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## On Not Being "Not an Originalist"

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## ARTICLE

## ON NOT BEING “NOT AN ORIGINALIST”

H. JEFFERSON POWELL

This semester I am teaching constitutional law out of a new casebook—new to me and to the world at large (it came out just in time for the semester)—and a very fine casebook it is.<sup>1</sup> One of its most prominent features is its recurrent use of a distinction between originalist and not-originalist as a tool for the students, a means of identifying arguments and classifying decisions. Unavoidably, therefore, in teaching out of the casebook I find myself obliged to talk about originalism and its supposed opposite, and inadvertently I suppose I end up suggesting from time to time that I am, or that I am not, an originalist myself.

And that is frustrating. It is no doubt true that classifying the positions that constitutionalists take is sometimes appropriate, a necessary part of the ongoing debate over whether a given decision is persuasive, or on what basis a given scholar argues for her approach to deciding constitutional cases. But such classifications can be misleading. I am told from time to time that I am “not an originalist”—and that seems wrong to me. Not because I am what today we call an originalist, but because I am not the opposite either. The distinction between originalism and its negation, on which my very fine casebook is built and which animates a great deal of modern constitutional scholarship, is—I think—misleading. I am neither an originalist nor “not an originalist,” and in my view you too should avoid being either. This evening I want to explore why that is so.

## I.

Let us begin a long time ago, long before the story of American constitutional originalism begins, with Alain of Lille, a French poet and theologian who died in 1202 and who came to be known later as the *doctor universalis* because of his broad-ranging interests.<sup>2</sup> Alain worked roughly

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1. See GREGORY E. MAGGS & PETER J. SMITH, CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH (2009).

2. Perhaps Alain’s chief claim to attention from modern scholars has been in his role as a

halfway between the eleventh century renaissance of learning in the Latin Christian West and the rise of high-medieval scholasticism. In a few decades, the translation into Latin of Aristotle and his great Muslim and Jewish interpreters that was going on during Alain's lifetime would inspire the remarkable creativity of Albert the Great and Thomas Aquinas and, shortly after that, the path-breaking inquiries of the great Franciscan natural scientists of the late thirteenth and fourteenth centuries. Alain does not get great press from modern scholars for his place in this trajectory. I wonder if that is not a little unfair. He was less talented no doubt but perhaps he was also a little overwhelmed by the intellectual challenges posed by all the new sources and ways of thought.<sup>3</sup> My interest in him tonight is with a book he wrote not long before he died. Alain intended the book, known as *On the Catholic Faith*, as a refutation of the "new heretics" whom he believed to be devising novel errors even while pretending to rely on the recognized authorities of the past. The problem of error and authority was not new: Abelard had identified it decades earlier in his controversial book *Yes and No*, where he sought to demonstrate the profound theological disagreements to be found among the Church Fathers.<sup>4</sup> Alain and his contemporaries were increasingly troubled over how to accommodate Plato and Aristotle, with their enormous prestige as the great sages of antiquity, in an intellectual world already confused about how to reconcile its own internal authorities, its sources of argument in Scripture, canon law, and church doctrine.

To his great credit, Alain saw that merely to cite or quote authority was no answer to these difficulties. Different scholars can cite the same authorities for contrary propositions, and for that reason argument based on authority (the *argumentum ab auctoritate*) is often unsatisfactory either for disputation or in seeking to address one's own questions.<sup>5</sup> In making this point Alain crafted one of those sentences that, freed from its literary and historical contexts, is echoed again and again in later thought because it captures a truth that is enduring. "But since authority has a nose made of wax, it is possible to twist it in any direction, so that one must rely on

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source for and influence on Chaucer. See, e.g., Sarah Powrie, *Alan of Lille's Anticlaudianus as Intertext in Chaucer's House of Fame*, 44 CHAUCER REV. 246 (2010).

3. See the mixed evaluation of Alain's success by G.R. Evans in her generally sympathetic study of his work, G.R. EVANS, ALAN OF LILLE: THE FRONTIERS OF THEOLOGY IN THE LATER TWELFTH CENTURY 168 (1983) ("He had flair, but not brilliance, persistence, but not depth, a taste for novelty, but no real originality."). Eileen C. Sweeney's recent, remarkable book persuasively argues that this common judgment greatly understates Alain's insight and creativity. See EILEEN SWEENEY, LOGIC, THEOLOGY, AND POETRY IN BOETHIUS, ABELARD, AND ALAN OF LILLE: WORDS IN THE ABSENCE OF THINGS 127–75, 181–83 (2006).

4. See DAVID KNOWLES, THE EVOLUTION OF MEDIEVAL THOUGHT 125–26 (1962) (discussing Abelard's purpose in employing as a method "the juxtaposition of seemingly contradictory authorities").

5. On Alain's place in the twelfth and thirteenth century debate over how to relate arguments from authority to arguments based on reason, see EVANS, *supra* note 3, at 129–32.

strengthening the rational faculty.”<sup>6</sup> Just why later medievals found Alain’s image of the “wax nose” quite so powerful I cannot tell you, but his point is clear enough: what line of argument a complex or ambiguous authority supports depends on how one interprets that authority, and interpretation itself can go, at least much of the time, in more than one direction. The lament or complaint that Scripture in particular has a wax nose—that arguments invoking the incontestable authority of the Bible can very often be mounted on either side of a proposition—became commonplace in medieval theology after Alain.<sup>7</sup>

Alain’s image played a significant role in the great theological disputes of the sixteenth century.<sup>8</sup> Responding to the argument that the complexities of scriptural interpretation made obedience to the teaching authority of the Church a necessity for Christians, the great Reformers insisted on the perspicuity of Scripture, its clearness taken as a whole and on all important matters. In 1525, Luther stated this view with his typical vigor:

that in Scripture there are some things abstruse, and everything is not plain—this is an idea put about by the ungodly Sophists . . . . The subject matter of the Scriptures . . . is all quite accessible, even though some texts are still obscure owing to our ignorance of their terms . . . [but] if the words are obscure in one place, yet they are plain in another.<sup>9</sup>

Luther often invoked Alain’s figure of speech, but he recast its meaning. The problem created by the conflicting arguments of biblical exegetes was for Luther a real one, but its source lay not in the difficulties of interpretation but in the wickedness of the interpreters. Scripture’s wax nose was the product of the perverse ingenuity of theologians and hierarchs intent on twisting the Bible’s clear meaning to support their own fancies and power.<sup>10</sup> The solution was not recourse to papal authority but a faithful approach to interpreting the Bible that would of itself dissolve the conflicts.

The problem for which Alain provided a commonly-used metaphor has later echoes in many areas. Luther’s hotly-contested diagnosis, that the pretensions of institutional power are easily served by the supposed

6. Alain de Lille, *De fide catholica contra haereticos* 1.30: “Sed quia auctoritas cereum habet nasum, id est in diversum potest flecti sensum, rationibus roborandum est.” Alain’s image became, Jean-Louis Quantain suggests, a “scholastic joke.” See JEAN-LOUIS QUANTAIN, *THE CHURCH OF ENGLAND AND CHRISTIAN ANTIQUITY* 83 n.334 (2009).

7. See QUANTAIN, *supra* note 6.

8. See, e.g., H.C. Porter, *The Nose of Wax: Scripture and the Spirit from Erasmus to Milton*, 14 *TRANSACTIONS ROYAL HIST. SOC’Y* 155 (1964).

9. MARTIN LUTHER, *The Bondage of the Will* (1526), in 33 *LUTHER’S WORKS* 25, 26 (Philip S. Watson ed., 1972).

10. See, e.g., MARTIN LUTHER, *Against the Papacy in Rome, Against the Most Celebrated Romanist in Leipzig* (1520), in 39 *LUTHER’S WORKS* 81 (Eric W. Gritsch ed., 1970) (“Thus we see how excellently the Romanists deal with Scripture, making whatever they want of it, as if it were a wax nose to be pulled to and fro.”).

difficulties of interpretation, has also enjoyed an ongoing currency. In that regard, and coming closer both to our time and to my eventual subject, the pre-1787 history of Anglo-American law is replete with statements of anxiety over the pliability of legal authority and the uncertainties attending its interpretation, often expressed as a concern over the claims of others to interpretive power. Let me quote a couple of familiar examples: responding to Sir Edward Coke's assertion that the law can only be interpreted through the "artificial reason" of the common lawyers, King James I snapped that "[i]f the Judges interpret the lawes themselves and suffer none else to interpret, then they may easily make of the laws shipmens hose."<sup>11</sup> Almost a century later, Bishop Benjamin Hoadly failed to mention either wax noses or sailors' stockings but made the same claim: "Whoever hath an *absolute authority to interpret* any written or spoken laws, it is *he* who is truly the *Law-giver* to all intents and purposes, and not the person who first wrote or spoke them."<sup>12</sup> And just to prove that I have not entirely forgotten my topic, consider this exchange, shortly after the Philadelphia convention adjourned, between Gouverneur Morris and a friend. Morris, you will recall, was more than anyone else the final, individual draftsman of the 1787 Constitution, and he later wrote that he "believed it to be as clear as our language would permit."<sup>13</sup> Nevertheless, Morris responded to praise of his handiwork very much in the spirit of Alain of Lille. "Friend to Morris: 'You have given us a good Constitution.' Morris: 'That depends on how it is construed.'"<sup>14</sup> Common lawyers (and their critics) have always recognized the truth in Alain's worry that it is possible to twist authority in diverse directions and to differing and contrary ends.

Authority, including the Constitution as an authority, has or may have a wax nose; interpretation may make of it something as flexible and unconstraining as a sock. Alain was right to be worried, and his worry should trouble anyone who works within or is committed to a system of normative thought (such as Christian theology or American constitutional law) that rests on written authorities. In the sentence I quoted you a few minutes ago, Alain also suggested a solution, at least in part, to his worry, and I will return to him and to his solution at the end of this lecture. For

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11. See HOWARD NENNER, *BY COLOUR OF LAW: LEGAL CULTURE AND CONSTITUTIONAL POLITICS IN ENGLAND, 1660–1689*, at 72 (1977).

12. See JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 102 n.2 (1921).

13. Letter from Gouverneur Morris to Timothy Pickering (Dec. 22, 1814), in 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 420 (M. Farrand ed., 1966).

14. See EDWARD S. CORWIN, *COURT OVER CONSTITUTION* 228 (1938). Thomas Jefferson, in fact, used Alain's metaphor, halfway at any rate. See Letter from Jefferson to Spencer Roane (Sept. 6, 1819), in 10 *THE WRITINGS OF THOMAS JEFFERSON* 140, 141 (Paul Leicester Ford ed., 1899) ("The Constitution, on this hypothesis [that the power to interpret the Constitution is exclusively judicial], is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.").

now, however, let me turn at last to originalism, widely touted as the proper means of addressing the malleability of the Constitution’s wax nose.

We can profitably start by setting out a few historical propositions about American constitutional law that I think are incontrovertible although I am not confident that they are always given their full weight. First, lawyers have been making arguments about the original meaning of the Constitution ever since there was a Constitution to have a meaning, and they have made those arguments in every form known to lawyers in 2009—save, to be sure, the thousand footnote article.<sup>15</sup>

I’ll give one example, in fact one of the earliest: in his 1791 opinion on the constitutionality of a national bank, Secretary of State Thomas Jefferson based his conclusion in part on the proceedings of the Philadelphia framers. “It is known that the [power to charter corporations],” Jefferson wrote, “was rejected . . . by the Convention which formed the Constitution,” and for that reason among others he advised President Washington that the power did not exist.<sup>16</sup> Arguments from original meaning are, well, unoriginal.

Second historical proposition: ever since the Constitution became law, American constitutional lawyers have been attacking original meaning arguments as inconclusive, unpersuasive, or even immaterial because some other consideration outweighed them. Again, I will use an example from the 1791 bank debate. Secretary of the Treasury Alexander Hamilton (himself, you will recall, a framer), told President Washington that Jefferson was wrong on all points, including Jefferson’s reference to the Philadelphia convention, over which Washington of course had presided. Hamilton criticized Jefferson’s sources—“the precise nature or extent of this proposition [to include an express incorporation power and] the reasons for refusing it [are] not ascertained by any authentic document, or even by accurate recollection.”<sup>17</sup> He rejected Jefferson’s interpretation of what had happened as an historically erroneous over-simplification of what had gone on in Philadelphia. Finally, and most radically, Hamilton simply dismissed Jefferson’s original-meaning argument as beside the point in light of other,

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15. Of course early lawyers lacked the amazing resources we now have at our fingertips and so their original meaning arguments were mostly a lot briefer than ours tend to be—one of the ironies of our constitutional history is that any competent modern scholar knows far more about the details of the founding generation’s arguments over the document’s meaning than any founder ever did or could have, and that includes James Madison.

16. Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15, 1791), reprinted in JEFFERSON POWELL, *LANGUAGES OF POWER* 43 (1991) (“A proposition was made to them to authorize Congress to open canals, and an amendatory one to empower them to incorporate. But the whole was rejected, and one of the reasons for rejection urged in debate was that then they would have a power to erect a bank, which would render the great cities, where there were prejudices and jealousies on the subject, adverse to the reception of the Constitution.”).

17. Alexander Hamilton, *Opinion on the Constitutionality of the Bank* (Feb. 23, 1791), reprinted in POWELL, *supra* note 16, at 48.

and to Hamilton more persuasive, arguments not based on original meaning:

whatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual & established rules of construction. Nothing is more common than for laws to *express* and *effect* more or less than was intended.<sup>18</sup>

As Jefferson and Hamilton are witnesses, throughout our history, lawyers have made, and rebutted, original-meaning arguments in specific situations, sometimes sounding as if original meaning were all that mattered (when that would buttress their position), and sometimes sounding as if original-meaning arguments were entirely illegitimate (again, when that was the helpful viewpoint). Such comments, even when made by judges in opinions, were advocacy and should not be read as anything more. There has never been a time in which arguments from *original* meaning were universally or invariably treated as conclusive on the question of *constitutional* meaning, any more than there has been a time in which such arguments have been universally disparaged.

Third historical proposition: no one gave much attention until very recently to the possible variations among the forms of what I am calling original meaning argument, or to the possible differences in legitimacy or persuasiveness between these variations. Any contemporary originalist worth her salt can explain the serious practical and theoretical differences between, say, the claim that the Constitution means X because the Philadelphia framers intended X and the claim that it means X because that is what an ideal reader at the time it was written would have taken it to mean. Contemporary originalists parse these distinctions with great care and debate their significance with tremendous sophistication. But as an historical matter, and this is my historical point, the distinctions, the debate, and the sophistication are all novelties, created within the professional memory of lawyers my age. They were not an important feature of traditional constitutional argument.

Do not misunderstand me. From the beginning, lawyers making constitutional arguments have invoked the familiar building blocks of originalist debate—“the framers,” “the ratifiers,” “the Convention” (or conventions), intent and intention and meaning and purpose. Some of the phrases do not show up quite as often, perhaps, as some people seem to think they should, but the language is there. The resemblance between these traditional expressions, however, and the modern debate is superficial. Let us take Chief Justice John Marshall as a representative of early constitutional usage. Is it the purposes and intentions of the framers and

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18. *Id.*

ratifiers that matter? “[T]he great duty of a judge who construes an instrument, is to find the intention of its makers”; “the *intention* is the most sacred rule of interpretation.”<sup>19</sup> Or perhaps it is the words of the Constitution alone that govern: “[We] know of no rule for construing [the Constitution] other than is given by the language of the instrument”; “this court does not feel itself authorised to disregard the plain meaning of words, in search of a conjectural intent to which we are not conducted by the language of any part of the instrument” regardless of the historical evidence about such a “particular intent.”<sup>20</sup> Or is it his point that the best evidence of intent and purpose is the text: “the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood . . . to have intended what they have said.”<sup>21</sup> In the end, one comes away from reading Marshall with the sense that there was usually very little difference in his mind between talking about the intentions and purposes of the framers and ratifiers, the meaning understood by the people, and his own construction of the words through the exercise of reason and principle. In this Marshall was, I suggest, thoroughly conventional, for his day and after. Traditionally lawyers have talked, when they thought it helpful, about what the framers intended and what the Constitution’s original purposes were and so on, but on the whole they have done so unselfconsciously, haphazardly. Most of the time such language was clearly nothing but an emphatic way of saying that such and such is what the Constitution *really* means.

This is not to say that one cannot find genuine original-meaning arguments, but they are simply one mode of argument among many, without any special importance or receiving any special attention. Take Marshall again, as an example. In *Barron v. Baltimore*, Marshall considered the claim that the protections of the Fifth Amendment apply to state governmental action because its language does not limit its scope to the federal government. Writing for the Court, Marshall loftily announced that the original purpose of the amendment, as revealed in “the history of the day,” made it necessary to limit the application of the amendment’s words. Original meaning was determinative.<sup>22</sup> In *Dartmouth College v. Woodward*, on the other hand, the Chief Justice refused to confine the protections of the contracts clause of Article I, Section 10 to private contracts even though he conceded that “it was not particularly in the view of the framers” to apply its words to a public charter such as that before the Court. When arguments based on other considerations are persuasive, Marshall wrote, “it is not

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19. John Marshall, *A Friend of the Constitution*, ALEXANDRIA GAZETTE, July 2, 1819, reprinted in JOHN MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND 167, 168–69 (G. Gunther ed., 1969).

20. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824); *Craig v. Missouri*, 29 U.S. (4 Pet.) 410, 434 (1830).

21. *Gibbons*, 22 U.S. (9 Wheat.) at 188.

22. 32 U.S. (7 Pet.) 243, 250 (1833).

enough to say, that this particular case was not in the mind of the convention, when the [constitutional provision] was framed, nor of the American people, when it was adopted.”<sup>23</sup> Original meaning was not determinative. Attempts to find an underlying originalist logic to what Marshall wrote in the two cases are, I believe, pointless, but so is the suggestion that he was contradicting himself in any serious fashion. Like the vast majority of American constitutionalists for most of our history, Marshall did not think there was any general principle to be followed on the use or rejection of original-meaning argument. There were simply particular arguments, persuasive or not in the context of particular cases.

As I remarked earlier, I think these are simple and rather uncontroversial claims about the history of constitutional argument. Their importance for my topic today lies in their essential irrelevance for much of the contemporary debate over what we call “originalism.” Despite all the discussion of the past that this debate includes, it is not really about history.<sup>24</sup> The argument over originalism is a debate over a question of law. It is bootless to argue over whether originalism is constitutionally normative by invoking claims, even warranted claims, about the past. Gouverneur Morris once wrote, quizzically, “But, my dear Sir, what can a history of the Constitution avail towards interpreting its provisions? This must be done by comparing the plain import of the words, with the general tenor and object of the instrument.”<sup>25</sup> Suppose you and I conclude that as an historical matter, Morris was expressing the general understanding of the founding generation: would that disprove originalism’s claim to being the proper legal approach? I think not, and not just because of the obvious problem of circularity but more fundamentally because to answer otherwise is to commit a category error. Law is law, not history.

Some of you are thinking, I am fairly sure, that this is too simple: perhaps the proper legal question defines its answer in terms of historical assertions, in which case history *can* speak to law. I agree, but in that case we need to identify the legal principle that gives history legal weight. What might that principle be?

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23. 17 U.S. (14 Wheat.) 518, 644 (1819).

24. The reason that the historical attempts to resolve the originalism debate are endless is that history on its own cannot settle legal disputes, any more than law can settle historical ones. Turn the process around if you are in doubt: it’s a legitimate question whether Parliament’s attempts to assert legislative jurisdiction over the North American colonies were the central factor in triggering the American Revolution or an excuse for actions that the colonists would have taken eventually anyway. You will get nowhere in answering it, however, by presenting an argument, regardless of how powerful, that Parliament lacked the constitutional authority: your legal argument may be persuasive but it fails to join issue with the historical inquiry.

25. Letter from Gouverneur Morris to Timothy Pickering, *supra* note 13.

## II.

In order to answer this last question, it is time to bring onto center stage our central character, as yet noticeable by its absence. What is originalism? The term itself is, I think, not all that old: many people say that it was coined by the distinguished scholar Paul Brest in a 1980 article.<sup>26</sup> That may well be right; in any event, what we mean when we talk about originalism is a proposition of constitutional law, or more exactly constitutional theory, that was the product, I think, of specific issues in the 1960s, ‘70s, and ‘80s. Let me remind you briefly of the state of constitutional law at about the time Professor Brest wrote his article. The Warren Court had given way to the Burger Court, a fairly consistent judicial liberalism apparently driven by substantive political commitments to a fairly rootless and inconsistent assertion of judicial power.<sup>27</sup>

The Court and the constitutional law that it administers were under attack from all directions, and perhaps most damningly from observers such as Alexander Bickel and John Hart Ely who seemed unhappy not with the Court’s outcomes in themselves but with the coherence and intellectual honesty of the arguments that justices and lawyers were entertaining: writing about *Roe v. Wade*, for example, Professor Ely famously asserted that the decision was “bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.”<sup>28</sup> The Court’s constitutional jurisprudence, it seemed to many people, had simply collapsed into an illegitimate form of politics, with the Constitution and its wax nose serving as an excuse for the adoption of their policy preferences by nine (or indeed five out of nine) politicians wearing black robes. I think the alarm the critics felt was somewhat exaggerated—much of the course of constitutional law between the mid-Fifties and the mid-Seventies seems to me perfectly defensible. But there were problems, and serious ones, in what the Court and some of its more supportive observers were willing to count as conscientious decision making.

Take as an example, the Court’s 1972 decision in *Eisenstadt v. Baird*, which extended the constitutional right to receive contraceptives to unmarried persons.<sup>29</sup> In its first contraception decision a few years earlier, *Griswold v. Connecticut*, the opinion of the Court appeared to ground the

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26. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 n.1 (1980).

27. See, e.g., Charles Fried, *The Supreme Court, 1994 Term—Foreword: Revolutions?*, 109 HARV. L. REV. 13, 76 (1995).

28. John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973). See generally ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

29. 405 U.S. 438 (1972).

constitutional right of a married couple to use contraceptives in the special nature of the marriage relationship, “an association,” the Court announced, “for as noble a purpose as any involved in our prior decisions” protecting the freedom of association.<sup>30</sup> In *Eisenstadt*, the entirety of the Court’s explanation for applying *Griswold*’s right of marital privacy to the unmarried was as follows: “if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion.”<sup>31</sup> Now there are a great many things that can be said about *Griswold* and *Eisenstadt* and the constitutional right to receive or use contraceptives, but one thing that cannot be said—with a straight face and expecting to be taken seriously—is that if the right of marital privacy announced in *Griswold* means “anything,” it *must* be a right belonging to individuals regardless of marital status. The Court’s assertion that the Constitution requires that conclusion was proof that the difference between reasoned judgment and authoritarian *diktat* had become obscure.

Originalism was born in response to a situation in which the Constitution’s most important interpreters could present the “logic” of the *Eisenstadt* opinion as though it were a reasonable legal argument. The core problem of which *Eisenstadt* was a symptom was not in truth the existence of doubt whether the Court decided the case correctly: such doubts have been with us always. The problem, rather, lay in the Court’s cavalier attitude toward the opinion filed supposedly in justification of its decision. As Professor Ely wrote about *Roe*, the *Eisenstadt* opinion failed to be reasoned constitutional law and gave almost no sense of an obligation to be so. The justices who joined the opinion cannot have taken its one-sentence non sequitur seriously as providing a defensible legal rationale for the holding. In acting as if it did, they revealed a sort of contempt for the notion of reasoned decision, and for the litigants, lawyers, and general public for whom the opinion was supposed to explain the Court’s decision. If the *Eisenstadt* opinion discharges the Court’s duty to explain itself, that duty is a sheer formality, an empty ritual. It is understandable that lamentable judicial performances such as that in *Eisenstadt* would provoke a sharp reaction.

Originalism was that reaction.<sup>32</sup> Reduced to a sentence, and leaving to one side later refinements, here it is: the legal interpretation of the Constitution ought to be governed by what we can make out about its

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30. 381 U.S. 479, 487 (1965).

31. 405 U.S. at 453.

32. We do not need to stop now to consider the extent to which the early proponents of originalism were motivated by professional and intellectual dissatisfaction with the Supreme Court’s failures as opposed to the expediencies of argument: the true answers, I suppose, would be just as mixed as they would be if we asked the same question of the early opponents of originalism, and would differ among individuals. My interest is not in anyone’s motivations but in the proposal.

original meaning. This does not mean, and no responsible originalist has ever claimed, that the Supreme Court can never entertain any other considerations (*stare decisis*, for example) in deciding a constitutional case. But originalism, in the significant sense that the term is used in current debate, is the proposal that properly constructed original-meaning arguments have a priority over all other forms of constitutional argument, that at least presumptively *and* ordinarily an original-meaning argument persuasive in its own terms (“oh yeah, that must be what the commerce clause *originally* meant!”) defeats other claims about constitutional interpretation. The meaning of the Constitution’s spare language, which history confirms can indeed be twisted in various directions, is to be fixed by an interpretive lodestar located in the past, beyond the reach of present-day preferences. Contemporary originalists have worked this out in far greater detail and with much greater care than you can find in the first originalist arguments thirty years ago, but the core of the proposal remains the same.<sup>33</sup> The answer to what appears to be a purely historical question—what did this bit of writing mean when it was first crafted?—thus becomes the answer to the legal question of the Constitution’s present-day meaning.

Originalism is, in a very real sense, an enormously attractive proposal. The problem it was crafted to address was, and is, no laughing matter. If in truth the Supreme Court’s constitutional decisions are authoritative simply and only because they are the Court’s, with the Constitution serving merely as the window dressing for the Court’s choices, then we are in the predicament Alain de Lille identified long ago. Our central legal authority, the Constitution, turns out to have a wax nose that can be twisted in whatever direction a majority of the justices prefer: as President Lincoln wrote in a somewhat similar context, the American people have “practically resigned their government into the hands of that eminent tribunal.”<sup>34</sup> Constitutional law, on such terms, is indeed the anti-democratic and authoritarian exercise of judicial power that the Court’s critics have often accused it of being. Constitutional law is, furthermore, a conscious fraud on the Court’s part, for the justices never claim to make constitutional decisions based on their policy preferences but always to do so on the authority of the Constitution. Originalism is an elegant response to a genuine problem.

### III.

People who are happy to be labeled “not an originalist” counter the originalism proposal with a variety of arguments. I want to note two of

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33. To be sure, as I noted earlier, contemporary originalists disagree with one another vigorously, but I am not concerned tonight with those disagreements.

34. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Basler ed., 1953).

them briefly. Opponents sometimes argue that originalism is in fact impossible to execute because the historical question it asks is unanswerable, however that question is fashioned. Talk about “the original intent” of the framers is subject to all the objections familiar from debate over statutory construction: collective law-making bodies do not have intentions in the literal sense, much of the time the texts they produce are the product of bargains between legislators with very different objectives, and so on, attempts to specify what was agreed on beyond the texts themselves lead to debatable hypotheses rather than historical truths, the evidence on which people try to base such efforts is unreliable and often itself the result of manipulation, and so on. Talk about the intentions of the ratifiers runs into all the same difficulties, only amplified since we are now talking about a collectivity of collective bodies. Changing the focus from intent or purpose to an idea like that of original public meaning only moves the point of difficulty: we replace the fiction that the Constitution is the creation of a single mind with the fiction of an ideal original reader, a sheerly hypothetical figure quite similar to the common law’s reasonable man, not least because he can be hypothesized only through the use of normative rather than historical presuppositions.

In practice this criticism is, I think, often rather powerful. It can be very difficult to make responsible historical arguments about what the language of a given provision meant to its first readers, and at least as difficult to talk sensibly about the historical purposes of a document that came into existence and then into law only by the actions of many different people. We need not pause over the sort of faux originalism that mixes two parts quotes from Madison’s notes with one part confident generalization and “voilà! the original meaning.” The difficulty of execution exists even when the effort is made by intelligent and skillful scholars. When I read sustained arguments on specific issues by the current generation of smart and industrious young originalists, I am often struck by how much hard work has gone into showing that such and such a meaning was a plausible reading of the Constitution . . . and equally struck by the failure to give me any real reason to think that this reading was necessarily or even probably the one that in fact most people (most readers? most ratifiers? whatever!) gave it. Perhaps the most striking recent example of the practical difficulties with originalist argument I know can be seen in the opinions Justices Scalia and Stevens filed in the *Heller* Second Amendment case.<sup>35</sup> It is no criticism of either justice to observe that the historical research on which each relied was in all likelihood that of the many brief-writers in the case (and of *their* sources)—that is, after all, what briefs are for.<sup>36</sup> As many of you know, the

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35. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

36. *See, e.g.*, Brief for Jack N. Rakove et al. as Amici Curiae Supporting Petitioners, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (discussing original meaning); Brief

opinions are full of interesting information about early thinking on the right to bear arms, and are at loggerheads over what to make of it.<sup>37</sup> The fair-minded response to the justices’ efforts, I think, is that each has shown that his normative position on the Second Amendment was entertained by some people in the founding era, an historical conclusion that is, of course, utterly inconclusive on the only issue that most of us care about—what the Second Amendment means.

Originalism is, oftentimes at least, hard to do well, but unlike some of the “I’m not an originalist” crowd I don’t think that refutes the originalist proposal. I agree with Judge Richard A. Posner (not an invariable experience on my part) that a blanket rejection of all concepts of collective intention is untenable: “It denies the possibility of meaningful interpersonal communication and agreement, of a ‘meeting of the minds’ . . . to suggest that one can never meaningfully ask what Congress was driving at in this or that . . . provision . . . is to deny that people can ever share a purpose.”<sup>38</sup> The possibility of discerning such purposes at least some of the time is not in principle different when the shared purpose is that of the Constitution’s makers. *Heller*, the Second Amendment decision, is not really evidence to the contrary. It happens to be the case that founding-era Americans apparently held a variety of ideas about the right to bear arms and (if I am correct) that it is very hard persuasively to single out one of those ideas as the public, shared, intended meaning of the Second Amendment (you choose the adjective). But this inconclusiveness is by no means true across the board, and there is no reason why original-meaning arguments cannot be given the priority originalism calls for *when* they exist just because they sometimes do not. When the evidence permits, historically persuasive original-meaning claims can be made.<sup>39</sup> There is no fault intrinsic to the originalists’ history-based method of constitutional interpretation that renders the originalist proposal unworkable.

I can present the second anti-originalist objection more briefly. Even if

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for Academics for the Second Amendment as Amicus Curiae Supporting Respondents, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (No. 07-290) (discussing original meaning).

37. Compare *Heller*, 128 S. Ct. at 2790–2812 (opinion of the Court) with *Heller*, 128 S. Ct. at 2824–42 (Stevens, J., dissenting) (debating history).

38. RICHARD A. POSNER, *HOW JUDGES THINK* 194–95 (2008).

39. An example: I think it is demonstrable (in the probabilistic sense that an assertion of intellectual history can be demonstrable) that the commonly understood original meaning of the First Amendment forbade prior restraints: history produces a core of meaning that originalism would treat as presumptively prior to other modalities such as *stare decisis* that lead to a more lenient approach to prior restraints. See DAVID L. LANGE & H. JEFFERSON POWELL, *NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT* 222 (2009). But let me make my point in general terms: I do not think that historical arguments, including arguments about the original meaning of the Constitution, are impossible efforts to square some intellectual circle, or exercises in mere choice dressed up in historical garb. History is not an inscrutable mystery, or a mirror in which all that we can see is a reflection of ourselves.

it is in theory possible to answer original-meaning questions some of the time, the anti-originalist asserts, the resort to history will not save one from the problem of interpretive manipulation that spurred the originalist proposal in the first place. Original-meaning arguments can be made deceitfully or insincerely; more interestingly, they can be made with the greatest sincerity and yet reflect the dominating influence of other, non-historical concerns at work on the originalist's judgment at a level below his or her conscious awareness. Is anyone very surprised that Justice Scalia read the historical evidence in *Heller* one way and Justice Stevens the other?

I think the proper originalist response to this objection, one that I share up to a point, is "so what?" Of course it is quite possible to make historical arguments hypocritically or manipulatively, or to do so sincerely but without noticing the warp in one's reasoning that stems from bias or preference. That is a statement about the human condition, by no means confined to history or law. No approach to constitutional law can avoid the possibility of human waywardness, any more than a specification of the scientific method can stop a dishonest investigator from fudging his results or a careless one from seeing what she wants to see. We talk about the scientific method in order to give the honest scientist an idea of how to do his work; discussions of legal method, including the originalist proposal, can only hope to do the same for the honest lawyer, not the cheat.

At this point, you might well ask why someone who thinks as I do should not be an originalist. I agree with the originalists that the problem with which they are concerned is an important one. I admire the clarity of their proposed solution and I think it could be carried out. I do not subscribe to many of the standard objections to originalism. I am not, in short, "not an originalist." But I am not an originalist either.

#### IV.

I am not an originalist because I am a constitutional conservative, and the originalists are constitutional radicals. I should acknowledge at this point that to identify a proposal as revolutionary is not thereby to prove it unwise or unnecessary. Originalists are radicals, but they became such in reaction to what they have seen as an intolerable situation: rule by the institutional guardians of an authority that those guardians have deliberately twisted to suit their own ends through "interpretation." Their solution is simply to insist that this authority be interpreted faithfully (as they see it) in the happy confidence that doing so will address the difficulties that interpretive obfuscation has created. All that they ask is a return to interpretive fidelity, in that respect very much like the Protestant Reformers of the sixteenth century. (As an aside, I cannot resist noting that our originalists remind me a great deal of Luther, a comparison that in these

ecumenical days I am confident you will not take to be a slur. Luther’s opponents, needless to say, had little doubt that he was leading a revolution, not moderating an academic debate over recent developments in Pauline studies.)

Originalism is a proposal for revolutionary change, for an almost wholesale reformation of constitutional law. This aspect of originalism is often overlooked, not least by originalism’s proponents. Like most revolutionaries, originalists often fancy themselves the restorers of a golden past. It is a congenial thought, and found in many settings: though it is seldom remarked today, for example, many of the American Revolutionaries enjoyed rather absurd stories about Saxon freedom and the Norman yoke, as if the Battle of Hastings had been a first and unsuccessful attempt to stage the Siege of Yorktown. Radicals of all sorts, under attack because of the novelty of their ideas, are fond of pointing out that the word radical comes from the Latin for root.<sup>40</sup> This rather begs the question whether a given radicalism is seeking to return to something’s roots or put an axe to them, but with respect to originalism the assumption is clearly the former. It is easy to assume furthermore, that a proposal to enshrine original meaning must have been originally meant. Easy perhaps, but not true, as I have already pointed out. The heyday of historically-serious original meaning arguments has been the present, not the founding era. In actual fact, there never was a time in our constitutional past in which originalism in the modern sense, indeed in any substantive sense, has enjoyed a generally-accepted primacy among American constitutionalists. Claims to the contrary are an indulgence in the imagination.

Originalism is a thoroughly modern phenomenon and its triumph would mark a sharp break with the legal past. If present-day originalists succeeded in persuading the rest of us, the forms in which we make constitutional arguments would be severely curtailed. Post-Originalist-Revolution constitutional discussion would no longer resemble very closely at all the historical tradition of constitutional argument that one finds in Jefferson’s and Hamilton’s bank opinions, or Chief Justice John Marshall’s judgments, or for that matter in Chief Justice William Rehnquist’s. Recall the three historical assertions I laid out a while ago. In our constitutional tradition as it has existed up to now, historically-serious original-meaning arguments have been only one among a much broader set of modalities of interpretation. When Jefferson invoked the drafting history of the Constitution in his 1791 opinion, it was as secondary support for a conclusion he had already established to his satisfaction on other grounds; both he and Hamilton spent far more of their energy debating structural,

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40. Radical is derived from *radix* (“root”). See Merriam-Webster Online Dictionary, <http://www.merriam-webster.com>.

prudential, and textual matters. Many of the Supreme Court's greatest decisions have given no serious, sustained attention to original meaning at all: think of *Marbury*, *M'Culloch*, *Strauder*, *Darby*, *Barnette*, *Brown*, *Reynolds v. Sims*, *New York Times v. Sullivan*. In none of these cases (or myriad others) did the justices find it necessary to make originalist arguments or impossible to reach a decision without doing so. All of these decisions would have to be deemed terribly wrong-headed (at least in their reasoning), and certainly should not be repeated, if originalism prevails.

A constitutional law reshaped in accordance with originalism would change, not just on specific issues (that would vary), but even more fundamentally as an activity or practice. The traditional lawyers' tools—close textual reading, argument by analogy from case to case, the principled elaboration and application of established rules, consideration of consequences—have always made up the essential means by which lawyers and judges have interpreted the Constitution. However, they would fade into, at best, a quiet insignificance, rather as the old canons of documentary construction have sunk into decrepitude without quite disappearing altogether. The skills necessary to make good constitutional-law arguments would change drastically, with ramifications throughout our legal world. Graduate work in history, not the study of legal method, would be the best academic background for constitutional-law work, and it might even be appropriate to ask the American Historical Association, not the ABA, to rate the qualifications of Supreme Court nominees. (But let us not get into the nomination process mess!) What has been up to now a rich, variegated, disorderly tradition of controversy embedded within a broader legal culture characterized by the same complexities would give way to a quite different practice of historical argument, supplemented by whatever degree of *stare decisis* the now-originalist judiciary thought unavoidable. It is nothing more than accurate to term such a transformation a revolution, and its proponents the radicals of our profession—if indeed I should even speak of “our” profession.

Originalism triumphant would open an all but unbridgeable chasm between constitutional decision making and the rest of legal practice. A few moments ago I mentioned, whimsically, the idea of having professional historians evaluate potential justices for an originalist Court, but I am not sure it should be a joke. The intellectual knowledge and skills necessary to engage in the sort of historical argument that serious originalists call for are not at all the same as those of a good lawyer: indeed to some considerable extent, the two practices are at cross-purposes. Very few people likely to become judges have the training to do originalist work well and the adversarial process is not structured to provide courts with historical analysis that can be taken seriously—the mocking epithet “law office history” is not a joke. No originalist I know of proposes to make the

institutional changes necessary to address these problems. But in the absence of such changes, what we would end up with, I think, are constitutional arguments no more seriously historical than was the norm before, but now largely insulated from *lawyerly* critique by their claims to rest on historical “fact.” As I implied earlier, it is by no means clear that the opinions in the recent Second Amendment decision are any more persuasive because of their elaborate parades of historical, or is it pseudo-historical, learning.

Originalism’s own origins lay in tough-minded lawyers reading the Supreme Court’s work product and saying “this will not do, not as law”; in an originalist world, ironically, lawyers could do little to help identify any problems with the Court’s decisions. Under our traditional practices, the continuity between the methods of constitutional law and legal method generally made every village barrister a potentially effective critic as well as advocate: the Supreme Court’s centrality in constitutional argument stemmed from its institutional role, not the esoteric nature of its reasoning. Originalism would substantially modify this healthy vulnerability on the Court’s part to professional cross-examination, rendering constitutional law less open to broad-based criticism, and making it more the preserve of supposed experts.

At the same time, by downgrading or dismissing the relevance to constitutional decision of the traditional lawyerly skills, originalism would forfeit the profound and (I believe) beneficial contribution of the lawyerly mindset to the resolution of constitutional disputes. In the work of good lawyers, legal method is the practice of “coming to a responsible decision, what to do, what to advise, what to order,” rather than an academic exercise.<sup>41</sup> For many observers, and I am one, the best justices have been those who approached the task of constitutional interpretation as just this—one of the occasions on which it is necessary to undertake the ordinary lawyer’s task of responsible decision. Treating a constitutional decision in this way entails no lack of awareness of the decision’s moral and political dimensions, but it respects the role of constitutional law in creating and maintaining a political community in which disagreement and conflict are unavoidable. One of the greatest antebellum American judges, William Gaston, once wrote that “[c]onstitutions are not themes proposed for ingenious speculation, but fundamental laws ordained for practical purposes.”<sup>42</sup> Originalism asks us to reverse Gaston’s wise admonition.

I am an academic, and I love and respect the academic enterprise, but the originalists’ proposal would render constitutional law “academic” in the

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41. Joseph Vining, *Theorists’ Belief: A Comment on the Moral Tradition of American Constitutionalism*, 72 NOTRE DAME L. REV. 15, 23 (1996).

42. *State v. Manuel*, 20 N.C. (3 & 4 Dev. & Bat.) 144 (1838).

pejorative sense of that term. The Supreme Court is not a history seminar, and constitutional decisions affect people's lives and fortunes, not just scholarly reputations. The historian qua historian is oriented, and properly so, toward understanding, toward making sense of whatever he is studying: the disputes he resolves are ones of understanding, even if he or others take his conclusions as the basis for further moral or political judgments. The judge deciding a constitutional case is oriented, and necessarily so, toward decision, toward announcing an appropriate resolution of some controversy in the world of action, not ideas: the disputes she resolves are ones of justice and social peace, even if in doing so she also settles some intellectual disagreements as well. However much these two activities sometimes overlap, they are fundamentally different. Originalism obscures or mistakes the difference. If we took originalism seriously as a program for constitutional law in general, we would repeat the very mistake to which the first originalists objected. That objection, after all, was not that the justices were acting out of sheer caprice, as if they were flipping a coin, but that the justices were not being candid about their grounds for decision because their decisions were not based in responsible legal judgment. The originalist cure, in the end, would just as surely eliminate responsible legal judgment, even if it would do so in the name of an academic theory honestly avowed.

## V.

No to originalism, then! But to what shall we say yes? My answer, you may already have guessed, is that we should embrace the actual, historical, *original* tradition of American constitutional interpretation. I am not an originalist because I am committed to what in fact we have been doing in the way of constitutional decision making for the last couple of centuries plus. George Washington hardly had drawn his hand off the Bible from taking the oath of office when the lawyers seized control of the Constitution and made it for most practical purposes their preserve. King James I could have warned President Washington about the consequences of giving the Constitution into the hands of the lawyers: having done so the American Republic engaged itself to run the risk that willful, unscrupulous justices, or willful and feckless ones, might make of the Constitution whatever they would, "shipmens hose." Washington was no blind admirer of the pretensions of lawyers about the reading of documents: his own last will and testament carefully provided that if there should be any dispute over its meaning, the controversy was to be resolved by "three impartial and intelligent men, known for their probity and good understanding" who were to resolve the dispute "unfettered by law or legal constructions."<sup>43</sup> But when

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43. George Washington, Last Will and Testament (July 9, 1799), in 4 ANNALS OF AMERICA 115, 119 (1968).

it came to the Constitution, and questions over *its* meaning, Washington took another approach altogether: he went to the smartest lawyers he knew confidentially, and canvassed their professional opinions.<sup>44</sup> He knew, or quickly learned, that he could not expect them always to agree—recall, yet once again, Jefferson’s and Hamilton’s bank opinions written for Washington who had to decide whether to approve the national bank act or veto it. The legal interpretation of the Constitution is a matter of judgment, not geometry, and as in any practice involving human judgment, smart and good people sometimes disagree, obtuse ones often make no sense, and dishonest ones can offer inauthentic decisions concealed by dead, dishonest speech.

Washington may not have trusted “legal constructions,” but he understood the problems surrounding human judgment in his bones, and he turned to the lawyers and legal reasoning for solutions to constitutional questions. In doing so, Washington was vindicated. If the Constitution is actually to be, as it calls itself, the supreme law of the land, Americans have recognized that there will inevitably be disputes over its meaning and application, and from the beginning we have addressed that reality using the resources of the law. Without much ado, and from the beginning, we therefore have subsumed constitutional interpretation under the familiar legal activity of interpreting documents that possess, for some purpose or the other, authority: statutes, wills, trust instruments, charters, and the like. Constitutional interpretation became constitutional law, created in the image and with the tools of the common law.<sup>45</sup>

The results have been pretty much what one would expect. The lawyers have done what common lawyers do, and the chief result of their labors has been the creation of a vast body of judge-made case law, in its form and character a species of common law even though it is case law anchored to the text of the Constitution. What Justice Stevens once wrote about the law of the First Amendment is true of constitutional law generally: it is “an elaborate mosaic of specific judicial decisions, characteristic of the common law process of case-by-case adjudication.”<sup>46</sup> The common-law method does not pretend to the certainty of deductive logic: as Stevens also observed, the

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44. See NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS ON THE ATTORNEY GENERAL’S OFFICE, 1789–1990*, at 11 (1992) (discussing Washington’s consultations with a broad range of lawyers).

45. This assertion, I believe, should not be controversial as a matter of historical description. See, e.g., CHARLES FRIED, *ORDER AND LAW* 66 (1991) (“Originalism was not the original interpretive doctrine of the framers nor of the framing generation. It was taken for granted that the Constitution, like other legal texts, would be interpreted by men who were learned in the law, arguing cases and writing judgments in the way lawyers and judges had done for centuries in England and its colonies. Argument from precedent and by analogy would allow the Constitution to be applied to changing circumstances. . . . This has been the texture of common lawyers’ reasoning for centuries.”).

46. John P. Stevens, *The Freedom of Speech*, 102 *YALE L.J.* 1293, 1300–01 (1993).

“judges have frequently reminded us that their work involves more than the logical application of general propositions to particular facts; instead, in the crucible of litigation, those facts often reshape the very propositions that have been applied to them.”<sup>47</sup>

Our constitutional law reflects another aspect of the common law as well. From the medieval yearbooks on, the common law has unabashedly recognized the impress of individual minds on its process of decision. Partly as a consequence, the common law of the Constitution has frequently come to specific decisions that were and are contestable in good faith, and its history undeniably reflects the personalities, predilections and politics of those who have created it. A body of fundamental law made by such means will inevitably be contentious and its links to the other political and ethical commitments of the lawyers will be unmistakable. With the national-bank controversy in mind, John Marshall wrote in 1805 that “[t]he judgment is so much influenced by the wishes, the affections, and the general theories of those by whom any political proposition is decided, that a contrariety of opinion on this [or, we might add, any other] great constitutional question ought to excite no surprise.”<sup>48</sup> The American constitutional tradition is as much one of political conflict as it is of agreement, though it is conflict within a shared practice of legal argument.

In such a legal tradition, a tremendous amount necessarily rests on the identities of the constitutionalists themselves. The Constitution and the Republic have been served by brilliant lawyers, interpreters who brought both intellectual honesty and political vision to the task; and by inept or crassly partisan lawyers unable to distinguish their passions from responsible judgments; and also, no doubt, by a few scoundrels, cynical about the whole enterprise. Their constitutional decisions and opinions—whether as justices, judges, presidents, members of Congress, executive officers, or scholars—have sometimes been as admirable, both in reasoning and in moral substance, as one could reasonably hope from any human political institution. All too often the decisions have been failures, intellectually and morally, as well as constitutionally. As Marshall might have said, that too ought to excite no surprise, not in a fallen world.

The problem with originalism as a program is not that the first originalists were wrong to sense something amiss with the constitutional law of three decades ago. Their error was to think the problem of the Constitution’s wax nose somehow unique or the invention of their own time, and to think further that it is possible to escape human waywardness and error through finding and following the right theory of interpretation.

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47. *Id.*

48. 4 JOHN MARSHALL, LIFE OF GEORGE WASHINGTON 243 (Chelsea House 1983) (1805).

“Grand theories . . . map uncertainly onto the difficult terrain of the law,”<sup>49</sup> and no theory can eliminate the possibility of error, caprice or dishonesty: after all, inept or manipulative arguments can be made about original meaning. All the pathologies anyone has ever seen in our original constitutional tradition (in the Seventies or any other time) would assert themselves in the remade originalist world, amplified by loss of the tradition’s common law concern with particularity, with justice in the individual case, and by loss of the traditional recognition that uncertainty and disagreement are unavoidable. That would make things far worse. The tradition, with all its flaws, is grounded in the practicalities of responsible decision; originalism is a scholar’s endeavor. There is no theoretical solution to the problem of the Constitution’s wax nose—including, I should add hastily, theories about common-law constitutionalism. There is instead only the case-by-case attempt to come to the best answer we can, the individual by individual effort to be conscientious interpreters insofar as we can, the ongoing collective task of criticizing cases and interpreters when they (when we) fail to do these things.

## VI.

I have kept you long enough, but before I close I want to return briefly to our friend Alain of Lille. Let me remind again you of the entirety of Alain’s famous *dictum*: “But since authority has a nose made of wax, it is possible to twist it in any direction, so that one must rely on strengthening the rational faculty.” Another way to render the last clause would be “so that one must rely on fortifying [authority] with reasons.”<sup>50</sup> The exact translation is immaterial for our purposes, however: what interests me is Alain’s suggestion that the problem of interpretive uncertainty can be ameliorated by resort to the activity of offering and evaluating reasoned arguments.

There is an implied contrast here. Without the fortification of reason, on the one hand, an argument resting on authority is an exercise of power, power asserted in the authority’s name but power in fact wielded by the person making the argument. And power in this sense can indeed be twisted in any direction one wishes: it is external, authoritarian, a means of intellectual and, maybe, institutional coercion. On the other hand, there are arguments *grounded* in authority but *structured* and set forth through the

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49. Samuel Issacharoff, *The Difficult Path from Observation to Prescription*, 77 N.Y.U. L. REV. 36, 44 (2002).

50. See Nicolette Zeeman, *The Idol of the Text*, in IMAGES, IDOLATRY, AND ICONOCLASM IN LATE MEDIEVAL ENGLAND 50 (Jeremy Dimmick, James Simpson, & Nicolette Zeeman eds., 2002). The question about the correct translation cannot be resolved simply on the basis of grammar: *ratio* could be used in ancient and medieval Latin in either the singular or the plural without a change of meaning. See, e.g., Gerald Bray, *The Legal Concept of Ratio in Tertullian*, 31 VIGILIAE CHRISTIANAE 94, 97 (1977).

exercise of the rational faculty, through the presentation of reasons that appeal to the mind and judgment not just of the person making them, but of his hearers and readers as well. Such arguments are not authoritarian, for they implicitly admit the legitimacy of disagreement, the legitimacy of the hearer or reader saying “no, that doesn’t make sense to me.” Alain apparently believed that the orthodox Catholicism of his day could and should be explicated on the basis of this sort of argument by authority and reason, and not through imitating the intellectual bullying he ascribed to his “new heretics.” Authority and reason were not opposites but essential allies in his mind: reason rightly exercised is the true form of obedience to genuine authority.<sup>51</sup>

It has been a long time since Alain’s day, and our concern, tonight anyway, is with the authority of the Constitution and not that of Scripture or the Fathers or Aristotle. The first half, the famous half, of Alain’s statement is undeniably relevant. The Constitution has a wax nose: its interpretation can be disputed in good faith and manipulated in bad. Is there in constitutional law a parallel to the second half, to his resort to reason? Historically, the answer was clearly yes. In our constitutional tradition, as that very fine and very traditional judge Richard Arnold once wrote, “the judicial power . . . is based on reason, not *fiat*.”<sup>52</sup> I would add (on my own though I think Judge Arnold would have agreed) that this means reason in a robust, almost medieval sense, not an etiolated version of reasoning that excludes on *a priori* grounds most forms of recognized legal argument. We have practiced constitutional law as Alain wanted theologians to practice Christian theology, by an embrace of reason, not a flight from it. Originalism, with its fearful retreat to a single approved line of argument, gets this exactly backwards. If the justices, or other constitutionalists, have lost their faith in our shared practices of reasoned legal debate, the solution is to recall them to their duty, or educate them in it, not to create some new definition of their task in the naive hope that they will be more faithful to it than to the original.

If our tradition of reasoned argument is at risk, however, it is not the originalists, with their reductionistic view of constitutional law, who are chiefly to blame. They at least would tell us what they are doing. I am more afraid of those who are happy to maintain the trappings of legal argument on the understanding, shared among those in the know, that the real

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51. In an earlier work, Alain asserted that theological truth is established and error refuted through reason’s approbation of what is disclosed by nature and revelation. “‘For now the nightmares of Epicurus are put to sleep, the insanity of Manichaeus made sane, the quibbles of Aristotle argued, the false arguments of the Arians falsified; reason approves the unique unity of God, [which] the universe declares, faith believes, and [to which] Scripture testifies’ ([*De planctu naturae*] 8.140–41, 143–45).” SWEENEY, *supra* note 3, at 163.

52. *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

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determinants of constitutional decision have nothing to do with the law. This is no mere impoverishment of law; it is the negation of law. Put into action, it is a betrayal: a judge who thinks legal reasoning is *nothing* more than a rationalization for decisions reached on other grounds, and yet announces those decisions in the name of the Constitution, acts in bad faith. Such decisions may enjoy raw institutional power but they are lawless, as our tradition has understood law. The opinions announcing them make no appeal to the mind and judgment of the reader just as they express nothing of the mind and judgment of the decision maker. In that emptiness lies the death of constitutional law.