LOWER COURT ORIGINALISM

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Originalism is among the most significant and contentious topics in all of constitutional law and has generated a massive literature addressing almost every aspect of the theory. But curiously absent from this literature is any sustained consideration of the distinctive role of lower courts as expositors of constitutional meaning and the particular challenges that such courts may confront in attempting to incorporate originalist interpretive methods into their own decisionmaking. Like most constitutional theories, originalism has tended to focus myopically on a select handful of decisionmakers—paradigmatically, the Justices of the Supreme Court—as the principal expositors of constitutional meaning. While this perspective unquestionably has value, it ignores the adjudicative context in which the vast majority of litigated constitutional questions are finally resolved.

The question of whether and to what extent lower courts should use originalism in their own decisionmaking is hardly an insignificant one. Although lower courts are strictly bound to follow controlling Supreme Court precedent, these strictures leave open a wide domain in which the choice between originalism and other modes of decisionmaking might plausibly affect the content of lower courts' decisions. But lower courts face a number of institutional limitations and challenges that do not directly confront the Supreme Court, including greater time and resource constraints and the inability to overrule directly controlling nonoriginalist precedents.

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This Article aims to examine lower court originalism by looking to a set of values commonly associated with our system of vertical stare decisis—including uniformity, accuracy, efficiency, percolation, and legitimacy—as well as a set of values commonly associated with originalism itself—including popular sovereignty, judicial restraint, desirable results, and positive law. In general, the use of originalism by lower court judges is likely to be more costly and error–prone than similar decisionmaking by the Supreme Court, while being less likely to directly further certain of the values most closely associated with originalism. This assessment does not necessarily suggest that lower courts should never seek to incorporate originalist methods into their own decisionmaking. But it does suggest the need for a cautious and thoughtful approach that takes proper account of the institutional limitations of lower court decisionmaking.

These challenges are hardly unique to originalism. Similar challenges confront virtually all constitutional theories, particularly those that, like originalism, ask lower courts to look beyond the relatively familiar tools of case-focused, doctrinal reasoning.

INTRODUCTION

"[W]e are all originalists" now.[1] Or so we've been told—repeatedly.[2] But despite such assurances, "originalism" remains one of the most controversial and polarizing terms in contemporary constitutional discourse.[3] Originalist approaches to constitutional decisionmaking have been the focus of an expansive scholarly literature, both supportive and critical, spanning more than four decades.[4] But

1. *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. 62 (2010) [hereinafter *Kagan Hearings*] (statement of Elena Kagan, Solicitor Gen. of the United States) ("And I think that [the Framers] laid down—sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists.").

2. *See, e.g.*, Lawrence B. Solum, *We Are All Originalists Now*, *in* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1–77 (2011); Jamal Greene, *How Constitutional Theory Matters*, 72 OHIO ST. L.J. 1183, 1184 (2011) ("We are all originalists now."); Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL'Y 495, 495 (1996) ("[A]t some suitably abstract level almost everyone is an originalist in at least some limited sense.").

3. *See, e.g.*, Donald L. Drakeman, *What's the Point of Originalism?*, 37 HARV. J.L. & PUB. POL'Y 1123, 1133 (2014) ("Recent surveys have consistently shown that the American public divides roughly evenly when they are asked to pick between originalism and a 'living' or 'modern' constitutional interpretation."); Jamal Greene et al., *Profiling Originalism*, 111 COLUM. L. REV. 356, 364–70 (2011) (reporting survey results to that effect).

4. Even an illustrative list of such sources would run many pages while omitting

despite the massive scholarly attention that has been lavished on the originalism debate, there remain some aspects of this debate that have somehow managed to escape close attention.

For the most part, the originalism debate has focused on a set of well-trod questions that have been turned over repeatedly from differing perspectives. One major set of debates focuses on the teleological purposes that originalist methods might serve—the "*why*?" of originalism[5]—or on critiques of originalism as a theory of interpretation—the "*why not*?".[6] A second, significant set of debates focuses on the proper object of originalist interpretation and particularly the choice between framers' intent, ratifiers' understandings, and objective public meaning as the appropriate target of originalist concern—originalism as to "*what*?"[7] Finally, a closely related set of debates has centered on methodological questions regarding the extent to which originalist interpreters can recover the actual original meaning of a constitutional text and the appropriate methods

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numerous key contributions. The following historical accounts from a diverse range of viewpoints provide a useful starting point for identifying some of the most relevant developments in the debate. *See, e.g.*, JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2005); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 750–51 (2011); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 549 (2006); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003).

5. *See, e.g.*, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV 849 (1989).

6. *See, e.g.*, CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT–WING COURTS ARE WRONG FOR AMERICA 74–76 (2005); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 5 (2009); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

7. *See, e.g.*, Kesavan & Paulsen, *supra* note 4, at 1134–48 (discussing predominance of original intentions in early versions of originalist theory and emergence of competing theories that focus on original public meaning).

for attempting to do so—the "*how*?" of originalism.[8]

But despite all the attention devoted to these questions of why, what, and how, an equally important set of questions regarding the identities of the individuals for whom originalist interpretive methods are appropriate—the "*who*?" of originalism—has remained largely unexplored.[9] With the exception of a handful of works examining whether members of the political branches should embrace originalism's interpretive premises,[10] nearly all originalist scholarship has focused on the role of the judiciary, and the Supreme Court in particular, as the principal expositor of constitutional meaning.[11] Nearly absent from such accounts is any sustained consideration of the possibility that distinctions between

8. *See, e.g.*, Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017) (outlining a theory of originalist methodology informed by ideas from linguistic philosophy); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 828 (2009) (considering extent to which originalism can be reconciled with the use of judicial precedent); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 549–50 (2003) (considering role of background interpretive principles and conventions in constitutional interpretation); Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411, 421–28 (1996) (considering role of burdens and standards of proof in originalist interpretation).

9. *See, e.g.*, Berman, *supra* note 6, at 14 & n.30 (identifying this potential for variability in the "subjects" to whom originalist interpretive theses might apply while noting the issue has been "generally overlooked").

10. *See, e.g.*, Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 3–4 (2016) (concluding that members of Congress are presumptively bound by the original meaning of the Constitution but may recognize "super precedents" that have gained widespread assent); Michael D. Ramsey, *Presidential Originalism?*, 88 B.U. L. REV. 353, 358–62 (2008) (contending that leading arguments for judicial originalism do not necessarily extend to constitutional interpretation by the President); Jose Joel Alicea, *Originalism and the Legislature*, 56 LOY. L. REV. 513 (2010) (arguing that the leading justifications for originalism require that the members of Congress interpret the Constitution in an originalist manner).

11. *See, e.g.*, WHITTINGTON, *supra* note 5, at 39 ("Originalists have been particularly concerned about the discretion available to judges and therefore have been careful to clarify and emphasize the limits placed on them by the adoption of their interpretive method."); Berman, *supra* note 6, at 14 ("Many originalist theses concern only how judges should act; they are agnostic regarding how other readers should interpret the Constitution.").

different courts—and particularly the distinction between the Supreme Court and hierarchically inferior courts—might matter to the interpretive prescriptions offered by originalist theory.[12]

The virtual invisibility of lower courts in the originalism debate is both unsurprising and unfortunate. Unsurprising insofar as lower courts have historically been ignored by virtually all theories of constitutional interpretation, which have myopically focused on Supreme Court decisionmaking as the only subject worthy of academic attention.[13] And unfortunate given that the overwhelming majority of constitutional litigation in the United States is resolved at the lower court level without any meaningful involvement by the Supreme Court.[14]

The present moment seems a particularly auspicious time to consider the relationship between originalism and lower court decisionmaking. A majority of the Supreme Court's current members

12. An important first effort toward filling this gap is provided by a recent short essay authored by Professor Josh Blackman, which surveys certain of the challenges an originalist lower court judge might face, including the constraints of binding Supreme Court precedent and the lack of originalist briefing from the parties. *See* Josh Blackman, *Originalism and Stare Decisis in the Lower Courts*, 13 N.Y.U. J.L. & LIBERTY 44 (2019).

Apart from Professor Blackman's essay, the only other meaningful efforts to engage the originalism debate from the specific perspective of the lower courts consist of a handful of works examining the implications of originalism for the interpretation of state constitutions by state courts. *See*, *e.g.*, Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 GEO. J.L. & PUB. POL'Y 341, 344 (2017) (contending that originalism is the "ubiquitous" interpretive method used by state courts interpreting state constitutions); Troy L. Booher, *Utah Originalism*, 25 UTAH B.J. 22 (2012) (considering implications of originalism for interpretation of the Utah state constitution).

13. *See* Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 459 (2012) (describing lower courts as "the forgotten stepchildren of constitutional theory"); Patricia M. Wald, *Upstairs/Downstairs at the Supreme Court: Implications of the 1991 Term for the Constitutional Work of the Lower Courts*, 61 U. CIN. L. REV. 771, 772–73 (1993) ("[I]n their focus on what happens 'upstairs' at the Supreme Court, observers often fail to recognize the efforts 'downstairs' in the lower federal courts and state courts.").

14. *See infra* note 39.

have expressed some degree of support for originalism,[15] suggesting that originalism is likely to remain a prominent feature of constitutional jurisprudence for some time to come. And given the previous administration's pronounced commitment to appointing textualist and originalist judges,[16] originalist theories seem likely to find a receptive audience among at least a significant portion of lower court judiciary.

Part I of this Article clarifies some terminology surrounding the use of the term "originalism," particularly the potential distinction between originalism as a theory of constitutional interpretation or legal obligation versus originalism as a theory of adjudication.

Part II examines the role of originalism in lower courts, summarizing some important institutional differences between the Supreme Court and lower courts that bear upon the present inquiry, including disparities in docket size and discretion, institutional resources, advocacy, precedential constraint, and influence over

15. *See Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 242, 262 (2017) (statement of Hon. Neil M. Gorsuch, Judge, U.S. Ct. of App. for the 10th Cir.); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 465 (2006) (statement of Hon. Samuel A. Alito, Jr., Judge, U.S. Ct. of App. for the 3d Cir.); *Confirmation Hearing on Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 182 (2005) (statement of Hon. John G. Roberts, Jr. Judge, U.S. Ct. of App. for the D.C. Cir.); *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 Hon. Brett M. Kavanaugh, Judge, U.S. Ct. of App. for the D.C. Cir.); Brian Naylor, *Barrett, An Originalist, Says Meaning Of Constitution 'Doesn't Change Over Time'*, NPR (Oct. 13, 2020, 10:08 AM), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesnt-change-over-time [https://perma.cc/VCH4-M955] (reporting statement of Hon. Amy Coney Barrett, Judge, U.S. Ct. of App. for the 7th Cir.); Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6 (1996) ("[W]hen interpreting the Constitution, judges should seek the original understanding of the provision's text . . . ."); *see also Kagan Hearings*, *supra* note 1 (statement of then–Solicitor General Elena Kagan).

16. *See generally* Leslie H. Southwick, *A Survivor's Perspective: Federal Judicial Selection from George Bush to Donald Trump*, 95 NOTRE DAME L. REV. 1847, 1914–17 (2020) (describing Trump Administration's commitment to appointing originalist judges).

other constitutional decision-makers. Part II also examines the potential practical significance of originalist interpretation for lower courts' decisionmaking, demonstrating that consideration of originalist evidence may be permissible and potentially significant for lower court decisionmaking across a broad range of cases.

Part III considers several important systemic values undergirding the hierarchical structure of the federal judiciary and the doctrine of vertical stare decisis, including uniformity, proficiency, judicial economy, percolation, and legitimacy. As Part III shows, the widespread embrace of originalism by lower court judges could plausibly further certain of these values, such as percolation and legitimacy, while potentially impeding or threatening others, such as uniformity and judicial economy. The precise balance of such comparative benefits and burdens is likely to depend on the particular ways in which originalist reasoning factors into lower courts' decisionmaking and the circumstances in which such decisionmaking occurs.

Part IV shifts the focus from the values undergirding vertical stare decisis toward a consideration of the values most commonly associated with originalism itself. Although originalists have asserted numerous theoretical arguments in support of their preferred theory, Part IV focuses on four of the most prominent—popular sovereignty, judicial constraint, desirable results, and originalism's purported claim to represent "our law" of constitutional interpretation. Although each of these normative justifications might be consistent with the use of originalism by lower courts, none seems to clearly and definitively require a practice of lower court originalism.

Part V seeks to draw some tentative conclusions regarding lower court originalism as an adjudicative practice. In general, the use of originalism by lower court judges is likely to involve higher costs and greater risk of interpretive error than would use of similar methods by the Justices of the Supreme Court. Lower court originalism is also considerably less likely to deliver the sorts of practical benefits typically associated with originalism. These ob-

servations suggest that the Supreme Court is institutionally best situated to shoulder the burdens of originalist decisionmaking and should strive to minimize the interpretive burdens on lower courts. Consequently, lower courts should exercise a cautious approach in seeking to integrate originalism into their own decisionmaking, particularly in those situations where the parties have chosen not to raise or brief originalist arguments and where a particular issue seems to fall within the scope of controlling Supreme Court precedent.

Part VII extends the frame of analysis to briefly consider the potential implications for nonoriginalist theories of constitutional interpretation. Many of the institutional concerns that could be implicated by the lower courts' use of originalism may apply with equal force to a variety of nonoriginalist arguments that expect or demand interpreters to look beyond the confines of familiar doctrinal reasoning of the sort that typifies existing lower court practices. To the extent a particular nonoriginalist theory requires consideration of such nontraditional sources—be they foreign legal materials, post-enactment historical practice, the requirements of moral philosophy, or contemporary public opinion—similar questions may arise regarding the competence of lower courts and their ability to further the relevant values at stake.

I. UNPACKING "ORIGINALISM": INTERPRETATION AND ADJUDICATION

Before proceeding further, it will be useful to explain briefly the particular sense of "originalism" explored in this Article. Originalism is a famously multi-faceted concept that can be used to describe a range of loosely connected interpretive theories sharing a core set of foundational premises.[17] Further complexity is added by the fact

17. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013) (observing that the term originalism describes "a family of constitutional theories" united by the commitment to the idea that the meaning of constitutional provisions is fixed at the time of framing and enactment and to the idea that this meaning should constrain officials in the performance of their constitutional functions).

that the term "originalism" can be used to describe both a set of postulates about the nature of the Constitution's meaning and authority—originalism as a theory of interpretation—as well as a more specific set of prescriptions about the way in which public officials (paradigmatically judges) should exercise their adjudicative responsibilities—originalism as a theory of adjudication.[18]

The primary sense of "originalism" this Article examines involves originalism as a theory of adjudication—that is, as a theory about *how* the postulates of originalist interpretive theory should inform judicial decisionmaking rather than a theory about *what* makes a claim about constitutional meaning ontologically true or false. In principle at least, one could embrace originalism as a theory of interpretation without believing that the interpretively determined meaning should make *any* meaningful contribution to the practice of constitutional adjudication.[19] But even if one believes that originalism should guide and constrain judicial practice to some extent, further questions will inevitably remain regarding how judges should go about translating the Constitution's interpretively determined meaning into a set of judicially manageable prescriptions that are capable of resolving concrete cases and controversies.

Sometimes, for example, the applicable rules of adjudication may require a judge to apply something other than what she believes to be the "best" understanding of constitutional meaning. Doctrines

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18. *See, e.g.*, Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1823 (1997) (distinguishing "[t]heories of interpretation," which "concern the meaning of the Constitution," from "[t]heories of adjudication," which "concern the manner in which decisionmakers (paradigmatically public officials, such as judges) resolve disputes"); *cf.* Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 546 (2013) (drawing a similar distinction between originalism as a theory of adjudication and originalism as "a theory of law").

19. *See* Lawson, *supra* note 18, at 1835 ("[I]nterpreting the Constitution and applying the Constitution are two different enterprises. Once one knows what the Constitution means, there remains the (open) question whether to apply that meaning in any given case in which it might be thought potentially applicable.").

requiring courts to give preclusive effect to prior judgments premised on incorrect understandings of constitutional meaning or to reject valid constitutional arguments that a party has waived or forfeited are not generally regarded, even by originalists, as inconsistent with a judge's duty to follow the Constitution.[20] Likewise, rules of precedent and stare decisis may sometimes require lower courts to act "as if" the legal meaning of the Constitution is something other than what a "pure" theory of originalist interpretation might otherwise suggest.[21] The Supreme Court has asserted a strong conception of its own authority to bind lower courts, insisting that lower courts must always follow directly controlling Supreme Court precedents until the Supreme Court itself decides to overrule them.[22] And though originalists have expressed differing views regarding the extent to which stare decisis should guide the Supreme Court's own decisionmaking,[23] most originalists accept the legitimacy of inferior courts according strong stare decisis effect to the Supreme Court's rulings.[24]

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20. *See, e.g.*, William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1472–73 (2019) (discussing the example of preclusion); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2359–60 (2015) (identifying waiver as an "obvious and uncontroversial example of . . . a common–law rule" that sometimes requires decisionmakers to apply something besides the correct constitutional meaning) [hereinafter Baude, *Our Law*].

21. Baude & Sachs, *supra* note 20, at 1473.

22. *See, e.g.*, 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.").

23. *Compare, e.g.*, Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 3–4 (2007) (arguing that the Supreme Court should "mostly never" "choose precedent over direct examination of constitutional meaning" (internal quotation marks omitted)), *with, e.g.*, John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 823–24 (2009) (arguing that the "judicial power" referred to in Article III "can be understood as requiring judges to deploy a minimal concept of precedent" and empowering judges to deploy stronger precedential rules subject to Congressional regulation).

24. *See, e.g.*, Baude, *Our Law*, *supra* note 20, at 2370 (observing that "there is a shared consensus under almost every theory (including originalism) that lower courts are

A theory of adjudication must also grapple with the problem of interpretive uncertainty in a way that "pure" theories of interpretation need not. Those engaging in the interpretive enterprise for purely academic reasons might plausibly insist on a much lower threshold of interpretive proof and be much more comfortable with a conclusion of interpretive uncertainty than public officials whose decisions carry practical legal consequences.[25] Those engaged in adjudication, however, must make decisions about how to allocate scarce time and decisional resources among competing cases and the systemic consequences of their decisions for parties whose claims may be brought before judges with different interpretive philosophies.[26]

In practice, the questions that will typically confront lower court judges will rarely appear so straightforward as a decision to either "follow" or "reject" the Constitution's original meaning as such. More often, lower courts will find themselves confronted with competing claims about what original meaning requires or with conflicting arguments about the best way to reconcile arguments from original meaning with arguments from precedent or post-enactment historical practice. In such circumstances, determining what originalism demands as a theory of adjudication may require difficult judgments about, among other things, the credence to give claims asserted by the parties or by outside experts, the weight to

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bound by 'vertical precedent'"). Some scholars contend that the original meaning of Article III itself requires such deference to hierarchical precedent. *See, e.g.*, JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES 1–2, 38–44 (2009) (surveying historical evidence suggesting that "inferior tribunals must generally follow the precedents of their judicial superior"). *But see* Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & RELIGION 33, 82–84 (1989) (arguing that Article III does not compel lower court judges to follow erroneous Supreme Court precedent).

25. *See, e.g.*, Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 879 (1992) ("The degree of certainty, and hence the standard of proof, that people require before accepting propositions as true for particular purposes varies with the consequences of that acceptance.").

26. *See infra* Part III.B (discussing concerns regarding the decision costs of originalist interpretive methods).

be accorded different sources of originalist evidence, and the constraints imposed by existing precedent.

In weighing such considerations, the lower court judge is likely to possess a substantial degree of practical discretion.[27] This discretion is, of course, shaped and constrained to some extent by the requirements of existing case law and the postulates of the interpretive theory the judge believes to be correct.[28] But even acknowledging the existence of such constraints, lower court judges—including those committed to originalism as an abstract theory of constitutional obligation—are likely to face a range of practical questions about how to integrate such abstract commitments into their own practical obligations to adjudicate the concrete disputes that are brought before them.

II. ORIGINALISM IN THE LOWER COURTS

A. Institutional Differences Between the Supreme Court and Lower Courts

In thinking about the role of originalism in the lower courts, it is important to keep in mind two potential fallacies that might lead to faulty conclusions. First, observers should take care to avoid the *fallacy of composition*—the assumption that what is true of the individual component members of an aggregate must necessarily be true of the aggregate itself.[29] Second, observers should be cognizant of the closely related *fallacy of division*—the assumption that what is

27. *See, e.g.*, Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 378 (1975) ("[W]hen more than one result will widely be regarded as a satisfactory fulfillment of his judicial responsibilities then it does not make good sense to say that a judge is under a duty to reach one result rather than another; as far as the law is concerned, he has discretion to decide between them.").

28. *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1977) ("Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.").

29. *See generally* ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 15–16 (2011) (discussing the fallacies of division and composition).

true of the aggregate is necessarily true of the component members.[30] Thus, for example, a firm belief that a particular mode of constitutional interpretation—such as originalism, or doctrinalism—is appropriate for the Supreme Court should not necessarily lead one to conclude that the same mode of interpretation would work equally well if used by all other U.S. courts—a fallacy of composition. Likewise, a conclusion that originalism constitutes the appropriate interpretive target of our judicial system as a whole would not necessarily warrant the further conclusion that every court within that system must be originalist—a fallacy of division.

To some extent, our existing practices already reflect a recognition of these potential fallacies by dividing the powers and responsibilities of courts at differing levels of the judicial hierarchy in various ways. These differences are most clearly visible with respect to the law of precedent. The power to create precedent, for example, is lodged in the federal courts of appeals and the Supreme Court but is denied to federal district courts.[31] Federal courts of appeals possess authority to create binding precedent for federal district courts over which they possess appellate jurisdiction but do not bind other federal courts or even the state courts that exercise jurisdiction over the same territory.[32] The Supreme Court possesses the power to create binding precedential obligations for all other U.S. courts—both federal and state—and has claimed for itself the exclusive authority to overrule its own prior precedents.[33]

It is conceivable that the interpretive responsibilities of courts at the differing levels of the judicial hierarchy might be divided in a

30. *See generally id.*

31. *See* Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (quoting 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.02[1][d] (3d ed. 2011)).

32. *Cf.* Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("[N]either federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation.").

33. *See supra* note 22.

similar way, and scholars have explored the conceptual possibility of such interpretive divergence in other interpretive contexts.[34] To date, however, such interpretive specialization has found little formal recognition in the judiciary's discourse.[35]

In the constitutional realm, however, an informal practice of interpretive specialization seems to have emerged organically. Unlike the Supreme Court, which deploys a variety of recognized "modalities" of constitutional reasoning in reaching its decisions—including arguments from text, original understanding, structure, precedent, and ethical commitments[36]—lower courts tend to focus much more centrally on Supreme Court precedent.[37]

There may be sound practical reasons for this informal divergence to have emerged in the manner it has. Although the Constitution does not draw any clear distinction between the judicial officers who compose the "one Supreme" Court and the "inferior"

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34. *See, e.g.*, Aaron–Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433 (2012) (suggesting potential for different approaches to statutory interpretation methodology depending on the level of the judicial hierarchy in which a particular question is presented); Evan H. Caminker, *Precedent and Prediction: The Forward–Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 5–8 (1994) (suggesting that lower courts should adopt a prediction or "proxy" model of precedent that focuses on attempting to predict how the Supreme Court would decide the particular issue if presented with the opportunity) [hereinafter Caminker, *Precedent and Prediction*].

35. *See, e.g.*, Caminker, *Precedent and Prediction*, *supra* note 34, at 5–6 (noting that "the overwhelming consensus reflected by judicial and academic discourse holds that lower courts ought to" decide cases in essentially the same manner as they would "if they were courts of last resort.").

36. *See generally* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) (providing a well–known typology of six recognized "modalities" of constitutional argument).

37. *See, e.g.*, Aaron–Andrew P. Bruhl, *Following Lower–Court Precedent*, 81 U. CHI. L. REV. 851, 888 (2014) ("Lower–court decisionmaking in constitutional cases is . . . especially doctrinal in character, focusing largely on parsing the holdings (and dicta) of prior Supreme Court cases."); Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 849 (1993) (observing that, in the lower courts, "constitutional discourse . . . consist[s] almost entirely of the analysis of (usually recent) cases of the United States Supreme Court that ostensibly serve as dispositive 'precedents' to resolve issues under discussion").

federal courts,[38] the ways in which these institutions have been structured in practice leads to significant differences in their respective institutional capacities.

Under current law, the Supreme Court—unlike the lower federal courts—enjoys virtually plenary control over its own docket.[39] And because the Court chooses to hear and decide only a tiny fraction of the cases that reach the circuit courts each year,[40] it is able to devote substantially more time and decisional resources to the resolution of each case.[41] The Supreme Court may also have other institutional advantages vis–à–vis the lower courts that render it better suited to resolve complex legal issues, such as its larger size, its ability to reframe and modify the legal questions presented by the parties, its ability to draw on the experiences and decisions of the lower courts, and its greater access to amicus briefing by interested third parties.[42]

Additionally, the Supreme Court's role as the apex court in the

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38. U.S. CONST. art. III, § 1; *see also, e.g.*, Akhil Reed Amar, *A Neo–Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 221 (1985) (noting "the structural parity of all Article III judicial officers", including identical treatment with regard to tenure in office, salary protection, and selection and confirmation processes).

39. *Compare* 28 U.S.C. § 1254(1) (2006) (providing the Supreme Court with discretionary certiorari jurisdiction over most cases), *with* 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.").

40. *See* Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 405 n.22 (2013) (noting that more than 55,000 cases were filed in the federal courts of appeals each year from 2009 to 2011 while the Supreme Court had considered only eighty–six cases in its October 2010 term).

41. *See, e.g.*, Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 22 (2009) (emphasizing the Supreme Court's docket control and smaller caseload as indicia of its relative decisionmaking competence).

42. *See, e.g.*, *id.* at 23 (identifying control over question presentation, ability to await developments in the lower courts and access to amicus briefing as additional informational resources available to the Supreme Court that lower courts typically lack); Caminker, *Precedent and Prediction*, *supra* note 34, at 42 (arguing that larger number of participating jurists confers advantages on Supreme Court as compared to most lower court deliberations).

federal judicial system tends to render its decisions uniquely salient for purposes of coordinating official action. In addition to the tendency of lower courts to fall in line behind authoritative Supreme Court pronouncements,[43] both Congress and the President typically abide by authoritative Supreme Court interpretations, as do (in most circumstances) officials at the state and local levels.[44] The massive number of lower court rulings, their relative lack of public visibility, and the potential for lower courts to reach divergent interpretations make the opinions of lower courts a much less plausible focal point for coordinating official action and thereby attaining the types of settlement and stability benefits that Supreme Court opinions might plausibly achieve.[45]

Furthermore, as a practical matter, the Supreme Court is much less constrained by its own prior rulings than are lower court judges. Whatever claims might be made for the interpretive freedom of lower courts as a theoretical matter, the practical reality is

43. *Cf.* David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2036–42 (2013) (noting willingness of many lower court judges to accord binding effect to even explicitly recognized Supreme Court dicta).

44. *See* KEITH E. WHITTINGTON, THE POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY xii (2009) (observing that while "[d]epartmentalism has enjoyed moments of prominence in American political thought and practice, . . . most political leaders have eschewed this kind of independent responsibility for reading the Constitution," preferring instead to let the Supreme Court "take the responsibility for securing constitutional fidelity"); *but see, e.g.*, ANDREW JACKSON, VETO MESSAGE (July 10, 1832), *reprinted in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 576–91 (James Richardson ed., 1897) (explaining veto of statute re–chartering the Bank of the United States on constitutional grounds despite earlier Supreme Court decision, concluding legislation was within Congress's constitutional authority).

45. *Cf.* Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 943–44 (2013) (describing the incentives driving political actors to accept the Supreme Court's rulings as a focal point of coordination and observing that while "[l]ower courts . . . can specify the boundaries of permissible conduct within their respective jurisdictions" "only the Supreme Court can provide a definitive and nationally uniform resolution of federal law").

that our current institutional and professional norms strongly impel lower court judges to follow Supreme Court precedents.[46] Given the Supreme Court's strong assertion of interpretive supremacy,[47] it is almost certain that a lower court judge who attempted to assert her own interpretive freedom from controlling Supreme Court precedent would routinely find her efforts thwarted by either the Supreme Court itself or by resistance from her colleagues in the inferior courts. Thus, as a practical matter, lower court judges lack the capacity to implement an originalist jurisprudence in its "ideal" form; rather, they will inevitably be limited to choosing between a set of "second–best" options, constrained by their inability to displace controlling Supreme Court precedent.[48]

B. The Practical Significance of Lower Court Originalism

The prevalence of doctrinalism and stare decisis in lower court decisionmaking might plausibly lead one to question the practical significance of originalism for lower court judges. Professor Eric Posner, for example, has argued that the judges of the lower courts "don't care about originalism," leaving "the justices of the Supreme Court" as the only practically significant "audience for" originalist scholarship.[49] Other scholars have made similar observations regarding the assumedly limited relevance and utility of originalism

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46. *See, e.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 820 (1994) (observing that "the doctrine of hierarchical precedent appears deeply ingrained in judicial discourse—so much so that it constitutes a virtually undiscussed axiom of adjudication") [hereinafter Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*].

47. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (asserting that "the federal judiciary is supreme in the exposition of the law of the Constitution" and that the Supreme Court's opinions interpreting the Constitution are thus "the supreme law of the land" binding on all other public officials).

48. *See* Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 311–12 (2008) (discussing the idea of a "constitutional second best" in which decisionmakers are prevented from changing some variable necessary to the attainment of an ideal state of affairs and are thus constrained to choosing from among a more limited set of possible outcomes).

49. Eric Posner, *Why Originalism Will Fade*, ERIC POSNER (Feb. 18, 2016), http://ericposner.com/why-originalism-will-fade/ [https://perma.cc/P8GD-EGB7] (last visited Jan.

to lower courts' decisionmaking.[50]

But while doctrinalism certainly plays a far more prominent role in lower court decisionmaking than it does at the Supreme Court, the question of whether and when originalist reasoning should be used is far from inconsequential for lower court judges. As this Part will show, lower court judges often have the option of invoking originalist modes of reasoning in a variety of circumstances, including: (A) in addressing constitutional questions of first impression, (B) in dealing with originalist–oriented doctrinal frameworks established by the Supreme Court itself, (C) in filling out gaps and ambiguities left open by existing Supreme Court precedent, and (D) in critiquing binding Supreme Court precedent in the course of urging the Court to revisit or reverse particular nonoriginalist decisions.

1. Issues of Judicial First Impression

One fairly obvious domain in which originalist interpretation might feature prominently in lower court decisionmaking involves issues of judicial first impression that are not already the subject of authoritative Supreme Court pronouncements. Because virtually all interpretive theories acknowledge at least some role for evidence of original meaning,[51] even jurists who recoil at the "originalist" label might find it useful to consider evidence of original meaning as a starting point for interpretation.

16, 2019).

50. *See, e.g.*, Darrell A.H. Miller, *Romanticism Meets Realism in Second Amendment Adjudication*, 68 DUKE L.J. ONLINE 33, 34 (2018) (suggesting that "originalism is a method of reasoning that only the nine Justices of the Supreme Court can apply with any regularity"); Gewirtzman, *supra* note 13, at 498 (concluding that the "practical significance" of originalism "to lower court judges is often negligible").

51. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990) ("Even opponents of originalism generally agree that the historical understanding is relevant, even if not dispositive.").

Of course, when dealing with a more than two–century–old document comprising a total of only 7,591 words,[52] issues of true constitutional first impression may be few and far between.[53] Although many significant constitutional provisions have not come before the Supreme Court in any meaningful fashion,[54] the considerations that have prevented the Supreme Court from weighing in on such provisions—such as the relative clarity of their language (think, for instance, of the age limits for federal officeholders)[55] or their lack of practical contemporary significance (think, for instance, of the Third Amendment)[56]—are likely to pose similar barriers to their meaningful elaboration in the lower courts as well.[57]

Nonetheless, questions of first impression are worth keeping in mind for at least three reasons. First, the fact that particular constitutional provisions are not now, and have not historically been, prominent subjects of litigation does not mean that they will never come before the courts. Changes in social or political conditions may lend new and unexpected salience to heretofore neglected constitutional provisions. Consider, for example, the Foreign Emoluments Clause of Article I, Section 9.[58] Although this provision has

52. *See* Jefferson A. Holt, *Reading Our Written Constitution*, 45 CUMB. L. REV. 487, 487 (2015) (noting that the original Constitution, as enacted in 1788, contained 4,543 words (including signatures) and that the twenty–seven subsequent amendments adopted pursuant to Article V have added a combined total of 3,048 words).

53. *See* Jamal Greene, Heller *High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325, 340 (2009) (noting that important cases of first impression are likely to be rare).

54. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 400–07 (1985) (observing that many constitutional clauses are rarely or never litigated).

55. *See* U.S. CONST. art. I, § 2, cl. 2 (minimum age limit for members of the House of Representatives); *id*. § 3, cl. 3 (minimum age limit for Senators); *id.* art. II, § 1, cl. 5 (minimum age limit for President).

56. U.S. CONST. amend. III. *But see* Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982) (indicating that Third Amendment may limit authority to evict striking state employees from state–operated apartment housing in order to provide lodging for National Guard troops).

57. *See* Schauer, *supra* note 54, at 401 n.6 (noting that the same factors that render particular clauses insignificant for purposes of Supreme Court decisionmaking are likely to render them insignificant for lower courts as well).

58. *See* U.S. CONST. art. I, § 9, cl. 8 ("[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any

been part of the Constitution since its adoption in 1788, it has never been authoritatively construed by the Supreme Court and has not been a particularly prominent focus of litigation in the lower courts.[59] But the 2016 election of President Donald Trump thrust the Emoluments Clause into a new position of prominence.[60] This new prominence spurred litigation brought against the President in the lower federal courts seeking judicial enforcement of the provision's requirements.[61] Unsurprisingly, the provision's original meaning featured prominently in those proceedings.[62]

Second, changes in Supreme Court doctrine may render heretofore overlooked or underenforced constitutional provisions newly relevant to the lower courts' institutional responsibilities. The Court has rendered some provisions effectively off limits to the lower courts by either declaring them inappropriate subjects for judicial enforcement[63] or interpreting them so narrowly as to render

present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."); *cf.* U.S. CONST. art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services a Compensation . . . and he shall not receive within that Period any other Emolument from the United States, or any of them.").

59. *See, e.g.*, United States ex rel. New v. Rumsfeld, 350 F. Supp. 2d 80, 102 (D.D.C. 2004) (observing that there appears to be "no Supreme Court precedent defining the scope and application of the" Foreign Emoluments Clause), *aff'd* 448 F.3d 403 (D.C. Cir. 2006).

60. *See, e.g.*, Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639, 639–40 (2017) (observing that President Trump's "successful election has ignited public and scholarly interest in the Foreign Emoluments Clause").

61. *See, e.g.*, District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018); Blumenthal v. Trump, 335 F. Supp. 3d 45 (D.D.C. 2018); Citizens for Resp. & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017).

62. *See, e.g.*, *District of Columbia v. Trump*, 315 F. Supp. at 881 ("Both sides embrace a blend of original meaning and purposive analysis . . . in support of their view that the Emoluments Clauses should or should not apply to the President and, if applicable, to which of his actions they should apply.").

63. *See, e.g.*, Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 569 (1916) (recognizing the "settled rule that the question of whether [the Guarantee Clause of Article IV] has been disregarded presents no justiciable controversy but involves the exercise by Congress of the authority vested in it by the Constitution") (internal citations omitted).

them practically insignificant.[64] If the Supreme Court were to reverse its course with respect to the interpretation of one or more of these provisions, evidence of their respective original meanings would likely be an important source of guidance for the lower courts.[65]

A third consideration that might lend significance to cases of judicial first impression stems from the fact that the category of "cases of first impression" can sometimes be a contested one. The line of lower court decisions leading up to the Supreme Court's 2008 decision in *District of Columbia v. Heller*[66] provides an illustration. The Supreme Court majority in *Heller* viewed itself as unencumbered by prior precedent and free to consider the question of whether the Second Amendment protected an individual right to keep and bear arms as one of judicial first impression.[67] But the large majority of lower courts that had considered the issue prior to *Heller* viewed the question as settled by an earlier Supreme Court decision, *United States v. Miller*,[68] from 1939.[69] Because such lower courts understood the *Miller* decision as rejecting the "individual rights" interpreta-

64. *See, e.g.*, Slaughter–House Cases, 83 U.S. (16 Wall.) 36 (1873) (narrowly construing the Privileges or Immunities Clause of the Fourteenth Amendment's first section); Veix v. Sixth Ward Bldg. & Loan Ass'n of Newark, 310 U.S. 32, 38–40 (1940) (noting that state regulations adopted to further some legitimate public interest may alter obligations arising from private contracts without violating the Contracts Clause of Article I, Section 10).

65. *Cf.* Kerr v. Hickenlooper, 744 F.3d 1156, 1178–79 (10th Cir. 2014) (suggesting that lower courts could obtain "judicially manageable guidance" regarding the meaning of the Guarantee Clause by looking to Founding–era evidence such as "the Federalist Papers, founding–era dictionaries, records of the Constitutional Convention, and other papers of the founders"), *vacated*, 576 U.S. 1079 (2015).

66. 554 U.S. 570 (2008).

67. *Id.* at 625 (concluding that the nature of the Second Amendment's protection remained "judicially unresolved" and that "nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment").

68. 307 U.S. 174 (1939).

69. *Heller*, 554 U.S. at 638 (Stevens, J., dissenting) (observing that "hundreds of judges" in the lower courts had "relied on the view of the [Second] Amendment" expressed in *Miller*).

tion of the Second Amendment in favor of a "collective rights" interpretation, they saw no need to consider evidence of the Amendment's original meaning that might bear on that question.[70]

But *Miller* was hardly a model of analytic clarity. Although the Supreme Court's opinion could be read to support the broad collective–rights interpretation endorsed by numerous lower court decisions, it was also susceptible to a much narrower reading that focused specifically on the particular weapon at issue in that case (a sawed–off shotgun) and its presumed unsuitability for use in military settings.[71] Beginning in the late 1990s, a handful of lower courts, influenced by a new wave of scholarship arguing that the individual rights interpretation was more consistent with the Second Amendment's original meaning,[72] began to read the *Miller* decision more narrowly.[73] This line of revisionist decisions culminated in the overtly originalist opinion of the United States Court of Appeals for the District of Columbia Circuit in *Parker v. District of Columbia*,[74] which rejected the precedential conclusiveness of *Miller* and em-

70. *See, e.g.*, Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995) ("Since [*Miller*], the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual, right."); United States v. Hale, 978 F.2d 1016, 1020 (8th Cir. 1992) ("Since the *Miller* decision, no federal court has found any individual's possession of a military weapon to be reasonably related to a well regulated militia.") (internal quotation marks omitted).

71. *See, e.g.*, Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J. L. & LIBERTY 48, 50–52 (2008) (surveying various proposed readings of *Miller*).

72. *See, e.g.*, United States v. Emerson, 270 F.3d 203, 220 (5th Cir. 2001) (observing that "[t]he individual rights view" had "enjoyed considerable academic endorsement, especially in the . . . two decades" prior to 2001) (internal citations omitted); *see also* Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.–KENT L. REV. 3, 8–12 (2000) (discussing emergence of academic scholarship defending the individual rights interpretation of the Second Amendment in the 1970s and 1980s).

73. The first lower court decision to explicitly endorse the individual rights interpretation was issued by a federal district court in Texas. United States v. Emerson, 46 F. Supp. 2d 598 (N.D. Tex. 1999), *rev'd and remanded*, 270 F.3d 203 (5th Cir. 2001). On appeal, the Fifth Circuit too embraced the individual rights interpretation, though it reversed and remanded the district court's decision on other grounds. 270 F.3d at 260.

74. 478 F.3d 370 (D.C. Cir. 2007).

braced the individual rights interpretation based principally on evidence of the Amendment's original meaning.[75] The following year in *Heller*, a five–Justice majority affirmed the D.C. Circuit's *Parker* decision on originalist grounds.[76]

2. Originalist–Oriented Supreme Court Frameworks

A second important category of cases in which originalism might feature prominently in lower court decisionmaking involves doctrinal areas where the Supreme Court itself has either explicitly or implicitly embraced an originalist framework for interpreting a particular constitutional provision.

The Seventh Amendment provides a prominent illustration of one such originalist-oriented framework.[77] In expounding the meaning of the Amendment's command that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,"[78] the Supreme Court has long looked to Founding–era practices—particularly the practices of English common law courts at the time of the Amendment's adoption in 1791—as the principal source of interpretive guidance.[79] In applying this "historical test" for determining the Amendment's proper application, the Court has sought "to preserve the substance of the common–law right as it existed in 1791" by asking "whether we are dealing with a cause of action that either

75. *Id.* at 395.

76. 554 U.S. 570, 625 (2008) (noting that its holding that there is an individual right to bear arms for defensive purposes reflects "the original understanding of the Second Amendment").

77. *See, e.g.*, Adam M. Samaha, *Originalism's Expiration Date*, 30 CARDOZO L. REV. 1295, 1324 (2008) ("The Court's analytical framework for triggering a jury trial right in federal court typically includes a significant originalist element.") (internal citations omitted) [hereinafter Samaha, *Expiration Date*].

78. U.S. CONST. amend. VII.

79. *See, e.g.*, Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) ("Since Justice Story's day . . . we have understood that 'the right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted.'") (quoting Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935)).

was tried at law at the time of the founding or is at least analogous to one that was."[80]

The Seventh Amendment is hardly the only area in which the Supreme Court has looked to enactment–era history as a principal source of interpretive guidance. For example, in determining the scope of the federal courts' equitable powers, the Supreme Court has looked to "the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution" as a principal source of guidance.[81] The Court has also looked to Founding–era history as a key factor in assessing the scope of various constitutional guarantees regarding criminal procedure, such as the Sixth Amendment's Jury Trial and Confrontation Clauses.[82] And in recent years, the Court has shown increasing interest in incorporating some form of historically focused test into its Fourth Amendment jurisprudence as well.[83]

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80. *Id.* at 376.

81. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999) (quoting ARMSTRONG M. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928)); *see also, e.g.*, Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U.S. 563, 568 (1939) ("The 'jurisdiction' . . . conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which . . . was being administered by the English Court of Chancery at the time of the separation of the two countries.") (internal citations omitted).

82. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . [and] to be confronted with the witnesses against him . . . ."); *see also, e.g.*, Crawford v. Washington, 541 U.S. 36, 42–50 (2004) (relying on evidence of the Sixth Amendment's original meaning to establish new rule requiring that all testimonial evidence against a criminal defendant be subject to cross examination).

83. *See, e.g.*, Virginia v. Moore, 553 U.S. 164, 168 (2008) ("We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve."); Atwater v. City of Lago Vista, 532 U.S. 318, 326–40 (2001) (considering extensive evidence of pre–founding and Founding–era understandings of peace officers' authority to make warrantless arrests). Some Justices have urged that enactment–era history should guide legal rules across a much broader swath of constitutional doctrine. *See, e.g.*, Gamble v. United States, 139 S.Ct. 1960, 1980–89 (2019) (Thomas, J., concurring) (contending that the Court should generally be willing to overrule modern precedents that are demonstrably inconsistent with the original meaning of the Constitution).

The case for lower court originalism might seem most straightforward when dealing with such clearly endorsed Supreme Court frameworks. But even in this category, complications can arise. For example, it may not always be clear whether or not the Supreme Court has, in fact, prescribed an originalist oriented framework for addressing a particular doctrinal area. Once again, the Supreme Court's decision in *Heller* provides an illustration. The majority opinion in *Heller*, which relied heavily on historical evidence regarding the Second Amendment's original meaning, has been described as a "triumph of originalism."[84] But the *Heller* majority stopped short of explicitly directing lower courts to apply the type of historical test for implementing the Amendment that applies in the Seventh Amendment context. And some portions of the opinion seem to cut against such a strictly historical approach. For example, in describing the scope of the right to "keep and bear arms," the *Heller* opinion seemed to declare certain commonplace modern limits on gun ownership to be presumptively valid without making any effort to demonstrate their historical pedigree.[85]

These competing strains within the *Heller* decision have left lower courts without clear guidance regarding their responsibilities in implementing the Second Amendment.[86] Some have interpreted the

84. *See, e.g.*, Adam Winkler, Heller*'s Catch 22*, 56 UCLA L. REV. 1551, 1557, & n.30 (2009) (collecting sources describing *Heller* as a "triumph of originalism"). The Court's follow–up decision in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), which interpreted the Fourteenth Amendment to incorporate the right to keep and bear arms against state governments, also focused heavily on historical evidence regarding original understanding. *See* 561 U.S. at 770–78.

85. *See* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."); *cf.* Rory K. Little, Heller *and Constitutional Interpretation: Originalism's Last Gasp*, 60 HASTINGS L.J. 1415, 1427 (2009) (noting that while these exceptions "draw[] on commonsense and modern–day experience," the Court made no effort to ground them in the enactment–era history or background of the Second Amendment).

86. *See* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment*

Court's historically oriented decision as demanding that lower courts use a similarly historically focused approach in determining the Amendment's scope and requirements.[87] But enactment–era history has not been the sole or even primary reference point lower courts have looked to in implementing the decision. Instead, most lower courts have relied primarily on other methods, such as closely parsing the language of the *Heller* decision itself (including portions that were arguably dicta),[88] or borrowing preexisting doctrinal tests and frameworks developed in other areas (particularly the First Amendment).[89] These approaches have drawn criticism from those who believe *Heller* commands a more historically rigorous inquiry, including Justice Thomas, a member of the *Heller* majority.[90]

Can Teach Us About the Second, 122 YALE L.J. 852, 866 (2013) (claiming the *Heller* decision "left lower court judges at sea").

87. *See, e.g.*, Peruta v. Cnty. of San Diego, 824 F.3d 919, 929 (9th Cir. 2016) ("In determining whether the Second Amendment protects the right to carry a concealed weapon in public, we engage in the same historical inquiry as *Heller* and *McDonald*."); United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011) ("[H]istorical meaning enjoys a privileged interpretative role in the Second Amendment context.").

88. *See* Miller, *supra* note 86, at 855 ("Some judges have answered [*Heller*'s challenge] by mechanically citing broad dicta in *Heller* and *McDonald* . . . rather than conducting the historical inquiry the Court ostensibly demands."); *see also, e.g.*, United States v. Scroggins, 599 F.3d 433, 451 (5th Cir. 2010) (looking to "[d]icta in *Heller*" as confirming that prohibitions on weapon possession by convicted felons did not violate the Second Amendment).

89. *See* United States v. Marzzarella, 614 F.3d 85, 89 & n.4 (3d Cir. 2010) (looking to First Amendment jurisprudence to assert that analysis under *Heller* should first examine whether the law in question imposes a burden on protected conduct); *see also* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 212 (2017) ("Almost every circuit court has adopted the Two–Part Test, which was created by the Third Circuit in *Marzzarella*.").

90. Silvester v. Becerra, 138 S.Ct. 945, 950–51 (2018) (Thomas, J., dissenting from denial of certiorari); *see also, e.g.*, Friedman v. City of Highland Park, 136 S. Ct. 447, 448–49 (2015) (Thomas, J., dissenting from denial of certiorari) (arguing that "[i]nstead of adhering to our reasoning in *Heller*," the lower court "limited *Heller* to its facts"); *see also, e.g.*, Tyler v. Hillsdale County Sheriff's Dep't, 837 F.3d 678, 702–703 (6th Cir. 2016) (en banc) (Batchelder, J., concurring in most of the judgment) (writing that both *Heller* and *McDonald* "put the historical inquiry at the center of the analysis, not at the margin" and "conspicuously refrain from engaging in anything resembling heightened scrutiny

3. Doctrinal Gaps and Discretionary Space

The Supreme Court's ongoing failure to provide further clarifying guidance regarding its *Heller* decision illustrates a further way in which an embrace of originalism by lower courts might affect their decisionmaking across a range of constitutional cases. Even in the absence of an issue of first impression or an originalist–oriented doctrinal framework, lower courts often have substantial freedom to look to originalist interpretive methods where existing Supreme Court case law does not fully settle a particular interpretive question.

The Tenth Circuit's decision in *Vogt v. City of Hays*[91] provides an illustration. *Vogt* involved a question regarding the scope of the Fifth Amendment's Self Incrimination Clause, which provides that no person shall be "compelled in any criminal case to be a witness against himself."[92] The question before the court was whether the introduction of compelled testimony in preliminary hearings triggers this right or whether the Amendment's reference to "a criminal case" limits its application to situations where the compelled testimony is introduced at trial.[93] This question was not one of clear first impression. The Self Incrimination Clause is the subject of a voluminous body of Supreme Court precedent and questions very close to the issue presented to the Tenth Circuit had reached the Supreme Court on at least three prior occasions.[94] But in each of those cases, the Supreme Court had stopped short of definitively answering the

review").

91. 844 F.3d 1235 (10th Cir. 2017).

92. U.S. CONST. amend. V.

93. *Vogt*, 844 F.3d at 1237–38.

94. *See, e.g.*, Chavez v. Martinez, 538 U.S. 760, 766–67 (2003) (concluding that Self Incrimination right is not triggered by the mere compulsion of testimony that was never introduced at trial); Mitchell v. United States, 526 U.S. 314, 320–21, 327 (1999) (holding that Self Incrimination Clause applies to post–trial sentencing hearings); United States v. Verdugo–Urquidez, 494 U.S. 259, 264 (1990) (stating in dicta that the Self Incrimination Clause is only a "trial right").

specific question presented to the Tenth Circuit in *Vogt*.[95] In the absence of specific guidance from the Supreme Court, other circuit courts had divided on the question, with some concluding that the introduction of testimony in pre–trial proceedings was sufficient to trigger the Self Incrimination Clause[96] and others reaching the opposite conclusion.[97] For the most part, courts on both sides of this divide based their conclusions on fairly traditional modes of doctrinal reasoning, relying on analogous Supreme Court case law,[98] persuasive dicta,[99] prior circuit precedent,[100] and functionalist considerations regarding the perceived purposes of the Self-Incrimination Clause.[101]

The unanimous three–judge panel in *Vogt* joined those circuits that had held "the right against self–incrimination is more than a trial right."[102] But it reached that conclusion for significantly different reasons. While the *Vogt* court did not ignore existing Supreme Court case law or the reasoning of other lower courts, it placed principal emphasis on the "text of the Fifth Amendment," which the court interpreted "in light of the common understanding of the

95. *Vogt*, 844 F.3d at 1237–38.

96. *See, e.g.*, Higazy v. Templeton, 505 F.3d 161, 171, 173 (2d Cir. 2007); Stoot v. City of Everett, 582 F.3d 910, 925 (9th Cir. 2009); Sornberger v. City of Knoxville, 434 F.3d 1006, 1027 (7th Cir. 2006).

97. *See, e.g.*, Renda v. King, 347 F.3d 550, 552 (3d Cir. 2003); Burrell v. Virginia, 395 F.3d 508, 514 (4th Cir. 2005); Murray v. Earle, 405 F.3d 278, 285 (5th Cir. 2005).

98. *See, e.g.*, *Higazy*, 505 F.3d at 172–73 (concluding that a bail hearing constituted a "criminal case" for purposes of the Self–Incrimination Clause based in part on treatment of such hearings in Supreme Court cases involving the Sixth and Eighth Amendments).

99. *See, e.g.*, *Murray*, 405 F.3d at 285 & n.12 (citing Supreme Court dicta from *Verdugo–Urquidez* and Justice Thomas's non–majority opinion in *Chavez* as support for the proposition that the "privilege against self–incrimination is a fundamental trial right which can be violated only *at* trial").

100. *See, e.g. Renda*, 347 F.3d at 558–59 (following earlier circuit case limiting self–incrimination privilege to testimony introduced at trial).

101. *See, e.g. Stoot*, 582 F.3d at 925 (including that the protection should extend to uses of evidence in pre–trial court proceedings because "[s]uch uses impose precisely the burden precluded by the Fifth Amendment: namely, they make the declarant a witness against himself in a criminal proceeding").

102. *Vogt*, 844 F.3d at 1242.

phrase 'criminal case'" at the time of enactment and "the Framers' understanding of the right against self–incrimination."[103] The Court consulted a broad range of textual and extratextual evidence bearing on these issues, including Founding–era dictionaries and the Fifth Amendment's drafting history.[104] The majority opinion also relied on a number of scholarly works that examined the Fifth Amendment's original meaning[105] as well as originalist–oriented scholarship that addressed broader points of interpretive methodology.[106]

The strikingly originalist opinion in *Vogt* demonstrates the potential ability of lower courts to incorporate originalist reasoning when filling out doctrinal gaps and ambiguities in controlling Supreme Court case law. Because no two cases are ever precisely identical and the Supreme Court cannot foresee every possible application of the rules it hands down, lower courts will often possess a substantial degree of discretion in applying the Court's doctrines to a given set of facts.[107] Several features of the federal judicial system

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103. *Id*.

104. *Id.* at 1241–46.

105. *See id.* at 1242–46 (citing, among other works, LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 423–27 (1968); David Rossman, *Conditional Rules in Criminal Procedure: Alice in Wonderland Meets the Constitution*, 26 GA. ST. U.L. REV. 417, 488 (2010); Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self–Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 TENN. L. REV. 987, 1009–13, 1017 (2003); and Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again"*, 74 N.C. L. REV. 1559, 1627 (1996)).

106. *See, e.g.*, *Vogt*, 844 F.3d at 1242 (citing Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 365 (2014) and William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1338 n.99 (2007) as support for the use of contemporaneous dictionaries as evidence of original meaning); *id.* at 1243 n.3 (citing Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 534 (2003) for the proposition that "[t]he Founders recognized that a word's meaning often changes over time").

107. Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 412 (2007) ("Discretion is inevitable in judicial decisionmaking, not only because of the indeterminacy of language, but also because of the difficulty of anticipating future scenarios in which a rule of decision might be required.").

combine to magnify the discretion available to lower courts, including the Supreme Court's comparatively miniscule case load,[108] its frequent practice of handing down vague, open–ended, or fact–bound rulings,[109] and the lack of any clear legal consensus regarding how to determine the scope of Supreme Court precedent.[110] Taken in combination, these factors tend to produce a substantial domain of discretionary space in which lower courts are free to reach any of multiple possible resolutions without clearly defying or ignoring binding precedent.[111] Even in the absence of an issue of first impression or a clear instruction from the Supreme Court to decide cases in an originalist fashion, lower courts will thus often possess substantial freedom to incorporate originalism into their decisionmaking if they are inclined to do so.[112]

Of course, the precise boundaries of the discretionary space left open by Supreme Court precedent may sometimes be uncertain or contestable. Consider, for example, the Eleventh Circuit's 2019 en banc decision in *United States v. Johnson*,[113] which involved a motion to suppress evidence obtained through a warrantless "pat down" of a suspect that detected ammunition but no accompanying

108. *See supra* note 39.

109. *See, e.g.*, Frederick Schauer, *Abandoning the Guidance Function:* Morse v Frederick, 2007 SUP. CT. REV. 205, 207 (lamenting "a growing tendency on the part of the [Supreme] Court to avoid issuing a clear, general, and subsequently usable statement of the Court's reasoning or the Court's view of the implications of its decision").

110. *See* Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 181–84 (2014) (discussing ambiguities in determining the scope of Supreme Court precedent).

111. *See* Kim, *supra* note 107, at 413–14.

112. *See, e.g.*, Holland v. Rosen, 895 F.3d 272, 288–91 (3d Cir. 2018) (surveying Founding–era evidence of the Excessive Bail Clause of the Eighth Amendment to determine whether the provision guarantees a right to cash bail); New Doe Child #1 v. United States, 901 F.3d 1015, 1021–23 (8th Cir. 2018) (considering evidence regarding the original understanding of the Establishment Clause to determine the constitutionality of reference to "God" on U.S. currency); United States v. Phillips, 834 F.3d 1176, 1179–83 (11th Cir. 2016) (looking to evidence of original meaning to determine whether an unpaid child support warrant constitutes a "warrant" within the meaning of the Fourth Amendment).

113. 921 F.3d 991 (11th Cir. 2019).

weapon.[114] The majority opinion authored by Judge Pryor concluded that the search was permissible under the Supreme Court's decision in *Terry v. Ohio*,[115] which interpreted the Fourth Amendment to authorize seizure of weapons and contraband discovered through such warrantless pat downs. Judge Pryor—who himself has embraced originalist methods in other cases[116]—rejected the defendant's argument, which was that *Terry* should be construed narrowly because it was "inconsistent with the original meaning of the Fourth Amendment."[117]

Writing in dissent, Judge Jordan displayed much greater sympathy toward the defendant's originalist argument for narrowly construing *Terry*.[118] Drawing on originalist scholarship and a concurring opinion by Justice Scalia that had criticized *Terry* as inconsistent with the Fourth Amendment's original meaning,[119] Judge Jordan agreed with the defendant that the decision should not be "expand[ed] . . . beyond its 'narrow scope.'"[120]

The dispute between Judge Jordan and Judge Pryor—two self–described originalists—illustrates the tensions that lower court judges can face in attempting to reconcile their interpretive commitments with the obligation to follow seemingly nonoriginalist Supreme Court precedent. Although Judge Jordan acknowledged his obligation to follow directly controlling Supreme Court decisions, he insisted that *Terry* was distinguishable because that case had not spoken to the specific issue before the court—namely, the

114. *Id.* at 995–97.

115. 392 U.S. 1 (1968).

116. *See, e.g.*, United States v. Touset, 890 F.3d 1227, 1232 (11th Cir. 2018) (opinion of Pryor, J.) (looking to practices of the First Congress as evidence of original understanding of the Fourth Amendment); United States v. Bellaizac–Hurtado, 700 F.3d 1245, 1249–51, 1254 (11th Cir. 2012) (opinion of Pryor, J.) (examining evidence of Founding–era understandings to determine the scope of Congress's power to define and punish violations of the law of nations).

117. *Johnson*, 921 F.3d at 1001.

118. *Id.* at 1010 (Jordan, J., dissenting).

119. Minnesota v. Dickerson, 508 U.S. 366, 381 (1993) (Scalia, J., concurring).

120. *Johnson*, 921 F.3d at 1009–10 (Jordan, J., dissenting) (quoting Dunaway v. New York, 442 U.S. 200, 210 (1979)).

permissibility of seizing ammunition where no weapon or other contraband was discovered on a suspect's person.[121] And given what he viewed as *Terry*'s "shaky originalist foundation," Judge Jordan contended that lower courts should exercise "the option of declining to broaden it—of 'refus[ing] to extend it one inch beyond its previous contours.'"[122] Judge Jordan's approach can be viewed as an example of what Professor Richard Re has described as "narrowing" precedent—that is, "interpret[ing] [a] precedent in a way that is more limited in scope than what [one] think[s] is the best available reading."[123] Narrowing provides a mechanism through which lower courts might seek to limit the effects of nonoriginalist Supreme Court rulings without directly challenging the institutional authority of the Court itself. But as Judge Pryor's majority opinion demonstrates, the technique is not without controversy. Judge Pryor insisted that it was the duty of lower courts to "apply Supreme Court precedent neither narrowly nor liberally—only faithfully" and asserted that "[w]e cannot use originalism as a makeweight when applying" a directly controlling "analytic framework."[124]

4. Originalist Critique

A final category of cases in which originalist modes of reasoning may feature prominently in lower court opinion writing involves situations in which a lower court judge believes a particular line of Supreme Court precedent conflicts with the actual original meaning of a constitutional provision. Although the lower court is bound

121. Id. at 1010.

122. *Id.* (alterations in original) (quoting Richard Epstein, *The Classical Liberal Alternative to Progressive and Conservative Constitutionalism*, 77 U. CHI. L. REV. 887, 903 (2010)).

123. Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1863 (2014) [hereinafter Re, *Narrowing Precedent*]; *see also* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016) (examining the phenomenon of "narrowing from below" through which lower courts might limit the effect of Supreme Court rulings through narrow interpretation) [hereinafter Re, *Narrowing From Below*].

124. *Johnson*, 921 F.3d at 1001–02 (majority opinion).

to follow such erroneous precedents, the deciding judges, or some portion of them, may sometimes choose to use their opinions to call attention to what they see as the inconsistency between the binding Supreme Court precedent and the correct understanding of the Constitution.

Consider, for example, Sixth Circuit Judge Bush's opinion concurring *dubitante* in the en banc decision in *Turner v. United States*, a case involving the Sixth Amendment's application to preindictment plea negotiations.[125] Though Judge Bush agreed with the majority of the en banc panel that the court was "bound to affirm because of Supreme Court precedents holding that the Sixth Amendment right to counsel attaches only 'at or after the initiation of criminal proceedings,'"[126] he wrote separately, and at length, to articulate his reservations about those precedents. Specifically, Judge Bush expressed concern that the "the original understanding of the Sixth Amendment gave larger meaning to the words 'accused' and 'criminal prosecution' than" the controlling Supreme Court cases had acknowledged.[127] Judge Bush explained his motivation for calling attention to what he perceived to be the inconsistency between the controlling Supreme Court doctrine and "the original meaning of the Sixth Amendment text" by suggesting that the history surveyed in his concurrence might cause the Court "to reconsider its right–to–counsel jurisprudence."[128]

Judge Bush's opinion is hardly aberrational. Several other lower court judges have chosen to voice their concerns regarding the historical legitimacy of particular Supreme Court frameworks while simultaneously acknowledging their obligation to adhere to those frameworks as a matter of vertical stare decisis.[129] The Supreme

125. Turner v. United States, 885 F.3d 949, 955 (6th Cir. 2018) (Bush, J., concurring *dubitante*).

126. *Id.* at 956 (quoting United States v. Moody, 206 F.3d 609, 614 (6th Cir. 2000)).

127. *Id.*

128. *Id.*

129. *See, e.g.*, Morgan v. Fairfield Cnty., 903 F.3d 553, 567, 575 (6th Cir. 2018) (Thapar, J., concurring in part and dissenting in part) (criticizing the Supreme Court's current

Court has taken a relatively tolerant view of such critiques. Although the Court has repeatedly insisted that the prerogative of overruling a directly controlling precedent is reserved to the Court alone,[130] it has not attempted to shut down mere criticism by lower court judges. To the contrary, the Court has occasionally signaled its receptiveness to invitations from lower courts calling for it to reconsider some earlier precedential holding.[131]

III. ORIGINALISM AND THE VALUES OF VERTICAL STARE DECISIS

The potential significance of originalist modes of decisionmaking to the functions of lower courts raises the question of whether and to what extent lower courts should strive to integrate originalist interpretation into their own decisionmaking. One way of approaching this inquiry is to focus on the values undergirding our system of vertical stare decisis. This Part focuses on five such values: (A) uniformity, (B) accuracy, (C) efficiency, (D) percolation, and (E) legitimacy—and explores their implications for lower courts' use of originalism.

Fourth Amendment jurisprudence as "a morass of legal precedent that is often confusing, contradictory, and incomplete" and urging the adoption of a more originalist approach, while acknowledging that existing doctrine remains binding until the Supreme Court chooses to revisit it); Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1113 (5th Cir. 1997) (Garza, J., concurring specially) (criticizing the Supreme Court's modern substantive due process jurisprudence as "inimical to the Constitution" while acknowledging that he was "forced to follow" the Court's decisions), *overruled by* Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001).

130. *See supra* note 22.

131. *See, e.g.*, United States v. Hatter, 532 U.S. 557, 567 (2001) (noting lower court was correct to follow controlling Supreme Court precedent while accepting that court's "invit[ation] [for] us to reconsider" and overrule the relevant precedent); State Oil Co. v. Khan, 522 U.S. 3, 19–20 (1997) (acknowledging the legitimacy of lower court's critique of controlling Supreme Court precedent while approving of that court's decision to adhere to the precedent as controlling).

A. Uniformity

One of the most important systemic values that vertical stare decisis is thought to serve is that of ensuring the national uniformity of federal law.[132] By ensuing that the geographically dispersed inferior courts adhere to a single set of authoritative interpretations, vertical stare decisis enables individuals and entities engaged in multistate activities to conform their behavior to a single set of legal requirements[133] and ensures that enforcement officials will apply consistent standards across jurisdictional boundaries.[134] In this way, uniformity may also contribute to equality by ensuring that similarly situated litigants in different forums will have their claims adjudicated under consistent interpretations of federal law.[135]

In contrast, the potential uniformity objection to lower court originalism can be broken down into multiple subsidiary concerns. Some critics contend that originalism is intrinsically less constraining than a more precedent–focused interpretive practice.[136] A further uniformity concern arises from the near certainty that any shift toward a more widespread embrace of originalism by lower courts will be neither immediate nor universal. Rather, such a shift will

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132. *See, e.g.*, Caminker, *Precedent and Prediction*, *supra* note 34, at 38 (identifying uniformity of federal law as "an important objective of the federal adjudicatory process"); *see also* Michael Serota, *Stare Decisis and the* Brady *Doctrine*, 5 HARV. L. & POL'Y REV. 415, 427–28 (2011) ("[V]ertical stare decisis provides 'maximal rule of law benefits,' in that lower court adherence to Supreme Court precedent enables a uniform interpretation of federal statutory and constitutional provisions, making the law more predictable, stable, and certain.") (quoting Kurt T. Lash, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437, 1454 (2007)).

133. *But see, e.g.*, Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1597 (2008) ("Uniformity is claimed to be especially important to multi–state actors, who will be forced to comply with multiple, possibly even conflicting, legal rules when courts differ over the meaning of federal law.").

134. *See*, *e.g.*, Caminker, *Precedent and Prediction*, *supra* note 34, at 39.

135. *Id.* ("[N]ational uniformity of federal law ensures that similarly situated litigants are treated equally . . . .").

136. *See also*, *e.g.*, Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 215 (2008) (noting possibility that "increasing the number of indicators could . . . increase net discretion, because different indicators might sometimes point to wholly different results").

almost certainly proceed in a more gradual and piecemeal fashion, with some originalist judges interspersed among their many nonoriginalist cohorts. The mixture of originalist and nonoriginalist jurists at the lower court level poses at least a near–term uniformity challenge—one that is likely to persist until there is either a comprehensive turnover in judicial personnel at the lower court level or a dramatic shift in jurisprudential attitudes among judges.[137] And while this particular concern might theoretically be resolved either by inducing would–be originalist judges to stick to doctrinalism *or* by inducing nonoriginalist jurists to adopt originalism, the predominance of nonoriginalist modes of reasoning in existing lower court practices suggests that the former option would be considerably less burdensome and costly than the latter.[138]

While these potential uniformity concerns are hardly trivial, such concerns should not be overstated. Although uniformity is certainly an important value in the federal judicial system, it is far from the only relevant consideration.[139] The practices of the Supreme Court, the practices of the inferior federal courts and state courts, and the allocation of jurisdictional authority by Congress all suggest a willingness to tolerate a fairly wide degree of disuniformity at the lower court level.[140] Courts applying traditional doctrinal methods routinely disagree with one another regarding the proper interpretation of particular constitutional provisions and Supreme Court precedents, and such disagreements are routinely allowed to persist for years at the lower court level.[141]

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137. *Cf.* Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 4, 55 (2009) (observing that "[e]ven if it would be best . . . for all judges to be originalist, it is not best for only some judges to be originalist in a partially nonoriginalist world") [hereinafter Vermeule, *System Effects*].

138. *Cf. id.* at 55 (observing that "most judges most of the time have not been originalist, with episodic exceptions, a fact that originalists explicitly lament") (citing BORK, *supra* note 5).

139. *See generally* Frost, *supra* note 133 (suggesting grounds for believing that the value of uniformity may be overstated in federal courts scholarship).

140. *See, e.g.*, *id.* at 1610 (noting Congress's failure to take available steps to foster more uniform interpretive practices in the lower courts).

141. *See, e.g.*, Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the*

Nor is disuniformity an inevitable consequence of lower court originalism. In many situations, the results to which an originalist interpretation points may overlap with those produced by non-originalist methods, allowing judges of diverse methodological perspectives to converge on a set of mutually agreed–upon outcomes.[142] Indeed, the use of originalism by lower courts might sometimes be most conducive to fostering uniformity. For example, in cases of first impression, original meaning might provide a useful focal point around which lower courts might plausibly converge.[143] And where the Supreme Court itself has clearly prescribed an originalist-oriented framework, faithful application of that framework by lower courts would seem most conducive to fostering uniformity.[144]

B. Accuracy

As discussed above, many of the values associated with uniformity cluster around the value our legal system places on the desire that the law be settled and predictable. But such settlement is not the only relevant consideration. Our legal system also emphasizes the importance of having the law be settled correctly.[145] Any assessment of vertical stare decisis must therefore be attentive not only to the desire that lower courts converge on the same answer

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Fourth Amendment, 65 VAND. L. REV. 1137, 1139–40 (2012) (noting "the existence of over three dozen extant circuit splits" regarding proper application of the Fourth Amendment and observing that such splits are often allowed to persist "for extended periods of time").

142. *See* Cass R. Sunstein, *Originalism*, 93 NOTRE DAME L. REV. 1671, 1679 (2018) (observing that, in some contexts, "the line between originalism and nonoriginalism becomes blurry in practice").

143. *See id.* at 1686–87 (observing that originalism may sometimes provide a useful focal point for coordination in situations when alternative options, such as judicial precedent or longstanding tradition, are unavailable).

144. *Cf. infra* notes 312–314 and accompanying text (discussing potential uniformity concerns associated with "narrowing" of Supreme Court precedent by lower courts).

145. *See generally* Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1845–47 (2013) (identifying the tension between legal settlement and legal correctness as central when assessing the role of precedent within any particular theory of constitutional interpretation).

to a given legal question but also to the concern that such courts converge on the *correct* answer. This concern, in turn, requires consideration of the comparative proficiency of courts at different levels of the judicial hierarchy. Other things being equal, it seems reasonable to conclude that courts that are more proficient at working with a particular interpretive methodology will be less likely to apply that methodology erroneously than comparatively less proficient courts.

Such proficiency concerns might apply with particular force to originalist interpretive theories. For one thing, originalism is closely associated with the idea that there exist objectively "right" answers to contested constitutional questions that are external to the views or practices of the judiciary.[146] Originalism also seeks answers to such questions in historical materials that will often be unfamiliar to most members of the legal profession.[147] As observers on both sides of the originalism debate have observed, doing originalism well may require specialized knowledge and capabilities that are beyond the professional training and experience of most judges.[148]

A competent originalist interpreter must not only identify the relevant universe of historical sources—a task which may itself require difficult and contestable judgments[149]—but must also be able

146. *See, e.g.*, Randy E. Barnett, *The Misconceived Assumptions About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 660 (2009) ("The intuitive appeal of originalism rests on the proposition that the original public meaning is an objective fact that can be established by reference to historical materials.") [hereinafter Barnett, *Misconceived Assumptions*].

147. *See, e.g.*, Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 281–82 (2005).

148. *See, e.g.*, *id.* at 281 ("Originalism . . . if it is to be done well, requires a skill set that is beyond the ken of most lawyers and judges."); *cf.* Scalia, *supra* note 5, at 856–57 (describing the "greatest defect" of originalism as "the difficulty of applying it correctly").

149. *See, e.g.*, Kesavan & Paulsen, *supra* note 4, at 1183–96 (considering whether originalist interpreters should look to private records of the Philadelphia Convention as evidence of constitutional meaning and acknowledging existence of academic disagreements regarding their relevance).

to understand such sources,[150] identify any limitations that may affect their accuracy or reliability,[151] and situate such sources within their relevant historical, political, legal, and linguistic context.[152] Such an interpreter may also face the difficult task of translating language, rules, and background principles that were addressed to a particular set of historical circumstances into a much different context presented by subsequent developments.[153] In view of these complexities, even Justice Scalia, one of originalism's most well–known proponents, felt compelled to acknowledge that originalism might be "a task sometimes better suited to the historian than the lawyer."[154]

While such proficiency concerns could be (and have been) raised with regard to the qualifications of all jurists (including the Justices of the Supreme Court),[155] there are reasons to believe that they apply with particular force to judges in the lower courts. As noted above, the Supreme Court has certain institutional advantages that may render it better equipped to accurately resolve difficult legal

150. *Cf.* Solum, *supra* note 8, at 281–82 (noting that modern linguistic intuitions may sometimes mislead interpreters regarding the meanings of writings prepared in the past).

151. *See, e.g.*, MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015) (questioning the reliability of James Madison's notes of the Philadelphia Convention); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 1–2 (1986) (noting concerns about the reliability of Founding–era records of the state ratification conventions).

152. Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1761–62 (2015).

153. *See, e.g.*, Nelson, *supra* note 8, at 588–98 (noting challenges of applying language to new facts and circumstances that were not anticipated at the time the language was written); *cf.* Kyllo v. United States, 533 U.S. 27 (2001) (concluding that a thermal imaging scan of a private home constituted a "search" for purposes of the Fourth Amendment's prohibition on "unreasonable searches and seizures").

154. Scalia, *supra* note 5, at 857.

155. *See, e.g.*, Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 FORDHAM L. REV. 1587, 1588 (1997) ("[T]here is good historical evidence that jurists rarely make good historians, and that a theory of interpretation which requires judges to master the ambiguities of history demands a measure of faith that we, as citizens and scholars alike, should be reluctant to profess.").

questions.[156] For example, the Court's ability to control its own docket may allow it to focus on addressing constitutional questions to a greater extent than lower court judges, which may, in turn allow it to gain a deeper familiarity with the relevant universe of originalist interpretive sources.[157] The Court can also devote much more time and attention to each case it considers and can benefit from the amicus participation of experts in history, linguistics, and others who may assist the Court in understanding and contextualizing the relevant historical sources.[158]

The Supreme Court's high profile and the salience of its decisions may also give it a unique capacity to influence the development of interpretive evidence that is brought before it. Because the Court consists of only nine members, and because all nine typically deliberate on each case that comes before the Court, repeat players in the Court—including the Solicitor General, prominent members of the Supreme Court bar, and public interest organizations—have strong incentives to closely scrutinize the views and attitudes of each Justice.[159] Such entities may be particularly attentive to any "signals" the Justices might convey regarding their openness to considering certain types of evidence and arguments in future cases and may shape their litigation strategies accordingly.[160]

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156. *See supra* notes 39–42 and accompanying text.

157. Even nonoriginalist Justices may find it useful to develop some felicity with originalist sources and modes of argument in order to competently respond to originalist–oriented arguments of their fellow Justices or the parties. *See, e.g.*, Seminole Tribe of Florida v. Florida, 517 U.S. 44, 132–68 (1996) (Souter, J., dissenting) (contending that the majority's extension of state sovereign immunity principles was inconsistent with the original understanding of the Constitution).

158. Josh Blackman, *Orginalism and Stare Decisis in the Lower Courts*, 13 N.Y.U. J.L. & LIBERTY 44, 57–58 (2019) (contrasting the "phalanx of originalist amicus briefs on both sides of the 'v.'" at the Supreme Court with the lack of originalist arguments at lower court level).

159. *See, e.g.*, Re, *Narrowing From Below*, *supra* note 123, at 943–44 (describing "the growing culture of Court–watching," which has been facilitated both by technological advancements and by the increasing specialization of the Supreme Court bar).

160. *See id.* (noting the Justices' occasional efforts to use quasi-formal means to "signal" their views and preferences to a wider audience); *cf.* Carpenter v. United States,

By contrast, the judges of the lower courts have far less capacity to shape the evidence and arguments presented to them in any particular case. Judges on the federal courts of appeals, for instance, typically decide cases as part of randomly assigned three–judge panels and the parties may have little or no advance knowledge of the panel members' identities until shortly before oral argument occurs.[161] And the far larger number of judges who serve on the lower courts means that the jurisprudential views of any particular lower court judge have a drastically smaller likelihood of shaping the content of arguments that are presented to the courts, let alone the broader scholarly agendas of academics and other experts who may be able to make meaningful contributions to the subject. Lower court judges will thus typically have far less assistance from outside sources in sorting through the mass of potentially relevant enactment–era sources that may be relevant to an originalist inquiry.

The potential proficiency gap between the lower courts and the Supreme Court seems significant for most theories of originalism. Although it is certainly possible to imagine versions of originalism that can tolerate a high degree of interpretive error,[162] most of the more familiar variants insist not merely on originalism being done but that it be done correctly.[163] Indeed, a chief selling point of originalism in the eyes of many proponents is its putatively superior capacity to deliver objectively "right" answers (or, at least, a more limited universe of potentially right answers) as compared to

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138 S. Ct. 2206, 2267–68 (2018) (Gorsuch, J., dissenting) (expressing potential willingness to reconsider "reasonable expectations of privacy" test in Fourth Amendment jurisprudence but noting that "[m]uch work" needs to be done to determine how a historically faithful doctrinal test should apply in practice).

161. *See, e.g.*, Samuel P. Jordan, *Early Panel Announcement, Settlement, and Adjudication*, 2007 BYU L. REV. 55, 67 n.45 & 71 (noting that all courts of appeals use some form of random assignment practice and observing that "most circuits do not announce panel composition to litigants until shortly before the oral argument is scheduled").

162. *Cf.* Samaha, *Expiration Date*, *supra* note 77, at 1358–61 (suggesting a "randomization" analogy for originalism but suggesting that this version of originalism should aspire to be "economical and unsophisticated," prioritizing the value of settlement over historical correctness).

163. *See infra* Section V (discussing arguments for originalism).

leading alternatives.[164]

But while such proficiency concerns certainly provide grounds for caution in considering originalism's role in lower court decisionmaking, they do not provide a conclusive argument against lower court originalism. Even if the Supreme Court might be better situated to assess claims regarding original meaning, lower courts might still perform the task tolerably well to make the practice worthwhile. Moreover, any assessment of the risks of error involved in lower courts' determinations should also take into account the fact that such errors are, at least in principle, correctable by the Supreme Court at a later time. Furthermore, as will be discussed in further detail below, it is possible that the Supreme Court's own decisionmaking may benefit from affording lower courts the freedom to take originalist evidence into account in making their own rulings.[165]

C. Efficiency

In addition to balancing the sometimes competing values of having the law be settled, stable, and uniform, on the one hand, and having it be decided correctly, on the other, our system of vertical stare decisis also reflects concern for the *costs* involved in reaching a "correct" decision.[166] The doctrine of vertical stare decisis tends to

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164. *See, e.g.*, Barnett, *Misconceived Assumptions*, *supra* note 146, at 660 ("The intuitive appeal of originalism rests on the proposition that the original public meaning is an objective fact that can be established by reference to historical materials."); Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2415 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)) ("The point is that *in principle* the textualist–originalist approach supplies an objective basis for judgment that does not merely reflect the judge's own ideological stance. And when errors are made, they can be identified as such, on the basis of professional, and not merely ideological, criteria.").

165. *See infra* Part III.D (discussing potential "percolation" effects of lower court decision–making).

166. *See, e.g.*, Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 1968 (2019) ("Besides promoting correct outcomes, the law of precedent aims to be efficient, in the sense of avoiding wasteful expenditures of resources.").

reduce decision costs by allowing some questions to be conclusively settled by authoritative pronouncements of superior courts, thereby eliminating the need for continued litigation and deliberation over those issues in the lower courts.[167]

By expanding the range of sources to which courts must look in order to determine the content of constitutional meaning, originalism threatens to raise decision costs substantially. Unlike conventional forms of lower court decisionmaking, which involve relatively low–cost strategies such as analogical comparisons to prior cases, invoking dicta, or abstract moral or policy–based reasoning, originalism demands that courts look to historical evidence, which is typically far less accessible and more challenging for non–expert judges to work with.[168] Justice Scalia once observed that if "done perfectly," resolving a constitutional question on originalist grounds might require "thirty years" of historical investigation "and 7,000 pages" of explanation.[169] And even allowing for a certain level of hyperbole on the Justice's part, his observation reflects the reality that originalism seems to demand considerably more investment of time and decisionmaking resources on the part of interpreters than other plausible alternatives. Indeed, some have gone so far as to claim that "[o]riginalism is plausibly the most costly approach to constitutional adjudication in terms of time and effort."[170]

To be sure, such concerns do not apply with unique force to the use of originalism by lower courts. Similar concerns plausibly can be (and have been) raised with regard to the use of originalism by

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167. *See, e.g.*, Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, *supra* note 46, at 840 (observing that "the doctrine of hierarchical precedent promotes administrative efficiency"); Serota, *supra* note 132, at 428–29 (identifying judicial economy as a principal value underlying vertical stare decisis).

168. *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Originalism and Emergencies: A Reply to Lawson*, 87 B.U. L. REV. 313, 319 (2007) ("Instead of relying upon moral intuitions, or low–cost analogies to precedents . . . , originalist judges do massive amounts of historical and archival research . . . ."); *see also, e.g.*, Samaha, *Expiration Date*, *supra* note 77, at 1358 (noting that "originalism can be costly when performed conscientiously").

169. Scalia, *supra* note 5, at 852.

170. Posner & Vermeule, *supra* note 168, at 319.

the Supreme Court as well.[171] Nevertheless, institutional differences between the Supreme Court and the lower courts—including the far greater number of lower courts and the greater decisional resources available at the Supreme Court level—suggest that the time and effort that originalism requires might be most efficiently invested at the Supreme Court level.[172]

But while a broader embrace of originalism by the lower courts seems likely to enhance the aggregate costs of constitutional decisionmaking, such an assessment comes with several caveats. First, it might be argued that the enhanced decision costs will be justified by the enhanced accuracy of the lower courts' resulting rulings or by the information such rulings generate for the Supreme Court's own deliberations.[173] Such an assessment would, of course, require some account of the anticipated benefits a practice of originalist interpretation might be thought to produce.[174] For present purposes, it is sufficient to recognize that the minimization of decision costs should not necessarily be viewed as an overriding objective in choosing an interpretive theory.[175]

Second, lower court judges and litigants may be able to econo-

171. *See, e.g.*, Berman, *supra* note 6, at 78–79 (expressing concern that investing the level of time and effort insisted upon by some versions of originalism "might well translate into a yet greater reduction in the Supreme Court caseload, which itself would translate into less clarity and less uniformity in our law").

172. *See, e.g.*, Grove, *supra* note 41, at 22 ("[T]he Supreme Court has various institutional advantages over the inferior federal and state courts that may make it more efficient for the Court to incur . . . decision costs itself."); Bruhl, *Hierarchy and Heterogeneity*, *supra* note 34, at 475 ("To the extent resource constraints pose a problem, they pose a far more serious problem for courts other than the Supreme Court.").

173. *Cf.* Samaha, *Expiration Date*, *supra* note 77, at 1330 n.124 ("It seems likely that originalism's proponents are willing to accept substantial decision costs to achieve relatively high degrees of certainty about public meaning and its limits . . . ").

174. *See infra* Section IV (discussing various normative arguments in favor of originalism).

175. *See, e.g.*, Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 88–89 (2000) (contending that interpretive theory should aim to achieve the "best mix of error costs and decision costs," while acknowledging that "the concept of 'error' has meaning only in relation to some interpretive goal given by the underlying theory of . . . authority").

mize decision costs to some extent by relying on third–party research performed by historians, law professors, and other academics rather than undertaking their own, independent research. Because many of the questions that originalism might require jurists to answer may also be of independent interest to academic researchers, lower courts may sometimes find the relevant historical sources have already been thoroughly vetted by outside experts. A wider embrace of originalism by the judiciary may further drive academic research toward efforts to recover original meaning, which may, in turn, further limit the direct costs imposed upon the judiciary itself.[176]

Of course, relying on such third–party research raises its own complications, including the challenges of verifying the accuracy and reliability of such researchers' conclusions and the difficulties of reaching a reliable determination when the academic research does not point to a single, unambiguous conclusion.[177] Absent the availability of credible, low–cost proxies for determining the accuracy of particular researchers' historical conclusions, judges may have no choice but to invest their own time and resources to ensure that the history on which they rely is, in fact, reliable.

Third, the costs of originalist decisionmaking for lower courts may be mitigated to a significant extent by the force of stare decisis. As discussed above in Part I, the practical ability of lower courts to engage in originalism is likely to be constrained to a significant extent by the contours of Supreme Court precedent.[178] The horizontal and vertical effect of circuit precedent in the federal system and of

176. It might be argued that even such third–party research costs should be counted as part of the overall decision costs of originalism to the extent it diverts academics' resources away from other endeavors. *Cf.* Jeffrey L. Harrison & Amy R. Mashburn, *Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study*, 3 TEX. A&M L. REV. 45, 47–48 (2015) (questioning the extent to which the benefits of legal scholarship in general outweigh the costs of its production).

177. *See, e.g.*, William J. Novak, *Constitutional Theology: The Revival of Whig History in American Public Law*, 2010 MICH. ST. L. REV. 623, 642 (2010) (observing that "if one does not have any previous independent experience with a substantial range of primary sources in a given field," it may be challenging to decide which of various alternative secondary sources "gives a more accurate, convincing, and authoritative account").

178. *See supra* notes 107–112 and accompanying text.

appellate court rulings at the state level adds additional layers of constraint on the decisional freedom of lower courts. A practice of lower court originalism thus likely would not entail forcing lower courts to thoroughly engage with originalist evidence in each and every constitutional case that might come before them. Rather, once a constitutional question has been "settled" by precedent—whether originalist or nonoriginalist, horizontal or vertical—the lower court is unlikely to face substantial decision costs in implementing that precedent, at least in those cases where the precedent directly and unambiguously applies. Thus, even if a wider embrace of originalism by lower court judges may increase lower courts' decision costs in those cases where originalism might plausibly inform their decisionmaking, the constraints of precedent may limit the magnitude of such cost increases to tolerable levels.

D. Percolation

The general tension referred to above between the competing values associated with settlement, on the one hand, and correctness, on the other,[179] takes on particular salience in the vertical stare decisis context in debates between proponents of strong uniformity and those who advocate allowing issues to "percolate" in the lower courts.[180]

Proponents of percolation contend that "allow[ing] a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule" will tend to improve the quality of Supreme Court decisionmaking.[181] Those who take a more skeptical view of percolation

179. *See supra* note 145 and accompanying text.

180. *See, e.g.*, Caminker, *Precedent and Prediction*, *supra* note 34, at 54–61 (discussing tradeoff between institutional values served by a "centralizing" model of hierarchical precedent versus the values thought to be served by "issue percolation" in the lower courts); Gewirtzman, *supra* note 13, at 481–92 (surveying various arguments for and against "percolation" in the lower courts).

181. Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716 (1984); *see also, e.g.*, Gewirtzman, *supra* note 13, at 482–83 (discussing potential benefits of percolation).

have criticized the practice on various grounds, including the costs involved in repeated adjudications of the same legal issue in multiple forums, the potential for uncertainty and confusion prior to Supreme Court resolution, and the potential for unfairness to disappointed litigants.[182] Many critics have also taken a skeptical view of the extent to which lower court deliberations can truly benefit or inform the Supreme Court's ultimate resolution of a contested legal issue.[183]

The potential for originalist reasoning by lower courts to benefit the Supreme Court's decisionmaking may not be immediately obvious, even to those who endorse percolation in other contexts. Unlike interpretive theories that prioritize experimentation and practical results as guides to determining the "best" interpretation of particular constitutional provisions, originalists tend to look principally to a set of historical and linguistic facts that are unaffected by the practical realities or consequences of a particular line of jurisprudential reasoning. Originalist jurists on the Supreme Court may thus find far less to value in the kinds of practical experimentation that are often asserted as one of percolation's chief benefits.[184]

Nonetheless, there are reasons to believe that originalist decisionmaking by lower courts could benefit the Supreme Court's deliberations in at least some circumstances. For one thing, at least

182. *See, e.g.*, Gewirtzman, *supra* note 13, at 489–92 (summarizing objections to percolation).

183. *See, e.g.*, Paul M. Bator, *What is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 690 (1990) (expressing skepticism that lower court opinions provide important insights for the Supreme Court); Caminker, *Precedent and Prediction*, *supra* note 34, at 60 ("Only infrequently will inferior courts develop unique analytical approaches or doctrinal constructs that would otherwise escape the Supreme Court's attention.").

184. *See, e.g.*, Gewirtzman, *supra* note 13, at 492 (observing that "the data collected by lower court rulings may be irrelevant to judges that adopt interpretive modalities—like originalism—that purport to ignore the real–world impact of constitutional rules"); Caminker, *Precedent and Prediction*, *supra* note 34, at 58–59 (questioning the usefulness of lower court deliberations to Justices' "interpretive methodologies, such as plain–language interpretation or originalism, for which contextual assessments concerning how a rule will play out in a given region or how it will affect particular persons have little if any relevance").

some originalist theories may not be so impervious to the practical consequences of interpretive outcomes as is sometimes assumed. Although few originalists may be willing to concede that the practical consequences of a given interpretation could ever warrant departing from very clear evidence of original meaning, consequentialist evidence may nonetheless be relevant to determining how best to flesh out vague or underspecified constitutional language,[185] how persuasive a given set of evidence must be in order to warrant giving legal force or effect to a particular interpretation,[186] or whether some existing nonoriginalist precedent should be overruled.[187]

Moreover, a practice of lower court originalism may benefit Supreme Court decisionmaking in other ways, such as by helping to generate useful information relevant to assessing original meaning. Even though lower courts lack many of the decisional advantages available to the Supreme Court, the sheer numerical superiority of the lower court judiciary may contribute some informational benefit to the Supreme Court by allowing the Court to harness the benefits of having many minds deliberate on the same subject.[188]

A practice of lower court originalism may also benefit the Supreme Court's deliberations due to the different time horizons on which lower court decisionmaking occurs. Because issues typically

185. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 469–73 (2013) (discussing role of normative considerations in the process of "construction," which involves giving legal effect to constitutional language and is most visible "when the meaning of the constitutional text is unclear, or the implications of that meaning are contested").

186. *See, e.g.*, GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS 119–22 (2017) (discussing the problem of selecting a standard of proof by which to assess claims about original meaning).

187. *See, e.g.*, Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 59–60 (2001) (observing that later courts possess "more information about how the rule chosen by their predecessors has worked in practice" and that this "additional experience" may, in some circumstances, "help expose an error" the prior court overlooked).

188. *See* Bruhl, *Following Lower–Court Precedent*, *supra* note 37, at 862–64 (discussing potential epistemic advantages of increasing the number of decisionmakers on a given question).

reach the lower courts long before they arrive at the Supreme Court—whether out of a deliberate practice of fostering percolation or simply out of capacity constraints on Supreme Court decisionmaking[189]—lower court judges may have some ability to shape and influence the trajectory of the arguments that will eventually reach the Supreme Court. A lower court judge who employs an originalist mode of reasoning might call the attention of other prospective litigants to important historical evidence or scholarship relevant to the underlying constitutional question. Such decisions may also spur further historical research by other interested parties and their attorneys or by third–party scholars and organizations who are able to approach such questions with a broader time horizon that extends beyond the briefing schedule that can feasibly be met in the context of a single litigated appeal.

Conversely, lower courts may also sometimes encounter constitutional questions many years or even decades after the Supreme Court has stepped in with an authoritative pronouncement on the issue. A lower court judge inclined to look to evidence of original meaning may identify new evidence or scholarship that was developed or came to light after the Court handed down its original pronouncement and which the Justices may not have been aware of at the time of their original decision. Such a judge might then be able to identify possible distinctions that would not necessarily be apparent had the originalist inquiry not been conducted. Such distinctions may, in turn, suggest that the Court's existing precedents may speak to the issue less clearly or definitively than they might appear at first glance.[190] Even if the judge concludes that the only faithful

189. *Cf.* William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11 (1986) (asserting that arguments in favor of percolation may simply reflect an effort to make "a virtue of necessity").

190. For example, the lower courts that first embraced the "individual rights" interpretation of the Second Amendment in the late 1990s and early 2000s, *see supra* notes 73–74 and accompanying text (discussing United States v. Emerson, 46 F. Supp. 2d 598 (N.D. Tex. 1999), *rev'd and remanded*, 270 F.3d 203 (5th Cir. 2001) and Parker v. District of Columbia, 478 F.3d 370, 395 (D.C. Cir. 2007)), were able to draw upon a substantial body of originalist scholarship examining that interpretation, nearly all of which was

reading of precedent forecloses the best originalist reading, she might at least be well situated to call the Supreme Court's attention to the inconsistency, allowing the Court to decide for itself whether it wishes to revisit the issue.[191]

Finally, and relatedly, to the extent originalism acts as at least a partial counterweight to the authority of Supreme Court precedent, a practice of lower court originalism may call the Court's attention to a broader range of possible issues than would be true in its absence. Lower court judges sometimes adopt expansive readings of Supreme Court precedents, choosing to follow even statements that the lower courts themselves recognize to be nonbinding.[192] Such courts may have strong incentives to extend Supreme Court precedent in this way, including to minimize their own decision costs, insulate themselves against possible reversal, and offload some of the rhetorical responsibility for decisions over which they may have some meaningful degree of practical discretion.[193] Over time, the accretive effect of such a practice may result in the ossification of lower court doctrine around a mutually agreed–upon reading of existing precedent that may be disputable in theory but uncontested in practice.[194]

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generated decades after the Supreme Court's decision in *United States v. Miller*, 307 U.S. 174 (1939)—its last decision addressing a Second Amendment challenge. *See* Bogus, *supra* note 72, at 5–8 (identifying a student note written in 1960 as the first academic defense of the individual rights interpretation to appear in a law review and noting that twenty–seven more defenses were published in law reviews between 1970 and 1989).

191. *See supra* Part III.D (discussing originalist–oriented critiques of Supreme Court precedents by lower courts).

192. *See* Re, *Narrowing From Below*, *supra* note 123, at 949 (observing that "[i]n some cases of precedential ambiguity . . . [lower court] judges may feel tempted to exaggerate the degree to which higher court precedent supports their position," either for strategic reasons or due to "the psychological tendency to view neutral evidence as supportive of one's own views").

193. *Cf.* Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67, 69 (1988) (noting concern that "[a] system of unalterable judicial precedent, on the other hand, with an ever–growing body of decisions, would gradually choke off all opportunity for growth and reexamination").

194. *Cf.* notes 68–76 and accompanying text (discussing lower courts' coalescence

A practice of originalism by some lower court judges—even if less than universally embraced—may help to counteract these ossifying tendencies. By providing a theoretical spur to narrower readings of Supreme Court precedent than are embraced by other judges at the same level of the judicial hierarchy, originalism may reveal lingering ambiguities in the law and issues that the Court has not felt it necessary to address but that could benefit from its further intervention. By fostering some level of interpretive disagreement at the lower court level, originalism may generate useful interventions by the Supreme Court that may, in turn, generate new authoritative settlements that could be superior to the lower courts' earlier consensus reading of Supreme Court precedent.

E. Legitimacy

A final value that is typically invoked in support of the doctrine of stare decisis in general, and vertical stare decisis in particular, is legitimacy.[195] Supporters of stare decisis claim that adherence to past decisions enhances the perceived legitimacy of constitutional decisionmaking by preserving a sense of continuity in legal doctrine, preserving doctrines that have attained widespread social acceptance, and presenting to the public an image of judicial decisionmaking constrained by law.[196] Vertical stare decisis can serve a

around a contestable interpretation of the Supreme Court's decision in *United States v. Miller* that was eventually rejected by the Supreme Court in *Heller*).

195. Legitimacy is a famously multi–faceted concept, embracing sociological, legal, and moral dimensions. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21–36 (2018) (distinguishing "sociological legitimacy" from "legal legitimacy" and "moral legitimacy" and discussing the relationship between the three). For present purposes, the most salient dimension of analysis is sociological legitimacy—that is, what the relevant public regards as "justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward." Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005).

196. *See, e.g.*, RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 42 (2017) ("Fidelity to precedent ensures that the law is not reduced to the preferences and personalities of a particular group of justices assembled at a particular moment in time.") Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992) (plurality opinion) ("[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious

similar function by ensuring that lower court judges adhere to settled precedent rather than following their own personal preferences.[197]

In the federal judicial system, the legitimating effects of Supreme Court and lower court decisions can also interact with one another in complex ways. The Supreme Court sometimes invokes the lower courts' reactions to its own precedents as a basis for standing by or extending those precedents.[198] An enthusiastic lower court reaction to a doctrinal innovation by the Supreme Court may also help to solidify the doctrine's sociological legitimacy by presenting to the public the appearance of a united front, supported by all levels of the geographically dispersed judicial hierarchy.[199] Conversely, widespread lower court disagreement with, or resistance to, Supreme Court decisions may limit their jurisprudential significance and may, in extreme cases, even contribute to their reconsideration by the Supreme Court itself.[200]

Assessing the potential legitimacy effects of lower court originalism is complicated by the fact that original meaning provides an alternative and, in some cases, competing source of legitimation for

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question.").

197. *See, e.g.*, Gewirtzman, *supra* note 13, at 470 (contending vertical stare decisis helps to legitimate constitutional judicial review); David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 75 (2003) (arguing that by correcting lower courts' errors and ensuring that such courts "obey the law," appellate courts "thereby promot[e] the perception of legitimacy by ensuring that the ultimate outcome of litigation is based on impersonal and reasoned judgments").

198. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 662–63 (2015) (referring to the near unanimity of appellate court rulings recognizing a constitutional right to same–sex marriage in the aftermath of the Supreme Court's earlier, more narrowly framed opinion in *United States v. Windsor*, 570 U.S. 744 (2013) as support for recognizing such a right).

199. *See, e.g.*, Gewirtzman, *supra* note 13, at 483 (noting that "[w]hen judges on multiple diverse courts converge on the same outcome, the rule is more likely to be seen as the correct one," bringing "added legitimacy to judge–made constitutional law").

200. *Cf.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 539–40 (1985) (pointing to lower courts' challenges in applying the standard articulated in *National League of Cities v. Usery*, 426 U.S. 833 (1976) as a basis for reconsidering, and overruling, that decision).

judicial decisionmaking. Consider, for example, a case of true constitutional first impression such as the recent Emoluments Clause litigation described above in Part I.A.[201] A lower court judge tasked with resolving such a case might seek to resolve the dispute by asking what interpretation of the Clause would yield the most desirable public policy. But approaching the question in this way might raise significant legitimacy concerns because the resulting decision would reflect nothing more than the deciding judge's own personal views without the guiding constraints that are often seen as essential to judicial legitimacy.[202] Because reference to original meaning is generally recognized as one legitimate form of reasoning about the Constitution (even if not the only one),[203] a decision premised on the original meaning of the relevant constitutional text might plausibly be seen by many as more legitimate.

In the far more typical case where a lower court acts against a framework of preexisting Supreme Court case law, the legitimation concern becomes more complicated. In some cases, the two sources may be mutually supporting, as where the Supreme Court itself has adopted an originalist–oriented doctrinal framework.[204] Precedent perceived by the deciding judge as inconsistent with the original meaning, however, can give rise to a tension between competing sources of legitimacy. Unquestioningly following or extending a nonoriginalist precedent may be perceived as illegitimate by those who view original meaning as the sole legitimate source of constitutional decisionmaking.[205] But questioning or narrowing Supreme

201. *See supra* notes 58–62 and accompanying text.

202. *See, e.g.*, Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J.L. & POL. 123, 127 (2011) (describing the "widely accepted proposition that judges commit the cardinal sin of their profession when they decide cases based upon their own biases or personal policy preferences, rather than upon democratically legitimate sources of law"). *But see, e.g.*, DAVID STRAUSS, THE LIVING CONSTITUTION 44–45 (2010) (arguing that "it is legitimate to make judgments about fairness and policy" when they are not constrained by precedent).

203. *See supra* note 51 (noting that even many nonoriginalists accord some interpretive significance to evidence of original meaning).

204. *See supra* Part III.B (discussing such frameworks).

205. *See, e.g.*, BORK, *supra* note 5, at 119–20 ("When constitutional law is judge–made

Court precedent on originalist grounds may raise competing legitimacy concerns among those who reject originalism's interpretive premises.[206]

Shifting the focus of the legitimacy inquiry away from specific judicial decisions and toward a consideration of the legitimacy of the courts and the broader legal system reveals additional layers of complexity. As noted above, the legitimacy effects of Supreme Court rulings and lower court decisions can interact with one another in complex ways.[207] Where the Supreme Court and the lower courts are closely aligned with one another, their respective decisions can exert a kind of force–multiplying effect, with lower court rulings providing legitimating force to the Supreme Court's rulings and vice versa.[208]

But it is not difficult to imagine scenarios in which an ideological mismatch between the Supreme Court and the inferior courts can short circuit this mutual legitimation process. For example, if lower courts were to shift toward a decidedly more originalist approach, without a corresponding shift by the Supreme Court, the resulting conflicts over interpretive method could undermine the perceived legitimacy of not only individual decisions but also the broader judicial system.[209] Of course, the same kinds of legitimacy concerns

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and not rooted in the text or structure of the Constitution, it does not approach illegitimacy, it *is* illegitimate . . . ."); Kesavan & Paulsen, *supra* note 4, at 1128 (contending that originalist textualism is "the sole, legitimate method for interpreting and applying the Constitution as authoritative, controlling law").

206. *See* Reva B. Siegel, Heller *and Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1404 (2009) (observing that originalism's critics have "objected that interpreting the Constitution in accordance with originalist methods would undermine the Constitution's democratic legitimacy").

207. *See supra* notes 195–197 and accompanying text.

208. Professor Neil Siegel has recently suggested that the Supreme Court may sometimes attempt to trigger this feedback mechanism deliberately by "signaling" to lower courts its preferred doctrinal direction without handing down a ruling that directly compels them to do so. *See* Neil Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183, 1186–87, 1215 (2017).

209. *See, e.g.*, Brannon P. Denning, *Can Judges Be Uncivilly Obedient?*, 60 WM. & MARY L. REV. 1, 40 (2018) ("Outright resistance of Supreme Court decisions thought to be

could be raised if the Supreme Court were the institution that shifted in a decidedly more originalist direction while the lower courts refused to follow suit.

IV. VERTICAL STARE DECISIS AND THE VALUES OF ORIGINALISM

The foregoing section focused on assessing the practice of lower court originalism by looking to the values that undergird our system of vertical stare decisis. But this is hardly the only perspective from which to view the phenomenon. Another way of interrogating the practice might start from the perspective of originalist theory and inquire whether, and to what extent, the practice of lower court originalism may further the values typically associated with originalism. Such an assessment assumes that originalism as an interpretive theory must be justified on pragmatic grounds, an assumption that may be rejected by some originalists who see originalism as intrinsically obligatory without regard to consequences.[210] But for those willing to adopt a more empirical perspective about interpretive method,[211] the extent to which the use of originalism by lower courts may tend to advance (or detract from) the types of values that are typically associated with originalism more broadly may be quite relevant to the perceived desirability of

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wrong–headed is understood in our system as illegitimate and lawless."); Re, *Narrowing from Below*, *supra* note 123, at 960 (observing that "lower court resistance can . . . threaten disruption and undermine the Court's authority").

210. *See, e.g.*, Berman, *supra* note 6, at 12 (observing that some versions of originalism may stake out the strong position that originalism is either "conceptually necessary," such that "matters could not be otherwise" or, alternatively, that the theory is "logically necessary given a set of premises that, while not themselves necessary, are in fact noncontroversial"); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 635 (1999) ("[A] proper respect for the writtenness of the text means that those committed to this Constitution have no choice but to respect the original meaning of its text until it is formally amended in writing.") [hereinafter Barnett, *Originalism for Nonoriginalists*].

211. *Cf.* Cass R. Sunstein, *Must Formalism be Defended Empirically?*, 66 U. CHI. L. REV. 636, 641 (1999) (contending, "[w]ith some qualifications," that formalist methods of statutory interpretation require empirical defense).

such a practice.[212] This Part considers four of the most prominent arguments offered in support of originalism—(A) popular sovereignty, (B) judicial constraint, (C) desirable results, and (D) positive law—and examines the potential significance of lower court decisionmaking with respect to each.

A. Popular Sovereignty

One of the most commonly expressed justifications for originalism as an interpretive theory involves the principle of popular sovereignty—the idea that a written Constitution reflects "a people's highest expression of its consent to the government" and, as such, reflects a superior source of legal obligation over any and all forms of nonconstitutional lawmaking.[213] Because the superior authority of the written Constitution derives from a decision by a historically situated supermajority to entrench their commitments against change by ordinary majoritarian processes,[214] popular sovereignty theorists argue that fidelity to the expressed will of the sovereign people requires interpreting the constitutional text as it was understood by the enacting generation.[215]

But this argument is subject to a set of well–known objections that question the legitimacy of allowing contemporary majoritarian

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212. *Cf.* Lash, *supra* note 132, at 1440 ("[D]ifferent originalists advance different normative grounds for their interpretive approach.").

213. WHITTINGTON, *supra* note 5, at 128; *see also*, *e.g.*, Lash, *supra* note 132, at 1440 (describing popular sovereignty as "the most common and most influential justification for originalism").

214. *See* Lash, *supra* note 132, at 1444 ("As the product of a more deeply democratic process, constitutional rules have earned the right to be treated as the will of the people and accordingly trump those laws passed through the ordinary political process.").

215. *See, e.g.*, Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1279 n.45 (1997) ("The theory of judicial review is not based on any claim that judges are superior to the people, but on the claim that in enforcing the Constitution they are carrying out the will of the people. It follows, then, that judges act legitimately under the Constitution only when they are faithfully enforcing those collective decisions.").

lawmaking to be controlled by the "dead hand" of past generations.[216] No living member of the current U.S. population was alive at the time of the original Constitution's enactment in 1788, nor at the time of the adoption of any of its most significant amendments.[217] It is thus not possible to speak of the contemporary majority of living Americans (let alone a supermajority) of having "chosen" to bind itself to a set of enactments adopted in the distant past in anything other than a metaphorical sense.[218]

In response to such objections, some proponents of popular sovereignty have pointed to the Constitution's revisability and the absence of contemporary amendments as evidence of current acceptance.[219] But such arguments must grapple with both the high barriers to constitutional amendment in the United States[220] as well as more general skepticism of "tacit consent" arguments in general.[221]

A more innovative twist on the popular sovereignty argument focuses not on the democratic authority of past supermajorities or

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216. *See generally* Adam M. Samaha, *Dead Hand Arguments and Constitutional Theory*, 108 COLUM. L. REV. 606, 609–10 (2008) (summarizing the "dead hand" objection to according legal force to a document enacted by prior generations) [hereinafter Samaha, *Dead Hand Arguments*].

217. *See, e.g.*, Samaha, *Expiration Date*, *supra* note 77, at 1344–45 ("No one alive in 2008 witnessed any constitutional text–making earlier than the ratification of the Sixteenth or Seventeenth Amendments in 1913.").

218. *See, e.g.*, Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1757–61 (2003) (describing the descriptive inadequacy of precommitment analogies as applied to an intergenerational society).

219. *See, e.g.*, Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1131 (1998); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1072–73 (1988).

220. Primus, *supra* note 136, at 195 (contending that the difficulty of amending the U.S. Constitution provides a "well–known rejoinder to the revisability argument").

221. *See, e.g.*, Barnett, *Originalism for Nonoriginalists*, *supra* note 210, at 636–37 (denying that "consent"—either overt or tacit—can legitimate an obligation to follow the Constitution unless such consent is unanimous); *see also, e.g.*, Primus, *supra* note 136, at 196–97 ("[I]mplied consent to the Constitution as it is does not justify originalist decisionmaking in a world where the existing constitutional arrangements do not reliably correspond to the Constitution's original meanings.").

the implicit consent of the current population but rather on the forward–looking effects of interpretive method as a means of preserving the lawmaking authority of *future* enactors.[222] Professor Keith Whittington suggests such a justification as part of a lengthy and sophisticated defense of originalist interpretation that draws heavily on popular sovereignty as a source of legitimation.[223]

Whittington argues that in addition to preserving the sovereign authority of past enactors, originalism can also "secure[] the effectiveness of a future expression of the popular will." By "maintaining the principle that constitutional meaning is determined by its authors, originalism provides the basis for future constitutional deliberation by the people."[224] According to Whittington, the only way to reliably reassure future enactors that their understandings and intentions will be honored in the future is for the current generation to give similar effect to the authoritative pronouncements laid down in the past.[225]

While the forward–looking nature of such justifications avoids the objection that originalism fetishizes dead hand control for its own sake,[226] it raises its own distinctive set of empirical and normative questions.[227] But even if the incentive effects argument succeeds on its own terms, the implications for the interpretive practices of lower courts are far from obvious. As discussed above,

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222. *See, e.g.*, Samaha, *Dead Hand Arguments*, *supra* note 216, at 660–61.

223. *See* WHITTINGTON, *supra* note 5, at 155–59.

224. *Id.* at 156.

225. *Id.*; *see also id.* at 207 (suggesting that judicial updating can make "[t]he asserted impossibility of constitutional amendment . . . a self–fulfilling prophecy"); Jeffrey Goldsworthy, *Interpreting the* Constitution *in Its Second Century*, 24 MELB. U. L. REV. 677, 683–84 (2000) (contending that originalism is not primarily motivated by "[a]ncestor worship" but rather by a desire to ensure that the lawmaking authority of contemporary majorities "is not usurped by a small group of unelected judges, who are authorised only to interpret the *Constitution*, and not to change it").

226. *See* Samaha, *Expiration Date*, *supra* note 77, at 1350.

227. *See, e.g.*, Berman, *supra* note 6, at 74–75 (questioning the empirical premises of Whittington's claim); Samaha, *Expiration Date*, *supra* note 77, at 1350–51 (noting the forward–looking argument raises both empirical questions about the relationship between interpretive method and incentive effects and normative questions regarding the relative desirability of Article V amendment as compared to judicial updating).

lower court rulings tend to be far less publicly visible and salient than are rulings of the Supreme Court.[228] As such, lower courts' rulings are likely to be far less relevant in forming and reinforcing the incentives of prospective constitutional amenders than are the rulings of the Supreme Court.

The history of the Article V amendment process bears out this observation. Although the machinery of Article V has been successfully invoked on a handful of occasions to reverse particular rulings by the Supreme Court,[229] no similar successful effort has ever been provoked in response to the rulings of the lower courts alone. Given the multiplicity of lower courts, the relative obscurity of their rulings to those outside the legal profession, and the potential for their decisions to be overridden by the Supreme Court, it seems doubtful that any but the rarest of lower court rulings could be sufficient to spur successful efforts to invoke Article V.[230]

It does not necessarily follow, however, that the interpretive practices of lower courts are wholly irrelevant to the forward–looking argument for originalism. Even if lower court rulings are unlikely to spur amendment efforts directly, they may contribute to the shaping of amendment incentives in other, more subtle ways. For

228. *See supra* notes 44–45 & 160 and accompanying text.

229. *See* JOHN R. VILE, CONSTITUTIONAL CHANGE IN THE UNITED STATES 20–24 (1994) (identifying four occasions on which the amendment process was successfully invoked to override a ruling of the Supreme Court: (1.) the Eleventh Amendment (overriding the holding of Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); (2.) the first sentence of the Fourteenth Amendment (overriding the citizenship holding of Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856)); (3.) the Sixteenth Amendment (overriding the holding of Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601 (1895)); (4.) the Twenty-Sixth Amendment (overriding the holding of Oregon v. Mitchell, 400 U.S. 112 (1970)).

230. *But see* Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 535–71 (2008) (discussing unsuccessful Congressional efforts in the early 2000s to amend the Constitution in response to lower court rulings recognizing a constitutional right to same–sex marriage).

example, to the extent lower court deliberations improve the quality of originalist rulings by the Supreme Court,[231] the resulting Supreme Court decisions may establish a more reliable baseline for the exercise of lawmaking authority by the sovereign people. Improved accuracy of originalist reasoning by the Supreme Court might avoid both "false negatives"—the delusive impression that the existing constitutional order is sufficiently tolerable that there is no need to invoke the machinery of Article V[232]—as well as "false positives"—the impression that an Article V amendment is needed when, in fact, a proper interpretation of the Constitution's original meaning would have achieved the desired result.[233]

A consistent practice of lower court originalism might also contribute to the perceived legitimacy of the Supreme Court's originalist rulings.[234] Such legitimating effects might be particularly important to the formation of desirable amendment incentives because the onerous requirements of Article V suggest that the amendment process will only be successfully invoked in cases where the existing constitutional order produces results that substantial majorities consider intolerable. If such undesirable effects are attributed to the Supreme Court's rulings, the Court's institutional legitimacy may be critical to enabling it to withstand public pressure to reverse course.[235] The Court's perceived legitimacy may

231. *See supra* Part IV.D (discussing "percolation" effects of lower court deliberations).

232. *Cf.* John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1746–48 (2010) (positing that nonoriginalist Supreme Court rulings extending heightened scrutiny to sex–based classifications may have sapped popular support for ratification of the proposed Equal Rights Amendment in the 1970s).

233. *Cf.* Kurt T. Lash, *Leaving the* Chisholm *Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577, 1695–96 (2009) (noting the Eleventh Amendment was spurred by what many of its supporters believed to be an erroneous constitutional interpretation in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

234. *See* Part III.E (discussing the relationship between vertical stare decisis and legitimacy).

235. *See, e.g.*, Fallon, *supra* note 195, at 1833 ("Justices who defy aroused public opinion risk, and know that they risk, provoking a political backlash that ultimately could

also be a key factor limiting the ability of political actors to effectively force the Court's hand through unorthodox measures such as impeachment or Court–packing.[236]

B. Judicial Constraint

Another frequently invoked justification for originalism focuses on judicial constraint. Many proponents of originalism have argued that requiring judges to interpret the Constitution in accordance with its original meaning promotes rule–of–law values by requiring judges to ground their rulings in a source of law external to their own beliefs, preferences, and values.[237]

But originalism is hardly the only mechanism capable of constraining judicial discretion. Indeed, virtually all plausible theories of interpretation constrain judicial discretion in some way.[238] Many skeptics of originalism have pressed the claim that judicial precedent is a more effective means of constraining judicial discretion than reliance on historical evidence of original meaning.[239]

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cause their doctrinal handiwork to collapse.").

236. For example, in the aftermath of the Supreme Court's decision in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), President Taft played a significant role in channeling public hostility to the decision away from efforts to seek a direct overruling from the Supreme Court and toward what would eventually become the Sixteenth Amendment, based in substantial part on his concerns over the potential effect of the former strategy on the Court's institutional legitimacy. *See* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION 1776–1995 199–203 (1996).

237. *See, e.g.*, WHITTINGTON, *supra* note 5, at 39 ("Originalism is said to offer at least a comparative advantage in being able to constrain judges by providing fairly objective and specific criteria by which to evaluate judicial performance."); Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1019–22 (1992) (contending that "[o]riginalism is . . . necessary to distinguish the judicial from the legislative function").

238. *See* WHITTINGTON, *supra* note 5, at 40 ("[M]ost interpretive approaches can at least constrain judges within bounds and in all likelihood could provide greater constraints over time as techniques of application are worked out in practice."); Primus, *supra* note 136, at 213–14 ("[*A*]*ny* decisionmaking theory creates constraints.").

239. *See, e.g.*, Primus, *supra* note 136, at 214 ("[I]t would be extravagant to claim that attention to original meanings alone would yield less discretionary decisionmaking than, say, a jurisprudence that looked only at judicial precedents."); David A. Strauss,

Originalists generally reject the claim that stare decisis constitutes a more effective means of constraining judges.[240] The Supreme Court has emphasized repeatedly that it does not view stare decisis as an "inexorable command."[241] And because its rulings are not reviewable by any higher court and are subject to, at best, weak political constraints, the Justices possess significant practical discretion to reconsider and reverse those earlier rulings with which they disagree.[242] Indeed, some have gone so far as to claim that, at least at the Supreme Court level, "*stare decisis* in constitutional law is pretty much of a sham."[243]

In view of the relatively weak constraints of precedent on Supreme Court decisionmaking, interpretive methodology might plausibly be seen as one of the few tools available to limit the influence of a Justice's own personal preferences and biases in the formation of constitutional doctrine. Even if it isn't perfect, originalism might be thought to go some way toward ameliorating such concerns.[244]

Common Law Constitutional Interpretation, 63 U. CHI. L. REV. 877, 927 (1996) ("[I]t is implausible to say that adherence to the Framers' intentions, by itself . . . limits judges more than precedent.").

240. *See, e.g.*, David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 300 (2005) (observing that "[o]riginalists often criticize precedent–based approaches on the ground that they impose only a nominal limit, not a real limit, on the use of the judge's moral and policy judgments").

241. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 577 (2003) ("The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.").

242. *See, e.g.*, Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 399 (2007) ("[P]recedent has rarely genuinely mattered in the Supreme Court.").

243. JOHN A. JENKINS, THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST 250 (2012) (quoting a private writing of Chief Justice William Rehnquist); *see also, e.g.*, Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 130–31 (2019) (contending that "history strongly suggests . . . that cases in which either the Court as a whole or individual justices are inclined . . . to make a particular decision, the presence of an opposed precedent is rarely a barrier to reaching the precedent–independent outcome").

244. *See* Scalia, *supra* note 5, at 864 (analogizing originalism to a librarian who talks too softly).

Such arguments from judicial constraint apply with considerably less force to judges of the lower courts. Unlike Supreme Court Justices, lower court judges cannot plausibly expect to have the last word on contested questions of constitutional meaning. Their decisions on questions of federal law are almost always reviewable, at least potentially, by a hierarchically superior court. And because they must work within the confines of existing precedent, they have far less ability to pursue their own policy preferences or desires in resolving contested questions.

It might be argued that originalism will add extra constraints over and above the requirements of precedent and the threat of reversal and that such additional constraint is therefore a good thing. But it is not entirely clear that a combination of originalism and stare decisis is necessarily more constraining than stare decisis alone.[245] As noted above, originalism may sometimes operate as a partial counterweight to stare decisis, providing lower courts with reasons for questioning the applicability of particular Supreme Court precedents or to read them more narrowly than they otherwise would.[246] To the extent originalism opens up such interpretive possibilities, it is possible that lower court judges who embrace originalism may occasionally find themselves with a broader range of interpretive options than their nonoriginalist peers who view precedent as a more stringent constraint.

But as was also noted above, stare decisis is unlikely to answer definitively all of the constitutional questions that might be brought before the lower courts.[247] In filling out doctrinal gaps and ambiguities left open by existing precedent, and in applying the Supreme Court's decisions to new and unanticipated contexts, lower courts will inevitably possess some degree of meaningful discretion in

245. *See* Primus, *supra* note 136, at 215 (observing that it is not clear "that a jurisprudence that used originalist reasoning as one method among several—say, alongside text and precedent—would always yield less discretionary decisionmaking than a jurisprudence that consulted text and precedent but not original meanings").

246. *See supra* notes 113–124 and accompanying text.

247. *See supra* notes 107–111 and accompanying text.

choosing between differing rationales that fit within the broad constraints imposed by the Court's decisions. Given the practical inevitability of lower court discretion in fleshing out the meaning of unsettled areas of constitutional doctrine, it might plausibly be argued that originalism provides an additional desirable constraint on the exercise of such decisionmaking.[248] A disciplined form of originalism that is willing to work within the confines of existing Supreme Court precedent might thus plausibly contribute to the value of judicial constraint in a way that outright rejection of originalism might not.

C. Desirable Results

A third prominent argument that has been offered in support of originalism focuses on its claimed capacity to produce desirable results. One particularly prominent version of this justification has been developed by Professors John McGinnis and Michael Rappaport, who contend that the supermajoritarian enactment processes prescribed by the Constitution are likely to produce desirable results.[249] By adhering to the original meaning of the rules that passed through those processes, McGinnis and Rappaport claim that modern decisionmakers are more likely to achieve desirable outcomes than would otherwise be possible.[250]

The implications of the desirable results justification for lower court originalism are somewhat ambiguous. Because the argument hinges on the presumptively superior quality of rules that have

248. *See, e.g.*, William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2223–27 (2018) (arguing that originalism can provide a desirable internal constraint on judicial decisionmaking that can help minimize the influence of the judge's personal preferences and attitudes).

249. MCGINNIS & RAPPAPORT, *supra* note 5, at 19 ("[P]assing a constitution through a strict supermajoritarian process provides the best method for discovering and enacting a good constitution.").

250. *Id.* at 13 (contending that "beneficial judicial review requires a form of originalism" because "[f]ollowing a meaning that was not endorsed by the enactors would sever the Constitution from the process responsible for its beneficence").

passed through the rigorous supermajoritarian enactment processes, the theory seems particularly sensitive to accuracy concerns. Mistaken interpretations—even those that a particular originalist judge believes in good faith to be correct—have not passed through the stringent enactment processes and thus have no greater claim to producing desirable results than any other judge-made rule.[251] The role of lower courts in the interpretive process is thus likely to depend, in large part, on an empirical assessment of whether lower court originalism is likely to enhance the overall accuracy of the interpretive enterprise.[252]

Moreover, because the desirable results justification is explicitly consequentialist in nature, its proponents must be attentive to the relative costs and benefits that may be involved in any attempt to move the law in a more originalist direction. McGinnis and Rappaport acknowledge as much in their approach to horizontal stare decisis. Although their theory is generally skeptical of nonoriginalist precedent,[253] it allows courts to adhere to certain nonoriginalist precedents where the net benefits of doing so outweigh those that would be produced by restoring the original meaning.[254] Similarly, on the vertical plane, the theory would seem to advise shifting lower court practices in a more originalist direction only in those circumstances where the net benefits of doing so are greater than

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251. By contrast, theories of originalism that emphasize judicial constraint might be much less concerned with the possibility of judicial mistakes. A judge who endeavors in good faith to identify the original meaning will be constrained in much the same way regardless of whether or not the particular outcome of the interpretive process matches the actual original meaning of the relevant provision. *Cf.* Scalia, *supra* note 5, at 862–63 (conceding that judges are unlikely to achieve perfect adherence to the original meaning but responding that "nothing is flawless" and that "a thing worth doing is worth doing badly").

252. *Compare, e.g.*, *supra* Part III.B.2 (noting potential proficiency concerns surrounding the use of originalism by lower courts), *with, e.g.*, Part II.B.4 (discussing the countervailing argument that originalist interpretation by the lower courts might contribute to and inform the Supreme Court's own originalist decisionmaking).

253. MCGINNIS & RAPPAPORT, *supra* note 5, at 189 ("[T]he strong reasons for following the original meaning generally preclude a presumption in favor of precedent.").

254. *Id.* at 181–82.

those that would be produced by maintaining current practices. As such, proponents of the desirable results justification should be particularly attentive to the types of accuracy, efficiency, and uniformity concerns outlined above in Part IV.

A further complication with grounding a practice of lower court originalism in a theory premised on desirable consequences relates to the continuing influence of nonoriginalist precedent and nonoriginalist judges. As Professor Adrian Vermeule has observed, even if one concludes that "it would be best, in the rule–consequentialist sense, for all judges to be originalist," one should not necessarily assume that it would be "best for only some judges to be originalist in a partially nonoriginalist world."[255] The Constitution and its amendments reflect a series of carefully wrought and interrelated compromises.[256] It is thus conceivable that the desirable features of at least some rules enacted through the supermajoritarian processes prescribed by the Constitution may have been contingent on their interoperation with other rules enacted through those same processes. Restoring the original meaning of some constitutional provisions but not others may thus lead to less desirable aggregate consequences than would interpreting both in a nonoriginalist manner.[257]

For the Supreme Court, one possible solution to the objection identified by Professor Vermeule is simply to reverse a broader

255. Vermeule, *System Effects*, *supra* note 137, at 55.

256. *See, e.g.*, John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2040 (2009) ("[N]o less than is true in the case of modern statutes, the original Constitution in fact reflects the end result of hard–fought compromise.").

257. Professor Vermeule suggests the example of the legislative veto procedure declared unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983). Even if that procedure was not consistent with the original understanding of Article I, § 7, Vermeule contends it might nonetheless have been justified as a desirable accommodation if (as some have argued) current doctrine allows Congress to delegate significantly more of its legislative power to the Executive than would be allowable under a proper originalist interpretation. Vermeule, *System Effects*, *supra* note 137, at 56.

swath of nonoriginalist precedent.[258] But for reasons already discussed, this option is practically unavailable to judges of the lower courts. Lower court judges must work within the confines of existing Supreme Court precedent and therefore their efforts to move the law in a more originalist direction will necessarily be circumscribed by the existing body of Supreme Court precedent. Such judges must also acknowledge the reality that their rulings will inevitably be integrated into a broader body of lower court case law that has been generated in part by, and that will be further elaborated and developed in part by, their nonoriginalist peers at the lower court level. Against this backdrop, lower court judges may have little basis for confidence that any particular originalist decision they hand down will move the law appreciably closer to achieving the types of desirable results that McGinnis and Rappaport posit.

But even if originalist lower court judges face such constraints, proponents of the desirable-results justification might plausibly see some use for lower court originalism as part of the broader system of constitutional interpretation. For example, even if one grants the premise that institutional constraints render lower court judges less proficient at correctly identifying the original meaning than the Supreme Court is, it may nonetheless be the case that lower courts' assessments are sufficiently accurate to provide useful information to the Supreme Court's own decisionmaking. Lower court support may also help to legitimate the Supreme Court's originalist decisions, making it somewhat easier for the Court to withstand public pressure to deviate from original meaning in those circumstances where its results prove controversial or politically unpopular.[259]

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258. McGinnis and Rappaport acknowledge a limited role for stare decisis in the Supreme Court where special circumstances are present—for example, where the precedent has itself attained supermajoritarian consensus or where overruling would prove exceedingly costly. MCGINNIS & RAPPAPORT, *supra* note 5, at 179–83. But they generally view nonoriginalist precedent as suspect because the legal rules reflected in those precedents have not passed through the (presumptively desirable) supermajoritarian enactment processes. *Id.* at 155.

259. McGinnis and Rappaport's theory encompasses a forward–looking dimension

D. The "Positive Turn"

In recent years, a new defense of originalism grounded in positivist jurisprudential theory has gained prominence in the academic literature. This "positive turn"[260] is premised on the idea that an "inclusive" version of originalism—one that allows some role for precedent and acknowledges the legitimacy of judicial gap filling in cases where constitutional meaning is vague, ambiguous, or otherwise underdeterminate[261]—constitutes "our law" of constitutional interpretation.[262] Proponents assert that the widespread acceptance of this inclusive version of originalism should obligate judges to practice inclusive originalism themselves.[263]

The positivist nature of this particular justification for originalism

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similar to the one described above in connection with the popular sovereignty justification. *See supra* notes 221–224 and accompanying text (describing the forward–looking dimension of popular sovereignty theory). In brief, McGinnis and Rappaport argue that judicial updating may sap public support for constitutional amendments, thereby depriving proposed amendments of the necessary support they need to clear the high supermajoritarian thresholds established by Article V and locking in judge–made rules that are presumptively inferior to the rules that would have been enacted through the amendment process. MCGINNIS & RAPPAPORT, *supra* note 5, at 88. The institutional legitimacy of the Supreme Court and the lower courts may thus be essential to enabling the Court to withstand pressure to engage in informal updating for reasons discussed above. *See supra* notes 230–235 and accompanying text (discussing connection between legitimacy and amendment incentives).

260. *See* Baude, *Our Law*, *supra* note 20, at 2351 n.5 ("The 'positive turn' evokes the basic tenets of legal positivism: that the content of the law is determined by certain present social facts and that moral considerations do not necessarily play a role in making legal statements true or false.").

261. *See id.* at 2352 (describing "inclusive version of originalism" as "a version that allows for some precedent," and "for some evolving construction of broad or vague language" to the extent the original meaning of the Constitution itself permits such methods).

262. *Id.* at 2391 ("[W]hen you look at our current legal commitments, as a whole, they can be reconciled with originalism. Indeed, not only can they be reconciled, but originalism seems to best describe our current law."); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 874 (2015) (contending that originalism is "plausibly true as a description of our law").

263. Baude, *Our Law*, *supra* note 20, at 2392–95 (contending that "if . . . some form of originalism is the law," then judges act properly in using originalism, "and indeed judges would be required to use it").

makes it particularly sensitive to the content of our existing interpretive practices.[264] In general, the theory posits the existence of a presumptive obligation on the part of judges to continue adhering to originalist interpretive practices to the extent the relevant social facts support recognizing those practices as part of "our law" of constitutional interpretation.[265] But the theory provides little support for shifting current interpretive practices in a direction that is more self-consciously originalist than current practices support.[266]

As discussed above, lower courts' existing interpretive practices are characterized primarily by doctrinal analysis of Supreme Court case law and other forms of judicial precedent.[267] Such precedent–based reasoning is fully consistent with the interpretive premises of the "inclusive originalism" described by proponents of the positive turn, who recognize the legitimacy of stare decisis as a permissible exception to the presumptive obligation of courts to follow the Constitution's original meaning.[268] Indeed, Professor William Baude, one of the leading proponents of the positive turn, has gone so far as to claim that lower courts' decisions are relatively "uninformative" to the question of whether our legal system's interpretive commitments are, in fact, originalist in nature because virtually all theories (including originalism) assume the legitimacy of vertical stare decisis.[269] It thus seems doubtful that the positivist argument, standing alone, provides much support for shifting lower courts' interpretive practices in a more originalist direction.

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264. *See, e.g.*, *id.* at 2364 ("To ask whether the written Constitution and the original interpretive rules are the law today is to ask a question about *modern social facts*."); Sachs, *supra* note 262, at 835–36.

265. *See* Baude, *Our Law*, *supra* note 20, at 2399–2400 (discussing contrasting scenarios in which judges may—or may not—be obliged to apply originalism).

266. *See id.* at 2398 (concluding that the positivist argument may "exclude[] some strong forms of originalism," such as those that reject the legitimacy of stare decisis because "[t]hey probably cannot be derived from our current practices").

267. *See supra* note 37 and accompanying text.

268. *See* Baude, *Our Law*, *supra* note 20, at 2358–61.

269. *Id.* at 2370.

At the same time, our existing practices do not foreclose the option of originalism to lower court judges. Notwithstanding the prevalence of doctrinalism in the lower courts and the acknowledged force of vertical stare decisis, lower courts often have the option of incorporating originalist reasoning into their decisionmaking without fear of being seen to violate any widely accepted social understanding or professional norm.[270] Indeed, it is plausible that our existing practices might affirmatively *require* lower courts to engage in originalism in certain discrete areas, such as in cases of true first impression.[271]

In short, the positivist case for originalism, like the other justifications surveyed in this Section, may *permit* lower court judges to engage in originalist reasoning but does not seem to affirmatively *require* them to do so, at least in the vast majority of cases.

V. TOWARD A PRACTICE OF LOWER COURT ORIGINALISM

The diversity of considerations relevant to assessing lower court originalism, combined with the multiplicity of empirical, predictive, and normative judgments that such assessments require, renders it difficult to draw broad conclusions regarding the normative desirability of the practice. Nonetheless, the foregoing discussion does support a few conclusions that may help to guide thinking about the distinctive role of lower courts within a broader framework of originalist–oriented jurisprudence.

Because lower court judges face considerable institutional constraints on their capacity to further the broader values typically associated with originalism, their use of originalism is likely to deliver fewer potential benefits than would similar decisionmaking by the Justices of the Supreme Court.[272] And because their decisions are always subject to review and possible reversal by the Supreme Court, the risk of entrenching significant interpretive error also

270. *See supra* Part III.

271. *But cf.* Samaha, *Expiration Date*, *supra* note 77, at 1318–23 (discussing methodological diversity displayed in Supreme Court opinions reflecting the Court's first interpretation of particular constitutional provisions).

272. *See supra* Part V.

seems considerably less significant at the lower court level. As a result, it seems reasonable to conclude that the choice between originalism and non–originalism at the lower court level involves considerably lower interpretive stakes than those at issue in the context of decisionmaking by the Supreme Court. These lowered stakes might carry potential implications for how lower courts should approach the task of constitutional adjudication. Professor Adam Samaha argues that lowering the stakes surrounding interpretive questions might lead decision makers to strike a different balance between error costs and decision costs, leading to lower cost decisionmaking strategies that tolerate a higher risk of interpretive error.[273] This observation seems to fit with existing lower court interpretive practices, which tend to emphasize comparatively low-cost strategies associated with doctrinalism.[274]

This assessment is complicated, however, by two additional considerations. First, lower stakes are not the same as no stakes.[275] At least some lower court judges may conclude that the increased costs required by originalism are worth bearing in order to reach more accurate results in the particular cases before them. A second complication with exclusive reliance on low–cost decisionmaking strategies relates to the possibility that lower courts' decisions might function as a useful input to the Supreme Court's own decisionmaking. To the extent lower court decisionmaking can inform and improve the Supreme Court's decisionmaking in the manner suggested by proponents of percolation,[276] higher investments in originalist decisionmaking by lower courts might be justified.

The Supreme Court, which seems institutionally best situated to determine whether and to what extent its own decisionmaking would benefit from further deliberations in the lower courts, possesses at least some degree of practical control over the lower

273. Adam M. Samaha, *Low Stakes and Constitutional Interpretation*, 13 U. PA. J. CONST. L. 305, 322 (2010) [hereinafter Samaha, *Low Stakes*].

274. *See supra* note 37 and accompanying text (discussing the prevalence of doctrinalism in lower court decisionmaking).

275. *See* Samaha, *Low Stakes*, *supra* note 273, at 319–20.

276. *See supra* Part IV.D (discussing arguments in favor of "percolation" as a mechanism of informing Supreme Court decisionmaking).

courts' interpretive processes. As discussed above in Part III, the precedential backdrop against which lower courts act reflects something of a continuum. At one end of this continuum stand cases of pure constitutional first impression, in which the Supreme Court has not spoken to a particular issue at all. At the opposite end stand cases in which a particular issue is clearly and directly controlled by a precedential holding of the Court. In between stand a range of cases in which the Supreme Court may have spoken to the issue in some way but has done so in a manner that leaves lower courts with a degree of discretion in fleshing out the Court's ruling.

The nature and extent of this "discretionary space" left open to lower courts is shaped to a significant extent by the Supreme Court's own decisionmaking. In the absence of Supreme Court guidance, lower courts are largely unconstrained in their ability to resolve constitutional questions according to their preferred interpretive approach.[277] Even when the Supreme Court does intervene, the Justices may fail to provide complete guidance by choosing to leave particular questions unanswered or by deciding cases on narrow grounds that are difficult to generalize beyond the facts of the particular cases before them.[278] Some of the Court's originalist decisions have taken this tack, announcing a case–specific outcome grounded in text and historical context but without much concrete guidance regarding how the resulting standard should apply to future cases.[279]

But the interpretive freedom thus conferred on lower courts does not come without costs. By leaving questions unanswered or providing only limited guidance, the Supreme Court forces lower courts to invest their own time and resources into answering such

277. *See* Randy J. Kozel & Jeffrey A. Pojanowski, *Discretionary Dockets*, 31 CONST. COMMENT. 221, 227 (2016); Grove, *supra* note 41, at 28.

278. *See id.*, at 227; Grove, *supra* note 41, at 28.

279. *See, e.g.*, Kozel & Pojanowski, *supra* note 277, at 228–29 (discussing the Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004) as an example of such a decision).

questions.[280] In addition to reallocating decision costs to lower levels of the judicial hierarchy, such "minimalist" Supreme Court decisions also increase the possibility of national disuniformity.[281]

One response to such cost and disuniformity concerns might be for the Supreme Court to embrace its role as the "cheapest precedent creator" by providing clearer and more determinate guidance to the lower courts.[282] An obvious path to providing such enhanced guidance might be to expand the number of cases the Court decides each term.[283] But an increased caseload could burden the Supreme Court's own decisionmaking by shrinking the time and resources the Court can devote to each individual case. And even if the Court were inclined to expand its docket to some extent, it would still be capable of addressing only a tiny fraction of the cases and issues that lower courts must resolve.[284]

Another way the Court could enhance the guidance it provides to lower courts might be to embrace broader grounds of decision in the cases they do choose to decide. Consider, for example, the

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280. *See* Grove, *supra* note 41, at 28–29 ("[A] minimalist Supreme Court opinion serves to delegate substantial decision–making responsibility to the Court's judicial inferiors.").

281. Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left–Wing Law Professors Are Wrong for America*, 106 COLUM. L. REV. 2207, 2216 n.15 (2006) (reviewing CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT WING COURTS ARE WRONG FOR AMERICA (2005)) (cautioning that the Supreme Court often grants certiorari to resolve contested questions and that "[i]ssuing a narrow opinion in this scenario may only continue the confusion and nonuniformity plaguing the lower federal courts").

282. *See* Re, *Beyond the* Marks *Rule*, *supra* note 166, at 1969 (arguing that "the law of precedent should place burdens on the 'cheapest precedent creator'—that is, the decisionmaker who can most clearly and inexpensively form precedent that reflects the views of most Justices").

283. *See, e.g.*, Kozel & Pojanowski, *supra* note 277, at 224 ("[A] court that decides a greater number of cases will have more opportunities to clarify the law through incremental interventions.").

284. *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 268 (2006) (suggesting that the Supreme Court's "peak capacity" would only enable it to decide around 200 cases per year) [hereinafter VERMEULE, UNCERTAINTY]; Grove, *supra* note 41, at 57 ("[E]ven if the Court decided 150 or 200 cases per year . . . it would dispose of only a fraction of its 9,000–case docket and could not possibly correct every error in lower court interpretations of federal law.").

Court's 2014 decision in *National Labor Relations Board v. Noel Canning*,[285] which raised several issues of first impression regarding the scope of the President's power under the Recess Appointments Clause.[286] All nine Justices agreed that the case could be disposed of on a narrow ground—namely, that the particular appointments challenged in that case did not fall within the provision's scope because the three–day intrasession adjournment during which they occurred was not a "Recess" for constitutional purposes.[287] Had the Justices chosen to limit their decision to this specific ground, they could have reached unanimity on the specific case, while leaving the broader interpretive questions for a later date.

But the majority chose to place its opinion on broader grounds, addressing (and rejecting) the respondent's arguments that the provision did not authorize appointments during intrasession breaks at all and that it did not authorize appointments to fill vacancies that occurred while Congress was in session.[288] Four Justices joined in a concurrence in the judgment disagreeing with the majority on both of these points.[289] Both opinions defended the interpretations

285. 573 U.S. 513 (2014).

286. U.S. CONST. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").

287. *Noel Canning*, 573 U.S. at 519 ("Three days is too short a time to bring a recess within the scope of the Clause."); *id.* at 569 (Scalia, J., concurring in the judgment) ("The Court of Appeals correctly held that the appointments here at issue are invalid because they did not meet" the conditions specified by the Recess Appointments Clause.).

288. *Id.* at 526–49 (majority opinion).

289. *Id.* at 575–613 (Scalia, J., concurring in the judgment).

they respectively embraced as consistent with the provision's original meaning.[290] But while the original meaning of the Recess Appointments Clause remains a topic of scholarly debate,[291] this debate need no longer occupy the time and attention of the lower courts. Rather, going forward, such courts can simply rely on the broad rationale supplied by the majority opinion to resolve any future case in which that rationale applies.[292]

Such a strategy may not be appealing in every context. If originalist Justices are genuinely uncertain about the original meaning of a particular provision or about how the provision should apply to modern circumstances, they may prefer to avoid broad pronouncements and thereby allow for a period of continued percolation in

290. The focus of disagreement between the competing opinions focused primarily on the degree of clarity of the constitutional language. Justice Breyer insisted that the provision was ambiguous with respect to the relevant questions and that this ambiguity should be resolved by looking to post-enactment practices of the political branches. *See id.* at 528 (majority opinion); *see also id.* at 540 ("[T]he linguistic question here is not whether the phrase can be, but whether it must be, read more narrowly. The question is whether the Clause is ambiguous. . . . And the broader reading, we believe, is at least a permissible reading of a '"doubtful"' phrase."). Justice Scalia, by contrast, denied that the provision was ambiguous and insisted that post–enactment practices were therefore irrelevant. *See id.* at 584 (Scalia, J., concurring in the judgment) (asserting that "the Constitution's text and structure unambiguously refute the majority's" interpretation); *see also* Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1265 (2015) (observing that "no Justice in *Noel Canning* suggested that [historical] practice (or any other considerations) could prevail over clear [constitutional] text").

291. *Compare, e.g.*, Michael B. Rappaport, *Why Non–Originalism Does Not Justify Departing from the Original Meaning of the Recess Appointments Clause*, 38 HARV. J.L. & PUB. POL'Y 889, 892–94 (2014) (criticizing the majority's textual arguments and contending the opinion is better understood "as a form of non–originalism"), *with, e.g.*, David J. Arkush, *The Original Meaning of Recess*, 17 U. PA. J. CONST. L. 161, 248 (2014) (contending that Justice Breyer's majority opinion "comes much closer than the concurrence to respecting the original meaning of 'recess' because . . . [i]t recognizes that the meaning of 'recess' is broad and that it does not rule out any particular type of break").

292. *See, e.g.*, Gestamp S.C., L.L.C. v. NLRB, 769 F.3d 254, 257–58 (4th Cir. 2014) (determining that an official was validly appointed under the standard prescribed by *Noel Canning* majority despite earlier circuit precedent holding that the provision only authorized appointments during the intersession recess of Congress).

the lower courts.[293]

But if the goal of such percolation is to foster specifically originalist deliberations among the lower courts, leaving such courts to their own devices may not achieve the desired result. *Heller* provides a cautionary example. Despite the strongly originalist tenor of the majority's opinion in that case, nearly all lower courts chose not to use originalist methods to flesh out the gaps and ambiguities left open by the Court's decision.[294] And while it is possible that ideological disagreements may have played some role in driving this disconnect,[295] such factors may not provide a complete explanation. Given a choice between the relatively familiar and low–cost decisionmaking techniques associated with doctrinal reasoning and the more time-consuming and burdensome methods associated with originalism, it would hardly be surprising to see resource–constrained lower court judges gravitate toward the former.[296] To the extent Justices wish to encourage lower courts to base their rulings on originalist interpretive evidence, they may need to make such expectations explicit, such as by prescribing an explicitly originalist–oriented doctrinal framework.[297]

The judges of the lower courts also have an obvious role to play in determining whether and how originalist methods should factor into their decisionmaking. One factor that will likely influence this decision is the extent to which originalist considerations feature in the arguments presented by the parties. If the parties choose to

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293. *See supra* notes 181–193 and accompanying text (discussing arguments for percolation).

294. *See supra* notes 87–91 and accompanying text (discussing lower courts' reaction to *Heller*).

295. *See* Adam M. Samaha & Roy Germano, *Judicial Ideology Emerges, At Last, in Second Amendment Cases*, 13 CHARLESTON L. REV. 315, 317–19 (2018) (discussing evidence suggesting possible ideological influence on lower court decisions in civil cases addressing Second Amendment rights).

296. *Cf.* Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 903 (2015) ("Judges may be motivated to resist legal changes that increase their decision costs by increasing the time and effort necessary to address a legal issue or by increasing the cognitive difficulty of decisionmaking.").

297. *See supra* Part III.C (discussing originalist–oriented Supreme Court frameworks).

frame their arguments solely in originalist terms, the judges may feel constrained by the norms of judicial behavior to address those arguments in at least some form.[298] More challenging questions may arise if the parties fail to address originalist arguments that the judges believe may be relevant. A staunch advocate of the adversarial process might insist that courts should limit themselves to the legal arguments presented by the parties.[299] But it is hardly unusual for courts to insert new legal issues, arguments, or evidence into proceedings that were not raised by the parties.[300]

In the absence of originalist briefing, some lower court judges might be tempted to raise originalist arguments themselves, relying on their own independent research and that of their law clerks.[301] But in addition to the extra time and effort required of courts and judicial staff, such independent investigation is likely to magnify proficiency concerns and heighten the risk of interpretive error.[302] Professor Josh Blackman argues that lower courts should seek to address such proficiency concerns by requesting originalist briefing from the parties.[303] But this proposed solution merely shifts the

298. *Cf.* Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 125 (2005) (contending that "adjudicative legitimacy depends" on the generation of "decisions that squarely confront [the parties'] proofs and arguments, even if the court determines that they do not ultimately supply an appropriate basis for resolution").

299. *See, e.g.*, Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) ("The premise of our adversarial system is that appellate courts do not sit as self–directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."); Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1218–19 (2011) ("If courts exist to resolve disputes, there is no necessary reason other than lack of jurisdiction why they should do anything other than resolve *precisely* the disputes brought to them by the parties when the parties agree on the character of those disputes.").

300. *See, e.g.*, Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 516 (2009) ("Despite the strong norm in favor of party presentation, in practice judges regularly engage in judicial issue creation.").

301. *See* Blackman, *supra* note 12, at 58 ("An absence of originalist briefing will invariably lead circuit judges to perform their own research, likely aided by law clerks.").

302. *See id.* at 58–59 (noting that in the absence of originalist briefing, lower courts' opinions may be plagued by "*law office history*" and erroneous interpretations).

303. *Id.* at 59–64.

costs associated with originalist research (or at least some of them) from the courts to private litigants.[304] The costs of such a shift are likely to be substantial, particularly if, as Professor Blackman suggests, lower courts were to demand originalist briefing in *all* constitutional cases.[305]

Nor is it obvious that the additional burdens imposed on the parties or the courts would be worth the effort. For one thing, private litigants and their attorneys are likely to labor under similar resource and competency constraints as lower court judges. Like lower court judges, most lawyers representing clients in the lower courts are unlikely to have specialized training or expertise in dealing with historical materials or the methods associated with originalist interpretation.[306] Lower courts should also keep in mind Professor Jefferson Powell's admonition that "[h]istory answers—and declines to answer—its own issues, rather than the concerns of the interpreter."[307] Thus, the mere fact that modern decisionmakers may find the answer to a particular interpretive question useful for resolving some present controversy is no guarantee that the relevant historical materials will provide any clear guidance in answering that question.[308]

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304. Even if private litigants shoulder some of the burden of originalist research, lower court judges would still need to familiarize themselves with the relevant historical sources, background context, and methodologies to a sufficient extent to determine which side has the better of the argument. *See supra* note 177 and accompanying text (discussing the unavoidable need for judges to invest time and effort to be able to assess third–party research).

305. Blackman, *supra* note 12, at 62.

306. *See id.* at 58 ("Most attorneys—from judges to law clerks—simply lack the training to develop originalist research.").

307. H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 669 (1987).

308. *Id.* at 669–71. An illustration of the limitations of party briefing is provided by a notable order from a panel of the U.S. Court of Appeals for the Sixth Circuit inviting the parties to submit supplemental briefing in an argued case addressing "the original meaning of the Article III Cases or Controversies requirement." Letter, Wright v. Spaulding, No. 17-4257, *1 (6th Cir. filed May 28, 2019), ECF No. 44, archived at https://perma.cc/C6K7-ZGWF. The panel specifically invited the parties to address the question of whether a corpus of Founding–era writings could help inform that determination and whether such findings could inform the court's decision regarding the

The institutional constraints on lower court decisionmaking and the limitations of party briefing suggest that lower courts should exercise a fair degree of epistemic humility with regard to their own competence as originalist interpreters.[309] Such humility need not (and should not) cause lower court judges to foreswear originalist considerations entirely. But it should lead to a healthy degree of skepticism regarding their own capacity to single out the "correct" original meaning of a provision in the face of conflicting evidence or divided opinion among subject matter experts.[310]

Such skepticism seems particularly appropriate in considering the relationship between original meaning and prior precedent. As discussed above, originalist judges may sometimes feel tempted to push back against or "narrow" seemingly controlling decisions that they view as inconsistent with the Constitution's original meaning.[311] But such tactics raise additional concerns beyond the proficiency and cost concerns discussed above. In particular, narrowing precedent may also threaten both the national uniformity of federal law and the perceived legitimacy of the broader judicial system.[312]

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particular interpretive question that confronted them, which involved parsing the distinction between holdings and dicta with regard to one of the circuit's own prior precedents. *Id.*; *see also* Blackman, *supra* note 12, at 60–62 (summarizing the court's order and the supplemental briefing submitted by the parties in response). After considering the briefing submitted by the parties as well as two briefs from third–party *amici* addressing the panel's inquiry, the judges ultimately determined that the corpus analysis the court had requested "turned out not to be the most helpful tool in the toolkit." Wright v. Spaulding, 939 F.3d 695, 700 n.1 (6th Cir. 2019).

309. *Cf.* Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 498 (2016) (discussing need for epistemic humility in originalist analysis more generally).

310. *See id*. at 500.

311. *See supra* notes 114–124 and accompanying text (discussing concept of originalist "narrowing"); *see generally* Re, *Narrowing From Below*, *supra* note 123 (discussing the concept of "narrowing" Supreme Court precedent more generally). Such "narrowing" tactics are hardly unique to originalism. *See id.* at 924 ("[N]arrowing from below happens all the time.") (footnote omitted); *see also id.* at 960–61 (identifying the lower courts' resistance to the Supreme Court's originalist decision in *Heller* as an example of narrowing from below).

312. *See id.* at 924 (acknowledging that lower court narrowing "can undermine the authority of higher courts and generate legal disuniformity as varying jurisdictions construe higher court precedent in divergent ways").

It thus seems advisable for lower court judges to be particularly cautious about departing from the most natural or consensus reading of judicial precedent based on their own perceptions of what original meaning requires. At a minimum, such judges should insist on a particularly high threshold of interpretive certainty about the content of the original meaning before using originalism to narrow controlling precedent.[313]

By contrast, in cases of true constitutional first impression or cases in which the Supreme Court itself has endorsed a doctrinal framework that prescribes the use of originalism, lower courts should be somewhat more confident in relying on their own best understanding of what original meaning requires. Such cases are not likely to raise the types of disuniformity or legitimacy concerns associated with narrowing. To the contrary, the use of originalism may actually help to foster uniformity to the extent lower courts are able to converge on a consensus understanding of what original meaning requires.[314] Moreover, because the Supreme Court itself seems particularly likely to look to evidence of original meaning in addressing cases of this type, the prospect that originalist research and exposition by lower court judges might provide useful information to the Court is higher than it might be in other circumstances.

A final relevant consideration that lower courts should take into account in determining how much time and effort to devote to originalist decisionmaking is their respective position in the judicial hierarchy. In general, the case for lower court originalism seems considerably stronger when applied to the intermediate federal courts of appeals and state appellate courts than to federal or state trial–level courts. For one thing, trial courts typically face far

313. *Cf.* Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105, 155–56 (2015) (observing that courts might reasonably insist on a higher threshold of interpretive certainty before departing from precedent than they would in the absence of precedential constraints).

314. *Cf.* Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 273 (2018) (arguing that originalism can contribute to uniformity and other rule–of–law values by directing interpreters to a common interpretive object).

greater docket pressures and resource constraints than do appellate-level courts.[315] And unlike appellate courts, which can largely specialize in legal interpretation, trial courts must shoulder significant responsibilities relating to case management and the fact-finding process.[316] Moreover, because trial court rulings typically lack precedential effect, such rulings may have less practical capacity to further certain benefits associated with originalism, such as preserving principles of popular sovereignty or attaining desirable results.[317]

Such considerations do not necessarily exclude the possibility that trial courts might sometimes make useful contributions to identifying originalist evidence and arguments—particularly in cases of first impression or where a particular line of originalist argument has been persistently ignored by appellate courts. But they do suggest that, as a general matter, courts of appeals are better situated to shoulder the interpretive burdens of originalist research and to achieve the potential benefits associated with originalism than will courts at the trial level.

A comparison of federal courts of appeals with state appellate courts yields more ambiguous conclusions. On the one hand, there are fewer obvious structural differences between federal courts of

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315. In 2018, there were 167 authorized judgeships in the regional federal circuit courts of appeals and 663 authorized federal district court judgeships. Admin. Office of the U.S. Courts, Authorised Judgeships 7–8 (2020), uscourts.gov/sites/default/files/allauth.pdf [https://perma.cc/CE5L-DUTG]. During that same year, there were 49,363 filings in the regional courts of appeals—a little more than 295 per judge—versus 358,563 filings in the district courts—more than 540 per judge. Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics 2018, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018 [https://perma.cc/K3VZ-M448].

316. *See* Salve Regina College v. Russell, 499 U.S. 225, 231–232 (1991) (identifying absence of case management and evidentiary responsibilities as among the comparative advantages appeals courts possess over trial courts with respect to legal interpretation).

317. *See supra* notes 230–235 and accompanying text (discussing connection between adherence to originalist precedent and popular sovereignty arguments for originalism); *supra* note 258 and accompanying text (discussing connection between adherence to originalist precedent and desirable results arguments).

appeals and state appellate courts than between appellate courts and trial courts within either system. There is, however, at least one important dissimilarity between the two—namely, that federal courts are likely to face a higher proportion of cases implicating questions of federal law, including federal constitutional law. Given their more frequent exposure to federal constitutional questions, federal judges might be expected to more efficiently invest the time and effort to develop proficiency in the specific historical periods and interpretive questions that are relevant to interpreting the federal Constitution.[318] Rather than attempting to develop similar levels of proficiency themselves, state courts might plausibly defer to the interpretations adopted by federal courts and invest greater interpretive resources in examining the original meaning of their own respective state constitutions.[319] Dividing interpretive responsibility in this way might also yield other potential benefits, such as avoiding disagreements between the state courts and the federal courts of appeals possessing jurisdiction over the same territory.[320] Such a division of interpretive responsibility might also discourage needless forum shopping, reinforce public confidence in the rule of law, and conserve scarce judicial resources.[321]

But notwithstanding the surface–level appeal of dividing inter-

318. *See, e.g.*, Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53, 97 (2015) ("[T]here are good reasons to think that federal judges are simply better at interpreting federal law than state judges."); Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 329–30 (1976) (contending that federal courts are more likely than state courts to be proficient at interpreting federal law).

319. *Cf.* Christiansen, *supra* note 12, at 357 (contending that most state courts tend to use originalist methods in interpreting their own state constitutions).

320. Such disagreements might be seen as even more problematic than other types of disuniform interpretation because they can "leave[] citizens in a single state subject to conflicting legal standards." Frost, *supra* note 318, at 93.

321. *Id.* at 95–96, 99 (identifying forum shopping, rule–of–law values, and conservation of judicial resources as among the potential benefits of avoiding intracircuit splits between state and federal courts).

pretive responsibilities in this manner, the argument for concentrating U.S. constitutional interpretation in the federal courts is not entirely clear cut. For one thing, to the extent allowing a question to percolate among the geographically dispersed federal courts of appeals is thought to yield informational benefits to the Supreme Court,[322] one might plausibly conclude that such benefits would be enhanced by expanding the scope of such percolation to encompass the fifty–plus state and territorial judicial systems as well.

Beyond sheer numbers, state–court deliberations might add useful perspectives that may be missed by concentrating decisionmaking authority in the federal courts alone. Among other things, state–court judges are selected through different mechanisms than federal judges, typically lack the protection of life tenure, and are generally more experienced with the workings of state government than are federal judges.[323] To the extent homogeneity of background and experience can exacerbate well–known decisionmaking pathologies, such as motivated reasoning and groupthink,[324] diversifying the pool of decisionmakers tasked with engaging in originalist inquiry might go some way toward achieving more accurate assessments of original meaning.[325]

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322. *See supra* notes 180–182 and accompanying text (discussing arguments in favor of percolation).

323. Frost, *supra* note 318, at 97–98, 100.

324. *See* Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19 (2011) ("Motivated reasoning refers to the unconscious tendency of individuals to process information in a manner that suits some end or goal extrinsic to the formation of accurate beliefs." (emphasis omitted)); Irving L. Janis, *Groupthink*, PSYCHOLOGY TODAY, Nov. 1971, at 84 (describing "groupthink" as "the mode of thinking that persons engage in when concurrence–seeking becomes so dominant in a cohesive ingroup that it tends to override realistic appraisal of alternative courses of action").

325. *Cf.* Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 391–92 (2018) (noting concern that lack of diversity among those engaged in originalist research may exacerbate problems of unconscious bias in the assessment of originalist evidence).

VI. BEYOND ORIGINALISM

Though originalism provides the principal focus of the present study, the concerns identified regarding the institutional differences between the Supreme Court and the lower courts are hardly unique to originalism. Rather, the different institutional context of lower court decisionmaking may have implications for a variety of nonoriginalist methods of constitutional decisionmaking as well.

Consider, for example, the controversial suggestion that U.S. constitutional interpretation should be informed by international law and foreign legal sources.[326] One prominent justification for this approach focuses on the claimed informational benefits of the practice. By drawing on the experiences and wisdom of decisionmakers in other legal systems, proponents claim that U.S. courts will reach more accurate, or at least better informed, constitutional decisions.[327] But such informational benefits are only possible if U.S. courts are able to correctly identify and understand the foreign legal decisions relevant to the particular issue before them. In addition to locating the potentially relevant foreign legal sources—many of which may not be available in English[328]—comparativists face the challenging task of assessing how those rules fit within an unfamiliar legal system that may be very different from our own.[329]

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326. *See generally* Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 647–49 (2007)(discussing academic debate over this practice).

327. *See, e.g.*, *id.* at 678–79 (defending the informational value of foreign legal sources); Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 266 (2003) (asserting that there is "enormous value in any discipline of trying to learn from the similar experience of others").

328. *See* Ronald J. Krotoszynski, Jr., *The Heisenberg Uncertainty Principle and the Challenge of Resisting—or Engaging—Transnational Constitutional Law*, 66 ALA. L. REV. 105, 134–36 (2014) (noting that the prevalence of "monolinguism" in the United States presents challenges for comparativism).

329. *See, e.g.*, David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927, 1021 (2015) (footnotes omitted) ("Critics of comparativism and sophisticated comparativists alike have drawn attention to the perils of invoking foreign law without the knowledge needed to place that law in context."); Anthony Mason, *The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human*

Like originalism, "[c]onstitutional comparativism is" thus "an extraordinarily difficult task to do well, even in the best of circumstances."[330] And as with originalism, it is a task for which most lower court judges lack professional training and for which they will typically receive limited assistance from the attorneys who appear before them.[331] Perhaps unsurprisingly and despite the Supreme Court's suggestion of its own potential openness to the practice,[332] lower courts "have displayed almost no interest in" incorporating constitutional comparativism into their own decisionmaking.[333]

A second prominent nonoriginalist approach that might raise similar questions about the institutional capacities of the lower courts is suggested by Justice William Brennan's theory of "contemporary ratification."[334] According to Brennan, "[w]hen Justices interpret the Constitution, they speak for their community, not for themselves alone" and "[t]he act of interpretation must" therefore "be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is" being sought.[335] Brennan's theory bears some resemblance to theories of "popular

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Rights in Hong Kong, 37 H.K. L.J. 299, 305 (2007) (explaining that the public law of a foreign jurisdiction "cannot be understood or applied in the absence of a comprehensive understanding of its political, historical, social and cultural context").

330. Roger P. Alford, *Lower Courts and Constitutional Comparativism*, 77 FORDHAM L. REV. 647, 661 (2008); *see also, e.g.*, Law, *supra* note 329, at 1020 ("Comparativism is especially dependent upon institutional support because it is resource–intensive.").

331. *See* Alford, *supra* note 330, at 661 ("State and federal judges rarely have been trained to deal with foreign or international material, either on the job or prior to joining the bench."); *see also, e.g.*, Law, *supra* note 329, at 1015–18 (noting lack of focus on comparativism in U.S. legal training).

332. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575–78 (2005) (looking to practices of a variety of foreign nations as "instructive" on the question of whether the Eighth Amendment should be construed to prohibit capital punishment for crimes committed by individuals younger than eighteen); Lawrence v. Texas, 539 U.S. 558, 573 (2003).

333. Alford, *supra* note 330, at 659.

334. *See generally* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986).

335. *Id.* at 434.

constitutionalism,"[336] that seek to reconcile judicial enforcement of a "living Constitution" with majoritarian principles by connecting judicial interpretation to perceived majority-supported preferences.[337] But for this justification to work as anything more than a rhetorical fig leaf, [338] judges must have the ability to identify what a majority of the relevant public actually believes about relevant constitutional issues.

Although judges are themselves members of the contemporary public, the individuals who compose the judiciary hardly reflect a representative sample of the overall population. [339] One cannot merely assume, therefore, that the views and preferences endorsed by a majority of judges or Justices—let alone the view preferred by the particular majority whose votes are necessary to decide a particular case—will necessarily mirror those of the broader population.[340] Nor is it clear that judges have adequate resources to allow them to correctly identify the majority–supported position on any given constitutional question.[341]

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336. *Cf.* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2053–60 (2010) (noting ambiguities surrounding the phrase "popular constitutionalism" but identifying common commitments that unite disparate popular constitutionalist theories).

337. *See, e.g.*, Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2598 (2003) (noting that what popular constitutionalists "seem to share is a notion that—at least in specified circumstances—judicial review should mirror popular views about constitutional meaning").

338. *Cf.* James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669, 673 (2012) (observing that "[i]n many formulations, the idea of contemporary ratification seems hardly more than a metaphor or slogan").

339. *See, e.g.*, Michael W. McConnell, *What Are the Judiciary's Politics?*, 45 PEPP. L. REV. 455, 458 (2018) (the federal judiciary "has always been richer, older, whiter, maler, more secular, and more prominent and successful than the American population as a whole"); Alicia Bannon & Laila Robbins, *The Nation's Top State Courts Face a Crisis of Legitimacy*, N.Y. TIMES (July 23, 2019), https://www.nytimes.com/2019/07/23/opinion/states-courts-diversity.html [https://perma.cc/6GCG-QBR4] (discussing the lack of racial and gender diversity on state supreme courts).

340. *See, e.g.*, Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1226 (2010) (noting concern that "judges acting in good faith might mistake their own strongly held views for those of the public at large").

341. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 519 (1965) (Black, J., dissenting)

Some scholars have argued that the Supreme Court does a tolerably good job of responding to such informational challenges through various mechanisms, such as attentiveness to signals emanating from the political branches, participation by interested amici, media coverage of pending cases, and observing public reaction to lower court decisions.[342] But even if one accepts these accounts of the Supreme Court's responsiveness to public sentiment, lower courts seem far less capable of making such determinations due to resource constraints on their own decisionmaking and the comparatively low salience of their decisions to the broader public.[343]

Other constitutional theories that ask or expect courts to look beyond relatively straightforward doctrinal analysis to consider less traditional criteria such as moral philosophy,[344] pragmatic consequences,[345] or nontextually expressed commitments embraced by

("Our Court certainly has no machinery with which to take a Gallup Poll. And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the '[collective] conscience of our people.'") (footnote omitted) (alteration in original); *cf.* NATHANIEL PERSILY, *Introduction*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 5 (Nathaniel Persily et al. eds., 2008) ("Curiously absent from the literature on popular constitutionalism or the countermajoritarian difficulty is any evaluation of what 'the people themselves' actually think about the issues the Supreme Court has considered.").

342. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 14 (2009) ("On issue after contentious issue . . . the Supreme Court has rendered decisions that meet with popular approval and find support in the latest Gallup Poll."); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 325 (2005) (identifying media coverage and amicus briefing as mechanisms through which the Court may keep itself apprised of public opinion).

343. *Cf.* Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J.F. 197, 217 (2013) (suggesting that lower courts may be less inclined than the Supreme Court "to respond to perceived shifts in public constitutional culture").

344. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION 2–3 (1996) (arguing that the best constitutional theory is one that "brings political morality into the heart of constitutional law"); JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS, 74–82 (2015) (defending theory of constitutional interpretation informed by principles of moral philosophy).

345. *See, e.g.*, RICHARD A. POSNER, OVERCOMING LAW 171–204 (1995) (endorsing a

politically mobilized supermajorities at particular "constitutional moments"[346] may pose similar challenges for nonexpert, lower court judges constrained by limited time and decisional resources and by the strictures of existing Supreme Court precedent.

Not all theories of constitutional interpretation will necessarily raise these same concerns. Consider, for example, Professor David Strauss's theory of "common law constitutionalism," which posits that constitutional interpretation both does and should reflect a process of common law reasoning through which constitutional understandings evolve through an incremental process of precedent–based comparisons, informed by judicial intuitions regarding fairness and good policy.[347] This methodology is not significantly different from the types of doctrinal reasoning that currently predominate in the lower courts.[348]

Of course, such interpretive theories may be found objectionable for other reasons. For example, some may question the institutional capacity of judges to steer constitutional interpretation in desirable

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pragmatic approach to constitutional decision–making in which judges strive to read the Constitution and other legal materials in the manner that will produce the best practical results); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1341–49 (1988) (defending pragmatic approach to constitutional interpretation).

346. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 8–31 (1998) (contending that courts should recognize and accord legal effect to unwritten constitutional amendments that have been informally ratified by the national people).

347. *See* STRAUSS, *supra* note 202, at 36–38; *see also* Strauss, *Common Law Constitutional Interpretation*, *supra* note 239. Other comparatively low–cost decisionmaking strategies, like deferring to decisions of the political branches, may likewise be less challenging for lower courts to implement. *See, e.g.*, VERMEULE, UNCERTAINTY, *supra* note 284, at 254–56 (noting low costs of adjudication under such a deferential system); *cf.* Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 827–28 (2017) (considering, without endorsing, the possibility that "lower courts" should defer to political actors about the scope of constitutional rights, "leaving more aggressive review for the Supreme Court to apply in appropriate cases").

348. *See supra* note 37 and accompanying text (discussing centrality of doctrinalism to most lower court decisions).

directions in the manner that Strauss's theory of common law constitutionalism assumes[349] or may question the legitimacy of this form of constitutional reasoning.[350] But as with the case of originalism, it is important to assess such objections at a systemic level, keeping in mind the different institutional settings in which judicial decisionmaking occurs. Those who harbor concerns about common law constitutionalism's desirability as a method of Supreme Court decisionmaking should not automatically conclude that the use of doctrinal reasoning by lower courts is similarly objectionable. For example, one plausible concern with the use of common law reasoning as a guide to Supreme Court decisionmaking might be that horizontal stare decisis constitutes too weak of a constraint on doctrinal innovation, leaving the Justices with too much freedom to alter constitutional law to conform to their own personal policy preferences.[351] But the same concerns do not necessarily apply to lower courts due to the greater practical strictures that stare decisis—in particular, vertical stare decisis—places on the scope of such courts' discretion.

In short, just as one should resist the temptation to conclude that what works well for the Supreme Court will work equally well when carried over into the lower courts, one should also be cautious in assuming that methodologies that might work well in the

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349. *See, e.g.*, McGinnis & Rappaport, *supra* note 232, at 1737–41 (contending that judicial updating is likely to yield results that are less desirable than results achieved through the formal constitutional amendment process); *cf.* Adrian Vermeule, Essay, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1514–15 (2007) (questioning whether common law judges are better equipped to make constitutional decisions than historically situated framers or contemporary legislative majorities).

350. *See* Brannon P. Denning, *Common Law Constitutional Interpretation: A Critique*, 27 CONST. COMMENT. 621, 637–38 (2011) (reviewing STRAUSS, *supra* note 202) (noting implicit assumption of judicial supremacy inherent in Strauss's theory and possible democracy–centered objections to that assumption).

351. *See* Denning, *supra* note 350, at 632 (accusing Strauss of seeming to "downplay the significant discretion that judges have to interpret precedent" in order to make his theory appear more constraining than originalism); *see also supra* notes 241–242 and accompanying text (discussing relatively weak force of horizontal *stare decisis* in the Supreme Court).

lower courts are necessarily appropriate when cases ascend to the highest level of the judicial hierarchy.[352]

CONCLUSION

Constitutional theory is centrally concerned with what happens "upstairs" at the level of Supreme Court decisionmaking; what happens "downstairs" in the messier and more complicated domain of lower court adjudication remains largely invisible.[353] Originalism is no exception. But originalism, like nearly all constitutional theories, typically presents itself as a theory to guide all official interpreters of the Constitution, not only those privileged few engaged in the rarified enterprise of Supreme Court decisionmaking. As such, originalism, like nearly all constitutional theories, needs an account of how lower court decisionmaking fits within the broader framework of the interpretive prescriptions the theory provides.

By focusing on the distinctive challenges that confront lower court judges, including the strictures of Supreme Court precedent, the potential for national disuniformity of decisions, and the significantly greater time and resource constraints on their decisionmaking, this Article has sought to demonstrate that the seemingly simple prescriptions of originalist theory become much more complex and contestable when applied to courts at lower levels of the judicial hierarchy.

Nor should the potential challenges surveyed in this Article be of exclusive interest to originalists. Originalism provides a useful and highly salient framework for examining the challenges that confront constitutional theories as they descend to lower levels of the judicial hierarchy. But *all* theories of constitutional interpretation—originalist and nonoriginalist alike—must confront and engage with the question of whether the theory posits an approach that is

352. *See supra* note 30 and accompanying text (discussing the related fallacies of composition and division).

353. *See* Wald, *supra* note 13, at 772 ("[I]n their focus on what happens 'upstairs' at the Supreme Court, observers often fail to recognize the efforts 'downstairs' in the lower federal courts and state courts.").

appropriate for all courts or for the Supreme Court alone. And if the answer provided is the latter, the theory must also be prepared to consider the nature of the interpretive and adjudicative processes that are appropriate for judges at each level of the judicial hierarchy. Proponents of some constitutional theories may find this task more challenging than others. But it is a task that no theory that aspires to real-world significance can permanently avoid.