PROGRESSIVISM FOR ME, BUT NOT FOR THEE

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INTRODUCTION

In 1988, Justice Antonin Scalia penned an opinion in *Budinich v. Becton Dickinson & Co.*, ruling a court's decision final regardless of whether there had been a decision rendered regarding attorney's fees.[1] A quarter of a century later, citing the same case in oral arguments before the Court, an attorney suggested, "if you have a dispute between a lawyer and a . . . former client, over fees . . . and there's a lawsuit to recover the fees, *Budinich* won't apply in that situation."[2] Justice Scalia disagreed: "I wrote it," he interjected, eliciting laughter. "I don't think that's what I meant."[3]

On the surface, Justice Scalia's offhand comment on a rather esoteric case seems fairly innocuous. But Supreme Court watchers might be forgiven for thinking that someone else was occupying Justice Scalia's seat that day. Where had "the resolute text-reader, dictionary-minder, expectation-scorner" gone?[4] If, as Justice Scalia has elsewhere argued, "government by unexpressed intent is . . . tyrannical [and] it is the *law* that governs, not the intent of the lawgiver,"[5] then surely it is the *judgment* that governs, not the intent of the judge?

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1 486 U.S. 196, 202-203 (1988) (Scalia, J., opinion) ("[A] decision on the merits is a 'final decision' for the purposes of [federal law] whether or not there remains for adjudication a request for attorney's fees.").

2 Transcript of Petitioners' Oral Argument at 13, Ray Haluch Gravel Co. v. Central Pension Fund, 571 U.S. ____ (2014) (No. 12-992).

3 *See* Josh Blackman, *Scalia: "I wrote it, I don't think that's what I meant"*, JOSH BLACKMAN'S BLOG (Dec. 9, 2013), http://joshblackman.com/blog/2013/12/09/scalia-i-wrote-it-i-dont-think-thats-what-i-meant/.

4 *See* Ronald M. Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 126 (Amy Gutmann ed., 1997).

5 ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Gutmann ed., 1997).

Indeed, Justice Scalia's *lapsus linguae* (slip of the tongue)[6] reveals a broader problem with theories of legal interpretation. We enjoy a thriving literature on constitutional and statutory interpretation, of which Justice Scalia's writings on original public meaning rank amongst the most prominent contributions. But how are we to interpret the *rulings* or *judgments* themselves? What theory of interpretation should one apply to Supreme Court rulings? Should one be an originalist 'judgmentist,' or a living 'judgmentist'? And are there conflicts or problems of coherence that emerge when one chooses to interpret the Constitution and Supreme Court judgments in either an originalist or progressive fashion?

A. Progressivism's incoherence

In this essay, we demonstrate the incoherence within progressive legal theory by applying progressives' own criticisms of originalism to their adherence to Supreme Court precedents. We argue that progressives face a dilemma: *either archetypal progressivism is impractical, or it is inconsistent*. On the one hand, the wholesale application of progressivism demands that all actors (non-judicial actors and the Supreme Court alike) are entitled to progressive interpretation. This, however, risks an 'explosion' of interpretation. On the other hand, progressives might argue that only the Supreme Court is entitled to a progressive interpretation, while other government actors are obligated to read their rulings in an originalist fashion. However, this would effectively undermine the force of their objections to originalism in the first place.

We trace out a similar argument from the Canadian context to the American one. In our view, the American progressive is hypocritical in rejecting originalism as a viable theory of Constitutional interpretation while simultaneously embracing an originalist approach to interpreting Supreme Court judgments. Our essay proceeds as follows:

First, we sketch out the plethora of reasons offered by progressives to object to originalism in all its varieties (including intentionalism). These include progressive claims that frozenness (the 'fixation' thesis) and adherence to particular meanings (the 'fidelity' thesis)—both tenets of originalism—render outcomes that are incoherent, tyrannical, and impractical. We demonstrate that these objections apply with equal strength to originalism as a theory for interpreting judgments.

Second, we show that the archetypal American progressive needs also to advance a form of 'judicial supremacy.' Assuming we preferred

6 In a tongue-in-cheek fashion, we borrow Justice Scalia's phrase. *Id.* at 20.

courts to deliver progressive judgments, we would also need some way to ensure it is *those judgments* that are authoritative. A failure to establish such authority leads to the impractical 'explosion of progressivism,' wherein each and every lower judicial officer interprets the law according to his or her own perception of contemporary values. We then point out the ills of an 'explosion' of judgment, demonstrating the need for living constitutionalists to adhere to *stare decisis* and judicial supremacy.

Third, we show that progressives' efforts to avoid the explosion forsake pure progressivism. In this event, we show that American progressives have committed the sin of embracing the very same 'frozenness' for judgment interpretation that they regard as a sufficient reason to abandon originalism when it comes to constitutional interpretation. The progressive is guilty of advocating "progressivism for me but not for thee."

Finally, we consider the availability of alternate routes for progressives to escape this untenable 'explosion of progressivism,' but conclude that there are none. If American progressives are to ensure the strength of progressive rulings and also contain the 'explosion of progressivism,' they must accept the doctrine of judicial supremacy. Concomitantly, progressives must accept (and have accepted) standard features of the very originalism that they claim to reject.

B. Review: Is the 'explosion of progressivism' contained to Canada?

In a previous work,[7] one of us noted that contemporary proponents of a progressive (or "living tree") doctrine of interpretation in Canada simultaneously embrace two contradictory theses. On the one hand, they argue, Supreme Court justices are to deliver judgments on the basis of society's contemporary values. Yet on the other, the 'doctrine of judicial supremacy' advocates that all lower judicial and non-judicial actors must strictly observe said progressive rulings of the Supreme Court. Because adherence to the first thesis can lead to an 'explosion of progressive interpretation' – a free-for-all where each government actor is entitled to act on the basis of what they consider to be contemporary values – it fails to cohere with the latter thesis of judicial supremacy, and indeed, contradicts it rather directly.

Distinct parallels with the United States emerge. On one end of the progressive spectrum are academics like Michael Perry, who advocates for a doctrine of "consensualism" that echoes pure progressivism.[8]

7 Peter M. Jaworski, *Originalism All the Way Down. Or: The Explosion of Progressivism* 26:2 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE (2013): 313-340

8 MICHAEL J. PERRY, MORALITY, POLITICS AND LAW 155 (1988).

Where applied to the 14th Amendment, consensualism dictates that "[l]iberty includes only what a current social consensus says it includes."[9] Since the majority of Americans only support abortion where there is "rape, incest and serious fetal deformity", *Roe v. Wade* ought to have limited the constitutional right to an abortion to those cases.[10]

Yet most American progressives generally tend to be more nuanced. Jack Balkin, for instance, rejects the idea that the Supreme Court should simply be a "mirror" that "reflect[s] popular opinion."[11] In *Living Originalism*, Balkin offers the countervailing idea of "framework originalism", where the Constitution offers an "initial" outline to be filled out by future political and judicial branches.[12] With some differences, David Strauss and Laurence Tribe also share Balkin's position on the progressive spectrum. "Living constitutionalism," as articulated by Strauss, takes a "common law" approach toward "constitutional issues . . . that arise in a large, complex, diverse, changing society."[13] This nuanced version of progressivism partakes in Justice Harlan's metaphor of the Constitution as a "living tradition."[14] The Constitution evolves in accordance with changing social mores.

Although Balkin, Strauss and Tribe reserve a role for other actors in their progressive vision, all progressives place the Supreme Court in a primary position. In so doing, American progressives, like their Canadian counterparts, defend a theory of judicial supremacy that is at odds with their advocacy of progressivism based on contemporary values.[15]

Noting these similarities, we extend the problems of progressivism from the Canadian context to an American one. The incoherence of advocating progressivism while adhering to *stare decisis* means that American progressives are just as Janus-faced as their Canadian counterparts. More broadly, we believe this incoherence hints at a more

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9 SOTIRIOS A. BARBER AND JAMES A. FLEMING, CONSTITUTIONAL INTERPRETATION 70-71 (2007) (interpreting Perry's work).

10 *Id.*

11 JACK M. BALKIN, LIVING ORIGINALISM 288 (Harvard University Press 2011).

12 *Id.* at 21-22.

13 DAVID A. STRAUSS, THE LIVING CONSTITUTION 34-35 (2010).

14 Justice Harlan famously opined that the "content" of the 14th Amendment "cannot be determined with reference to any code." Instead, it has been determined by "the balance which our Nation… has struck between [individual] liberty and the demands of organized society." This balance was evident in the "traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing." Ullman v. Poe, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

15 Chief Justice Charles Evan Hughes is known to have remarked, "we are under a Constitution, but the Constitution is what the judges say it is." CHARLES E. HUGHES, ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES, GOVERNOR OF NEW YORK: 1906-1908 139 (Jacob Gould Schurman ed., G. P. Putnam's Sons 1908).

significant issue – that of constructing a doctrine of interpretation for Supreme Court judgments.

These questions are not mere exercises in academic speculation. "Super precedents" - highly influential Supreme Court decisions that have acquired a near-permanent status in American constitutional law - significantly affect modern American life.[16] To cite just two, consider *Roe v. Wade*[17] and *Brown v. Board of Education*.[18] When questioned during her confirmation hearings, Justice Sonia Sotomayor considered the former to be "the precedent of the court and settled."[19] Conversely, Bernard Siegan's confirmation was stymied because he believed *Brown* to be incorrectly decided.[20] Nor is the interpretation of rulings limited only to confirmation hearings and superprecedents. Rarely does the Supreme Court mention the *exact* text of the Constitution in its rulings. We would be hard pressed, however, to find a Court opinion that did not contain a single reference to an earlier decision.

I. A NEED FOR A THEORY OF 'JUDGMENT INTERPRETATION'?

There are a wide number of disputes over which laws overrule precedent,[21] and whether new judgments supersede old ones.[22] How-

16 Michael J. Gerhardt considers 'super precedents' to be "constitutional decisions in which public institutions have heavily invested, repeated relied, and consistently supported over a significant period of time. Super precedents are deeply embedded into our law . . . ." Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205 (2005).

17 *See generally* 410 U.S. 113 (1973).

18 *See generally* 347 U.S. 483 (1954).

19 Confirmation Hearings on the Nomination of the Honorable Sonia Sotomayor S. Hrg. 111-503 Before the Senate Committee on the Judiciary, 111th Congress, 1st Session. S. No. J-111-34 (2009).

20 Siegan felt that "the case is strong that the Thirty-ninth Congress did not seek to adopt an amendment that would affect racial segregation in the schools. . .". Rather, he suggests that the legislators "solely comprehended civil rights and not social privileges, voting, office holding . . . public schooling, or other political rights." BERNARD H. SIEGAN, THE SUPREME COURT'S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY 89-93 (1987). Facing strong opposition, the Senate Judiciary Committee voted not to recommend his nomination to the 9th Circuit Court of Appeals favorably. Ruth Marcus, *Senate Committee Defeats Siegan Judicial Nomination*, WASH. POST, July 15, 1988, available at https://www.washingtonpost.com/archive/politics/1988/07/15/senate-committee-defeats-siegan-judicial-nomination/c2f17559-b281-4f41-a9eb-5e8493cac308/.

21 The Eleventh, Thirteenth, Fourteenth, Sixteenth and Twenty-Sixth Amendments were all Congressional measures passed to override Supreme Court decisions.

22 *See e.g.,* Texas v. Johnson, 491 U.S. 397, 397, 429 (1998) (the Supreme Court ruled that flag burning was permitted under the free speech protections of the 1st Amendment. Although 48 states and the federal government had laws that prohibited the desecration of the flag, these laws were invalidated.).

Even though Congress had widespread national support, they did not seek to invalidate the Supreme Court's ruling through a Constitutional Amendment. Instead they sought to circumvent *Texas v. Johnson* by expanding the definition of desecration. Congress amended the Flag Desecration Act of 1968 and renamed it the Flag Protection Act of 1989.

ever, none of these disputes have accurately identified the dissonance involved in applying theories of textual interpretation on the Constitution to an interpretation of the rulings themselves. Originalists and living constitutionalists alike lament the fact that American law is built upon precedents. Justice Scalia begins his critique of the system by observing that the "aspiring American lawyer . . . learns the law not by reading statutes . . . but rather by studying the judicial opinions that invented it."[23] Strauss concurs: "Advocates know what actually moves the Court. Briefs are filled with analysis of the precedents . . . But when a case involves the Constitution, the text routinely gets no attention."[24]

And yet if rulings hold such importance in American law, why do we lack a consistent theory of interpretation for them? If progressivism and originalism dominate the academic discourse, why is it that we do not apply those interpretive theories in reading judgments? Which theory of interpretation ought to prevail when the Supreme Court disagrees with the legislature, or when the Court disagrees with lower courts? [25] Let us illustrate the need for such a theory using two seminal cases: *Brown v. Board of Education* and *Whitney v. California* .

A. Example 1: Brown v. Board of Education: How do we interpret "equitable principles" and "all deliberate speed"?

In *Brown* the Supreme Court famously ruled that "[i]n the field of public education, the doctrine of "separate but equal" has no place."[26] In the subsequent rehearing, known as *Brown II*, the Court assigned to "[s]chool authorities . . . the primary responsibility for elucidating, assessing and solving [segregation]" and noted that "[F]ull implementa-

(18 U.S.C. §700 (1989)). Nevertheless, the Court struck down the law again in 2000. *See* United States v. Eichman, 496 U.S. 310, 310 (2000) ("Appellees' prosecution for burning a flag in violation of the Act is inconsistent with the First Amendment.").

23 SCALIA, *supra* note 6, at 4.

24 STRAUSS, *supra* note 13, at 34.

25 Benesh and Reddick. empirically demonstrate that lower courts generally comply with Supreme Court decisions. However, this should not be construed as blind obedience. The Supreme Court's "dialogue" with lower-judicial actors is just as, if not more, sophisticated as with the legislature. When lower courts ideologically disagree with a precedent, they have multiple legal tools available to them to reduce the degree of compliance (*e.g.,* narrowly interpreting the decision, ignoring it, dismissing it on procedural grounds, *etc.*). Sara C. Benesh and Malia Reddick, *Overruled*: *An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 JOURNAL OF POLITICS 534, 536 (2002).

Conversely, in order to mitigate defiance or half-hearted compliance, the Supreme Court also has a range of options available to it. It may name and shame by "revers[ing] a circuit court" (Benesh and Reddick, *id.* at 539) or it might submit *per curiam* decisions. *See generally* Laura K. Ray, *The Road to Bush v. Gore*, 79 NEB. L. REV. 518, 519 (2000) (discussing the "shifting balance between the impersonal and the individual" in per curiam opinions).

26 Brown v Board of Education, 347 U.S. 486, 495 (1955) (Warren, C.J., writing for a unanimous decision).

tion of these constitutional principles may require solution of varied local school problems."[27]

However, *Brown II* specifically noted that "[i]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."[28] Nevertheless, the Supreme Court acknowledged that lower courts may develop differing solutions and require varied amounts of time to eliminate desegregation. Both allowances came with the respective caveats of "be[ing] guided by equitable principles" and "with all deliberate speed."[29]

How should lower governmental officials have interpreted these caveats? In *Cooper v. Aaron*, the Warren Court recognized that Arkansan School Board officials had sought delays on a "good faith" basis, pursuant to the "all deliberate speed" clause. "'Tension . . . chaos, bedlam and turmoil'" had resulted from the actions of Governor Faubus' defiance of *Brown*.[30] The Court rebuked the actions of the governor and legislature, firmly stating that its "interpretation of the Fourteenth Amendment . . . in the *Brown* case is the supreme law of the land."[31]

In contrast, following *Brown*, Virginia implemented a policy of "Massive Resistance", refusing to fund all of its public schools.[32] After this was overturned in *Griffin v. County School Board of Prince Edward County*,[33] Virginia implemented a "freedom of choice" plan where pupils could choose their own schools. *De facto* segregation ensued in New Kent County, Virginia, with no white child applying to the black-designated New Kent School, and no black child applying to the white-designated Watkins School.[34]

The Court sought to reign in these competing interpretations of its *Brown* judgment. Responding to the stalling procedures used by Virginia officials, Justice Brennan fumed, "it is relevant that this first step ["freedom of choice" plans] did not come until some 11 years after *Brown I* was decided . . . Such delays are no longer tolerable for "the

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27 Brown v. Board of Education, 349 U.S. 294, 299 (1955).

28 *Id.* at 300.

29 *Id.* at 300-301. On the one hand, the ruling's exhortations to be bound by the principle of desegregation imply an originalist reading of *Brown*. On the other hand, the leeway given for local solutions implies that the Court recognized a need for a "progressive" reading of *Brown*. Of course, if one favors a progressive reading of *Brown*, it ought to ensue irrespective of whether the Court declared it to be so.

30 Cooper v. Aaron, 358 U.S. 1, 13 (1958) (Warren, C.J., writing for a unanimous decision).

31 *Id.* 18.

32 *See* Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 221 (1964).

33 *See id.* at 221-22 ("In April 1959 the General Assembly abandoned 'massive resistance' to desegregation and turned instead to what was called a 'freedom of choice' program.").

34 Green v. County School Board of New Kent County, 391 U.S. 430, 441 (Brennan, J., writing for a unanimous decision).

governing constitutional principles no longer bear the imprint of newly enunciated doctrine."[35] Justice Brennan directly rejected Virginia's interpretation of "all deliberate speed" – "[t]he time for mere 'deliberate speed' has run out . . . the context in which we must interpret and apply this language [of *Brown II*] to plans for desegregation has been significantly altered . . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."[36]

By *Alexander v. Holmes County Board of Education* it was clear that the Court had run out of patience. It declared in oposition to the U.S. Department of Education and the School Board of Mississippi that "continued operation of segregated schools under the standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible."[37] The Supreme Court thus overturned the Fifth Circuit Court of Appeals' order for an indefinite postponement, and required the implementation of "unitary school systems" effective immediately.[38]

B. Example 2: A consideration of circumstances in Whitney v. California

Anita Whitney was convicted under the Californian Criminal Syndicalism Act. Her conviction rested on the finding that she was a "member of the Local Oakland branch of the Socialist Party."[39] The Supreme Court ruled unanimously to uphold her conviction.

Justice Brandeis wrote a separate, powerful defense of free speech. He pointed out, "[t]his Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present, and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgement of free speech and assembly as the means of protection."[40] However, he ultimately concurred with the majority because he felt that "when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil."[41]

Californian Governor C. C. Young acknowledged that he "felt . . . that after the constitutionality of the law had been upheld by our highest

35 *Id.* at 438.
36 *Id.*
37 396 U.S. 19, 20 (1969) (per curiam).
38 *Id.*
39 Whitney v. California, 274 U.S. 357, 363 (1919).
40 *Id.* at 374 (Brandeis, J., concurring).
41 *Id.* at 379.

court, its penalties must be exacted."[42] However, Young undertook a 'progressive' reading of the judgment by citing Brandeis' defense of free speech as reason for overturning the conviction and pardoning Whitney.[43] Young then pointed out that according to Brandeis' criteria of clear and present danger, "[t]he Communist Labor Party has practically disappeared . . . in California . . . I am unable to learn of any activities of this party, in California at least . . . which ever rendered it a danger or a menace to our institutions."[44]

Governor Young also disputed the judicial procedures leading up to *Whitney's* appearance before the Supreme Court. He cited the fact that she had not directly incited any violence, the paucity of evidence against her, and the death of Whitney's attorney at trial.[45] Young also solicited opinions from judges at every stage of the appeals process, many of whom felt a pardon was in order.[46] Lastly, he consulted the architect of the Criminal Syndicalism Act, who articulated that the Act had been misapplied.[47] Accordingly, Young pardoned Whitney before she was imprisoned.[48] The Supreme Court ultimately reversed its ruling in *Brandenburg v. Ohio* by expressing that "*Whitney* has been thoroughly discredited by later decisions."[49]

Governor Young's read of *Whitney* is particularly significant. It is quite clear that the Governor reached a different conclusion from the one the Court reached (i.e. imprisoning Anita Whitney). However, in pardoning her, he justified his reasoning by citing Brandeis' opinion. This was done in conjunction with Governor Young's judgment of the social conditions in California *vis-à-vis* Communism.

Similarly, Arkansan and Virginian officials arguably interpreted the *Brown* ruling in bad faith. But even then, they did so with reference to the leeway of "all deliberate speed" granted in *Brown*. In both cases, elements of judgments can be vague, ambiguous and include abstract, value-laden concepts. Lower-judicial officials may feel justified in enacting a 'progressive' interpretation of the ruling mediated by 'on-the-ground' conditions. And, at least in the case of *Brown*, these rulings have serious consequences for social justice (or lack thereof).

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42 Clement C. Young, *Governor C. C. Young's Pardon of Charlotte Anita Whitney, reprinted in* ANITA WHITNEY, LOUIS BRANDEIS, AND THE FIRST AMENDMENT 165, 166 (Haig A. Bosmaijin, ed., 2010).

43 *Id.* at 170.

44 *Id.*

45 *Id.* at 167-168.

46 *Id.* at 171-172.

47 *Id.* at 175.

48 *Id.* at 177.

49 *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

Brown and *Whitney* are but two examples of ambiguous rulings. There are many others. The fact that rulings can be ambiguous, coupled with the fact that these rulings have significant practical implications, suggests a need for a consistent theory of ruling or judgment interpretation.

II. OBJECTIONS TO ORIGINALISM – A DOUBLE-EDGED SWORD

Can we defend progressivism as a theory of judgment interpretation? In this section, we demonstrate its fallibility via the following steps: First, we canvass the principal objections progressives level against originalism, including objections to intentionalism and the requirement of fidelity. Second, we show that strict adherence to Supreme Court judgments, even progressive judgments, raises the very same objections that progressives had heretofore directed at their originalist opponents.

A. The Problem of Intentionalism for Judgments

Most progressive critiques of originalism begin with intentionalism. Indeed, even contemporary originalists reject intentionalism. The focus on 'original intention', with an emphasis on the meaning of the Constitution as intended by the founders emerged with Robert H. Bork and Raoul Berger's critique of the Warren Court majority.[50] This critique was furthered in the 1980s with the "Jurisprudence of Original Intention."[51] Intentionalism urges us to avoid the "veritable constitutional forest" of the present day by considering the intentions of "those who framed the Constitution."[52]

The same decade saw a bumper crop of practical and moral objections to intentionalism arise. Paul Brest[53] and H. Jefferson Powell[54] raised significant practical objections to intentionalism. Brest questioned the possibility of aggregating and summing the intentions of a

50 *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. REV. 1, 13-15, 17-19 (1971) on *Brown v. Board of Education* (1954)(critiquing Warren's opinion in *Brown*); RAOUL BERGER, GOVERNMENT BY JUDICIARY 4 (2nd ed. 1997)(critiquing the Warren Court more generally). Credit goes to Joseph Hartman for directing us to these two examples.

51 Edwin Meese III, *The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intent*, 45 PUB. ADMIN. REV. 701, 701-704 (1985).

52 *Id.* at 702.

53 *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B. U. L. REV. 204 (1980)(noting that a legislature has multiple people, who can have different opinions and intentions).

54 *See* Jefferson H. Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985)(explaining the shift in how original intent was perceived over time).

corporate body like the legislature, while Powell argued that intentionalism may be self-effacing since many of the founders did not intend for their intentions to be decisive. Meanwhile, some originalists themselves have raised forceful moral critiques of intentionalism. Justice Scalia and John J. Gibbons, for example, have both depicted an unfettered dependence on legislative intent as tyranny.. [55] It is tyrannical to use thoughts in the head of legislators as law since no ordinary person who is subject to the law can be reasonably expected to know these thoughts. All they know, or should be expected to know, is the written and promulgated text of the law. By the end of the decade, many in both the originalist and progressive camps felt that intentionalism had been soundly defeated as a plausible theory of constitutional interpretation.

It is of course possible that the framers intended for the Constitution to be read in an open-ended and progressive manner. Chief Justice Marshall in *McCulloch v. Maryland*, for example, indicates some sympathy with this view: "A Constitution . . . requires, that only its great outlines should be marked . . . [and] minor ingredients . . . be deduced from the nature of the objects [designated]. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language."[56] Be that as it may, contemporary progressives would nevertheless reject intentionalism in principle. After all, what matters is that *we* approve of the law, that *we* who are bound by the law regard the law not as an alien imposition from the anachronistic past, but as both reflecting and aligning with the values of the people governed by it in the present. That the framers may or may not have intended or wanted a progressive doctrine of interpretation would be of merely historical and biographical interest, but it would in no way be decisive or even relevant to what doctrine of interpretation we ought to embrace.

What is interesting, however, is how these objections to intentionalism for constitutional interpretation apply just as readily to intentionalism for judgment interpretation. Below, we outline in detail two objections to intentionalism, showing how they apply to judgments as well:

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55 SCALIA, *supra* note 5, at 17; John J. Gibbons, *Intentionalism, History and Legitimacy*, 140 U PA. L. REV. 613, 623 (1991).

56 *See McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (Marshall, C.J., opinion)(describing the language in a constitution). Justice Marshall further posed in the judgment that the "[C]onstitution [was] intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." *Id.* at 415.

i. Judgments have a life of their own: The tyranny of intentionalism for judgment interpretation

Justice Scalia fiercely derided legislative intent as "simply incompatible with democratic government."[57] "Men will intend what they will," he opined, "but it is only the laws they enact which bind us."[58] Underpinning his criticism is a two-fold understanding of the nature of law. On one level, for the sake of fairness, laws that are not "promulgated" should not bind citizens, since they were unaware of said laws. On another, rules that are not well known cannot count as law, if they are not promulgated widely enough to guide behavior.

John J. Gibbons adds to this critique by posing the pertinent question that even if intentionalism is to be considered the right mode of interpretation, we should still ask, "who elected the Founders?"[59] Unless, as Gibbons argues, we engage in the "fiction" that through our willingness to abide by the judgments of the Supreme Court ("their present spokespersons") and we find reasons to consent to their original intent as discovered by the Court, the current system of Constitutional law "must be found wanting."[60]

We can apply these same objections to intentionalism for constitutional interpretation to intentionalism for judgment interpretation. When we look at an ambiguous ruling from the bench, we may be tempted to try to figure out what the Justices intended by, for example, "all deliberate speed." But we cannot succumb to this temptation if we agree with the reasons stated above for rejecting intentionalism. We can dismiss as anachronistic or possibly inconsistent with contemporary values the views, opinions, beliefs, convictions, and whatever else may be constitutive of the intentions of Justices who wrote or signed on to *Brown* or *Whitney*, none of whom now sit on the Supreme Court. We can ask as pointed and pertinent a question about Justices who no longer sit on the Court as we can of legislators who no longer hold office. Instead of "who elected them?" we can ask, "who appointed them?" The answer will be the same: "not us and not our generation." It would also be just as tyrannical to use the thoughts in the minds of the Justices rather than the promulgated text of their ruling, as it would to use thoughts in the mind of legislators rather than the text of the promulgated law. This is, as Justice Scalia makes plain, as true of the intentions of currently sitting Justices as is true of the intentions of those who are no longer on the bench. Referring to *Chevron v. USA*, Jus-

57 SCALIA, *supra* note 6, at 17.
58 *Id.*
59 Gibbons, *supra* note 55, at 624.
60 *Id.* at 624-625.

tice Scalia asks wryly "Do I have to defer to John Paul Stevens because he's the author? 'Oh John, you wrote Chevron. You must know what it means.' Of course not! John doesn't know what it means! Once you let loose the judicial opinion, John, it has a life of its own, and it means what it says."[61]

ii. Too many judges spoil the judgment: Discerning intent from amalgamations, dissents and pluralities

Even if the moral objections to intentionalism could be overcome, we would face the very same practical difficulties for intentionalism for judgment interpretation as we do for intentionalism for constitutional interpretation. There were 55 framers at the Constitutional Convention in Philadelphia.[62] Many find it hard to believe that there is one unified 'intention' emanating from the Constitution. Instead, it is more likely that we will have distinct sets of preferences and expectations informing the intentions of the 55 individuals, with no way of deciding which "intention" should reign supreme.

If these practical objections are persuasive against intentionalism for constitutional interpretation, then they should also persuade us of the impracticality of intentionalism for judgment interpretation. The Court is a corporate body consisting of nine Justices, how are we to interpret the corporate intention? Since Chief Justice Warren wrote the opinion for *Brown* (1954), should his intentions be given the highest priority? What about the intentions of Justices like Jackson and Reed who, despite their reservations, signed on to the unanimous opinion?

Moreover, the problem of aggregating intentions is aggravated by concurring opinions. Concurring opinions thus give rise to "plurality" or "no-clear-majority" opinions. In 2007, "the number of concurring opinions [was] more than half the [total] number of opinions . . . ."[63] These can prove confusing to lower-judicial officials. Davis *et al.* argue that such opinions have "less precedential weight" and "fail[] to give definitive guidance as to the state of law to lower courts . . . as well as to the legislative, administrative and executive agencies."[64] Using the example of obscenity standards for outlawing pornography, Davis *et al*.

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61 Adam Liptak, *On the Bench and Off, The Eminently Quotable Justice Scalia*, N.Y. TIMES, May 12, 2009, at A13.

62 JOHN C. MORTON, SHAPERS OF THE GREAT DEBATE AT THE CONSTITUTIONAL CONVENTION OF 1787: A BIOGRAPHICAL DICTIONARY 2 (2006).

63 Linas E. Ledebur, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 PENN ST. L. REV. 899, 904 (2008).

64 John F. Davis and William L. Reynolds, *Juridical Cripples*: *Plurality Opinions in the Supreme Court*, 1974 DUKE L. J. 59, 62 (1974) citing Justice Burger's opinion in *Miller v. California*, 413 U.S. 15 (1973).

cite the four separate opinions in *Roth v. United States* and the six separate opinions in *Jacobellis v. Ohio*. The least helpful, but most memorable of all, was Justice Potter Stewart's infamous "I know it when I see it."[65] The judgments led to widespread confusion over which test to apply, requiring the Court to "summarily revers[e] convictions."[66] Finally, the ability of justices to issue dissents poses a further complication. By the formal rules of precedent, dissents ought not to be accorded weight. And yet landmark rulings often refer to prior dissents. In *Lawrence v. Texas*, citing Justice Steven's dissent in *Bowers v. Hardwick*, Justice Kennedy emphatically stated, "Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here."[67] Of course, it is often said that future justices are borrowing the *reasoning*, rather than the authority of the dissent. But the question still remains: whose opinion ought to be controlling here? Justice Stevens' or Justice Kennedy's?

B. Originalism's Sins in the Living Garden of Constitutionalism

Given the above problems, intentionalism was mainly abandoned in favor of 'New Originalism' in the 1990s.[68] New Originalism's emphasis was on the public meaning of the Constitution. As Justice Scalia put it, original public meaning is the meaning that a "reasonable person would gather from the text" at the time of the promulgation of the law.[69] Of course, New Originalists also differ over whether this public meaning embodies 'semantic intentions'–the meaning of the words in the text–or 'application intentions'–the hoped-for or expected application of the law to specific cases.[70]

Regardless of whether one is an intentionalist or new originalist, all flavors of originalism share two theses in common. Lawrence Solum calls these the "fixation" and "fidelity" theses. Fixation, says Solum, is the descriptive claim that the meaning of the Constitution "was fixed at the time of its framing and ratification."[71] What it means now is what it meant then. Fidelity, on the other hand, is the normative claim that Courts ought to defer to that fixed, original meaning of the Constitu-

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65 *Jacobellis v. Ohio*, 378 U.S. 184, 198 (1964) (Stewart, J. , concurring)

66 Davis and Reynolds, supra n. 64 at 70 citing Justice Burger's opinion in *Miller v. California*, 413 U.S. 15 (1973). *See also* Ledebur, *Plurality Rule*, *supra* note 63, at 905–10 for four other modern cases where plurality opinions have led to confusion over interpretative meaning.

67 Lawrence v. Texas, 539 U.S. 558, 578 (2003) (citing 478 U.S. 186).

68 *See generally* Keith E. Whittington, *The New Originalism*, 2 GEO J. L. & PUB. POL'Y 599 (2004).

69 Scalia, *supra* note 5, at 17.

70 Whittington, *supra* note 68, at 610-611. *See generally* Dworkin, *supra* note 4, for the clash between Justice Scalia and Dworkin on original public meaning.

71 Lawrence B. Solum, Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption, Review, 91 TEX. L REV. 147, 154 (2012).

tion. In the context of the 'Old Originalism' of the 1980s, this exhortation was known as "judicial restraint."[72]

Whilst originalists of all stripes are united by the fixation and fidelity theses, progressives are united in their rejection of both theses. For the progressive the 'sins' of originalism[73] are two-fold:

1. Progressives reject fixation because it 'freezes' into place concepts and rights that are archaic and irrelevant;

2. Progressives reject fidelity because we ought not be bound by the 'dead hand of the past';

As with intentionalism, we outline each of these objections in detail:

i. Frozen concepts and rights

Progressives reject the idea that the meaning of the Constitution is fixed. They claim that two centuries have wrought significant linguistic and cultural changes that make this impractical. One clear example of this is the Seventh Amendment that guarantees trial by jury when "the value in controversy shall exceed twenty dollars."[74] Clearly that amount is no longer a practical guide. When balancing the efficiency costs in convening a jury with the individual's right under the Seventh Amendment, judges and legislators are unlikely to locate the fulcrum at twenty dollars.

The Seventh Amendment is not the only complication in reading a 200-year-old text according to its original meaning. Yet another is the contentious "right to bear arms" of the Second Amendment.[75] One of the most advanced weapons in 1791 was the Belton Flintlock. Belton attempted to sell it to the Continental Congress, citing a firing rate of 20 shots in 16 seconds.[76] Today, the most advanced machine gun, developed by Metal Storm, fires over a million rounds per minute.[77] In the 1960s, the U.S. military developed the Davy Crockett, a "two-man [nuclear] weapon carried by hand" that could cause damage of a "sub-

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72 J. Clifford Wallace, *Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1, 1-2 (1981-1982).

73 Strauss uses this phrase in *Living Constitutionalism*, *supra* note 13, at 7.

74 U.S. CONST. art. VII. Even using the Consumer Price Index, this inflation-adjusted amount would be US $512 in 2014 rates. It would be quite impractical (and economically inefficient) to have to empanel a jury every time a civil suit arose for an amount as low as US $512. Samuel H. Williamson, *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount, 1774 to present,* MEASURINGWORTH, (2014), http://www.measuringworth.com/calculators/uscompare/result.php. (Apr. 29, 2014).

75 U.S. CONST. art. II.

76 *See* PETER FRANCIS, A HISTORY OF GUNS (CreateSpace Publishing 2014).

77 Press Release, *Metal Storm CEO on Strategy to Commercialization*, REUTERS, Jul. 15, 2008, 1:10 PM, *available at* http://in.reuters.com/article/2008/07/15/idUS67330+15-Jul-2008+MW20080715.

kiloton yield."[78] If the meaning of the Second Amendment is fixed, and if these new weapons count as 'arms,' then it appears to follow that every American has the right to bear a Davy Crockett or a Metal Storm machine gun. For many progressives, that is reason enough to abandon the fixation thesis.

While technological and financial changes make adherence to 'frozen' concepts undesirable for progressives, so too do they find 'frozen' rights to be objectionable. As Barber et al. put it, "[c]onsistently applied, a framers'-application approach . . . might undermine not only the constitutionality of the nation's labor laws and social welfare programs; it also would undermine the legality of NASA and the Air Force, federal laws against drug abuse . . . and many other practices of modern government."[79]

As with intentionalism specifically, so too with originalism more broadly: if we reject them for constitutional interpretation, we will have to reject them for judgment interpretation as well. If anything, frozen rights and concepts ought to be a greater concern for judgment interpretation because they are more plainly articulated in rulings as opposed to the often broad, abstract clauses of the Constitution. Should *Plessy v. Ferguson* continue to enshrine the archaic practice of segregation just because a prior Supreme Court established it? Should we accept *McCulloch v. Maryland* even though those principles were articulated at a time when the American government was far less established, and when the problems of modern government today are far more extensive?

ii. Dead hand of the past

Yet another popular argument is that of the 'dead hand of the past'. There are two strands to the argument. In a previous essay, one of us discussed how the 'dead hand of the past' objection was a way of rejecting the fixation and fidelity theses.[80] Here, we present a new way of countenancing the 'dead hand of the past' critique on practical and normative grounds.

The first is closely related to the idea of frozen concepts and rights. Long-dead legislators, or the Americans who constituted the public in the past, simply had no conception of the new technologies, lifestyles and values that modern Americans have. It hardly seems reasonable that we should be governed by their views about how our modern so-

78 Hugh Beach, *The Nuclear Battlefield*, *in* THE BRITISH NUCLEAR WEAPONS PROGRAMME, 1952-2002, 31, 36 (Frank Barnaby and Douglas Holdstock eds., 2003).

79 SOTIRIOS A. BARBER AND JAMES A. FLEMING, A CONSTITUTIONAL INTERPRETATION 88-89 (2007).

80 Jaworksi, *supra* note 7, 327

ciety should be run. James Madison, who led the drafting of the Bill of Rights, could not possibly have foreseen modern societal changes *vis-à-vis* segregation and the rights of criminal defendants.

The second strand posits that even if prior legislatures and generations somehow could have foreseen the problems and technological innovations of the twenty-first century, they have no right to establish laws governing our society. This strand suggests that rule by former legislators, our ancestors, is anti-democratic because they no longer hold political office. It is further anathema to basic ideas of fairness, because the generations who enacted these laws do not have to live under them. Instead, we do. Barnett echoes this very critique by noting, "consent morally binds only those who themselves actually consent. No one has yet explained how the consent of some of our ancient ancestors, and in my case someone else's ancestors . . . can bind those alive today who have not consented . . . the insides of any such theory inevitably involve some form of cheat."[81]

If rule by the dead hands of the framers is impractical and anti-democratic, then the same is true for rule by dead justices. For example, President Eisenhower appointed Earl Warren to the bench in 1953. Justice Warren, however (much to Eisenhower's chagrin[82]), would author some of Court's landmark liberal opinions, including *Brown v. Board of Education* (1954) and *Miranda v. Arizona*. *Brown* is today one of the most celebrated Supreme Court decisions.[83] Similarly, *Miranda* has made an indelible mark on modern day criminology and jurisprudence. For instance, Justice Warren's opinion has been transposed almost word-for-word onto contemporary 'Miranda warnings.'[84]

Regardless of how seminal the Warren Court's decisions are, progressives ought to reject an originalist interpretation of these rulings. Since Justice Warren retired in 1969 (and passed away in 1974) his au-

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81 Randy E. Barnett, *Scalia's Infidelity: A Critique of Faint-Hearted Originalism*, 75 U. CIN. L. REV. 7, 10 (2006).

82 Eisenhower was known to have heavily regretted his decision. He called Justice Warren's appointment "the biggest damn-fool mistake I ever made." G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 129–30 (1982).

83 In 2001, Congress established the *Brown v. Board of Education* 50th Anniversary Commission via Pub. L. No. 107-41, 115 Stat. 226. The act not only commemorated the landmark decision, but also created a foundation to perpetuate the significance of the ruling.

84 A typical iteration of the Miranda warning might state: "you have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you?" *Pre Arrest Questioning*, MirandaRights.org (2009), http://www.mirandarights.org/prearrestquestioning.html. The original opinion reads: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney."

thority ought to be superseded by new justices.[85] In the same vein, the last serving member of the *Miranda* majority, Justice Brennan, retired in 1990 (and passed away in 1997). Since these justices no longer sit on the Supreme Court, and we ought not be ruled by the 'dead hands' of those who no longer hold office, then Justice Warren's (and Justice Brennan's) preferences, expectations, or understandings of the Constitution, should not rule us any more for the same reasons that James Madison's preferences, desires, expectations or understanding of the Constitution should not rule us.

iii. Contemporary values

In place of frozen rights and the dead hand of the past, progressives offer a vision of the Constitution that flourishes in the soil of contemporary values. Progressives believe that judges, and especially Supreme Court justices, need to interpret the Constitution in light of evolving societal changes rather than as a 'dead' text. Justice Breyer leans towards this view when he asserts "[The Framers] wrote a Constitution that begins with the words 'We the People.' The words are not 'we the people of 1787.'"[86] Instead, he submits that there must be active liberty – the "'active and constant participation in collective power'" by citizens.[87]

In fact, especially *because of* the ambiguity of the Constitution, and its constant invocation of American values, there is a need to read it contemporaneously. As Justice Brennan puts it, "one cannot read the text without admitting that it embodies substantive value choices . . . To remain faithful to the content of the Constitution, therefore, [interpretation] must account for . . . these substantive value choices, and must accept the ambiguity inherent in the effort to apply them to modern circumstances."[88]

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85 Of course, we might assume that the Supreme Court's future rulings on *Miranda* - most recently in *Berghuis v. Thompkins*, 547 F.3d 572 (2010) – implicitly reaffirm the Warren Court's judgments in *Miranda*. However, this does not take into account potential occasions where new justices may not have a chance to revisit settled doctrines (since cases are not brought before them), or occasions where the rulings of new justices only peripherally touch upon the *ratio decidendi* of old rulings.

86 STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 4, 25 (2005).

87 *Id.* at 4.

88 William J. Brennan, Justice of the Supreme Court of the United States, *Speech at Georgetown University, Washington D.C.*, Text and Teaching Symposium: Constitutional Interpretation (Oct. 12, 1985).

C. The hypocrisy of progressivism: Forbear to judge, for we are original sinners all[89]

As we have seen, progressives have a long litany of complaints against intentionalism and new originalism. Both, they argue, are tyrannical. Both rely on original meanings (or intentions) that are difficult to discern, much less to apply. And both are out of touch with contemporary values.

Surprisingly, no progressive that we're aware of seems to have noticed that these objections apply to judgment interpretation with equal force. This is especially surprising in light of the fact that progressives *depend upon* the Supreme Court to read the Constitution progressively, be it as a 'living document', or as part of a 'living tradition.' Some, such as Strauss, depend exclusively on the Court to "have the last word on most issues of constitutional law."[90] Others, such as Balkin and Tribe, are willing to accept that other players – e.g. the executive and legislative branches – have roles to play alongside the Court.[91] Regardless of their stance, progressives indubitably uphold the pre-eminence of the Court's rulings.

But as we have earlier noted, this adherence to the Supreme Court's judgments is at odds with their objections to originalism. If rule by long-dead legislators and generations is objectionably tyrannical, then why isn't rule by long-dead judges also objectionably despotic? If the language of Amendments has been rendered archaic by changes in values and technology, then why isn't the same true for judgments enacted centuries ago? If the Constitution has to be updated in light of contemporary values, shouldn't Supreme Court judgments be similarly updated for the same reasons? And if they are to be updated in accordance with contemporary values, why should that updating be reserved to a Supreme Court alone?

Of course, progressives don't embrace this apparent incoherence flippantly. Rather, as we argue below, they are driven by exigency and practicality. Progressives want to prevent what one of us has earlier termed the 'explosion of progressivism.' The explosion is the judicial free-for-all, where everyone is entitled to their conception of what contemporary values are. Passing the buck to the Supreme Court is therefore a means of mitigating such an explosion. This may well give us

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89 WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH, act 2, sc. 2 in THE WORKS OF WILLIAM SHAKESPEARE (Alexander Dyce ed., 2nd Ed. Chapman and Hall 1866).

90 STRAUSS, *supra* note 13, at 47.

91 For Tribe, the Constitution has "invisible, non-textual foundations and facets" shaped by historical contingencies and cultural norms. Tribe treats "a relatively robust form of [judicial review as compared to judicial supremacy] as presumptively desirable." LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION, 50 (Geoffrey R. Stone ed., Oxford University Press 2008).

good reason to subscribe to judicial supremacy. However, it appears to come at the expense of the strength of the objections to originalism for the sake of practicality. In so doing, they are advocating, albeit unwittingly, an inconsistent, and even hypocritical, stance.

III. PROGRESSIVISM ALL THE WAY DOWN:

The Explosion of Progressivism And Its Problems

Below, we argue that progressivism is untenable. Indeed, none of America's foremost proponents of progressivism advance a form of 'pure progressivism.' This is because decisions on the weighty issues of law cannot merely rely on contemporary values. Contemporary values are fluid. Consider the American public's view of abortion. In various years from 1996 to 2012, Gallup polled a sample of Americans on whether they were pro-choice or pro-life. In six of those 12 years, a simple majority identified as pro-choice, and in two of those years the majority shifted within the space of three months.[92]

If public opinion on abortion has seen significant changes, the issue at least has the ability to capture the public's imagination. For the multiple cases that fill the Court's schedule every day, public opinion is amorphous, or even non-existent. *Ray Haluch*, the case we cited in our introduction, concerns whether payment of attorney fees constitutes a 'final decision.'[93] On the same day, the Court also heard about civil liability under the Aviation and Transportation Security Act - hardly the stuff of primetime news.[94]

Progressives and originalists alike clearly prize the Supreme Court's ability to decide cases with finality, to ensure some sense of certainty with respect to what is the law. Americans can disagree over abortion, but there is a settled code guiding their immediate actions on the issue. The laws (established by the Court's ruling) also allow for predictability. If they so choose, American women may opt for abortions knowing that they will not be unfairly punished due to the vagaries of public opinion.

This stability in the law is established through the doctrines of judicial supremacy, vertical *stare decisis* and horizontal *stare decisis*. The doctrine of judicial supremacy advances *legal* reasons to submit to the Supreme Court's authority. Because the Constitution has given a clear

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92 *Trend from polls in which pro-life/pro-choice was asked in isolation*, GALLUP (accessed Apr. 29, 2014), http://www.gallup.com/poll/1576/abortion.aspx#1.

93 *Ray Haluch Gravel Co. v. Central Pension Fund*, 571 U.S. ____, 1 (2014) (No. 12-992).

94 *See* Transcript of Oral Argument, Air Wisconsin Airlines Corp. v. Hoeper, 134 S. Ct. 852 (2013) (No. 12-315).

"grant of authority" to the Court, we ought to abide by their rulings.[95] Susan R. Burgess lists four cases that highlight how vertical *stare decisis* "emphatically" accords sole deference to the Supreme Court. This was most forcefully articulated in *Cooper v. Aaron*, where the Supreme Court faced down segregationist Arkansan legislators by unequivocally stating, "the federal judiciary is supreme in the exposition of the law of the Constitution . . . No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."[96]

Vertical *stare decisis*, requests the same of lower judicial officials, but for *practical* and *moral* reasons. Vertical *stare decisis* demands deference to the Supreme Court because of the practicality of not having to "[address] every question anew in each case", or the fairness of like cases being treated alike.[97] Insofar as progressives agree that the stability function of law matters, they concede to the need for judicial supremacy.

Horizontal *stare decisis*, on the other hand, does not definitively constrain the Court. On occasion, the Supreme Court reconsiders previous constitutional decisions. However, this power is reserved solely for the Supreme Court, and not for lower judicial officials (who are still bound to obey its rulings). Generally speaking, the Court has appeared reluctant to overrule past decisions. Some prime examples include *Brown's* (1954) implicit overruling of *Plessy*, *Lawrence*'*s* explicit overturning of *Bowers* and the "thorough discredit[ing]" of *Whitney* by *Brandenburg v. Ohio*, but despite these well-known reversals, the instances of the Court overruling prior decisions tend to be few and far between.

A. Why Avoid the Explosion?

Why do progressives have to adhere to the doctrines of *stare decisis*, or judicial supremacy? Is it necessarily impossible to have progressivism 'all the way down'? In other words, why must progressives contradict themselves and abandon pure progressivism?

In principle, progressives have no reason to favor judicial supremacy for legal reasons. Indeed, they seem to reject it. Since the doctrine of judicial supremacy suggests that the Constitution reserves the sole role

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95 Jack Wade Nowlin, *Authority Doctrines and the Proper Judicial Role*, *in* OURSELVES AND OUR POSTERITY 65 (Bradley C.S. Watson ed., 2009).; *See generally*, Frederick Schauer, *Judicial Supremacy and the Modest Constitution*,a92 CALIFORNIA LAW REVIEW (2004): 1045

96 Cooper v. Aaron, 358 U.S. 1, 18 (1958) (Frankfurter, J., concurring).

97 Edward Whelan, *Original Meaning and Responsible Citizenship*, in OURSELVES AND OUR POSTERITY, 7 (Bradley C.S. Watson ed., 2009) *supra* note 95.

of its interpretation to the Supreme Court, to the extent that this exhortation arises from an originalist reading of the Constitution, progressives ought to shun it. Rather, the progressive chooses the lesser evil of *stare decisis* for practical reasons. Without resort to vertical or horizontal *stare decisis* the explosion is certain to ensue. With reference to the American context, we demonstrate two ways in which this explosion is 'triggered':

i. Disagreement and discord

Absent judicial supremacy, it is not hard to conceive of situations where the lower courts and non-judicial actors disagree with one another. Much has been written on the false consensus effect, where individuals believe that the majority of the population holds similar beliefs as they do.[98] A recent study on the false consensus effect online shows that on controversial issues like the death penalty, gun control and moral education in public schools, "respondents whose opinions are strongly supportive estimate general support to be significantly greater than those respondents who hold moderate or unfavorable opinions."[99] The Internet, it seems, has a greater propensity to create 'echo chambers', reinforcing the false consensus effect. A similar study on comments on political blogs shows that there is an "agreement to disagreement ratio of 9:1."[100]

If individuals disagree with each other over what the societal consensus is, the settlement function of law will be disabled. The predictability of laws on privacy, transportation, and commerce that Americans rely upon to guide their actions will be thrown into chaos. Moreover, rival interpretations may imperil the rule of law, preventing disadvantaged groups from accessing its protections.

In *The Invisible Constitution*, Tribe progressively envisions an optimistic "gyroscopic construction" where different actors have the ability to interpret the Constitution.[101] To prevent the whole edifice from being pulled apart at the seams, he suggests that "majoritarian politics will probably hold the line," preventing any one interpreter from going

98 *See generally*, Lee Ross, David Greene, et al., *The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOCIAL PSYCHOLOGY 279 (1977).

99 Magdalena Wojcieszak and Vincent Price, *What Underlies the False Consensus Effect? How Personal Opinion and Disagreement Affect Perception of Public Opinion*, 21 INT'L J. OF PUB. OP. RESEARCH 26, 39 (2009).

100 Eric Glibert, Tony Bergstrom, et al., *Blogs are Echo Chambers: Blogs are Echo Chambers*, 42 HAWAII INTERNATIONAL CONFERENCE ON SYSTEM SCIENCES 5 (2009).

101 TRIBE, *supra* note 91, at 207-09.

too far out of bounds.[102] Of course, Tribe may be a little too sanguine about the effort it takes to reel in rival interpretations. Despite putative judicial supremacy within the American constitutional system, disagreement with the Supreme Court's rulings has generated problems on the ground. Decades after its initial ruling in *Brown*, the competing interpretations of Arkansan, Virginian and Mississippian legislators, relying in part on their Southern societies' consensus on segregation, forced *de facto* segregation upon children of color. This was despite the Court's declaration of "supreme" authority in *Cooper v. Aaron*.

ii. Self-interested interpretations

What we have earlier considered are genuinely held differing interpretations about Supreme Court rulings. But it is not hard to point to examples of self-serving interpretations of judgments, or the Constitution. Indeed, legislators in Virginia, Arkansas and Mississippi were almost certainly more likely to have racist tendencies than a sincere belief that the Constitution permitted segregation. Nowhere was this more evident than in Arkansas, where Eisenhower was forced to mobilize the 101st Airborne Division against Governor Orval Faubus. Faubus, in direct opposition to *Brown*, had ordered the Arkansan National Guard to prevent black children from entering a high school.[103]

It would be difficult to imagine progressives advancing such an unpalatable agenda as segregation. And yet, pure progressivism would allow for the possibility of self-interested interpretation. Racist governors might use 'contemporary values' as a pretext for their bigotry. Moreover, pure progressivism would permit each and every individual (and not just governors) to champion his or her own version of contemporary values. Doctors might choose to implement (or not) abortions by selecting whichever poll showed a majority (or minority) in favor of *Roe v. Wade*. Police officers might vacillate between Gallup or Pew studies, depending on which showed polling data skewed toward their own views on *Miranda v. Arizona*.

B. The Contradiction of Progressivism

In the interests of practicality, progressives are thus bound by *stare decisis*. The doctrines of *stare decisis* and judicial supremacy, however, require fixation and fidelity – the very theses that progressives reject. When rulings issue forth from the Supreme Court, they are automati-

102 *Id.* at 205.

103 Exec. Order No. 10,730, 22 Fed. Reg. 7628, (Sep. 25, 1957).

cally vertically binding upon lower judicial officials and non-judicial personnel.

The contradiction of progressivism arises from the fact that Supreme Court judgments *must be* just as 'frozen' as the Constitution, if they are to be binding. We have not been given any principled reason, however, why this kind of frozenness is palatable while the other kind is to be rejected. Instead of the 'frozen concepts' of the Constitution, we have the frozen concepts captured by judgments. Although medical changes in contraception and abortion have advanced dramatically since 1973, *Roe v. Wade* remains the foundation upon which future law on abortion is to be made, regardless of new technologies, changed circumstances, and possibly different values.[104] Similarly with rights – while we are to reject rights 'frozen' by the Constitution, we are to accept rights 'frozen' by the Supreme Court of generations past. Although the circumstances and the context of segregation was different in 1954, when *Brown* was established, than it is today, *Brown* continues to hold as much force currently as it did then.

It is certainly a good thing that Americans continue to enjoy these rights despite changing circumstances. But the basis upon which progressives enjoy the stability of these rulings seems in direct conflict with their own objections to originalism. Justices Blackmun and Warren have long since left the Supreme Court. If they could not have conceived of the changes in abortion or segregation that have since ensued, the progressive ought then to reject the weight of their rulings. Justices Blackmun and Warren have also long since passed away. If so, why should the 'dead hands' of Justices Blackmun and Warren continue to rule over us through their opinions?

The progressive doctrine rejects originalism as an appropriate doctrine for constitutional interpretation, favoring judgments made with an eye to contemporary values. But once the Court has passed these (progressive) rulings, progressives then appear to accept the legitimacy of originalism as a guide to judgment interpretation. Thus the meanings of Court judgments are to be 'fixed' at the time of their promulgation, and lower courts and non-judicial officials are then expected to demonstrate fidelity to those 'fixed' meanings.

If progressives are to consistently reject frozen concepts, frozen rights, the tyranny of intentionalism, and the dead hand of the past, then they will have to do the same when it comes to rulings from the

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104 Significantly, the Court's later ruling in *Planned Parenthood v. Casey* that affirmed "the essential holding of *Roe v. Wade*," was based on reasons of upholding *stare decisis* and the stability function of law, precisely the reasons that we argue are in conflict with the progressive doctrine. Planned Parenthood v. Casey, 505 U.S. 833, 845-846 (1992) (O' Connor, J., opinion).

Supreme Court. Unless good reasons are offered for why there should be a special exception carved out for the Supreme Court, a consistent application of the objections to originalism appears to undermine judicial supremacy. Below we canvass how plausible such an exception might be.

IV. WHAT'S LEFT AFTER THE DUST SETTLES: JUDICIAL SUPREMACY AND ORIGINALISM

A. Defenses for Judicial Supremacy

Progressives might argue that the apparent contradiction within their interpretive doctrine is a compromise between the need for stability (by reserving the authoritative role of interpretation to the Supreme Court) and the need for legitimacy (by exhorting the need to look to contemporary values).

However, as our earlier examples have shown, the problems of disagreement and bad faith could very well lead to the explosion of progressivism. Regardless of their attempts to balance the two, American progressives still reserve a preeminent role for the Supreme Court. The Court progressively sets the law of the land per contemporary values. Future Courts, though bound by horizontal *stare decisis*, have the authority to 'update' previous decisions per contemporary values.

The progressive doctrine relies on the Supreme Court to resolve the contradiction, because the nine members of America's highest court are a select body. They are impartial, and they are wise. Below, we assess two reasons to show why this is an inadequate defense.

i. Bad faith and the "counter-majoritarian" contradiction

Rorie Spill and Zoe Oxley point out that when reporters cover the Supreme Court, they tend to adopt a position of deference, "paint[ing] the justices as philosopher kings––apolitical oracles of the Constitution and the law."[105] We would like to believe that because of various devices––e.g. the lack of term limits and appointments by the President, rather than by elections––Supreme Court Justices are free from political influences. As such, they are not susceptible to bad faith rulings.

But justices are, after all, human. Jeffrey Segal and Albert Cover run an empirical study of the Supreme Court from 1953-1988. They find a 0.8 correlation between a justice's ideological values prior to confirma-

105 Rorie L. Spill & Zoe M. Oxley, Philosopher Kings or Political Actors-How the Media Portray the Supreme Court, 87 JUDICATURE 22, 24-25 (2003).

tion, and their voting record on the Supreme Court.[106] This is not to suggest that judges are voting in bad faith––perhaps justices sincerely believe that the Constitution incorporates their own values. Each new case is thus interpreted accordingly. What it does suggest, however, is that Supreme Court justices may not perceive each new case the way progressives would like––seen afresh via the light of contemporary values.

Our critique is also not a type of naturalistic fallacy. We recognize that the progressive argument is that the Supreme Court *does not* follow popular opinion, but it certainly *ought* to. Yet as the American progressive Jack Balkin has pointedly observed, "ought implies can."[107] There is nothing in the progressive program that suggests that the Supreme Court is, or can be, uniquely placed to adhere to contemporary values. If anything, the converse is true. Part of the reason why Americans place great faith in the Supreme Court is because of its function as a "counter-majoritarian check on the legislature and the executive."[108] To accomplish his, or her, agenda, the progressive would thus require of the Supreme Court a role that it was not designed for.

ii. Moral arbiters and experts

Members of the America's highest Court are undoubtedly learned. But the progressive is unconcerned about legal knowledge. Rather, the progressive program requires the Court to be fluent in the language of contemporary norms and mores. Supreme Court justices must be ever attuned to changes in public opinion. Occasionally, as in the case of gay rights, Americans might believe that the judges can "read the tea leaves" and "know where society is going."[109]

Once again, reality hardly matches up to the progressive dream. Supreme Court justices clearly do not see themselves as moral arbiters, or experts on public opinion. Originalist judges like Justice Scalia have remarked that they "frankly do not want to undertake [the] responsibility" of "looking for what the moral perceptions of America [are]."[110]

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106 Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of the U.S. Supreme Court Justices*, 83 AM. POL. SCIENCE ASSOC'N 559, 561 (1989).

107 Jack M. Balkin, What *Brown* Teaches us About Constitutional Theory, 90 VA. L. REV. 1537, 1576 (2004).

108 Andrew M. Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 21 (1986).

109 *Law Professor: 'Judges Can Read the Tea Leaves' on Gay Marriage,* CBS DC (May 26, 2014), available at http://washington.cbslocal.com/2014/05/26/law-professor-judges-can-read-the-tea-leaves-on-gay-marriage/ (quoting UCLA Law Professor, Adam Winkler)).

110 Federal News Service, *Transcript of Discussion between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer*, AU NEWS (Jan. 13, 2005), available at

Rather, he "sleep[s] very well at night, because [he] reads old English cases."[111] Progressive judges like Breyer have echoed the same sentiment. "If I catch myself saying, 'I'm doing this because I think it's morally good,'" says Breyer, "then I think to myself, that's not my job."[112]

Nor, does it appear likely that the justices are inclined to reference public opinion seriously. We would be hard pressed to find a single Court opinion that referenced a public opinion poll. Nor would we be inclined to believe that members of the Supreme Court are attuned to the values of present-day Americans. The Supreme Court's youngest member was born in 1960.[113]

B. The Ouroboros of Originalism[114]

It is worth noting that some of the problems that plague the progressive appear to also affect the originalist. Originalists uphold the fixed 'original meaning' of the Constitution. But the plethora of originalist theories–-intentionalism, public meaning originalism, etc.—demonstrates that 'original meaning' can be as elusive a yardstick as the progressive's public opinion.

And even when putatively pledging allegiance to the *same* theory of originalism, the devil is still in the details when the theory is applied. In *Lawrence v. Texas*, both the dissent and the majority applied "'expectation' originalism."[115] Justice Scalia remarked, "it is *obvious* to us that [there is no] fundamental right . . . in 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had *criminal sodomy laws*."[116] Whereas Justice Kennedy opined "far from possessing 'ancient roots,' American laws targeting same-sex couples did not develop until the last third of the 20th century."[117] Both referred to "time-dated" evidence of anti-sodomy laws, but arrived at diametrically different conclusions.[118]

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http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument.

111 *Id.*

112 *Id.*

113 The youngest member of the bench is Justice Elena Kagan. She was born in 1960 and was appointed to the bench in 2010. *Biographies of Current Justices of the Supreme Court*, http://www.supremecourt.gov/about/biographies.aspx.

114 The Ouroboros is a mythical snake that feeds upon itself. We argue that for originalists to assert judicial supremacy via judicial fiat is to create a circular argument with no logical 'legs.'

115 Dworkin, *supra* note 4, at 119.

116 Lawrence v. Texas, 539 U.S. 558, 596 (2003) (Scalia J., dissenting)(emphasis added to the word "obvious").

117 *Id.* at 559 (Kennedy J., opinion).

118 SCALIA, *Response*, *in* A MATTER OF INTERPRETATION 147, *supra* note 5.

These same problems can apply to judgments as well. Lower courts and non-judicial actors might be inclined towards an originalist reading of Supreme Court judgments, but there is no guarantee that all of them will agree on the same interpretation. However, unlike progressivism, we might be inclined to believe that while an originalist methodology is "no ironclad protection" against arbitrariness, it offers at least "*some* protection."[119] Without going into the merits of this comparative argument, we suggest that the 'explosion of originalism' may also exist, warranting further scholarly attention.

More acutely, originalists, to avoid the explosion of differing originalist interpretations, must *also* turn to the doctrine of judicial supremacy. But here, originalists may run into problems.

One such significant problem is circularity. Originalists sometimes argue that the Constitution directs its interpreters towards an originalist doctrine of interpretation. They sometimes then argue that this very interpretive theory affords absolute judicial supremacy to the Supreme Court. But as Dworkin and Tribe note, these directives are ultimately self-referential.[120] We ought to obey the Court's originalist rulings, because an originalist interpretation of the Constitution says so. And we know that this interpretative method is right, the logic runs, through an originalist reading of the Constitution. It is originalism "all the way down."[121]

Trickier still is a practical problem with disagreement about original meaning. What if a non-judicial actor, or a lower court judge believes that the Supreme Court has incorrectly interpreted the Constitution, or past judgments? For a 'pure' originalist, his, or her, allegiance is to the original meaning of the Constitution and not to the Supreme Court *per se*.[122] But in order to contain an explosion of originalism, originalists must take the extreme position that the Constitution's original meaning upholds judicial supremacy to the point where the Supreme Court may *overrule* any of the Constitution's other promulgations. It is hard to countenance that this degree of judicial power is

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119 *Id. 132*

120 Ronald M. Dworkin, LAW'S EMPIRE 364 (1986).

121 Tribe references a tale of Bertrand Russell's: When asked by a professor about the foundations of the universe, a student replies that the universe stands upon the back of a giant turtle. "'But what does the turtle stand on?' asks the professor . . . 'Oh, it's turtles all the way down,'" the student responds. Laurence Tribe, *Comment*, *in* A MATTER OF INTERPRETATION 76 (Amy Gutmann ed., 1997).

122 We should caveat that originalists do not universally hold this position. Michael Stokes Paulsen argues that the doctrine of judicial review stemming from *Marbury* is in fact a "myth." Instead, an original read would see the Framers favoring coordinate powers of interpretation amongst the branches. *See* Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 601, 604 (2003).

afforded by an original reading of the Constitution, but to avoid the scenario of an explosion, originalists must nevertheless subscribe to the sole and absolute interpretive ability of the Court.

What this tells us is that practical exigencies countenance against 'pure' originalism and progressivism. Both originalists and progressives appear to require *stare decisis* and judicial supremacy as "pragmatic exception[s]"[123] to their own theories. Like the progressive, the originalist must cast her gaze outward. The stability function of the law, the impartiality of the Supreme Court, and matters of expertise are all reasons to be found outside of theories of pure originalism and progressivism.

CONCLUSION

We began our essay by extending the problems of progressivism from the Canadian context to the American one. Despite some differences, we find that analogous conflicts confront the archetypal American progressive. Progressives favor contemporary values, rejecting the incoherence, impracticality and anti-democratic nature of originalism. But in order to prevent free-for-all interpretation, they subscribe to the doctrines of *stare decisis* and judicial supremacy, resting their case for these doctrines on arguments that they had earlier rejected.

Moreover, in carving out exemptions for the Supreme Court, we note that the progressives further contradict their ideology. Like Canadian 'living tree' progressives, American 'living constitutionalists' need to justify their exceptions to the rule. To do otherwise is to espouse progressivism for me, but not for thee.

123 SCALIA, *supra* note 5, at 140 (emphasis removed).