

# “THIS”

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## ABSTRACT

*The “supreme law of the land” includes “this Constitution,” and federal officers are “bound, by oath or affirmation, to support this Constitution.” In recent years, some people have argued that these words require oath-takers to be originalists and to follow the Constitution’s “original public meaning,” properly understood. An understanding of this argument requires an exploration of the diverse forms and conceptions of originalism, which raise puzzles of their own. Whether or not we embrace some form of originalism, the broader point is this: the claim that the term “this Constitution” mandates a contested theory of interpretation, including a contested form of originalism, belongs in the same category with many other efforts to resolve controversial questions in law by reference to the supposed dictate of some external authority. Whether maddening or liberating, there is nothing that communication just is, nor is there any such dictate. The choice is ours.*

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## I. "TO SUPPORT THIS CONSTITUTION"

Article VI of the Constitution says this:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.<sup>1</sup>

The "supreme law of the land" includes "this Constitution," and federal officers (along with state legislators) are "bound, by oath or affirmation, to support this Constitution." Do these words have implications for constitutional interpretation? Might they settle longstanding debates? Some people think so.<sup>2</sup>

Emphasizing the importance of the oath, Professor Green concludes: "Those who swear the Article VI oath should . . . take the historic textually expressed sense as interpretively paramount."<sup>3</sup> On one view, the term "this Constitution" is equivalent to "the

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1. U.S. CONST. art. VI, cl. 2–3.

2. See Christopher Green, "This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism, 84 NOTRE DAME L. REV. 1607 (2009), for a clear treatment. Green does not rely solely on the phrase "this Constitution"; he emphasizes several temporal indexicals. See *id.* at 1657–66. See also Evan Bernick and Christopher Green, *What is the Object of the Constitutional Oath?* (2019) [<https://perma.cc/9NW4-VJ9E>]; William Pryor, *Against Living Common Goodism*, 23 FED. SOC'Y. REV. 24 (2022).

3. Green, *supra* note 2, at 1674.

original public meaning of this Constitution,”<sup>4</sup> and perhaps the oath requires that conclusion.

As we shall see, the argument is of general interest. It raises several questions about what, exactly, originalism should be taken to entail,<sup>5</sup> and without attempting to resolve them, I shall devote considerable attention to those puzzles. It also tells us something about constraint and choice in interpretation more broadly.

Let us begin with the text.<sup>6</sup> Simply as a matter of language, the referent of “this Constitution” -- what “this” refers to -- is clear.<sup>7</sup> It

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4. See Pryor, *supra* note 2. For discussion, see Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 597 (2006). Green, *supra* note 2; Cass R. Sunstein, *Originalism*, 93 NOTRE DAME L. REV. 1671, 1674 (2018). For valuable and exceptionally illuminating general accounts, see Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421 (2021); Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953 (2021); Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015); Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (2017) [<https://perma.cc/SH4R-46FF>]. There is a view of the sense—as opposed to the reference—of the Constitution’s terms, see Green, *supra* note 2, that plausibly binds public officials to the semantic meaning of those terms; but as I will emphasize, that form of originalism accommodates a great deal, including (for example) protection of same-sex marriage, protection of libel and obscenity, and prohibitions on life imprisonment. It is not clear that anyone objects to that form of originalism. See ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022). But see DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

5. For illuminating discussion, see Fallon, *supra* note 4; Solum, *The Public Meaning Thesis*, *supra* note 4; Mark D. Greenberg and Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998); Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004).

6. I will mostly bracket here some complex questions about how, exactly, the Constitution was understood at the time of ratification, and whether its fixed character might have come later (1795? 1892? 2019? 2047?). See JONATHAN GIENAPP, THE SECOND CREATION 9–10 (2018) (“Many had initially assumed that the Constitution was an incomplete document, not least because they refused to think of it strictly, or even primarily, as a text. As a dynamic system that seamlessly blended text and surrounding practice, the Constitution was very much a work in progress. It was deeply indeterminate, by necessity and design, and accordingly the task of subsequent political generations would be to afford it ever-increasing coherence.”).

is the written Constitution of which Article VI is a part.<sup>8</sup> The word “this” is what philosophers and linguists call an “indexical.”<sup>9</sup> Indexicals like “now,” “here,” and “this” point us to their referent. It follows that the word “this” in the phrase “this Constitution” points to the written text of the Constitution of the United States in which the phrase appears. Other constitutions are not part of “the supreme law of the land,” and public officials are not bound, by oath or affirmation, to support other constitutions. That much is straightforward.

## II. OPTIONS

Now turn to some constitutional questions, and ask how the oath of office might help to orient those who seek to answer them. (1) Does the First Amendment protect libelous speech?<sup>10</sup> (2) Does the Equal Protection Clause or the Privileges or Immunities Clause forbid racial segregation?<sup>11</sup> (3) Does the Equal Protection Clause or the Privileges or Immunities Clause forbid sex discrimination?<sup>12</sup> (4) Does the vesting of legislative power in Congress forbid Congress from granting broad discretion to administrative

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7. See Green, *supra* note 2, at 1649–1653. Alas (from the standpoint of conceptual clarity) some serious qualifications come from Jonathan Gienapp, who emphasizes that it was not at all clear, immediately after ratification, what the Constitution was, exactly, and what its relationship was to what preceded it. The rise of a consensus in favor of the idea of a fixed written constitution may well have come in the decade after ratification. GIENAPP, *THE SECOND CREATION* (2018). Among other things, Gienapp urges that the Constitution was “a ‘first draught’ . . . a work in progress, in need of activation and subsequent work—in essence an imperfect and unfinished object.” *Id.* at 81.

8. I am bracketing the possibility that “this Constitution” might be understood to include, or to incorporate, background principles of various kinds. See GIENAPP, *supra* note 6; VERMEULE, *COMMON GOOD CONSTITUTIONALISM*, *supra* note 4.

9. David Kaplan, *Demonstratives: An Essay on the Semantics, Logic, Metaphysics and Epistemology of Demonstratives and other Indexicals*, in THEMES FROM KAPLAN 481 (Joseph Almog, John Perry & Howard Wettstein eds., 1989).

10. See *New York Times v. Sullivan*, 376 U.S. 254 (1964).

11. See *Brown v. Bd. Of Educ.*, 347 U.S. 483, 488 (1954).

12. See *Craig v. Boren*, 428 U.S. 190, 192-93 (1976).

agencies?<sup>13</sup> (5) Does the vesting of executive power in a President of the United States forbid Congress from creating independent regulatory agencies?<sup>14</sup> (6) Does the Takings Clause forbid regulatory takings, or is it limited to physical takings?<sup>15</sup> (7) Does Article III of the Constitution require plaintiffs to show an "injury in fact"?<sup>16</sup> (8) Does the Fourteenth Amendment forbid affirmative action programs?<sup>17</sup> (9) Does the Fifth or Fourteenth Amendment forbid racial discrimination by Congress?<sup>18</sup> Now ask: How may, or how must, those who take the oath of office approach such questions?

To answer such questions, we need to start with these two: What does the phrase "this Constitution" mean?<sup>19</sup> How do we interpret it? We might think that there is "this Constitution," and then there are theories of how best to interpret it. The *theories* are not "this Constitution." In the end, I believe that it is correct to insist on this point, and to separate theories of interpretation from the Constitution itself, but it will take us a while to get there.

Suppose that we are originalists, in the sense that we believe that interpreters must focus on the "original public meaning" of the document.<sup>20</sup> If so, we might get tempted to think that "this

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13. See *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019).

14. See *Humphrey's Executor v. United States*, 295 U.S. 602, 608–09 (1935).

15. See *Lucas v. South Carolina Coast Council*, 505 U.S. 1003, 1028 (1992).

16. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992).

17. See *Regents of the University of California v. Bakke*, 438 U.S. 265, 269–72 (1978).

18. See *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954).

19. Green recognizes the issue: "The phrase 'this Constitution' on its own is not inherently a textual or historical self-reference, because the word 'this' does not always refer to a text or to the historical circumstance in which the text is spoken. . . . The bare use of 'this Constitution' in Article VI, then, leaves our constitutional ontology unspecified." Green, *supra* note 2, at 1642. A modest amendment: The word "this," in contexts of this (!) kind, typically refers to the text, though it is much less clear that it typically refers to the original meaning of the text.

20. On some of the complexities here, see Solum, *supra* note 4; Cass R. Sunstein, *supra* note 4. Emphasizing context, Solum does not restrict public meaning originalism to semantic meaning. The early emphasis on "original intentions" has largely given way to an emphasis on original meaning. See Solum, *supra* note 4. On original inten-

Constitution” is its original public meaning.<sup>21</sup> That suggestion immediately raises another question: how do we understand the “original public meaning”?<sup>22</sup> Things immediately become exceptionally complicated here, because public meaning originalism includes a family of approaches, and because the family’s members are very different from one another.<sup>23</sup> Consider in that light an assortment of possible approaches,<sup>24</sup> starting with several within the category of “originalists” and proceeding to nonoriginalist alternatives, and acknowledging that some of them might overlap<sup>25</sup>:

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tions, see Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Larry Alexander & Saikrishna Prakash, “Is That English You’re Speaking?” *Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967, 969 (2004) (“Full blooded intentionalists consider all available evidence of the actual author’s intended meaning.”).

21. One of my principal goals here is to urge that this temptation should be resisted, on the ground that a contestable normative argument is needed to defend the view that the original public meaning should be deemed authoritative. It follows that different people, with different accounts of interpretation, can take the oath, and claim to follow it. For a bracing and even jarring account of why the temptation should be resisted as a matter of history itself, see GIENAPP, *supra* note 6.

22. For one (implicit) answer, see Note, *Blasphemy and the Original Meaning of the First Amendment*, 135 HARV. L. REV. 689 (2021), and in particular this conclusion: “In other words, the original public meaning of the First Amendment, whether in 1791 or in 1868, allowed for criminalizing blasphemy.” *Id.* at 690.

23. See generally Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory* (Georgetown Law Faculty Publications and Other Works, 2011), <https://scholarship.law.georgetown.edu/facpub/1353> [<https://perma.cc/Q9V5-HVX5>].

24. I am bracketing the fact that judges do not work on a clean slate, and they might find one or more of these approaches strongly favored or disfavored by precedents. How to square one’s preferred theory of interpretation with principles of stare decisis is of course an important and challenging question.

25. Most of these are discussed illuminatingly in Solum, *The Conceptual Structure of the Great Debate*, *supra* note 4. Solum discusses as well original law originalism, which draws attention to original constitutional law as it existed during the time of ratification. See *id.* at 1286–88; William Baude & Stephen E. Sachs, *Originalism’s Bite*, 20 GREEN BAG 2D 103 (2016). I greatly admire Baude and Sachs, but I do not discuss their approach separately here.

- (1) *Semantic originalism*: The Constitution must be interpreted in a way that is consistent with the original semantic meaning of its words.<sup>26</sup> On that view, "executive power" cannot be interpreted to diverge from its *semantic* meaning at the time of the founding,<sup>27</sup> but interpreters are not bound by the original understanding of what that power specifically entailed, or of how far it reached.<sup>28</sup> Interpreters must follow the words as a matter of semantics, but they need not focus on the original intent or the original public meaning. (Semantic originalism seems compatible with "living originalism," authorizing a set of rulings that depart dramatically from the original public meaning as enriched by the historical context, or from the expectations of the Constitution's ratifiers.<sup>29</sup>)
- (2) *Sense-reference originalism*: The Constitution must be interpreted to fit with its original sense, but not necessarily its original referents.<sup>30</sup> On that view, the words "equal protection" cannot be interpreted in a way that departs from how they were taken at the time of ratification as a matter of

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26. Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 572 (2010).

27. See Solum, *The Constraint Principle*, *supra* note 4, at 34 ("Originalists agree that the 'meaning' (the semantic content or linguistic meaning) of the constitutional text was fixed at the time that each provision of the constitution was framed and ratified.").

28. I am bracketing for the present purposes the right understanding of "the construction zone," and will do that for much of the discussion here. Solum has discussed the issue illuminatingly in many places. See, e.g., *The Public Meaning Thesis*, *supra* note 4.

29. See JACK BALKIN, *LIVING ORIGINALISM* (2013). There is a puzzle here about what kind of enrichment is obligatory or acceptable. To see "the Senate" as the one in Washington, DC, rather than the one in ancient Rome, or the one associated with some university, does seem mandatory, which suggests that some kind of contextual enrichment is acceptable and obligatory, to make the Constitution readable. But this kind of enrichment need not lead us all the way to (3).

30. See Christopher Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 558 (2006).

language (their “sense”), but interpreters are not bound by the original understanding of how they applied to actual cases (their “referents”).<sup>31</sup> It might follow, for example, that the Fourteenth Amendment forbids racial segregation, even if the ratifiers did not believe that the Fourteenth Amendment forbids racial segregation. Similarly, it might follow that the First Amendment protects commercial advertising, even if the ratifiers did not believe that.

- (3) *Public meaning originalism, with the contextual enrichment of history (including contextual disambiguation)*: The Constitution must be interpreted in a way that fits with its original public meaning, including not only semantic meaning, but also the shared public context,<sup>32</sup> which includes various forms of “contextual enrichment.”<sup>33</sup> Alert to the flexibility of semantic originalism and the risk of instability over time, James Madison vigorously endorsed this view toward the end of his life, in a plain effort to stabilize constitutional meaning.<sup>34</sup> In Solum’s words, public meaning “is meaning for the public, the citizenry of the United States, and hence is related to the legal concept of ‘ordinary meaning’ as distinguished from ‘technical meaning.’”<sup>35</sup> In Fal-

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31. See *id.* Green does not claim that the original understanding is necessarily binding.

32. See generally Solum, *The Public Meaning Thesis*, *supra* note 4. This is the form of originalism discussed and challenged in Fallon, *supra* note 4, at 1459–60.

33. See Solum, *Public Meaning Originalism*, *supra* note 4, at 1983–1988.

34. See GIENAPP, *supra* note 6, at 327–33. The “meaning of a Constitution,” Madison wrote, had to be “fixed and known,” to ensure against “that instability which is incompatible with good government.” *Id.* at 329–30. Intriguingly, Madison took the opposite view during the debates over the Constitution. See *id.* at 333. A speculation: The elder Madison, seeing some of his life’s work at risk, might well have had an interest in seeking to stabilize it.

35. Solum, *The Public Meaning Thesis*, *supra* note 4, at 1963. Solum also writes: “There are caveats and possible exceptions, but the general implication . . . is that the meaning of the constitutional text is a function of the conventional semantic meanings of the words and phrases as they are enriched and disambiguated by the public con-



lon's words, "Rather than defining the original public meaning as limited to minimally necessary (for intelligibility) or historically noncontroversial meaning, mainstream public meaning originalists posit that constitutional provisions' original public meanings consist of minimal meanings *plus* some further content that, they maintain, can also be discovered as a matter of historical and linguistic fact."<sup>36</sup>

- (4) *Original methods originalism*: The Constitution must be interpreted in a way that is consistent with the ratifiers' views about how it should be interpreted.<sup>37</sup> On that view, judges need to follow the ratifiers' *theory of interpretation*. If the ratifiers believed that judges should follow the original public meaning, judges must follow the original public meaning, and the meaning of that proposition should depend on what the ratifiers believed.<sup>38</sup>
- (5) *Original expectations originalism*: The Constitution must be interpreted in a way that is consistent with the ratifiers' expectations about how it should be interpreted.<sup>39</sup> The fo-

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text of constitutional communication. In unusual cases, there can be divergence between the meaning of constitutional provisions that were intended by its Framers and public meaning." *Id.* at 2048. The word "unusual" deserves to be underlined. The enriching and the disambiguating weaken the distinction between (3) and (5), at least when it comes to the questions with which this section began. See Fallon, *supra* note 4, at 1427, for the argument that "original public meanings, in the sense in which originalists use that term, are insufficient to resolve any historically contested or otherwise reasonably disputable issue." Solum disagrees. See Solum, *supra*. Fallon's argument obviously bears on the meaning of the oath of office, but I will assume here that some forms of originalism do, in fact, resolve some contested issues.

36. Fallon, *supra* note 4, at 1431.

37. See JOHN MCGINNIS & MICHAEL RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013).

38. See Solum, *supra* note 23, at 19.

39. See RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (rev. ed. 1997); CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 25–26 (2001) (understanding originalism as relying on

cus here, unlike in (4), is on particular results. This view raises many questions, but it would follow, for example, that if the ratifiers had a narrow conception of “the freedom of speech,” current interpreters are bound by their view,<sup>40</sup> and that if the ratifiers believed that the vesting of executive power in the President required a strongly unitary presidency, current interpreters are bound by that view as well.

- (6) *Democracy-reinforcing judicial review*: The Constitution should be interpreted in a way that makes the democratic process work as well as possible, and that makes up for deficits in that process -- by, for example, vigorously protecting the franchise.<sup>41</sup> On this view, interpreters should understand semantically ambiguous constitutional provisions by reference to the ideal of self-government. The idea of one-person, one-vote might well be defensible on this ground; judges should certainly look skeptically at restrictions on the right to vote, and at legislation that targets the politically powerless. Democracy-reinforcing judicial review might be defended by reference to the republican

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original expectations). In principle, this approach is very different from, and far more constraining than, (1). But consider Solum’s suggestion: “The fact that original expected applications are distinct from original meanings should not imply that the two are unrelated. Expected applications of a text may offer evidence about its meanings, even if these applications are neither decisive evidence of meaning nor meaning itself.” Solum, *supra* note 23, at 19. As noted at various points, the line between (5) and (3) is not entirely clear; the two approaches will generally produce the same results (I think).

40. On the expectations of the founding generation, see Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017). On the potentially close relationship between (3) and (5), see Solum, *The Public Meaning Thesis*, *supra* note 4, at 2047: “Campbell’s article shows how Public Meaning Originalism can incorporate thick eighteenth-century ideas.” If public meaning originalism does that, because of contextual enrichment, then (3) really does look close to (5).

41. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); STEPHEN BREYER, *ACTIVE LIBERTY* (2006).

aspirations of the founding document. But it is not originalist.

- (7) *Moral readings*: The Constitution should be subject to a "moral reading," in the sense that its terms should be interpreted in a way that makes best moral sense of them.<sup>42</sup> The moral reading is the judges' own, but judges live in society, and they are not free agents. When, for example, the Court struck down racial segregation, it might well be understood not to have spoken for the original understanding, but to have put the Fourteenth Amendment in its best moral light. Broad understandings of the principle of freedom of speech and of liberty rights might be understood in similar terms.<sup>43</sup>
- (8) *Thayerism*: The Constitution should be interpreted in a way that gives the political process maximum room to maneuver, in the sense that reasonable doubts should be resolved favorably to Congress and the President.<sup>44</sup> (Note that this approach is incomplete; we need a background theory about how to discern meaning. We could imagine Thayerian originalists, who would uphold statutes and regulations against constitutional attack unless the violation of the document, on the right originalist premises, was clear. We could imagine moral reader Thayerians as well.)

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42. See RONALD DWORKIN, *FREEDOM'S LAW* (1996). Some originalists do appear to be moral readers in practice. See, e.g., VERMEULE, *supra* note 4. For a vivid illustration, see *United States v. Vaello Madero*, 142 S.Ct. 1539, 1544–1552 (2022) (Thomas, J., concurring in the judgment). For a general treatment, see FRANK CROSS, *THE FAILED PROMISE OF ORIGINALISM* (2013). This fact does not, however, discredit originalism, though it might discredit (some) originalists.

43. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

44. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). VERMEULE, *supra* note 4, appears to be a common good Thayerian.

- (9) *Common law constitutionalism*: The Constitution should be interpreted in common-law fashion; it is best taken as the foundation for a process of case-by-case judgment, in which the document's text, and the original understanding or original public meaning, are relevant but do not have decisive roles.<sup>45</sup>
- (10) *Common good constitutionalism*: The Constitution should be interpreted in a way that is consistent with principles of the common good, as they have been understood and elaborated over time.<sup>46</sup> Those principles, not firmly rooted in the original public meaning of the founding document, could be understood in different ways; they might be rooted in longstanding understandings in diverse traditions.

No originalist is drawn to (6), (7), (8), (9), and (10), though all originalists might be willing to embrace them in some sense.<sup>47</sup> Most of the prominent current *theorists* of originalism accept (1) and (3);<sup>48</sup> they may or may not accept (2), which is close to (1), at

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45. STRAUSS, *supra* note 4.

46. See VERMEULE, *supra* note 4. I do not include minimalism on the list, love it though I do. See CASS R. SUNSTEIN, *ONE CASE AT A TIME* (1999). The reason is that minimalists favor narrow, shallow rulings, but they could also be (for example) common law constitutionalists, semantic originalists, moral readers (of a modest sort), or something else. To be sure, it would be difficult to imagine Thayerian minimalists.

47. This is a compressed sentence. Within the construction zone, originalists might be willing to entertain (6), (7), (8), and (10), and because of the role of precedent, they might be open to some version of (9), depending on their conception of *stare decisis*. See Solum, *supra* note 23, at 23 ("Confining 'Originalism' (in its focal meaning) to the view that original meaning must trump all other considerations is misleading. Moreover, this move has the unfortunate effect of defining the topography of argument in a way that eliminates plausible forms of originalism from the originalist camp, leaving only the most implausible and extreme views in contention."). Note also that there is an argument, historical in nature, that the founding generation was not originalist in the modern sense, and that originalism in that sense is a recent concoction (!). See GIENAPP, *supra* note 6; VERMEULE, *supra* note 4.

48. See Solum, *supra* note 23, at 1–2 (emphasizing that "almost all originalists agree that the linguistic meaning of each constitutional provision was fixed at the time that provision was adopted," and also that "originalists agree that our constitutional prac-

least as a matter of practice. Many of the most prominent current *practitioners* of originalism seem to embrace (5),<sup>49</sup> though this may be because they embrace (3), which, as noted, will generally produce similar results. My questions are these: Which, if any, of these approaches is ruled off-limits by the oath? Which is inconsistent with a commitment to support "this Constitution"?

### III. WHAT THE OATH DOES AND DOES NOT DO

Suppose that we accept (1) and understand originalism to entail it, and to entail nothing more.<sup>50</sup> If so, there is a strong argument that oath-takers are indeed bound by it. To be President, someone must be at least thirty-five years of age;<sup>51</sup> the impeachment power

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tice both is (albeit imperfectly) and should be committed to the principle that the original meaning of the Constitution constrains judicial practice"). The emphasis on "linguistic meaning" raises a fair question, which is whether originalists disagree with anyone, or whether anyone disagrees with originalists. As Solum also says, "The question whether living constitutionalists actually disagree with these core principles of originalist theory is a complex one." *Id.* at 2. Those who accept (5), (6), (7), and (8) can accept (1) and almost certainly (2).

49. See, e.g., *McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring in the denial of certiorari); *TransUnion v. Ramirez*, 141 S. Ct. 2190, 2214–2226 (2021) (Thomas, J., dissenting); *Gundy v. United States*, 139 S. Ct. 2116, 2131–2148 (2019) (Gorsuch, J., dissenting). Admittedly, this is a complicated matter. In my view, it is exceedingly difficult to justify the votes and the opinions in these cases without embracing original expectations originalism (noting as well that whether original expectations originalism does, in fact, support these results is a controversial matter). As noted in text, there is also a question to what extent semantic originalism can or should be subject to a kind of contextual enrichment, which would thicken it in various ways. The burden of the argument here is that whether or not the thickening is justified, it is contentious, and it is not compelled by the oath.

50. If so, originalism is of course a radically incomplete theory of interpretation, and to decide cases, a great deal of nonoriginalist work must be done, perhaps in the "construction zone." Note that some people might think that semantic originalism, so understood, is implausible, because texts cannot be understood without context. We should be careful with that thought. There are contexts (I live on planet Earth and speak English) and there are contexts (I have a time machine; I used it to go back to the United States when it was constituted; I know what people meant and understood).

51. U.S. CONST. art. II, §1, cl 5.

is not vested in the federal judiciary;<sup>52</sup> there is a right to trial by jury, not to trial by magistrate.<sup>53</sup> If the semantic meaning of words shifts over time, it is fair to say what is binding is the original semantic meaning, not some new semantic meaning.<sup>54</sup> Imagine, for example, that the words “freedom of speech” come to mean “flight of birds” in, say, 2050. Even if that happens, the First Amendment would not forbid Congress from abridging the flight of birds. Almost everyone almost always accepts semantic originalism.<sup>55</sup> The challenge is that purely semantic originalism leaves constitutional meaning wide open, at least on contested issues.<sup>56</sup> It probably does not answer *any* of the questions posed

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52. *See id.* art. I, §2, cl. 5; *id.* art. I, §3, cl. 6.

53. *Id.* art. III §2, cl 3.

54. But I do not mean by this proposition to conflate (1) with (3). We are speaking of semantic meaning, not (much) contextual enrichment.

55. We need the term “almost” in view of STRAUSS, *supra* note 4, and some well-known puzzles for semantic originalism, including the application of equal protection principles to the federal government. *See* *Bolling v. Sharpe*, 347 U.S. 497 (1954). Did the Justices who signed *Bolling v. Sharpe* violate their oath of office? That would be a strong claim. Compare with Solum, *supra* note 23, at 39:

The compatibilist story about the relationship between living constitutionalism and originalism can be articulated via the distinction between constitutional interpretation and constitutional construction that is associated with the New Originalism. Compatibilism could be the view that originalism and living constitutionalism have separate domains. Originalism has constitutional interpretation as its domain: the linguistic meaning of the Constitution is fixed. Living constitutionalism has constitutional construction as its domain: the vague provisions of the constitution can be given constructions that change over time in order to adapt to changing values and circumstances.

If the linguistic meaning is a weak constraint—if it refers to the meaning of the words, in the English language, at the time of construction—then living constitutionalists might have no problem with it. For example, they might agree that “the freedom of speech” is a binding term, but add that its purely semantic meaning, at the time of the founding, can coexist with modern free speech doctrine, which of course goes far beyond expected applications.

56. Madison feared this, *see* GIENAPP, *supra* note 6, at 327–33, but even so, I offer this point with some trepidation. If semantic originalism is not purely semantic, and if it

above;<sup>57</sup> it is hard, in practice, to see it as different from or as forbidding any form of "living constitutionalism."<sup>58</sup> Those who reject originalism<sup>59</sup> are entirely comfortable with (1).<sup>60</sup> They may well be comfortable enough with (2), which (as noted) seems close to (1).<sup>61</sup>

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takes on board some aspects of historical understandings of terms, it gets closer to (3) and even to (5) (expected applications originalism). See Solum, *The Public Meaning Thesis: An Originalist Account of Constitutional Meaning*, *supra* note 4. On the open-endedness of semantic originalism, see VERMEULE, *supra* note 4; for a case in point, see Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIA. L. REV. 648, 649–52 (2016).

57. I do not mean to suggest that semantic originalism answers no questions. Most constitutional questions are easy, and never get litigated; semantic originalism is the reason. There is also an argument that the term "due process of law" is purely procedural, simply as a matter of semantics, and also that the "equal protection of the laws" does not suggest a general antidiscrimination principle, simply as a matter of semantics.

58. JACK BALKIN, *LIVING ORIGINALISM* (2014); Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007). On Madison's fear of the openness of semantic originalism, see GIENAPP, *supra* note 6, at 333–37. In some ways, however, we can see Madison as urging that semantic originalism is at least necessary: "What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense." *Id.* at 329. Thus Madison warned that "[i]f the meaning of the text be sought in the changeable meaning of the words composing it," then "the shape and attributes of the Government must partake of the changes to which the words and phrases of all living languages are constantly subject." *Id.*

59. Wise words from Solum: "The quest for agreement on a single definition of originalism is likely to prove Quixotic." Solum, *supra* note 23, at 6.

60. There is a question as to what, exactly, those who embrace semantic originalism commit themselves. I would have thought, for example, that semantic originalism, even with contextual enrichment, does not answer the question of whether the Second Amendment creates an individual right to bear arms, and that on that question, we are in the construction zone. But Solum urges, with respect to *District of Columbia v. Heller*, 554 U.S. 570 (2008): "Given the inevitable differences between judicial practice and constitutional theory, it is hard to imagine finding a clearer example of original public meaning originalism in an actual judicial decision." Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 940 (2009). In my view, *Heller* is closer to (5).

61. At least this is so if they accept the relevant distinction, which is controversial among philosophers of language. See Green, *supra* note 2, who acknowledges the point.

A. *The Oath and Originalism*

What about (3), (4) and (5)? Is the oath relevant to them? Both (3) and (5) seem to be embraced by the most prominent current practitioners of originalism.<sup>62</sup> Here things become much harder. Many constitutions use a phrase of this kind (“this Constitution”), and yet it is generally understood that they should *not* be interpreted in terms of (3), (4), or (5), or in terms that make originalism a distinctive approach to constitutional interpretation.<sup>63</sup> This fact strongly suggests that the phrase “this Constitution” need not be taken to entail any particular view about how to interpret it, and that those who take an oath to support it need not endorse any theory of interpretation, though they will probably have to choose one.

To see the point, note that we could imagine a constitution that uses the phrase “this constitution” that was also thought and understood -- before, during, or after ratification -- to include a set of general concepts (say, “the freedom of speech,” or “executive”) whose meaning in particular cases would change over time.<sup>64</sup> In other words, we could imagine a constitution that was understood, as a matter of historical fact by those who ratified it, to call for semantic originalism (but nothing else). Suppose, however, that as a matter of historical fact, the ratifiers of the U.S. Constitution unanimously understood “this Constitution” in terms that fit with (3), (4), or (5). Suppose that they thought that the three approaches were one and the same, such that any effort to separate

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62. See, e.g., *McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring in the denial of certiorari); *TransUnion v. Ramirez*, 141 S. Ct. 2190, 2214–26 (2021) (Thomas, J., dissenting); *Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting).

63. See Conor Casey & Adrian Vermeule, *Argument By Slogan*, HARV. J.L. & PUB. POL’Y: PER CURIAM, Spring 2022.

64. I am bracketing the question of what it means, exactly, for a constitution to have a fixed meaning; some of the subsequent discussion will bear on that question.



them would have been unintelligible. What then? Would the oath require officials to follow the ratifiers?

We might think that this question immediately raises, or essentially is, another: the level of generality problem.<sup>65</sup> Is the phrase "the freedom of speech" to be interpreted in terms of a specific set of understandings (protecting, say, political dissent and commercial advertising, but not blasphemy<sup>66</sup> or obscenity)? Or should it be understood to set out an abstract term, whose specific consequences are not frozen in time, and might even change dramatically over a period of decades?<sup>67</sup> If the answer to the first question is "no" and the answer to the second question is "yes," we have rejected (5), or at least we have specified (5) in a way that leaves a great deal open.

If we agree that "this Constitution" is "the original understanding of this Constitution," then perhaps we will also agree, consistent with (3), (4), and (5), that the proper solution to the level of generality problem must be *historical*. It is a matter of uncovering a *fact*.<sup>68</sup> If so, whether a constitutional phrase was originally understood to be specific and fixed, or instead abstract and susceptible to different specifications over time, is not a philosophical or normative question. It is a question about the original understanding. To be sure, it might be exceedingly difficult to answer that question. But at least we have identified the right question, if we are to be faithful to "this Constitution." Or so it might be concluded.<sup>69</sup>

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65. See Casey & Vermeule, *supra* note 63, at 15.

66. See Note, *Blasphemy and the Original Meaning of the First Amendment*, 135 HARV. L. REV. 689 (2021).

67. See Green, *supra* note 2, for one version of that view.

68. Public meaning originalism is one version of this view. See, e.g., Solum, *The Fixation Thesis*, *supra* note 4, at 27–28.

69. Compare this suggestion from Green: "Functional and normative arguments are only relevant to an understanding of the nature of the actual Constitution to the extent that views about the function of a constitution or the norms that govern desirable results were, in fact, embodied in our actual 'this Constitution' of Article VI." Green, *supra* note 2, at 1613.

B. *The Heart of the Matter*

Now we arrive at the heart of the matter. Whether “this Constitution” should be identified with any particular historical understanding of how to interpret it is not, in fact, a question of history or one of fact. To see why, suppose that the ratifiers did, in fact, embrace a particular view of interpretation, and that that view just is the original understanding, consistent with (3), (4) or (5).<sup>70</sup> Or suppose that constitutional terms did have a specific public meaning, consistent with (3).

Without circularity, *we cannot say that the original understanding is binding because the original understanding was that the original understanding is binding.*<sup>71</sup> The same would be true if we substitute the term *original public meaning for original understanding*. (I use the two terms interchangeably.<sup>72</sup>) The original public meaning may or may not be the best way to interpret “this Constitution,” but it is simply not the same as “this Constitution.” Public meaning originalism may or may not be the right approach to interpretation, but it is not required by the oath.

Pointing to both text and history, Professor Green urges<sup>73</sup>:

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70. This is a disputed question. For relevant discussion, see Green, *supra* note 2; Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 L. & HIST. REV. 321 (2021). See in particular Green’s suggestion: “A full survey of th[e] evidence supports an understanding of ‘this Constitution’ as a historical and textual self-reference, and taking the Constitution as binding.” Green, *supra* note 2, at 1613.

71. The historical issues are immensely complicated. Gienapp traces the shift, *after* the ratification period, to a conception of the Constitution as fixed (in the sense in which Gienapp uses that word). See GIENAPP, *supra* note 6.

72. It might be tempting to urge that this is not true of interpretation, as understood by originalists. In other words, it might be thought that the original public meaning, with contextual enrichment, is binding, and that we do not need a normative argument for that proposition. I deny that claim. If we want to use the original meaning with contextual enrichment, it must be for *reasons*, perhaps associated with the rule of law, democracy, or social welfare (but let’s hope not associated with the idea of legitimacy). See *infra* note 91.

73. Green, *supra* note 2, at 1666.

"This Constitution" is, then, located at the time of the Founding. The constituting of the United States happened at the Founding. It did not happen over generations and does not happen anew every day. The constitutional author distinguished itself from succeeding generations, identified its work of establishing the Constitution with the Founding's ratifying conventions, and spoke of the Founding as the time of its adoption. If we ask the Constitution what time it is -- that is, what it means by the term "now" -- it answers with the time of the Founding.

In an important sense, these claims are correct. The constituting of the United States did indeed happen at the Founding, and if we define that idea in a certain way, that is the only time that it happened.<sup>74</sup> (True, we could define it in other ways,<sup>75</sup> in which case it does indeed happen anew every day.) But does it follow, from these claims, that "this Constitution" must be understood in accordance with its original public meaning, as understood in (3), or with the ratifiers' view of how it should be understood, in accordance with (4) or (5)? Not at all. Those who take the oath are and must be bound by "this Constitution," and none other. But they need not agree that the meaning of the Constitution is identical to that which would follow from (3), (4), or (5).<sup>76</sup>

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74. GIENAPP, *supra* note 6, does complicate this view, though in the end I think it is compatible with it.

75. To be less obscure: The question when the United States was "constituted" could be taken in multiple ways. As a matter of law, it makes sense to answer with the ratification of the Constitution. *But see* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936) ("The Union existed before the Constitution."). This statement, and its implications, are illuminatingly discussed in VERMEULE, *supra* note 4.

76. *See* Vermeule, *supra* note 4. A qualification: If we understand the original public meaning in a very thin sense, to refer to the semantic meaning of the document, oath-takers might be bound by it. *See* Green, *supra* note 2, at 1624–25 (treatment of the sense-reference distinction). But as noted, purely semantic originalism leaves constitutional meaning wide open; it is hard, in practice, to see it as forbidding any form of "living constitutionalism." *See* Vermeule, *supra* note 4; Casey & Vermeule, *supra* note 63. In addition, and also as noted, there are some problems (not a lot) even for semantic originalism, as in the equal protection component of the Due Process Clause and

No one should doubt that the “supreme law of the land” includes “this Constitution,” and that federal officers<sup>77</sup> are “bound, by oath or affirmation, to support this Constitution.”<sup>78</sup> But people with different views about constitutional interpretation, and with favorable or unfavorable views about different forms of originalism, can agree to “support this Constitution.”<sup>79</sup> Nothing in the oath requires officials to subscribe to a particular conception of interpretation.<sup>80</sup> Diverse judges can “support this Constitution” while having diverse views about how to interpret it.

Here is another way to put the point. Throughout American history, many distinguished judges have not been self-identified originalists, and they did not spend a lot of time on the original understanding or the original public meaning. They might have been semantic originalists, or (better) they might not have been semantic originalists, but none of them spent a lot of time on semantic originalism. (That is an understatement.)<sup>81</sup> Clear examples include Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter, Benjamin Cardozo, Charles Evans Hughes, Robert Jackson, John Marshall Harlan II, Thurgood Marshall, Lewis Powell, Ruth Bader

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the application of the First Amendment’s Free Speech Clause to institutions other than Congress. See STRAUSS, *supra* note 4.

77. Article VI also applies to “the Members of the several State Legislatures.” U.S. CONST. art. VI, cl. 3.

78. *Id.*

79. *Id.*

80. It is true that different officials, at different times, take the oath of office to “this Constitution,” and it is the same Constitution. But those facts do not mean that they must simultaneously agree to the same approach to interpretation! Justices Thurgood Marshall, Antonin Scalia, Stephen Breyer, and John Roberts, for example, took the same oath (I did too, by the way, in 2009, twice, and again in 2021), without necessarily agreeing to interpret it in the same way or with the same methodology.

81. It might be tempting to note that the term “originalism” is relatively new, and to insist that for that reason, the fact that justices and judges did not embrace it, before it was a term, is not exactly surprising. The point is correct but not responsive. What I am emphasizing is not that the relevant people did not use the term; *they did not practice originalism in any form.* (At least they did not do so that often. In fact, they almost never did.)

Ginsburg, Henry Friendly, Harold Leventhal, Stephen Williams, and Richard Posner. It would be remarkable, a kind of miracle, if all of these justices violated their oath of office, or if they made some fundamental mistake about the meaning of the word "this."<sup>82</sup>

#### IV. THE ILLUSION OF CONSTRAINT

There is a broader point in the background here, and let us now put it in the foreground. It involves the illusion of constraint.<sup>83</sup> In many cases, words do have unambiguous meanings, or relevantly unambiguous meanings, and real or imagined disputes are simple to resolve. The word "jury" does not include a "judge" or a "magistrate"; a "treaty" is not an ordinary contract; the grant of legislative power to Congress does not include the grant of executive power to Congress. Simply as a matter of text, some interpretations are out of bounds. But compare the question whether "the freedom of speech" includes blasphemy, obscenity, and commercial advertising, or indeed subsequent punishment of any kind. The operative phrase ("the freedom of speech") can be specified in many ways, consistent with its semantic meaning alongside a modest amount of contextual enrichment.<sup>84</sup> To identify the right specification, we need something other than a language lesson.

Or consider the phrase "equal protection of the laws,"<sup>85</sup> and take it as a matter of semantics. Do affirmative action programs violate "equal protection"? It might seem tempting to say that if state of-

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82. Or about the meaning and consequences of other constitutional indexicals. See Green, *supra* note 2, at 1649.

83. See Fallon, *supra* note 4, for an illuminating discussion.

84. It is possible that the original public meaning might lead to a single specification, and original expectations originalism should narrow the field, though we might end up in the construction zone.

85. I am bracketing the view that as an original matter, "equal protection" was a relatively narrow idea, not a general antidiscrimination principle. (I agree with that view.) We could use the Privileges or Immunities Clause to make the same point. See Green, *supra* note 2, at 1633.

ficials discriminate on the basis of race, they are not treating people equally, essentially by definition. But the temptation should be resisted. English speakers could easily understand a guarantee of “equal protection” to allow and even to require affirmative action programs, just as they could easily understand such a guarantee to forbid or to allow discrimination on the basis of age, sex, disability, and sexual orientation.<sup>86</sup> Or consider the question whether a “case or controversy” requires plaintiffs to show an “injury in fact.”<sup>87</sup> The term “case or controversy” may or may not impose that requirement. The text does not tell us.<sup>88</sup> It would be easy to proliferate examples. Here again, a language lesson is insufficient.

The claim that the term “this Constitution”<sup>89</sup> mandates a contested<sup>90</sup> theory of interpretation belongs in the same category with many other efforts to resolve controversial questions in law by reference to the supposed dictate of some external authority. Whether maddening or liberating, the truth is that in important cases, there is no such dictate. The choice is ours.<sup>91</sup>

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86. It remains possible for public meaning originalists to insist that equal protection has a specific meaning and that it does or does not forbid affirmative action programs, though we might end up in the construction zone.

87. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992).

88. Again, the original public meaning might, and in fact it does (in my view). See Cass R. Sunstein, *Injury In Fact, Reformulated*, 2021 SUP. CT. REV. 349 (2021).

89. On some historical puzzles, see GIENAPP, *supra* note 6.

90. I have urged that semantic originalism is, by and large, not contested, while also noting that it might well have to be qualified in various ways. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954). I have also bracketed some historical puzzles. Note that in his later years, Madison himself adopted (3) on normative grounds, not so different from those offered in Solum, *supra* note 4. See GIENAPP, *supra* note 6, at 327–33.

91. Fallon offers a different version of this claim, as a challenge to the view that the original public meaning is a fact. Fallon, *supra* note 4. For a vigorous response, see Solum, *The Public Meaning Thesis*, *supra* note 4, at 2006–23.

Four qualifications are important:

(1) The oath does indeed obligate people to follow “this Constitution,” and not another. That is not a choice.

(2) The statement in text is emphatically not a suggestion that the choice is arbitrary or willful. For different views on whether and when we should choose to be original-

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ists of various kinds, and on the criteria for the choice, see Solum, *The Public Meaning Thesis*, *supra* note 4, at 1967–2001; Sunstein, *supra* note 4. Very briefly, Solum believes that public meaning originalism rests on both claims about the actual meaning of the constitutional text (his Fixation Thesis and Public Meaning Thesis) and a claim that the Original Public Meaning ought to be treated as binding (his Constraint Principle). It is hazardous to disagree with Solum, but my view is that the original public meaning of the constitutional text (as he understands it, and distinct from the semantic meaning) is one of several possible meanings; there is nothing that communication just is (though there are many things that communication just isn't). We must decide today which of these meanings should guide constitutional practice. Solum seems to agree that we must choose today, and he offers an assortment of arguments for the choice he defends, but he argues that only the original public meaning qualifies as the "true" meaning (or in his words "communicative content") of the constitutional text. (In other words, I question both the Public Meaning Thesis and the Constraint Principle; Solum accepts both.) Madison, by the way, was (I think) broadly speaking with me on the issue of criteria (he spoke in terms of the need for stability, not in terms of the nature of meaning or communication), though he was with Solum on public meaning originalism, as I am not.

In my view, the only way to choose a theory of interpretation is broadly pragmatic in nature, a claim that in the abstract does not rule originalism either in or out. See Sunstein, *supra* note 4, at 1698. Whether or not they unite, interpreters of the world have nothing to lose but their chains. See Cass R. Sunstein, *Textualism and the Duck-Rabbit Illusion*, 11 CAL. L. REV. ONLINE 463, 475–76 (2020). The central issue is what approach to interpretation makes our constitutional order better rather than worse. Madison's support for (3), in his later years, is best understood as asking and answering that question (as noted, in favor of public meaning originalism). See GIENAPP, *supra* note 6, at 327–33. Note, however, that nothing in the central argument here—on the oath and the term "this Constitution"—depends on whether we agree with Solum or Madison. We might ultimately agree with either or both, and still insist that the oath does not require their view: People with diverse, reasonable views of interpretation are acting in accordance with the oath, and each should acknowledge that fact about reasonable people who disagree with them. (While we are down here, in the footnotes: The idea of "legitimacy" does not, in my view, argue strongly for public meaning originalism. Ratification was a long time ago, and the process was not exactly all-inclusive. But democratic considerations do bear strongly on the choice of a method of interpretation.)

(3) Semantic originalism has a strong claim on our attention. It is one thing to say that "the freedom of speech" includes blasphemy (which is consistent with semantic originalism); it is another thing to say that "the freedom of speech" includes riding horses or playing tennis. But even semantic originalism has to be justified on external grounds; it is not self-justifying, though it does seem to be plausibly "this Constitution." I have noted some complexity in the question of what kind of enrichment is

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necessary to make semantic originalism even meaningful, without turning it into something like (3).

(4) We might choose a theory of interpretation that binds us. In fact, we had better.