

## ORIGINALIST IDEOLOGY AND THE RULE OF LAW

*Ian Bartrum\**

In July of 1985, Attorney General Edwin Meese addressed the national convention of the American Bar Association with hopes of inspiring a fundamental change in constitutional interpretation.<sup>1</sup> He railed against the Supreme Court’s unprincipled turn towards a “jurisprudence of idiosyncrasy,” lamented recent decisions as “more policy choices than articulations of constitutional principle,” and called urgently on the Justices to adopt “a coherent jurisprudential stance,” lest a “constitution in the true sense” cease to exist.<sup>2</sup> Meese had a particular stance in mind, and, to no one’s surprise, it was not a return to the Warren Court’s brand of “radical egalitarianism.”<sup>3</sup> Rather, he claimed that the only interpretive theory adequate to protect our democratic institutions and the rule of law is “a jurisprudence of original intention.”<sup>4</sup> Of course, most such attempts to initiate broad interpretive change have fairly limited effect, but Meese’s speech seemed to engage an idea whose time had come, and, in retrospect, it helped bring about something of a sea change in constitutional theory. To wit, Justice Antonin Scalia recently reflected that, unlike circumstances at the time of his appointment, “[o]riginalism is [now] in the game, even if it does not always prevail.”<sup>5</sup> And, a little over a decade after Meese’s speech, Laurence Tribe would summarize some of Ronald Dworkin’s thoughts with what has become a contemporary ubiquity: “We are all originalists now.”<sup>6</sup>

While Meese certainly did not invent originalism, his speech undoubtedly helped revive an approach that had fallen into some dis-

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\* Associate Professor, William S. Boyd School of Law, UNLV. Many thanks to Sean Wilson, whose fundamental insights about language and meaning deeply inform this paper. Any misunderstandings or misapplications of those insights are entirely my own.

1 See Edwin Meese III, Speech Before the American Bar Association (July 9, 1985), *reprinted in ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 47 (Steven G. Calabresi ed., 2007).

2 *Id.* at 50, 52–53.

3 *Id.* at 52.

4 *Id.*

5 Antonin Scalia, *Foreword* to *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 43, 44 (Steven G. Calabresi ed., 2007).

6 Laurence H. Tribe, Comment, *in ANTONIN SCALIA, A MATTER OF INTERPRETATION* 65, 67 (1997).

use. Perhaps nowhere is this resurgence more evident than in the legal academy, where Meese contemporaries like Raoul Berger<sup>7</sup> and Robert Bork<sup>8</sup> have passed the torch to a younger generation of “New Originalists,” who have abandoned the archaeology of “original intentions” and now search for various forms of “original public meaning.”<sup>9</sup> This “new” originalism concedes that *intentions* are not *meaning*, and recognizes that, to the extent that history should inform constitutional interpretation, the relevant moment is *ratification* and not *drafting*.<sup>10</sup> Contemporary originalists have also generally come to accept that constitutional language may be underdetermined, and thus concede that modern interpreters will sometimes need to “construct” legal rules in ways that rely on “something other than original meaning.”<sup>11</sup> Nonetheless, most modern originalists believe that original meaning must contribute something quite substantial to constitutional interpretation.<sup>12</sup> Indeed, Larry Solum—perhaps the most inclusive of the New Originalists—has argued that almost all originalists share two essential commitments: (1) the *fixation thesis*, which claims that constitutional meaning is “fixed” or “frozen” at a particular moment in time; and (2) a reasonably strong version of the *contribution thesis*, which holds that, absent weighty reasons, this fixed meaning must “constrain” modern interpretive decisions.<sup>13</sup>

In earlier work, I have attacked the first of these commitments, and I continue to believe that with ordinary language usage—particularly vague usage—meaning is not the sort of thing that *can* be

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7 See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

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

9 See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law & Legal Theory Research Papers Series, No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244>; RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007); John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371 (2007).

10 See, e.g., WHITTINGTON, *supra* note 9, at 59 (recognizing that “[t]he goal of interpreting meaning is not to penetrate into some alien mind”); Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory* 10 (Apr. 28, 2011), available at <http://ssrn.com/abstract=1825543> (claiming that scholarly consensus came to recognize that “the original intentions of the Framers could not serve as the basis for a viable theory of constitutional interpretation and construction”).

11 Solum, *What is Originalism?*, *supra* note 10, at 16.

12 See *id.* at 32.

13 *Id.* at 34.

“fixed.”<sup>14</sup> And some key constitutional clauses certainly present themselves as ordinary language constructions.<sup>15</sup> In this essay, however, I turn my attention to the second originalist commitment—the so-called “contribution thesis.” Assuming here that constitutional meaning *could* be fixed in time, I contend that, Ed Meese notwithstanding, it is actually the contribution thesis—at least in its strong forms—that compromises the rule of law. Originalism of this type would have “historical understandings” displace the judiciary as the principal expositor of legal meanings.<sup>16</sup> One of the core features of the American conception of the rule of law is that it is the *law*—not the lawgiver or her intentions—that obligates us, and, when the text is vague, an institutionalized judiciary is authorized to act as its interpreter. The interposition of a binding historical exegetist between the text and the judge thus compromises the basic structural commitments of American democracy. We should therefore understand this sort of originalism as a *political ideology* and not a theory of the Constitution as it exists.<sup>17</sup>

#### VAGUENESS AND THE RULE OF LAW

Quarrels about textual meaning rarely arise over determinate constitutional provisions like the Presidential age requirement. In such cases, the relevant linguistic rules are suitably precise and our prac-

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<sup>14</sup> See Ian Bartrum, *Constructing the Constitutional Canon: The Metonymic Evolution of Federalist 10*, 27 CONST. COMMENT. 9, 11–12 (2010). The basic point is that no foundational referent—no external, verifiable object—exists to which vague language can be “fixed.” Such words do not get their meaning by naming objects, but from proper usage according to underdetermined linguistic conventions or rules. See LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 43, 84–85 (G.E.M. Anscombe trans., 3d ed. 1958). Despite efforts to the contrary, we cannot liken these underdetermined rules to “linguistic facts,” which might become the basis of a “fixed” meaning. *But see* Lawrence B. Solum, *A Reader’s Guide to Semantic Originalism and a Reply to Professor Griffin* 13 (Ill. Pub. Law & Legal Theory Research Papers Series, No. 08-12, 2008), available at <http://ssrn.com/abstract=1130665> (“But when we disagree about [the linguistic meaning or semantic content of the Constitution] we are disagreeing about linguistic facts. In principle, there is a fact of the matter about what the linguistic content is.”).

<sup>15</sup> See Frederick Schauer, *An Essay on Constitutional Language*, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 133, 134–36 (Sanford Levinson & Steven Mailloux eds., 1988) (discussing the hybrid nature of constitutional language). Specialized or technical language usages rely on either an expert language community or the stipulation of definitions and/or applications. *Id.* The Constitution was, of course, submitted to “the People,” and contains little in the way of stipulated definitions. See, e.g., Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 FORDHAM L. REV. 1657, 1657–59 (1997) (discussing populist nature of constitutional ratification).

<sup>16</sup> For an enlightening discussion of this problem, see SEAN WILSON, THE FLEXIBLE CONSTITUTION (forthcoming 2012) (on file with author).

<sup>17</sup> This fundamental insight is Sean Wilson’s. See *id.* at 149–50. I hope here only to think through some of its implications for constitutional culture and the rule of law.

tices well enough settled that the law essentially speaks for itself. It is rather the underdetermined or vague constitutional language that gives us trouble, exactly because the underlying rules and practices governing its meaning are themselves imprecise and controversial. Logically speaking, the problem is straightforward: a vague proposition may have no determinate truth value.<sup>18</sup> Whether it is true, for example, that a particular kind of legal protection is “equal” to another depends upon how we measure equality, and it may be the case that two perfectly reasonable kinds of measurement yield contradictory results. And so we cannot, as David Lewis says, “pick a delineation once and for all . . . but must consider the entire range of reasonable delineations.”<sup>19</sup> Thus, unlike the Presidential Age Clause, the Equal Protection Clause cannot speak for itself, and so requires an interpreter. In our legal tradition, that job lies with the judge, who may consider and adopt any reasonable measurement to decide a given case. Originalist ideology, however, makes “historical understanding” superior to the judge, and would thus confine “equal” to reasonable *historical* measurements. This, I contend, is at odds with well-accepted ideas about the rule of law.

Without a working account of the “rule of law,” of course, this final assertion only begs the question, and so to better define the concept I turn to Brian Tamanaha’s thoughtful descriptive efforts.<sup>20</sup> In a recent lecture, Tamanaha summarized some of his earlier work with a “thin” definition—“[t]he rule of law means that government officials and citizens are bound by and abide by the law”—which he fleshed out with three core “themes” or “notions” of usage and practice: (1) “government is limited by law”; (2) “formal legality”; and (3) “[t]he

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18 The late and eminent David Lewis summarized the issue well:

If Fred is a borderline case of baldness, the sentence “Fred is bald” may have no determinate truth value. Whether it is true depends on where you draw the line. Relative to some perfectly reasonable ways of drawing a precise boundary between bald and not-bald, the sentence is true. Relative to other delineations, no less reasonable, it is false. Nothing in our use of language makes one of these delineations right and all the others wrong. We cannot pick a delineation once and for all (not if we are interested in ordinary language), but must consider the entire range of reasonable delineations.

DAVID LEWIS, *Scorekeeping in a Language Game*, in 1 PHILOSOPHICAL PAPERS 233, 244 (1983).

19 *Id.* “Reasonable” here points towards the accepted practical usage conventions, which may, again, be underdetermined.

20 See, e.g., BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004); Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, (Washington Univ. in St. Louis Legal Studies Research Paper Series, No. 12-02-07, 2012), available at <http://ssrn.com/abstract=2012845>.

rule of law, not man.”<sup>21</sup> The American embodiment of the first theme is a semi-independent prosecuting branch and a structural division of government that gives “the judiciary the capacity to hold the other parts answerable on legal grounds.”<sup>22</sup> The second theme promotes predictability by demanding that laws be published in advance, that they not “demand the impossible,” and that they be generally applicable “according to their terms.”<sup>23</sup> The third theme requires that neutral principles supersede individual caprice, enforcement of which, in the American model, remains “the special preserve of judges,” who must be “unbiased” and “loyal to the law alone.”<sup>24</sup> These three core themes provide a useful framework against which we can assess and explore my claim that originalist ideology subverts the rule of law.

I will consider the second theme—“formal legality”—first, both because it underpins the other themes, and because it is in assessing this notion that the fundamental problem with originalism becomes most clear. Leaving aside the problem of laws that demand the impossible,<sup>25</sup> formal legality requires that the laws be set forth in advance and bind all according to their published terms. These requirements ensure that the laws are predictable and provide notice to all. Originalist interpretive ideologies, however, compromise both these guiding principles and their purposes. Indeed, in many cases, originalism *does not treat the prior published text as law at all*. Rather, the published text and terms act only as a *placeholder* for some set of “historical understandings,” which in fact contain the relevant legal content.<sup>26</sup> As a crude illustration, imagine a Yellow Pages entry that simply refers the user to a different location: “Cinemas: See Theaters.” In the context of originalist ideology this might become, “Cruel and Unusual Punishment: See Penal Codes, 1789.” Under such a theory, we bar those younger than thirty-five from the Presidency based on the public meaning of “the Age of thirty five Years”<sup>27</sup> in 1789—not

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21 Tamanaha, *History and Elements*, *supra* note 20, at 2, 3, 8. Tamanaha considers each of these themes in a great deal more depth in his book on the subject. See TAMANAHA, ON THE RULE OF LAW, *supra* note 20, at 114–26.

22 Tamanaha, *History and Elements*, *supra* note 20, at 14.

23 *Id.* at 15.

24 *Id.* at 22.

25 In this context, however, it is interesting to think about recent “positive right” constitutions—such as South Africa’s—that may ask their governments to meet impossible demands. See, e.g., S. AFR. CONST. ch. 2, §§ 26–27 (guaranteeing access to minimum housing and health care).

26 Sean Wilson has argued that such a view treats the text as a “gesture,” or something akin to a religious sacrament, in which meaning lies somewhere beyond the actual utterance. WILSON, *supra* note 16, at 35–36.

27 U.S. CONST. art. II, § 1.

because there is broad agreement on that phrase's public meaning today. For originalists, then, the Constitution's published terms are *not actually the law*, which is instead hidden in a set of extra-legal historical norms and conceptions.<sup>28</sup> This compromises both the law's "formal" character and the goals of notice and predictability, and thus subverts the rule of law as we understand that idea.

So what are we to do with vague constitutional language, which seems to be somewhat unpredictable all by itself? The answer is simple, if unsatisfying to some. Formal legality requires us to treat vague published language as the law, even if it is less predictable than other, more determinate provisions. It must be the published terms themselves—not some hidden set of historical conceptions—which bind us moving forward. In a government dedicated to the rule of law, the lawmaker who hopes to bind future generations to specific or determinate legal conceptions must make those conceptions explicit in the enacted text. There is a difference, in other words, between declaring that the President must be "mature" and requiring that he "have attained to the Age of thirty five Years,"<sup>29</sup> and formal legality requires us to recognize the law in the particular *form* that it appears. When that form is vague or underdetermined, we must accept that the law leaves questions of specific application or conception to its designated interpreter, which brings us to the other two themes underlying the rule of law.

Tamanaha's remaining themes—"government limited by law" and "rule of law, not man"—speak to related ideas about the *function* and *limits* of the judiciary under the rule of law. Our constitutional structure works to ensure that law limits the government by dividing authority among several branches, and by empowering the judicial branch to hold the legislative and executive branches to account. As Tamanaha says, this architecture makes the interpretation and application of law "the special preserve of judges,"<sup>30</sup> and I suggest that efforts to divest the judiciary of this authority—or to constrain it in the service of extra-legal policy preferences—compromise the structural means by which we have sought to limit government by law. Indeed, Miguel Schor has observed that a weakened, politicized judiciary is

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28 Ronald Dworkin has famously made the distinction between a *concept* and its *conceptions*. Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my "meaning" was limited to these examples . . . I might say that I meant the family to be guided by the *concept* of fairness, not by any specific *conception* of fairness I might have had in mind.

RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134 (1977).

29 U.S. CONST. art. II, § 1.

30 Tamanaha, *History and Elements*, *supra* note 20, at 22.

among the “key features of . . . the un-rule of law” in developing nations.<sup>31</sup> And this is exactly the danger of an interpretive ideology that makes judicial interpretation subservient to “historical understandings,” which in turn promote the conceptual preferences of a past culture. Thus, originalist ideologies, at least those that depend upon strong versions of the contribution thesis, not only violate the principle of formal legality, they also subvert our efforts to limit government by law. It is for these reasons that I contend that originalism is inconsistent with the rule of law, and suggest that we must leave judges free to engage all reasonable interpretive strategies in fulfilling their constitutional role.

Of course, entrusting judges with such broad authority presents its own substantial risks to the rule of law, particularly when courts are called upon to interpret vague constitutional language in concrete cases. There is the danger, as Tamanaha points out, “that the *rule of law* might become *rule by judges*”; that is, if the courts cannot remain politically neutral and “loyal to the law alone,” we might just as easily find ourselves subject to the arbitrary whim of a judge as of any other person.<sup>32</sup> Indeed, it is precisely this danger that has led Ed Meese and others to endorse the binding constraint of originalist ideology. But, as I have demonstrated above, this kind of extra-legal constraint is inconsistent with other broadly accepted notions about the rule of law, and so it cannot provide the sort of remedy that originalists are seeking. This is not to say that judges are, or should be, completely unconstrained in their decision-making. Rather, they must operate within the accepted norms governing constitutional interpretive practice.<sup>33</sup> Historical arguments are certainly an important *part* of that practice, but, in keeping with the rule of law, we cannot treat them as the *only permissible*—or even the *strongly preferred*—grounds of judicial interpretation. If history is to constrain interpretation, it must be because the *judge* so decides in a particular case, not because the contribution thesis—or any external normative construct—categorically commands it.

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31 Miguel Schor, *Rule of Law*, in 3 ENCYCLOPEDIA OF LAW & SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES 1329, 1330 (David S. Clark ed., 2007). Along these same lines, David Strauss has recently argued that originalism compromises the candor and Burkean legitimacy inherent in our longstanding common law tradition. See DAVID STRAUSS, *THE LIVING CONSTITUTION* 43–46 (2010).

32 Tamanaha, *History and Elements*, *supra* note 20, at 22, 24 (emphasis in original).

33 Philip Bobbitt has provided an excellent account of these norms as “modalities” of constitutional argument. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

## BEYOND THE DEAD HAND PROBLEM

This objection to originalism—call it the “legality objection” for short—is both more and less than the so-called (and much rehearsed) “dead hand problem,” and explaining why may help clarify my claim. The claim is *more* because, while “dead hand” theories generally suggest that originalism results in undemocratic applications of law, the “legality objection” contends that binding originalism *does not treat the Constitution as law at all*.<sup>34</sup> The claim is *less* because I do not suggest that the “dead hand” of the past cannot bind us in democratically legitimate ways—this is, after all, an essential feature of law’s authority—but, rather, that it must do so through the *text* and not by resort to extra-legal historical norms.

To explore these distinctions in more depth, we need a working account of the “dead hand” problem, and Reva Siegel has offered as good a summary as any:

It has been hundreds of years since the Constitution was ratified. No one alive today participated in the ratification process. The cumbersome supermajority rules of Article V make amending the Constitution so much more difficult than other forms of legislative change that, since ratification of the Bill of Rights, the Constitution has been amended less than twenty times. The living have not assented to Article V as the sole method of constitutional change. And if we are to construe the living as having implicitly consented to any constitutional understanding or arrangement, it is to the Constitution as it is *currently* interpreted, with its many pathways of change.<sup>35</sup>

The objection is thus to originalism’s *democratic legitimacy* as an interpretive practice given the (perhaps unintended) insurmountability of Article V’s amendment hurdles.<sup>36</sup> The difficulty of amendment makes the Constitution’s normative commitments practically unassailable, and thus largely unaccountable to the American people. In our political theory and tradition, of course, government derives its “just powers from the consent of the governed,”<sup>37</sup> and so, to preserve democratic legitimacy, the Supreme Court should provide an Article

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<sup>34</sup> Again, at least this much of the “legality objection” derives directly from Sean Wilson’s work. See WILSON, *supra* note 16, at 149 (“[I]t makes no sense to set forth a constitution as ‘the law,’ yet retain some other mysterious entity from the past that controls who wins or loses the cases, and what the hidden principles are.”).

<sup>35</sup> Reva B. Siegel, *Heller & Originalism’s Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1404–05 (2009) (emphasis in original) (citations omitted).

<sup>36</sup> For an interesting take on Article V’s “imbecilic” design, see Sanford Levinson, *Our Imbecilic Constitution*, N.Y. TIMES, May 28, 2012, <http://campaignstops.blogs.nytimes.com/2012/05/28/our-imbecilic-constitution>.

<sup>37</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).



V workaround by interpreting the Constitution as a “living” document.

The essential claim here is that the Constitution suffers from a serious and probably permanent design defect: Article V. Notice that if the Constitution were more easily amended the “dead hand” problem would largely dissolve, just as Raoul Berger supposed was true back in 1981: “[o]f course the dead cannot bind us; nor did they seek to do so. Instead, the Framers provided us with an instrument of change—amendment pursuant to Article V.”<sup>38</sup> In such a circumstance, presumably, those who rely solely on the “dead hand” objection would have no problem with a strong version of originalism. For them the problem with binding originalism is *contextual* and not *categorical*. It is our peculiar, flawed Constitution—not the theory itself—that makes originalist approaches problematic. In this sense the “legality objection” claims *more* than the “dead hand problem”; indeed, it *is* categorical. Even if we could readily modify constitutional terms to suit the living, the “legality objection” claims that approaches that would bind us to extra-legal “historical understandings” of the text are *always* inconsistent with the rule of law.

I have also said that the “legality objection” is *less* than the “dead hand problem,” and we are now in a better position to see why. Unlike “dead hand” complaints, the “legality objection” does *not* claim that efforts to bind future generations through law pose a threat to democratic legitimacy. Indeed, as I have said, this is a central feature of law’s claim to authority: present enactments—if made pursuant to suitably democratic secondary rules—will impose legitimate future obligations. In other words, even if the Framers had chosen to omit Article V entirely, or had expressly made the Constitution *unamendable* (as in the case of Senate apportionment),<sup>39</sup> the “legality objection” has no quarrel with past majorities binding present ones—provided they do so explicitly through law. The objection, rather, is to an ideology that would interpose extra-textual historical understandings or norms between the modern reader and the law itself. If, for example, the Presidential age requirement were as unpopular today as is the claim that the Fourteenth Amendment excludes women, presumably “dead hand” theorists would find both rules equally lacking in democratic legitimacy. Not so the “legality objection,” which holds that any duly enacted law properly binds future generations to the plain meaning of its published terms.

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<sup>38</sup> Raoul Berger, *Paul Brest’s Brief for an Imperial Judiciary*, 40 MD. L. REV. 1, 3 (1981).

<sup>39</sup> Article V, of course, expressly provides “that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” U.S. CONST. art. V.

## CONCLUSION

In the title and throughout this essay, I have referred to originalism as an “ideology” and have suggested that, despite rhetorical recourse to philosophical terms like “speaker’s meaning” and “semantic content,”<sup>40</sup> originalism is *not* an account of how our Constitution has meaning in a culture dedicated to the rule of law. What I mean by this is that originalism, by virtue of the contribution thesis, is an *organized normative effort to bring about a fundamental change in our existing political structure* by making judges subservient to extra-legal constraints that generally advance a particular policy agenda. I hope I have demonstrated that this ideology undermines broadly accepted notions about the rule of law, and so—no matter how tempted we are to bring “unfettered” judicial discretion under greater political control—binding external constraints on legal interpretive practices are a cure worse than the disease. We must accept that both the rule of law and our constitutional structure entrust judges with great authority and responsibility, and we must hope that our legal practices—in courtrooms, boardrooms, and classrooms—can cultivate and maintain an interpretive culture that honors our most important democratic ideals.

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<sup>40</sup> I refer here to the description Larry Solum has offered in his highly influential account of “semantic originalism.” See Solum, *Semantic Originalism*, *supra* note 9, at 34–37 (citing PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 3–143 (1989)).