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ACCEPTING CONTESTED MEANINGS

*Bernadette Meyler**

INTRODUCTION

One claim that has both fueled originalism and spawned multiple objections to its very possibility is the contention that, if original meaning is to retain any significance at all in the present, it must be determinate. Without determinacy, some argue, originalism cannot solve the problem that it was aimed at addressing: the so-called “countermajoritarian difficulty,” or the notion that judicial review functions as an undemocratic element within the U.S. political system because it permits unelected judges to controvert the will of legislative majorities. And yet, as many have pointed out, ascertaining determinate meanings often proves to be an elusive goal within the constitutional context. This problem is rendered even more pronounced when one takes into account what I have tried to identify elsewhere as the contested meanings of common law clauses within the Constitution.¹ These phrases often sound like terms of art, which a reader or ratifier might assume possessed a specialized meaning within the legal community. The practices of legal communities differed among the colonies and states and even within them. Legal actors themselves recognized local and English variants of these practices. Rather than simply accepting what appears to have been the majority interpretation of such common law terms, throwing one’s hands up in despair, or moving immediately to constitutional construction in light of the interpretive situation, I contend here that we should uncover these disparate meanings and perform our contemporary interpretations of constitutional clauses in ways that resonate with them.

Over the past few decades, originalist theories of constitutional interpretation have arguably presented the most compelling solution to what Alexander Bickel identified in 1962 as the “counter-majoritarian difficulty.”² As Bickel eloquently stated the relevant problem:

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1. See generally Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006) (elaborating historically and theoretically upon the variety of common law glosses available for a number of constitutional provisions).

2. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic.³

Originalists have attempted to solve the difficulty by insisting that judges are not simply imposing their own elite views of what the Constitution should mean or what rights should look like upon a reluctant populace who would prefer a different politics, but instead are enforcing an agreement that commands the support of “the people” or, at least, of a supermajority, and that, therefore, should outweigh majoritarian expediencies in the present.

Phrased in these general terms, originalism has commanded the allegiance of both liberals like Bruce Ackerman and conservatives like Justice Antonin Scalia. One of the principal differences between the camps as represented by Ackerman and Justice Scalia consists in the account of when change has occurred at the level of the Constitution; whereas Justice Scalia would always—at least in principle—look back to the moment of the Founding or the time of ratification of a constitutional amendment, Ackerman insists that periods like the New Deal allow for extratextual constitutional amendment by a plebiscitary president and his influence on the judiciary.⁴ In creating a typology of liberal responses to the counter-majoritarian difficulty, Nimer Sultany recently divided the possibilities into two general camps—those characterized by a “Discourse of Unity” and those typified by a “Discourse of Disunity.”⁵ Included within the “Discourse of Unity” are both “denial” (of a “tension between constitutionalism and democracy”) and “reconciliation” (of the tension, resulting in a justification of judicial review).⁶ Originalists of the various stripes all fall within the discourse of unity, whether, as Sultany attributes to Ackerman,⁷ denying the tension, or, extending Sultany’s argument, attempting to achieve reconciliation, like Justice Scalia.

For many originalists, asserting the determinacy of constitutional meaning has been crucial to denying or reconciling the potential tension between constitutionalism and democracy. According to this understanding, unelected judges are authorized to cabin or annul the will of political representatives as expressed in legislative or executive branch action only by recourse to a text that, when interpreted correctly—or, in other words, when employing the proper procedures—states a determinate constraint articulated by the Founding or amending generation. To the

3. *Id.* at 19.

4. Contrast, for example, the theoretical account of originalism provided by Justice Scalia in *Common Law Courts in a Civil Law System*, in *A MATTER OF INTERPRETATION* 3 (Amy Gutmann ed., 1997), with Bruce Ackerman’s vision of constitutional change as expressed in *BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS* 3–33 (1991).

5. Nimer Sultany, *The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification*, 47 *HARV. C.R.-C.L. L. REV.* 371, 377 (2012).

6. *Id.* at 377.

7. *Id.* at 377, 399–402.

extent that ambiguity or uncertainty remains upon application of the right interpretive principles, these originalists argue that courts should not intervene and should instead let political determinations lie. By contrast, a number of those falling within the “New Originalist” camp instead acknowledge that the meaning of much constitutional text cannot be definitively resolved from an originalist perspective.⁸

The recommendation of these scholars is not, however, to dwell on the various meanings recoverable in light of originalist interpretation but instead to resort to some form of what Keith Whittington has called “construction”—whether by judges or by actors in the political branches—in developing an account of how the Constitution should apply in the present.⁹ These writers hence advocate turning to current politics once confronted with the possibility of constitutional indeterminacy. As this Symposium Article contends, the move from the indeterminacy of original meaning straight to contemporary construction is satisfactory neither as an account of interpretation nor as a matter of democracy.

Many originalists have, so far, taken one of the premises of the countermajoritarian difficulty for granted—the notion that the majoritarian electoral process should constitute the dominant means of securing democracy within our system, as within any democratic system. To the extent that figures like Ackerman or, more recently, Michael Rappaport and

8. Several accounts have been given of what constitutes “the New Originalism” or, more broadly, “New Originalisms.” James Fleming has recently observed that Keith Whittington, Lawrence Solum, and even Justice Scalia, Ronald Dworkin, and Jack Balkin have characterized themselves or been characterized as New Originalists. Under such a broad definition, he argues, “new originalism . . . is a family of theories, not one unified view.” James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785, 1788–94 (2013) (quotation marks omitted).

Despite the diversity of scholars and approaches, some have attempted to furnish a concrete set of criteria for recognizing New Originalism. Hence, Lawrence Solum suggests that New Originalists adhere to four theses, the second and fourth of which do not apply to other kinds of originalists:

- *The fixation thesis*: The linguistic meaning of the constitutional text was fixed at the time each provision was framed and ratified.
- *The public meaning thesis*: Constitutional meaning is fixed by the understanding of the words and phrases and the grammar and syntax that characterized the linguistic practices of the public and not by the intentions of the framers.
- *The textual constraint thesis*: The original meaning of the text of the Constitution has legal force: the text is law and not a mere symbol.
- *The interpretation-construction distinction*: Constitutional practice includes two distinct activities: (1) constitutional interpretation, which discerns the linguistic meaning of the text, and (2) constitutional construction, which determines the legal effect of the text.

Lawrence B. Solum, *We Are All Originalists Now*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 4 (2011). Similarly distinguishing new from old originalism, Keith Whittington has claimed that “the new originalism . . . is more concerned with providing the basis for positive constitutional doctrine than the basis for subverting doctrine,” that it “is less likely to emphasize a primary commitment to judicial restraint,” and that it “is focused less on the concrete intentions of individual drafters of constitutional text than on the public meaning of the text that was adopted.” Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 608–09 (2004).

9. See *infra* notes 20–21, 34–39 and accompanying text.

John McGinnis have suggested that the role of the Constitution in our system demonstrates the purchase of a different democratic vision, they have relied on the notion that constitutional settlements entail the concurrence of a broader constituency than ordinary legislation, and, hence, should be deferred to in cases of conflict.¹⁰ This kind of “dualist democracy,” as Ackerman has called it, juxtaposes the time of regular politics with the exceptional moments when constitutions or constitutional changes are produced.¹¹

The focus in extant originalist accounts on majoritarianism and more unified conceptions of “the people” or supermajorities is, this Article argues, misguided. Not only does it underestimate the role of political dissensus within the governmental system that the Constitution itself establishes—as witnessed by the distribution of powers and capabilities among a broad range of constitutional actors—but it also forces originalists to ignore or work around the substantial disagreements among the members of the Founding generation. These disagreements pertained not simply to questions that the Constitution ultimately resolved, but rather to the very meaning of constitutional terms. Taking seriously the challenge to justifications of originalism posed by dissensus, one can reconstruct the value of originalism as a domain of contested meanings—contested not simply as a matter of present democracy, but also as a function of a democracy that has endured and possesses awareness of its own temporality, the possibility of which is precisely what critics of democracy from Athens onward have denied.

Some might argue that, even if it were democratically desirable to accept the contested meanings of constitutional terms, such contested meanings do not, as a matter of interpretation, constitute meanings at all. Hence, Stanley Fish’s recent work contends that original meaning originalism carries no meaning at all, because meaning derives only from intentional communications by authors.¹² Were the Constitution to be discovered millennia in the future and thought to have been created by a random set of typographical accidents, the possible interpreters would be correct to treat it as simply nonsense rather than as a potential carrier of meaning. Fish concludes from this that the Constitution can only mean what it was intended to mean—although he also specifies that this theoretical conclusion says nothing about how one should go about discerning that intent. Even accepting the priority Fish places on original intent, however, one can justify interpreting the Constitution as a document of contested signification. There is nothing about meaning that requires it to be unitary to exist.

10. See ACKERMAN, *supra* note 4, at 3–33. See generally John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693 (2010) (arguing that the supermajoritarian process of constitutional creation led to many of the virtues of the U.S. Constitution).

11. ACKERMAN, *supra* note 4, at 3–33.

12. See *infra* notes 79–83 and accompanying text.

In Part I, this Article articulates the role of determinacy in originalism as it has been practiced. Part II turns to the democratic justifications for focusing on the disparate meanings furnished by the common law backdrop of the Constitution. Part III then defends the interpretive proposition that constitutional clauses can maintain multiple meanings.

I. DETERMINACY IN ORIGINALISM

The significance of an originalist insistence on determinacy can be gleaned from the contrast between Justice Kennedy's opinion, writing for the Court, in the 2008 habeas corpus case of *Boumediene v. Bush*¹³ and Justice Scalia's dissent in that same case. The decision arose from challenges to the Military Commissions Act's attempt to remove the pending habeas corpus cases of aliens detained as enemy combatants from the jurisdiction of the federal courts.¹⁴ The Court determined that the petitioners, Guantánamo Bay detainees, could assert a right under the Suspension Clause of the Constitution against this provision of the Military Commissions Act,¹⁵ despite the fact that the Founding-era history of habeas corpus could not definitively answer the question of whether the writ would have extended to Guantánamo Bay under the common law.¹⁶ Part of the resolution of the case thus depended on the justices' decision about how to treat conflicting and sometimes absent common law evidence. According to Justice Kennedy,

[The] arguments [of both the petitioners and the Government] are premised . . . upon the assumption that the historical record is complete and that the common law, if properly understood, yields a definite answer to the questions before us. There are reasons to doubt both assumptions. Recent scholarship points to the inherent shortcomings in the historical record. And given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one. We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on point.¹⁷

Although Justice Kennedy here points to the lack of historical documentation and the fact that exact parallels to contemporary circumstances might not have been present in the Founding era, his comments could equally apply to situations in which the common law evidence of various relevant jurisdictions cut in different directions. In that case as well, Justice Kennedy might have insisted that the lack of determinacy in the historical evidence should not itself be outcome determinative.

Because he concludes that the common law record is insufficient to establish a determinate eighteenth-century understanding of the reach of

13. 553 U.S. 723 (2008).

14. *Id.* at 732–33, 735–37.

15. *Id.* at 771.

16. *Id.* at 752.

17. *Id.* (citation omitted).

habeas corpus to territories analogous to Guantánamo Bay, Justice Kennedy's lengthy review of the historical scope of habeas corpus carries few implications for the ultimate test he establishes in *Boumediene*. Instead, he invokes the U.S. Supreme Court's own prior precedents—including, most prominently, *Johnson v. Eisentrager*,¹⁸ a case involving German war criminals held in a prison that the United States administered in Germany—to generate a set of factors that should be weighed in deciding whether the writ of habeas corpus runs to any particular location.¹⁹

This method appears consistent with a New Originalist norm of constitutional construction. As Keith Whittington explains it, construction takes up where interpretation leaves off: “Constructions do not pursue a preexisting if deeply hidden meaning in the founding document; rather, they elucidate the text in the interstices of discoverable, interpretive meaning, where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules.”²⁰ In the face of the indeterminacy of the results of interpretation, construction fills in the gaps.²¹ Similarly, under Justice Kennedy's view in *Boumediene*, the indefiniteness of the answer that the common law yields to the question of the scope of the writ of habeas corpus requires turning to other sources and other modes of reasoning to generate factors for constitutional analysis.

By contrast, Justice Scalia insists in *Boumediene* upon an unreconstructed version of originalism, one opposed to any claims for the role of constitutional construction—at least as practiced by the judiciary. Responding to the majority's arguments about the weight of history, Justice Scalia maintains:

In light of [the] principles of deference [to Congress's view that a law it has passed is constitutional], the Court's conclusion that ‘the common law [does not] yield a definite answer to the questions before us,’ leaves it no choice but to affirm the Court of Appeals. The writ as preserved in the Constitution could not possibly extend farther than the common law provided when that Clause was written. The Court admits that it cannot determine whether the writ historically extended to aliens held abroad, and it concedes (necessarily) that Guantanamo Bay lies outside the sovereign territory of the United States. Together, these two concessions establish that it is (in the Court's view) perfectly ambiguous whether the common-law writ would have provided a remedy for these petitioners. If that is so, the Court has no basis to strike down the Military Commissions Act, and must leave undisturbed the considered judgment of the co-equal branches.²²

18. 339 U.S. 763 (1950).

19. *Boumediene*, 553 U.S. at 766.

20. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 5 (1999).

21. Notably, under Whittington's account, it is largely the political branches, not the courts, that engage in construction. See *infra* notes 35–37 and accompanying text. Other theories like Jack Balkin's that rely on the interpretation-construction distinction, however, allow for a larger judicial role in the process of construction.

22. *Boumediene*, 553 U.S. at 832–33 (Scalia, J., dissenting) (citations omitted).

Although Justice Scalia refers to the Court's customary principles of deference to Congress, it is a short step from here to the notion he has frequently reiterated that the Court must defer to the elected branches when the Constitution does not dictate a contrary result. Hence, in any cases of constitutional ambiguity, Congress's judgment should supplant the Court's. If, for Justice Kennedy, the fact that the common law of the Founding era did not dictate constitutional meaning meant that constitutional construction could take over, for Justice Scalia, it suggested that the Constitution's role in the matter—at least as judicially implemented—was at an end. Although the political branches might legitimately engage in constitutional construction, such an act is precisely that which judges must conscientiously avoid when interpreting the Constitution.

This conclusion flows inevitably from the significance of the role of originalism as a constraint on judges in Justice Scalia's interpretive theory. As Jack Balkin has summarized this position, dubbing it “skyscraper originalism,” “skyscraper originalism views following correct interpretive methodology as the central constraint on judges,” neglecting the possible role of other institutional constraints.²³ The vision of originalism as restraining otherwise rampant judicial overreaching is rooted in the countermajoritarian difficulty. As Barry Friedman's apt title of one part of his history of the countermajoritarian difficulty—*The Birth of an Academic Obsession*²⁴—suggests, the quandary has preoccupied constitutional theorists at least for the fifty years since Alexander Bickel's formulation of the problem in 1962 in *The Least Dangerous Branch* (which had its fiftieth anniversary just last year).²⁵ Of course, many brilliant efforts have attempted to resolve the difficulty. Two approaches are of particular interest here.

First, in *We the People*, Bruce Ackerman indicates a particular value of the Constitution *for democracy* rather than simply for the liberal articulation of rights.²⁶ According to his dualist theory of democracy, higher law is created during particular periods or constitutional moments—including the Founding era, Reconstruction, and the New Deal—and must be preserved from the incursions of temporary legislative majorities during the intervening eras. This higher law is not imposed by fiat from above, but is posited by the people themselves. It is the role of the courts to maintain the principles of higher law during the eras intervening between constitutional moments. Hence the judiciary protects the will of “the people” against the views of transient majorities.²⁷

23. JACK M. BALKIN, *LIVING ORIGINALISM* 22 (2011).

24. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153 (2002).

25. BICKEL, *supra* note 2.

26. *See generally* ACKERMAN, *supra* note 4.

27. Michael Rappaport and John McGinnis's arguments in favor of construing the Constitution as enshrining a preference for supermajorities can be read as another variant on the dualist democracy theme. Although they have written extensively about this idea, they encapsulate it most succinctly in *Our Supermajoritarian Constitution*:

Second, for Justice Stephen Breyer, the courts not only help to serve democracy by deferring to the political branches but can also democratize themselves. As he writes in the introduction to *Active Liberty: Interpreting Our Democratic Constitution*,

[M]y thesis . . . finds in the Constitution's democratic objective not simply restraint on judicial power or an ancient counterpart of more modern protection, but also a source of judicial authority and an interpretive aid to more effective protection of ancient and modern liberty alike. . . . [I]ncreased emphasis upon that [democratic] objective by judges when they interpret a legal text will yield better law.²⁸

Under this view, judges implement democracy not simply by enforcing constitutional meaning, but by attempting to actualize the democratic decisionmaking of the contemporary moment.

These two approaches represent two poles of justification for judicial review in the face of the countermajoritarian difficulty. One argument insists upon the democratic credentials of the Constitution itself, and, in a derivative sense, of the judiciary reviewing political branch actions for constitutionality. The other makes an implicit or explicit claim that the legitimacy of the Constitution rests in the hands of present citizens who accept it, and maintains, therefore, that judges should espouse a living constitutionalism that gives shape to a more contemporary democratic vision.

There are significant problems, I would contend, with both of these approaches. With respect to the former, the Ackermanian vision of “we the people” resonates with the heritage of Jean-Jacques Rousseau, and his invocation of the “general will.”²⁹ If we interpret Ackerman's account of the Constitution as a version in miniature of Rousseau's argument about

This Article proposes a new theory of the Constitution. We argue that the central principle underlying the Constitution is governance through supermajority rules. More specifically, the Constitution embraces supermajority rules as a means of improving legislative decisionmaking in various circumstances where majority rule would operate poorly. Supermajoritarianism is thus a means of promoting the more general constitutional principle of republicanism, which attempts to promote the public good within a system of popular representation. The super-majoritarian principle is central both to an accurate description of the Constitution and to the proper understanding of the normative reasons why the Constitution binds us.

John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 705 (2002). This article points to supermajoritarian aspects of the creation and ratification of the Constitution (including the fact that twelve of the thirteen states supported convening a constitutional convention and that nine of the thirteen were obliged to approve the Constitution before it went into effect), the inclusion of supermajority requirements in various constitutional clauses, and the stringent constraints on constitutional amendment. *Id.* at 705, 709, 710–17, 780–90.

28. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 6 (2005).

29. Rousseau's classic formulation of the “general will” in *The Social Contract* explicitly subordinates majoritarianism to consensus. As Rousseau writes, “The law of majority rule is itself something established by convention, and presupposes unanimity at least once.” JEAN-JACQUES ROUSSEAU, *Of the Social Contract, in THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* 39, 49 (Victor Gourevitch ed. & trans., 1997) (1762). For Ackerman's indebtedness to Rousseau, see Sultany, *supra* note 5, at 399–401.

entrance into the social compact, we can see the American individual as, like the Rousseauvian citizen (in Daniel Bensaïd's gloss), "put[ting] his person 'under the supreme direction of the general will,'" and "becom[ing] 'an indivisible part of the whole.'"³⁰ "The cost," as Daniel Bensaïd has claimed, of this model "is an exacerbated holism."³¹ By imagining that we are part of "*the* people," we are forced to live out a fiction that may be useful when it comes to the justifications for entering into society but less helpful when it pertains to following the Constitution.

With respect to the latter, it may furnish a perfectly fine model for judging, but it does not account for the role of *the Constitution* within our political scheme, apart from its capacity to indicate certain values of liberty that we could also glean from almost any other modern legal document. Even one of the most thoroughgoing proponents of living constitutionalism, David Strauss, does not defend this position fully. Instead, when advocating for applying a common law interpretive model in the area of constitutional interpretation, he refutes the contention that the *common law method* is undemocratic by instead claiming that it is the Constitution itself that is undemocratic because it will and should sometimes thwart majorities.³² Here the problem rests not in the conception of the people as a fictional unity but instead in the vision of democracy as exclusively connoting the rule of majorities within the present.

If the forms of originalism advocated by figures as disparate as Justice Scalia and Ackerman rely on the notion that the special democratic origins of the Constitution legitimize the constraints that it imposes on the statutorily expressed will of legislative majorities, the corollary for at least some originalists is that this legitimacy ends once the meaning of particular constitutional clauses becomes demonstrably less than certain. Justice Scalia himself has perhaps most clearly propounded this position in cases like *Boumediene* and others. In light of the ambiguity of common law meanings, Justice Scalia generally advocates adopting what he deems the dominant view in the states at the time of the Founding, if such a dominant view can be discerned. For example, in the Confrontation Clause case of *Crawford v. Washington*, he distinguished most of the Founding-era evidence Chief Justice William Rehnquist had furnished contrary to Justice Scalia's own position on the original meaning of the provision and claimed, "The only timely authority the Chief Justice cites . . . provides no substantial support."³³ If no determinate meaning seems forthcoming, as in *Boumediene*, Justice Scalia indicates that decisionmaking should be left to the political branches.

New Originalists instead place more weight both on the possibility that the Constitution might not be as determinate as Justice Scalia often contends, and on the mechanisms for implementing the Constitution in light

30. Daniel Bensaïd, *Permanent Scandal*, in *DEMOCRACY IN WHAT STATE?* 16, 28 (Amy Allen ed., William McCuaig trans., 2011).

31. *Id.* at 29.

32. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 47 (2010).

33. *Crawford v. Washington*, 541 U.S. 36, 54 n.5 (2004) (citations omitted).

of this lack of fixity. As Keith Whittington explains towards the end of *Constitutional Interpretation*,

If originalism is theoretically possible, and in fact required to ground the practice of judicial review, it remains practically difficult. As critics have pointed out, the record of the founders' intent is less extensive and clear than might be desired. Although the broad outlines of the constitutional meaning may be reasonably clear, interpretation of the text often falls short of providing clear guidance in making the fine distinctions required to settle contemporary disputes. . . . In such cases, the founders could reasonably be said to have no intent relevant to a given question, and thus constitutional law has no determinate answer to provide.³⁴

In responding to this situation, Whittington insists both that it means interpretation is at an end, and that the Constitution still remains relevant through the "political constitution," which "requires a process of construction to add to the text to realize its suggested meaning."³⁵

According to Whittington's vision, "It is a necessary and essential political task, regardless of the particular institution exercising that function, to construct a determinate constitutional meaning to guide government practice."³⁶ Significantly, the moments he addresses in *Constitutional Construction* relied on the political branches to effectuate constitutional change rather than on the judiciary. As he writes of the episodes he discusses, "these constructions did not depend on judicial review for their enforcement. They altered constitutional practices but barely affected judicial doctrine."³⁷ Recently, Jack Balkin has brought construction squarely back into judicial decisionmaking in *Living Originalism*. As Balkin claims, "[T]he processes of constitutional change are primarily the work of constitutional construction, involving both the political branches and the courts. . . . It is a 'democratic constitutionalism,' to use Post and Siegel's expression, because constitutional doctrine is responsive, over time, to a wide variety of political and cultural forces."³⁸ In particular, under a living originalist account, judicial interpretations of the Constitution respond to the pressure of social movements; hence, "[t]he system of living constitutionalism . . . maintains the benefits of

34. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 211 (1999).

35. *Id.* Whittington emphasizes elsewhere that the New Originalism is focused less on judicial restraint than on articulating a positive vision of the constitutional rights that judges should promote, and that it has concomitantly deemphasized the counter-majoritarian problem facing judicial review. *See* Whittington, *supra* note 8. Nevertheless, he generally advocates construction by the political branches, just as a number of more traditional originalists "have converged on the prescription that constitutional ambiguities mandate judicial deference to 'current democratic majorities' and, therefore, judicial abstinence." Lynn A. Baker, *Constitutional Ambiguities and Originalism: Lessons from the Spending Power*, 103 NW. U. L. REV. 495, 499 (2009).

36. WHITTINGTON, *supra* note 20, at 6.

37. *Id.* at 218.

38. BALKIN, *supra* note 23, at 320.

constitutionalism while allowing adjustments in interpretation over time in the face of sustained democratic mobilization.”³⁹

When originalists like Justice Scalia insisted on their method of interpretation as a solution to the countermajoritarian difficulty, they were obliged to posit the determinacy of large swaths of constitutional text in order to undertake judicial review in a manner they deemed democratically justifiable. New Originalists have instead acknowledged a greater role for the ambiguity and multiplicity of constitutional meanings and, as a result, distinguish between interpretation and construction. By turning to construction rather than interpretation, however, they have, in the process, discounted the significance of the contested meanings of the Constitution within the Founding era and neglected the import—both interpretively and democratically—of those contested meanings for understanding the Constitution in the present.

As the following Part aims to show, an insistence on meaning as unified, and on the impossibility of interpreting once the postulate of unity has been undermined, resonates with a theory of politics emanating more from Thomas Hobbes’s notion of sovereignty than from other accounts of democracy or law.⁴⁰ Adopting this vision of meaning impoverishes our understanding of the kind of democracy upon which our constitutional tradition rests and that which our Constitution itself makes possible.

II. DEMOCRACY AND CONTESTED MEANINGS

Well before the Founding era, Thomas Hobbes, whose late seventeenth-century philosophical controversies with John Locke are often seen as the commencement of the liberal tradition, addressed the quandary posed by the effort to reconcile political stability with the possibility of divergent interpretations. As Philip Pettit has argued in *Made with Words: Hobbes on Language, Mind, and Politics*,⁴¹ for Hobbes, the human capacity to employ language both creates and solves man’s fundamental problem.⁴² According to Pettit’s summary:

Although human beings are born in animal quietude, the invention of words leads them into inevitable strife, putting them at motivational loggerheads and making it impossible for them to agree on any common, normative currency for the regulation of their affairs. But the invention of

39. *Id.* at 327–28.

40. The status of democracy in Hobbes’s own work has been hotly contested; although many have associated him with a defense of monarchy that is incompatible with democracy, scholars like Richard Tuck have recently made strong cases that Hobbes’s theories hold important implications for our democracy. Hence, Tuck argues that Hobbes sets forth an influential account of “despotic democracy.” See Richard Tuck, *Hobbes and Democracy*, in *RETHINKING THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 171, 171–90 (Annabel Brett, James Tully & Holly Hamilton-Bleakley eds., 2006). Whether or not Hobbes is viewed as a democratic theorist is less significant for the purposes of this Article than is the despotic quality of the political arrangement he describes.

41. PHILIP PETTIT, *MADE WITH WORDS: HOBBS ON LANGUAGE, MIND, AND POLITICS* (2009).

42. *Id.* at 115.

words provides the solution for the very problem it creates, enabling human beings to enter into a contract for incorporation that creates a sovereign sufficiently powerful to embody the commonwealth: “that great Leviathan,” “that Mortal God to which we owe, under the Immortal God, our peace and defence.”⁴³

While words furnish a source of conflict within the second, verbal state of nature, they also allow for the creation of the political contract. The power and unity of the sovereign proves crucial for the stable deployment of language within the constituted polity, as well. Hobbes emphasizes the sovereign’s role in legislating and, in particular, in implementing legislation that has “a constitutive as well as regulative character,”⁴⁴ in other words, legislation that “will first introduce new terms or concepts, and so new possibilities of behavior, and then regulate for how these should materialize in social life.”⁴⁵ Because no objectively correct interpretation of certain terms exists,

the sovereign is to establish the conventional meanings of a range of terms: not just “what is to be called right, what good, what virtue,” but also “what much, what little . . . what a pound, what a quart,” what even in deformed or premature births is to be called “a man”; in all these matters, as in matters of ownership, “private judgments may differ, and beget controversy.”⁴⁶

Under this account, language enables entrance into the social contract, but the very establishment of that contract entails the placement of a sovereign in charge of deterring interpretive controversies and settling those that arise despite all efforts to ward them off. Notwithstanding his view that monarchy constitutes the best form of government, Hobbes purports here to be speaking in more general terms of all political forms.⁴⁷

Put this way, Hobbes’s account of the relation between language and sovereignty bears a substantial resemblance to originalist justifications of judicial review in the face of the countermajoritarian difficulty. If one substitutes “Constitution” for “legislation” in Pettit’s account of Hobbes, the sovereign’s duty becomes that of establishing a Constitution, then ensuring the fixity of the meaning of its terms. Under a conventional originalist account, that would entail having “the people” (as sovereign) ratify the Constitution, then appointing a Supreme Court as the people’s transtemporal sovereign representative in announcing authoritative interpretations of the Constitution. Sovereignty here is intimately bound up with the insistence on determinate meaning.

43. *Id.* (quoting THOMAS HOBBS, *LEVIATHAN* ch. 17, para. 13 (Edwin Curley ed., Hackett Pub. Co. 1994) (1651)).

44. *Id.* at 130.

45. *Id.*

46. *Id.* at 131 (quoting THOMAS HOBBS, *HUMAN NATURE AND DE CORPORE POLITICO: THE ELEMENTS OF LAW, NATURAL AND POLITIC* ch. 29, para. 8 (Oxford Univ. Press 1994) (1651)).

47. *Id.* at 110.

An alternative position might entail viewing such a forceful sovereign as unnecessary once the relevant legislation or Constitution were put in place, because the meaning of its terms should not be subject to such deep contestation. On this account, the “private judgments” that might cause controversy would simply constitute erroneous interpretations, errors that would be apparent to the vast majority of observers. Hobbes was, however, concerned not simply with individuals’ deviant “private judgments,” but also with more thoroughgoing divergences of meaning, particularly those insisted upon by his early seventeenth-century adversary, Sir Edward Coke. As Hobbes recognized in his *A Dialogue Between a Philosopher and a Student of the Common Laws of England*, Coke’s writings posed a substantial challenge to the political unification of meaning by positing a specialized understanding of those trained in the “artificial reason” of the common law.⁴⁸ Different degrees of expertise might undergird varying versions of particular terms.

Rendered in originalist terms, this issue appears as that of the “division of linguistic labor,” which Lawrence Solum has artfully unpacked.⁴⁹ Those opposing a Hobbesian solution might argue, in accordance with this division of linguistic meaning, that specialized terms should simply carry their specialized meaning. This appears to be the answer to which Whittington appeals, asserting that “legal writing, of which the Constitution is an example for the judiciary, is more contextualized than the literary writing around which indeterminacy theories developed.”⁵⁰ Here the existence of specialized meanings not only poses no impediment to constitutional interpretation, but further limits the possibilities for ambiguity within constitutional provisions.

As I have attempted to demonstrate elsewhere, however, recourse to specialized meanings and, in particular, common law meanings of constitutional terms, does not, in many instances, settle the Founding-era import of various constitutional clauses.⁵¹ Those in different states had disparate understandings of what it might mean for an accused to be confronted with the witnesses against him, as the Sixth Amendment

48. See THOMAS HOBBS, *A DIALOGUE BETWEEN A PHILOSOPHER AND STUDENT OF THE COMMON LAWS OF ENGLAND* 54–57 (Joseph Cropsey ed., Univ. of Chi. 1971) (1681).

49. See, e.g., Solum, *supra* note 8, at 34–35 (“[T]here are some words and phrases in the Constitution that seem to have technical meanings. For example, it might be the case that the phrase *letters of marque and reprisal* would have been familiar to seamen, officials, and admiralty lawyers but almost unknown to the general public. If this is the case, it might seem that this provision lacks public meaning. To solve this problem, we can borrow an idea from the philosophy of language, which recognizes that the meaning of some words and phrases is conveyed via the *division of linguistic labor*. Thus a Massachusetts farmer who encountered the phrase *letters of marque and reprisal* might say ‘That sounds like a term of art. I’d better consult a lawyer or judge if I want to know what it means.’”). For a more technical discussion of the division of linguistic labor, see also Lawrence B. Solum, *Semantic Originalism* 56–58 (Univ. of Ill. Coll. of Law Ill. Pub. Law & Legal Theory Research Papers Series, Paper No. 07-24, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

50. WHITTINGTON, *supra* note 34, at 90.

51. See generally Meyler, *supra* note 1.

requires, or what “equity” connoted within the text of the Seventh Amendment. If one accepts that these disparate individuals ratified a text interpreted according to their own assumptions about its connotations, one would imagine a Constitution that meant different things to different people, even at the time of the Founding. This originary contestation about meaning is consistent not with a unified “We the People,” or even a majoritarian account, but instead with a fundamentally contestatory notion of the democratic foundations of the Constitution. The divisions within democracy rather than consensus or majority rule are foregrounded by bringing forward and emphasizing contested original meanings.

The resistance to accepting these aspects of original meaning derives in part from the dominant models of democracy that inform the countermajoritarian difficulty and the originalist responses—those of majoritarianism or of a Rousseauvian vision of “the people”—formulated in response to the majoritarian emphasis. Taking the long view of democracy, the focus on majorities seems less inevitable. Certainly, as a number of critics have recently reminded us, decision by lot seemed more central to the ancient conception of democracy than an idea of election.⁵² While we might resist the notion—except in the context of juries—that aleatory processes should represent a central component of our democratic vision, the principle of selection by lot should remind us that the notion of majority rule does not have to be integral to a conception of democracy. Displacing focus away from majoritarianism allows instead for the emergence of the significance of contestation within democracy.

Along these lines, Chantal Mouffe has proposed an “agonistic” (adversary oriented)—as opposed to “antagonistic” (enemy oriented)—account of modern democracy. This account would not attempt to reconcile what she deems the paradoxical relation of democracy and liberalism, as Rawlsian theory or Habermasian deliberative democracy do, but instead to acknowledge it. As Mouffe contends:

One of the keys to the thesis of agonistic pluralism is that, far from jeopardizing democracy, agonistic confrontation is in fact its very condition of existence. Modern democracy’s specificity lies in the recognition and legitimation of conflict and the refusal to suppress it by imposing an authoritarian order. Breaking with the symbolic representation of society as an organic body—which was characteristic of

52. See, e.g., JACQUES RANCIÈRE, HATRED OF DEMOCRACY 40 (2006) (explaining that the “scandal” of Athenian democracy lies in “the choice of the god of chance, the drawing of lots, i.e., the democratic procedure by which a people of equals decides the distribution of places”); Oliver Dowlen, *The Modern Revival of an Old Idea*, in SORTITION: THEORY AND PRACTICE 3, 3–4 (Gil Delannoi & Oliver Dowlen eds., 2010) (“[S]ortition [or] the use of random selection . . . in the public or political arena to choose people or allocate goods . . . may be new to today’s politics but was systematically used in Ancient Athens and in late medieval Italy—two formative periods in the development of what we know as politics or the political process—and in many other places besides.”).

the holist mode of social organization—a democratic society acknowledges the pluralism of values.⁵³

The key to moving from antagonism to agonism consists in the identification of “adversaries,” “the opponent with whom one shares a common allegiance to the democratic principles of ‘liberty and equality for all,’ while disagreeing about their interpretation.”⁵⁴ Crucial to the construction of an adversary relationship is each participant’s act of refraining from “put[ting] into question the legitimacy of their opponent’s right to fight for the victory of their position.”⁵⁵

Within an agonistic system, reconciliation remains impossible, yet the presence of irreducible pluralism must not frustrate action. Hence the moment of decision becomes crucial for Mouffe—a decision that does not represent a final and unquestionable verdict but a provisional step. Mouffe writes that

to institute an order, frontiers need to be drawn and the moment of closure must be faced. But this frontier is the result of a political decision; it is constituted on the basis of a particular we/they, and for that very reason it should be recognized as something contingent and open to contestation.⁵⁶

The practice of agonism means, for Mouffe, that “the specificity of modern pluralist democracy—even a well-ordered one—does not reside in the absence of domination and of violence but in the establishment of a set of institutions through which they can be limited and contested.”⁵⁷ Under her account, however, these institutions do not seem to include a constitution. Furthermore, Mouffe objects to the privileging of the juridical sphere, deeming this phenomenon a symptom of “the growing impossibility of envisaging the problems of society in a properly political way.”⁵⁸ Hence, the requisite decision must take place outside the judicial arena.

Despite this dismissal of the judicial in favor of the political, Mouffe furnishes no reasons why agonistic democracy could not be practiced in the area of constitutionalism itself. Indeed, a work she relies on extensively in elaborating her conception of democracy—James Tully’s *Strange Multiplicity*—itself considers constitutional systems rather than politics per

53. CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 103 (2000) [hereinafter MOUFFE, PARADOX]; see also CHANTAL MOUFFE, AGONISTICS: THINKING THE WORLD POLITICALLY 1-18 (2013) [hereinafter MOUFFE, AGONISTICS].

54. MOUFFE, AGONISTICS, *supra* note 53, at 7.

55. *Id.*

56. *Id.* at 17.

57. MOUFFE, PARADOX, *supra* note 53, at 22. Mouffe writes similarly in *Agonistics: Thinking the World Politically*:

A pluralist perspective informed by the agonistic approach . . . recognizes that divergences can be at the origin of conflicts, but it asserts that those conflicts should not necessarily lead to a “clash of civilizations.” It suggests that the best way to avoid such a situation is the establishment of a multipolar institutional framework that would create the conditions for those conflicts to manifest themselves as agonistic confrontations between adversaries, instead of taking the form of antagonistic struggles between enemies.

MOUFFE, AGONISTICS, *supra* note 53, at 41.

58. MOUFFE, PARADOX, *supra* note 53, at 115.

se.⁵⁹ Tully invokes the writings of Ludwig Wittgenstein to suggest that the contestation at the heart of constitutionalism derives from a constitutive feature of language and fatally undermines modern constitutional theory's quest for uniformity. According to Tully, "[T]he language of constitutionalism . . . is a labyrinth of terms and their uses from various periods," with an "irreducible multiplicity of concrete usage."⁶⁰ The analysis of language that Tully finds in Wittgenstein he connects with that of the common law. As he writes,

Since the practical form of reasoning Wittgenstein describes is akin to the reasoning in individual cases at the common law, . . . it is not surprising that similar arguments were presented by one of the greatest common lawyers, Chief Justice Matthew Hale, against one of the founding theorists of modern constitutionalism, Thomas Hobbes.⁶¹

Here we return full circle to the debate between Hobbes and the common lawyers over the nature of language and its significance for the polity.

While Tully highlights the significance of linguistic contestation in the constitutional context, he concentrates largely on the capacity of different identity groups to achieve recognition rather than on the act of interpreting constitutional language. Reading constitutional provisions as fundamentally contested could, however, allow for the judicial opening of a more general public conversation about the Constitution, one that would encourage an agonistic model of democracy to flourish. In particular, focusing on the original contestation over meaning in the constitutional context reveals the extent to which agonism does not simply represent a newer feature of our constitutional system, but has been entrenched within it from the beginning. Furthermore, uncovering the variant Founding-era significations of constitutional clauses takes seriously the notion that the Constitution actually says something; rather than simply envisioning the Constitution as a framework for ongoing agonistic discussion, it permits consideration of the Constitution as a repository of meanings. This could only be the case, however, if the diversity of Founding era meanings did not undermine the very possibility that the Constitution could mean anything at all, the claim addressed by the following Part.

59. *See id.* at 60–77 (endorsing Tully's reliance on the work of Ludwig Wittgenstein to understand the agonistic role of language within the polity); JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* 103–15 (1995) [hereinafter TULLY, *MULTIPLICITY*] (elaborating how a Wittgensteinian approach to language practices can assist in moving beyond what Tully criticizes as the "uniformity" of modern constitutionalism); *see also* 1 JAMES TULLY, *PUBLIC PHILOSOPHY IN A NEW KEY: DEMOCRACY AND CIVIL FREEDOM* 135–59 (2008) [hereinafter TULLY, *PUBLIC PHILOSOPHY*] (espousing his own version of agonism in a chapter on "[t]he agonistic freedom of citizens").

60. TULLY, *MULTIPLICITY*, *supra* note 59, at 104–05; *see also* 1 TULLY, *PUBLIC PHILOSOPHY*, *supra* note 59, at 39–70 (explaining how Wittgenstein's account of language demonstrates the flaws both in Jürgen Habermas's efforts to "establish a framework of argument that is itself beyond argumentation" and in Charles Taylor's reliance on interpretation as "the essential feature of personhood" and provides an alternative means for moving forward through critical reflection).

61. TULLY, *MULTIPLICITY*, *supra* note 59, at 113.

III. THE MEANING OF CONTESTED MEANINGS

A number of theorists who espouse intentionalist positions on constitutional interpretation contend that the demonstrated existence of disparate intentions underwriting a constitutional clause would fatally undermine the possibility of the relevant language meaning anything.⁶² Hence, Whittington claims, “To the extent that the founders could genuinely not achieve a common understanding as to the meaning of particular textual provisions, these provisions must necessarily remain meaningless.”⁶³ Similarly, Richard Kay writes,

While there are aspects of constitution-making that complicate the inquiry—such as the relatively large number of individuals and the need for the concurrence of more than one group—the basic idea is still valid. Without a core of identical meanings shared by all those agreeing, the concept of decision by majority is meaningless.⁶⁴

Whereas Whittington asserts as a matter of meaning itself that a lack of common understanding would vitiate signification, Kay bases his account of the deficit of enforceable meaning on the majoritarian principle underpinning the authority of the Constitution. Despite the connections between the two arguments, they can be disaggregated; while the former relies on a theoretical position concerning interpretation, the latter depends on a proposition about legitimacy. As contentions about democracy and legitimacy have already been addressed, this Part will take up Whittington’s arguments stemming from the philosophy of language. Although I believe there are reasons to endorse an original public meaning rather than an intentionalist version of originalism, this Part focuses on the intentionalist account since it has furnished the most full-throated denunciation of the possibility of multiple original meanings. Even under an intentionalist view, the existence of several different intended meanings of a particular constitutional provision should not render that portion of the Constitution meaningless. Regardless of which of the two principal originalist interpretive postures one adopts, or of whether one believes that the Constitution means what its authors intended or what its original readers would have understood, there is no reason rooted in interpretive theory why several meanings cannot coexist.

Many of the recent revivals of an intentionalist position in the literary and legal contexts can be traced back to E.D. Hirsch, Jr.’s *Validity in Interpretation*.⁶⁵ For Hirsch, resort to intention becomes necessary

62. This critique was first articulated by Paul Brest in his classic article, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). There, Brest identified many of the difficulties of attributing a unified intent to the adopters of the Constitution. *Id.* at 214–17. The problems that Brest diagnosed furnished some of the impetus for movement from an “original understanding” to an “original meaning” approach to originalist constitutional interpretation. See Solum, *supra* note 8, at 9.

63. WHITTINGTON, *supra* note 34, at 96.

64. Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 708 (2009).

65. E.D. HIRSCH, JR., *VALIDITY IN INTERPRETATION* (1967).

precisely because unmoored textual interpretation will lead to an indeterminacy of meaning. He states that “if the meaning of a text is not the author’s, then no interpretation can possibly correspond to *the* meaning of the text, since the text can have no determinate or determinable meaning.”⁶⁶ Elaborating upon this point, Hirsch claims that “no mere sequence of words can represent an actual verbal meaning with reference to public norms alone. Referred to these alone, the text’s meaning remains indeterminate.”⁶⁷ Only when “we . . . posit a speaker who very likely means something . . . does the most usual sense of the word sequence become the most probable or ‘obvious’ sense.”⁶⁸ At the same time, Hirsch is careful to specify what the indeterminacy to be avoided consists in and what it does not. While ambiguity may be and frequently is inherent in the meaning of a complicated literary object like a poem, indeterminacy “denies the self-identity of verbal meaning by suggesting that the meaning of the text can be one thing and also another, different thing, and also another.”⁶⁹

Hirsch presents as an example the relation between several different critics’ interpretations of Wordsworth’s poem, *A Slumber Did My Spirit Seal*.⁷⁰ While what he calls an “inclusivist” might try to reconcile these possible readings and the meanings they suggest, meanings rendered plausible by the ambiguity of the poem itself, failure to determine the poem’s “relative emphasis” of these meanings constitutes an interpretive flaw.⁷¹ On Hirsch’s account, the two readings are not reconcilable, but wrong, because each neglects the other; the effort to meld them is inadequate because “[t]he submeanings of a text are not blocks which can be brought together additively . . . [s]ince verbal . . . meaning is a *structure* of component meanings.”⁷² A poem’s ambiguity allows for analysis of its respective meanings and their order of priority, whereas those positing a poem’s indeterminacy separate out its meanings as if they bore no structural relation to each other.⁷³

Despite resuscitating much of Hirsch’s emphasis on the intentionality of meaning, Steven Knapp and Walter Benn Michaels’s essay, *The*

66. E.D. Hirsch, Jr., *In Defense of the Author*, in INTENTION AND INTERPRETATION 11, 14 (Gary Iseminger ed., 1995).

67. *Id.* at 17.

68. *Id.* at 17–18.

69. *Id.* at 15.

70. *Id.* at 19.

71. *Id.* at 20–21.

72. *Id.* at 21.

73. Gary Iseminger has attempted more recently to rescue Hirsch’s claims about indeterminacy from various critiques, contending that these claims must rest on an ontological rather than an epistemological basis. For Iseminger, contrary to Hirsch’s apparent position, an author’s will is not required to ensure the determinacy of a poem but instead that “[i]ndeterminacy *could* be resolved . . . by a random process.” Gary Iseminger, *An Intentional Demonstration?*, in INTENTION AND INTERPRETATION, *supra* note 66, at 76, 84. Insisting upon the *author* as guarantor of the determinacy of a poem entails an ontological claim that does not involve “*find[ing] out* which of . . . two contradictory statements about [a] poem is true” but rather “claims to tell us what *makes* the true one true.” *Id.* at 85.

Impossibility of Intentionless Meaning, criticizes Hirsch for “imagining a moment of interpretation before intention is present,” or “the moment at which the text’s meaning ‘remains indeterminate,’ before such indeterminacy is cleared up by the *addition* of authorial intention.”⁷⁴ Instead, endorsing the work of those philosophers of language who, like John Searle, insist that “there is no getting away from intentionality,”⁷⁵ they maintain that meaning only inheres in intentional utterances; “to deprive [textual marks] of an author is to convert them into accidental likenesses of language. They are not, after all, an example of intentionless meaning; as soon as they become intentionless they become meaningless as well.”⁷⁶ The search for meaning simply is, for them, the search for intention, and “[t]he issue of determinacy or indeterminacy is irrelevant.”⁷⁷

Nevertheless, the problem of indeterminacy returns for many of those following in Knapp and Michaels’s path, particularly when they confront the collective dimension of constitutional authorship.⁷⁸ In several places, Stanley Fish has addressed the issue briefly, distinguishing, like Hirsch, between ambiguity and indeterminacy and allowing for the former as a feature of authorial intention. As Fish writes:

In [certain] instances, ambiguity would be produced, not by the language but by the intentional context within which it was encountered. It is no paradox to say that those ambiguities (like the ambiguities of modern poetry) would be perfectly straightforward; they would capture what the text precisely means. As Steven Smith observes, “legislators may sometimes choose to be deliberately ambiguous or vague, but they will communicate their favored ambiguity as precisely as possible,” for “they

74. Steven Knapp & Walter Benn Michaels, *The Impossibility of Intentionless Meaning*, in INTENTION AND INTERPRETATION, *supra* note 66, at 53.

75. *Id.* at 54.

76. *Id.* at 55.

77. *Id.* at 53.

78. It is worth noting here that some of those who believe that meaning must be intentional depart from the view that the relevant meaning is that with which the author endows the text. Richard Shusterman argues that

even if we deny with Knapp and Michaels that “there can in fact be intentionless meanings” and accept their premise that texts seen as “intentionless . . . become meaningless as well” and thus that in some sense “what is intended and what is meant are identical,” it still does not follow that “the meaning of a text is simply identical to the author’s intended meaning.” All that follows is that the meaning of a text is inseparable from some intention (or group of intentions) or another. But the necessary meaning-securing intentions could belong to readers of the text rather than to its original author.

Richard Shusterman, *Interpretation, Intention, and Truth*, in INTENTION AND INTERPRETATION, *supra* note 66, at 67 (quoting Steven Knapp & Walter Benn Michaels, *Against Theory*, in AGAINST THEORY 12, 15–17 (W.J.T. Mitchell ed., 1985)). Similarly, even the return to the connection between determinacy and intention does not preclude a reception-based account of the determinacy-supplying intents. According to Jerrold Levinson: “The determinacy in question, I would maintain, can just as easily and reasonably come from an audience’s best contextually informed hypothesis of authorial intention in a given passage, all things considered.” Jerrold Levinson, *Intention and Interpretation: A Last Look*, in INTENTION AND INTERPRETATION, *supra* note 66, at 221, 236.

will want the courts and the public to have the blessing and burden of *their* preferred ambiguity, not somebody else's ambiguity."⁷⁹

Both Fish's and Smith's descriptions of ambiguity here assume the unity of intent, whether poetic or legislative. The situation would be different if it could be demonstrated that a particular group of legislators—or drafters of the Constitution—endorsed one meaning of a provision, whereas another group thought it carried quite a different signification, and neither constituency agreed on the ambiguity (at least explicitly) as a means of agreeing to disagree. This situation is a common one, as Jeremy Waldron notes in *The Core of the Case Against Judicial Review*: “[T]he bland rhetoric of the Bill of Rights was designed simply to finesse the real and reasonable disagreements that are inevitable among people who take rights seriously for long enough to see such a Bill enacted.”⁸⁰ Although Waldron's use of “design” could imply a general intent among the Constitution's authors to enshrine ambiguity, it could also entail a less intentional putting aside of disagreement simply to facilitate consensus on general language about which most could concur.

In another essay, Fish addresses this problem rather cursorily, simply claiming that any disparity in intentions among the authors of a collectively created document results in the existence of several texts rather than a single one. Hence, he inquires:

[S]uppose different legislators meant something different by the words of the legislation—the word was “canard” and some were voting for “ducks” and others for “false stories.” What then? Well, as J.L. Austin might say, that is an infernal shame, for then you would have two texts and two meanings and no way of reducing them to one, and you would have to figure out another way to proceed. This, however, would be an unusual instance; in most cases a multiauthored text presents no particular problem to interpreters.⁸¹

The concluding casual dismissal of the problems arising from the task of assessing the meaning of a multiauthored text quickly puts aside the significant puzzles propounded by game and public choice theorists and others who have—largely in the legislative rather than the constitutional context—questioned the viability of an intentional account of the meaning of collectively produced documents.⁸² Quite apart from this, however,

79. Stanley Fish, *The Intentionalist Thesis Once More*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 99, 113 (Grant Huscroft & Bradley W. Miller eds., 2011) (quoting Steven D. Smith, *That Old-Time Originalism*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION*, *supra*, at 223, 236).

80. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1369 (2006).

81. Stanley Fish, *There Is No Textualist Position*, 42 *SAN DIEGO L. REV.* 629, 648 (2005).

82. For the classic version of this argument, see Kenneth A. Shepsle, *Congress Is a 'They,' Not an 'It': Legislative Intent As Oxymoron*, 12 *INT'L REV. L. & ECON.* 239 (1992). For a critique of the claims of public choice theorists from a collective intent vantage point, see generally Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 *WIS. L. REV.* 205.

Fish's account entirely ignores the significance of the fact that the authors have—intentionally, one might say—chosen to express themselves in one text.

The consequences of this neglect emerge from his subsequent remarks on the single author who is not simply attempting to enhance ambiguity in her work, but is instead genuinely divided in intent about the work being created. As Fish observes:

There is another possibility; not two persons with different intentions, but one person with different intentions. . . . Could an author have contradictory intentions and employ the same words as the vehicle for both of them? Sure, but in that case we would speak of an author “of two minds” with each of the minds producing its own text with its own meaning.⁸³

Here we arrive back at something resembling Hirsch's example of the two critical takes on Wordsworth's poem. For Hirsch, simply adding these interpretations together could not produce a correct view because doing so would ignore the structure of the relation between meanings within the poem. Acknowledging poetic ambiguity then differs from finding indeterminacy because in the former case the object is admitted to be singular whereas in the latter it can be divided into various possible texts.

If we consider in more detail what it means to decompose the work of Fish's “author ‘of two minds’” into two texts, it becomes apparent that this process summarily puts to one side the author's (intentional) decision to present her work as unitary.

Imagine a modification of an example that Gary Iseminger uses in his essay, *An Intentional Demonstration*?⁸⁴ There Iseminger considers a letter in which Gerard Manley Hopkins, upon reading over his poem, expressed concern that it actually meant something quite different from what he had intended.⁸⁵ Suppose that Hopkins had embraced, rather than rejected, this alternative—and even contrary—meaning, and decided that the poem was only improved by promulgation with an additional possible sense. This scenario could be seen as a version of the situation in which the poet is of two minds, at first intending one meaning, then later endorsing another, as well. The relevant analogy in the legislative or constitutional context would presumably consist in the conscious embrace of textual ambiguity, such as Joseph Grundfest and A.C. Pritchard discuss in their aptly entitled *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*.⁸⁶ With respect to both the individual and

83. Fish, *supra* note 81, at 648–49.

84. See Iseminger, *supra* note 73.

85. In the letter to Robert Bridges, Hopkins notes,

One thing disquiets me: I meant “fair fall” to mean *fair* (*fortune be*)*fall*; it has since struck me that perhaps “fair” is an adjective proper and in the predicate and can only be used in cases like “fair fall the day,” that is, *may the day fall, turn out, fair*. My line will yield a sense that way indeed, but I never meant it so.

Id. at 78.

86. Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 628

collective authors, parsing out separate texts to preserve the unity of intentional meaning under these circumstances seems to unjustifiably neglect the choice to present the work as singular, not multiple.

The multiplicity of meanings may not itself be intended, however, when different constitution drafting or legislative constituencies find the signification of a particular phrase obvious, and yet each supplies a distinct “obvious” meaning. In this case too, however, the collective decision to create a speech act with a certain force cannot be disregarded. A great deal of ink has been spilled over the nature and reducibility of collective intention in the sphere of analytic philosophy, and entering fully into the relevant debates is not possible within the scope of this Article.⁸⁷ Nevertheless, some of the basic insights that have been elaborated in the area are relevant here. Much of the discussion of collective intention bears most upon matters of criminal law rather than those of constitutional or legislative interpretation, as the focus remains on group activity instead of the documents or meanings generated out of such activity. Hence, in elaborating on the existence of collective intention, John Searle writes,

It seems obvious that there really is collective intentional behavior as distinct from individual intentional behavior. You can see this by watching a football team execute a pass play or hear it by listening to an orchestra. Better still, you can experience it by actually engaging in some group activity in which your own actions are a part of the group action.⁸⁸

At the same time, Searle identifies collective intention as required for the consequences of a speech act like the Declaration of Independence. As he maintains, “Full-blown cooperative collective intentionality . . . is often necessary for the creation of the institution. Think of the creation of the United States at the time of the Declaration of Independence, for example.”⁸⁹ The cooperative intentionality at work here achieves not just the production of a document, but also the creation of an institution. This collective speech act differs from an individual one. When arguing for the notion that “collective speech acts are really different from and irreducible

(2002) (“Ambiguity serves a legislative purpose. When legislators perceive a need to compromise they can, among other strategies, ‘obscur[e] the particular meaning of a statute, allowing different legislators to read the obscured provisions the way they wish.’ Legislative ambiguity reaches its peak when a statute is so elegantly crafted that it credibly supports multiple inconsistent interpretations by legislators and judges. Legislators with opposing views can then claim that they have prevailed in the legislative arena, and, as long as courts continue to issue conflicting interpretations, these competing claims of legislative victory remain credible.” (alteration in original) (quoting ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 779–80 (1997))).

87. See JOHN R. SEARLE, MAKING THE SOCIAL WORLD: THE STRUCTURE OF HUMAN CIVILIZATION 45–46 (2010) (listing some of the key works, including those by Margaret Gilbert, Raimo Tuomela, Michael Bratman, Seumas Miller, and David Velleman). See generally INTENTIONAL ACTS AND INSTITUTIONAL FACTS: ESSAYS ON JOHN SEARLE’S SOCIAL ONTOLOGY (Savas Tsohatzidis ed., 2007) (rehearsing many of the key debates).

88. John R. Searle, *Collective Intentions and Actions*, in INTENTIONS IN COMMUNICATION 401, 401 (Philip R. Cohen et al. eds., 1990).

89. SEARLE, *supra* note 87, at 57.

to individual speech acts,”⁹⁰ it is precisely Searle’s category of the declaration—a speech act aimed at “bring[ing] about a correspondence between the propositional content of the speech act and reality, i.e., to make true in the world what is said in the content of the act”⁹¹—that Anthonie Meijers adduces to demonstrate that “Searle’s taxonomy [of speech acts may] already include[] elements of collective agency.”⁹² As he notes: “A case in point is Searle’s category of declarations. Though there may be exceptional cases of individual declarations—for example, when a speaker defines a term—most declarations require extralinguistic institutions and thus collective intentionality and collective agency.”⁹³ Not only the Declaration of Independence, but the Constitution, too, performs a speech act. As a declaration, it announces and implements a structured polity, regardless of the particular nuances of that structure. The collective element of constitutional creation is crucial to the Constitution’s status as declaration and presupposes the possibility of collective agency.

Although focusing on group testimony rather than on declarations, and on our justifications for believing such testimony instead of our interpretation of its meaning, Deborah Tollefsen valuably elaborates on the inadequacy of an account of group documentary production that relies simply on the summing of individual activities. The “summative approach” would consider that “when a group offers testimony it is really understood as the testimony of all or some of the members—what they would testify to if given the opportunity.”⁹⁴ Pointing out that the research for something like a United Nations Commission report may have been done by staff not involved in the drafting process, that some individual members might remain skeptical of the final results, and that particular people within the group may only have arrived at views on the topic at hand once they saw the compiled information, Tollefsen maintains that the summative approach cannot deal with these problems. Instead,

when a group testifies the source of this testimony is the group itself. What is required for an assertion to count as the group’s testimony is some form of sanction that allows an assertion to be that of the group, and such an assertion must occur within the proper normative context.⁹⁵

A similar set of points applies to the process of constitution making. Simply disaggregating the resulting document into a number of disparate statements by members of a constitutional convention who were unable—or inadvertently failed—to agree on the meaning of component terms neglects the sanction that renders the constitution as promulgated a product of the meeting, a document with a particular legal force, and a speech act intended

90. Anthonie Meijers, *Collective Speech Acts*, in INTENTIONAL ACTS AND INSTITUTIONAL FACTS: ESSAYS ON JOHN SEARLE’S SOCIAL ONTOLOGY, *supra* note 87, at 93, 108.

91. *Id.* at 106.

92. *Id.* at 108.

93. *Id.*

94. Deborah Tollefsen, *Group Testimony*, 21 SOC. EPISTEMOLOGY 299, 300 (2007).

95. *Id.* at 302.

to establish a political structure.⁹⁶ This speech act does not end contestation over particular clauses by generating either a unitary meaning or none at all, but instead expresses the intent of the drafters (or ratifiers) to produce a common polity. Agonism left its mark on the text in the form of the Founding-era debates over constitutional meaning as much as social movements' work to affect constitutional interpretation has brought such agonism to the fore today. The agonism enshrined in the Constitution itself does not undermine the possibility of constitutional meaning, but instead demonstrates that the contestation we live with now only represents the most recent manifestation of a longstanding constitutional tradition.

CONCLUSION

New Originalists have moved beyond an insistence on determinacy toward advocating for constitutional construction as a supplement to interpretation. In doing so, however, many have accepted the proposition that original meaning cannot exist in the absence of a majority Founding-era view about what that meaning was. This position both undervalues the feasibility and desirability of interpretation in light of multiple meanings and rests on a view of democracy that neglects the role of agonism and dissensus within the polity. Recovering the contested Founding-era meanings of constitutional provisions instead foregrounds the possibility of a democracy in which the people agree to make a declaration announcing a constitutional structure but simultaneously acknowledge—implicitly or explicitly—the considerable disagreement that persists despite their joint project. This, I would contend, is our democracy.

96. Although the individuals involved in ratification were more dispersed, the same analysis of collective intent should apply; the relevant collective intent entailed approving of a Constitution that would structure a practice of government.