American University Journal of Gender, Social Policy & the Law

Volume 32 | Issue 1 Article 2

2023

Principle Originalism--The Third Way: A Jurisprudential Response to Dobbs v. Jackson Women's Health Organization

Ryan Fortson

PRINCIPLE ORIGINALISM — THE THIRD WAY: A JURISPRUDENTIAL RESPONSE TO *DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION*

RYAN FORTSON, J.D., PH.D.*

* Associate Professor; Justice Center, University of Alaska Anchorage. The author can be contacted at hfortson@alaska.edu or (907) 786-4886. The author would like to thank his colleagues at the University of Alaska Anchorage Justice Center and the students in his Jurisprudence and Legal Theory courses for allowing him to bounce some of the ideas in this Article off them.

ABSTRACT

All judges attempt to decide cases for reasons other than politics or their own personal opinions. But finding a consistent judicial methodology is fraught with peril. Against what it sees as the hyper-textualism of strict constructionism and the unfettered discretion of living constitutionalism, originalism posits itself as the only viable way to achieve an objectively neutral interpretation of the law. This is certainly the stance taken by the majority opinion in *Dobbs v. Jackson Women's Health Organization*, which claims that the Constitution is silent on abortion and that therefore no corresponding right to abortion exists. But there can be different forms of originalism. This article introduces principle originalism as an equally objective and superior theory of judicial interpretation to the meaning of originalism advanced by the *Dobbs* majority. Drawing from the jurisprudence of Ronald Dworkin, principle originalism remains grounded in the Constitution as construed at the time of the Founding, but it interprets that semantic context at a higher level than meaning originalism and then uses legal precedent as a way to explain and justify the gradual evolution of the law. After exploring alternatives to meaning originalism advanced in two prominent cases interpreting Title VII, this article will delineate how principle originalism functions as a theory of jurisprudence. Applying this methodology to *Obergefell v. Hodges* and the dissent in *Dobbs* demonstrates principle originalism to be a better alternative to meaning originalism than strict constructionism or living constitutionalism.

The public reaction to *Dobbs v. Jackson Women's Health Organization*[1] overturning the constitutionally protected right to abortion in *Roe v. Wade*[2] and upheld in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[3] was, understandably and unsurprisingly, swift and substantial,[4] with several major newspaper editorial boards condemning the decision and its impact on

1. 142 S. Ct. 2228, 2242 (2022) (overturning the constitutionally protected right to abortion in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*).

2. 410 U.S. 113, 154 (1973) (finding a constitutional right to abortion).

3. 505 U.S. 833, 845-46 (1992) (upholding the constitutional right to abortion in *Roe v. Wade* on *stare decisis* grounds).

4. *See, e.g.*, Ellie Silverman et al., *Protests Erupt in D.C., Around Country as* Roe v. Wade *Falls,* WASH. POST (June 24, 2022), https://www.washingtonpost.com/dc-md-va/2022/06/24/supreme-court-abortion-protests-roe/; Sam Levin & Victoria Bekiempis, *"It's Important to Fight": US Cities Erupt in Protest as* Roe v Wade *Falls*, GUARDIAN (June 25, 2022), https://www.theguardian.com/us-news/2022/jun/24/us-cities-protest-roe-v-wade-abortion-rights.

women.[5] Scholars and legal experts wrote numerous opinion articles noting the stripping away of a long-held right of significant importance to many women in the United States.[6] Some commentators decried the decision as "unvarnished radicalism" and an assault on the principles of *stare decisis*.[7] Others saw in the *Dobbs* decision a co-opting of the Supreme Court by the

5. The Editorial Board, *The Ruling Overturning* Roe *Is an Insult to Women and the Judicial System*, N.Y. TIMES (June 24, 2022), https://web.archive.org/web/20220625100254/https://www.nytimes.com/2022/06/24/opinion/dobbs-ruling-roe-v-wade.html [hereinafter N.Y. Times Ed. Bd.]; Editorial Board, *The Supreme Court's Radical Abortion Ruling Begins a Dangerous New Era*, WASH. POST (June 24, 2022), https://www.washingtonpost.com/opinions/2022/06/24/ overturning-roe-dangerous-era/ [hereinafter Wash. Post Ed. Bd.]; The Times Editorial Board, Roe *has been Overturned. Feel Outraged, Feel Betrayed — Then Fight to Get it Back*, L.A. TIMES (June 24, 2022), https://www.latimes.com/opinion/story/2022-06-24/editorial-roe-overturned-supreme-court-outraged [hereinafter L.A. Times Ed. Bd.]; The Editorial Board, *The Impractical End of* Roe v. Wade, CHI. TRIB. (June 26, 2022), [hereinafter Chi.https://www.chicagotribune.com/opinion/editorials/ct-editorial-roe-versus-wade-20220624-76ekyaw24zckxoaj6gai2udgdm-story.html [hereinafter Chi. Trib. Ed. Bd.]; The Editorial Board, Roe *Reversal Won't End National Debate: States Must Allow Access to Abortion*, NEWSDAY (June 24, 2022), https://www.newsday.com/opinion/editorials/roe-v-wade-abortion-rights-womens-movement-ijy7ye2r [hereinafter Newsday Ed. Bd.]; The Editorial Board, *Tossing* Roe *wasn't Justice by the Supreme Court. It was Activism.*, HOUS. CHRON. (June 24, 2022), https://www.houstonchronicle.com/opinion/editorials/article/Supreme-court-trust-17264241.php [hereinafter Hous. Chron. Ed. Bd.]; Editorial Board, *Women Have Lost a Basic Freedom*, MINN. STAR TRIB. (June 24, 2022), https://www.startribune.com/women-have-lost-a-basic-freedom/600185079/ [hereinafter Minn. Star Trib. Ed. Bd.]; The Denver Post Editorial Board, *Colorado's Neil Gorsuch Corrupts the U.S. Supreme Court by Siding with Radical Abortion Ruling*, https://www.denverpost.com/2022/06/24/roe-v-wade-overturned-editorial/ [hereinafter Denv. Post Ed. Bd.]; The Editorial Board, *A Travesty Foretold — For the First Time in Memory, Americans' Inalienable Rights have been Curtailed.*, BOS. Globe Ed. Bd.]; Miami Herald Editorial Board, *In Florida, a Self-Righteous Minority Shows us Supreme Court's Post*-Roe *World*, MIA. HERALD (June 25, 2022), https://www.miamiherald.com/opinion/editorials /article262768863.html [hereinafter Mia. Herald Ed. Bd.].

6. *See, e.g.*, *20 Ways the Supreme Court Just Changed America*, POLITICO MAG. (June 25, 2022), https://www.politico.com/news/magazine/2022/06/25/post-roe-america-roundup-00042377 (collecting commentaries on the impact of the *Dobbs* decision); Amelia Thomson-DeVeaux, Roe v. Wade *Defined an Era. The Supreme Court Just Started a New One*, FIVETHIRTYEIGHT (June 24, 2022), https://fivethirtyeight.com/features/roe-v-wade-defined-an-era-the-supreme-court-just-started-a-new-one/ (summarizing the political history behind the movement to overturn *Roe v. Wade*).

7. Jennifer Rubin, Opinion, *The Supreme Court Eviscerates Abortion Rights and its Own Legitimacy,* WASH. POST (June 24, 2022), https://www.washingtonpost.com/opinions/2022/06/24/supreme-court-abortion-legitimacy-radicalism/.

Christian right[8] or fear for what the decision portends for American democracy.[9] Still other commentators expressed concern for what rights an increasingly political Supreme Court might erode next.[10] While the *Dobbs* decision did not prohibit abortion, rather returned abortion law to the provenance of the states, for those in support of maintaining abortion rights, fears about the future are well-founded.[11] About half the states have banned abortion in anticipation of the *Dobbs* decision, either through existing laws or through implementing trigger laws,[12] and there remains significant legal and political debate over the future of abortion law in the United States.[13] It

---

8. *See, e.g.*, Katherine Stewart, *How the Christian Right Took over the Judiciary and Changed America*, GUARDIAN (June 25, 2022), https://www.theguardian.com/world/2022/jun/25/roe-v-wade-abortion-christian-right-america; Lauren R. Kerby, *The Christian Right's Version of History Paid Off on Abortion and Guns*, WASH. POST (July 18, 2022), https://www.washingtonpost.com/made-by-history/2022/07/18/christian-rights-version-history-paid-off-abortion-guns/.

9. *See, e.g.*, Mary Ziegler, Guest Essay, Roe's *Death Will Change American Democracy*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/opinion/roe-v-wade-dobbs-democracy.html.

10. *See, e.g.*, Aaron Blake, *Clarence Thomas Undercuts Justices' Assurances About Post-*Roe *Rulings* WASH. POST (June 24, 2022), https://www.washingtonpost.com/politics/2022/06/24/thomas-opinion-post-roe/; Isabella B. Cho & Brandon L. Kingdollar, *After* Roe *Dismantled, Harvard Experts Condemn, Defend Landmark Decision*, HARV. CRIMSON (June 25, 2022), https://www.thecrimson.com/article/2022/6/25/dobbs-experts-reax/; Tierney Sneed, *Supreme Court's Decision on Abortion Could Open the Door to Overturn Same-Sex Marriage, Contraception and Other Major Rulings*, CNN (June 24, 2022), https://www.cnn.com/2022/06/24/politics/abortion-ruling-gay-rights-contraceptives/index.html.

11. *See* Amelia Thomson-DeVeaux, *States Aren't Waiting for the Supreme Court to Rule on Abortion*, FIVETHIRTYEIGHT (May 3, 2022), https://fivethirtyeight.com/features/states-arent-waiting-for-the-supreme-court-to-rule-on-abortion/.

12. *Tracking Abortion Bans Across the Country*, N.Y. TIMES https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html (last visited Aug. 14, 2023); Dan Mangan, *Here are the States Set to Ban or Severely Limit Abortion Access now that* Roe v. Wade *is Overturned,* CNBC (June 27, 2022) https://www.cnbc.com/2022/06/24/states-set-to-ban-abortion-after-supreme-court-overturns-roe-v-wade.html; *After* Roe *Fell: Abortion Laws by State*, CTR. REPRODUCTIVE RTS., https://reproductiverights.org/after-roe-fell-abortion-laws-by-state/ (last visited July 25, 2022).

13. *See, e.g.*, Rachel Roubein & Brittany Shammas, *A Triumphant Antiabortion Movement Begins to Deal with its Divisions*, WASH. POST (July 24, 2022) https://www.washingtonpost.com/politics/2022/07/24/antiabortion-movement-divisions/; *see also* Mariana Alfaro et al., *Pence Calls for National Abortion Ban as Trump, GOP Celebrate End of* Roe, WASH. POST (June 24, 2022), https://www.washingtonpost.com/politics/2022/06/24/abortion-supreme-court-trump-pence-republicans-roe/.

is undeniable that this decision will have a major impact on the lives of those capable of becoming pregnant.[14] Amid this turmoil, polls show widespread disagreement with the decision in *Dobbs* and public preference for maintaining the right to abortion.[15] Approval of the Supreme Court has correspondingly declined.[16]

However justified these reactions may be, they fall into the trap set by the majority in *Dobbs*. At their essence, the majority opinion and concurrences (with the arguable exception of Roberts' concurrence) all assert that the legality of abortion cannot be derived from the Constitution but rather must be secured through the political process.[17] The majority and concurring

---

14. *See* Melody Schreiber, *"A Matter of Life and Death": Maternal Mortality Rate will Rise Without* Roe*, Experts Warn*, GUARDIAN (June 27, 2022), https://www.theguardian.com/us-news/2022/jun/27/roe-v-wade-overturned-maternal-mortality-rate-will-rise; Jessica Bruder, *The Future of Abortion in a Post-*Roe *America*, ATLANTIC (Apr. 4, 2022), https://www.theatlantic.com/magazine/archive/2022/05/roe-v-wade-overturn-abortion-rights/629366/; Taraneh Azar, *Need Help Getting an Abortion? Social Media Flooded with Resources After* Roe *Reversal*, USA TODAY (June 28, 2022), https://www.yahoo.com/lifestyle/help-getting-abortion-social-media-200908720.html?guccounter=1&guce_referrer=aHR0cHM6Ly9lbi53aWtpcGVkaWEub3JnLw&guce_referrer_sig=AQAAANLyVl4aYtCYxZyu9Vd8OLjv6vIsgC33VWRxNTbPBPwXRrfDdnxtNrDYGgn37fvueaXwhlsVzJjdnlyYlGksplIFuZOoDoj9nH89Hl_0QDcKND6iQDJNJVto4OoZvQsdH9XBCtXlKhkW6vdnMkp72_cZa6cMpN-dFzNd0M9P7qZ7; Jennifer Rubin, Opinion, *It's No Wonder Right-Wing Justices Didn't Weigh* Dobbs*'s Awful Impact on Women*, WASH. POST (July 25, 2022), https://www.washingtonpost.com/opinions/2022/07/25/turnaway-study-abortion-bans-impact-women/.

15. Charles Franklin, *New Marquette Law School Poll National Survey Finds Approval of the Supreme Court at New Lows, With Strong Partisan Differences of Abortion and Gun Rights,* MARQUETTE UNIV. L. SCH., https://law.marquette.edu/poll/2022/07/20/mlspsc09-court-press-release/ (last accessed July 25, 2022) [hereinafter *Marquette Poll*] (showing 64% of American in July 2022 opposed overturning *Roe* (consistent with 68% who opposed overturning *Roe* in September 2019)); Ariel Edwards-Levy, *Majority of Americans Disapprove of SCOTUS* Roe v. Wade *Reversal, Poll Shows*, CNN (June 28, 2022), https://edition.cnn.com/2022/06/27/politics/americans-disapprove-supreme-court-abortion-poll/index.html (citing a CBS news/YouGov poll showing that 59% of US adults disapprove with the decision to overturn *Roe v. Wade*).

16. *See Marquette Poll*, *supra* note 15 (showing a decline nationally of the U.S. Supreme Court in approval rating from 66% approval in September 2020 to 38% approval in July 2022, with a strong correlation to whether the respondent favored or opposed overturning *Roe*).

17. The opinions in *Dobbs v. Jackson Women's Health Organization* will be discussed in more detail later in this article. For summaries of the majority, concurring, and dissenting opinions, *see* Amy Howe, Opinion, *Supreme Court Overturns Constitutional Right to Abortion*, SCOTUSBLOG (June 24, 2022),

opinions claim their decisions remove politics from the judicial decision-making process by removing the courts from the resolution of a highly contested political issue.[18] This creates a problem for those that would oppose *Dobbs*. To argue that *Dobbs* was incorrectly decided by the Court because it stripped women of a fundamental right, or to argue that the majority acted politically, is itself a political argument that fails to rebut the majority opinion for several reasons.

For one, if the Supreme Court has become a realm of political decisions, the unavoidable conclusion is that one side — namely conservative anti-abortion politicians and/or justices — has prevailed politically.[19] One could argue about unfair Supreme Court appointments, but short of arguing that the decisions of the Court therefore have no legal weight, the decisions of the Supreme Court are the legally binding law of the land. And, if politicized judicial opinions are the outcome of an appointment process for justices that has become overly political,[20] that politicization is an unfortunate result of the current era in which we find ourselves.[21] The remedy would be to appoint

---

https://www.scotusblog.com/2022/06/supreme-court-overturns-constitutional-right-to-abortion/.

18. *Dobbs*, 142 S. Ct. at 2284 ("We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. Roe and Casey arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives."); *id.* at 2305 (Kavanaugh, J., concurring) ("On the question of abortion, the Constitution is therefore neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address.").

19. *See* Karen Hobert Flynn, *From* Roe *to* Dobbs*: How The Supreme Court Became A Political Weapon*, COMMON CAUSE (June 24, 2022), https://www.commoncause.org/democracy-wire/from-roe-to-dobbs-how-the-supreme-court-became-a-political-weapon/.

20. *See* Ilya Shapiro, *The Politics of Supreme Court Confirmations and Recommendations for Reform*, CATO INST. (July 20, 2021) https://www.cato.org/testimony/perspectives-supreme-court-practitioners-views-confirmation-process.

21. Among the reactions to the *Dobbs* decision in the U.S. Senate have been claims that Court nominees lied during their confirmation process and calls for expansion of the number of members of the Supreme Court. *See* Carl Hulse, *Kavanagh Gave Private Assurances. Collins Says He 'Misled' Her.*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/us/roe-kavanaugh-collins-notes.html; Iris Samuels, *Murkowski Reflects on Supreme Court Votes, with Abortion a Key Issue in Alaska's U.S. Senate Race*, ANCHORAGE DAILY NEWS (July 9, 2022),

different justices through the political process, a prospect that likely would take many years to accomplish. Even then, one could not escape the rabbit hole of judicial decisions being a battle of political wills.[22]

This issue points to a more fundamental concern over the line of critique outlined above: the Justices in *Dobbs*, and indeed in every other decision, are not overtly deciding cases on the basis of policy[23] or politics.[24] Rather, the justices are trying — at least with respect to how their opinions are framed and argued — to decide cases like *Dobbs* purely on the law itself.[25] In other

---

https://www.adn.com/politics/2022/07/08/murkowski-reflects-on-supreme-court-votes-with-abortion-a-key-issue-in-alaskas-us-senate-race/; Ivana Saric, *Warren Calls for Supreme Court Expansion After* Roe *Overturned*, AXIOS (June 26, 2022), https://www.axios.com/2022/06/26/warren-supreme-court-abortion.

22. Billy Corriher, *Partisan Judicial Elections and the Distorting Influence of Campaign Cash*, CTR. AM. PROGRESS (Oct. 25, 2012), https://www.americanprogress.org/article/partisan-judicial-elections-and-the-distorting-influence-of-campaign-cash/ ("When justices owe their offices to political parties and their fundraising machines, . . . the judges form liberal and conservative factions, which often lead to very clear ideological divides on these courts.").

23. *Dobbs*, 142 S. Ct. at 2259 ("Both sides make important policy arguments, but supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the States."); *id.* at 2304 (Kavanaugh, J., concurring) ("The issue before this Court, however, is not the policy or morality of abortion. The issue before this Court is what the Constitution says about abortion. The Constitution does not take sides on the issue of abortion.").

24. *Id.* at 2243 (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in part and dissenting in part)) ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. 'The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.' That is what the Constitution and the rule of law demand."); *id.* at 2305 (Kavanaugh, J., concurring) ("On the question of abortion, the Constitution is therefore neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address.").

25. *Id.* at 2244-5 (internal citations omitted) ("We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion….Constitutional analysis must begin with "the language of the instrument," which offers a "fixed standard" for ascertaining what our founding document means."); *id.* at 2310 (Kavanaugh, J., concurring) ("In my judgment, on the issue of abortion, the Constitution is neither pro-life nor pro-choice. The Constitution is neutral, and this Court likewise must be scrupulously neutral. The Court today properly heeds the constitutional principle of judicial neutrality and returns the issue of abortion to the people and their elected representatives in the democratic process.").

words, consistent with originalist principles,[26] the *Dobbs* majority and concurrences seek to determine the outcome of the case within the legal framework and history of abortion, i.e., solely on criteria internal to the law.[27] The problem posed for critics of *Dobbs* is that they cannot assert a critique of the decision on the basis of criteria external to the law — policy implications, moral objections, public sentiment, etc. — and expect to engage with the "internal" reasoning of the justices in the majority. Using criteria to assess the *Dobbs* decision that draws on outcomes or moral considerations external to internal judicial reasoning of the opinions creates legally unrebuttable positions that only reinforce the majority's position that abortion and similar issues can only be resolved politically.

What is needed, then, is a jurisprudential response to the majority in *Dobbs*. Namely, a response that relies upon a coherent form of judicial reasoning, one internal to the law. While it may be unrealistic to anticipate swaying the opinions of the majority in *Dobbs*, engaging in a meaningful debate with them on their terms remains crucial because a jurisprudential response prevents being summarily disregarded as an advocate with purely external or political motives. To borrow Justice Roberts's famous phrase, if the job of a justice is "to call balls and strikes, and not to pitch or bat,"[28] then a legal theorist must aspire to be a better umpire and not a home run hitter. Only by providing a more coherent and convincing theory of judicial interpretation can one assert a meaningful response to the majority in *Dobbs*.

This article attempts to craft such a response by advancing the concept of "principle originalism."[29] This article will start with competing claims of fidelity to originalism and to Justice Antonin Scalia's jurisprudential legacy in the majority and dissenting opinions in *Bostock v. Clayton County*.[30] An examination of the history and tenets of originalism will be presented next, not just as a way of resolving this dispute but also by way of introducing

---

26. *See infra* Section I.

27. *Dobbs*, 142 S. Ct. at 2246 (internal citations and punctuation omitted) ("In deciding whether a right falls into [a select list of fundamental rights that are not mentioned anywhere in the Constitution], the Court has long asked whether the right is deeply rooted in [our] history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty. And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue.").

28. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55-56 (2005), https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process (opening statement of John G. Roberts, Jr.). This quote follows a statement that judges "are not politicians."

29. *See infra* Section II.A.

30. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

principle originalism as an alternative — a third way — of approaching an internal perspective on law. Principle originalism, which is primarily drawn from the jurisprudence of Ronald Dworkin, relies upon deriving underlying legal principles from the evolution of legal doctrines through application in the common law. After articulating principle originalism as a theory of judicial interpretation, this Article will show it to have stronger jurisprudential foundations than more common conceptions of originalism by comparing the majority and concurring opinions in *Dobbs* to Justice Breyer's dissent along three dimensions: (1) allowing the law to evolve in a rational but constrained manner over time;[31] (2) respecting precedent and *stare decisis* for reasons beyond just stability of the law;[32] and (3) avoiding the fallacy that past legal understanding is more easily determined than the present.[33]

I. "WE ARE ALL ORIGINALISTS"

A. The Justices in Bostock v. Clayton County Fight Over Scalia's Legacy

In her confirmation hearings, Justice Elena Kagan, as part of a discussion of interpreting the Constitution, commented, "we are all originalists."[34] Though Justice Kagan was open to the idea of the Framers setting forth "broad principles,"[35] her willingness to accept the label of an "originalist" highlights the widespread use and significance of the term. Originalism, which at its heart rests upon the notion that all legal interpretation must derive the meaning of a law from the "origins" of that law, has the asserted appeal of deducing legal meaning independent of the personal biases and beliefs of individual judges.[36] Framed this way, it is easy to see why originalism would have broad resonance as a method of judicial interpretation. Asserting, alternatively, that judicial interpretation should incorporate judicial discretion as a core tenet, as might be present in an invocation of a "living constitution," seems to open legal interpretation to

31. *Infra* Section III.B.

32. *Infra* Section III.C.

33. *Infra* Section III.A.

34. *Confirmation Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States, Hearing Before the Sen. Comm. on the Judiciary*, 111th Cong. (2010), https://www.govinfo.gov/content/pkg/CHRG-111shrg67622/html/CHRG-111shrg67622.htm (testimony of Elena Kagan).

35. *Id.*

36. *See generally* S.L. Whitesell, *The Church of Originalism*, 16 U. PA. J. CONST. L. 1531 (2014) (providing an overview of the historical development of originalism throughout its many iterations).

political vagaries that most would want to avoid for judges.[37] Indeed, the question of whether all contemporary jurisprudence can be reduced to some form of originalism is one of scholarly debate.[38]

The pull of originalism as the fundamental method of judicial interpretation can be further seen in *Bostock v. Clayton County*, the case holding that Title VII of the Civil Rights Act prohibited employment discrimination on the basis of sexual orientation.[39] The decision turns on whether the language in Title VII, making it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual . . . because of such individual's . . . sex,"[40] applied to three individuals who asserted they were discriminated against by their employer on the basis of being either homosexual or transgender.[41] Both the majority opinion, written by Justice Gorsuch, and the dissenting opinion of Justice Alito, claim adherence to a "textualist school of statutory interpretation championed by . . . Justice Scalia."[42] But, each opinion takes a different approach to applying Title VII to the case at hand.

Justice Gorsuch's majority opinion emphasizes the need to avoid "extratextual sources and our own imaginations" in "interpret[ing] a statute in accord with the ordinary public meaning of its terms at the time of enactment."[43] Using "but-for" logic, Gorsuch interprets the language of Title

---

37. *See, e.g.*, William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1976) ("Once we have abandoned the idea that the authority of the courts to declare laws unconstitutional is somehow tied to the language of the Constitution that the people adopted, a judiciary exercising the power of judicial review appears in a quite different light. Judges then are no longer the keepers of the covenant; instead, they are a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country.").

38. *See, e.g.*, Lawrence B. Solum, "We Are All Originalists Now" in ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE (2011) (advocating in favor of originalism in a published debate between an originalist and a living constitutionalist); *contra* James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785 (2013) (advocating for a moral reading of the constitution akin to living constitutionalism).

39. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

40. *Id.* at 1738 (citing 42 U.S.C. § 2000e-2(a)(1)).

41. *Id.* at 1738.

42. *Id.* at 1755 (Alito, J., concurring) (characterizing the majority opinion); *see also id.* at 1749 (Gorsuch, J.) (citing ANTONIN SCALIA & BRIAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 101 (2012). in support of the proposition that "when the meaning of the statute's terms is plain, our job is at an end").

43. *Id.* at 1738 (majority opinion). Justice Gorsuch earlier in the opinion similarly

VII to mean an employer violated the law if the employee's sex was a factor — a but-for cause in an adverse employment action.[44] Gorsuch then uses an analogy to demonstrate why discrimination based on sexual orientation falls under the meaning of "sex" discrimination prohibited by Title VII. Gorsuch asks readers to imagine:

> an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge.[45]

Gorsuch applies similar logic to the firing of a transgender employee who identified as male at birth but who later identified as female.[46] In both instances, the sex of the employee was the determining factor in the firing, which is precisely what Title VII prohibits.[47] Later in the opinion, Gorsuch invokes Scalia to counter an argument that Title VII should be interpreted in light of legislative history.[48] While legislative history can be informative, "'it is ultimately the provisions of' those legislative commands 'rather than the principal concerns of our legislators by which we are governed.'"[49] Gorsuch, therefore, had no problem if Title VII produces "unexpected applications."[50]

In Alito's opinion, such an interpretation is anathema to Scalia's version of textualism. Exhorting the reader not to be "fooled" by the majority's

---

wrote: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Id.* at 1737.

44. *Id.* at 1739.

45. *Id.* at 1741.

46. *Id.*

47. *See id.* at 1741-42.

48. *Id.* at 1747.

49. *Id.* at 1749, 1774 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 US. 75, 79 (1998) (holding same-sex harassment claims are covered by Title VII even if that "was assuredly not the principal evil Congress was concerned with when it enacted Title VII.") (further citing ANTONIN SCALIA & BRIAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 101 (2012)) ("noting that unexpected applications of broad language reflect only Congress's 'presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions.'").

50. *Id.* at 1753.

assertion of textualism, Alito decries "the theory that courts should 'update' old statutes so that they better reflect the current values of society," which he accuses the majority of undertaking and calls for them to "own up to what [they are] doing."[51] Alito asserts the Court should decide the case in relation to what Congress did in 1964 when Title VII was enacted.[52] After citing a series of dictionary definitions from around 1964 of the term "sex" as referring to biological sex,[53] Alito argues Congress could not possibly have meant for the term to apply to sexual orientation.[54] For Alito, this is the heart of textualism, which he explicitly connects to Scalia, who maintains that "[t]he words of a law, he insisted, 'mean[ing] *what they conveyed to reasonable people*'" at the time a law was created.[55] Judges should look to common linguistic understanding of the law to determine meaning and therefore application. Alito asserts textualism "properly understood . . . calls for an examination of the social context in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment."[56] This approach of determining semantic context is fundamentally different from the "but-for" logic exercise engaged in by Gorsuch.[57]

---

51. *Id.* at 1755-56 (Alito, J., dissenting).

52. *Id.* at 1756.

53. *Id.* at 1756.

54. *Id.* at 1757, 1776-77.

55. *Id.* at 1766 (quoting ANTONIN SCALIA & BRIAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012)).

56. *Id.* at 1767 (Alito, J., dissenting). Alito further elaborates:

> For this reason, it is imperative to consider how Americans in 1964 would have understood Title VII's prohibition of discrimination because of sex. To get a picture of this, we may imagine this scene. Suppose that, while Title VII was under consideration in Congress, a group of average Americans decided to read the text of the bill with the aim of writing or calling their representatives in Congress and conveying their approval or disapproval. What would these ordinary citizens have taken "discrimination because of sex" to mean? Would they have thought that this language prohibited discrimination because of sexual orientation or gender identity?

57. Alito spends much of the next several pages of his dissent detailing ways in which homosexuals and homosexual conduct was not legally or socially accepted in the 1960s and consequently could not reasonably have been contemplated to be covered under Title VII at the time of its passage, let alone transgender status. *Id.* at 1767-71 (Alito, J., dissenting) (detailing ways in which homosexuals and homosexual conduct were not legally or socially accepted in the 1960s and consequently could not reasonably have been contemplated to be covered under Title VII, let alone transgender status).

B. Varieties of Originalism and Application to Bostock

So, who is correct? Who is the heir to Scalia's textualism? The confusion comes from the use of the term "textualism" itself. The word suggests a strict adherence to the text in question, without appeal to sources from outside the text. Scalia himself described his philosophy of interpretation as textualism.[58] Yet, a more careful reading of Scalia's writings on jurisprudence reveals that his version of textualism is not the narrow version suggested by the term.[59]

The distinction to draw here is first between strict constructionism and originalism, and then between intent originalism and meaning originalism.[60] Strict constructionism is defined as "[t]he doctrinal view of judicial construction holding that judges should interpret a document or statute . . . according to its literal terms, without looking to other sources to ascertain the meaning."[61] This definition has the appeal of limiting judicial interpretation solely to the text of the law, thus creating a purportedly pure and very narrow interpretation of the law that prevents judges from making law. It is, however, also a bit naïve in function. If the words in a statute were clear, there would be no need for litigation over their meaning.

---

58. ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997).

59. *Id.* at 23, 24 (implying that Scalia's version of textualism does not rely strictly on the text itself) ("A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.") ("The phrase 'uses a gun' fairly connoted the use of a gun for what guns are normally used for, that is, as a weapon.").

60. Brief summaries of these theories of jurisprudence will be provided here. For further discussion, particularly in relation to Scalia, *see* Ryan Fortson, *Was Justice Antonin Scalia Hercules? A Re-Examination of Ronald Dworkin's Relationship to Originalism*, 13 WASH. U. JURISPRUDENCE REV. 253, 282-85 (2021).

61. *Strict Interpretation*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "strict interpretation" as "[a]n interpretation according to the narrowest, most literal meaning of the words without regard for context and other permissible meanings," though also providing an alternate definition as "[a]n interpretation according to what the interpreter narrowly believes to have been the specific intentions or understandings of the text's authors or ratifiers, and no more"). Brian Garner, the author of Black's Law Dictionary, was a frequent collaborator with Scalia, so the definitions he provides should carry extra weight. *See also Strict Construction*, LAW.COM, https://dictionary.law.com/ (last visited Apr. 1, 2021) (defining "strict construction" as "interpreting the Constitution based on a literal and narrow definition of the language without reference to the differences in conditions when the Constitution was written and modern conditions, inventions and societal changes"); *Strict Construction*, ORAN'S DICTIONARY OF THE LAW (4th ed. 2008) ("Strict construction of a law means taking it literally or "what it says, it means" so that the law should be applied to the narrowest possible set of situations.").

Moreover, because there can be no appeal outside of the text itself and the reasoning abilities needed to interpret it, strict constructionism provides no means to resolve ambiguous laws or conflicting interpretations.

Originalism attaches meaning to a statute or constitution based on interpretation at the time of passage.[62] The term "originalism" was popularized in 1980 as "the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters."[63] Originalism can be divided into an earlier form of intent originalism and its more contemporary version as meaning originalism.[64] Intent originalism, as the name would suggest, tries to determine the individual intent of the drafters of a law by applying the "goals, objectives, or purposes of those who wrote or ratified the text."[65] The problem with this approach is that it incorrectly assumes a unified "intent" on the part of the drafters of a law. Laws are passed by whole legislative bodies (and then signed into law by the executive), and statements by individual legislators should not be assumed to express the will of all.[66] Nor is it possible to extrapolate from the intent of drafters to more contemporary issues involving different technologies or social advances.[67]

---

62. *See Originalism*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The doctrine that words of a legal instrument are to be given the meanings they had when they were adopted.").

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

64. Without using this exact terminology, Black's Law Dictionary effectively provides both meanings, defining "originalism" alternately as (1) "[t]he doctrine that words of a legal instrument are to be given the meanings they had when they were adopted; specif., the canon that a legal text should be interpreted through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect," which is termed "doctrine or original public meaning" or "original-meaning doctrine" or "original public meaning"; or as (2) "[t]he doctrine that a legal instrument should be interpreted to effectuate the intent of those who prepared it or made it legally binding," termed as "intentionalism." *Originalism*, BLACK'S LAW DICTIONARY (11th ed. 2019).

65. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001). The term "original intent" appears to have been coined by Attorney General Edwin Meese at a speech to the American Bar Association in 1985. *See also* Edwin Meese, *Speech Before the American Bar Association*, U.S. DEP'T JUST. (July 9, 1985), https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf.

66. *See generally* Brest, *supra* note 63, at 1415.

67. Brest, *supra* note 63, at 221 ("The act of translation required . . . involves the counterfactual and imaginary act of projecting the adopters' concepts and attitudes into

In contrast, meaning originalism takes a different approach, addressing certain perceived shortcomings of intent originalism. Meaning originalism broadens its scope beyond the sole focus on the drafters' intent and encompasses the wider societal understanding of the language, terms, and concepts within the text — the "original meaning" as it were.[68] This is an important shift from the subjective intent of the legislators to a more objective semantic meaning.[69] While still emphasizing the text of a law, "meaning originalism" also incorporates into its interpretive framework diverse sources such as: dictionary definitions contemporary to the drafting of the law, non-legal linguistic conventions, legislative history, and the context in which the public would have understood the law.[70]

Scalia clearly falls into the "meaning originalism" camp. He explicitly rejects strict constructionism, stating in no uncertain terms: "I am not a strict constructionist, and no one should be — though better that, I suppose, than a nontextualist.[71] Scalia differentiates between textualism and strict constructionism with a case where increased sentencing penalties could be levied under federal law where a defendant "used a firearm" in a drug trafficking crime."[72] The defendant "used" an unloaded firearm as a form of currency in exchange for cocaine.[73] To a strict constructionist, that situation might merit an increased sentence under a purely linguistic reading of the statute. And that, indeed, was the majority decision.[74] But, Scalia ridicules this decision as departing from how the language in the statute would have

---

a future they probably could not have envisioned. When the interpreter engages in this sort of projection, she is in a fantasy world more of her own than of the adopters' making.").

68. Barnett, *supra* note 65, at 105.

69. *See* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 4 (2011) ("Constitutional meaning is fixed by the understandings of the words and phrases and the grammar and syntax that characterized the linguistic practices of the public and not by the intentions of the framers."); Emily C. Cumberland, *Originalism, In a Nutshell*, 11 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 52, 52 (2010) ("The shift from original intent to original meaning was basically a shift from a focus on the framers' subjective intentions to a focus on the text's objective meaning during the framers' time.").

70. Barnett, *supra* note 65, at 106-08.

71. SCALIA, *Common-Law Courts in a Civil-Law System, in* A MATTER OF INTERPRETATION, *supra* note 58, at 23. Scalia continues: "A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." *Id.*

72. *Id.* at 23-24 (discussing Smith v. United States, 508 U.S. 223 (1993)).

73. *Id.*

74. *See* Smith v. United States, 508 U.S. 223, 228-29 (1993).

been commonly understood to apply — "the good textualist is not a literalist."[75] Or as Scalia writes in his dissent, "[t]he Court does not appear to grasp the distinction between how a word *can* be used and how it *ordinarily* is used."[76]

Scalia clearly adopts meaning originalism over intent originalism. Just prior to his ascendancy to the Supreme Court, Scalia called for a transition from original intent to original meaning.[77] Instead of the "unpromulgated intentions of those who enact them" — the approach taken by intent originalism — Scalia asserted laws should be interpreted "on the basis of what is the most probable meaning of the *words* of the enactment, in the context of the whole body of public law with which they must be reconciled"[78] — an approach more consistent with meaning originalism and not with the individual motivations of intent originalism.[79] For Scalia, the primary benefit of meaning originalism is that "the provisions of the Constitution have a fixed meaning, which does not change: they mean today what they meant when they were adopted, nothing more and nothing less."[80] To Scalia, the Constitution is "enduring" because "[i]t means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted."[81] Meaning originalism allows the judge to determine the objective meaning of a law or constitutional provision without appealing to contemporary norms or the judge's personal whims. Indeed, the desire to avoid these pitfalls serves as the basis for Scalia's critique of

75. SCALIA, *Common-Law Courts in a Civil-Law System*, *in* A MATTER OF INTERPRETATION, *supra* note 58, at 24.

76. *Smith*, 508 U.S. at 242 (emphasis in original). Scalia here further explains: "In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning. To use an instrumentality ordinarily means to use it for its intended purpose." *Id. See also* SCALIA, *Common-Law Courts in a Civil-Law System*, *in* A MATTER OF INTERPRETATION, *supra* note 58, at 24 ("As I put the point in my dissent, when you ask someone, "Do you use a cane?" you are not inquiring whether he has hung his grandfather's antique cane as a decoration in the hallway.").

77. ANTONIN SCALIA, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 184 (Christopher J. Scalia & Edward Whelan eds., 2017). The book is a collection of Scalia's speeches on a variety of topics. This speech, given to the Attorney General's Conference on Economic Liberties, turned out to be a *de facto* audition for the U.S. Supreme Court.

78. *Id.* at 182.

79. For further discussion, *See* Fortson, *supra* note 60, at 288.

80. SCALIA, SCALIA SPEAKS, *supra* note 77, at 188.

81. Antonin Scalia, *God's Justice and Ours*, 156 LAW & JUST. CHRISTIAN L. REV. 3, 3 (2006).

what he (and others) calls living constitutionalism,[82] which molds interpretation of the Constitution (and presumably statutes as well) to evolving moral standards in society.[83] Scalia sees this approach as being without a guiding principle to determine when an interpretation fits these evolving standards.[84] If judges are expected to make decisions on the basis of what the Constitution "ought" to be, then this would logically result in judges being chosen not for their impartiality but rather according to politics.[85] Hence, Scalia's need for meaning originalism — "the originalist at least knows what he is looking for: the original meaning of the text."[86]

There can be no question, with respect to the competing opinions in *Bostock v. Clayton County*, that Alito provides an application of originalism more faithful to Scalia than does Gorsuch. Alito looks to the semantic understanding of "sex" at the time of the adoption of the Civil Rights Act to argue the drafters of the act would not have wanted the term to be applied to sexual orientation and that therefore it *should not* be applied as such today.[87]

---

82. Black's Law Dictionary defines "living constitutionalism" as "[t]he doctrine that the Constitution should be interpreted and applied in accordance with changing circumstances and, in particular, with changes in social values." *Living Constitutionalism*, BLACK'S LAW DICTIONARY (11th ed. 2019). The term "living constitutionalism" has a long history and a variety of different meanings. For an overview, *see* Bennett & Solum, *supra* note 69, at 64-67; *see also* Lawrence Solum, *Legal Theory Lexicon: Living Constitutionalism*, LEGAL THEORY BLOG, *http://lsolum.typepad.com/legaltheory/2017/05/legal-theory-lexicon-living-constitutionalism.html* (last visited June 27, 2023). Jack Balkin, for one, describes living constitutionalism as "less a theory of interpretation-as-ascertainment than a theory about interpretation-as-construction" and as "a descriptive and normative theory of the processes of constitutional construction." Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW U. L. REV. 549, 559-60, 566 (2009).

83. ANTONIN SCALIA, *Common-Law Courts in* A MATTER OF INTERPRETATION, *supra* note 58, at 45-47.

84. *Id.* at 44-45 ("Perhaps the most glaring defect of Living Constitutionalism, next to its incompatibility with the whole antievolutionary purpose of a constitution, is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution."); *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-63 (1989) ("I also think that the central practical defect of nonoriginalism is fundamental and irreparable: the impossibility of achieving any consensus on what precisely is to replace original meaning, once that is abandoned.").

85. SCALIA, *Common-Law Courts in a Civil-Law System*, *in* A MATTER OF INTERPRETATION, *supra* note 58, at 46-47.

86. *Id.* at 45.

87. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1767 (2020) (Alito, J., dissenting) (emphasis in original). In responding to the questions regarding the common public understanding of the term "sex" in Title VII at the time of its passage, Alito stated:

It is hard to imagine a clearer example of meaning originalism. Gorsuch's majority opinion, with its pure linguistic "but-for" analysis, adheres more to strict constructionism.[88] This does not suggest that the majority in *Bostock* is legally infirm, only that it is not textualism as Scalia intended the term.

C. Meaning Originalism and Dobbs

To some extent, the debate between Alito and Gorsuch is quibbling over bona fides. The larger importance of the dispute arises from use in other cases, such as *Dobbs v. Jackson Women's Health Organization*, for which Alito wrote the majority opinion.[89] It is difficult to dispute that the majority opinion in *Dobbs* relied on meaning originalism as its method of judicial interpretation. The argument of the majority turns on whether the right to an abortion "is deeply rooted in our history and traditions and whether it is essential to our Nation's scheme of ordered liberty."[90] Though it may seem like this analysis broadens the scope of the opinion beyond the semantic meaning at the time of adoption, the interpretive approach remains fundamentally grounded in historical meaning.[91] The concept of "abortion" is not explicitly mentioned in the Constitution, and there is no "founding" document to which the standard methodology of meaning originalism can be applied.[92] Functionally, an appeal to history, tradition, and ordered liberty serves the same purpose as a "founding document" subject that can be interpreted using meaning originalism.[93] Absent a specific date of enactment of a law, broader appeal must be made to the history of public understanding of the existence or not of the right in question. This is how meaning originalism maintains its core motivation to find a fixed and objective

---

> The answer could not be clearer. In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity. The *ordinary meaning* of discrimination because of "sex" was discrimination because of a person's biological sex, not sexual orientation, or gender identity. The possibility that discrimination on either of these grounds might fit within some exotic understanding of sex discrimination would not have crossed their minds. *Id.*

88. *Id.* at 1739, 1742, 1744.

89. *Dobbs,* 142 S. Ct. at 2240.

90. *Id.* at 2246 (internal punctuation and citations omitted).

91. *Id.* at 2249-53.

92. *Id.* at 2244-45.

93. *See id.* at 2247 ("Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the "liberty" protected by the Due Process Clause because the term "liberty" alone provides little guidance.").

historical foundation for legal interpretation.[94]

The majority opinion in *Dobbs* clearly relies on an historical analysis of the right to abortion. It starts by reaching as far back as writings and cases in 13th century England to make an argument about common law prohibitions against abortion.[95] More attention is paid to statutes from colonial and early America and legal treatises leading up to the ratification of the Fourteenth Amendment in 1868.[96] Based on this history, the majority reached "[t]he inescapable conclusion . . . that a right to abortion is not deeply rooted in the Nation's history and traditions" and, moreover, that "an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973."[97] The majority further chastises the respondents and *amici* for having "no persuasive answer to this historical evidence"[98] and asserts "[t]he dissent's failure to engage with this long tradition is devastating to its position."[99] The majority is only willing to entertain historically derived arguments surrounding the establishment of a right to an abortion.[100] Whether the history in the majority opinion

94. *See id.* at 2244-45 ("Constitutional analysis must begin with "the language of the instrument," which offers a "fixed standard" for ascertaining what our founding document means. The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.") (internal citations omitted).

95. *Dobbs,* 142 S. Ct. at 2249.

96. *See id.* at 2251-53. The majority provides additional support in an appendix of statutes "criminalizing abortion at all stages of pregnancy in the States existing in 1868" and another appendix of comparable statutes for subsequently admitted states and the District of Columbia. *Id.* at 2285-2300.

97. *Id.* at 2253-54.

98. *Id.* at 2254.

99. *Id.* at 2260. The Court continues: "We have held that the established method of substantive-due-process analysis requires that an unenumerated right be deeply rooted in this Nation's history and tradition before it can be recognized as a component of the "liberty" protected in the Due Process Clause." *Id.* (internal punctuation and citations omitted).

100. A similar approach can be seen in the majority opinion in N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen, 142 S. Ct. 2111 (2022), where the Court relies on a lengthy historical analysis reaching back to medieval England to support the proposition that the Second Amendment protects a right to the public carry of firearms. *See also id.* at 2136 ("[W]hen it comes to interpreting the Constitution, not all history is created equal. "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them.*") (quoting D.C. v Heller, 554 U.S. 570, 634-35 (2008) (emphasis in *Bruen*, but added from *Heller*). One of the distinguishing features of *Bruen* as compared to *Dobbs* is that the Second Amendment of course explicitly addresses the right to bear arms, whereas there is no language in the Constitution explicitly addressing

accurately reflects historic understandings of abortion is not of primary concern. The majority certainly thinks the history is accurate and, more importantly, relies upon this history as its methodological foundation for judicial interpretation. This reliance upon historical meaning underscores the point that the majority opinion embraces meaning originalism.[101]

Where does that leave alternative theories of interpretation to mean originalism with respect to *Dobbs*? Not only did Gorsuch join the majority opinion in *Dobbs*, but any attempt to take a strict constructionist approach to the topic of abortion would be challenging since the term "abortion" does not appear in the Constitution and is therefore not directly subject to interpretation.[102] But, if the strict constructionism of *Bostock* is not an option, then the only alternative would be a more subjective approach that steps outside the objectivity of meaning originalism to appeal to extra-judicial sources of justification for maintaining a constitutional right to abortion.[103] Much of the critique of *Dobbs* relies upon this extra-judicial appeal. However, if the justification for abortion is primarily a moral justification or some other extra-judicial source, then it cannot escape the charges of judicial politicization Scalia levels against living constitutionalism. Moreover, critics of *Dobbs* would not be able to engage adequately with the majority opinion, as the majority seeks through its appeal to meaning originalism to remain *within* the confines of the law and legal history. What is needed in response to the meaning originalist approach in

---

abortion. Thus, in *Bruen* the majority adopts an expansive scope of interpretation that goes beyond what might otherwise be considered the strict confines of meaning originalism to the public understanding at the time a law (or in this case a constitutional amendment) was adopted. The more historically expansive approach may be justified for abortion, where the Court is — at least in the version of originalism adopted by the majority in *Dobbs* — seeking to determine the "history and tradition" of an unwritten right. This broad appeal should not be necessary according to meaning originalism in *Bruen* because it should be possible to fix the date on which the right in question was created. Yet, the Court in *Bruen* utilizes this more expansive "history and traditions" approach, nonetheless.

101. Much the same point could be made about Thomas's concurrence, which goes a step further than the majority by contending that the Due Process Clause only protects procedural due process and that all substantive due process should be reconsidered, including the cases securing the right to contraception, same sex relations, and same sex marriage. *Dobbs*, 142 S. Ct. at 2300-01 (Thomas, J., concurring). Thomas's jurisprudential approach is a bit different from the majority's. Thomas does not delve into the history of any purported right but rather focuses on the historical understanding of the meaning of the Due Process Clause to argue that it could never be applied to the creating of new rights. *Id.* at 2301-02 (citing several of his own concurring opinions).

102. *Dobbs,* 142 S. Ct. at 2242.

103. *Id.* at 2337 (Breyer, J., dissenting).

Dobbs is a coherent jurisprudential alternative to strict constructionism on one end of the spectrum and living constitutionalism on the other. This approach must be grounded in its own form of objectivity by itself being an internal approach to jurisprudence.

II. PRINCIPLE ORIGINALISM — THE THIRD WAY

A. A Posnerian Starting Point

Whether one is starting from the tension between meaning originalism and strict constructionism or between meaning originalism and living constitutionalism, *Hively v. Ivy Tech Community College of Indiana*,[104] a pre-*Bostock* case alleging employment discrimination under Title VII on the basis of sexual orientation, hints at an alternative approach. In that case, an openly lesbian adjunct professor was denied a full-time position six times and, ultimately, her contract was not renewed.[105] The majority in an *en banc* decision took an approach similar to Gorsuch's strict constructionism in *Dobbs* and held sex was the dependent variable in the discrimination and that, therefore, the acts in question violated Title VII.[106] The dissent, clearly taking a meaning originalism approach[107] (and quoting from Scalia's jurisprudential writings),[108] claimed the majority opinion violated "the traditional first principle of statutory interpretation" because the court is "not authorized to infuse the text with a new or unconventional meaning or to update it to respond to changed social, economic, or political conditions."[109]

The resolution of this dichotomy, which would be repeated in *Bostock v. Clayton County*, emerges in the concurring opinion of Judge Richard

104. Hively v. Ivy Tech Community College of Indiana, 853 F.3d 339, 340 (7th Cir. 2017).

105. *Id.* at 341.

106. *See id.* at 347 ("Any discomfort, disapproval, or job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex. That means that it falls within Title VII's prohibition against sex discrimination, if it affects employment in one of the specified ways.").

107. *See id.* at 362 (Sykes, J., dissenting) ("[T]he analysis must begin with the statutory text; it largely ends there too. Is it even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination "because of sex" also banned discrimination because of sexual orientation? The answer is no, of course not.").

108. *Id.* at 362 (Sykes, J., dissenting) (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997)).

109. *Hively*, 853 F.3d at 360 (Sykes, J., dissenting).

Posner.[110] After describing theories of jurisprudence based on "interpretation in ordinary meaning"[111] (essentially strict constructionism) and based on "unexpressed intent"[112] (essentially the semantic context of meaning originalism), Judge Posner advances a theory of jurisprudence he terms "judicial interpretive updating"[113] that attempts to "giv[e] a fresh meaning to a statement (which can be a statement found in a constitutional or statutory text) — a meaning that infuses the statement with vitality and significance today."[114] Posner tries to strike a middle ground between strict constructionism and meaning originalism. Posner admits the drafters of Title VII would not have contemplated the inclusion of homosexuality in its scope.[115] But, at the same time, Posner argued that the meaning of words changes over time and that failing to acknowledge this evolution results in "statutory obsolescence."[116] Rather, courts should "tak[e] advantage of what the last half century has taught."[117] Posner further asserts this is a common practice in Supreme Court cases, which frequently interpret statutory and constitutional provisions "on the basis of present need and understanding rather than original meaning."[118] Posner argues contemporary understanding of the word "sex" is broader today than when Title VII was adopted in 1964.[119] Instead of trying to shoehorn sexual orientation into the imputed understanding of those who adopted Title VII, Posner finds it more

110. There is an additional concurrence in *Hively* that follows the strict constructionist approach of the majority with the added point that sexual orientation needs only be *a* factor in discrimination and not the sole factor to make it legally actionable under Title VII. *Id.* at 357-59 (Flaum, J., concurring).

111. *Id.* at 352 (Posner, J., concurring).

112. *Id.*

113. *Id.* at 353.

114. *Hively*, 853 F.3d at 352. Posner further asserts that such updating is only appropriate where there has been "a lengthy interval between enactment and (re)interpretation." *Id.* at 353.

115. *Id.* at 353.

116. *Id.* at 357.

117. *Id.*

118. *Id.* at 353.

119. *Id.* at 356 ("The most tenable and straightforward ground for deciding in favor of Hively is that while in 1964 sex discrimination meant discrimination against men or women as such and not against subsets of men or women such as effeminate men or mannish women, the concept of sex discrimination has since broadened in light of the recognition, which barely existed in 1964, that there are significant numbers of both men and women who have a sexual orientation that sets them apart from the heterosexual members of their genetic sex (male or female), and that while they constitute a minority their sexual orientation is not evil and does not threaten our society.").

intellectually honest and justified to simply interpret the statute as it is understood now. In support of this approach, Posner writes: "We understand the words of Title VII differently not because we're smarter than the statute's framers and ratifiers but because we live in a different era, a different culture."[120]

Posner's jurisprudence sounds akin to living constitutionalism, and in some ways, it is. Posner attempts to preserve relevancy to the law by connecting it to current times.[121] But, where Posner differs from living constitutionalism is that while living constitutionalism appeals to moral sentiments within society writ large, Posner couches his jurisprudence in the current semantic meaning of disputed terms. In other words, the justification for departing from the original meaning of statutory language comes not from the belief that society today views a prior construction of the law as immoral — the snapshot view of moral rectitude that characterizes living constitutionalism — but rather that society today simply *understands* the law differently.[122] That is why Posner describes interpreting the word "sex" in Title VII according to its meaning at the time the law was passed as anachronistic[123] — it is not in its correct time. The change in common meaning justifies a change in judicial interpretation.[124]

Posner's move to base his interpretative approach in semantic meaning is an important step because it uses the same type of source material as meaning originalism, only shifting the timeframe. In this way, judicial interpretive updating as presented in *Hively* maintains a similar objectivity to meaning originalism. But, while Posner's "third flavor" of interpretation[125] constitutes a useful starting point for offering an alternative to strict

120. *Id.* at 357.

121. *Id.*

122. Posner details ways in which the Supreme Court has adapted in various constitutional cases to changing understandings of First Amendment free speech, warrants under the Fourth Amendment, the term "cruel and unusual punishment" in the Eighth Amendment, and Second Amendment gun rights. *Id.* at 353-54.

123. *Id.* at 355 ("A broader understanding of the word "sex" in Title VII than the original understanding is thus required in order to be able to classify the discrimination of which Hively complains as a form of sex discrimination. That broader understanding is essential. Failure to adopt it would make the statute anachronistic….").

124. *Id.* at 353-54. ("The compelling social interest in protecting homosexuals (male and female) from discrimination justifies an admittedly loose "interpretation" of the word "sex" in Title VII to embrace homosexuality: an interpretation that cannot be imputed to the framers of the statute but that we are entitled to adopt in light of (to quote Holmes) "what this country has become," or, in Blackstonian terminology, to embrace as a sensible deviation from the literal or original meaning of the statutory language.").

125. *Id.* at 352.

constructionism and meaning originalism, the interpretation is not as fully developed by Posner as it could be. For one, Posner still employs the snapshot approach of living constitutionalism, albeit one that is semantic and internal to the law rather than moral and external. As such, his interpretive approach falls suspect to a claim of instability — interpretation of the law would vary according to changes in common public meaning. Or, to put it another way, there is nothing to anchor Posner's judicial interpretive updating to prior legal history. It is a solely present-focused approach to judicial interpretation. Posner, after all, did not seem to give any deference to the common understanding of "sex" as used in Title VII in 1964.[126] If the response is if one is "updating," then one must be mindful of the source being updated, then the criteria need to be established for when to update and how.

This is where principle originalism shows its merits. Regardless of whether one is contrasting meaning originalism with strict constructionism, living constitutionalism, or judicial interpretive updating, principle originalism is positioned as the interpretive third way that resolves the tension between the competing jurisprudential theories. Principle originalism is a theory of jurisprudence whereby judicial interpretation evolves gradually over time through judges deriving underlying legal principles from precedent and applying those principles to cases and issues without clear outcomes to determine the meaning of the law within the context in which it is being applied.[127] Drawing heavily from Ronald

126. *Id.* at 355 ("A broader understanding of the word "sex" in Title VII than the original understanding is thus required in order to be able to classify the discrimination of which Hively complains . . . That broader understanding is essential.").

127. There is limited use of the phrase "principle originalism" in legal secondary literature. The most commonly cited reference is Lee J. Strang, *Originalism and the "Challenge of Change": Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 930 (2009). Strang's article has been cited by 28 law review articles, though for various purposes beyond advancing his theory of principle originalism.

Jack Balkin's theory of interpretation has in places been referred to as "'text and principle' originalism." *See, e.g.*, John T. Valauri, *As Time Goes By: Hermeneutics and Originalism*, 10 NEV. L.J. 719, 730 (2010) (also attributing this concept to Dworkin); Marc O. DeGirolami, *The Vanity of Dogmatizing*, 27 CONST. COMMENT. 201, 226 (2010); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 286 (2009); Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 206 (2009). These sources draw the term from Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 427 (2007), where Balkin attempts to combine originalism and living constitutionalism.

Both Strang and Balkin advance theories of jurisprudence that are consistent with principle originalism as described in this article, though neither draw as extensively on Dworkin to formulate their theories.

Dworkin's interpretivism, principle originalism attempts to remain faithful to the original text while also creating a non-subjective method for allowing linguistic meaning to evolve as society and the law evolve.[128] This connection between Dworkin and principle originalism will be explored more in the next section, but first Dworkin's theories must be set out on their own terms.

B. Dworkin's Interpretivism

Dworkin's interpretivism is based on four core tenets: (1) the distinction between rules and principles in allowing for judicial discretion; (2) reliance upon precedent as the source material for judicial decision-making; (3) a "chain novel" approach to legal interpretation that uses the two dimensions of fit and making the law the best it can be to articulate "law as integrity"; and (4) the positing of one right answer to any legal dispute.[129]

Dworkin, who once engaged with Scalia in a spirited debate over originalism,[130] recognizes that law is an essentially contested subject, and that written law can never completely encompass all the vagaries of disputes before the court. Rules, which for Dworkin are rigid "all or nothing" propositions,[131] cannot accommodate so-called "hard cases" where no legal rule clearly resolves or which implicate multiple conflicting rules.[132] Principles, on the other hand, are abstract legal standards that draw upon "a requirement of justice or fairness or some other dimension of morality."[133] Principles are flexible "considerations" for the judge.[134] As such, principles require an interpretive element and hence judicial discretion in their

128. *See* Strang, *supra* note 127, at 930.

129. For further explanation of each, particularly in relation to Dworkin's response to and reformulation of positivism, *see* Fortson, *Was Justice Antonin Scalia Hercules?*, *supra* note 60, at 267-80.

130. *See generally* ANTONIN SCALIA & AMY GUTMANN, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) (including an initial essay by Scalia, a comment by Dworkin, and a response by Scalia).

131. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 24 (1977) ("If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.").

132. *Id.* at 27 ("If two rules conflict, one of them cannot be a valid rule. The decision as to which is valid, and which must be abandoned or recast, must be made by appealing to considerations beyond the rules themselves.").

133. *Id*. at 22.

134. *Id.* at 26 ("All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one that officials must take into account, if it is relevant, as a consideration inclining in one direction or another.").

application.[135] This distinction is illustrated in the famous case of *Riggs v. Palmer*,[136] where a strict interpretation of a law of inheritance would have allowed a murderer to inherit from his grandfather, but where the court, rightly according to Dworkin, denied the inheritance based upon a larger principle of not benefiting from one's criminal acts.[137]

The problem with judicial discretion and deciding cases based on principles is that it has the potential to rely upon extra-judicial sources, as Scalia and other originalists have pointed out.[138] Dworkin seeks to maintain a closed, and therefore objective, system of law in which judges can only decide cases based on sources internal to the law, namely the text of the law and legal precedent. This closed system is reflected in Dworkin's creation of the ideal judge Hercules, who is described as "an imaginary judge of superhuman intellectual power and patience."[139] Hercules, who Dworkin admits is an unobtainable methodological ideal[140] who decides cases the way an actual judge would "if they had a career to devote to a single decision,"[141] has access to the entirety of legal precedent — all prior statutes and judicial opinions — and uses this to derive a coherent set of applicable principles to resolve the case.[142] Through this reliance on precedent to derive principles,

---

135. *Id.* at 31 (Dworkin colorfully describes judicial discretion as "the hole in a doughnut" that "does not exist except as an area left open by a surrounding belt of restrictions").

136. Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889).

137. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 131, at 23-24. *See also* Riggs, 22 N.E. at 190 ("What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable, and just devolution of property that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable.").

138. Dworkin is not here directly responding to Scalia in his theory of interpretivism. Indeed, Dworkin developed his theories before Scalia drafted most of his philosophical writings and legal opinions. Dworkin did respond to Scalia's primary statement of jurisprudence. *See generally* RONALD DWORKIN, *Comment [on Antonin Scalia]*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 115–27 (1998). It is not necessary for this article to delve into the details of that exchange. For further discussion, *see* Fortson, *supra* note 60, at 293-96.

139. RONALD DWORKIN, LAW'S EMPIRE 239 (1986).

140. *Id.* at 245 ("No actual judge could compose anything approaching a full interpretation of all of his community's law at once. That is why we are imagining a Herculean judge of superhuman talents and endless time. But an actual judge can imitate Hercules in a limited way.").

141. *Id.* at 265.

142. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 131, at 116–17 ("You will

Hercules decides hard cases solely based on the internal content of the law and without the use of external sources such as policy concerns or personal convictions.

Once applicable principles have been derived, the judge employs those principles and the subsidiary precedent using a "chain novel" approach to judicial decision-making. The chain novel methodology can be described as thus: Imagine yourself as an author. However, you cannot start a novel but must instead write the next chapter in an unending tome based upon prior chapters by other authors.[143] Dworkin maintains you would create two dimensions for how you would draft the next chapter: (1) anything you write must be consistent, i.e., must "fit", with what has come previously; and (2) any new contributions must advance the appeal and direction of the novel, i.e. it must make the work the "best it can be."[144] As an example, Dworkin discusses the end of *A Christmas Carol* after Scrooge experienced his sequence of ghostly visits.[145] After his dreams of Christmas past, present, and future, it would not fit with the prior chapters to make Scrooge irredeemably wicked. Before the dreams, you would have more choice in the direction to take the plot and could potentially keep Scrooge inherently evil. But, in trying to make the novel the best it could be,[146] you likely would opt for a story of personal redemption like the one written by Charles Dickens. Even if you would not make these exact choices, this is the methodological approach you would use in weighing your contribution.[147]

Dworkin refers to the combination of the "chain novel" approach with his two associated dimensions as "law as integrity."[148] The analogy here to judicial decision-making is clear: judges are never the first "author" when writing an opinion. Even in cases of first impression, the judge will invariably have a selection from a variety of case precedents upon which to build their opinion. Judges are mindful of making rulings that fit with this precedent; if a judge chooses to overrule precedent, there needs to be an

---

now see why I called our judge Hercules. He must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents, and, so far as these are to be justified on principle, constitutional and statutory provisions as well.").

143. DWORKIN, LAW'S EMPIRE, *supra* note 139, at 229.

144. *Id.* at 230-31.

145. *Id.* at 232-33.

146. *Id.* at 233 (Dworkin describes the task for the chain novelist under this second dimension as "mak[ing] the work more significant or otherwise better").

147. *Id.* at 234.

148. *Id.* at 225.

explanation of why.[149] This is relatively uncontroversial. The notion of making the law the best it can be is a bit more complex, as it suggests a moral component to interpretation. This second dimension, which arises in cases where multiple possible interpretations "fit" a continuing narrative,[150] recognizes law as a constructive enterprise in which judges are fully aware of their role in a dynamic process.[151] Making the law the best it can be is not so much a moral enterprise as it is a methodological approach at the heart of law as integrity. Judges using law as integrity rely on the past to derive the future, find law, and invent law.[152] Moreover, judges determine the "best" law through appeal to common understandings of core principles of civil society.[153]

Finally, Dworkin posits the existence of only "one right answer" to interpretations of law.[154] This theory is primarily a methodological maneuver in service of Dworkin's search for objectivity in judicial decision-making. Dworkin does not believe there is in fact only one right answer to any given legal dispute nor does he expect judges will agree on that interpretation.[155] Rather, the key to understanding Dworkin's one right

149. The issue of *stare decisis* and overturning precedent will be addressed later in this article. *Infra Section C. Respect for Stare Decisis beyond Stability*.

150. DWORKIN, LAW'S EMPIRE, *supra* note 139, at 231 ("He may find, not that no single interpretation fits the bulk of the text, but that more than one does. The second dimension of interpretation then requires him to judge which of those eligible readings makes the work in progress the best, all things considered.").

151. *Id.* at 87 ("Judges normally recognize a duty to continue rather than discard the practice they have joined. So they develop, in response to their own convictions and instincts, working theories about the best interpretation of their responsibilities under that practice.").

152. *Id.* at 225 ("[Law as integrity] insists that legal claims are interpretive judgments and therefor combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative. So law as integrity rejects as unhelpful the ancient question whether judges find or invent law; we understand legal reasoning, it suggests, only by seeing the sense in which they do both and neither.").

153. *Id.* ("According to law as integrity, propositions of law are true if they figure in or follow from principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.").

154. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 131, at 81 ("I shall argue that even when no settled rule disposes of the case, one party may nevertheless have a right to win. It remains the judge's duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively.").

155. Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in PRAGMATISM IN LAW AND SOCIETY 359, 360 (Michael Brint & William Weaver eds.,

answer thesis comes from examining his distinction between the internal and external skeptic. Internal skepticism "relies on the soundness of a general interpretive attitude to call into question all possible interpretations of a particular object of interpretation."[156] An internal skeptic is limited to evaluating arguments on their own merits using only the logic of the argument. On the other hand, an external sceptic evaluates and critiques an argument from a metaphysical perspective outside of the merits of the interpretive claim.[157] Dworkin had no use for external skepticism because it cannot be disproven since its evaluative criteria lie outside the argument itself. Dworkin states, "[t]he only skepticism worth anything is skepticism of the internal kind, and this must be earned by arguments of the same contested character as the arguments it opposes, not claimed in advance by some pretense at hard-hitting empirical metaphysics."[158]

If Dworkin did not embrace internal skepticism, he could not escape a charge of moral relativism. External critiques are unavoidably subjective. Similarly, Dworkin must assume — methodologically at least — the existence of only one right answer to any legal interpretation to avoid a fall into relativism. Judges, at the end of the day, must make decisions, and if two internally derived interpretations are equally valid, then there must be an external source to weigh one over the other. The only way to maintain objectivity in the law is to operate under the premise that judges *must* advance legal arguments *as if* they were the one right answer to engage in legal debate at all. In short, an assertion of internal objective truth in the law is the necessary structure of legal argumentation. The other three core tenets of interpretivism establish the mechanism by which judges can determine the one right answer.

C. Dworkin as a Principle Originalist

The parallels between Dworkin's search for objectivity and meaning originalism are evident. Both rely upon sources internal to the law to determine its meaning. By incorporating precedent so fundamentally into his jurisprudence, Dworkin posits a historical foundation to legal interpretation, and thus, akin to meaning originalism, avoids the

---

1991) ("We should now set aside, as a waste of important energy and resource, grand debates about . . . whether there are right or best or true or soundest answers or only useful or powerful or popular ones. We could then take up instead how the decisions that in any case will be made should be made, and which of the answers that will in any case be thought right or best or true or soundest really are.").

156. DWORKIN, LAW'S EMPIRE *supra* note 139, at 78-79.

157. *Id.* at 79.

158. *Id.* at 86.

contemporary snapshot approach of living constitutionalism. Indeed, because Dworkin relies on precedent as the source material for judicial decision-making, and because that precedent must ultimately reach back to the original source of the law, Dworkin can be viewed as a type of originalist.[159] Hercules, after all, takes the entire legal history of a topic as input, including the interpretive framework at the time of a law's adoption that is relied upon by meaning originalists such as Scalia. The primary reason Dworkin can be considered an originalist, though, is also the primary way in which he differs from meaning originalism, namely his use of principles as the core of his theory of interpretation. This is consequently also the primary way in which principle originalism differs from meaning originalism.

Dworkin begins his "constructive interpretation" with the question of what the authors of "the text in question intended to say."[160] Dworkin is not an intent originalist — "[i]t does not mean peeking inside the skulls of people dead for centuries."[161] Instead, he places this inquiry into a larger social context[162] and explains that we must look at larger linguistic meaning.[163] More importantly, Dworkin does not stop with the semantic meaning at the time a law or constitutional provision was created. This original understanding is only a moment in time in the life of the law. In writing on the Founders, Dworkin asserts that "we should conclude that they intended to lay down abstract, not dated commands and prohibitions."[164] Indeed, Dworkin contends that the relative abstractness of the language in much of

159. For more extensive discussion of Dworkin's originalism, and with some contrast to Scalia, *see* Fortson, *supra* note 60, at 296-301.

160. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1252 (1997) ("We must begin, in my view, by asking what — on the best evidence available — the authors of the text in question intended to say.").

161. *Id.*

162. *Id.* ("It means trying to make the best sense we can of an historical event — someone, or a social group with particular responsibilities, speaking or writing in a particular way on a particular way on a particular occasion."). Dworkin later in the same essay describes the "semantic strategy" of interpreting the Constitution (or presumably other texts) as follows: "We decide what propositions a text contains by assigning semantic intentions to those who made the text, and we do this by attempting to make the best sense we can of what they did when they did it." *Id.* at 1260.

163. Dworkin provides as an example Milton speaking in *Paradise Lost* of "Satan's 'gay hordes'" and explaining that at the time "gay" clearly meant "happy" and not "homosexual." *Id.* at 1251-52. The term could have different meanings depending on the time and context in which it is being used.

164. *Id.* at 1253.

the Constitution points to an intent only to set out abstract principles.[165] Moreover, because the Founders understood their moral principles to be abstract, they could not have intended what they wrote to be the end point of their interpretation.[166] Consequently, the approach taken by meaning originalism of adhering solely to the understanding of a law at the time of its creation betrays the designed flexibility of documents such as the Constitution that comes from their assertion of abstract principles.[167]

Though Dworkin never fully articulated the concept of principle originalism, the methodology of such an approach is easy to derive from the four tenets of interpretivism set out above. The interpreter, be it Hercules or a mortal judge, starts with the principles articulated in the original document.[168] Those principles could be thought of as the basic plot of the chain novel. Each time a case arises implicating that constitutional provision, the judge takes into account not only the original meaning of the provision, but also — and this is where principle originalism differs from and expands on meaning originalism — how subsequent cases have interpreted the provision. Just as a good novel will develop over the course of its chapters with new characters and nuanced plot twists, so too does the law. With each new legal opinion, the meaning of the underlying legal principle becomes more fully developed. Legal precedent becomes a source of legal interpretation along with a law's original meaning.[169] To be "valid" in Dworkin's sense of adhering to a coherent interpretive methodology, any new opinion must "fit" with the core legal principle and subsequent cases, but it must also make the opinion "the best it can be" by aligning the opinion with common semantic understanding of the principle at the time the judicial decision is made. Dworkin's Hercules explicitly rejects:

> the assumption of a canonical moment at which a statute is born and has

---

165. *Id.* ("The Framers were careful statesmen who knew how to use the language they spoke. We cannot make good sense of their behavior unless we assume that they meant to say what people who use the words they used would normally mean to say — that they used abstract language because they intended to state abstract principles.").

166. *See id.* ("They are best understood as making a constitution out of abstract moral principles, not coded references to their own opinions (or those of their contemporaries) about the best way to apply those principles.").

167. *Id.* at 1255 ("It is a fallacy to infer, from the fact that the semantic intensions of historical statesmen inevitably fix what the document they made says, that keeping faith with what they said means enforcing the document as they hoped or expected or assumed it would be enforced.").

168. *See* Fortson, *supra* note 60, at 268.

169. DWORKIN, LAW'S EMPIRE, *supra* note 139, at 410 ("Law is an interpretive concept. Judges should decide what the law is by interpreting the practice of other judges deciding what the law is.").

> all and only the meaning it will ever have. Hercules interprets not just the statute's text but its life, the process that begins before it becomes law and extends far beyond that moment. He aims to make the best he can of this continuing story, and his interpretation therefore changes as the story develops.[170]

The characterization of law as evolving may seem to degrade Dworkin's claim, and by extension principle originalism, to objectivity. However, expanding the scope of inputs into judicial decision-making does not by itself make the methodology less objective, though it may make it more complicated. Both the meaning originalist and the principle originalist seek to ground their understanding on semantic understandings of law, but only the latter engages in a temporal shift and incorporates precedent in a way that would not be done by a pure meaning originalist jurisprudence. Neither approach considers extra-judicial sources of interpretation, and both maintain an internal perspective. As shown by the reliance upon history by the majority in *Dobbs*, any law at the time of its passage or its operative interpretation is the sum of a long history of social and legal understandings that impact what the law means. However, that same semantic context does not stop at that moment. Instead, it continues into subsequent judicial interpretations through changes in the common public meaning of the law. If broader semantic context can be objective and internal for the meaning originalist, then the same inputs should remain objective and internal, even if temporally they occur after the adoption of the law. Under the "chain novel" approach to interpretation in principle originalism, the law is always a continuing story with many authors.

The difference between meaning originalism and principle originalism is illustrated in how Dworkin and Scalia interpret the Eighth Amendment's prohibition of "cruel and unusual" punishment. Scalia, when interpreting this amendment, looks to the understanding of the phrase at the time of the adoption of the Eighth Amendment.[171] By contrast, Dworkin interprets the Eighth Amendment as "lay[ing] down an abstract principle forbidding whatever punishments are in fact cruel and unusual" at the time the law is applied.[172] To be sure, there is a level of abstraction to Scalia's approach

---

170. *Id.* at 348. This quote is from a chapter on interpreting statutes, but there is no reason it would not also apply to interpreting the Constitution.

171. *See* Atkins v. Virginia, 536 U.S. 304, 340-41 (2002) (Scalia, J., dissenting) (arguing that individuals with limited intellectual capacity could be subject to the death penalty and railing against the "evolving standards of decency" justifying overriding the original meaning of "cruel and unusual punishment").

172. DWORKIN, *Comment [on Antonin Scalia]*, *in* A MATTER OF INTERPRETATION, *supra* note 138, at 120.

because the Eighth Amendment does not speak directly on types of punishment and cannot be held to contemplate forms of punishment that did not exist at the American founding. But this abstraction for Scalia must be "rooted in the moral perceptions *of the time*" the amendment was adopted.[173] Scalia attempts to resolve a modern question of law using an objective historical framework of common public meaning.

The abstraction of principle originalism operates at a higher level; but for Dworkin, it yields a more concrete result. Dworkin contends that relying solely on the semantic understanding of the Framers would result in unconstrained discretion in selecting the level of generality and how to apply it to a contemporary dispute.[174] Dworkin's point becomes more valid as technological innovation or social development is further removed from what could be contemplated at the time of a law's inception.[175] At least with principle originalism, one is interpreting contemporary legal issues within a contemporary semantic context while still maintaining a connection to original meaning.

D. Principle Originalism in Action

A relatively recent example of the Court using principle originalism is found in the majority opinion in *Obergefell v. Hodges*,[176] which held that same-sex marriages are constitutional. Justice Kennedy's opinion rests on core principles derived from precedent and embraces an evolutionary view of rights.[177] Kennedy starts with a brief historical overview of the centrality of marriage, noting the institution of marriage and the role of women has changed for the better over time, and a series of Supreme Court cases gradually liberalized the legal status of same-sex relationships.[178] He begins with a Due Process Clause analysis, drawing from the long history of the

---

173. Antonin Scalia, *Response*, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, at 145.

174. Ronald Dworkin, *Reflections on Fidelity*, 65 FORDHAM L. REV. 1799, 1808 (1997).

175. For example, Scalia held in *Kyllo v. United States* that the use of a thermal imaging device without a warrant violated the Fourth Amendment, despite the lack of physical intrusion into the house, because the requirement of a warrant in this instance "assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." 533 U.S. 27, 34-35 (2001). Though a defensible position, this is essentially a guess. It is impossible really to know how public common understanding of privacy at the Founding would have reacted to something so foreign as a thermal imaging device.

176. Obergefell v. Hodges, 576 U.S. 644, 681 (2016).

177. *Id.*

178. *Id.* at 659-663.

Supreme Court protecting the right to marry.[179] Kennedy acknowledges these cases all "presumed a relationship involving opposite-sex partners."[180] But, his analysis serves the purpose of establishing marriage as a fundamental right that extends in modern times to new and previously unanticipated situations. Kennedy implicitly rejects the staid nature of meaning originalism[181] by explicitly calling for a more flexible interpretive framework that allows for and incorporates the gradual evolution of the scope of fundamental rights:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[182]

Kennedy looks to "four principles and traditions" that "compel the conclusion that same-sex couples may exercise the right to marry."[183] The core principles can be summarized as: (1) the right to personal choice in whom to marry being inherent in individual autonomy; (2) the fundamental importance of marriage as a two-person union; (3) that marriage creates safeguards for children and childrearing; and (4) that marriage is "a keystone of our social order."[184] Importantly, these core principles are legally derived — Kennedy cites Supreme Court cases for each one to more fully articulate and support his argument — but in a way that speaks to broader social

179. *Id.* at 664.

180. *Id.* at 665.

181. Not surprisingly, Scalia and Thomas, in separate dissents, argue for rejecting the right to same sex marriage along meaning originalist lines. Scalia describes the majority opinion as a "judicial Putsch" because the right to same sex marriage was undeniably not within the meaning of due process at the time the Fourteenth Amendment was ratified and continued to be unrecognized for much of the subsequent 135 years until the present ruling. *Id.* at 715-18 (Scalia, J., dissenting). Thomas, in an opinion that anticipates his concurrence in *Dobbs*, relies upon the understanding of liberty by the Framers as "individual freedom *from* governmental action, not as a right to a particular governmental entitlement" to call for a dismantling of all substantive due process. *Id.* at 726 (Thomas, J., dissenting). The dissent of Roberts, which accuses the Court of acting as a political body, could loosely be viewed as advocating those rights be more firmly grounded in history and tradition akin to meaning originalism, though there is not the explicit appeal to prior historical meaning. *Id.* at 686-87, 706 (Roberts, C.J., dissenting).

182. *Id.* at 664.

183. *Id.* at 665.

184. *Id.* at 665-69.

concepts about the meaning of marriage outside of the courtroom. The connection to societal understanding allows the right to marriage to evolve over time as the role of marriage in legal precedent and in society also changes. Arguing the fundamental right to marry "come[s] not from ancient sources alone," Kennedy instead asserts contemporary understandings of the right to marry "rise, too, from a better-informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[185] The right of a same-sex couple to marry is a rational extension of the development of legal and social understandings of marriage over the past several decades.[186] Moreover, Kennedy affirms that it is the Court's obligation to interpret and secure these rights,[187] particularly in the face of widespread public opposition.[188]

There are clear parallels between Kennedy's majority opinion in *Obergefell* and principle originalism. Kennedy bases his opinion on the underlying meaning of due process as applied to the institution of marriage. The Constitution does not directly address marriage, so Kennedy derived this meaning from history and tradition.[189] However, unlike the majority in *Dobbs*, Kennedy explicitly rejects the notion of fixing the semantic meaning of marriage at the time of the ratification of the Fourteenth Amendment from which substantive due process originates.[190] Had Kennedy stopped at that point in time, it is hard to see how he could have found a constitutional right to same-sex marriage. The right to same-sex marriage adheres not to original meaning but to an evolved legal meaning, and the absence of the right in previous legal frameworks is not determinative of whether the right exists. What *is* determinative, rather, is how the institution of marriage has gradually changed through a series of cases addressing marriage and family. Kennedy looks to this legal precedent to derive the four core principles about

185. *Id.* at 671-72.

186. *Id.*

187. *Id.* at 677 ("The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter.").

188. *Id.* ("An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. . . . It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.").

189. *See id.* at 664 ("History and tradition guide and discipline this inquiry."). The parallels in language to abortion in the majority opinion in *Dobbs* are interesting to note.

190. *See id.* ("That method respects our history and learns from it without allowing the past alone to rule the present.").

marriage, principles that are not purely legal but also point to a broader social understanding of the institution.[191] Coupled with the obligation of the Court to define fundamental rights under the Constitution, these principles guide Kennedy to the conclusion that there exists a constitutional right to same-sex marriage.[192] Precedent determines principles through a series of cases that create an objective answer to the legal dispute before the Court based on sources internal to the law.

The reliance upon precedent in assessing the evolution of the law differentiates principle originalism from living constitutionalism. The latter, as characterized in this article, looks at a snapshot of public moral sentiments about an issue at the time a case is decided to guide the judge in deciding the law. The temptation is to attribute this approach to the majority opinion in *Obergefell*,[193] but as has just been shown, Kennedy's opinion is not solely dependent upon contemporary social attitudes toward marriage, as would be the case for living constitutionalism.[194] Rather, Kennedy is careful to provide a basis in precedent for the transformation of marriage as a fundamental right and carefully separates this right from a reliance on public approval.[195] It is conceivable that a judge using living constitutionalism and public opinion could have arrived at the same decision in *Obergefell*, since several states legalized same-sex marriage by statute or litigation prior to the decision and public support[196] was increasing for same-sex marriage.[197]

However, living constitutionalism could not have been the interpretive method used to justify the decisions in several other seminal civil rights opinions. Living constitutionalism would not have enabled reaching the

---

191. *Id.* at 665-69.

192. *See id.* at 668 ("Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry.").

193. *See, e.g.*, *id.* at 706 (Roberts, C.J., dissenting) ("The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now.").

194. *Id.* at 716-17 (Scalia, J., dissenting) Even Scalia concedes that the majority bases its decision on "principles and traditions" only that Scalia would have stopped the clock at the ratification of the Fourteenth Amendment.

195. *Id.* at 665.

196. *See* Appendix B to *Obergefell*, *id.* at 685-86.

197. A Gallup poll on the eve of the *Obergefell* decision showed 60% of Americans supported same sex marriage. Justin McCarthy, *Record-High 60% of Americans Support Same-Sex Marriage*, GALLUP (May 19, 2015), https://news.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx.

decision desegregating schools in *Brown v. Board of Education*[198] in the face of fervent opposition in the affected states; nor the decision in *Loving v. Virginia*[199] finding a constitutional right to interracial marriage when sixteen states still had anti-miscegenation laws on the books at the time of the decision; nor the holding in *Roe v. Wade*[200] establishing a constitutional right to abortion which — as the majority in *Dobbs* points out — was decided while thirty states had prohibited abortion at all stages except to save the life of the mother.[201] All these decisions relied upon precedents and evolving theories of rights at the heart of their reasoning.[202] The decision in *Brown* came only after a series of prior decisions gradually chipped away at segregation in education.[203] The decision in *Loving* was the second attempt at voiding anti-miscegenation laws.[204] *Roe* relied heavily on the "penumbra" of privacy rights established in *Griswold v. Connecticut*.[205] Principle originalism thus provides a better explanation of the decisions in these pivotal cases than living constitutionalism.

Strict constructionism would similarly have little ability to address these cases. While *Brown* could draw upon the language of the Equal Protection Clause, there is no clear way the Constitution can differentiate between the

198. Brown v. Board of Education, 347 U.S. 483, 495 (1954) (finding segregated schools to be an Equal Protection violation).

199. Loving v. Virginia, 388 U.S. 1, 12 (1966) (striking down prohibitions on interracial marriage).

200. Roe v. Wade, 410 U.S. 113, 164 (1973) (establishing a constitutional right to an abortion).

201. Dobbs v. Jackson Whole Women's Health Org., 142 S. Ct. 2228, 2253 (2022).

202. *See, e.g.*, *Loving*, 388 U.S. at 12 (beginning its reasoning for overruling anti-miscegenation laws with the Court's holding in Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), that marriage is a "basic civil right[] of man[.]").

203. Some of the more prominent cases in this sequence are Missouri ex rel Gaines v. Canada, 305 U.S. 337, 351 (1938) (holding that if a state provides schools to white students, it must also do so for black students); McLaurin v. Oklahoma State Regents for Higher Edu., 339 U.S. 637 (1950) (holding it unconstitutional to allow a black graduate student to attend school but be forced to sit outside the classroom); Sweatt v. Painter, 339 U.S. 629, 635 (1950) (holding that a separate state law school just for black students did not provide equal opportunities as the law school for white students).

204. *See* McLaughlin v. Florida, 379 U.S. 184, 184, 196 (1964) (striking down a Florida law prohibiting cohabitation between blacks and whites "in the nighttime [in] the same room" but declining to extend the holding to interracial marriage).

205. *Roe*, 410 U.S. at 152-53 (discussing the right to privacy as arising from the concept of personal liberty in the Fourteenth Amendment as articulated, among other sources, "in the penumbras of the Bill of Rights" in *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965)).

decision in *Plessy v. Ferguson* and the decision in *Brown*.[206] After all, the Court in *Plessy* found a way to fold segregation into Equal Protection.[207] Any attempt to differentiate the two interpretations must appeal to some semantic context, including an attempt to understand the concept of "equal protection" on an abstract level. Strict constructionism would have similar problems with anti-miscegenation laws in *Loving*.[208] The absence of any text directly applicable to substantive due process would also render a strict constructionist unable to address abortion in *Roe*.

III. PRINCIPLE ORIGINALISM IN RESPONSE TO *DOBBS*

Principle originalism is therefore better positioned than either living constitutionalism or strict constructionism to handle complicated cases that implicate fundamental abstract principles in the Constitution. The comparison remains to be made, though, between principle originalism and meaning originalism. Both offer objective, internal approaches to interpreting the law. However, principle originalism ultimately provides a more coherent jurisprudence than meaning originalism as it justifies maintaining the right to an abortion contrary to the majority decision in *Dobbs*. As will be explained, principle originalism avoids some of the fallacies of meaning originalism such as that only the past can be fixed or that the past is more coherent than the present. The use of precedent allows for a constrained evolution of the law to make it more reflective of changes in society and contemporary semantic understanding of the law and fosters a respect for the doctrine of *stare decisis* that goes beyond just legal stability. Principle originalism can be examined in relation to Justice Breyer's dissent in *Dobbs*, with an acknowledgment that the dissent does not go so far as to fully embrace principle originalism.

A. The Fallacy of Past Determinacy

Meaning originalism attempts to remain faithful to the semantic meaning of a law or constitutional provision at the time of its adoption. The semantic meaning of a law at the time of its origination can be determined with some level of certainty. If not, then an alternative criterion would be necessary to

206. *Compare* Plessy v. Ferguson, 163 U.S. 537, 548 (1896) (using an Equal Protection argument to uphold segregation laws), *with* Brown v. Board of Ed., 347 U.S. 483, 495 (1954) (using an Equal Protection argument to strike down segregation laws).

207. *Plessy*, 163 U.S. at 548.

208. The Supreme Court in 1883 upheld an Alabama law criminalizing marriage between a white and black person on the ground that the law treated both races equally and therefore satisfied the Equal Protection Clause. Pace v. State, 106 U.S. 583, 585 (1883).

decide between two co-equal interpretations. The majority in *Dobbs* seems confident in the history it presents of laws against abortion from the time of the Founding and the following centuries.[209] However, this history is not on unshakable ground. Breyer's dissent briefly suggests a lack of uniformity in how early common law authorities treated abortion.[210] Others have also taken up this mantle.[211] It is well beyond the scope of this article to argue which account of history is correct. Instead, the point is that this history *can* be contested.

It is a fallacy to assume the past is beyond interpretive dispute simply because it is in the past. Meaning originalism abandoned intent originalism because of its inability to determine and extrapolate from the mind of the drafters — or even more so with respect to the ratifiers — of the Constitution. Expanding the scope of inputs to a broader semantic understanding unavoidably increases the discord in the interpretive framework and opens the judge up to claims of "cherry-picking" history to support a desired argument. For example, the majority and concurrence in *Dobbs* could not agree on which history to rely upon, with Alito looking to legal (primarily statutory) interpretations of abortion during and around the time of the ratification of the Fourteenth Amendment[212] and Thomas harkening back to understandings of the concept of liberty at the time of the Founding four score prior.[213] One could also look to the debate in *District of Columbia v.*

---

209. Dobbs v. Jackson Whole Women's Health Org., 142 S. Ct. 2228, 2248-55 (2022).

210. *Id.* at 2324 (Breyer, J., dissenting).

211. *History, the Supreme Court, and Dobbs v. Jackson: Joint Statement from the American Historical Association and the Organization of American Historians*, AM. HIST. ASSOC. (July 2022), https://www.historians.org/news-and-advocacy/aha-advocacy/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah-(july-2022) ("[T]he Court adopted a flawed interpretation of abortion criminalization that has been pressed by anti-abortion advocates for more than 30 years. The opinion inadequately represents the history of the common law, the significance of quickening in state law and practice in the United States, and the 19th-century forces that turned early abortion into a crime."); Sarah Hougen Poggi & Cynthia A. Kierner, *A 1972 Case Reveals That Key Founders Saw Abortion as a Private Matter*, WASH. POST (July 19, 2022), https://www.washingtonpost.com/made-by-history/2022/07/19/1792-case-reveals-that-key-founders-saw-abortion-private-matter/; Patricia Cline Cohen, *The Dobbs Decision Looks to History to Rescind Roe, But the History it Relies On is Not Correct*, WASH. POST (June 24, 2022), https://www.washingtonpost.com/outlook/2022/06/24/dobbs-decision-looks-history-rescind-roe/.

212. *Dobbs*, 142 S. Ct. at 2249-54.

213. *Id.* at 2300-01 (Thomas, J., concurring).

Heller[214] between Scalia's majority and Stevens' dissent over the meaning and application of the "well-regulated militia" phrase in the Second Amendment, — both opinions rely on substantial case law and other historical sources but reach vastly different results.[215] There are many other examples where one could identify legal history that is in dispute, both within case opinions and more broadly in the academic discipline of legal history.[216] With its one right answer thesis, principle originalism may seem to fall prey to the same fallacy. However, the thesis is only a methodological maneuver to maintain an internal perspective. Principle originalism contemplates disagreement in actual legal practice, and because it gives primacy to principles over history, principle originalism does not rely upon a definitive history as the sole source of legal interpretation.

Another aspect of the fallacy of past determinacy is its close relation to the past being indefinite, namely, the notion that the interpretive lens through which the past is interpreted changes over time. To return to the Second Amendment, arguments about the operative underlying principle aside, if the Bill of Rights were written today, the drafters would not include the phrase "[a] well-regulated Militia, being necessary to the security of a free State"[217] in the preamble to the equivalent of the Second Amendment.[218] The relationship of the citizenry to national defense is simply different to the point that such an inclusion would not make any sense. In interpreting the Second Amendment today, we are forced to make assumptions about what underlying principles can be drawn from how the language would have been understood then. This is true for both meaning originalism and principle originalism, though arguably with a higher level of abstraction for the latter. The problem is that the Second Amendment was drafted at a time when guns were much less dangerous than they are today. It is entirely conceivable, though by no means a certainty, that if the weapons of today existed at the time of the Founding, the Second Amendment might have been drafted

214. D.C. v. Heller, 554 U.S. 570 (2008).

215. *See generally* MICHAEL WALDMAN, THE SECOND AMENDMENT: A BIOGRAPHY (2014).

216. One could, for instance, skim the Legal History Blog or the website for the American Society for Legal History and their journal Law and History Review. LEGAL HISTORY BLOG, http://legalhistoryblog.blogspot.com/ (last visited June 27, 2023); AMERICAN SOCIETY FOR LEGAL HISTORY, *https://aslh.net/* (last visited June 27, 2023); LAW AND HISTORY REVIEW, https://www.cambridge.org/core/journals/law-and-history-review (last visited June 27, 2023).

217. U.S. CONST. amend II.

218. *See* WALDMAN, *supra* note 215, at 171 ("When the militias evaporated, so did the original meaning of the Second Amendment").

differently.[219] There is no way to tell because the interpretive lens through which this question is viewed now is so foreign to life hundreds of years ago that the semantic contexts of the two eras cannot be meaningfully interpolated. Principle originalism has the virtue of answering modern questions in their modern semantic context, drawing broad principles from prior eras but also accounting for changes in the interpretation and application of those principles over time.

The third fallacy inherent in meaning originalism is the idea that only past semantic meaning can be determined objectively. The assumption here is that "dead" past events do not change; but, because meaning originalism uses broader linguistic understanding and not authorial intent, the same types of sources relied upon by a meaning originalist would also be available to a principle originalist to understand the meaning of a concept currently. The sources are the same, only the timeframe has shifted. A dispute between Dworkin and Scalia over the meaning of "cruel and unusual" punishment in the Eighth Amendment was alluded to earlier.[220] Now, imagine the following thought experiment: a political movement arose to interpret that phrase under current standards, and the movement succeeded in passing a new constitutional amendment with the exact same language as the Eighth Amendment, only with an additional clause repealing the Eighth Amendment.[221] A court interpreting this new amendment would be tasked with understanding the meaning of "cruel and unusual" punishment in a modern context. This is a task the court *should* be able to accomplish. Indeed, courts interpret new laws all the time, though admittedly usually in relation to pre-existing legal principles. But were a law of fundamental importance like a constitutional amendment to be passed, a judge could not throw her hands up and say it is impossible to determine the current semantic meaning of the law. Yet, if contemporary interpretation is possible, then meaning originalism ceases to offer a more viable approach than principle originalism. The aspect of principle originalism that derives meaning from current societal understanding possesses as much methodological objectivity as does meaning originalism.

Breyer's dissent does not engage in a discussion of the fallacies of meaning originalism, nor would anyone expect it to.[222] Breyer, however,

---

219. *See id.* at 174.

220. *See supra* notes 173-174.

221. Put aside for the sake of this exercise the folly of having to pass a constitutional amendment to change the interpretive framework of identical language.

222. Breyer does have more theoretical non-opinion writings where he crafts a view of "active liberty" asserting that while texts are "driven by *purposes*," judges should also

critiques the majority for reading the Fourteenth Amendment in the context of the time of its ratification and for assuming that only those rights that existed then could exist now.[223] Breyer also rejects the notion that the only alternative to original meaning is to "surrender to judges' 'own ardent views,' ungrounded in law, about the 'liberty that Americans should enjoy.'"[224] Breyer embraces the argument that "applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents."[225] This statement, with its implicit call to use constitutional principles, history, and precedents as a foundation for deriving modern applications of rights, is at least consistent with the methodology of principle originalism and, as such, responds to the fallacies of meaning originalism.

B. Constrained Evolution of the Law through the Use of Precedent

One of the major benefits of principle originalism over meaning originalism is that it avoids being dependent upon trying to find ways to argue around opinions and social attitudes that are not just outdated but negatively viewed. One example is the case of *Plessy v. Ferguson*.[226] The majority in *Dobbs* cites *Plessy* as being "egregiously wrong on the day it was decided," and thus, a justification for abandoning *stare decisis* as a binding principle.[227] Yet, this notion poses a problem for meaning originalists. Certainly, *Plessy* is widely viewed as "egregiously wrong" by today's standards, but that can hardly be said to be the prevailing opinion when the case was decided in 1896. *Plessy* was a 7-1 decision after all, and it was decided when segregation was rampant not just in former slave states, but

---

consider language, history, tradition, precedent, and consequences in crafting judicial decisions. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 8, 17 (2005). Breyer considers the flexibility of this approach in adapting the Constitution to changing times to reflect the overarching democratic framework of the document. *Id.* at 18. *See also* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 84 (2010).

223. Dobbs v. Jackson Whole Women's Health Org., 142 S. Ct. 2228, 2324 (2022) (Breyer, J., dissenting) ("The majority's core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. And that is indeed what the majority emphasizes over and over again….If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.").

224. *Id.* at 2326 (quoting the majority at 2247).

225. *Id.* at 2326.

226. Plessy v. Ferguson, 163 U.S. 537 (1896).

227. *Dobbs*, 142 S. Ct. at 2265 (internal citations omitted).

throughout the country.[228] The majority opinion put forth an interpretation of the Thirteenth and Fourteenth Amendments only thirty years after their ratification, which logically should be more reflective of the semantic understanding of those amendments than any present sentiments. To an honest meaning originalist, this should be a clear sign that the Equal Protection Clause was not understood as prohibiting segregation. *Plessy* was wrongly decided precisely *because* it was firmly situated in its time, a position a meaning originalist cannot coherently advance.[229] If an originalist responds by pointing to the "core values" behind the Equal Protection Clause, then he or she becomes a principle originalist.

By relying upon underlying principles in the law, principle originalism does not deny the problems of the past but seeks to move beyond them. It acknowledges that our past is undeniably part of our perception of the present. Principle originalism also recognizes that societal attitudes do, in fact, change over time and that to the extent that law is both a reflection of and constitutes the governing rules for society, law must change along with it. The majority in *Dobbs* lauds *Brown v. Board of Education* for overturning *Plessy v. Ferguson* and notes that *Brown* also overturned "six other Supreme Court precedents that had applied the separate-but-equal rule."[230] What the *Dobbs* majority did not point out, but the Court in *Brown* did, is that in four of those cases, "all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications."[231] *Brown* did not overturn *Plessy* by itself; *Brown* overturned *Plessy* in conjunction with a series of prior cases that laid the groundwork for *Brown*.[232] Moreover, in reaching its decision,

---

228. *Plessy v. Ferguson*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/plessy-v-ferguson (last visited July 28, 2023).

229. Scalia once tried to answer the question of whether *Brown* was rightly decided by saying that he would have voted with Justice Harlan's dissent in *Plessy*. Adam Liptak, *From 19th-Century View, Desegregation Is a Test*, N.Y. TIMES (Nov. 10, 2009), http://www.nytimes.com/2009/11/10/us/10bar.html?_r=2&scp=1&sq=Scalia,%20Breyer&st=cse. The statement was made as part of an exchange with Justice Steven Breyer at the University of Arizona. Even this response is problematic in that a strong argument could be made that Harlan only sought to protect civil rights such as freedom of contract and property ownership and not social rights such as education. *See generally* Ronald Turner, *A Critique of Justice Antonin Scalia's Originalist Defense of Brown v. Board of Education*, 62 UCLA L. REV. DISC. 170 (2014); *see also* Liptak, *supra* note 229.

230. *Dobbs*, 142 S. Ct. at 2262.

231. *Brown*, 347 U.S. at 491-92; *see also supra* note 200.

232. *See, e.g.*, Mo. ex rel Gaines v. Canada, 305 U.S. 337 (1938); McLaurin v. Ok. State Regents for Higher Edu., 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950).

Brown explicitly rejects the methodology of meaning originalism and instead adopts an approach more akin to principle originalism:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[233]

The *Dobbs* majority, by overturning the right to an abortion established in *Roe*, not only overlooks the legal history behind *Brown*, but also rejects the very reasoning of the opinion.

Breyer's dissent in *Dobbs* embraces the same principle originalism as in *Brown*. Noting that "[t]he Framers (both in 1788 and 1868) understood that the world changes," Breyer contends that the Framers consequently "defined rights in general terms, to permit future evolution of their scope and meaning."[234] Breyer further points out the Supreme Court has done just that, in order to be "responsive to new societal understandings and conditions,"[235] particularly with respect to Fourteenth Amendment cases such as *Loving v. Virginia* (finding anti-miscegenation laws to be unconstitutional) and *Obergefell v. Hodges* (establishing a constitutional right to same-sex marriage).[236] But, as Breyer additionally notes, "[t]hat does not mean anything goes."[237] In an interpretive stance very much in line with principle originalism, Breyer asserts:

> [J]udges also must recognize that the constitutional "tradition" of this country is not captured whole at a single moment. Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions.[238]

Breyer's methodological approach here comes close to articulating a "chain novel" theory of jurisprudence, with new decisions building on prior case law. At the very least, it requires consideration of the "sweep" of

---

233. *Brown*, 347 U.S. at 492-93.

234. *Dobbs*, 142 S. Ct. at 2325 (Breyer, J., dissenting).

235. *Id.* at 2325.

236. *Id.* at 2326.

237. *Id.*

238. *Id*. Breyer in the next several pages applies this methodology to defend the right to an abortion in Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), further noting that law in the 19th century did not protect a variety of rights we recognize and that liberty and equality "do not inhabit the hermetically sealed containers the majority portrays." *Id.* at 2329-32.

"successive judicial precedents" — shades of Dworkin's Hercules — by which the judge would derive "fundamental" principles of law that could be applied to "new conditions." Breyer is not advocating for a completely contemporary, living constitutionalist application of the law. Breyer — and principle originalism — maintain firm connections to the past as a way of informing current understandings of law. This approach results in changes to the law that are contextualized and consistent with judicial precedent, which constrains judges from being "free to roam where unguided speculation might take them."[239] Consequently, principle originalism does not lead to sudden changes, as living constitutionalism might, but a more gradual evolution in the law, just like how *Brown* overturned *Plessy*.

Furthermore, principle originalism is reflective of how judges actually decide cases. A true meaning originalist has little use for precedent outside of that created at the time of or near the creation of law or constitutional provision at issue. But judges invariably attempt to find precedent to support whatever argument they are advancing, be it in the majority or in the dissent. Even the majority opinion in *Dobbs* relies heavily on precedent.[240] When judges cite precedent, it is often done for the purpose of highlighting an important legal principle in that opinion that can then be applied to the case the judge is deciding. By invoking precedent, judges *de facto* frequently employ principle originalism. Precedent is an integral component of judicial decision-making. A credible theory of jurisprudence, to some extent, should reflect the actual practice of judging. Principle originalism does in this regard, meaning originalism does not.

C. Respect for Stare Decisis beyond Stability

The decision in *Dobbs* overturned five decades of a constitutionally protected right to an abortion and the legal precedent associated with that right, albeit legal precedent that had gradually narrowed that right from its initial articulation. How would principle originalism respond to this legal history and application to Mississippi's ban on abortion after 15 weeks' gestation? It is necessary first to understand the majority's approach to *stare decisis*, the legal doctrine pertaining to precedent "under which a court must follow earlier judicial decisions when the same points arise again in litigation."[241]

---

239. *Id*. at 2326 (quoting Poe v. Ullman, 367 U.S. 497, 542 (Harlan, J., dissenting)).

240 *See, e.g.*, *id.* at 2242 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)) (stating "some rights [. . .] are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty'").

241. *Stare decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Stare decisis would normally require the upholding of settled legal principles, and even the majority in *Dobbs* notes the "important role" served by the doctrine in enabling people — both lawyers and potential litigants — to rely on the law as previously stated by prior decisions.[242] But, the majority asserts that *stare decisis* is "not an inexorable command"[243] and "is at its weakest when we interpret the Constitution."[244] The underlying premise behind this position is that constitutional cases are of such fundamental importance that getting the decision "right" weighs more heavily than having settled expectations of law.[245] *Stare decisis* gets a bad name because it is only invoked when a judge disagrees with an outcome but decides to uphold the case out of an interest in legal stability. Scalia described *stare decisis* as a "pragmatic exception" to originalism and that "[t]he whole function of the doctrine is to make us say what is false under proper analysis must nonetheless be held to be true, all in the interest of stability."[246] Justice Barrett, commenting on Scalia and writing before her ascension to the Supreme Court, allowed for some adherence to the results of prior decisions out of deference to *stare decisis* but not using the decisional theory to adjudicate subsequent cases.[247] Justice Barrett's point makes sense because if a judge determines a prior decision was rightly decided, the judge could just say that or re-articulate the same reasoning without having to invoke *stare decisis*. To a pure-meaning originalist, *stare decisis* is especially problematic due to the diminished role of precedent and deference instead to original public understanding.[248] Yet, judges in practice cannot simply ignore relevant prior case law and must come up with a way to decide whether to honor *stare decisis*.

To determine whether to overrule precedent — and in effect to abandon *stare decisis* — the Court in *Dobbs* creates a five-factor test: (1) the nature of the Court's error; (2) the quality of the reasoning of the case to be upheld; (3) the "workability" of the rules created by the case; (4) the effect of the case on other areas of law; and (5) the reliance interests in the decision.[249] The first four factors are essentially case-dependent and difficult to discuss

242. *Dobbs*, 142 S. Ct. at 2261-62.

243. *Id.* at 2262 (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)).

244. *Id.* (quoting Agostini v. Felton, 521 U.S. 203, 235 (1997)).

245. *Id.*

246. SCALIA & GUTMANN, A MATTER OF INTERPRETATION, *supra* note 130, at 139, 141.

247. Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1939 (2017).

248. *Id.* at 1922.

249. *Dobbs*, 142 S. Ct. at 2265.

from a principle originalism (or meaning originalism, for that matter) perspective,[250] other than to note that the majority's emphasis on *Plessy* being "egregiously wrong on the day [it was] handed down"[251] is only correct from a non-originalist retrospective standpoint. Unfortunately, the average (White) American in 1896 likely did not consider *Plessy* to be wrongly decided.[252] However, the reliance interests' factor is worth examining further.

The majority, drawing upon *Casey*, downplays reliance upon the availability of abortion because obtaining an abortion is an "unplanned activity."[253] In response to questions about the larger implications of the availability of abortions on the lives of women, the Court essentially throws up its hands and asserts this is a matter best left to the political process.[254] But, as the dissent stresses, the right to an abortion has implications not just on the immediate choice of whether or not to have an abortion, but also on how a woman views her place in society.[255] This broader focus is integral to *stare decisis* because it demonstrates that overturning established decisions does not just have consequences for individual decisions, but also a profound societal impact on public understanding of constitutional rights and associated relations both among people and between citizens and their government.[256]

---

250. One could certainly dispute from a principle originalism perspective the majority's premise that *Roe* was based on weak legal reasoning (*Id.* at 2266) by discussing how *Roe* drew upon prior right to privacy cases, but this would shed little light on the methodological debate between principle and meaning originalism *per se*.

251. *Id.* at 2279.

252. Indeed, the majority makes three odd case choices in defending its version of *stare decisis*. As discussed above and as Breyer points out in dissent, *Brown* overruled *Plessy* only after a series of decisions began a change in the law. *Id.* at 2341-42. West Virginia Board of Education v. Barnette overruled a case that had only been decides three years prior. *Id.* at 2342. And, West Coast Hotel Co. v. Parrish overruled the Lochner v. New York line of cases only after the Great Depression fundamentally altered understanding of the relationship between law and the economy and, something Breyer understandably does not acknowledge, after intense political pressure and a threat to pack the Court. *Id*. at 2341.

253. *Id*. at 2276 (quoting *Casey*, 505 U.S. at 856).

254. *Id.* at 2277.

255. *Id.* at 2345-46 (Breyer, J., dissenting) (pointing out that "[reproductive control] reflects that she is an autonomous person, and that society and the law recognize her as such. Like many constitutional rights, the right to choose situates a woman in relationship to others and to the government. It helps define a sphere of freedom, in which a person has the capacity to make choices free of government control.").

256. *Id.* at 2347. Breyer further contends that a decision reversing the constitutional

Breyer's critique of the majority decision in *Dobbs* is consistent with the response principle originalism would offer on *stare decisis* and reliance interests. Principle originalism relies upon contemporary understanding of legal concepts to form meaning that can then be applied to the legal issue before the judge. This semantic meaning is not limited to individual reliance interests but rather extends to the impact of the law on relational understandings of rights. The social context of a law provides its meaning. Established rights cannot be lightly discarded because they have become part of the fabric of the law and shape perception of one's role in that society. With respect to the right to an abortion, women, as Breyer suggested, have developed a sense of bodily integrity and personal autonomy because of the existence of the right.[257] The right to an abortion deserves to be maintained not out of a concern over the political or personal consequences of disrupting that belief; to rely upon this reasoning would be to appeal to the external critiques that principle originalism seeks to avoid. Rather, the right to an abortion deserves to be preserved because over the past half century since the decision in *Roe*, this right has become integrated into the public understanding of the rights of women, and that understanding, in turn, must inform any subsequent applications of the law.

It is here that we can see the value of principle originalism with respect to *stare decisis*. Principle originalism views *stare decisis* not through the primarily legal lens of the majority in *Dobbs*, but instead in terms of the semantic impact of the law. This is not preserving precedent for the sake of stability; it is preserving precedent because that precedent informs subsequent jurisprudence. This increases the stability of the law by transforming the law into a self-reflective interpretive endeavor. Principle originalism provides a richer and more respectful use of precedent than meaning originalism.

IV. CONCLUSION

The temptation to object to the decision in *Dobbs v. Jackson Women's Health Organization* for personal or political reasons is understandably strong for some people, but it does not respond to the majority opinion in jurisprudential terms. Efforts must be made to engage with the meaning

---

right to an abortion would be seen as bowing to political pressure and result in increased mistrust of the Supreme Court. *Id.* at 2348. This has indeed in reality been borne out, particularly among Democrats more likely opposed to the ruling in *Dobbs*. *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RESEARCH CTR. (Sept. 1, 2022), https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/.

257. *Dobbs*, 142 S. Ct. at 2348-49.

originalism of the *Dobbs* majority using an interpretive methodology internal to the law. Principle originalism accomplishes this task. Principle originalism draws from the chain novel theory of interpretivism advanced by Ronald Dworkin to craft judicial opinions that both fit with precedent, and which also look to the future by making the decision the best it can be in relation to contemporary public understandings of the law. Both approaches are equally grounded in objective sources of interpretation, but principle originalism avoids the fallacies of past determinacy that plague meaning originalism. Principle originalism is more reflective of actual judicial decision-making than meaning originalism due to its reliance on precedent. A jurisprudential methodology cannot just be pulled out to achieve the result one wants; it must be consistently applied and be able to address all cases that come before the court. Principle originalism satisfies this requirement while at the same time keeping the law reflective of current attitudes and semantic understanding through an interpretive framework that does not fall into the critique of judicial discretion leveled by meaning originalists against living constitutionalism. Breyer's dissent in *Dobbs* may not explicitly articulate a jurisprudential methodology to combat the majority opinion, but through principle originalism it provides a viable and superior argument for defending the right to abortion. Principle originalism offers a viable method of judicial interpretation that retains objectivity by remaining internal to the law while at the same time imbuing to the law the vibrancy it needs to be relevant to a changing contemporary society. As such, principle originalism offers a better, third way of judicial interpretation to both living constitutionalism and meaning originalism.