ARE ORIGINALIST CONSTITUTIONAL THEORIES PRINCIPLED, OR ARE THEY RATIONALIZATIONS FOR CONSERVATISM?

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My topic is whether originalism, and in particular the form of originalism that might be thought to constitute Originalism 2.0, is "a rationalization for conservatism, or a principled theory of interpretation."[1] This question includes at least three parts: First, what is originalism? Second, are particular varieties of originalism capable of being, or likely to be, applied in a principled way? Third, are most or all varieties of originalism "rationalization[s] for conservatism"?

My answer to the first of these questions frames my answers to the second and third. Although it is customary to speak of originalism as a single constitutional theory, even a cursory review of recent scholarship reveals that the range of originalist theories has grown startlingly broad and diverse and is becoming more so all the time.[2] So great are the differences among originalist theories that I question the premise that we can talk meaningfully about Originalism 2.0 and whether it is a principled theory or a rationalization for conservatism. It would be more accurate to say that there are multitudinous rivals for the

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1. This topic derived from the title of a panel at the Twenty-Ninth Annual National Federalist Society Student Symposium, held at the University of Pennsylvania Law School.

2. *See, e.g.*, Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 5–6 (2009) (distinguishing between "hard" and "soft" originalism); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244–45 (2009) (arguing that originalists' work consists of a "smorgasbord of distinct constitutional theories" that are "rapidly evolving"); Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 926–39 (2009) (tracing the development of originalism from the early 1970s through 2009).

title of Originalism 2.0 and that whether these competitors are principled can only be answered on a theory-by-theory basis.

When assessment proceeds accordingly, a striking feature of many originalists' theories is their vagueness or indeterminacy. The vagueness of many originalist theories bears vitally on the second question, involving whether originalist theories are likely to be applied in a principled way. As a generalization, versions of originalism that are not well specified allow more opportunities for ideologically motivated manipulation to achieve conservative results than would more fully specified versions. By itself, this conclusion is hardly surprising. What may be less obvious is that originalist theories that are rigorously defined in advance, thus to avoid case-by-case inconsistencies in application, may be more prone to generate disturbing or even calamitous results than are originalist theories that leave more room for discretionary judgment. Originalists may therefore have good reason not to want to bind themselves too rigidly to a methodological mast.

With regard to the third question, however, the more methodological discretion that originalist theories authorize, and the more that practitioners of those theories exercise their discretionary judgment to justify substantively conservative conclusions, the better the charge that originalist theories are "rationalization[s] for conservatism" appears to fit. Suspicions of rationalization are also in order insofar as originalists maintain that the case for adopting an originalist theory is entirely independent of the theory's conservative valence.[3]

I. WHAT IS ORIGINALISM?

For a long time, self-identified originalists and non-originalists alike have tended to speak as if originalism were a single theory.[4] Recent scholarship has revealed the fallacy of this assump-

3. *See, e.g.*, Edwin Meese III, *A Return to Constitutional Interpretation From Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925, 925–27 (1996).

4. *See, e.g.*, Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1086 (1989) (explaining that although originalists have "various shades of belief" regarding how to define intent, as a whole they are "committed to the view that original intent is not only relevant but authoritative").

tion.[5] There are multiple strands of originalism, with additional versions proliferating as rapidly as law reviews can publish them. The various originalist theories differ from each other along at least four dimensions, involving: (1) the historical object or phenomenon that originalist judges or scholars should seek to identify—the Framers' intent, the original understanding of a specified group of lawmakers, or the original public meaning of constitutional language;[6] (2) the conclusiveness of originally expected applications of constitutional language in fixing the Framers' intent, the original understanding, or the original public meaning;[7] (3) the degree of determinacy with which historical sources can be expected to fix historical meaning and the role of judges in cases of relative indeterminacy;[8] and (4) the circumstances, if any, under which non-historical considerations such as stare decisis, prudence, and apprehensions of normative desirability can justify constitutional decisions other than those that a purely historical criterion of constitutional meaning would mandate.[9]

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5. *See, e.g.*, Colby & Smith, *supra* note 2; Solum, *supra* note 2, at 926–27, 934–35. My argument in this Part is especially indebted to the article by Professors Colby and Smith.

6. *See* Colby & Smith, *supra* note 2, at 245–46.

7. *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295–96 (2007); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1284 (1997).

8. *Compare* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 60–61, 88–89 (1999) (arguing that "interpretation is the effort to discover [the] intended meaning" of a text, but acknowledging that meaning will sometimes be indeterminate) *with* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 236–44 (1988) (arguing that "it is almost always possible to examine the constitutional text and other evidence of intent associated with it and make a reasonable, good faith judgment about which result is more likely consistent with that intent").

9. *See, e.g.*, Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 269–70 (2005) ("Some original public meaning originalists would have courts ignore the original meaning of the text when it is insufficiently rule-like."); Thomas W. Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 272–74 (2005); David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 299 (2005) (explaining that, in its purest form, originalism does not allow interpreters to make their own moral judgments, but that some versions of originalism vary in their adherence to this tenet).

A. The Historical Phenomenon To Be Identified

Proponents of originalism agree that historical facts at the time of a constitutional provision's adoption normally determine its meaning.[10] They disagree, however, about what the precise object of originalist historical inquiry ought to be.[11]

The founders of the modern originalist movement characteristically maintained that constitutional interpretation should reflect *the intent of the Framers*.[12] Although most "original intent" theories would fit better under the heading of Originalism 1.0 than Originalism 2.0,[13] at least a few originalists still affirm the centrality of some notion of original intent.[14]

Other originalists have argued that originalist inquiry should focus on *the original understanding*, or the originally understood meaning, of constitutional language, especially among the members of the state ratifying conventions that actually adopted the Constitution as law.[15] What matters for originalists who take this position is not what the Framers intended, but what a broader, more public audience understood their words to mean.[16]

A third group of originalists—probably including many who would embrace the notion that Originalism 2.0 has succeeded Originalism 1.0—maintains that constitutional interpreters should not seek to identify how constitutional language was understood by the members of a group of Framers or ratifiers, who may have disagreed among themselves or had no pertinent understanding regarding some points, but should look instead at the *original public meaning* of constitutional language.[17] Leading theorists equate the original public meaning

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10. *See, e.g.*, Colby & Smith, *supra* note 2, at 250–53.

11. *See id.* at 249–52.

12. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 403 (2d ed., Liberty Fund 1997) (1977); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986).

13. *See* Solum, *supra* note 2, at 927–28, 933–34.

14. *See, e.g.*, Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 718–26 (2009).

15. *See* Colby & Smith, *supra* note 2, at 250.

16. *Id.* at 250–51.

17. *See, e.g.*, WHITTINGTON, *supra* note 8, at 35; Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1132–33 (2003). Before his nomination to the Supreme Court, Justice

with the understanding of a hypothetical reasonable observer, skilled in contemporary grammar and syntax and fully informed about all pertinent history.[18] According to Professors McGinnis and Rappaport, for example, "the focus of originalism should be on how a reasonable person at the time of the Constitution's adoption would have [understood] its words and thought they should be interpreted" even in the case of provisions that "may have seemed ambiguous."[19] Professor Lawson further specifies that objective-public-meaning originalism requires "a hypothetical inquiry that asks how a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world, would understand a particular provision."[20]

B. The Conclusiveness of Originally Expected Applications in Fixing Meaning

Besides disagreeing about whether the Framers' intent, the original understanding of a limited group, or the original public meaning should be the object of originalist inquiry, originalists further diverge about the pertinence of originally expected applications of constitutional language in resolving their historical questions.[21] *Brown v. Board of Education*[22] illustrates the potential distinction between anticipated applications of constitutional language and the Framers' intent, the original understanding, or the original public meaning. Partly as a result, *Brown* constitutes a flash point for disagreement among originalists.[23]

Scalia played a leading role in arguing that originalists should reorient their inquiries in this way. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997); Solum, *supra* note 2, at 933.

18. *See* Kesavan & Paulsen, *supra* note 17, at 1132.

19. John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 374 (2007).

20. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002).

21. *See* Solum, *supra* note 2, at 934–35.

22. 347 U.S. 483 (1954).

23. *See* Colby & Smith, *supra* note 2, at 283–86 (summarizing the "divergent theories" originalists have applied to reach disparate explanations for the decision in *Brown*).

Nearly all constitutional historians agree that the Framers and ratifiers of the Fourteenth Amendment did not intend it to ban race-based school segregation, nor anticipate that the Amendment's provisions would have that effect.[24] Nor did most reasonable and informed members of the public at the time of the Fourteenth Amendment's ratification expect that the Equal Protection Clause would or should be applied to prohibit one-race public schools.[25] Some originalist theories would treat these historical facts as conclusively determining that the Fourteenth Amendment does not prohibit the states from maintaining racially discriminatory public schools.[26]

According to other originalist theories, however, originally intended applications or original understandings of a constitutional provision's applications are evidence, but not necessarily decisive evidence, of the original intent, original understanding, or original public meaning.[27] For originalists who focus on the Framers' intent, some would say that intent can be stated at varying levels of generality.[28] Although the Framers did not specifically intend to ban race-based discrimination in public education, perhaps they did intend to confer the kinds of protections against state discrimination that are necessary to grant equal protection in an objective sense. If the prohibition of school segregation is objectively necessary to give racial minorities the equal protection of the laws, then some originalists would say the result in *Brown v. Board of Education* is consistent with the intent of the Fourteenth Amendment's Framers.[29]

Some originalists who emphasize the original understanding or the original public meaning of constitutional language authorize a similar, though not identical, distinction between his-

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24. *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252 & n.180 (1991).

25. *See* BERGER, *supra* note 12, at 242.

26. *See id.* at 117–33, 245; Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENT. 223, 231 (1996).

27. *See, e.g.*, McConnell, *supra* note 7.

28. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 216–17 (1980); J.M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 950–51 (1988) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)).

29. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 82–83 (1990).

torical understandings concerning how language would be applied and the language's "semantic" intention.[30] "The linguistic meaning of a text is one thing, and expectations about the application of that meaning . . . are a different thing," Professor Solum explains.[31] When this distinction is drawn, it becomes possible to maintain that even if most people in 1868 erroneously believed that race discrimination in public education was consistent with equal protection, widespread error about the appropriate application of the Equal Protection Clause does not determine the Clause's original meaning.[32] Professor Steven Calabresi and Sarah Agudo thus write:

> The [F]ramers and ratifiers of the Fourteenth Amendment may well not have understood that the Amendment outlawed segregation in education, but arguably that is precisely what it did. Obviously, it is the formal text of the Fourteenth Amendment that governs, and not the uncodified and erroneous ideas of the ratifiers of that text as to what it might mean.[33]

Whether—and, if so, when—originally intended or expected applications of constitutional language conclusively establish its original meaning is obviously a crucially important question with implications for how myriad constitutional questions ought to be resolved.

C. The Degree of Determinacy with Which Historical Sources Can Be Assumed To Fix Constitutional Meaning

Some originalist theories incorporate a methodological assumption that historical evidence could, in principle, generate an account of original intent, understanding, or public mean-

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30. *See* Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 144 (Amy Gutman ed., 1997) (purporting to accept an analogous distinction); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 591–96 (1998) (providing an especially sophisticated exposition of the distinction).

31. Solum, *supra* note 2, at 935.

32. *Cf.* McGinnis & Rappaport, *supra* note 19, at 371 (asserting that "original expected applications" are "strong evidence" of original meaning but that "the Constitution's original meaning [is] not exhausted by" expected applications).

33. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 110 (2008).

ing adequate to yield determinate answers to all constitutional questions.[34] Without denying that constitutional language might originally have been vague or ambiguous, they believe there is a correct way, discernible through historical inquiry, to resolve pertinent ambiguities or give requisite specificity to vague provisions.

By contrast, other originalists admit that historical inquiries sometimes do not, and even in principle could not, furnish a specification of the original intent, understanding, or public meaning that would settle all disputes.[35] Sometimes, in their view, the relevant intent, understanding, or meaning may be too vague to determine constitutional outcomes.[36] According to Professor Randy Barnett, the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment have meanings so "abstract" that that they require judges to exercise "some discretion" in applying them to "changing circumstances."[37]

Originalist theories that accept the possibility of historical underdeterminacy sometimes distinguish between constitutional interpretation, which may yield only general conclusions, and the constitutional "construction" that courts engage in when they create doctrinal tests to implement otherwise vague or indeterminate constitutional provisions.[38] Versions of originalism that embrace this distinction necessarily contemplate a lawmaking role for courts in otherwise indeterminate cases that some other versions of originalism purport to eschew.[39] In so doing, theories that defend constitutional construction almost necessarily claim less determinacy than originalist theories that reject the distinction between interpretation and construction. It

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34. Professors McGinnis and Rappaport seem to come close to this position in arguing that originalists "should follow the principles of interpretation that a reasonable person at the time of the framing and ratification thought would be applied." McGinnis & Rappaport, *supra* note 19, at 372.

35. *See* Solum, *supra* note 2, at 933 (discussing originalist theories that "acknowledge[] . . . *the fact of constitutional underdeterminacy*").

36. *Id.*

37. Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 23 (2006).

38. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 118–21 (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 7 (1999); Barnett, *supra* note 9, at 264.

39. Barnett, *supra* note 9, at 264.

is, of course, a separate question whether theories that claim more determinacy actually achieve it.

D. The Conditions, if Any, Under Which the Best Evidence of Original Meaning Should Yield to Other Factors

Some originalist theories maintain that when the original meaning of a constitutional provision can be specified in a clear enough way to resolve a constitutional question, the original meaning necessarily governs.[40] By contrast, other originalists contemplate that considerations such as prudence and precedent can override the best evidence of the original intent, understanding, or public meaning in at least some cases.[41] As I read the literature, first-generation originalists tended to be more willing to accept the authority of non-originalist precedents than are the originalists purporting to champion Originalism 2.0.[42] In an especially striking manifestation of this tendency, Professor Barnett concludes that Justice Scalia—who allows for departures from the original understanding on the basis of precedent, justiciability, and settled historical practice—is not really an originalist at all.[43] Nevertheless, some who view their theories as the leading prototypes for Originalism 2.0 continue to assert that non-originalist precedents at least sometimes mandate or authorize otherwise non-originalist outcomes to constitutional questions.[44] It could almost go without saying that the proper resolution of many important constitutional issues could hinge on the conditions, if any, under which various versions of originalism would authorize courts to devi-

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40. *See id.* at 269; Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 26–27 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005).

41. *See, e.g.*, BORK, *supra* note 29, at 158–59 (noting circumstances under which it would be prudent to forgo the original meaning in favor of societal stability); Scalia, *supra* note 30, at 138–40 (writing that stare decisis is a "pragmatic *exception*" to his originalist theory); Solum, *supra* note 2, at 938 (arguing that some originalists believe that precedent can trump original intent "for a variety of reasons").

42. *See, e.g.*, BORK, *supra* note 29, at 158–59 (discussing Justice Scalia's unfaithfulness to the original meaning of the Constitution), Scalia, *supra* note 30, at 138–40.

43. Barnett, *supra* note 37, at 13.

44. *See* Solum, *supra* note 2, at 938–39.

ate from the original constitutional meaning based on considerations of precedent and prudence.

E. The Varieties of Originalism and Their Significance

The variety of actual and possible originalist theories reveals the error in speaking about Originalism 1.0, and especially about Originalism 2.0, as if either denominated a single theory to be compared with a diffuse multitude of non-originalist competitors.[45] In the remainder of this Essay, I shall therefore refer not to two dichotomous and competing brands of originalism—called Originalism 1.0 and 2.0—but to various versions or strands[46] defined and distinguished by the positions they take on such questions as: (1) the historical reference point that originalist inquiries should seek to identify; (2) the relative conclusiveness of historically expected applications of constitutional language in fixing its historical meaning; (3) the expected degree of determinacy of historical evidence of original meaning; and (4) the circumstances, if any, under which evidence of original meaning should yield to precedent, settled expectations, or other prudential considerations in contemporary constitutional adjudication.

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45. *See* Colby & Smith, *supra* note 2, at 244 (arguing that originalist theories are not unified and coherent and, in fact, share little in common). It is true, of course, that all originalists emphasize the role played by past historical actors not only in writing and ratifying constitutional provisions, but also in fixing their meaning. Yet few non-originalists would deny the general proposition that original intentions or understandings should, and, in fact, do, matter in constitutional interpretation. *See, e.g.*, RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 45–47 (2001) (discussing the typical reliance of constitutional scholars upon the original and historical understanding of the Constitution); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189–90 (1987) (arguing that only a few constitutional law scholars do not find the intent of the original authors to be important); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990) ("Even opponents of originalism generally agree that the historical understanding is relevant, even if not dispositive."); Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1192 (writing that some scholars deny that any theory of constitutional interpretation can ignore the original intent).

46. Others have reached similar conclusions about appropriate usage. *See, e.g.*, Robert Bennett, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 355, 355 (1988) (distinguishing between "textualism" and "intentionalism" as species of originalism); Michael Moore, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 364, 364–66 (1988) (discussing the divisions between intentionalists and textualists).

II. ARE ORIGINALIST THEORIES CAPABLE OF BEING, OR LIKELY TO BE, APPLIED IN PRINCIPLED WAYS?

Having established that there are multitudes of actual and possible originalist theories, I come now to the question of whether some or all are "principled theories of constitutional interpretation."[47] The meaning of this question is not wholly obvious, but I shall take it to be whether originalist theories are realistically *capable* of principled application. I shall further posit that originalist theories are realistically capable of principled application insofar as they provide methodological specifications for the decision of constitutional issues that are (1) determinate enough to yield demonstrably correct answers and (2) sufficiently specified in advance to stop interpreters from consciously or subconsciously revising their methodological commitments to justify ideologically congenial conclusions on a case-by-case basis.[48]

When the notion of a principled constitutional theory, or one capable of principled application, is defined in this way, the exemplar or ideal of a principled theory would be one that is fully worked out or specified along all four of the dimensions identified in Part I. I am sure that no originalist has a theory that is fully specified in this way. Indeed, it would be unreasonable to demand a completely specified theory from anyone, originalist or non-originalist. My aim in developing the idea of a fully specified theory is thus not to criticize, but rather to make the point—which I think important—that the question of various originalist theories' capacity for principled application is one of degree. Almost self-evidently, more fully specified originalist theories are likely to be capable of relatively more principled application than less fully specified theories.

Having insisted that the capacity for principled application is a question of degree, and that more specified originalist theories are likely to be more principled than less specified theories, I would offer five brief further comments.

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47. *See supra* note 1 and accompanying text.

48. These criteria reflect assumptions common in discussions of constitutional theory and the definition of "principled" as "exhibiting, based on, or characterized by [a] comprehensive . . . doctrine." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 935 (1983).

First, people who identify themselves as originalists vary greatly in the extent to which they have worked out or specified their theories' details.[49] It seems likely, moreover, that many originalists' working theories—as manifest by the judgments they reach about particular cases and the arguments they adduce to support their judgments—are poorly specified.[50]

Second, when originalists have not fully articulated their positions about what originalism requires along the dimensions identified in Part I, they often appear to wobble from one version to another, typically in ways that promote substantively conservative results. Some of the opinions of Justices Scalia and Thomas provide examples of this phenomenon.[51] I bring up their cases with ambivalence, because many second-generation originalists would apparently relegate those Justices to the generation that created Originalism 1.0.[52] Nevertheless, Justices Scalia and Thomas illustrate the possibility of ideologically influenced decisionmaking by originalists whose theories are not well specified.

Because a well-developed literature supports the conclusion that Justices Scalia and Thomas are not consistent in the versions of originalism that they employ[53]—presumably because their theories are not sufficiently specified to constrain them from varying—I shall limit myself to a single example. Both Justices appear to avow that the proper object of originalist historical inquiry is either the original understanding or the original public meaning of constitutional language—a significant

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49. *See* Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1086 (2004) (reviewing RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004)) (stating that Randy Barnett's theory is "far more penetrating and less superficial than what has been provided by any other originalist writer to date").

50. A comparable charge could undoubtedly be levied against most non-originalists.

51. *See, e.g.*, Colby & Smith, *supra* note 2, at 292–304 (arguing that Justices Scalia and Thomas change originalist theories from case to case to obtain the results they desire); Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas?*, 4 N.Y.U. J.L. & LIB. 494, 496–502 (2009) (concluding that Justice Thomas has not chosen among possibly pertinent types of original meaning).

52. *See* Kesavan & Paulsen, *supra* note 17, at 1140.

53. *See, e.g.*, Colby & Smith, *supra* note 2; Maggs, *supra* note 51.

point of ambiguity by itself.[54] Yet both appear to have taken inconsistent positions about the pertinence of originally expected applications in fixing the meaning of constitutional language.[55] In *United States v. Virginia*,[56] for example, Justice Scalia appeared to maintain that the Equal Protection Clause did not and could not bar gender-based exclusions from the Virginia Military Institute because the Equal Protection Clause was not originally understood as applicable to gender-based exclusions from public colleges and universities.[57] By contrast, in cases involving race-based admissions preferences at public universities,[58] Justices Scalia and Thomas have felt no need to grapple with evidence suggesting that the Framers and ratifiers of the Equal Protection Clause did not expect it to be applied to bar race-based programs for the benefit of racial minorities.[59] In these cases, the Justices apparently concluded that the semantic meaning of constitutional language governed and that originally anticipated applications were not determinative.

Third, the likelihood of case-by-case revision of methodological premises seems especially great in the case of originalists

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54. *See* Colby & Smith, *supra* note 2, at 300–03 (documenting Justice Thomas's vacillation on this point).

55. For a fuller development of the argument that Justices Scalia and Thomas have not adhered consistently to a set of well-specified and constraining originalist principles, see *id.* at 293–305 (highlighting specific instances of Justice Scalia's and Justice Thomas's inconsistent use of originalist theories).

56. 518 U.S. 515 (1996).

57. *Id.* at 568–69 (Scalia, J., dissenting) ("[I]t is my view that 'when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.' The same applies, *mutatis mutandis*, to a practice asserted to be in violation of the post-Civil War Fourteenth Amendment.") (internal citations omitted); *id.* at 570 ("Today . . . change is forced upon Virginia, and reversion to single-sex education is prohibited nationwide, not by democratic processes but by order of this Court . . . . This is not the interpretation of a Constitution, but the creation of one.").

58. *See* Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

59. *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 429–32 (1997) (noting that the "selfsame Congress that had just framed the Fourteenth Amendment" also passed poor-relief statutes that were expressly race based). *See generally* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754–83 (1985) (amassing evidence that the Framers' and ratifiers' understanding of the Equal Protection Clause did not view it as barring references for disadvantaged racial minorities).

who sometimes allow precedent to prevail over original constitutional meaning but lack a well-developed, articulated theory of when and why non-originalist precedent should control. The voting patterns of Justices Scalia and Thomas again furnish examples. They have apparently relied on precedent to reach conclusions that would seem impossible to justify by reference to originally understood meanings (regardless of the measure that one uses) when subjecting race-based decisionmaking by the federal government to strict judicial scrutiny (without adducing any evidence that the Due Process Clause of the Fifth Amendment was originally understood to bar racial preferences),[60] when enforcing prohibitions against "regulatory takings" (despite appearing to concede that the Taking Clause was not so understood as an original matter),[61] and when finding a violation of the Equal Protection Clause in *Bush v. Gore*.[62] In other cases, however, both have voted to overrule longstanding precedents on the sole ground that they deviate from the original understanding.[63]

Fourth, the development of a rigorously specified theory poses daunting challenges even for originalists who avow that the original meaning should always determine constitutional outcomes. Although this point applies to originalists of all stripes along all of the remaining dimensions that Part I identified, I shall offer just two examples. One involves the relative conclusiveness of originally expected applications in fixing constitutional meaning—an issue that I illustrated above by reference to *Brown v. Board of Education*. If a theory does not treat originally expected applications as always determinative, full specification of expected applications' relevance will be extraordinarily difficult to achieve. My second example comes from second-generation originalist theories that emphasize the significance of the original public meaning of constitutional

60. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment); *id.* at 240–41 (Thomas, J., concurring in part and concurring in the judgment).

61. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028 n.15 (1992).

62. 531 U.S. 98 (2000).

63. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45–54 (2004) (Thomas, J., concurring); Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200–01 (1995) (Scalia, J., concurring).

language as grasped by a hypothetical objective observer.[64] Any observer's interpretation of vague or ambiguous language will almost inevitably reflect a value-laden judgment about which interpretation would best advance the purposes most sensibly ascribed to a constitutional provision in its structural and historical context.[65] From the very beginning, our constitutional history has confirmed this observation. As Professor John Harrison has noted, in early congressional debates about the Constitution, "every interpreter's methodology, whatever it was, *had* to be 'originalist,' because the origin had been so recent"; yet, even in the Founding generation, "interpreters' positions on constitutional questions overwhelmingly lined up with what they thought were good ideas."[66] In short, reasonable people reasonably disagreed in light of their reasonable but divergent political outlooks. It is no small challenge to specify the rules by which to determine what a hypothetical reasonable observer would have concluded with regard to questions that were not clearly foreseen and that understandably provoke, or would historically have provoked, ideologically inflected disagreement. In addressing that challenge, a fully specified originalist theory might actually need to identify the political values or concerns to be attributed to the hypothetical reasonable observers whose views define the original public meaning.

My fifth and final observation speaks to second- or third-generation originalists who think that the challenge for would-be designers of Originalism 2.0 is to fix the indeterminacy problem of Originalism 1.0. The more principled an originalist theory is (in the sense of being sufficiently methodologically determinate to prescribe uniquely correct decisions in individual cases without heed to their normative attractiveness), the more it may threaten to produce disastrous outcomes in modern cases. Among originalists, Justice Scalia has increasingly

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64 *See, e.g.*, John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL'Y 83, 89–94 (2003) (describing second-generation originalists' textual interpretations).

65. *See* RONALD DWORKIN, LAW'S EMPIRE 254–58 (1986).

66. John Harrison, *On the Hypotheses That Lie at the Foundations of Originalism*, 31 HARV. J.L. & PUB. POL'Y 473, 474 (2008). Professor Harrison draws this conclusion based upon his reading of DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 116–22 (1997).

drawn criticism for not being sufficiently principled.[67] Perhaps in self-defense, he has reportedly attempted to distinguish his originalism from that of Justice Thomas by saying, "I am an originalist, but I am not a nut."[68] In abstract discussions of whether "principled" decisionmaking is desirable, the word "principled" has a distinctly favorable connotation. But that connotation should be defeasible. In my view, an originalist theory that, for example, left the contemporary constitutionality of paper money and Social Security hostage to the outcome of historical tests that they might not pass[69]—despite the devastating consequences that their invalidation would entail—might rate high on the scale of being principled, but it also would be morally, politically, and legally irresponsible. Those who want to design Originalism 2.0 should be careful what they aspire to.

III. ARE ORIGINALIST THEORIES RATIONALIZATIONS OF CONSERVATIVE POLITICAL VIEWS?

A. The Salience and Meaning of the Question

The salience of the question whether originalist theories are "rationalization[s] for conservatism"—regardless of whether they are more or less fully specified and thus more or less capable of principled application—derives from a series of well known correlations between originalist constitutional theories, on the one hand, and substantively conservative or libertarian political beliefs, on the other hand.[70] The originalist movement

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67. *See, e.g.*, Barnett, *supra* note 37, at 22–24 (critiquing Justice Scalia's "infidelity" to originalist principles).

68. JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 103 (2007).

69. *See, e.g.*, Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 389 (1981) ("In short, although it may have been inconvenient to the proponents and constitutional defenders of legal tender paper money, it is difficult to escape the conclusion that the Framers intended to prohibit its use."); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 733–34 (1988) (discussing inconsistency between modern social welfare programs and the original understanding of federal powers under the Constitution); *id.* at 744 ("[I]t seems clear that under the 1789 Constitution only metal could constitute legal tender.").

70. *See, e.g.*, TOOBIN, *supra* note 68, at 14–15 (implying that conservatives were using originalism to promote a conservative political agenda); Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1028–29 (1992)

received its foundational intellectual leadership from politically conservative thinkers who disliked the legal legacy of the Warren Court and the political legacy of the New Deal.[71] As politically conservative lawyers of the 1970s and 1980s observed what appeared to them to be "government by judiciary,"[72] and took umbrage at the substantively liberal results that reigning approaches to constitutional adjudication frequently yielded, they naturally looked for an alternative constitutional theory.[73] If originalism seemed attractive to them, part of the explanation almost certainly lay in its ideological valence. With respect to many of the constitutional issues in which political conservatives felt the deepest stake, preliminary historical work by historians and lawyers suggested that the Framers' intent would support or mandate politically conservative conclusions.[74] For example, Conservatives and liberals alike widely believed that the Framers had not intended to protect abortion rights, vest the federal government with nearly limitless regulatory powers, confer a growing panoply of procedural rights on criminal suspects, nor make the Equal Protection Clause a mandate for revising historically accepted practices in cases not involving overt race discrimination.[75] With respect to these and other issues, originalism not only promised a more or less principled ground for opposing further liberal innovations, but also provided a potential justification for demands to roll back legal doctrines that had originated either in the Warren Court or "the New Deal settlement" that marked the end of the *Lochner* era.[76]

(listing examples of judicial decisions made "in the name of the Constitution" that mirror the conservative political platform).

71. *See, e.g.*, Harrison, *supra* note 64, at 83–84; Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599–602 (2004).

72. *See* BERGER, *supra* note 12, at 364.

73. *See* Whittington, *supra* note 71 (explaining how critics of the Warren Court "frequently recurred to the original intent to ground their disagreement with the Court's innovative rulings"); *see also* TOOBIN, *supra* note 68, at 11–18 (describing the conservative push to reject or reverse liberal decisions through originalist constitutional interpretation).

74. For an especially prominent example, see BERGER, *supra* note 12; *see also* Harrison, *supra* note 64, at 86 (arguing that conservatives and originalists identified with the Framers' political beliefs, including "limited government, federalism, and private property").

75. *See* Harrison, *supra* note 64, at 85–86.

76. *See* TOOBIN, *supra* note 68, at 14–15; Whittington, *supra* note 71.

Today, as much as in originalism's founding days, nearly all participants in debates about constitutional theory take for granted that originalist theories almost invariably have conservative or libertarian implications. There may be a few versions of originalism, such as Professor Jack Balkin's,[77] that reverse the political valence, but when a purportedly originalist theory has a liberal tilt, questions predictably arise about whether that theory qualifies as originalist at all.[78] Further confirming the association of originalism with political conservatism, the originalist Justices Scalia and Thomas almost invariably cast votes that political conservatives applaud.[79]

Nevertheless, the conservative valence of originalist theories is not invariant. As recognized in Part II, at least some originalist theories are capable of being applied in relatively principled ways. As so applied, moreover, some versions of originalism might sometimes generate results in some cases that conservatives and libertarians would very much dislike.

With this short catalogue of correlations between originalist constitutional theories and political conservatism now in view, it is important to attend to the precise meaning of the question whether originalist theories are "rationalization[s] for conservatism." My dictionary defines "rationalize" as meaning "to attribute (one's actions) to rational and creditable motives without analysis of true and esp[ecially] unconscious motives."[80] The last part of this definition bears close attention. To rational-

77. Profesor Balkin has advocated a version of originalism rooted in what he calls "text and principle" that, he maintains, reveals the correctness of *Roe v. Wade*, 410 U.S. 113 (1973). Balkin, *supra* note 7, at 292–95, 303–11.

78. *See* McGinnis & Rappaport, *supra* note 19, at 371 ("Professor Balkin undertakes what many previously would have thought a conjuror's trick: he attempts to locate the constitutional right to abortion, the poster child for imposition of the judiciary's own idiosyncratic values, in the original meaning of the Constitution.").

79. *See* Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113, 113, 128–30, 133 (2002) (reporting empirical results suggesting that the votes "of even those Justices alleged to be originalists" are better predicted by political ideology than by the presence or absence of arguments pertaining to text or original intent); *see also* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 688 (2009) (citing the "originalist" theory that the Second Amendment "confers an essentially unqualified individual right to keep and bear arms" as an example of originalism as a strategy for using the Constitution as a basis for political positions originalists prefer).

80. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 977 (1983).

ize is not necessarily to utter a knowing falsehood. People of intelligence and good will can fail fully to comprehend the subconscious psychological forces that sometimes animate them.[81]

B. Possible Kinds of Rationalizing Connections

There are two interesting senses in which originalist theories might be "rationalization[s] for conservatism." One involves the relationship between originalist methodologies and the decisions of particular cases. The other concerns the relationship between substantively conservative or libertarian values and the grounds for adopting an originalist theory in the first place.

1. Rationalizing Outcomes in Individual Cases

The answer to the question whether some versions of originalism are or furnish rationalizations for conservative judicial decisions in particular cases is implicit in what I said in Parts I and II. To minimize repetition, I shall be brief.

Many versions of originalism—including those practiced by self-identified originalist judges and Justices—are not fully defined along one or more relevant dimensions. The less fully defined an originalist theory is, the less possible it is to say that the theory requires, rather than permits, a judge or Justice to decide a particular case in a particular way. When originalist judges, Justices, or scholars announce that their theories mandate a decision that the theories are not sufficiently specified to determine uniquely, one may suspect that the purportedly determinate

81. Indeed, a good deal of modern research in psychology and behavioral economics supports a proposition that is fully consistent with centuries of folk wisdom: People have a strong propensity to believe to be true that which they would like to be true. *See* LORD BACON, NOVUM ORGANUM 26 (Joseph Devey ed., P.F. Collier & Son 1902) (1620) ("[A] man always believes more readily that which he prefers."); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175–220 (1998) (reviewing evidence of "confirmation bias," a widespread psychological phenomenon that involves "the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand"). This point holds as fully for liberal non-originalists as it does for conservative originalists, but the latter come within the scope of my topic, whereas the former do not

originalist analyses rationalize a judgment substantially driven by other, possibly subconscious, considerations.[82]

2. *Originalism and the Rationalization of the Choice of a Constitutional Theory*

A second question is whether originalist theories are "rationalization[s] for conservatism," in the sense that they have been or may be adopted because of their *generally* conservative implications. Once again, the answer in many cases is "yes."

If originalists argued that their versions of originalism should be adopted for reasons including their tendency to promote conservative values, no one would suggest that they were concealing their true motives. The possibility of rationalization seems real, however, if we imagine versions of originalism that purport to demand strict political neutrality in the selection of a constitutional theory and maintain that an originalist theory should be chosen solely because it is entailed by politically neutral understandings of such concepts as those of a written constitution, the rule of law, and popular sovereignty. For anyone who holds this view, the tendency of an originalist theory to promote conservative or libertarian outcomes could be, at most, a happy accident. Taken to its extreme, this position maintains that all constitutional decisions should be originalist even if the principled application of an originalist theory would cause economic devastation (for example, by requiring the judicial invalidation of paper money or Social Security), would authorize a return to officially sponsored race discrimination, or would result in the abolition of long-recognized rights to freedom of speech.[83]

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82. The seeming inconsistencies in the originalist approaches of Justices Scalia and Thomas that I discussed in Part II, all involving cases in which they reached substantively conservative conclusions, could be cited again here as illustrations of the point.

83. *See* Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1123–24 (2008); *see also* Graglia, *supra* note 70, at 1035–39 (discussing originalists' difficulties with incorporating the First and Fourteenth Amendments). *But see id.* at 1043 (supporting the result of *Brown v. Board of Education*, 347 U.S. 483 (1954), as compatible with originalism).

In other work, I have argued at length that ideals such as those of written constitutionalism,[84] the rule of law,[85] and democracy or popular sovereignty[86] are simply too vague to dictate a single correct theory of constitutional interpretation or to establish that a particular theory would be the "best" even if its practical implications were disastrous as a practical matter. With one exception, I shall not reiterate those arguments here.[87]

The single argument that I would repeat—as a platform for making a further argument—is this: the choice of a constitutional theory has weighty practical implications.[88] Anyone who would choose a theory without taking account of those implications would be, as I said above, morally, politically, and legally reckless. It is not merely an affirmation of hope that "the Constitution . . . is not a suicide pact."[89] The guarantee that the Constitution is not a suicide pact comes from social practices within which the Constitution is accepted as law and within which constitutional interpretation is constrained by public expectations and tolerance.[90] From the perspective of judges and the public alike, any

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84. *See* Fallon, *supra* note 83, at 1122–46; Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 545–51 (1999). In some versions, the claim that the idea of a written constitution or the rule of law mandates originalism depends on the bankrupt jurisprudential view that equates the very idea of law with the command of a lawmaker or lawmakers. *See id.* at 546–47. More tenable theories root law in rules or practices of recognition, which can accept the possibility that the meaning of the law might evolve over time as the social practices of law and constitutionalism change. *See* Fallon, *supra* note 83, at 1118–46.

85. *See* Richard H. Fallon, Jr., *"The Rule of Law" As a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 26–28 (1997).

86. *See* Fallon, *supra* note 84, at 545–51.

87. I do, however, want to adopt by reference my earlier writings on this point, for I do not mean to try to win a serious argument by making dogmatic assertions about the inability of conceptual analysis to establish the indubitable correctness of any version of originalist theory.

88. *See* Fallon, *supra* note 84, at 549–62 (discussing important criteria for constitutional theories, such as their practicability and impact on economic efficiency).

89. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) ("[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact."); *see also* Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

90. *See* Fallon, *supra* note 84, at 1118–39, 1160 (noting that Supreme Court decisionmaking is constrained by public expectations and requires weighing costs and benefits).

constitutional theory that turned the Constitution into a suicide pact would and should be deemed unacceptable on that ground.[91]

Although this claim may sound tendentious, there is at least partial corroboration for it in originalist scholarship. Some originalists expressly defend their theories partly on the ground that, as applied to the generality of cases, they would yield a better overall pattern of outcomes than would non-originalist theories.[92] More tellingly, I have never read a work of originalist scholarship that acknowledged that its preferred version of originalism would or might yield practically disastrous results but contended that the theory should be adopted anyway. Implicitly, if not explicitly, originalists thus seem to recognize that constitutional theories must be judged at least partly by their expected fruits.[93]

Once it is recognized that constitutional theories' substantive implications matter to their acceptability or attractiveness, however, there is no way of keeping liberal, conservative, or libertarian values wholly out of the calculus, even if some originalists may wish to believe otherwise.[94] Once again, it is nearly impossible to account on any other ground for why so many conservatives are originalists of one variety or another and why almost no liberals embrace originalism of any form.

In saying that arguments for originalism are partly rationalizations unless they acknowledge and defend originalism's generally conservative implications, I want to emphasize once again that I make no imputations of bad faith.[95] My point is solely about the

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91. *Cf.* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995) ("[I]f any particular theory does not produce the conclusion that *Brown* [*v. Board of Education*] was correctly decided, the theory is seriously discredited.").

92. *See* McGinnis & Rappaport, *supra* note 19 (asserting that "originalism is the best interpretive approach for the United States Constitution because it is more likely to produce desirable results than other interpretive approaches").

93. *See id.*

94. *See, e.g.*, BORK, *supra* note 29, at 177–78 (arguing that applying originalist theories has political outcomes, but originalism itself is politically neutral); *id.* at 177 ("The philosophy of original understanding means that the ratifiers of the Constitution and today's legislators make the political decisions, and the courts do their best to implement them. That is not a conservative philosophy or a liberal philosophy; it is merely the design of the American Republic.").

95. Nor do I wish to deny that any reasonably well-specified version of originalist theory is likely to require a conscientious practitioner of that theory to reach

grounds on which constitutional theories, including originalist theories, are likely to be selected as a psychological matter. Insofar as originalists publicly declaim the relevance of practical consequences or political valence to their choice of originalist theory, rationalization is likely underway.[96]

I am aware, of course, that acknowledging that the case for a particular version of originalism has an ideological component is politically anathema to many of originalism's advocates in the political arena. Part of originalism's political appeal (though by no means all of it) has lain in its patina of political neutrality—its assertion that making decisions based on historical criteria stops judges from letting their political views dictate their decisions. Having found political advantage in this position, originalists in positions of political leadership will dislike embracing the qualification that they anticipate that their preferred versions of originalism will tend generally to yield substantively conservative outcomes and that the normative attractiveness of getting substantively conservative outcomes forms part of the case for their originalist theories. It may be an interesting tension within the originalist movement that prominent political leaders cannot, for political reasons, say things that intellectually honest members of the movement who are not so constrained should know to be true.

IV. CONCLUSION

In this Essay, I have sought to answer three related questions about originalist constitutional theories. First, in response to the question "What is originalism?," I have argued that it is misleading to speak of "originalism" as if all self-styled originalists subscribed to a single, reasonably well-specified theory. In fact,

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results in at least some cases that the practitioner would substantively dislike. *See* Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 184 (2005) (noting that in 2004 "Justice Scalia, long the darling of tough-on-crime conservatives," employed originalist methods to author "two sweeping majority opinions that vindicated criminal defendants' rights").

96. This point would hold, moreover, even in the case of an originalist whose theory was fully specified and who applied it in a perfectly principled way. In other words, it is at least theoretically possible for an originalist theory to be wholly principled, but also to be a rationalization for conservatism.

there are multiple strands of originalism, some quite dramatically different from others in both their theoretical tenets and their practical implications. Accordingly, there is no Originalism 2.0. There are only pretenders to the title. Second, in response to the question of whether particular varieties of originalism are reasonably capable of being, or likely to be, applied in principled ways, I have maintained that some are more principled than others. Those that are more fully specified in advance permit less case-by-case methodological inconsistency than those that are defined only vaguely. But rigorously specified methodological theories that leave little room for case-by-case discretionary judgment run the risk of generating deeply disturbing or even practically disastrous conclusions in some cases. The question of how determinately to define an originalist theory's purely methodological limits on judicial discretion may therefore confront originalists with a dilemma. Third, I have responded to the question whether most or all varieties of originalism are "rationalization[s] for conservatism" by arguing that it would be impossible to mount an intellectually honest and persuasive defense of any version of originalism without referring to the attractiveness of the consequences that it would likely yield in the generality of cases. Perhaps counterintuitively, it is when originalists argue that their theories should be adopted without regard to their practical consequences and political valences that the charge of "rationalization for conservatism" becomes most apt.