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The New Originalism and the Uses of History

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THE NEW ORIGINALISM AND THE USES OF HISTORY

*Jack M. Balkin**

Central to the new originalism is the distinction between constitutional interpretation and constitutional construction. Interpretation tries to determine the Constitution's original communicative content, while construction builds out doctrines, institutions, and practices over time. Most of the work of constitutional lawyers and judges is constitutional construction.

The distinction between interpretation and construction has important consequences for constitutional theory. In particular, it has important consequences for longstanding debates about how lawyers use history and should use history.

First, construction, not interpretation, is the central case of constitutional argument, and most historical argument occurs in the construction zone.

Second, although people often associate historical argument with originalist argument, the actual practices of lawyers and judges demonstrate that nonadoption history is as important as adoption history to constitutional construction.

Third, there is no single modality of "historical argument." Instead, history is relevant to many different kinds of constitutional argument. One important task of this Article is to rethink the familiar model of modalities of argument offered by Philip Bobbitt and Richard Fallon; and to offer a different version that better reflects the multiple ways that lawyers and judges actually use history in constitutional argument.

Fourth, according to the new originalism, arguments about adoption history can offer mandatory answers only with respect to questions of interpretation; they cannot do so for questions of constitutional construction. That is, new originalists accept an originalist model of authority only with respect to questions of interpretation, not construction. Yet new originalists, like most lawyers, often make appeals to adoption history in constitutional construction. This raises the obvious question why American judges and lawyers should use or accept arguments from adoption history in constitutional construction and only sometimes find

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them persuasive. The originalist model of authority by itself cannot answer this question.

Fifth, we can solve this puzzle by paying careful attention to how lawyers and judges actually use adoption history. In constitutional construction, “originalist” argument is not a single form of argument. It involves many different kinds of argument, and it often appeals to ethos, tradition, or “culture heroes”—honored authorities who are treated as objects of respect, wisdom, and emulation.

In fact, in constitutional construction, arguments from adoption history are often hybrid; they appeal to multiple modalities of argument simultaneously. Most arguments about the Founding period usually also make implicit appeals to one of three modes of argument: national ethos, political tradition, or honored authority.

This hybrid nature gives arguments from adoption history their distinctive character in constitutional construction. Despite the dominance of original public meaning originalism in originalist theory, lawyers actually use adoption history quite differently from the way that academic theory prescribes.

Sixth, precisely because originalist arguments (in constitutional construction) generally appeal to ethos and tradition, they will normally not be persuasive unless the audience can plausibly accept the values of the adopters as their own, or can recharacterize them so that they can plausibly accept them as their own. When these values appear too alien or irrelevant, lawyers generally avoid making originalist arguments. Thus, lawyers do not feel an obligation to consult adoption history in every case; and when they do, they do not accept the results of adoption history as binding on them if there are other considerations.

Seventh, in constitutional construction, adoption history is a valuable resource available to originalists and nonoriginalists alike. Indeed, once they understand how originalist-style arguments actually operate in the construction zone, nonoriginalists and living constitutionalists should have no qualms about appealing to adoption history and making originalist arguments. Using such arguments does not undermine living constitutionalist theories of construction in the least. Refusing to employ adoption history serves no important theoretical principle and has no significant rhetorical advantages; indeed, all it does is limit lawyers’ ability to persuade their fellow citizens through calling on shared traditions and invoking powerful symbols of cultural memory.

TABLE OF CONTENTS

I. INTRODUCTION.....	644
A. <i>Framework Originalism</i>	645
B. <i>The Originalist Model of Authority and Its Limits</i>	647
C. <i>The Consequences of the Interpretation-Construction Distinction for Historical Argument</i>	650
II. FIGHTING ABOUT HISTORY ON ORIGINALIST TURF	655

2013]	<i>NEW ORIGINALISM AND USES OF HISTORY</i>	643
III.	HISTORY AND THE FORMS OF CONSTITUTIONAL ARGUMENT.....	658
	A. <i>Rethinking the Modalities of Constitutional Argument</i>	658
	B. <i>Text, Structure, Purpose, and Nonadoption History</i>	661
	C. <i>The Interdependence of History and the Forms of Constitutional Argument</i>	663
IV.	STALKING NONADOPTION HISTORY IN THE WILD: THE EXAMPLE OF STRUCTURAL ARGUMENT	666
V.	HOW MODALITY SHAPES HISTORY: THE EXAMPLE OF ARGUMENTS FROM JUDICIAL PRECEDENT	668
VI.	THE ROLE OF CULTURAL MEMORY: ARGUMENTS FROM NATIONAL ETHOS, POLITICAL TRADITION, AND HONORED AUTHORITY.	672
	A. <i>Invoking Cultural Memory</i>	676
	B. <i>Selection and Simplification</i>	679
	C. <i>Culture Heroes and Antiheroes</i>	681
	D. <i>Arguments from Honored Authority</i>	682
	E. <i>Selective Identification and Dis-identification</i>	684
	F. <i>Evaluating Arguments from Ethos, Tradition, and Honored Authority</i>	687
VII.	HOW LAWYERS USE ADOPTION HISTORY IN CONSTITUTIONAL CONSTRUCTION	691
	A. <i>Adoption History and the Forms of Argument</i>	691
	B. <i>Persuasiveness and Ethos</i>	694
	1. <i>The Founders and the Ethical Trifecta</i>	695
	2. <i>Adoption History and Memory Entrepreneurs</i>	696
	C. <i>How Ethos, Tradition, and Honored Authority Interact with Other Modalities of Argument</i>	697
	D. <i>The Hybrid Nature of “Originalist” Arguments</i>	700
	E. <i>Why Originalist Arguments Are Defeasible</i>	708
	F. <i>The Gravitational Force of Living Constitutionalism on Originalist Argument</i>	711
VIII.	CONCLUSION: ORIGINALIST ARGUMENT FOR ORIGINALISTS AND NONORIGINALISTS.....	717

I. INTRODUCTION

There is by now a large literature on the proper use of history in constitutional argument.¹ Much of this literature concerns “adoption history”: the history surrounding the adoption of the Constitution and its subsequent amendments. This focus is hardly surprising given interpretive debates about originalism in the last half century. But it also blinds us to larger realities.

Most constitutional arguments in everyday legal practice do not employ adoption history; they may discuss history from other periods and places, or

1. See, e.g., LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996); Hans W. Baade, “Original Intent” in *Historical Perspective: Some Critical Glosses*, 69 *TEX. L. REV.* 1001 (1991); Randy E. Barnett, *The Relevance of the Framers’ Intent*, 19 *HARV. J.L. & PUB. POL’Y* 403 (1996); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. REV.* 204, 213–17 (1980); Michael C. Dorf, *A Nonoriginalist Perspective on the Lessons of History*, 19 *HARV. J.L. & PUB. POL’Y* 351 (1996); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 *GEO. L.J.* 1765 (1997) [hereinafter Dorf, *Integrating Normative and Descriptive Constitutional Theory*]; Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 *FORDHAM L. REV.* 1611 (1997); Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 *U. PITT. L. REV.* 349 (1989); Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 *COLUM. L. REV.* 523 (1995); Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725 (1996); Martin S. Flaherty, *The Practice of Faith*, 65 *FORDHAM L. REV.* 1565 (1997) [hereinafter Flaherty, *Practice of Faith*]; Mitchell Gordon, *Adjusting the Rear-View Mirror: Rethinking the Use of History in Supreme Court Jurisprudence*, 89 *MARQ. L. REV.* 475 (2006); Jamal Greene, *The Case for Original Intent*, 80 *GEO. WASH. L. REV.* 1683 (2012); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 *TEX. L. REV.* 1 (1986); Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 *FORDHAM L. REV.* 87 (1997); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 *SUP. CT. REV.* 119; Larry Kramer, *Fidelity to History—and Through It*, 65 *FORDHAM L. REV.* 1627 (1997); Larry D. Kramer, *When Lawyers Do History*, 72 *GEO. WASH. L. REV.* 387 (2003); Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365 (1997); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 *CONST. COMMENT.* 77 (1988); David McGowan, *Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court*, 85 *MINN. L. REV.* 755 (2001); Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 *MINN. L. REV.* 377 (1998); Robert Post & Reva Siegel, *Originalism As a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545 (2006); H. Jefferson Powell, *Rules for Originalists*, 73 *VA. L. REV.* 659 (1987); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *HARV. L. REV.* 885 (1985) [hereinafter Powell, *Original Understanding*]; Jack N. Rakove, *Fidelity Through History (or to It)*, 65 *FORDHAM L. REV.* 1587 (1997); John Phillip Reid, *Law and History*, 27 *LOY. L.A. L. REV.* 193 (1993); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court’s Uses of History*, 13 *J.L. & POL.* 809 (1997); Cass R. Sunstein, *The Idea of a Usable Past*, 95 *COLUM. L. REV.* 601 (1995); Mark Tushnet, *Heller and the New Originalism*, 69 *OHIO ST. L.J.* 609 (2008); Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 *CHI.-KENT L. REV.* 909, 918 (1996) [hereinafter Tushnet, *Interdisciplinary Legal Scholarship*]; Mark Tushnet, *The Concept of Tradition in Constitutional Historiography*, 29 *WM. & MARY L. REV.* 93 (1987); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 *VA. L. REV.* 485 (2002); William M. Wiecek, *Clio As Hostage: The United States Supreme Court and the Uses of History*, 24 *CAL. W. L. REV.* 227 (1988); Paul Horwitz, *The Past, Tense: The History of Crisis—and the Crisis of History—in Constitutional Theory*, 61 *ALB. L. REV.* 459 (1997) (reviewing KALMAN, *supra*); Joshua Stein, Note, *Historians Before the Bench: Friends of the Court, Foes of Originalism*, 25 *YALE J.L. & HUMAN.* 359 (2013).

not at all. Even when lawyers do use adoption history, they do not always use it in ways that the originalist model of authority presumes. Sometimes lawyers treat the adopters as having special insight into the application of the Constitution, but merely as persuasive or honored authority, not as binding authority. Sometimes they treat the adopters as important figures in the development of the American political tradition, not because we must follow their views, but in order to understand the historical context of the constitutional questions we face today. And sometimes lawyers view the adopters as presenting negative examples or outmoded conceptions that we should not follow today. The originalist model of authority does not explain these practices of argument. To understand them, we must look elsewhere.

The rise of the new originalism offers a fresh opportunity to think about how constitutional lawyers use, and should use, history. In this Article, I focus on my own version of new originalism, which I call framework originalism, and which is developed in my recent book, *Living Originalism*.² As its name implies, framework originalism argues that the Constitution creates a basic framework or plan for politics that is not complete at the outset but must be filled out by later generations.

A. Framework Originalism

Like other new originalisms, framework originalism divides the practice of constitutional interpretation into two different activities.³ The first, which we might call “interpretation as ascertainment of meaning” or “interpretation proper,” is aimed at figuring out the original meaning of the Constitution’s words, including the original semantic meaning of the text, any generally recognized legal terms of art, and any inferences from background context necessary to understand the text. In most cases, the Constitution’s words mean today what they meant at the time of adoption, but there are a few exceptions, and we want to be sure that we do not unwittingly engage in a pun or a play on words.⁴

Through their choice of legal norms—rules, standards, or principles—written constitutions create an economy of constraint and delegation with respect to future generations. Therefore, it matters whether the Constitution uses hard-wired rules, which leave relatively little discretion for practical reasoning by later generations, or standards or principles, which require considerable practical reasoning to apply, and therefore delegate comparatively more to future generations to develop and work out over time.

When the Constitution is silent, or when it uses vague language, standards, or principles, an inquiry into original meaning will not be

2. JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

3. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 455–58 (2013) (explaining that the distinction between interpretation and construction is characteristic of the new originalism).

4. Jack M. Balkin, *Must We Be Faithful to Original Meaning?*, 7 *JERUSALEM REV. LEGAL STUD.* 57, 61 (2013).

sufficient to decide most contested questions. Hence there is a second activity of constitutional interpretation, called constitutional construction. Constitutional construction builds out the “Constitution-in-practice,” fleshing out and implementing vague and abstract language through doctrine, and creating institutions to further constitutional values. All three branches of government engage in constitutional construction, responding to each other and to continuous waves of social and political mobilizations in politics and civil society.⁵

Framework originalism argues that we must be faithful to the Constitution’s original meaning, and to its choice of rules, standards, and principles to constrain and delegate future constitutional construction. Framework originalism has a “thin” theory of original meaning. “Original meaning” refers to the original semantic meaning of the text, any generally recognized legal terms of art, and any inferences from background context necessary to make sense of the text.⁶ It thus leaves most important constitutional controversies in what Lawrence Solum calls the “construction zone.”⁷ These disputes cannot be resolved simply by consulting the basic constitutional framework; they require building and implementing doctrines and institutions. These tasks are the work of multiple generations; the adopters only begin a transgenerational project of governance that others must continue.

The processes of constitutional construction through politics and law are living constitutionalism. The American Constitution is “living” in the sense that the participants engage in constitutional construction in order to meet the problems of their time, creating new constructions that may supplement, displace, or reinterpret older ones. Living constitutionalism is not a distinct theory of interpretation that gives advice to judges or that judges might consciously follow. Rather it is an account of the processes of constitutional construction over time.⁸ That is why framework originalism is both originalist and compatible with a living Constitution.⁹

By contrast, other originalists, especially conservative original meaning originalists, have a “thick” conception of original meaning, which offers a correspondingly narrower zone for construction. Moreover, some conservative original meaning originalists object to the very category of constitutional construction; for them all constitutional issues are questions of interpretation, and the Constitution’s original meaning settles—or at least significantly bounds—most constitutional questions.¹⁰

5. See BALKIN, *supra* note 2, at 5.

6. Balkin, *supra* note 4, at 77.

7. Solum, *supra* note 3, at 458, 469–72 (defining the “construction zone” as the domain in which constitutional norms are underdetermined by the original public meaning).

8. See BALKIN, *supra* note 2, at 23.

9. See *id.* at 3, 20–21.

10. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 13–15 (2012) (“[T]he supposed distinction between *interpretation* and *construction* has never reflected the courts’ actual usage.”); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 773 (2009)

Most historical research and debate about adoption history concerns the contemporary constructions that people around the time of adoption gave to the Constitution's words and phrases. It involves what I call "original expected applications"—how the relevant adopters understood the principles and purposes behind the Constitution, the cases and situations that would be covered by the Constitution's terms, and how the Constitution's words would apply to controversies of their day.¹¹ Conservative originalists tend to create their thick conceptions of original meaning from this type of history. That is why in practice their versions of original meaning originalism often hew closely to original expected applications even though the concepts of original meaning and original expected applications are distinct.

A central claim of *Living Originalism* is that there are many different meanings of "meaning"—including semantic meanings, inferences from context, intentions, purposes, expectations, and cultural associations—and that it is a mistake to assume that the act of adopting a constitution fixes all of these meanings permanently into the law. Instead, what is fixed at the time of adoption—and binding on later generations—is original meaning (in the thin sense described above), and not the purposes, intentions, expectations, psychological states, or cultural associations of the adopters. Fidelity to original meaning does not require fidelity to original expected applications.

B. *The Originalist Model of Authority and Its Limits*

Originalist theories of interpretation share a distinctive view of constitutional authority. They argue that something—whether it is original intention, original understanding, or original meaning—is fixed at the time of adoption, and that the proper interpretation of the Constitution depends on what was fixed at that point in time.¹² I will call this the *originalist model of authority*. History provides evidence of what is fixed at the time of adoption, and the result of historical inquiry, when properly conducted, is a legal norm that we must follow in the present if we want to continue to be faithful to the Constitution. According to the originalist model of authority, constitutional interpretations are legitimate to the extent that they are consistent with what is fixed at the time of adoption; they are illegitimate to the extent that they are not.

Originalists offer different theories for why we must follow what is fixed at the time of adoption.¹³ A common explanation, however, is that the

(rejecting the distinction between interpretation and construction and arguing that using original methods resolves almost every controversy). For a rebuttal to Scalia and Garner's historical claim, see Solum, *supra* note 3, at 483–88.

11. See BALKIN, *supra* note 2, at 7; Balkin, *supra* note 4, at 70.

12. Solum, *supra* note 3, at 459–62 (describing the "Fixation Thesis" and "Constraint Principle," which all forms of originalism share).

13. Justice Scalia has argued that this approach helps to constrain judges. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863–64 (1989) (noting that "the main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law," and that "[o]riginalism . . . establishes a

American people created the Constitution as an act of popular sovereignty and the law they created must remain in force until it is altered or the people create a new constitution.¹⁴ This argument combines elements of popular sovereignty (for the initial creation of the law) and the rule of law (for why the law should continue unchanged over time).

Once we introduce the distinction between interpretation and construction, however, it becomes clear that the originalist model of authority cannot explain why lawyers and judges make most of the arguments from adoption history offered in American legal culture. To be sure, the originalist model explains why we *must* always make arguments about adoption history and why the best versions of these arguments are always *mandatory*; but it does not explain why arguments from adoption history could be merely *persuasive* authority, sometimes invoked and sometimes ignored. It does not explain why lawyers do not always try to make originalist arguments in every constitutional case and why judges do not always accept them. Under the originalist model of authority, to knowingly reject what was fixed at the time of adoption is illegitimate.

According to the new originalism, arguments about adoption history can offer mandatory answers only with respect to questions of interpretation; they cannot do so for questions of constitutional construction. Yet new originalists, like most lawyers, often make appeals to adoption history in constitutional construction.¹⁵ This raises the obvious question why American judges and lawyers should use or accept arguments from adoption history but only sometimes find them persuasive. The originalist model of authority by itself cannot answer this question. This is the key issue that the rise of the new originalism poses about the use of history. It is the subject of this Article.

We can see this point through the example of framework originalism. Framework originalism accepts an originalist model of authority with respect to the content of the basic framework, but not with respect to constitutional construction. Framework originalism argues that we should interpret the Constitution according to its original meaning (in the thin sense), which is fixed at the time of adoption. Thus, if we want to be faithful to the Constitution, we must be faithful to original meaning. To the extent that we need historical inquiry to clarify what is in the basic

historical criterion that is conceptually quite separate from the preferences of the judge himself"). But many contemporary originalists do not emphasize judicial restraint as the primary justification for originalism. *See, e.g.*, Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 608 (2004) ("The new originalism is less likely to emphasize a primary commitment to judicial restraint . . . [and features] less emphasis on the capacity of originalism to limit the discretion of the judge.").

14. For examples of this kind of argument, see BALKIN, *supra* note 2, at 55; Balkin, *supra* note 4, at 59; Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 412 (2013) ("The New Originalism stands for the proposition that the meaning of a written constitution should remain the same until it's properly changed.").

15. *See, e.g.*, BALKIN, *supra* note 2, at 138–255 (using adoption history to argue for constructions of the Commerce Clause and the Fourteenth Amendment).

framework, what history shows us is mandatory—mandatory, that is, *if* we wish to continue to accept the Constitution as our basic law.¹⁶

Nevertheless, the basic framework does not settle most disputed questions of constitutional interpretation; most disputed questions require constitutional construction. There are many potential ways we might construct the Constitution-in-practice. Therefore answering these disputed questions must depend on other kinds of authority than the originalist account. When we engage in constitutional construction, we are attempting to persuade each other about the best way to build out and reform the Constitution-in-practice over time. History will often be relevant to this practice, but it will be relevant in different ways than the originalist model of authority prescribes. People use history as a resource for construction, not as a command. They employ many different kinds of history—not just adoption history—and they use it in many different ways.

Originalists with a thick account of original meaning, by contrast, have a narrower zone for construction or do not accept the concept at all. They believe that history provides a very wide range of commands that we must be faithful to today. The problem with a thick conception is that it cannot account for a very large proportion of our current practices, including practices that most Americans regard as valuable and would be reluctant to abandon. Examples are the modern administrative and regulatory state, modern conceptions of federal power, the national security state, and large swaths of constitutional civil rights and civil liberties. Under thick accounts of original meaning, Americans have not been faithful to the Constitution in many ways, and for a very long time. Many if not most of the federal protections and programs that citizens rely on today are unconstitutional.

Originalists with a thick theory of original meaning generally explain current practices by arguing that longstanding precedents inconsistent with (their thick account of) original meaning are an exception to the originalist account of authority.¹⁷ They are illegitimate from the perspective of that model, but we should retain them anyway because of reliance interests.

The problem is that the exceptions are so prevalent that they threaten to swallow the rule. If original meaning is as thick as some conservative originalists believe, most of contemporary constitutional practice will be inconsistent with the originalist model of authority. Moreover, according to this picture, much of modern constitutional law—for example, constitutional guarantees of equality for women—must be deemed mistakes that Americans are stuck with and must grudgingly accept rather than valuable achievements that Americans should honor.

Perhaps equally important for purposes of this Article, in these areas of the law most originalists reason from judicial precedents and other

16. See Balkin, *supra* note 4, at 60, 66 (arguing that fidelity to original meaning assumes that Americans want to stick with the plan adopted in 1787 as subsequently amended through Article V).

17. E.g., Antonin Scalia, *Response, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 129, 139–40 (Amy Guttman ed., 1997) (arguing for retaining nonoriginalist precedents as a “pragmatic exception” in the interests of stability).

modalities of argument in much the same way that nonoriginalists do. To this extent, they treat these bodies of law as presenting questions of constitutional construction, because they do not believe that adoption history can be conclusive and sometimes must simply be ignored.¹⁸ To be sure, originalists may want to move the law closer to what their interpretive stance claims is actually correct, but in doing so they must always balance the demands of their theory against other considerations. In and of itself, the originalist model of authority does not explain why such a balance is necessary, when it should be invoked, how it should be conducted, and the relevant factors that this balancing should take into account. These issues are left largely to the discretion of the individual jurist and the jurist's understanding of what is currently canonical and durable in existing constitutional practices. As a result, there is wide room for differing judgments.¹⁹

In *Living Originalism*, I argue that this is not a plausible account of constitutional legitimacy.²⁰ We can make much better sense of Americans' actual practices of constitutional interpretation if we adopt the distinction between interpretation and construction, and if we recognize that fidelity to original meaning commits us only to a thin theory of original meaning. It follows that the originalist model of authority applies only to the basic framework. The rest is constitutional construction, which features many different kinds of arguments.

*C. The Consequences of the Interpretation-Construction Distinction
for Historical Argument*

One does not have to agree with my theory of framework originalism in all respects in order to accept the analysis in this Article. The only idea that one has to accept is the distinction between interpretation and construction. This idea has far-reaching consequences for constitutional theory generally; in this Article, I show how it has four important consequences for how lawyers use and should use history:

1. *Construction, not interpretation, is the central case of constitutional argument, and most historical argument occurs in the construction zone.* When we ask how lawyers use and should use history, we are primarily asking about the role of history in constitutional construction. In constitutional construction, history is a resource for persuasion, but not a

18. Some originalists allow the practical meaning of some parts of the Constitution to change as a result of longstanding traditions, customs, and political conventions. See, e.g., Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1128 (1998) (arguing for originalism tempered by tradition and judicial restraint). They also treat these parts of the Constitution as raising questions of constitutional construction because they are interested in the meaning and practical application of tradition, custom, and convention. See generally *id.*

19. Part VIII, *infra*, points out that the processes of living constitutionalism shape the potential for originalist arguments in constitutional construction. Originalists are always working within these processes even when they claim to oppose them.

20. BALKIN, *supra* note 2, at 8–13 (arguing that this approach confuses constitutional mistakes with constitutional achievements).

command. To be sure, there will still be need for historical work about original semantic meaning and generally recognized terms of art. But the vast majority of historical research and debate about adoption history is not about these questions; it concerns contemporary constructions of words and phrases and original expected applications. Although we are not bound by these constructions, we might nevertheless choose to adopt some of them or modify them for present purposes. We should be interested in history—and adoption history—because it helps us craft and argue for constitutional constructions appropriate for our own time.

Moreover, there is more than one way to use adoption history in constitutional construction. We might want to adopt the constructions of the adopters for a variety of reasons that I will describe later in this Article. We might also want to employ the adopters' constructions at a different level of generality or abstraction, or modify them in light of subsequent experience, changed understandings, or changed factual circumstances. We might not want to accept the adopters' views, but rather seek to understand how their assumptions shaped the subsequent history of constitutional and political development. And we might want to reject their constructions as outmoded or as negative examples that we should not follow today. None of these uses of adoption history corresponds to the originalist model of authority. Even when we accept the adopters' constructions, we do so because we believe it is the most appropriate choice for us today, and not because these constructions are mandatory.

These uses of adoption history are inevitably practical and presentist. We look to the past in order to help us solve present-day problems. That does not mean that we should deliberately embrace anachronism. We should want to understand the past carefully and on its own terms. But having done so, we must still go on to ask how the past can be useful to constitutional construction in the present.

2. *Nonadoption history is as important as adoption history to constitutional construction.* Many different kinds of history are relevant to constitutional construction, not just the history of the adoption of the Constitution and its subsequent amendments. Debates over originalism have dominated the literature on history and constitutional interpretation. Yet the ways that lawyers use adoption history are not all that different from the ways they use nonadoption history in making constitutional arguments and constitutional constructions. In both cases, there are a wide variety of different uses of history, which depend on different kinds of claims of authority.

3. *There is no single modality of "historical argument." Instead, history is relevant to many different forms of constitutional argument.* The originalist model of authority maintains that the history of adoption, correctly understood, reveals binding commands on later generations. But this is not how lawyers generally use history. They invoke history in multiple ways and in the service of multiple methods or styles of justification. These methods of justification correspond to the standard

forms (modalities) of legal argument. Examples are arguments about structure, consequences, convention, and precedent.

When the constitutional text is vague or ambiguous, no single mode of argument consistently trumps all others. This is yet another way of noting that, in constitutional construction, history is a resource, not a command. It is a resource in three senses. First, lawyers use history to support arguments from each and every modality of argument. Rather than a distinct mode of argument, history is a resource for making arguments within each modality. Second, how history is used and how it becomes relevant depends on each modality's underlying theory of justification. Third, historical arguments within each modality are always defeasible given sufficiently powerful countervailing considerations.

4. *In constitutional construction, "originalist" argument is not a single form of argument; it involves many different kinds of argument, and it often appeals to ethos, tradition, or culture heroes.* People may be tempted to think of all arguments from adoption history as "originalist." But not all arguments from adoption history treat the Founders, Framers, and adopters as worthy of emulation—they might view the Founders, Framers, and adopters as negative examples. By "originalist" arguments I mean those which treat the Founders, Framers, and adopters as positive examples that we should emulate today. But even when we limit the class of arguments in this way, originalist arguments do not always behave in the way that the originalist model of authority assumes.

First, as noted above, originalist arguments do not always win; they are often rejected due to other considerations; sometimes they are not even offered at all.

Second, arguments from adoption history do not fall into a single modality of argument that we might call "originalist" argument. Instead, just like other arguments that use history, there are a variety of originalist arguments, corresponding to different modalities of justification. Each modality of argument may use adoption history in a different way.

Third, in constitutional construction, arguments from adoption history are often *hybrid*; they appeal to multiple modalities of argument simultaneously. Most arguments about the Founding period (but not necessarily other periods of adoption history) usually also make implicit appeals to one of three modes of argument: national ethos, political tradition, or honored authority.²¹

21. Jamal Greene has argued that originalist argument is a species of ethical argument. See Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 64, 82–88 (2009); Greene, *supra* note 1, at 1697; see also McGowan, *supra* note 1, at 757–59, 825–35 (arguing that regardless of theoretical commitments, the actual practices of original meaning jurisprudence are often appeals to ethos); Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 29 (1990) (explaining that the claim that the Framers speak for present generations "is neither more nor less than a characterization of the national ethos"); Richard Primus, *The Functions of Ethical Originalism*, 88 TEX. L. REV. SEE ALSO 79, 80 (2009) ("[T]he deeper power of originalist argument sounds in the romance of national identity."). Michael Dorf has argued that originalist argument appeals either to political traditions (which he calls "ancestral originalism") or honored authorities (which he

Fourth, this hybrid nature gives arguments from adoption history their distinctive character in constitutional construction. Despite the dominance of original public meaning originalism in academic theory, lawyers use adoption history quite differently than the theory prescribes. Even when lawyers say they are making arguments from “original meaning” they often focus on the Founders’ and Framers’ purposes, goals, expectations, and intentions. They continue to quote particular honored Founders, Framers, and adopters, and texts like *The Federalist*, Madison’s notes, or correspondence between famous Founders and Framers as evidence of this form of “original meaning,” even though any contemporaneous speaker of the English language should be an equally valid authority. In short, despite the academic theory of original meaning originalism, lawyers continue to treat particular members of the Founding generation differently than a dictionary or concordance. They treat them as having special *ethical authority* in constitutional argument.²²

Moreover, although lawyers use adoption history to appeal to powerful features of American cultural memory, originalist arguments are usually not dispositive unless supported by other kinds of reasons. Precisely because these arguments appeal to ethos and tradition, they will normally not be persuasive unless the audience can plausibly accept the values of the adopters as their own, or can recharacterize them so that they can plausibly accept them as their own.²³ When these values appear too alien or irrelevant, lawyers generally avoid making originalist arguments. Thus, lawyers do not feel an obligation to consult adoption history in every case; and when they do, they do not accept the results of adoption history as binding on them if there are other considerations.

It is a commonplace that lawyers use history to gain authority.²⁴ But this phenomenon actually refers to three different (albeit related) practices. First, lawyers sometimes use history to argue about original meaning in the thin sense: original semantic meanings, legal terms of art, and necessary inferences from background context. In these cases, history offers evidence of the basic framework, but it is a comparatively small proportion of constitutional argument. Second, in constitutional construction, lawyers routinely use history—including adoption history—to support a wide range of different arguments that use different modes of justification. Third, when lawyers make arguments from adoption history they usually also invoke the ethical authority of the Founders, Framers, and adopters. Hence,

calls “heroic originalism”). Dorf, *Integrating Normative and Descriptive Constitutional Theory*, *supra* note 1, at 1770, 1800–05.

22. See Greene, *supra* note 1, at 1697; McGowan, *supra* note 1, at 835–40.

23. See Post, *supra* note 21, at 29; Primus, *supra* note 21, at 80.

24. See, e.g., Kalman, *supra* note 1, at 103 (“[L]aw professors’ concentration on the texts of the Founding reflected their search for continuity between past and present and their attempt to imbue the past with prescriptive authority.”); *id.* at 114 (explaining that lawyers use history “to confer authority and be dispositive—to foreclose choice and surrender authority to the past”).

most originalist argument is best understood as an argument from tradition and from cultural memory.²⁵

Because people living within a tradition treat it as constitutive of their identities, they generally assume that what tradition teaches is an important guide to how we should behave today. But people also disagree about how to describe and characterize tradition, and the level of generality at which we should understand and apply the teachings of the past; they also disagree about what elements of tradition are living and still worthy of respect, and what elements have been superseded or rejected. Originalist argument in constitutional construction follows the same rhetorical patterns.

Since the 1980s, originalists have tried to argue that original intention, original understanding, or original public meaning should be the touchstone for legitimate constitutional interpretation, even if one must make exceptions for precedents of long standing.²⁶ When originalists fail to make the interpretation-construction distinction, they risk confusing what is *mandatory* with what is merely *persuasive*. Americans make originalist arguments because they like to call on the nation's longstanding traditions and invoke the authority of its cultural heroes. But they do so selectively. The danger for originalist theory is that it will attempt to leverage persuasive authority into mandatory authority, and appeals to the past into commands from the past.

Nonoriginalists and living constitutionalists who do not attend to the interpretation-construction distinction may tend to make the same mistake in the opposite direction. They reject the originalist theory of authority and argue that we should not be bound by the dead hand of the past. This may make them hesitant to offer originalist-style arguments because they fear charges of hypocrisy. The interpretation-construction distinction helps clarify why these fears are unfounded. Making originalist arguments in the construction zone does not commit one to the originalist theory of authority generally. Appeals to ethos, tradition, and honored authority—understood *as such*—should be valuable and important features of American constitutional culture for the nonoriginalist and the living constitutionalist. Indeed, a living tradition of constitutionalism needs cultural memory and the resources that go with it, even if the tradition constantly changes.

The remainder of this Article proceeds as follows: Part II notes that although adoption history dominates discussions of the uses of history in

25. Note that when the question is one of constitutional *interpretation*—i.e., ascertaining original meaning—reference to specific Founders, Framers, and adopters is theoretically unnecessary. An adoption-era dictionary or a sample of contemporaneous writings would serve just as well. Yet even when the question is semantic meaning or generally recognized terms of art, lawyers may continue to offer linguistic examples from key Founders, Framers, and adopters because they are especially honored authorities—not as experts on the English language, but as key symbols of the American political tradition. See *infra* Part VII.C–D.

26. See, e.g., Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986) (“I wish to demonstrate that original intent is the only legitimate basis for constitutional decisionmaking.”); Scalia, *supra* note 13, at 854 (“The principal theoretical defect of nonoriginalism . . . is its incompatibility with the very principle that legitimizes judicial review of constitutionality.”).

constitutional argument, this focus can distract us from larger issues about the use of history. Part III revises the well-known account of “modalities” of constitutional argument first offered by Philip Bobbitt and Richard Fallon. It describes eleven different ways that lawyers make constitutional arguments in American constitutional law, and points out that one can use history to support each of them. How lawyers use history in constitutional argument depends on background theories of valid constitutional argument, which are often unstated. This means, among other things, that there is no single modality called “historical argument,” and that appeals to adoption history are just a special case of appeals to history generally.

Part IV uses the example of structural argument to show how lawyers frequently use nonadoption history in constitutional argument. Part V shows how different background theories of constitutional argument lead to different accounts of the same historical events. Part VI describes three important classes of arguments: arguments from national ethos, political tradition, and honored authority. They use history in distinctive ways and they undergird most arguments from adoption history.

Part VII builds on this analysis to show how lawyers use adoption history in constitutional construction; it explains that many originalist arguments involve complex appeals to ethos, tradition, and honored authority. This account explains why lawyers and judges use and follow adoption history only some of the time; it also explains lawyers’ and judges’ actual practices of argument much better than most academic accounts of original meaning originalism. Originalist arguments are part of the larger processes of constitutional change rather than a criterion that stands outside them. The practice of originalist argument by self-described “originalists” and living constitutionalists is part of a complex political and cultural struggle over American traditions and cultural memory.

Part VIII concludes that in constitutional construction, adoption history is a valuable resource available to originalists and nonoriginalists alike. Indeed, once they understand how originalist-style arguments actually operate in the construction zone, nonoriginalists and living constitutionalists should have no qualms about appealing to adoption history and making originalist arguments. Using such arguments does not undermine living constitutionalist theories of construction in the least. Refusing to employ adoption history serves no important theoretical principle and has no significant rhetorical advantages; indeed, all it does is limit lawyers’ ability to persuade their fellow citizens through calling on shared traditions and invoking powerful symbols of cultural memory.

II. FIGHTING ABOUT HISTORY ON ORIGINALIST TURF

Adoption history has dominated the scholarly debates about history in constitutional argument.²⁷ This is no doubt because many of these debates have been, either directly or indirectly, about the merits of originalism. Yet this focus has had a cost; it has diverted our attention from the vast realm of

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

history that is irrelevant to originalism. History is valuable and relevant for the originalist model to the extent that it sheds light on those aspects of adoption history that bestow authority on legal argument; it is less valuable or relevant to the extent that it does not. Judged from the standpoint of the originalist model of authority, all other uses of history, all other periods of history, and, indeed, all of the other places on Earth where history occurred, are of limited importance.

Yet most history—and indeed, most American history—is not adoption history. The history of social mobilizations, political movements, and institutional innovations that have dramatically changed America but have not led to the ratification of a new constitutional amendment are, by definition, not adoption history and may have little relevance to adoption history. Examples might include the New Deal, the creation of the national security state in the 1940s and 1950s, the civil rights revolution of the 1950s and 1960s, and the second wave of American feminism of the 1970s that led to modern sex equality law (but did not achieve an Equal Rights Amendment). These events may have had major impacts on how Americans understand their Constitution today. But from the standpoint of the originalist model of authority, these events are of little importance to correct interpretation, because they did not lead to constitutional amendments. Indeed, for some originalists, many of these events produced departures from original meaning that must be explained, if at all, as exceptions and mistakes that we retain not because of their fidelity to the Constitution, but on the basis of *stare decisis* or reliance interests. In fact, most of the twentieth century is pretty much useless to the originalist model of authority, except as a negative example—it is the period when everything went to hell in a handbasket. No less than eleven constitutional amendments—or twelve, depending on how you count²⁸—were adopted in the twentieth century, but these amendments have played a very small role in the great battles over constitutional interpretation that characterized the twentieth century.²⁹

Post-ratification history—the history of the understandings of and struggles over constitutional norms after adoption—is also generally irrelevant to the originalist model except where post-ratification history might shed light on adoption history. Justice Antonin Scalia's opinion in *District of Columbia v. Heller*³⁰ looked to mid- and late nineteenth-century sources to determine the public meaning of the Second Amendment in 1791.³¹ One can—and should—criticize Justice Scalia for his anachronistic

28. The Twenty-First Amendment repealed the Eighteenth Amendment. The Twenty-Seventh Amendment, although sent to the states in 1789 with the rest of the Bill of Rights, was not ratified until 1992.

29. See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1737–41, 1750 (2010) (observing that one can hardly understand the constitutional legacy of the twentieth century and the enormous changes it produced from studying the text of the amendments passed during that period).

30. 554 U.S. 570 (2008).

31. See *id.* at 606–19.

use of historical sources,³² but it is still anachronism in the service of adoption history.

The practices of the Washington Administration immediately after adoption of the Constitution are generally thought relevant to understanding the original meaning of Article II.³³ But the practices of the Roosevelt, Truman, and Eisenhower Administrations—which did far more to shape the actual presidency we have and the actual powers that contemporary presidents enjoy³⁴—are not relevant to the originalist model of authority.

Originalists are not alone in their focus on adoption history. Nonoriginalists and living constitutionalists tend to agree that adoption history is very important. They know that originalism is highly influential in American legal culture, and so they often make their own appeals to adoption history as the need arises. When they do, they sound pretty much like originalists.

The focus on adoption history continues even when nonoriginalists criticize originalism. Much of the literature on the uses of history in constitutional argument concerns the kind of history that originalists care about. It has featured critiques and arguments about how to interpret and use adoption history. Living constitutionalists and historians both inside and outside of the legal academy have argued that law professors should be more sensitive to context and the complexities of history, and that lawyers should try to integrate intellectual history and good professional standards of historians. The irony, of course, is that for the most part these debates over methodology are debates over adoption history—and especially the Founding and the early years of the Republic.

Thus, even when nonoriginalists contest the uses of history, they tend to do so on originalists's turf—and about the kind of history that originalists care about. In this way, they reinforce the idea that the kind of historical research that is most relevant to constitutional interpretation is the kind of research that sheds light on the history of adoption. In fact, when Philip Bobbitt offered his famous list of constitutional styles of argument, he defined “[h]istorical arguments” as those which “depend on a determination of the original understanding of the constitutional provision to be construed.”³⁵

32. Akhil Reed Amar, Heller, HLR, and *Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 173–74 (2008) (criticizing Justice Scalia's opinion for anachronism).

33. See, e.g., AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012); LOGAN BEIRNE, BLOOD OF TYRANTS: GEORGE WASHINGTON & THE FORGING OF THE PRESIDENCY (2013); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008); Saikrishna Prakash, *A Two-Front War*, 93 CORNELL L. REV. 197, 212 (2007) (“Consider the Washington Administration, the most crucial administration because it was closest in time to the Constitution's creation and because its views best reflect the Constitution's original meaning.”); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 295–96 (2001) (using examples from the Washington Administration to explain the Constitution's original meaning).

34. See STEPHEN M. GRIFFIN, LONG WARS AND THE CONSTITUTION (2013).

35. PHILIP C. BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 26 (1982) [hereinafter BOBBITT, CONSTITUTIONAL FATE]; see also PHILIP C. BOBBITT, CONSTITUTIONAL

III. HISTORY AND THE FORMS OF CONSTITUTIONAL ARGUMENT

Yet if we are interested in how history is and should be used in constitutional argument, we should begin in a different place. Instead of debating the merits of adoption history, we should instead focus on how lawyers make constitutional arguments. And the best place to start is with the recurrent forms of constitutional argument. Each form of argument offers a different way of engaging in constitutional construction. And for each form of argument there is a corresponding account or theory of why that style of argument is valid in American constitutional culture.

A. *Rethinking the Modalities of Constitutional Argument*

Both Bobbitt and Richard Fallon have offered well-known catalogues of the standard forms of constitutional argument that lawyers and judges regularly employ. Bobbitt offers six forms: text, history, structure, prudence (including consequences), precedent (including judicial decisions, interbranch conventions, political tradition, and social custom), and ethos.³⁶ Fallon offers five forms: text, historical intent, theory (including a wide range of different justifications), precedent, and value (including moral theory, political theory, and natural law).³⁷

Bobbitt calls the recurrent forms of argument “modalities.” Drawing an analogy with modal logic, Bobbitt argues that the modalities of argument are “the ways in which legal propositions are characterized as true from a constitutional point of view.”³⁸ I prefer to restate Bobbitt’s idea in terms of styles of justification. Each form of argument gives people reasons to accept beliefs about the Constitution-in-practice as true. A modality of argument—for example, an argument from structure or from purpose—offers a distinctive way of claiming that an interpretation is valid and correct. Different modalities of argument offer lawyers different ways to show why people should accept or be guided by their interpretations of the law.

Moreover, each style of argument presumes a theory of why arguments of that type are valid. For example, arguments from structure assert that an

INTERPRETATION 13 (1991) [hereinafter BOBBITT, CONSTITUTIONAL INTERPRETATION] (“A[] *historical* modality may be attributed to constitutional arguments that claim that the framers and ratifiers [of a constitutional provision] intended, or did not intend”); *id.* (“Historical, or ‘originalist’ approaches to construing the text . . . are distinctive in their reference back to what a particular provision is thought to have meant to its ratifiers.”). Similarly, Richard Fallon’s list of constitutional arguments refers to “[a]rguments of historical intent,” which he identified with “the intent of the framers.” Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244, 1254 (1987). Both Bobbitt and Fallon wrote at a time when the focus of originalist theory was shifting from original intention and understanding to original meaning.

36. BOBBITT, CONSTITUTIONAL FATE, *supra* note 35, at 7–8; BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 35, at 12–13.

37. Fallon, *supra* note 35, at 1244–46, 1252–58.

38. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 35, at 12 (“[C]onstitutional modalities [are] the ways in which legal propositions are characterized as true from a constitutional point of view.”).

interpretation is correct because it causes the various parts of the Constitution to perform properly and in conjunction with each other, while “[a]n interpretation that destroys the very characteristic of the government cannot be just.”³⁹ Arguments from precedent are based on rule-of-law values, arguments from consequences maintain that where the Constitutional text is unclear, we should adopt the reading that is most just or will produce the best consequences, and so on.

Bobbitt and Fallon do not distinguish between interpretation and construction.⁴⁰ But I believe that the idea of modalities of argument makes the most sense as a theory about constitutional construction. In *Living Originalism*, for example, I described Bobbitt’s list of modalities as a set of tools that lawyers use in constitutional construction.⁴¹

In this Article, however, my focus is on how lawyers use *history* in constitutional construction. That task requires some rethinking of Bobbitt’s and Fallon’s categories.

I will offer a list of arguments different from either Bobbitt’s or Fallon’s, because their accounts do not crisply distinguish between different theories of justification. For example, Bobbitt’s category of “precedential” argument lumps together appeals to judicial doctrine—which gain particular authority from rule-of-law values—with arguments from political settlements, interbranch conventions, social customs, and cultural traditions, which rest on different kinds of justifications. Fallon offers a category of arguments from “theory” which, as he recognizes, comprehends a wide array of different and potentially incompatible justifications.⁴²

For purposes of this Article, I will divide constitutional arguments into eleven different modalities. They represent eleven different ways that lawyers argue for constitutional constructions, and they presuppose eleven different theories of justification.

39. James Madison, U.S. Representative, Speech on the Bank Bill (Feb. 2, 1791), in *LIBERTY AND ORDER: THE FIRST AMERICAN PARTY STRUGGLE* 73 (Lance Banning ed., 2004), available at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=875&chapter=63865&layout=html&Itemid=27. The classic discussion of structural argument is CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

40. See Solum, *supra* note 3, at 481 (explaining that a pluralist model of multiple modalities “collapses the interpretation-construction distinction”).

41. BALKIN, *supra* note 2, at 17, 46, 89, 129, 205, 256–57, 333, 341–42 (explaining that interpreters should use all of the traditional modalities of constitutional argument); Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 824 (“In *Living Originalism*, I argue that lawyers can and should use all of the traditional resources of lawyers both in ascertaining original meaning and in creating constitutional constructions that implement original meaning.”). Lawyers might use some of the same tools to resolve ambiguities about original meaning when linguistic evidence runs out; these are also questions of constitutional construction. See Solum, *supra* note 3, at 481 (arguing that all of the modalities are relevant to constitutional construction, and that historical, textual, and structural modalities are also especially relevant to constitutional interpretation).

42. Fallon, *supra* note 35, at 1200–02 (describing different types of arguments from constitutional theory); *cf. id.* at 1204–09 (describing a wide range of different kinds of philosophical theories that might generate arguments from value).

A modality of constitutional argument might argue that an interpretation (i.e., a construction) is correct because it:

1. elucidates the meaning of the text (arguments from text);
2. reveals the structural logic underlying the constitutional system (arguments from structure);
3. reveals the underlying purposes or principles behind the Constitution or some part of the Constitution (arguments from purpose);
4. resolves gaps or ambiguities by choosing the interpretation that is the most just or that otherwise has the best consequences (arguments from consequences);
5. shows how previous judicial precedents require a particular result (arguments from precedent);
6. appeals to existing political settlements or conventions among political actors (arguments from convention);
7. appeals to the people's customs and lived experience (arguments from custom);
8. appeals to natural law or natural rights (arguments from natural law);
9. appeals to important and widely honored values of Americans and American political culture (arguments from national ethos);
10. appeals to American political traditions and to the meaning of important events in American cultural memory (arguments from political tradition); or
11. appeals to the values, beliefs, and examples of culture heroes in American life (arguments from honored authority).

No doubt this list might be expanded or described differently. The point of the classification is to clarify the different ways of justifying interpretations—and thus using history—in constitutional argument.

Note two things about this list. First, there is no separate category of “historical” arguments. Second, there is no separate category of “originalist” arguments. Any of the eleven modes of argument might employ history—including adoption history.

Both Bobbitt's and Fallon's list of constitutional modalities featured a separate category of historical arguments, and each limited historical arguments to arguments from the original understanding or the intentions of the Framers.⁴³ Each, in effect, imagined “originalism” as a distinctive mode of argument, and each associated historical argument with originalism, and originalism with historical argument.

I believe this is unhelpful for two reasons. First, it overlooks the possibility that lawyers might use history other than adoption history. Second, it overlooks the fact that lawyers use history in many different ways to buttress a wide variety of constitutional arguments. In fact, for each modality of constitutional argument—text, structure, purpose, consequences, and so on—there is a different way to use history. Based on

43. *See supra* note 35.

the above list, it follows that lawyers can use history to make at least eleven different styles of argument.

We can compare the two approaches using these two diagrams:

FIGURE 1: MODALITIES OF CONSTITUTIONAL ARGUMENT

Text	History (the intentions and understandings of the framers)	Structure	Prudence (primarily about judicial restraint, but also includes arguments from consequences generally)	Precedent (includes arguments about tradition, political settlement, political convention and social custom)	Ethos (appeals to the philosophy of limited government)
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Bobbitt’s model of modalities of constitutional argument.

Note that in Bobbitt’s model historical argument is treated as a separate modality, which concerns Framers’ intent or understanding. Arguments from judicial precedent, tradition, political convention, and custom are treated as a single type of argument.

FIGURE 2: HISTORICAL ARGUMENT IN CONSTITUTIONAL CONSTRUCTION

← History can be used to support all styles of argument →

Text	Structure	Purpose	Consequences	Judicial Precedent	Political Settlement & Political Convention	Custom	Natural Law	Ethos	Tradition	Honored Authority
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A basic model of styles of argument in constitutional construction.

This model classifies arguments according to the different reasons why a form of argument is valid. Note that there is no separate modality of historical argument; instead history is available to support each style of justification. Moreover, history is not limited to the Framers’ intentions, meanings, or understandings; no distinction is made between adoption and nonadoption history.

B. Text, Structure, Purpose, and Nonadoption History

An originalist might object: Aren’t several of the modalities listed above—arguments from structure, purpose and text—*inherently* originalist modes of argument? The answer is no. In the construction zone, each of these modes of argument *may* appeal to adoption history but it *need not*.

Take structural arguments as an example. Structural arguments concern how the Constitution works or should work. They are also arguments about how different parts of the Constitution should operate together, and thus play their appropriate role in the larger system of government. Structural arguments claim validity because a correct interpretation of the Constitution should further, and not undermine, the proper functioning of its constituent parts. But asking how the Constitution's parts best perform their proper functions and best work together is not the same thing as asking what the Constitution's adopters expected, intended, or meant.

Of course, if we want to understand how the Constitution should function, it is surely helpful to consider the opinions of those who participated in its design or its adoption. That is why many structural arguments do appeal to original understanding and original expectations. Nevertheless, the adopters might be mistaken. The 1787 Constitution was a grand experiment; nothing quite like it had been attempted before, and many of the adopters offered their opinions before the plan of government actually went into operation. The adopters could only guess at how the various parts would fit together, and, in some cases, their hopes—and their fears—were widely off the mark. Often one only comes to understand how a complicated machine or institution works best after one sees it in operation for some period of time. For this purpose, nonadoption or postadoption history may be more relevant.⁴⁴

In addition, the Constitution has been continually amended. Later amendments may alter structural operations and incentives in ways that the original adopters could not have imagined (and might have actively opposed). How layers of new provisions and institutions best work together may only be understood after many years, because their interactive effects may only become clear later on, through practice. The United States is still coming to grips with the effects of the Fourteenth Amendment on the federal judiciary, the Seventeenth Amendment on Congress, and the Twenty-Second Amendment on the presidency.

Moreover, new institutions (for example, political parties, the administrative state, a central bank, standing armies stationed around the world) and new technologies of communication, transportation, and warfare have grown up around the basic framework, altering the way that the different parts of the Constitution and different actors in the constitutional system interrelate. Because of institutional accretions and technological changes, the best structural account of the Constitution might not correspond to the views of the original adopters.

44. See BALKIN, *supra* note 2, at 142, 261–63 (distinguishing between structural arguments and arguments from original meaning and original intention); cf. Martin S. Flaherty, *Post-originalism*, 68 U. CHI. L. REV. 1089, 1107 (2001) (noting a distinctive form of argument that looks to what succeeds or fails historically as opposed to what the original designers expected would happen). Ironically, as Flaherty points out, some of the best explanations for why structural argument is not originalist come from the Founding period itself. *Id.* at 1107–08.

Similar considerations apply to arguments from purpose. These arguments claim validity because we should strive to interpret the Constitution consistent with its point or purpose. Yet the purpose of a constitutional provision, like the purpose of a statute, need not be the same as the intentions of the persons who drafted or adopted it. To be sure, arguments from purpose often quote adoption history because Americans generally assume that the Founding generation had special insight into the Constitution's purposes. Yet the purposes of the Constitution—or parts of the Constitution—might alter or expand given subsequent history. Today, Americans generally believe that a central purpose of the U.S. Constitution is the promotion of democracy. But our contemporary value of democracy is far more egalitarian and participatory than the Founders' vision of republicanism or representative self-government. Many of the 1787 adopters distrusted democracy, believing it to be unstable and likely to degenerate into dictatorship or anarchy. Similarly, people today may understand the purposes of the First Amendment—including self-expression, autonomy, and democratic participation—in different ways than the generation of 1791. New purposes can be grafted onto the text that the adopters did not dream of, or—in the case of participatory democracy—that they might have actively opposed.

Arguments from the text often involve adoption history—especially when the goal is elucidating original semantic meaning or generally recognized terms of art. But many textual arguments do not depend on what the adopters meant, believed, or intended. One example is intratextual arguments, which compare and contrast the use of words in different parts of the Constitution.⁴⁵ A second and related example is textual arguments that rest on assumptions about purpose, structure or consequences, which need not correspond to the adopters' expectations or intentions. A third example is textual arguments that use familiar canons of statutory interpretation. Such arguments may not be appeals to original meaning, understanding, or intention. The adopters may not have known about some or all of these canons, the content of the canons may have changed over time, and new canons may have developed since the time of adoption.⁴⁶

C. The Interdependence of History and the Forms of Constitutional Argument

Constitutional argument, like legal argument generally, does not study history for its own sake. Rather, law uses history for a purpose—to establish interpretive authority according to some account of what makes a

45. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 789 (1999) (arguing that intratextual argument is not an appeal to original meaning and is “distinct from standard forms of argument based on history and original intent”).

46. Cf. William N. Eskridge, *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 542–43 (2013) (reviewing SCALIA & GARNER, *supra* note 10) (“[C]anons ‘valid’ in one era may become ‘invalid’ in the next.”); *id.* at 538, 543 (noting that Congress’s assumptions about what canons are valid may change over time and differ from those of judges).

constitutional argument valid and persuasive. For example, the originalist theory of authority I mentioned at the beginning of this Article asserts that current generations are bound by what was fixed at the time of adoption. History is relevant because it shows us what was fixed. People who make arguments from original meaning use history and study the historical record against the background of this model of authority. They view history through the lens of their task: discovering what meaning was fixed at the time of adoption. History that does not elucidate this question is ignored or treated as irrelevant, even though it may be quite relevant for other purposes.

The same point applies in constitutional construction. Each modality of argument is a distinct form of justification; each provides a different kind of reason why people should accept or be guided by a particular reading of the Constitution. And behind each modality is a theory or an account of why that form of argument is or should be valid in American legal culture. Because there are many ways of making valid constitutional arguments, there are many different ways of using history and perspectives on history in constitutional argument.

Lawyers and judges employ history against the background of a theory (or modality) of constitutional argument, even (and especially) when the theory (or modality) is not explicitly articulated. Thus, history usually appears in legal arguments as an *enthymeme*—an argument with a suppressed premise.⁴⁷ That suppressed premise is the theory of argument that justifies the use of history, or that makes the use of history salient and relevant.

Thus, in constitutional argument, history and forms of justification are interdependent. Legal argument often depends on historical claims; conversely, what history is relevant to legal justification and how it is relevant depends on the underlying form of justification one is invoking (textual, structural, precedential, and so on).

History and forms of legal justification are related in a second way. What people look for in history and what they see in history is shaped by their background mode of justification: why a particular kind of constitutional argument is valid, and the kinds of facts that would tend to support or constitute this argument. In short, history supports different

47. ENCYCLOPEDIA OF RHETORIC AND COMPOSITION: COMMUNICATION FROM ANCIENT TIMES TO THE INFORMATION AGE 223 (Theresa Enos ed., 1996) (“[E]nthymeme generally refers to claims in arguments that are supported by probable premises assumed to be shared by the audience.”). Laura Kalman has noted how lawyers use history as an enthymeme and has criticized the ways that this leads to unreflective practice:

The enthymeme here seems designed to confer authority and be dispositive—to foreclose choice and surrender authority to the past. In the context of contemporary constitutional law, it may be a move from rhetorical to logical syllogism, and perhaps from rhetoric to authoritarianism. It replaces interpreter with author in a vain attempt to invest authority in author, rather than in interpreter, and to bypass persuasion and interpretation.

Kalman, *supra* note 1, at 114. This Article responds to Kalman’s complaint by showing the many different kinds of suppressed premises in historical argument.

forms of legal argument, and different forms of legal argument provide or impose a perspective on history.

In constitutional argument, the way that people imagine history, look for things in history, deem historical evidence relevant or salient, and weigh competing historical claims will depend on their background modes of justification. For each different theory or style of legal argument, there will be a corresponding way to use history to support that argument. There will also be a corresponding lens or filter through which people perceive and interpret the significance and relevance of historical events.

These two ideas are central to understanding how lawyers use history. First, most historical arguments are enthymemes that suppress a theoretical premise. Second, the lawyer's use of history shapes the lawyer's perspective on history—the way that history is apprehended, understood as relevant or irrelevant, interpreted, and argued over. These two ideas are just opposite sides of the interdependence of history and forms of legal argument.

A third point follows from the last two. Each mode of justification not only shapes how history is used, it also provides ways of rebutting or critiquing that use of history. As I will show in the next section, a lawyer or judge who uses history to make a structural argument is subject to distinctive forms of critique or rebuttal that stem from the way that structural arguments work and the reasons why these arguments are treated as valid and persuasive. That is why revealing the suppressed premise of historical argument is so important to evaluating it. That is also why it is important to distinguish interpretation and construction, and to delineate the different forms of legal argument in the construction zone. Understanding what kinds of historical arguments people make helps us better understand their relative strengths and weaknesses.

It is hardly a surprise that constitutional lawyers employ history for presentist purposes and to gain authority for their claims. But this does not make professional standards of history irrelevant to legal argument, or excuse lawyers from anachronisms and simplifications because they are engaged in a different kind of activity than professional historians.⁴⁸ For each use of history that I describe in this Article, and for each associated claim of authority, it always remains possible to criticize or rebut the argument on the grounds that the argument simplifies or distorts history, engages in anachronism, or simply gets the facts wrong. The fact that history has uses for lawyers and is useful to them does not excuse bad history. It does not excuse lawyers from striving to understand the past as

48. For arguments that legal uses of history may involve different criteria than those of professional historians, see Sunstein, *supra* note 1, at 605 (“[T]he historically-minded lawyer need not be thought to be doing a second-rate or debased version of what the professional historians do well, but is working in a quite different tradition with overlapping but distinct criteria.”), and Tushnet, *Interdisciplinary Legal Scholarship*, *supra* note 1, at 934–35 (“Law-office history is a legal practice, not a historical one. The criteria for evaluating it, for determining what is a successful performance, must be drawn from legal practice rather than from historical practice.”).

best they can, or allow them to ignore the best work of professional historians.⁴⁹ Rather, the reason we should be concerned about the multiple ways that lawyers employ history is that the theoretical premises that bestow authority on history are often suppressed or elided in legal argument. Bringing them to the surface helps us better understand how to criticize and evaluate historical arguments on their own terms.

IV. STALKING NONADOPTION HISTORY IN THE WILD: THE EXAMPLE OF STRUCTURAL ARGUMENT

My first example of how modalities of argument shape historical use comes from Justice Robert Jackson's famous opinion in the *Steel Seizure* case, *Youngstown Sheet & Tube Co. v. Sawyer*.⁵⁰ In this example, Jackson explains why Article II does not give the president inherent emergency powers. Jackson begins by making ritual obeisance to "the forefathers,"⁵¹ and noting that they omitted adding such a power to the constitutional text.⁵² But Jackson then goes on to reject the idea that the Court should infer such powers through constitutional construction. Jackson points to the experience of "many modern nations" with emergency powers⁵³:

Germany, after the First World War, framed the Weimar Constitution, designed to secure her liberties in the Western tradition. However, the President of the Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more than 250 occasions. Finally, Hitler persuaded President Von Hindenberg to suspend all such rights, and they were never restored.⁵⁴

By contrast, Jackson points out,

The French Republic provided for a very different kind of emergency government [in which] emergency powers could not be assumed at will by the Executive but could only be granted as a parliamentary measure. And it did not, as in Germany, result in a suspension or abrogation of law but was a legal institution governed by special legal rules and terminable by parliamentary authority.

Great Britain also has fought both World Wars under a sort of temporary dictatorship created by legislation. As Parliament is not bound by written constitutional limitations, it established a crisis government simply by delegation to its Ministers of a larger measure than usual of its own unlimited power, which is exercised under its supervision by

49. See Flaherty, *The Practice of Faith*, *supra* note 1, at 1575–80 (arguing that lawyers should strive to ensure that their historical work is consistent with the best available professional historical scholarship of the day, even though the interpretations of professional historians may change over time).

50. 343 U.S. 579 (1952).

51. *Id.* at 641 (Jackson, J., concurring).

52. *Id.*

53. *Id.* at 650.

54. *Id.* at 651.

Ministers whom it may dismiss. This has been called the “high-water mark in the voluntary surrender of liberty,” but, as Churchill put it, “Parliament stands custodian of these surrendered liberties, and its most sacred duty will be to restore them in their fullness when victory has crowned our exertions and our perseverance.” Thus, parliamentary control made emergency powers compatible with freedom.⁵⁵

Jackson summarizes the lessons of this history:

This contemporary foreign experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government. But it suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the “inherent powers” formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience.⁵⁶

Jackson’s use of history is noteworthy in four respects. First, although he begins with a bow to the Framers, his primary use of history is not aimed at determining original meaning, original intentions, or original understanding. He focuses on relatively recent history, not the history of the late eighteenth century. And he is not even concerned with the history of the United States. His examples come from Europe.

Second, when Jackson discusses the historical experiences of Germany, France, and Great Britain, he does not invoke an originalist model of authority. He is not claiming that his argument is correct *because* it reflects the original meaning, understanding, or intentions of the Framers, which would provide a legal command that is binding on Americans today.⁵⁷ Rather, Jackson is making an argument from structure or consequences. We should interpret the Constitution one way rather than another because it avoids bad consequences (a consequentialist argument); or because it is more consistent with important structural features of the Constitution that secure liberty and self-rule (a structural argument). Jackson uses contemporary European history to make his points, but he could also have drawn on a wide range of examples from around the world and from different periods in history, including, for example, the dictatorships of ancient Rome.⁵⁸

Third, Jackson does not explicitly state or defend his theory of argument. He does not say, “I am making an argument from structure or consequences, and here are the reasons why you should accept these kinds

55. *Id.* at 651–52.

56. *Id.* at 652.

57. Indeed, he finds appeals to original understanding singularly unhelpful. *See id.* at 634 (“Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”).

58. *See, e.g.,* Jack M. Balkin & Sanford Levinson, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1798, 1800–02, 1844, 1863, 1865 (2009) (drawing structural lessons from the design of the Roman dictatorship).

of arguments.” Rather, he uses history unselfconsciously—he leaves the background theory of argument unstated, and he simply assumes that his audience accepts the validity of appeals to structure and consequences. Jackson’s argument is an enthymeme. It suppresses a crucial premise—namely, the theory of legal justification that underlies the history he presents.

Fourth, once we clarify the background theory (or theories) of argument implicit in Jackson’s argument, we can see exactly how a critic might dispute or correct Jackson’s use of history. One could, for example, simply dispute the legitimacy of constitutional appeals to structure or consequences. More likely, one could accept the legitimacy of these arguments but argue that Jackson’s historical examples are irrelevant because they are too different from our American experience.

In the alternative, one might accept that the examples are relevant, but dispute what the historical account tells us about structure and consequences. Perhaps Jackson did not get the history of Weimar right. Perhaps the constitutional provisions were not the real cause or the most important cause of Germany’s slide into totalitarianism. Perhaps what saved France and Great Britain from Germany’s fate was not legislative control over emergency powers, but other features of French and British political culture.

In short, once we recognize that we are using history to support a particular kind of argument, we can bring to bear all of the tools of historical analysis to support or undermine the argument. We can complicate the history, resituate and recontextualize it, and add counterexamples, counterinterpretations and counternarratives.

To understand what makes Jackson’s use of history good or bad, competent or incompetent, we must first recover the suppressed premise in his argument. We must understand how and why he is using history. This is the point of the interpretation-construction distinction, and of classifying constitutional arguments in terms of modalities of argument.

V. HOW MODALITY SHAPES HISTORY: THE EXAMPLE OF ARGUMENTS FROM JUDICIAL PRECEDENT

The most familiar forms of argument in the federal courts are arguments from judicial precedent. These arguments do not claim that interpretations are correct because of what the adopters meant, thought, or understood. Instead, arguments from precedent claim that an interpretation is correct because of previous decisions by courts. Arguments from judicial precedent derive their authority from rule of law values and from the institutional practice of *stare decisis*.

Arguments from precedent frequently use history. Precedent’s distinctive claim to authority shapes what history is relevant and how it is relevant. For example, arguments from judicial precedent may require historical inquiry because particular judicial tests within doctrine may depend on history. The U.S. Supreme Court’s current test for heightened scrutiny of government classifications requires a showing that a group has

been subject to a history of unjust discrimination.⁵⁹ Therefore, arguments that classifications affecting a particular group—homosexuals, for example—should be subject to heightened scrutiny will depend on historical evidence and argument.

Substantive due process jurisprudence is based in part on evolving traditions of practice and the historical importance of a right. Satisfying this doctrinal test may require considerable historical analysis. Equally important, it may look at history differently than an inquiry into original meaning, intentions, or understanding.

*McDonald v. City of Chicago*⁶⁰ offers a good example. In a previous case, *District of Columbia v. Heller*,⁶¹ the Court held that the Second Amendment guaranteed a right to keep and bear arms in the home for purposes of self-defense.⁶² The issue in *McDonald* was whether this Second Amendment right applied to state and local governments through the Fourteenth Amendment.⁶³ The Court held that it did, but on the basis of two different reasons that employed history in two different ways.⁶⁴

Justice Clarence Thomas, concurring in the judgment, argued that the original meaning of the Fourteenth Amendment's Privileges or Immunities Clause included the Second Amendment right to keep and bear arms.⁶⁵ His opinion offers evidence of what the framers of the Fourteenth Amendment intended and the ratifiers expected.⁶⁶

Justice Samuel Alito, writing for a four-justice plurality, canvasses much of the same history as Justice Thomas.⁶⁷ But his focus is quite different. Justice Alito argues that given the Court's current test for incorporation—as shaped by previous precedents—Second Amendment rights should be incorporated against the states.⁶⁸ The central question, Justice Alito explained, is “whether the Second Amendment right to keep and bear arms is incorporated in the concept of due process” in the Fourteenth

59. See, e.g., *Bowen v. Gilliard*, 483 U.S. 587, 601–02 (1987); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976) (per curiam); *Frontiero v. Richardson*, 411 U.S. 677, 683–84 (1973) (plurality opinion).

60. 130 S. Ct. 3020 (2010).

61. 554 U.S. 570 (2008).

62. *Id.* at 635.

63. *McDonald*, 130 S. Ct. at 3027.

64. See *id.* at 3026.

65. *Id.* at 3063–66 (Thomas, J., concurring).

66. *Id.* at 3071–77. In general, Justice Thomas describes himself as an original meaning originalist, but his account of original meaning is thick rather than thin, because he often treats original expected applications as part of original meaning. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 410–11 (2007) (Thomas, J., concurring) (“In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools.”); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 358–59 (1995) (Thomas, J., concurring) (“We should seek the original understanding when we interpret the Speech and Press Clauses, just as we do when we read the Religion Clauses of the First Amendment.”).

67. *McDonald*, 130 S. Ct. at 3038–42 (plurality opinion).

68. *Id.* at 3035–36.

Amendment.⁶⁹ To decide that question “we must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty,”⁷⁰ or “whether this right is ‘deeply rooted in this Nation’s history and tradition.’”⁷¹

The differences between the kinds of arguments that Justices Thomas and Alito make shape the history that is relevant to each. Justice Thomas wants to know what the adopters of the Fourteenth Amendment meant. Therefore his focus is on adoption history and the meaning of “Privileges or Immunities of Citizens of the United States.” Justice Thomas does not care what other generations of Americans thought about the right to bear arms except to the extent that their views elucidate the understandings of the adopting generation.

Justice Alito, by contrast, relies on the authority of judicial precedent. He therefore uses history in two different ways. First, he looks to the history of doctrinal development to derive the proper test. Second, he applies a doctrinal test that asks a historical question. The doctrine asks whether there is a longstanding tradition of treating a right as fundamental. If so, and if the Court has not previously decided the question to the contrary (that is, in the history of precedent), the right is protected by the Due Process Clause of the Fourteenth Amendment. As he puts it: “Unless considerations of *stare decisis* counsel otherwise, a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States.”⁷²

Justice Alito therefore endeavors to show that the right to keep and bear arms has long been regarded as fundamental. He canvasses attitudes at the Founding, during the early nineteenth century, and during Reconstruction leading up to the ratification of the Fourteenth Amendment.⁷³ He argues that framers of the Fourteenth Amendment believed that the right to bear arms was fundamental.⁷⁴ But Justice Alito does not care that the adopters would not have understood the right in the same way as a modern court. The adopters would likely have considered the right to keep and bear arms as a right of citizens protected by the Privileges or Immunities Clause. But the Supreme Court long ago relegated that clause to irrelevance. Beginning in the early twentieth century, it began asking whether a right is “incorporated” into the Due Process Clause.⁷⁵

69. *Id.* at 3036.

70. *Id.* (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

71. *McDonald*, 130 S. Ct. at 3036 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

72. *Id.* at 3050.

73. *Id.* at 3036–42.

74. *Id.* at 3040 (noting that the thirty-ninth Congress’s “efforts to safeguard the right to keep and bear arms demonstrate that the right was still recognized to be fundamental”); *id.* at 3041 (“In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection.”).

75. As Randy Barnett shows, when Justice Alito briefly mentions the views of framers like John Bingham and Jacob Howard about the purposes of the Fourteenth Amendment, he states that they believed that the Fourteenth Amendment as a whole, rather than the Privileges or Immunities Clause, protected the right to bear arms. Barnett, *supra* note 14, at

An important weakness in Justice Alito's argument—which does not apply to Justice Thomas's—is that Justice Alito does not carry his story forward into the twentieth century. Having established that the right was viewed as fundamental in 1868, he pronounces it deeply rooted in the nation's traditions, and stops his historical inquiry. Nevertheless, although the views of the Fourteenth Amendment's adopters may be good evidence that a right has long been regarded as fundamental, they cannot establish that proposition by themselves. Suppose, for example, that public attitudes that the right is fundamental faded away in the late nineteenth century because of concerns about political radicals, labor activists, and immigrants,⁷⁶ that states and the federal government began to regulate arms regularly,⁷⁷ and that the modern movement for gun rights did not begin in earnest until the second half of the twentieth century.⁷⁸ Rather than always being deeply rooted in our nation's traditions, the right's importance to Americans has oscillated throughout history. This history would tend to undermine Justice Alito's doctrinal argument that there is a longstanding tradition of viewing the right as fundamental, but it would have little effect on Justice Thomas's inquiry into original meaning.

Even when Justices Alito and Thomas focus on the same period of history—Reconstruction—they see different things. Justice Thomas asks whether the right to bear arms is a privilege or immunity of national citizenship protected by the Fourteenth Amendment's Privileges or Immunities Clause. He tries to show that the adopters meant to protect portions of the Bill of Rights through that clause,⁷⁹ and he describes how early Supreme Court decisions like the *Slaughter-House Cases*⁸⁰ and *United States v. Cruikshank*⁸¹ distorted the framers' design.⁸² Modern case law now uses the controversial doctrine of “substantive due process” to incorporate fundamental rights into the Due Process Clause; but this clause,

427 (accusing the plurality of “bowdlerizing its sources to read that the right to bear arms was protected by the original meaning of the Fourteenth Amendment *as a whole*, rather than by the Privileges or Immunities Clause in particular”); *see also McDonald*, 130 S. Ct. at 3033 n.9.

76. Cf. Gerard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?*, 94 MINN. L. REV. 102, 124 (2009) (“[E]nthusiasm for extending the substantive protections of the Bill of Rights to the states evaporated during the 1890s because of the sharp increase in agrarian radicalism and labor protests.”).

77. *See* David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right To Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1157 (2010) (“In the twentieth century, gun control ceased to be a peculiar Southern institution. Fear of labor unrest and massive waves of immigrants, as well as the emigration of Southern blacks, brought gun control north. Many gun control laws were upheld, and many others were not even constitutionally questioned.” (footnote omitted)).

78. *See, e.g.,* Reva B. Siegel, *Dead or Alive: Originalism As Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 207–12 (2008) (noting that the modern movement for gun rights began in the 1970s).

79. *McDonald*, 130 S.Ct. at 3062 (Thomas, J., concurring) (“This Court’s substantive due process framework fails to account for both the text of the Fourteenth Amendment and the history that led to its adoption . . .”).

80. 83 U.S. (16 Wall.) 36 (1872).

81. 92 U.S. 542 (1875).

82. *McDonald*, 130 S. Ct. at 3060–63.

Justice Thomas explains, concerns substance, not process.⁸³ Adoption history shows that the Court's precedents have betrayed the Constitution's original meaning, creating a "jurisprudence devoid of a guiding principle."⁸⁴

Justice Alito finds these aspects of history irrelevant to his purposes. His source of authority is not original meaning, but past precedent: "For many decades," he explains, "the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause."⁸⁵ And that settles the matter. Whether or not the Supreme Court has strayed from the adopters' views, Justice Alito explains, it will "decline to disturb" its previous rulings.⁸⁶ Where Justice Thomas sees a betrayal of the original understanding, Justice Alito merely sees a line of precedents to be followed.

VI. THE ROLE OF CULTURAL MEMORY: ARGUMENTS FROM NATIONAL ETHOS, POLITICAL TRADITION, AND HONORED AUTHORITY.

Perhaps the most interesting and complicated use of history occurs in the last three modalities of argument: arguments from national ethos, political tradition, and honored authority. As I shall point out in the next section, these arguments often strongly shape how lawyers use adoption history in constitutional construction.⁸⁷

Although superficially similar to arguments from custom on the one hand, and appeals to political convention and institutional settlement on the other, arguments from ethos and tradition claim a different kind of justification. Arguments from national ethos and political tradition appeal to what is honorable about American values, as judged from the standpoint of the present. These are arguments about national character, national values, and the retrospective meaning of political and historical events. Arguments from ethos and tradition are often framed in terms of sweeping narratives, canonical events, and cultural heroes.

Arguments from tradition claim that our traditions constitute our political life and offer normative direction to our endeavors. Arguments from national ethos claim that a constitutional interpretation that betrays the deepest meanings of America's values and political traditions cannot be correct. Finally, arguments from honored authority claim that we should follow the model and the views of honored figures from our nation's past because (1) they represent important national values and norms; (2) they are central to or constitutive of important and valuable American traditions; or

83. *Id.* at 3062 ("The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.").

84. *Id.* at 3062.

85. *Id.* at 3030–31 (plurality opinion).

86. *Id.* at 3031.

87. *See infra* Part VII.

(3) their actions and beliefs display wisdom, courage, or other political virtues.

Because traditions are shaped and sustained over long periods of time and because new traditions can arise throughout the nation's history, arguments from ethos and tradition may invoke many different periods in American history, not just adoption history. Moreover, arguments from political tradition and national ethos may reach different conclusions than arguments from original meaning, intention, and understanding because we only know what the country means and what its central values are in retrospect, through an interpretive and narrative construction judged from the standpoint of the present. (Of course, people who view the Framers through the lens of contemporary concerns may not notice this difference, leading to anachronisms.) Our present-day conclusions about the meaning of America and its values may not have been obvious or uncontroversial to everyone at the time of adoption. Some features of the American experience which we see as central today were unknown to or would have been rejected by the adopting generation.

For example, because of the work of successive waves of social movements for equality, most Americans believe that equality and opposition to racism are central to the American creed. But many people in 1787—or even 1868—might not have seen it the same way. The American political tradition as it has developed may reshape or even reject the principles and values we derive from original meaning, original understanding, or original intentions. Nevertheless, as I shall point out in the next section, many arguments that people call “originalist” are better understood as appeals to ethos, tradition, and honored authority.

Arguments from ethos and tradition address fellow members of the political community in the present by invoking the normative meaning of a shared past. They interpret the meaning of the past in order to demonstrate appropriate action in the present and the future. Thus, arguments from ethos and tradition claim authority in constitutional argument because of contingent facts about the speaker and audience. They presume that both the speaker and the audience identify with a common tradition, that the identities of both are partly constituted by that tradition, and therefore that both speaker and audience wish to continue to be true to it. People owe allegiance to a political tradition because it informs their way of understanding the world and it shapes their views of how and why aspects of social life should be valued and continued.

Note that these assumptions may be unfounded. If people do not identify with the country's traditions, arguments from ethos and tradition will have little purchase. If people do not look up to venerated figures as models of value and behavior, arguments from honored authority will carry little weight. A distinctive feature of American constitutional culture, however, is its quasi-religious veneration of American political traditions and especially its Founders—not necessarily as they were understood in the past or in their own time, but as they are understood in the present.

Arguments from ethos and tradition are related to arguments from social custom and political convention, but they have a different focus and flavor. Arguments from social custom assume that the people as a whole have settled upon a set of mores that reflect mutual adjustment, solve coordination problems, and economize on collective wisdom. Arguments from political convention assume that political actors have settled on permissible courses of conduct that all relevant actors have either consented or acquiesced to; the authority of these conventions comes from mutual consent and/or continuous practice.

Arguments from ethos and tradition may draw on these mechanisms, but their concern is quite different. They often focus on particular individuals and events as symbols of political values; they emphasize great deeds and great struggles, cultural heroism and cultural villainy, and narratives of progress, decline, restoration, and redemption. They explain the meaning of key events like the Civil War or the New Deal. Nevertheless, arguments from ethos and custom can overlap. In American mythology, the common individual can be—and often is—a cultural hero, and important figures from history can symbolize the cumulative actions of many people over long periods of time. Similarly, political settlements can be imbued with the authority of myth and symbol as well as convention.

Moreover, appeals to ethos, tradition, and honored authority should not be confused with arguments for maintaining the status quo. Appeals to social custom or political convention usually argue for retaining some version of the status quo, even if the nature of the status quo is disputed. But arguments from ethos, tradition, and honored authority work quite differently. Lawyers' invocation of tradition need not be Burkean—it might be revolutionary. When Americans invoke the traditions of the past, they may be offering jeremiads or narratives of decline. They may call for restoration and return. Or they may urge the present to return to the wisdom and instruction of a forgotten past, newly excavated.

Appeals to the Founders, Framers, and adopters are often made in order to contest the way things are currently being done, and to urge people to return to a better, purer, or more authentic version of American norms and values. Movement conservatives, for example, made originalist appeals beginning in the late 1970s and early 1980s. They sought to overthrow what they saw as the liberal status quo under the banner of a return to original intention, and later, a return to original meaning. In response, liberals during the late 1980s and early 1990s looked to Founding-era traditions of civic republicanism to promote progressive reforms.⁸⁸

Movement conservatives were hardly the first to use originalism as a technique of constitutional revolution. In his study of the use of history in judicial opinions through the Warren Court era, Alfred Kelly noted that appeals to the Founding were often used as a “precedent-breaking” device that allowed judges to sweep away old doctrinal structures and put new

88. The story is told in KALMAN, *supra* note 1, and Kalman, *supra* note 1.

ones in their stead under the guise of preserving continuity.⁸⁹ That is why, Kelly explained, liberal justices from the 1940s onward—and especially during the Warren Court era—so often used adoption history to justify their revolutionary opinions.⁹⁰ They invoked older American traditions to explain why they were abandoning newer ones.⁹¹

Although we now tend to think of the Warren Court as the enemy or opposite of originalism, citations to the Framers, Founders, and adopters actually increased during the Warren Court years.⁹² The reason is simple: the liberal justices of the New Deal/Civil Rights regime were engaged in constitutional transformation. After adopting a philosophy of judicial restraint during the New Deal, liberal justices had to justify continuing the use of judicial review to protect new kinds of civil rights and civil liberties, to discipline state and local police forces, to outlaw prayer in the public schools, to reform the voting system, and to protect African Americans and the poor. To overturn scores of precedents and remake the constitutional status quo in the image of legal liberalism, liberal justices needed a source of authority beyond precedent. They found it in adoption history.⁹³

Conservatives learned the same lesson when they, in turn, began to attack the work of the Warren Court in the name of the Framers, Founders, and adopters. But unlike liberal legal reformers, the conservative movement made the idea of Framers' intentions and original meaning central to its cause. Conservatives were so successful in opposing "originalism" to "living constitutionalism" and using originalist arguments to attack legal liberalism that people today forget how often appeals to the Framers were a staple of Warren Court living constitutionalism. Indeed, Kelly's famous

89. Kelly, *supra* note 1, at 125–26.

90. *Id.* at 131 ("In search of some adequate guiding principle upon which to support their libertarian interventionism in the social order, the reformist activists on the Court initiated a new era of historically oriented adjudication."); see also BOBBITT, *CONSTITUTIONAL FATE*, *supra* note 35, at 56 (explaining that Justice Hugo Black's turn to text and history allowed him "to restore to judicial review the popular perception of legitimacy which the New Deal crisis had jeopardized").

91. See AMAR, *supra* note 33, at 198 (explaining that the reason why the Warren Court overturned so many precedents is that it was returning to "the deepest ideals of the written Constitution"). Justice Black, the most famous liberal originalist, exemplified liberals' turn to history both before and during the Warren Court era; indeed, in Bruce Ackerman's words, he is "the original originalist on the modern Supreme Court." Ackerman, *supra* note 29, at 1799; see also Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1242 (2002) (arguing that Justice Black was the true intellectual leader of the Warren Court).

92. See FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* 136–43 (2013) (collecting statistics). Cross notes, for example, that the Warren Court used *The Federalist* "more than any previous Court [in] American history," although usage increased even further in the Burger and Rehnquist Courts' years. *Id.* at 136; see also *id.* at 92–96 (describing use of adoption history in Warren Court school prayer, reapportionment, and criminal procedure opinions). The regular and frequent use of adoption history in Supreme Court opinions began with the Warren Court, not the conservative courts that succeeded it. *Id.* at 96.

93. See Kelly, *supra* note 1, at 130–31. The justices flirted with the idea of using an appeal to the framers of the Fourteenth Amendment to justify overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896). Finding the historical record inconclusive, they eventually settled on social science as the precedent-breaking device. Kelly, *supra* note 1, at 142.

critique of “law-office history” is an attack on liberal Warren Court originalism, not the conservative originalism of Robert Bork and Antonin Scalia. Years later, as movement conservatives gained power and influence in American law, historians would level similar charges of law-office history at conservatives.⁹⁴

A. *Invoking Cultural Memory*

Arguments from ethos and tradition use history in distinctive ways. A characteristic example is Justice Louis Brandeis’s concurrence in *Whitney v. California*.⁹⁵ Justice Brandeis argues that government should not be permitted to punish seditious speech unless it poses a “clear and present danger.”⁹⁶ He appeals to the values and beliefs of the American revolutionaries, and argues that we should remain faithful to these values and beliefs today:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They believed liberty to be the secret of happiness and courage to be the secret of liberty.⁹⁷

The courage to risk social disruption from political dissent, Justice Brandeis explains, is a central and honored American value:

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.⁹⁸

Although Justice Brandeis’s appeal looks like an argument from original intention, it is really an appeal to American ethos and tradition, drawing on features of American cultural memory. Note that Justice Brandeis speaks of “those who won our independence,” i.e., the American revolutionaries, rather than “those who framed our Constitution.” The two groups overlap but they are not identical; however, in American cultural memory, the two groups tend to merge into one. This is a sign that we are dealing with an argument from tradition or ethos rather than a technical argument about the

94. See Saul Cornell, Heller, *New Originalism, and Law Office History*: “Meet the New Boss, Same As the Old Boss,” 56 UCLA L. REV. 1095, 1098 (2009) (arguing that *District of Columbia v. Heller* “is not the triumph of a new methodology, but really just the latest incarnation of the old law office history—a results oriented methodology in which evidence is selectively gathered and interpreted to produce a preordained conclusion” (footnote omitted)); Kalman, *supra* note 1, at 94–95 (describing historians’ criticisms of Reagan-era originalism).

95. 274 U.S. 357 (1927).

96. *Id.* at 373–74 (Brandeis, J., concurring).

97. *Id.* at 375.

98. *Id.* at 377.

meaning attributed to the Constitution by its Framers or ratifiers. Arguments that appeal to the Founders or the Framers as an undifferentiated whole, or that conflate different generations (revolutionaries, Framers, politicians of the early federal period) are likely to be arguments from tradition or ethos.

Arguments from ethos and tradition are similar to what Philip Bobbitt called “ethical” arguments.⁹⁹ In *Constitutional Interpretation*, Bobbitt suggested that ethical arguments are appeals to “the idea of limited government, the presumption of which holds that all residual authority remains in the private sphere.”¹⁰⁰ Ethical argument concerns “those choices beyond the power of government to compel.”¹⁰¹

This account of national ethos is too narrow, and Bobbitt did not mean for it to be exclusive.¹⁰² In any case, one of Bobbitt’s definitions of ethical argument is much broader: “constitutional argument whose force relies on a characterization of American institutions and the role within them of the American people.”¹⁰³

Many aspects of American political traditions and national ethos do not concern limited government and the protection of the private sphere; two obvious examples are the idea of democratic egalitarianism and equality before the law, which apply regardless of the size of government. Moreover, some aspects of American ethos and political traditions, like those implicit in Social Security, the Homestead Act, the National Security Act, and Medicare, assume the beneficial exercise of government power in the public interest. Indeed, one of the central motivations for the creation of the 1787 Constitution was that the current government’s powers were too limited; government needed to be vigorous in order to protect liberty and provide security.¹⁰⁴ This example shows that what people call American

99. See BOBBITT, *CONSTITUTIONAL INTERPRETATION*, *supra* note 35, at 20 (“This form of argument denotes an appeal to those elements of the American cultural ethos that are reflected in the [U.S.] Constitution.”).

100. *Id.*

101. *Id.*; see also BOBBITT, *CONSTITUTIONAL FATE*, *supra* note 35, at 162 (“Ethical arguments arise from the ethos of limited government and the seam where powers end and rights begin.”).

102. Philip Bobbitt, *Reflections Inspired by My Critics*, 72 *TEX. L. REV.* 1869, 1937 (1994) (“I do not in fact think that the commitment to limited government is the only ethical commitment of the Constitution.”). His original formula was probably influenced by the context in which *Constitutional Fate* was written: Bobbitt used ethical argument to demonstrate the right to abortion recognized in *Roe v. Wade*. See BOBBITT, *CONSTITUTIONAL FATE*, *supra* note 35, at 225–38 (arguing that the result in *Roe* follows from the ethical principle that a government of limited powers may not coerce intimate acts, which include carrying a child within one’s body and giving birth).

103. BOBBITT, *CONSTITUTIONAL FATE*, *supra* note 35, at 144.

104. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 45–50, 106–10 (2005) (arguing that the Constitution and its enumerated powers flowed from geostrategic imperatives for a stronger centralized government with ample powers to protect liberty and security); MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* (2003); RAY RAPHAEL, *CONSTITUTIONAL MYTHS: WHAT WE GET WRONG AND HOW TO GET IT RIGHT* 114–23 (2013).

traditions and American character are often subject to multiple and contrasting interpretations.

Arguments from ethos and tradition seamlessly combine the descriptive and the normative. From the nation's founding, what is fundamental to American character and political culture has been contested. Moreover, appeals to tradition are complicated by the fact that consensus in practice and belief often disappears when we inspect history more closely; moreover, many practices and beliefs that were once widely accepted and considered traditional or valuable are now rejected as un-American. To argue from tradition or ethos, one must make interpretive judgments about what aspects of American history are central and valuable features of its traditions and what aspects are peripheral, exceptional, irrelevant, or have been dishonored or repudiated as time has passed.¹⁰⁵ In short, arguments from political tradition or ethos claim that particular values or beliefs are characteristic of the nation and its traditions *rightly understood*; such arguments are inevitably interpretive and normative. As a result, there is usually more than one way to characterize political traditions and national ethos; hence arguments from ethos and tradition are usually available on either side of a constitutional dispute, just as they are for the other modalities of argument.

Accordingly, it does not matter for Justice Brandeis's argument whether the Founding generation disagreed about protecting politically unpopular speech, whether some of the Founders were selective in their support of free expression, or whether some members of the Founding generation actually *wanted* to suppress particular dissenters—for example, Loyalists during the Revolution or supporters of France during the early years of the Republic. After all, the Federalists who supported the Alien and Sedition Acts *did* fear the effect of seditious advocacy.¹⁰⁶ It was the Jeffersonian Republicans—then the political minority—who articulated the need for civic courage.¹⁰⁷ And even Jefferson himself was not always a champion of free expression.¹⁰⁸

If Justice Brandeis's argument is an argument from original intention or original meaning, it is a pretty bad argument.¹⁰⁹ Charitably understood,

105. *Cf.* *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (“The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.”).

106. *See* JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956) (describing the Federalist campaign for the Alien and Sedition Acts and their subsequent enforcement by Federalist judges).

107. *See* *Whitney v. California*, 274 U.S. 357, 375 n.2 (1927) (quoting Letter from Thomas Jefferson to Elijah Boardman (July 3, 1801), and Thomas Jefferson, First Inaugural Address (March 4, 1801)).

108. *See, e.g.*, Michael P. Downey, Note, *The Jeffersonian Myth in Supreme Court Sedition Jurisprudence*, 76 WASH. U. L.Q. 683, 684 (1998) (“Jefferson's myth has enshrined him as a great advocate of individual liberties, but [in] reality [Jefferson] seems to have been a more pragmatic, and consequently a more repressive, figure.” (footnote omitted)).

109. *See* Kelly, *supra* note 1, at 131 n.50 (criticizing Justice Brandeis's opinion as “a prime example of history by a combination of essay, fiat, and revelation”).

however, Justice Brandeis is using history in a different way than the originalist model of authority prescribes. If pressed, Justice Brandeis should have been quite willing to admit that not all Founders—or the Americans who succeeded them—practiced civic courage. Nevertheless, he might emphasize, this ideal best represents our aspirations as a people.

Note, once again, that Justice Brandeis is not invoking ethos and tradition in order to argue against change or to preserve the status quo. Quite the contrary: he wants the Supreme Court to protect the speech of dissidents, which the law of his day did not.¹¹⁰ Justice Brandeis uses the cultural memory of the revolutionaries in order to critique the Court's existing doctrine. His use of ethos is reformist or revolutionary, rather than a defense of existing arrangements. Although appeals to tradition may seem conservative on the surface, they are often calls for transformation or revolution. Movements for reform often try to persuade fellow citizens by appealing to shared premises and widely honored examples.¹¹¹ If the speaker believes the country has strayed from the correct path, then a call for fidelity to ethos or tradition is an argument for change, not stasis.

B. Selection and Simplification

Justice Brandeis invokes a heroic past; he calls upon Americans in the present to live up to their ideals and to their highest aspirations as Americans. And he tells his story from a present-day perspective, describing how matters appear—and what they mean—in hindsight. His portrait of the past is deliberately selective. He equates Jefferson's vision with American values and he treats Jefferson's Federalist opponents as false prophets. He identifies with some members of the Founding generation as reflecting the best in the American tradition and neglects or simply refuses to identify with others.

These features of Justice Brandeis's argument are characteristic of appeals to ethos and tradition. Such arguments assume that history has a purpose or meaning that vindicates or critiques the present, and points to the proper direction of action in the future.¹¹² Arguments from ethos and

110. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666–68 (1925) (rejecting First Amendment claims); *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting). In *Whitney* itself, the Court upheld Anna Whitney's conviction under California's Criminal Syndicalism Act for being a member of the Communist Labor Party. *Whitney*, 274 U.S. at 366–71. Despite his famous argument, Justice Brandeis's opinion is technically a concurrence because he believed that Whitney did not properly raise her federal constitutional objections in the lower courts. *Id.* at 380 (Brandeis, J., concurring).

111. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 44, 55–56 (2011) (“An appeal to the past [by social movements] . . . is a way of convincing others that we should be true to a larger set of common commitments to liberty, equality, and justice that we have compromised or forgotten.”).

112. *Id.* at 44 (“Members of the political community [use narrative arguments] in order to make sense of current controversies and the proper direction of political/legal change.”); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 342–43 (2001) (arguing that history supplies both a sense of collective identity and “the field of collective experience through which we make

tradition both explain and invoke the meaning of events in the country's history, including normative lessons to be drawn from these events and appropriate models of behavior. Hence they may sometimes simplify complex historical events in order to demonstrate how they exemplify key values or lessons.

Because arguments from ethos and tradition draw meaning from history, they often take a narrative form. They may employ, either overtly or implicitly, narratives of progress, decline, restoration, or redemption. They explain who Americans are by explaining where they have come from and where they are going. They are arguments about Americans' deepest values as symbolized by the struggles, commitments, successes, and failures of the past.¹¹³ They are appeals to a transgenerational subject, "We the People," who possess certain traditions, values, and features of character that we come to understand in retrospect. Arguments from ethos and tradition attempt to explain the trajectory and the meaning of events in American history. This trajectory may not be one of progress. Americans may have missed opportunities, or fallen short of their ideals.

Not surprisingly, arguments from ethos and tradition often treat history differently than most professional historians; sometimes they purposefully condense events and smooth over complexities and complications. They seek to understand the past, not for its own sake, but in the service of the present and the future. History that explains American values may be heroic or tragic, but it is always didactic.¹¹⁴

Arguments from ethos and tradition explain the meaning and trajectory of history, not from the standpoint of the past, but from the standpoint of the present. That is why these arguments are inherently anachronistic. People in the past did not know how the future would turn out; therefore they did not understand themselves or their actions in terms of the narratives we craft today. The defenders of slavery did not know that they would lose, and the defenders of abolition did not know that they would ultimately win. Neither side's adherents knew what use later generations would make of them, nor how their story would be represented as part of the country's political traditions.

pragmatic judgments about how to realize constitutional commitments and values in practice").

113. See BALKIN, *supra* note 111, at 25–32, 51–60 (explaining and defending the practice of narrative justification); Akhil Reed Amar, *The Supreme Court 1999 Term: Foreword: The Document and the Doctrine*, 114 HARV L. REV. 26, 29 (2000) (arguing that done properly, textual argument requires understanding the meaning of key events in American history, and "good historical narrative, in both a broad (epic-events) sense and a narrow (drafting/ratification) sense, should inform good textual analysis").

114. Cf. Gordon S. Wood, *No Thanks for the Memories*, N.Y. REV. BOOKS, Jan. 13, 2011, at 40, available at <http://www.nybooks.com/articles/archives/2011/jan/13/no-thanks-memories/> (reviewing JILL LEPORE, *THE WHITES OF THEIR EYES: THE TEA PARTY'S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY* (2010)) (explaining that social mobilizations like the Tea Party find it important to articulate the normative lessons of history, even if such groups inevitably understand history in simplified ways, and remarking that "[m]emory is as important to our society as the history written by academics").

C. Culture Heroes and Antiheroes

Arguments from ethos and tradition often feature cultural heroes and antiheroes, or canonical events that stand for particular values characteristic of the nation and its people. In mythology, a *culture hero* is a figure of legend to whom a people attributes its greatest or most essential achievements or values.¹¹⁵ Culture heroes often symbolize a people's characteristics or aspirations. In China, for example, the legendary Emperor Fuxi is credited with the invention of writing, fishing, and trapping;¹¹⁶ in English legend, King Arthur stands for the unification of the English nation and the value of chivalry.¹¹⁷ Culture heroes are often demigods or people of elevated rank or status (like kings or emperors); but they can also be pioneers, inventors, discoverers, or people or groups of people who endure great hardships and overcome great obstacles.

A culture antihero, by contrast, is a person who embodies values or achievements that the culture currently rejects (but may once have accepted). The category also includes people who make a great mistake or transgression that is important to the culture or defines the culture. Thus, the same person can be both a culture hero and an antihero; an example from Christianity is Adam and Eve, who are both the progenitors of mankind and whose mistake results in mankind's fall from grace.

In American memory, culture heroes include the Founding Fathers as a group, and, individually, key figures like George Washington, Benjamin Franklin, James Madison, Thomas Jefferson, John Adams, and Alexander Hamilton. Culture heroes in the nineteenth century include Abraham Lincoln, Frederick Douglass, and Susan B. Anthony, and in the twentieth century, Rosa Parks and Martin Luther King, Jr. Among lawyers, important figures like Chief Justice John Marshall, Justice Joseph Story, the first Justice John Marshall Harlan, and Justice Oliver Wendell Holmes, Jr., may serve as culture heroes. Like other culture heroes, their salience and prominence may wax and wane over time.

Culture antiheroes include King George III, Chief Justice Roger Brooke Taney, and Sheriff Bull Connor. Interestingly, the Founding Fathers (and particularly Thomas Jefferson) also play the role of antiheroes when people view them as slaveowners or as accommodators of slavery. (Hence, as with Adam and Eve, people may accuse the Founders of committing America's original sin.)¹¹⁸

115. See DAVID LEEMING, *THE OXFORD COMPANION TO WORLD MYTHOLOGY* 88 (2005) (noting that often the culture hero "establishes the community's institutions and traditions").

116. LIHUI YANG, DEMING AN & JESSICA ANDERSON TURNER, *HANDBOOK OF CHINESE MYTHOLOGY* 120–21 (2005) (describing the many inventions attributed to Emperor Fuxi).

117. MAIKE OERTEL, *THE RETURN OF KING ARTHUR AND THE NIBELUNGEN: NATIONAL MYTH IN NINETEENTH-CENTURY ENGLISH AND GERMAN LITERATURE* 200 (1997) (noting King Arthur's use as a symbol of Englishness and chivalry during the nineteenth century).

118. See, e.g., Barack Obama, U.S. Senator, *A More Perfect Union* (Mar. 18, 2008), available at <http://my.barackobama.com/page/content/hisownwords/> ("The document [the Framers] produced was . . . ultimately unfinished. It was stained by this nation's original sin of slavery, a question that divided the colonies and brought the convention to a stalemate

Arguments from ethos and tradition pick winners to identify with and losers to scorn (or even forget), because these people articulated values that Americans now honor or oppose. People understand culture heroes (and antiheroes) as such in retrospect; their importance and their reputation may rise and fall as times change and traditions evolve.

American culture heroes may not have been paragons of virtue in all respects. They may not have represented a majority of public opinion at the time they spoke. They may not have been particularly prominent in their day, or as prominent as others now long forgotten. They may even have been considered marginal, dangerous, radical, or a threat to American values in their own time—as Jefferson and his followers may have seemed to their Federalist adversaries, or as people like William Lloyd Garrison or Thaddeus Stevens must have seemed to Southern whites in mid-nineteenth-century America. An argument from ethos might quote the views of Frederick Douglass and ignore or castigate those of Chief Justice Taney, even though Chief Justice Taney's views may have been held by a majority of the public and Douglass's were considered "off-the-wall"; and even though Taney was Chief Justice of the United States and Douglass could not even be a citizen.¹¹⁹

D. Arguments from Honored Authority

The use of culture heroes and antiheroes in American constitutional argument produces a special kind of argument from ethos and tradition. I call these *arguments from honored authority*.¹²⁰ If an honored figure—say Madison, Jefferson, Washington, or Lincoln—expresses or demonstrates a view about a constitutional question, the argument has greater persuasive authority simply because the honored figure expressed it or supported it. That is because one way of being faithful to tradition is to adopt the same practices or beliefs as a culture hero, who acts as a paragon and as a model for appropriate action.

When the culture hero does not come from the Founding period, it is easy to see that the argument is not one of original meaning. But quite often arguments from honored authority do invoke members of the Founding generation. In these situations, arguments from honored authority may resemble and overlap with arguments from original intention, original meaning, or original understanding. But their claim to authority is different than the originalist model of authority.

until the founders chose to allow the slave trade to continue for at least twenty more years, and to leave any final resolution to future generations.”).

119. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 967 (1998) (using an 1860 speech by Douglass as an example of constitutional interpretation by members of social movements).

120. Michael Dorf calls this style of argument “heroic originalism.” Dorf, *Integrating Normative and Descriptive Constitutional Theory*, *supra* note 1, at 1803. The idea of honored authorities, however, applies beyond adoption history. *See id.* at 1811 (“If we appeal to the Framers because we believe that their unusual place in history as well as their wisdom make their views especially authoritative, should we not also consult the views of other historically well-situated, wise actors?”).

The originalist model asserts that a particular meaning, intention, or understanding was both fixed *and* widely shared at the time of adoption. That is why current generations must follow this meaning, intention, or understanding today. For example, original meaning originalism considers legally binding the objective public meaning of the words at the time of adoption, which presumes a wide and durable consensus on meaning. But the honored authority's views or practices may not have been the consensus view or representative of what most other Founders, Framers, ratifiers, or citizens believed. On certain topics there may have been no consensus view; the honored authorities simply offered their opinion or acted based on their political interests or beliefs. The claim to authority is not that the honored authority's views were widely shared in their own time, but that they are important to our present day political traditions, or otherwise worthy of emulation. To be sure, people may quote honored authorities in the belief that their views are a good proxy for those of the adopters in general, but doing so may confuse salience and honored status with representativeness.¹²¹

For example, Madison's views on constitutional issues evolved through decades of public life as he served in multiple capacities and confronted a wide range of political problems and controversies.¹²² He and other Founders—including many of the early Federalists—were often on different sides of political and legal issues as time passed. Madison freely offered opinions on constitutional questions later in his life that the adopters may never have considered or on which there was no generally agreed view. Nevertheless, statements by James Madison on almost any subject are treated as having persuasive authority because he is regarded as the Father of the Constitution. Here again, *why* we use history matters greatly to assessing the strength and relevance of particular arguments. Madison's views may often not be a reliable guide to original meaning, original understanding, or original intention, and yet may still be important to us today because of his preeminent place in American political traditions.

George Washington's behavior as the first president of the United States offers a particularly complicated source of authority. Some of Washington's actions as president may have been followed by most or all of his successors and therefore have the authority of nonjudicial precedent or convention. In other cases, however, contemporary audiences may look to what Washington did to elucidate the meaning of executive power today because of Washington's symbolic status in American history. Arguments

121. Cf. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 4–14 (Daniel Kahneman et al. eds., 1982); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra*, at 163–65 (noting heuristics that confuse salience with representativeness).

122. See RAPHAEL, *supra* note 104, at 94–101 (describing Madison's evolution from the Philadelphia Convention, in which he argued for the power of the federal government to veto all state legislation, to the Virginia Resolution of 1798, in which Madison argued for the power of state interposition).

that his actions demonstrate the original meaning of Article II may actually be better characterized as arguments from honored authority, using Washington as a sort of constitutional paragon and a model for constitutional virtue. Although Washington was greatly honored and admired in his lifetime, not all of his contemporaries agreed with everything he did as president, or would have agreed that what he did fixed for all time the correct meaning of Article II. Like most political leaders, many of Washington's decisions were controversial in his own day and may not reflect a consensus of meaning, understanding, or intentions. Although his actions might not be a reliable guide to original meaning, they still might be important as arguments from an honored authority who holds a central place in the American political tradition.

E. Selective Identification and Dis-identification

Arguments from ethos and tradition often call for us to remember what “we”—here a transgenerational subject—fought for, what we stand for, what we promised we would do, and what we promised we would never let happen again.¹²³ They explain the meaning of history in terms of what has been lasting, honorable, and worthy of continuation in our political traditions. They may do so as a critique of the status quo. One of the most common forms is the American jeremiad, which asserts a decline or a falling away from political virtue, and asserts the need for reform and renewal.¹²⁴

Such judgments, as noted above, may offer a selective view of history. They are also selective in another sense. They identify people and ideas that history has hallowed through time, and people and ideas that history has judged mistaken. They refer, either implicitly or explicitly, to who was on the right side of history, as judged from the present, and who was on the wrong side. Those on the right side should be emulated; those on the wrong side serve as negative examples. Thus, arguments from ethos and tradition pick history's winners and losers, regardless of how these people understood themselves or were understood by others in their own day.

Arguments from ethos and tradition engage in *selective identification* and *dis-identification*.¹²⁵ They identify Americans in the present with only some of the people who lived in the past and only some of the events that occurred in the past. Equally important, they also *dis-identify* Americans in

123. BALKIN, *supra* note 111, at 17, 26, 31 (describing narrative justification's use of transgenerational “we” in constitutional argument).

124. SACVAN BERCOVITCH, *THE AMERICAN JEREMIAD* 7 (1978) (contrasting the European jeremiad, with its “lament over the ways of the world” and the sins of the people, with the American jeremiad, which featured a call for action and renewal); Jack M. Balkin, *The Distribution of Political Faith*, 71 MD. L. REV. 1144, 1152–54 (2012) (noting the use of the jeremiad in constitutional and political argument, and identifying the argument of *Constitutional Redemption* with “the jeremiad of renewal”); Timothy P. O’Neill, *Constitutional Argument As Jeremiad*, 45 VAL. U. L. REV. 33, 40–41 (2010) (arguing that American “constitutional argument has absorbed th[e] structure of the American jeremiad”).

125. BALKIN, *supra* note 111, at 53–60 (describing processes of selective identification and dis-identification in constitutional narratives and arguments).

the present from certain people and events in the past, because those people and events have proven not to be representative of America at its best, or exemplify ideas and traits that Americans today should denounce or repudiate.¹²⁶

Thus, a contemporary argument about the constitutionality of the Voting Rights Act would identify with President Lyndon Johnson and Martin Luther King, Jr. and his followers, and dis-identify with the police who rioted on the Edmund Pettus Bridge. An argument about the proper interpretation of the Fourteenth Amendment might identify with social movements for abolition, black civil rights, and women's rights and dis-identify with their opponents, who lost a political struggle over the nature of America. For similar reasons, people may prefer to quote the views of those who supported the Constitution rather than their anti-Federalist opponents. The reason is not because the former had a better insight into original public meaning of the words in the Constitution than the latter—after all, both sides spoke the same English language—but because the supporters were on the right side of history.¹²⁷

In such arguments, dis-identification is as important as identification. American constitutional culture includes both a list of canonical cases and a list of anticanonical cases, like *Lochner v. New York*,¹²⁸ *Dred Scott v. Sandford*,¹²⁹ *Plessy v. Ferguson*,¹³⁰ and *Korematsu v. United States*.¹³¹ A familiar form of constitutional argument is to associate one's opponents with the positions in these cases, because they were on the wrong side of history.¹³²

These arguments need not concern adoption history or the Framers. A good example is the hallowed status that *Brown v. Board of Education*¹³³ and the civil rights movement have in American political tradition.

In *Parents Involved in Community Schools v. Seattle School District No. 1*,¹³⁴ the members of the Supreme Court fought over the legacy of *Brown*, and over who was most faithful to the values of the NAACP and the members of the civil rights movement who fought for racial equality in the 1950s and 1960s. The issue was whether school districts in Seattle and

126. *Id.* at 59 (“The stories through which we understand ourselves as part of We the People create a narrative economy of who ‘we’ are in the story and who ‘they’ are, who we are rooting for and who we are rooting against, who had wisdom and justice on their side and who made mistakes (or worse).”).

127. Vasavan Kevasan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1152 (2003) (“The Federalists won, whereas the Anti-Federalists did not.”).

128. 198 U.S. 45 (1905).

129. 60 U.S. (19 How.) 393 (1856).

130. 163 U.S. 537 (1896).

131. 323 U.S. 214 (1944); *see infra* note 156.

132. *See, e.g.*, BALKIN, *supra* note 111, at 188 (describing use of canonical and anticanonical cases to bestow and withhold authority); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 939–40, 944 (1973) (coining the term “Lochnering” and comparing *Roe* to *Lochner*).

133. 347 U.S. 483 (1954).

134. 551 U.S. 701 (2007) (plurality opinion).

Louisville could assign students by race in order to promote greater racial integration.¹³⁵ The plurality opinion, written by Chief Justice John Roberts, held that they could not, invoking the legacy and meaning of *Brown*, and arguing that the school districts were attempting to return to pre-*Brown* ideas.¹³⁶ Justice Thomas's concurrence emphasized that his approach was especially faithful to the values and arguments of the plaintiffs in *Brown*.¹³⁷ Moreover, Justice Thomas argued, the dissenters and the school board, who would allow local authorities to use race to promote integration, were like the people who attempted to defend racial segregation in the public schools, and who opposed the result reached in *Brown*.¹³⁸ (Here Justice Thomas both identifies with culture heroes and identifies his opponents with the cultural memory of antiheroes.) Conversely, the dissenters argued that they were faithful to the legacy of the civil rights revolution and *Brown*.¹³⁹

The contrasting opinions in *Parents Involved* were not simply arguments about *Brown* as a legal precedent. Rather, they were arguments about the meaning of *Brown* as a central symbol of America's constitutional traditions. The arguments in *Parents Involved* made much use of history, but not adoption history. Their focus was not on the original meaning of

135. Even the way that the issue is phrased by the plurality and the dissent reflects contrasting interpretations of *Brown*. The plurality, understanding *Brown* as about colorblindness, sees the issue as "whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments." *Id.* at 711. The dissent, by contrast, explains, "These cases consider the longstanding efforts of two local school boards to integrate their public schools . . . [and] to bring about the kind of racially integrated education that *Brown v. Board of Education* . . . long ago promised—efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake." *Id.* at 803 (Breyer, J., dissenting).

136. *Id.* at 746 (plurality opinion) ("[W]hen it comes to using race to assign children to schools, history will be heard."); *id.* at 747 (quoting the argument of attorney Robert Carter in *Brown* that "[w]e have one fundamental contention . . . that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens"); *id.* ("Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons.").

137. *Id.* at 772 (Thomas, J., concurring) ("[M]y view was the rallying cry for the lawyers who litigated *Brown*"); *id.* at 778 ("What was wrong in 1954 cannot be right today.").

138. *Id.* at 773–79 (comparing the dissent to *Plessy* and noting "similarities between the dissent's arguments and the segregationists' arguments"); *id.* at 778 n.27 ("The segregationists in *Brown* [also] argued that their racial classifications were benign, not invidious."); *id.* ("It is the height of arrogance for Members of this Court to assert blindly that their motives are better than others.").

139. *Id.* at 867 (Breyer, J., dissenting) ("The lesson of history . . . is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration. Indeed, it is a cruel distortion of history to compare Topeka, Kansas, in the 1950's to Louisville and Seattle in the modern day."); *id.* at 799 (Stevens, J., dissenting) ("The Chief Justice rewrites the history of one of this Court's most important decisions."); *id.* at 803 ("The Court has changed significantly since it decided *School Comm[itee] of Boston [v. Board of Education]*, 389 U.S. 572 (1968), in 1968. It was then more faithful to *Brown* and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision.").

the Fourteenth Amendment but on the original meaning of *Brown* and the struggle over black civil rights.¹⁴⁰

Both sides identified with Thurgood Marshall, the NAACP, and the civil rights movement, and both dis-identified with the defendant school boards and with the many powerful and influential national politicians who believed that overturning the separate but equal doctrine of *Plessy* was a mistake. Each claimed that they were faithful to *Brown* and the civil rights revolution and that the other side had betrayed its principles.

Much of *Parents Involved* is an invocation of ethos and tradition, articulating the meaning of history in hindsight, and identifying history's winners and losers. The decision also demonstrates the multiple interpretations and meanings available to people who call on a historical tradition. Not only did both sides engage in selective identification and dis-identification, but both drew very different lessons about the meaning of history and the principles that the civil rights movement fought for. For the plurality and for Justice Thomas, the NAACP's campaign to overturn *Plessy* was centrally about the achievement of a colorblind Constitution; for the dissenters, it was a struggle to end racial oppression and to achieve a racially integrated society.¹⁴¹

F. Evaluating Arguments from Ethos, Tradition, and Honored Authority

Arguments from ethos, tradition, and honored authority are as important as they are ubiquitous in American constitutional culture. In Part VII, I will argue that they undergird many uses of adoption history in constitutional construction. Most originalist arguments in the construction zone are either themselves appeals to ethos, tradition, and honored authority, or are assisted by such appeals.

Given their prevalence and importance, how should we evaluate and critique them? We saw the answer to this question in our discussion of structural argument in Part IV.¹⁴² How we evaluate and critique a particular use of history flows directly from its background theory of justification.

140. See Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203 (2008) (discussing the controversy over the uses of *Brown* in *Parents Involved* and the ways that colorblindness was invoked in the *Brown* litigation).

141. Compare *Parents Involved*, 551 U.S. at 746–47 (plurality opinion) (declaring that *Brown* is about prohibiting differential treatment of students because of their race), and *id.* at 772 (Thomas, J., concurring) (arguing that *Brown* supports the view of a colorblind Constitution), with *id.* at 803, 804 (Breyer, J., dissenting) (arguing that *Brown* is about the achievement of an integrated society and “set[ting] the Nation on a path toward public school integration.”). Justice Kennedy’s concurrence also argues that *Brown* reflects a national commitment to an integrated society. See *id.* at 797 (Kennedy, J., concurring in part and concurring in the judgment) (“This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.”).

142. See *supra* notes 56–58 and accompanying text.

Arguments from ethos, tradition, and honored authority claim to be persuasive because (a) interpretations inconsistent with the deepest meaning of the nation's history and character cannot be correct; (b) we are embedded in and constituted by political traditions and therefore should employ them as guideposts for correct action in the present; and (c) honored authorities are appropriate models for emulation and sources of wisdom and advice in the present.

We can critique these arguments in three ways.

1. *First*, we can *challenge the underlying theory of justification* implicit in arguments from ethos, tradition, and honored authority.

(a) An interpretation can only be inconsistent with the meaning of the nation if the meaning is relatively clear or coherent. The argument assumes a clear normative meaning and/or lesson of history that does not exist or is deeply controversial.

(b) The fact that we are embedded in and constituted by political traditions does not justify following them if they are unjust or outmoded. Traditions grow by rejecting past practices as much as by following them. There may be no univocal tradition; the claimed tradition may be an invented tradition, or a parochial interpretation of a much more complicated set of practices that are honored in the breach as much as the observance. Moreover, if traditions are equivocal, indeterminate, or incoherent, there are multiple ways of following them that are equally valid.

(c) The mere fact that an authority is honored is not a sufficient reason for emulating the authority's behavior or adopting the authority's views. Multiple honored authorities existed at the same time or different times who offer contrary examples or advice. Honored authorities were not themselves completely honorable in their behavior and values. They are not particularly wiser or more foresighted than people in other generations or even the current generation. Their advice and their actions are conditioned by and limited by the perspective and circumstances of their times and may not be generalizable to very different situations. Translating their practices, norms, and advice to our present circumstances is indeterminate. Finally, we may learn more about our present circumstances from their moral failings, their compromises with evil and injustice, their lack of wisdom, and their inability to foresee the future.

2. *Second*, we can *challenge the characterization and application* of national ethos, tradition, or honored authority in the situation before us.

(a) The historical argument does not properly characterize the meaning of the events of the past and of American character. History has a different meaning, and American character is different or more complicated. The argument tells or assumes the wrong narrative; a different story or counterstory is more appropriate.

(b) The historical argument does not identify the tradition most relevant to our present circumstances. It mischaracterizes existing traditions, describes them at the wrong level of generality, fails to note their complications and exceptions, or misunderstands their proper normative application to the present.

(c) The historical argument relies on an authority that is not particularly honorable or wise, or is not reliable or worthy of emulation on this particular subject matter. Other authorities are more honorable, wise, reliable, and worthy of emulation.

3. *Third*, we can challenge the quality of the history that supports an argument from ethos, tradition, or honored authority.

(a) The history mischaracterizes the historical narrative, and oversimplifies the story. The history identifies only with some people and events rather than others, but other people and events are just as important to the meaning of history; they show the nation's limitations, compromises and failings, or provide lessons equally valuable for the present.

(b) The history oversimplifies the existence, coherence, and nature of political traditions; sanitizes or obscures their more unsavory features; erases complications and incoherencies in practice; treats history as leading up to an imagined moment of realization or fulfillment; fails to note traditions' multiple layers, tensions, and continuous evolution; leaves out important counterexamples; omits the presence of dissenting practices and countertraditions; and engages in anachronism.

(c) The history misdescribes the actions and beliefs of honored authorities, mischaracterizes their relevance for the present, unduly sanitizes them, fails to place their example and their beliefs in the context of their own time, and fails to note how their behavior and beliefs changed over the course of their lives, or varied in different contexts. By offering a one-sided picture of honored authorities, it fails to note how their moral failings, compromises with evil and injustice, lack of wisdom, and inability to foresee the future provide equally important lessons for us in the present.

* * *

Note that these forms of critique generally do one of three things. First, they offer counternarratives. Second, they complicate history. Third, they draw competing normative lessons from history. These three tasks are related, and they bring out central features of arguing about history—and with history—in politics and law.¹⁴³

The interdependence of history and justification tells us that the form of legal argument places a perspective on history. It affects how history is viewed and made salient. Because arguments from ethos and tradition are looking for something that can be called national meaning, national character, or national tradition, they will tend to see history as relevant to the extent that it yields something that can be called ethos or tradition. Such arguments go into history *looking* for coherence, determinacy, and order in a past that may lack these features, or have less of them than the advocate is searching for. That is one reason, although surely not the only one, that lawyers' history tends to wipe away complications and difficulties. The three-pronged strategy of counternarratives, counterlessons, and

143. Cf. Stein, *supra* note 1, at 123–27 (arguing that a primary task of historians should be to destabilize and complicate historical narratives used to support normative conclusions).

complications offers a corrective to the likely ways that these forms of argument will shape (and possibly deform) the historical record.

In addition, historical argument is a way of using the past—persons, events, traditions, and norms—to contend about important values in the present and assert the proper direction of action in the future. The use of counternarratives, counterlessons, and complications helps bring the normative elements of historical use to the surface. They reveal the normative choices we make in constitutional argument when we invoke history. Therefore they also make more salient our responsibilities for the choices we make.

Appeals to ethos, tradition, and honored authority may obscure these responsibilities by arguing that our proper path is to emulate the past and submit to the authority of the past. We treat these individuals, institutions, narratives, and traditions as both theoretical and practical authorities that give us reasons to follow their example and adopt their reasons as our own.

The point of historical complication, counterinterpretation, and counternarrative is to reassert our contemporary responsibility for the choices we make in the present. The idea is not completely to undermine the value of tradition, ethos, or honored authority in moral and political judgment. Rather, the point is to demonstrate that there are multiple paths that could be understood as proper continuations of tradition, or appropriate ways of continuing and honoring the constitutional project of past generations. Complication, counterinterpretation, and counternarrative also help us see that the failings of the past, the legacy of past mistakes and injustices, and the limitations of even our most honored culture heroes are vitally important to making sound judgments in the present.

Such critiques may demystify certain uses of ethical authority, but they do not eliminate ethical authority itself. They may complicate history so that tradition seems far more equivocal and multi-vocal, but they do not eliminate the constitutive power of tradition over people who live within it. Such critiques bring to the surface what is at stake in our use of history to persuade each other—that what we are actually doing is fighting about values, norms, and ethos using the past as a common resource and a common point of reference. This, once again, is part of what it means to say that history is a resource and not a command.

Appeals to ethos, tradition, and honored authority should never be an excuse for incompetent or sloppy uses of history. People sometimes note the importance of historical myth in public discourse, but there are two conceptions of myth that are easily confused. One conception of myth is that which is false; its falsity makes it useful for persuading others. This conception of myth does not respect the audience, but merely seeks to manipulate it. The other conception of myth is a story that highlights and simplifies in order to demonstrate something that is deeply true (or universal) in the human condition.

Often the job of lawyers is to persuade others who may lack deep historical knowledge, much less professional historical training. In this task, lawyers should never make historical arguments that they know to be

false, misleading, or oversimplified. Didactic history often engages in narrative construction, simplification, and selective identification, but these rhetorical devices must always be in the service of helping explain what one knows to be true to an audience who is thereby better able to understand its truth. It should never excuse the lawyer from having to address and respond to factual complications and contrasting interpretations.

Some arguments from ethos, tradition, and honored authority are deflated when we complicate the historical picture. Others are not. They may become richer and more complex by absorbing complicating information, but they need not entirely lose their ability to persuade. What they will probably become, however, is more clearly about norms and political visions than purely about historical facts and descriptions. They will be more clearly revealed as arguments to adopt certain norms because this is the best way of carrying on American political traditions *properly* honored and understood.

VII. HOW LAWYERS USE ADOPTION HISTORY IN CONSTITUTIONAL CONSTRUCTION

I now turn to the use of adoption history in constitutional construction. How lawyers use adoption history is just a special case of how lawyers use history generally—in multiple ways through multiple modalities of argument.

A. *Adoption History and the Forms of Argument*

It is incorrect to call all arguments from adoption history “originalist.” Arguments about adoption history need not claim that we should adhere to the views of Founders, Framers, or adopters. They need not treat the Founders, Framers, or adopters in a positive light. We might simply want to understand how their views shaped the later course of political and legal development.¹⁴⁴ Equally importantly, we might treat their views as outmoded or their practices as negative examples.

Instead, in this Article I will use the term “originalist argument” to refer to a subset of arguments that use adoption history; namely those that argue that we should interpret or construct the constitution in a certain way today *because* that is how the Founders, Framers, or adopters would have interpreted it or constructed it. Originalist arguments use adoption history to argue that the Founders, Framers, or adopters have theoretical or

144. This is one purpose of what Michael Dorf calls “ancestral originalism.” Dorf, *Integrating Normative and Descriptive Constitutional Theory*, *supra* note 1, at 1770; *see also* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 968 (2002) (“By reconstructing the debates that link the Fourteenth and Nineteenth Amendments, we can identify the institutions, practices and understandings that have played a key role in controversies about women’s status in our constitutional order.”).

practical authority for us today, and that we should follow their views or understandings or emulate their practices.¹⁴⁵

Defined in this way, originalist arguments cross-cut the distinction between interpretation and construction. A relatively small number of originalist arguments concern the content of the basic framework—original semantic meaning, generally recognized terms of art, and necessary inferences from background context. They use history to show the minimum requirements of constitutional fidelity. Most of the arguments that people generally think of as “originalist,” however, do not concern these basic elements; they fall in the zone of constitutional construction. Moreover, unlike arguments about the basic framework, they do not treat the views or understandings of Founders, Framers, or adopters as mandatory, in the way that the originalist model of authority assumes.

In constitutional construction, originalist arguments generally assert that the Founders, Framers, or adopters have *special status* or *special insight* with respect to one or more of the modalities of constitutional argument. Note that other uses of adoption history might also claim that the Founders, Framers, or adopters have a special status in the American political tradition, but not necessarily a positive status or one that we should emulate today. This is especially so, for example, in discussions of slavery and its consequences for constitutional structure. Originalist arguments, by contrast, claim that the Framers, Founders, or adopters have a special status that is positive or worthy of our emulation. The kind of special insight or status depends on the underlying modality of argument.

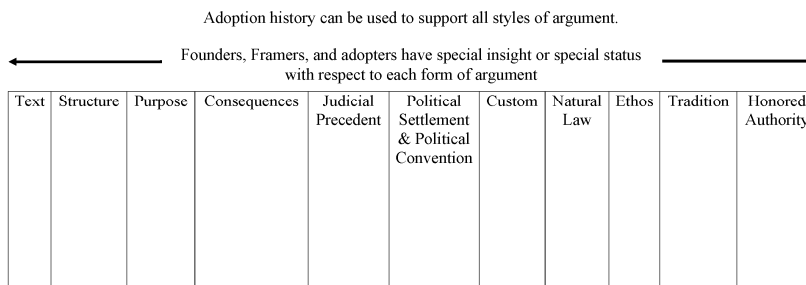
Accordingly, there are eleven different ways that lawyers might use adoption history in constitutional argument:

1. The Founders, Framers, and adopters had special insight into the generally accepted meanings of the words and phrases in the text at the time of adoption (arguments from text);
2. The Founders, Framers, and adopters had special insight into the likely consequences or the justice of particular constructions (arguments from consequences);
3. The Founders, Framers, and adopters had special insight into the meaning and application of judicial precedents (arguments from judicial precedent);
4. The Founders, Framers, and adopters had special insight into longstanding interbranch conventions (arguments from interbranch convention);
5. The Founders, Framers, and adopters had special insight into longstanding social customs (arguments from social custom);

145. Generally speaking, theoretical authorities give us reasons to believe something, while practical authorities give us reasons to do things. JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON* (2009); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979). The originalist theory of authority treats Framers and adopters as possessing both theoretical authority about the meaning of the Constitution and practical authority about how we should apply it.

6. The Founders, Framers, and adopters had special insight into natural law and natural rights (arguments from natural law);
7. The Founders, Framers, and adopters had special insight into the purposes behind the Constitution as a whole and its individual provisions (arguments from purpose);
8. The Founders, Framers, and adopters had special insight into constitutional structure and into how the Constitution and its various parts should function (arguments from structure);
9. The Founders, Framers, and adopters had special insight into, or are particularly representative of, the nation’s character and values (arguments from national ethos);
10. The Founders, Framers, and adopters had special insight into or particularly exemplify our nation’s political traditions, and they are powerful symbols of these traditions (arguments from political tradition); or
11. The Founders, Framers, and adopters are honored authorities whose views are valuable to us today because of who they were and the role they played in the formation of our country’s political institutions (arguments from honored authority).

FIGURE 3: THE USE OF ADOPTION HISTORY IN CONSTITUTIONAL CONSTRUCTION



Note once again that there is no separate modality of historical argument; instead adoption history is available to support each style of justification.

The persuasiveness of these eleven kinds of arguments depends on the plausibility of claiming—with respect to a given mode of argument—that the Founders, Framers, or adopters actually have special insight or special status. The claim is more likely to be plausible for some modalities than others; hence we should expect that lawyers using adoption history will predominantly employ these modalities of argument. Equally important, the claim of special status or insight is more likely to be persuasive only with respect to some Founders, Framers, and adopters. That is because not all of the adopters of the Constitution and its various amendments enjoy the same prominence in American cultural memory or the same ethical authority in American political traditions.

B. Persuasiveness and Ethos

Start with modalities nine, ten, and eleven. These are arguments from ethos, tradition, and honored authority. These are arguments in which an appeal to Founders, Framers, and adopters is likely to be the most persuasive. Even though the nation's political traditions have constantly evolved—both before and after the Founding—the Founding generation is often seen as marking the beginning of American political traditions, and therefore serves as a potent symbol of these traditions. (Colonial history is imagined as leading up to or culminating in the Founding.) The Founders are also among the most hallowed symbols of American values and American national character. Finally, the Founders are among the most salient and the most honored authorities in American political memory.

Note that I have just spoken of “Founders” rather than of constitutional adopters generally. The authority of arguments from ethos, tradition, and honored authority is a function of how cultural memory gets constituted. For example, at present, the Founding generation—and particular individuals within that generation—enjoy special authority in American cultural memory, while later generations, even when they adopt important amendments to the Constitution, have much less. The framers and adopters of the Twenty-Second Amendment, for example, are mostly forgotten today. Even the framers of the Reconstruction Amendments—including John Bingham, Thaddeus Stevens, Lyman Trumbull, William P. Fessenden, Charles Sumner, and Jacob Howard—have remarkably little ethical authority given the importance of these amendments, and are known today mostly to specialists. Indeed, among the general public the Confederate General Robert E. Lee is probably better known and more admired. The reason has nothing to do with the comparative importance of their respective contributions to the Constitution. Rather, it is due to the cultural memory of Reconstruction.¹⁴⁶ Downplaying the importance of Reconstruction to America's constitutional culture helped assuage tensions between Northern and Southern whites after the Civil War.¹⁴⁷ For many

146. See, e.g., Michael Kent Curtis, *John A. Bingham and the Story of American Liberty: The Lost Cause Meets the “Lost Clause,”* 36 AKRON L. REV. 617, 620 (2003) (“[F]or years our national story largely ignored our second group of framers who gave the nation the new birth of freedom in the post-Civil War amendments.”); Tom Donnelly, *Our Forgotten Founders: Reconstruction, Public Education, and Constitutional Heroism*, 58 CLEV. ST. L. REV. 115 (2010) (noting lack of attention to Reconstruction-era founders in public education).

147. See DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 2 (2009) (describing the “story of how the forces of reconciliation overwhelmed the emancipationist vision in the national culture, how the inexorable drive for reunion both used and trumped race”); PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 61–68 (1999) (noting how Supreme Court opinions since the Civil War have portrayed Reconstruction and downplayed its egalitarian and transformative aspects); Robert Meister, *Forgiving and Forgetting: Lincoln and the Politics of National Recovery*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 135, 163–64 (Carla Hesse & Robert Post eds., 1999); Norman W. Spaulding, *Constitution As Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 2033 (2003) (“Respect for state sovereignty (and the twin theory that the War was fundamentally about preserving the

years historians in the Dunning School, and those they influenced, treated this crucial period of political reform as mistaken and corrupt.¹⁴⁸ Only Abraham Lincoln, who was assassinated before the drafting and adoption of the Fourteenth and Fifteenth Amendments, is widely regarded as a culture hero today.

1. The Founders and the Ethical Trifecta

The Founders, Framers, and adopters have disproportionate power over American political imaginations because of the way that American cultural memory has been constituted. Americans have a story about how they became a nation. In this story, the American state (the United States of America), the American nation and people (“We the People”), and the American Constitution are born at virtually the same time. Through an act of revolution, the American people brought themselves into being and created a state and a Constitution under which they still live.

This is a fiction, of course, because from 1776 to 1781 the American government (such as it was) was the Continental Congress, and from 1781 to 1789 the country was governed by the Articles of Confederation. But these events are collapsed in American cultural memory. Contemporary Americans do not understand the Articles of Confederation as America’s First Republic, and the 1787 Constitution as the Second Republic. Instead, Americans think of the Articles—if they have heard of them at all—as a sort of trial run for the real Constitution—the Constitution of 1787.

Most other countries—even those with a revolutionary tradition like France—do not imagine their state, their people, and their Constitution as born together. The French nation and the French people long predated the French Revolution, and France has had many constitutions. It is on its Fifth Republic and counting. Canada has many cultural affinities to the United States, but its cultural memory is completely different. It does not have a revolutionary tradition, and Canadian nationhood and the Canadian Constitution emerged in phases, beginning with the 1867 British North America Act, which was passed by the British Parliament, and not by “We the Canadian People.”

Because Americans remember their state, their national identity, and their Constitution as roughly simultaneous, they imbue the Founding generation (which they identify correctly or incorrectly with the revolutionary generation) with enormous symbolic power. We might call this the “ethical trifecta”: Americans think of the same group of people as responsible for creating the American state, the American nation and the American Constitution, and certain Founders who had key roles in the process, like Washington, Jefferson, Franklin, Madison, Adams, and Hamilton have

Union) thus became a powerful, publicly acceptable, and legally authoritative framework for expressing the rather perverse desire to abandon the principles of equality implicated in the War for the sake of reconciliation with southern whites.”)

148. See Donnelly, *supra* note 146, at 142–43 (describing the Dunning School’s influence).

taken on mythic status. We return to them again and again for wisdom and example.

2. Adoption History and Memory Entrepreneurs

Arguments from ethos and tradition trade on what Americans (and American lawyers and judges) remember, and how they remember it. But cultural memory—and the pantheon of American culture heroes (and anti-heroes)—is not forever fixed. It changes over time, due in part to cultural, political, and demographic changes, and due in part to people's efforts at framing and shaping memory. What we remember and how we remember it depends on what has happened in the interim and what people before us have decided it means. During the course of the twentieth century the Founding generation—and particular members of that generation—became ever more prominent and central to American cultural memory. The rise of the conservative movement and conservative versions of originalism in the second half of the twentieth century, if anything, enhanced these tendencies.

Cultural memory is not like a bank account so that the more one draws on it the less one has. Quite the contrary: the act of invoking the past is a way of reinforcing and reinscribing memory—as well as reinterpreting it. Thus, arguments from ethos, political tradition, and honored authority both rely on the existing configuration of cultural memory in America and may also attempt to reframe or reshape it. Remembering, invoking, and arguing in the name of the Framers, and claiming that they stood for one thing rather than for another helps produce—and reproduce—American political traditions and cultural memory.

Just as we speak of “norm entrepreneurs,” who argue in favor of particular norms in society, we might also speak of “memory entrepreneurs.”¹⁴⁹ Memory entrepreneurs emphasize the meaning and the importance of past events and the ethical authority (or villainy) of particular figures; they also attempt to associate these heroes and villains with particular norms and principles.

Arguments from adoption history participate in the practice of memory entrepreneurship. The repeated practice of making these arguments—and the development of multiple resources for learning about, studying from, and quoting certain figures from the past—may add to the ethical authority of particular Founders, Framers, and ratifiers. It may make some parts of world history and American history more salient and important than others. The recent proliferation of online resources for studying the Founding period and the proliferation of books, articles, and essays about the Founders, far from exhausting their authority, may serve to enhance it.

149. See ELIZABETH JELIN, *STATE REPRESSION AND THE LABORS OF MEMORY* 33–34 (2003) (“[M]emory entrepreneurs . . . seek social recognition and political legitimacy of *one* (their own) interpretation or narrative of the past.” (internal quotation marks omitted)); cf. Gary Alan Fine, *Reputational Entrepreneurs and the Memory of Incompetence: Melting Supporters, Partisan Warriors, and Images of President Harding*, 101 AM. J. SOC. 1159, 1159 (1996) (“Reputational entrepreneurs attempt to control the memory of historical figures through motivation, narrative facility, and institutional placement.”).

Even the practice of contending over the significance and positions of certain Founders, Framers, and adopters can add to their ethical authority, because it signals their importance in the wider political culture.

*C. How Ethos, Tradition, and Honored Authority Interact
with Other Modalities of Argument*

Next, consider modalities seven and eight. These are arguments from structure and purpose. These are the arguments in which appeals to adoption history are likely to be most persuasive, and therefore most often employed. What the Founders, Framers, and adopters believed, thought, assumed, or intended is likely to be especially salient and important.

As I noted previously, arguments from structure and purpose need not be arguments from original meaning, original intention, or original understanding. Nevertheless, most American lawyers—and, indeed, most Americans—accept that members of the Founding generation have special insight into the Constitution’s point or purpose, and special insight into how its various parts were designed and should function together. That is so even if some of their assumptions may have become outmoded by intervening events. Here too, the authority of the Founders, Framers, and adopters is buttressed by the rhetorical authority of their place in the nation’s political traditions.

Matters become more complicated with modalities two to six. These are arguments from consequences, judicial precedent, interbranch convention, social custom, and natural law. In these situations arguments from adoption history may also rely implicitly on the ethical authority of the Founders, Framers, or adopters.

The Founders, Framers, and adopters might have special insight into the meanings of judicial precedents of their own era, but they are not a particularly good guide to the proper application of judicial precedents that were decided years after their time. In fact, lawyers and judges are likely to cite to the Founders, Framers, and adopters in order to justify *departing* from existing precedents. In this way, lawyers and judges can claim that in breaking with precedent they are maintaining a deeper continuity.¹⁵⁰

The Founders, Framers, and adopters are unlikely to have special insight into the consequences of constitutional interpretations in a future they could know nothing about. On the other hand, people might believe that these honored authorities have special wisdom about institutional design or special insight into what is just and unjust. Moreover, with sufficient rhetorical preparation, lawyers might invoke the Founders in consequentialist arguments. We can make the Founders’ views persuasive by describing their predictions or their judgments of political cause and

150. Thus, Alfred Kelly, in his critique of the Supreme Court’s use of history, pointed out that judges have often engaged in extended historical essays as “a precedent-breaking instrument, by which the Court could purport to return to the aboriginal meaning of the Constitution. It was thus able to declare that in breaking with precedent it was really maintaining constitutional continuity.” Kelly, *supra* note 1, at 125.

effect selectively or in general terms so that they apply to us today.¹⁵¹ Or we can cherry-pick those predictions or causal judgments that turned out roughly correct while ignoring those that have turned out to be wildly inaccurate or irrelevant.

The Founders, Framers, and adopters are unlikely to be particularly persuasive authority about the content and application of longstanding interbranch conventions, at least if the claim is we should follow existing conventions *because* they reflect the longstanding practice of many generations of actors. Many of these conventions began after the Founders', Framers', or adopters' time; others may have begun contemporaneously but evolved significantly later on.

Nevertheless, the views of the Founding generation might have persuasive authority if we stipulate that conventions have not changed at all; in that case, their views stand for the entire tradition of practice and we invoke their understandings because of their distinctive status as honored authorities. We also might invoke the Founders' views about interbranch relations in order to argue for a *change* in current conventions, or to argue for a *return* to original understandings. Advocates of congressional war power who do not like the growth of executive power in the twentieth century might call for a return to the assumptions of the Framers or the early federal period. Note that these are better described as structural arguments that invoke the ethical authority of the Founders or their special insight into purpose and structure rather than arguments for following existing conventions. Here again, recourse to the Founders is a way of breaking with tradition or settled practice in the name of a deeper continuity.¹⁵²

For similar reasons, the Founders, Framers, and adopters will rarely offer particularly persuasive authority about the content or application of longstanding social customs. These customs may have begun long after their deaths or may have evolved significantly since their day. We might argue for a return to or a restoration of the (imagined) mores of the Founding generation, despite intervening changes in society. But this is not

151. Consider, for example, Madison's statement in *The Federalist No. 47*, "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 293 (James Madison) (Gary Wills ed., 2003). A lawyer might quote this passage to criticize a particular development in the administrative state or in government surveillance practices, even though (1) the principle applies far more generally, and (2) Madison would not have comprehended the situation—much less the modern administrative and national security state—in his 1788 essay. By treating the statements of the Framers as general principles, we allow ourselves to wrench them out of their historical contexts and apply them to contemporary situations.

152. For a pronounced example of how original meaning trumps tradition, see *Noel Canning v. NLRB*, 705 F.3d 490, 502–03 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (2013). In *Noel Canning*, the D.C. Circuit jettisoned longstanding presidential appointment practices (which had existed since 1921 and 1823, respectively) on the authority of the original public meaning in 1787. *See id.* at 502 ("[W]e conclude that practice of a more recent vintage is less compelling than historical practice dating back to the era of the Framers.").

an argument for following longstanding custom; it is an argument for *reform* or *revision* of longstanding custom based on the ethical authority of the Founders. Thus, it is better described as an argument from ethos or honored authority.

The Founders, Framers, and adopters may have special insight into natural law or natural rights, but it is more likely that key philosophers like Aristotle, Thomas Aquinas, John Locke, or Immanuel Kant have greater expertise. Nevertheless, the fact that various Founders, Framers, and adopters believed in natural law and natural rights and spoke in these terms gives their statements special force in American constitutional argument.¹⁵³ But this persuasive force comes not from their philosophical expertise, but from their status as honored authorities or as key figures in the American political tradition.

Finally, consider the first modality—arguments from text. These can either be arguments about original meaning, which are questions of interpretation, or constructions of the text. The latter might include intratextual arguments, arguments that use text to elucidate structure and purpose, or arguments from statutory canons of construction.

If the issue is the original meaning of the text, the linguistic uses of the Founders, Framers, and adopters are perfectly good evidence. Nevertheless, any competent speaker of the English language during the same period should be an equally good authority.¹⁵⁴ Some arguments from original meaning do look to dictionary definitions, contemporaneous newspaper accounts, and correspondence.¹⁵⁵ Nevertheless, as Jamal Greene has pointed out, lawyers and judges often quote texts from the Founders or Framers—like *The Federalist*—as evidence of original public meaning. They do so not because the Founders were more competent speakers, but because of their ethical authority.¹⁵⁶

Similarly, many textual arguments that quote the Founders, Framers, or adopters are really arguments about their purposes, intentions, or

153. Moreover, to the extent that people identify a timeless common law with the natural rights of Englishmen, the common law at the time of the Founding becomes a proxy for natural rights. See Reid, *supra* note 1, at 211–12 (discussing the theory of the “ancient constitution” identified with Magna Carta).

154. If the issue is generally recognized legal terms of art, the opinions of any well-trained lawyer or judge of the period should be equally good.

155. See, e.g., *Baze v. Rees*, 553 U.S. 35, 97 (2008) (Thomas, J., concurring) (consulting a dictionary as to the meaning of the word “cruel” in the Cruel and Unusual Punishments Clause); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 856–65 (2003) (examining every use of the term “commerce” in the *Pennsylvania Gazette* that appeared from 1728 to 1800).

156. Greene, *supra* note 1, at 1697. Akhil Amar’s well-known defense of textualism is largely about the text’s relationship to ethos, tradition, and honored authority. Amar emphasizes the text’s wisdom, its connection to epic narratives of American history, its role as a common cultural focal point, and its singular ability to bind the diverse people of the United States together as one nation. See Amar, *supra* note 113, at 29–30 (emphasizing that the text must be understood against epic narratives and great events); *id.* at 43–45 (emphasizing the comparative wisdom of the text); *id.* at 47 (“[I]n the Constitution itself, we can all find a common vocabulary for our common deliberations, and a shared narrative thread . . . [T]he Constitution is and should be our national bedtime story.”).

expectations, or about their views on constitutional structure. Lawyers may call these arguments from “original meaning,” but in fact they are arguments from how the Founders, Framers, or adopters would have constructed the text. As noted above, this kind of argument is familiar in thick accounts of original meaning.¹⁵⁷ In these cases, the textual argument rests either explicitly or implicitly on the ethical authority of the Founders, Framers, or adopters or their centrality in the political tradition.

D. The Hybrid Nature of “Originalist” Arguments

A recurrent pattern emerges in our march through the modalities. Many originalist arguments—that is, arguments from adoption history that treat the Founders, Framers, and adopters positively or as worthy of emulation—are *hybrids*. They may formally be arguments from purpose, structure, consequences, and so on; but they also rely on the ethical authority of the Founders or Framers or their special status in the American political tradition. These originalist arguments appeal to ethos, tradition, or honored authority in the service of other modes of argument, like text, structure, purpose, or consequences.

The rhetorical advantage of hybrid arguments is obvious: an argument about constitutional text, purpose, structure, or consequences becomes more powerful if a famous Framers also made it or if one can associate it with the Founders in general. Conversely, one way of critiquing an opponent’s arguments is by associating them with opponents of the Constitution, with other cultural antiheroes or with a now discredited or anticanonical opinion like *Dred Scott v. Sandford* or *Plessy v. Ferguson*.¹⁵⁸

An implicit or explicit appeal to ethos, tradition, and honored authority is a characteristic feature of originalist argument in the United States. That includes both arguments about the basic framework and the vast majority of originalist arguments, which are in the construction zone.

157. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 410–11 (2007) (Thomas, J., concurring).

158. See Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677, 681 (2005) (“Anti-canonical cases serve as examples of how the Constitution should not be interpreted and how judges should not behave.”); Balkin & Levinson, *supra* note 119, at 1018–19 (explaining that the anticanon consists of “cases that any theory worth its salt must show are wrongly decided” and which help normalize belief about law); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 384 (2011) (explaining that anticanonical cases are a device of ethical argument because they “symbolize a set of generalized ethical propositions that we [as a nation] have collectively renounced.”); Richard A. Primus, *Canon, Anti-canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998) (explaining that the anticanon consists of “the set of texts that are important but normatively disapproved”).

FIGURE 4: ORIGINALIST ARGUMENT IN
CONSTITUTIONAL CONSTRUCTION

Adoption history can be used to support all styles of argument.

← Founders, Framers, and adopters have special insight or special status
with respect to each form of argument →

Text	Structure	Purpose	Consequences	Judicial Precedent	Political Settlement & Political Convention	Custom	Natural Law	Ethos	Tradition	Honored Authority
Plus appeal to ethos, tradition, or honored authority	Plus appeal to ethos, tradition, or honored authority	Plus appeal to ethos, tradition, or honored authority	Plus appeal to ethos, tradition, or honored authority	Plus appeal to ethos, tradition, or honored authority	Plus appeal to ethos, tradition, or honored authority	Plus appeal to ethos, tradition, or honored authority	Plus appeal to ethos, tradition, or honored authority			

These features of constitutional argument are modeled in Figure 4: adoption history can support each style of justification; and originalist arguments are often “hybrid,” appealing either explicitly or implicitly to ethos, tradition, or honored authority.

The distinctive role of ethos, tradition, and honored authority in originalist argument explains why originalist arguments are so commonplace in American constitutional culture, and why both self-styled originalists and nonoriginalists often make appeals to adoption history. Regardless of their theoretical disagreements, both originalists and nonoriginalists have a stake in American political traditions, and both recognize the normative importance and rhetorical force of those traditions among lawyers, judges, citizens, and government officials in the United States.

Moreover, the importance of ethos, tradition, and honored authority in much originalist argument also explains the remarkable mismatch between the actual practice of originalist argument by lawyers and judges, and the many contemporary academic theories of originalism. Academic theories of originalism and the originalist model of authority do not explain why Americans—including American lawyers and judges—are repeatedly drawn to adoption history when they argue about the American Constitution.

Contemporary academic theories generally attempt to ground originalism on the basis of abstract theories about popular sovereignty, the rule of law, or the nature of meaning. These theories may offer perfectly sensible accounts of why lawyers and judges must adhere to the basic framework. Indeed, the new originalism offers one such account. But the actual practice of originalist argument in the United States goes well beyond claims about the basic framework. The way that Americans—including most American lawyers and judges—make originalist arguments does not correspond to the assumptions of originalist academic theory. It is heavily infused with appeals to ethos, tradition, and honored authority. It often ignores the distinction between interpretation and construction, and casually

runs together claims about the original meaning of the Constitution with appeals to the ethical authority of the past.

Jamal Greene has pointed out a curious feature of contemporary constitutional theory. Today, most originalists are original public meaning originalists. They argue that what is binding on later generations is what the words of the text would have meant to the general public. As Greene notes, originalists converged on this theory because of theoretical difficulties with earlier forms of originalism that looked to the intentions of the Framers and the understandings of the ratifiers.¹⁵⁹

However, if the relevant question is what the text meant to a member of the lay public, contemporary dictionaries, newspapers, and private correspondence should be just as authoritative as the statements of Framers and ratifiers.¹⁶⁰ Moreover, the use of a particular word or phrase by an

159. See Brest, *supra* note 1, at 213–17 (noting difficulties that the Framers themselves did not recognize intentionalism as a valid form of argument; that there may not be a original intention or understanding on a wide range of certain questions, that intentions and understandings may have differed among the relevant adopters, that intentions and understandings may be indeterminate, or that they cannot be made determinate “unless those intentions are understood at a level of generality too high to give practical guidance”); Greene, *supra* note 1, at 1687–88 (citing Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611–12, 620 (1999)); Powell, *Original Understanding*, *supra* note 1, at 886–88; see also Baade, *supra* note 1 (noting that general acceptance of arguments from intention appear well after the Founding period); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 585–86 (2003) (noting that a theory of original understanding “has trouble handling disagreements among the ratifiers about the meaning of the Constitution [I]t is hard enough to identify consensus interpretations within a single state’s convention. The difficulties are only magnified when one tries to identify consensus interpretations across different states” that ratified at different times in the debate).

160. See Barnett, *supra* note 159, at 621–22 (stating that critics of originalism mistakenly “expect to see a richly detailed legislative history only to find references to dictionaries, common contemporary meanings, and logical inferences from the structure and general purposes of the text”); McGowan, *supra* note 1, at 757 (“On the public-meaning theory, *The Federalist* is no more than a topical equivalent of Samuel Johnson’s dictionary or any other usage guide, and the theory cannot distinguish the writings of Hamilton and Madison from those of any literate hack of the day.”).

Justice Scalia offers a similar theory in the *Tanner Lectures*, although he appears to conflate original public meaning with original understanding:

I will consult the writings of some men who happened to be delegates to the Constitutional Convention—Hamilton’s and Madison’s writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. Thus I give equal weight to Jay’s pieces in *The Federalist*, and to Jefferson’s writings, even though neither of them was a Framers. What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.

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, *supra* note 17, at 38.

Using the example of a private 1788 letter from a clergyman to a farmer, (neither a Framers or adopter) Vasavan Kevasan and Michael Stokes Paulsen agree that the everyday linguistic usage of ordinary citizens “is at least *competent* evidence of original meaning, notwithstanding its purely private nature.” Kevasan & Paulsen, *supra* note 127, at 1146. On this account, however, sources like *The Federalist* are not markedly superior. See *id.* at

opponent of the Constitution should be just as authoritative as usage by a proponent.¹⁶¹ Yet this does not appear to match the practice of American constitutional lawyers. Citations to *The Federalist* and to Madison's notes of the Philadelphia Convention are among the most frequently cited forms of adoption history; Greene has shown that they have become even more widely cited in the period in which originalist scholars moved to theories of original public meaning.¹⁶²

Moreover, *The Federalist* and Madison's notes are not entirely reliable sources of either original intention or original understandings.¹⁶³ They may not reflect a consensus either of the ratifiers or of the general public. Indeed, in some respects they may not even represent Madison's, Hamilton's or Jay's own views.¹⁶⁴ The essays in *The Federalist* were

1156–57 (“We should read *The Federalist* because those essays show the meaning of the words of the Constitution, in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted.”).

Nevertheless, Kevasan and Paulsen go on to explain why familiar sources like *The Federalist*, the state ratifying conventions, and Madison's notes should nevertheless have greater authority than the correspondence of ordinary citizens. They are, among other things, “an excellent topical concordance” of words and phrases in the Constitution. *Id.* at 1147–48. In addition, they provide “second-best sources of original public meaning” which nevertheless are “not constitutive of meaning, and hence binding determinations of meaning in their own right.” *Id.* at 1148–49.

161. See Greene, *supra* note 1, at 1693 (“As evidence of the objective public meaning of the Necessary and Proper Clause, it is not obvious why [the Anti-Federalist] Brutus's view—that it gives Congress ‘virtually unlimited power’—is any less reliable than Hamilton's or Madison's.”); *id.* at 1694 (arguing that if proponents of the Constitution are cited more often than opponents, “it is not because opponents are somehow less knowledgeable about the contemporary meaning of words or have less access to prevailing public wisdom”).

162. See *id.* at 1691 (“From 1986 to 2002, according to Professor Melvyn Durchslag, the Supreme Court referenced *The Federalist* in forty-two percent more cases (ninety-eight cases) than during the preceding sixteen years, with Justice Scalia writing nearly one-fifth of those opinions.” (citing Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here Than Meets the Eye?*, 14 WM. & MARY BILL RTS. J. 243, 295, 297 (2005))); *id.* (“*The Federalist* was cited more often in the nineteen years from 1980 to 1998 than in the eighty previous years combined.” (citing Ira C. Lupu, *Time, the Supreme Court, and The Federalist*, 66 GEO. WASH. L. REV. 1324, 1328 (1998))); *id.* (“Justice Scalia cited to the Convention debates in eight Supreme Court opinions from 1986 to 2009, and Justice Thomas did so in seven opinions from 1991 to 2009. For each Justice, that number of citations is the highest of any member of the Court during that Justice's tenure.” (citing Louis J. Sirico, Jr., *The Supreme Court and the Constitutional Convention*, 27 J.L. & POL. 63, 70–71 (2011))); see also *id.* (“*The Federalist* and Farrand's *Records* are the two most significant sources of original understanding in our constitutional tradition. The Supreme Court . . . has referenced *The Federalist* in 236 opinions from 1965 to 2005 alone.” (citing Pamela C. Corley, Robert M. Howard & David C. Nixon, *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RES. Q. 329, 330 (2005))).

163. See Greene, *supra* note 1, at 1694–95 (listing various problems with these sources).

164. See RAPHAEL, *supra* note 104, at 114–23 (noting that Alexander Hamilton's essays probably did not reflect his own views on a number of subjects). Madison, who had strongly opposed the compromise that gave the small states equal votes in the Senate, was nevertheless required to defend it in *The Federalist No. 62*. Madison had wanted a stronger national government than the convention ultimately produced, and he had repeatedly pushed for a national power to veto all state legislation. He even expressed to Jefferson his fears that the new government might fail without the powers he sought for it. *Id.* at 84–90; Letter from James Madison to Thomas Jefferson, October 24, 1787, in 1 THE FOUNDERS' CONSTITUTION, ch. 17 document 22 (Philip B. Kurland & Ralph Lerner eds., 2000),

propaganda pieces directed at the New York ratifying convention. It is not clear that they had much influence on the outcome of that convention.¹⁶⁵ It is even less clear that they had much influence on the other state ratifying conventions.¹⁶⁶ As Ray Raphael has explained, “Publius’s first five essays were reprinted in an average of eight papers outside of New York State, but after that out-of-state publication fell off dramatically.”¹⁶⁷ In fact, “[a]fter *The Federalist No. 16*, no essays were printed in more than one paper out of state.”¹⁶⁸ And “following *The Federalist No. 23*, the remaining sixty-two essays never made it across New York’s borders at all, except for an excerpt from *The Federalist No. 38* in the *Freeman’s Oracle*, published in Exeter, New Hampshire.”¹⁶⁹ Although reprints of speeches and essays about the Constitution “were customary at the time, . . . Publius’s last seventy essays stand as anomalies, the *least* likely pieces to have appeared in more than one state.”¹⁷⁰

In addition to publication in newspapers, a collection of the essays in *The Federalist* was printed in two volumes, the first (containing numbers one through thirty-six) appearing in March 1788 and the second in May 1788.¹⁷¹ But it is very unlikely that the two-volume set influenced the state ratifying conventions. The “initial printing of this now-famous work was only 500 copies, and ‘several hundred’ of these were still unsold in the fall of 1788, after the Constitution had been ratified.”¹⁷² Moreover, the first volume was not published until six states had already ratified.¹⁷³

Madison’s notes of the Constitutional Convention also have weaknesses as evidence of public understanding—much less public consensus—at the time of adoption. They were not made public until many years after the ratification of the Constitution, and therefore could not have influenced the

available at <http://press-pubs.uchicago.edu/founders/documents/v1ch17s22.html>. Nevertheless, in public, Madison lauded the careful balance of federal and state powers in the new Constitution and emphasized the states’ retention of sovereignty in *The Federalist No. 39* and *The Federalist No. 45*. RAPHAEL, *supra* note 104, at 89–91.

165. See RAPHAEL, *supra* note 104, at 112 (noting that by the time New York voted, New Hampshire and Virginia had already ratified). Moreover, “[f]ollowing *The Federalist No. 21*, only one of the remaining sixty-four essays appeared in any of the state’s papers north of the city.” *Id.* at 275 n.23; see also John P. Kaminski, *New York: The Reluctant Pillar, in THE RELUCTANT PILLAR: NEW YORK AND THE ADOPTION OF THE FEDERAL CONSTITUTION* 71–72 (Stephen L. Schechter ed., 1985) (“Despite the significant place *The Federalist* has assumed in American political thought, its impact on New York’s reception of the Constitution was negligible.”).

166. See Rakove, *supra* note 1, at 1597 (“*The Federalist* exercised much less influence over the debates of 1787–88 than did James Wilson’s published speeches to a Federalist crowd at the Pennsylvania statehouse and at the Harrisburg ratifying convention.”).

167. RAPHAEL, *supra* note 104, at 111.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 106.

172. *Id.*

173. Kesavan & Paulsen, *supra* note 127, at 1153.

public debate leading up to ratification.¹⁷⁴ They are also quite brief and leave out most of what actually transpired at the convention.¹⁷⁵

To be sure, some original meaning originalists with the courage of their convictions might argue that these texts should receive no special treatment, and that lawyers and judges should stick to dictionaries and similar resources. But for the most part, their suggestions have fallen on deaf ears. Lawyers and judges continue to cite *The Federalist*, Madison's notes, the ratification debates, letters from and between famous Framers, and so on.¹⁷⁶

What explains this curious state of affairs? As Greene points out, the best explanation is that lawyers and judges are simply using these materials differently than contemporary originalist theories of original public meaning assume or prescribe.¹⁷⁷ Appeals to *The Federalist* and to Madison's notes do a special kind of work in legal argument. Although these arguments seem to appeal to original intentions or original meaning, they are actually forms of ethical argument.¹⁷⁸ In the typology offered above, they are hybrid arguments that appeal in part to national ethos, political tradition, and honored authority.

The Federalist and Madison's notes are authoritative for American lawyers and judges not because they are reliably representative of the thought of the adopters as a whole, or because they are especially good sources of the original public meaning of words and phrases appearing in the Constitution. They are authoritative because of their revered status in the American political tradition. They are part of America's political Scripture. Accordingly, lawyers and judges quote them like Scripture to establish key principles and ideas in the American political tradition.

What is true of *The Federalist* and Madison's notes also extends to other familiar sources of adoption history: the ratification debates in the state conventions, and letters and public statements written by key Framers like

174. See Hutson, *supra* note 1, at 24 (“At [Madison’s] death in 1836, the notes passed to his widow who sold them to the federal government, which commissioned their publication in 1840.”).

175. See *id.* at 34 (“If read aloud, Madison’s notes for any particular day consume only a few minutes, suggesting that he may have recorded only a small part of each day’s proceedings.”).

176. See Greene, *supra* note 1, at 1702 (“[O]riginal intent as such, invoked for its inherent authority value, has been a significant part of constitutional practice since the beginning of the republic and remains significant today.”); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 Nw. U. L. REV. 703, 704 (2009) (“The idea that judicial interpretation of the Constitution should be governed by the real subjective intentions of the human beings who established it as governing law was, for a long time, so natural as to require no name.”).

177. Greene, *supra* note 1, at 1696–97 (noting that originalist arguments “are authoritative not because they specify the semantic meaning of a text, but because they reflect a set of values that are offered by proponents as uniquely or especially constitutive of American identity”); McGowan, *supra* note 1, at 757–59, 825–35 (noting that in practice original meaning arguments appeal to ethos); Post, *supra* note 21, at 29 (historical appeals to Framers are “a characterization of the national ethos”); cf. Dorf, *Integrating Normative and Descriptive Constitutional Theory*, *supra* note 1, at 1770, 1800–05 (describing and approving of “ancestral” and “heroic” uses of originalism in constitutional argument).

178. See *supra* notes 21, 175 and accompanying text.

Madison and Jefferson. (Jefferson, of course, was off in France during the debate over the Constitution.) Each of these sources has its own drawbacks and limitations in demonstrating a consensus about intentions, understandings, or meanings. But that has not stopped American lawyers and judges, who continue to cite and invoke them with reverence.

There is nothing wrong with such practices, as long as we recognize them for what they are, and understand the nature of the claims being made. In constitutional construction, originalist arguments may appropriately invoke the authority of ethos and tradition. They may call on the memory of honored authorities and argue that we should emulate their principles, ideals, and practices. But we should not confuse these claims with binding commands from the past. When we do so, we give originalist arguments an authority they do not really deserve. Correctly understood, however, such arguments still have plenty of legitimate persuasive power. Originalist arguments exemplify how Americans use the common resources of the past to argue about the meaning of the present and the appropriate direction of the future.

This account of originalist argument attempts to explain and vindicate the use of these arguments by originalists and nonoriginalists alike. Moreover, it explains several features of contemporary legal practice that most academic theories of original meaning originalism are far less able to account for. Indeed, from the standpoint of these theories, what most people are doing is simply a mistake.

First, lawyers and judges—including originalist judges—continue to focus not on the original public meaning of the Constitution—i.e., the linguistic understandings held in common by any competent speaker of language—but on the views and examples of famous Founders, Framers, and ratifiers. They also continue to focus on purposes, intentions, understandings, and goals—on what the Framers wanted and what they hoped to accomplish. Sometimes this is called an inquiry into “original public meaning,” but in such cases “original public meaning” is but a fig leaf for a very different kind of inquiry. Even so, this practice makes sense if we stop trying to shoehorn it into original meaning originalism. What gives these arguments their rhetorical power is the special status of the Founding generation as especially wise people or as culture heroes, or the special role that the Founders play in inaugurating the American political tradition.

Second, not all adopters receive the same degree of attention. Some Framers (like Madison, Jefferson, Franklin, Adams, Washington, and Hamilton) and some texts (like *The Federalist*) receive the lion’s share of attention, while adopters of post-1791 amendments are not quoted or cited with the same frequency or reverence.¹⁷⁹ From the standpoint of the theory of original public meaning, all adopters—indeed all members of the

179. The recently created Founders Online website, part of the National Archives, includes the complete papers of these six figures. FOUNDERS ONLINE, <http://founders.archives.gov/> (last visited Oct. 21, 2013).

public—should be equally important in providing evidence of how the English language was used at the time of adoption. On the other hand, we would expect something closer to current practices if originalist argument mostly concerns what is central to American national ethos or American political traditions.

Third, conservative original meaning originalists who argue that fidelity to original meaning offers the only correct interpretation of the Constitution nevertheless often leaven their theory by making room for nonoriginalist precedents and for evolving traditions.¹⁸⁰ These accommodations make particular sense if originalist arguments are themselves appeals to tradition and ethos.

Fourth, even the most vocal opponents of originalism as a general theory of interpretation nevertheless frequently use adoption history to buttress their arguments. In many contexts, like the scope of presidential power, presidential impeachment, or the Second Amendment, living constitutionalists sound almost indistinguishable from originalists. They do so not because they are originalists *manqué*, but because they are good lawyers, and they know that appeals to adoption history have special force in American constitutional culture, especially when there are not very many judicial precedents to argue from.¹⁸¹ Again, this practice would make particular sense if most originalist arguments are in the construction zone and are appeals to ethos, tradition, and honored authority.

180. See, e.g., Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 273 (2005) (arguing for “a strong theory of precedent in constitutional law” even when it might conflict with originalism because “it would promote judicial restraint.”); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 794 (2010) (“Unless we are prepared to condemn our existing constitutional practice as illegitimate, the propriety of other modes of argument besides originalism, particularly those based upon precedent, must be acknowledged.”); Scalia, *supra* note 13, at 861 (“[A]lmost every originalist would adulterate [the theory] with the doctrine of stare decisis.”); Scalia, *supra* note 17, at 139–40 (defending use of nonoriginalist precedents as a “pragmatic exception” in the interests of stability); cf. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269, 1292 (1997) (noting the roles of text, original understanding, the presumption of constitutionality, tradition, and precedent as appropriate constraints on judicial decisionmaking that produce humility). Other originalists, by contrast, argue that original meaning should generally control. See, e.g., Amar, *supra* note 32, at 157–62 (arguing that “a proper consideration, consistent with the Constitution’s general structure of coordinate branches, should not treat the Supreme Court’s past constitutional errors as categorically different from the past constitutional errors of other branches”; nevertheless, liberty-expanding precedents that are incorrect when decided should survive when there has been popular ratification); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 24 (1994) (“[T]he practice of following precedent is not merely nonobligatory or a bad idea; it is affirmatively inconsistent with the federal Constitution.”); Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005) (“*Stare decisis* not only impairs or corrupts proper constitutional interpretation. [It] is *unconstitutional*, precisely to the extent that it yields deviations from the correct interpretation of the Constitution!”).

181. Barnett, *supra* note 14, at 421–22 (noting that lawyers and judges are more likely to make originalist arguments when they are “writing on a clean slate”).

E. Why Originalist Arguments Are Defeasible

Perhaps the most important feature of originalist arguments in American constitutional culture is that they are nonmandatory and defeasible. In disputes over constitutional construction, lawyers do not always offer originalist arguments, and originalist arguments are not always accepted.

For example, regardless of the Founders', Framers', or adopters' views, few lawyers today would bother to argue that paper money, Social Security, the Americans with Disabilities Act, or the Fair Labor Standards Act are unconstitutional; that states may prevent blacks and whites from marrying; or that states may provide that married women lose all of their common law rights upon marriage. If lawyers did offer these arguments, most judges would quickly dismiss them.

If originalist arguments asserted binding commands rather than resources for constitutional construction, lawyers would always cite them as their most powerful legal arguments and judges would never ignore them. This is not how American lawyers and judges operate. As we saw in the case of *Parents Involved*, none of the justices—including the two originalists, Justices Thomas and Scalia—focused on the views of the Reconstruction framers to resolve the issues in the case. Instead, they focused on the ethical authority of *Brown*, the early civil rights movement, and the NAACP's campaign to overturn *Plessy v. Ferguson*.¹⁸²

On the other hand, these practices make particular sense if originalist arguments in constitutional construction implicitly rely on ethos, tradition, and honored authority.

First, these aspects of political culture change over time, asserting continuity with the past while nevertheless rejecting many elements of the past.

Second, traditions contain variegated elements, so that there is often more than one way to characterize them and draw normative lessons from them. In particular, tradition and ethos can be stated at different levels of generality.¹⁸³ Constitutional scholars have often argued that lawyers' ability to characterize original intentions and understandings at higher and lower levels of generality presents a problem for originalism, because it makes originalist argument indeterminate, and thereby undermines its ability to constrain wayward judges.¹⁸⁴ But suppose that we view

182. See *supra* notes 133–36.

183. See, e.g., Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (Scalia, J.) (noting that traditions can be described at various levels of generality and arguing that judges must “adopt the most specific tradition as the point of reference” in order to avoid “arbitrary decisionmaking”); J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1615 (1990) (noting that traditions can be characterized multiply, are constantly in the process of change, and may feature tensions or even inconsistencies when viewed at different levels of generality); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1059 (1990) (criticizing Scalia's test and arguing that “judges trained in the method of the common law can generalize from prior cases without merely imposing their own values.”).

184. See, e.g., David A. Strauss, *Can Originalism Be Saved?*, 92 B.U. L. REV. 1161, 1163 (2012) (“If we are allowed to change the level of generality at which we characterize the

originalist arguments—at least those in the construction zone—as appeals to tradition and ethos. Then what seemed like a flaw now looks like a feature. Varying descriptions and levels of generality is precisely how people invoke traditions and claims about national character.

Claims about tradition are often contestable (1) because past practices are variegated and not uniform; (2) because the meaning and lessons of tradition are often best described through generalization (and there is often more than one way to do this); and (3) because traditions evolve by discarding or rejecting previous elements of tradition and absorbing new ones. Traditions, in short, are always breaking away from parts of themselves, glomming onto what is new, and then redescribing the changes as always having been part of the tradition, correctly understood.¹⁸⁵

Third, if originalist arguments in constitutional construction are appeals to ethos or tradition, it is entirely reasonable that these arguments would not be mandatory but would be defeasible. Contemporary Americans will accept appeals to the values of the Framers, Founders, or adopters to the extent that they can plausibly identify them with their own values and their own sense of what is lasting and valuable about American traditions.¹⁸⁶ Traditions, however, change over time, and elements and norms that once were central may later become peripheral or even repudiated. If contemporary Americans cannot plausibly identify their values or their understanding of America's political traditions with the views of the Framers, Founders, or adopters, they will not regard them as possessing ethical authority or the authority of tradition; therefore they will not treat originalist arguments as having special force. Lawyers will not offer them, and judges will not accept them.

Originalist arguments in constitutional construction appeal to an identity between the ethos and traditions of the present and those of the past. Only if we can plausibly identify the ethos of the Founders, Framers, or adopters with our own will we accept their will as representing our will.¹⁸⁷ That is why arguments from original understandings and intentions are most powerful in the years immediately following the adoption of an amendment. It is much easier to identify with the ethos of recent adopters and view them as representing or speaking for all citizens in the present.¹⁸⁸

original understandings, then originalism can justify anything.”); Tribe & Dorf, *supra* note 183, at 1063 (“Whose intent matters and at what level of generality? No judge can answer this question without reference to a value-laden, extra-textual political theory.”).

185. See Balkin, *supra* note 183, at 1615.

186. See Post, *supra* note 21, at 29 (“[H]istorical interpretation seemingly presents itself as a self-denying submission to the identity of past ratifiers, . . . [yet] that identity is authoritative only insofar as we can be persuaded to adopt it as our own.”).

187. *Id.* (arguing that “the authority of historical interpretation will in significant measure depend” on our present “identification, [or] a community of interest, with the framers or ratifiers” so that “[t]heir consent . . . is ‘our’ consent; they spoke ‘for’ us.”).

188. *Id.* at 28–29, 40 n.77; see also Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 209 (2008) (arguing that recent amendments should be construed according to original understandings out of “respect for democratic decisionmaking”).

As time passes, however, these connections become attenuated, because norms change, conceptions of what is reasonable and unreasonable evolve, and political traditions mutate, discarding some elements while accumulating others. Although Founders, Framers, and adopters may retain their status as honored authorities, we will invoke them only selectively, in certain contexts, or in abstract or general ways.

People in a democracy disagree with each other about values, about the content and force of political traditions, and about the meaning and importance of historical events. This means that not only will people invoke the Founders, Framers, and adopters selectively, but they will also disagree about when and how it is appropriate to do so. Some people will refuse to respect the authority of the Founders, Framers, and adopters in particular constitutional contexts—like gay rights or the scope of federal power—while others will find their views very important indeed. People will quote different Framers for different propositions. They will see different things in adoption history. Finally, they will reinterpret the views of the Framers differently in light of contemporary concerns.

Originalist arguments for judicial restraint sometimes have this character. For example, the generation that adopted the Fourteenth Amendment had very different views about sex equality than we do today. That is why they did not think that states had any constitutional obligation to grant what we would now consider equal rights to married women.¹⁸⁹ Most people today would find these views objectionable. Instead of arguing that these norms are substantively correct and that we should abide by them today, one might instead argue that the framers believed that the issue was best left to legislatures. Thus, even if the law is unjust by today's standards, the framers were wise to leave the issue to democratic majorities.¹⁹⁰ One could make similar originalist arguments against protecting rights to contraceptives, gay rights, and so on. This reinterpretation of the meaning of the past converts what might be a potentially unpalatable substantive view about women, homosexuals, or sexual autonomy into a more plausible view about democracy, judicial restraint, and the separation of powers.¹⁹¹

189. Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 *Nw. U. L. REV.* 1229, 1230 (2000) (“The [Fourteenth] Amendment was understood not to disturb the prevailing regime of state laws imposing very substantial legal disabilities on women, particularly married women.”).

190. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (“[T]o counterbalance the Court’s criticism of our ancestors, let me say a word in their praise: They left us free to change.”).

191. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting) (describing the Texas law criminalizing same-sex sodomy as “uncommonly silly” and noting that he would vote against it if he were a legislator, but arguing that the right to privacy has no basis in the Constitution).

F. *The Gravitational Force of Living Constitutionalism
on Originalist Argument*

More generally, how lawyers and judges use adoption history is shaped by the constitutional canon and by the current configuration of constitutional common sense—what kinds of arguments and positions are currently treated as “off the wall” and “on the wall.”

Some results, doctrines, and institutional adaptations are both canonical and durable. Examples are cases like *United States v. Darby*¹⁹² and *Wickard v. Filburn*,¹⁹³ and the accompanying New Deal conceptions of federal power and economic due process. Most well-trained lawyers and judges will regard these constructions as settled and believe that maintaining these constructions is important to constitutional legitimacy. Therefore, they will argue within the logic of these constructions instead of directly against them.

For example, the lawyers who challenged the Patient Protection and Affordable Care Act in *National Federation of Independent Business v. Sebelius*¹⁹⁴ (*NFIB*) did not argue for a wholesale return to the original understanding of federal power of the 1790s (even though their opponents may have accused them of that).¹⁹⁵ Instead, the challengers invoked the Framers as part of a larger argument that the Affordable Care Act was unprecedented and went beyond the boundaries set by the New Deal and modern precedents.¹⁹⁶ Instead of attacking these canonical and durable constructions directly on the grounds that they violated the Constitution’s original meaning, the challengers argued for a more limited conception of these constructions.¹⁹⁷

In general, then, lawyers will tend to offer originalist arguments in contexts or in ways that do not directly threaten constructions they currently believe are canonical and durable.¹⁹⁸ (Obviously, lawyers may disagree about what is canonical and durable at any point in time, and therefore what they feel authorized to challenge will differ accordingly.) Even lawyers who dislike canonical and durable constructions and want to overthrow them may invoke adoption history to alter or limit these constructions only at the margins, with the hopes of chipping away at them gradually. Some legal academics, for example, believe that the New Deal settlement was a serious mistake. If legal doctrine and politics change sufficiently, lawyers and judges may be emboldened to attack New Deal precedents more directly. If this happened, it would signal that these precedents are no

192. 312 U.S. 100 (1941).

193. 317 U.S. 111 (1942).

194. 132 S. Ct. 2566 (2012).

195. Barnett, *supra* note 14, at 428.

196. *Id.*; see also JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE (2013).

197. Barnett, *supra* note 14, at 428.

198. On the notion of “canonical” and “durable” constructions, see BALKIN, *supra* note 2, at 231, 312–17.

longer durable and their continuation is up for grabs in constitutional politics.

In sum, lawyers and judges offer originalist arguments, like all other constitutional arguments, in the context of the current configuration of the constitutional canon, and the current constellation of canonical and durable constructions, and the current sense of what is reasonable and unreasonable, “on the wall” and “off the wall.” Because the constitutional canon and what people consider reasonable and unreasonable can change, so too may the way that lawyers and judges invoke adoption history and the views of the Founders, Framers, and ratifiers.

Randy Barnett has recently described what he calls the “gravitational force” of originalist arguments in nonoriginalist opinions.¹⁹⁹ Barnett points out that in judicial decisions that are not primarily based on originalist reasoning, or where originalist reasoning would seem to be completely irrelevant, judges nevertheless often feel moved or obligated to quote adoption history or honored authorities from the Founders, Framers, or adopters.²⁰⁰ For example, Barnett explains that in *NFIB*, there was a conflict between two large-scale conceptions of doctrine, what Lawrence Solum has called the “constitutional gestalt.”²⁰¹ One vision of doctrine, held mostly by liberals and establishment conservatives, assumed that Congress had virtually plenary powers under the Commerce Clause; the other, held mostly by movement conservatives, argued that although the New Deal precedents should be retained, they should not be expanded any further.²⁰² Originalist arguments helped lawyers and judges express this latter position. To be sure, originalist arguments, taken to their logical conclusion, would justify dismantling large parts of the New Deal settlement. But the Framers were not employed for that purpose; instead lawyers and judges invoked them to argue for a slightly more limited construction of the constitutional commitments of the New Deal.

Barnett suggests that originalism may play a role in these cases because judges sense that current doctrine has strayed too far from the original meaning, and therefore they are trying to compensate—admittedly in small ways—from doctrine’s massive deviations from the correct interpretation of the Constitution.²⁰³ I do not think this is the best explanation, especially

199. Barnett, *supra* note 14, at 425–32.

200. *Id.*

201. Lawrence Solum has introduced the concept of the “constitutional gestalt” to describe the configuration of normative theories, doctrines, and constitutional narratives in place at any period of time. Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. L. REV. (forthcoming 2013) (manuscript at 32–33), available at <http://ssrn.com/abstract=2152653>. The configuration of the constitutional gestalt is the result of the processes of living constitutionalism and it can be altered through the same processes.

202. Barnett, *supra* note 14, at 428–29.

203. *See id.* at 431 (“[T]he powers upheld by the New Deal and Warren Courts violated the original meaning of the Constitution, and this expansion was, therefore, illegitimate on originalist grounds. Because of this, any further expansion must be justified, and any purported justification that would essentially eliminate the enumerated powers scheme in the original Constitution is unacceptable or improper.”).

since judges and justices who do not feel themselves particularly bound by original meaning regularly make originalist arguments.²⁰⁴ Rather, I think that lawyers and judges—especially lawyers and judges who have no thoroughgoing commitment to originalism—are simply doing what lawyers and judges always have done. They are invoking the rhetorical authority of honored Framers, Founders, and adopters in order to promote their favored positions in the particular litigation before them. They will not make originalist arguments or quote originalist sources for positions that they believe are too “off the wall,” and if they do, judges—who are equally happy to cite the same Framers, Founders and adopters—will reject their arguments.

In *United States v. Lopez*,²⁰⁵ for example, Chief Justice William Rehnquist quotes *The Federalist No. 45* to argue that “[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”²⁰⁶ When the Chief Justice quotes Madison, however, he is not expressing buyer’s remorse about the New Deal. Nor is he seriously contending that the powers of the federal government really are “few and defined” in the sense that Madison himself would have understood. After all, Rehnquist then goes on to offer three very expansive tests for the scope of the federal commerce power, all drawn from post–New Deal doctrine.²⁰⁷ His point is that these tests do not permit the Gun Free School Zones Act at issue in *Lopez*.²⁰⁸ Rehnquist believes that federal power, while expansive, and beyond the wildest imaginings of the very Framers he is quoting, is still not unlimited, and that it should be more limited than most liberal constitutionalists believe. He quotes the Framers as authority for *that* proposition. In *Lopez*, originalist argument operates as a rhetorical flourish, not a gravitational mass; it is not pulling Rehnquist in any direction he does not already want to go.

Similarly, when Chief Justice John Roberts quotes *The Federalist No. 45* in *NFIB v. Sebelius*,²⁰⁹ he is not expressing hidden pangs of regret about the entire New Deal settlement. Rather, he believes that federal power should be limited in *this* context, and he selects quotations from Madison that

204. By way of analogy, secular Jews do not recite Hebrew prayers and engage in traditional rituals because they hope to emulate their ultra-Orthodox brethren, who they secretly recognize are the only “real” Jews. On the contrary, just as modern Jewish traditions do not depend on the imprimatur of ultra-Orthodoxy, the widespread practice of originalist argument in constitutional construction does not rest on obeisance to the originalist model of authority. Both the ultra-Orthodox and secular Jewry are the result of the same forces of modernity; they have simply responded to those forces in different ways.

205. 514 U.S. 549 (1995).

206. *Id.* at 552 (quoting THE FEDERALIST NO. 45, at 292–93 (James Madison) (C. Rossiter ed., 1961)).

207. *Id.* at 558–59 (noting “three broad categories of activity that Congress may regulate under its commerce power”).

208. *Id.* at 559, 567–68 (concluding that the Gun Free School Zone Act does not fit into any of the three categories).

209. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012).

argue for limited federal power and hence help him make his arguments.²¹⁰ They remind his audience about the nation's political traditions. In the next case, or the one before, he will turn right around and argue for positions that would have made the Framers blanch.²¹¹

Indeed, it is worth noting that *both* sides made originalist arguments in the Affordable Care Act litigation. Opponents of the mandate invoked the Founders to argue that the mandate was inconsistent with the principle that the powers of the federal government were limited; therefore any interpretation that gave the government a general federal police power had to be incorrect.²¹² Defenders of the individual mandate pointed to the structural assumptions in Resolution VI of the Virginia Plan; they argued that Congress has the authority to solve federal problems that the states are separately incompetent to solve on their own.²¹³ Neither side's use of originalist argument was designed to wreak a wholesale alteration in the constitutional status quo. Rather, each side sought to invoke the ethical

210. *Id.* at 2589 (“The Government’s theory would erode those limits, permitting Congress to reach beyond the natural extent of its authority, ‘everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.’” (quoting THE FEDERALIST NO. 48 (James Madison))).

211. In *United States v. Comstock*, 130 S. Ct. 1949, 1954 (2010), for example, Chief Justice Roberts joined an opinion that held, in effect, that because the federal government could create crimes, it could create a federal prison system for people who violated them, and because it could create a federal prison system, it could create a federal system of civil commitment to detain mentally ill persons who had served their sentences but whom no state was eager to accept.

212. *NFIB*, 132 S. Ct. at 2589; Brief for Respondent on the Minimum Coverage Provision at 16, 18, U.S. Dep’t of Health & Human Servs. v. Florida, *aff’d in part, rev’d in part sub nom NFIB*, 132 S. Ct. at 2566 (2012) (No. 11-398) (quoting THE FEDERALIST NO. 45 (James Madison)); *id.* at 20 (quoting eighteenth-century dictionaries on the meaning of “regulate”); *id.* at 32 (quoting THE FEDERALIST NO. 84 (Alexander Hamilton)); *id.* at 11 (“A power to regulate existing commercial intercourse is precisely what the framers sought to confer upon the new federal government. The power to compel individuals to enter commerce, by contrast, smacks of the police power, which the framers reserved to the States.”); *id.* at 17 (“The power to force individuals to engage in commercial transactions against their will was the kind of police power that [the Framers] reserved to state governments more directly accountable to the people”); *id.* at 32 (“[T]he framers were acutely aware of that flawed argument [that rights guarantees militated against limited federal power] and drafted the Ninth and Tenth Amendments to guard against it.”).

213. *NFIB*, 132 S. Ct. at 2615 (Ginsburg, J., concurring in part and dissenting in part) (“The Framers’ solution was the Commerce Clause, which, as they perceived it, granted Congress the authority to enact economic legislation ‘in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent.’” (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 131–132 (Max Farrand ed., Yale Univ. Press 1967) (1911) (quoting the language of Resolution VI of the Virginia Plan))); *see* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 14, 16–17 (original language of the Virginia Plan); *see also NFIB*, 132 S. Ct. at 2615–16 (Ginsburg, J., concurring in part and dissenting in part) (citing as support for flexible national power to solve federal problems THE FEDERALIST NO. 34 (Alexander Hamilton); James Madison, *Vices of the Political System of the United States*, in JAMES MADISON: WRITINGS 69, 71 (Jack Rakove ed., 1999); Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 PAPERS OF JAMES MADISON 368, 370 (Robert A. Rutland & William M. E. Rachal eds., 1975); Letter from James Madison to N.P. Trist (Dec. 1831), in 9 WRITINGS OF JAMES MADISON 471, 475 (Gaillard Hunt ed., 1910); Letter from George Washington to James Madison (Nov. 30, 1785), in 8 PAPERS OF JAMES MADISON, *supra*, at 428–29).

authority of the past to argue for the best way to construct the Constitution in the present. This is not so much the “gravitational force” of originalism as the rhetorical power of culture heroes.

In fact, there is a far more powerful “gravitational force” at work. It is the gravitational influence of the present on the reception and use of the past. What we think the Framers and Founders meant, when we think it important to quote them, and what we think important to quote them for, depend on our present-day views and values, and not on how they saw the world. The constitutional canon and constitutional culture, which shape the boundaries of the reasonable and the unreasonable in legal argument, also shape the contemporary use of adoption history. The constitutional canon and constitutional culture, however, are the result of the processes of living constitutionalism. Thus, the more important “gravitational force” is the influence of living constitutionalism on originalism—the influence of the constitutional culture on how and when originalist rhetoric is wielded in constitutional argument. Originalist argument—when, where, and how it is invoked—is produced by the same forces that construct the living Constitution generally.²¹⁴

In his academic novel, *Small World*, David Lodge describes a character who writes about the influence of T.S. Eliot on William Shakespeare.²¹⁵ He does not claim that Shakespeare was actually influenced by Eliot, who lived centuries later. The point, rather is that our understanding and reception of Shakespeare is shaped by living in a literary culture that has already experienced Eliot and literary modernism.²¹⁶ More generally, we cannot help but read Shakespeare in the light of the cultural world we now live in.

A similar phenomenon affects our understanding and use of the Founders, Framers, and adopters. When we read famous texts from the Founding today, we immediately connect them to our own constitutional controversies and anxieties—about the growth of the federal government, about the increasing power of the presidency, about the dysfunctionality of contemporary politics, about encroaching invasions of privacy, about the

214. Thus, the gravitational force of originalism on constitutional rhetoric is just the flipside of the gravitational force of living constitutionalism on the rhetorical practice called “originalism.” To continue the comparison to physics, what people call centrifugal force is not really an independent force at all; it is actually the felt effect of centripetal acceleration. In the same way, the gravitational force of originalism is actually the influence of the processes of living constitutionalism in constructing how Americans think about their past, which, in turn shapes what counts as a plausible appeal to Founders, Framers, and adopters in the present. Or, to use yet another physics metaphor, the acceleration that people call gravitational force is merely an effect of the curvature of space-time. Contemporary mores reshape cultural memory—they bend the space-time of history—which, in turn, shapes contemporary conceptions of how people invoke the past. What we call “originalist argument” today is the effect of historical change on the reception and normative force of adoption history.

215. DAVID LODGE, *SMALL WORLD: AN ACADEMIC ROMANCE* 51–52, 149–50, 197–98 (1984).

216. *Id.* at 52 (“[W]hat I try to show . . . is that we can’t avoid reading Shakespeare through the lens of T.S. Eliot’s poetry. I mean, who can read *Hamlet* today without thinking of ‘Prufrock’?”).

influence of money in politics, or about how to preserve representative self-government in a world of growing inequality. Appeal to the wisdom and example of Framers, Founders, and adopters is an important aspect of how Americans build out their Constitution over time—how they continue their intergenerational constitutional project in an uncertain world. Originalist argument allows us to explain the future in terms of fidelity to the past, yet it is always a manifestation of the present.

Rather than being opposed to an evolving constitutional tradition, the ritual citation of Framers, Founders, and adopters is part of that evolving tradition. Rather than being in conflict with a living Constitution, the invocation of originalist sources is part of the processes of living constitutionalism. Invoking the past, and honored authorities from the past, is often how contemporary reformers call for return, restoration, and redemption. They seek to modify the constitutional canon in light of changing times and new political challenges, and when they do, they call on the Founding generation to support their endeavors, regardless of what the Founding generation itself would have thought.

Today's conservative originalists are not the opponents of a living Constitution; they are the living constitutionalists of the right. If they succeed, what they will produce is not the Founders' constitutional world and vision, but their own world and vision, a world and vision very much of the present.²¹⁷

Indeed, the very idea of "originalist" argument as a distinct species of argument, and of "originalism" as a distinctive philosophy of interpretation—is a relative latecomer in American history. It is a product of constitutional modernity.²¹⁸ It arises with the new conservative movements of the second half of the twentieth century.²¹⁹ To be sure, the practice of referring to the views of Founders, Framers, and adopters as ethical authorities occurs throughout American constitutional history. Before the middle of the twentieth century, however, there was no systematic or self-conscious attempt to make these rhetorical moves the most authentic or central examples of constitutional rhetoric. Rather, lawyers and judges sometimes invoked the Founders, Framers, or adopters when they felt it was a particularly good argument, and sometimes they did not. They did not understand that they were under a theoretical obligation to behave otherwise.

217. And before movement conservatives, Warren Court liberals used adoption history to justify constitutional transformation. See Kelly, *supra* note 1 (listing as examples Establishment Clause, reapportionment, and criminal procedure cases).

218. See Sanford Levinson & J. M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1643–44 (1991) (arguing that the experience of modernity creates a sense that the past is slipping away, and therefore it creates an urgency to recapture what has been lost). Note that although this may explain the origins of originalism, one can still theorize independently about its merits.

219. See Post & Siegel, *supra* note 1, at 554 (describing conservative embrace of originalism in politics and law beginning in the 1980s); Whittington, *supra* note 13, at 601 ("It is important to note that originalism was a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts; originalism was largely developed as a mode of criticism of those actions.").

The characteristic move of originalism in the second half of the twentieth century is the self-conscious invocation of the Founders, Framers, and adopters as the touchstone of constitutional legitimacy and as the spearhead of a movement for political reform. Conservatives opposed fidelity to the Framers to “living constitutionalism.” They understood “living constitutionalism” to be the reigning liberal philosophy. But the actual processes of living constitutionalism transcend left or right.

Conservative social and political movements and their influence on the Constitution-in-practice are themselves aspects of a living Constitution. Movement conservatives wanted to move constitutional doctrine away from the precedents of the Warren and early Burger Courts in order to better reflect conservative understandings of constitutional fidelity. Their constitutional rhetoric featured narratives of restoration and return that are characteristic of appeals to ethos, tradition, and honored authority. The country had strayed from its foundations during the 1960s and 1970s, and it was necessary to return to the wisdom of the Framers.

The processes of living constitutionalism shape the reception and use of originalist argument by contemporary Americans on both the left and the right. Americans use originalist argument in some ways and in some contexts rather than others because of the legacy of the New Deal, the national security state, the civil rights movement, the second wave of American feminism, and movement conservatism. Contemporary Americans’ use of originalism is conditioned by political and social mobilizations that shape American political traditions and normative ethos, and influence the boundaries of the reasonable and the unreasonable, the off-the-wall and the on-the-wall. The practice of originalist argument occurs *within* these aspects of the American political tradition; it does not sit outside them and regulate them from beyond.

VIII. CONCLUSION: ORIGINALIST ARGUMENT FOR ORIGINALISTS AND NONORIGINALISTS

By focusing on the distinction between interpretation and construction, the new originalism recognizes a broad space for arguments about adoption history that do not correspond to originalist models of authority. These arguments operate on multiple levels. Although they may purport to be solely about original meaning, purpose, or the Framers’ vision of constitutional structure, they also concern cultural memory and the best understanding of the American political tradition.

Originalists are hardly the only people interested in these questions. Nonoriginalists and living constitutionalists also have a stake in the constitution of America’s political traditions and in conceptions of national ethos. They have a stake in who is considered an honored authority and why. They have a stake in the stories Americans tell themselves about their origins and achievements, and how Americans understand the meaning and direction of their history. They have a stake, in short, in the nation’s cultural memory. The point of this Article is not to eliminate the persuasive authority of arguments from tradition and cultural memory; rather, it seeks

to recognize them *as such* and to encourage even those who do not think of themselves as originalists to understand their appropriate use in constitutional argument.

In fact, a living tradition of constitutionalism needs the resources of tradition and cultural memory to work with. These resources are not simply impediments to change. They are also wellsprings of change. These resources provide important intellectual tools for people within a living tradition to understand the challenges of the present, and to argue with their fellow citizens about the proper direction of the constitutional project in the future.²²⁰

Some nonoriginalists and living constitutionalists may shy away from invoking adoption history because they fear that this will be seen as an implicit confession that conservative originalism is the only correct theory of interpretation. But the rise of a new originalism founded on the distinction between interpretation and construction shows why these fears are misplaced. Lawyers engaged in constitutional construction are building out the Constitution-in-practice. In so doing, they can and should use all of the available tools of argument and persuasion. Adoption history, and arguments from ethos, tradition, and honored authority are among those tools; indeed, in American legal culture, they are often quite powerful tools. Originalist argument is a characteristic rhetorical feature of the processes of living constitutionalism; if so, those who call themselves “living constitutionalists” should certainly avail themselves of it. Arguments from adoption history and invocations of American culture heroes do not belong to any sect or party. Appeals to the Founders, Framers, and adopters occurred long before the rise of modern originalism, and they will no doubt continue to be offered long after the current configuration of political argument and academic theory has passed into oblivion.

We should understand the conservative mobilizations of the past forty years in this light. Like many social mobilizations before them, conservatives used cultural memory and political tradition to diagnose and characterize a politics they believed had gone wrong. They used the same cultural resources to explain how things should change to a wider public. As noted previously, the arguments that movement conservatives made were not always conservative in the Burkean sense. Often they proposed quite radical changes.²²¹ We can and should distinguish between

220. Balkin, *supra* note 4, at 85 (comparing constitutional change to the oral tradition in Jewish law and explaining that “[a] living tradition needs memory and resources to work with, even if it changes over time”).

221. Similarly, although it is now not generally remembered, the Warren Court repeatedly invoked adoption history to justify many of its revolutionary decisions. Alfred Kelly’s famous critique of the Supreme Court’s use of “aboriginal” history was written in 1965 and directed primarily at the Warren Court. Kelly, *supra* note 1, at 131 (“[T]he reformist activists on the Court initiated a new era of historically oriented adjudication.”). In his survey of the Court’s work, the “most important characteristic,” Kelly emphasized, is adoption history’s “use as part of a process for diverting the stream of established legal precedent.” *Id.* at 126. Through its appeal to adoption history, “the Court managed successfully to achieve a paradox: breaking precedence while rendering obeisance to the doctrine of constitutional continuity.” *Id.*

movement conservatives' use of cultural memory and political tradition to speak to their fellow citizens and the particular substantive values they sought to promote. We should also distinguish between movement conservatives' invocation of cultural memory and tradition and the jurisprudential claim that the beliefs or understandings of particular Framers or ratifiers constitute binding law in the present.

Given the interpretation-construction distinction, the practice of making arguments from adoption history creates no theoretical difficulties for living constitutionalism. Conversely, living constitutionalists gain no theoretical points for refusing to engage in originalist styles of argument. All that one achieves by rejecting these arguments is to limit one's ability to draw upon powerful symbols of ethos, tradition, and honored authority.

Tradition and cultural memory are not fixed. They are shaped by how people choose to argue, articulate, persuade, and remember. They are shaped by how people actively invest in memory and by how people choose to remember and encourage others to remember. The pantheon of honored authorities evolves over time as a result of political and cultural change. Today Martin Luther King, Jr. is a culture hero; he was not universally so regarded in 1970. Through politics and through interventions in culture, different people, groups, and institutions can move in and out of the pantheon of honored authorities, can gain or recede in salience and prominence, and can take on different meanings and associations. Even if the past does not change, memory of the past certainly does. Refusing to claim the past for one's self means accepting other people's versions.

Struggling over tradition and cultural memory is not alien to the idea of a living Constitution; it is how constitutional politics operates. For the Founders, Framers, and adopters to maintain their cultural authority, they must be curated by the present, and continually made relevant to contemporary needs and perspectives. We must hear them speak to us in ways that contemporary lawyers and judges can understand and use. We will not treat them as honored authorities unless we can identify their will and their norms with our own. It follows then that if the Founders are to retain their hold over our imaginations, we must constantly reinterpret what they mean to us. For if the Founders, or some group of them, no longer are able to speak to us, we will find other culture heroes—Abraham Lincoln, Susan B. Anthony, Oliver Wendell Holmes, Jr., Martin Luther King, Jr., or Rosa Parks—whose ethical authority better speaks to our political imagination.

The use of history in constitutional argument is one aspect of larger struggles over cultural memory and the American political tradition. Living constitutionalists on both the left and the right are well advised to pay careful attention to these questions. Indeed, living constitutionalists place themselves at a disadvantage if they fail to invoke features of our shared history and traditions in attempting to persuade audiences. Those who will not deign to speak in the name of tradition and cultural memory will have tradition and cultural memory deployed against them.