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# Originalism, Election Law, and Democratic Self-Government

Joshua S. Sellers
*University of Texas School of Law*

# ORIGINALISM, ELECTION LAW, AND DEMOCRATIC SELF-GOVERNMENT

*Joshua S. Sellers*[*]

Abstract

Originalism has a democracy problem. Among prevailing theories of constitutional interpretation—pragmatism, common-law constitutionalism, popular constitutionalism, and Elysian representation-reinforcement—originalism uniquely creates a legal environment in which antidemocracy is viable. That is, it uniquely imperils democratic structures, practices, and norms that are essential to modern democratic self-government. This fundamental flaw is most apparent when considering the relationship between election law (a conspicuously non-originalist area of law) and originalism. Accordingly, this Article uses election law as a heuristic for illustrating one of originalism's central deficiencies. It is the first extended treatment of election law and originalism—a topic of heightened salience following the Supreme Court's originalist turn.

[*] Professor of Law, University of Texas School of Law. This project was vastly improved by feedback from Kevin Arlyck, Mary Sarah Bilder, Travis Crum, Erik Encarnacion, Jonathan Gienapp, Rebecca Green, Aaron Hall, Allison Larsen, Margaret Lemos, John Mikhail, Darrell Miller, Eric Orts, Shaun Ossei-Owusu, Justin Weinstein-Tull, and additional faculty at the University of Pennsylvania Carey Law School, the William & Mary Law School, and the University of Houston Law Center. I also thank the editors of the *Florida Law Review* for their superb work.

## INTRODUCTION

Originalism has a democracy problem. Among prevailing theories of constitutional interpretation[1]—pragmatism,[2] common-law constitutionalism,[3] popular constitutionalism,[4] and Elysian representation-reinforcement[5]—originalism *uniquely* creates a legal environment in which antidemocracy is viable. That is, originalism *uniquely* imperils democratic

1. By "prevailing theories," I mean to describe theories that inform, or have informed, modern (i.e., 1953–present) constitutional litigation. I therefore exclude natural law theories, libertarian theories, Professor Jack Balkin's "living originalism," Thayerism, common-good constitutionalism, and progressive constitutionalism. On these theories, see generally Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT. 93 (1995) (discussing natural law theories of constitutional interpretation); Richard A. Epstein, *The Classical Liberal Constitution Vindicated*, 8 N.Y.U. J.L. & LIBERTY 743 (2014) (discussing libertarian theories); JACK M. BALKIN, LIVING ORIGINALISM (2011) (discussing living originalism); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (discussing Thayerism); ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION (2022) (discussing common-good constitutionalism); ERWIN CHEMERINSKY, WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY (2018) (discussing progressive constitutionalism). There are, to be sure, additional theories in circulation. *See* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1271–76 (2019) (providing examples of additional theories). This Article's claims do not require fully explicating these theories, their practical import, or the extent to which they overlap with the theories I foreground.

2. *See, e.g.*, STEPHEN BREYER, READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, *NOT* TEXTUALISM xxi, 261–63 (2024) (rejecting the textualist and originalist approaches and endorsing pragmatism); RICHARD A. POSNER, HOW JUDGES THINK 230 (2010) ("The word that best describes the average American judge at all levels of our judicial hierarchies and yields the greatest insight into his behavior is 'pragmatist' . . . .").

3. *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 48–49 (2010) (discussing common-law constitutionalism).

4. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7–8 (2004) (describing the emergence of popular constitutionalism); *see also* Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 43 (2003) ("Although the Court may claim authority to speak for the Constitution, that authority does not exist merely by decree. It must be earned by articulating a vision of the Constitution that the nation is prepared to accept.").

5. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 77–78 (1980) (describing the representation-reinforcement theory). Large swaths of modern election law are premised on representation-reinforcement. *See, e.g.*, Luke P. McLoughlin, *The Elysian Foundations of Election Law*, 82 TEMPLE L. REV. 89, 92 (2009) ("In short, Ely's theory, for all the criticism it has received, is ingrained as an organizing principle in the election law jurisprudence.").

structures, practices, and norms that are essential to modern democratic self-government.[6] This fundamental flaw is most apparent when considering the relationship between election law—"probably the most radically non-originalist body of constitutional law that we have"[7]—and originalism. Accordingly, this Article uses election law as a heuristic for illustrating this central deficiency. It is the first extended treatment of election law and originalism—a topic of heightened salience following the Supreme Court's originalist turn.

Of course, critiquing originalism is more like clay pigeon shooting than archery, given the constantly shifting definitions and justifications constructed by its adherents.[8] But if we take originalism seriously on its own terms, if we assume that a "strong"[9] or, as labeled by Jack Balkin, "skyscraper"[10] originalism is truly emergent,[11] then debates over the "original public meanings"[12] of various constitutional provisions will soon multiply.[13] This strong form of originalism, under which

6. There are, of course, no universally agreed-upon definitions of either democracy or antidemocracy. This Article reflects the commonly held view that democracy is defined by its commitment to political equality, representative democracy, and institutional arrangements that facilitate civic participation. *See, e.g.*, DANIELLE ALLEN, JUSTICE BY MEANS OF DEMOCRACY 68–69 (2023). Antidemocracy, therefore, undermines these aspirations.

7. Dean Reuter et al., *Why, or Why Not, Be an Originalist?*, 69 CATH. U. L. REV. 683, 689 (2020) (comments by Richard Pildes).

8. *See* Solum, *supra* note 1, at 1246–47; Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 661 (2009) ("Originalism is an inconstant term.").

9. Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 22 (2009) ("Originalism proper is strong originalism—the thesis that original meaning either is the *only* proper target of judicial constitutional interpretation or that it has at least lexical priority over any other candidate meanings the text might bear (again, contrary judicial precedents possibly excepted).").

10. Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 550 (2009) ("Skyscraper originalism views the Constitution as more or less a finished product, albeit always subject to later Article V amendment.").

11. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n. v. Bruen, 597 U.S. 1, 17–18 (2022) (employing a strong version of originalism); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 536 (2022) ("An analysis focused on original meaning and history . . . has long represented the rule rather than some 'exception' . . . .").

12. *See* Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1427 (2021).

13. *See, e.g.*, Travis Crum, *The Riddle of Race-Based Redistricting*, 124 COLUM. L. REV. 1823, 1904 (2024) ("Given originalism's sway at the Supreme Court, constitutional law is undergoing seismic change based on the original understanding of a constitutional provision."); Samuel Issacharoff, *Pragmatic Originalism?*, 4 N.Y.U. J.L. & LIBERTY 517, 517 (2009) ("While the extent to which the Supreme

the original public meaning of constitutional provisions is dispositive,[14] is, again, *uniquely* threatening to democratic self-government.[15] This thesis may strike some as provocative, as it directly conflicts with one of originalism's most common justifications: that originalism itself uniquely *vindicates* democratic self-government.[16] This Article reveals the speciousness of that justification.

To be clear, the claim is not that a strong form of originalism *compels* antidemocratic decisions, nor is it that originalism is categorically incompatible with what we might define as a minimally acceptable version of democracy. Originalism, as is true for all methods of constitutional interpretation, can produce a range of outcomes depending on what the relevant source materials reveal.[17] The claim is that originalism, in contrast to rival theories of interpretation, renders plausible profoundly antidemocratic possibilities.[18] It offers a legal

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Court's jurisprudence is in any true sense originalist can be debated, the sheer weight of originalism in briefs, arguments, and the rhetorical style of constitutional cases cannot be disputed.").

14. *Infra* Section I.A (defining original public meaning originalism). In fact, most forms of originalism, even those that might not be characterized as "strong," posit that "(1) the meaning of the constitutional text was fixed at the time each provision was framed and ratified; and (2) courts and officials *should be bound* by that fixed meaning." Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 235 (2018) (emphasis added).

15. *See* Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL'Y 5, 6 (2011) ("[O]riginalist 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.").

16. *See, e.g.*, Kenneth Ward, *Originalism and Democratic Government*, 41 S. TEX. L. REV. 1247, 1248 (2000) ("[O]riginalism's appeal rests on the claim that originalist conceptions of law promote political legitimacy by encouraging democratic participation."); *infra* Part IV.

17. As one pertinent example, there are compelling originalist arguments in support of Congress's broad authority to enforce the Reconstruction Amendments that, if judicially recognized, would bolster congressional power to regulate electoral processes. I thank Professor Aaron-Andrew Bruhl for raising this point. For an argument that the Supreme Court has failed to reconcile originalism and the Reconstruction Amendments' enforcement provisions, see Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 257 (2023). For arguments that Congress already possesses broad authority under the Reconstruction Amendments to regulate voting and elections, see Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. COMMENT. 1, 62–63 (2021); Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1571–72 (2020).

18. Fallon, *supra* note 15.

vocabulary and methodology for upending representative democracy in ways that rival theories would not countenance. This capaciousness—one that has gone largely unaddressed thus far—is among originalism's great weaknesses.

Crucially, this critique targets originalism on both external (i.e., consequentialist) and internal (i.e., under the terms of its own logic) grounds. On external grounds: Since its origins, originalism has been criticized for its propensity to produce what are widely understood to be morally distasteful outcomes.[19] The classic example is originalism's "*Brown* problem," which refers to originalism's tension, if not incompatibility, with the decision in *Brown v. Board of Education*[20] finding legally mandated race-based school segregation unconstitutional.[21] Incompatibility with the central holding of *Brown*, many argue, should render an interpretive theory unviable.[22] In response to this critique, originalists have long struggled to reconcile originalism with *Brown*.[23] These efforts have themselves been rebutted.[24]

Yet the debate itself is revealing. To even contemplate the possibility that intentional racial segregation in public schools *might* be constitutional in 2024 if compelled by a theory of constitutional interpretation reflects an already tarnished constitutional discourse.[25] And evaluating originalism's election law implications offers a similar lesson. A theory of constitutional interpretation that contemplates the possibility of a return to pre-modern American democracy—a prospect that many originalists, I suspect, are unlikely to defend—is necessarily an unsubstantial theory. In short, application of a

19. *See* Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1686–88 (2016) (discussing the "[b]ad [c]onsequences" objection to originalism).

20. 347 U.S. 483 (1954).

21. *Id.* at 495.

22. *See, e.g.*, CASS R. SUNSTEIN, HOW TO INTERPRET THE CONSTITUTION 110–14 (Bridget Flannery-McCoy & Alena Chekanov eds., 2023); STRAUSS, *supra* note 3, at 78.

23. *See, e.g.*, Solum, s*upra* note 14, at 259–67 (analyzing whether *Brown* can be reconciled with originalism); Michael W. McConnell, *The Originalist Case for* Brown v. Board of Education, 19 HARV. J.L. & PUB. POL'Y 457, 457–58 (1996).

24. *See, e.g.*, Michael J. Klarman, Response, Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1881–83 (1995) (discussing reasons why Professor Michael McConnell's argument that *Brown* can be justified through originalism is unpersuasive).

25. I bracket here the originalist response that stare decisis would sustain *Brown*. *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1929–31 (2017) (laying out an originalist argument, based on stare decisis, for not overturning *Brown*).

strong form of originalism in the election law context contemplates such a significant degree of democratic regression that originalism's general utility is rendered suspect.

As detailed in Part III, reconciling election law and originalism is exceedingly difficult. Popular democratic understandings, observed either in 1789, 1791, or during the Reconstruction era, were, by any contemporary standard, deeply circumscribed.[26] Elections in the nation's early years were "masculine, competitive, drunken, and often violent."[27] Political parties, so central to modern democracy, were anathema to the Framers, who strongly opposed "a party-driven democracy in which the people's representatives would merely obey the will of the people as dictated to them through party structures."[28] Voting was, in many places, an "oral and public act."[29] Before the 1960s, malapportionment and gerrymandering were commonplace.[30] In countless ways, our modern democracy, the product of decades of activism and organizing in furtherance of political equality, would be unrecognizable to those in the eighteenth and nineteenth centuries. Given this history, modern election law might be seen as falsifying the viability of any muscular version of originalism.[31]

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26. *See, e.g.*, GERALD LEONARD & SAUL CORNELL, THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780S-1830S 211 (2019) ("[W]hether this or that constitutional actor preferred the language of law or that of democracy, nearly everyone in public life—virtually all of them white and male—agreed that republican principles demanded the stark exclusion of most of the population from participation in republican governance."); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 23 (2000) ("[T]he records of the federal convention and state constitutional conventions suggest that most members of the new nation's political leadership did not favor a more democratic franchise . . . .").

27. ALAN TAYLOR, AMERICAN REPUBLICS: A CONTINENTAL HISTORY OF THE UNITED STATES 1783–1850 207 (2021).

28. LEONARD & CORNELL, *supra* note 26, at 213; *see also* Joshua A. Douglas, *A History of Third-Party Voter Registration Drives*, INST. FOR RESPONSIVE GOV'T 3 (May 17, 2023), https://responsivegov.org/research/a-history-of-third-party-voter-registration-drives/ [https://perma.cc/K4F9-BJ2P] (discussing how political parties often produced—and manipulated—ballots).

29. KEYSSAR, *supra* note 26, at 28.

30. *See* Rucho v. Common Cause, 588 U.S. 684, 696–99 (2019); Baker v. Carr, 369 U.S. 186, 301 (1962) (Frankfurter, J., dissenting).

31. *See* William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251, 1252 (2011) ("Generally, the validity of an interpretive theory should rest on its internal merits, not its external results. But if a particular theory

Along these lines, consider Professor Cass Sunstein's recent argument that any defensible theory of constitutional interpretation must account for certain "fixed points."[32] In his view:

> [W]e cannot possibly ignore or refuse to attend to fixed points, even if they are subject to revision. For each chooser—each one of us—a judgment must be made about what those fixed points are, about exactly how fixed they are, and about whether one or another approach would endanger them.[33]

He reiterates the commonly held view that laws and judicial rulings prohibiting explicit race-based and sex-based discrimination are fixed points that justify abandoning any interpretive theory that might imperil them.[34]

Understood in these terms, much of modern election law might be understood as a sort of collective fixed point, a widespread recognition that, for example, malapportionment is unjust, voting rights may not be arbitrarily denied, and political parties are associational entities entitled to constitutional protection. Yet, to date, originalists have failed to offer a fulsome theory for how originalism can be reconciled with modern democracy or, alternatively, why election law doctrine alone should remain exempt from originalist reasoning. That said, observing this tension between election law and originalism is just another way of observing that originalism may produce some undesirable outcomes or that originalism is selectively employed.[35] Though those points bear repeating,

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cannot explain decisions that are universally considered to be both correct and integral to the American system of justice, the question necessarily arises as to whether there is something lacking in that theoretical account.").

32. Cass R. Sunstein, *"Fixed Points" in Constitutional Theory* 2 (Harvard L. Sch. Pub. L. Working Paper, Paper No. 22-23, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4123343# [https://perma.cc/63HD-ZB5Z].

33. *Id.* at 14.

34. *See id.* at 2 ("If a theory of interpretation would allow the federal government to discriminate on the basis of race and sex, it is at least presumptively unacceptable for that reason."). For a rejection of this metric, see Lawrence B. Solum, *Outcome Reasons and Process Reasons in Normative Constitutional Theory*, 172 U. PA. L. REV. 913, 920 (2024) ("One of the central claims of this Article is that *outcomes reductionism should be rejected as an approach to normative constitutional theory*.").

35. *See* Fallon, *supra* note 17, at 234 ("Less creditably, selective originalists like to posture themselves as principled adherents to original constitutional meanings, in contrast with feckless nonoriginalists, while conveniently subordinating original meanings to judicial precedents when original meanings would yield unwanted

this external critique does not illustrate originalism's self-contradictory nature.

Thus, the internal critique: Even if one accepts that originalism can be supported by something internal to itself—a controversial[36] but reasonable claim—assessing originalism through the lens of election law exposes a more central flaw. The democracy that animates originalism is truncated; it is divorced from actual democratic life. Take as a starting assumption that the Constitution was designed to facilitate democratic self-government.[37] From that uncontroversial premise, originalists claim that originalism is the *only* interpretive theory that fully honors that commitment.[38] Former-Judge Robert Bork, for example, claimed that "only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy."[39] He framed the choice as being between "an authoritarian judicial oligarchy and a representative democracy."[40] And he lauded originalism as protective of "the self-government of ordinary folk."[41] Former-Attorney General Edwin Meese III likewise described the stakes as involving "the nature of the Constitution itself, and in turn, the nature of our political order."[42] Originalism's fate, he

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results."); Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 93–94, 104 (2023); Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 WAKE FOREST L. REV. 617, 618–19 (2019).

36. Many argue that constitutional theories are only properly judged by their consequences. *See, e.g.*, Sunstein, *supra* note 32, at 14 (explaining that judges (and others) should choose the theory that "would make [the American] constitutional order better rather than worse").

37. *See* THE FEDERALIST NO. 10 (James Madison); OWEN FISS, WHY WE VOTE 5 (2024) ("Democracy is a guiding ideal of the Constitution. It sets the standard for judging the adequacy of the governmental structure under which we live and, at the same time, projects into the future what that structure should be."); Martin S. Flaherty, *The Better Angels of Self-Government*, 71 FORDHAM L. REV. 1773, 1773 (2003) ("For many, perhaps most, commentators, the Constitution is about democratic self-government.").

38. *See* Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 3 (2009) (referring to "the claims to singular democratic legitimacy made on originalism's behalf").

39. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143 (1990).

40. *Id.* at 160.

41. *Id.* at 252.

42. Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 6 (1988).

said, will have "a tremendous impact on the nature of our political process."[43]

A related defense of originalism, also tied to democratic self-government, rests on the Constitution as an embodiment of popular sovereignty, a document justly celebrated for its "democratic pedigree."[44] As summarized by Professor Larry Solum:

> If (1) the polity has through democratic processes ratified a text and retains the power to modify the text, and (2) the text is a constitution the communicative content of which creates constitutional law, then the combination of these two facts constitutes a reason for constitutional actors (judges and other officials) to act in compliance with the text.[45]

The democratic processes Solum refers to are the ratification of the Constitution and the ratification of constitutional amendments through the Article V amendment process.[46] And "compliance with the text," originalists claim, requires adherence to popular understandings at these ratification moments (or thereabout). Thus, having defined popular sovereignty and democratic legitimacy by way of exclusive reference to these moments, originalists can denigrate non-originalist interpretive methods as antidemocratic.[47] According to Solum, the democratic legitimacy argument provides a *pro tanto* reason to reject alternate approaches.[48]

Yet, once viewed through the lens of election law, such claims collapse under their own weight. The conceptions of popular sovereignty and democratic legitimacy that originalists rely on are partial, circumscribed to promote "democratic

43. *Id.*

44. Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice 73 (Apr. 3, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215 [https://perma.cc/KJG2-QFB9].

45. *Id.*

46. *Id.*; U.S. CONST. art. V.

47. *See, e.g.*, Lawrence B. Solum, *Themes from Fallon on Constitutional Theory*, 18 GEO. J.L. & PUB. POL'Y 287, 333 (2020) ("Some forms of living constitutionalism authorize antidemocratic judicial constructions that override the constitutional text, examples include: Moral Readings Theory, Common Law Constitutionalism, and Constitutional Pluralism.").

48. *Id.* at 330–31.

legitimacy of a nominal kind";[49] a form of legitimacy that, once *actual* democratic practices are considered, renders originalism self-contradictory. Originalism's democratic commitment, I argue, is only to an estranged form of democracy, rendering its adherents' claimed proprietorship over democracy flimsy.

This Article proceeds as follows. Part I summarizes originalism's ascendance and the perennial debates over its utility. It also briefly introduces originalism's rivals. Part II explores the non-originalism of nearly all areas of election law and summarizes the very few scholarly articles that directly engage election law and originalism. Part III contains the external critique of originalism, examining how a strong form of originalism would imperil democratic structures, practices, and norms that are essential to democratic self-government. As examples, this Part revisits the *Moore v. Harper*[50] litigation, explores tentative efforts to revisit the landmark one person–one vote cases, and examines prospective litigation over the breadth of Congress's power over elections. Part IV contains the internal critique of originalism, suggesting that one of originalism's principal justifications—that it uniquely protects democratic self-government, democratic legitimacy, and popular sovereignty—is self-contradictory.

## I. ORIGINALISM AND ITS RIVALS

Originalism is emergent at the Supreme Court.[51] Three Justices—Justices Clarence Thomas, Neil Gorsuch, and Amy Coney Barrett—are avowed originalists, and Justices Samuel Alito and Brett Kavanaugh are similarly inclined toward originalist judgments.[52] The newest Justice, Justice Ketanji Brown Jackson, has revealed a similar receptivity to originalist

49. Rebecca L. Brown, *Self-Government, Change, and Justice*, 1 ADVANCE 83, 87 (2007).

50. 600 U.S. 1 (2023).

51. Erwin Chemerinsky, *The Philosophy That Makes Amy Coney Barrett So Dangerous*, N.Y. TIMES (Oct. 21, 2020), https://www.nytimes.com/2020/10/21/opinion/supreme-court-amy-coney-barrett.html [https://perma.cc/5N4F-TFJH] ("But now, with the confirmation of Judge Barrett, [originalism] will be a dominant theory on the Supreme Court.").

52. *See* Fallon, s*upra* note 12, at 1423–24 (explaining that "originalism has moved to center stage" and highlighting that multiple Supreme Court Justices "self-identif[y] as . . . originalist[s]").

approaches.[53] This emanant "methodological assertiveness"[54] at the Court demands acknowledgment from both litigants and scholars. This Part summarizes originalism's ascendance and the perennial debates over its utility before briefly introducing rival theories of constitutional interpretation.

### A. *Originalism at Present*

Originalism was designed as a response to the perceived liberal activism of the Warren Court.[55] Its advocates, with some exceptions, argue that constitutional interpreters should look to the original understanding (i.e., the understanding at the time of ratification) of constitutional provisions.[56] Accordingly, 1789 (when the Constitution was first operative), 1791 (when the Bill of Rights was ratified), and 1868 (when the Fourteenth Amendment was ratified) are critical originalist moments.[57]

Originalism's advocates proffer many justifications. One of the most common asserts that the Constitution is a kind of public instructional manual that, unless properly amended, should be strictly complied with.[58] Deviating from its terms, it is argued, invites arbitrariness and abuse.[59] Along similar lines, many originalists emphasize the virtues of judicial restraint: in short, because federal judges are unelected, and therefore unaccountable to the voting public, it is essential that they faithfully adhere to the text of the Constitution.[60] Alternative approaches, originalists argue, grant judges too much latitude to read their values and policy preferences into constitutional provisions, a task that should be reserved for democratically accountable officials.[61] These accounts characterize originalism as the only interpretive theory that reliably assures faithful

53. Adam Liptak, *In Her First Term, Justice Ketanji Brown Jackson 'Came to Play'*, N.Y. TIMES (July 7, 2023), https://www.nytimes.com/2023/07/07/us/supreme-court-ketanji-brown-jackson.html?searchResultPosition=1 [https://perma.cc/CE4M-XYGL].

54. Neil S. Siegel, *The Trouble with Court-Packing*, 72 DUKE L.J. 71, 79 (2022).

55. *See* Greene, *supra* note 8, at 671.

56. Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/white-papers/on-originalism-in-constitutional-interpretation [https://perma.cc/G3VQ-5CF4].

57. Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 ILL. L. REV. 1935, 1943 (2013).

58. Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 52 (2006).

59. *See* William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2214 (2017).

60. *Id.* at 2213–14.

61. *Id.* at 2218–19.

adherence.[62] Some originalists tout its capacity to produce good outcomes, though such expressly consequentialist defenses are rare.[63] And finally, many originalists rest their case on the majoritarian processes that produced the Constitution.[64] Those processes—states' ratification, most notably—originalists claim, enjoy a uniquely democratic pedigree that must be honored.[65] Deference to the choices made at those moments, it is said, confers democratic legitimacy on our legal system, vindicates rule of law values, and mitigates the "[countermajoritarian] difficulty."[66]

Though these justifications are longstanding, the practice of originalism has undergone significant changes since its inception in the 1970s. Early adherents argued that the *original intent* of the Framers was the relevant object of concern,[67] but this approach presented several conceptual and normative challenges. For one, the intent of a collective body is often difficult or impossible to identify. More fundamentally, the Constitution's legitimacy is rooted in its ratification by citizen-led conventions, not the Framers' subjective views about its terms.[68] Additionally, some of the Framers' original intentions were abhorrent and therefore embarrassing to defend. Consequently, modern originalism (again, with some exceptions) now principally relies on unearthing the *original public meaning* of constitutional provisions.[69] As the label suggests, this approach prioritizes what the contemporaneous public understood a provision to mean at the time it was enacted.[70]

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62. *See, e.g.*, *id.* at 2213–14 (quoting Justice Scalia on this point).

63. *See, e.g.*, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 4 (Harv. Univ. Press ed., 2013).

64. *See* Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1628 (2013).

65. *Id.* at 1631–32.

66. Or Bassok, *The Two Countermajoritarian Difficulties*, 31 ST. LOUIS U. PUB. L. REV. 333, 348 (2012).

67. *See* Meese III, *supra* note 42, at 10–11.

68. Steven D. Smith, *That Old-Time Originalism, in* THE CHALLENGE OF ORIGINALISM 225 (Grant Huscroft & Bradley W. Miller eds., 2011).

69. *See* Solum, *supra* note 1, at 1250–51 ("Original intent fell out of favor among originalists more than thirty years ago."); *id.* at 1251 ("Most contemporary originalists aim to recover the public meaning of the constitutional text at the time each provision was framed and ratified; this has been the dominant form of originalism since the mid-1980s.").

70. CONG. RSCH. SERV., THE MODES OF CONSTITUTIONAL ANALYSIS: ORIGINAL MEANING (PART 3), https://crsreports.congress.gov/product/pdf/LSB/LSB10677#:~:

Though public meaning originalism is in vogue, it is not unrivaled. As Larry Solum has detailed, originalism, even today, is best described as a "family of constitutional theories,"[71] some of which are thoroughly at odds with one another.[72] Because of this diversity, it is difficult to talk about originalism in any categorical sense. Suffice it to say that an absence of consensus persists on rather basic methodological matters: What, precisely, is the *meaning* of the constitutional text?[73] Which sources should be considered, and, in turn, prioritized? Whose understandings receive interpretive priority? Those of the Founding era constitutional interpreters, such as lawyers? Or those of reasonable people at the time of ratification? How is interpretation possible when many, if not most, understandings are inherently ambiguous?[74] To what extent, if at all, should post-ratification history inform interpretation? More fundamentally, why should we, in the present, adhere to the views of men whose "ideological world . . . seems light years removed from our own?"[75] And how can originalism be reconciled with precedent?[76]

These questions naturally inform the most common critiques of originalism. For example, critics contend that the task of uncovering original understandings is "often impossible"[77] or

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text=Constitution's%20original%20public%20meaning.,textualism%2C%20but%20is%20not%20identical [https://perma.cc/4S63-HMT6].

71. Solum, *supra* note 1 at 1253–55; *see* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244 (2009) ("A review of originalists' work reveals originalism to be not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label.").

72. Well-known variants include semantic originalism, original expected application originalism, original-methods originalism, and inclusive originalism. It is beyond the scope of this Article to catalogue the various permutations of these respective approaches.

73. *See, e.g.*, Lawrence B. Solum, *Constitutional Texting*, 44 SAN DIEGO L. REV. 123, 150–51 (2006) (explicating the idea of constitutional meaning).

74. *See generally* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777 (2022) (discussing how the standards, rather than procedures, of originalism give the theory strength).

75. Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 383 (1997).

76. *See generally* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009) (offering an account of how originalism can be reconciled with precedent).

77. *See* STRAUSS, *supra* note 3, at 18; Fallon, s*upra* note 12, at 1432 (stating that in most instances "claims that determinate original public meanings existed as a matter of historical and linguistic fact reflect a conceptual or metaphysical mistake."); *see also* Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329,

faultily practiced;[78] they question originalists' adherence to our nation's troubled past;[79] they express skepticism about efforts to translate original understandings to present circumstances;[80] they charge originalism with producing bad outcomes;[81] and so on.

Academic historians, for their part, have long questioned the entire originalist enterprise.[82] As Professor Jack Rakove asserted nearly thirty years ago, "historians have little stake in

365 (2013) ("At the end of the day, then, the new originalism, just like the old, fails to constrain judicial decision making any better than other methods of constitutional interpretation."); Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 222 (1980) ("The [constitutional] interpreter's understanding of the original understanding may be so indeterminate as to undermine the rationale for originalism.").

78. Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 936 (2015) (critiquing Larry Solum and other original public meaning originalists for marginalizing historical knowledge and practice).

79. *See* Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 396 (2018) ("White women and people of color neither drafted the Constitution nor participated in the state ratifying conventions themselves."); Klarman, *supra* note 75, at 388 ("No matter how smart the Framers were, they still held slaves and subordinated women . . . ."); G. Alex Sinha, *Original(ism) Sin*, 95 ST. JOHN'S L. REV. 739, 765 (2021) (noting that the "drafting and ratifying [of] the Constitution drew on a narrow demographic slice of the American population").

80. *See* STRAUSS, s*upra* note 3, at 21–25. The discordance between contemporary and historical practices is, to originalists, not reason enough to doubt originalism's validity. In fact, reconciling such discordance is a central part of the originalist enterprise. *See, e.g.*, Lee J. Strang, *Originalism and the "Challenge of Change": Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 929–30 (2009) (presenting an originalist answer to the "challenge of change"); Neil M. Gorsuch, *Justice Neil Gorsuch: Why Originalism Is the Best Approach to the Constitution*, TIME (Sept. 6, 2019, 8:00 AM), https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/ [https://perma.cc/8RSJ-6B64] ("Whether it's the Constitution's prohibition on torture, its protection of speech, or its restrictions on searches, the meaning remains constant even as new applications arise.").

81. *See* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 284–92 (1988) (examining and rejecting this critique).

82. In response to the Supreme Court's originalist turn, the Brennan Center for Justice announced earlier this year the formation of the Historians Council on the Constitution, which is tasked with "counter[ing] the U.S. Supreme Court's misuses and mischaracterizations of history to decide major constitutional issues." Press Release, Brennan Ctr. for Just., Brennan Center Introduces the Historians Council on the Constitution (Jan. 17, 2024), https://www.brennancenter.org/our-work/analysis-opinion/brennan-center-introduces-historians-council-constitution [https://perma.cc/2LQX-D46K].

ascertaining the original meaning of a clause for its own sake, or in attempting to freeze or distill its true, unadulterated meaning at some pristine moment of constitutional understanding."[83] Better, Rakove continued, to "rest content with—even revel in—the ambiguities of the evidentiary record, recognizing that behind the textual brevity of any clause there once lay a spectrum of complex views and different shadings of opinion."[84] Nearly forty years ago, Professor Gordon Wood similarly proclaimed, "[i]t may be a necessary fiction for lawyers and jurists to believe in a 'correct' or 'true' interpretation of the Constitution in order to carry on their business, but we historians have different obligations and aims."[85]

More recently, Professor Jonathan Gienapp has published a series of compelling critiques of originalism, accusing its advocates of "failing to historicize the American Founding"[86] and thereby "proceed[ing] from the faulty premise that the Founding generation and we today occupy more or less the same linguistic world, an assumption that enables their [historical] translation to take a narrow and atomistic form."[87] Gienapp, moreover, rejects the notion of any *fixed* constitutional understanding of the Founding era that might be relied on as a basis for the resolution of judicial disputes.[88]

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83. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 9 (1996).

84. *Id.* at 9–10; *see also* Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 LAW & HIST. REV. 321, 334 (2021) ("At the Founding, most aspects of constitutionalism were deeply contested, not least because the federal Constitution was such a novelty with no obvious analogues. On foundational matters, the Founding generation disagreed as deeply as Americans always have.").

85. Gordon S. Wood, *Ideology and the Origins of Liberal America*, 44 WM. & MARY Q. 628, 632–33 (1987).

86. Gienapp, s*upra* note 78.

87. *Id.*

88. Gienapp explains that:

> When the Constitution initially appeared, as Founding-Era Americans struggled to make sense of its essential characteristics, they often imagined it in ways quite different than how it is conceived of today. Many of the attributes that we would consider definitive of the Constitution emerged only later through searching debate and significant transformations in legal and constitutional understanding.

Gienapp, *supra* note 84, at 322. His book-length critique of originalism was published in September 2024: JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE (2024).

Other critics contend that originalism, while earnestly debated in the legal academy and conspicuously promoted by some Justices, is inconsistently employed in practice. For example, in his review of Fourth Amendment doctrine, Professor Lawrence Rosenthal found that Justice Antonin Scalia, an avowed originalist, actually voted on originalist grounds only a fraction of the time.[89] Additional research led Rosenthal to conclude that "authentically originalist adjudication is something like the Loch Ness Monster—much discussed, but rarely encountered."[90] Professor Eric Segall has likewise concluded that "[o]n the ground, originalism has been much more a dead end than a realizable destination."[91] That assessment finds empirical support in a forthcoming article by Professors Kevin Tobia, Neel Sukhatme, and Victoria Nourse.[92] Originalism's unpredictable application, others assert, reveals it to be a stalking horse for conservative decision-making.[93]

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89. *See* Lawrence Rosenthal, *An Empirical Inquiry into the Use of Originalism: Fourth Amendment Jurisprudence During the Career of Justice Scalia*, 70 HASTINGS L.J. 75, 99 (2018) ("[D]espite his professed commitment to originalism, Justice Scalia voted on originalist grounds in only 18.63% of cases in which the Court decided a disputed question of Fourth Amendment law."); *id.* at 100 ("In a slightly higher percentage of cases (20.59%), Justice Scalia referenced historical evidence or other indicia of original meaning, but did not cast his vote on that basis.").

90. Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1244 (2012).

91. *See* Eric Segall, *Originalism Diluted*, DORF ON LAW (Aug. 18, 2021), http://www.dorfonlaw.org/2021/08/originalism-diluted.html [https://perma.cc/8NYS-ER39] (arguing that originalism was never the law at the founding and has been inconsistently applied).

92. Kevin Tobia et al., Originalism as the New Legal Standard? A Data-Driven Perspective 60 (Feb. 1, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4551776 [https://perma.cc/JMB2-F99A] ("The data is also consistent with the notion that modern originalism remains a method only in some constitutional cases: The data shows that the current Court decides many constitutional cases—indeed a majority—without considering original meaning.").

93. *See, e.g.*, Michael C. Dorf, *Why Not to Be an Originalist*, DORF ON LAW (Nov. 14, 2019), http://www.dorfonlaw.org/2019/11/why-not-to-be-originalist.html [https://perma.cc/CHW8-X8AF] (suggesting that originalist judges "vote their ideological druthers"); Calvin TerBeek, *"Clocks Must Always Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821, 821–22 (2021) (tracing modern originalism to opposition of school integration); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 548 (2006) ("During the Reagan Presidency, however, 'originalism' emerged as a new and powerful kind of constitutional politics in which claims about the sole legitimate method of interpreting the Constitution inspired conservative mobilization in both electoral politics and in the legal profession.").

Debates over originalism's utility, however, show no signs of abating. Legal scholarship on originalism proliferates.[94] And, as noted above, it is widely understood that "originalism and textualism . . . are the key to understanding the Roberts Court."[95] Original public meaning originalism, specifically, is championed by at least two sitting Justices.[96] Accordingly,

94. *See e.g.*, William J. Magnuson, *Original Discontent*, 78 VAND. L. REV. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4815299 [https://perma.cc/8LTM-MUCR] (arguing that original discontent is an essential part of the founding and is more severe than is generally recognized); Joseph Blocher & Brandon L. Garrett, *Originalism and Historical Fact Finding*, GEO. L.J. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4538260 [https://perma.cc/482F-TBY7] (interrogating originalism's reliance on historical fact-finding); Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99 (2023) (addressing several issues with the concept of originalism-by-analogy); J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022) (arguing that obeying the original meaning of the constitution is necessary to achieving the common good of preserving the legitimate authority of the people); Ryan C. Williams, *Lower Court Originalism*, 45 HARV. J.L. & PUB. POL'Y 257 (2022) (examining lower courts' application of originalism); Sachs, *supra* note 74 (distinguishing the standards of originalism from its procedures); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021) (discussing how originalist critics are mistaken in stating that there were no early coercive, domestic congressional grants of rulemaking power when engaging with the Framers' Constitution); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (noting the absence of Founding era information that might support a nondelegation doctrine); Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1 (2020) (explaining how leading originalist accounts of executive power wrongly foreclose historical arguments and admit no caveats or exceptions); Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261 (2019) (exploring the utility of corpus linguistic methodology for originalism).

95. Emily Bazelon, *How Will Trump's Supreme Court Remake America?*, N.Y. TIMES (Feb. 27, 2020), https://www.nytimes.com/2020/02/27/magazine/how-will-trumps-supreme-court-remake-america.html [https://perma.cc/9XKY-NN6Q] (noting that the "Trump vision of the judiciary can be summed up in two words: 'originalism' and 'textualism'").

96. *See* Gorsuch, *supra* note 80; Brian Naylor, *Barrett, An Originalist, Says Meaning Of Constitution 'Doesn't Change Over Time'*, NPR (Oct. 13, 2020, 10:08 AM), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time [https://perma.cc/XD7S-X9R3]; United States v. Rahimi, 144 S. Ct. 1889, 1909 (2024) (Gorsuch, J., concurring) ("Faithful adherence to the Constitution's original meaning may be an imperfect guide, but I can think of no more perfect one for us to follow."); Barrett, *supra* note 25, at 1921 ("Originalism maintains both that constitutional text means what it did at the time it was ratified and that this original public meaning is authoritative.").

those invested in the Court must contend with originalism to an extent that was not true even five years ago.

### B. *Originalism's Rivals*

Though originalists have long claimed an absence of defensible alternatives to originalism, there are in fact many contenders. The most influential include pragmatism, common-law constitutionalism, popular constitutionalism, and Elysian representation-reinforcement.[97] While a comprehensive summary of these alternatives is beyond the scope of this Article, this Section briefly describes the contours of each. What matters here is simply that each of these alternatives comports with (and in many cases, facilitates) modern representative democracy (and therefore modern election law). In this regard, originalism is an outlier.

Pragmatism is a theory of both constitutional and statutory interpretation that relies on "practical reasoning" to resolve cases; it transparently considers the possible consequences of judicial decisions.[98] As summarized by former-Judge Richard Posner, pragmatism reflects "a determination to use law as an instrument for social ends."[99] Thus, judicial pragmatism is forward-looking, receptive to value judgments, and solution-focused.[100] The most prominent judicial advocate of pragmatism in recent years was former-Justice Stephen Breyer.[101] His election law jurisprudence, some of which is summarized below, reflects the symbiosis between pragmatism and democratic self-government.

The interpretive theory known as common-law constitutionalism is most closely associated with Professor David Strauss, who claims that our constitutional system is one of precedent and past practice, not original meanings.[102] The common law, he notes, has a distinguished history and provides a principled method of resolving novel disputes; one that, contrary to critics' claims, does in fact constrain judges.[103]

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97. *See supra* note 1.

98. *See* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 82–83 (2010).

99. Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1670 (1990).

100. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 465 (1990).

101. *See* BREYER, *supra* note 98; Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 YALE L.J. 1719, 1719–21 (2006).

102. STRAUSS, *supra* note 3, at 3.

103. *See id.*

Common law constitutionalism, Strauss claims, is more workable, more justifiable, more descriptively accurate, and more candid than originalism.[104] Given its emphasis on gradual evolution and adherence to precedent, one of the strengths of common-law constitutionalism is its preservation of our modern democratic norms and practices.

Popular constitutionalism is a general term encompassing a variety of arguments in support of resisting judicial supremacy and restoring interpretive authority in the public. At its core, it claims that "American constitutionalism assign[s] ordinary citizens a central and pivotal role in implementing their Constitution. Final interpretive authority rest[s] with 'the people themselves,' and courts no less than elected representatives [are] subordinate to their judgments."[105] Though advocates of popular constitutionalism vary in their understanding of the judicial role, most agree that the importance of preserving popular engagement with the Constitution is a necessary aspect of preserving "political self-determination" and "legitimacy in a democratic state."[106] Accordingly, popular constitutionalists would view any interpretive theory that undermines these goals as presumptively illegitimate.

Elysian representation-reinforcement is the intellectual contribution of Professor John Hart Ely.[107] A simplified description of this approach contends that judges should defer to elected officials unless doing so would compromise the democratic process, whether through self-dealing or the systematic marginalization of vulnerable minority groups.[108] Representation-reinforcement is expressly premised on preserving democratic self-government and has served as the predominant conceptual justification for much of modern election law.

While the nuances of each of these theories differ, what is important here is the simple observation that none of them pose an identifiable threat to democratic stability. That is, none of them introduce a non-trivial possibility of profoundly antidemocratic outcomes. In that regard, originalism stands alone. It should come as little surprise then, that, historically,

104. *Id.* at 43–46.
105. KRAMER, *supra* note 4, at 8.
106. Post & Siegel, *supra* note 4, at 20.
107. *See* ELY, *supra* note 5, at vii.
108. *Id.* at 103.

originalism has not played a meaningful role in election law doctrines. The next Part supplies some evidence of that fact.

## II. THE NON-ORIGINALISM OF ELECTION LAW

Before proceeding to the critiques of originalism, it is worth examining the decidedly non-originalist nature of election law. In modern election law's early years, between roughly 1940 and 1960, originalism was not yet nascent.[109] But even after originalism's emergence in the 1970s, it did not meaningfully influence election law's development.[110] However, originalism-inflected arguments do routinely appear across election law doctrines. While no complete catalogue of such arguments exists, they are found in nearly all types of election law cases. That said, with some conspicuous exceptions, I would describe the originalist reasoning found in election law doctrines as ceremonial—reflecting, at most, what Professor Michael Dorf has called "ancestral originalism."[111] In fact, such reasoning is often indistinguishable from simple historical analysis, which is, of course, conventional in constitutional law.[112]

A few caveats are necessary at the outset. First, this Part includes cases in which various types of originalist arguments (e.g., original intent arguments and original public meaning arguments) are present. At times, original public meaning

109. *See, e.g.*, United States v. Classic, 313 U.S. 299, 315–16 (1941) (recognizing primary elections as an integral part of the electoral process by stating that "[w]e may assume that the framers of the Constitution in adopting [Article I, Section 2], did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication, which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar.").

110. *See* Edward B. Foley, *Originalism and Election Law (or, The Difference between* Reynolds *and* Benisek*)*, ELECTION LAW BLOG (Mar. 21, 2018, 8:14 AM), https://electionlawblog.org/?p=98255 [https://perma.cc/8LNP-JVQP] ("Election Law as a distinct field of study was founded on decidedly 'non-originalist' premises.").

111. Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1801 (1997) (making a case for considering the Framers' thoughts because "tracing the historical origins of an idea elucidates the meaning of the idea and opens one up to possible meanings that may not be immediately apparent from an ahistorical perspective."). Dorf, a non-originalist, notably does not treat this form of originalism as dispositive in resolving cases.

112. Brandon J. Murrill, CONG. RSCH. SERV., R45129, MODES OF CONSTITUTIONAL INTERPRETATION 22–25 (2018), https://crsreports.congress.gov/product/pdf/R/R45129 [https://perma.cc/RZZ3-FMBK].

originalism is complemented by other versions; at other times, alternative versions of originalism exclusively appear. Second, several originalism-inflected arguments are included below despite predating the emergence of originalism as a recognized interpretive theory. They are included here to demonstrate the continuity of decisions invoking original meanings. Third, though the strength and significance of the arguments do vary, cases such as *Chiafalo v. Washington*[113] in which originalist interpretation is foregrounded (though not necessarily dispositive) are the clear exception. Fourth, not all originalist arguments are authored by those considered to be originalist Justices. Even if Justice Elena Kagan may have overstated matters in saying "we are all originalists,"[114] few Justices reject originalism-inflected arguments altogether. And finally, this overview is necessarily abridged. Inventorying the complete history of originalist reasoning in election law cases is infeasible in this project. Readers who are already familiar with the case law, or those primarily interested in the critiques of originalism, can jump ahead to Part III.

### A. *Rare Exceptions*

Following Donald Trump's surprise victory in the 2016 presidential election, ten presidential electors (the most since 1872[115]) broke their respective states' pledge laws by casting their Electoral College ballots for former-Secretary of State Colin Powell, Senator Bernie Sanders, and others, despite their obligation to vote for their states' chosen nominee (whether Trump or Hillary Clinton).[116] Some of these individuals were party to a desperate gambit to keep Trump from the White House;[117] others simply preferred different candidates.[118] In most instances, these "faithless electors" were either replaced

113. 591 U.S. 578 (2020).

114. Harry Litman, *Originalism, Divided*, ATLANTIC (May 25, 2021), https://www.theatlantic.com/ideas/archive/2021/05/originalism-meaning/618953/ [https://perma.cc/7VS3-JAQ2].

115. *See Presidential Elections*, FAIRVOTE (Oct. 2022), https://fairvote.org/resources/presidential-elections/ [https://perma.cc/T3FP-SYTP].

116. *2016 Electoral College Results*, NAT'L ARCHIVES, https://www.archives.gov/electoral-college/2016 [https://perma.cc/CU4N-3SQB].

117. *See* Jesse Wegman, *The Electoral College is a Confusing Mess*, N.Y. TIMES (May 13, 2020), https://www.nytimes.com/2020/05/13/opinion/supreme-court-electoral-college.html [https://perma.cc/TE7Y-SYMT].

118. *Id.*; *"Faithless Electors' Explain Their Last-Ditch Attempt to Stop Donald Trump*, GUARDIAN (Dec. 19, 2016), https://www.theguardian.com/us-news/2016/dec/19/electoral-college-faithless-electors-donald-trump [https://perma.cc/8F9E-3UD5].

or, in the case of those living in Washington State, fined $1,000.[119]

Rather than paying the fine, a handful of the electors sued, claiming a constitutional right to cast their Electoral College ballots for whomever they preferred, a position ultimately rejected, unanimously, by the Supreme Court in *Chiafalo*.[120] In her opinion for the Court, Justice Kagan principally relied on both the text of Article II, Section 1 of the Constitution and historical practice.[121] Article II, Section 1, the Electors Clause, requires each state to appoint presidential electors "in such Manner as the Legislature thereof may direct."[122] In interpreting that provision, Justice Kagan observed that the Framers likely would have included additional language had they intended to afford presidential electors the discretion plaintiffs sought. In the Founding era, she noted, both Maryland and Kentucky relied on electors (elected by popular vote) to select state senators, and, notably, both states' constitutions contained language suggestive of elector discretion.[123] It was therefore instructive, she determined, that no such language was included in the Electors Clause despite James Madison's and Alexander Hamilton's familiarity with Maryland's system.[124]

Regarding contemporaneous public meaning, Justice Kagan noted that as early as 1796, in "the Nation's first contested election," electors committed themselves to support their party's chosen candidate.[125] She quoted Professor Keith Whittington's claim that, in the Founding era, presidential electors "*were understood to be* instruments for expressing the will of those who selected them, not independent agents authorized to exercise their own judgment."[126] And she went on to describe how "[c]ourts and commentators throughout the

119. Wegman, *supra* note 117.

120. Chiafalo v. Washington, 591 U.S. 578, 597 (2020).

121. *Id.* at 588 ("The Constitution's text and the Nation's history both support allowing a State to enforce an elector's pledge to support his party's nominee—and the state voters' choice—for President.").

122. U.S. CONST. art. II, § 1, cl. 2.

123. *Chiafalo*, 591 U.S. at 590 (noting that Maryland and Kentucky's Founding-era constitutions expressly referred to electors' "judgment and conscience").

124. *Id.* at 590–91.

125. *Id.* at 593. This is evidence of at least the *electors'* contemporaneous understanding of the Electors Clause. What the broader public believed is uncertain.

126. *Id.* (emphasis added) (quoting Keith Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903, 911 (2017)).

[nineteenth] century recognized the electors as merely acting on other people's preferences."[127]

Though Justice Kagan's *Chiafalo* opinion seemingly gives substantial weight to ratification-era history, it is arguable whether it can properly be considered an originalist decision. That is because, in addition to the history it mines, it also emphasizes the "long settled and established practice" of electors *not* using their independent judgment about which presidential candidate to vote for.[128] That focus on a consistent practice of elector non-discretion is arguably at least as important to the case's outcome as the historical analysis.[129]

Constitutional cases involving the right to vote have at times also heavily relied on originalist reasoning. In 1872, a Missouri woman named Virginia Minor filed a lawsuit challenging the constitutionality of the state's denial of voting rights to women.[130] She claimed that the Fourteenth Amendment's Privileges or Immunities Clause entitled her, as a citizen of the United States, to vote.[131] In rejecting this claim, a unanimous Supreme Court held, in *Minor v. Happersett*,[132] that while the

127. *Id.* at 595.

128. *See id.* at 592–93 ("From the first, States sent [electors] . . . to vote for pre-selected candidates, rather than to use their own judgment."). I bracket here a consideration of so-called "liquidation" and whether it properly supplements original public meaning originalism in this instance. On liquidation, see generally William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019). For an argument that liquidation provides no answer to this issue, see Rebecca Green, *Liquidating Elector Discretion*, 15 HARV. L. & POL'Y REV. 53, 76–77 (2020) ("[P]erhaps applying liquidation principles to the question of faithless electors is neither conclusive nor instructive."). Professors Guy-Uriel Charles and Luis Fuentes-Rohwer read the case as decidedly non-originalist, viewing it as "entrench[ing] a particular and modern view of political participation." Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, Chiafalo: *Constitutionalizing Historical Gloss in Law and Democratic Politics*, 15 HARV. L. & POL'Y REV. 15, 19 (2020).

129. The same could be true of the Court's decision in *U.S. Term Limits, Inc. v. Thornton*, which involved the question of whether states may impose term limits on members of Congress. 514 U.S. 779, 783 (1997). In denying states that right, Justice John Paul Stevens's lead opinion relied as much on historical material—the Constitutional Convention and state ratification debates, see generally *id.* at 806–15—as it did on general democratic principles, see generally *id.* at 819–22. The same was true for Justice Anthony Kennedy's concurring opinion, which relied on both ratification history and the "political reality that our National Government is republican in form and that national citizenship has privileges and immunities protected from state abridgement by the force of the Constitution itself." *Id.* at 842 (Kennedy, J., concurring).

130. KEYSSAR, s*upra* note 26, at 181.

131. *Id.*

132. 88 U.S. 162 (1874).

Fourteenth Amendment may have created some new citizens, it "did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it."[133] This assertion led the Court to ask whether "suffrage was coextensive with the citizenship of the States at the time of [the Constitution's] adoption."[134]

As modern readers we can recognize this as an originalist inquiry. And given the abbreviated history of American democracy recounted above, we know that in 1788–1789 "in no State were all citizens permitted to vote. Each State determined for itself who should have that power."[135] As observed by Professor Alexander Keyssar, the opinion "formally ratified the severance of national citizenship from suffrage that the late-eighteenth-century authors of the Constitution had devised as a solution to their own political problems."[136] As further evidence of the absence of a constitutionally protected right to vote, the Court considered what we today would regard as compelling evidence of original public meaning.

Specifically, the opinion noted that "[n]o new State has ever been admitted to the Union which has conferred the right of suffrage upon women, and this has never been considered a valid objection to her admission."[137] This was true regarding both the states that joined the Union in the late eighteenth century as well as those readmitted after the Civil War.[138] Finally, the Court questioned why, if in fact the Fourteenth Amendment prohibited vote denial, ratification of the Fifteenth Amendment was necessary.[139] Taken as a whole, the originalist approach employed in *Minor* offers no federal constitutional protection for the right to vote.

Originalism was similarly employed in *Richardson v. Ramirez*,[140] a case involving the constitutionality of felon disenfranchisement.[141] Three California felons who had completed their sentences and paroles had their voter registration applications rejected under a provision of the

133. *Id.* at 171.
134. *Id.*
135. *Id.* at 172.
136. KEYSSAR, s*upra* note 26, at 181.
137. *Minor*, 88 U.S. at 177.
138. *Id.* at 177–78.
139. *Id.* at 175. The same could of course be asked about the Nineteenth Amendment.
140. 418 U.S. 24 (1974).
141. *Id.* at 26–27.

California constitution that denied the right to vote to those convicted of an "infamous crime."[142] The felons claimed a violation of the Equal Protection Clause.[143] Plaintiffs' argument was rejected on multiple grounds, including "that at the time of the adoption of the [Fourteenth] Amendment, 29 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes."[144]

In addition to this evidence, the Court, as it had in *Minor*, bolstered its holding by pointing to "the congressional treatment of States readmitted to the Union following the Civil War."[145] Included within the enabling legislation authorizing readmission was language expressly permitting felon disenfranchisement.[146] The Court interpreted this language as evidence of "the understanding of those who framed and ratified the Fourteenth Amendment."[147] By contrast, Justice Thurgood Marshall, writing in dissent, criticized the majority for relying on antiquated notions of equality:

> Disenfranchisement for participation in crime . . . was common at the time of the adoption of the Fourteenth Amendment. But "constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber."[148]

These exceedingly rare exceptions aside, originalism—at least an originalism with any heft—is notably absent from election law doctrine.

### B. *Voting Rights Act Cases*

One of the Supreme Court's most maligned modern election law decisions is *Shelby County v. Holder*.[149] Commonly referred to as the decision that "gutted" the Voting Rights Act of 1965 (VRA),[150] it "dismantled the nation's long-established voting

142. *Id.*
143. *Id.* at 33.
144. *Id.* at 48.
145. *Id.*
146. *Id.* at 49.
147. *See id.* at 48.
148. *Id.* at 76 (Marshall, J., dissenting) (quoting Dillenburg v. Kramer, 469 F.2d 1222, 1226 (9th Cir. 1972)).
149. 570 U.S. 529 (2013).
150. *See, e.g.*, *The Supreme Court Abandons Voting Rights*, N.Y. TIMES (July 1, 2021), https://www.nytimes.com/2021/07/01/opinion/supreme-court-voting-law.html [https://perma.cc/42AG-F82E].

rights enforcement regime and, in turn, engendered a plethora of controversial state and local voting laws regarding voter identification, voter registration, and voter access that have resulted in racial and ethnic voter discrimination."[151] Chief Justice John Roberts's majority opinion eliminated the preexisting obligation of certain states and local governments with a history of discrimination to get federal government approval before making any changes to their voting systems (known as preclearance).[152]

Prior constitutional challenges to the VRA had failed, with the Court in each instance deferring to Congress's considered judgment that the statute was appropriately tailored to address voter discrimination.[153] But in this instance, the majority reasoned, it was necessary to invalidate the preclearance regime as a means of upholding "the principle that all States enjoy equal sovereignty."[154] The majority found the statute's singling out of select jurisdictions constitutionally problematic.[155] Many have criticized the "invented tradition" of equal sovereignty employed in *Shelby County*.[156] Relevant here is the majority's uncompelling attempt to ground the equal sovereignty principle in history.[157]

As a reason for undoing the preclearance regime, the opinion references the decision made at the Constitutional Convention to reject a proposal to give the federal government veto power over state laws.[158] It later contends that "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized."[159] Methodologically, this style of reasoning can hardly be

151. Joshua S. Sellers, Shelby County *as a Sanction for States' Rights in Elections*, 34 ST. LOUIS U. PUB. L. REV. 367, 367 (2015).

152. *See* Joshua S. Sellers & Justin Weinstein-Tull, *Constructing the Right to Vote*, 96 N.Y.U. L. REV. 1127, 1337 (2021) (summarizing the preclearance requirement).

153. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966); Georgia v. United States, 411 U.S. 526, 533 (1973); City of Rome v. United States, 446 U.S. 156, 176–78 (1980), *superseded by statute*, 42 U.S.C. § 1973(b); Lopez v. Monterey County, 525 U.S. 266, 283–84 (1999).

154. *Shelby County*, 570 U.S. at 535.

155. *Id.* at 556–57.

156. Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1211 (2016).

157. *Id.* at 1212.

158. *Shelby County*, 570 U.S. at 542.

159. *Id.* at 544 (quoting Coyle v. Smith, 221 U.S. 559, 580 (1911)).

classified as originalism, relying as it does on dubious, essentially thematic presumptions about the Founding era.[160]

### C. *Reapportionment and Partisan Gerrymandering Cases*

The Court's mid-twentieth-century reapportionment "revolution," perhaps more than any other line of cases, highlights the inherent tension between originalism and election law. The invalidation of malapportioned electoral districts from coast to coast marked the Court's leap into the so-called "political thicket,"[161] a move that drastically upended American politics by constitutionally mandating equipopulous districts.[162] As Professor Ned Foley has noted, "The Warren Court made no effort to derive this 'one-person, one-vote' requirement from the original meaning of the Equal Protection Clause."[163] Subsequent attempts to do so have been unavailing, as the contrary evidence is strong.[164] Recall Justice Felix Frankfurter's dissent in *Baker v. Carr*,[165] the 1962 case in which the majority found reapportionment cases justiciable:

> However desirable and however desired by some among the great political thinkers and framers of our government, [equipopulous districting] has never been generally practiced, today or in the past. It was not the English system, it was not the colonial system, it was not the system chosen for the national government by the Constitution, it was not the system exclusively or even predominantly practiced by the States at the time of adoption of the

160. *See* Litman, s*upra* note 156, at 1233 ("[A]n analysis of the original meaning of the Constitution reveals no clear understanding or expectation that the Constitution prohibits Congress from distinguishing among the states.").

161. Colegrove v. Green, 328 U.S. 549, 556 (1946).

162. *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 185 (6th ed. 2016) ("One result of these decisions is that legislative districting has now become a permanent part of the Court's docket, particularly during the years immediately following the constitutionally required decennial census that reveals which states (and which regions within the states) gained or lost population.").

163. Foley, *supra* note 110.

164. *See* ERIC J. SEGALL, ORIGINALISM AS FAITH 54 (2018) ("If [*Reynolds v. Sims*] is correct as a matter of constitutional law (and maybe it is), it is not because text, history, original meaning, or prior case law supported the decision."); Derek T. Muller, *Perpetuating "One Person, One Vote" Errors*, 39 HARV. J. L. & PUB. POL'Y 371, 371 (2016).

165. 369 U.S. 186 (1962).

> Fourteenth Amendment, it is not predominantly practiced by the States today.[166]

These arguments were echoed in Justice John Marshall Harlan's dissent in *Wesberry v. Sanders*,[167] where the majority held that malapportioned congressional districts violate Article I, Section 2 of the Constitution.[168] In referencing the Constitutional Convention, Justice Harlan noted that

> in all the discussion surrounding the basis of representation of the House and all of the discussion whether Representatives should be elected by the legislatures or the people of the States, there is nothing which suggests even remotely that the delegates had in mind the problem of districting within a State.[169]

This history, coupled with a similar absence of attention within the ratifying states, led Justice Harlan to conclude that "[t]he constitutional right which the Court creates is manufactured out of whole cloth."[170]

In a companion case, *Reynolds v. Sims*,[171] which applied the "one-person, one-vote" principle to state legislative districts, Justice Harlan again dissented, basing his opinion on "the language of the Fourteenth Amendment taken as a whole, by the understanding of those who proposed and ratified it; and by the political practices of the States at the time the Amendment was adopted."[172] As to the original public meaning of the Fourteenth Amendment, Justice Harlan detailed how malapportioned state legislative districts were codified in over a dozen state constitutions in the late nineteenth and early twentieth centuries.[173] For these and related reasons, "*Reynolds* sits uneasily in the canon of contemporary constitutional jurisprudence."[174] As a historical matter, these originalist dissents have force. Yet, they are dissents. The

166. *Id.* at 301 (Frankfurter, J., dissenting).
167. 376 U.S. 1 (1964).
168. *Id.* at 17–18; U.S. CONST., art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States.").
169. *Wesberry*, 376 U.S. at 31–32 (Harlan, J., dissenting).
170. *Id.* at 41–42.
171. 377 U.S. 533 (1964).
172. *Id.* at 591 (Harlan, J., dissenting).
173. *Id.* at 608–10 (Harlan, J., dissenting).
174. Foley, *supra* note 110.

majority opinions in these reapportionment cases, to say nothing of the adjacent election law doctrines built on their premises (e.g., minority vote dilution and racial gerrymandering doctrines), are rather plainly irreconcilable with originalism.[175]

This makes the appearance of originalist arguments in recent apportionment cases particularly notable. In *Evenwel v. Abbott*,[176] for instance, the Court took up the question of whether states are constitutionally *required* to draw legislative districts based on their voter-eligible population as opposed to their total population.[177] Plaintiffs argued, in other words, that the constitutional requirement of equipopulous districts requires the creation of districts that exclude non-citizens.[178] The creation of such districts, they claimed, are necessary to protect voter equality.[179]

In rejecting plaintiffs' argument, Justice Ruth Bader Ginsburg's opinion for the Court noted that, during the debates over the Fourteenth Amendment's ratification, Representative Thaddeus Stevens proposed an amendment that would have changed the way that congressional House seats are allocated to states from an allocation based on total population to one based on voter population.[180] The fact that this proposal was rejected, she noted, gives credence to the claim that total population is a permissible redistricting denominator.[181] To find otherwise, she went on, would undermine the notion of "representational equality"[182]—the notion that elected representatives represent *all* people, not just voters.[183] In support of this point Justice Ginsburg quoted a statement made on the Senate floor by Senator Jacob Howard during the congressional debates over the Fourteenth Amendment's ratification;[184]

> The committee adopted numbers as the most just and satisfactory basis, and this is the principle upon

175. On the fundamental incompatibility of originalism and the constitutional minority vote dilution and racial gerrymandering doctrines, see Crum, *supra* note 13, at 1829.

176. 578 U.S. 54 (2016).

177. *Id.* at 57–58.

178. *Id.* at 63.

179. *Id.*

180. *Id.* at 66, 70.

181. *Id.* at 66–70.

182. *Id.* at 64.

183. *Id.*

184. *Id.* at 67.

> which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such, I think, after all, is the safest and most secure principle upon which the Government can rest.[185]

The notion that either the Framers or those members of Congress who supported the Fourteenth Amendment shared an identifiable vision of representation was attacked by Justices Thomas and Alito, each of whom wrote separate concurring opinions.[186] On Justice Thomas's reading of history—a history drawn from *Federalist 51*,[187] Gordon Wood's "*The Creation of the American Republic 1776-1787*,"[188] and the Framers' collective understanding—"designing a government to fulfill the conflicting tasks of respecting the fundamental equality of persons while promoting the common good requires making incommensurable tradeoffs. For this reason, [the Framers] did not attempt to restrict the States to one form of government."[189] Justice Ginsburg's opinion, in his estimation, relied on a "flawed reading of history" and "wrongly pick[ed] one side of a debate that the Framers did not resolve in the Constitution."[190]

Justice Alito similarly critiqued Justice Ginsburg's "profoundly ahistorical" reliance on how congressional House seats are allocated.[191] Rather than reflecting "any abstract theory about the nature of representation," the decision by those debating the Fourteenth Amendment to maintain total population, he argued, reflected a predominant concern with "the distribution of political power among the States."[192] Moreover, to Justice Alito, Senator Howard's statements about representational equality were disingenuous: "The bottom line is that in the leadup to the Fourteenth Amendment, claims about representational equality were invoked, if at all, only in service of the *real* goal: preventing southern States from acquiring too much power in the National Government."[193]

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185. CONG. GLOBE, 39th Cong., 1st Sess. 2760, 2767 (1866).

186. *See Evenwel*, 578 U.S. at 85, 86 (Thomas, J., concurring); *id.* at 96 (Alito, J., concurring).

187. *Id.* at 81 (Thomas, J., concurring).

188. *Id.* at 82.

189. *Id.* at 85–86.

190. *Id.* at 81.

191. *Id.* at 96 (Alito, J., concurring).

192. *Id.*

193. *Id.* at 102.

How should this exchange between Justices Ginsburg, Thomas, and Alito be understood? On the one hand, the *Evenwel* opinions seem to foreground originalist arguments, a harbinger perhaps of the then-emergent originalism that has since taken hold at the Court. On the other hand, Justice Ginsburg's opinion also relied on "settled practice," observing that the adoption of plaintiffs' position "as constitutional command would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for decades, even centuries."[194] So, while originalist arguments clearly informed the resolution of *Evenwel*, they do not appear to have been dispositive.

Building off the reapportionment cases, originalist arguments are sporadically invoked in partisan gerrymandering cases as well. Partisan gerrymandering is the manipulation of redistricting maps for partisan gain.[195] The Court first considered its constitutionality in 1986,[196] and revisited the issue in 2004,[197] 2006,[198] and 2018.[199] In each instance, the Justices failed to agree on whether manageable standards for assessing partisan gerrymanders could be established, and therefore, whether partisan gerrymandering claims were justiciable.[200] In 2019, in *Rucho v. Common Cause*,[201] the Court ultimately determined that partisan gerrymandering claims are nonjusticiable in federal courts.[202] So, for the foreseeable future, partisan gerrymandering cases will be exclusively heard in state courts. That said, the existing cases are nevertheless revealing.

Consider, for instance, Justice Sandra Day O'Connor's concurring opinion in the 1986 case, *Davis v. Bandemer*,[203] in which she concluded that partisan gerrymandering claims are nonjusticiable. Her opinion was premised on her belief that the Framers of the Constitution "unquestionably intended" to leave

194. *Id.* at 73 (Ginsburg, J., majority).

195. *Gerrymandering*, BLACK'S LAW DICTIONARY (12th ed. 2024).

196. *See* Davis v. Bandemer, 478 U.S. 109, 113 (1986), *abrogated by* Rucho v. Common Cause, 558 U.S. 684, 718 (2019).

197. *See* Vieth v. Jubelirer, 541 U.S. 267, 271 (2004).

198. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 409–10 (2006).

199. *See* Gill v. Whitford, 585 U.S. 48, 53 (2018).

200. *See Davis*, 478 U.S. at 123, 125; *League of United Latin Am. Citizens*, 548 U.S. at 413–14; *Vieth*, 541 U.S. at 271–72; *Gill*, 585 U.S. at 65.

201. 588 U.S. 684 (2019).

202. *Id.* at 718.

203. 478 U.S. 109 (1986).

such claims to legislatures.[204] She further noted that "no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment."[205] In *Vieth v. Jubelirer*,[206] the 2004 case, Justice Scalia's opinion arguing against justiciability observed that political gerrymandering not only has been traced "back to the Colony of Pennsylvania at the beginning of the 18th century, where several counties conspired to minimize the political power of the city of Philadelphia"[207] but also "remained alive and well (though not yet known by that name) at the time of the framing."[208]

This history was recounted by Chief Justice Roberts in *Rucho*, in which the Framers' design of Article I, Section 4, the Elections Clause, was deemed instructive: "The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress."[209] Though the Chief Justice's opinion did not rely on originalism, a point acknowledged in Justice Kagan's dissent,[210] it found some support in the fact that partisan gerrymandering can be traced to the founding.[211]

### D. *Political Party Cases*

Election law encompasses a wide variety of disputes involving the parameters of the constitutional rights of political parties. These cases are difficult to reconcile with originalism, given the Framers' despisal of political parties and failure to account for the central role they would come to play in American politics.[212] The Framers' oversight helps explain why

204. *Id.* at 144 (O'Connor, J., concurring).

205. *Id.* at 147.

206. 541 U.S. 267 (2004).

207. *Id.* at 274.

208. *Id.*

209. Rucho v. Common Cause, 588 U.S. 684, 699 (2019).

210. *Id.* at 728 (Kagan, J., dissenting) (observing that "the majority does not frame [the fact that partisan gerrymandering is longstanding] as an originalist constitutional argument").

211. *See id.* at 696.

212. SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 370 (6th ed. 2022) ("How should originalist methods of constitutional interpretation deal with modern issues in state regulation of political parties, given that the Constitution itself was designed to avoid the very existence of parties?"); Klarman, *supra* note 75, at 386 ("[T]he Framers abhorred political

few political party cases contain originalist arguments. It is fair to say that "[h]istory has left behind the vision that actors contemporaneous with the Constitution's formation held of political parties, and there is no way to recapture their world and refashion ours in its image."[213] In fact, it is perhaps more accurate to describe many of the arguments in this line of cases as not at all originalist, but, rather, as rooted in broad notions about Founding-era traditions and aspirations.

The most originalist-inflected Supreme Court political party case may be *Tashjian v. Republican Party*,[214] which considered the constitutionality of Connecticut's closed primary law.[215] At the time, Connecticut law permitted only voters registered with a party to vote in that party's primary election; independents or non-registered voters were barred from doing so.[216] The Republican Party of Connecticut (the party), however, desired to let independent voters participate in its primary election for members of Congress.[217] In defense of the closed primary law, the state claimed that by allowing this exception, the party would violate the Qualifications Clause of Article I, Section 2 of the Constitution.[218] That clause provides: "[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[219] By these terms, as noted above, one's eligibility to vote in federal elections is contingent upon one's state-conferred eligibility to vote in state elections.[220] As argued by the State, by allowing independents to vote in the party's congressional primary election (but not the party's *state* legislative primary election), a dual qualification system would be created that would violate the Qualifications Clause.[221]

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parties—which, almost by definition, devote themselves to *partial* agendas rather than the common good of the whole—and certainly did not [assume] they would exist under the Constitution.").

213. Robert W. Bennett, *Originalism: Lessons from Things That Go Without Saying*, 45 SAN DIEGO L. REV. 645, 664–65 (2008).

214. 479 U.S. 208 (1986).

215. *Id.* at 208.

216. *Id.*

217. *See id.*

218. *Id.* at 225.

219. U.S. CONST. art. I, § 2, cl. 1.

220. *Id.*

221. *Tashjian*, 479 U.S. at 225 ("Appellant argues here . . . that implementation of the Party rule would violate the Qualifications Clause . . . because it would establish qualifications for voting in congressional elections which differ from the voting qualifications in elections for the more numerous house of the state legislature.").

In the majority opinion invalidating the state law, Justice Marshall acknowledged that the Framers "in adopting the Qualifications Clause . . . [were] not contemplating the effects of that provision upon the modern system of party primaries."[222] Yet he went on to quote James Madison, Oliver Ellsworth, and Benjamin Franklin in support of his conclusion that nothing "require[s] that qualifications for exercise of the federal franchise be at all times precisely equivalent to the prevailing qualifications for the exercise of the franchise in a given State."[223] An understanding of the Framers' purpose, Justice Marshall stated, helped determine that "a perfect symmetry of voter qualifications in state and federal legislative elections"[224] is not required. In dissent, Justice Stevens found the dual qualification system to violate the Qualifications Clause and criticized the inference drawn by Justice Marshall from the Constitutional Convention debates.[225]

*Tashjian*'s originalist tone is an outlier. It is more common to see "soft" originalist arguments in political party cases—arguments based on Founding era traditions or the Framers' democratic aspirations. For example, in *California Democratic Party v. Jones*,[226] a case involving the constitutionality of California's so-called "blanket primary" system, Justice Scalia's majority opinion noted that "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."[227] This ability, he reasoned, is a tradition that is "almost concurrent with the formation of the Republic itself."[228] This style of soft originalism, a nod of sorts to the post-Revolutionary political world, is hard to ascribe meaning to. Whatever its import, this style has no claim to rigor, as it "makes no attempt to fathom original intention, understanding, or meaning with regard to political parties."[229]

222. *Id.* at 226.
223. *Id.* at 228–29.
224. *Id.* at 227, 229.
225. *Id.* at 232–34 (Stevens, J., dissenting).
226. 530 U.S. 567 (2000).
227. *Id.* at 574.
228. *Id.*
229. Bennett, *supra* note 213, at 665.

## E. *Campaign Finance Cases*

Originalism-inflected arguments appear with some frequency in campaign finance cases, primarily because the bulk of campaign finance doctrine is a subgenre of First Amendment doctrine and because the self-governance rationale for freedom of speech, which can be traced to the founding, has found a receptive audience among Supreme Court Justices.[230] Justice Thomas's dissenting opinion in *Nixon v. Shrink Missouri Government PAC*[231] is emblematic of this point. The case involved Missouri's limits on the amount of money donors could give to state political candidates.[232] Plaintiffs unsuccessfully argued that the limits were unconstitutional.[233] In dissent, though, Justice Thomas relied on the writings of James Madison to reinforce what he called "the primary object of First Amendment protection"[234]: "The Founders sought to protect the rights of individuals to engage in political speech because a self-governing people depends upon the free exchange of political information."[235]

Justice Breyer echoed this view in *McCutcheon v. Federal Election Commission*,[236] dissenting from the Court's invalidation of statutory aggregate limits on political donations to federal candidates.[237] Quoting philosopher Jean-Jacques Rousseau, Justice James Wilson's "*Commentaries on the Constitution of the United States*," and *Federalist 57*, Justice Breyer argued that "the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech *matters*."[238]

*Randall v. Sorrell*[239] involved the question of whether Vermont's exceedingly low contribution limits were

230. *See, e.g.*, Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (noting that free speech is "essential to effective democracy"), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969). *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (discussing the freedom of speech promised by the Constitution).

231. 528 U.S. 377 (2000), *vacated sub nom.* Bray v. Shrink Mo. Gov't PAC, 528 U.S. 1148 (2000).

232. *Id.* at 382.

233. *Id.* at 377, 380.

234. *Id.* at 410–11 (Thomas, J., dissenting).

235. *Id.* at 411.

236. 572 U.S. 185 (2014).

237. *See id.* at 238 (Breyer, J., dissenting).

238. *Id.* at 237.

239. 548 U.S. 230 (2006).

constitutional.[240] Justice Breyer's opinion for the Court found that the limits were unconstitutional in part because they made it extremely difficult for challengers to mount effective campaigns against incumbents.[241] Writing in dissent, Justice Stevens lamented that neither the majority opinion nor the cases it relied on "pay heed to how the Framers"[242] would have approached the central question. He noted, "I am firmly persuaded that the Framers would have been appalled by the impact of modern fundraising practices on the ability of elected officials to perform their public responsibilities."[243]

Originalism-inflected arguments made in this context are often vague and pitched at a high level of generality. Because much of the doctrine rests on defining corruption,[244] significant attention has been put to Founding-era views on bribery, graft, and the obligations attendant to representation.[245]

Taken as a whole, the sampling of cases summarized in this Section reflects democratic self-government as practiced "in the messy and second-best realm of lived experience."[246] The cases, while reflective of pragmatist, common-law constitutionalist, popular constitutionalist, and representation-reinforcing modes of interpretation, are by and large not originalist, because applying any strong form of originalism to modern democratic self-government would be a radically regressive prospect.

### F. *Scholarship on Election Law and Originalism*

Given the non-originalist nature of election law, it is unsurprising that existing scholarship on election law and originalism is relatively spare. To date, scholars have not closely examined the near-categorical incompatibility between the topics, nor have they examined the paradox in the fact that originalists routinely extol originalism as preservative of

240. *Id.* at 236.

241. *Id.* at 236–37, 250, 256.

242. *Id.* at 280 (Stevens, J., dissenting).

243. *Id.*

244. *See* Joshua S. Sellers, *Contributions, Bribes, and the Convergence of Political and Criminal Corruption*, 45 FLA. ST. U. L. REV. 657, 657 (2018).

245. *See, e.g.*, Lawrence Lessig, *What an Originalist Would Understand "Corruption" to Mean*, 102 CAL. L. REV. 1, 7–10 (2014); ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO *CITIZENS UNITED* 38–40 (2014).

246. Samuel Issacharoff, *Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World*, 98 N.C. L. REV. 1, 14 (2019).

democratic self-government, while ignoring how originalism imperils democratic self-government as currently practiced.

Why have these issues been neglected? Perhaps the absence of clear constitutional text on the nature of the political process has discouraged interest in the original public meaning of democratic self-government. With no affirmative right to vote in the Constitution,[247] the search for the original public meaning of voting rights may strike many as a fool's errand. Relatedly, many experts may simply view the two topics as categorically irreconcilable. As detailed in Part III, for most of American history representative government was wanting.[248] To some, then, there may be little sense in trying to square the circle.

Another possibility is that the seeming inconsistency between election law and originalism is subsumed by larger debates about constitutionalism, democratic legitimacy, and judicial review. There is a wealth of academic commentary on the structural features of the Constitution and the relationship between those features—as understood by the Framers and the citizenry—and representative democracy.[249] And, of course, there is an enormous literature on the countermajoritarian difficulty and judicial review.[250] Much of that literature reflects concerns about democratic legitimacy. Perhaps, then, there may seem to be little novelty in narrowly focusing on retail-level election law questions. This perspective is unsatisfying. The problem with this view is that, despite the comprehensiveness of the existing commentary, its engagement with originalism is minimal. That is, it explores democratic norms and practices at a very high level of generality, one that most originalists renounce.

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247. *See generally* U.S. CONST. (including general propositions preventing the abridgement of voting but containing no provision affirmatively guaranteeing the right to vote).

248. *See* discussion *infra* Part III.

249. *See generally, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2008); AKHIL R. AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2006); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1998).

250. *See, e.g.*, Bassok, *supra* note 66; Erwin Chemerinsky, *Foreward: The Vanishing Constitution*, 103 HARV. L. REV. 43, 71 (1989) (stating that the countermajoritarian difficulty "set the terms for the contemporary debate over judicial review"); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CAL. L. REV. 2323 (2021); ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986).

As for election law scholars, most of us have devoted our attention to the already formidable challenge of reconciling election law doctrine with "interpretive approaches based on the evolving historical practices of American democracy."[251] In other words, seeking coherence between garden-variety constitutional law and election law is challenging enough without contemplating the implications of applied originalism. Whatever the case, the extant scholarship is surprisingly thin. This Section reviews, to my knowledge, most of what exists.

Professor Ilya Somin is one of the few to challenge the notion that originalism is democracy-enhancing. In an essay reviewing former-Judge Robert Bork's constitutional thought, Somin observes that "[o]ver the last twenty to thirty years, it has become increasingly clear that consistent adherence to originalism would often require judges to impose more constraints on democratic government rather than fewer."[252] While Somin does not address election law doctrines, he does posit, albeit tentatively, that original public meaning originalism might be reconciled with modern democracy on "representation-reinforcing" grounds.[253] Under this way of thinking, judicial review of election laws might be justified as a means of promoting democratic self-government.[254] The problem with this suggestion, as previously noted, is that the original public meaning of democratic self-government was exceedingly narrow in 1789, 1791, and 1868.[255] Ultimately, Somin acknowledges that "even if we push such ideas as far as they can reasonably go, it seems unlikely that representation-reinforcement can be stretched far enough to cover all, or even most, elements of the original meaning."[256] Somin's observations illustrate that the relationship between originalism and democratic self-government is vexing.

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251. Reuter et al., *supra* note 7, at 690 (comments by Richard Pildes).

252. Ilya Somin, *The Borkean Dilemma: Robert Bork and the Tension Between Originalism and Democracy*, 80 U. CHI. L. REV. ONLINE 243, 243 (2017).

253. *Id.* at 250–51. Somin explains that:

> The most obvious way to reconcile democracy and originalist judicial review is to argue that enforcement of the original meaning actually promotes democracy rather than detracts from it—not because the original meaning was democratically enacted, but because adherence to it has 'representation-reinforcing' effects.

*Id.*

254. *Id.*

255. *See* discussion *infra* Part III.

256. Somin, *supra* note 252, at 251.

Ned Foley has more straightforwardly considered election law and originalism. In an article on partisan gerrymandering (published prior to the Court's opinion in *Rucho v. Common Cause*), Foley presents two arguments for why, in his view, originalism compels federal courts to invalidate partisan gerrymanders.[257] The first is that doing so effectuates the constitutional protection of the "republican form of government."[258] The second is that partisan gerrymandering of congressional districts implicitly violates the original understanding of the Elections Clause.[259] Elsewhere, Foley has expanded on these arguments, asserting that partisan gerrymandering violates the original understanding of Article I, Section 2.[260] In a separate article, Foley mines the history of due process to argue that the Fourteenth Amendment's Due Process Clause can be interpreted to constrain excessive partisanship.[261] In his telling, "the Fourteenth Amendment itself rests on the foundation that partisan overreaching is antithetical to the success of constitutional self-government."[262] In making these claims, then, Foley seeks to use originalism to

257. Edward B. Foley, *Constitutional Preservation and the Judicial Review of Partisan Gerrymanders*, 52 GA. L. REV. 1105, 1110–11 (2018).

258. *Id.* at 1126; *accord* U.S. CONST. Art. IV, § 4.

259. *See* Foley, *supra* note 257, at 1146 ("State laws that gerrymander congressional districts so that a political party is able to retain power despite the electorate's shift in views and desire to remove that party from power are subversive of the Elections Clause's original purpose."); *accord* U.S. CONST. Art. I, § 4.

260. Edward B. Foley, *The Gerrymander and the Constitution: Two Avenues of Analysis and the Quest for a Durable Precedent*, 59 WM. & MARY L. REV. 1729, 1762–63 (2018). Foley also explains that:

> [I]nsofar as partisan gerrymandering causes Congress to remain beholden to the interests of a political party long after that party has lost public support—and thus Congress pursues the interests of a faction rather than the public interest, and yet gerrymandering has distorted the electoral system so that "the People" are unable to make Congress responsive to the public will rather than the self-serving faction—then gerrymandering contravenes the most basic original understanding of how biennial elections to the federal House of Representatives were supposed to operate.

Foley, *supra* note 110.

261. *See* Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 699 (2017) ("From a Dworkinian perspective, this history provides enough grounds to interpret the Due Process Clause of the Fourteenth Amendment, insofar as it already embodies the norm of fair play, as entailing a constitutional constraint against excessive partisanship.").

262. *Id.* at 708.

preserve representative democracy against partisan abuses.[263] Regrettably, following *Rucho*, his arguments lack an audience in federal courts.

Professor Travis Crum has explored in detail the original understanding of the Fifteenth Amendment and questioned why modern doctrine "treats the Fourteenth Amendment as the font for voting rights, whereas the Fifteenth Amendment is a constitutional afterthought—a superfluous amendment."[264] Through a detailed examination of Reconstruction-era debates prior to ratification of the Fifteenth Amendment, Crum concludes that "Congress's Fifteenth Amendment enforcement authority is distinct from—and broader under current doctrine than—its Fourteenth Amendment authority."[265] And in a more recent article, he offers an extensive history of the original understanding of the Fifteenth Amendment, ultimately concluding that "the original public meaning of the Fifteenth Amendment's text and context suggest that it could apply to [race-based] redistricting."[266]

Professor Rebecca Green, in a fascinating article about faithless electors, challenges the logic of the Supreme Court's decision in *Chifalo*, claiming that, based on the full historical record, it "is hard to argue that the Framers intended anything but elector discretion in the original design."[267] And beyond the Framer's intent, "[n]orms of Electoral College design, history, and practice in the states suggest that elector *discretion* is settled and accepted practice."[268] While Green ultimately equivocates on the import of the historical record,[269] her article is among the few to directly wrestle with the original public meaning of discrete election law issues.

The same can be said of the scholars, including Professors Michael Morley,[270] Carolyn Shapiro,[271] Vikram Amar, Akhil

263. *Id.*

264. Crum, *supra* note 17, at 1551.

265. *Id.* at 1555.

266. Crum, *supra* note 13, at 1905.

267. Green, *supra* note 128, at 54.

268. *Id.* at 55.

269. *Id.* at 76 ("Fifty-one Electoral College meetings over the course of dozens of presidential elections does not produce clean answers about either practice or popular expectation.").

270. Michael T. Morley, *The Independent State Legislatures Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 2 (2020).

271. Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 137 (2023).

Amar,[272] Leah Litman, and Kate Shaw,[273] who, in the lead-up to the *Moore v. Harper* litigation, wrote about the so-called "independent state legislature theory (ISLT)."[274] The ISLT is a controversial reading of the Constitution that empowers state legislatures to unilaterally regulate federal elections, even over the decisions of state courts and state executive officials.[275] These scholars' projects examine the original public meaning of the Elections Clause. I discuss the ISLT at greater length in Part III.

On campaign finance doctrine, Professor Larry Lessig argues that an originalist interpretation of the Constitution reveals that Congress is corrupt.[276] More precisely, "the way we fund elections has created a dependency that conflicts with the dependency intended by the Constitution."[277] Lessig emphasizes that an institution can be corrupt even if the individuals that make up the institution are not.[278] He sees Congress as tarnished by what he calls "dependence corruption," even if bribes and other forms of corruption are infrequent.[279] His originalist interpretation of corruption leads him to conclude that "limits on [political] contributions designed to reduce a competing, and hence improper, dependence could be upheld, even if limitations on expenditures would not."[280]

Finally, Professor Yasmin Dawood offers a cautionary analysis of election law and originalism.[281] It is cautionary because it warns against an "elitist conception of democracy"[282] that has manifest in recent election law cases, one that "has certain continuities (and discontinuities) with theories of republicanism that existed at the time of the Founding."[283] Though Dawood correctly observes that most election law

272. Vikram D. Amar & Akhil R. Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 1 (2022).

273. Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235, 1235 (2022).

274. Shapiro, *supra* note 271, at 140; Litman & Shaw, *supra* note 273.

275. Shapiro, *supra* note 271, at 140.

276. Lessig, *supra* note 245, at 2.

277. *Id.* at 5.

278. *Id.* at 2.

279. *Id.* at 11.

280. *Id.* at 23.

281. Yasmin Dawood, *Election Law Originalism: The Supreme Court's Elitist Conception of Democracy*, 64 ST. LOUIS U. L.J. 609, 609 (2020).

282. *Id.* at 610.

283. *Id.*

opinions are not thoroughly originalist, she suggests that "some of the Court majority's arguments in the cases display an 'originalist orientation.'"[284] This orientation indicates, troublingly, that "at least for some issues, the founding era is serving as an implicit baseline for the conservative wing of the Court."[285] Taken as a whole, the extant scholarship on election law and originalism does not meaningfully engage the profound dissonance between the two topics.

I turn now to the external and internal critiques of originalism.

## III. ORIGINALISM AND MODERN DEMOCRACY (THE EXTERNAL CRITIQUE)

The external critique of originalism is premised on the fact that, if actually employed in many modern election law cases, original public meaning originalism would introduce the non-trivial likelihood of unacceptably undemocratic outcomes. Its application would jeopardize a host of laws, regulations, and institutional arrangements that are core features of modern American politics. Election law originalism, in other words, would have bad democratic consequences.

Of course, democracy is a notoriously elusive concept. Even a narrowed focus on representative democracy in the United States elicits a series of questions. Should elected representatives serve as delegates or trustees?[286] What degree of democratic participation is required to qualify a democracy as representative?[287] Do we have too many elections, too much participatory democracy?[288] At minimum, though, taking account of our democratic evolution, democratic self-government derives its authority and credibility from its accommodation of diverse interests;[289] execution of frequent,

284. *Id.* at 626.

285. *Id.*

286. For the classic treatment of this question, see HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION 146–47 (1967).

287. *See, e.g.*, James A. Gardner, *Democratic Legitimacy Under Conditions of Severely Depressed Voter Turnout*, U. CHI. L. REV. ONLINE 24, 24 (2020) (exploring the relationship between participation and democratic legitimacy).

288. *See* BRUCE C. CAIN, DEMOCRACY MORE OR LESS, AMERICA'S POLITICAL REFORM QUANDRY 71 (2014).

289. *See* DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION 4–5 (2nd ed. 1971).

fair (minimally defined), and inclusive elections;[290] commitment to the peaceful transfer of power from electoral losers to winners; and, perhaps most crucially, capacity to produce government outcomes that align with the will of the people.[291] Each of these conditions are familiar in democratic theory and widely accepted in practice. No credible observer would argue that a democracy characterized by factional dominance, sham elections, severely circumscribed voting rights, a reluctance by elected officials to relinquish political office, and the systemic misalignment between the desires of voters and the actions of politicians qualifies as representative.[292]

Constitutional theory does not take account of or seek to accommodate these democratic conditions in express terms. That is, the abstract nature of constitutional theory rarely brings it in contact with the nitty-gritty of democratic administration or retail-level democratic performance.[293] Some may find this unproblematic; constitutional theories, they might argue, can be defended on grounds that are independent of their base-level consequences. But there is a strong counterargument that any compelling constitutional theory must find some correspondence between its procedural and substantive dimensions—between its first-, second-, and third-

290. THE FEDERALIST NO. 52 (James Madison); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1480, 1522 (1985) ("From its inception, modern political theory has attempted to discover and articulate a theory about authority that can serve as an acceptable substitute for the belief in the authority of an outside entity or order, religious or otherwise. Our own political theory, 'democracy,' locates this source of authority in the members of society. The most important consequence of this theory of authority has been that the people should have supervisory rights over governing bodies, exercised primarily through an election process.").

291. THE FEDERALIST NO. 52 (James Madison); *see* Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 313–16 (2014) (summarizing the intellectual pedigree of this condition).

292. In previous work, I have argued that the right to vote—an essential component of democracy—should entail an affirmative obligation on the part of the government to create robust, inclusive electoral structures. *See* Sellers & Weinstein-Tull, *supra* note 152, at 1157–59. More recently, Professor Owen Fiss has argued that the right to vote should be understood to include "the duty of facilitation," which he describes as "an affirmative duty on the states to manage the election process in a way that minimizes the practical difficulties citizens might experience in trying to exercise the right to vote." FISS, *supra* note 37, at 148. Others may view these features as exceeding what is absolutely necessary in a democracy.

293. *See generally* Andrew Coan, *The Foundations of Constitutional Theory*, 2017 WIS. L. REV. 833 (providing a critique of constitutional theory's failure to account for normative foundations).

order concerns.[294] And originalist theory does, in fact, devote great attention to consequences of various sorts.[295] Thus, it seems fair to scrutinize originalism through the lens of election law as a test of its utility. This inquiry reveals enormous tension between the "fixity" sought by originalists,[296] and election law's conceptual underpinnings.

Modern election law is the product of constitutional inferences. Consider, for example, the right to vote. With no express voting rights provision in the Constitution, the right is imported from Article I, Section 2; the Fourteenth; Fifteenth; Seventeenth; Nineteenth; Twenty-Fourth; and Twenty-Sixth Amendments.[297] Campaign finance doctrine rests on the judicial extension of First Amendment speech rights to political spending.[298] And the constitutional doctrine pertaining to political party rights rests on the First Amendment right of association, itself a twentieth-century judicial creation.[299] This unique developmental arc complicates any attempt to apply originalism to election law.

To reiterate, election law originalism requires, at a minimum, discerning the original public meaning of democratic self-government in 1789, 1791, and during the Reconstruction era, when the Fourteenth and Fifteenth Amendments were ratified. It requires consideration of how elections were administered and what representative government entailed at those historical moments. In pursuing this line of thinking, it should be said that taking seriously historians' claims about the challenge of ascertaining and assessing historical ideas means being humble about the limits of our knowledge. This is

294. *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 126 (2018) ("In order to meet the resulting challenges to the possibility of legally and morally legitimate decision making in the Supreme Court, we need an approach that integrates constitutional theorizing more indissolubly into the practice of identifying the proper outcomes of concrete cases while preserving enough bite to ensure meaningful consistency and good faith in constitutional argumentation.").

295. *See* Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1380 (1990) ("The originalist faces backwards, but steals frequent sideways glances at consequences.").

296. GIENAPP, *supra* note 88, at 25–27 (describing and questioning originalists' conception of fixity).

297. *See* FISS, *supra* note 37, at 2 ("[The] right [to vote] is not directly or explicitly granted by the Constitution but rather is assumed or necessarily implied from the democratic character of the government it establishes. The right to vote is immanent in the Constitution.").

298. *See* Buckley v. Valeo, 424 U.S. 1, 19 (1976).

299. *See*, John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485, 506 (2010).

particularly true regarding the Founding era, a period of great ideological upheaval, political tumult, and social transformation.[300] Prevailing political understandings at the time were complex and contradictory, and I claim no expertise.

With that qualification, scholars largely agree that the predominant conception of democracy in the Founding era was, by modern standards, decidedly antidemocratic. "The American Revolution," writes Alexander Keyssar, "produced modest, but only modest, gains, in the formal democratization of politics."[301] In the colonial era and under the Articles of Confederation, prosperous white men reserved the vote for themselves, expressly codifying voting restrictions in colonial and state laws.[302] The Framers' views on the shape of republican government and the nature of political participation were in many ways antithetical to those of non-elites. James Madison, *the* essential figure in the Constitution's structure and ratification,[303] embodied the Federalists' "elitist social perspective."[304] He feared that an expansion of voting rights would spell the end of republicanism.[305] To his mind, "once power was held by a propertyless majority, republican government would not long survive. It, and the liberty that it fostered, would soon be replaced by either a despotic or an oligarchic regime."[306] Other prominent figures of the time, speaking "[b]ehind the closed doors of the Philadelphia convention . . . referred to democracy in disparaging terms—

300. WILLIAM HOGELAND, INVENTING AMERICAN HISTORY 114 (2009) ("A hundred-year war rages in history circles over what was really going on at the founding when it comes to equality, liberty, and law, and how those relationships affected the writing and ratification of the Constitution we live by every day.").

301. KEYSSAR, *supra* note 26, at 24.

302. *Id.* at 5 ("For more than a decade before the founding fathers arrived in Philadelphia, individual states had been writing their own suffrage laws. These laws almost everywhere were shaped by colonial precedents and traditional English patterns of thought. The lynchpin of both colonial and British suffrage regulations was the restriction of voting to adult men who owned property.").

303. *See* Michael J. Klarman, *The Founding Revisited*, 125 HARV. L. REV. 544, 544–46 (2011) (reviewing PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION (2010)).

304. GORDON S. WOOD, POWER AND LIBERTY: CONSTITUTIONALISM IN THE AMERICAN REVOLUTION 87 (2021).

305. *See generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787 46–90 (1998) (discussing the origins and concept of republicanism in the United States).

306. Dawood, *supra* note 281, at 619.

'the worst . . . of all political evils'—according to Elbridge Gerry."[307]

Structurally, the Constitution sought to promote democratic deliberation, establish competing power centers with the aim of mitigating factionalism (and the prospect of tyranny), and discourage self-interested representation.[308] The establishment of voting qualifications, however, was left to the states; the right to vote in federal elections is contingent upon having met the qualifications determined by one's home state.[309]

And it is in the states that more capacious views on democratic participation gradually took root. Keyssar recounts how "the laws governing the right to vote in the United States were greatly elaborated and significantly transformed between 1790 and the 1850s."[310] He connects this shift to three developments: "widespread and significant changes in the social structure and social composition of the nation's population; the appearance or expansion of conditions under which the material interests of the enfranchised could be served by broadening the franchise; and the formation of broadly based political parties that competed systematically for votes."[311] As a result of these developments, "[r]estrictions on the franchise that appeared normal or conventional in 1780 came to look archaic in subsequent decades."[312]

With this history in mind, consider the scope of the right to vote through the lens of original public meaning originalism. The absence of the right to vote in the constitutional text "left

307. Klarman, *supra* note 303, at 571; *see also* WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION 5 (2007) ("[The Framers'] great hope was that the federal convention would find a way to put the democratic genie back in the bottle."). William Hogeland describes how Virginia Governor and Constitutional Convention delegate Edmund Randolph opened the Convention. "Our chief danger," Randolph said, "arises from the democratic parts of our constitutions." William Hogeland, *Our Chief Danger: The Story of the Democratic Movements that the Framers of the U.S. Constitution Feared and Sought to Suppress*, 13 LAPHAM'S Q. (2020), https://www.laphamsquarterly.org/democracy/our-chief-danger [https://perma.cc/UES7-DZZW].

308. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 436–37 (1987).

309. *See* U.S. CONST. art. I, § 2, cl. 1; *see also* Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2090 (2018) ("Although states were required to maintain a republican form of government, the Constitution did not compel them to extend the right to vote for state or local offices to any particular people.").

310. KEYSSAR, s*upra* note 26, at 28.

311. *Id.* at 34.

312. *Id.* at 42.

the federal government without any clear power or mechanism, other than through constitutional amendment, to institute a national conception of voting rights, to express a national vision of democracy."[313] Political parties—so important to the gradual expansion of voting rights—are themselves absent from the constitutional text. In short, many questions about the structure of electoral politics in the late eighteenth century yield answers that are in fundamental tension with modern democratic norms.[314]

Perhaps, though, 1789 can largely be ignored. To the extent that the Constitution protects the right to vote, that protection has been located in the Fourteenth Amendment's Equal Protection Clause.[315] Perhaps, therefore, our historical point of reference should be Reconstruction. As put by New York Times columnist Jamelle Bouie, "[o]ur politics would likely look very different if Reconstruction were the basis for our common constitutional understanding, if founders' chic included [John] Bingham and [Charles] Sumner as much as Madison and Benjamin Franklin, and our jurists were preoccupied with bringing the original meaning and intent of those amendments to bear on American life."[316] Under this conception, perhaps the challenge of aligning originalism and modern democracy is made less daunting.

Although this conception has force, the history of Reconstruction and the original public meaning of the Reconstruction Amendments make this conception hard to sustain. First, as Professor Thomas Colby has detailed, the ratification of the Fourteenth Amendment was essentially a power play, rather than a deliberative process reflecting

313. *Id.* at 24; *see* Morley, *supra* note 309, at 2091 ("[T]he Constitution originally treated elections as a primarily political issue rather than a matter of constitutional right.").

314. If the best that can be said is that "the U.S. Constitution is a curious amalgam of textual silences, astute insights into the risks and temptations of political power, archaic assumptions that subsequent developments quickly undermined, and a small number of narrowly targeted more recent amendments that reflect more modern conceptions of politics," ISSACHAROFF ET AL., *supra* note 212, at 5, one wonders how much weight should be assigned to *The Federalist Papers*, ratification debates, or Founding-era democratic norms when resolving election law cases.

315. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966); Yick Wo v. Hopkins, 118 U.S. 356, 370–71 (1886).

316. Jamelle Bouie, *Which Constitution is Amy Coney Barrett Talking About?*, N.Y. TIMES (Oct. 16, 2020), https://www.nytimes.com/2020/10/16/opinion/amy-coney-barrett-originalism.html [https://perma.cc/XYC2-6TWA].

approval by a supermajority of the American people. In his words:

> The Fourteenth Amendment was a purely partisan measure, drafted and enacted entirely by Republicans in a rump Reconstruction Congress in which the Southern states were denied representation; it would never have made it through Congress had all of the elected Senators and Representatives been permitted to vote. And it was ratified not by the collective assent of the American people, but rather at gunpoint.[317]

In the midst of these dynamics, finding clarity on how the average member of the public felt about political rights is dubious.

To the extent that clarity exists, the original public meaning of the Fourteenth Amendment provided no voting protection and, in fact, "tacitly recognized the right of individual states to erect racial barriers."[318] As numerous scholars have noted, the Fourteenth Amendment was understood to protect civil, as opposed to political, rights, including the right to vote.[319] Ratification of the Fifteenth Amendment, which prohibits voter discrimination "on account of race, color, or previous condition of servitude,"[320] was a monumental achievement, yet, like the Fourteenth Amendment, it stopped short of guaranteeing voting rights. As put by Professor Eric Foner, "the tradition of state control of voting requirements was deeply entrenched, and many northern states, while willing to see black men enfranchised, did not wish to surrender that power."[321] Even this historical snapshot complicates any argument that the

317. Colby, *supra* note 64, at 1629; *see also* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 56 (2019) ("Without the South being held in what many Republicans called the 'grasp of war,' the [Republican] party would not have enjoyed the two-thirds majority in both houses of Congress necessary for the adoption of the Fourteenth Amendment.").

318. *See* KEYSSAR, s*upra* note 26, at 90–91; *see also* Morley, s*upra* note 309, at 2091 ("The Reconstruction Amendments expressly mention voting rights but, as originally intended and understood, left Congress largely in control. Section 1 of the Fourteenth Amendment contains the Due Process and Equal Protection Clauses, which have come to be construed as the primary constitutional sources of the right to vote. Neither Clause mentions voting, however.").

319. *See, e.g.*, Travis Crum, *The Unabridged Fifteenth Amendment*, 133 YALE L.J. 1039, 1054–55 (2024).

320. U.S. CONST. amend. XV, § 1.

321. FONER, s*upra* note 317, at 101.

Reconstruction Amendments' original public meaning should dictate the resolution of modern election law cases.

As further evidence of this point, consider the broader stakes in context. Even though "originalists tend either to say little about the difficulty in squaring their approach with foundational commitments of the contemporary constitutional order, or to insist that the difficulty is not so severe, because originalism already embodies those commitments,"[322] election law presents originalism with a uniquely hard case. It is uniquely hard because, while many originalists indicate a willingness to impose significant economic and social costs on society as a byproduct of originalism, the calculus is altered when democratic self-government is in the balance. The burden therefore rests on originalists to justify the "extraordinarily radical purge of established constitutional doctrine"[323] that would accompany election law originalism.[324] Below, I provide three examples of how a strong form of originalism threatens to imperil democratic structures, practices, and norms that are essential to modern democratic self-government.

### A. *The Independent State Legislature Theory*

The ISLT is an interpretation of the Constitution's Elections and Electors Clauses, which assign principal authority over the regulation of federal elections to state *legislatures*. The interpretation goes as follows: The Elections Clause states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."[325] Regarding presidential elections, the Electors Clause states that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the

322. Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193, 201 (2015).

323. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 713 (1975)*; see also* STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 158 (1996) ("If the adoption of originalism by the Court as the sole or primary method of constitutional interpretation would therefore be a significant departure from the status quo, originalists must assume a heavy normative burden.").

324. *See* Reuter et al., *supra* note 7, at 692 (comments by Richard Pildes) (questioning the possibility of reconciling originalism and election law).

325. U.S. CONST. art. I, § 4, cl. 1.

Congress[.]"[326] Under the textual commands of these provisions, the theory goes, state *legislatures* are empowered to regulate federal elections and select slates of presidential electors for the Electoral College, respectively. The ISLT presumes that these provisions empower state legislatures *exclusively* (unless Congress overrides a state legislative time, place, or manner regulation), *even if* their actions conflict with state executive actions or state constitutional law.[327] Put differently, under the theory, when state legislatures act under either Clause, they are "operat[ing] in a state-constitution-free zone."[328] Interpreting the Clauses in this way would radically unsettle American election law and speed the nation's democratic decline.[329]

Until recently, the ISLT was an anachronism.[330] Yet, among the arguments made by former-President Trump's lawyers in the wake of the 2020 presidential election were claims that the ISLT prevents states, most notably Pennsylvania, from counting late-arriving mail-in ballots.[331] The specific argument made in Pennsylvania was that the Supreme Court of Pennsylvania's decision to require the counting of the ballots violated the Elections Clause.[332] As asserted in the briefing, any other reading of the Clause "would instigate a battle between the state's courts and its legislature, and the Elections Clause

326. U.S. CONST. art. II, § 1, cl. 2.

327. *See, e.g.*, Morley, *supra* note 270, at 9 ("Because these provisions confer power over federal elections specifically upon state legislatures, state constitutions cannot restrict the scope of that authority.").

328. Carolyn Shapiro, *Calibrating Judicial Review to the Times*, SLOGBLOG (Jan. 25, 2022), https://www.sloglaw.org/post/calibrating-judicial-review-to-the-times [https://perma.cc/MC62-SW8C].

329. *See* Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 289 n.128 (2022) ("[J]udicial acceptance of the strong reading of the independent state legislature doctrine would create a potential earthquake in American election law by upending everything from voter initiatives setting the rules for congressional primaries to normal election administration decisions of state and local election administrators — not to mention, rendering state constitutional protections for voting rights a nullity in congressional and presidential elections.").

330. Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 504 (2021) ("Though some courts continued to apply the [ISLT] into the early twentieth century, it fell into desuetude, its historical background minimized or forgotten.").

331. *See* Richard L. Hasen, *Trump's Legal Farce Is Having Tragic Results*, N.Y. TIMES (Nov. 23, 2020), https://www.nytimes.com/2020/11/23/opinion/trump-election-courts.html [https://perma.cc/36B5-VV9X].

332. *See id.*

plainly sides with 'the legislature' in that dispute."[333] Though the merits of the ISLT were not resolved in the Pennsylvania litigation, similar litigation was underway elsewhere.

In June 2023, the Supreme Court issued an opinion in *Moore v. Harper*,[334] an ISLT case that arose from North Carolina.[335] The underlying litigation involved a partisan gerrymandering claim first brought in state court.[336] That litigation culminated in an opinion from the North Carolina Supreme Court holding that the congressional districting map enacted by the Republican-controlled legislature was an unconstitutional partisan gerrymander.[337] In challenging that holding at the Supreme Court, the state legislature argued that the Elections Clause—which, again, expressly empowers state *legislatures*—precluded the North Carolina Supreme Court from invalidating its congressional map.[338] A majority of the United States Supreme Court rejected that interpretation of the Elections Clause,[339] though it did not entirely foreclose future ISLT claims.[340] In fact, such claims reemerged, initially, in, state-level litigation about former-President Trump's eligibility to be placed on Colorado's presidential primary ballot.[341] So, while the strong form of the ISLT is thankfully off the table, the

333. Emergency Application for a Stay Pending the Filing Disposition of a Petition for a Writ of Certiorari at 24, Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732 (2021) (No. 20-542).

334. 600 U.S. 1 (2023).

335. Harper v. Hall, 868 S.E.2d 499 (N.C. 2022), *reh'g granted*, 882 S.E.2d 548 (N.C. 2023), *cert. granted sub nom.* Moore v. Harper, 600 U.S. 1 (2023).

336. *Harper*, 868 S.E.2d at 513.

337. *Id.* at 544.

338. *See* Petition for Writ of Certiorari at 26–27, *Moore*, 600 U.S. 1 (2022) (No. 21-1271).

339. *Moore*, 600 U.S. at 15 ("The Elections Clause does not insulate state legislatures from the ordinary exercise of judicial review.").

340. Specifically, the Court held that, though state legislative decisions are not immune from judicial review, there is a point at which judicial review becomes invalid. *See id.* at 29 ("We hold only that state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."); *see also* Leah H. Litman & Katherine Shaw, *The "Bounds" of* Moore*: Pluralism and State Judicial Review*, 133 YALE L.J. F. 881, 883 (2024) ("[T]he Court's failure to clearly and decisively repudiate the ISLT in *Moore* means that the ISLT may continue to pose a threat to meaningful rights protection by state courts, and more broadly to state-level democracy.").

341. *See, e.g.*, Brief of the Merits for Respondent Jena Griswold, Secretary of State of Colorado at 34–35, Trump v. Anderson, 144 S. Ct. 662 (2024) (No. 23-719) (describing arguments related to state court power under the Elections Clause in light of the *Moore* ruling).

theory continues to linger and has recently appeared in some of the Election 2024 litigation.[342]

Why, exactly, is the ISLT so potentially harmful to democracy? For one, it provides license to ongoing efforts by state legislatures across the country—many of which are bastions of fringe political views[343]—to introduce biased electoral rules and regulations with potentially outcome-determinative effects.[344] In other circumstances, it might prevent state courts from invalidating egregious partisan gerrymanders, thereby eliminating partisan gerrymandering claims altogether (again, such claims are already "nonjusticiable" in federal courts). And it threatens to empower state legislatures to override the countless decisions that are currently the province of election administrators, the majority of whom work at the local level.[345] It is easy to imagine any number of additional dangers that would significantly undermine democratic self-government.

The central point, as illustrated by a brief review of the *Moore* litigation, is that originalism uniquely invites these possibilities. Petitioners' brief relied almost exclusively on the text and Founding-era understanding of the Elections Clause.[346] As argued in the brief, the "Court's analysis in this case must begin with the Constitution's text, and it can end there as well."[347] The brief placed principal reliance on the Constitution's drafting history, including, specifically, debates

342. *See, e.g.*, Petition for a Writ of Certiorari at I, Jacobsen v. Mont. Democratic Party, No. 24-220 (U.S. *petition for cert. filed* Aug. 26, 2024), https://www.supremecourt.gov/DocketPDF/24/24-220/323346/20240826115911672_Petition.pdf [https://perma.cc/3ZPQ-88D8] (raising an ISLT issue); Petition for Allowance of Appeal at 5–6, Baxter v. Phila. Bd. of Elections, No. 1309 CD 2024 (Pa. Commw. Ct. filed Nov. 12, 2024), https://electionlawblog.org/wp-content/uploads/395-396-EAL-2024-Petition-for-Allowance-of-Appeal-Election.pdf [https://perma.cc/5KCN-54PQ] (same).

343. *See* Krysten Crawford, *The Roots of Legislative Polarization: How State Elections are Producing a More Extreme Pipeline of Political Candidates*, STAN. INST. FOR ECON. POL'Y RSCH. (Feb. 28, 2022), https://siepr.stanford.edu/news/roots-legislative-polarization-how-state-elections-are-producing-more-extreme-pipeline [https://perma.cc/V2FP-MHFL].

344. *See* JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS 152–53 (2022) ("Although the national level may show troubling signs of diminishing democracy, state governments are *the* primary actors who administer democratic backsliding in practice and on the ground.").

345. *See* Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1363–64 (2020) (documenting "states' attempts to displace local governments' structural authority").

346. *See* Brief for Petitioners at 14–15, *Moore*, 600 U.S. 1 (No. 21-1271).

347. *Id.* at 13.

internal to the Constitutional Convention's Committee of Detail.[348] It additionally invoked what it called the "clear preponderance of the practice of the States in the first few decades of the Republic,"[349] including the fact that "21 of the 24 States admitted by 1830 did not impose any substantive state-constitutional limits expressly governing federal elections."[350] Multiple amicus briefs filed in support of petitioners advanced similar arguments.[351] Revealingly, non-originalist arguments played a strikingly minor role in both petitioners' brief and in the briefs of supportive amici. This is not to say that the few relevant Supreme Court precedents went unmentioned, but it was clear from the filings that petitioners' hopes rested on a majority of the Court adopting an originalist reading of the Elections Clause.

The absence of non-originalist arguments in petitioners' brief can be contrasted with the arguments of the state respondents, which, while rebutting petitioners' historical evidence,[352] also warned against the sanctioning of "grievous practical consequences for elections across the country."[353] Respondents' brief also considered democracy as currently practiced, highlighting that "[t]oday, *not a single State* uses an elections regime in which the state legislature alone sets the rules governing congressional elections."[354] Amici writing in support of respondents similarly drew attention to the dire consequences of adopting a strong form of the ISLT.[355]

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348. *Id.* at 15–17.

349. *Id.* at 12.

350. *Id.* at 3.

351. *See, e.g.*, Brief of Amici Curiae the Republican National Committee et al. at 10–16, *Moore*, 600 U.S. 1 (No. 21-1271); Brief for *Amicus Curiae* Restoring Integrity and Trust in Elections, Inc. in Support of Petitioners at 12–15, *Moore*, 600 U.S. 1 (No. 21-1271); Brief of the National Republican Redistricting Trust as *Amicus Curiae* in Support of Petitioners at 5–9, *Moore*, 600 U.S. 1 (No. 21-1271).

352. Brief by State Respondents at 27–31, *Moore*, 600 U.S. 1 (No. 21-1271).

353. *See id.* at 55.

354. *Id.*

355. *See, e.g.*, Brief of Professor Richard L. Hasen as *Amicus Curiae* Supporting Respondents at 27, *Moore*, 600 U.S. 1 (No. 21-1271) ("Petitioners' Elections Clause theory not only threatens voter confidence in the integrity of the election process and in the judiciary; it also may pave the way for other efforts to subvert free and fair elections in the United States."); Brief of *Amici Curiae* Campaign Legal Center et al. in Support of Respondents at 27, *Moore*, 600 U.S. 1 (No. 21-1271) ("By removing checks on partisan gerrymandering, as well as other antidemocratic state legislative action, Petitioners' interpretation of the Elections Clause would accelerate the vicious cycle of polarization, extremism, and dysfunction already imperiling the

Under any non-originalist theory of constitutional interpretation currently in use, it is difficult to imagine petitioners' arguments having had *any* chance at success. While I, of course, cannot prove the counterfactual, the notion that pragmatism, common-law constitutionalism, popular constitutionalism, or representation-reinforcement would accommodate the maximalist version of the ISLT proposed by the *Moore* petitioners is fanciful. In fact, the Chief Justice's majority opinion in *Moore* is a rather classic common-law constitutionalist opinion, opening its Elections Clause analysis with a discussion of the few relevant precedents,[356] and then chastising both petitioners and the dissenting Justices for ignoring them.[357] As is conventional across election law doctrines, *Moore* is a decidedly non-originalist opinion.

To be sure, many commentators critiqued the legitimacy of the ISLT on originalist grounds. For example, Carolyn Shapiro argued that "the pre-2000 history demonstrates that from the Founding, Congress, drafters of state constitutions, state legislatures, and state courts have all repeatedly either rejected the ISLT outright or proceeded on the understanding that it did not exist."[358] Vikram and Akhil Amar contended that the ISLT directly contradicts original constitutional understandings, the actions of state legislatures, and precedent.[359] Leah Litman and Kate Shaw stated that the ISLT is "fatally inconsistent with basic precepts of both federalism and the separation of powers."[360] And Professor Evan Bernick, in his *Moore* amicus brief, argued that the "original public meaning of the Elections Clause precludes [the North Carolina legislature's] atextual and ahistorical claim that state legislatures wield arbitrary power, unbound by their state constitutions, to enact legislation to regulate federal elections."[361] To reiterate, originalism certainly does not compel antidemocratic outcomes. But, as

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health of American democracy."); Brief of Democracy & Race Scholars as *Amici Curiae* in Support of Respondents at 32, *Moore*, 600 U.S. 1 (No. 21-1271) ("The ISLT, however, would plunge the democratic processes into chaos."). In full disclosure, I was involved with preparing the latter brief.

356. *See Moore*, 600 U.S. at 2081–83.

357. *See id.* at 2083 (noting that both petitioners and the dissent "simply ignore[] the precedent just described").

358. Shapiro, *supra* note 271, at 155.

359. Amar & Amar, *supra* note 272, at 17.

360. Litman & Shaw, *supra* note 273; *see also* Litman & Shaw, *supra* note 340, at 881 ("[T]he logic of *Moore* is fatal to [a maximalist] version of the ISLT.").

361. Brief of Professor Evan Bernick as *Amicus Curiae* in Support of Respondents at 1, *Moore*, 600 U.S. 1 (No. 21-1271).

evidenced by the *Moore* litigation, among prevailing theories, it alone invites them.

### B. *Districting and Equality*

Section II.C. discussed the inherent tension between reapportionment doctrine and originalism. And it described how the Court, in *Evenwel v. Abbott*, resolved only that states are not *required* to draw legislative districts based on their voter-eligible population (as opposed to their total population).[362] The Court notably did not address whether states *may* do so, and that question is likely to reappear before the Court.[363] Given the vigorous originalist opinions in *Evenwel* by Justices Thomas and Alito, and, again, the changed composition of the Court, an originalist decision confirming that states *may* draw districts based around various population segments remains plausible. In fact, some scholars have concluded that under an originalist interpretation of the Constitution, this may very well be the "correct" outcome.[364] Such an outcome would also be deeply disruptive to a modern conception of democratic self-government.

The main reason this issue has not yet reemerged is the absence of reliable data that would permit states to draw districts based on the citizen-voting-age-population.[365] Former-President Trump's Department of Commerce controversially sought to add a citizenship question to the 2020 Census,[366] but the Supreme Court blocked that effort for being pretextual.[367] Yet, some states are currently attempting to gather their own

362. Evenwel v. Abbott, 578 U.S. 54, 58 (2016).

363. That is, the majority opinion did not settle whether states are constitutionally *required* to use their total population when drawing districts. *See id.* at 94 (Alito, J., concurring). Consequently, as soon as a state uses a denominator other than total population, litigation will follow.

364. *See* Muller, *supra* note 164, at 395 ("The States remain in their sound discretion to apportion representatives among the people of their States as they see fit. The Constitution demands nothing else.").

365. *See* Jeff Zalesin, *Beyond the Adjustment Wars: Dealing with Uncertainty and Bias in Redistricting Data*, 130 YALE L.J. F. 186, 208–12 (2020).

366. Michael Wines, *A Census Whodunit: Why Was the Citizenship Question Added?*, N.Y. TIMES (Dec. 2, 2019), https://www.nytimes.com/2019/11/30/us/census-citizenship-question-hofeller.html [https://perma.cc/VJN2-AHH3].

367. Dep't of Com. v. New York, 588 U.S. 752, 784–85 (2019); *see also* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1785–94 (2021) (analyzing the *Department of Commerce* ruling as one of political accountability enforcement).

citizenship data,[368] an effort that finds strong support in the Republican Party.[369] Some of this data is likely to influence the 2030 redistricting cycle, a prospect that raises concerns about its completeness, accuracy, and potential to be used for partisan ends.[370]

As we know from the contrary opinions in *Evenwel*, originalism will be central to courts' resolutions of any disputes over the appropriate redistricting denominator. Resolving the central debate—whether "representational equality"[371] supersedes "voter equality"[372]—on originalist terms introduces the possible reversal of decades of redistricting practice, and threatens to marginalize various segments of the country. Originalism renders this possible; no rival theory of constitutional interpretation would invite such disruption.

In the lead-up to *Evenwel*, Professor Richard Pildes stated that the "argument for a uniform understanding of 'equality' is strong, as a matter of both constitutional principle and pragmatic judicial implementation of the Constitution."[373] He said this while predicting that the Court would not disturb the apportionment status quo, which ultimately proved correct.[374] He further noted that the choice of which population denominator to use when designing electoral districts "is a fundamental, categorical one about the essential interpretation and meaning of equal protection in the context of designing our basic democratic institutions."[375] Today's originalist Court may perceive the matter in far less pragmatic terms.

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368. *See, e.g.*, Alexa Ura, *Texas' Renewed Voter Citizenship Review Is Still Flagging Citizens as 'Possible Non-U.S. Citizens'*, TEX. TRIB. (Dec. 17, 2021), https://www.texastribune.org/2021/12/17/texas-voter-roll-review/ [https://perma.cc/W9W9-WDEX].

369. *See* Hansi Lo Wang, *Republicans in Congress are Trying to Reshape Election Maps by Excluding Noncitizens*, NPR ILL. (May 1, 2024, 4:00 AM), https://www.nprillinois.org/2024-05-01/republicans-in-congress-are-trying-to-reshape-election-maps-by-excluding-noncitizens [https://perma.cc/QAL9-63RM].

370. *See* Nathaniel Persily, *Who Counts for One Person, One Vote?*, 50 U.C. DAVIS L. REV. 1395, 1417–20 (2017).

371. *Evenwel*, 578 U.S. at 66.

372. *Id.* at 63.

373. Richard Pildes, *Misguided Hysteria over* Evenwel v. Abbott, SCOTUSBLOG (July 30, 2015, 12:01 AM), https://www.scotusblog.com/2015/07/symposium-misguided-hysteria-over-evenwel-v-abbott/ [https://perma.cc/RK2N-EX4E].

374. *Evenwel*, 578 U.S. at 73.

375. Pildes, *supra* note 373.

### C. *Elections and State Democratic Deterioration*

A third area in which originalism would facilitate democratic regression involves state authority over federal elections. There is greater ambiguity here than in the prior examples, but the concern is as follows: In various instances, some Justices have endorsed an originalist reading of the Elections Clause that would afford states even greater autonomy than they enjoy at present to regulate federal elections. This interpretation would substantially limit Congress's regulatory power under the Elections Clause, rendering suspect existing federal legislation, including the National Voter Registration Act of 1993 (NVRA) the Help America Vote Act of 2002 (HAVA), and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[376]

To better appreciate the concern, consider the dissenting opinions of Justices Thomas and Alito in *Arizona v. Inter Tribal Council of Arizona*.[377] The case involved the question of whether Arizona could require individuals to show proof of citizenship when registering to vote.[378] The NVRA includes no such requirement; the question was whether Arizona was permitted to supplement the federal law.[379] A majority of the Court found the NVRA to preempt the Arizona law,[380] however, the Court also emphasized that "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them."[381]

This regulatory distinction between *how* elections are run and *who* is permitted to participate in them is conceptually vague, as many regulations might fairly be characterized as pertaining to both. Consequently, the scope of congressional authority under the Elections Clause remains ambiguous. Justice Thomas, for example, has argued that the scope is exceedingly narrow. In his *Inter Tribal* dissent, he relied on Founding-era history to support a crabbed reading of the Clause that would markedly limit Congress's power by, for

376. On the history and importance of these statutes, see Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 755–64 (2016).

377. 570 U.S. 1 (2013).

378. *Id.* at 5.

379. *See id.*

380. *Id.* at 20.

381. *Id.* at 16.

instance, entirely precluding Congress from regulating voter registration. [382]

Justice Alito's *Inter Tribal* dissent sounded a similar note in addressing "States['] . . . default authority to regulate federal voter registration."[383] Like Justice Thomas, he drew from the Founding era in support of his argument that "the Elections Clause's default rule helps to protect the States' authority to regulate state and local elections."[384] On his understanding, then, the NVRA, and by extension other federal election statutes enacted under the Elections Clause, should be subject to a presumption against preemption.[385]

The originalist interpretations of the Elections Clause offered by Justices Thomas and Alito would, especially as many states are experiencing "democratic backsliding,"[386] threaten representative democracy. They would also abet arguments against the constitutionality of certain provisions of the NVRA, the HAVA, and UOCAVA, three immensely important federal election laws.[387] Among prevailing theories of constitutional interpretation, originalism alone heightens these possibilities.

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382. *See id.* at 35 (Thomas, J., dissenting) ("It is, thus, difficult to maintain that the [Elections Clause] gives Congress power beyond regulating the casting of ballots and related activities, even as a matter of precedent."). Justice Thomas reinforced his view in *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 780–82 (2018) (Thomas, J., concurring) ("[The Elections Clause] grants Congress power 'only over the "when, where, and how" of holding congressional elections,' not over the question of who can vote.").

383. *Inter Tribal Council of Ariz.*, 570 U.S. at 38 (Alito, J., dissenting).

384. *Id.* at 41.

385. *Id.* at 39–40.

386. *See* Jacob M. Grumbach, *Laboratories of Democratic Backsliding*, 117 AM. POL. SCI. REV. 967, 967 (2022), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/0742F08306EFDD8612539F089853E4FE/S0003055422000934a.pdf/laboratories-of-democratic-backsliding.pdf [https://perma.cc/F67H-H43K] (discussing "[t]roubling stories . . . in recent years, of voter suppression, of gerrymandering, of state legislatures taking power from incoming out-party governors, and of the authoritarian use of police powers against vulnerable communities"); James A. Gardner, *Illiberalism and Authoritarianism in the American States*, 70 AM. U. L. REV. 829, 880 (2021) (observing that "some of the most severe constitutional norm-bashing occurring in the states over the last few years has been the work not of governors, but of state legislatures attempting to enhance their own powers at the expense of governors"); Sellers & Scharff, *supra* note 345.

387. *See* Sellers & Weinstein-Tull, *supra* note 152, at 1143–46, 1173; *see also* Joshua S. Sellers, *Comparative Voter Registration: Lessons from Abroad for Improving Access and Accuracy in the United States*, INST. FOR RESPONSIVE GOV'T (Mar. 15, 2024), https://responsivegov.org/research/comparative-voter-registration-lessons-from-abroad-for-improving-access-and-accuracy-in-the-united-states/ [https://perma.cc/9JDT-C2ZB] (providing overviews of the NVRA and the HAVA).

This Part has explored how originalism might facilitate a retrograde form of democracy—a form of democracy that many would argue falls below the threshold of what is tolerable or just. Based on the three examples above, the employment of strong forms of originalism would render possible a democracy in which state legislatures are afforded wide latitude to engage in partisan gerrymandering (if not outright malapportionment) and are entitled to manipulate election administration, all while immune from state judicial review. It would jeopardize the longstanding representational equality reflected in districting practices. And it would undermine federal election laws, including the NVRA's command that states provide voter registration opportunities at motor vehicle, public assistance, disability services, and other locations would be brought into doubt.[388] This is obviously just a snapshot of the antidemocratic outcomes that election law originalism might accommodate.

For many (most likely those already skeptical of originalism), the external critique in this Part supplies enough of a reason to question originalism's utility. And the examples above might even give pause to those committed originalists who care about originalism's practical consequences. But for others, constitutional theories should not be primarily judged on their outcomes. After all, the constitutional law canon is replete with offensive, arguably unjust decisions that are the product of a wide range of interpretive theories. Surely, then, case outcomes should not serve as the exclusive metric of whether a theory is justifiable. It is better, some scholars say, to focus on so-called process reasons: the "qualities that processes possess and not on the outcomes they produce."[389] For many originalists, the processes that led to the ratification of the Constitution (and its amendments) supply sufficient justification for judges to be originalists.[390] The next Part interrogates that assumption.

388. *See* Sellers, *supra* note 387 (noting that in 2022, fifty-five percent of voter registrations occurred at motor vehicle offices).

389. Solum, *supra* note 34, at 931.

390. *See* Coan, *supra* note 293, at 854 ("The most venerable argument for originalism, however, is procedural.").

## IV. ORIGINALISM AND ESTRANGED DEMOCRACY (THE INTERNAL CRITIQUE)

Among originalism's various justifications,[391] advocates recurrently assert that originalism is unique in its preservation of democratic self-government.[392] As summarized by Professor Andrew Coan, "this argument holds that constitutional decision-makers should be originalists because originalism is necessary to preserve the popular sovereignty of the ratifiers whose democratic endorsement gives the Constitution its legal force."[393] Yet, originalists' appropriation of values such as democratic self-government, democratic legitimacy, and popular sovereignty, takes on a new cast once modern democracy, as practiced, is considered. Viewed through this broader lens, originalism's democratic commitments are revealed to be truncated, loyal only to an estranged form of democracy.

The democratic self-government justification takes several forms. At its core, though, "it is derived from a vision about the proper relationship between the court and agencies of government that are theoretically responsible to the people."[394] This emphasis on public accountability explains originalists' attraction to ratification moments as sacrosanct manifestations of popular sovereignty.[395] Professor Keith Whittington aptly describes this perspective:

> Under this approach, pursing the original meaning of the Constitution is justified by the special status of the authorized lawmakers who established the fundamental rules to govern the polity. Only those lawmakers were democratically authorized to create fundamental law, and the goal of constitutional interpretation therefore should be to uncover the content of the rules laid down by those lawmakers

391. For justifications outside the scope of this project, see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 5 (2004) (defending originalism on liberty grounds); MCGINNIS & RAPPAPORT, *supra* note 63 (defending originalism on public welfare grounds); GIENAPP, *supra* note 88, at 29–35 (exploring other justifications).

392. *See, e.g.*, Simon, *supra* note 290, at 1495 (summarizing the argument as "claim[ing] that any less restrictive method of interpretation poses an unacceptable threat to electorally responsible institutions, and therefore allegedly poses an unacceptable threat to democracy").

393. Coan, *supra* note 293, at 854–55.

394. Simon, *supra* note 290, at 1485.

395. *See* Kurt T. Lash, *Originalism as Jujitsu*, 25 CONST. COMMENT. 521, 534 (2009) (referring to originalists' "normative theory of popular sovereignty").

> and faithfully apply them. Drafting text for a written constitution allows for public deliberation and choice about the desired content of the fundamental law. Originalism refers back to that deliberate choice and seeks to understand the substance, and not merely the form, of the rule that was adopted.[396]

On this account of democratic self-government, non-originalist theories of constitutional interpretation fail to "preserve the possibility of constitutional self-governance."[397] Whittington's views are common among originalists. For example, Larry Solum invokes the Constitution's enactment to support his assertion that originalism "is clearly superior to [many rival theories] with respect to democratic legitimacy."[398] Edwin Meese III claimed that "allow[ing] the courts to govern simply by what it views at the time as fair and decent[] is a scheme of government no longer popular; the idea of democracy has suffered."[399] Professor Joel Alicea asserts that, "[i]n the American context, the only way to preserve the authority of the people is to understand their commands—as embodied in the Constitution—as the people themselves understood those commands."[400] And then-Judge, now-Justice, Amy Coney Barrett, endorses originalism because "the original Constitution, along with each of its amendments, was adopted in an exercise of popular sovereignty through a process self-consciously designed to create authoritative law."[401] Failure to honor the outputs of this process "impos[es] constraints on the People to which they have not consented" and "undermines the

396. Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 399 (2013).

397. Keith E. Whittington, *Originalism Within the Living Constitution*, ADVANCE 39, 45 (2007); *see also* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 216 (1999) ("If the choices that we have made can be undone, if the laws can be remade by those selected to administer them, then the possibility of self-government has been removed.").

398. Solum, *supra* note 44, at 74.

399. Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465 (1986).

400. Alicea, *supra* note 94, at 44–45; *see also* Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1440 (2007) (referring to "the most common and most influential justification for originalism: popular sovereignty and the judicially enforced will of the people").

401. *See* Reuter et al., *supra* note 7, at 686 (comments by then-Judge Amy Coney Barrett).

ability of the citizens of our very large and diverse country to live peaceably together under one constitutional roof."[402]

While these proclamations sound in concerns about constitutional legitimacy,[403] and judicial activism,[404] at bottom, they are rooted in fears about the loss of democratic self-government.[405] They reflect originalists' avowed commitment to democracy (procedural democracy, at least) as a "master norm."[406] Yet, these claims are largely metaphysical, or semantic, and they rest on an undertheorized, crabbed conception of democratic self-government. Coan betrays their false allure in his observation that "procedural arguments premised on abstract theories of democracy have 1) limited normative power to persuade adherents of competing conceptions of democracy; and 2) the potential to be self-defeating."[407] Put another way, applied originalism risks sacrificing actual democracy at the altar of abstract democracy. This paradox renders the democratic self-government justification for originalism self-contradictory.[408]

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402. *Id.* at 688; *see also* Alicea, *supra* note 94, at 45 ("If the distinct governing personnel could construe the people's commands differently from how the people understood them, the governing personnel could interfere with the means for achieving the common good that the people selected, which would effectively nullify the people's authority.").

403. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 321 (2d ed. 1997) ("It is because Americans continue to regard the Constitution as the bulwark of their liberties that they hold it in reverence.").

404. *See, e.g.*, WHITTINGTON, *supra* note 397, at 157 ("Further efforts by the courts to fill remaining gaps in the law represent political choices not only in the sense that they depend on something more than can be provided through examination of the law, but also because they move outside the realm of legal authority."); Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1044 (1992) ("To effectively limit judicial policymaking and protect representative self-government, originalism should be understood as requiring a strong presumption of constitutionality.").

405. *See, e.g.*, WHITTINGTON, *supra* note 397, at 156 ("Self-governance becomes an empty phrase if the intentions of authoritative popular bodies can be disregarded.").

406. Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1098–99 (1989).

407. Coan, *supra* note 293, at 859.

408. In a recent article, Larry Solum offers a clarifying distinction between outcome reasons and process reasons in constitutional theory. He claims that neither are, on their own, sufficient to vindicate a theory, leading him to conclude that "normative constitutional theory ought to consider a wide range of both outcome reasons and process reasons" (e.g., "considerations of legitimacy, the rule of law, and institutional capacities"). Solum, *supra* note 34, at 916. Much of the article argues

It is not the purpose of this Article to advance an alternative normative constitutional vision. But consider briefly two counterpoints to the originalist conception of democracy, both of which offer comparatively more sophisticated and realist accounts of democratic governance.

Professor Samuel Freeman, in a philosophically powerful rebuttal of originalism, describes the Constitution as "the locus for civic justification within our constitutional scheme,"[409] a status that "implies that the Constitution's meaning is to be decided by principles that everyone, in their status as equal citizens, *could* now freely accept and reasonably endorse as interpretive of its provisions by the public use of reason."[410] These features, he concludes, "require[] that we reject the doctrine of original meaning."[411] According to Freeman, original public meaning originalism "subordinates the permanent and shared interests of democratic citizens in their freedom and equal status to someone else's parochial interests, loyalties, and personal moral values."[412]

Another alternative is offered by Professor Sam Issacharoff who, while not directly engaged with the debate over constitutional interpretation, advocates judicial review as a means of stabilizing democratic governance.[413] Key to Issacharoff's account is his decision to "look directly to the 'contaminated' domain of our lived experience in the moment."[414] The moment, to state the obvious, is one of profound democratic dysfunction. Cognizance of this, Issacharoff posits, justifies an active role for courts: "The loss of state competence in democratic societies pushes courts into areas of state responsibility once properly reserved for the

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against what Solum calls "outcome reductionism," namely, "the theoretical position that maintains that the goodness or badness of selected outcomes provides decisive reasons for choosing an approach to the large questions of constitutional theory." *Id.* With that point, I agree. What I perceive in much originalist literature, however, is the inverse: a process reductionism, or perhaps even a process glorification, that treats ratification moments as self-evidently preservative of democracy. This form of reductionism, as evidenced through the lens of election law originalism, introduces its own "intractable obstacles to progress in normative constitutional theory." *Id.*

409. Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB. AFF. 3, 17 (1992).

410. *Id.*

411. *Id.*

412. *Id.* at 28.

413. Issacharoff, *supra* note 246, at 5 ("[J]udicial review invoking a higher-order legal authority is a necessary corrective for the concern over discrete and insular minorities facing the disregard of a tyrannous majority.").

414. *Id.*

political branches."[415] This is a defense of judicial review, not necessarily of non-originalist forms of constitutional interpretation. But it is easy to see how a judiciary tasked with "protecting democracy against systemic failure" and "warding off temporary political expedients that threaten governmental integrity" would fail miserably if confined to originalist constitutional interpretation.[416] Issacharoff has himself noted that it "is not enough simply to say that there is a Constitution that serves as a social contract when that approach does not generate a set of determinate answers as to how to apply the Constitution to contemporary problems."[417] Originalism necessitates ignoring the preponderance of contemporary democratic problems. And it does so in service of an intellectually incoherent, self-defeating conceptualization of democratic self-government.

## CONCLUSION

Originalism is unique among prevailing theories of constitutional interpretation in inviting antidemocratic outcomes. It renders viable regressive democratic possibilities, and does so by, in part, appealing to the values of democratic self-government. Yet, the history of our democracy is long and fraught and meandering and worth honoring. It is a history of contestation, negotiation, success, failure, and compromise. That history should inform our methods of constitutional interpretation.[418]

In 2017, during the Supreme Court's oral argument in *Gill v. Whitford*,[419] a partisan gerrymandering case arising from Wisconsin, Justice Gorsuch asked Paul Smith, the advocate for those challenging Wisconsin's maps, whether he was advancing "a republican form of government claim."[420] Seemingly surprised by the question—such claims were not briefed and have long been nonjusticiable[421]—Smith replied, "I think it's a First Amendment claim and an equal protection claim. I—I'm

415. *Id.* at 47.

416. *Id.* at 5.

417. Issacharoff, *supra* note 13, at 531.

418. *See* Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of* Baker v. Carr, 80 N.C. L. REV. 1103, 1142–43 (2002); Fallon, *supra* note 12, at 1495 (arguing that "vagueness and flexibility" bring risks but "also open[] paths to public influence on the development of constitutional law").

419. 585 U.S. 48 (2018).

420. Transcript of Oral Argument at 59, *Gill*, 585 U.S. 48 (No. 16-1161).

421. *See* Luther v. Borden, 48 U.S. (1 How.) 1, 40 (1849).

not going to try to revive the republican form of government clause at this late stage of . . .” before trailing off.[422] Justice Gorsuch then sarcastically requested that they “just for a second talk about the arcane matter of the Constitution.”[423] By prodding Smith in this way, Justice Gorsuch was evoking an old debate—one that was at the heart of the Court’s reapportionment decisions of the 1960s—over whether the Court is justified in regulating reapportionment at all.[424] After all, under an originalist interpretation of the Fourteenth Amendment, states would face no constitutional barrier to designing malapportioned districts, a point that Justice Gorsuch evidently wanted to accentuate. In short time, Justice Ginsburg interjected with her own rhetorical response to Justice Gorsuch: “Where did one person, one vote come from?”[425] Where, indeed?

422. Transcript of Oral Argument, *supra* note 420.

423. *Id.* at 61.

424. *See* Carl A. Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 2–4 (1964) (summarizing the Court’s discussion of whether issues of reapportionment are justiciable).

425. Transcript of Oral Argument, *supra* note 420, at 60.