THE LIMITED RELEVANCE OF ORIGINALISM IN THE ACTUAL PERFORMANCE OF LEGAL ROLES

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I am truly delighted to have been invited to join this examination of the role of originalism in constitutional interpretation. I must also add that the "invisible hand," however problematic for general economic analysis, seems to be working in this Panel, for I will build on what Frank Easterbrook and Dick Fallon have just said. In particular, I shall argue that the opportunity actually to *be* originalists—even assuming that originalism is a coherent theory of constitutional interpretation, an assumption I will leave unexamined in my remarks[1]—is quite limited for most lawyers, whether they practice in the bar, on the bench, or even in the legal academy. Thus, one of my theses is that there is a surprisingly general consensus—ranging at least from Fallon to Easterbrook and including even Robert Bork—that originalism simply will not do as an *exhaustive*, or even a *privileged*, theory of constitutional interpretation. It follows, therefore, that originalism sometimes legitimately loses out to other theories as to how to properly give meaning to the complex web of understandings we call the United States Constitution.

If (almost) no one is committed to originalism *über alles*, then it is also the case, as Professor Sunstein suggests,[2] that at some suitably abstract level almost everyone is an originalist in at least some limited sense. No one in this conference, after all, has asserted, "Under no circumstances do I care in the least what any-

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1. For well expressed and, I think, convincing critiques, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). I should also note, though, the extremely interesting and influential argument by Steven Knapp & Walter B. Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723 (1982) (arguing that *all* coherent interpretation rests on some notion of an agent's intent); *see also* Steven D. Smith, *Law Without Mind*, 88 MICH. L. REV. 104 (1989) (defending originalism in statutory interpretation on the grounds that it reserves to the political community the power to make decisions).

2. *See* Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311 (1996).

body once thought about something." To be sure, some of us care more than do others, and I am probably more indifferent than are most members of this audience to original understandings. But I scarcely disdain appeals to history to understand what accounts for the placement of a particular clause in the Constitution in the first place. It is also true, as a practical matter, that interpretations that demonstrably stray too far from pragmatically plausible original understandings sometimes pay a real price in support from those members of the public who, naively or not, identify constitutional meaning with original understanding. Perhaps it is worth noting that the argument in what almost certainly is my best known piece of legal writing depends on a reconstruction of Eighteenth Century civic-republican thought, knowledge of which is, I believe, a *sine qua non* for understanding why the Second Amendment[3] is in the Bill of Rights in the first place, and even for interpreting the Amendment as we approach the Twenty-First Century.[4] Thus, I am happy to offer a type of originalist argument, whatever the ultimate weight I would give it.

The flip side, though, of my assertion that "we are all originalists" is that we also are all (or at least most of us) "Ackermanians" as well. What I mean by this intentional provocation is that I believe that anyone analyzing our operating constitutional system must recognize that constitutional change—and even "amendment"—is a far more complicated process than might be suggested by reference simply to constitutional text or original understanding. Now, the reason I do not say that "all" of us are Ackermanian is that I know that our distinguished honoree, Raoul Berger is not; it may be that Gary Lawson is not as well. But I would suggest that almost all the rest of us are Ackermanians, if by Ackermanian one simply means that one accepts the legitimacy of significant constitutional change that has occurred outside the boundaries presumably set by Article V.[5]

How do I justify that proposition? Let me begin with one of Easterbrook's own illustrations in his remarks: James Madison,

3. U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

4. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

5. *See* U.S. CONST. art. V (providing for the amendment of the Constitution upon the proposal of two-thirds of each House of Congress or the proposal of a convention called by two-thirds of the States and the ratification by conventions or the state legislatures in three-fourths of the States).

the icon of the Federalist Society whose silhouette graces many Federalist publications. I agree that Madison is an unusually important and interesting figure, though I suggest that he may deliver some decidedly mixed messages relative to the subject matter of our conference. Take, for example, Madison's speech to the 1791 House of Representatives explaining why the bill before Congress that would charter the Bank of the United States was, for better or worse, unconstitutional. The record of the congressional debate, written in indirect form, states that "[Madison] had entertained this opinion from the date of the Constitution. His impression might, perhaps, be the stronger, because he well recollected that a power to grant charters of incorporation had been proposed in the general convention and rejected."[6] Thus, the man often called "the father of the Constitution" is telling his colleagues, in effect, "I was there. I know what we meant. We can't do this."[7]

However, it was President James Madison himself who some twenty-five years later signed the bill authorizing the establishment of the Second Bank of the United States, the charter for the first Bank having expired, unrenewed, in 1811. Why did Madison sign the legislation, especially because we know that he was thoroughly capable of vetoing bills that he supported as a policy matter, but thought, alas, unconstitutional? This occurred, for example, in 1817, when he vetoed an "internal improvements" bill, even though it might provide "signal advantage to the general prosperity" of the United States, because the bill was beyond the powers assigned to Congress by Article I of the Constitution.[8] Had Madison changed his mind about the merits of his 1791 speech and concluded that he had been wrong and that Hamilton had in fact been correct in defending the constitutional propriety of the Bank? You will find no such admission. Instead, Madison stated that the issue of congressional power

6. PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 10-11 (3d ed. 1992).

7. As every student knows, though, the Senate and the House disagreed with Madison, in part because of the defense of the Bank authored by Alexander Hamilton, and the Bank was chartered. *See* ALEXANDER HAMILTON, OPINION ON THE CONSTITUTIONALITY OF AN ACT TO ESTABLISH A BANK (1791), *reprinted in* 8 THE PAPERS OF ALEXANDER HAMILTON 97 (Harold C. Syrett & Jacob E. Cooke eds., 1965).

8. The veto message is reprinted in GREAT PRESIDENTIAL DECISIONS 84 (Richard B. Morris ed., 1973).

had been settled "by repeated recognitions, under varied circumstances, of the validity of such an institution."[9]

Madison's argument is a version of precedent-oriented doctrinalism. What this means is that decisions that violate the tenets of originalism at time *t* become accepted as part of our constitutional fabric at t_1. I think that this version of doctrinal argument, which Professor Fallon well argues is at the very heart of ordinary legal reasoning, is basically similar to the most general (and thus compelling) version of Bruce Ackerman's argument. I understand him to be saying that it is literally impossible to understand American constitutionalism as it has actually been practiced for the past two hundred years if you say (something like), "Look. There is a set of decisions that are legitimate only because they can be traced back to original understandings. Then there are changes that come through and only through Article V. Otherwise, there is nothing else that a well-trained legal analyst should be willing to recognize as American constitutional law."

That certainly does not seem to describe James Madison's view of what made the bank legitimate by 1816 in a way that it was not in 1791. Instead, I think that Madison is in effect arguing that the course of practice had affected a de facto constitutional amendment. To be sure, Madison did not express Ackerman's kind of delight in this fact, but, ultimately, that is beside the point. The question before us is more strictly positivist: what is the best way of understanding the actualities of American constitutionalism, whether or not one is delighted by what one finds? Consider in this context James Boyd White's frank description of Marshall's opinion in *McCulloch v. Maryland*,[10] which of course upheld the constitutionality of the bill that Madison signed. White has described the opinion as "less an interpretation of the Constitution than an amendment to it, the overruling of which is unimaginable."[11]

As Jonathan Culler has written, "The history of readings is a history of misreadings, though under certain circumstances these

9. BREST & LEVINSON, *supra* note 6, at 18 (quoting BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 233 (1957)).

10. 17 U.S. (4 Wheat.) 316 (1819).

11. JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 263 (1984). I discuss this quotation and its implications in Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 22 (Sanford Levinson ed., 1995).

misreadings can be and may have been accepted as readings."[12] Jack Balkin has persuasively argued that Culler's comment aptly describes what we ordinarily think of as the "Rule of Law," especially insofar as that concept includes paying due regard to decided cases. Indeed, Balkin compares "constitutional decisionmaking" to "the party game where each guest whispers a message into the next person's ear, and finally the first and last incarnations of the message are compared." To the extent that "the Constitution obeys the Rule of Law, it must contain its own possibilities of cumulative misunderstanding . . . ."[13]

Whether we agree with White's specific description of *McCulloch*, I suspect that each of us has a nomination for a case, well integrated into the corpus of American constitutionalism, that is "less an interpretation of the Constitution than an amendment to it." To stick only to Twentieth Century examples, some might pick one of the central cases that, taken together, comprise the so-called "constitutional revolution" of 1937;[14] others might choose *Bolling v. Sharpe*,[15] the companion case to *Brown v. Board of Education*[16] that in effect read the Equal Protection Clause of the Fourteenth Amendment[17] into the Fifth Amendment as a limitation on the federal government. Many, of course, would name *Roe v. Wade*,[18] though there might be considerably more debate on whether it is in fact well integrated into the constitutional fabric. We could, presumably, go on and on giving examples of cases that under one or another plausible originalist argument were wrongly decided, but nonetheless are be followed by the conscientious judge.

As exhibit A for my argument, I offer not Justices O'Connor, Kennedy, and Souter and their argument in behalf of stare decisis in their (in)famous opinion in *Planned Parenthood v. Casey*.[19] That opinion is, of course, highly relevant to my argument, but I suspect that they are not the best examples to bring forth in *this*

12. JONATHAN D. CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM 176 (1982).

13. J. M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 934 (1988) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)).

14. *See, e.g.*, WILLIAM LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995).

15. 347 U.S. 497 (1954).

16. 347 U.S. 483 (1954).

17. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

18. 410 U.S. 113 (1973).

19. 505 U.S. 833 (1992).

venue. I therefore call as my witness Robert Bork. It was he, after all, who both denounced *Bolling* as essentially lawless and, yet, promised the Judiciary Committee that he would not vote to overrule it were he confirmed as a member of the Supreme Court.[20] Similarly, Bork has indicated his belief that "it is too late to overrule . . . those decisions validating certain New Deal and Great Society programs," for that "would be to overturn most of modern government and plunge us into chaos."[21] This prudential argument obviously would be beside the point if he believed that those decisions were legitimate from the beginning; it would also be obviously beside the point if he believed that the conscientious judge owed strict fidelity only to original intent.

I therefore believe that Bork literally is incoherent when he first concedes his agreement with Ackerman that "the Constitution's interpretation has undergone radical shifts in the past that cannot be accounted for by classical or lawyerly reasoning," including "the constitutional revolution worked by the New Deal Court," but then attempts to distance himself from his former Yale colleague by saying that he, unlike Ackerman, refuses to "concede its legitimacy."[22] Perhaps this means that Bork, like Richard Epstein, laments the revolution and regards it as a bad thing, politically speaking. But Bork, quite unlike Epstein, seems to believe that conscientious judges are now bound by many of these "radical shifts" and that voting to overrule them would constitute almost as egregious a display of judicial activism as the original decisions themselves. Surely this is all that a positivist analyst like Bork could mean by "legitimacy," and he has sworn under oath that, however begrudgingly, he finds *Bolling* and the Supreme Court decisions of 1937 legitimate at present even if they were illegitimate at birth. Therefore, Robert Bork is Bruce Ackerman in disguise.

It may be only fair at this point to mention Suzanna Sherry's argument, in her review of Ackerman's *We The People*,[23] that he is more than a little bit Borkian himself insofar as his theory of constitutional moments includes the duty of judges to enforce the

20. For the denunciation, see *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. pt. I, at 262-63 (1987); for the reassurance, see *id.* at 264.

21. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 158 (1990).

22. *Id.* at 215.

23. Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918 (1992) (reviewing 1 BRUCE A. ACKERMAN, WE THE PEOPLE (1991)).

new norms that an aroused people, through one means or another, have placed into the Constitution. These norms must be followed by judges, whether or not they agree with them as a political matter, simply because the People adopted them at some earlier time and, presumably, intended them to be implemented by judges and other officials who have taken oaths to obey "the Constitution." This is why I am willing to assert that almost all of us pay homage to some kind of originalism.

So the central point is that the present Yalie Ackerman and the former Yalie Bork in fact have more in common than either would like to concede. Indeed, I might add one more former Yalie to this list: Justice Clarence Thomas. Although Justice Thomas has written perhaps the most uncompromising originalist opinions in decades,[24] he nonetheless joined in the majority opinion in *Adarand Constructors, Inc. v. Pena*,[25] which requires "strict scrutiny" of congressional statutes that use race as a classification. That opinion literally makes no sense unless one gives full credit to *Bolling* as a reading of the Constitution (and, incidentally, rejects Andrew Kull's telling of the original history of the Fourteenth Amendment).[26] One observes that Justice Thomas took nary a sentence in his uncharacteristically short concurrence in *Adarand*[27] to indicate if he disagrees with Robert Bork as to the historical provenance of *Bolling* or to explain why, if he in fact agrees with Bork, it is nonetheless binding on him now in a way that other precedents of the Court seem not to be. Dare one suggest that Justice Thomas's own political (or moral) preferences are more important to him, at least on this occasion, than fidelity to original understanding?

One more example of what I am calling the Ackermanian consensus appears in a recently published article by Peter McCutchen.[28] The article begins with a very dramatic statement: "In exercising executive, legislative, and judicial power, administrative agencies combine powers that the Constitution separates. . . . In short, the administrative state is unconstitutional."[29] Mc-

24. *See* U.S. Term Limits, Inc. v. Thorton, 115 S. Ct. 1842, 1875 (1995) (Thomas, J., dissenting); United States v. Lopez, 115 S. Ct. 1624, 1642 (1995) (Thomas, J., concurring).

25. 115 S. Ct. 2097 (1995).

26. *See* ANDREW KULL, THE COLOR BLIND CONSTITUTION (1992).

27. *See Adarand*, 115 S. Ct. at 2119 (Thomas, J., concurring).

28. *See* Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1 (1994).

29. *Id.* at 2.

Cutchen immediately goes on to state that the Supreme Court has been unwilling to invalidate the post-New Deal administrative state, largely on "pragmatic" grounds, including the possibility that the Court "might not have the political capital necessary to realize its objective."[30] The naive reader, especially if he is aware that McCutchen is indeed a Federalist, might believe that this analysis will shortly translate into the proposition that we must immediately begin, perhaps with all deliberate speed, to dismantle the constitutionally illegitimate administrative state. After all, I assume that most Federalists easily can write a paragraph castigating the ill-disguised political calculations known as "pragmatism" as a proffered reason for refusing to enforce the Constitution as originally understood. Raoul Berger certainly knows how to write such a paragraph, as does another honored guest of this gathering, former Attorney General Edwin Meese.[31]

But then McCutchen proceeds, "[T]he Court should tolerate structures or practices that are conceded to be unconstitutional when such structures or practices have become institutionalized."[32] I quickly note that this is a very plausible notion. But, once again, I think this is a version of Ackermanian argument. To be sure, many of us might quibble whether Ackerman has gotten it exactly right with his particular theory of non-Article V amendment. But such quibbles are beside the point. Far more important, I think, is that all of these distinguished people—James Madison, Robert Bork, and Peter McCutchen—join with Ackerman in saying that one simply cannot understand American constitutionalism as actually practiced unless one complements originalism and Article V with some theory of non-Article V amendment. Maybe you would respond that Madison, Bork, and McCutchen are talking about "constitutional change" rather than "constitutional amendment." As I have written elsewhere, however, that purported distinction must itself be subjected to close analysis rather than blithely asserted. I believe, and I believe that *you* in fact believe, that our constitutional history manifests more "amendments" than those found in the numbered listing following the 1787 text of the Constitution.

30. *Id.*

31. *See* EDWIN MEESE III, ADDRESS BEFORE THE D.C. CHAPTER OF THE FEDERALIST SOCIETY LAWYERS DIVISION (1986), *reprinted in* INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 25 (Sanford Levinson & Steven Mailloux eds., 1988).

32. McCutchen, *supra* note 28, at 2-3.

Thus, point one of my argument is that originalism is less important than it is sometimes cracked up to be. To be sure, emphasis on the importance of precedent does not genuinely stop the discussion, for, as Professor Fallon emphasizes, part of our constitutional practice is that on occasion precedents can in fact be overruled. It would be nice to have some theory as to what justifies overruling precedents. I must say, though, that I am not familiar with any very good theory of how to decide which precedents are worthy of respect and which are well consigned to the dustbin of history.

Now for my second major point: We have this whole time made what I consider to be one of the cardinal mistakes of the way American academics—and most other people—approach the study of constitutional law. That mistake is to reduce the subject matter of constitutional interpretation to the interpretive practices of judges—in reality to only one group of judges, those on the United States Supreme Court. Many of us are much too often—and I certainly include most devotees of neo-Federalism in this criticism—just like Ronald Dworkin, who writes about a mythic judge named Hercules rather than about the actual practices of the American (or British) judiciary in all of their complexity. It is far easier to ignore that complexity and to obsess about the interpretive practices of a single Justice on the Supreme Court (and therefore ignore the legitimate requirements of "teamwork" and "compromise" to gain five votes to make a majority opinion). This, of course, was one of the reasons the Bork hearings were so riveting, because everyone assumed that he would indeed have a great deal of interpretive freedom were he confirmed. And many of our own arguments revolve around the implicit question, "How would *you* decide the case were you on the Big Court?"

I do not want to deny that that is an interesting question, no less interesting, for example, than asking one of our friends or colleagues what she would do as President of the United States. But, for better or worse, such questions are almost always literally fantastic. The reality, of course, is that there are *very* few seats available on the Supreme Court (and even fewer in the Oval Office). I am certainly never going to occupy any of them, and the odds are overwhelmingly against the prospect of any of you occupying them as well. Even under the most optimistic scenario of

the Federalist Society, no more than nine of you are likely to be on the Supreme Court!

The rest of you might aspire to appointment to an "inferior court," which I quickly point out is a constitutional term.[33] Thus, Frank Easterbrook is not an inferior judge, but he is a member of an inferior court, the Court of Appeals for the Seventh Circuit. And what does it mean to be a member of an inferior court? Well, one of the things that it means is that one is viewed as part of a command structure in which superior courts—that is, in the case of Easterbrook's court, the Supreme Court—give the orders that the lower courts are required, whether with pleasure or sullenly, to enforce. Recall that it was Judge Easterbrook himself—and I use this appellation not so much out of politeness as to focus attention on his specific institutional role—who confessed at this Symposium to being a loyal and faithful servant of non-overruled opinions written by Justice William J. Brennan that are based on interpretive theories that Easterbrook most definitely does not adopt. What is one's reaction to this confession?

The Supreme Court itself could not be clearer in emphasizing that it does not want inferior court members to think for themselves in regard to what the Constitution requires. The Court rejects Andrew Jackson's altogether sensible notion that opinions of the Court "have only such influence as the force of their reasoning may deserve."[34] Indeed, if you want to see command structure thought played out, just read an opinion of the U.S. Supreme Court when an inferior court *does* develop a mind of its own. Thus, after the Fourth Circuit more or less ignored an existing Supreme Court decision and found cruel and unusual a forty-year sentence that had been imposed for possessing with intent to distribute and distributing nine ounces of marijuana,[35]

33. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

34. ANDREW JACKSON, VETO MESSAGE OF JULY 10, 1832, *reprinted in* BREST & LEVINSON, *supra* note 6, at 50.

35. *See* Davis v. Davis, 646 F.2d 123 (4th Cir. 1981) (en banc), *aff'g by an equally divided court* Davis v. Zahradnick, 432 F. Supp. 444 (W.D. Va. 1977). The procedural history is more complex than might be suggested by this citation. *Zahradnick* had first been overruled by a panel of the Court of Appeals, *see* Davis v. Davis, 585 F.2d 1226 (4th Cir. 1978), but then affirmed en banc in Davis v. Davis, 601 F.2d 153 (4th Cir. 1979) (en banc). The Supreme Court then granted certiorari and remanded for reconsideration in light of its decision in Rummel v. Estelle, 445 U.S. 263 (1980). *See* Hutto v. Davis, 445 U.S. 947 (1980). As noted, the Fourth Circuit adhered to its original (en banc) decision, though only by an equally divided vote. The history is set out in Hutto v. Davis, 454 U.S. 370, 372 (1982) (per curiam).

the Supreme Court granted certiorari and did not even bother to write a signed opinion in reversing the Circuit Court for its having "failed to heed our decision in *Rummel* [*v. Estelle*]."[36] It used a per curiam opinion, the most contemptuous sort of opinion it can use to indicate to an inferior court exactly how inferior it is, to say that "the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress."[37] As you might quickly infer, this is not a good thing. "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."[38]

So now we come to a key question: what would it mean to be an originalist—or, indeed, any other kind of "ist," save a doctrinalist, on an inferior court—if your superiors insist on giving you what you consider to be dumb, wrongly decided, nonoriginalist opinions? So long as one adopts Easterbrook's bounded view of his own authority, I think the answer to the question is, not much or, at the very least, far less than might be the case, *arguendo*, for a member of the U.S. Supreme Court.

I should confess, incidentally, that I am one of those relatively few people who in fact are not so appalled by the notion of members of inferior courts thinking for themselves and feeling themselves free to overrule misguided decisions—or at least to challenge misguided decisions of the U.S. Supreme Court by refusing to follow them.[39] But I have discovered in making this argument, whether to my own students or to audiences like this, that most people do latch onto the language of the U.S. Supreme Court and consider my position little short of anarchy. To the extent that is true, then all such critics *must* be rejecting originalism in the name of the quite different value of institutional stability.

We must ask, therefore, whether anybody other than that numerically insignificant group of individuals who in fact make it to the United States Supreme Court really engage in these great passionate debates about what approach to constitutional inter-

36. *Hutto*, 454 U.S. at 372.
37. *Id.* at 374-75.
38. *Id.* at 375.
39. *See* Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843 (1993).

pretation is the one true approach. Consider once more our good fortune in having Frank Easterbrook as a member of this Panel. He was, and remains, one of the most distinguished members of the legal academy; he also belongs to a court that is second only to the Supreme Court of the United States within the judicial structure of the United States.[40] But even he is treated within the standard form ideology as simply a loyal satrap of his masters in Washington. The same is true, though perhaps with a different valence, for former Yale Dean Guido Calabresi, who must now accept marching orders from—and demonstrate due respect for—Antonin Scalia and other Justices whom he had publicly castigated prior to appointment to the Second Circuit.[41] Now, is there anything wrong with my reading of Easterbrook (and Calabresi)? Am I missing something?

I now turn to my final point as to why originalism is, most often, not so much "wrong" as irrelevant. Although it might be fun to imagine yourself joining Easterbrook and others on the federal bench, most of you are going to be lawyers who, on rare occasion, may write briefs and present arguments in court that touch on basic constitutional questions. What, precisely, does that mean? The answer in many ways is quite simple. As lawyers, your duty is to make the best arguments you can for your client, where "best" is defined, for better or worse, in the crassest, most instrumental terms possible: the best argument is the one that is in fact likely to be accepted by your audience, *not* the one that you yourself might select were you a member of the United States Supreme Court. If you accept my proposition—and if you do not, then I suggest you seriously ask if you can comfortably take on the role of a practicing lawyer with real live clients who depend on you for competent representation—then does it make any sense at all to imagine yourself as "an originalist attorney"? Can any of you imagine, for example, telling clients that a condition of your representing them is that you will make only originalist arguments? More to the point, can you imagine any client that would in fact retain you under this condition?

40. My colleague Jordan Steiker points out that there are two legitimate candidates for "second-place" status: federal circuit courts of appeals and state supreme courts. This is surely correct, though I suspect that most legal academics, rightly or not, accord the former a higher status than the latter. In any event, though, it is hard to argue that Easterbrook's court is any *lower* than second-place in the structural hierarchy.

41. *See, e.g.*, Guido Calabresi, *What Clarence Thomas Knows*, N.Y. TIMES, July 28, 1991, § 4, at 15, 15 ("I despise the current Supreme Court and find its aggressive, willful, statist behavior disgusting . . . .").

One of the reasons you really do have to know the alternatives to originalism is that you have to be prepared to speak in all of the possible forms of the language of constitutional law, what my friend Jack Balkin and I refer to as "constitutional grammar."[42] All of you, for example, ought to read Philip Bobbitt's book, *Constitutional Interpretation.*[43] I say that not only because he is a colleague of mine at the University of Texas Law School but because he will teach you the various forms of law talk—he calls them "modalities"—that are admissible in lots of courts in the land, especially over time and before some judges at any time. One of these modalities, to be sure, is "historical" argument, which is functionally similar to originalism. But it is only one of six. Perhaps the two other modalities that are most relevant to this discussion are "doctrine"—the reliance on previously decided cases—and "ethos"—reference to the fundamental notions underlying our constitutional norms.

Unless you manage to be hired by clients who will allow you to ignore a plethora of admissible legal arguments, you will simply be incompetent lawyers, who should be found guilty of malpractice, if you refuse to use every one of these modalities when it would help your client. You have to know how to make a fundamental values argument, even if your stomach turns at the idea and even if, were you named to the Supreme Court, you would rule out any such arguments. But you cannot do that as a lawyer. The point is that you often will be begging judges below to follow decisions of hierarchical superiors that may make you retch, as legal theorists, but whose holdings help out the person who has hired you to use the rhetorical skills that you presumably learned in one or another great American law school. Once again it turns out that you really cannot afford to be a very strong "ist" of any kind, lest you truly incapacitate yourself as a lawyer.

Should you still doubt the truth of what I am saying, let me pose the following question: would the most originalist students among you really want your own law professors to be "hard core originalists" if that meant, for example, that they would simply refuse to train you to make any other than originalist arguments? One can imagine a course that would concentrate exclusively on the opinions and writings of, say, Robert Bork, Antonin Scalia,

42. Jack M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771 (1994).

43. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

and Clarence Thomas, but would any of you wish to take it instead of a course taught by a professor who, by stipulation, praised these individuals as wonderful role models, but who nonetheless also took care to teach the opinions and approaches of, say, William Brennan, David Souter, and Richard Posner? I truly would be stunned if you would really prefer the first course, especially if you observed that persons with broader training were getting better jobs because they were competent at many arguments rather than at only one. Frankly, I have a difficult time imagining any conscientious law teacher even offering the first course.

There may be a few decisionmakers who can be "ists." As already argued, Supreme Court Justices may have that prerogative, whether or not they demonstrate any genuine consistency across time in regard to the particular "ism" of their choice. Perhaps the same is true for members of the United States Senate or House of Representatives, not to mention the most important officials of all in a constitutional republic, citizens who stand in judgment over the constitutional fidelity of their governmental agents. (Law professors, in their sometime mode of judges manqué, can also write articles encouraging the adoption of originalist outcomes.) Otherwise, however, as practicing lawyers, law professors preparing students to be lawyers, or judges, we almost always are playing specific roles in which originalism is only one of several necessary methods of decision making and argument. It is far past time to integrate the role of role into our jurisprudential understandings. Once one does this, the limited relevance of originalism is all too clear.