. *Id.* (quoting historian Frank Craven).
169. *Id.*

The historicist perspective outlined by Wood is at odds with both the old and new originalism.[170] I will summarize briefly what I see as its most important elements. The Constitution was created during a period of transition from a monarchical and republican order to a more democratic one.[171] Trying to pin down the original meaning of the fundamental elements of a constitutional order in transition is quite difficult, like trying to hit a moving target.[172] This is one of the reasons the founding generation began arguing over the meaning of the Constitution in the 1790s.[173] More important, originalism has no way to account for the legitimacy of significant constitutional changes outside the Article V amendment process, such as the development of political parties. Wood's final point resonates quite well with the emphasis a pluralist theory of constitutional interpretation places on tradition. In practice, originalism often ignores traditions that began after the magic founding moment, making it difficult to meaningfully engage with our entire constitutional past.

By using history without historicism, originalism creates two problems for constitutional interpretation—it perpetuates a selective account of the context in which the Constitution was adopted and went into operation in the 1790s and renders us unable to cope with the legitimacy of informal constitutional changes that occurred later, especially in the twentieth century. In addition, originalism in practice tends to downgrade the importance of even formal amendments approved after the founding period, such as the Fourteenth Amendment.[174] As Wood surmised, originalism tends to cut us off from our constitutional tradition. There is no reason to accept any of these outcomes for constitutional law and thus originalism should be rejected.

I want to make clear that in this part of the article, originalism is not evaluated as a method of interpretation, but as a perspective on constitutional meaning. Such perspectives, while general, can nonetheless influence constitutional interpretation. I proceed by first identifying the alternative perspective to originalism. This is usually termed "the living Constitution," but this is more a brand name than a detailed theory. Fortunately, it has been transformed into what I call "the developmental

170. The critique of the originalist use of history by Wood and others may have been misread as claims that we cannot know with a reasonable degree of certainty what happened in the past. *See, e.g.*, Kay, *supra* note 83, at 251–53. In fact, Wood was saying nearly the opposite. Obviously it would be incongruous for a historian to claim that the effort to recover the past was fruitless.

171. *See* SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY 13–98 (2005). *See generally* WOOD, RADICALISM, *supra* note 156.

172. For a critique of originalism that advances this argument, see Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529 (forthcoming 2008).

173. *See* sources cited *supra* note 140.

174. As Tom Keck observes: "To the extent that the Rehnquist Court's federalism revival has been rooted in fidelity to original meaning, then, it has been a 1789 version of original meaning that minimizes the constitutional change wrought during Reconstruction." KECK, *supra* note 40, at 264.

Constitution" by historicist theories of constitutional change.[175] I then identify what would have to occur for originalism to take historicism on board. Because historicism would threaten changes to originalism that originalists cannot accommodate, I conclude that originalism involves an untenable outcome—history without historicism. In the final section, I offer some thoughts on what developmental theory can contribute to constitutional interpretation.

A. Defining the Alternative: The Developmental Constitution

Many judges and scholars believe that the alternative to originalism is "the living Constitution."[176] As a matter of public rhetoric and debate on editorial pages, this is difficult to deny. However, if our purpose is to compare methods of constitutional interpretation, it quickly becomes evident that the ideas behind the living Constitution are too hazy to serve as meaningful guides to interpretation. As I explained in Part II, the alternative to originalism is a pluralist theory of constitutional interpretation.

This is not to say that the ideas invoked by the living Constitution are without relevance to the debate over originalism. But the living Constitution is not best understood as a discrete method of interpretation. Rather, it has traditionally functioned as a general perspective on the role of history and society in determining constitutional meaning. Roughly, this perspective asserts that the meaning of the Constitution can and has been determined legitimately outside of original meaning.

It is possible that since the retirements of Justices Brennan and Marshall, the notion of the living Constitution has fallen into disuse on the Supreme Court.[177] In the scholarly debate, the living Constitution has perhaps diminished into a set of stock quotations and truisms. Fortunately, recent developments in constitutional theory can be understood as revitalizing the concepts behind the living Constitution.[178] As a matter of theoretical scholarship at least, the living Constitution has been superseded by historicist theories of constitutional change.[179] While I do not wish to unnecessarily add another label to the debate, these theories are more complex than the living Constitution. To distinguish them, I will refer to the perspective these theories promote as the "developmental Constitution" and the theories themselves as "developmental theories."

175. *See, e.g.*, Griffin, *Transformed*, *supra* note 153.

176. *See, e.g.*, WHITTINGTON, *supra* note 3, at 196–98; William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, *in* INTERPRETING THE CONSTITUTION, *supra* note 7, at 23; Scalia, *supra* note 44, at 38–47; Wood, *supra* note 155.

177. For example, Justice Breyer's recent book does not mention it. *See* BREYER, *supra* note 147. For Brennan's approach, see Brennan, *supra* note 176.

178. This is explicit in Ackerman's recent Holmes lectures. *See* Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures: The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

179. *See id.* at 1754.

Developmental theories of constitutional change include Ackerman's well-known account of "transformative moments,"[180] the "partisan entrenchment" theory of Balkin and Levinson,[181] and my own institutional approach.[182] Briefly stated, their purpose is to describe, explain, and justify constitutional change outside the Article V amendment process. There is an evident similarity between this purpose and the emphasis of the living Constitution on the dynamic character of constitutional meaning.[183] However, theories of constitutional change aim to impose some coherent structure on the rather loose observations connected with the living Constitution.

Developmental theories are more *systematic* than the living Constitution in that they aim to explain change across the entire constitutional order, not simply changes associated with the judiciary. They are *historicist* in several respects: they pay attention to context, they do not necessarily assume that the story of American constitutionalism is one of moral progress, and they do not assume that all past changes inevitably led to our present constitutional order. Finally, they are *developmental* in attempting to relate different eras of interpretation by the Supreme Court to developments in the structure of American politics and society.

Bruce Ackerman's well-known works on American constitutional transformation have been exemplary in advancing the developmental approach.[184] Ackerman's most striking claim is that the Constitution has been marked by a series of unconventional changes outside the text, but having the same legal status as formal constitutional amendments.[185] While insuperable barriers of legal conventionalism perhaps stand in the way of acceptance of this proposition, Ackerman's consistent emphasis on patterns of unconventional change during his three key periods of the founding, Reconstruction, and the New Deal have proven remarkably suggestive for many scholars.[186] For example, Ackerman has called attention to how the interpretive labors of the Supreme Court followed rather than led changes initiated by the political branches.[187] And he has properly emphasized the importance of the New Deal in marking a key

180. *See* ACKERMAN, TRANSFORMATIONS, *supra* note 63.

181. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

182. *See* GRIFFIN, *supra* note 51; Griffin, *Constituent Power*, *supra* note 142; Griffin, *Transformed*, *supra* note 153; *see also* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998).

183. *See* Brennan, *supra* note 176, at 26–27.

184. *See* ACKERMAN, FOUNDATIONS, *supra* note 63; ACKERMAN, TRANSFORMATIONS, *supra* note 63.

185. *See* ACKERMAN, FOUNDATIONS, *supra* note 63, at 40–50, 315–16.

186. *See, e.g.*, Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1, 57–61 (2007); Ken I. Kersch, *Everything Is Enumerated: The Developmental Past and Future of an Interpretive Problem*, 8 U. PA. J. CONST. L. 957, 974–75 (2006); Robert L. Tsai, *Democracy's Handmaid*, 86 B.U. L. REV. 1, 6 (2006).

187. *See* ACKERMAN, TRANSFORMATIONS, *supra* note 63, at 359–77.

unconventional turning point, not just for constitutional doctrine, but for the structure of American constitutionalism as a whole.[188]

Developmental theories can have a number of starting points, but one that they share with the living Constitution is the difficulty of making formal constitutional changes through Article V. Although in accounts of the living Constitution this leads to the conclusion that the judiciary must adapt the "majestic generalities"[189] of the Constitution to changing circumstances, developmental theories draw a wider lesson. The difficulty of change through Article V has implications for all institutions of government and, indeed, for the entire constitutional order.

The difficulty of amendment resulted not only from the daunting supermajorities required by Article V,[190] but from the internal logic of constitutional stability. As Madison foresaw,[191] the founding generation had every reason to ensure government stability through promoting veneration of the Constitution. Proponents of constitutional change thus had little incentive to propose amendments unless the constitutional text stood directly in the way.[192] It was far easier to obtain significant, even far-reaching constitutional changes outside the amendment process. This logic was amply illustrated by the New Deal experience[193] in which President Roosevelt consciously rejected the amendment option as the way to make his constitutional changes legitimate.[194]

Developmental theories also begin with the commonly expressed point that the Constitution left much unsaid and unresolved even with respect to basic institutional arrangements.[195] Roughly speaking, the ratification of the Constitution created internal and external contexts for informal constitutional change.[196] The internal context involved the different institutions created by the Constitution and their mutual effort to work out various sorts of understandings and accommodations.[197] The external context was the rapidly evolving sphere of democratic politics and the realization by political actors that constitutional meaning could be determined through political argument and contestation. With respect to the former context, the Constitution created institutional uncertainties and gaps. Here are two examples: Did "advise and consent" mean that the President was supposed to go to the Senate and literally

188. *See id.* at 255–78; *see also* Griffin, *Transformed*, *supra* note 153.

189. Brennan, *supra* note 176, at 27 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (Jackson, J.)).

190. *See* U.S. CONST. art. V.

191. *See* THE FEDERALIST NO. 49, at 338 (James Madison) (Jacob E. Cooke ed., 1961). See also the discussion in Griffin, *supra* note 51, at 29–30, 39–41.

192. As it did in the matter of the Twelfth Amendment.

193. The changes made during the New Deal are reviewed in the next section. *See infra* text accompanying notes 228–30.

194. For an extensive discussion, see GRIFFIN, *supra* note 51, at 36–46.

195. *See, e.g.*, ELKINS & MCKITRICK, *supra* note 140, at 50.

196. *See* Griffin, *Constituent Power*, *supra* note 142, at 53–56.

197. *See* ELKINS & MCKITRICK, *supra* note 140, at 50–58.

ask for it? President Washington thought so (but the Senate disagreed).[198] Did the requirement of Senate approval for presidential appointments mean that approval was required for removals?[199]

The constitutional order was changed also by external events, circumstances that went beyond institutional accommodation or debates inside the government. A primary example in the early republic was the development of political parties.[200] The founding generation did not foresee the impact that developments abroad such as the French Revolution would have on American politics.[201] As the government tried to find its way, it reached a low point when Federalists enacted the Alien and Sedition Acts of 1798 which put severe restrictions on the freedoms of speech and the press.[202] In opposition, Madison and Jefferson authored the Virginia and Kentucky Resolutions respectively, which advocated strict construction of the Constitution and the theory that came to be known as states' rights.[203] Two embryo parties developed, Federalists and Republicans, and the election of 1800 seemed to many a revolution in that it introduced party politics into presidential elections and signaled a new order of things in the federal government.[204] Federalists were opposed to parties, indeed opposed to the very idea of opposition in government, but they lost the initiative and eventually their party disappeared.[205]

The advent of political parties had such far-reaching implications for American constitutional government that it is hard to believe the Constitution would have been written in the same way had the Founders known of them in advance.[206] Parties meant a role in government for ordinary people, not just leisured gentlemen,[207] and created the possibility of presidential government and the control of Congress by means of party influence. Parties changed the way the Constitution worked and was expected to work.

These are only a few examples of the reality that many significant constitutional changes have occurred outside the formal amendment process. Whittington has listed eighty-seven examples of such changes (he calls them "constitutional constructions") made outside of amendments and legal precedents, including the President's Cabinet, independent regulatory commissions, congressional subpoena and contempt

198. *See id.* at 55–58.
199. *See id.* at 50–55.
200. *See id.* at 24.
201. See the discussion in *id.* at 308–73, 388–488, 643–62.
202. *See id.* at 590–93.
203. *See id.* at 719–26.
204. For a recent involving account, see BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY (2005).
205. *See* WILENTZ, *supra* note 171, at 158–59, 175–78; *see also* RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM (1969).
206. *See* ELKINS & MCKITRICK, *supra* note 140, at 701–03.
207. *See* WILENTZ, *supra* note 171, at 4–5.

power, the military draft, the Louisiana Purchase, establishment of the Federal Reserve System, development of the welfare state, and entrance into the United Nations.[208] Whittington's list is by no means comprehensive, as it leaves out many of the developments that occurred during the New Deal.[209]

Developmental theories seek to understand constitutional change by focusing on constitutional institutions within a historicist framework. Focusing on institutions encourages us to pay attention to how structures influence political action and interpretive contexts. Adopting a historicist framework encourages us to confront the myriad ways in which constitutional institutions interact with the world outside doctrine and especially with politics. The task of understanding the constitutional order at any particular point in time thus becomes a matter of establishing the ways in which multiple structuring institutions, orders, and rules intersect to establish a pattern for political and legal action.[210]

A full presentation and defense of developmental theory is obviously beyond the scope of this article.[211] What is important for my purposes here is that developmental theories are the most plausible alternative to originalism in terms of the historicist perspective they offer on the process of constitutional change.

B. Taking Historicism on Board

Whether we call it the "living Constitution" or developmental theory, these approaches can seem latecomers to American constitutionalism. There is good historical reason for this air of modernity. As G. Edward White has shown, the founding generation (and many generations thereafter) operated in a prehistoricist framework.[212] Historical change was thought of "as the progressive unfolding of first principles rather than as a continuous, dynamic process."[213] The founding generation and their nineteenth-century successors lacked a sense of the differentness of the past. The past was not a foreign country, but a storehouse of relevant examples, to be sorted and categorized.

Although White says this sensibility is not a modern one,[214] there are elements of this lack of historical consciousness in contemporary originalism. Judges and scholars speak of the founding generation as if they were our contemporaries and continue the search for the first principles

208. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 12 (1999).

209. *See* Griffin, *Transformed*, *supra* note 153.

210. For relevant discussion, see KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT (2004).

211. I have devoted considerable space to such a defense. *See* GRIFFIN, *supra* note 51; Griffin, *Constituent Power*, *supra* note 142; Griffin, *Transformed*, *supra* note 153.

212. *See* White, *supra* note 150, at 498–500; *see also* WHITE, *supra* note 86.

213. WHITE, *supra* note 86, at 360.

214. *See id.* at 741.

that will return American constitutional law to its proper course.[215] This way of thinking is understandable in that it seeks a usable past, but it also involves an untenable escape from historical change.[216]

At the same time, some contemporary originalists, Justice Scalia prominent among them, have indicated their willingness to adopt a historicist perspective, at least in form. In his influential 1988 lecture, Scalia remarked that the daunting task of originalist interpretation seemed "better suited to the historian than the lawyer."[217] He endorsed the idea that originalist interpretation required considering a vast quantity of historical evidence and "immersing oneself" in the different context of the past.[218] In general, however, this historicist project is not one that originalists have been willing to take on.

The reason is not difficult to discover. The differentness of the past and the reality of historical change pose insurmountable obstacles to anyone who wants to appropriate evidence from the eighteenth century and then time-jump, in an unmediated fashion, to solve a constitutional problem in the present. Originalists want to interpret clauses of the Constitution in accordance with evidence of original meaning. But particular clauses make little sense without taking into consideration their purposes, especially with reference to fundamental constitutional ideas and values. Everyone familiar with American constitutionalism has heard of them: examples include republicanism, federalism, separation of powers, checks and balances, liberty, and natural rights. There are also broader eighteenth-century constitutional purposes to consider such as preserving the rights of private property,[219] and avoiding tyranny, corruption, and oppressive government.[220] And let's not forget the goals of limited government,[221] effective government,[222] and balanced government[223]—all to be achieved simultaneously! These structures knit the Constitution together—canonical sources of the thought of the founding generation are full of them.[224] Yet they were not based in well-worked out theories that fixed their meaning. They were more akin to useful organizing tools shaped by the ratification of the Constitution and the debates that followed in the 1790s.[225]

215. *See, e.g.*, HADLEY ARKES, BEYOND THE CONSTITUTION (1990); BARNETT, *supra* note 3; CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW (1994).

216. *See* GRIFFIN, *supra* note 51, at 152–57.

217. Scalia, *supra* note 23, at 857.

218. *Id.* at 856.

219. *See, e.g.*, JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 1 (1990).

220. *See, e.g.*, White, *supra* note 150, at 526.

221. *See, e.g.*, Lawson, *supra* note 3, at 336–37.

222. *See* BARBER & FLEMING, *supra* note 5, at 45–55.

223. On the idea of balanced government as a goal of the founding generation, see ELKINS & MCKITRICK, *supra* note 140, at 312–13.

224. *See, e.g.*, RAKOVE, *supra* note 140, at 6–7; WOOD, CREATION, *supra* note 156, at 606–15.

225. *See* Wood, *supra* note 155, at 38–39.

These fundamental constitutional ideas and values are structures that have a life and history of their own. Many of them played roles not only in important constitutional cases but in historical transitions such as Reconstruction, the Progressive Era, and the New Deal. Their changing meaning helps explain how the Constitution could evolve informally without constant recourse to formal amendment.

One characteristic of originalism, whether old or new, is a failure to take accurate measure of the differentness of the constitutional past and to fully acknowledge the incongruous nature of the quest to restore original meaning. Gauging the differentness of the past is not a matter of reading this or that clause, but appreciating that the founding generation had an essentially different outlook on key constitutional values. As White notes, the baseline for constitutional analysis in the early republic was "anti-statist, antidemocratic, and prehistoricist in its orientation."[226] There was no presumption of constitutionality because of a very restrictive view of the power of legislatures.[227] Limited government meant just that.

I have described elsewhere the informal constitutional changes made during the New Deal.[228] In brief, they included changes in the responsibilities of all three branches of government, thus affecting the separation of powers; alterations to the system of federalism and thus expectations of the division of responsibility among the national government and the states; and a transformation in the understanding of congressional power to regulate the economy and provide for the welfare of citizens. In sum, the New Deal was a significant departure from eighteenth-century conceptions of limited government. In addition, the New Deal changed the meaning of some basic concepts that were particularly associated with judicial enforcement of the Constitution, including a greatly expanded presumption of constitutionality for federal and state statutes[229] and abandonment of doctrines opposed to class legislation and redistribution of income and wealth.[230]

To further illustrate how changes in fundamental values affect the meaning of the Constitution, consider *Brown*.[231] In *Plessy v. Ferguson*,[232] the Supreme Court used concepts such as the distinction among civil, political, and social rights (itself protective of the values of federalism and noninterference with state practices) to immunize state segregation from

226. White, *supra* note 150, at 526.

227. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 54–55, 203–04 (1993).

228. *See* GRIFFIN, *supra* note 51, at 37, 81–86; Griffin, *Transformed*, *supra* note 153, at 2129–42; *see also* ACKERMAN, TRANSFORMATIONS, *supra* note 63, at 255–78. For a careful review of the changes during the New Deal, see Monaghan, *supra* note 22, at 729–39.

229. *See* United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

230. *See* Griffin, *Transformed*, *supra* note 153, at 2134–35; *see also* GILLMAN, *supra* note 227, at 125, 193, 200–02.

231. 347 U.S. 483 (1954).

232. 163 U.S. 537 (1896).

a constitutional challenge based on the Fourteenth Amendment.[233] As Michael Klarman has shown, the turn of the nineteenth century was a time in which the supremacy of the white race was taken for granted.[234] To the Court, state-imposed segregation was a reasonable means of ensuring that members of two different races would not be forced into a situation of social equality before they were ready.[235] That these laws were part of a system designed to keep blacks in their place was simply ignored.

The decision the Court made in *Brown* not to ignore this reality reflected a change in constitutional values on multiple levels. By the time of *Brown*, the justices believed in the concept of the "living Constitution."[236] The Court saw concrete harm being imposed by segregation,[237] not mere perception on the part of African Americans.[238] The Court stated explicitly that times had changed and that public education was now more important than in the nineteenth century.[239] The Court also put greater value on the contributions of African Americans as citizens.[240]

The response of new originalists to the reality of historical changes in constitutional meaning has been equivocal and disappointing. Of course, one possible response is simply to claim that all departures from original meaning, including the changes during the New Deal, are illegitimate deviations from the Constitution.[241] Setting aside that the constitutional order has been on a deviant path for seventy years,[242] it is startling to realize there is no coherent originalist narrative that explains historically what happened to constitutional meaning in the post-*Lochner*[243] era. Originalists have been largely silent[244] and have no persuasive explanation why concepts like the "living Constitution" became

233. *See id.* at 544–46.

234. *See* KLARMAN, *supra* note 102, at 10–23.

235. *Plessy*, 163 U.S. at 551–52.

236. *See* KLUGER, *supra* note 102, at 573.

237. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954).

238. See the infamous comment in *Plessy* that if state segregation appears to place a "badge of inferiority" on African Americans, that is "solely because the colored race chooses to put that construction upon it." 163 U.S. at 551.

239. *See Brown*, 347 U.S. at 492–93.

240. *See id.* at 490.

241. *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

242. Here I employ the conventional chronology that the break with the past occurred in 1937. For a more complicated understanding of the New Deal period, see BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).

243. *See* Lochner v. New York, 198 U.S. 45 (1905). By post-*Lochner* I mean the post-1905, Progressive Era and after.

244. Barnett has some thoughts on this, but they are muddled. *See* BARNETT, *supra* note 3, at 204–05, 211. I criticize his account in Griffin, *supra* note 30, at 302–05.

conventional wisdom or how New Deal-era changes in constitutional meaning became legitimate.[245]

One innovation of new originalists that can be understood as a response to historicism is Whittington's idea of "constitutional construction"[246] as a supplement to interpretation based on original meaning. According to Whittington, constitutional constructions "resolve textual indeterminacies"[247] within "the context of political debate, but to the degree that they are successful they constrain future political debate."[248] The basic idea of construction is that constitutional meaning can be determined legitimately in a nonjudicial or political framework. Whittington contends that construction allows for the introduction of "an element of creativity" into the interpretive process.[249] This helps determine textual meaning in situations "where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules."[250] Given the case histories that Whittington discusses, it is clear that he is thinking especially of separation of powers controversies such as impeachments where there has been little judicial guidance on constitutional meaning.[251]

Barnett employs constitutional construction in order to handle the problems that arise from "the vagueness of language and the limits of historical inquiry."[252] The purpose of construction is to arrive at a meaning "that is consistent with . . . original meaning but not deducible from it."[253] But constitutional construction cannot help Barnett deal with the challenges posed by informal constitutional change. In fact, Barnett is explicit on this point: The process of construction cannot "be used to change the original meaning of the Constitution without adhering to the formalities governing amendments that are needed to preserve its integrity as a written constitution."[254] Nor does Barnett come to grips with any of the chief historical instances of constitutional change discussed above (or developed by Whittington, for that matter).[255]

245. There is no illumination on this point, for example, in O'Neill's recent history of originalism. *See* O'NEILL, *supra* note 7, at 28–36. But I think O'Neill is typical among originalists in seeing developments in the Progressive Era and New Deal almost exclusively in intellectual terms rather than focusing on political events and social movements. For a more sophisticated account of the intellectual history of the shift to the living Constitution, see White, *supra* note 150, at 506–21 (stressing the move from a prehistoricist to a historicist understanding of constitutional change in the early twentieth century).

246. *See* WHITTINGTON, *supra* note 208, at 12.

247. *See id.* at 9.

248. *Id.* at 6.

249. *Id.* at 5.

250. *Id.*

251. Whittington's detailed case histories of constructions include the impeachments of Judge Chase and President Andrew Johnson, the nullification crisis of 1832–1833, and President Nixon's impoundments. *See id.* at 17–18.

252. BARNETT, *supra* note 3, at 121.

253. *Id.*

254. *Id.* at 126.

255. *See generally* WHITTINGTON, *supra* note 208.

In Whittington's hands, the idea of constitutional construction is somewhat underdeveloped and he does not actually show this is the best way to understand the process of informal constitutional change.[256] The difficulty comes with the idea that "construction" somehow solves or even addresses the problems originalism has with historicism. At the end of his book defending the new originalism, Whittington provides an argumentative *tour de force* in responding to no less than thirteen arguments against originalism.[257] I assume it will be no surprise that, in my view, he fails to adequately answer the objection (which he calls the "dead hand" problem)[258] that is closest to my concerns here.[259] However, in doing so, he provides a window on how originalists think about the "living Constitution" and the reality of informal constitutional change.

Part of Whittington's critique of the living Constitution rests on the assumption that it provides a ground for the legitimacy of judicial review or is a method of constitutional interpretation.[260] It may be that some scholars regard it this way, but this is not true of developmental theory, which is a perspective on the role of history in determining constitutional meaning. The legitimacy of the various methods of constitutional interpretation rests not on their ability to adapt the text to new circumstances, but rather on their grounding in accepted sources of law and their traditional function in establishing a legally enforceable Constitution.

Whittington's argument runs off the rails when he considers the reality that formal change through Article V is difficult. Surprisingly, he contends that any such claim is "unproven"[261] and that "there has been no serious effort to examine it."[262] He ignores that this is conventional wisdom for a number of good reasons.[263] The supermajority requirements of Article V cannot be dismissed lightly given their historic role in discouraging constitutional change.[264] Further, in relation to the historical changes experienced by the constitutional system, there have not been that many important amendments. The issue is not the "death" or lack of viability of Article V as Whittington seems to think,[265] but the his-

256. Jack Balkin asserts that Whittington has done so in Balkin, *Original Meaning*, *supra* note 3, at 9–10. However, Balkin does not demonstrate this. It may be that Balkin's method of "text and principle" can provide a legal justification for the changes made during the New Deal. In my view, it is doubtful that Balkin can square the New Deal in a historically sound way with the pre–New Deal framework of constitutional principles.

257. *See* WHITTINGTON, *supra* note 3, at 160–208.

258. *See id.* at 196–209.

259. I say "closest" because I do not rely on a number of the versions of the dead hand problem that Whittington refutes. For a version I do not find persuasive, see Klarman, *supra* note 5.

260. *See* WHITTINGTON, *supra* note 3, at 197–99.

261. *Id.* at 202.

262. *Id.*

263. Whittington does not consider a number of relevant discussions including GRIFFIN, *supra* note 51, at 28–46.

264. Here one might mention the decades it took to win approval of women's suffrage and the failure of the Equal Rights Amendment. Also, President Roosevelt's experience in the New Deal is relevant. *See* GRIFFIN, *supra* note 51, at 38.

265. *See* WHITTINGTON, *supra* note 3, at 201.

torical case that an enormous amount of constitutional change has occurred off-text.

Whittington then asks the flawed question that Wood anticipated in his discussion of the Straussians[266]—if formal change is too difficult, why should we remain faithful to the text?[267] Here Whittington exhibits a characteristic assumption of originalism—the choice must either be the text as adopted or nothing. The idea that there might be a historically legitimate tradition connecting us backward in time to the text is not considered. This move cuts us off from our own legal and political traditions.

Another notion driving Whittington's argument is that advocates of the "living Constitution" want to make it easier for the judiciary to adapt the text to changing conditions.[268] Although this has been a popular idea, it is not a necessary part of a historicist view of constitutional change. What is important to developmental theory is not any particular view of the judiciary, but understanding the process of informal change and the role of social and political values in enabling such change.

Nonetheless, to mediate the pressures of historical change, Whittington suggests that constitutional construction can lend a hand by reminding us that the judiciary is not in sole control of constitutional interpretation (or construction).[269] He provides a hopeful picture of the political branches engaged in principled debate and struggling together "with the duties and limits of their offices and the aspirations of the country."[270] Again, however, the problem is not supplementing judicial interpretation with political construction of the Constitution, but rather explaining how it was legitimate, as in the case of the New Deal, for one set of received understandings about fundamental constitutional institutions and values to be displaced by another.[271] Originalism, whether old or new, has no theoretical resources to cope with this sort of historical change.

Originalists use history but avoid taking historicism on board. They maintain that original meaning *cannot* be mediated by intervening history. This puts them in the position of using a normative argument to deny a descriptive-explanatory historical reality. By contrast, developmental theory argues that constitutional meaning has been mediated through intervening generations of amendments, institutional orders, commentary, and social change. If all of this sounds formidable, it simply amounts to the claim that all of American history is at least of *potential* relevance to the interpretation of any particular constitutional provision.

266. *See* Wood, *supra* note 155, at 39–40 (responding to originalist Walter Berns).
267. *See* WHITTINGTON, *supra* note 3, at 202.
268. *See id.* at 203.
269. *See id.* at 204–06.
270. *Id.* at 205.
271. Whittington does not discuss the New Deal, so it is hard to know how he would approach it from an originalist perspective.

Whether it is relevant or not is a matter for careful investigation, not assumptions about the primacy of original meaning.

C. Developmental Theory and Constitutional Interpretation

We know on the basis of experience what happens when judges and legal scholars fail to approach the past on its own terms in deciding constitutional cases—"law office history."[272] As I have discussed elsewhere,[273] the task of interpretation leads scholars to ask questions of history that history cannot answer and tends to assume that the Framers did resolve issues important to us that they tabled for later decision.[274] Legal scholars also tend to frame constitutional issues around two alternatives that track the parties to a contemporary case but ignore that history might show that neither is right.[275]

Given this, and the critique advanced in the preceding sections, it may appear that more than the new originalism is thrown into question. Even if we assume that the historical method of interpretation is nonexclusive, one method among others, has not its use in constitutional cases been called into question?

Here we should distinguish between the rationale supporting the multiple methods of interpretation and the historicist perspective offered by developmental theory. Relying on historical evidence of original meaning is a traditional method of interpretation. The search for such meaning may present problems, but each method of interpretation has equivalent challenges. It is reasonable to expect some slippage with all methods of constitutional interpretation, in part because they originate from nonconstitutional sources of law.

Although I would not abandon the historical method, the experience of the twentieth century suggests strongly that it is a mistake to invest too much in this approach. Despite the respect that is due historians, relying on secondary authority would have sent the Court astray. During the deliberation on *Brown*, for example, leaning on the judgment of leading historians might have led the Court to institutionalize the flawed work of the "Dunning school"[276] which promoted the view that

272. *See, e.g.*, Flaherty, *supra* note 153, at 554; Eric Foner, *The Supreme Court's Legal History*, 23 RUTGERS L.J. 243, 243 (1992); Alfred H. Kelly, Clio *and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122; Neil M. Richards, Clio *and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809, 811–16 (1997); William M. Wiecek, Clio *as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227, 230 (1988).

273. Griffin, *Transformed*, *supra* note 153, at 2148–56.

274. *See id.* at 2149.

275. *See id.* at 2149–50.

276. On the influence of the Dunning school on the Court at the time of *Brown*, see WIECEK, *supra* note 125, at 655–56.

the Fourteenth Amendment was the product of the terrible mistake of "Radical Reconstruction."[277]

On the other hand, the intriguing example of Justice Black shows that deriving case judgments solely and directly from original sources is a tricky business at best. Black's advocacy of the incorporation doctrine[278] took decades to win scholarly approval[279] and his (and the Court's) foray into the history of religious freedom was widely condemned.[280] Given the continuing critiques of law-office history,[281] there is no evidence that the Court's ability to read the historical record has improved.

What developmental theory offers to constitutional interpretation is a more realistic approach to the changing historical meaning of the Constitution.[282] Developing this sort of theory in detail is beyond the scope of this article. However, I will briefly consider presidential impeachment as an example.

If we approach presidential impeachment by using the methods of interpretation without a historicist or developmental perspective, we would treat the issues surrounding the impeachments of Presidents Andrew Johnson, Richard Nixon, and Bill Clinton as if they were presented in a law court. In general, this is how legal scholars analyzed the Clinton impeachment.[283] They evaluated it through methods such as textualism and originalism, consulting primarily the Constitution's eighteenth-century background.[284] While I have great respect for the scholars of different persuasions who analyzed the Clinton impeachment, I think in many ways it was a missed opportunity that illustrates the limitations of a purely interpretive analysis. Using a developmental approach enables a much richer understanding of the context of presidential impeachment, the issues at stake, and the implications for future constitutional and political action.

First, in understanding any particular impeachment, we should consider institutional relationships in time—with respect to Johnson's im-

277. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at xix–xxvii (1988).

278. *See* Adamson v. California, 332 U.S. 46, 69–92 (1947) (Black, J., dissenting).

279. *See* WIECEK, *supra* note 125, at 519–21. Perhaps most scholars today would see the weight of history on Black's side. But for a nuanced (and not to be overlooked) recent summary of the evidence and analysis, see DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 27–36 (2003).

280. I refer to the controversy over *Everson v. Board of Education*, 330 U.S. 1 (1947). *See* WIECEK, *supra* note 125, at 253–73.

281. *See* sources cited *supra* note 272.

282. I have called this context "the lens of constitutional change." *See* Griffin, *Constituent Power*, *supra* note 142, at 62–65.

283. I do not claim that historians or political scientists were prone to analyze the Clinton impeachment in this way.

284. *See, e.g.*, *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998). *But see id.* at 45–57, 81–89 (testimony of Michael Gerhardt and testimony of Cass Sunstein) (referring to historical examples of past presidential impeachments). Gerhardt and Sunstein thus used a developmental analysis.

peachment, for example, how Congress and the presidency had been affected by the experience of the Civil War. Second, the influence of party, electoral results, and conflicts over policy preceding the impeachment must be layered over institutional structures. Third, we should examine how institutional and political realities, such as the need to achieve consensus by focusing on indictable crimes, constrain otherwise valid legal interpretations of the Constitution (that the constitutional standard of "high crimes and misdemeanors"[285] does not refer solely to crimes, but a larger class of political offenses). Fourth, we should consider how the impeachment might shape future understandings of the proper role of the executive and legislative branches.[286]

These multiple dimensions of analysis highlight aspects of the Clinton impeachment missed by purely interpretive approaches. Legal scholars could have achieved greater insights and relevance to the public debate had they used a comparative developmental approach. That approach would have employed the Johnson and Nixon impeachments to shed light on the situation that developed after Republicans won control of Congress in 1994.[287] The parallels were striking: Congress controlled by the opposition, a political context of bitter partisanship and intense policy disagreements, presidents challenged by their own unusual personalities and errors of judgment, and an impeachment process driven ultimately by questions of criminality rather than constitutional abuse of power and suitability for high office.

Using a developmental approach to constitutional interpretation means we "think in time," taking contemporary constitutional problems and looking for parallels throughout our constitutional history. In theory, judges and scholars know how to do this. In practice, "historical" argument too often means reliance on eighteenth-century evidence to the exclusion of other important periods of constitutional change. Ultimately, that leaves us less able to understand and cope with the constitutional system we actually have.

V. CONCLUSION

While I could develop additional examples, that would take this article into different territory. The point is not only that there are alternatives to exclusive originalism, but there are more interesting and sophisticated alternatives to the idea of a living Constitution.

Why have these alternatives been overlooked? In part, it was convenient for scholars to organize the theoretical debate around the dualism of originalism and nonoriginalism. Influential judges like Justice

285. U.S. CONST. art. II, § 4.

286. This is suggested by the account in WHITTINGTON, *supra* note 208, at 113–57.

287. See the prescient discussion in STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH 442–46 (1993).

Scalia helped promote the idea of a two-sided debate.[288] As I have shown, originalists kept the dual debate alive long after the scholars they regarded as "nonoriginalist" lost interest.

In addition, pluralistic theories of constitutional interpretation have been misunderstood. Scholars have tended to see these theories as useful typologies rather than as a meaningful alternative to the standard categories of the theoretical debate. The idea that each method of interpretation has a separate ground of legitimacy in our constitutional tradition has also not been appreciated.

Finally, scholars have not been sufficiently aware that there has been a genuinely new development in constitutional theory—theories of constitutional change. These theories are often treated as failed contributions to the enterprise of constitutional interpretation, when in reality they have a much wider scope. As I have argued, they bring a new and valuable historicist perspective to the study of American constitutionalism.

It is worth bearing in mind that it is difficult to develop sound normative theories, such as theories of interpretation, without an accurate understanding of our constitutional institutions and practices as they have developed over time and as they exist today. We can do better for ourselves and our theories by giving originalism the boot.

288. *See* Scalia, *supra* note 23.