

Selective Originalism and Judicial Role Morality

By Richard H. Fallon, Jr.*

The Justices of the Supreme Court increasingly claim to be originalists. Yet close examination reveals that the Court's actual reliance on originalist analysis is highly selective. In large swathes of cases, the avowedly originalist Justices make little or no effort to justify their rulings by reference to original constitutional meanings. Nor do most of them show much disposition to grant certiorari in many cases that might enable them to overrule past, nonoriginalist decisions.

This Article defines and documents the phenomenon of selective originalism. Having done so, the Article explores the cultural and jurisprudential conditions in which selective originalism, which typically abets substantively conservative decisionmaking, has developed and now flourishes. The doctrine of stare decisis, the Article argues, plays an important role in enabling selective originalism. Because it seldom either requires or forbids precedent-based decisionmaking by the Supreme Court, it allows the Court to be originalist when it chooses but not to be originalist when it chooses. In light of this appraisal of the significance of stare decisis in the Supreme Court, the Article criticizes the practice of selective originalism for its inconsistency and disingenuousness. But the Article also explores the obvious question that criticisms frame: Why do the selectively originalist Justices not respond by articulating a more complex doctrine that would seek to justify their only-selective reliance on originalist premises?

We would misunderstand selective originalism, the Article argues, if we derided its misleading pretensions and probed no further. The self-avowed originalist Justices almost certainly experience themselves as duty-bound to overturn nonoriginalist holdings in some cases, though not in all, even when the

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doctrine of stare decisis is too weak to dictate their conclusions as a strict matter of law. And the reasons why, I argue, contain lessons for originalists and nonoriginalists alike: A clear-eyed appraisal of the Justices' functions should inspire the conclusion that the Supreme Court, unlike other courts, is a predominantly lawmaking tribunal that must bear responsibility for the practical and moral desirability of changes that it effects in the fabric of constitutional law. In light of the Court's distinctive functions, conclusions about what the Justices ought to do, and indeed have obligations to do, are often best understood as embodying judgments about judicial role morality in addition to law.

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The Justices of the Supreme Court are increasingly originalist. Two decisions from the Court’s 2021 Term exemplify their professed commitments. *New York State Rifle & Pistol Ass’n v. Bruen*¹ defined the modern content of the right to bear arms by direct reference to the Second Amendment’s perceived historical meaning.² Similarly, *Kennedy v. Bremerton School District*³ instructed that decisions under the Establishment Clause must “faithfully reflect the understanding of the Founding Fathers.”⁴

As the Justices become more originalist, however, another phenomenon grows equally striking. This is the selectiveness of the Court’s reliance on originalist analysis.⁵ In large swathes of cases spread across multiple areas of

1. 142 S. Ct. 2111 (2022).

2. *Id.* at 2131 (“The Second Amendment ‘is the very *product* of an interest balancing by the people’ [That balance] demands our unqualified deference.” (citation omitted) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008))).

3. 142 S. Ct. 2407 (2022).

4. *Id.* at 2428 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014)).

5. See, e.g., David Cole, *Egregiously Wrong: The Supreme Court’s Unprecedented Turn*, N.Y. REV. BOOKS (Aug. 18, 2022), <https://www.nybooks.com/articles/2022/08/18/egregiously-wrong-the-supreme-courts-unprecedented-turn-david-cole/> [<https://perma.cc/AD68-YWDF>] (characterizing the Court’s current conservative majority as “cafeteria originalists” whose “fidelity to originalism is both opportunistic and manipulable”); Noah Feldman, *Supreme Court ‘Originalists’ Are Flying a False Flag*, BLOOMBERG (July 17, 2022, 7:00 AM), <https://www.bloomberg.com/news/articles/2022-07-17/supreme-court-originalists-are-flying-a-false-flag>.

law, the Justices make little or no effort to justify their rulings by reference to original constitutional meanings.⁶ In the nonoriginalist areas, the Justices rely principally on their own precedents as grounds for decision. Sometimes they simply apply the precedents or the frameworks that prior cases have established.⁷ Sometimes the Justices extend or limit previous rulings.⁸ The

www.bloomberg.com/opinion/articles/2022-07-17/supreme-court-s-conservative-originalists-are-flying-a-false-flag [https://perma.cc/L2KF-GWJT] (describing the Court as “cherry-pick[ing] history to rationalize its activism”); cf. William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 313 (noting recent preoccupations with the overruling of precedents and maintaining that, “[r]ather than worrying about which cases will be cast aside, we should pay more attention to those precedents that are left standing”); Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 WAKE FOREST L. REV. 617, 641–43 (2019) (identifying inconsistencies in the Court’s reliance on history in Establishment Clause cases).

For earlier criticisms of Justice Scalia for selectively and inconsistently making precedent-based exceptions to his avowed originalism, see DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 49 (2002). See also David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1412–13 (1999) (arguing that Justice Scalia’s “partial willingness to accept precedents that conflict with his methodology conveniently opens a back door to value choice”). Other scholars have criticized originalist Justices for being only selective or inconsistent in their purported commitment to adjudication on originalist grounds. See, e.g., ERIC J. SEGALL, *ORIGINALISM AS FAITH* 122–40 (2018) (examining opinions of Justices Scalia and Thomas and concluding that both failed to “practice[] what they preached,” *id.* at 123, and instead engaged in “aggressive acts of judicial review that they did not justify by reference to the Constitution’s text or its original meaning,” *id.* at 123–24); Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 13–15 (2006) [hereinafter Barnett, *Scalia’s Infidelity*] (citing examples of Justice Scalia’s failure to practice originalism faithfully); Lawrence Rosenthal, *An Empirical Inquiry into the Use of Originalism: Fourth Amendment Jurisprudence During the Career of Justice Scalia*, 70 HASTINGS L.J. 75, 99–102 (2018) (surveying Fourth Amendment jurisprudence and finding that Justices Scalia and Thomas “frequently did not cast their votes on originalist grounds,” *id.* at 102); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 562–65, 568–69 (2006) (describing Justices Scalia and Thomas’s “originalism” as a project of enacting “contemporary conservative political values” into law, *id.* at 565, and critiquing those Justices’ votes in cases interpreting the Eleventh and Fourteenth Amendments accordingly, *id.* at 564); Gene R. Nichol, *Justice Scalia and the Printz Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953, 968–73 (1999) (arguing that, in cases involving takings, free exercise, standing, and affirmative action, “Justice Scalia departs radically from his chosen theory when it suits his fancy,” *id.* at 971); see also Mila Sohoni, *The Puzzle of Procedural Originalism*, 72 DUKE L.J. 941, 997 (2023) (maintaining that a large number of civil procedure doctrines are incompatible with originalism).

6. See Baude, *supra* note 5, at 313 (“Many of the Court’s questionable precedents . . . go unquestioned.”).

7. See, e.g., *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 792 (2011) (applying strict scrutiny to restrictions on speech in the absence of “persuasive evidence” of a “long . . . tradition of proscription”) (quoting *United States v. Stevens*, 559 U.S. 460, 470, 472 (2010)).

8. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74, 576 (1992) (extending precedents barring standing based on generalized grievances in the absence of congressional authorization to a case in which Congress had sought to confer standing).

crucial point, however, is that self-avowed originalist Justices⁹ often show little or no interest in whether the precedents that they accept as controlling would be justifiable based on originalist premises. As one measure of the selectivity of the Court's reliance on originalist methodology, in only five cases from the 2021 Term did a Court majority purport to base its decision on evidence of the Constitution's original meaning, and there were only three further cases in which concurring or dissenting opinions—typically for just one or two Justices—advanced originalist arguments.¹⁰

In the more recent 2022 Term, in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,¹¹ which effectively held that race-based admissions preferences violate the Equal Protection Clause, originalist arguments figured more prominently in Justice Sotomayor's dissenting opinion than in the majority opinion in which the six conservative Justices all joined. Justice Sotomayor cited several pieces of Reconstruction legislation that included race-based appropriations for categories of "colored" citizens¹² in support of her conclusion that "[t]he text and history of the Fourteenth Amendment make clear that the Equal Protection Clause permits race-conscious measures."¹³ Writing for the majority, Chief Justice Roberts chose not to respond to the evidence on which Justice Sotomayor relied. Without citation to any specific opinion of the Court in any prior case, the Chief Justice offered only the cryptic and enigmatic comment that "[the dissents] fail to mention that the entirety of their analysis of the Equal Protection Clause—the statistics, the cases, the history—has been considered and rejected before."¹⁴ Although Justice Thomas filed a concurring opinion maintaining that the original meaning of the Fourteenth Amendment forbade racial preferences that are not necessary to a compelling governmental interest,¹⁵ none of the other ostensibly originalist Justices joined him, possibly because the historical support for his position was so weak.¹⁶

9. On the Justices' self-classification, see *infra* notes 70–76 and accompanying text.

10. See *infra* notes 224–27 and accompanying text.

11. 143 S. Ct. 2141 (2023).

12. See *id.* at 2228–30 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting) (discussing race-based Reconstruction legislation).

13. *Id.* at 2246.

14. *Id.* at 2174 (majority opinion).

15. See *id.* at 2182–83, 2185–88 (Thomas, J., concurring) (arguing that, while historically the Fourteenth Amendment has protected African Americans, it was because there was legislation that discriminated against them on the basis of race during that period).

16. See, e.g., Stephen Siegel, *Clarence Thomas's Cherry-Picked Originalism on Affirmative Action*, NEW REPUBLIC (July 21, 2023), <https://newrepublic.com/article/174469/clarence-thomas-cherry-picked-originalism-affirmative-action> [<https://perma.cc/29RH-UC3U>] (criticizing Justice Thomas's opinion as "remarkably ahistorical").

Four decisions authored or joined by Justice Samuel Alito, who has described himself as a practical originalist,¹⁷ illustrate the selectivity of the Court's reliance on originalist analysis, even in opinions of Justices who self-identify as originalists. In *Dobbs v. Jackson Women's Health Organization*,¹⁸ Justice Alito wrote for the Court in overruling *Roe v. Wade*.¹⁹ Parts of his opinion sounded originalist themes. He argued, for example, that neither British nor American common law had historically recognized a right to abortion and that, "[b]y 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime."²⁰ Many commentators thus described *Dobbs* as an originalist decision.²¹ But Justice Alito did not actually rest *Dobbs*'s overruling of *Roe v. Wade* on a claim about the Fourteenth Amendment's original meaning. Instead, premitting any originalist inquiry, Justice Alito noted that prior Court decisions had established that although the Due Process Clause protects "a select list of fundamental rights that are not mentioned anywhere in the Constitution," that list consists exclusively of rights that are "deeply rooted in [our] history and tradition' and . . . essential

17. Matthew Walther, *Sam Alito: A Civil Man*, AM. SPECTATOR (Apr. 21, 2014, 12:00 AM), <https://spectator.org/sam-alito-a-civil-man> [<https://perma.cc/XD92-CVGH>] ("I think I would consider myself a practical originalist."); see also Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. 507, 512 (2019) (observing that a "theme of Justice Alito's jurisprudence is originalism, though not in the traditional sense of the word that one might associate with Justice Scalia").

18. 142 S. Ct. 2228 (2022).

19. 410 U.S. 113 (1973), overruled by *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *Dobbs*, 142 S. Ct. at 2284.

20. *Dobbs*, 142 S. Ct. at 2251–53.

21. See, e.g., David Cole, *Originalism's Charade*, N.Y. REV. BOOKS (Nov. 24, 2022), <https://www.nybooks.com/articles/2022/11/24/originalisms-charade-worse-than-nothing-chemerinsky/> [<https://perma.cc/NXR6-K6WK>] ("When the Court in *Dobbs v. Jackson Women's Health Organization* declared *Roe* 'egregiously wrong,' its reasoning rested squarely on originalism."); J. Joel Alicea, *An Originalist Victory*, CITY J. (June 24, 2022), <https://www.city-journal.org/article/an-originalist-victory> [<https://perma.cc/WD83-TURE>] (explaining that the Court's analysis based on the precedent of *Washington v. Glucksberg*, 521 U.S. 702 (1997), "serv[ed] the same function as an originalist analysis" since it delimited the "range of potential original meanings of the amendment" through reference to historical practice); Lee J. Strang, *A Three-Step Program for Originalism*, PUB. DISCOURSE (June 12, 2022), <https://www.thepublicdiscourse.com/2022/06/82703/> [<https://perma.cc/ZE5E-8FPH>] (noting that although *Dobbs* "follows *Glucksberg*'s approach," it is originalist because it "uses the tools of text and *stare decisis* to move errant constitutional doctrine back to the Constitution's original meaning"). But see, e.g., Evan D. Bernick, *Vindicating Cassandra: A Comment on Dobbs v. Jackson Women's Health Organization*, 2021–2022 CATO SUP. CT. REV. 227, 263 (2022) ("*Dobbs* isn't originalism and gives almost no sense of an obligation to try to be. It focuses its attention on the right time period, but its inquiry into that period is limited by nonoriginalist doctrine, and Alito limits it still further in ways that aren't defended on originalist grounds.").

to our Nation’s ‘scheme of ordered liberty.’”²² *Roe*’s mistake, according to Justice Alito, was that it had failed to recognize that a right to abortion was not “deeply rooted in [our] history and traditions.”²³ Justice Thomas, concurring, said that he agreed with Justice Alito’s application of the Court’s settled framework for identifying fundamental rights, but “wr[o]te separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause.”²⁴ Only then did Justice Thomas, alone among the originalist Justices, argue that the original meaning of the Due Process Clause encompassed only procedural and not substantive rights.²⁵

In a tactic similar to that in *Dobbs*, in *McDonald v. City of Chicago*²⁶—an important precursor to *Bruen*—Justice Alito wrote for a plurality in holding that the right to bear arms is a “fundamental” one that the Due Process Clause, as interpreted by the Court’s prior cases, makes applicable against the states.²⁷ As in *Dobbs*, Justice Alito did not purport to establish that the Due Process Clause was originally understood or intended to incorporate the right to bear arms or any other provision of the Bill of Rights.²⁸ Rather, after noting a historical dispute about whether either the Fourteenth Amendment’s Due Process Clause or its Privileges or Immunities Clause was originally understood as incorporating fundamental rights, he

22. *Dobbs*, 142 S. Ct. at 2246 (quoting *Glucksberg*, 521 U.S. at 721).

23. *See id.* at 2253–54 (arguing that instead of holding that the right to abortion was constitutionally protected, “[t]he Court in *Roe* could have said of abortion exactly what *Glucksberg* said of assisted suicide: ‘Attitudes toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that practice]’” (quoting *Glucksberg*, 521 U.S. at 719)).

24. *Id.* at 2300 (Thomas, J., concurring).

25. *See id.* at 2300–02 (“[T]he Due Process Clause at most guarantees *process* . . . [It] does not secure *any* substantive rights”).

26. 561 U.S. 742 (2010).

27. *Id.* at 778, 791.

28. There is a near scholarly consensus that the Fourteenth Amendment’s Due Process Clause was not originally understood to have incorporated the fundamental guarantees of the Bill of Rights. *See, e.g.*, Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L.J.* 1672, 1801 (2012) (“There is little historical evidence to support the notion that the Fourteenth Amendment Due Process Clause was originally understood to apply the Bill of Rights’ substantive liberty provisions against the states.”); Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 *OKLA. L. REV.* 1, 28 n.113 (2007) (“[D]ue process incorporation has never found support among legal scholars . . .”). By contrast, there are substantial historical arguments that the Privileges or Immunities Clause may have been originally understood as incorporating some provisions of the Bill of Rights. *See, e.g.*, Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 *J. CONTEMP. LEGAL ISSUES* 409, 418–19 (2009) (setting up the question whether substantive rights in the Bill of Rights are “privileges or immunities” under an originalist understanding).

characterized the premise that incorporation had occurred via the Due Process Clause as settled by precedent.²⁹ Having relied on the Court's precedents to establish that the Due Process Clause incorporates fundamental rights, Justice Alito found that the right to bear arms is a fundamental one before finally concluding that the substantive content of that right was fixed by original historical understandings.³⁰

In *Janus v. AFSCME*,³¹ by contrast, Justice Alito treated a party's attempted invocation of what he termed "halfway originalism" with disapproving condescension.³² Writing for the Court, Justice Alito overruled a prior decision and held that the First Amendment's Free Speech Clause protects public sector employees from being compelled to pay fees to support unions' collective bargaining activities.³³ In order to identify a protected right in the case, Justice Alito relied on Free Speech Clause precedents that he deemed correctly reasoned.³⁴ He used those precedents to justify overruling another precedent that had permitted public sector bargaining agreements that required employees to pay dues to support a union's bargaining activities.³⁵

As will be discussed below, leading scholars believe that much of the Court's free speech jurisprudence has deviated significantly from the original understanding of the First Amendment.³⁶ But Justice Alito turned to history only to refute an originalist argument by the respondent union that "the First Amendment was not originally understood to provide *any* protection for the free speech rights of public employees."³⁷ In doing so, moreover, he began

29. See *McDonald*, 561 U.S. at 784–85 (arguing that "[u]nder our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then . . . that guarantee is fully binding on the States," and suggesting that ruling otherwise would require "turn[ing] back the clock or adopt[ing] a special incorporation test").

30. *Id.* at 767–78, 791.

31. 138 S. Ct. 2448 (2018).

32. *Id.* at 2470.

33. See *id.* at 2486 (overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

34. See *id.* at 2463–65 (quoting *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 310–11 (2012)) (relying on several modern cases, including *Knox*, to argue that compelling a person to subsidize speech is especially offensive to the First Amendment).

35. *Id.* at 2486; see *id.* at 2489 (Kagan, J., dissenting) (explaining that *Abood* had "struck a balance" of allowing mandatory agency fees for bargaining activity, but not political activity).

36. See *infra* note 141 and accompanying text.

37. *Janus*, 138 S. Ct. at 2469. Justice Alito contested that argument principally by thrusting the burden of proof onto the respondents to show that public sector employees were *not* understood at the time of the Founding to possess the specific rights that the petitioner claimed. See *id.* at 2470 ("The Union offers no persuasive founding-era evidence that public employees were understood to lack free speech protections."). Justice Alito's opinion took no note of an amicus brief by Professors

by disparaging the respondents' reliance on an originalist argument as "discordant" in "a brief that [otherwise] trumpets the importance of *stare decisis*."³⁸ Justice Alito did not object categorically to reliance on *stare decisis* nor to arguments based on the Constitution's original meaning. Even so, it was a flaw in the respondents' argument, he suggested, that it asked the Court to "apply the Constitution's supposed original meaning only when it suits them."³⁹

But, one might ask, was that not exactly what Justice Alito did in *Dobbs* and *McDonald*? Indeed, even in *Janus*, Justice Alito made no inquiry into whether the parts of free speech doctrine that "suit[ed]" him were defensible on originalist grounds except insofar as the respondents pressed the Court to do so.⁴⁰

In other areas of the law, too, Justice Alito—like the Court's other originalist Justices—has written or joined opinions that either ignore originalist arguments altogether or parry specific evidence concerning original understandings with appeals to vague, general propositions. The *Students for Fair Admissions* case, to which I have alluded already, furnishes one vivid example. *TransUnion LLC v. Ramirez*,⁴¹ in which Justice Alito joined Justice Kavanaugh's opinion denying standing to most of the plaintiffs,⁴² further exemplifies the ostensibly originalist Justices' sometime approach of refusing to engage seriously with originalist arguments against their positions. Alone among the originalist Justices, Justice Thomas voted to allow the action brought by the *TransUnion* plaintiffs—upon whom he thought Congress had permissibly conferred "personal" rights the violation of which sufficed to support standing—based on the original meaning of Article III.⁴³ For the majority that included Justice Alito, Justice Kavanaugh

Eugene Volokh and William Baude reporting that they had not seen "any persuasive argument that a right against compelled subsidies is supported by the original meaning of the Constitution." Brief of Professors Eugene Volokh and William Baude as Amici Curiae in Support of Respondents at 16, *Janus*, 138 S. Ct. 2448 (No. 16-1466).

38. *Janus*, 138 S. Ct. at 2469.

39. *Id.* at 2470.

40. *Id.* at 2459–86.

41. 141 S. Ct. 2190 (2021).

42. *Id.* at 2200.

43. *See id.* at 2217–19 (Thomas, J., dissenting). Justice Thomas observed that "[a]t the time of the founding, whether a court possessed judicial power over an action with no showing of actual damages depended on whether the plaintiff sought to enforce a right held privately by an individual or a duty owed broadly to the community." *Id.* at 2217. He later noted that "[t]he principle that the violation of an individual right gives rise to an actionable harm was widespread at the founding." *Id.* at 2218.

relied principally on the Court's modern standing cases.⁴⁴ To be sure, Justice Kavanaugh's majority opinion emphasized Founding-era purposes in restricting the judicial branch to the adjudication of actual cases or controversies.⁴⁵ But it did not seek to refute Justice Thomas's specific readings of Founding-era authorities as supporting the conclusion that the parties before the Court presented a dispute that the Founding generation would have regarded as judicially cognizable.

When we contrast areas of the law in which the Court is originalist with areas in which it is not, or is only half-heartedly so, the explanation for the selectiveness of the Justices' originalism is undoubtedly multifaceted and complex. Sometimes the parties may have based their arguments on the Court's precedents and not put the original meaning of a disputed provision in issue.⁴⁶ And even when the parties press originalist grounds for decision, the doctrine of *stare decisis* may complicate analysis and possibly determine outcomes in some cases.⁴⁷ Nevertheless, even when one takes account of procedural and doctrinal considerations, the selectivity of the Justices' originalism—as reflected in the number of Supreme Court decisions that make no reference to original constitutional meanings—remains less than

44. See *id.* at 2204 (majority opinion) (relying principally on modern cases, including *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014); *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); and *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992)).

45. See *id.* at 2203 (noting, *inter alia*, James Madison's observation at the Constitutional Convention that the power of the federal judiciary was limited to resolving cases "of a Judiciary Nature").

46. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517–18 (1996) (Scalia, J., concurring in part and concurring in the judgment) (noting that despite his "discomfort with the [prevailing] test," because the "briefs and arguments of the parties in the present case . . . accept[]" it and "provide no evidence" on original meaning, he felt obliged to "resolve this case in accord with our existing jurisprudence"); *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment) (declining to address the issue of the "original understanding of the Due Process Clause" because "neither party has argued that our substantive due process cases were wrongly decided"); cf. Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 807–09 (2022) (explaining that "common law rules of waiver and party presentation" often require that courts "ignore correct arguments that the parties didn't raise"—thus "forbid[ding]" courts "from reaching what would otherwise be the legally correct answer").

47. See, e.g., *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2133–34 (2020) (Roberts, C.J., concurring in the judgment) (acquiescing in the Court's judgment, despite disagreeing with it as a matter of first principles, because "*stare decisis* requires us, absent special circumstances, to treat like cases alike"). Scholars disagree on the Roberts Court's attitude towards *stare decisis*. Compare Jonathan H. Adler, *The Stare Decisis Court?*, VOLOKH CONSPIRACY (July 8, 2018, 10:05 AM), <https://reason.com/volokh/2018/07/08/the-stare-decisis-court/> [https://perma.cc/KX6A-MDU7] (characterizing the Roberts Court as "the *stare decisis* Court" and arguing that it "has overturned prior court precedents at a lower rate than its predecessors"), with Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 966–68 (2022) (arguing to the contrary).

fully explained. Although the originalist Justices sometimes invoke the principle that they address only those issues that the parties present,⁴⁸ their adherence to this principle is itself selective.⁴⁹ Similarly, as the Justices often emphasize, *stare decisis* in the Supreme Court is “a principle of policy,”⁵⁰ not a firm rule. Only rarely do the originalist Justices maintain that *stare decisis* requires them to reject the Constitution’s original meaning as a ground for decision.

Also noteworthy is the originalist Justices’ only selective use of their discretionary certiorari jurisdiction to take cases framing challenges to arguably nonoriginalist precedents. By nearly all accounts, there are a number of past Supreme Court decisions that might well be vulnerable to originalist attack⁵¹ but that some or all of the current, ostensibly originalist Justices exhibit no interest in revisiting, even if the doctrine of *stare decisis* would not strictly preclude them from overruling those precedents if they chose.

Under these circumstances, it takes only realism, not cynicism, to recognize that the modern Justices who are regularly identified as originalist are also conservative⁵² and that they seldom rely on originalist premises to support conclusions that they would find ideologically uncongenial.⁵³ The recent decision in *Students for Fair Admissions* stands as a case in point. By the same token, Justice Thomas’s dissenting opinion in *TransUnion* is an outlier: in that case, he alone among the Court’s originalists conducted a fine-grained examination of Founding-era evidence concerning the scope of legislative power to authorize private rights to sue and accepted the “liberal”

48. See, e.g., *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2130 n.6 (2022) (“[I]n our adversarial system of adjudication, we follow the principle of party presentation.” (quoting *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020))).

49. See *infra* notes 262–65 and accompanying text.

50. E.g., *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

51. See *infra* notes 220–23 and accompanying text.

52. Justices Thomas, Roberts, Alito, Gorsuch, and Kavanaugh worked in Republican presidential administrations. *Current Members*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/AMH7-GHGK>]. Justice Barrett assisted President Bush in *Bush v. Gore*, 531 U.S. 98 (2000), alongside Chief Justice Roberts and Justice Kavanaugh. Joan Biskupic, *Supreme Court Is About to Have Three Bush v. Gore Alumni on the Bench*, CNN (Oct. 17, 2020, 8:07 AM), <https://www.cnn.com/2020/10/17/politics/bush-v-gore-barrett-kavanaugh-roberts-supreme-court/index.html> [<https://perma.cc/2FPW-U3KY>].

53. See Post & Siegel, *supra* note 5, at 562–65 (giving examples of originalist Justices’ unprincipled historical omissions); Nichol, *supra* note 5, at 968–73 (same); see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (“I cannot imagine myself . . . upholding a statute that imposes the punishment of flogging.”).

conclusion to which he thought the evidence pointed.⁵⁴ By contrast, when the originalist Justices trumpet their originalism, it is often to deride judicial nonoriginalists and especially liberals for infidelity to the Constitution.⁵⁵ In this pattern, nonoriginalists readily discern opportunism⁵⁶ and hypocrisy.⁵⁷

My first goal in this Article is to define and document the phenomenon of “selective originalism” among the Justices of the Supreme Court. Although I am hardly the first to press a charge of selectivity in the practice of originalism against purportedly originalist Justices,⁵⁸ this Article both updates and expands the bill of particulars and precisely specifies the accusation that it mounts. To a first approximation, I define selective originalism as the practice of the Justices and others in professing obligations of adherence to the Constitution’s original meaning in some cases but, without close engagement with historical evidence or invocation of *stare decisis* as a ground of obligation, taking no interest in or subordinating arguments based on original meanings in other cases.⁵⁹ Originalists often maintain that the “great debate” in American constitutional law involves whether Supreme Court Justices should be originalist or nonoriginalist.⁶⁰ As a practical matter, however, we do not now have and never have had any originalist Justices who were not selective originalists. Justice Clarence Thomas may come the closest to being a pure originalist,⁶¹ but even he exhibits selectivity.⁶² Much more characteristically, originalism functions as

54. See *infra* notes 127–31131 and accompanying text.

55. See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 237 (2008) (observing that when “Justice Scalia speaks out most forcefully, he regularly depicts his own views as fidelity to law, while denouncing his liberal colleagues for injecting their values into judging” (footnote omitted)).

56. See Cole, *supra* note 5 (“The Court’s treatment of a pair of cases involving religion and public education further illustrates that its fidelity to originalism is both opportunistic and manipulable.”).

57. Cf. *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (arguing that “[t]he current Court is textualist only when being so suits it” and not “[w]hen that method would frustrate [its] broader goals”).

58. See *supra* note 5.

59. For a more precise specification of my definition, see *infra* subpart I(B).

60. See, e.g., Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1244 (2019) (discussing the “great debate”).

61. See *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) (“In my view, if the Court encounters a decision that is demonstrably erroneous—*i.e.*, one that is not a permissible interpretation of the text—the Court should correct the error, regardless of whether other factors support overruling the precedent.”).

62. See, e.g., Michael C. Dorf, *How to Test Whether Justice Thomas Favors “Halfway Originalism,”* DORF ON LAW (Feb. 22, 2019), <http://www.dorfonlaw.org/2019/02/how-to-test->

a potentially destabilizing tool or force in constitutional adjudication in the Supreme Court, available to upset existing doctrinal equilibria, but not as a recognized determinant of all decisions. Given the role that originalism actually plays in Supreme Court decisionmaking, any honest reckoning with the great questions of American constitutional law should take the measure of the only form of originalism that avowedly originalist Justices have been willing to practice and should consider why all Supreme Court originalists have so far been selective originalists.

My second goal in this Article is to criticize selective originalism for its inconsistency and disingenuousness. If the originalist Justices are prepared to rest their decisions on originalist premises only some of the time, they should acknowledge as much and should articulate and defend their bases for determining when to decide cases on originalist grounds and when not to do so. As I recognize, however, my criticisms on this score are mostly obvious, and they yield an equally obvious question: Why do selective originalists not respond by promulgating reconciliations of their avowed originalism with their selective subordination of originalist premises to precedent-based frameworks for decision?

My third goal is to answer that question. I begin by exploring the cultural and jurisprudential conditions in which selective originalism has developed and increasingly flourishes. A self-conscious originalist school of constitutional interpretation developed only during the 1970s and 1980s, partly as an expression of reactive conservative opposition to perceived defects of “the New Deal settlement” in law and politics and the rights-creating excesses of the Warren Court.⁶³ But leading originalists have almost always acknowledged the need for limiting principles or exceptions to their creed, centrally including the doctrine of *stare decisis*, lest originalism destabilize too much law and practice all at once.⁶⁴ For Supreme Court

whether-justice-thomas.html [https://perma.cc/BH4F-X96H] (querying how Justice Thomas can justify his “eagerness to re-evaluate some but not all of the Court’s nonoriginalist precedents”); Mark Tushnet, *In-Chambers Stare Decisis*, BALKINIZATION (Feb. 20, 2019, 6:15 PM), <https://balkin.blogspot.com/2019/02/in-chambers-stare-decisis.html> [https://perma.cc/6XRC-3GTF] (similarly querying how Justice Thomas can reconcile the competing methodological approaches he has taken in various First Amendment cases).

63. See, e.g., Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 674–75 (2009) (describing originalist critiques of the Warren Court); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 392, 408 (2013) (tracing the development of originalism in the twentieth century).

64. See Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 129, 139 (Amy Gutmann ed., 1997) (acknowledging that to “forswear *stare decisis*” would render originalism “so disruptive of the established state of things that it will be useful only

Justices, unlike lower court judges, no rule of lexical priority determines the comparative authority of original constitutional meanings and nonoriginalist precedents. In the Supreme Court, the etiology of selective nonoriginalism lies in this absence. And the full dimensions of the Justices' need to choose between original meanings and judicial precedents emerges when we recognize—as I argue in this Article—that direct appeals to either original meanings or frameworks established by judicial precedents offer nearly pervasively available, yet alternative, methods of constitutional decisionmaking that may point to different outcomes.

Much of the explanation for selective originalism—as distinguished from an originalist theory that candidly explains when nonoriginalist precedents should be overruled and when they should be followed—resides in the sheer difficulty of developing a theory adequate to the task of choosing between these two frameworks in particular cases.⁶⁵ Admittedly, working out an even reasonably principled and determinate theory of *stare decisis* for application in the Supreme Court has proved as confounding to nonoriginalist liberals as to conservative originalists. But other considerations may make originalism peculiarly problematic to implement. These include the overwhelming challenge that conducting serious original historical research would pose, especially if the Justices were to attempt it in every constitutional case. Less creditably, selective originalists like to posture themselves as principled adherents to original constitutional meanings, in contrast with feckless nonoriginalists, while conveniently subordinating original meanings to judicial precedents when original meanings would yield unwanted results.

Posturing notwithstanding, we would misunderstand selective originalism, I argue, if we labeled it as dishonest or disingenuous and probed no further. By all appearances, selective originalism reflects the genuinely felt commitment of originalist Justices to the proposition that adherence to original meanings is often a matter of judicial obligation, contrary precedents notwithstanding—even though, to repeat, the same Justices routinely subordinate original meanings to precedent in other cases and decline to grant *certiorari* to reconsider nonoriginalist rulings in more still.

My final goal in this Article is to frame and begin to answer the question: What should all participants in American constitutional practice, including originalists and nonoriginalists, learn from a critical examination

as an academic exercise and not as a workable prescription for judicial governance”); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 158–59 (1990) (recognizing that “it is too late to overrule” decisions upholding paper money and programs the judicial termination of which would “plunge us into chaos”).

65. See RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 137–41 (2018) (discussing the difficulties).

of selective originalism? Nonoriginalists confront many of the same challenges as selective originalists, including that of offering consistent, principled explanations for when, if ever, the Justices should count themselves obliged—and others should view them as obliged—to prioritize original constitutional meanings over contrary judicial precedents, or vice versa, as their bases for constitutional decisions.

The first step in addressing that challenge, I argue, should be to acknowledge the singularity of the Supreme Court's role as a predominantly lawmaking tribunal.⁶⁶ The Supreme Court gets to select the cases that it will decide; it populates its merits docket almost exclusively with hard cases to which the law rarely provides uniquely correct, purely legal resolutions; and after the Court has decided, its rulings bind all other courts.⁶⁷ Under these circumstances, we should recognize that the Court's primary modern function is not to apply the law correctly but, instead, either to clarify or sometimes explicitly reshape the constitutional law of the United States. A clear-eyed appraisal of the Justices' functions, I argue, should inspire the conclusion that judgments about what the Justices ought to do, and claims about whether cases in the Supreme Court are rightly decided, are best understood as embodying judgments of role morality, involving what it would be best for a Justice of the Supreme Court to do to reshape the law for the future. Although I can sketch only the bare outlines of a theory of judicial role morality as it applies to Justices who are legally authorized to choose between original constitutional meanings and judicial precedents as frameworks for decision, this Article makes a start. Even when confronting the hardest and most contentious constitutional cases—about abortion, or affirmative action, or gay rights—the Justices may seek solace in the notion that their grounds for decision reflect “law all the way down.”⁶⁸ But if so, I argue, the operative conceptions of law and legal reasoning would need to be morally suffused to a degree that reinforces, rather than weakens, claims for the importance of judicial role morality.

The Article consists of six Parts. Part I offers introductory discussions of originalism and stare decisis and advances a working definition of selective originalism. Part II demonstrates the widespread character of

66. For general discussion of the Court's lawmaking role, see *id.* at 127–32.

67. See, e.g., Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1929–31 (2017) (discussing the Court's discretion in terms of agenda control); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 681, 689 (2012) (similar).

68. *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 103 (2010) [hereinafter *Kagan Hearing*] (statement of Elena Kagan, Solicitor General of the U.S.).

selective originalism in Supreme Court decisionmaking. After Part III develops a normative critique of selective originalism, Part IV explores the circumstances and competing normative impulses that have allowed selective originalism, despite its demonstrable flaws, to achieve its prominent if not predominant position in the Supreme Court. Part V draws lessons for originalists and nonoriginalists alike from the analysis of selective originalism that previous Parts have proffered. Emphasizing that the law often permits the Justices to choose between precedent-based and originalist grounds for decision, Part V recasts many of the choices that confront the Justices as legally underdetermined but as subject to norms of judicial role morality. It preliminarily outlines the Justices' distinctive role-based moral obligations, and it explains many of the most central disagreements among the Justices as species of moral, as distinguished from narrowly legal, disagreement. Part V also argues that evaluation of Supreme Court decisionmaking through the lens of role morality would illumine and potentially improve constitutional debate. Part VI is a brief conclusion.

I. Introductions to Originalism, Stare Decisis, and Selective Originalism

According to many accounts, originalist Justices now exert a controlling influence on the Supreme Court.⁶⁹ Justices Amy Coney Barrett,⁷⁰ Neil Gorsuch,⁷¹ and Clarence Thomas⁷² all self-identify as originalists. Justice Alito has characterized himself as “a practical originalist.”⁷³ Some

69. See Cole, *supra* note 5 (“[T]his past term, the new majority aggressively applied originalism to disastrous effect, and only they know how far they will go.”).

70. See, e.g., Dean Reuter, Thomas Hardiman, Amy Coney Barrett, Michael C. Dorf, Saikrishna B. Prakash & Richard H. Pildes, *Why, or Why Not, Be an Originalist?*, 69 CATH. U. L. REV. 683, 686 (2020) (panel discussion) (“At bottom, I think one ought to be an originalist because the Constitution, no less than a statute, is law.” (statement of Amy Coney Barrett)); *Full Transcript: Read Judge Amy Coney Barrett's Remarks*, N.Y. TIMES (Sept. 26, 2020), <https://www.nytimes.com/2020/09/26/us/politics/full-transcript-amy-coney-barrett.html> [<https://perma.cc/FZ6Z-GDZA>] (“I clerked for Justice Scalia more than 20 years ago, but the lessons I learned still resonate. His judicial philosophy is mine, too.”).

71. NEIL M. GORSUCH, *A REPUBLIC, IF YOU CAN KEEP IT* 116–27 (2019) (advancing a defense of originalism); *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1381 (2018) (Gorsuch, J., dissenting) (contending that “[t]he Constitution's original public meaning supplies the key” to its interpretation).

72. *Rosenkranz Originalism Conference Features Justice Thomas '74*, YALE L. SCH. (Nov. 4, 2019), <https://law.yale.edu/yls-today/news/rosenkranz-originalism-conference-features-justice-thomas-74> [<https://perma.cc/3SKV-9LBQ>] (quoting Justice Thomas as saying that modern day originalists should “give the words and phrases used by [authors] natural meaning in context” and that doing otherwise “usurps power from the people”); see also Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas?*, 4 N.Y.U. J.L. & LIBERTY 494, 495, 511 (2009) (describing Justice Thomas's originalism).

73. See *supra* note 17.

commentators classify Justice Kavanaugh as an originalist as well.⁷⁴ In a slightly earlier era, Justice Antonin Scalia zealously championed originalism.⁷⁵ Chief Justice William Rehnquist sometimes defended originalist premises.⁷⁶ Other Justices, and especially those from the Court's conservative wing, frequently join opinions that sound originalist themes.⁷⁷

In order to permit assessment of the extent to which particular Justices actually practice originalism, this Part frames the contrast between originalist and nonoriginalist, especially precedent-based, grounds for Supreme Court decisionmaking. Subpart I(A) builds on work by leading originalist scholars to offer an account of originalism and the rationales that support it. Subpart I(B) defines selective originalism as the failure of purportedly originalist Justices to adhere consistently to the originalist principles laid out in subpart I(A), typically without citing legally obligatory reasons—such as ones that might arise from the doctrine of *stare decisis* or the so-called party-presentation principle, which normally requires federal courts to “rely on the parties to frame the issues for decision”⁷⁸—as their grounds for doing so. Subpart I(C) offers a few points of clarification concerning the implications of my respective definitions of originalism and selective originalism.

74. Cole, *supra* note 5; see *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 196 (2018) (statement of Judge Brett M. Kavanaugh) (responding to “you are an originalist” with “[t]hat is correct”).

75. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 38–47 (1997) (defending an originalist interpretation of the Constitution); Scalia, *supra* note 53, at 862 (“Having described what I consider the principal difficulties with the originalist and nonoriginalist approaches, I suppose I owe it to the listener to say which of the two evils I prefer. It is originalism.”).

76. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEXAS. L. REV.* 693, 698–99 (1976) (rejecting a brief writer's assertion that the Constitution is a living document).

77. Indeed, two of the Court's “liberal” Justices, Elena Kagan and Ketanji Brown Jackson, have gone so far as to label themselves as originalists. See *Kagan Hearing*, *supra* note 68, at 62 (“[W]e are all originalists.”); Robert Barnes & Ann E. Marimow, *Ketanji Brown Jackson Declares Herself a Modest Jurist, Defends Record Against Republican Criticism*, *WASH. POST* (Mar. 22, 2022, 10:27 PM), <https://www.washingtonpost.com/politics/2022/03/22/ketanji-brown-jackson-hearing-day-2/> [<https://perma.cc/75UZ-PDF2>] (quoting Justice Jackson's statement that “I believe that the Constitution is fixed in its meaning. I believe that it's appropriate to look at the original intent of original public meaning of the words”); see also Mark Joseph Stern, *Hear Ketanji Brown Jackson Use Progressive Originalism to Refute Alabama's Attack on the Voting Rights Act*, *SLATE* (Oct. 4, 2022, 1:23 PM), <https://slate.com/news-and-politics/2022/10/ketanji-brown-jackson-voting-rights-originalism.html> [<https://perma.cc/PZ3M-ELH9>] (celebrating Justice Jackson's use of originalism during oral argument).

78. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)).

A. *Originalism in the Supreme Court*

In offering a definition of originalism, I begin with Professor Lawrence Solum's account of two commitments that nearly all originalists embrace: the "Fixation Thesis" and the "Constraint Principle."⁷⁹ According to the Fixation Thesis, the various provisions of the Constitution—like all texts—have linguistic meanings, existing as a matter of fact, that were fixed at the time of their promulgation.⁸⁰ Originalists can, and many do, acknowledge that the Constitution's original meaning may sometimes have been vague, ambiguous, or otherwise underdeterminate.⁸¹ Originalists who regard underdeterminacy as relatively common often distinguish between constitutional "interpretation," which aims to identify linguistic meaning, and "construction," through which judges and Justices give legal significance to vague provisions, including by rendering them more precise than they were previously.⁸² But however precise or vague a provision's original linguistic meaning may be, originalists hold that meaning to be unchangeable over time.

The Constraint Principle complements the Fixation Thesis by stipulating the significance of original constitutional meanings. As formulated by Professor Solum, the Constraint Principle holds that the Constitution's original linguistic meaning should at least constrain, even if it does not always determine, decisionmaking by the Supreme Court.⁸³ More precisely, as Solum puts it in a recent article with Randy Barnett, "[c]onstitutional practice ought to be consistent with, fully expressive of, and fairly traceable to the original public meaning of the constitutional text."⁸⁴

79. See, e.g., Solum, *supra* note 60, at 1249 (designating the "Fixation Thesis" and the "Constraint Principle" as two elements that are core to the originalist theory).

80. See, e.g., Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 278 (2017) ("[T]he communicative content of the constitutional text is a *fact*."); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 12 (2015) ("Interpretations are either true or false . . ."); Barrett, *supra* note 67, at 1921 ("For an originalist, the meaning of the text is fixed so long as it is discoverable.").

81. See, e.g., Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 536 (2013) (referring to "the fact of constitutional underdetermina[cy]"); see also Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 2018 (2021) [hereinafter Solum, *Public Meaning Thesis*] (noting the need for constitutional "construction" in cases involving linguistically underdeterminate provisions).

82. E.g., RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT 6–12* (2021); Solum, *Originalism and Constitutional Construction*, *supra* note 81, at 457.

83. Solum, *Originalism and Constitutional Construction*, *supra* note 81, at 460.

84. Randy E. Barnett & Lawrence B. Solum, *Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. (forthcoming 2023) (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4338811 [<https://perma.cc/NHV2-FC6P>].

Importantly, however, originalists can, and many do, embrace two major qualifications of the proposition—which otherwise might seem to follow from the Constraint Principle—that originalist Justices should always decide cases based on original constitutional meanings. First, most originalists accept the doctrine of *stare decisis*, which is historically understood to require courts, including the Supreme Court, to stand by some past, erroneous decisions, including about constitutional matters.⁸⁵ On one plausible account, a judicial capacity to endow even some initially mistaken precedents with *stare decisis* effect inheres in historical understandings of “the judicial power” that Article III confers on the federal courts.⁸⁶

Second, many originalists view the Constraint Principle as being conditioned by the party-presentation principle, which provides that courts should normally decide only those questions—including about original

85. See, e.g., J. Joel Alicea, *The Originalist Jurisprudence of Justice Samuel Alito*, HARV. J.L. & PUB. POL’Y PER CURIAM, Spring 2023, at 1, 3 (“It is widely accepted among originalist scholars and jurists alike that some version of *stare decisis* is compatible with originalism.”). A few originalist scholars have argued that original meanings should never or almost never yield to *stare decisis* in cases decided in the Supreme Court. See, e.g., Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 269 (2005) (“Where a determinate original meaning can be ascertained and is inconsistent with previous judicial decisions, these precedents should be reversed and the original meaning adopted in their place.”); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 24 (1994) (arguing that “the practice of following precedent is not merely nonobligatory or a bad idea” in certain circumstances but “affirmatively inconsistent with the federal Constitution”); Michael Stokes Paulsen, *The Inherently Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005) (“*Stare decisis* is unconstitutional, precisely to the extent that it yields deviations from the correct interpretation of the Constitution!”). So far as I am aware, however, no Justice up through and including those currently sitting has persistently questioned the legitimacy of *stare decisis* or failed to apply it in some cases. Cf. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 662–81 (1999) (tracing the history of constitutional *stare decisis* from the Founding through the Marshall Court). Even the current Justice who appears most resistant to precedent-based decisionmaking in constitutional cases, Clarence Thomas, sometimes relies on it and appears to believe that the Justices are obliged to overrule a prior decision only when it is demonstrably erroneous. See, e.g., *Gamble v. United States*, 139 S. Ct. 1960, 1981–86 (2019) (Thomas, J., concurring) (maintaining that precedents must be overruled when they do not reflect a “permissible interpretation of the text” or are “demonstrably erroneous”).

86. See, e.g., Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754, 757 (1988) (locating in Article III an “inalienable command” to follow precedent unless “substantial countervailing considerations” require otherwise); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 (2015) (defending a version of originalism under which “judges can look to precedent, policy, or practice, but only to the extent that the original meaning incorporates or permits them” (emphasis omitted)); see also *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring) (“The Framers of our Constitution understood that the doctrine of *stare decisis* is part of the ‘judicial Power’ and rooted in Article III of the Constitution.”).

constitutional meanings and their relevance—that the parties have framed.⁸⁷ The Supreme Court sometimes deviates from the party-presentation principle.⁸⁸ As Justice Barrett wrote while still a law professor, the Court can and sometimes does “call[] for supplemental briefing to address the issue whether a precedent that the parties did not challenge should be overruled,” and sometimes the Justices “urge the overruling of a case where the merits of the precedent were neither raised nor briefed by the parties.”⁸⁹ Nonetheless, on a sensible definition, originalists are as entitled as nonoriginalists to take account of interests in the orderly presentation of issues and argument, partly to ensure ample opportunities for the testing of claims through the adversary process.

Beyond the doctrine of *stare decisis* and the party-presentation principle, however, I take it to be implicit in standard endorsements of originalism—including by Justices of the Supreme Court—that the Justices should decide constitutional cases based on original constitutional meanings whenever originalist arguments are properly before them and the doctrine of *stare decisis* does not require adherence to a mistaken past interpretation.⁹⁰ In particular, I understand the Constraint Principle to preclude originalist Justices from choosing judicial precedent over the Constitution’s original meaning as a ground for decision based on legally discretionary judgments that the outcome dictated by precedent would be preferable on moral or policy grounds to that required by the Constitution’s original meaning. Although this stipulation might provoke resistance, I introduce it for two related reasons. The first reflects what I take to be common-sense understandings of what it means to be an originalist. Suppose a nominee to be a Justice of the Supreme Court testified to the Senate as follows: “Although I count myself an originalist, you can expect me to decide a large majority of the cases that come before the Court on the basis of precedent,

87. See, e.g., Sachs, *supra* note 46, at 807–08 (explaining that “common law rules of waiver and party presentation” often require that courts “ignore correct arguments that the parties didn’t raise”—thus “forbid[ding]” courts “from reaching what would otherwise be the legally correct answer”); Baude, *supra* note 86, at 2360 (“A party whose originalist claim is foreclosed by a valid waiver rule . . . will lose; . . . because inclusive originalism permits rules of waiver . . .”).

88. See Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 450 (2009) (“Despite the rhetoric in favor of party presentation, judicial issue creation is not uncommon.”); Barrett, *supra* note 67, at 1941–42, 1941–42 nn.96–97 (giving examples).

89. Barrett, *supra* note 67, at 1941–42.

90. I do not mean to suggest that the decision of a prior court could not influence an originalist Justice’s assessment of whether a prior decision should be adjudged correct when tested pursuant to originalist principles. See, e.g., Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105, 156 (2015) (describing deference to precedent as a “fallback rule . . . in situations of constitutional uncertainty”).

not original constitutional meanings, because I would adhere to all nonoriginalist precedents whose results I approve or would not wish to disturb for prudential reasons—even in the absence of any legal compulsion to do so.” Based on this response, we would, I think, conclude that the nominee was not really an originalist at all.

Closely relatedly, defining originalism so that it allows the Justices to make discretionary judgments about whether to base their decisions on nonoriginalist precedents in preference to original meanings—in the absence of any legal compulsion to deviate from original meanings under the doctrine of *stare decisis*—would make it difficult to differentiate originalism from “pluralist” theories of constitutional interpretation that view original meanings as permissible but rarely obligatory bases for decision by the Supreme Court.⁹¹ From the time of originalism’s emergence as a distinctive constitutional theory in the 1970s, its leading champions have always sought to distinguish it from, and define it in opposition to, methodologically pluralist theories. Professors Barnett and Solum make this point emphatically: “[B]oth . . . progressive and conservative variations on Constitutional Pluralism are nonoriginalist.”⁹²

Whereas originalists’ grounds for embracing the Fixation Thesis are largely linguistic, their arguments for the Constraint Principle rest on a mix of legal and normative grounds. As a legal matter, most current originalists regard the Constraint Principle as being consistent with, and increasingly they view it as being dictated by, “our law,” such that initial deviations from originalist premises—before *stare decisis* even arguably comes into play—are in some sense legally illegitimate.⁹³ Originalists’ grounds for holding that position are diverse and controversial,⁹⁴ and any attempt at brief summary

91. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE* 3–8 (1982) (cataloguing multiple modalities of constitutional argument, any one of which the Justices can permissibly adopt as their grounds for decision in a particular case).

92. Barnett & Solum, *supra* note 84 (manuscript at 42).

93. See, e.g., Baude, *supra* note 86, at 2352 (“[T]his Essay argues that a version of originalism is indeed our law.”); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 874–75 (2015) (maintaining that “[o]n this theory, our law today is the Founders’ law”); Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 7–8 (2016) (“Today, most originalists cast the theory as a claim about what the law *is*.”); Barrett et al., *supra* note 70, at 701 (panel discussion) (“I’m also persuaded by the Will Baude and Steve Sachs argument that we treat the Constitution’s original meaning as law as a positive matter.”).

94. Compare, e.g., William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1116 (2017) (“We assume in this Article something like Hartian positivism . . .”), with, e.g., Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 108, 117 (2016) (praising the “positive turn” in originalist theory on the ground that “[i]t is good for

risks oversimplification. That said, the common element supporting the view that most if not all nonoriginalist decisions are legally erroneous, at least if they are not dictated by precedent or the party-presentation principle, appears to lie in the proposition that the Constitution is not only “law,”⁹⁵ but also, as Article VI proclaims, “the supreme law of the land.”⁹⁶ And if one probes the foundation of the claim that the Constitution is law, it inheres in the premise—often associated with legal “positivism”—that law is necessarily grounded in social facts,⁹⁷ conjoined with the further empirical premise that the Constitution has been accepted as “our law” since 1789. Although there are many versions of legal positivism, I shall treat as paradigmatic the strand that derives its core tenets from H.L.A. Hart’s *The Concept of Law*.⁹⁸ In Hart’s account, the social facts that determine the law involve the day-to-day practice of officials and especially judges in following a shared “rule of

constitutional lawyers . . . to focus on the positive content of the Constitution” but arguing that originalist interpretive theory should also incorporate insights from the natural law tradition).

95. See, e.g., NEIL M. GORSUCH, *supra* note 71, at 117 (arguing that “the Constitution’s self-conscious language emphasizing its written-ness, its status as a law, and the judge’s duty to abide its terms” instruct “that only the terms of this written document and nothing else, not any unreferenced norm or custom, constitutes that supreme law.”).

96. See, e.g., *id.* at 116 (maintaining that “a careful inspection of [the Constitution’s] terms and structure,” including Article VI, “shows that originalism is anticipated and fairly commanded by its terms”); Amanda L. Tyler, Frank H. Easterbrook, Brett M. Kavanaugh, Charles F. Lettow, Reena Raggi, Jeffrey S. Sutton & Diane P. Wood, *A Dialogue with Federal Judges on the Role of History in Interpretation*, 80 GEO. WASH. L. REV. 1889, 1897–98 (2012) (panel discussion) (“[The Constitution’s text] is binding law. It says in Article VI it’s the supreme law of the land . . .” (statement of Brett M. Kavanaugh)).

As suggested above, acceptance of this position is not inconsistent with recognizing that even the Justices of the Supreme Court are bound by the doctrine of stare decisis in some cases even when they believe that earlier decisions deviated from the Constitution’s original meaning. First, a Justice might believe that the authority to establish precedents that will thereafter constitute binding law inheres in Article III’s grant of “the judicial Power” to a judiciary headed by “one Supreme Court.” See *supra* note 86 and accompanying text. Second, a Justice might conclude that accepted rules of recognition that are not part of the Constitution’s original meaning but that the Constitution does not displace, either require or authorize precedent-based adjudication in some cases. See Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 654 (1987) (asserting that “the force of precedent . . . is an aspect of our law because of acceptance”); Sachs, *supra* note 93, at 863 (asserting that adherence even to erroneous precedents is permissible if the doctrine authorizing or requiring this result was authorized by the Founders or “has been lawfully added since”).

97. See Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1331 (2017) (maintaining that “[t]he Core Argument” of modern interpretive theories reflecting positivist assumptions “holds that for any given interpretive rule, that rule counts as law (and thereby imposes a duty on courts to apply it) if it is supported by the kind of social facts that determine the content of law”).

98. H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012).

recognition” that distinguishes law from non-law and, in some instances, establishes priority among legal norms.⁹⁹

In maintaining that most modern originalists rely heavily on the social fact of the Constitution’s acceptance as law, I acknowledge that some originalists’ theories contain non-positivist elements, including ones rooted in the natural law tradition, that would supplement or restrict the legal authority of socially accepted norms or practices.¹⁰⁰ As I shall explain momentarily, others also press normative arguments in favor of adherence to original constitutional meanings. For the remainder of this Article, however, I shall proceed on the basis of the assumption—which I believe to be true, but which I shall not pause to attempt to demonstrate—that the originalist Justices of the Supreme Court characteristically believe originalism to be “our law”¹⁰¹ for reasons that either directly reflect or are at least consistent with the Hartian “positivist” premise that law is necessarily grounded in acceptance. I shall also assume, again without having purported to demonstrate, that the best theory of law, whatever its details, would be at least loosely compatible with the main tenets of Hartian positivism.¹⁰²

In its moral dimension, originalism answers various questions about why and when the Justices and others ought to practice originalism.¹⁰³ Insofar as the law requires originalist decisionmaking, the Justices’ legal obligation and their oath-based promise to obey the law may number among the reasons

99. See *id.* at 94–95, 100–10 (introducing and explicating the concept of the rule of recognition as the uniting feature of a legal system).

100. See, e.g., Pojanowski & Walsh, *supra* note 94, at 110–17, 138–57 (criticizing Hartian positivism as an inadequate legal theory and asserting justifications for originalist interpretive methods rooted in the classical natural law tradition).

101. See *supra* note 93 and accompanying text.

102. See Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1126–29 (2008) (noting the illuminating power of “the most basic tenet of Hart’s analysis . . . that the foundations of law necessarily lie in social facts” involving “the current acceptance of criteria for identifying valid legal norms”).

103. See, e.g., Pojanowski & Walsh, *supra* note 94, at 102 (asserting that “[o]n normative grounds, many originalists claim that it is good, as a matter of political morality, for courts to be originalist” because it “reins in platonic guardians, promotes popular sovereignty, maximizes liberty, or is good rule-consequentialism” (footnotes omitted)).

to practice originalism,¹⁰⁴ but it need not exhaust them.¹⁰⁵ For example, originalists often argue that originalist interpretation enables popular sovereignty,¹⁰⁶ promotes rule-of-law values such as consistency and predictability of judicial decisions,¹⁰⁷ and conduces to morally desirable outcomes.¹⁰⁸ Reasons such as these may shape the details of the theory that any particular originalist embraces, including in cases of conflict between original constitutional meaning and judicial precedent.¹⁰⁹

B. *Selective Originalism: A Working Definition*

My analysis so far yields a definition not only of originalism but also of selective originalism. Selective originalism is a practice of constitutional decisionmaking in which putatively originalist Justices of the Supreme Court sometimes ignore or subordinate their avowed originalist premises, including the Constraint Principle as glossed above to differentiate originalism from interpretative pluralism, and instead rest their decisions on prior judicial precedents based partly on their policy-based preferences without regard to

104. See, e.g., Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RESV. L. REV. 905, 909 (2016) (observing that judges take an oath to uphold the Constitution and that “any theory of judging . . . must be measured against that foundational duty”); Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 307–08 (2016) (arguing that the oath gives the Constitution normative force in our world because it is the solemn assertion of a promise, with all the moral force that a promise carries).

105. Among other things, originalists can rely on moral arguments for embracing originalist interpretive precepts that are more specific or determinate than current, practice-grounded legal norms.

106. See, e.g., J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 5 (2022) (offering “a natural law justification for originalism grounded in the legitimate authority of the people-as-sovereign” to establish law “that is necessary for achieving the common good”); Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1440, 1444–46 (2007) (addressing “the most common and most influential justification for originalism: popular sovereignty and the judicially enforced will of the people”).

107. See, e.g., GORSUCH, *supra* note 71, at 125 (“Originalism reinforces . . . rule-of-law values of notice and equality.”).

108. See, e.g., JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 3 (2013) (“[S]tringent supermajority rules are likely . . . to generate good constitutional provisions.”); Ilya Somin, *How Constitutional Originalism Promotes Liberty*, L. & LIBERTY (June 1, 2015), <https://lawliberty.org/forum/how-constitutional-originalism-promotes-liberty/> [<https://perma.cc/HQ3R-J9PD>] (“Both the structural and individual rights provisions of the Constitution generally protect liberty more when interpreted from an originalist standpoint than by applying any of originalism’s plausible competitors.”).

109. See RANDY J. KOZEL, SETTLED VERSUS RIGHT 64–69 (2017) (“The need to determine which flawed precedents are most problematic marks an important difference between consequentialist originalism and its structuralist cousin.”); Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 462 (2018) (arguing that an originalist “big bang” that rendered “federal law as a whole . . . unpredictable, inconsistent, and uncertain” would be “inconsistent with the rule of law justification for originalism”).

whether those precedents (1) are defensible on originalist grounds, (2) are binding as a matter of stare decisis, or (3) are reasonably left unexamined solely based on the principle that the Court should normally decide only those issues framed by the parties' briefing.¹¹⁰

C. *Transitional Clarifications*

In order to forestall possible misunderstandings going forward, I should offer three points in clarification of the definitions of originalism and selective originalism offered above. First, although my definitions of originalism and selective originalism will be crucial to subsequent analysis, they do not try to resolve which is the most defensible version of originalist theory or what result originalist analysis would require in particular cases. Originalists differ among themselves about such matters as whether a provision's original meaning is fixed by the intent of the Framers,¹¹¹ the original public understanding of relevant language,¹¹² or the application of the methods of legal interpretation prevailing at the time of a provision's

110. Cf. FARBER & SHERRY, *supra* note 5, at 49 (emphasizing the role of stare decisis in facilitating "pragmati[c]" decisionmaking by avowed originalist Justices); Zlotnick, *supra* note 5, at 1412–13 (arguing that Justice Scalia's "partial willingness to accept precedents that conflict with his methodology conveniently opens a back door to value choice").

111. See Larry Alexander, *Simple-Minded Originalism*, in THE CHALLENGE OF ORIGINALISM 87, 87 (Grant Huscroft & Bradley W. Miller eds., 2011) (championing "simple-minded," intent-focused originalism); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 229 (1988) (defending intent-focused originalism).

112. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012) ("In their full context, words mean what they conveyed to reasonable people at the time they were written . . ."); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 94–95 (revised ed. 2014) ("[O]riginal [public] meaning' originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment."); Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution*, 81 U. CHI. L. REV. 1385, 1440 (2014) (book review) ("[T]he true, original public meaning of the language employed . . . [is] the objective meaning the words would have had, in historical, linguistic, and political context, to a reasonable, informed speaker and reader of the English language at the time that they were adopted."); cf. Solum, *Public Meaning Thesis*, *supra* note 81, at 2012 n.172 (emphasizing that "pragmatic enrichment[]" of constitutional provisions' literal meanings depends on actual rather than reasonable people and insisting that "the idea of 'a reasonable member of the ratifying public' is a heuristic and not an account of the causal mechanism by which communicative content is conveyed" (quoting Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 544 (2011))). But cf. Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 158 (2017) (noting that "[a] number of scholars, this author among them, have argued for shifting focus from original meaning to our original law").

ratification.¹¹³ Accordingly, when I talk about a decision as an example of selective originalism, I do not mean to imply that there is one correct originalist conclusion on which all consistent originalists should converge. Rather, I mean to refer to the stances of those Justices who sometimes embrace originalist premises but sometimes exhibit indifference to whether the decisions that they reach in other cases could be justified pursuant to their own avowed methodologies.

Second, besides acknowledging that originalist Justices could decide cases based on nonoriginalist precedents when the doctrine of *stare decisis* requires them to do so, my definitions contemplate that anyone could be a consistent originalist, not a selective one, and also believe that Justices of the Supreme Court should accord substantial significance to precedent in some further aspects of their decisionmaking. For example, a consistent originalist who accepted the distinction between judicial interpretation and construction of constitutional meaning could embrace—indeed feel bound by—all judicial “constructions” that are consistent with vague original meanings, even if she thought some prior constructions less than ideal.¹¹⁴ A consistent originalist could also accord a strong presumption of correctness to any prior decision in which the Court had made a conscientious effort to discern and apply the Constitution’s original meaning.¹¹⁵

Third, in my view there is an important and little-noticed gap in most of the purportedly originalist Justices’ avowed theories that contributes

113. See Baude & Sachs, *supra* note 94, at 1117–18 (“[T]he ‘touchstone’ of legal interpretation ‘is not the specific thoughts in the heads of any particular historical people’—whether at Philadelphia, in Congress, or in society at large—but rather the hypothetical understandings of a reasonable person who is artificially constructed by lawyers.” (citation omitted) (quoting Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006))); 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, 765 (2009) (“[T]he reason for the priority of the lawyer’s interpretation of the document is that it is understood to be better than, and to take priority over, the lay person’s.”); cf. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2130 n.6 (2022) (“The job of judges is . . . to resolve *legal* questions presented in particular cases or controversies. That ‘legal inquiry is a refined subset’ of a broader ‘historical inquiry,’ and it relies on ‘various evidentiary principles and default rules’ to resolve uncertainties.” (quoting William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 810–11 (2019))).

114. See, e.g., Solum, *supra* note 109, at 466–67 (“[T]he rule of law might favor giving precedent in the construction zone ‘gravitational force’ in order to produce constitutional norms that are coherent, consistent, and stable.”); Barnett, *supra* note 85, at 263–66 (“[J]udicial constructions of the Constitution that are not inconsistent with original meaning may well be subject to the doctrine of precedent.” (emphasis omitted)).

115. See, e.g., Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729, 1739, 1764–65 (arguing that precedents attempting in good faith to articulate original meaning should be presumed valid).

substantially to widespread misestimation of the extent to which Supreme Court decisionmaking is currently originalist. The gap arises from the originalist Justices' failure to extend their commitment to decide cases based on original constitutional meanings into the domain of decisionmaking about whether to grant certiorari in cases that frame originalist challenges to nonoriginalist precedents that are binding on the lower courts unless and until the Supreme Court overrules them.¹¹⁶ In my view, one might reasonably expect that if originalist Justices believe that fidelity to the Constitution requires that their decisions in “merits” cases must accord with the Constitution’s original meaning, they might also count themselves obliged to vote to grant certiorari in cases presenting plausible, historically based challenges to assertedly nonoriginalist precedents. In any event, it strikes me as an odd lacuna in many originalists’ theories if they hold that originalism has nothing to say about when the Justices should embrace opportunities that the certiorari jurisdiction affords the Court to reconsider and overturn past nonoriginalist rulings.

Nevertheless, neither the originalist Justices nor most of their academic champions appear to have embraced the view that originalist premises have implications for whether and when a Justice should vote to grant certiorari.¹¹⁷ Because I want to define originalism in terms that most self-avowed originalists would embrace, I shall not categorize the ostensibly originalist Justices’ claimed prerogative to shield nonoriginalist precedents from challenge via their votes to deny certiorari as involving a selective deviation from originalist principles. Even so, it is surely no accident—as I shall emphasize below—that ostensibly originalist Justices’ votes about whether to grant certiorari frequently achieve effects that are similar to the practical results of selectively (non)originalist votes on the merits.¹¹⁸

II. Some Examples of Selective Originalism

My aim in this Part is to establish that all of the Justices of the Supreme Court who self-identify as originalists or are plausibly characterized as originalists—like their predecessor originalist Justices—are selective originalists.¹¹⁹ In service of that goal, this Part identifies a number of

116. See *infra* notes 290–98 and accompanying text.

117. See, e.g., Barrett, *supra* note 67, at 1930 (“Even if a petitioner asked the Court to revisit, say, its 1937 conclusion that the Social Security Act is constitutional, there is no chance that the Court would grant certiorari.”).

118. See *infra* notes 328–43 and accompanying text.

119. Academic originalist theorists sometimes deride selective originalist Justices and call for a purer version of originalist practice. See, e.g., Barnett, *Scalia’s Infidelity*, *supra* note 5, at 13–22

doctrinal areas in which Court majorities, with the acquiescence and sometimes with the leadership of originalist Justices, decide some cases on originalist grounds while ignoring or discounting originalist premises in others. In most of the cases I discuss, either the parties or amici raised originalist arguments, as noted in relevant footnotes below. Moreover, my examples all involve issues in which debates about original meaning are well known in the academic literature. Even if the Justices have not read that literature, I assume that their clerks would alert them to the availability of substantial originalist arguments if the Justices instructed their clerks to do so. In addition, in most of the cases in which I refer to the votes of self-identified originalist Justices, one or more other Justices wrote dissenting or concurring opinions in which they adduced evidence—not refuted by the majority—that the Court’s ruling was contrary to a provision’s original meaning. In a short subpart at the end of this Part, I also discuss the rarity of the Court’s reliance on original meanings as its basis for decision during its October 2021 Term.

A. *Article III*

In large domains of Article III doctrine, the Supreme Court decides the majority of its cases based on its own precedents, without close attention to original meanings, even when it is under no legal compulsion to do so. Occasionally, however, the Court cites original history as its ground for decision, thereby exhibiting selective originalism’s ostensibly originalist face.

1. *Standing*.—According to a near consensus among scholars, the modern law of standing is substantially a twentieth-century invention of the Supreme Court.¹²⁰ The centerpiece of modern standing law is a demand that

(criticizing Justice Scalia’s deviations from originalism and calling for a “better approach”). In this Part, I do not deny that consistent or nonselective originalism is a theoretical possibility, nor do I mean to levy criticisms against any academic theorist, though I later express some skepticism of nonselective originalism in Parts IV and V.

120. See, e.g., Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 358 (asserting that the Supreme Court “basically” “just ma[d]e . . . up” the injury-in-fact requirement); James E. Pfander, *Scalia’s Legacy: Originalism and Change in the Law of Standing*, 6 BRIT. J. AM. LEGAL STUDIES 85, 101–02 (2017) (pointing out that “[w]hile Justice Scalia was quite insistent that the injury-in-fact requirement was a crucial element of Article III standing limits, the term did not appear in the Court’s decisions until 1970” and that “[a] careful review of the historical record would seem to refute the injury-in-fact requirement”).

plaintiffs demonstrate injury in fact.¹²¹ By contrast, entitlements to sue in the Founding era flowed from the requirements of various common law and equitable writs, not all of which demanded the pleading of a personal injury to the plaintiff.¹²²

Nevertheless, the Court occasionally bases its standing rulings on originalist premises. It did so, for example, in *Uzuegbunam v. Preczewski*,¹²³ in which eight Justices joined a resolutely originalist opinion by Justice Thomas that upheld a plaintiff's standing to seek nominal damages for a past constitutional violation.¹²⁴ Over the protest of a dissenting opinion that the plaintiff had not established any measurable harm that an award of nominal damages might redress, and thus failed to satisfy the demands of modern doctrine,¹²⁵ the Court relied on Founding-era cases to hold that "every legal injury necessarily causes damage."¹²⁶

Just a few months later, however, five conservative Justices refused to embrace Justice Thomas's originalist analysis in *TransUnion LLC v. Ramirez*.¹²⁷ There, Justice Thomas argued that Founding-era practice supported broad congressional power to authorize suits by parties who had not suffered "injury-in-fact" in cases involving violations of congressionally created "private," as distinguished from public, rights.¹²⁸ In denying standing, the other five conservatives relied primarily on modern standing

121. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) ("[T]o establish standing, a plaintiff must show . . . that he suffered an injury in fact that is concrete, particularized, and actual or imminent . . ."); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (Scalia, J.) ("Over the years, *our cases* have established . . . the irreducible constitutional minimum of standing . . .") (emphasis added).

122. Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 817 (2004) ("A case was justiciable if a plaintiff had a cause of action for a remedy under one of the forms of proceeding at law or in equity."); Ernest A. Young, *Standing, Equity, and Injury in Fact*, 97 NOTRE DAME L. REV. 1885, 1889 (2022) ("[C]ases concerning the justiciability of a plaintiff's claims during the nineteenth century focused on the legal merits—that is, whether the relevant common or statutory law provided the right kind of legal right or entitlement to review."). For the suggestion that the demand for injury-in-fact in suits in equity aligns reasonably well with historical equitable practice, even though the modern Supreme Court has not justified it that way, see Young, *supra*, at 1910.

123. 141 S. Ct. 792 (2021).

124. *Id.* at 798, 802.

125. *Id.* at 806–07 (Roberts, C.J., dissenting) (noting that the majority "spends little time trying to reconcile its analysis with modern justiciability principles").

126. *Id.* at 798 (majority opinion) (emphasis omitted).

127. 141 S. Ct. 2190 (2021).

128. See *supra* note 43 and accompanying text; see also Brief of Constitutional Accountability Center as Amicus Curiae in Support of Respondent at 15–22, *TransUnion*, 141 S. Ct. 2190 (No. 20-297) (presenting to the Court the Founding-era doctrine on which Justice Thomas relied).

cases enforcing a stringent demand for injury-in-fact.¹²⁹ In response to Justice Thomas, the Court’s opinion in *TransUnion* emphasized Founding-era purposes in restricting the judicial branch to the adjudication of actual cases or controversies,¹³⁰ but it made no effort to engage with the dissent at a more granular level by challenging Justice Thomas’s readings of Founding-era authorities. Instead, the *TransUnion* majority ignored those authorities as if they had been rendered irrelevant by what Chief Justice Roberts, dissenting in *Uzuegbunam*, called “modern justiciability principles.”¹³¹

2. *Non-Article III Judicial Tribunals.*—Beginning with a 1982 decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,¹³² the Supreme Court has often affirmed that Congress’s capacity to employ legislative courts and administrative agencies—as distinguished from Article III judges—to adjudicate legal disputes¹³³ is constrained by original historical understandings of Article III, which vests “the judicial Power of the United States” in life-tenured judges appointed by the President and confirmed by the Senate.¹³⁴ But a number of the originalist Justices have not been consistent in limiting congressional reliance on non-Article III adjudicative tribunals based on norms prevailing at the Founding. For example, the originalist Justices have largely upheld agency adjudication of “private rights” disputes by federal agencies administering regulatory statutes on the theory, often traced to the 1932 case of *Crowell v. Benson*,¹³⁵ that federal courts exercising limited powers of review retain “the essential attributes of the judicial power.”¹³⁶ With the concurrence of originalist

129. See *TransUnion*, 141 S. Ct. at 2204 (majority opinion) (principally relying on cases including *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014); *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); and *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992)).

130. See *id.* at 2203 (noting, *inter alia*, James Madison’s observation at the Constitutional Convention that the power of the federal judiciary was limited to resolving cases “of a Judiciary Nature”).

131. *Uzuegbunam*, 141 S. Ct. at 806 (Roberts, C.J., dissenting).

132. 458 U.S. 50 (1982).

133. See, e.g., RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 345–411 (7th ed. 2015) [hereinafter *HART & WECHSLER*] (discussing congressional authority to allocate judicial power to non-Article III tribunals).

134. U.S. CONST. art. III, § 1.

135. 285 U.S. 22 (1932).

136. *Id.* at 51; see, e.g., *Stern v. Marshall*, 564 U.S. 462, 503–05 (2011) (Scalia, J. concurring) (joining the Court’s opinion because “I agree with the Court’s interpretation of our Article III precedents” and observing that “[l]eaving aside certain adjudications by federal administrative

Justices, the Court has sometimes also allowed adjudication by administrative agencies based on the parties' consent¹³⁷ without substantial inquiry into how consent might have mattered to the Founding generation.¹³⁸

B. *First Amendment Freedom of Speech*

The constitutional law of the United States recognizes broader free speech rights than any other liberal democracy.¹³⁹ Subject only to a few exceptions, the Supreme Court has held that any governmental restrictions linked to the message that an utterance conveys are constitutionally impermissible unless they can be justified as narrowly tailored to protect a compelling governmental interest.¹⁴⁰ Leading scholars have found no

agencies, which are governed (for better or worse) by our landmark decision in *Crowell v. Benson*, 285 U.S. 22 (1932), in my view an Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary”).

137. See *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 686 (2015) (Alito, J., concurring) (joining a Court opinion upholding adjudication by a non-Article III bankruptcy court based on the parties' consent because “[w]hatever one thinks of” a prior precedent according significance to consent, “it is still the law of this Court, and the parties do not ask us to revisit it”). *But cf.* Brief for Respondent at 39–40, *Wellness Int'l*, 575 U.S. 665 (No. 13-935) (arguing that the Framers did not originally permit consent to overcome separation of powers violations). Chief Justice Roberts, joined by Justices Scalia and Thomas, dissented. *Wellness Int'l*, 575 U.S. at 687 (Roberts, J., dissenting). Chief Justice Rehnquist had joined the Court opinion upholding the jurisdiction of a federal agency to adjudicate a common law, private rights claim in the relevant precedent, *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). *But see* Brief for Respondent at 17–23, 27–28, *Schor*, 478 U.S. 833 (No. 85-621) (suggesting that the original scope of Article III foreclosed the Court's result).

138. See F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 731 (2018) (“Permitting parties to authorize Article I adjudication through their consent has no basis in the constitutional text, historical practice, or the reasons underlying the creation of an independent judiciary.”).

139. See Mila Versteeg, *What Europe Can Teach America About Free Speech*, ATLANTIC (Aug. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/08/what-europe-can-teach-america-about-free-speech/537186/> [<https://perma.cc/NSM2-U325>] (comparing American free speech laws to their more restrictive counterparts in Europe).

140. See, e.g., *United States v. Stevens*, 559 U.S. 460, 469 (2010) (rejecting regulations on depicting animal cruelty because they are content-based and there is no “tradition excluding depictions of animal cruelty” from First Amendment protection); *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 792, 795 (2011) (Scalia, J.) (relying on *Stevens* to reject regulations on violent video games because there was no “longstanding tradition in this country of specially restricting children's access to depictions of violence”). *But see* Reply Brief for the United States at 12 n.8, *Stevens*, 559 U.S. 460 (No. 08-769) (briefly noting that “had the Framers been confronted with this case, nothing suggests that they would have offered the producers of crush videos or videos of brutal dogfights a First Amendment shield, especially because animal cruelty was illegal even then”); Brief of Amicus Curiae Common Sense Media in Support of Petitioners at 12–17, *Brown*, 564 U.S. 786 (No. 08-1448) (using Founding-era evidence to argue that “[f]or anyone guided by history, the conclusion that children as an audience do not have [a] constitutionally protected right to violent video games is inevitable,” *id.* at 17).

justification for either the presumptive demand for content-neutrality or the strict scrutiny test for permissible speech regulation in the Founding-era history of the First Amendment.¹⁴¹ To the contrary, esteemed historians have maintained that the original understanding of “the freedom of speech” was narrowly limited to prohibiting “prior restraints” and, possibly, to banning prosecutions for “seditious libel.”¹⁴² More recent scholars, including Professors Jud Campbell and Genevieve Lakier, have concluded instead that the protective reach of the free speech guarantee spread more broadly during the Founding era but tolerated a host of regulations that were reasonably designed to promote the public welfare.¹⁴³ According to their research, no showing of compelling necessity was required to justify prohibitions against libel, blasphemy, obscenity, speech that disturbed the peace, and much more.¹⁴⁴

Despite the substantial exclusion of originalist reasoning from a large sample of modern free speech cases, selective invocations of originalism abound. For instance, Justices Thomas and Gorsuch have recently called for a reexamination of the Court’s iconic decision in *New York Times Co. v. Sullivan*¹⁴⁵—which precludes public officials from suing successfully for libel unless the defendant uttered a knowing falsehood or exhibited reckless

141. Historians of the First Amendment have characteristically maintained either that the Founders predominantly understood the Free Speech Clause as having a narrow reach (by modern standards), *see, e.g.*, LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* xii–xv (1985) (arguing that the original understanding of the First Amendment would allow laws not tolerated today), or that the Founding generation widely viewed the Free Speech Clause as broad in scope but readily tolerating restrictions that served the public interest, *see, e.g.*, Jud Campbell, *Natural Rights and the First Amendment*, 127 *YALE L.J.* 246, 259 (2017) (“Founding Era constitutionalism allowed for restrictions of natural liberty to promote the public good—generally defined as the good of the society as a whole.”); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 *HARV. L. REV.* 2166, 2169–70 (2015) (arguing that “eighteenth- and nineteenth-century courts employed what we might call a broad but shallow conception of freedom of speech and press”).

142. *See, e.g.*, LEVY, *supra* note 141, at xi–xv (maintaining that the framers did not intend to “abolish the common law of seditious libel” and reviewing scholarship to the contrary); *see also* DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 61 (2010) (suggesting “the First Amendment was *not* understood to outlaw prosecutions for seditious libel”).

143. *See* Campbell, *supra* note 141, at 259 (arguing that speech and press freedoms in the Founding era were expansive in scope but weak in legal effect); Lakier, *supra* note 141, at 2169–70 (arguing that early American courts employed a “broad but shallow” approach to the First Amendment under which speech that was not categorically excluded from constitutional protection could be penalized if it posed a “threat to the public order”).

144. *See* Campbell, *supra* note 141, at 259–60 (“Founding Era constitutionalism allowed for restrictions of natural liberty to promote the public good”); Lakier, *supra* note 141, at 2195 (asserting that “[t]he general rule in the eighteenth and nineteenth centuries was that speech . . . could be sanctioned criminally whenever it threatened, as Justice Story put it, to “disturb the public peace, or . . . subvert the government”).

145. 376 U.S. 254 (1964).

disregard for the truth¹⁴⁶—based on evidence of the First Amendment’s original meaning.¹⁴⁷

Another example of the selective role of originalism in free speech jurisprudence came in *Citizens United v. Federal Election Commission*,¹⁴⁸ which invalidated a federal statute prohibiting corporations from engaging in political campaign advertising.¹⁴⁹ Prior to *Citizens United*, the Supreme Court’s case law involving the regulation of campaign advertising had developed with few references to the original meaning of the Free Speech Clause.¹⁵⁰ But Justice John Paul Stevens, who dissented in *Citizens United*, argued that the Court’s ruling—which ostensibly originalist Justices joined—had no foundation in the original understanding of the First Amendment.¹⁵¹ According to Justice Stevens, the Founding generation viewed corporations as possessing only such powers and prerogatives as the legislature chose to grant them.¹⁵² Predictably, Stevens’s dissent provoked a concurring opinion by Justice Scalia, attempting an originalist defense of the majority opinion despite its lack of explicitly originalist reasoning.¹⁵³ Justice Scalia’s argumentative strategy was to assign the burden of proof to the dissent: he maintained that Justice Stevens had failed to demonstrate that the original meaning of the Free Speech Clause would *not* have protected corporate shareholders, who possessed individual speech rights, when they chose to join together and speak through the corporate form.¹⁵⁴ However one judges

146. *Id.* at 279–80.

147. *E.g.*, *Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr.*, 142 S. Ct. 2453, 2454–55 (2022) (Thomas, J., dissenting from denial of certiorari); *Berisha v. Lawson*, 141 S. Ct. 2424, 2424–26 (2021) (Thomas, J., and Gorsuch, J., dissenting from denial of certiorari); *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in the denial of certiorari).

148. 558 U.S. 310 (2010).

149. *Id.* at 321, 372.

150. *See generally, e.g.*, *McConnell v. FEC*, 540 U.S. 93 (2003) (addressing free speech issues almost entirely within the framework judicial doctrine); *Austin v. Mich. State Chamber of Com.*, 494 U.S. 652 (1990) (not mentioning original meaning).

151. *See Citizens United*, 558 U.S. at 425–32 (Stevens, J., concurring in part and dissenting in part) (maintaining that “there is not a scintilla of evidence to support the notion that anyone believed [the First Amendment] would preclude regulatory distinctions based on the corporate form”).

152. *See id.* at 425–28 (explaining that “[t]hose few corporations that existed at the founding were authorized by grant of a special legislative charter”).

153. *See id.* at 392 (Scalia, J., concurring) (defending “the conformity of [the majority] opinion with the original meaning of the First Amendment”).

154. *See id.* at 385–86 (“[The dissent] never shows why ‘the freedom of speech’ that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form.”). *But cf.* Brief of the League of Women Voters of the United States and Constitutional Accountability Center as Amici Curiae in Support of Appellee at 13–19, *Citizens United*, 558 U.S. 310 (No. 08-205) (arguing that Founding-era corporations were presumed to have fewer rights than individuals).

the persuasiveness of the relatively brief originalist arguments by Justices Stevens and Scalia in *Citizens United*, appeals to evidence of the original constitutional understanding constitute a subtheme, at most, in the Supreme Court's free speech jurisprudence, which many legal historians maintain deviates significantly from original constitutional understandings.

C. *Equality Norms*

As with free speech doctrine, much of the Supreme Court's case law involving "the equal protection of the laws" has developed with little specific attention to original constitutional meanings. The Court's deliberations in *Brown v. Board of Education*¹⁵⁵ marked a partial exception. After an initial argument, the Justices asked for additional briefing devoted to the original meaning of the Fourteenth Amendment,¹⁵⁶ but the resulting research failed to provide the support that some of the Justices had apparently hoped for.¹⁵⁷ In the end, Chief Justice Warren's opinion characterized the historical sources as "inconclusive"¹⁵⁸ but found other ample justification for holding that school segregation violated the Equal Protection Clause.¹⁵⁹

Post-*Brown* cases, mostly without close attention to original meanings or understandings of the Fourteenth Amendment, have held that all race-based classifications, including for purposes of affirmative action, trigger strict judicial scrutiny;¹⁶⁰ decreed that sex-based classifications are impermissible unless substantially related to important governmental

155. 347 U.S. 483 (1954).

156. *See id.* at 488–89 (explaining that the Court heard reargument on the Fourteenth Amendment issue).

157. *Cf.* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995) (citing, though ultimately claiming to refute, a near consensus of constitutional scholars that "*Brown* was inconsistent with the original understanding of the Fourteenth Amendment").

158. *Brown*, 347 U.S. at 489.

159. *See id.* at 492–95 (finding that "[s]eparate educational facilities are inherently unequal.").

160. *See, e.g.*, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2166–73 (2023) (holding that universities must comply with strict scrutiny in admissions processes); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227–35 (1995) ("There is nothing new about the notion that Congress, like the States, may treat people differently because of their race only for compelling reasons."); *id.* at 239 (Scalia, J., concurring in part and concurring in the judgment) (opining that the government can never meet the strict scrutiny standard when its aim is to rectify past discrimination); *id.* at 240 (Thomas, J., concurring in part and concurring in the judgment) (agreeing with the majority "that strict scrutiny applies to *all* government classifications based on race"). *But see, e.g.*, Brief of Howard University as Amicus Curiae in Support of Respondents at 19, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) ("The exercise of race-conscious measures to avoid participation in and perpetuation of discrimination is wholly consistent with the original intent of the framers of the Fourteenth Amendment.").

purposes;¹⁶¹ laid down the one-person, one-vote principle;¹⁶² and ruled that deliberate efforts to create majority–minority voting districts are invalid unless necessary to promote compelling governmental interests.¹⁶³ Conservative Justices protested some of these decisions on originalist grounds,¹⁶⁴ but they have deployed originalist arguments only selectively. For example, conservative Justices dominated the Court majorities that initially subjected affirmative action and majority–minority voting districts to strict judicial scrutiny, mostly without claiming support for their rulings in the original understanding of the Fourteenth Amendment,¹⁶⁵ which many scholars believe was not historically understood to confer any voting rights at all.¹⁶⁶

161. *E.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996).

162. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 567–68 (1964) (“The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.”). *But see* State Appellees’ Brief at 20, *Shaw v. Reno*, 509 U.S. 630 (1993) (No. 92-357) (arguing that the ultimately victorious “proposal is contrary both to the original meaning of the Equal Protection Clause and to the cases interpreting the Clause”).

163. *See, e.g.*, *Shaw*, 509 U.S. at 649 (concluding that a plaintiff may bring an Equal Protection claim “by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification”); *Miller v. Johnson*, 515 U.S. 900, 904–05 (1995) (“In *Shaw v. Reno*, we recognized that these equal protection principles govern a State’s drawing of congressional districts, though, as our cautious approach there discloses, application of these principles to electoral districting is a most delicate task.” (citation omitted)).

164. *See, e.g.*, *Reynolds*, 377 U.S. at 590–91 (Harlan, J., dissenting) (arguing that “the Equal Protection Clause was never intended to inhibit the States in choosing any democratic method they pleased for the apportionment of their legislatures” as demonstrated “by the language of the Fourteenth Amendment taken as a whole, by the understanding of those who proposed and ratified it, and by the political practices of the States at the time the Amendment was adopted”).

165. *See, e.g.*, EDWARD A. PURCELL, JR., ANTONIN SCALIA AND AMERICAN CONSTITUTIONALISM: THE HISTORICAL SIGNIFICANCE OF A JUDICIAL ICON 262 (2020) (noting that Justice Scalia “ignored originalist historical evidence in condemning affirmative action”); Joel K. Goldstein, *Calling Them as He Sees Them: The Disappearance of Originalism in Justice Thomas’s Opinions on Race*, 74 MD. L. REV. 79, 80 (2014) (“Justice Thomas has not explained or even acknowledged the absence of an originalist presentation from his jurisprudence in constitutional cases dealing with race . . .”). For arguments that the Equal Protection Clause was not originally understood to bar racial preferences for members of disadvantaged groups, see, for example, Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985) and Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 431–32 (1997).

166. *See, e.g.*, Earl M. Maltz, *A Minimalist Approach to the Fourteenth Amendment*, 19 HARV. J.L. & PUB. POL’Y 451, 453 (1996) (“[T]he historical record is clearly inconsistent with the view that the Fourteenth Amendment was understood to protect political rights.”); Jeffrey Rosen, *Conservatives v. Originalism*, 19 HARV. J.L. & PUB. POL’Y 465, 465 (1996) (“The voting rights cases are perhaps the most flamboyant example of the conservatives Justices’ betrayal of their originalist principles.”).

More recently, originalist scholarship has taken an interesting turn. Increasingly, originalist scholars maintain that many of the Supreme Court's pathbreaking decisions forbidding race and gender discrimination were correct in their results, but that some should have been based on the Privileges or Immunities Clause, not the Equal Protection Clause.¹⁶⁷ It remains to be seen whether the Court's originalist Justices may embrace this view.

Bolling v. Sharpe,¹⁶⁸ which was a companion case to *Brown v. Board of Education*, held that the Due Process Clause of the Fifth Amendment—which was ratified in 1791, at a time when the Constitution tolerated slavery—bound the federal government to the same equality norms that apply against the states under the Equal Protection Clause.¹⁶⁹ Although *Bolling* made no pretense of reflecting the Due Process Clause's original meaning,¹⁷⁰ the selectively originalist Justices Rehnquist and Thomas joined an opinion that relied on *Bolling* to subject affirmative action by the federal government to strict judicial scrutiny in *Adarand Constructors, Inc. v. Peña*.¹⁷¹ Justice Scalia concurred in the result, also without reference to the original meaning of the Due Process Clause.¹⁷²

In a recent case applying equal protection norms to Congress's treatment of residents of Puerto Rico,¹⁷³ a concurring opinion by Justice Thomas drew on work by originalist scholars to suggest that although *Bolling* was wrong to conclude that the Due Process Clause forbids race discrimination by the federal government,¹⁷⁴ the Citizenship Clause of the

167. See, e.g., BARNETT & BERNICK, *supra* note 82, at 6 (asserting that the “original meaning of the Privileges or Immunities Clause strongly supports the outcome in *Brown*”); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1665–66 (concluding that the Privileges or Immunities Clause protects women against discrimination regarding fundamental rights); see also Stephen M. Griffin, *Optimistic Originalism and the Reconstruction Amendments*, 95 TUL. L. REV. 281, 282–84 (2021) (discussing the emergence of recent, “optimistic” originalist scholarship that “directly counters the widespread impression and influential criticism that adoption of originalism would put in question many cherished United States Supreme Court precedents” upholding civil rights).

168. 347 U.S. 497 (1954).

169. *Id.* at 499–500.

170. See Peter J. Rubin, *Taking Its Proper Place in the Constitutional Canon: Bolling v. Sharpe, Korematsu, and the Equal Protection Component of Fifth Amendment Due Process*, 92 VA. L. REV. 1879, 1880 (2006) (calling it “widely accepted” that reverse incorporation “cannot be easily justified by the Fifth Amendment’s text or its history”).

171. 515 U.S. 200, 224, 235 (1995).

172. *Id.* at 239 (Scalia, J., concurring in part and concurring in the judgment).

173. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1541 (2022).

174. See *id.* at 1544–45 (Thomas, J., concurring) (“Although I have joined the Court in applying this doctrine, I now doubt whether it comports with the original meaning of the Constitution.” (citation omitted)).

Fourteenth Amendment may do so.¹⁷⁵ In Thomas's view, the Court should now consider the possible application of the original meaning of the Citizenship Clause to race discrimination by the federal government.¹⁷⁶ That proposal, offered only after it became plausible to expect that originalist evidence might support the result that Thomas had endorsed on precedent-based grounds in *Adarand*, may be broadly suggestive of the circumstances under which selectively originalist Justices may wish to reconsider nonoriginalist precedents whose outcomes they approve.

D. *Enforcement Provisions of the Civil War Amendments*

The Court's originalist Justices have largely also avoided serious engagement with historical arguments that the "enforcement" provisions of the Civil War Amendments were originally intended and understood to give Congress broad authority to specify the content of those Amendments' vaguely worded guarantees.¹⁷⁷ Instead, the modern Court, with the concurrence of its originalist Justices, has trumpeted the dictum of *Marbury v. Madison*¹⁷⁸ that it is the province of the judicial branch to say what the law is in constitutional cases.¹⁷⁹

E. *"Procedural Originalism" and Nonoriginalism*

A recent article by Professor Mila Sohoni documents an emergent phenomenon of "procedural originalism"¹⁸⁰ regarding "subjects taught in the

175. *See id.* at 1544 ("Firmer ground for prohibiting the Federal Government from discriminating on the basis of race, at least with respect to civil rights, may well be found in the Fourteenth Amendment's Citizenship Clause.").

176. *Id.* at 1547.

177. *See, e.g.,* *City of Boerne v. Flores*, 521 U.S. 507, 527 (1997) ("Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by *our case law.*" (emphasis added)); *United States v. Morrison*, 529 U.S. 598, 601–02, 619, 627 (2000) (relying principally on precedent in concluding "that Congress' power under § 5 does not extend to the enactment of" a statute creating a private cause of action for violence against women). For contrary arguments based on claims about original meaning, see, for example, Brief of Respondent Flores at 38, *Boerne*, 521 U.S. 507 (No. 95-2074); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1805 (2010); Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 766 (1998); Evan H. Caminker, "Appropriate" *Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1159 (2001); and Ruth Colker, *The Supreme Court's Historical Errors in City of Boerne v. Flores*, 43 B.C. L. REV. 783, 783–84 (2002).

178. 5 U.S. (1 Cranch) 137 (1803).

179. *Id.* at 177; *see, e.g., Morrison*, 529 U.S. at 616 n.7 (affirming that "ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text").

180. Sohoni, *supra* note 5.

typical civil procedure course.”¹⁸¹ Her baseline in identifying the spread of procedural originalism involves “open and notorious nonoriginalism in blackletter civil procedure law.”¹⁸² As she points out, until recent years, leading champions of originalism had seldom highlighted procedural doctrines.¹⁸³ In Sohoni’s view, moreover, numerous rules that lie at the heart of the field would likely be vulnerable to originalist objections.¹⁸⁴ She instances three doctrines as paradigmatic of nonoriginalism in civil procedure.

First, Article III authorizes federal diversity jurisdiction over “Controversies . . . between Citizens of different States.”¹⁸⁵ According to Sohoni, persuasive evidence points to the conclusion that the Founding generation understood the word “States” to mean states.¹⁸⁶ Nevertheless, in *National Mutual Insurance Co. v. Tidewater Transfer Co.*,¹⁸⁷ a fractured Supreme Court upheld a decision by Congress to classify the District of Columbia as a “State” for purposes of the statutory grant of diversity jurisdiction to the federal courts.¹⁸⁸ That decision remains controlling precedent.

Second, the Supreme Court has held that corporations are “citizens” of both the states in which they are incorporated and the states in which their principal place of business is located for purposes of federal “diversity” jurisdiction.¹⁸⁹ According to Sohoni, corporations were not “citizens” within the original meaning of Article III’s authorization of jurisdiction in cases

181. *Id.* at 952–53.

182. *Id.* at 972.

183. *See id.* at 956–60 (observing that “the ‘original’ originalists had little to say about civil procedure” and giving examples).

184. *See id.* at 947 (maintaining that a “full-scale return to original meaning in civil procedure could jeopardize diversity jurisdiction over corporations, [leading decisions on personal jurisdiction], summary judgment, declaratory judgments, and many other fixtures of extant procedural law” (footnotes omitted)).

185. U.S. CONST. art. III, § 2, cl. 1.

186. *See Sohoni, supra* note 5, at 975–77 (arguing that D.C. is not a “State” if that word is given its original meaning).

187. 337 U.S. 582 (1949).

188. *Id.* at 600 (plurality opinion); *id.* at 617 (Rutledge, J., concurring in the judgment).

189. On the complex history that resulted in this interpretation, see Sohoni, *supra* note 5, at 980–81. *See also* 28 U.S.C. § 1332(c)(1) (“[A] corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . .”).

involving diversity of citizenship.¹⁹⁰ Other commentators concur.¹⁹¹ Yet today corporations are among the principal beneficiaries of federal diversity jurisdiction.¹⁹²

Third, Sohoni points to the test for “personal jurisdiction” traceable to *International Shoe Co. v. Washington*,¹⁹³ which held that a party, including a corporation, may be subject to the jurisdiction of a state court if it has “minimum contacts” with the state in question “such that the maintenance of the suit [there] does not offend ‘traditional notions of fair play and substantial justice.’”¹⁹⁴ “In justifying this test,” Sohoni writes, “the *International Shoe* Court did little more than vaguely allude to the ‘purpose’ of the Due Process Clause—not its text or original meaning”¹⁹⁵ According to Professor Stephen Sachs, the *International Shoe* test for personal jurisdiction has “no better source than the pen of Chief Justice Stone,”¹⁹⁶ who authored it.

In other areas of civil procedure doctrine, however, Professor Sohoni notes that the Supreme Court has begun to exhibit a keen interest in enforcing original constitutional meanings. One example comes from decisions defining and limiting the authority of the Article III courts to issue equitable remedies.¹⁹⁷ In *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*,¹⁹⁸ decided in 1999, the Court embraced an originalist historical test for federal courts’ authority to issue injunctions. Writing for the Court in that case, Justice Scalia associated the equitable jurisdiction conferred by the 1789 Judiciary Act with “the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.”¹⁹⁹ Dissenting, Justice Ginsburg protested that “we have never limited federal equity jurisdiction to the specific practices and remedies of the pre-Revolutionary

190. Sohoni, *supra* note 5, at 978–82.

191. See Mark Moller & Lawrence B. Solum, *Corporations and the Original Meaning of “Citizens” in Article III*, 72 HASTINGS L.J. 169, 173 (2020) (arguing that “[c]orporations were not citizens in the 1780s and did not become so through the Fourteenth Amendment”).

192. Sohoni, *supra* note 5, at 978.

193. 326 U.S. 310 (1945).

194. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

195. Sohoni, *supra* note 5, at 985.

196. Stephen E. Sachs, *Pennoyer Was Right*, 95 TEXAS L. REV. 1249, 1314 (2017).

197. See Sohoni, *supra* note 5, at 966–69 (pointing to multiple recent Supreme Court cases).

198. 527 U.S. 308 (1999).

199. *Id.* at 318 (quoting *Atlas Life Ins. Co. v. W.I. S., Inc.*, 306 U.S. 563, 568 (1939)).

Chancellor”²⁰⁰ and worried that the Court’s test might have precluded the federal injunctions necessary to enforce *Brown v. Board of Education*.²⁰¹

Another, more incipient example of the Supreme Court’s selective originalism in the field of civil procedure comes from recent decisions upholding personal jurisdiction based on minimum contacts—the longtime domain of *International Shoe*. In *Ford Motor Co. v. Montana Eighth Judicial District Court*,²⁰² the Court, in an opinion by Justice Kagan, applied the *International Shoe* test to uphold personal jurisdiction over Ford based on its marketing, sales, and service activities in two states in which it had been sued.²⁰³ But Justice Gorsuch, joined by Justice Thomas, concurred only in the judgment. “[T]he right question,” he asserted, was “what the Constitution as originally understood requires, not what nine judges consider ‘fair’ and ‘just.’”²⁰⁴ Justice Alito commented favorably on Justice Gorsuch’s proposal to consider doctrinal revisions based on the Constitution’s text and history.²⁰⁵

A fractured Supreme Court stopped just short of conducting that inquiry in *Mallory v. Norfolk Southern Railway Co.*,²⁰⁶ which held that a Pennsylvania statute requiring out-of-state corporations to consent to personal jurisdiction in the state’s courts as condition of doing business there did not violate the Due Process Clause.²⁰⁷ Writing in part for a majority and in part only for a plurality,²⁰⁸ Justice Gorsuch found that *International Shoe* was distinguishable based on Norfolk Southern Railway’s consent to the jurisdiction that it subsequently challenged.²⁰⁹ In a part of his opinion joined

200. *Id.* at 336 (Ginsburg, J., concurring in part and dissenting in part).

201. *Id.* at 337 & n.4. In charting the Supreme Court’s selectivity in applying originalist principles to civil procedure cases in the relatively recent past, Professor Sohoni highlights the voting practices of Justice Scalia. According to her summary, Justice Scalia cited originalist grounds for decision in some civil procedure cases, Sohoni, *supra* note 5, at 958–59, but “voiced no originalist objection” to rulings “that applied the framework established in *International Shoe* or that glossed the doctrines applicable to corporations suing in diversity.” *Id.* at 959 (footnotes omitted).

202. 141 S. Ct. 1017 (2021).

203. *Id.* at 1032.

204. *Id.* at 1036 n.2 (Gorsuch, J., concurring).

205. *See id.* at 1032 (Alito, J., concurring) (“To be sure, for the reasons outlined in Justice Gorsuch’s thoughtful opinion, there are grounds for questioning the standard that the Court adopted in *International Shoe* . . .”).

206. 143 S. Ct. 2028 (2023).

207. *See id.* at 2032–33 (“Norfolk Southern argues that the Due Process Clause entitles it to a more favorable rule, one shielding it from suits even its employees must answer. . . . Nothing in the Due Process Clause requires such an incongruous result.”).

208. Justices Thomas, Sotomayor, and Jackson joined the entirety of Justice Gorsuch’s opinion, *id.* at 2031, and Justice Alito, who concurred in the judgment, joined Parts I and III–B, *id.* at 2055.

209. *See id.* at 2038 (plurality opinion) (“The two precedents sit comfortably side by side.”).

only by a plurality, he cited evidence of the original meaning of the Fourteenth Amendment in support of his conclusion that a pre-*International Shoe* precedent controlled the outcome.²¹⁰ By contrast, the avowedly originalist Justice Barrett wrote for four dissenters in an opinion that rejected the majority's interpretation of relevant precedents and did not discuss the Fourteenth Amendment's original meaning.²¹¹ And Justice Alito, who joined Justice Gorsuch's opinion only in part, expressed doubt about whether Pennsylvania's requirement that foreign corporations must consent to the personal jurisdiction of Pennsylvania courts in order to register to do business there could survive scrutiny under modern dormant Commerce Clause doctrine²¹²—even though originalist Justices have often questioned whether that doctrine comports with the Commerce Clause's original meaning.²¹³

F. *The Fourth Amendment*

Although I have not sought to corroborate his findings, Professor Lawrence Rosenthal concludes that the Supreme Court is only selectively originalist in Fourth Amendment cases and, in particular, that “Justice Scalia voted on originalist grounds in only 18.63% of cases in which the Court decided a disputed question of Fourth Amendment law.”²¹⁴ During Justice

210. *See id.* at 2033–37 (citing Founding-era and nineteenth century practice, treatises, and case law as well as Supreme Court precedents); *see also* Mark Joseph Stern, *Neil Gorsuch's Quirky Originalism Just Dealt a Major Blow to Corporate America*, SLATE (June 28, 2023, 3:32 PM), <https://slate.com/news-and-politics/2023/06/neil-gorsuch-supreme-court-originalism-corporations-lose.html> [<https://perma.cc/7AGQ-7KWU>] (characterizing *Mallory* as a “surprising blow to the business bar that is rooted in an unusually rigorous application of originalism”).

211. *See Mallory*, 143 S. Ct. at 2055 (Barrett, J., dissenting) (asserting that the state jurisdictional rule that the Court embraced “flies in the face of our precedent” and maintaining that although the Court “does not formally overrule our traditional contacts-based approach to jurisdiction, . . . it might as well”).

212. *See id.* at 2052–54 (Alito, J., concurring in part) (discussing how the doctrine would apply).

213. *See, e.g.*, *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 260, 263 (1987) (Scalia, J., concurring in part and dissenting in part) (stating that there are “no grounds” for reading the Commerce Clause to restrict state regulatory power in the absence of congressional legislation); *United Haulers Ass'n v. Oneida-Hermiker Solid Waste Mgmt. Auth.*, 550 U.S. 330, 349 (2007) (Thomas, J., concurring in the judgment) (stating that an interpretation of the Commerce Clause as restricting state regulatory power has “no basis”); *Comptroller of the Treasury of Md. v. Wynne*, 575 U.S. 542, 572–74 (2015) (Scalia, J., dissenting) (calling the Dormant Commerce Clause “judicial fraud”); *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2100–01 (2018) (Gorsuch J., concurring) (“My agreement with the Court's discussion of the history of our dormant commerce clause jurisprudence, however, should not be mistaken for agreement with all aspects of the doctrine.”).

214. Rosenthal, *supra* note 5, at 99–100.

Scalia's tenure on the Court, Rosenthal finds, Justice Thomas's "votes were premised on originalist grounds in only 15.71% of cases."²¹⁵

G. *The Takings Clause*

In *Lucas v. South Carolina Coastal Council*,²¹⁶ Justice Scalia's opinion for the Court held that the Takings Clause restricts "regulatory as well as physical deprivations" of property, despite acknowledging historical evidence—which was adduced by the dissenting opinion—that the Clause was not originally understood to do so.²¹⁷ Instead, Justice Scalia based his decision on judicial precedents and on what he termed "the historical compact recorded in the Takings Clause that has become part of our constitutional culture."²¹⁸ As written by an avowedly originalist Justice, *Lucas* epitomizes selective (non)originalism.²¹⁹

H. *Further Examples*

In many of the cases discussed in previous subparts of this Part, the Supreme Court has actively applied nonoriginalist precedents in recent years. But those cases may represent only the tip of an iceberg. If one looks at doctrinal areas in which the Justices have displayed no active interest in considering or reconsidering original meanings through their use of the certiorari jurisdiction, leading commentators have affirmed with great confidence that a larger number of important and seemingly settled precedents are nonoriginalist. Without endorsing specific claims, I note the pronouncements of highly reputed scholars that decisions and doctrines potentially vulnerable to overruling by the Supreme Court on the ground that they deviate from original constitutional meanings include those establishing:

215. *Id.*; see also Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 793 n.135 (1994) ("[I]f we look at the original design of the Fourth Amendment, we see that its text, history, structure, and early implementation do not support the exclusionary rule.").

216. 505 U.S. 1003 (1992).

217. *Id.* at 1028 n.15; see also Brief of Amicus Curiae State of California in Support of Respondent at 7, *Lucas*, 505 U.S. 1003 (No. 91-453) ("Constitutional scholars have established that the drafters of the Takings Clause 'intended the clause to have narrow legal consequences: It was to apply only to the federal government and only to physical takings.'" (quoting Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708 (1985))).

218. *Lucas*, 505 U.S. at 1028.

219. See, e.g., William W. Fisher III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393, 1394–95 (1993) (highlighting Justice Scalia's inconsistent justifications in constitutional cases); Kathleen M. Sullivan, *The Jurisprudence of the Rehnquist Court*, 22 NOVA L. REV. 741, 759 (1998) (discussing Justice Scalia's nonoriginalism in *Lucas*).

- The validity of the status of paper money as legal tender;²²⁰
- The permissibility of the Social Security system;²²¹
- The right of indigent defendants to appointed lawyers and waivers of applicable fees in a variety of contexts;²²²
- The permissibility of criminal defendants' waivers of their rights to a jury trial in the Article III courts.²²³

I. Evidence from the 2021 Term

Further evidence of the selectivity of the current Justices' originalism comes from an examination of the Court's constitutional cases from its 2021 Term. In seeking to distinguish originalist from nonoriginalist opinions, I worked with two research assistants who began by collecting and examining the opinions for all of the sixty merits cases that the Court resolved during that year. Thirty-eight of the sixty included no disputed constitutional questions, broadly defined. With regard to the twenty-two constitutional cases,²²⁴ we classified opinions as originalist if they *either* (1) engaged in

220. See, e.g., Monaghan, *supra* note 86, at 744 (asserting the inconsistency of the Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871), with the Constitution's original meaning).

221. See *id.* at 733 (arguing that "the very transfer of money from the national government to state governments and their political subdivisions undercuts the historical premises of 1789 federalism" (footnote omitted) and pointing to Social Security as an example).

222. See STRAUSS, *supra* note 142, at 107 (asserting that the right of indigent defendants to have a lawyer appointed was "no part of the original understanding" of the Sixth Amendment).

223. See, e.g., Stephen A. Siegel, *The Constitution on Trial: Article III's Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 SANTA CLARA L. REV. 373, 378 (2012) (arguing that, contrary to modern precedent, the "constitutional text, common law tradition, early federal practice, [early] Supreme Court precedent and nineteenth-century legal theory all support the conclusion that Article III's jury provision established a *per se* rule banning bench trials regardless of defendants' consent").

224. See Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987 (2022) (Free Exercise Clause); City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464 (2022) (Free Speech Clause); Denezpi v. United States, 142 S. Ct. 1838 (2022) (Double Jeopardy Clause); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (Fourteenth Amendment's Due Process Clause); Egbert v. Boule, 142 S. Ct. 1793 (2022) (Fourth Amendment); FEC v. Cruz, 142 S. Ct. 1638 (2022) (Free Speech Clause); Hemphill v. New York, 142 S. Ct. 681 (2022) (Confrontation Clause); Hous. Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253 (2022) (Free Speech Clause); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (Free Exercise and Free Speech Clauses); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (Second Amendment); Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (Supremacy Clause); Siegel v. Fitzgerald, 142 S. Ct. 1770 (2022) (Bankruptcy Clause); Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022) (Free Speech Clause); Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455 (2022) (Eleventh Amendment); United States v. Tsarnaev, 142 S. Ct. 1024 (2022) (Sixth Amendment); United States v. Vaello Madero, 142 S. Ct. 1539 (2022) (Territories Clause and Fifth Amendment Due Process Clause's equal-protection component); United States v. Washington, 142 S. Ct. 1976 (2022) (Supremacy Clause); Vega v.

more than a paragraph of discussion of a constitutional provision's original history in a manner suggesting an intent to discern its original meaning *or* (2) described their analyses as aiming to discover original meanings by, for example, embracing the conclusions about original meaning that a prior decision or a scholarly book or article had provided. Pursuant to those criteria, we identified only five majority opinions that rested their decisions on originalist foundations²²⁵ and only three additional cases in which concurring or dissenting opinions pursued identifiably originalist approaches.²²⁶

Because the classification of opinions as originalist or nonoriginalist undoubtedly requires judgment calls,²²⁷ I cannot give confident assurances

Tekoh, 142 S. Ct. 2095 (2022) (Fifth Amendment); *Thompson v. Clark*, 142 S. Ct. 1332 (2022) (Fourth Amendment); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (Article III standing); *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (Article III standing); *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245 (2022) (per curiam) (Equal Protection Clause).

225. See *Denezpi*, 142 S. Ct. at 1844–45 (defining “offence” in the Double Jeopardy Clause based on how it was “commonly understood in 1791”); *Wilson*, 142 S. Ct. at 1259–60 (describing the “longstanding practice” of legislative censures as “leav[ing] a ‘considerable impression’” that such censures are compatible with the First Amendment (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819))); *Kennedy*, 142 S. Ct. at 2428 (noting that decisions under the Establishment Clause must “faithfully reflec[t] the understanding of the Founding Fathers” (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014))); *Bruen*, 142 S. Ct. at 2127–28 (explaining that because the Second Amendment was “intended to . . . codif[y] a right inherited from our English ancestors,” the lawfulness of a firearm regulation turns on “whether it comport[s] with history and tradition”); *Torres*, 142 S. Ct. at 2463–66 (relying on ratification-era materials to hold that it was the “plan of the Convention” for states to “waive[] their [sovereign] immunity” under Congress’s war powers).

226. See *Dobbs*, 142 S. Ct. at 2300–01 (Thomas, J., concurring) (describing substantive due process as “lack[ing] any basis” in the “[t]ext and history” of the Constitution); *Vaello Madero*, 142 S. Ct. at 1544, 1547–52 (Thomas, J., concurring) (critiquing “the premise that the Due Process Clause of the Fifth Amendment contains an equal protection component” as incompatible with “text and history” and describing the “original meaning” of the Citizenship Clause); *id.* at 1554–56 (Gorsuch, J., concurring) (describing the Insular Cases as incompatible with the “original meaning” of the Constitution); *Shurtleff*, 142 S. Ct. at 1606–07 (Gorsuch, J., concurring in the judgment, joined by Thomas, J.) (describing *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as incompatible with the “original meaning” of the Constitution); *Torres*, 142 S. Ct. at 2477–78 (Thomas, J., dissenting, joined by Alito, Gorsuch, and Barrett, JJ.) (arguing that “[c]onstitutional history and practice” do not support plan-of-the-Convention waiver for Congress’s war powers).

227. Among the sources of difficulty, the Court often discusses a variety of considerations as pertinent to its constitutional decisions, including, in addition to the text and original history of disputed provisions, inferences drawn from constitutional structure, post-ratification history, and judicial precedent. When an opinion discusses multiple pertinent factors, it can sometimes be difficult to ascertain whether the Court regards considerations such as constitutional structure, post-ratification history, and judicial precedent as furnishing evidence of original meanings or as possessing partly independent significance in a multi-factorial or pluralist approach to constitutional adjudication. See, e.g., Barnett & Solum, *supra* note 84 (manuscript at 7–8) (noting that the Court “frequently uses the words ‘history’ and ‘tradition,’ but rarely defines what they mean” or offers a consistent account for how such concepts influence constitutional adjudication).

that other researchers would reach the same tally as my research assistants and I, but I have no doubt that all or nearly all would concur that a substantial majority of the Court's constitutional decisions from the 2021 Term did not employ an explicitly originalist methodology. Of the opinions that my research assistants and I did not classify as originalist, most based their analyses on prior judicial precedents without reference to whether those precedents were themselves decided on originalist grounds.

III. Critique: The Defects and Insidious Consequences of Selective Originalism

As the evidence assembled in Part II establishes, decisionmaking by the current Supreme Court, including by its ostensibly originalist Justices, does not exhibit a consistent or even dominant practice of constitutional originalism. The Justices who sometimes self-identify and are frequently characterized as originalists are, instead, selective originalists. Their originalist practice, if that label applies at all, could be described at least as accurately as a form of what Professors Barnett and Solum call "conservative Constitutional Pluralism":

Conservative Constitutional Pluralism resembles its living constitutional cousin, but it eliminates the modalities of constitutional argument that allow judges to adopt novel constitutional constructions in response to changing values and circumstances. . . . [It] is like originalism, in that it allows for constitutional decisions and doctrines that are justified by the original public meaning of the constitutional text, but it differs from originalism in that it allows departures from the text that are justified on the basis of history, tradition, or longstanding precedent.²²⁸

Overestimates of the role of originalist reasoning in Supreme Court decisionmaking are no accident. Through self-descriptions and reliance on originalist premises in some of their opinions, the originalist Justices signal commitments that they then subordinate or ignore in a substantial fraction of the Court's cases. This practice is regrettable. To employ a rubric that has recently achieved broad currency, selective originalism threatens the Court's "legitimacy" in both the sociological and moral senses of that multi-faceted term.²²⁹

228. Barnett & Solum, *supra* note 84 (manuscript at 18).

229. See FALLON, *supra* note 65, 155–74 (distinguishing moral, legal, and sociological conceptions or senses of legitimacy).

A. *Damage to the Court's Sociological Legitimacy*

The sociological legitimacy of an institution such as the Supreme Court is an empirical phenomenon, involving the public's belief that it is respectable and that its decisions ought to be trusted as competent and disinterested.²³⁰ Recent survey data indicate that public confidence in the Supreme Court is at an all-time low.²³¹ The decline undoubtedly has many causes. Most members of the public may care more about the results that the Court reaches than about the reasons that it proffers for its decisions.²³² Even if so, leading political scientists have concluded that many members of the public strongly disapprove of decisionmaking by the Court that they perceive as disingenuous or unprincipled.²³³

Also not to be overlooked, methodological inconsistency seems especially likely to undermine respect for the Supreme Court among those who follow the Justices' work most closely. Judges, lawyers, and law students seek to ascertain what the law is, and how to counsel those who wish to stay within its evolving bounds, by parsing the Supreme Court's reasoning. When reasoning that insists on the importance of fidelity to originalist principles in some cases subsequently plays no role in the decision of others, those whose business it is to ascertain the implications of the Court's opinions may become cynical, demoralized, or both. They grow to suspect that the Justices sophistically invoke whatever arguments best support the outcomes that they prefer on other, possibly ideological, grounds.²³⁴

230. See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795–96, 1829–30 (2005) (defining and discussing sociological legitimacy).

231. See Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), <https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx> [<https://perma.cc/STQ2-TKXW>] (“Twenty-five percent of U.S. adults say they have ‘a great deal’ or ‘quite a lot’ of confidence in the U.S. Supreme Court, down from 36% a year ago and five percentage points lower than the previous low recorded in 2014.”).

232. See Keith E. Whittington, *Practice-Based Constitutional Law in an Era of Polarized Politics*, 18 GEO. J.L. & PUB. POL’Y 227, 236 (2020) (reviewing FALLON, *supra* note 65) (“It seems likely that the average citizen is not overly concerned with the details of constitutional argumentation and is much more concerned with the bottom line of whether a court supports the citizen’s own policy preferences.”).

233. See, e.g., JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* 120–25, 144–52 (2009) (finding, based on survey results, that “[the American people] support law and courts to the extent that [judicial] discretion is exercised in a principled, non-self-interested fashion,” *id.* at 123, and that “ideological, partisan, or otherwise unprincipled” decision-making is seen as “procedurally unfair and improper,” *id.* at 146).

234. See Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. POL. SCI. 241, 246 (2019) (reporting that the “judicial politics literature is clear in its documentation that ideology is a significant factor in judicial decision making,” albeit a factor “subject to institutional and informal

B. Erosion of the Court's Moral Legitimacy

Distinct from the Supreme Court's sociological legitimacy, which depends on public perceptions, is the Court's moral legitimacy.²³⁵ When the Court claims authority to overrule the decision of another branch of government, citizens are entitled to ask, "What moral right do the Justices have to resolve the issue before them in the way that they do and to impose their judgment on the rest of us?"²³⁶ In cases in which the law is determinate, it should normally suffice for moral legitimacy that the Justices adhere to the law. But when the Justices err, or when the law is not determinate, the concept of moral legitimacy defines conditions under which we ought to respect Supreme Court decisions that we think mistaken as well as those that we adjudge correct.²³⁷ Because the Court lacks the distinctively democratic legitimacy that electorally accountable decisionmakers possess—reflecting the right to rule that flows from a popular mandate²³⁸—the Court's moral legitimacy must depend on other kinds of considerations sounding in the register of political morality.²³⁹ Under these circumstances, it becomes crucially important whether the Justices display integrity and good faith in reasoning to their conclusions based on reasonable legal and moral principles that they genuinely believe to be controlling.²⁴⁰ If the Justices reason as conscientiously as they can, we should respect them for doing so. In my view, for example, even if we are not originalists, we should accord at least some respect to Justices who apply their originalist principles consistently, regardless of whether they yield conservative or progressive results in particular cases. By contrast, if the Justices shift their argumentative premises from one case to the next, typically to arrive at results that accord with their political ideologies, their varying grounds of purported justification diminish rather than enhance the respect that we owe them.²⁴¹

constraints"); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 323 (2002) ("The correlation between the ideological values of the justices and their votes is 0.76 . . ."); HAROLD J. SPAETH & JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT* 287 (1999) (concluding that "precedent rarely influences United States Supreme Court justices").

235. See FALLON, *supra* note 65, at 23–24 (distinguishing moral from sociological legitimacy).

236. See *id.* (raising similar questions).

237. *Id.*

238. See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1387–89 (2006) (citing democracy as a source of legitimacy).

239. See FALLON, *supra* note 65, at 23–24, 127–31 (discussing moral legitimacy and outlining four "desiderata" of morally legitimate decisionmaking).

240. *Id.* at 12–13, 130–31.

241. *Id.* at 12–13, 127–31.

IV. Explaining Selective Originalism: A Partial Genealogy

Part III's criticisms of selective originalism pose a puzzle: why does selective originalism persist—and in some respects thrive—despite its manifest deficiencies and despite what one might imagine to be its easy corrigibility? If we put aside issues about whether originalist principles should extend to the cert jurisdiction, any originalist could immediately defuse the charge of selective originalism by offering a sincere and reasonably determinate account of when original meanings should yield to *stare decisis* and when the party-presentation principle does and does not preclude the consideration of originalist arguments in the first place. Or, alternatively, the selectively originalist Justices could acknowledge that they are in fact methodological pluralists who believe that original meanings and judicial precedents are both permissible grounds for decision by the Supreme Court, even when the precedents are not legally binding under the doctrine of *stare decisis*. So far, however, the selectively originalist Justices have not pursued either of these courses. Their efforts to specify when they believe the Court properly subordinates original meanings to judicial precedents have been half-hearted. At the same time, they appear to view the open embrace of “conservative Constitutional Pluralism”²⁴² as anathema.

This Part seeks insight into the phenomenon of selective originalism—as practiced by Justices who hold themselves out as originalists, not constitutional pluralists—by pursuing a loosely genealogical inquiry. It traces the historical emergence of originalism as a constitutional theory in the 1970s and 1980s, the practical considerations that originalist Justices and their supporters have felt compelled to accommodate, and the compromises and inconsistencies that have resulted.

A. *The Politics of Originalism*

For those who have grown up in an era when originalism dominates debates about constitutional theory, it is easy to imagine that participants in constitutional argument must always have shared modern preoccupations with original meanings. Through much of constitutional history, however, talk about original meanings or the Framers' intentions was merely one aspect of a flexible set of interpretive modalities.²⁴³ Only in the 1970s and 1980s did a self-conscious theory of constitutional originalism begin to take

242. See *supra* note 228 and accompanying text.

243. See, e.g., Post & Siegel, *supra* note 5, at 546–47 (noting that “[a]ttention to original understanding has been a prominent theme in American constitutional practice almost since the Founding” but emphasizing that traditional practice also involved “consulting forms of authority such as case law, custom, structure, and common sense”).

shape.²⁴⁴ At that time, moreover, originalism was widely regarded as a revolutionary (or reactionary) theory, the adoption of which would upend traditional approaches to constitutional adjudication.²⁴⁵

Some of the explanation for the prior absence of a sharply etched originalist theory lies in the polysemy of the term “meaning.”²⁴⁶ Senses of meaning potentially relevant to constitutional adjudication include constitutional provisions’ semantic or literal meaning, real conceptual or moral meaning, intended meaning, contextual meaning as framed by the shared suppositions of speakers and listeners, reasonable meaning, and interpreted or precedential meaning.²⁴⁷ In at least some cases, the Supreme Court has viewed all of these as controlling the outcome.²⁴⁸ For as long as participants in constitutional debates could invoke diverse senses of meaning, including precedential meaning, it was possible for the Constitution’s “meaning” as understood by the courts and the legal community to evolve over time.

Originalism as we know it today arose in the 1970s and 1980s as a reaction to and partial rejection of loose, pluralistic approaches to constitutional adjudication.²⁴⁹ As is widely recognized, the pioneering proponents of originalism had partly political motives.²⁵⁰ Since the New Deal, many political and judicial conservatives believed, a Supreme Court

244. See JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 117–23 (2005) (identifying Raoul Berger’s *Government by Judiciary*, published in 1977, as a key moment in the “restoration” of originalist jurisprudential theory); Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 16 (Grant Huscroft & Bradley W. Miller eds., 2011) (tracing the origin of contemporary debates about “originalism” as a distinctive mode of interpretation to the early 1970s); cf. Calvin TerBeek, “Clocks Must Always Be Turned Back”: *Brown v. Board of Education and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821, 821 (2021) (tracing the emergence of originalism to resistance to *Brown v. Board of Education*).

245. Cf., e.g., Monaghan, *supra* note 86, at 728 & nn.28–30 (citing important precedents that could not be justified pursuant to an originalist methodology).

246. See Solum, *supra* note 80, at 20–21 (arguing that “[i]n the legal context, the word ‘meaning’ is ambiguous and it can be used in at least three distinct (but related) senses”).

247. FALLON, *supra* note 65, at 51.

248. See *id.* at 51–57 (giving examples).

249. See, e.g., PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) (developing a typology of multiple accepted “modalities” of constitutional argument).

250. See, e.g., Sohoni, *supra* note 5, at 954–56 (deeming originalism a “reactive theory”); Post & Siegel, *supra* note 5, 554–58 (“Since the 1980s, originalism has primarily served as an ideology that inspires political mobilization and engagement.”); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 601–02 (2004) (“[O]riginalism was a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts . . .”).

dominated by liberals had forsaken the real Constitution—which the conservatives viewed as a charter of limited federal government and a bulwark of states’ rights—and replaced it with judge-made doctrines embodying shifting left-wing preferences.²⁵¹ From a conservative perspective, those doctrines fell into two main categories. One, reflecting the so-called switch in time that saved nine that resulted from President Franklin Roosevelt’s confrontation with the Supreme Court over the validity of New Deal legislation, licensed a vast federal regulatory and welfare state.²⁵² The other encompassed a proliferating set of nontraditional rights often associated with the Warren Court.²⁵³ Against this background, part of originalism’s appeal to conservatives has lain from the beginning in its capacity to destabilize judicially developed doctrines that deviate from what conservatives have taken to be original constitutional meanings.²⁵⁴

B. Originalist Selectivity: Threshold Considerations and Possible Explanations

Any effort to understand selective originalism must also recognize that originalists and especially originalist Justices have always faced daunting challenges. Two of these I shall briefly note and then put to one side. The

251. See O’NEILL, *supra* note 244, at 135 (“[O]riginalist scholarship in the 1980s typically argued that the liberal reformist use of modern judicial power [as in the Warren Court] threatened the rule of law and the formulation of public policy in legislatures.”).

252. See *id.* at 32 (explaining that, to originalists, “the New Deal displaced the textual originalist approach and advanced the reconceptualization of the Constitution as a judicially updated living document”). Of course, nonoriginalist scholars have made much the same point. See, e.g., MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 114 (1998) (describing the “vision of law” as a “malleable instrument of social policy” as core to the “New Deal legal consciousness”).

253. See O’NEILL, *supra* note 244, at 142 (describing as the predominant originalist view that “legal liberals wanted judges to move beyond the traditional limits on the judicial function, especially via the vindication of rights or values they had empowered themselves to announce”); see also, e.g., Rehnquist, *supra* note 76, at 706 (describing “the living Constitution” as “a formula for an end run around popular government,” in which an individual may “persuad[e] one or more appointed federal judges to impose on other individuals a rule of conduct that the popularly elected branches of government would not have enacted and the voters have not and would not have embodied in the Constitution”); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 3–5* (1977) (“The present generation, floating on a cloud of post-Warren Court euphoria, applauds a Court which read its libertarian convictions into the Fourteenth Amendment, forgetting that for generations the Court was harshly criticized because it had transformed laissez faire into constitutional dogma in order to halt the spread of ‘socialism.’”).

254. See, e.g., Post & Siegel, *supra* note 5, at 555–56 (“Beginning roughly in the 1980s, originalism gave conservative activists a language in which to attack the progressive case law of the Warren Court . . .”).

third forms the heart of the dilemma that often turns originalists into selective originalists.

The first threshold challenge for originalists, to which I have alluded already, is to specify in conceptual terms exactly what the Constitution's original meaning was. Should it be equated with the Framers' intentions, original public meanings, or original legal meanings?²⁵⁵

Once a definition of the original meaning is agreed to, the second threshold challenge for originalists is to specify how the meanings of disputed constitutional provisions could be established as a matter of historical fact. In my view, in cases of plausible historical disagreement, which often existed, there is typically no single fact of the matter about who was right and who was wrong concerning the Constitution's original linguistic meaning.²⁵⁶ Nevertheless, most originalists disagree with my conclusion on this point.²⁵⁷ Accordingly, for the purposes of this Article, I shall assume unless I specifically state otherwise that originalists can identify uniquely correct original meanings (even if those meanings are relevantly vague or otherwise underdeterminate in some respects).

The assumption that constitutional provisions have uniquely correct original meanings brings a third challenge into view. This third challenge is to define or confine originalism—a central appeal of which has historically involved its rejection of a number of liberal judicial precedents—so that it does not threaten intolerable consequences.²⁵⁸ In response, most originalists have always accepted that originalism requires exceptions.²⁵⁹ Within the Supreme Court, in particular, three problems with exception-less originalism have impelled all originalist Justices to find ways to dilute their originalist commitments, sometimes through definitional limitations and sometimes through selectivity in their application of avowed principles. Understanding these problems is vital to an understanding of selective originalism as a legal and sociological phenomenon.

255. See *supra* notes 111–13 and accompanying text.

256. See Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1446–53 (2021) (pointing to conceptual difficulties that arise in ascribing a determinate original historical meaning to texts with multiple authors that were written for diverse audiences and that occasioned interpretive disagreement as a matter of historical fact).

257. See, e.g., Solum, *Public Meaning Thesis*, *supra* note 81, at 2006–23 (rejecting arguments that original meanings often were not and could not be determinate).

258. See, e.g., Barrett, *supra* note 67, at 1924–29 (discussing the problem and how different originalists have responded to it).

259. See, e.g., Scalia, *supra* note 64, at 138–40 (“Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis* Where originalism will make a difference is not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpatious new ones.”).

1. *Informational Impediments to Originalist Decision-Making.*—First, requiring the Supreme Court to consider or reconsider the Constitution’s original meaning in every case would be unworkable as a practical matter.²⁶⁰ Most of the Constitution was written more than two centuries ago in frequently vague or cryptic language. New evidence regarding the drafting and adoption history of constitutional provisions emerges with stunning regularity. At the same time, academic theorists continue to debate, and offer alternative views concerning, how original historical evidence contributes to or constitutes original meanings that are determinate enough to resolve modern cases.²⁶¹

Amid the swirl of academic research and contention, the Justices—who have too crowded a docket to immerse themselves in scholarly literature and are not trained as historians—need to rely at least presumptively on the party-presentation principle.²⁶² But that principle may prove more an embarrassment than an asset when the parties offer either cursory or inept briefing.

In *Bruen*, Justice Thomas sought to brush that problem aside. “[I]n our adversarial system of adjudication,” he wrote,²⁶³ “[c]ourts are . . . entitled to decide a case based on the historical record compiled by the parties.”²⁶⁴ But however plausible that approach might be for the lower courts, it is a perilous one for the Supreme Court, whose decisions bind not only the parties, but

260. See Michael L. Smith & Alexander S. Hiland, *Originalism’s Implementation Problem*, 30 WM. & MARY BILL RTS. J. 1063, 1065 (2022) (arguing that courts seeking to implement originalist theory “face the options of deciding cases based on the skewed submissions of counsel, or undertaking their own independent research in the face of significant time and resource constraints” with the attendant “risk of courts rendering decisions based on facts and arguments that are not before them—resulting in unchecked, unreviewable decision-making”); cf. Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1863–66 (2012) (describing stare decisis as “a heuristic that helps simplify decisionmaking” pursuant to which precedent is presumed to be correct until proven otherwise, *id.* at 1865); Kozel, *supra* note 90, at 156 (describing deference to precedent as a mechanism for resolving constitutional uncertainty).

261. See *supra* notes 111–13 and accompanying text (distinguishing varieties of originalism).

262. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 382 (1982) (“[T]he parties, not the judge, have the major responsibility for and control over the definition of the dispute.”); Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 8 (2014) (“The dominance of party choice, though robust and widespread, is not inviolate.”); Frost, *supra* note 88, at 455 (“The rhetoric in favor of party presentation is not always consistent with actual judicial practice.”).

263. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2130 n.6 (2022).

264. *Id.* In support of this prescribed approach, the Court cited William Baude & Stephen Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 810–11 (2019).

also lower courts throughout the country.²⁶⁵ And if unable to rely on the parties' briefing, Justices committed to deciding every case based on original constitutional meanings would find themselves immersed in a flood of historical inquiries that even professional historians could not manage competently within the time allotted. In short, it is a virtual practical impossibility that the Supreme Court could conduct serious originalist inquiries in all of the cases on its docket.

2. *Issues of Legal Stability.*—*Second*, apart from overtaxing the Supreme Court, exception-less originalism would almost certainly test the tolerance of both the legal community and the broader public for uncertainty and change.²⁶⁶ As noted above, history yields abundant examples of instability in originalists' historical conclusions. Amid the continuing ferment of originalist investigation and argument, the only way for the Court to achieve reasonable consistency, settlement, and predictability in constitutional law is through either a requirement of or a permission for adherence to arguably mistaken prior decisions in some, possibly many, constitutional cases.²⁶⁷

3. *Reliance Interests.*—*Third*, a closely related concern involves special difficulties that would be posed if originalist analysis required the overruling of precedents that are lynchpins of modern government, the economy, or other aspects of social life on which large numbers of Americans have come to rely.²⁶⁸ I should emphasize that I do not presume to know what meticulous originalist research might establish in many controverted cases. As I have

265. See Frost, *supra* note 88, at 453 (“In a legal system in which appellate opinions not only establish the meaning of the law, but do so through precedent that binds future litigants, courts cannot cede to the parties control over legal analysis.”).

266. Cf. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“[I]n most matters, it is more important that the applicable rule of law be settled than that it be settled right.”).

267. In response to this acknowledged challenge, originalist scholar Lawrence Solum has proposed what he calls a “Stability Criterion”: “precedent[s] should be reversed on originalist grounds only if the case for inconsistency of the precedent with original meaning is stable in light of any debate among lawyers, judges, and scholars.” Mark Moller & Lawrence B. Solum, *The Article III “Party” and the Originalist Case Against Corporate Diversity Jurisdiction*, 64 WM. & MARY L. REV. 1345, 1439 (2023) (emphasis omitted).

268. See, e.g., John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 836–37 (2009) (“The fear, uncertainty, and chaos that overruling [decisions interpreting the Constitution to allow Social Security and legal tender laws for paper money] would cause to the nation’s public pensions and monetary system are so tremendous that they would far exceed any benefits from returning to the original meaning.”); see also BORK, *supra* note 64, at 155–59 (explaining that “[a]t the center of the philosophy of original understanding” is the idea that some faulty non-originalist precedents “are beyond reach”).

said, my own view is that the content of the original public meaning that can be established as a matter of linguistic fact is quite minimal.²⁶⁹ Nevertheless, as noted above, widely cited examples of Supreme Court precedents that might not survive strict originalist re-examination include the decisions upholding the constitutional validity of paper money as legal tender, validating the Social Security system, and establishing the one-person, one-vote principle.²⁷⁰

C. *The Promise of and Problems Posed by Stare Decisis*

In response to problems involving legal stability and reliance interests, Justice Scalia—who long served as the leading public face of the originalist movement—frequently acknowledged that his originalist philosophy included an “exception” for stare decisis.²⁷¹ As subpart I(A) explained, stare decisis has existed within our constitutional order from the beginning, and originalists can undoubtedly embrace some version of it. Justice Scalia’s stance toward stare decisis is notable for a number of reasons, not the least of which lies in his influence in shaping the thought of others within the originalist movement. As he memorably insisted, “I am an originalist[, but] I am not a nut.”²⁷² For originalists, the promise of stare decisis lies in its apparent capacity to alleviate what otherwise might appear to be originalism’s too-stringent demands.

But stare decisis, while eliminating some problems that originalism otherwise would face, exacerbates others. On the one hand, a rigid construction of stare decisis that required adherence to too many past mistakes would subvert the originalist ambition of overthrowing liberal doctrines that proliferated in the 1930s and 1940s and further expanded under the Warren and Burger Courts. On the other hand, in the absence of reasonably determinate rules of stare decisis, an exception to originalism for some but not all judicial precedents threatens to authorize discretionary, value-based decisionmaking that originalists purport to find objectionable.²⁷³

269. See Fallon, *supra* note 256 and accompanying text.

270. See *supra* notes 162, 220–21 and accompanying text.

271. Scalia, *supra* note 64, at 140 (emphasis omitted).

272. Antonin Scalia, Assoc. J., Sup. Ct. of the U.S., Wriston Lecture at the Manhattan Institute for Policy Research: On Interpreting the Constitution (Nov. 17, 1997), <https://www.manhattan-institute.org/html/1997-wriston-lecture-interpreting-constitution-8063.html> [<https://perma.cc/TEM9-KVJH>] (“I am an originalist. I am a textu[.]alist. I am not a nut.”).

273. See, e.g., Baude, *supra* note 5, at 333 (observing that “discretionary precedent forfeits . . . th[e] justification for originalism” that it “give[s] judges a source of law outside their own will”); Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6 (1996) (“[W]hen struggling to find the right

More specifically, too much discretion for the Justices to choose between original meanings and judicial precedents as grounds for decision might collapse originalism into conservative constitutional pluralism.

1. Stare Decisis and Judicial Discretion.—It would be theoretically possible for a rule of recognition to establish when the Justices of the Supreme Court are legally obliged to overrule nonoriginalist precedents and when, if ever, they are legally obliged to follow such precedents. But no such rule exists.²⁷⁴

Within the Supreme Court, nearly all of the Justices profess to believe that precedent, where it exists and applies, presumptively controls: although the priority of precedent is not absolute, the Court has often said, overruling decisions requires a powerful justification going beyond the mere fact of a case's having been wrongly decided in the first instance.²⁷⁵ Yet agreement exists only to that very abstract principle, not to the criteria for its proper application. Increasingly, moreover, even the abstract proposition that the Justices should adhere to past, mistaken decisions absent special reasons to overturn them holds little sway when a majority of the Justices feel inspired, for whatever reason, to overrule a precedent that they dislike.²⁷⁶ When the Court issues overruling decisions, dissenting Justices routinely castigate the majority for failing to accord stare decisis any real significance.²⁷⁷

answer to a case, judges should adopt principles of interpretation and methodology that reduce judicial discretion.”); Scalia, *supra* note 53, at 863 (“[T]he main danger in judicial interpretation of the Constitution— . . . in judicial interpretation of any law—is that the judges will mistake their own predilections for the law. . . . Nonoriginalism, which under one or another formulation invokes ‘fundamental values’ as the touchstone of constitutionality, plays precisely to this weakness.”).

274. See Baude, *supra* note 5, at 329–30 (noting the doctrine of precedent’s “discretionary nature” in the Supreme Court); Mark Greenberg, Response, *What Makes a Method of Legal Interpretation Correct?: Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 115 (2017) (“Because of the straightforward way in which the rule of recognition is determined by the convergent practice of judges, nothing that is uncertain or controversial can be part of the rule of recognition.”).

275. *E.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (“Before overturning a long-settled precedent, . . . we require ‘special justification,’ not just an argument that the precedent was wrongly decided.” (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000))).

276. *E.g.*, Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 132, 135, 137.

277. See, *e.g.*, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2333–35 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (“None of th[e] factors [for overriding stare decisis] apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives.”); *Edwards v. Vannoy*, 141 S. Ct. 1547, 1574 (2021) (Kagan, J., dissenting) (“In overruling a critical aspect of

Commentators agree increasingly that the legally obligatory force of *stare decisis* in the Supreme Court—as measured and enforced by the Justices’ practice—is vanishingly weak.²⁷⁸

Professor Richard Re has argued persuasively that the most important function of precedent in the Supreme Court—as a matter of practice and positive law, not normative desirability—is not to bind the Justices to what they believe to be past errors, as traditional theories would suggest.²⁷⁹ It is, rather, to grant the Justices a permission to decide current and future cases on the basis of precedent, even when they think it deviates or might deviate from the Constitution’s original meaning, when the Justices believe that overruling (or even a deep, time- and resource-consuming inquiry into the original meaning) would have undesirable consequences from a practical, moral, or policy perspective.²⁸⁰

Re’s account of “precedent as permission” provides a partial explanation of the conditions that have allowed selective originalism—as defined in Part I—to flourish. Even if originalism is in some sense “our law,”²⁸¹ the crucial question of how to temper originalism with *stare decisis*, or predominantly precedent-based decisionmaking with originalism, is not one to which our law very often yields a clear conclusion, particularly with respect to such specific matters as whether the Supreme Court must either

Teague, the majority follows none of the usual rules of *stare decisis*.”); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1425 (2020) (Alito, J., dissenting) (“Lowering the bar for overruling our precedents, a badly fractured majority casts aside an important and long-established decision with little regard for the enormous reliance the decision has engendered.”); *Citizens United v. FEC*, 558 U.S. 310, 414 (2010) (Stevens, J. concurring in part and dissenting in part) (“Today’s ruling thus strikes at the vitals of *stare decisis* . . .”).

278. See, e.g., Schauer, *supra* note 276, at 139 (“Taken together, *Wayfair* and *Janus* thus hardly inspire confidence that the Court views *stare decisis* as a serious and sometimes insurmountable hurdle . . .”).

279. See Richard M. Re, *Precedent as Permission*, 99 TEXAS L. REV. 907, 912–14 (2021) (discussing precedent’s function as a source of permission rather than obligation); see also Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1769–70 (2015) (taking a similar view).

280. See Re, *supra* note 279, at 926 (arguing that “precedent’s permissive aspect can help insulate from political, social, and even internal pressures those Justices who are already otherwise drawn toward preserving precedent”); cf. JOSEPH RAZ, *Legal Reasons, Sources, and Gaps*, in THE AUTHORITY OF LAW 53, 67 (2d ed. 2009) (labeling legal permissions “explicit” when resulting from an authorizing norm, not just the absence of a relevant prohibition); JOSEPH RAZ, *The Institutional Nature of Law*, in THE AUTHORITY OF LAW, *supra*, at 103, 117 n.4 (equating “explicit” permissions with “strong” permissions).

281. See Baude, *supra* note 86, at 2351–53 (arguing that “a version of originalism is indeed our law”).

uphold or overrule a challenged precedent.²⁸² Academic originalists have sometimes expressed hope that more meticulous examination of Founding-era interpretive practices might reveal clearer norms governing judicial decisionmaking than modern Justices have discerned or practiced.²⁸³ But historical speculation to that effect remains uncorroborated.²⁸⁴ For now, the plain fact is that the modern Justices do not observe any shared rule of significant determinacy establishing when initially erroneous constitutional precedents should be followed and when they should be overruled. Accordingly, to the extent that the existing “doctrine” of stare decisis serves as the gauge of the Justices’ legal obligations to apply precedents or to overturn them, the Justices are “free” to act on originalist premises in some cases but to deviate from those premises and to follow precedent in other cases.

To put the point slightly differently, in the Supreme Court, stare decisis is mostly a discretionary legal doctrine that, when coupled with originalism, endows the Justices with a legal permission to deviate from their originalist commitments.²⁸⁵ And insofar as originalist Justices embrace and act on that permission without explaining their discretionary choices not to decide on originalist grounds, the problem of selective originalism is exemplified, not solved.

2. *The Scope of the Stare Decisis Exception.*—By describing stare decisis as an “exception” to his generally originalist philosophy,²⁸⁶ Justice Scalia implied that the exception was much less important than the originalist norm. Upon examination, however, that suggestion proves misleading.

282. See Baude, *supra* note 5, at 329–30 (characterizing stare decisis as “discretionary” in the Supreme Court); Greenberg, *supra* note 274, at 115 (explaining why, under Hartian positivist premises, “nothing that is uncertain or controversial can be part of the rule of recognition”).

283. See Baude & Sachs, *supra* note 94, at 1128–31 (arguing in favor of looking at “the law of interpretation as it stood at the Founding”).

284. See, e.g., JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 116–23 (2018) (describing chaotic uncertainty about appropriate interpretive rules for the Constitution based on deeper uncertainty about what kind of document the Constitution was); Farah Peterson, *Expounding the Constitution*, 130 *YALE L.J.* 2, 7, 10 (2020) (maintaining that litigants in early constitutional cases in the Supreme Court disputed whether the Constitution should be interpreted according to restrictive rules applicable to private legislation or the more flexible and pragmatic rules applicable to public legislation); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 *U. CHI. L. REV.* 519, 555–56, 561, 571–73 (2003) (noting Founding-era disagreement on how the Constitution should be interpreted).

285. See Baude, *supra* note 5, at 333–34 (arguing that combining stare decisis and originalism “introduces elements of . . . arbitrary discretion”); cf. Post & Siegel, *supra* note 5, at 560 (“As a political practice, . . . originalism aspires to ‘return to Constitutional authenticity’ only insofar as it perceives authenticity to make sense in the present.” (footnote omitted)).

286. See *supra* note 271 and accompanying text.

To see how *stare decisis* influences originalist and selectively originalist judicial practice, one must begin by distinguishing between the doctrine's application in the Supreme Court, on the one hand, and in the lower courts, on the other. As a matter of law, the lower courts are absolutely bound to apply Supreme Court precedents to all cases to which their rationales extend.²⁸⁷ Leading originalists have seldom challenged this norm.²⁸⁸ Insofar as lower courts adhere to it, they have no opportunity to be originalist, much less selectively originalist, in any case to which the network of Supreme Court precedents extends, even if lower court judges believe that the Justices have deviated markedly from the Constitution's original meaning.²⁸⁹

In the Supreme Court, whether to adhere to nonoriginalist precedents is a question that the Justices take up directly only a few times per Term, as Justice Scalia emphasized.²⁹⁰ As I suggested above, however, the Court constantly addresses that question indirectly by managing its docket. Unlike the lower federal courts, the Supreme Court has nearly complete discretion to choose which cases to decide.²⁹¹ Furthermore, when agreeing to hear a case, the Justices can limit their grants of certiorari to the particular issues on

287. *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”); *Hohn v. United States*, 524 U.S. 236, 252–53 (1998) (“Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.”); see also Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 395 & n.43 (2007) (reporting that “most systematic studies have found defiance [of the Court’s rulings] to be rare and compliance the norm”).

288. See, e.g., Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEXAS L. REV. 1711, 1712–13 (2013) (“Vertical *stare decisis* is an inflexible rule that admits of no exception.”); Josh Blackman, *Originalism and Stare Decisis in the Lower Courts*, 13 N.Y.U. J.L. & LIBERTY 44, 44–45 (2019) (recognizing that lower court judges are bound by Supreme Court precedents, “[n]o matter how *wrong* [they are] from an originalist perspective”); Solum, *supra* note 109, at 460 (“Even if one believes that the Supreme Court itself should always follow the original meaning, there are very strong arguments that lower courts should not strike out on their own.”).

289. See, e.g., Ryan C. Williams, *Lower Court Originalism*, 45 HARV. J.L. & PUB. POL’Y 257, 265 (2022) (asserting that “the Supreme Court is institutionally best situated to shoulder the burdens of originalist decisionmaking” and that “lower courts should exercise a cautious approach in seeking to integrate originalism into their own decisionmaking”). But cf. Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 971 (2016) (maintaining that lower courts can sometimes evade the full effect of Supreme Court precedents through narrowing interpretations); Blackman, *supra* note 288, at 46 (arguing that lower court judges can and should “decline to *extend* a constitutional rule to brand new circumstances, if the binding precedent is completely unmoored from the Constitution’s original public meaning”).

290. See also Barrett, *supra* note 67, at 1929–30 (identifying “features of the federal judicial system,” including the discretionary nature of the Supreme Court’s certiorari jurisdiction, that keep the validity of precedents the rejection of which might occasion chaos or havoc “off the table”).

291. E.g., Narechania, *supra* note 47, at 924.

which they wish to pronounce.²⁹² In a further claim of authority, the Court sometimes reframes the issues that the parties have asked it to decide.²⁹³ In *Citizens United v. FCC*, for example, the Court, on its own motion, requested briefing on whether one of its own precedents should be overruled and an important federal statute should be held unconstitutional on its face.²⁹⁴ In *Brown v. Board of Education*, the Justices asked the parties to discuss the original meaning of the Fourteenth Amendment.²⁹⁵ If the Court wished to reconsider the correctness of earlier decisions on originalist grounds, it could either signal its interest—in which case petitions calling for the overruling of particular cases or doctrines would undoubtedly flow in—or it could grant certiorari in cases argued in the lower courts within precedent-based frameworks and ask for briefing on original meanings. As a result, if it is true, as Justice Scalia implied, that the Court rarely confronts cases in which originalist Justices must decide whether to make an exception to their originalist philosophies, it is largely because of the way that the Justices construct their own agenda.²⁹⁶ In academic writing before she became a Justice, Justice Barrett made this point explicitly: “Originalism does not obligate a justice to reconsider nonoriginalist precedent *sua sponte*, and if reversal would cause harm, a Justice would be foolhardy to go looking for trouble.”²⁹⁷ She continued, “This technique of assuming, and therefore not

292. Monaghan, *supra* note 67, at 689; Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 794–95 (2022).

293. See Monaghan, *supra* note 67, at 705–07 (explaining the Supreme Court’s exercise of its discretionary reframing authority and citing examples).

294. See *Citizens United v. FEC*, 557 U.S. 932 (2009) (restoring the case to the calendar for reargument and directing the parties “to file supplemental briefs addressing [whether] . . . ‘the Court [should] overrule either or both *Austin v. Michigan Chamber of Commerce*, and the part of *McConnell v. FEC*, which addresses the facial validity of § 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b’” (citations omitted)); see also Barrett, *supra* note 67, at 1941 (noting that the Court sometimes asks for supplemental briefing to consider whether unchallenged precedents should be overruled).

295. See *Brown v. Bd. of Educ.*, 345 U.S. 972, 972 (1953) (per curiam) (restoring the case to the calendar for reargument and directing the parties to focus, in part, on how the “Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools”).

296. See Barrett, *supra* note 288, at 1731–33 (discussing the Court’s certiorari standards); Barrett, *supra* note 67, at 1930 (“Even if a petitioner asked the Court to revisit, say, its 1937 conclusion that the Social Security Act is constitutional, there is no chance that the Court would grant certiorari.”); see also Frederick Schauer, *Stare Decisis and the Selection Effect*, in PRECEDENT IN THE UNITED STATES SUPREME COURT 121 (Christopher J. Peters ed., 2013) (describing the “selection effect” in the Court’s certiorari practice). *But cf.* Narechania, *supra* note 47, at 934 (observing that the “Roberts Court . . . seems to favor granting review in cases that invite the Court to overrule precedent”).

297. Barrett, *supra* note 67, at 1931.

investigating, a precedent's validity to avoid the possibility of overruling it is a critical means of keeping law stable."²⁹⁸

Another point about the scope of the stare decisis "exception" also deserves recognition. When the Justices adopt a precedent-based framework for decision, the line between applying a precedent and extending it can be a fine one. Perhaps more importantly, it is a line to which the Justices, including the selectively originalist Justices, frequently pay little heed. For example, even Justices who purport to be originalist have felt empowered to extend precedents enforcing equal protection norms against the federal government²⁹⁹ and establishing a First Amendment requirement of content neutrality,³⁰⁰ notwithstanding objections raised by scholars that their actions in doing so deviate from the Constitution's original meaning.³⁰¹

Under these circumstances, decisionmaking by ostensibly originalist Justices that devotes little or no attention to original constitutional meanings—even in the absence of a determination that stare decisis exerts a trumping force or that the party-presentation principle ties the Court's hands—cannot be persuasively portrayed as anomalous. To the contrary, decisionmaking based on considerations other than original constitutional meanings is more nearly the norm than the exception in the Supreme Court, including by ostensibly originalist Justices. In sum, if originalism is "our law," it is only pursuant to a definition of originalism under which the Justices are seldom if ever legally obliged to decide cases based on the Constitution's original meaning, though they can do so if they want to, and the lower courts can seldom inquire into original meanings at all.

D. *Originalism, Selective Originalism, and Argumentative Good Faith*

Any plausible genealogy of selective originalism must confront at least one more question. Although *the law*—as reflected in Hartian rules of recognition or otherwise determined purely by social facts—typically leaves originalist Justices free to choose whether to decide cases based on original meanings or based on precedent, a prescriptive constitutional theory such as originalism could in principle resolve many of the legal indeterminacies—including those involving the doctrine of stare decisis—that the Supreme

298. *Id.* at 1940.

299. *See, e.g.,* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (holding that equal protection norms apply against the federal government in a portion of the opinion joined by Justice Thomas and Justice Scalia).

300. *See, e.g.,* *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (affirming a First Amendment requirement of content neutrality in an opinion authored by Justice Thomas and joined by Justice Scalia).

301. *See supra* notes 141, 165, 170.

Court confronts. So the puzzle of selective originalism remains: why do originalist Justices not feel obliged to provide, and then adhere to, articulate explanations of when, as a normative matter, they believe that original meanings should prevail over contrary precedents that the doctrine of stare decisis would permit but not require them to follow? Without being able to get into the Justices' minds, I conjecture that selective originalists' honest responses would include three elements beyond the factors that motivate them to identify as originalists in the first place.

First, articulating a full theory of originalist strictures and their justified exceptions, including a specification of when original constitutional meanings should yield to precedent even when stare decisis does not dictate that result, and vice versa, would be enormously difficult if not impossible.³⁰² And while the originalist Justices have not fully met that challenge, they have gone at least as far as nonoriginalist Justices in explaining their approaches to when overruling decisions are justified, typically by articulating or endorsing multi-factor balancing tests.³⁰³

In *Dobbs v. Jackson Women's Health Organization*, Justice Alito's majority opinion, which four other originalist Justices joined,³⁰⁴ maintained that decisions about whether to overrule precedents should depend on considerations including "the nature of [prior decisions'] error, the quality of their reasoning, [and] the 'workability' of the rules they imposed on the country."³⁰⁵ Applying those factors, a 5–4 majority in *Dobbs* overruled *Roe v. Wade* and *Planned Parenthood v. Casey*.³⁰⁶ As the three dissenting Justices' very different appraisals of *Roe* and *Casey*³⁰⁷ would tend to indicate,

302. See FALLON, *supra* note 65, at 136–48 (discussing the difficulty of developing a fully specified and determinate originalist theory prior to consideration of all the types of cases to which the theory would apply).

303. Cf. Baude, *supra* note 5, at 319–29 (discussing significant underdeterminacies in the articulated theories of Justices Thomas and Alito).

304. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (opinion of Alito, J., joined by Thomas, Gorsuch, Kavanaugh, and Barrett, JJ.).

305. *Id.* at 2265.

306. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *Dobbs*, 142 S. Ct. at 2265, 2284.

307. See *Dobbs*, 142 S. Ct. at 2334 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("None of [the factors which support overruling prior precedent] apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives."). Justice Roberts, the fourth Justice who voted against overturning *Roe* and *Casey* wholesale, would have overruled only the viability line set in those cases in favor of a line that "extend[ed] far enough to ensure a reasonable opportunity to choose." *Id.* at 2310 (Roberts, J., concurring in the judgment); see also *id.* at 2311–12 (arguing that the viability line should be overruled based on the stare decisis factors); *id.* at 2315–16 (expressing doubt that the stare decisis factors support overruling *Roe* and *Casey* wholesale).

however, the *Dobbs* factors require considerable, and understandably contestable, judgment in application.

More determinate alternatives could be devised. In order to limit discretion and promote predictability, Professor Randy Kozel advocates excluding the original substantive correctness of a precedent—as measured by originalist as well as other criteria—from decisions about whether it ought to be overruled.³⁰⁸ But his proposal would involve an extraordinary cession of de facto constitutional lawmaking authority to any five Supreme Court Justices who chose to exercise it even in the teeth of original constitutional meanings. So far, no originalist Justice has endorsed it. Further complications would enter the picture if one began to consider not only whether precedents should be overruled, but also when precedents that are not overruled should be extended or limited.³⁰⁹

In *Ramos v. Louisiana*,³¹⁰ Justice Kavanaugh acknowledged that the Court's failure to “establish[] any consistent methodology or roadmap” for applying the principle of stare decisis “pose[d] a problem for the rule of law” and advanced three criteria that he thought would solve it: “*First*, is the prior decision not just wrong, but grievously or egregiously wrong? . . . *Second*, has the prior decision caused significant negative jurisprudential or real-world consequences? . . . *Third*, would overruling the prior decision unduly upset reliance interests?”³¹¹ But Justice Kavanaugh's proposal does not appear to have gained much traction, unless perhaps it influenced the test that Justice Alito laid out in his majority opinion in *Dobbs*, which Justice Kavanaugh joined.

In another originalist attempt to address the “muddle”³¹² of indeterminacy in the doctrine of stare decisis, Justice Thomas has offered a solution that appears relatively determinate along one dimension: “When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it. This view of stare decisis follows directly from the Constitution's supremacy over other sources of law—including our own precedents. That the Constitution outranks other sources of law is inherent in

308. See KOZEL, *supra* note 109, at 118–21 (arguing that criteria for application of stare decisis should not include a challenged decision's original correctness).

309. See Barrett, *supra* note 67, at 1933–39 (discussing Justice Scalia's approach to this problem and noting his effort to distinguish between nonoriginalist precedents' “‘decisional theory,’ which he felt free to reject, and application of that theory to particular facts, which he [often] felt constrained to follow”).

310. 140 S. Ct. 1390 (2020).

311. *Id.* at 1414–15 (Kavanaugh, J., concurring).

312. *Id.* at 1414.

its nature.”³¹³ But even Justice Thomas has been unwilling to go further in limiting his own discretion “when traditional tools of legal interpretation show that [an] earlier decision adopted a textually permissible interpretation of the law” but not one that the best evidence of original meaning uniquely required.³¹⁴ In such cases, Justice Thomas has written, “courts may (but need not) adhere to an incorrect decision as precedent.”³¹⁵

In a survey of the originalist Justices’ approaches to stare decisis, Professor William Baude has argued that the problem of specifying when nonoriginalist precedents should be followed and when they should be rejected is so deep and difficult that no general solution may be possible.³¹⁶ Although none of the originalist Justices have said so explicitly, they may well concur. If so, they may feel justified in simply doing what they take to be the best they can, even if their resulting practice appears from the outside to bear a close resemblance to conservative constitutional pluralism.

Second, as I shall discuss more fully in Part V, I believe that many of the originalist Justices would defend their refusal to abandon the rhetorical high ground of originalist commitment by insisting that they—unlike many if not most constitutional pluralists—genuinely experience pulls of principled obligation to decide some cases on the basis of original meanings, in preference to nonoriginalist precedents, even if they have not fully worked out the principles that would justify their legal intuitions.³¹⁷ If so, the originalist Justices may believe that better theoretical explanations for their currently selective reliance on originalist premises may emerge over time as the Court gradually transitions from a less to a more originalist regime.³¹⁸ Until then, the selectively originalist Justices might protest, they should not be expected to eschew professions of sincerely felt originalist commitments.

Third, insofar as originalist rhetoric (that depicts originalists’ commitments in principled, nonselective, nondiscretionary terms) has

313. *Gamble v. United States*, 139 S. Ct. 1960, 1984–85 (2019) (Thomas, J., concurring).

314. *Id.* at 1984.

315. *Id.*

316. See Baude, *supra* note 5, at 326 (analogizing the challenge for originalists seeking to determine the proper scope of stare decisis to the problem of the second best in welfare economics, which many economists believe “has no general solution”).

317. See Scalia, *supra* note 64, at 139. As Justice Scalia put it:

The demand that originalists alone ‘be true to their lights’ and forswear *stare decisis* is essentially a demand that they alone render their methodology so disruptive of the established state of things that it will be useful only as an academic exercise and not as a workable prescription for judicial governance.

Id.

318. See, e.g., Solum, *supra* note 109, at 462 (“[E]ven a Supreme Court with nine originalist Justices might adhere to precedent during a transitional period.”).

persuasive effects among segments of the American public, originalist Justices may believe that they have good reasons—including ones involving the sociological legitimacy of their opinions—for continuing to employ it.³¹⁹ Originalist rhetoric appeals to many people's intuitive idea of the nature of constitutional law: having been written and adopted by particular people at a particular time, the Constitution means what those who wrote and ratified it intended or understood it to mean.³²⁰ In addition, due to the high repute in which most Americans hold the Founders, there is a widespread disposition to believe that the Framers' design reflected enduring insights about governmental organization, individual rights, and popular sovereignty.³²¹ Indeed, the allure of originalism appears to be so strong in the public mind, or at least among some constituencies, that the liberal Justices Kagan and Jackson have publicly identified themselves as originalists in some sense of that term.³²²

In my view, none of the considerations that help to explain the persistence of selective originalism—which involves not only discretionary selectivity in embracing erroneous precedents when arguments for overruling precedents are squarely on the table, but also unexplained inconsistency in judgments about whether to consider the overruling of precedents when the parties have not asked them to do so—suffices to justify it. Selective originalists might of course believe that selective originalism is actually the best interpretive theory, all things considered, in light of the difficulties of articulating a more determinate theory of *stare decisis* than they have been able to develop to date and the costs that exceptionless originalism, which they would otherwise think best, would impose. But if so, originalist Justices and their defenders should acknowledge that they believe that original meanings should control constitutional outcomes only when such meanings would dictate prudent or otherwise desirable results.

In asserting these criticisms, I do not deny that nonoriginalist Justices and theorists might be vulnerable to similar charges of methodological

319. For discussion of possible tensions between sociological and moral legitimacy, and of what judges and Justices should do in cases of conflict, see Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2250–72 (2019) (reviewing FALLON, *supra* note 65).

320. See, e.g., Jamal Greene, *On the Origins of Originalism*, 88 TEXAS L. REV. 1, 89 (2009) (“Originalism has been relatively successful in the United States because its proponents have related it to an account of constitutional authority that resonates with the American people.”).

321. See, e.g., *id.* at 6 (noting “our tendency to lionize historical figures” and hypothesizing that “[e]ven if we cannot expect Madison to understand our world, his imprimatur is worth more than that of the ‘rascals’ who currently populate our politics”).

322. See *supra* note 77 and accompanying text.

inconsistency and rhetorical disingenuousness. Be that as it may, two points developed in earlier Parts of this Article stand unrefuted. First, as a descriptive matter, we should recognize that the Supreme Court's currently dominant methodological approach is not a principled and consistent form of constitutional originalism; it is selective originalism. Second, even if nonoriginalists have sometimes fallen short of the standards that they ought to meet, their derelictions do not excuse the deficiencies that I have catalogued under the rubric of selective originalism.

V. Learning from Selective Originalism

This Part takes up the question: are there lessons that all participants in American constitutional practice—consistent originalists, selective originalists, and nonoriginalists alike—should learn from the documentation, analysis, and critique of selective originalism that earlier Parts of this Article have provided? Among the reasons to pose this question, important commonalities exist among champions of consistent originalism, selective originalism, and nonoriginalism. One involves their shared need to gauge the pertinence of original meanings in comparison with judicial precedents. As noted above, most originalists recognize that original meanings should sometimes yield to *stare decisis*, at least in the short term.³²³ And nonoriginalist Supreme Court Justices often join and occasionally write opinions that teem with references to original meanings.³²⁴

Second, besides agreeing that original meanings matter to and sometimes ought to control constitutional adjudication, advocates of consistent originalism, selective originalism, and nonoriginalism should all concur that the challenge of determining whether decisions should be based on original meanings or on judicial precedents in particular cases is often a hard one. Nonoriginalists may avoid charges of rank hypocrisy by refusing to endorse the premise that original meanings hold a strongly presumptive if not lexical priority. But nonoriginalists cannot escape the legitimacy-based challenge of offering articulate and principled bases for choosing one legally eligible ground for decision over another in particular cases.

In seeking to draw lessons, subpart V(A) argues that selective originalism should provoke reflection on the distinctiveness of the Supreme Court's role, in comparison with other courts, which are bound by Supreme Court precedent and have few opportunities to practice originalism even if

323. *See supra* note 85 and accompanying text.

324. *See, e.g.*, FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* 119–51 (2013) (concluding that there is “relative[ly little] difference among the justices in using originalist sources”).

they wanted to. Subpart V(B) discusses the nature of the “choice” that the Justices must make when deciding whether to embrace original meanings or judicial precedents as grounds for decision. The challenge for the Justices, it argues, is not to choose on a purely preferential basis but to exercise judgment about what they *ought* to do under the legal and moral circumstances that they inhabit. Subpart V(C) argues that the obligations to which the Justices are subject in choosing between original meanings and precedent-based reasoning are most illuminatingly characterized as ones of judicial role morality. Classifying them as such, I argue, would bring enhanced clarity to constitutional argument and to evaluation of the Justices’ performances, even if it would not point directly to proper resolutions of disputed cases.

One more preliminary remark is in order. Consistent with the stance that I have adopted throughout this Article, this Part brackets a number of debates about appropriate interpretive methodology in order to highlight issues arising from the need for the Supreme Court to choose between original meanings and judicial precedents as grounds for decision. In my view, the multi-faceted process that we call “constitutional interpretation”—including consideration of the Constitution’s language, history, and structure; judicial precedent; and the practical administrability of judicially crafted doctrinal formulations—inescapably requires normative judgment at multiple points.³²⁵ Among other things, reasonable people often disagreed as a historical matter about the precise meaning of constitutional terms.³²⁶ In these circumstances, I believe that determinate ascriptions of original meaning necessarily reflect more than purely factual evidence. Similarly, as the common law tradition celebrates, judicial precedents are often subject to varied interpretations that properly if not inherently reflect sometimes-contestable judgments of justice and prudence.³²⁷ For present purposes, however, I put aside all of these methodological claims and the grounds on which others might dispute them. Unless I specifically signal otherwise, this Part proceeds on the assumption that the primary issue to be resolved or illuminated involves a need for choice between original meanings and judicial precedents in Supreme Court adjudication.

325. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1252–68 (1987) (explaining how value arguments influence appraisals of other kinds of constitutional arguments).

326. See Fallon, *supra* note 256, at 1483–88 (discussing recent cases in which Supreme Court Justices have overstated the “capacity of historical materials to establish determinative linguistic meanings of constitutional provisions”).

327. See STRAUSS, *supra* note 142, at 62–97 (illustrating and defending a common-law-like approach to constitutional interpretation).

A. *Selective Originalism and the Distinctiveness of the Supreme Court's Role*

The first step in deriving lessons from the phenomenon of selective originalism in the Supreme Court is to recognize the Court's distinctive role. Given its capacity to select its grounds for decision, its hierarchical superiority over the lower courts, and its control over its agenda, the Court functions perhaps most typically as a constitutional-lawmaking institution.³²⁸ In characterizing the Court as a lawmaker, I mean to appeal to the legal and linguistic intuition that a distinction exists between judicial application of law to the facts of particular cases and judicial lawmaking with case-transcending, law-altering effects.³²⁹ According to the conceptual assumption that underlies this distinction, which accords with the Hartian positivism described in Part I, the law consists of norms that it is the obligation of courts to identify and enforce.³³⁰ But while those materials' proper application to the facts of cases will sometimes be plain to virtually all competent lawyers, sometimes there will be uncertainty or disagreement. We then need to consider what judges should do when they reach the limits of positive law.

If that assumption is granted, law-making by the Supreme Court can be contrasted with the application of relevantly clear norms to particular facts in two closely related, individually necessary, and jointly sufficient respects. First, as a conceptual matter, judicial lawmaking requires an exercise of judgment or choice in determining whether a previously existing norm or

328. See, e.g., Monaghan, *supra* note 67, at 680 (observing that “the Court sees its ‘essential role’ . . . as law declaration, not dispute resolution” and “displays impatience with doctrines that limit its authority in that respect” as applied to the Court itself, though not to other courts); Johnson, *supra* note 292, at 801–02 (noting the shift away from the Court’s traditional role of deciding cases “in favor of targeting preselected questions”). Other commentators offer less-modulated accounts of the Supreme Court’s role as a constitutional lawmaking institution. See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* 270, 277 (2008) (arguing that the Supreme Court has “a basically legislative character,” *id.* at 270, and that its constitutional decisions are not a “lawlike activity,” *id.* at 277); SEGALL, *supra* note 5, at 4 (“[T]he justices’ decisions are driven primarily by their personal values.”).

329. See, e.g., JOSEPH RAZ, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN* 194, 218–19 (1994) (maintaining that courts “participate in the lawmaking process” when “their decisions are binding on future courts . . . and where their decisions do not merely reflect previous authoritative rulings”). My distinction between applying the law and clarifying it, with the latter classified as a form of lawmaking, is roughly consistent with the distinction that many originalists draw between constitutional interpretation and constitutional construction. See *supra* note 82 and accompanying text.

330. See, e.g., HART, *supra* note 98, at 79–99 (characterizing law as the union of primary rules of conduct, which “impose duties” and require people “to do or abstain from certain actions,” *id.* at 81, and secondary rules of change and adjudication, which confer powers to enforce, create, and vary such obligations and help to “centraliz[e]” social pressure and deter “the use of physical punishments or violent self help by private individuals,” *id.* at 97–98).

source of law should be applied to particular facts.³³¹ Wherever the precise boundary between law-application and judgment-based law-elaboration may lie,³³² the Justices' decisions about whether to rule based on original constitutional meanings or prior judicial precedents—as discussed above—require judgment or choice. Second, as a functional matter, lawmaking decisions alter the legal framework—if only by clarifying norms that previously were underdeterminate—within which other courts must decide future cases.³³³

In advancing a definition of judicial lawmaking that conjoins the necessity for judgment or choice with precedentially binding effects, I should note two objections that might be advanced even within a Hartian framework. Both contain germs of insight, but neither defeats my characterization of the Supreme Court as a lawmaking institution. First, as I have acknowledged, the line between judicial lawmaking and judicial application of law to fact will often be a fine or blurry one.³³⁴ Although this point is descriptively accurate, many sound distinctions, such as those between night and day and hot and cold, have blurry edges.

Second, an objector might maintain that the term “lawmaking,” which paradigmatically describes legislative functions, errs by equating Supreme Court rulings with enactments by legislatures.³³⁵ This objection also contains a core of truth. Judicial lawmaking in constitutional cases is a different species of lawmaking from legislative lawmaking. Legislatures, including Congress, can develop new rules on an entirely forward-looking, ad hoc basis. By contrast, the Supreme Court's role as a constitutional lawmaker has an inherently backward-looking aspect, with all questions for decision involving pre-existing legal authorities and the judicial obligation to apply

331. See, e.g., 2 HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 374–77 (tent. ed. 1958) (drawing a distinction between law declaration—the “formulation in general terms of the relevant law to be applied,” *id.* at 374—and law application—applying the “relevant characteristics of the particular matter” to the general rule, *id.* at 375).

332. See JOSEPH RAZ, *Law and Value in Adjudication*, in *THE AUTHORITY OF LAW*, *supra* note 280, at 180, 182 (“The courts carry with them both their functions of applying pre-existing law and of making new ones into almost all cases.”).

333. See John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199, 215 (2001) (observing that “even in a case which cannot be decided by applying only existing legal norms it is possible to use legal reasoning to arrive at a new norm that enables (or constitutes) a decision in the case, and this norm is validated as a new legal norm in the process”).

334. See Gardner, *supra* note 333, at 221 (observing that “[i]nterpretative activity straddles the distinction between the identification of existing legal norms and the further use of them to make new legal norms”).

335. Cf. *id.* at 215 (ascribing to Ronald Dworkin “the mistaken assumption that all law-making is necessarily legislative law-making”).

them, clarify their meanings, or choose among them to resolve an issue.³³⁶ But while constitutional lawmaking by the Supreme Court necessarily begins with a backward-looking focus, the Court not only can, but often does and should, look forward, as the Court's penchant to test proposed resolutions by their implications for hypothetical cases suggests.³³⁷

It also bears repeating that the Supreme Court's capacity to set its own agenda importantly differentiates it from most lower courts.³³⁸ The Court has not always had this prerogative. As commentators have observed, the Court's discretion has liberated it from many of the disciplines that courts have traditionally borne and encouraged the Justices to assume a role more focused on law declaration than on the resolution of individual cases.³³⁹

When the Court's lawmaking role is acknowledged, an important lesson about how appeals to original meanings function in our constitutional practice emerges unmistakably. A recurrent, functional feature of appeals to original constitutional meanings—especially when they are contrasted with precedent-based grounds for decision—is to justify major revisions and even total replacements of existing doctrinal structures. Originalists have often advertised their commitment to original meanings as a basis for overruling past decisions and making doctrinal fresh starts.³⁴⁰ But judicial liberals also favor doctrinal innovation in some contexts and, notably under the Warren

336. See, e.g., FALLON, *supra* note 65, at 127–32 (“At a minimum, the Justices must strive conscientiously to identify what past authorities have established and to apply the law that those authorities have created.”); RAZ, *supra* note 332, at 195 (“There are no pure law-creating cases. In every case in which the court makes law it also applies laws restricting and guiding its law-creating activities.”).

337. See, e.g., EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1–8 (1961) (describing “[t]he basic pattern of legal reasoning,” *id.* at 1, as involving the “comparison of cases” and the use of “hypothetical instances,” *id.* at 8).

338. The jurisdiction of the district courts is almost entirely mandatory. See, e.g., *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (emphasizing the district courts’ “virtually unflagging obligation . . . to exercise the jurisdiction given them”). Although appeals of final district court decisions to the courts of appeals are available as a matter of right, increasing pressure on appellate dockets has led the circuits to reduce opportunities for oral argument and to increase the number of cases decided either without opinion or by per curiam opinion to well over half. See HART & WECHSLER, *supra* note 133, at 43–46 (describing business of the courts of appeals).

339. See Monaghan, *supra* note 67, at 684 (“The Court’s current place in our constitutional order distinguishes it in kind, not in degree, from other courts.”); see also Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1713–17 (2000) (arguing that the Court’s discretion in its certiorari jurisdiction is at odds with the traditional rationale for judicial review as a “byproduct of a court’s obligation to decide a case,” *id.* at 1714).

340. See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395–96, 1404–05 (2020) (overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972)); *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1492–96 (2019) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)).

Court, have appealed to original meanings as grounds for reformist lawmaking in some instances.³⁴¹ Today, I expect that many liberals fantasize about a time when the Supreme Court might overrule *Citizens United v. FEC*.³⁴² In the face of contrary precedent, I would venture that the fantasized overruling opinion might echo Justice Stevens's argument that judicial protection for corporate campaign expenditures is inconsistent with the original understanding of the First Amendment.³⁴³

B. The Grounds for Identifying Criteria for "Choice" Between Original Meanings and Judicial Precedents

If we accept the conclusion—advanced in section IV(C)(1) and echoed immediately above—that purely positive law does not determine how the Justices of the Supreme Court should choose between precedent-based and originalist modes of analysis in many cases, it may be tempting to infer that the Justices enjoy discretion to make preference-based selections. Yet the terminology of discretion, preference, and “choice,” which I myself have sometimes employed in this Article, can prove misleading. When originalists, including selective originalists, affirm that the Justices have an obligation of fidelity to original meanings, they do not affirm merely that original meanings are a permissible ground for judicial decision. Rather, as noted in section V(D)(3), I believe that originalists mean to make the stronger claim that conscientious Justices have genuine obligations to follow original meanings, rather than adhere to judicial precedents, in some cases. As much as originalists, moreover, many nonoriginalists believe that there are “right” answers to disputed Supreme Court cases that the Justices ought to reach as a matter of judicial obligation.³⁴⁴

If I am correct that the Justices frequently feel a sense of obligation in choosing between precedent-based frameworks for decision and original public meanings and that many informed observers retain a comparable sense that there are right and wrong answers to constitutional questions that purely practice-based legal rules do not pick out, multiple possible explanations exist. One would be that the selectively originalist Justices are mistaken, or even self-deluded, if they hold this belief about the scope of their

341. See Frank B. Cross, *Originalism—The Forgotten Years*, 28 CONST. COMMENT. 37, 49 (2012) (“The Warren Court deployed originalist sources more than any prior Court in history.”).

342. 558 U.S. 310 (2010).

343. See *supra* note 151 and accompanying text.

344. The leading liberal proponent of this view has been Ronald Dworkin. See RONALD DWORKIN, *LAW'S EMPIRE* 266–71 (1986) (explicating and defending his one-right-answer thesis).

obligations.³⁴⁵ If we want to understand the roots of passionately divisive constitutional disagreements, however, we should not dismiss protestations of obligation, or at least of felt obligation, without further inquiry.

A second possibility would be to reconsider the assumption that the best jurisprudential theory would be consistent with the main outlines of Hartian positivism. Other jurisprudential theories, of which I shall take Professor Ronald Dworkin's to be representative, posit that law is indissolubly linked to morality such that morality renders the fabric of legality both seamless and determinate in all cases.³⁴⁶ In contrast with positivist theories that identify law with authoritative materials (such as constitutional provisions) and norms that are picked out by a rule or rules of recognition, Dworkin characterized law as a pervasively "interpretive" practice³⁴⁷ within which the law in any particular jurisdiction consists of the often-unarticulated and sometimes-contested "principles" that provide "the best constructive interpretation" of such familiar legal phenomena as constitutional provisions, statutes, and judicial decisions.³⁴⁸ According to Dworkin, identification of the "best" interpretive theory of American law depends partly on moral criteria that yield "one right answer"³⁴⁹—which the Justices of the Supreme Court have an obligation to identify and enforce—even in hard constitutional cases.

Without engaging in the deep argument that a full consideration of Dworkin's theory would require, a few words may suffice to explain, though admittedly without furnishing the complete argument that would be necessary to justify, my continued reliance on Hartian positivist assumptions. Although Dworkin's theory of adjudication is illuminating in some respects, his more general equation of "law" with often-unarticulated explanatory "principles"—some of which no one has ever thought of—is highly

345. See, e.g., Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1224 (2009) (advancing an "Error Theory" as a possible explanation for judges arguing "as if there were a clear criterion of legal validity" in disputes in which no such clear criterion exists due to theoretical disagreement about the grounds of law).

346. See DWORKIN, *supra* note 344, at 266–71 (explicating and defending his theory's "refusal to accept the popular view that there are no uniquely right answers in hard cases at law" in light of his theory's partly moral test for identifying uniquely right answers and its rejection of moral skepticism as a ground for objection).

347. *Id.* at 226.

348. See *id.* at 225 ("According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.").

349. See *id.* at 266–71 (proffering an "interpretive" theory of the nature of law); see also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 290 (1977) ("The 'myth' that there is one right answer in a hard case is both recalcitrant and successful. Its recalcitrance and success count as arguments that it is no myth.").

counterintuitive. So is the idea that there can be law that was not made by any legal authority,³⁵⁰ does not reflect prevailing norms of practice, and does not directly embody moral standards that the law might plausibly be thought to incorporate in light of its inherent purposes.³⁵¹ As my discussion of practical obstacles to the implementation of originalism should have suggested, the Justices of the Supreme Court also need to take account of a number of practical considerations in choosing their bases for decision that are not easily assimilated into Dworkin's entirely principle-based account of legally permissible judicial reasoning. These considerations are especially prominent in cases in which the Justices must craft tests or rules of decision to implement vague constitutional language.³⁵² The strict judicial scrutiny standard, the widespread demand for content neutrality in free speech cases, and the formulae for ascertaining the limits of Congress's regulatory power under Article I and Section Five of the Fourteenth Amendment all furnish well-known examples of judicially devised doctrines that lack firm foundations in the Constitution's text and original history. In the face of vague constitutional language and interpretive uncertainty and dispute, the Justices can undoubtedly come to determinate conclusions. But the most plausible explanation for how they can do so involves their sometime reliance on extra-legal sources of value and grounds of obligation.

C. *Role Morality*

If the Justices experience obligations that cannot persuasively be accounted for purely as a matter of positive law, then we should look for an alternative explanation. When we do so, morality is an obvious alternative or partial complement to law as a source of obligation: When the Justices face a choice between deciding a case based on the Constitution's original meaning and ruling based on precedent, and when no legal rule determines that choice, the Justices should do what is morally best under the

350. See, e.g., RAZ, *supra* note 329, at 208 (criticizing Dworkin's position that "there can be laws which do not express anyone's judgment on what their subjects ought to do").

351. The principles that Dworkin views as constitutive of the law are the ones that provide the best explanation of recognized legal authorities, *see supra* note 348 and accompanying text, not ones that are advanced as possessing inherent moral validity such as those espoused by the natural law tradition, *see, e.g.,* Pojanowski, & Walsh, *supra* note 94, at 117 (noting Professor Adler's comment that Dworkin's "relationship with the natural law tradition is complicated at best"), or that Professor Adrian Vermeule has traced to the "classical legal tradition," *see* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION 3 (2022) (arguing for incorporating insights from the classical legal tradition into the modern understandings of the nature and content of law).

352. See, e.g., RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 26 (2001) (highlighting the need for empirical and strategic thinking in the crafting of doctrinal tests).

circumstances.³⁵³ If so, judicial conservatives will most often think it morally best to make conservative decisions, while liberal Justices will feel equally obliged to reach liberal ones. As I shall discuss more fully below, the dispute about whether the Supreme Court should overrule *Roe v. Wade* stands as a recent, highly salient, case in point.

Although the claim that the Justices should resolve legal indeterminacies based on moral considerations may seem shocking at first blush, it is largely consistent with the more familiar proposition that judges and Justices have role-based obligations to “reach their decisions by legal reasoning” even in the absence of determinate rules.³⁵⁴ The Justices must always ground their rulings in legal authorities and adhere to legal constraints, including constraints on permissible normative reasoning.³⁵⁵ But even when such constraints enter the picture, they leave many issues that confront the Supreme Court—including questions involving whether the Justices should decide cases based on judicial precedents or original constitutional meanings—legally underdetermined. In such cases, the Justices properly decide what they ought to do as a matter of role morality.³⁵⁶

353. See, e.g., Joseph Raz, *Incorporation by Law*, 10 LEGAL THEORY 1, 17 (2004) (noting that if “morality applies to people and courts alike anyway, then we are all, courts included, bound by it” even if the law is not conceptualized as “incorporating morality”). Especially in the second edition of *The Concept of Law*, Professor H.L.A. Hart appeared to embrace an alternative approach, which holds that the law, as identified through practice-based inquiries, can incorporate moral criteria for decision in some or all otherwise doubtful cases and thus make it legally obligatory for judges to decide some cases on the basis of moral norms. See H.L.A. HART, THE CONCEPT OF LAW 250 (2d. ed. 1994) (“[T]he rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values . . .”). Yet it would be analytically unhelpful to characterize the law as requiring Justices, as a matter of legal obligation, to do what is morally best. First, the posited legal incorporation of moral norms is analytically unnecessary to explain why judges should decide otherwise doubtful cases based on moral considerations. Because moral norms would apply to judges anyway, see Raz, *supra*, at 14 (so asserting), we do not need legal incorporation of morality to explain why the Justices should do what it is morally best for them to do. Second, theories that posit legal incorporation of moral norms invite endless questions about which moral norms the law incorporates if it does not incorporate all of them.

354. Gardner, *supra* note 333, at 215–16.

355. See *id.* (arguing that “judges . . . have a professional obligation to reach their decisions by legal reasoning”).

356. See, e.g., Leslie Green, *Law and the Role of a Judge*, in LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL S. MOORE 323, 323–42 (Kimberly Kessler Ferzan & Stephen J. Morse eds., 2016) (arguing that judges are subject to norms of role morality); Michael O. Hardimon, *Role Obligations*, 91 J. PHIL. 333, 333–34 (1994) (arguing that role obligations are central to morality); see also Gardner, *supra* note 333, at 215 (characterizing judges as having “professional obligations”).

Admittedly, “[*r*]ole is not a well-defined and well-developed moral idea, and we will have to make do with some sloppiness around the edges.”³⁵⁷ Even so, recognition that moral obligations and ideals can vary with roles is ingrained in everyday life. Among the roles that carry obligations are those of parent, child, spouse, friend, teacher, and mentor.³⁵⁸ Although the ways in which roles ground obligations and ideals may be diverse, the capacity of recognized roles to do so often arises from the beneficial social consequences that such roles, once they are recognized and support a surrounding system of norms and expectations, enable or create.³⁵⁹ In the case of the Justices of the Supreme Court, the central issues of role morality emerge within a legal system that requires judicial lawmaking in some cases but also establishes other, co-equal institutions of government and contemplates limits on judicial power.

Although I can explore the role-based moral norms that distinctively apply to Supreme Court Justices neither broadly nor deeply in this Article,³⁶⁰

357. ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* 46 (1999).

358. To be sure, not all roles generate moral obligations or give rise to justifications or excuses. The role of a Mafia don, which carries no morally justificatory force with regard to conventionally expected yet brutal behavior, stands as a case in point.

359. Professor Leslie Green identifies four characteristic features of roles that give rise to role-based moral obligations:

1. A role is cluster of norms (e.g., obligations, powers, permissions) that apply to its occupant, together with virtues and expectations that support those norms.
2. Role-norms apply to the occupant of the role at least partly in virtue of the fact that he occupies that role.
3. A role can have more than one possible occupant, either at the same time or sequentially.
4. Role-norms typically function together as a package: some are binding only because others are; some support conformity to the others; some influence the interpretation of the others.

Green, *supra* note 356, at 329.

360. Professor Lawrence Lessig has offered a partial theory of the Justices’ role-based moral obligations by arguing that the Justices have sometimes conflicting obligations of fidelity to the Constitution’s meaning and fidelity to their roles as Justices within our system of law and government as it has evolved over time. *See* LAWRENCE LESSIG, *FIDELITY AND CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION* 445 (2019) (differentiating the Justices’ obligations). In his terminology, fidelity to role demands that the Justices produce workable and reasonably just bodies of law and that they preserve public confidence in the judiciary, even occasionally at the expense of fidelity to the Constitution’s meaning. *See id.* at 451–56 (discussing internal and external aspects of the Court’s fidelity to role). I take the judgments that the Justices must make about how best to accommodate the sometimes competing demands of fidelity to constitutional meaning and fidelity to role to be ones of role morality.

in the remainder of this subpart I shall consider—more suggestively than conclusively—two aspects of the Justices’ responsibilities to which role-based moral thinking might bring illumination, even though it would not dispel disagreement. The first involves choice of a decisional framework for cases that appear on the Supreme Court’s docket. The second involves selection of cases for decision and related issues of agenda control.

With respect to both, I shall assume, in line with arguments advanced by Professor Thomas Nagel, that morality has both deontological, or rights-based, and consequentialist components.³⁶¹ Again following Nagel, I further assume that for officials exercising public roles, consequences frequently assume greater moral significance than they would possess for actors in private life. But I continue to assume that when the law imposes obligations or constraints, judges and Justices, who have promised to obey the law, will normally have a moral obligation to fulfill their promises. In speaking of judicial role morality, I am principally concerned with cases in which the law is underdeterminate.

1. Role Morality in Choices of Decisional Frameworks.—Although many originalists believe that the best approach to issues presented by the availability of original constitutional meanings and judicial precedents as alternative bases for decision would lie in a maximally determinate theory that was laid out in advance of particular cases, my view is different. In recognition of the complexity involved in elaborating an even moderately determinate theory, I have argued elsewhere for a “reflective equilibrium” approach to constitutional adjudication in which the Justices would seek to work out their methodological commitments and other judgments about the weights of constitutionally relevant considerations on a partly case-by-case basis.³⁶² This second-order methodology, which draws its inspiration from John Rawls’s account of reflective equilibrium as a device for reasoning

In speaking of judicial role morality, I do not mean to foreclose the possibility that some of the norms binding on judges might be traceable to natural law or “the classical legal tradition” as sketched in VERMEULE, *supra* note 351. But whereas Professor Vermeule characterizes the classical legal tradition as exhibiting “agnosticism about . . . the allocation among institutions of authority to interpret the constitutional scheme,” *id.* at 10, role-based moral thinking about the norms applicable to Supreme Court Justices necessarily aims to identify appropriate assignments of institutional authority under the Constitution of the United States.

361. See THOMAS NAGEL, MORTAL QUESTIONS 54, 83 (1979) (“Two types of concern determine the content of morality: concern with what will happen and concern with what one is doing.”).

362. FALLON, *supra* note 65, at 125–54.

about issues of political morality,³⁶³ calls for Justices and others to consider the attractiveness of methodological commitments or premises—including those for determining original meanings’ significance relative to other considerations counseling adherence to precedent—and the desirability of the outcomes that those principles would yield in light of one another. Among its principal features, Reflective Equilibrium Theory posits that a well-chosen first-order theory of constitutional interpretation, such as some version of originalism or nonoriginalism, ought to be revisable, not rigidly fixed, though it should also demand articulate explanations for changes of position.

I shall not attempt to lay out the arguments for a rolling, reflective-equilibrium-based approach to constitutional adjudication here. But the lessons to be drawn from the originalist Justices’ frequent lapses into selective originalism are relevant to assessments of interpretive methodologies and decisionmaking frameworks in at least two ways. First, the considerations that lead to selectivity in the practice of avowedly originalist Justices illustrate the difficulty of elaborating all of the details of a defensible approach to the choice between original meanings and precedent as grounds for decision in advance of challenging and occasionally unanticipated cases. Second, as my earlier criticisms of selective originalism have suggested, originalists and nonoriginalists should concur in recognizing the desirability of transparency and integrity in the Justices’ articulation of their rationales for deciding particular cases, even if the former disagree with my judgment that those rationales might often need to be quite case-specific.

A partial list of the considerations that the Justices should consider in making the choice between original meanings and judicial precedents as grounds for decision—whether via pre-commitment to a set or priority rules or on a more nearly case-by-case basis—would include the following:

Democratic legitimacy and fair distributions of political power. If the Supreme Court decides a case based on the Constitution’s original meaning, the Justices may believe—whether more or less plausibly—that their decision implicates claims about fair allocations of power to past lawmaking authorities who wrote and ratified a disputed provision.³⁶⁴ But especially in cases involving precedents that have taken root and expanded over time, there also may be questions about how to allocate judicial power fairly as

363. See JOHN RAWLS, A THEORY OF JUSTICE 20–22, 48–53 (1st ed. 1971) (outlining his theory of reflective equilibrium).

364. See, e.g., Alicea, *supra* note 106, at 50 (arguing that originalism is required to “preserv[e] the people’s authority . . . in a regime operating under a constitution . . . that is designed to serve as a higher form of positive law than acts of ordinary politics”).

between past Supreme Courts and the current Justices. Past Justices, all of whom were appointed by politically accountable Presidents and confirmed by the Senate, have frequently reflected public perceptions of fairness and practical necessity in interpreting constitutional language in light of the felt needs of changing times.³⁶⁵ Even as a matter of democratic legitimacy, their judgment should not lightly be cast aside. In addition, parties claiming constitutional rights frequently argue that within any fair allocation of power, some decisions should be reserved to the individual, not political majorities or governmental officials.³⁶⁶

Rule-of-law values, including maintenance of legal stability and protection of reliance interests. Values such as these possess undisputed significance in the eyes of originalists as well as nonoriginalists.³⁶⁷ Even for someone who believes, for instance, that considerations of democratic legitimacy support adherence to the Constitution's original meaning, interests in maintaining legal stability and protecting reliance interests are matters that Supreme Court Justices need to weigh, and should strive to weigh correctly, even in the absence of a determinate and binding rule of stare decisis. When considering whether to effect a significant change in existing doctrine based on the Constitution's original meaning, the Justices should take care that the evidence before them, and on which their decision would be based, is tested and reliable. Doctrine ought not change based on law-office history or every new academic article proffering a plausible revisionist interpretation of a constitutional provision's original meaning.³⁶⁸

365. On the Supreme Court's historic responsiveness to evolving public opinion regarding politically salient issues, see generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (1st ed. 2009). See also David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 730 (2009) ("[E]mpirical studies suggest that the Court's actions are at least as consistent with public opinion as those of the *elected* branches.").

366. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (explaining that the law protects individual choice in many private matters), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (invalidating a statute that "seek[s] to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals").

367. See, e.g., Solum, *supra* note 109, at 461–62 (characterizing "predictability, certainty, stability, publicity, and uniformity" as "rule of law values" and arguing that an approach to stare decisis that failed to accommodate them "would be inconsistent with the rule of law justification for originalism"); Barnett, *supra* note 85, at 266 ("An originalist need not reject legal claims made by particular persons made in reliance on mistaken precedent."); KOZEL, *supra* note 109, at 116 ("The reliance a precedent has commanded is a reason for upholding it regardless of the precedent's rule of decision . . .").

368. See *supra* note 265 and accompanying text.

Substantive justice. In cases involving perceived disparities between original constitutional meanings and judicial precedents, issues of substantive justice matter to how the Justices should decide which ground for decision to adopt. Consider whether the Justices should have overruled *Roe v. Wade*.³⁶⁹ Contrary to some arguments on both sides,³⁷⁰ it is untenable to maintain that the Justices—against the background of debates about the force of stare decisis—could think sensibly about whether to overturn longstanding precedents upholding abortion rights without considering issues involving the nature of the state’s interest in restricting abortion, the moral claims of pregnant people to be free from state coercion in controlling their own bodies, and the consequences for those who are forced to carry unwanted pregnancies to term. These are all considerations relevant to the nature, if any, of *Roe*’s error under the Court’s modern substantive due process precedents and to the question whether an overruling would “unduly upset reliance interests.”³⁷¹ Though acknowledging the influence of substantive moral considerations in Supreme Court adjudication may prove uncomfortable in some respects, the appropriate response is to situate such considerations in a matrix of judicial role morality that also includes other elements. We should also recall the Justices’ obligation to integrate attention to considerations of substantive justice into a framework of legal reasoning that extends “all the way down” and constrains purely moral analysis.³⁷²

369. 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

370. *See, e.g., Casey*, 505 U.S. at 871 (“[A]fter nearly 20 years of litigation in *Roe*’s wake we are satisfied that the immediate question is not the soundness of *Roe*’s resolution of the issue [of the weight of the state interest in preserving fetal life], but the precedential force that must be accorded to its holding.”); *id.* at 980 (Scalia, J., concurring in the judgment in part and dissenting in part) (maintaining that *Roe* was wrongly decided and should be overruled “not because of anything so exalted as my views concerning the ‘concept of existence, of meaning, of the universe, and of the mystery of human life’” but “because of two simple facts: (1) the Constitution says absolutely nothing about [abortion], and (2) the longstanding traditions of American society have permitted it to be legally proscribed”).

In the context of abortion, as elsewhere, disagreements about substantive justice abet the confidence with which we classify Justices as conservative or liberal. *See, e.g.,* RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1–7 (1996) (arguing that “the best explanation of the differing patterns” of decisions by judges whom “scholars and journalists” classify as “‘liberal’ or ‘conservative’ . . . lies in their different understandings of central moral values embedded in the Constitution’s text”). Influential political scientists who study judicial voting behavior often concur in this conclusion based on a very different set of methodological assumptions. *See, e.g.,* SEGAL & SPAETH, *supra* note 234, at 110–11 (presenting the “attitudinal model, which holds that justices make decisions by considering the facts of the case in light of their ideological attitudes and values”).

371. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring).

372. *See supra* note 68 and accompanying text.

Lawmaking significance of decisions by Justices on a multi-member Court. Although each of the nine Justices votes individually in adopting a framework for decision in cases in which original meanings and prior judicial rulings are both available, any particular Justice may find herself unable to achieve what she views as the optimal outcome in a particular case. If not, she may need to decide whether to compromise. For example, an originalist Justice may find that she can move the law closer to what she believes to be the correct position if she joins a nonoriginalist opinion, which her vote might establish as the majority opinion, than if she files a separate opinion that advances what she believes to be the precisely correct originalist analysis.³⁷³ Or a nonoriginalist Justice may find that an originalist opinion—for which her vote could create a majority—reaches precisely the right result in particular case, albeit for reasons that she would not otherwise endorse. The specific holdings of constitutional cases, which sometimes can be appraised as better or worse as well as right or wrong, matter. As I have emphasized in my criticisms of selective originalism, however, judicial candor and integrity also matter. Sometimes the best accommodation may be for a Justice to join an opinion that she thinks reaches the best available case-specific result while explaining differences in her preferred approach in a separate opinion. But it would seem to me mistaken to conclude categorically that a Justice subject to the strictures of judicial role morality should never make or attempt to forge compromises.

As my arguments in this subpart will have signaled, my own view is that issues involving the choice between original meanings and judicial precedents as bases for Supreme Court decisionmaking illustrate the desirability not only of a reflective equilibrium approach to constitutional theorizing, but also of a candidly pluralist approach to constitutional adjudication in the Supreme Court. In light of the plurality and complexity of relevant considerations, the Justices should shoulder the burden of explaining the sometime-priority of even erroneous precedents over original meanings, and vice versa, in candid, principled terms. Selective originalism would seem to me to be defensible as a matter of judicial role morality only if it were somehow refashioned as a form of constitutional pluralism, although possibly with a stronger presumptive preference for originalist decisionmaking frameworks than most versions of constitutional pluralism currently embrace. As I have said, I believe that, as the frequent lapses of

373. For a thoughtful discussion of how an originalist Justice ought to consider when to compromise her personal views in order to function effectively as a member of a nine-member Court, see Barnett & Solum, *supra* note 84 (manuscript at 48–51).

ostensibly originalist Justices into selective originalism may unwittingly tend to confirm, any defensible form of nonselective originalism would likely need to be reformulated in more flexible terms than originalist rhetoric characteristically purports to aspire to. At the very least, committed originalists should acknowledge the need for candidly-embraced premises for managing a gradual transition to what they hope will be a more pervasively originalist future. Some originalist theorists have begun to recognize this challenge.³⁷⁴

2. *Role Morality and Issues of Agenda Construction.*—The Justices’ responsibility for setting their own agenda is a matter of vast, urgently timely consequence.³⁷⁵ In the aftermath of *Dobbs*, the Court will face decisions about whether, for example, to reconsider precedents such as *Lawrence v. Texas*,³⁷⁶ *Obergefell v. Hodges*,³⁷⁷ and *Griswold v. Connecticut*.³⁷⁸

Although I do not have a complete theory, any framework for normative prescription and appraisal would need to rely heavily on role-inflected moral norms. No law, written or unwritten, dictates which petitions for certiorari the Justices should grant and which they should deny. In considering which aspects of constitutional doctrine the Supreme Court should reconsider afresh, my own views are substantially Burkean: whatever role an unelected Supreme Court ought to play within our constitutional structure, especially when it is recognized that the Court frequently cannot avoid lawmaking functions in cases that it decides on the merits, the Justices should seldom assert revolutionary or counterrevolutionary prerogatives, even in the service of (what they take to be) substantive justice or fidelity to original

374. See, e.g., Solum, *supra* note 109, at 461–63 (discussing a hypothetical “gradual transition” to originalism); John O. McGinnis & Michael Rappaport, *An Originalist Approach to Prospective Overruling*, 99 NOTRE DAME L. REV. (forthcoming 2023) (manuscript at 41), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4367359 [https://perma.cc/NK9J-QX9N] (acknowledging the need for a theory of originalism that makes the “transition from non-originalism back to the original meaning . . . less disruptive and more gradual when necessary” and arguing that prospective overruling of nonoriginalist statutes and prior decisions provides the right mechanism for doing this); Lawrence B. Solum & Max Crema, *Originalism and Personal Jurisdiction: Several Questions and a Few Answers*, 73 ALA. L. REV. 483, 535 (2022) (arguing that the Supreme Court could manage a transition toward originalism in personal jurisdiction by giving Congress ample notice about potential doctrinal overruling so that it could pass new laws preserving the doctrinal status quo).

375. Cf., e.g., Monaghan, *supra* note 67, at 729–30 (“The discretion exercised by the Court in issue selection (as opposed to decision on the merits) often will run past the outer edges of what counts as legal reasoning in the interpretive context.”).

376. 539 U.S. 558 (2003).

377. 576 U.S. 644 (2015).

378. 381 U.S. 479 (1965).

constitutional meanings.³⁷⁹ My position is of course not absolutist. No one believes that the Supreme Court should never overrule its past decisions. Decisions such as *Plessy v. Ferguson*³⁸⁰ and *Lochner v. New York*³⁸¹ furnish frequently cited examples of decisions that were rightly overturned. Rank injustices should be righted, serious anomalies corrected—and the reconsideration of suspect precedents obviously needs to be put on the Court’s agenda for overrulings to occur. Nevertheless, by word and deed, the Justices should signal their commitment to leaving the vast bulk of federal law undisturbed.³⁸²

For originalist Justices, the certiorari jurisdiction may pose different, harder questions of role-based morality in light of what I have taken to be originalism’s implicit commitment to the view that decisionmaking based on the Constitution’s original meaning should be the norm, not the exception, largely for normative reasons laid out in Part I. Prior to her appointment to the Supreme Court, Justice Barrett, in expounding an originalist position, opined that the Supreme Court should use its prerogatives in granting and denying certiorari to ensure that the law remained reasonably stable, including through the retention of nonoriginalist precedents.³⁸³ Although pragmatic considerations provide strong support for that position, I struggle to see how it could be consistent with originalists’ ostensible belief that whether to be bound by the Constitution’s original meaning is not properly a matter for merely pragmatic judgment, including by the Supreme Court. If strategic use of the certiorari jurisdiction allows originalist Justices to choose in advance the occasions on which they will decide cases on originalist bases, while refusing to entertain other cases in which they would think it undesirable to render originalist rulings, then originalist theories that embrace or promote this strategy would seem to me to be inherently selective in an important sense. If this appraisal is correct, then the felt need for selectivity would seem to me, once again, to be instructively relevant to the overall assessment of originalist constitutional theory. At the very least, I

379. See STRAUSS, *supra* note 142, at 40–41 (defending a common-law-like approach to constitutional decisionmaking animated by “attitudes of humility and cautious empiricism” that were most famously championed by Edmund Burke).

380. 163 U.S. 537 (1896).

381. 198 U.S. 45 (1905).

382. Sometimes the Justices might feel that a lower court leaves them no choice but to consider whether an important precedent should be reconsidered. But if a lower court has arguably deviated from a prior Supreme Court precedent by which it is bound, the Justices could, if they chose, limit their grant of certiorari to the question of whether the lower court had violated its obligation to apply Supreme Court precedents until the Court had overruled them.

383. See Barrett, *supra* note 288, at 1731–33 (discussing how the Court maintains stability through its certiorari standards).

believe that proponents of originalism owe skeptics a principled explanation of why their premises about the requirements of constitutional fidelity in Supreme Court decisions of merits cases do not extend to the Justices' decisions concerning whether to grant certiorari in the first place.

3. *Broader Implications of Role-Based Moral Thinking.*—If concerned citizens internalized the lesson that the resolution of disputed cases in the Supreme Court is frequently not uniquely determined by law, but that norms of role morality apply, discussions about the proper role of the Supreme Court within our constitutional order would be clarified significantly. Although this is not a feasible place for me to discuss all possible implications, candor demands mention of two.

First, acknowledgment of the Court's role as a constitutional lawmaker would be highly pertinent to debates about whether, and if so how, the Court's powers ought to be checked. Issues involving possible actions by Congress to check or reshape the Court have gained significant attention in recent years, including through a report by a presidential Commission on the Supreme Court.³⁸⁴ Some have resisted reform proposals on the ground that they implicitly cast aspersions on the current Justices' disinterestedness or good faith in discharging their roles.³⁸⁵ Once the nature of those roles is seen as including a substantial lawmaking function, arguments concerning the wisdom or desirability of checking the Court's power need not depend on hidden premises of malice or corruption.

Second, like debates about the proper decision of particular cases, discussions surrounding nominations and confirmations to the Supreme Court would occur on clarified, more candid terms. It would need to be acknowledged that Justices should be chosen based on much more than their technical, narrowly legal knowledge and skills. In the interstices between binding legal rules, the Justices need to exercise judgment along the multiple dimensions that judicial role morality makes relevant. Accordingly, issues about a nominee's values and judgment would come to the fore. Along one dimension, discussion of a nominee's substantively conservative or liberal

384. See PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT 20–21, 84–85, 111, 154 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/6GSE-GRA3>] (enumerating proposals for reforming and reshaping the Supreme Court).

385. See, e.g., THOMAS B. GRIFFITH & DAVID F. LEVI, STATEMENT BY FORMER FEDERAL JUDGES THOMAS B. GRIFFITH AND DAVID F. LEVI 2 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/Griffith-Levi-Statement.pdf> [<https://perma.cc/AG74-AZ3E>] (“In our view, most of the proposed reforms discussed in the Commission report—including ‘court packing’ and term limits—are without substantial merit . . .”).

views would be in order. Along another, views about appropriate allocations of decisionmaking power within our constitutional regime might hold equal significance. In addition, a willingness to reason with other Justices and occasionally compromise might count as a virtue, not a weakness, from the perspective of some—though others, I suppose, might insist that there can be no morally tolerable compromise with morally objectionable positions.

In suggesting that we should evaluate sitting and prospective Justices in light of standards of role morality, which are admittedly contestable in some respects, I must note a practical objection. Processes of nomination and confirmation of Supreme Court Justices already subject our politics to severe strain.³⁸⁶ Frank recognition that the central questions in appraising potential Justices involve contestable issues of role morality, views about which probably skew along ideological lines, might tend to make a bad situation worse. Although I do not discount that worry, my argument that we should evaluate Justices pursuant to role-based moral norms stands more as a statement of legal and moral truth than as a proposal to be chosen or rejected on some other basis. Mythologized accounts of how those who wield power make their decisions seldom prove beneficent, or even supportable, in the long run.³⁸⁷

Conclusion

In this Article I have defined selective originalism and charted its scope. Contrary to the impressions of many, we do not have an originalist Supreme Court, committed to deciding all or nearly all cases based on original constitutional meanings, but at most a selectively originalist Court. I have also argued that selective originalism, as currently practiced, is disingenuous if not hypocritical.

In addition to defining, documenting, and criticizing selective originalism, this Article has pursued a constructive agenda. Among its affirmative submissions, four warrant highlighting. First, the Justices' decisions whether to base their holdings on original meanings or past judicial precedents are seldom controlled by positive law. Both original constitutional meanings and Supreme Court precedents are legally permissible bases for the Justices' decisions, and both are available to the Justices in nearly every

386. For a recent discussion, see PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, *supra* note 384 at 13–17.

387. If the process of nomination and confirmation as it is currently structured would run completely off the rails if it were acknowledged openly that the Justices frequently must exercise a kind of moral judgment that provokes ideological division, a structural solution might be to establish eighteen-year terms for Supreme Court Justices and to guarantee each President two nominations to the Court during a four-year presidential term. *See id.* at 122–25 (discussing such proposals).

constitutional case. Second, given (a) the Justices' discretion to choose the bases for their decisions, (b) their nearly untrammelled power to set their own agenda, and (c) their authority to establish rules of decision binding on all other courts, we should acknowledge the reality that the Supreme Court is a predominantly lawmaking tribunal. Third, recognition that the Justices' central modern function is one of constitutional lawmaking does not imply that the Justices are free to make and unmake constitutional law as they will, ungoverned by controlling standards or obligations. Legal norms apply, even when they do not determine unique outcomes. Fourth, especially when legal norms do not uniquely determine the outcomes of constitutional cases in the Supreme Court, the Justices are subject to, and we should base our evaluations of their performances on, norms of judicial role morality.