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## Diverse Originalism

Christina Mulligan

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## DIVERSE ORIGINALISM

Christina Mulligan\*

### ABSTRACT

*Originalism has a difficult relationship with race and gender. People of color and white women were largely absent from the process of drafting and ratifying the Constitution. Today, self-described originalists are overwhelmingly white men. In light of these realities, can originalism solve its “race and gender” problems while continuing to be originalist? This Article argues that originalists can take several actions today to address originalism’s race and gender problems, including debiasing present-day interpretation, looking to historical sources authored by people of color and white women, and severing originalism and the Constitution’s text from their historical associations with racism and sexism. Taking these steps will not only make originalism more inclusive, but also help originalists become better at accessing the original meaning of the Constitution.*

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## INTRODUCTION

Originalism has a difficult relationship with race and gender. Jamal Greene wonders “whether African-Americans have especially good reason to reject originalism.”<sup>1</sup> Jerome Culp, Jr. argued that “[a]lmost all notions of originalism are subject to the criticism that they ask black concerns to defer to white concerns. . . . ‘Defer to the past’ is the implicit message. Listen to the wiser and greater (and whiter) founders.”<sup>2</sup> Mary Anne Case similarly concluded that “no version of original meaning . . . holds much promise for yielding what Abigail Adams demanded of John—a constitutionally mandated code of laws more ‘generous and favorable to women’ than the one the Framers inherited.”<sup>3</sup>

Beyond these concerns about the substantive content of originalist interpretation, the scholars who most actively engage with originalism also tend to be a visually homogenous group. At the 2017 Originalism Works-in-Progress conference,<sup>4</sup> non-originalist scholar Richard Primus tweeted before the first panel, “At a conference on originalism. Nice people here. I count 31 around the table. 29 men; 28 white men.”<sup>5</sup> Primus’s observation

<sup>1</sup> Jamal Greene, *Originalism’s Race Problem*, 88 DENVER L. REV. 517, 517 (2011).

<sup>2</sup> Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 75.

<sup>3</sup> Mary Anne Case, *The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 445 (2014).

<sup>4</sup> *Eighth Annual Hugh & Hazel Darling Foundation Originalism Works-in-Progress Conference*, U. SAN DIEGO, [https://www.sandiego.edu/law/centers/cscs/detail.php?\\_focus=55335](https://www.sandiego.edu/law/centers/cscs/detail.php?_focus=55335) (last visited Nov. 14, 2018).

<sup>5</sup> Richard Primus (@Richard\_Primus), TWITTER (Feb. 17, 2017, 2:41 PM), [https://twitter.com/Richard\\_Primus/status/832721572280430592](https://twitter.com/Richard_Primus/status/832721572280430592). Although a few additional

feeds into another longstanding, indirect critique of originalism as an interpretive methodology: that it is a methodology developed by white men, that primarily attracts white men, and that, *res ipsa loquitur*, there must be something wrong with originalism if this is the population it attracts.

These critiques of originalism are perennial, and continue to resonate, because there are elements of truth to them. And yet, little work has been done to try to resolve originalism's race and gender problem, in large part because it is difficult to imagine how an interpretive methodology could do so while still being "originalist."

Accordingly, this Article asks whether originalism can address its relationship with race and gender while maintaining its commitment to the fixation principle—the principle that a constitutional provision's meaning was fixed at the time of its adoption.<sup>6</sup> Addressing this question necessitates teasing apart what specifically originalism's race and gender problem is—or more precisely, what those problems are. When concerns are genuinely understood and appreciated, opportunities to resolve the tension between originalism and its lack of diversity can emerge—on originalism's own terms, and according to its own values.

This Article proceeds in two main pieces. Part I isolates several interlocking but distinct concerns one might have about originalism's relationship to women and people of color. Part II evaluates what originalists might do to address the articulated concerns.

When proceeding, this Article makes certain limited presumptions about the nature of language and communication. Specifically, this Article presumes that language is not always wholly and insolubly indeterminate, and that there is some threshold of evidence which can satisfactorily demonstrate that particular pieces of language had some communicative content to a specific audience at a particular time. Language may often be under-determinate or open-textured, or be interpreted in different ways by different people; evidence about how a term or phrase was understood historically sometimes may also be too limited to draw convincing conclusions. Additionally, present-day interpreters may have conscious or unconscious biases that may distort their views of historic understanding. Nonetheless, this Article presumes that because language in general, and

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participants, including women and people of color, arrived after the tweet was sent, Primus's observation accurately captured the general demographic character of the room.

<sup>6</sup> See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015) ("The meaning of the constitutional text is fixed when each provision is framed and ratified: this claim can be called the *Fixation Thesis*. This thesis is one of two core ideas of originalist constitutional theory . . .").

the Constitution specifically, has some communicative content, originalist interpretation is possible. As a result, substantive discussion of whether language is radically indeterminate will be left to the side, both because the topic has been addressed elsewhere<sup>7</sup> and because its scope goes beyond the subject of diversity and representation in originalism.

## I. ORIGINALISM'S DEMOGRAPHIC PROBLEMS

Originalism's problem with race and gender is perhaps better characterized as several problems—overlapping concerns with the Constitution's origins, founding-era content, and modern-day interpretation. In order to better understand the concerns at issue, this Part first works to isolate and understand each potential problem on its own, and then describes how each problem interacts with one other. Loosely speaking, the concerns can be divided into two broad categories: concerns over substantive outcomes of applying originalist methodology, and non-consequentialist concerns about the origins of the Constitution or with originalism's political associations. Within these categories, objections break down into further subcategories. A belief that originalism's application will lead to undesirable outcomes could be a belief that correctly-executed originalist interpretation will yield bad results, but it could also be a belief that the interpretation will be manipulated, consciously or unconsciously, by one's political opponents to achieve their preferred results, regardless of whether correctly-executed originalist interpretation would provide the same answer. In theory, one might further wonder if one is following originalist methodology correctly but arriving at mistaken conclusions because of unrepresentative evidence. As Saul Cornell has argued about the elision of non-elite interpreters from originalist discourse,<sup>8</sup> studying the discourse of lower-class Americans, women, and minorities might reveal that the white, elite men whose writings are most commonly consulted sometimes interpreted the Constitution differently than other sub-communities.

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<sup>7</sup> See, e.g., Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 476–84 (1987) (discussing the indeterminacy thesis).

<sup>8</sup> See Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 303–04 (2011) ("When one moves beyond the debate between elite Federalists and Anti-Federalists, or Jefferson and Hamilton's arguments over strict and loose construction, a much more fundamental division within the Founding generation becomes visible: a conflict between elite and popular approaches to constitutional interpretation. Only when this aspect of the Founding debate is restored to its prominence can we begin to understand the dynamics of the original debate over Originalism.").

Besides concerns about the substantive applications of originalist interpretation, some concerns about originalist interpretation are decidedly non-consequentialist. These concerns largely relate to the political legitimacy of following originalist methodology—whether the “dead hand” of the founding generation can bind the living public today, generally, or whether a group of historic actors perceived as unrepresentative of the past or present-day population can legitimately bind future generations, specifically. Distinct from concerns about political legitimacy are concerns about the Constitution’s founding-era associations with slavery and black oppression, and about the alienation experienced by populations that feel disenfranchised by and external to America’s origin myth and narrative.

While this Part draws apart each of these concerns individually, empirically they frequently occur together and reinforce each other. Nonetheless, by conceptually clarifying what each concern consists of, it will be easier to identify the extent to which these concerns are redressable and how that redress may be achieved.

#### A. *Adverse Outcomes*

##### 1. *Outcomes Necessitated by Originalism*

One of the most straightforward demographic concerns about originalism is that originalist interpretation fails to advance the interests or reach the preferred outcomes of women and people of color.<sup>9</sup> At the onset, this worry has the potential to overgeneralize the views of these populations. While there are many political issues about which there is significant agreement within particular populations, there also exists a variety of diverse viewpoints, particularly as policy questions gain complexity or as questions get more specific. Nonetheless, as Greene observes, “[I]f we believe that originalism in particular is identified with outcomes that African-Americans tend not to support, then we have a simple explanation for why African-Americans might not have warm feelings toward originalism.”<sup>10</sup> Ditto for other people of color and white women.

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<sup>9</sup> More generally, this objection has been raised without a demographic context several times. *See, e.g.,* Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for its Own Interpretation?*, 103 NW. U. L. REV. 857, 898–912 (2009) (citing CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 63–65, 75, 81–150, 199–252 (2005)) (responding to Sunstein’s critique of originalism).

<sup>10</sup> Greene, *supra* note 1, at 517–18.

The concern that originalism leads to unpalatable outcomes has sparked several scholarly efforts to explain why originalist methodologies do lead to just results. Michael McConnell advanced the position that *Brown v. Board of Education* was justified on originalist grounds.<sup>11</sup> Although at the time “countless” others had disagreed with his conclusion, Steven G. Calabresi and Michael W. Perl later claimed McConnell had “the better of the argument.”<sup>12</sup> David Upham, as well as Calabresi and Andrea Matthews, have argued that the holding of *Loving v. Virginia* can be reached by originalist methods.<sup>13</sup> William Eskridge, and Calabresi and Hannah Begley, similarly argued that constitutional protection for same-sex marriage could be derived from an originalist interpretation of the Equal Protection Clause.<sup>14</sup> Their arguments appeared in an amicus brief for *Obergefell v. Hodges*,<sup>15</sup> although Justice Kennedy’s majority decided the case on different grounds. Calabresi and Julia Rickert have also mounted an originalist case in favor of constitutional protection against sexual discrimination.<sup>16</sup>

Other originalists have been less concerned that the Constitution might fail to protect certain rights or necessitate particular, desirable outcomes.<sup>17</sup>

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- <sup>11</sup> Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953 (1995) (“Parts II and III then demonstrate that the belief that school segregation does in fact violate the Fourteenth Amendment was held during the years immediately following ratification by a substantial majority of political leaders who had supported the Amendment.” (footnote omitted)); Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937, 1937–38 (1995) (responding to criticism of the argument set forth in *Originalism and the Desegregation Decisions*).
- <sup>12</sup> Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 432.
- <sup>13</sup> Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393; David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L.Q. 213, 216 (2015) (summarizing historical evidence that supports the Court’s holding in *Loving*).
- <sup>14</sup> See Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648, 649 (2016) (offering originalist justification for Justice Kennedy’s opinion); William N. Eskridge Jr., *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067, 1067 (2015) (“While the drafters of the Equal Protection Clause had no ‘expectations’ that states in 1868 would have to issue marriage licenses to same-sex couples . . . the state cannot create a caste regime arbitrarily marking a whole class of worthy persons as outside the normal protections of the law.”).
- <sup>15</sup> See generally Brief of Amici Curiae Cato Institute et al. in Support of Petitioners, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, -562, -571, -574) (arguing that originalism supported a constitutional interpretation that protected same-sex marriage).
- <sup>16</sup> Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 2–3 (2011) (arguing that an originalist interpretation of the Fourteenth Amendment prohibits discrimination on the basis of sex).
- <sup>17</sup> See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 117–33, 245 (1977); Alfred Avins, *De Facto and De Jure School*

Justice Scalia, for instance, claimed the Fourteenth Amendment did not provide protections against sex discrimination, but that legislatures could create whatever important protections the Constitution failed to provide. When asked about the topic, he explained,

[I]f indeed the current society has come to different views, that's fine. You do not need the Constitution to reflect the wishes of the current society. Certainly, the Constitution does not require discrimination on the basis of sex. . . . If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws. You don't need a constitution to keep things up-to-date. All you need is a legislature and a ballot box.<sup>18</sup>

Justice Scalia's observation may be satisfying when a position holds sway over a majority of the population, but where a position merely commands a sizeable minority of the population's views, that minority—justifiably or unjustifiably—often looks to the courts to address its problems and advance its interests. As a result, whether originalism yields particular results remains important to anyone whose position may not command a majority, but who places great weight on the government protecting a certain interest.<sup>19</sup>

Ultimately, the weight of the concern that originalism does not yield satisfactory or sufficiently desirable results for women and people of color is contingent on facts about the world—on the actual interests of many women and people of color, and on the substantive outcomes of applying

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*Segregation: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875*, 38 MISS. L.J. 179, 226 (1967).

<sup>18</sup> Interview by Calvin Massey with Antonin Scalia, CAL. LAWYER (Jan. 2011), <http://legacy.callawyer.com/2011/01/antonin-scalia/> (cited in Case, *supra* note 3, at 447 n.66). Notably, a few years later, Justice Scalia seemed to suggest the government still could not arbitrarily discriminate against women under the Constitution. “No, you can’t treat women differently, give them higher criminal sentences. Of course not. . . . The issue is, ‘What is discrimination?’ If there’s a reasonable basis for not letting women do something—like going into combat or whatnot.” Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/>. Mary Ann Case points out the challenges of identifying the “reasonable basis” Justice Scalia referred to. “[I]n many states for much of U.S. history, women were indeed treated differently in criminal sentencing and given higher sentences, for example under statutes that provided indeterminate sentences for them, and shorter fixed sentences for men.” Case, *supra* note 3, at 447 n. 67; see also Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 28 (1995) (cited in Case, *supra* note 3, at 447 n. 67) (“Courts justified legislative distinctions which imposed longer sentences on women than men as reasonable in view of the state’s purpose of providing more effective rehabilitation for women.”).

<sup>19</sup> Additionally, the content of originalist interpretation remains important to those holding majority positions, as courts may also prevent majority-approved government action they deem unconstitutional.



an originalist methodology to legal questions.<sup>20</sup> And to a point, some conclusions perceived to be “bad” results may be outweighed by other values. For example, one may believe that originalist interpretation is required by our law currently,<sup>21</sup> is necessary or conducive for government by “rule of law,” is the most legitimate way of interpreting our Constitution, produces the best outcomes overall (though not in every single case),<sup>22</sup> or constrains the tyrannical impulses of political and governmental actors. Nonetheless, concerns that originalism leads to unjust results are understandable reasons for someone to oppose it.

## 2. *Conscious Manipulation*

One might also be wary of originalism, not because of what accurate interpretation would yield, but because one worries that present-day interpreters have or will misread evidence to favor views that they prefer. This concern is especially resonant with some because of originalism’s origins.

Originalism gained adherents and momentum as a reaction to the perceived excesses of the Warren Court, whose decisions were seen by many Republicans and conservative scholars as untethered to the text of the written Constitution and as inappropriately expanding the role of the judiciary.<sup>23</sup> Writing in 2006, Reva Siegel and Robert Post expressed

20 See, e.g., Greene, *supra* note 1, at 517–18 (“[The conclusion that African-Americans tend not to be originalists because originalism breeds undesirable outcomes for the social group] is contingent on a set of assumptions about African-American political views and about the actual or perceived substantive outcomes originalism entails.”).

21 See William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2391 (2015) (“[W]hen you look at our current legal commitments, as a whole, they can be reconciled with originalism. Indeed, not only can they be reconciled, but originalism seems to best describe our current law.”); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 818–19 (2015) (“To an originalist . . . [w]hatever rules of law we had at the Founding, we still have today, unless something legally relevant happened to change them. Our law happens to consist of *their* law . . . . Preserving the meaning of the Founders’ words is important, but it’s not an end in itself.” (emphasis omitted)).

22 See JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 2 (2013) (“We argue that originalism advances the welfare of the present-day citizens of the United States because it promotes constitutional interpretations that are likely to have better consequences today than those of nonoriginalist theories.”).

23 See OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 4 (1987) (“[I]f the courts go beyond the original meaning of the Constitution . . . they usurp powers not given to them by the people.”); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 545 n.3 (2006) (citing originalist allegations that the Warren Court committed “judicial usurpation”); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 601 (2004) (describing

incredulity over Edwin Meese's claim that a "jurisprudence of original intention [was] necessary to preserve constitutional law from politicization."<sup>24</sup> Describing originalism as "an ideology that inspires political mobilization and engagement," Siegel and Post painted a highly politicized picture of the first wave of originalism.<sup>25</sup> "[O]riginalism gave conservative activists a language in which to attack the progressive case law of the Warren Court on the grounds that it had 'almost nothing to do with the Constitution' and was merely an effort to enact 'the political agenda of the American left.'"<sup>26</sup> In addition to accusing originalism of being outcome-oriented, Siegel and Post charged that Reagan-era originalism opportunistically "ignored elements of the original understanding that [did] not resonate with contemporary conservative commitments,"<sup>27</sup> particularly those which would lead to exceedingly unpopular or unjust results. Indeed, Justice Scalia described himself as a "faint-hearted" originalist,<sup>28</sup> although he later backed down from that description.<sup>29</sup> Post and Siegel emphasized that "[n]o one paid any attention"<sup>30</sup> when Lino Graglia argued that because "the fifth amendment . . . was adopted in 1791 as part of a Constitution that explicitly and repeatedly provided for slavery," it therefore did not forbid racial segregation in schools in the District of Columbia.<sup>31</sup> But if originalists de-emphasized conclusions they disliked,

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originalism as a reaction to the Warren and Burger courts); Raoul Berger, *The Imperial Court*, N.Y. TIMES, Oct. 9, 1977, at 38 ("The Supreme Court . . . has usurped legislative powers that the framers reserved to the states . . .").

24 Post & Siegel, *supra* note 23, at 554; see also Edwin Meese III, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 29 (1985) ("A jurisprudence based on first principles is neither conservative nor liberal, neither right nor left. It is a jurisprudence that cares about committing and limiting to each organ of government the proper ambit of responsibilities. It is a jurisprudence faithful to our Constitution.").

25 Post & Siegel, *supra* note 23, at 554.

26 *Id.* at 555 (quoting Lino A. Graglia, "Constitutional Theory": *The Attempted Justification for the Supreme Court's Liberal Political Program*, 65 TEX. L. REV. 789, 789 (1987)).

27 *Id.* at 558.

28 Antonin Scalia, *Originalism: The Lesser Evil*, 57 CIN. L. REV. 849, 864 (1989).

29 See Senior, *supra* note 18 ("You've described yourself as a fainthearted originalist. But really, how fainthearted?" "I described myself as that a long time ago. I repudiate that." "So you're a stouthearted one." "I try to be. I try to be an honest originalist! I will take the bitter with the sweet!"); see also MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* 165 (2013) ("But then Scalia confessed that 'in a crunch I may prove a faint-hearted originalist.'").

30 Post & Siegel, *supra* note 23, at 558.

31 *Id.* (alteration in original) (quoting Graglia, *supra* note 26, at 796). Recall that the Fourteenth Amendment's Due Process and Equal Protection Clauses on their terms only apply to the states. U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction

and drew attention to outcomes they did, their choices opened originalism up to being criticized as a cover for results-oriented reasoning.

Originalism has changed significantly since its politicized debut in the 1980s, and since Post and Siegel wrote their critique. Criticisms of original-intent jurisprudence inspired many originalists to instead interpret the Constitution based on how it was understood by the public, rather than by the drafters.<sup>32</sup> Two later iterations emphasize interpreting constitutional language using the “original methods” used to interpret the Constitution<sup>33</sup> and by relying on the law of how to interpret legal texts that existed at the time of enactment.<sup>34</sup> Many originalists have grown more accepting of and comfortable with the notion that some constitutional terms and phrases are underdetermined, vague, ambiguous, or open-textured.<sup>35</sup> And rather than using originalism to justify judicial minimalism, originalists like Randy Barnett emphasize the importance of the Ninth Amendment’s protections of unenumerated rights retained by the people.<sup>36</sup>

Nonetheless, despite originalism’s evolution, individuals who consider themselves left-of-center remain wary of it in light of its origins. For every originalist who agrees with Barnett’s characterization of the Ninth Amendment, there is another like Robert Bork who thinks the Ninth Amendment might be an “inkblot.”<sup>37</sup> While one could understand this sort

the equal protection of the laws.”).

32 See, e.g., Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 629 (1999).

33 See MCGINNIS & RAPPAPORT, *supra* note 22.

34 See William Baude & Steven E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017).

35 See, e.g., Solum, *supra* note 6, at 5 (“Some new originalists (those who accepted the interpretation-construction distinction and also believed that the Constitution contains some provisions that are vague or open textured) were led to the conclusion that the original meaning of the constitutional text does not fully determine the answers to all constitutional questions.”).

36 RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 254 (2004) (“The Ninth Amendment mandates that unenumerated rights be treated the same as those that are listed. . . . [T]he doctrine currently in place . . . fails to provide the equal protection of liberties required by the Ninth Amendment. It is a construction that runs afoul of the text . . .”).

37 More specifically, Bork said in his confirmation hearing:

I do not think you can use the [N]inth [A]mendment unless you know something of what it means. For example, if you had an amendment that says, “Congress shall make no” and then there is an ink blot, and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it.

14 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-1987, at 249 (Roy M. Mersky & J. Myron Jacobstein eds., 1990); see also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 166 (1990) (“A provision whose meaning cannot be ascertained is precisely like a provision that is written in Sanskrit or is obliterated past deciphering by an ink blot. No judge is entitled to

of disagreement as the sort good-faith difference any interpretive theory can yield, some see substantive disagreement among originalists as an indication that originalist practice is indeterminate, or at least largely contestable, and therefore will be manipulated, as Post and Siegel suggested, to justify implementing the interpreter's agenda.<sup>38</sup>

From this perspective, concerns about adverse outcomes are as much about the present-day as they are about the past. In other words, yes, one might worry that originalism will fail to advance or protect the interests of particular populations because the Constitution's drafters actually chose not to advance or protect those interests. But just as importantly, a skeptic of originalism might be *even more concerned* that originalism's advocates are abusing their ability to selectively appeal to the constitutional text, in order to reach their preferred outcomes *today*.

### 3. *Unconscious Bias*

The previous section explored the concern that originalism might not only *happen* to reach outcomes unpopular with particular populations, but in fact be designed to do just that—to restore an American vision that, while appealing to some, is experienced by others as hostile to their interests. This picture of originalism painted by Siegel and Post is an intentional one, depicting the “first wave” of originalism as a movement developed largely in response to the Warren Court's apparent indifference to the constitutional text and structure, with the goal of reversing it.

But the originalism of the 2010s is a very different creature than it was thirty years ago. On the one hand, originalism has evolved in response to criticism, focusing more on the communicative content of the constitutional text during the founding era, rather than on the drafters' intentions about how the text would be applied. Originalism is also a somewhat larger tent: if you believe the meaning of the Constitution was fixed in the founding era, and that meaning constrains government actors today, you can call yourself an originalist. (Under that broad and quite moderate-sounding definition, it would seem many more people would qualify as originalists

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interpret an ink blot on the ground that there must be something under it.”).

<sup>38</sup> Indeed, Jeffrey Rosen indirectly made this charge against Justice Scalia in 1997. “Scalia deserves respect for having redefined the mainstream of constitutional discourse, and in a substantially useful way. But having abandoned the pose of judicial neutrality, Scalia has now transformed himself into a passionate advocate for traditional values rather than a dispassionate guardian of the constitutional text.” Jeffrey Rosen, *Originalist Sin*, NEW REPUBLIC (May 5, 1997), <https://newrepublic.com/article/74152/originalist-sin>.

than have affirmatively adopted the label.) Even Jack Balkin, a figure in the critical legal studies movement, chooses to characterize his constitutional methodology as originalist in nature.<sup>39</sup> The Constitutional Accountability Center in Washington, D.C., describes itself as practicing “honest textualism and principled originalism”<sup>40</sup> in order to “fulfill[] the progressive promise of our Constitution’s text and history.”<sup>41</sup> While the majority of self-described originalists would probably not suppose the originalist’s Constitution leads to particularly progressive outcomes, it remains true that several of the emerging “new originalist” writings are more explicitly concerned with developing a more reliable and justified method of legal and constitutional interpretation than with advancing particular policy outcomes.<sup>42</sup> Originalism remains a theory of constitutional change, which gives credence to arguments for abandoning judicial precedent that deviates, or deviates too far, from what the Constitution requires.<sup>43</sup> However, despite its prominence in the Reagan administration, most originalists would be offended at the insinuation that their goals were to manipulate legal and popular discourse in order to unprincipledly advance a conservative policy agenda. Indeed, the great efforts to formalize originalist methodology and respond to critics represent a self-conscious attempt to establish originalism as a compelling and coherent theory of constitutional interpretation, rather than as a shorthand for a set of substantive policy positions.<sup>44</sup>

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<sup>39</sup> See JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

<sup>40</sup> *What Is Constitutional Accountability?*, CONST. ACCOUNTABILITY CTR. (June 1, 2008), <https://www.theusconstitution.org/blog/what-is-constitutional-accountability/>.

<sup>41</sup> *About the Constitutional Accountability Center*, CONST. ACCOUNTABILITY CTR., <https://www.theusconstitution.org/about-cac/> (last visited Sept. 22, 2018).

<sup>42</sup> See, e.g., MCGINNIS & RAPPAPORT, *supra* note 22, at 2; Baude & Sachs, *supra* note 34; Solum, *supra* note 6; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

<sup>43</sup> See H. Jefferson Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 IOWA L. REV. 1427, 1433 (1986) (“Just as in a scriptural religion, the most elaborate and established theological system can be challenged by the call *ad fontes* (‘back to the sources’); so in American constitutional law it is always possible to go back to the text, to challenge what currently is[,] in the name of what once was written.”); see also Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1603 (1989) (“The Constitution has a radical potential to disrupt our constitutional practice in part because the principles that animated the framing and ratification of the Constitution can prompt us to change our own understanding of constitutional meaning.”); *id.* at 1627 (“Just as Martin Luther initiated the transformation of religious practice by confronting the Church with its origins, so, too, the text of the Constitution and evidence of its original meaning can serve as the linchpin of a transformative politics.”).

<sup>44</sup> In 1989, Larry Solum contrasted what he hoped the direction of the originalist enterprise would be with Richard Nixon’s call for “strict construction” of the Constitution. See Solum, *supra* note 43, at 1601 (“As originalism has been modified and defined in reaction to nonoriginalist critiques,

Even if we agree that the overwhelming majority of originalists are intellectually honest and well-intentioned, there are still some fair concerns to raise about the potential for originalists to unconsciously evaluate originalist evidence to reach the results they prefer, or to comport with their existing expectations. Compared to the rest of the legal academic community, originalists tend to hold conservative or libertarian political philosophies, tend to be white, and tend to be male. Tendency is, of course, not absolute uniformity; most notably, Justice Clarence Thomas is African-American and is undoubtedly one of the most influential originalists of all time. But the reality that originalists are a somewhat homogenous population—at least on these axes—creates the potential for originalist interpretation as practiced to be unwillingly distorted. Many originalists see constitutional interpretation as a two-part inquiry: first to discover the semantic or communicative content of the Constitution's text at the time of the founding, and second to determine or decide the legal effect of the text in a given situation.<sup>45</sup> The process of discovering the communicative content of the Constitution's text is meant to be an objective and descriptive endeavor.<sup>46</sup> Yet, the homogeneity of the current population of originalists creates the potential for unnoticed and shared distortions, because modern-day interpreters may be more likely to share expectations and preferences with each other, due to having had similar life experiences.

In this sense, originalism's reputation as white, male, and conservative, libertarian, or Republican may create self-perpetuating effects. By accidentally projecting one's own concerns onto the founding generation, interpretations of the Constitution's meaning may come to reflect not only

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the originalist's position has become more and more plausible as a theory of constitutional interpretation.”); *id.* (“[S]trict construction’ . . . is now recognized as a virtually meaningless phrase. It was never more than a rallying cry for a set of positions on a number of distinct constitutional issues; ‘strict construction’ represents no coherent theory or principle of constitutional interpretation today.”).

<sup>45</sup> See, e.g., Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 66 (2011) (“What defines originalism as a method of constitutional interpretation is the belief that (a) the semantic meaning of the written Constitution was fixed at the time of its enactment, and that (b) this meaning should be followed by constitutional actors until it is properly changed by a written amendment.” (footnote omitted)); Solum, *The Interpretation-Construction Distinction*, *supra* note 42, at 101 (“Constitutional interpretation yields the semantic content of the Constitution. . . [and] all of these [interpretive] theories aim at the recovery of the linguistic meaning of the constitutional text.”).

<sup>46</sup> See Solum, *The Interpretation-Construction Distinction*, *supra* note 42, at 99–100 (“[T]he linguistic meaning of a text is a fact about the world. The meaning of written or oral communication is determined by a set of facts: these facts include the characteristics of the utterance itself . . . and by facts about linguistic practice . . . . The linguistic meaning of an utterance cannot be settled by arguments of morality or political theory.” (footnote omitted)).

the views of the Founders, but of those observing the Founders today. Ironically, the absence of more diverse populations within the originalist enterprise may compound this effect. More diverse populations working to reveal the meaning of constitutional text would bring their own worldview and unconscious biases to the process, and a dialogue among individuals with a variety of life experiences and expectations may be more likely to correctly distinguish between founding-era meaning and unconscious projection of present-day values, expectations, or concerns.

#### *4. Unrepresentative Evidence*

One might finally worry that an originalist could be well-intentioned and unbiased, but nonetheless be thwarted in their efforts to discover the original public meaning of the Constitution because the available evidence was not representative of the general public. The overwhelming majority of evidence of original meaning comes from the speech and writings of elite white men—largely because the Constitution was itself written by elite white men, and because elite white men produced most published writing, and the most writing about the Constitution in the founding era. To the extent that white women and people of color interpreted the Constitution differently, those interpretations are less likely to have been recorded and identified. Moreover, the writings of white women and people of color that did address the Constitution have largely escaped attention, as efforts to identify and categorize writings about the Constitution have generally focused on the most influential public actors in the founding period. As a result, even a well-intentioned and entirely unbiased present-day originalist may err in evaluating the original public meaning of the Constitution, because the meaning understood by large portions of the public does not appear prominently in the accessible or existing historical record.<sup>47</sup>

#### *B. Non-consequentialist Concerns*

Arguments that originalism compels, for instance, protection of same-sex marriage or desegregation, appear to do little to alter the composition of

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<sup>47</sup> The extent to which this concern resonates depends on two foundational elements. One has to believe that it is relevant to the “original meaning” how actual members of the founding public understood the constitutional text, as contrasted to how a “reasonable” member of the public, or with a lawyer, understood it. Additionally, one has to believe that multiple communities may have existed within the whole founding-era public, which either differed in how they used and understood language generally, or differed in how they interpreted the Constitution specifically. Both of these issues are explored further in subsequent sections. See *infra* Section II.A.

adherents to an originalist methodology. Indeed, despite the obvious relevance of substantive outcome, originalism's results may not play as dominant a role in whether one subscribes to it as one might expect. Two of the most crisply shared "originalism conversion" stories are not primarily about reaching particular legal outcomes. Randy Barnett states that his support for following the Constitution's publicly accessible, written meaning was significantly inspired by similar concepts in contract law—after he had initially rejected "original intent" originalism, and the notion that the Drafters' intentions could be controlling even if the public was unaware of them.<sup>48</sup> The interpretive methods underpinning Lysander Spooner's anti-slavery reading of the Constitution also played a significant role in developing Barnett's perspective.<sup>49</sup> Jack Balkin developed and adopted what he terms "living originalism" or "framework originalism," in some part after becoming disenchanted with what he viewed as unnecessary hostility towards the constitutional text by those seeking progressive legal outcomes.<sup>50</sup>

There are several reasons why originalism would not easily gain or lose adherents based on the content of new research and argument about what outcomes originalism compels (although McConnell's defense of *Brown* certainly made it more comfortable to call oneself an originalist). One possibility is lack of diffusion of originalist scholarship—many people may have a vague sense of what originalism is, but few keep up with the literature. Another may be that many non-originalist legal thinkers are more committed to general principles and methods, rather than to particular outcomes—principles including ideas that legal institutions are for the living to design, or must be designed by a group representative of the whole population along certain axes, in order to be legitimate.

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48 See Barnett, *supra* note 32, at 629 ("I have long denied that I was an originalist because I was largely persuaded by the multifaceted critique that has been accepted by so many others. Now I am reconsidering my skepticism."); *id.* at 633 ("The Constitution is a law that governs the lawmakers. They and those they govern are entitled to rely on the Constitution's appearances every bit as much as parties to private contracts, and for the same reasons. We cannot read other people's minds.").

49 See Randy E. Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation*, 28 PAC. L.J. 977 (1997).

50 See Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 876 ("[M]any liberals have assumed an almost instinctive and reflexive posture against ideas like originalism, constitutional fidelity and the importance of text, structure, and history. They have assumed, without justification, that the past is against them, that the work of the adopters is incorrigible, [and] that the constitutional text is unhelpful if not irrelevant . . . . Liberal constitutionalists must relearn a lesson well understood by Hugo Black: originalism is their friend, not their enemy; and the Constitution and its text, its history, and its structure really are on their side."); *id.* at 875 ("I am attracted to originalism because it reveals things about our protestant constitutional culture that liberals, especially, have forgotten.").



Finally, some might be inclined to reject originalist interpretation, not because of its substantive content or theoretical legitimacy, but because of its associations. The original Constitution provided for the continuation of slavery in the Southern states; many of the Framers were slaveholders themselves. Even though the Reconstruction Amendments rendered human bondage unconstitutional and provided legal tools to combat the oppressive state and local laws of the Jim Crow era, for some, the taint or contamination brought by the evil of slavery remains part of the Constitution, like a stain that can't be washed away, continuing to defile the document and whatever stems from it. More broadly, some are inclined to reject originalism because its practice feels alienating. If someone with your characteristics would not have been allowed to meaningfully participate in the document's formation and ratification in the founding era, and if present-day originalists do not seem particularly troubled by that fact, one can easily internalize the message: this methodology is not for me. The balance of this section breaks each of these concerns apart in more detail.

### 1. *The Dead Hand Problem*

One of the most frequently-encountered critiques of originalist interpretation stems from general concerns about the "dead hand"<sup>51</sup> and the nature of "consent of the governed."<sup>52</sup> Most Americans today have never explicitly consented to be governed by the Constitution. Regardless of one's demographic identity, one can question why the values and views of dead people should govern living individuals who now exist in a wildly different cultural context.

There are a variety of responses to concerns about whether and when governments are legitimate, a full exploration of which would take this Article far afield. Some scholars bend the meaning of consent to find it implicitly, through individuals' participation in political processes or failure to exit a governed territory.<sup>53</sup> Others argue governments are legitimate if they are ones that a rational or reasonable person would have

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<sup>51</sup> For further exploration of the dead hand concern, see Paulsen, *supra* note 9, at 916-18.

<sup>52</sup> See Greene, *supra* note 1, at 520 ("[T]o the extent the dead hand problem as I have articulated it is a problem, it is not a 'race' problem. The challenge to the democratic representativeness of the Philadelphia Convention and the state ratifying conventions is one we all share . . .").

<sup>53</sup> See EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 13 (1988) ("[A]ll government rests on the consent, however obtained, of the governed."); see also BARNETT, *supra* note 36, at 11-25 (criticizing tacit consent or acquiescence as a source of political legitimacy).

hypothetically consented to.<sup>54</sup> Jed Rubenfeld proposes that Americans as a people exist in a state of continuity with their past self, and can be bound by whatever authority the ratifying generation had.<sup>55</sup> Barnett's notion of legitimacy escapes the notion of consent and popular sovereignty,<sup>56</sup> holding that "[a] constitution is *legitimate* if it regulates the lawmaking powers it authorizes in such a manner as to provide an assurance that validly-made laws are necessary and will not violate rights."<sup>57</sup>

A different response to the question of constitutional legitimacy is somewhat specific to the government established by the American federal Constitution. Under this view, the question of whether the public has a duty to obey the Constitution is a misleading one, because the Constitution hardly places any obligations on the American public.<sup>58</sup> Rather, the Constitution is the law that governs those who govern<sup>59</sup>—the legislators, judges, and executors of the law, each of whom explicitly swear an oath to uphold the Constitution. From this perspective, the question of constitutional legitimacy might be framed as whether the Constitution appropriately binds government actors, rather than the public—a

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<sup>54</sup> See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 12 (Harvard Univ. Press rev. ed. 1999) ("Moreover, assuming that the original position does determine a set of principles . . . it will then be true that whenever social institutions satisfy these principles those engaged in them can say to one another that they are cooperating on terms to which they would agree if they were free and equal persons whose relations with respect to one another were fair."); LYSANDER SPOONER, *The Unconstitutionality of Slavery*, reprinted in THE COLLECTED WORKS OF LYSANDER SPOONER 1, 153 (1971) ("Our constitutions purport to be established 'by the people,' and, *in theory*, 'all the people' consent to such government as the constitutions authorize. But this consent of 'the people' exists only in theory."); see also BARNETT, *supra* note 36, at 29–30 (discussing hypothetical consent).

<sup>55</sup> JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 81–88 (2001).

<sup>56</sup> See Barnett, *supra* note 32, at 637–38 ("[C]onsent does not *of itself* legitimate the terms of a constitution as it does (within limits) the terms of private contracts. In this regard, then, I part company from the many originalists, both old and new, who base their originalism on notions of popular sovereignty." (footnote omitted)).

<sup>57</sup> *Id.* at 640. See generally Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111 (2003). Although perfectly just laws are not possible, the governance system must include sufficient due process protections and substantive protections for rights to have legitimate claim over those who are bound by the system. Barnett, *supra* note 32, at 640–41. For Barnett, it does not really matter for legitimacy how a government was formed; it matters whether the government functions in a sufficiently procedurally and substantively just manner.

<sup>58</sup> Currently, the Constitution forbids private persons from holding anyone in slavery or involuntary servitude, U.S. CONST. amend. XIII, § 1, and from transporting or importing alcohol in violation of state or territorial law, U.S. CONST. amend. XXI, § 2. However, given the fact that a constitutional violation of the Twenty-First Amendment can only occur coincident with a violation of another law, one might colorably characterize the only constitutional claim on private individuals as being contained in the Thirteenth Amendment.

<sup>59</sup> See Barnett, *supra* note 32, at 633 ("The Constitution is a law that governs the lawmakers.").

potentially easier question, given officials' explicit oath.

Concerns about the dead hand might further be conceptually separated into questions of whether "the Constitution" is legitimate and whether originalist interpretation of the Constitution is legitimate. While Will Baude and Steven Sachs argue that these two questions are essentially the same,<sup>60</sup> someone might also believe that the Constitution can legitimately bind government actors or citizens only so long as it can be "updated" and interpreted in a non-originalist way, or so long as precedent is followed regardless of whether or not the precedent is "originalist."

## 2. *Representational Legitimacy*

A variation of the legitimacy concern could be raised not because the Framers lived too far in the past, but because their demographic character was not representative of the population in the right way. The overwhelming majority of women and black men could not vote for delegates in the ratifying conventions,<sup>61</sup> nor could a large number of white men who did not own property and were living in states that conditioned voting on property ownership. White women and people of color neither drafted the Constitution nor participated in the state ratifying conventions themselves. Unsurprisingly, this history causes some individuals to resist embracing a system of government that systematically excluded people like themselves from its development.<sup>62</sup>

Here again, this concern over legitimacy can be expressed in several ways. One flavor of the concern might be better characterized as a concern about substantive outcomes rather than legitimacy. Someone holding this variety of concern might ask, "If people like me were not represented when the government was formed, why should I believe this government will

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<sup>60</sup> See Baude, *supra* note 21, at 2391; Sachs, *supra* note 21, at 818–19.

<sup>61</sup> Unique among states, New Jersey allowed unmarried women who owned sufficient property to vote in state elections between 1776 and 1807. Jan Ellen Lewis, *Rethinking Women's Suffrage in New Jersey, 1776-1807*, 63 RUTGERS L. REV. 1017, 1017 (2011); Judith Apter Klinghoffer & Lois Elkis, "The Petticoat Electors": *Women's Suffrage in New Jersey, 1776-1807*, 12 J. EARLY REPUBLIC 159, 159–60 (1992). At the time of ratification, free black men were eligible to vote under the same rules as white inhabitants of five states: New Hampshire, New York, New Jersey, North Carolina, and Massachusetts. MCGINNIS & RAPPAPORT, *supra* note 22, at 107 n.6 (citing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 572–73 (1856) (Curtis, J., dissenting)).

<sup>62</sup> See Dorothy E. Roberts, *The Meaning of Blacks' Fidelity to the Constitution*, 65 FORDHAM L. REV. 1761, 1761 (1997) (discussing whether black Americans have any duty to the Constitution); cf. MCGINNIS & RAPPAPORT, *supra* note 22, at 107 ("Given the slaves' exclusion from the enactment process and their harsh treatment under laws not prohibited by the Constitution, our argument for the binding nature of the Constitution probably did not even apply to the slaves.").

actually advance my interests?" In other words, one may believe that, if people similar to oneself were not among the Framers, then surely the document produced would not yield substantively positive outcomes for the individual in question.<sup>63</sup> Certainly, the original Constitution did not advance the interests of slaves in being free, but later amendments fundamentally altered the constitutional treatment of African-Americans. Whether the amended Constitution remains unjust is a more contestable and contested question.<sup>64</sup> Nonetheless, if the Framers were indifferent or hostile to certain people's interests, one could reasonably surmise, in the absence of further evidence, that those interests were likely not advanced by the Constitution. But this supposition can also morph into a genetic fallacy, presuming that the Constitution must not favor a particular party's interests because of its origins, regardless of what the available evidence indicates. Moreover, given the vast cultural differences between the founding era and the present-day, broader demographic representation at the founding might not have advanced the actual preferences of people today. For example, historian Nancy F. Cott writes that women in the founding era often embraced their prescribed role in the private sphere.<sup>65</sup> While equal representation at the Constitutional Convention may well have advanced many of the interests Abigail Adams considered when she urged John to "remember the ladies," founding-era women probably would not have represented the interests of twenty-first- or even twentieth-century women accustomed to active participation in public and commercial life.<sup>66</sup>

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63 Cf. MCGINNIS & RAPPAPORT, *supra* note 22, at 16 ("The supermajoritarian process is supposed to help protect minorities, but it has difficulty doing so if those minorities cannot participate.").

64 McGinnis and Rappaport, for example, agree that "the most serious of all criticisms of originalism" is "the exclusion of African Americans and women from much of the constitution-making process." *Id.* They ultimately conclude that "subsequent generations have now corrected the most obvious and worst consequences of the exclusion of African Americans and women. . . . in the form of the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments. In light of these corrections, . . . further [nonoriginalist] judicial correction has more costs than benefits." *Id.* at 17.

65 See NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835*, at 199 (1977) ("[W]omen of the past centuries rarely perceived, as many modern feminists do, an anthesis between women's obligations in the domestic realm and their general progress."); cf. *id.* at 8 (noting that in the 1830s, "an emphatic sentence of domesticity was pronounced for women. Both male and female authors . . . created a new popular literature, consisting of advice books, sermons, novels, essays, stories, and poems, advocating and reiterating women's certain, limited role. That was to be wives and mothers, to nurture and maintain their families, to provide religious example and inspiration, and to affect the world around by exercising a private moral influence.").

66 Cf. MCGINNIS & RAPPAPORT, *supra* note 22, at 112 (citing JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* 958 (2006)) ("[I]t is extremely speculative to assess how the Constitution would have been further changed, if at all, by the earlier inclusion of women in its making. For instance, it is sometimes argued that the inclusion of women would have prevented

Another flavor of the representational legitimacy concern is akin to a concern about procedural justice. Speaking most specifically about present-day legal disputes, Tom Tyler has argued, based on his own empirical research, that litigants often regard legal proceedings as more legitimate if they feel that their experience was fair and procedurally just, regardless of whether legal outcomes actually come out in their favor.<sup>67</sup> Other scholars emphasize the importance of litigants' being heard.<sup>68</sup> It is possible, then, that regardless of the results that originalist interpretation yields, some individuals will experience the originalist method as procedurally unjust because a population they closely identify with was excluded from crucial decisions in the past.

### 3. Contamination

The prior two subparts articulated concerns over the procedural origins of the Constitution—who made it law, and when. Closely related to concerns over procedural legitimacy is a concern over the substantive, moral character of the original Constitution—a sense that the Constitution is so tainted by its initial sanctioning of slavery that it cannot justly serve as a legitimate basis for our government going forward. Greene gets at this idea when he describes his alienation from the restoration narrative sometimes associated with originalism. “For me, as an African-American, a narrative of restoration is deeply alienating; what America has been is hostile to my personhood and denies my membership in the political community.”<sup>69</sup> Culp’s rejection of intent originalism was also influenced by slavery’s role in the Constitution’s formation.<sup>70</sup> Although related to

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statutes against abortions, but the current views of women provide reason to doubt this conclusion: The proportion of women who oppose abortion today is close to the proportion of men.”). For support of the assertion by McGinnis and Rappaport, see *Public Opinion on Abortion*, PEW RES. CTR., <http://www.pewforum.org/fact-sheet/public-opinion-on-abortion/> (last accessed July 7, 2017) (finding in 2017 that fifty-nine percent of women and fifty-four percent of men believe abortion should be legal in all or most cases, and that thirty-eight percent of women and forty-two percent of men believe abortion should be illegal in all or most cases).

67 See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

68 See Pam A. Mueller, *Victimhood and Agency: How Taking Charge Takes Its Toll*, 44 PEPP. L. REV. 691, 697–700 (2017) (“Procedural justice scholars . . . find that victims are more satisfied with legal outcomes if they are able to have a voice in the process.” (citation omitted)); cf. Erin L. Sheley, *Reverberations of the Victim’s “Voice”: Victim Impact Statements and the Cultural Project of Punishment*, 87 IND. L.J. 1247, 1248–49 (2012) (“I contend that the complexity of a victim narrative effectively conveys the social experience of harm, without which the criminal justice system loses its legitimacy as a penal authority.”).

69 Greene, *supra* note 1, at 521 (emphasis omitted).

70 Culp, *supra* note 2, at 68–69 (“[R]ace and slavery, although never explicitly mentioned, cemented

concerns about political legitimacy and the outcome of present-day legal disputes, the discomfort with the Constitution's origins reflects a slightly different instinct—that the origin of the Constitution was so tainted by the evil of slavery, that it cannot be—or has not been—reclaimed, reframed, or amended in a way that eliminates the contamination. Just as some symbols or phrases become forever associated with indefensible movements or moments in history, some experience the Constitution as irredeemable and interpret following its original meaning as a hostile act regardless of the substantive outcomes of its application or the changes wrought by later amendments.<sup>71</sup>

In this light, rejecting the originalist's Constitution evokes an aspect of Jonathan Haidt's moral foundations theory—the idea that moral intuitions actually encompass several different kinds of commitments, including fairness, harm avoidance, loyalty—and purity. According to Haidt's theory, humans have moral reactions to objects and actions they regard as sanctified or degraded. We are capable of experiencing a psychological intuition that some things are too repugnant to be touched or engaged with, even if they are not causing any concrete harm.<sup>72</sup> Haidt argues that the intuition that some objects or actions are sanctified or degraded is “important for binding groups together.”<sup>73</sup> To the extent that the Constitution is associated with a narrative of oppression, Haidt's work articulates how the resulting conception of originalism and the Constitution as degraded can follow.

#### 4. *Alienation*

This Part has tried to separate out potential reasons why women and people of color may shy away from identifying themselves as “originalists” or as embracing an originalist approach to constitutional interpretation. The reality of why any individual person rejects originalism may of course be highly varied, reflecting any combination of the concerns above, as well

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the Great Compromise between the Southern slave-holding states and the Northern states together like a bloody glue. . . . To rely on original intent is to hitch our interpersonal scheme to a vision that excluded blacks.”).

<sup>71</sup> Additionally, one could make an argument that blended concerns about adverse outcomes and contamination, worrying that the Constitution's immoral origins necessarily, entail intolerable legal outcomes today, which were unintentionally not corrected by the Reconstruction Amendments.

<sup>72</sup> JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 170–77 (2012).

<sup>73</sup> *Id.* at 154.

as more general concerns, such as about the determinacy of textual meaning. But of the concerns above, there is a common thread among them—a simultaneous sense that the Constitution was not created *for* certain people at the time of its drafting, and that originalists are not especially concerned with those people now.

A partial explanation for this phenomenon is that many individuals hold “bundled,” rather than isolated, viewpoints, sometimes because a set of views represents a consistent philosophy, but sometimes because of psychological and social commitments to groups like political parties that advance a particular agenda or “party line.”<sup>74</sup> Originalism is closely associated with one’s being conservative, libertarian, or Republican. One may be attracted to originalism if one has those political views, but originalism will be a harder sell if one identifies as, for instance, liberal, progressive, or Democrat—both for substantive reasons (e.g., one may not believe originalism yields progressive results) and for cultural reasons (unconsciously, one may anticipate friends and associates will engage in judgmental or socially-rejecting behavior if one articulates an unpopular position). These bundled associations may be strong enough that, even if it turned out that originalist interpretation advanced progressive policy goals, it would take a long while for self-identified progressives to find originalism attractive.

But attributing alienation purely to partisan allegiances misses something very real about the experiences of people whose affinity groups were largely excluded from America’s framing and are largely absent from the originalist community now. The alienation exists both in the past and present—not only did the political system and power structure at the time of the framing largely exclude women and people of color, but many of originalism’s present-day advocates do not seem especially sympathetic to individuals who reject originalism because they feel alienated from the framing era.

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<sup>74</sup> See Katharine T. Bartlett, *Objectivity: A Feminist Revisit*, 66 ALA. L. REV. 375, 385–86 (2014) (“When our identity is defined through the groups with whom we identify, the commitment to that identity motivates us to accept the dogma of these groups. This motivation transcends the rationality of that dogma.” (citing HAIDT, *supra* note 72, at 189–220)).

## II. TOWARD A MORE AUTHENTIC ORIGINALISM

Having teased apart various concerns someone might have about originalism, it becomes possible to distinguish between concerns that originalists can *do* something about and concerns that originalists can merely argue about. In the latter category, we would include the concern that originalist interpretation yields undesirable legal outcomes, and legitimacy concerns that the dead hand should not control current political activity or that government-founding activities must be diverse along particular axes to be legitimate. In these cases, the relevant facts are set. If someone does not like an originalist interpretation of a clause of the Constitution, an originalist might argue that the result is not actually bad, that we are obliged to respect the result even if we do not like it because of other normative commitments, or that we are, in general, better off if we follow originalist methods, even if a particular outcome is not pleasing. But ultimately, if the interpretive effort was done correctly, there is nothing for an originalist to *do* to change the outcome, as the meaning of the term or phrase at issue was fixed at the founding. Similarly, while one can argue that the dead hand or representation problems ought not delegitimize the Constitution, the relevant facts of how the Constitution came to be ratified are essentially unchangeable—it remains true who drafted and ratified the document, and when they did it. Short of re-ratifying the document, the circumstances under which the Constitution came to be are fixed.

But other concerns present opportunities for originalists to improve originalist practice. Conscious and unconscious biases that bend originalism away from its most authentic conclusions can be countered. Historic sources representing more diverse figures may be located, analyzed, and incorporated into the corpus of sources used to interpret constitutional text. Indeed, if originalism is to become its best possible self, it should recognize and work to alleviate the sense of alienation that many populations feel about our government's founding document—not merely by trying to convince others of the virtues of originalism with words, but by trying to include others with action. The reason to be inclusive of diverse populations is not merely performative. Inclusion of diverse perspectives—in both the past and the present—has the potential to improve the quality of constitutional analysis, particularly, and counter-intuitively, in the areas of constitutional inquiry that are meant to be descriptive, specifically the search for the communicative content of the constitutional text.

The balance of this Article explores how originalism can address several of the concerns set forth above, in sections that address correcting for present-day bias, incorporating more diverse populations into the corpus of



evidence of founding-era meaning, and alleviating the sense of alienation and contamination that some populations may associate with the Constitution and with originalism. These efforts are related: by incorporating more diverse perspectives into constitutional interpretation, and by honestly wanting to do so, originalists and originalist practice can demonstrate that diverse perspectives are important, and that diverse populations matter.<sup>75</sup> Incorporating diverse perspectives and seeking the opinions of a variety of interpreters will also serve to improve the originalist project, by making it easier to identify and correct for mistaken interpretations of historic texts.

### A. *Incorporating Diverse Perspectives*

#### 1. *Embracing Self-Skepticism*

Originalist interpretation tends to be done by self-identified originalists—a group that tends to be highly educated, affluent, white, male, and tends to hold conservative, libertarian, or Republican views. Some variation does exist. Among judges, for example, Justice Thomas and former D.C. Circuit Court Judge Janice Rogers Brown are African-American, originalist jurists, and along with Brown, Seventh Circuit Judge Diane Sykes is a female judge well-known for following an originalist methodology.<sup>76</sup> A handful of progressives also call themselves originalist.<sup>77</sup> But on balance, the overwhelming majority of self-described originalists are white men who hold conservative, libertarian, or Republican views.

If humans were easily able to set aside their existing beliefs and preferences about the world when addressing descriptive questions—such as how the founding-era public understood a particular word or phrase—it

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<sup>75</sup> Here, it is important to be precise about what I mean by “diverse perspectives.” I do not mean that, if a population believes that an issue is important, or an interpretation is beneficial, that the assessment of the constitutional text’s meaning ought to resolve differently; indeed, this would deny the central “fixation thesis” of originalism that we should understand the semantic meaning of the Constitution’s text as fixed at the time it was enacted. See Solum, *supra* note 6, at 1 (“The meaning of the constitutional text is fixed when each provision is framed and ratified: this claim can be called the *Fixation Thesis*. This thesis is one of two core ideas of originalist constitutional theory . . .”). Rather, diverse perspectives will help interpreters better understand the communicative content of the Constitution’s text, by being able to approach the text from a variety of directions.

<sup>76</sup> Michele Gorman, *A Look at Diane Sykes, Possible Trump SCOTUS Nominee*, NEWSWEEK (Dec. 13, 2016, 5:50 PM), <https://www.newsweek.com/profile-diane-sykes-trumps-possible-scotus-nominee-531588> (quoting Sykes as describing herself as an “originalist-textualist”).

<sup>77</sup> See *supra* notes 39–41 and accompanying text.

would not matter whether constitutional interpreters tended to have one background or another. However, behavioral science research increasingly indicates that humans struggle to approach and resolve descriptive questions completely objectively. In an essay on objectivity, Katharine Bartlett explains, “people’s brains function in ways that cause them often to process information in irrational, non-truth-seeking ways.”<sup>78</sup> She canvases behavioral research that concludes,

[W]e observe, remember, and assess new information to confirm our stereotypes, rather than to correct them. Typically, when we confront evidence that conflicts with a stereotype we hold, we do not tend to revise our beliefs about the group; instead we dismiss the conflicting evidence as evidence of an exceptional case.<sup>79</sup>

Perhaps more painfully, humans tend to “make up [their] minds first and then select the reasons that best support [their] chosen result.”<sup>80</sup> In short, all sorts of factors get in the way of individuals looking at evidence and coming to the best or most-objective conclusions about that evidence. Distortions are created not simply by an individual’s narrow self-interest, but also by “the ways our brains work to over-generalize, self-justify, prioritize present over future gain, affirm rather than test what we already believe, and form beliefs according to the groups with whom we identify.”<sup>81</sup>

Some see evidence that everyone’s perspective is somewhat biased and conclude that objectivity is impossible or non-existent.<sup>82</sup> But the existence of cognitive biases does not mean that there is no truth about how the Constitution was understood at the framing, or that such truth is inaccessible. Rather, the existence of pervasive cognitive biases means that efforts to uncover the original meaning of the Constitution must grapple not only with the challenge of locating appropriate evidence, but also with the challenges of accessing truth even when all the relevant facts are right in front of us—the challenges of transcending “not only our self-interests, but also the mental processes that motivate us to fulfill our various

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<sup>78</sup> Bartlett, *supra* note 74, at 384.

<sup>79</sup> *Id.* at 384–85 (citing GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 22–24 (1954)); Steven L. Neuberg, *Expectancy-Confirmation Processes in Stereotype-Tinged Social Encounters: The Moderating Role of Social Goals*, in 7 *THE PSYCHOLOGY OF PREJUDICE: THE ONTARIO SYMPOSIUM* 103, 106, 108 (Mark P. Zanna & James M. Olson eds., 1994); Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1910–11 (2009)).

<sup>80</sup> Bartlett, *supra* note 74, at 385 (citing Jonathan Haidt, *Moral Psychology and the Law: How Intuitions Drive Reasoning, Judgment, and the Search for Evidence*, 64 ALA. L. REV. 867 (2013)); *see also* HAIDT, *supra* note 72, at 27–51.

<sup>81</sup> Bartlett, *supra* note 74, at 387.

<sup>82</sup> *See generally* MARYJOE FRUG, *POSTMODERN LEGAL FEMINISM* (1992).

psychological and emotional needs rather than to discover truth.”<sup>83</sup>

Bartlett’s theory of “positionality” is a helpful guidepost for approaching this challenge. Rather than deny the existence of truth or of humans’ ability to access it, Bartlett argues that we must combine “self-skepticism with a commitment to truth-seeking, encompassing a responsibility both for understanding our own partiality and distorted ways of thinking *and* for striving to overcome these multiple distortions.”<sup>84</sup> She warns against both being over-confident in one’s objectivity and about willingly abandoning the search for objectivity in order to advance one’s own interests:

Overconfidence in our objectivity and excessive cynicism about it are both truth-suppressing, although for different reasons. When we are too sure about our objectivity, we take things conveniently for granted, neglecting the obligation to identify and defend our assumptions and our criteria for truth and to recognize alternative perspectives. When we are too cynical, we also neglect the obligation to look beyond our own perspectives; since we don’t think objectivity exists, or we believe it exists only to maintain existing power relationships, there seems little reason to search for it.

Positionality . . . recogniz[es] the limitations of our own objectivities, yet accept[s] the obligation to justify ourselves in terms intelligible from outside our limitations.

....

Some propositions—about law, or moral truth, or the workings of the physical universe—are simply more true, or more right, than others.<sup>85</sup>

Although objectivity and accessing descriptive truths are possible, overconfidence in our objectivity can result in descriptive truths eluding us. Originalists in search of accurate accounts of what the text of the Constitution meant at the time its provisions were enacted thus have an obligation not only to seek truth as best they can, but to also be vigilant about the areas where truth-seeking endeavors might be unwillingly distorted. Given the homogeneity of originalist interpreters, one starting point for trying to defend against the possibility of distortion is to seek consensus among other interpreters with different backgrounds who are asking the same questions.

A diverse population of originalist constitutional interpreters may reveal unanimity on some questions—evidence that would suggest the unanimous view is accurate—and, in other cases, result in disagreement on how a term or clause was understood or would apply at the time of its adoption.<sup>86</sup> This

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<sup>83</sup> Bartlett, *supra* note 74, at 389.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 393–94 (footnotes omitted).

<sup>86</sup> Indeed, some disagreement should be expected; the public meaning of the Constitution at the

disagreement can be a feature and not a bug, revealing how various interpreters' experiences and psychological commitments may be affecting their conclusions. As Jack Balkin observes,

The choice of which facts are relevant and important, and how and why they are relevant and important, are shaped by our theoretical and practical commitments. Those commitments prefigure what we look for in the past, how we evaluate what we find, what we discard as peripheral or not germane, and what we will do with the evidence that we bring forward with us into the present.<sup>87</sup>

Although we may work to be aware of the default beliefs we hold about the world, it is only possible to consciously recognize and question so many of them at any one time. Despite our best efforts to objectively understand the external environment, or the experiences of others, we are not always able to recognize when our pre-existing perspectives distort our investigations.

Because of this, we can take advantage of other individuals' diverse perspectives to compare and triangulate meaning, in order to better understand the objects of our inquiry.<sup>88</sup> By comparing and contrasting a variety of interpretations, we can check each other's distorting preconceptions.<sup>89</sup> In this way, originalism stands to benefit a great deal from diversifying its participants—the more those attempting to understand the founding-era meaning of the Constitution differ today, the more likely we will be able to accurately understand the founding-era public.

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framing, and our understanding of that public meaning today, is not one single meaning, but many individuals' and groups' largely-overlapping, but non-identical, meanings. See Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 56 (2006) ("Assuming that reader and author are both speaking the same language, that both are relatively fluent in that language, and that the phrase is part of the standard vocabulary of ordinary speakers, there is reason to think that there will be substantial overlap in the coverage that each will give to the phrase, but there is room for divergence at the margins.").

<sup>87</sup> Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 82 (2016).

<sup>88</sup> See Christina Mulligan, Michael Douma, Hans Lind & Brian Quinn, *Founding-Era Translations of the U.S. Constitution*, 31 CONST. COMMENT. 1, 16 (2016) (arguing that the existence of multiple translations of the Constitution creates the ability to "triangulate" common elements to clarify original meaning); cf. Lawrence M. Solan, *The Interpretation of Multilingual Statutes by the European Court of Justice*, 34 BROOK. J. INT'L L. 277, 293 (2009) ("The ability to compare different versions and then to triangulate . . . brings out nuances that can help the investigator gain additional insight into the thoughts of the original drafter.").

<sup>89</sup> One can imagine a twofold criticism of this claim. First, that more powerful or confident individuals are still likely to have their biases creep into interpretation, despite the presence of countervailing viewpoints. Second, that even despite best efforts, it would not be possible to fully eliminate how our experiences and worldview might distort our understanding of how members of the founding public understood the Constitution. Yet, even though we cannot achieve perfection, improvement is still a worthwhile goal.

## 2. *Being Wary of "Reasonableness"*

One particular aspect of originalist interpretation that risks distortion through unconscious bias is the search for the original, semantic content of the constitutional text. Members of the founding-era public did not all share a completely uniform understanding of the Constitution's text. Accordingly, originalists are faced with the questions of how to translate the range of multiple, actually-held meanings into a conception of "what the Constitution means" and how to apply that meaning to resolve legal questions. This interpretive exercise has the potential to distort founding-era meaning, if decision-makers end up choosing "the" meaning based on normative judgments, while styling their choice as an objective or positive analysis of what the text objectively meant.

For example, one popular approach is to characterize the public meaning of the Constitution as what a reasonable person would have understood the text to mean. Gary Lawson and Guy Seidman advance the claim that the Constitution itself instructs interpreters to understand it as written by and for "We the People of the United States."<sup>90</sup> Because "We the People" is a hypothetical construction, Lawson and Seidman try to understand who this anthropomorphized "We the People" is based on the content of the Constitution and the circumstances under which the Constitution was written. They write,

[T]he hypothetical "We the People of the United States" is a pretty good fit with the reasonable person of the law. This person is highly intelligent and educated and capable of making and recognizing subtle connections and inferences. This person is committed to the enterprise of reason, which can provide a common framework for discussion and argumentation. This person is familiar with the peculiar language and conceptual structure of the law. "We the People of the United States" is a formidable intellectual figure.<sup>91</sup>

For Lawson and Seidman, information about what actual people believed about the Constitution is merely relevant, but not dispositive: "In order to know what mental states can most appropriately be attributed to the reasonable person, it helps to know the mental states that were most likely held by real persons situated in the same point in space and time."<sup>92</sup> Lawson and Seidman's "reasonable member of the founding public" will often be quite different from various actual members of the founding public who were less educated, less committed to particular approaches to

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<sup>90</sup> Lawson & Seidman, *supra* note 86, at 70.

<sup>91</sup> *Id.* at 73.

<sup>92</sup> *Id.* at 80.

argument, and less knowledgeable about the law.

Other authors suggest a “reasonable person” standard for understanding the Constitution that looks a bit more like a colloquial conception of reasonableness, rather than Lawson and Seidman’s superman. For example, Vasan Kesavan and Michael Stokes Paulsen argue, as characterized by Paulsen, “It is the objective meaning of the words—the meaning the words would have, in context, to some hypothetical ‘objective observer’ or ‘reasonable person’—that matters.”<sup>93</sup> Randy Barnett similarly explains,

[T]he New Originalism seeks to identify what a reasonable speaker of English would have understood the words of the text to mean at the time of its enactment. This is as much an empirical inquiry as it would be to ascertain what the words I am now using mean today.<sup>94</sup>

At least one way of understanding “reasonable meanings” can remain highly descriptive—if by “reasonable meanings” we simply mean *shared* meanings. On this broad view, we can exclude idiosyncratic and singular interpretations of the Constitution from the set of “reasonable interpretations.”<sup>95</sup> For example, an unreasonable interpretation of “the power to establish post offices and post roads” would be that the power includes the authority to commission sculptures of the Greek Pantheon for public parks. Even if I were a member of the founding public and genuinely believed this to be the case, it would not be a reasonable interpretation of the text simply because *no one else* would think I thought commissioning sculptures was important if I said, “I think it is important that government can establish post offices.” What makes an interpretation reasonable in this broadest sense is merely that it would be likely for some population of people (but not necessarily all people) to arrive at that interpretation if a speaker used the words in question.

<sup>93</sup> Paulsen, *supra* note 9, at 874 (describing his and Vasan Kesavan’s view and citing Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1131–32 (2003)); see also Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar’s Unwritten Constitution*, 81 U. CHI. L. REV. 1385, 1440 (2014) (“[T]he true, original public meaning of the language employed . . . is[] the objective meaning the words would have had, in historical, linguistic, and political context, to a reasonable, informed speaker and reader of the English language at the time they were adopted.”).

<sup>94</sup> Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 415 (2013) (emphasis omitted); see also Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001) (“‘[O]riginal meaning’ refers to the meaning a reasonable speaker of English would have attached to the words, phrases, sentences, etc. at the time the particular provision was adopted.”).

<sup>95</sup> See Kesavan & Paulsen, *supra* note 93, at 1130 (“The meaning of the words and phrases of the Constitution as law is necessarily fixed as against private assignments of meaning.”).

On this view of reasonableness, there can be multiple reasonable interpretations of language, in the context of how it was expressed, so long as there exist multiple populations of people who would share each interpretation among themselves. One useful example of the existence of multiple meanings is reflected in an early discussion over the scope of the meaning of the Progress Clause.<sup>96</sup> In the debates surrounding the need for the First Amendment, specifically the freedom of the press, Federalists and Antifederalists expressed a different opinion about the powers granted to Congress in the Progress Clause. Antifederalist Robert Whitehall was concerned that the power to secure “to authors the right [to] their writings” would give Congress the power to license printing presses, thus necessitating the need for the First Amendment.<sup>97</sup> In contrast, Federalist James Iredell argued that the Progress Clause only gave Congress the power to grant rights to particular works to their authors<sup>98</sup>—to create what we now call copyrights. Given the passage of the First Amendment, and the fact that Congress has never tried to require licensure to run a printing press, we do not know how this clause would have been interpreted in the absence of the passage of the First Amendment. But it seems clear that each party believed the “exclusive right to one’s writings” described in the Progress Clause had different scopes.

If reasonable meanings are merely shared meanings, we might think that *either* believing the Progress Clause only authorized the creation of copyrights *or* believing that the Progress Clause authorized licensure of the press was reasonable, because both meanings were held by particular populations. This conception of “reasonable meanings as shared meanings” has the potential to be fairly objective; we identify reasonable interpretations by trying to ascertain interpretations that would have been shared or understood by a significant number of people in the founding period.

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<sup>96</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>97</sup> *The Pennsylvania Convention: Saturday, 1 December 1787*, in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION, RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA 444, 454 (John P. Kaminski et al. eds., 2009); see also *id.* (“Congress [will] have a power to destroy liberty of the press . . . . They have a power to secure to authors the right of their writings. Under this, they may license the press, . . . and under licensing the press, they may suppress it.”).

<sup>98</sup> See James Iredell, *Answers to Mr. Mason’s Objections to the New Constitution*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787-1788, at 360-61 (Paul Leicester Ford ed., 1888) (1788) (“Congress will have no other authority over [liberty of the press] than to secure to authors for a limited time an exclusive privilege of publishing their works.”).

But this framing of “reasonable” may seem to eliminate something important about the notion of reasonableness; we do not tend to use the word “reasonable” to mean “actual.”<sup>99</sup> You may look at the Progress Clause debate, read the text carefully, and decide, “This text only gives Congress the power to grant exclusive rights *to an author’s writings*. How could one read a power to license printers into that?” You might conclude that even if the Antifederalist interpretation of the clause was widespread, it was an unreasonable interpretation because the meaning was not supported by the text. This intuition leads towards a concept of reasonableness closer to what Lawson and Seidman articulate—reasonable meanings are not just actual meanings, but also take into account values such as logic, certain modes of textual analysis, and the like. The meanings that Lawson and Seidman would consider reasonable might seem both better justified and less numerous—creating more constraint on how judges apply the text.

But for all the apparent benefits of a robust “reasonable person” standard for original meaning, searching for this kind of “reasonableness” creates a tension with the goal of undertaking an “*empirical inquiry*”<sup>100</sup> into what the words meant. Once we start jettisoning some actually-held and publicly-understood meanings, we are engaged in a normative enterprise—determining which actually-held meanings are better, more justified, more logical, more consistent.<sup>101</sup> These are worthwhile endeavors, but they are not addressing empirical questions. When we seek that kind of reasonable meaning, we are no longer asking a descriptive question about what the text meant to the public. But if we mistakenly believe we are engaged in an empirical inquiry, we open the door for our pre-existing and present-day values and commitments to influence our judgment, without being consciously aware that it is happening.<sup>102</sup> And to the extent that many individuals engaged in originalist interpretation are similarly situated, the process of searching for the reasonable founding-era person’s

<sup>99</sup> Cf. Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 326 (2012) (arguing that reasonableness must be a normative, not a positive, notion).

<sup>100</sup> Barnett, *The Gravitational Force of Originalism*, *supra* note 94, at 415 (emphasis added) (describing the process of discerning the original public meaning of the Constitution’s text as an empirical inquiry).

<sup>101</sup> Balkin worries that if originalists search for single meanings, “we will discover that we will only be able to draw out a single answer from the past by reading the evidence selectively and opportunistically, by ignoring many participants in the ratification process, or by declaring that their views were not in fact reasonable.” Balkin, *supra* note 87, at 92; *see also id.* (“But in any age or era—as in our own—reasonable people often differ about many things, especially where politics is involved.”).

<sup>102</sup> Cf. Cornell, *supra* note 8, at 301 (criticizing when New Originalists “side step dealing with the actual beliefs of Americans and substitute the beliefs of a fictive reader, effectively turning constitutional interpretation into an act of historical ventriloquism”).



interpretations invites a particular projection of a present-day, white, male, educated, conservative or libertarian person's experiences onto eighteenth-century members of the founding public.

It may be difficult to imagine how a search for "reasonableness" may result in projecting present-day values into the past, but we can identify some examples where present-day commitments might cause an interpreter to unwillingly misunderstand the Constitution's meaning to the founding public. Saul Cornell, for example, has argued that many founding-era elites adhered to Blackstone's view that preambulatory text played a significant role in establishing how legal language should be interpreted.<sup>103</sup> In the present day, this is far less true. Both *District of Columbia v. Heller*<sup>104</sup> and *Eldred v. Ashcroft*<sup>105</sup> avoided reading a constitutional clause's preambles to limit the scope of a constitutional right or power. Popular scholarship also argues that preambles do not limit the scope of subsequent clauses.<sup>106</sup> But let us assume that Cornell is not only correct, but that, counterfactually, acceptance of Blackstone's approach to preambles was even more widespread than even Cornell argues.<sup>107</sup> A present-day interpreter, even knowing about Blackstone's influence on the founding-era public, might unconsciously discount evidence of meaning derived from reference to the preamble, having internalized the idea that it is more reasonable to discount the potential effect of preamble texts.

Feminist legal scholarship in the 1990s and early 2000s also explored the challenges of searching for an objective "reasonableness" in the context

<sup>103</sup> See Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 631–35, 633 n.37 (2008) (criticizing Scalia's opinion in *District of Columbia v. Heller* because he ignores Blackstone's rules on interpretation which "mandate[] a consideration of the preamble" when the language of an enactment is ambiguous).

<sup>104</sup> 554 U.S. 570, 578, 599 (2008) (holding that the Second Amendment's prefatory clause "announces the purpose for which the right was codified," but that the clause neither "suggest[s] that preserving the militia" was the only reason for its enactment nor limits the Amendment's operative language).

<sup>105</sup> 537 U.S. 186, 213–14 (2003) (finding that the perambulatory goal of promoting science did not constrain Congress from extending copyrights where Congress had consistently adopted "new definitions or adjustments of the copyright term").

<sup>106</sup> Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 807 (1998) ("To the extent the operative clause is ambiguous, the justification clause may inform our interpretation of it, but the justification clause can't take away what the operative clause provides. And because we know that operative clauses may be at times broader and at times narrower than justification clauses, we should accept that the two clauses will sometimes point in different directions.").

<sup>107</sup> Cornell, in fact, argues that there were divergent views about whether to adopt Blackstone's method of legal interpretation, with more elite lawyers embracing Blackstone, and more populist figures arguing that text should be understood according to its plain meaning. See Cornell, *supra* note 8, at 311–12, 314–17, 319–20.

of sexual harassment and domestic violence.<sup>108</sup> Concerned that notions of the “reasonable man” and “reasonable person” were effectively androcentric,<sup>109</sup> some circuit courts went so far as to specifically ask how a “reasonable woman” would have responded to harassment, believing that based on dissimilar nature or experiences, a reasonable man and a reasonable woman might respond to harassment in different ways.<sup>110</sup> Distinguishing among reasonable men, reasonable women, and reasonable people presented its own problems, as some commentators observed that the construct of the “reasonable woman” appeared to instantiate a variety of controversial stereotypes about women—that women were, for example,

<sup>108</sup> See, e.g., MAYO MORAN, RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD 276–81 (2003) (“[A]dopting the reasonable person standard, given its history as the reasonable man, seemed to privilege one understanding of social interaction in the workplace (that of men) and simultaneously undermine the alternative understanding of such interaction (that of women) . . . .”); Kathryn Abrams, *The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law*, DISSENT, Winter 1995, at 48–49; Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 468–69 (1997) (arguing that removing group identity from a reasonableness standard undercuts sexual harassment claims by ignoring the social, historical, and conduct-specific contexts in which such claims arise); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1400 (1992) (arguing that the law requires a reasonable woman standard for cases of sexual harassment and domestic assault because the law fails to address or incorporate the experiences of female victims in gender-specific acts); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1218 (1990) (critically examining the reasonable woman standard as insufficiently capturing the context in which an individual acts, and therefore “any unequal social conditions that affect an individual’s situation are both perpetuated . . . by such . . . [broad] standard[s]”); Stephanie M. Wildman, *Ending Male Privilege: Beyond the Reasonable Woman*, 98 MICH. L. REV. 1797, 1806 (2000) (arguing for a gendered reasonableness standard that incorporates systemic privilege in legal analyses).

<sup>109</sup> See Cahn, *supra* note 108, at 1405 (“[A] reasonable person may resemble a reasonable man . . . . Feminist theory has re-examined the reasonableness standard as part of a critique of ‘objective’ standards. So-called neutral and objective standards may contain unstated assumptions that are actually gendered.” (citations omitted)). For a more general discussion of androcentric standards in the law, see SANDRA LIPSITZ BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY* 39–79, 183–91 (1993).

<sup>110</sup> See, e.g., *Gray v. Genlyte Grp., Inc.*, 289 F.3d 128, 136–37 (1st Cir. 2002) (denying the objection to the use of a reasonable woman standard in jury instructions because, given the evidence and arguments presented at trial, the jury did not misunderstand the legal standard); *Hurley v. Atl. City Police Dep’t*, 174 F.3d 95, 115–17 (3d Cir. 1999) (finding the lower court properly applied the reasonable woman standard for a sexual harassment claim); *Torres v. Pisano*, 116 F.3d 625, 632 (2d Cir. 1997) (noting that the reasonableness standard, as applied to female employees, requires considering the conditions under which a reasonable woman would find the work environment hostile); *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (noting that victims experience sexual harassment or violence differently among genders, and thus adopting a reasonable woman standard because the “sex-blind reasonable person standard tends to be male-biased and tends to systemically ignore the experiences of women”); see also Ann C. McGinley, *Reasonable Men?*, 45 CONN. L. REV. 1, 5–6 (2012) (summarizing the adoption and use of the reasonable woman standard by courts and the critique of that standard by scholars).

more moral, more sensitive, and less sex-seeking than men.<sup>111</sup> Theirs and others' extensive meditation on what constituted "reasonableness" assessed that the "reasonable person" could only be so much of a blank slate.<sup>112</sup> But choosing what qualities were included in the "reasonable" person was a normative enterprise, not a positive one,<sup>113</sup> and individuals and populations would sometimes differ on what "reasonable" means, based on their own experiences and commitments.<sup>114</sup>

Critiquing the search for a "reasonable member of the founding public" does not deny that there are better and worse interpretations of the Constitution. Rather, the aim is to highlight that, to the extent we want to separate empirical or descriptive accounts of what the text meant at the framing (its semantic content), and normative accounts of how the text should be understood and applied (its legal content), the question of what is a *reasonable* interpretation belongs in the latter category. There, we can make normative claims about the application of the constitutional text and, knowing that we are doing so, be more explicit about what we are claiming and why, and take measures to avoid distorted reasoning.

### B. Identifying Diverse Historic Speakers

The previous Section explored how the original meaning of the Constitution might be unwillingly distorted across time, if present-day

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<sup>111</sup> See Cahn, *supra* note 108, at 1415-17 (criticizing the reasonable woman standard because it incorporates sexist stereotypes about women, does not distinguish between women of different backgrounds, and focuses too closely on the behavior of the victim rather than the perpetrator).

<sup>112</sup> See Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 289-91 (2002) (analyzing "subjective" and "objective" standards for self-defense and arguing that both require consideration of the circumstances surrounding the actus reus); Christopher Jackson, *Reasonable Persons, Reasonable Circumstances*, 50 SAN DIEGO L. REV. 651, 661-62 (2013) (arguing that it is impossible to determine the relevant characteristics of a defendant for a reasonableness inquiry where subjective and objective standards necessitate consideration of the circumstances of the individual's conduct).

<sup>113</sup> See Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 788 (1994) (arguing the reasonable person test includes normative aspects); Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 CRIM. L. & PHIL. 137, 138 (2008) (referring to the reasonable person test as normative). Mayo Moran critiques the application of the "reasonable person" as, in practice, a "standard of ordinariness," although the comment seems to assume that reasonableness is actually a normative concept. See MORAN, *supra* note 108, at 13.

<sup>114</sup> See Balkin, *supra* note 87, at 82 ("The choice of which facts are relevant and important, and how and why they are relevant and important, are shaped by our theoretical and practical commitments. Those commitments prefigure what we look for in the past, how we evaluate what we find, what we discard as peripheral or not germane, and what we will do with the evidence that we bring forward with us into the present.").

interpreters unintentionally project their existing views about language and politics onto speakers from the past. But distorted interpretations can also occur if a present-day interpreter primarily looks at how the Constitution was understood by a subset of the public and mistakenly concludes that the views of the subset accurately represent the views of the majority or even the whole.

For example, Saul Cornell has argued that elite and non-elite members of the founding public adhered to varying methods of interpreting the Constitution.<sup>115</sup> It is similarly plausible that particular words or phrases in the original Constitution or its amendments would have been understood slightly differently across geographic location, across social and economic class, across language, across gender, and across race and ethnic background. If public-meaning originalists seek to understand the Constitution as it was understood by the public, the meanings of the entire public must be considered. Ignoring the understanding of lower-class Americans, black Americans, German-speakers, or women *ex ante* presumes that the views of elite, white, English-speaking men were either identical to other groups' interpretations, or were the best or most reasonable interpretations of the Constitution. But we can't make normative judgments about the reasonableness or quality of these populations' understanding of the Constitution until we know what their "actual public meanings" were.

### 1. *Working with Incomplete Records*

The realities of historical inquiry get in the way of discovering the views of linguistic and cultural sub-communities. Interpretations and commentary on the Constitution are more likely to have been preserved if there were many copies printed or if the works were written by well-known individuals or were thought to have been important. By definition, illiterate individuals left almost no written record of their thoughts and beliefs, unless they had been transcribed by another.<sup>116</sup> These realities mean that our

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<sup>115</sup> See Cornell, *supra* note 8, at 309–10 (“At one extreme stood men . . . who were firmly committed to the methods of the lawyer’s constitution. In the middle stood many self-made lawyers who had some familiarity with Blackstone’s writings. Further along this continuum were moderates who believed that the law required no special knowledge, and at the extreme were plebeian populists who believed the voice of the people could be spontaneously gathered by juries or even mobs.”).

<sup>116</sup> See CATHERINE ADAMS & ELIZABETH H. PLECK, *LOVE OF FREEDOM: BLACK WOMEN IN COLONIAL AND REVOLUTIONARY NEW ENGLAND* 21 (2010) (noting that, when one person’s story is told to another who writes it down, “[i]t is impossible to distinguish between the two voices in such collaborative efforts or discern the process that went into constructing a single

corpus of direct commentary about the Constitution, and of texts illustrating how language was used in general, will over-represent the elite and influential population that played a significant role in the public sphere.

Nonetheless, even though much information is irretrievably inaccessible, originalists can still work with available tools and material to ensure that when we talk about public meaning, we are considering as much of the entire public as possible. Brigham Young University's recent efforts to create a large corpus of American English from the founding era and later historical periods<sup>117</sup> lays a helpful groundwork for investigating and incorporating America's distinct populations into originalist constitutional analysis, even where there is little direct evidence about what members of those populations thought about the constitutional text itself. Designers of corpora of historic American English could consciously work to include and tag the writings of people of color, women, and other minorities and distinctive cultural sub-communities, so that investigators could research not only how language was used by the entire public, but also how language was used by these particular populations. In this way, it might be possible to identify divergent understandings of constitutional language across populations by looking at how key terms and phrases were used in other written contexts.

Complicating any attempt to identify and include diverse populations in historic corpora is the reality that it is often difficult to determine an author's demographic characteristics by name (or pseudonym) alone, without doing additional biographical research or deducing information from the content of the text. Especially over many texts, it may be impracticable to identify relevant characteristics of historic authors. One mitigating resource may be minority-owned and oriented newspapers, the first of which appeared in the 1820s.<sup>118</sup> In the case of newspapers whose intended audience was black, Hispanic, or Native American, one can more easily surmise that the authors of those papers often represented their intended audience. Although the 1820s and 1830s postdate ratification by several decades, language from that time may still be probative of how

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account").

117 See BYU LAW & CORPUS LINGUISTICS, <http://lawcorpus.byu.edu/> (last visited Nov. 11, 2018).

118 See JUAN GONZÁLEZ & JOSEPH TORRES, *NEWS FOR ALL THE PEOPLE: THE EPIC STORY OF RACE AND THE AMERICAN MEDIA* 64–65 (2012) (providing a short history of the pre-Civil War founding of newspapers by people of color); see, e.g., *THE LIBERATOR*, <http://fair-use.org/the-liberator/> (last visited Nov. 12, 2018) (archiving *The Liberator* newspaper, a "radical Abolitionis[t]" publication, 1831–1865).

language was used and understood at the framing and during the drafting and ratification of the Reconstruction Amendments.

Additionally, we are also already aware of many individual white women and people of color who authored significant writings, even if they did not always—or ever—discuss constitutional and legal ideas. These speakers admittedly remain unrepresentative of the average member of the public—their writings survive because these authors were prominent and often uncommonly educated for their time. Nonetheless, works by these authors constitute examples of how language was used by sub-populations and counterpublics<sup>119</sup> in the founding era and during the ratification of later amendments.<sup>120</sup> In the founding era particularly, female and black authors were rare, and so the next few paragraphs will highlight several of the most prominent authors in that time.<sup>121</sup>

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<sup>119</sup> The idea of “counterpublics” emerges from responses to Jürgen Habermas’s theory of the public sphere. Habermas described the public sphere as where “something approaching public opinion can be formed.” Jürgen Habermas, *The Public Sphere: An Encyclopedia Article*, in CRITICAL THEORY AND SOCIETY: A READER 136, 136 (Stephen Eric Bronner & Douglas MacKay Kellner eds., 1989). He “focused on the ways in which bourgeois society developed modes of interaction, from the small-group interactions of salons and coffee houses to the later, larger institutional arenas such as the press.” James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 716 (2016) (footnote omitted). Critics of Habermas pointed out that notions of “the public sphere” also needed to take into account discourse within “excluded and subordinated communities.” See Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, in HABERMAS AND THE PUBLIC SPHERE 109 (Craig Calhoun ed., 1992); see also Fox, *supra*, at 716. The notion of “counterpublics” emerged as “sites where excluded or subordinated groups can develop and refine counter-discourses, both to maintain and develop their own meanings and identities and to re-engage the dominant ‘public’ sphere in a critical discourse.” Fox, *supra*, at 716.

<sup>120</sup> For a discussion of the development of a black counterpublic sphere in late-eighteenth-century America, see Joanna Brooks, *The Early American Public Sphere and the Emergence of a Black Print Counterpublic*, 62 WM. & MARY Q. 67 (2005).

<sup>121</sup> By contrast, female and minority commentary on the later amendments was more common. See e.g., AFRO-AMERICAN WOMEN WRITERS 1746–1933 (Ann Allen Shockley ed., 1988); 1 HISTORY OF WOMAN SUFFRAGE (Elizabeth Cady Stanton et al. eds., Arno Press, Inc. 1969) (1881) (including documents dated from 1848 to 1861); 2 HISTORY OF WOMAN SUFFRAGE (Elizabeth Cady Stanton et al. eds., Arno Press, Inc. 1969) (1882) (including documents dated from 1861 to 1876); 3 HISTORY OF WOMAN SUFFRAGE (Elizabeth Cady Stanton et al. eds., 1886) (including documents dated from 1876 to 1885); 4 HISTORY OF WOMAN SUFFRAGE (Susan B. Anthony & Ida Husted Harper eds., 1902) (including documents dated from 1883 to 1900); 5 HISTORY OF WOMAN SUFFRAGE (Ida Husted Harper ed., 1922) (including documents from 1900 to 1920); 6 HISTORY OF WOMAN SUFFRAGE (Ida Husted Harper ed., 1922) (including more documents from 1900 to 1920); 1 PROCEEDINGS OF THE BLACK STATE CONVENTIONS, 1840–1865 (Philip S. Foner & George E. Walker eds., 1979); 2 PROCEEDINGS OF THE BLACK STATE CONVENTIONS, 1840–1865 (Philip S. Foner & George E. Walker eds., 1980); THE BLACK AMERICANS: A HISTORY IN THEIR OWN WORDS 1619–1983 (Milton Meltzer ed., 1984); THE CONCISE HISTORY OF WOMAN SUFFRAGE: SELECTIONS FROM THE CLASSIC WORK OF STANTON, ANTHONY, GAGE, AND HARPER (Mari Jo Buhle & Paul Buhle eds., 1978) (selections

Among the black, male founding-era figures in America who produced significant writings were African Methodist Episcopal Church founder Richard Allen;<sup>122</sup> almanac author, mathematician, and surveyor Benjamin Banneker;<sup>123</sup> businessman and sea captain Paul Cuffe;<sup>124</sup> businessman and sailmaker James Forten;<sup>125</sup> founder of black freemasonry Prince Hall;<sup>126</sup> Calvinist minister and Federalist Lemuel Haynes;<sup>127</sup> poet Jupiter Hammon;<sup>128</sup> preacher John Jea;<sup>129</sup> founder of the Protestant-Episcopal

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from the six volumes of *History of Woman Suffrage*, including documents reacting to the Fourteenth and Fifteenth Amendments' introduction of gender into the Constitution); Fox, *supra* note 119 (exploring black discourse surrounding the Reconstruction Amendments); *About the Colored Conventions*, COLORED CONVENTIONS PROJECT, <http://coloredconventions.org/> (hosting primary source documents from "colored conventions" from 1830 1899) (last visited Nov. 12, 2018).

<sup>122</sup> Allen was a major figure in Philadelphia's black community in the late eighteenth century. See generally GARY B. NASH, *FORGING FREEDOM: THE FORMATION OF PHILADELPHIA'S BLACK COMMUNITY, 1720 1840* (1988); RICHARD S. NEWMAN, *FREEDOM'S PROPHET: BISHOP RICHARD ALLEN, THE AME CHURCH, AND THE BLACK FOUNDING FATHERS* (2008).

<sup>123</sup> See generally BENJAMIN BANNEKER, *BANNEKER'S ALMANAC AND EPHEMERIS* (1975) (published annually from 1792 to 1797); SILVIO A. BEDINI, *THE LIFE OF BENJAMIN BANNEKER* (1972) (including documents written by Benjamin Banneker). Banneker's almanacs are described in BEDINI, *supra*, 137 201. Banneker is also known for participating in the land survey of the District of Columbia and for corresponding with Thomas Jefferson on the injustice of slavery. See BEDINI, *supra*, at 103; *id.* at 151 58 (reprinting Banneker's letter, dated August 19, 1791, and Jefferson's response, dated August 30, 1791).

<sup>124</sup> More precisely, Cuffe was part black and part Native American. Unlike several of his contemporaries, including Richard Allen and Absalom Jones, Cuffe supported efforts for black people in America to return to Africa. NASH, *supra* note 122, at 184 85, 235 239. Cuffe's writings can be found in PAUL CUFFE, *NARRATIVE OF THE LIFE AND ADVENTURES OF PAUL CUFFE, A PEQUOT INDIAN: DURING THIRTY YEARS SPENT AT SEA, AND IN TRAVELLING IN FOREIGN LANDS* (1839). See also CAPTAIN PAUL CUFFE'S LOGS AND LETTERS, 1808-1817: A BLACK QUAKER'S "VOICE FROM WITHIN THE VEIL" (Rosalind Cobb Wiggins ed., 1996); LAMONT D. THOMAS, *PAUL CUFFE: BLACK ENTREPRENEUR AND PAN-AFRICANIST* (1988).

<sup>125</sup> See JAMES FORTEN, *LETTERS FROM A MAN OF COLOUR, ON A LATE BILL BEFORE THE SENATE OF PENNSYLVANIA* (1813); JULIE WINCH, *A GENTLEMAN OF COLOR: THE LIFE OF JAMES FORTEN* (2002); Julie Winch, *The Making and Meaning of James Forten's Letters from a Man of Colour*, 64 WM. & MARY Q. 129 (2007).

<sup>126</sup> See CHARLES H. WESLEY, *PRINCE HALL: LIFE & LEGACY* (1977) (including Hall's letter book and his 1792 and 1797 charges to the African Lodge).

<sup>127</sup> See LEMUEL HAYNES, *BLACK PREACHER TO WHITE AMERICA: THE COLLECTED WRITINGS OF LEMUEL HAYNES, 1774 1833* (Richard Newman ed., 1990); JOHN SAILLANT, *BLACK PURITAN, BLACK REPUBLICAN: THE LIFE AND THOUGHT OF LEMUEL HAYNES, 1753 1833* (2003); Ruth Bogin, Note, "Liberty Further Extended": A 1776 Antislavery Manuscript by Lemuel Haynes, 40 WM. & MARY Q. 85 (1983).

<sup>128</sup> Hammon was a slave in New York who published numerous poems throughout his life and *An Address to the Negroes in the State of New-York* in 1787. See JUPITER HAMMON, *AN ADDRESS TO THE NEGROES IN THE STATE OF NEW-YORK* (1787), available at <http://digitalcommons.unl.edu/etas/12/>; JUPITER HAMMON, *THE COLLECTED WORKS OF JUPITER HAMMON* (Cedrick May ed., 2017).

African church Absalom Jones;<sup>130</sup> preacher John Marrant;<sup>131</sup> and orator and tobacco seller Peter Williams Jr.<sup>132</sup>

Poet Phillis Wheatley<sup>133</sup> stands essentially alone as a founding-era black woman whose writing remains accessible.<sup>134</sup>

While these individuals left numerous, sometimes highly-political, writings, few black Americans directly commented on the Constitution at the time of ratification in a way that has been preserved today.<sup>135</sup> There

<sup>129</sup> Jea was a slave in New York who was freed after converting to Christianity. His autobiography is JOHN JEA, *THE LIFE, HISTORY, AND UNPARALLELED SUFFERINGS OF JOHN JEA, THE AFRICAN PREACHER* (Dodo Press 2010) (1811).

<sup>130</sup> Jones was a major figure in Philadelphia's black community in the late eighteenth century. See generally NASH, *supra* note 122; NEWMAN, *supra* note 122 (discussing Jones throughout, and noting particular discussions in the index). See also ABSALOM JONES, *THANKSGIVING SERMON, PREACHED JANUARY 1, 1808* (1808).

<sup>131</sup> JOHN MARRANT, *A JOURNAL OF THE REV. JOHN MARRANT, FROM AUGUST THE 18TH, 1785, TO THE 16TH OF MARCH, 1790* (London, J. Taylor and Co. n.d.); JOHN MARRANT, *NARRATIVE OF THE LORD'S WONDERFUL DEALINGS WITH JOHN MARRANT, A BLACK* (4th ed. 1785); JOHN MARRANT, *SERMON PREACHED ON THE 24TH DAY OF JUNE 1789* (Boston, Bible and Heart 1789); see also JAMES SIDBURY, *BECOMING AFRICAN IN AMERICA: RACE AND NATION IN THE EARLY BLACK ATLANTIC* 41–42 (2007) (describing Marrant).

<sup>132</sup> See PETER WILLIAMS, JUN., *AN ORATION ON THE ABOLITION OF THE SLAVE TRADE; DELIVERED IN THE AFRICAN CHURCH, IN THE CITY OF NEW-YORK, JANUARY 1, 1808* (Samuel Wood 1808); NEW-YORK HISTORICAL SOCIETY, *Peter Williams, Jr., in LIFE STORIES: PROFILES OF BLACK NEW YORKERS DURING SLAVERY AND EMANCIPATION* (n.d.), [http://www.slaveryinnewyork.org/PDFs/Life\\_Stories.pdf](http://www.slaveryinnewyork.org/PDFs/Life_Stories.pdf) (last viewed Oct. 2, 2018).

<sup>133</sup> See generally PHILLIS WHEATLEY, *COMPLETE WRITINGS* (Vincent Carretta ed., 2001). Wheatley noted in a letter that “civil and religious Liberty” are “so inseparably united, that there is little or no Enjoyment of one without the other.” Letter from Phillis Wheatley to Rev. Samson Occom (Feb. 11, 1774), *reprinted in supra*, at 152–53.

<sup>134</sup> Historians Catherine Adams and Elizabeth Pleck note, specifically about colonial and revolutionary-era New England,

While there are letters of black men to their former masters, there are none from black women. . . . No black woman kept an account book, a journal, a diary, or published her autobiography, to our knowledge. . . . Thus, the contemporaneous written record about black women is less substantial than that for black men, in large part because they were much less likely to be literate. [Moreover], many of the letters written by the few literate black women have not survived. For example, while some of the correspondence of Phillis Wheatley to her female friend Obour Tanner, a slave in Newport, has been preserved, none of Tanner's letters to Wheatley have been found.

ADAMS & PLECK, *supra* note 116, at 21.

<sup>135</sup> In an email exchange, historian of African-American history David Waldstreicher wrote, “In researching [my book] *Slavery's Constitution* and more generally reading everything on black politics and the politics of slavery in this period, I have seen only two examples of direct responses by African Americans to the Constitution or the debates around it in 1787–88.” Email from David Waldstreicher, Distinguished Professor of History, Graduate Center, City University of New York, to Christina Mulligan, Professor of Law, Brooklyn Law School (Oct. 14, 2016, 2:00 PM) (on file with author); see also DAVID WALDSTREICHER, *SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* 154 (1st ed. 2009) (“There is almost no evidence as to what African Americans thought about the great compromises or the Grand Federal Processions in



are two notable pseudonymous exceptions: a group of self-described “black Inhabitants” of Providence, Rhode Island, and a pseudonymous essayist “Othello.”

The “black Inhabitants” gave a handful of public toasts on July 4, 1788, later publishing the same in a local newspaper. Several thousand Federalists had gathered to celebrate, and about a thousand rural Antifederalists had also shown up to “prevent what they felt was an illegitimate planned celebration of ratification in the public square” as Rhode Island had not yet ratified the Constitution.<sup>136</sup> Historian David Waldstreicher writes, “For this very reason—because people were watching—the group we know only as the black inhabitants seized the opportunity, and put on the first publicized self-consciously alternative African American celebration-cum-protest.”<sup>137</sup> They toasted,

1. The Nine States that have adopted the Federal Constitution.
2. May the Natives of Africa enjoy their natural Privileges unmolested.
3. May the Freedom of our unfortunate Countrymen (who are wearing the Chains of Bondage in different Parts of the World) be restored to them.
4. May the Event we this Day celebrate enable our Employers to pay us in hard Cash for our Labour.
5. The Merchants and other who take the Lead in recommending Restoration of Equity and Peace.
6. His Excellency General Washington.
7. The Humane Society of Philadelphia.
8. Hon. John Brown, Esq.
9. May Unity prevail throughout all Nations.<sup>138</sup>

Waldstreicher describes the larger purpose of the toast as being part of an effort by this group of African-Americans to “claim the Constitution as

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1787 and 1788.” (footnote omitted)).

<sup>136</sup> WALDSTREICHER, *supra* note 135, at 154.

<sup>137</sup> *Id.*

<sup>138</sup> WALDSTREICHER, *supra* note 135, at 155–56 (citing NEWPORT MERCURY, July 14, 1788; PROVIDENCE GAZETTE & COUNTRY J., July 5, 1788). Waldstreicher characterizes the toast’s context:

The Providence celebrants refused to choose between claiming a right to celebrate as “inhabitants” and making clear their bond to their “countrymen” in chains. They refused to pretend they were not interested in local economic issues and the currency controversy, even to the point of equating good merchant behavior with the peace that Africans the world over deserved. They suggested a moral and political equivalency between the Revolution’s greatest hero and the abolitionists in another city. And, having redrawn the political map to include the world as well as the nation, they raised their glass to the prominent federalist who was also Providence’s best-known international slave trader and critic of antislavery.

WALDSTREICHER, *supra* note 135, at 155–56.

their own . . . in effect to make a new constitution through interpretation.”<sup>139</sup>

The second commentator, Othello, published a series of essays in *The American Museum*<sup>140</sup> in 1788. Although Othello’s identity is not known, the author was likely black, given the essays’ subject matter and the pseudonym’s origin.<sup>141</sup> Othello condemned the Constitution’s slave-trade clause, arguing the role of slavery in the Constitution “will forever diminish the luster of their other proceedings, so highly extolled and so justly distinguished for their intrinsic value.”<sup>142</sup>

Commentary on the Constitution by white women close in time to ratification was also rare. Nonetheless, several white women did produce voluminous writings, poems, and letters in the founding era.<sup>143</sup> Significant among them were first lady Abigail Adams,<sup>144</sup> Alexander Hamilton’s sister-in-law Angelica Schuyler Church,<sup>145</sup> poet Elizabeth Graeme Fergusson,<sup>146</sup>

<sup>139</sup> MARK E. BRANDON, *FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE* 45 (1998); WALDSTREICHER, *supra* note 135, at 156 & n.4 (alteration in original) (quoting BRANDON, *supra*, at 45).

<sup>140</sup> *The American Museum* was a monthly Philadelphia paper published by Irish immigrant Mathew Carey from January 1787 to December 1792. See THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION, (John P. Kaminski et al. eds, Univ. of Virginia Press 2009).

<sup>141</sup> The titular character in William Shakespeare’s *Othello* is and was historically understood to be black or dark-skinned. See Michael Niell, *Introduction* to WILLIAM SHAKESPEARE, *OTHELLO, THE MOOR OF VENICE* 45–47 (Michael Neill ed., 2006) (focusing on the racial themes in *Othello* and how they were explored over time).

<sup>142</sup> NEGRO ORATORS AND THEIR ORATIONS 16–19 (Carter G. Woodson ed., reprint 1969) (1925) (cited in WALDSTREICHER, *supra* note 135, at 154 n.2); see also MANISHA SINHA, *THE SLAVE’S CAUSE: A HISTORY OF ABOLITION* 80–81 (2016) (describing Othello’s essay).

<sup>143</sup> See, e.g., THE DIARY OF ELIZABETH DRINKER: THE LIFE CYCLE OF AN EIGHTEENTH-CENTURY WOMAN (Elaine Forman Crane ed., Univ. of Pennsylvania Press 2d ed. 2010); THE POSTHUMOUS WORKS OF ANN ELIZA BLEEKER IN PROSE AND VERSE, TO WHICH IS ADDED A COLLECTION OF ESSAYS, PROSE AND POLITICAL, BY MARGARETTA V. FAUGERES (New York, T. & J. Swords 1793), [https://en.wikisource.org/wiki/The\\_Posthumous\\_Works\\_of\\_Ann\\_Eliza\\_Bleecker; Miscellanies, Moral and Instructive, in Prose and Verse; Collected from Various Authors, for the Use of Schools, and Improvement of Young Persons of Both Sexes](https://en.wikisource.org/wiki/The_Posthumous_Works_of_Ann_Eliza_Bleecker; Miscellanies, Moral and Instructive, in Prose and Verse; Collected from Various Authors, for the Use of Schools, and Improvement of Young Persons of Both Sexes) (Milcah Martha Moore ed., Burlington, N.J., Neale & Kammerer 1796), reprinted in MILCAH MARTHA MOORE’S BOOK: A COMMONPLACE BOOK FROM REVOLUTIONARY AMERICA 113 (Catherine La Courreye Blecki & Karin A. Wulf eds., 2007) [hereinafter MOORE];. Among the significant texts by white women that just predate the revolution are agriculturalist and plantation manager Eliza Lucas Pinckney’s letterbook, LETTERBOOK OF ELIZA LUCAS PINCKNEY, 1739–1762 (Elise Pinckney ed., 1972), and the journal of Esther Burr, mother of Aaron Burr, ESTHER BURR’S JOURNAL (Jeremiah Eames Rankin ed., 1903), <https://books.google.com/books?id=iW04AAAAMAAJ>.

<sup>144</sup> See FOUNDERS ONLINE, <https://founders.archives.gov/> (last visited Dec. 11, 2017) (search for Author: “Adams, Abigail”).

<sup>145</sup> See RON CHERNOW, ALEXANDER HAMILTON (2004) (discussed throughout); *A Guide to the Papers of Angelica Schuyler Church*, U. OF VA. LIBR., <http://ead.lib.virginia.edu/vivaxtf/view?docId=uva->

novelist Hannah Webster Foster,<sup>147</sup> poet Hannah Griffitts,<sup>148</sup> poet Sarah Wentworth Morton,<sup>149</sup> early feminist author Judith Sargent Murray,<sup>150</sup> novelist Susanna Rowson,<sup>151</sup> poet Annis Boudinot Stockton,<sup>152</sup> and poet Susanna Wright.<sup>153</sup> Nancy F. Cott's work has also canvassed many more, largely private, writings by middle-to-upper class white women in the late-eighteenth century.<sup>154</sup>

Among the female figures who published significant political writings on issues related to the Constitution and Bill of Rights were author Hannah Adams,<sup>155</sup> essayist Elizabeth Ryland Priestley, and Antifederalist writer

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sc/viu00003.xml (last visited Dec. 12, 2017).

<sup>146</sup> See MOORE, *supra* note 143 (including some of Fergusson's writings); see also ANNE M. OUSTERHOUT, *THE MOST LEARNED WOMAN IN AMERICA: A LIFE OF ELIZABETH GRAEME FERGUSSON* (2004).

<sup>147</sup> HANNAH WEBSTER FOSTER, *THE BOARDING SCHOOL; LESSONS OF A PRECEPTRESS TO HER PUPILS* (Boston, Press of Putnam & Hunt 1798), <https://www.gutenberg.org/ebooks/55558>; HANNAH WEBSTER FOSTER, *THE COQUETTE; OR, THE HISTORY OF ELIZA WHARTON* (1797), <https://www.gutenberg.org/ebooks/12431>.

<sup>148</sup> See MOORE, *supra* note 143 (including some of Griffitts's writing). Griffitts used the pseudonym "Fidelia" when her poetry was published in Moore's book. See ALAN SHUCARD, *AMERICAN POETRY: THE PURITANS THROUGH WALT WHITMAN* (1988).

<sup>149</sup> BEACON HILL. A LOCAL POEM, HISTORIC AND DESCRIPTIVE (Boston, Manning & Loring 1797) (unattributed poem by Sarah Wentworth Morton); PHILENIA, OUABI: OR THE VIRTUES OF NATURE, AN INDIAN TALE IN FOUR CANTOS (Boston, I. Thomas & E.T. Andrews 1790) (Philenia was the pseudonym of Sarah Wentworth Morton); THE VIRTUES OF SOCIETY. A TALE, FOUNDED ON FACT (Boston, Manning & Loring 1799) (unattributed poem by Sarah Wentworth Morton); SARAH WENTWORTH MORTON, MY MIND AND ITS THOUGHTS, IN SKETCHES, FRAGMENTS, AND ESSAYS (Boston, Wells & Lilly 1823), <https://books.google.com/books?id=RAofAAAAMAAJ>; Constantia, *Invocation to Hope*, MASSACHUSETTS MAGAZINE, July 1789, at 449 (Constantia was an early pseudonym of Sarah Wentworth Morton, abandoned later because Judith Sargent Murray had prior use of the pseudonym); Sarah Wentworth Morton, *The African Chief*, in 2 SPECIMENS OF AMERICAN POETRY 75 (Samuel Kettell ed., 1829) (reprinted from *Columbian Centinel* (June 9, 1792)), <http://www.bartleby.com/96/164.html>.

<sup>150</sup> Judith Sargent Murray, *On the Equality of the Sexes*, MASSACHUSETTS MAGAZINE, April 1790, <http://digital.library.upenn.edu/women/murray/equality/equality.html>; see *Judith Sargent Murray Archive*, JUDITH SARGENT MURRAY SOC'Y, [http://www.jsmsociety.com/JSM\\_Archive.html](http://www.jsmsociety.com/JSM_Archive.html) (including Sargent Murray's writings) (last visited Nov. 11, 2018).

<sup>151</sup> See ELLEN B. BRANDT, SUSANNA HASWELL ROWSON, AMERICA'S FIRST BEST-SELLING NOVELIST (1975); STEVEN EPLEY, SUSANNA ROWSON: SENTIMENTAL PROPHET OF EARLY AMERICAN LITERATURE (2016); *Papers of Susanna Rowson 1770 1879*, U. VA. LIBR., <http://search.lib.virginia.edu/catalog/u3957056> (last visited Dec. 11, 2017) (click on "GUIDE TO THE COLLECTIONS AVAILABLE ONLINE").

<sup>152</sup> See ONLY FOR THE EYE OF A FRIEND: THE POEMS OF ANNIS BOUDINOT STOCKTON (Carla Mulford ed., 1995).

<sup>153</sup> See MOORE, *supra* note 143; see also Frederick B. Tolles, *Susanna Wright*, in NOTABLE AMERICAN WOMEN: A BIOGRAPHICAL DICTIONARY (Edward T. James et al. eds., 1971).

<sup>154</sup> COTT, *supra* note 65; *id.* at 207 ("List of Women's Documents Consulted").

<sup>155</sup> Adams wrote several nonfiction books in her life. See HANNAH ADAMS, AN ALPHABETICAL

Mercy Otis Warren. Adams' *A Summary History of New-England* included a largely descriptive discussion of the Constitution's structure and ratification, and a brief comment on religious liberty in the states.<sup>156</sup>

Priestley wrote two essays on free speech, which appeared in politician and academic Thomas Cooper's *Political Essays*—part one of *On the Propriety and Expediency of Unlimited Enquiry* and a reply to Cooper's essay *Observations on the Fast Day*.<sup>157</sup> *On the Propriety* reads to a modern ear as an endorsement of unrestrained free speech. Priestley begins writing, "There is perhaps no political question so important to the interest of society, as that of the operation and unrestrained discussion on all subjects whatever."<sup>158</sup> "[K]nowledge is the most important instrument of human welfare. But it can exist in an eminent degree, and on a stable foundation, only by discussion; and its increase and extension will be proportioned to the freedom of discussion."<sup>159</sup> Bad speech was of little concern to Priestley because speech that espoused incorrect or immoral positions would eventually lose adherents.<sup>160</sup> Priestley went on to argue that "free enquiry"

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COMPENDIUM OF THE VARIOUS SECTS WHICH HAVE APPEARED IN THE WORLD FROM THE BEGINNING OF THE CHRISTIAN ÆRA TO THE PRESENT DAY (Boston, B. Edes & Sons 1784) (also published as "A View of Religions," in 1791 and 1801 and "Dictionary of Religions," in 1817); HANNAH ADAMS, A MEMOIR OF MISS HANNAH ADAMS (Boston, Gray & Bowen 1832); HANNAH ADAMS, A SUMMARY HISTORY OF NEW-ENGLAND (n.p., H. Mann & F.H. Adams 1799); HANNAH ADAMS, THE HISTORY OF THE JEWS (Boston, John Eliot, Jr. 1812); HANNAH ADAMS, LETTERS ON THE GOSPELS (Cambridge, Hilliard & Metcalf 1824).

<sup>156</sup> ADAMS, A SUMMARY HISTORY OF NEW-ENGLAND, *supra* note 155, at 492–499 (describing the federal Constitution); *id.* at 497 ("Religious liberty is a fundamental principle in the constitutions of the respective states. Some, indeed, retain a distinction between Christians and others, with respect to their eligibility to office; but the idea of raising one sect of Protestants to a legal preeminence, is universally reprobated.").

<sup>157</sup> Priestley Toulmin, *The Descendants of Joseph Priestley, L.L.D., F.R.S.*, 32 NORTHUMBERLAND COUNTY HIST. SOC'Y PROC. 1, 15 (1994); Eugene Volokh, *Elizabeth Ryland Priestley, Early American Author on Free Speech*, 4 N.Y.U. J.L. & LIBERTY 382, 382 (2009). Priestley's writings are reprinted in 4 N.Y.U. J.L. & LIBERTY 408–413 (2009) and 4 N.Y.U. J.L. & LIBERTY 449–492 (2009). They initially appeared in THOMAS COOPER, *POLITICAL ESSAYS* (2d ed. Philadelphia, R. Campbell 1800). Priestley was the daughter-in-law of Cooper's close friend, Joseph Priestley. Volokh, *supra*, at 382. There is not a great deal more biographical information about Elizabeth Ryland Priestley. In a 2009 introduction to the reprint of Cooper's *Political Essays* in the N.Y.U. Journal of Law & Liberty, Eugene Volokh observed that little had been written about her, although she is sometimes mentioned in connection with her prominent father-in-law Joseph. *Id.* at 383–84. Volokh expressed hope that "some historian can uncover more on this intriguing woman, if something survives to be uncovered." *Id.* at 385.

<sup>158</sup> Thomas Cooper & Elizabeth Ryland Priestley, *On the Propriety and Expediency of Unlimited Enquiry*, reprinted in 4 N.Y.U. J.L. & LIBERTY 447, 449 (2009) (emphasis omitted).

<sup>159</sup> *Id.* at 450 (emphasis omitted).

<sup>160</sup> *Id.* at 451.

It may perhaps be urged, and plausibly urged, that the welfare of the community may sometimes, and in some cases, require certain restrictions on this unlimited right of

would diminish the need for violent revolution,<sup>161</sup> citing the peaceful change from the Articles of Confederation to the Constitution for support.<sup>162</sup> She emphasized speech as an alternative to violence,<sup>163</sup> and the superiority of resolving theological disputes through discussion rather than indulging in religious persecution.<sup>164</sup>

In contrast to Priestley's relative obscurity, Mercy Otis Warren is by far the most prominent female political writer of the founding era. In addition to her three-volume history of the American revolution published in 1805,<sup>165</sup> and numerous politically-charged plays and poems,<sup>166</sup> she also wrote an Antifederalist pamphlet, *Observations on the New Constitution and on the Federal and State Conventions*, in 1788, under the pseudonym "A Columbian Patriot."<sup>167</sup> In her pamphlet, Warren expressed concerns related to the

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enquiry: that publications exciting to insurrection or immorality for instance, ought to be checked or suppressed. Not to dwell upon the difficulty of ascertaining the proper boundary of such restrictions, it may be observed, that opinions palpably false and of bad tendency, will never be generally received, and their promulgation must eventually do good. The mass of talents, of knowledge, and of respectability will, in every country, from interest as well as principle, be on the side of good order and morality. There can be few who, from ignorance or design, will be tempted publicly to support opinions inimical to the general welfare; and in cases where it may occur, the investigation that will ensue, and the confutation of such doctrines however plausible (which in the end must take place if they really are unfounded and of mischievous tendency) will establish truth more decisively, than could be effected in any other way.

*Id.* (emphasis omitted).

<sup>161</sup> *Id.* at 453 ("Were enquiry free, the convulsions and excesses of revolution, so deprecated by the best friends of liberty, would hardly be known; for the nature and necessity of the change proposed, would be understood through the whole society previous to its taking place; a remark which the example of this country has already illustrated.").

<sup>162</sup> *Id.* at 454.

<sup>163</sup> *Id.* ("Governments tenacious of an unaltered existence, would perhaps do well to consider that these restrictions serve only to excite more ardent opposition, and that the irritation of restraint carries men beyond what in other circumstances, they would have thought of."); *Id.* at 455 ("All the wars and persecutions that have desolated the earth, and exhibited man as more savage and ferocious than the worst species of brute animals, have arisen from the want of diffused knowledge and popular enquiry.").

<sup>164</sup> *Id.* at 456.

<sup>165</sup> MERCY OTIS WARREN, *HISTORY OF THE RISE, PROGRESS AND TERMINATION OF THE AMERICAN REVOLUTION* (Lester H. Cohen ed., 1989) (1805).

<sup>166</sup> See, e.g., MERCY OTIS WARREN, *POEMS, DRAMATIC AND MISCELLANEOUS* (Boston, I. Thomas & E.T. Andrews 1790). Alexander Hamilton once said of her work, "In the career of dramatic composition at least, female genius in the United States has outstripped the Male." ROSEMARIE ZAGARRI, *A WOMAN'S DILEMMA: MERCY OTIS WARREN AND THE AMERICAN REVOLUTION* 141 (2d ed. 2015).

<sup>167</sup> Authorship of *Observations* was not attributed to Warren until her descendent Charles discovered a reference to it in correspondence between Warren and British historian Catherine Macauley; the pamphlet had previously been attributed to Elbridge Gerry. KATE DAVIES, CATHARINE MACAULAY AND MERCY OTIS WARREN: THE REVOLUTIONARY ATLANTIC AND THE POLITICS OF GENDER 292 (2005); 45 MASSACHUSETTS HISTORICAL SOCIETY PROCEEDINGS 335 (OCT.

structure of federal government,

There are no well defined limits of the Judiciary Powers, they seem to be left as a boundless ocean . . . it would be an Herculean labour to attempt to describe the dangers with which they are replete.

The Executive and the Legislative are so dangerously blended as to give just cause of alarm . . . .<sup>168</sup>

Warren was keenly concerned with the potential within the Constitution to erode freedom and rights, specifically calling out the absence of a right to trial by jury in civil cases, and expressing concern about the right of the federal government to maintain a standing army.<sup>169</sup> She criticized the ease with which elected government officials might stay in power for long periods of time, and the large number of individuals each representative would be responsible for.<sup>170</sup> And like many Antifederalists, Warren expressed the need for a bill of rights to be adopted.<sup>171</sup> She lamented, “There is no security in the profered system, either for the rights of conscience or the liberty of the Press . . . .”<sup>172</sup> Throughout the pamphlet, Warren was not only critical of the strength of the proposed federal government, but also of the secretive manner in which the Constitution was drafted.<sup>173</sup>

## 2. Potential Paradigm Shifts

While authors like Adams, Othello, Priestley, and Warren directly addressed the Constitution or constitutional rights, their writings hardly send tremors through the fabric of constitutional interpretation today. For many reasons, this is comforting; lack of evidence that sub-communities understood the Constitution in wildly divergent ways should make us more confident that the existing, well-trod evidence of constitutional meaning was roughly representative of the founding public’s view. And it may be tempting to read Adams, Othello, Priestley, Warren, and others, and

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1911–JUNE 1912); Maud Macdonald Hutcheson, *Mercy Warren, 1728–1814*, 10 WM. & MARY Q. 378, 393 (1953).

<sup>168</sup> A Columbian Patriot, *Observations on the New Constitution, and on the Federal and State Conventions* (Boston 1788), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787–1788, at 9 (Paul Leicester Ford ed., Brooklyn, N.Y. 1888), <http://oll.libertyfund.org/titles/1670> (mistakenly crediting Elbridge Gerry with authorship of Warren’s pamphlet).

<sup>169</sup> *Id.* at 9–11.

<sup>170</sup> *Id.* at 11–12.

<sup>171</sup> *Id.* at 12–13.

<sup>172</sup> *Id.* at 9.

<sup>173</sup> *Id.* at 14.

presume that finding more obscure political writings by women and people of color will not reveal sufficiently significant revelations to be worth the research effort expended. But even individual, brief, and relatively obscure writings have the potential to dramatically alter how we understand the Constitution. The remainder of this subpart explores two potentially “paradigm-shifting” writings, by Absalom Jones in 1799, and a petition by several black Americans in 1853.

*a. Absalom Jones on the Slave Clauses and Bill of Rights*

In 1799, black minister Absalom Jones drafted a petition to Congress calling for the repeal of the Fugitive Slave Act of 1793. He wrote,

In the Constitution, and the Fugitive bill, no mention is made of Black people or Slaves—therefore if the Bill of Rights, or the declaration of Congress are of any validity, we beseech that as we are men, we may be admitted to partake of the Liberties and unalienable Rights therein held forth—firmly believing that the extending of Justice and equity to all Classes, would be a means of drawing down the blessings of Heaven upon this Land, for the Peace and Prosperity of which, and the real happiness of every member of the Community, we fervently pray.<sup>174</sup>

Jones’s petition anticipates Lysander Spooner’s more comprehensive 1845 pamphlet, *The Unconstitutionality of Slavery*, which argued that the Constitution did not condone slavery because each of the clauses that appeared to regulate slavery could be interpreted to have other referents.<sup>175</sup> Spooner argued that “other persons” in the three-fifths clause referred to aliens,<sup>176</sup> that the “Importation of . . . persons” referred to the importation of “foreigners” into the country,<sup>177</sup> and that “Person[s] held in Service or Labour” referred to convicts and indentured servants.<sup>178</sup>

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<sup>174</sup> Absalom Jones, *A Petition of Absalom Jones and Others* (1799), reprinted in LANDMARK DOCUMENTS ON THE U.S. CONGRESS 92, 93 (Raymond W. Smock ed., 1999).

<sup>175</sup> LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* (1845).

<sup>176</sup> SPOONER, *supra* note 175, at 44–54, 247–55, 265–70; Barnett, *supra* note 49, at 994–96; *see also* U.S. CONST. art. 1, § 2 (declaring that representative and direct taxes would be apportioned by population, “which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons”).

<sup>177</sup> SPOONER, *supra* note 175, at 81–82; Barnett, *supra* note 49, at 996–98; *see also* U.S. CONST. art. 1, § 9 (preventing Congress from prohibiting the “Migration or Importation of such Persons as any of the States now existing shall think proper to admit” until 1808);

<sup>178</sup> SPOONER, *supra* note 175, at 70–72; Barnett, *supra* note 49, at 998–99; *see also* U.S. CONST. art. IV, § 2 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping to another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour . . .”);

Spooner's discussion, to characterize it in present-day interpretive terms, advocated for understanding the Constitution according to its original meaning rather than the original intent of the authors. Spooner acknowledged that the Constitution's authors intended the three-fifths clause, the importation clause, and the service or labour clause to refer to slaves. However, he also argued that authorial intention did not determine the meaning of the Constitution.<sup>179</sup> Rather, the Constitution's meaning was "the meaning which its words, interpreted by sound legal rules of interpretation, express."<sup>180</sup> Later, in an 1860 speech, Frederick Douglass echoed Spooner, reasoning,

[T]he intentions of those who framed the Constitution, be they good or bad, for slavery or against slavery, are to be respected so far, and so far only, as will find those intentions plainly stated in the Constitution. . . . It was what they said that was adopted by the people, not what they were ashamed or afraid to say, and really omitted to say.<sup>181</sup>

For a public meaning originalist, the argument of Spooner's *Unconstitutionality of Slavery* struggles to overcome the apparent reality that everyone in the framing period "knew that the Constitution sanctioned slavery."<sup>182</sup> If everyone recognized that the three-fifths clause, importation clause, and service or labour clause referred to slavery, then Spooner's pamphlet would not establish that the "original public meaning" did not include slavery. Instead, Spooner's pamphlet would be perhaps better understood as a rhetorical tool for nineteenth-century abolitionists, highlighting the hypocrisy within the Constitution.

Jones's 1799 petition, however, makes Spooner's argument more persuasive on the merits. Jones wrote the petition only a little more than a

<sup>179</sup> SPOONER, *supra* note 175, at 222 ("We must admit that the constitution, of itself, independently of the actual intentions of the people, expresses some certain, fixed, definite, and legal intentions; else the people themselves would express no intentions by agreeing to it." (emphasis omitted)); *id.* at 220 ("[I]f the intentions could be assumed independently of the words, the words would be of no use, and the laws of course would not be written.").

<sup>180</sup> SPOONER, *supra* note 175, at 223. Barnett elaborates,

By [Spooner's] reasoning if the people ratified a document that failed to clearly authorize slavery and which omits all explicit reference to the practice using the most obvious and well-known term to describe it, we cannot presume that these enigmatic references are to slavery if some other meaning can reasonably be assigned to them.

Barnett, *supra* note 49, at 993.

<sup>181</sup> Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*, Speech Delivered in Glasgow, Scotland, March 26, 1860, in PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 207 (3d ed. 1992); see also WILLIAM S. MCFEELY, FREDERICK DOUGLASS 205 (1991) (explaining that Douglass's arguments "were those of Lysander Spooner and William Goodell as he had acknowledged at the time of his change of heart about the Constitution in 1851").

<sup>182</sup> Barnett, *supra* note 49, at .007.



decade after the ratification of the Constitution, emphasizing,

In the Constitution, and the Fugitive bill, no mention is made of Black people or Slaves—therefore if the Bill of Rights, or the declaration of Congress are of any validity, we beseech that as we are men, we may be admitted to partake of the Liberties and unalienable Rights therein held forth . . . .<sup>183</sup>

Jones is arguing that because the Constitution does not explicitly designate different classes of rights among white or black people, or among slaves and non-slaves, its public meaning provides that constitutional rights belong equally to all people, regardless of their color or status. His language further raises the question of whether it truly was universally acknowledged that constitutional rights did not apply to slaves. Even if excluding slaves was the intent of the Drafters, contemporary readers might have believed that the drafters' reticence to name slavery had inadvertently resulted in their writing a document that did not have the intended legal effect. Jones raised these issues at a time nearly contemporaneous with the Constitution's passage; that Jones's petition was sent to Congress suggests that he believed his interpretation constituted a reasonable legal position—perhaps even was the *best* interpretation of the Constitution given the conventions of the day.

The Reconstruction Amendments moot the question of whether Jones and other members of the public genuinely believed the Constitution protected the rights of slaves whenever it protected the rights of "persons" or "people." However, Jones's legal argument illustrates how attention to the writings and views of parties beyond "the usual suspects" has the potential to highlight the existence of genuinely-held, alternative interpretations of constitutional text.

*b. 1853 Petition on the Militia Power and on Privileges and Immunities*

In June 1853, "[s]ixty-five colored citizens of Boston" petitioned the Massachusetts Constitutional Convention to amend the Massachusetts Constitution "to remove the disabilities of colored citizens from holding military commissions and serving in the militia."<sup>184</sup> The petition was rejected, in part on the grounds that it could not be granted without putting Massachusetts law in conflict with the federal Constitution and with federal

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<sup>183</sup> Jones, *supra* note 174, at 93.

<sup>184</sup> WM. C. NELL, *THE COLORED PATRIOTS OF THE AMERICAN REVOLUTION* 103 (Boston, Robert F. Wallcut 1855).

law.<sup>185</sup> A further petition was then submitted by several “colored citizens of Massachusetts,” including William Cooper Nell,<sup>186</sup> arguing that this conclusion was unwarranted because the Privileges and Immunities Clause required the equality of all free citizens, and because Congress lacked the power to segregate the militias. While 1853 is hardly contemporaneous with the founding, this petition provides a detailed example of black Americans making legal arguments concerning several clauses of the Constitution. Moreover, it provides evidence of how the phrase “Privileges and Immunities” was understood prior to the adoption of the Fourteenth Amendment.

Regarding Privileges and Immunities, the petitioners quoted the Clause<sup>187</sup> and interpreted it, writing,

It is not possible to make a more unequivocal recognition of the equality of all citizens; and, therefore, whatever contravenes or denies it, in the shape of legislation, is manifestly unconstitutional. Whatever may have been the compromises of the Constitution, in regard to those held in bondage as chattel slaves, none were ever made, or proposed, respecting the rights and liberties of citizens.<sup>188</sup>

This characterization reads the Privileges and Immunities Clause as a non-discrimination clause, not merely among citizens of different states, but among citizens who are all residents of the same state. Additionally, while the petition acquiesces to reading the Constitution as contemplating different statuses for free people and enslaved people, it asserts that the Constitution draws no status distinction between free whites and free blacks, and that accordingly the same rights must be recognized in both populations.

The petition goes on to explore the scope of congressional power under the militia clause, implicitly articulating a boundary around the reach of the Necessary and Proper Clause. It explains,

It is true that, by the United States Constitution, Congress is empowered “to provide for organizing, arming and disciplining the militia”; it is also true, that Congress, in “organizing” the militia, has authorized none but “white” citizens to be enrolled therein; nevertheless, it is not less true, that the law of Congress, making this unnatural distinction, is, in this particular, unconstitutional, and therefore ought to exert no controlling force over the legislation of any of the States. To organize the

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<sup>185</sup> *Id.* at 107.

<sup>186</sup> *Id.* at 110.

<sup>187</sup> “The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States.” U.S. CONST. art. IV, § 2, cl. 1.

<sup>188</sup> NELL, *supra* note 184, at 109.

militia of the country is one thing; to dishonor and outrage a portion of the citizens, on any ground, is a very different thing. To do the former, Congress is clothed with ample constitutional authority; to accomplish the latter, it has no power to legislate, and resort must be had, and has been had, to usurpation and tyranny.<sup>189</sup>

The boundary on the militia power being articulated is not immediately crystal clear—Congress can “organize” the militia but not “dishonor and outrage a portion of the citizens, on any ground.” But in the context of the Privileges and Immunities Clause discussion, we might surmise that the “dishonor and outrage” language might refer to a dishonor or outrage that comes from treating citizens unequally. The petition’s argument thus also implicitly assumes that the Necessary and Proper Clause, which permits Congress to make “all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,”<sup>190</sup> does not give Congress the authority to segregate the states’ militias in the name of “organizing” them.<sup>191</sup>

### C. Addressing Alienation

The previous two sections explored practical efforts originalists could undertake to improve originalist interpretation, through debiasing and broadening the evidence of founding-era meaning considered. A final approach to ameliorating originalism’s race and gender problems feels less concrete, but is still crucially important: addressing the feelings of alienation that women and minorities may feel towards the Constitution in general, and to originalism in particular.

The Reconstruction Amendments and the Nineteenth Amendment arguably correct the early evils of the Constitution, rendering the document sufficiently just to command authority.<sup>192</sup> But a person’s feelings about the Constitution are not necessarily discretely responsive to arguments about

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<sup>189</sup> *Id.*

<sup>190</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>191</sup> The text of Congress’s Section 8 powers over the militia does not explicitly give the federal government the power to determine who may be a member. Rather, Congress is granted the power to “provide for calling forth the Militia” and “for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.” U.S. CONST. art. I, § 8, cls. 15–16.

<sup>192</sup> See MCGINNIS & RAPPAPORT, *supra* note 22, at 108 (“If enforced according to their terms, these amendments would have constituted substantially to a ‘new birth of freedom’ for African Americans that would have provided them with largely the same rights that white males enjoyed in 1789.” (footnote omitted)); *id.* at 111 (“But like the exclusion of African Americans, the exclusion of women has been substantially corrected.”).

political legitimacy and substantive outcomes. A person's moral sentiments about the Constitution are generated in large part by how they apprehend the document's history. Some think about the Constitution and engage in what is derogatorily referred to as "Founder worship," speaking as though the Founding Fathers could do no wrong. Some at the other extreme, motivated by Founders' and Framers' slave holding and ultimate sanctioning of slavery during the Constitution's drafting, embrace a narrative of constitutional contamination, rejecting the notion that the Constitution can have any meaningful claim on behavior today.

But there are different stories about the Constitution that we can tell. Jack Balkin presents the story of America, and of America's Constitution, as a story about potential redemption—"a story about the eventual fulfillment of promises made long ago."<sup>193</sup> For Balkin, the existence of constitutional evil in the past or the present does not necessarily mean we should reject the Constitution. Rather, he sees the political struggles of the past and present as part of a continuing struggle to create a democratic culture, that is necessarily morally compromised.<sup>194</sup> "A narrative of redemption . . . assumes that we exist, and have always existed, in a fallen condition. We live in compromises with the evils of the past, and we are compromised by them."<sup>195</sup> Yet, "[o]ver time we seek to free ourselves from the sins and inadequacies of the past, and hold ourselves ever more true to those best parts that have always been within us. . . . We the People made a promise to ourselves in the past that we strive to fulfill."<sup>196</sup> Balkin frames a narrative of "constitutional redemption" as being about "Americans as a people"—"constitutive narratives around which and through which people can imagine themselves as a people, with shared hopes, memories, goals, aspirations, and ambitions."<sup>197</sup>

Randy Barnett similarly embraces the notion of "redeeming" the Constitution,<sup>198</sup> as well as "restoring" the just founding principles that were incompletely actualized in the founding era.<sup>199</sup> For Barnett, the Constitution has a narrative arc. It begins with,

[A] profound and radical idea that was born in the American Revolution and matured in the great national struggle over slavery: that government is

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<sup>193</sup> JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION* 27 (2011).

<sup>194</sup> *Id.* at 27–28.

<sup>195</sup> *Id.* at 27.

<sup>196</sup> *Id.* at 27–28.

<sup>197</sup> *Id.* at 30–31 (emphasis omitted).

<sup>198</sup> RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* 247, 257 (2016).

<sup>199</sup> *Id.* at 250–51.

instituted by the people as individuals, that presidents and congressmen are the servants of the people as individuals, and that the just powers of government must protect the rights of each and every person.<sup>200</sup>

Barnett emphasizes that the Constitution “can, if followed, secure the liberty and sovereignty of We the People—*each and every one*.”<sup>201</sup>

Choosing among narratives of constitutional contamination and alienation, or of restoration or redemption, is important because those choices both represent and order how we understand our place in American society. While Barnett’s restoration narrative and Balkin’s redemption narrative acknowledge the evils in America’s past, they each view the American experiment as a struggle to actualize a society that protects justice for all. Even if that project is not fully realized, the Constitution can represent those laudable and radical aspirations. The contamination narrative, by comparison, contemplates that some populations are too alienated from the Constitution and its compromised origins—and by extension, to originalist interpretation—to understand and embrace it as a source of guidance or inspiration today.

The story we tell ourselves about our political origins and evolution matters. As Balkin pithily explains, it is not “just a story.”<sup>202</sup> Rather, it “is true for you because it is part of you, because you see yourself as part of it. If you are committed to a narrative in this way, . . . it becomes more than a story. It becomes a way of life.”<sup>203</sup> In the United States, how one feels about the Constitution can be an important part of how one sees one’s role in society. Does the document represent the ongoing struggle for liberty, equality, or justice? Is it a symbol and tool of oppression, which continues to serve as a divisive wedge every time someone talks about how wise and good the Founders were?<sup>204</sup> Is it both? Even at the time of ratification, competing narratives were in play. Particularly when it came to characterizing the Constitution’s relationship with slavery pre-ratification, Federalists “said different things, with different emphases, to different audiences,”<sup>205</sup> defending the Constitution “as proslavery in some states and

<sup>200</sup> *Id.* at 247.

<sup>201</sup> *Id.* at 258 (emphasis added).

<sup>202</sup> BALKIN, *supra* note 193, at 32.

<sup>203</sup> *Id.*

<sup>204</sup> Cf. ALAN GIBSON, INTERPRETING THE FOUNDING: GUIDE TO THE ENDURING DEBATES OVER THE ORIGINS AND FOUNDATIONS OF THE AMERICAN REPUBLIC 65 (2006) (characterizing some scholars as “echo[ing] the Progressives’ understanding of the realization of democracy in America as a struggle against founding principles and American history as a series of conflicts . . . between white males in positions of power and women, Native Americans, slaves, and the poor”).

<sup>205</sup> WALDSTREICHER, *supra* note 135, at 133.

as antislavery in others.”<sup>206</sup>

What is crucial for considering the problem of constitutional alienation is to recognize that, while the denotative meaning of the constitutional text may be fixed, the connotative meaning of the text is changeable and changing. The following two Sections elaborate on why the Constitution’s social meaning can be changed, and on how originalists can mitigate constitutional alienation in the present.

### 1. *Separating Author from Text*

When we discuss why we love or feel alienated from the Constitution, we often end up emphasizing the merits and flaws of the *people* responsible for the Constitution rather than the text, and the values embedded in the text, itself. Recognizing this connection between author and text provides an opportunity to recognize that judgments about the Framers do not have to track one’s feelings about the Constitution or how to interpret it. Was George Washington a role model for relinquishing power like Cincinnatus and freeing his slaves in his will?<sup>207</sup> Or was he a monster for pulling out his slaves’ teeth to make his dentures?<sup>208</sup> These questions are worth discussing,

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<sup>206</sup> *Id.* at 150.

<sup>207</sup> Richard Allen wrote a eulogy for Washington, which was published in the *Philadelphia Gazette* on December 31, 1799. In his eulogy, Allen characterized Washington as a “sympathising friend” to black people, emphasizing Washington’s decision to free his slaves in his will. Allen wrote,

He whose wisdom the nations revered thought we had a right to liberty. Unbiased by the popular opinion of the state [Virginia] in which is the memorable Mount Vernon he dared to do his duty, and wipe off the only stain with which man could ever reproach him.

. . . .

Deeds like these are not common.

Richard Allen, *Eulogy for Washington*, reprinted in LIFT EVERY VOICE: AFRICAN AMERICAN ORATORY, 1787–1900, at 56, 58 (Philip S. Foner & Robert James Branham eds., 1998). Manisha Sinha interprets Allen’s speech, claiming, “Allen sought to appropriate Washington’s legacy for abolition.” SINHA, *supra* note 142, at 149. Shortly after Washington’s death, Prince Hall’s African Lodge also expressed appreciation for Washington, a fellow mason, by adopting “a motion that the Lodge would walk on February 22” to commemorate his life. WESLEY, *supra* note 126, at 137.

<sup>208</sup> See RON CHERNOW, WASHINGTON: A LIFE 438–39 (2010) (describing Washington’s use of dentures made from human teeth). Jamal Greene reflects on this revelation:

I was surprised to learn recently, from Ron Chernow’s illuminating biography, that George Washington’s teeth might have been pulled from the mouths of his slaves. I suppose I should not have been surprised. I certainly knew that Washington kept slaves. I even knew that he was capable of uncommon barbarity with respect to his slaves, forcing them, for example, to clear swamps in the bitterest of winter chill. But even as a relatively sophisticated consumer of American legal and political history, I have been partly captured by the romantic myth around Washington. He paid for the teeth, it seems, but the fact that he bought them from someone from whom he was extracting free labor on pain of lash (or worse) cannot help but lower Washington another notch in my

and how someone answers them and why reveals important aspects of how they render moral judgments, what they value, and whether they grade people's character "on a historical curve."<sup>209</sup> But these questions do not have to have a close relationship to whether originalism is a desirable method of constitutional interpretation. Indeed, the movement from "original intent originalism" to "original public meaning originalism" demonstrates a commitment to the notion that the character and beliefs of the Framers are not particularly relevant to the meaning of the Constitution. By focusing on the public meaning of the Constitution, the subjective intents of, and the character and desires of, the Constitution's Framers can be stripped out of the interpretive story. All that remains is the text and how the public received it, and the text may be better than the men behind it.

To illustrate the separation between author and text, consider one of the most important founding-era sentences that exists in tension with the life of its author—the Declaration of Independence's claim that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."<sup>210</sup> This sentence plays a powerful role in the present-day belief that at the root of the American experiment is the notion that all people have equal rights and an equal claim to freedom and self-determination. It was also written by Thomas Jefferson, who held slaves, fathered children with one of his slaves, Sally Hemings, and clearly articulated his belief in the inferiority of black people in his *Notes on the State of Virginia*.<sup>211</sup> Nonetheless, it is Jefferson who tells us in a document that rings throughout the ages, "all men are created equal" and have the "unalienable Right" to

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imagination.

Greene, *supra* note 1, at 517 (internal citations omitted).

<sup>209</sup> Rick Hills, *Grading the Slave-Ownning Framers (and Yourself) on a Historical Curve: The Moral Case Against/For George Washington And Everyone Else*, PRAWFSBLAWG (Aug. 31, 2017), <http://prawfsblawg.blogs.com/prawfsblawg/2017/08/grading-the-slave-owning-framers-and-yourself-on-a-historical-curve-the-moral-case-against-for-george-wa.html>.

<sup>210</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>211</sup> See WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812*, at 429-81 (2d ed. 1968) (describing Jefferson's *Notes on the State of Virginia* and assertions of black inferiority); see also ANNETTE GORDON-REED, *THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY* 1-5 (1998) (introducing the historical debate discussed throughout the book over whether Thomas Jefferson had a relationship with Sally Hemings); THOMAS JEFFERSON FOUNDATION, *REPORT OF THE RESEARCH COMMITTEE ON THOMAS JEFFERSON AND SALLY HEMINGS* 10 (2000), <https://www.monticello.org/site/plantation-and-slavery/report-research-committee-thomas-jefferson-and-sally-hemings> (concluding based on DNA evidence that Sally Hemings had one or more children with Thomas Jefferson).

“Liberty and the pursuit of Happiness.”

Must Jefferson’s relationship to the Declaration compromise its aspirational language? Consider one reaction, James Forten’s 1813 *Letters from a Man of Color*, in which he writes,

W[e] hold this truth to be self-evident, that GOD created all men equal, and is one of the most prominent features in the Declaration of Independence, and in that glorious fabrick of collected wisdom, our noble Constitution. This idea embraces the Indian and the European, the Savage and the Saint, the Peruvian and the Laplander, the white Man and the African, and whatever measures are adopted subversive of this inestimable privilege, are in direct violation of the letter and the spirit of our Constitution, and become subject to the animadversion of all, particularly those who are deeply interested in the measure.<sup>212</sup>

Forten does not spit on the Declaration and the Constitution because of their compromised authors. Rather, he focuses only on the text, and calls out actions as deviant that fail to live up to what he understands to be the documents’ stated values.

Forten’s choice to focus on the Declaration and Constitution’s texts rather than origins finds support among later literary theorists. In 1919, T.S. Eliot argued, “[H]onest criticism and sensitive appreciation is directed not upon the poet but upon the poetry.”<sup>213</sup> Later, in the 1968 essay *Death of the Author*,<sup>214</sup> Roland Barthes set out “to show that the author is not conserved in the text,”<sup>215</sup> arguing that:

[W]riting is the destruction of every voice, of every point of origin. Writing is that neutral, composite, oblique space where our subject slips away, the negative where all identity is lost, starting with the very identity of the body writing.

....

... [I]t is language which speaks, not the author . . . .<sup>216</sup>

William Gass more gently accepts the creative role of authors without deifying them, characterizing the “death of the author” as “a decline in authority, in theological power, as if Zeus were stripped of his thunderbolts and swans, perhaps residing on Olympus still, but now living in a camper

<sup>212</sup> FORTEN, *supra* note 125.

<sup>213</sup> T.S. Eliot, *Tradition and Individual Talent*, 6 EGOIST 72, 72 (1919). Members of the New Criticism school W.K. Wimsatt Jr. and M.C. Beardsley similarly argued that a poem “belongs to the public. It is embodied in language, the peculiar possession of the public . . . .” W.K. Wimsatt, Jr. & M.C. Beardsley, *The Intentional Fallacy*, 54 SEWANEE REV. 468, 470 (1946).

<sup>214</sup> ROLAND BARTHES, *The Death of the Author*, in IMAGE MUSIC TEXT 142 (Stephen Heath ed. & trans., 1977).

<sup>215</sup> Harvey Hix, *Morte d’Author: An Autopsy*, 17 IOWA REV. 131, 142 (1987).

<sup>216</sup> BARTHES, *supra* note 214, at 142–43.



and cooking with propane. He *is*, but he is no longer a god.”<sup>217</sup> Ultimately, for Gass, “the elevation or removal of the author is a social and political gesture, not an esthetic one.”<sup>218</sup>

By being careful to contextualize and circumscribe the role the Constitution’s authors play in determining the meaning of the constitutional text, public meaning originalists not only “do originalism” better, but also further separate the associations the present-day public has with the biographies of the Constitution’s Framers and from the text itself. This separation allows Balkin and Barnett’s narrative of redemption and restoration of *principle* to ring truer. The Constitution was born flawed, instantiating many important principles while also facilitating slavery and failing to provide the tools to secure political equality for black Americans and others. Only by constitutional amendment was slavery ended, were woman and all people of color politically enfranchised, and was the federal government granted the power to prevent abuses of minorities by state and local governments. It is this progression toward actualizing the laudable principles found in the Constitution and the Declaration of Independence, regardless of what anyone in particular thought of those principles at the founding, and toward eliminating the Constitution’s immoral elements, that can make the Constitution worth defending and working with. No matter how insightful the Framers were, no matter how sympathetic one might be to their positions, we should all agree the original, unamended Constitution is not worth defending today, precisely because it facilitated the protection of the institution of slavery and allowed for the disenfranchisement of large portions of the population. Similarly, no matter how flawed and compromised the Framers were in how they conducted their personal lives or in how they viewed black Americans, women, and Native Americans, we can separately appreciate the Constitution’s provisions for dividing power and protecting rights, and the intellectual history that created the environment in which concerns about abuse of power could be sufficiently incorporated into a foundational legal document. The principles and text at the heart of American government can inspire us and serve as a source of enduring truth about political life, despite and because of the flaws of the Framers. Men are not angels, wrote Madison<sup>219</sup>—nor were he and his associates. Only with vigilance can their mistakes be corrected and victories preserved. That is the narrative that matters, and in that narrative

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<sup>217</sup> William H. Gass, *The Death of the Author*, SALMAGUNDI, Fall 1984, at 3.

<sup>218</sup> *Id.* at 11.

<sup>219</sup> THE FEDERALIST NO. 51, at 269 (James Madison) (George W. Carey & James McClellan eds., 2001) (“If men were angels, no government would be necessary.”).

the text stands apart from the authors.

## 2. *Breaking from Historical Associations*

Emphasizing the Constitution as a symbol of the ongoing struggle towards justice offers one way to contextualize how the Constitution, and American society, alienated and disenfranchised much of its population in the past. But the “ongoing struggle” narrative can only partially address the antipathy many people of color and white women have towards originalism and the Constitution in the present. There are other present-day sources of alienation, which originalists can recognize and orient away from.

Let’s consider alienation from originalism in a broader, cultural context. Originalism is closely associated with conservative, libertarian, and Republican ideas. Although not strictly related to constitutional interpretation, conservatives, libertarians, and Republicans are sometimes publicly perceived as holding negative attitudes or beliefs about women and racial minorities, partly because of the ways in which some conservatives, libertarians, and Republicans talk about them in the context of public issues. To provide one example, Jacob Levy recently wrote an essay about the ways members of the libertarian movement expressed greater anxieties over programs that provided welfare to black Americans than programs impacting other groups:

Think about the different ways that market liberals and libertarians talk about “welfare” from how they talk about other kinds of government redistribution. There’s no talk of the culture of dependence among farmers, although they receive far more government aid per capita than do the urban poor. . . . But once the imagined typical welfare recipient was a black mother, welfare became a matter not just of economic or constitutional concern but of moral panic about parasites, fraud, and the long-term collapse of self-reliance.<sup>220</sup>

Levy makes a key insight—that even when one holds a general, cross-cutting position (e.g., government welfare is bad, regardless of who receives it), much is revealed by how one chooses to talk about that belief. When one bemoans the welfare state, but focuses emotional ire more on individual black welfare recipients than on predominantly white farmers, many black Americans will hear the statements and reasonably conclude, “This person is racist,” rather than “This person dislikes welfare.”

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<sup>220</sup> Jacob T. Levy, *Black Liberty Matters*, NISKANEN CTR. (Sept. 20, 2017), <https://niskanencenter.org/blog/black-liberty-matters/>.

But Levy's essay also suggests that, despite its historic associations, originalism need not disproportionately appeal to white Americans and to men. He writes analogously about free-market politics,

[L]ibertarian, individualist, and market-liberal ideas, concepts, slogans, and advocates aren't alone in having a history that is entangled with white supremacy. Hardly any set of social ideas in American intellectual history lacks such an entanglement. This is as true of the technocratic progressivism associated with the racist Woodrow Wilson as it is of the populist democracy associated with the racist Andrew Jackson. . . . There's no good reason to sever "democracy" or "progressivism" from their complicated genealogies while tying "federalism" or "freedom of association" to theirs.<sup>221</sup>

And yet, in recent decades, progressives have largely been effective at separating progressive ideas from their unseemly history, while Republicanism and capitalism are increasingly associated with themes of racial subordination. This present-day phenomenon illustrates a vital insight. We choose *today* whether progressive, liberal, libertarian, and conservative values are associated with a racist and sexist past, in how we talk about them, and through what particulars we emphasize and de-emphasize. We choose *today* whether originalism is associated with the racist and sexist values of the founding-era public, by how we talk about the legitimacy of originalist methods and the consequences of originalist interpretation.

Originalism de-associates from the sexist and racist beliefs of the 1790s when its positive implications for women and people of color are made explicit, and when the role of women and people of color in determining constitutional meaning is acknowledged. This happens when Chris Green writes that "[o]nly originalism" guarantees that a woman can constitutionally run for president, because at the time of the framing, the gender-nonspecific use of "he" was common.<sup>222</sup> This happens when Jamie Fox tries to understand how black Americans used language that appears in the Reconstruction Amendments,<sup>223</sup> and when Randy Barnett emphasizes the importance of the abolitionist movement to securing the rights of "We

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<sup>221</sup> *Id.* (emphasis omitted).

<sup>222</sup> Chris Green, *Why My Daughter Needs Originalism*, ORIGINALISM BLOG (Mar. 22, 2017), <http://originalismblog.typepad.com/the-originalism-blog/2017/03/why-my-daughter-needs-originalism.html> ("Construing 'he' in the Constitution to mean what the Founders would have expressed by it--that is, what people in many circles today would say only by saying 'he or she' is clearly the way to go. I therefore put 'he' alongside 'now' as the Constitution's words which most obviously have only the meaning they expressed at the time of the Founding.").

<sup>223</sup> See Fox, *supra* note 119.

the People—each and every one.”<sup>224</sup> By extension, originalism is undermined when supporters of an individual right to bear arms express profound concerns about particular white Americans’ rights being protected, but fail to rally when a police officer shoots and kills a black man who had informed the officer that he was legally carrying a gun.<sup>225</sup>

Incorporating women and people of color more intentionally into the narrative about originalism is both difficult and worthwhile. It is difficult because there are literally thousands of relevant actors—people who talk about originalism, but also other individuals active in politics or policy-making whose views are associated with and bundled up with originalists’ views in the public perception. Each individual’s efforts only have a small effect on the larger cultural impression. But this effort is nonetheless worthwhile, regardless of whether anyone notices. Originalism strives to be unbiased in its application of the law, to instantiate “rule of law” values, and to treat like cases alike; by carefully considering how one reacts when issues affect people of different demographics, one can further improve how accurately one applies constitutional provisions to relevant cases.

## CONCLUSION

This Article has worked to advance several objectives. First, it has worked to identify and articulate the concerns women and people of color might have about embracing originalism,<sup>226</sup> and to explore alternative perspectives for understanding the originalist enterprise that might resonate with a more diverse population.<sup>227</sup> Second, it has argued that originalism stands to benefit as an interpretive methodology significantly by including more diverse voices in the present and from the past.<sup>228</sup> We all bring our

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<sup>224</sup> BARNETT, *supra* note 198, at 258.

<sup>225</sup> See, e.g., Leon Neyfakh, *Philando Castile Should Be the NRA’s Perfect Cause Célèbre. There’s Just One Problem*, SLATE (June 17, 2017, 4:47 PM), [http://www.slate.com/blogs/the\\_slatest/2017/06/17/after\\_jeronimo\\_yanez\\_acquittal\\_philando\\_castile\\_should\\_be\\_the\\_nra\\_s\\_perfect.html](http://www.slate.com/blogs/the_slatest/2017/06/17/after_jeronimo_yanez_acquittal_philando_castile_should_be_the_nra_s_perfect.html) (“It feels banal to even say it out loud: If Castile had been white instead of black, the [National Rifle Association] would have been rallying behind him and his family since the moment of his death and fundraising off his memory for the rest of time.”); Open Letter from Tamika D. Mallory, Co-President, Women’s March Inc., to Wayne LaPierre, Jr., CEO and Executive Vice President of the National Rifle Association (n.d.), <https://www.womensmarch.com/nra/> (criticizing the NRA for, among other actions, failing to “defend[] the civil rights of [Philando] Castile, a law-abiding gun owner who can be heard in video footage clearly notifying the officer that he was carrying a licensed firearm”).

<sup>226</sup> See *supra* Part I.

<sup>227</sup> See *supra* Section II.C.

<sup>228</sup> See *supra* Sections II.A–B.

own experiences and expectations to any interpretive enterprise, but by embracing and encouraging the participation of more diverse voices, we have a greater opportunity to triangulate among each other's interpretations and unearth more accurate claims about original meaning. Third, in order to jumpstart this process, this Article has tried to highlight particular historic speakers whose perspectives may be valuable to the discovery and analysis of original public meaning.<sup>229</sup>

A reader weary of today's political climate might have worked through each of the concerns and remedies suggested by this Article and thought that taking these steps will not create many converts to originalism. Positions are too polarized; partisans are too skeptical of the intentions of their opponents. But the goal of this Article is not to convince non-originalists to "swim the Tiber." Rather, the aim of this Article has been to consider and take seriously non-originalists' race- and gender-related concerns about originalism. By identifying valid and compelling concerns held by non-originalists, originalists can become better at accessing the original meaning of the Constitution and more accurately and objectively understand it themselves.

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229 See *supra* Section II.B.