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NEGATIVE ORIGINALISM

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INTRODUCTION: A CRITIQUE OF ORIGINALISM

Originalism has been criticized for failing to provide a determinate meaning in every instance of interpretation.[1] To these commentators, originalism is at best a flawed methodology in which diverging historical sources are inconsistently applied by judges and scholars who cannot even agree at what level of generality the original meaning should be viewed. Some even go so far as to argue that original meaning is, at worst, "illusory," and "allows originalism to be turned into, in effect, a form of progressive and very much living constitutionalism."[2] In other words, they say originalism, which was spawned as a cogent theory[3] to counter the Warren Court's flexible use of the Constitution, is a fraud.

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1. *See* Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485, 1502 ("[W]hen reasonable people disagree over the fundamental original meaning of a text based on identical historical source materials, the value of originalism as a means of authoritatively determining constitutional meaning becomes highly questionable."); *see also* William G. Merkel, The District of Columbia v. Heller *and Antonin Scalia's Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349, 349 (2009) (describing originalism as "an effort to pin point a single original understanding when in fact meaning was hotly contested at the time constitutional text was created"); Bret Boyce, *The Magic Mirror of "Original Meaning": Recent Approaches to the Fourteenth Amendment*, 66 MAINE L. REV. 29, 86 (2013) ("Indeed, the quest for a single 'original meaning' is a misguided one.").

2. ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 116 (2022).

3. There are diverging views as to whether originalism was practiced implicitly prior to its rise as a named theory. That debate is beyond the scope of this essay.

There are a few issues that scholars have raised with originalism, but in the end, each is a critique of originalism's alleged failure to provide a noncontroversial outcome in every case. The first issue is that judges are generally not historians, and their use of history may be ill informed.[4] Even when a historical analysis is well-performed, a lack of relevant data and historical disagreement over meaning make finding a concrete solution difficult.[5] Where a source provides an answer, deciding to attribute one historical author's view to the entire body that drafted the legal text raises additional concerns.[6] At the end of this line of inquiry is the question of whether a unique original meaning can be ascertained from the evidence, or even whether such a meaning existed in the first place. If not, is originalism a failed method of interpretation?

I argue that these critiques miss the primary strength of originalism in practice: even where an originalist analysis fails to provide a determinate interpretation, it typically will further determine an underdetermined text. In other words, it will tell us what the legal text does *not* mean. In Part I, I will expand on what exactly I mean when I say "originalism." Then, in Part II, I will show why much of originalism's strength comes from its negative interpretative functions, by narrowing the zone of possible interpretations.

ORIGINALISM AS A THEORY OF NOT LYING

Originalism has developed several strains over the years but can generally be defined as the idea that the proper meaning to be given to a legal text is some conception of a legal text's meaning as determined at the time it was written.[7] There are features—let us call them family resemblances—that are shared by many if not most originalist theories. These are generally: (1) the distinction between the interpretation of a legal text and its construction in adjudication,[8] (2) the theory that a text's

4. Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 77–78 (2006); *see also* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1481 (2019) ("Alas, legal history is hard. It's hard enough to trace the title of a single parcel of land back to legal grants a few centuries old.")

5. Redish & Arnould, *supra* note 1, at 1502.

6. Lawson & Seidman, *supra* note 4, at 61–67 (illustrating the issue of attributing individual views to collective bodies).

7. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) ("By 'originalism' I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.").

8. *See generally* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT 95 (2010).

meaning is fixed as of the time of its drafting,[9] and (3) the idea that this meaning is somehow constraining on judicial practice.[10] These minimalist originalist theses, together, make originalism a theory requiring judges to be honest about the linguistic meaning of a text and to be faithful to that meaning.

The interpretation-construction distinction is the first step in understanding originalism. This is the recognition of a divide between ascertaining the meaning of a written text and determining the proper application of a legal text to a given fact pattern.[11] Essentially, interpretation is the process of discovering the linguistic meaning of a text.[12] Construction is the process of giving legal effect to that text.[13]

At the interpretation stage, originalists are generally bound by the "fixation thesis."[14] This thesis claims that when interpreting a text, its communicative content was fixed when it was drafted.[15] This is largely a linguistic point, recognizing that linguistic drift occurs, and that the meaning of words or phrases can change over time.[16] A common example involves a thirteenth-century law banning the hunting of deer in certain areas.[17] While most twenty-first century Americans would likely read this to mean they cannot hunt a Whitetail or Mule Deer, in Middle English, "deer" meant animals generally.[18] Does this linguistic drift change the rule commanded by the law? An originalist would say that it would not. Of course, there is debate about what "original meaning" should be referred to. The "first wave" originalists thought this was the

9. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 7 (2015) ("Despite their differences, these originalist theories agree that the communicative content of the constitutional text was fixed at the time each provision was framed and ratified.").

10. *Id.* at 8 ("Originalists also agree on the Constraint Principle . . . .").

11. *See id.* at 5 ("It was at this stage that some originalists began to endorse the interpretation-construction distinction, which marks the difference between the discovery of the linguistic meaning of the constitutional text ('interpretation') and the determination of the legal effect associated with the text ('construction')."); Vermeule, *supra* note 2, at 91 ("Under this umbrella assumption, originalists of various stripes typically offer some version of a further distinction between two stages of the theory: (1) *interpretation*, the ascertainment of meaning, and (2) the *construction* of constitutional or statutory provisions where meaning is equivocal or indeterminate.").

12. Solum, *supra* note 9, at 5.

13. *Id.*

14. *Id.* at 15 ("The Fixation Thesis is a claim about constitutional interpretation—in the sense of 'interpretation' specified by the interpretation-construction distinction.").

15. *Id.*

16. *Id.* at 24.

17. *Id.*

18. *Id.* at 17 (citing SOL STEINMETZ, SEMANTIC ANTICS: HOW AND WHY WORDS CHANGE MEANING 49–50 (2008)).

original intentions of the drafters.[19] Later, originalists shifted toward the "original public meaning."[20] Some scholars have now proposed an "original law originalism," which is the view that "the Constitution should be read according to its *original legal content*, whatever that might have been."[21] While each of these originalist flavors seeks a different original meaning, each believes that this meaning was fixed at the time of drafting.

The second theory that originalists typically agree on is the "constraint principle." This is the idea "that the communicative content of the Constitution should constrain constitutional practice, including decisions by courts and the actions of officials such as the president and institutions such as Congress."[22] The three theses outlined above are what I mean when I say "originalism." This essay does not (and need not) move beyond these ideas to a broader debate over whether judges should employ original public meaning originalism,[23] original law originalism,[24] original methods originalism,[25] common good originalism[26]—the list could go on. Instead, this essay is confined to the features that make originalism, "originalism."

Each of these features helps to make originalism a theory of honesty—or at least of not lying. The interpretation-construction distinction allows us to analyze a legal text *as a text* with a unique linguistic meaning. We are then required to ask what the text has always meant, and we are constrained from shifting this meaning beyond what the text's writers understood it to be. Interpreting a journal entry from the eighteenth century using only modern understandings could warp its meaning beyond anything the writer could have intended to communicate. Similarly, reading a law without due diligence into what it could have meant to its drafters is to potentially *change* its meaning.

19. Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, GEO. U. L. CENTER, 2011, at 8 (suggesting that Robert Bork, William Rehnquist, Raoul Berger, and Edwin Meese believed "something like the theory we now call 'original intentions originalism,' the view that the original intentions of the Framers should guide constitutional interpretation").

20. *Id.* at 15 (identifying "the New Originalism" as "Original Public Meaning Originalism").

21. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. L. & PUB. POL'Y 817, 821 (2015).

22. Solum, *supra* note 9, at 8.

23. Solum, *supra* note 19, at 15.

24. Sachs, *supra* note 21.

25. John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 747 (2012).

26. *See generally* Josh Hammer, *Common Good Originalism: Our Tradition and Our Path Forward*, 44 HARV. J.L. & PUB. POL'Y 917 (2021).

In other words, the interpreter would be lying about the meaning of the text as it stood before their "interpretation."

NEGATIVE ORIGINALISM

The critique of originalism described in the introduction is not invalid—it is simply not as useful as its proponents contend. If originalism is viewed as a theory of not lying, then whether it reaches a noncontroversial outcome every time is beside the point. This is not its most beneficial aim. Instead, originalism forces interpreters to stay within a certain range of possible interpretations that comport with the fixed communicative content of a legal text.[27] Thus, while a single possible outcome in a case may not always be determined, the range is always narrower than the complete set of possible interpretations a judge might take if they were unconstrained by the text and its communicative content.

Consider the issue in quasi-Dworkinian terms. Ronald Dworkin believed that the best interpretation of a legal text is one that fits and justifies the current legal landscape.[28] Under this conception, the interpreter must first determine what range of interpretations "fit" within the scope of the legal text or precedent.[29] The interpreter must next choose which interpretation *within that range* best normatively justifies the existing landscape.[30] While Dworkin was not quiet about his disdain for originalism,[31] it is possible to frame originalism within Dworkin's interpretative structure, and doing so helps expose originalism's primary strength.

Let us view originalism as a mechanism for determining "fit." In this role, originalism need not lead to the only possible interpretation—some singular *original meaning* of the text. Instead, when we find ourselves facing disagreement between any preferred founding interpreters (dealer's choice between Hamilton, Madison, or Marshall), it tells us that the bounds of this disagreement approximate the scope of possible interpretation. In other words, originalism narrows the bounds of what interpretations "fit" a particular legal text. Sometimes the analysis may lead to one agreed-upon original meaning. Other times it may provide a

27. *See* Baude & Sachs, *supra* note 4, at 1481 (describing originalism as a "criterion of validity").

28. RONALD DWORKIN, LAW'S EMPIRE 239 (Harv. Univ. Press 1986).

29. *Id.*

30. *Id.*

31. *Id.* at 228.

choice of possible original meanings. This is the situation in which Dworkin would begin to normatively evaluate the choices.

The Direct Tax Clause in the Constitution can help to illustrate the point. The text of the Clause reads: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken."[32] An interpreter reading this sentence might wonder what exactly a "direct tax" is, and they would not be alone—the Supreme Court has struggled with this as well.[33] The originalist is optimistic, however, that the answer can be found in some various founding-era sources. Certainly, Hamilton or Madison told us what this means, right?

As it turns out, Hamilton and Madison actually disagreed with each other.[34] There are certainly clear cases on either side. Ratification dialogue suggests that direct taxes do not include taxes on "exports & imports [or] on consumption."[35] Further, the language of the Clause, combined with evidence from the ratification debates, show that capitation taxes are clearly direct taxes.[36] But between these clear cases, how should we distinguish direct and indirect taxes? Hamilton argued that the text was simply vague, and that no settled legal meaning could be assigned to the Direct Tax Clause.[37] Madison, on the other hand, thought it clear that certain taxes, such as carriage taxes, were direct taxes.[38]

With this evidence from the ratifying convention and ensuing years, scholars have disagreed as to how to apply the Direct Tax Clause.[39] Some say to simply disregard it because it was part of a deal with slave states,

32. U.S. CONST. art. I, § 9, cl. 4.

33. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 570 (2012).

34. John K. Bush & A.J. Jeffries, *The Horseless Carriage of Constitutional Interpretation: Corpus Linguistics and the Meaning of "Direct Taxes" in* Hylton v. United States, 45 HARV. J.L. & PUB. POL'Y 523, 556 (2022) (describing how the dispute in *Hylton* over the meaning of "direct tax" "pitted co-authors of *The Federalist Papers* (Madison and Hamilton) against each other").

35. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 591–92 (Max Farrand ed., rev. ed. 1966).

36. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 570 ("Even when the Direct Tax Clause was written it was unclear what else, *other than a capitation (also known as a 'head tax' or a 'poll tax')*, might be a direct tax." (emphasis added)).

37. Brief for the United States, Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796), *reprinted in* 8 THE WORKS OF ALEXANDER HAMILTON 378, 378–79 (Henry Cabot Lodge ed., Fed. Edition 1904) ("We shall seek in vain for any antecedent settled legal meaning to [direct and indirect taxes]—there is none.").

38. *Carriage Act of 1794*, STATUTES & STORIES: COLLECTIONS & REFLECTIONS ON AM. LEGAL HIST. (Aug. 5, 2018).

39. *See* Bush & Jeffries, *supra* note 31, at 529–32 (comparing approaches taken by academics).

while others argue that direct taxes are those capable of being justly apportioned among the states.[40] Two scholars, using founding-era corpus linguistics to attempt to discern the original meaning of the Clause, decided that they could not "provide a concrete, usable definition or test for what the constitutional phrase 'direct tax' means."[41] Nonetheless, their research narrowed the bounds of possible interpretations. They concluded that wealth taxes are direct taxes,[42] while "imposts, duties, and excises" are indirect taxes.[43]

To put the issue simply, originalism has thus far failed to fully determine the meaning of "direct tax." But this does not mean that endeavoring to ascertain the original meaning of the phrase was a waste of time. The founding sources—whether the ratification debates, litigation materials, or simply texts using similar phrases at the time—all serve to encompass a space within which interpretations must sit in order to "fit" the text and history of the Direct Tax Clause. There may not be one simple definition for the phrase "direct tax," but originalism has shown us certain things that *are not* direct taxes, such as imposts, duties, and taxes on consumption. To try and say that a consumption tax is a direct tax would be to lie about the fixed linguistic meaning of the clause.

Returning to the Dworkinian analysis, originalism here tells us what sort of interpretations would *not* fit with the ongoing interpretation of the law. This may seem, at first glance, to be a weak argument in support of originalism. However, where a text is ambiguous on its face, the bounds of interpretation may be infinitely underdetermined. In such cases, drawing a line *anywhere* removes from consideration a vast majority of possible interpretations. This, I argue, is the true strength of originalism, of constraining ourselves to the fixed linguistic meaning of the text. It is not in finding a clear determinate "original meaning." It is simply increasing the possible accuracy of such an interpretation by removing from consideration those interpretations that would not fit any plausible historical understanding of the text. Of course, in different situations, this narrowing feature will be stronger than in others and might even fully determine a text. But where it fails to do so, the originalist method has not failed. Instead, originalism has determined the range of interpretations that honestly fit a legal text.

40. *Id.*

41. *Id.* at 550.

42. *Id.* ("But a wealth tax is the exact kind of [assessment] . . . that Hamilton noted lay at the heart of direct taxation. As such, our corpus analysis indicates that the accepted wisdom [that a wealth tax would be an unconstitutional direct tax] is correct.").

43. *Id.* at 551 (describing "the three types of indirect taxes: imposts, duties, and excises" and arguing that if "a litigant can show that a tax is neither a duty nor an excise, then a court will likely find it to be a direct tax").

CONCLUSION

The common critiques of originalism carry weight. But they do not defeat it. Instead, they fundamentally misunderstand the heavy lifting that originalism does in legal interpretation. If a text says "blue," originalism need not determine whether that means baby blue or navy blue. Instead, it is enough to constrain interpreters from saying it means "red." Originalism is necessarily limited by the historical record and the ability of an interpreter to conduct a historical analysis. Nonetheless, even a limited record can get us close to the originalist ideal. It can tell us which possible interpretations plausibly fit a given text. More importantly, it can tell us that *all the other* interpretations do not. This negative quality of the originalist method—of showing not only what is included in the original meaning but also what is excluded—is the true strength of originalism. It is a tool to carve away anachronistic interpretations, and in so doing, it keeps us honest to the true communicative content of a legal text.