HISTORICAL VERSUS ICONIC MEANING: THE DECLARATION, THE CONSTITUTION, AND THE INTERPRETER'S DILEMMA

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ABSTRACT

The Declaration of Independence is one of the paradigm texts of American history. It was originally written for a time-specific purpose. But it also has spoken to a broader audience across time, as an icon representing American ideals. After describing how the Declaration has been given both historical and iconic meaning by judges, presidents, and public figures, this Article considers the relevance of these two forms of meaning to current debates over constitutional interpretation. Originalists generally privilege the historical meaning of texts. Yet originalist Justices on the Supreme Court have acknowledged that iconic meaning also exists and can sometimes be more relevant. In Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), originalist Justices turned to the iconic meaning over the historical meaning, endorsing dynamic interpretation of public monuments—even those containing texts. Ironically, then, they found fluidity in the meaning of texts that are literally carved in stone. This Article closes with a discussion of the interpreter's dilemma: the tension between fidelity to the past (served by historical meaning) and affirmation in the present (served by iconic meaning).*

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INTRODUCTION

It is by no means a new observation that the "Declaration and the Constitution have become texts for the ages, subject to the continuing interpretation and reinterpretation that each generation applies to the legacies of the past."[1] Originalists insist, however, that such reinterpretation of the Constitution is illegitimate and that true constitutional meaning was fixed for all time at enactment.[2] Strikingly, though, the same originalists have recognized and even embraced the continual reinterpretation of past texts in another context—a context that, somewhat ironically, involved words that were literally written in stone.[3]

Thus, these originalist Justices have recognized that there are two kinds of meaning for texts: one that is fully rooted in the time of their creation and another that is a product of current-day readings. From one perspective, which we might call "historical meaning," we think of a text as "having been written" in a bygone age. In the other, which we might call "iconic meaning," we might think of it as "speaking to us." Note the difference in verb tenses between these formulations. In practice, the line between these two forms of meaning is not always easy to draw, given the natural tendency to assume that what a text has come to mean is the same as what it originally meant. The difference is that historical meaning is supposed to be cued entirely to what actually happened in the past, whereas iconic meaning invokes the present audience's interpretation, sometimes based on a mythologized past.

The interpreter's dilemma is the need to find meanings that are both faithful to the past and worthy of acceptance in the present. To be perfectly faithful to the past is also to distance the text from present-day readers; the more deeply we embed a document in its own time, the less we can adopt it as our own.[4] For many documents, this may not matter. But for the Declaration of Independence or the Constitution, the effect is to weaken their force as constitutive of our current polity. On the other hand, if we cut them loose entirely from their historical moorings, we also endanger their special status as legacies of key historical events. Interpretation must

1. JACK N. RAKOVE, THE ANNOTATED U.S. CONSTITUTION AND DECLARATION OF INDEPENDENCE 2 (2009).

2. Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009) (providing an overview and critique of Originalism).

3. *See infra* Part II.B.

4. For instance, efforts to reclaim Thomas Jefferson's worldview and its connection with the Declaration can render the significance and even the meaning of the Declaration obscure to present-day readers, making the Declaration an antiquarian document rather than a source of inspiration.

function in the terrain between these poles.

This Article explores this dilemma by using the Declaration to illustrate the two forms of interpretation while applying the resulting insights to constitutional interpretation. Part I of the Article describes historical and iconic interpretations of the Declaration. On the one hand, Justices and others have used it as a source of insight into the framing period while historians have struggled to reconstruct the Declaration's meaning to Thomas Jefferson and his 1776 audience. On the other hand, it has also been invoked as an icon of freedom and equality by Justices and by public figures, especially during the Civil War Era and in the Civil Rights Era a century later. For those invoking the Declaration in these later eras, a general sense of its historical setting may have been relevant, but the significance of the Declaration to them was only loosely tied to its historical meaning.

Part II initially looks more deeply into historical meaning as the key commitment of originalism and at the recognition by originalists of iconic meaning as another form of interpretation. Part II then analyzes the ways in which originalists may be pressed toward more iconic readings, even in constitutional interpretation, while non-originalists may find themselves tethered by historical meaning. In different ways, both schools of constitutional interpretation are caught in the interpreter's dilemma, needing to connect the text both to its origins and present-day society. The tension between past and present meaning may well be inescapable when a historic document has become constitutive of present national identity. Ultimately, the interpreter's dilemma is not a puzzle to be solved, but an inescapable aspect of the need to bring such historic texts to bear on issues facing contemporary society.

I. MODES OF INTERPRETING THE DECLARATION

There were other texts of importance in eighteenth century America, but the two that stand out in significance today are the Declaration of Independence and the Constitution (with its attendant Bill of Rights). This Part will use the Declaration to show the significance of both the historical and iconic interpretations inside and outside the Supreme Court. We begin by considering how the Declaration has been viewed as a historical document and then how it has also been invoked as an icon of American values.

A. THE HISTORICAL DECLARATION

Historians, both professional and amateur (including the Justices), have probed the Declaration as a source of insights into the thought of the Founding Era. In particular, the Declaration has been used as an aid to interpreting other texts, particularly the Constitution, from the same era. For instance, in denouncing affirmative action, Justice Thomas quoted the Declaration as his authority for the statement that "the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution."[5] Elsewhere, he wrote that "[t]he proper way to interpret the Civil War amendments is as extensions of the promise of the original Constitution which in turn was intended to fulfill the promise of the Declaration."[6] Similarly, Justice Stevens invoked the Declaration in support of an argument that the "liberty protected by the Due Process Clause is not a creation of the Bill of Rights," but instead was seen as preexisting the Constitution.[7] Although these

5. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring).

6. Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 984, 994 (1987). As one admirer of Thomas's view elaborates,

> [T]he United States of America was founded to secure the natural rights of the American people. "To secure these rights," Thomas Jefferson proclaimed in the Declaration of Independence, is the reason that "governments are instituted among men." To secure natural rights is, therefore, why the Constitution was enacted, and to secure natural rights is how the Constitution should be interpreted. That is the "original intent" of the Founders.

Scott D. Gerber, *Liberal Originalism: The Declaration of Independence and Constitutional Interpretation*, 63 CLEV. ST. L. REV. 1, 4–5 (2014) (footnotes omitted). Given the tremendous changes between the 1776 and the drafting of the Constitution, however, the existence of such a clear continuity of purpose is not obvious.

7. Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 93 (2009) (Stevens, J., dissenting) ("Indeed, our Nation has long recognized that the liberty safeguarded by the Constitution has far deeper roots."). *See also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (holding it self-evident that "all men are . . . endowed by their Creator with certain unalienable Rights," among which are "Life, Liberty and the pursuit of Happiness"); Meachum v. Fano, 427 U.S. 215, 230 (1976) (Steven, J., dissenting).

The cited passage in *Meachum* reads:

> If man were a creature of the state, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.
>
> I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.

Meachum, 427 U.S. at 230. Notably, this invocation of the Declaration does not cite it—an indication that the meaning was not attributed to a specific historic incident, but rather to a contemporary, though historically rooted, truth.

Justices had starkly different constitutional views, they were alike in arguing that the Declaration can be used as a source of historical insight.

Dred Scott v. Sandford provides another clear-cut example of judicial efforts to probe the historical meaning of the Declaration. After quoting the Declaration, Chief Justice Taney admitted that the language "would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood."[8] But according to Taney, this language was actually understood to exclude African Americans.[9] "[I]t is too clear for dispute," he said, "that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration," for otherwise, the "conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted."[10] Taney rejected that imputation of inconsistency to the framers of the Declaration, saying that "[t]hey perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery."[11] In short, he concluded, the framers "spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them."[12]

This interpretation of history did not go undisputed. Abraham Lincoln responded to a similar argument by Stephen Douglas with the observation that he believed that

> the entire records of the world, from the date of the Declaration of Independence up to within three years ago, may be searched in vain for one single affirmation, from one single man, that the negro was not included in the Declaration of Independence; I think I may defy Judge Douglas to show that he ever said so, that Washington ever said so, that any President ever said so, that any member of Congress ever said so, or that any living man upon the

8. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 410 (1856).

9. *See id.*

10. *Id.*

11. *Id.* The thesis that the Declaration included only whites had long been popular among Southerners, though another response was to scoff at the Declaration for embracing a false norm of equality. ALEXANDER TSESIS, FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE 115–18 (2012).

12. *Dred Scott,* 60 U.S. (19 How.) at 410. It should be noted that Taney himself had freed his slaves and given them pensions, so he was hardly a personal enthusiast for the institution of slavery. TSESIS, *supra* note 11, at 144.

> whole earth ever said so, until the necessities of the present policy of the Democratic party, in regard to slavery, had to invent that affirmation.[13]

He added the observation that although Jefferson was a slave owner, "in speaking upon this very subject he used the strong language that 'he trembled for his country when he remembered that God was just.'"[14] Here, Lincoln's remarks were an effort to uphold his interpretation of the Declaration's original, historical meaning.

Efforts to connect the Declaration to the original understanding of the Constitution and the Bill of Rights face some significant barriers. As Charles Cosgrove explained in his study of the Declaration's role in constitutional interpretation, "[T]here is, however, very scant evidence from the time of the framing and ratification that anyone was thinking of the Constitution as an extension of a political theory announced in the Declaration."[15] Indeed, he added, the Declaration "suffered an obscure and uninfluential history during the first decades after its promulgation," and the Framers may well have "undergone significant changes of mind since the heady day and idealistic days of 1776."[16]

On top of these uncertainties about the historical relationship between the Declaration and the Constitution, there is also considerable disagreement among historians about the original meaning of the Declaration itself. For instance, historian Jack Rakove finds it ironic that we now understand the statement that "all men are created equal" to pertain to the equality of individuals.[17] Admittedly, he says, Jefferson was aware that the words could be read that way.[18] But in reality, he argues, when Jefferson "made equality the founding premise of the Declaration, it was primarily the equality of *peoples*, not *individuals*, that he meant to assert."[19]

13. ABRAHAM LINCOLN & STEPHEN A. DOUGLAS, THE POLITICAL DEBATES BETWEEN ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS 113 (George H. Putnam ed., 1912) [hereinafter LINCOLN-DOUGLAS DEBATES].

14. *Id.* at 113–14. For appraisals of the Lincoln-Douglas debates, see JOHN BURT, LINCOLN'S TRAGIC PRAGMATISM: LINCOLN, DOUGLAS, AND MORAL CONFLICT (2012), and ALLEN C. GUELZO, LINCOLN AND DOUGLAS: THE DEBATES THAT DEFINED AMERICA (2009).

15. Charles H. Cosgrove, *The Declaration of Independence in Constitutional Interpretation: A Selective History and Analysis*, 32 U. RICH. L. REV. 107, 134 (1997).

16. *Id.* at 135.

17. RAKOVE, *supra* note 1, at 22 (1979) (internal quotation marks omitted).

18. *Id.*

19. *Id.* at 23. This interpretation implies a break between this clause devoted to group equality and the language immediately following about rights, which addresses individual rights to life, liberty, and the pursuit of happiness and proclaims that governments were formed to protect these pre-political rights.

Thus, he contends, the Declaration was meant to confirm a collective right of revolution and self-government, not an individual right of equal treatment.[20]

Others have viewed the language of the Declaration as rooted instead in Lockean premises about natural rights, a view that is commonly identified with Carl Becker.[21] According to Becker, Locke's social compact theory, whereby people consented to authority of government in order to protect their rights because those rights were insecure under anarchy,[22] was second nature to the American colonists.[23] As Becker put it, "Most Americans had absorbed Locke's works as a kind of political gospel; and the Declaration, in its form, in its phraseology, follows closely certain sentences in Locke's second treatise on government."[24]

Yet another view of the history is provided by Garry Wills in his book *Inventing America*.[25] Although conceding a minor allusion to Locke in the Declaration,[26] he roots the Declaration instead in the thought of Scottish Enlightenment thinkers, of whom David Hume is the best remembered today.[27] Thus, he says, Jefferson's idea of equality was not a normative precept, but rather a factual observation that all humans share basic moral impulses.[28] (Historian Gordon Wood shares this reading of Jefferson but views him as unique in this respect among the Founding Fathers.) Wills

20. *Id.* Rakove later elaborates on this point in reference to the final paragraph, which contains the actual language declaring colonial independence:

> Though we now read the Declaration first and foremost as a statement of the idea of equality among individuals, the intent of this concluding passage—the whole Point of the Declaration as a public document and an act of state—was to affirm a different proposition. Americans had become a people and an alliance of provinces entitled to exercise all the powers that other sovereign nations exercised.

Id. at 98.

21. *See generally* CARL L. BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 98–105 (1922) (explaining Becker's view that the language of the Declaration is rooted in Lockean Premises about natural rights).

22. *Id.* at 63–69.

23. *Id.* at 24, 69.

24. *Id.* at 27.

25. GARY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE (2002 ed. 1978).

26. *Id.* at vii.

27. *See id.* at 207.

28. *See id.* at 215–16, 228. For more on Revolutionary Era conceptions of equality, see GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 99–106 (2003). Historian Gordon Wood shares this reading of Jefferson but views him as unique in this respect among the Founding Fathers. *See* GORDON S. WOOD, THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES 227–28 (2011). According to Wood, Jefferson "went much further than simply claiming that all men are created equal" by maintaining that "people were not just created equal but were actually equal to everyone else throughout their lives" in their "common moral or social sense." *Id.*

reads Jefferson to argue that rights are inalienable because the pursuit of happiness is a human motivation that cannot be transferred from one person to another.[29]

For present purposes, we need not be concerned over which of these interpretations, if any, best represents the intentions of Jefferson or of the Continental Congress or of the understanding of contemporary readers. Nor need we examine which of these understandings, if any, were in the minds of Americans when the Constitution was later adopted. Yet it is precisely these questions with which an interpreter must grapple to identify the historical meaning of the Declaration, just as originalists must struggle with similar issues in interpreting the Constitution. As we will see in Part I.B, however, there is quite another way of imputing meaning to the Declaration.

B. THE ICONIC DECLARATION

Beyond these historical interpretations, the Declaration's language can also be seen as signifying truths that are considered eternal rather than simply rooted in a historical moment. At the Supreme Court, that use is illustrated by Justice Kennedy's justification of the First Amendment's protection of speech based on the principle that "[f]reedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person."[30] Direct citation of the Declaration is often unnecessary for this type of use since the reader can be relied upon to make the connection, just as a reference to "We the People" automatically brings to mind the Constitution's Preamble.

In a more direct invocation of the Declaration—in the service of denouncing a restriction on campaign financing—Justice Scalia said:

> Another proposition which could explain at least some of the results of today's opinion is that the First Amendment right to spend money for speech does not include the right to combine with others in spending money for speech. Such a proposition fits uncomfortably with the concluding words of our Declaration of Independence: "And for the support of this Declaration, . . . we mutually pledge to each other our Lives, *our Fortunes* and our sacred Honor." (Emphasis added.) The

29. WILLS, *supra* note 25, at 247–48.

30. United States v. Alvarez, 132 S. Ct. 2537, 2550 (2012). In the setting of constitutional interpretation, a particularly nice explanation of this view can be found in David Souter's observation that the Court's role involves "making good on the aspirations that tell us who we are, and who we mean to be, as the people of the United States." David Souter, *Text of Justice David Souter's Speech Harvard Commencement Remarks,* HARVARD GAZETTE 5 (May 27, 2010), http://news.harvard.edu/gazette/ story/2010/05/text-of-justice-david-souters-speech.

> freedom to associate with others for the dissemination of ideas—not just by singing or speaking in unison, but by pooling financial resources for expressive purposes—is part of the freedom of speech.[31]

It is hard to read this passage as a serious effort to use the Declaration as historical evidence of the historical meaning of the First Amendment's speech clause. Not only was the subject of the case (campaign spending by corporations) far removed from any analogue in the Founding Era, but also the signers of the Declaration were speaking of their mutual support in engaging in a violent revolution, not free speech. Rather, Scalia seemed to be suggesting that the Court's ruling was untrue to the ethos of the Declaration.

For another iconic use, consider Justice Ginsburg's statement in a case involving the right of a prisoner to a hearing, in which she said that "[l]iberty that may vary from Ossining, New York, to San Quentin, California, does not resemble the 'Liberty' enshrined among 'unalienable Rights' with which all persons are 'endowed by their Creator.'"[32] Again, she clearly was not making a historical claim about the original meaning of the Fourteenth Amendment, but rather invoking the spirit of the Declaration as representing the American view of freedom.

Almost a century before Ginsburg, while striking down a law requiring railroads to pay attorneys' fees in certain types of litigation, Justice Brewer remarked in 1897 that the Constitution "is but the body and the letter" of which the Declaration is "the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence."[33] Accordingly, "[n]o duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."[34] Similar assertions had been made earlier by anti-slavery Republicans, such as Charles Sumner, who viewed the Declaration as "embodying . . . those primal truths to which our country pledged itself with baptismal vows as a Nation."[35] In these settings, a reference to the Declaration is an appeal to the American creed, not an exercise in historical exegesis.

Indeed, by the end of his life, Jefferson himself attached iconic

31. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 255 (2003) (Scalia, J., dissenting), *overruled in part by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 312 (2010).

32. Sandin v. Conner, 515 U.S. 472, 489 (1995) (Ginsburg, J., dissenting).

33. Gulf, Colo. & Santa Fe. Ry. Co. v. Ellis, 165 U.S. 150, 160 (1897).

34. *Id.*

35. TSESIS, *supra* note 11, at 137.

importance to the Declaration. "May it be to the world," he wrote in his last letter, "the signal of arousing men to burst the chains under which monkish ignorance and superstition had persuaded them to bind themselves, and to assume the blessings and security of self-government."[36] Fortunately, he wrote, "All eyes are opened, or opening, to the rights of man."[37] And for Americans, "let the annual return of this day [July 4] forever refresh our recollection of these rights, and an undiminished devotion to them."[38] Here, the emphasis is very much on the present reception of the Declaration.

Perhaps the best-known, and historically most important, use of the Declaration was by Abraham Lincoln. Lincoln repeatedly stressed the Declaration in his debates with Stephen Douglas.[39] In one speech, for example, he said:

> I adhere to the Declaration of Independence. If Judge Douglas and his friends are not willing to stand by it, let them come up and amend it. Let them make it read that all men are created equal except negroes. Let us have it decided whether the Declaration of Independence, in this blessed year of 1858, shall be thus amended.[40]

In another debate he argued that "[i]f [the] Declaration is not the truth, let us get the statute book, in which we find it, and tear it out!"[41]

Lincoln also invoked the Declaration as support for his view of racial equality:

> I have said that I do not understand the Declaration to mean that all men were created equal in all respects. . . . [B]ut I suppose that it does mean to declare that . . . they are equal in their right to "life, liberty, and the pursuit of happiness." Certainly the negro is not our equal in color,—perhaps not in many other respects; still, in the right to put into his mouth the bread that his own hands have earned, he is the equal of every other man, white or black.[42]

Adherence to the Declaration became a kind of touchstone for Republicans. Senator Wade, for example, proclaimed that Republicans

36. Letter from Thomas Jefferson to Roger C. Weightman (June 25, 1826), *in* THOMAS JEFFERSON: WRITINGS 1516, 1517 (Merrill D. Peterson ed., 1984).

37. *Id.*

38. *Id.*

39. LINCOLN-DOUGLAS DEBATES, *supra* note 13, at 175.

40. *Id.*

41. *Id.* at 64.

42. *Id.* at 176. *See also id.* at 115–16. Lovejoy expressed a similar view. *See* CONG. GLOBE, 35th Cong., 2d Sess. 199 (1858). According to Richard Sewell, most Republicans would have endorsed Lincoln's statement. RICHARD H. SEWELL, BALLOTS FOR FREEDOM: ANTISLAVERY POLITICS IN THE UNITED STATES, 1837–60, 327–28 (1976).

believe in the Declaration, not as "a tissue of glittering generalities," but as a statement that "every man bearing the human form has received from the Almighty Maker a right to his life, to his liberty, and to the pursuit of happiness," a right not "confined to men of any particular name, nation or color."[43] In the same vein, the recently formed Republican Party officially affirmed its belief in the 1860 platform:

> That the maintenance of the principles promulgated in the Declaration of Independence and embodied in the Federal Constitution [quoting the second paragraph of the Declaration] is essential to the preservation of our Republican institutions; and that the Federal Constitution, the Rights of the States, and the Union of the States must and shall be preserved.[44]

Moreover, when the Fourteenth Amendment was later under consideration, there were several references to the Declaration as the source of the rights it protected.[45]

Much later, the Declaration became a touchstone in the Civil Rights Era. President Kennedy invoked it in decrying violent attacks on civil rights workers,[46] while his Vice President "called on 'today's generation' to 'implement the Declaration of Independence . . . for all Americans.'"[47] As President, Lyndon Johnson also invoked the Declaration when signing the 1964 Civil Rights Act by juxtaposing the Declaration's premises with the realities of American race relations: "We believe that all men are created equal. Yet many are denied equal treatment. We believe that all men have certain unalienable rights. Yet many Americans do not enjoy these rights."[48]

Similarly, Martin Luther King invoked the Declaration in his most famous speech:

> I say to you today, my friends, so even though we face the difficulties of today and tomorrow, I still have a dream. It is a dream deeply rooted in the American dream.

43. TSESIS, *supra* note 11, at 154 (quoting Senator Wade).

44. ARTHUR MEIER SCHLESINGER, HISTORY OF U.S. POLITICAL PARTIES, 1239–40 (1973).

45. CONG. GLOBE, 39th Cong., 2d Sess. 2498 (remarks of Rep. Broomall); *id.* at 2468 (remarks of Rep. Kelley); *id.* at 2502 (remarks of Rep. Raymond); *id.* at 2511 (remarks of Rep. Elliott). For other citations, see Alexander Tsesis, *The Declaration of Independence and Constitutional Interpretation*, 89 S. Cal. L. Rev. 369, 387 n.93, 392–93 nn.126–130, 395–96 nn.144–49.

46. TSESIS, *supra* note 11, at 300.

47. *Id.* at 301.

48. *Id.* at 306–07.

> I have a dream that one day this nation will rise up and live out the true meaning of its creed: "We hold these truths to be self-evident: that all men are created equal."[49]

These invocations of the Declaration are different in spirit from those discussed in the previous section. They do not involve any serious claim about how the Declaration was understood when it was written or on its relationship, if any, with the framing of the Constitution. King, for instance, cannot fairly be read to make a historical claim that Jefferson himself or the other Framers actually would have rejected segregation.

It would be a mistake, however, to view these claims as entirely ahistorical. It mattered to King that Jefferson wrote at the moment of national independence on behalf of the American people. To cite the Declaration for the proposition that "all men are created equal" is not the same as citing Euclid's Postulates for the proposition that a "straight line segment can be drawn joining any two points."[50] The difference is that Mr. Euclid's endorsement of this principle, as opposed to the principle itself, is of interest only to historians of mathematics, but it has no relevance to whether we accept the principle as *valid.* But at least for Americans, the Declaration's endorsement of equality in 1776 is powerful in part because of its tie to the nation's origin.

Thus, Mr. Jefferson's authorship has a contemporary relevance that Mr. Euclid's does not. But it would be peculiar to view King's statement as making an argument about how segregation might or might not have fit into Jefferson's conceptual scheme. Indeed, Jefferson quite likely would have viewed segregation as a marvel of social progress in comparison with the institution of slavery in his own time. It is also difficult to know how segregation might or might not be analyzed from the philosophical perspectives of Locke or Hume, two of the influences that have been attributed to the Declaration. But those issues are quite irrelevant to King's purposes, or to Lincoln's for that matter.

Invocations of the Declaration as an icon to American ideals offer themselves as interpretations of historic texts, not merely as propositions whose acceptance is independent of their historic source. On the other hand, they do not rest heavily on the kind of historical accuracy that historians care about. Rather, they invoke the Declaration in the same way

49. Martin Luther King, Jr., I Have a Dream, Address at the March on Washington (Aug. 28, 1963), http://www.ushistory.org/documents/i-have-a-dream.htm.

50. Eric W. Weisstein, Euclid's Postulates, Mathworld, http://mathworld.wolfram.com/EuclidsPostulates.html.

as do the inscription in the Jefferson Memorial[51] or speakers on the Fourth of July—as an embodiment of historic American ideals. As we will see in Part II.B, the Supreme Court has recognized that this form of meaning is quite distinct from strictly historical meaning.

II. INTERPRETATIVE FIXATION AND FLUIDITY

Gary Wills, in his effort to reconstruct the intellectual world of Thomas Jefferson, and Martin Luther King, in his effort to obtain justice for a downtrodden minority, both referred to the meaning of the Declaration of Independence. But they were talking about two different kinds of meaning. This distinction may be obvious enough in these examples, but recognizing it can help illuminate current debates over constitutional interpretation. In particular, as we will see in Part II.A, originalists often seem to insist that texts can only have a single kind of meaning—the historical one. Yet Part II.B shows that even originalists have sometimes recognized the existence of iconic meaning. As Part II.C shows, however, it is difficult for either originalists or their opponents to rest solely on a single form of meaning, whether historical or iconic.

A. ORIGINALISM AND THE FIXATION THESIS

Originalism is a familiar approach to constitutional interpretation.[52] The case for originalism rests on a cluster of arguments. First, originalists argue that the Constitution's authority derives from its adoption by a supermajority, so that any interpretation contrary to their views lacked this legitimizing foundation. When judges carry out the views of this supermajority, they can claim democratic legitimacy even for rulings contrary to the views of current majorities.[53]

Second, according to originalists, interpretation based on the original

51. *See Quotations on the Jefferson Memorial*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, http://www.monticello.org/site/jefferson/quotations-jefferson-memorial# inscription_under_the_Dome.

52. A striking example of originalist decision-making is provided by the Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), interpreting the Second Amendment as creating an individual right to handgun ownership. Originalism also figures heavily in popular culture, particularly among conservatives. *See* Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT'L L. 780, 796–97 (2014).

53. The supermajority argument has been revived in the guise of a theory that supermajority rules are more likely to be good policy than those of simple majorities. S*ee* John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 383–96 (2007). But even if that is true at any given moment in time, it means only that a provision adopted by a supermajority in 1789 is likely to be better policy than one adopted by a majority in 1789. It says nothing about whether the provision continues to be good policy over two hundred years later.

understanding is consistent with the methods used to interpret other legal documents, such as contracts and wills.[54] Thus, originalism is said to be faithful to the nature of the Constitution as a legally operative rather than purely political document. It is also, according to originalists, consistent with the written nature of the Constitution, as opposed to the "unwritten" English constitution, which implies a desire to fix rules rather than leave them open for revision under the guise of interpretation.[55]

Third, originalists also contend that their approach provides the only principled basis for constitutional interpretation, eliminating or at least curtailing judicial discretion.[56] Other approaches are considered to be too formless to restrain judges from simply imposing their own policy views at the expense of the democratic process.[57] In the view of originalists, such judicial policymaking happened all too often during the mid-twentieth century in cases involving the rights of criminal defendants, religious freedom, abortion, and federal power.[58] They reject these opinions as generally lacking any foundation in historical evidence of the Framers' understanding of the Constitution.[59]

Originalism comes in several varieties.[60] It initially took the form of reliance on the intentions of the Framers.[61] Although this initial approach still has adherents, it confronted significant criticisms because of its tension with formalist premises.[62] In formal terms, it is the text of the Constitution that is legally operative, rather than the mental states of the Framers. Moreover, the intentions of the various Framers may have been different and even inconsistent with each other.[63] Reliance on expectations about

54. Justice Scalia and Bryan Garner argue that originalism is "the normal, natural approach to understanding anything that has been said or written in the past." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 82 (2012). They add that this observation "alone is reason enough for using originalism to interpret private documents." *Id.*

55. *See* Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review 61–62 (1999).

56. *Id.* at 39–40.

57. *See* SCALIA & GARNER, *supra* note 54, at 88–89.

58. Robert H. Bork, The Tempting of America: The Political Seduction of the Law 69–73, 113–15 (1990).

59. *Id.* at 113–15, 143–44.

60. These various forms of originalism have had varying appeal at different times and places. *See* Tew, *supra* note 52, at 786. Tew also refers to "original methods" originalism, where the text is interpreted according to interpretative conventions of the time. *See id.* at 791–92.

61. *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Facts in Original Meaning*, NOTRE DAME L. REV. 1, 3–4 (2015). *See generally* Saul Cornell, *Originalism as Thin Description: An Interdisciplinary Critique*, 84 FORDHAM L. REV. (2015) (critiquing Solum's originalist theory from the perspective of intellectual history).

62. Tew, *supra* note 52, at 790.

63. Berman, *supra* note 2, at 9; Tew, *supra* note 52, at 789–90.

how the Constitution would be applied was an especially slippery basis for interpretation, since those expectations may have been based on circumstances that have since changed or on factual assumptions that might be rejected today.[64]

In response to these concerns, many originalists switched their focus from expectations or intentions to understandings or objective meaning.[65] Put another way, they deemphasized the authors of the Constitution in favor of its audience, seeking to identify Constitutional meaning with the interpretation of a reasonable reader of the time.[66] This move to audience understandings has the advantage of operationalizing originalism and providing a recipe of sorts for its application. But it also opens an array of questions about the background knowledge of the reasonable reader and the methods of interpretation that reader would have applied.[67] Typical questions might be whether the reasonable reader was familiar with Blackstone or Locke, whether the reader should be presumed to apply methods of legal interpretation current at the time, whether the reader would be familiar with documents such as the Federalist Papers, and whether the reader had views of constitutional structure and purpose beyond those apparent in the text itself. One might ask similar questions about the reasonable reader of the Declaration of Independence, and the extent to which that reader would be familiar with the philosophical theories on which Jefferson drew.

In any event, these fine distinctions among types of originalism seem to have had little impact on how it is used by judges.[68] Despite these differences about the precise formulation of origimalism, originalists are in agreement that historic meaning is decisive.[69] As Justice Scalia once wrote, the "Great Divide with regard to constitutional interpretation" is not that between Framers' intent and objective meaning, but rather "that between *original* meaning" (whether derived from Framers' intent or not) and "*current* meaning."[70]

64. Berman, *supra* note 2, at 9–10, 28.

65. SCALIA & GARNER, *supra* note 54, at 33 (positing objective meaning as the ultimate goal, though admitting that many canons of interpretation are based on judicial policy preferences rather than a search for objective meaning); Berman, *supra* note 2, at 9.

66. BORK, *supra* note 58, at 144.

67. For an articulation of the "reasonable reader" test, see SCALIA & GARNER, *supra* note 54, at 33.

68. *See* Tew, *supra* note 52, at 792.

69. *See id.* at 788–90.

70. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997). Or as Scalia wrote more recently, "The meaning of rules is constant. Only their application to new situations presents a novelty." SCALIA & GARNER, *supra* note 54, at 86.

Regardless of its particular form, originalism has received a barrage of criticism. To begin with, critics argued that originalism failed as an effort to root judicial review in the prior democratic adoption of the Constitution. Even apart from questions that arise because of limitations on the franchise during the framing period, it remains unclear that a restriction on the current democratic majority can gain legitimacy *solely* from the fact of its enactment by an earlier, long-dead majority.[71] One pillar of support for a legal regime can be the legitimacy of the process of adoption, but it is less clear that this can function effectively as the *only* support without taking into account other motivations for public acceptance.

Another critique focused on the originalist contention that their methodology simply applies the usual methods of legal interpretation to the Constitution. Some critics questioned this description of legal interpretation. In particular, they questioned whether originalism corresponded to the methods of interpretation used by courts during the period when the Constitution was adopted.[72] Others observed that the Constitution is not the typical legal document and might call for different methods of interpretation.[73] And not all interpretation of legal texts today is purely originalist; later events may also be relevant to interpretation. For instance, under the Uniform Commercial Code, "any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement."[74]

Critics also challenged the originalist claim of reducing judicial discretion and thereby depoliticizing constitutional law.[75] These critics questioned whether historical events have readily ascertainable interpretations or whether contemporary meanings of constitutional texts were clear-cut.[76] They also questioned whether lawyers and judges possess

71. DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 23 (2009).

72. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985). For a response to Powell, see Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMM. 77 (1988).

73. Justice Breyer questions whether there was any consensus about methods of interpreting the Bill of Rights, given the conflicts over whether one was needed at all and about what should be included. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 117 (2012).

74. U.C.C. § 2-208(1) (AM. LAW INST. & UNIF. LAW COMM'N 2002).

75. For some empirical evidence that originalism does not limit the effects of ideology, see FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 183–88 (2013).

76. *See* BREYER, *supra* note 73, at 124–25. The difficulties, discussed earlier in this Article, in reconstructing the original understanding of the Declaration of Independence, are indicative of the difficulties facing originalist interpretation.

the training and historical knowledge needed for expert judgment about long-ago periods of time.[77] Meanwhile, critics also argued that originalism is indeterminate on the critical question of the level of generality; for instance, in a case involving racial segregation, it is unclear whether judges should be seeking the original understanding about whether segregated schools violate the equal protection clause or the original understanding of the general concept of equality embedded in the clause.[78]

Finally, critics argued that if originalism was consistently applied, it would have unacceptable consequences.[79] Modern Supreme Court decisions banned racial segregation, provided legal protection to advocacy by dissidents, limited discrimination against women, and allowed federal regulation of matters such as employment discrimination, environmental pollution, and organized crime. Critics portrayed originalism as a threat to reimpose an archaic legal order to the detriment of racial and gender equality and of civil liberties.[80]

A tension between constitutional meaning and present-day understanding is inherent in the nature of originalism. Without some distinction between current and original understandings, originalism would be indistinguishable from the "living Constitution" approach that it rejects. Judge Bork, for example, made the connection between originalism and historical fixity clear:

> When we speak of "law," we ordinarily refer to a rule that we have no right to change except through prescribed procedures. That statement assumes that the rule has a meaning independent of our own desires . . . .
>
> What is the meaning of a rule that judges should not change? It is the meaning understood at the time of the law's enactment.[81]

77. As Judge Posner puts this objection, "The decisive objection to the quest for original meaning, even when conducted in good faith, is that judicial historiography rarely dispels ambiguity. Judges are not competent historians. Even real historiography is frequently indeterminate, as real historians acknowledge." RICHARD A. POSNER, REFLECTIONS ON JUDGING 185 (2013).

78. This point has long been a trope in debates about originalism. *See* Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 463 (1984); David A. J. Richards, *Interpretation and Historiography*, 58 S. CAL. L. REV. 489, 514–15 (1985).

79. *See* Henry Paul Monaghan, *Supremacy Clause Textualism*, 111 COLUM. L. REV. 731, 788 (2010). Posner points to the desegregation opinion, in particular, as a "profound embarrassment for textual originalists." POSNER, *supra* note 77, at 198.

80. This point was well made as many as forty years ago in Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 712–13 (1975).

81. BORK, *supra* note 58, at 143–44. Lawrence Solum provides an illustration:

> For example, imagine that you are reading a text written quite some time ago—a letter written in the thirteenth century, for example. If you want to know what the letter means (or more precisely, what it *communicates*), you will need to know what the words and phrases used in the letter meant at the time the letter was written.

Indeed, Lawrence Solum contends that the fixation thesis, which maintains that the "communicative content of the constitutional text was fixed at the time each provision was framed and ratified," is one of the two pillars of originalism.[82] Or, more simply, "meaning is fixed by linguistic facts as they exist at the time a text is written."[83] He refers to "writing" quite specifically when he says that "[o]riginalism is a thesis about the meaning of the text of the Constitution of the United States that was adopted by the Philadelphia Convention—the text as it was written in ink on sheets of parchment at a particular place or time."[84] In the same vein, a Supreme Court opinion from a century ago maintains that "[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now."[85]

As we will see, however, the current Supreme Court (including its original Justices) *has* taken the position that the meaning of some kinds of texts does indeed change over time.[86]

B. MONUMENTS AND ICONIC INTERPRETATION

Ironically, when the Supreme Court has thought about how to interpret texts that are actually carved into stone, it has opted for a much more fluid approach.[87] One such occasion was a case dealing with privately funded

Solum, *supra* note 61, at 1.

82. *Id.* at 6.

83. *Id.* at 21. Solum adds later that the communicative content is a function of both the conventional meaning of words and the context, both being evaluated at the time the writing was produced. *Id.* at 21–23. For an incisive critique of the theory that some particular methodology is implicit in the concept of interpretation, see generally Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMM. 193 (2015).

84. Solum, *supra* note 61, at 31–32. This suggests, somewhat oddly, that the meaning of the Constitution printed at the end of a constitutional law casebook might differ from the meaning of the same words in the original parchment in the National Archives. As Solum says later, "[The] very same words in the same order could have different communicative content if uttered on a different occasion." *Id.* at 33.

85. Berman, *supra* note 2, at 22 (quoting South Carolina v. United States, 199 U.S. 437, 448 (1905)).

86. For another example, consider Michael McConnell's argument that the constitutional text "has reference to a slowly evolving, common law understanding of rights" from "decentralized processes of legal and cultural change." Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1292 (1997).

87. *See generally* B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning Over Time*, 59 DUKE L.J. 705 (2010) (discussing this problem in terms of the potentially changing meanings of routine religious references, such as "In God We Trust"). Hill provides an enlightening discussion of the relevance of contemporary philosophies of language to debates about the fixity of meaning. *See id.* at 733–54.

monuments in a public park, *Pleasant Grove City v. Summum*.[88] One of the Park's displays was a monument of the Ten Commandments, donated some thirty years earlier by the Fraternal Order of Eagles.[89] The plaintiff was a religious organization following the "Aphorisms of Summum,"[90] and it asked to add to the park a monument displaying the Aphorisms.[91] Contending that the city had established a public forum by allowing the Ten Commandments and other monuments to be erected, the plaintiff challenged the exclusion of its own monument from the forum.[92]

In an opinion by Justice Alito, which was joined by every Justice except Souter, the Court rejected this contention. The Court held instead that placement of the monuments in the park rendered them government speech and therefore outside the scope of First Amendment protection.[93] The Court then rejected the argument that in order to render a monument in the park government speech, the city needed to formally endorse the monument's message.[94]

Justice Alito began his analysis by dismissing the view—common among some originalists—that meaning is necessarily based on authorial intent. He stated:

> Respondent seems to think that a monument can convey only one "message"—which is, presumably, the message intended by the donor—and that, if a government entity that accepts a monument for placement on its property does not formally embrace *that* message, then the government has not engaged in expressive conduct.[95]

Thus, Alito rejected historical meaning as the basis for interpreting monumental texts.

The *Summum* opinion is at odds with the premise that original understanding is simply the only logically tenable form of interpretation.

88. Pleasant Grove City v. Summum, 555 U.S. 460, 464–81 (2009). More recently, the Court relied on *Summum* to hold that vanity license plate designs are also government speech. *See* Walker v. Sons of Confederate Veterans, 135 S. Ct. 2239, 2251 (2015).

89. *Summum*, 555 U.S. at 464–65.

90. Among these aphorisms, for those who are curious, are the propositions that "[n]othing rests; everything moves; everything vibrates;" and "[g]ender is in everything; everything has its masculine and feminine principles; [g]ender manifests on all levels." *Seven Summon Principles*, SUMMAN, http://www.summum.us/philosophy/principles.shtml (last visited Feb. 27, 2016).

91. Summum, 555 U.S. at 456.

92. *Id.* at 456–66.

93. *Id.* at 470.

94. *Id.* at 473–77.

95. *Id.* at 474. This passage raises the question whether even the version of the Constitution in the National Archives means what the Framers thought it meant, since the public display could be considered government speech.

For instance, as Mitchell Berman explains, "Intentionalists contend that the interpretation of *any* text—a poem, a novel, a musical score, an architectural blueprint, a sign, a contract, a will, a statute, or a constitution, among innumerable other things—is necessarily a search for the intentions of the text's author(s)."[96] But Justice Alito's opinion in *Summum* specifically rejected the argument that the meaning of a text, such as the copy of the Ten Commandments engraved in stone in that case, must "correspond with the intent of the authors."[97] Instead, he wrote, "Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways."[98]

Justice Alito then referred to examples of monuments with brief inscriptions that "are almost certain to evoke different thoughts and sentiments in the minds of different observers."[99] Indeed, he said, "[I]t frequently is not possible to identify a single 'message' that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor."[100]

Up to that point, it still seems possible to assume that the Court was speaking primarily in terms of historic meaning but with the government taking the original creator's place as the "author."[101] But then the Court made it clear that it was rejecting historical meaning in favor of iconic meaning. To begin with, "[t]he message that a government entity conveys by allowing a monument to remain on its property may also be altered by the subsequent addition of other monuments in the same vicinity."[102] More generally, "[t]he 'message' conveyed by a monument may change over time."[103]

96. Berman, *supra* note 2, at 39. Berman gives examples of a number of originalists making this argument. *Id.* at 39–42.

97. Some intentionalists might attempt to deal with situations of this kind by arguing that the true "author" of the monument was no longer the original creator, but rather the interpretative community. Berman, *supra* note 2, at 59. To the extent that this argument holds water, it would also potentially apply to the Constitution.

98. *Summum,* 555 U.S. at 474.

99. *Id.* at 475.

100. *Id.* at 476.

101. By analogy, we might say that the author of the Constitution is the collectivity of ratifying conventions (or maybe only the first nine, which were required for it to go into effect at all).

102. *Summum,* 555 U.S. at 477. The analogy would be the argument that later amendments to the Constitution modify the meaning of the earlier text.

103. *Id.* Justice Alito cited a study showing that people reinterpret monuments as historical interpretations and societal change. *Id.*

As a "striking example," the Court cited the Statue of Liberty.[104] The statue was intended by its French donors and by the American government as a symbol of French-American friendship and more generally as reflecting the international influence of American ideals (presumably including those in the Declaration).[105] "Only later," Justice Alito noted, "did the statue come to be viewed as a beacon welcoming immigrants to a land of freedom."[106] Indeed, it would be obtuse to say that the meaning of the Statue of Liberty today is something other than this message of welcome; a failure to understand that meaning would indicate a fundamental ignorance of American culture.

Originalists give the example of semantic drift—a word changing meaning over time—to support the fixation thesis.[107] But the example of the Statue of Liberty shows that a monument's meaning can change for other reasons. The meaning of the Statue shifted partly because of the experience of immigrants seeing it as they first entered America, the addition of the Emma Lazarus poem a decade after the Statue itself, and later cultural influences, such as a speech by FDR on the Statue's fiftieth anniversary.[108] As the *Summum* Court observed, this kind of process is not unique to the Statue. One might also expect similar factors to impact the reading of the Fourteenth Amendment—for instance, as shifting views of race relations first delegitimized Reconstruction and then gave it renewed importance in the Civil Rights Era.[109]

It seems clear from *Summum* that, when displayed in a public place such as a park, the words of the Constitution or the Bill of Rights might have a meaning other than the original understandings of 1776 or 1789. Indeed, Justice Alito made clear that the message conveyed by these words might change over time. Justice Alito's approach to interpreting public monuments seems similar to the iconic meanings that, as we have already seen, speakers commonly attribute to the Declaration of Independence. It is

104. *Id.*

105. *Id.*

106. *Id.*

107. *See* SCALIA & GARNER, *supra* note 54, at 78–79.

108. *See* NATIONAL PARK SERVICE, *Story of the Immigrant's Statue*, http://www.nps.gov/stli/learn/historyculture/the-immigrants-statue.htm. Apparently, the sculptor intended the Statue "to last many decades, even centuries, and wanted it to express a general, universal theme." EDWARD BERENSON, THE STATUE OF LIBERTY: A TRANSATLANTIC STORY 3 (2012). In addition, he "hoped that the often-dramatic changes inherent in liberal societies wouldn't render it obsolete," so he kept the figure abstract rather than specific. *Id.* The potential analogy to the broad phrases of the due process and equal protection clauses seems apparent.

109. On the historiography of Reconstruction, see generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–77 (2002).

notably distinct from the very different efforts at historical reconstruction by such disparate writers as Chief Justice Taney and Gary Wills. The remainder of this Article considers what we might learn from these different modes of interpretation in terms of constitutional interpretation.

C. IMPLICATIONS FOR THE ORIGINALISM DEBATE

There is an inevitable tension between historic interpretation and calls for present-day endorsement. For instance, speaking of the Declaration and invoking what he thinks are key historic sources for Jefferson's language, Gary Wills asks:

> [D]o we really think we can find people, running around alive in the street, who believe in the psychology of Louise de Landcourt, the contract theory of David Hume, the mechanics of benevolence as elaborated by Francis Hutcheson? And, if not, how can we ask people in good conscience to endorse a document of eighteenth-century science based on such beliefs? What are we asserting if we agree to the document?[110]

Perhaps originalists are right that the Constitution must draw its legal interpretation purely from the history of a century or more ago, and perhaps they are right that it must be considered law because it was adopted by eighteenth century voters with duly authorized amendments at various later times—the most important of which is itself nearly one hundred fifty years old. That may be a reason for people today to tolerate the 1789 Constitution in the same spirit of resignation with which they put up with the 1954 Internal Revenue Code. But people can hardly be expected to feel much sense of allegiance solely on the basis of such considerations.[111] Moreover, they are likely to find judicial decisions difficult to accept when those decisions depart too starkly from popular understandings of the Constitution, in particular when the departure rests entirely on (often disputed) interpretations of musty, old documents from the historical

110. WILLS, *supra* note 25, at xiii. To the reference that Wills cites in this passage, one might add as important historical sources "such eighteenth-century coffeehouse pamphleteers as John Trenchard and Thomas Gordon," who are even more obscure today. WOOD, *supra* note 28, at 59.

111. Solum offers a response to the argument that the legitimacy of the Constitution rests on contemporary acceptance of the Constitution and then should involve contemporary meaning. *See* Solum, *supra* note 61, at 15–16. He suggests that even so, the public's current understanding of the Constitution must be based on the original meaning because that is the way people interpret old documents. *Id.* He offers the example of a word that has completely changed its meaning over time, such as the change of the word "deer" to refer to a specific creature rather than any animal. *Id.* at 15. But even if he is correct, that proves only that people believe that *some* aspects of a text's meaning are fixed at its time of origin, not that they think that all aspects are.

archives.[112]

Originalists are not without responses to this conundrum. Judge Bork, for example, argues that constitutional doctrine can still evolve in response to societal changes because judges must "refine and evolve doctrine" so long as they are "faithful to the basic meaning" of the constitutional text.[113] Thus, they can adjust old principles to new realities but not create new principles—a line that Bork agrees may be difficult to draw. Still, he says, "Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom."[114] If constitutional provisions are understood at a sufficiently high level of generality, originalism becomes indistinguishable in practical terms from its opposite; Bork was not the last originalist to warn against this risk.[115] Still, without some effort at abstraction, originalists would be hard-pressed to explain why the "Press Clause" of the Constitution applies to anything other than printing machines that press inked metal typeface against sheets of paper.

Resorting to higher levels of generality is one way to square originalism with modern-day decisions that have established principles with deep normative appeal. For instance, Steven Calabresi and Julia Rickert argue that modern decisions requiring heightened scrutiny in gender discrimination cases are consistent with the original intent of the Fourteenth Amendment.[116] The core of their argument is that the Fourteenth Amendment reaches "all special or partial laws that single out certain persons or classes for special benefits or burdens."[117] In a departure from standard originalist methodology, they also rely on the later-enacted

112. *See* Berman, *supra* note 2, at 27 (discussing "cross-fertilization" between popular and judicial interpretations). Berman contends that part of our society's standard for success for a legal interpretation is that it have "the capacity to win public acceptance as an interpretation," which requires an understanding of society's argumentative culture. *Id.* at 56. Or, as Jack Balkin puts it:

> If people come to believe that the Constitution-in-practice is not responsive to their views, and that there is little chance that it ever will be responsive, people will lose respect for it and they will no longer regard it as their law. Instead it will seem to them like a law forced on them by others, like the law imposed by a tyrant or the law of an overbearing imperial power imposed on a subordinate colony. . . . This is not a democratic conception of law, much less a democratic conception of a constitution.

JACK BALKIN, LIVING ORIGINALISM 71 (2014).

113. BORK, *supra* note 58, at 168–69.

114. *Id.* at 169.

115. *See* Berman, *supra* note 2, at 29–30. In principle, the level of generality should be based on the one that was intended or understood at the time. *Id.* at 30 (citing originalist scholars). But this assumes, of course, that there was a consensus on that point among the drafters or the public, and that the consensus is now historically recoverable.

116. Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 96–101 (2011).

117. *Id.* at 7.

Nineteenth Amendment to support their application of the Fourteenth Amendment. In their view, the modern "change in our understanding of women's abilities has been constitutionalized by a monumental Article V amendment—the Nineteenth Amendment, which in 1920 gave women the right to vote."[118]

In an effort to provide an originalist argument against racial segregation in schools,[119] Michael McConnell also reaches past the time of enactment.[120] He argues that the view 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."[121] But given the ability to define the level of generality and to consider evidence of post-enactment events, combined with the frequent ambiguity of the historic record, originalists risk having so much flexibility that the method loses its sense of constraint or coherence.

Like McConnell, William Eskridge views the Fourteenth Amendment as embodying an anti-caste principle, and he cites to sources of the time that interpreted class or caste legislation to cover at least "exclusions based upon the ethnicity, religion, income, or occupation of the parents."[122] He then argues that the original understanding, so construed, invalidates state laws that prevent same-sex marriage. In his view, "If the original meaning of the Equal Protection Clause has any legal bite whatsoever, the broad anti-gay exclusions from family law . . . must be invalidated."[123] Although Eskridge is not himself an originalist, Steven Calabresi, the Chairman of the Federalist Society Board,[124] also argues that the original understanding

118. *Id.* at 9.

119. In another effort to support that decision, Scalia and Garner argue:

> The text of the Thirteenth and Fourteenth Amendments, and in particular the Equal Protection Clause of the Fourteenth Amendment, can reasonably be thought to prohibit all laws designed to assert the separateness and superiority of the white race, even those that purport to treat the races equally . . . . Recent research persuasively establishes that this was the original understanding of the post-Civil War Amendments.

SCALIA & GARNER, *supra* note 54, at 88. On their reading, it would appear that affirmative action would not violate equal protection, although Scalia himself does not seem to have followed the argument to its logical conclusion.

120. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953 (1995).

121. *Id.*

122. William N. Eskridge Jr., *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067, 1082 (2015).

123. *Id.* at 1093.

124. Board of Directors, FEDERALIST SOC'Y, http://www.fed-soc.org/aboutus/page/board-of-directors (last visited Feb. 27, 2016).

requires states to allow same-sex marriages.[125]

These efforts to bring originalism closer to current societal views are understandable responses to the interpreter's dilemma. But they do come with a cost because the move from narrowly circumscribed historical understanding toward more abstract and open reading of the original meaning deprives originalism of much of its constraining force. If we interpret historic meaning in sufficiently broad terms, it becomes difficult to distinguish from iconic meaning.[126]

Iconic interpretation leads to opposing pressures. The significance of a text like the Declaration or the Constitution (or for that matter, the Magna Carta) lies in considerable part in the history around its adoption. If we were to learn that Jefferson and Washington derided the Declaration as a cheap propaganda ploy, it would lose much of its luster. Moreover, any meaning that we would attach to the language of the Declaration cannot stray completely from its historical moment—or at least, our present image of that moment—without losing plausibility.[127] In short, like Bork's originalist, the non-originalist, too, works on a slippery slope and cannot afford to ski all the way to the bottom.

Thus, both originalists and non-originalists face different forms of the interpreter's dilemma. For the originalist, the dilemma is that any reading of historic intent that deviates too far from contemporary societal norms, such as one that views gender discrimination as innocuous, will be socially unacceptable. But expanding originalism to sufficiently avoid those results

125. *See* Steven G. Calabresi & Hannah M. Begley, *Originalism and Same Sex Marriage*, NORTHWESTERN PUBLIC LAW RESEARCH PAPER No. 14-51 (2015), http://ssrn.com/abstract=2509443. In an earlier piece, Calabresi and another co-author presented an originalist argument that the right to marry is a protected form of liberty. Steven G. Calabresi and Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1303–05, 1366 (2015).

126. A case in point is Jack Balkin's conception of framework originalism. He views the open-ended terms of the Constitution, such as equal protection, as having been framed with the understanding that they delegate to future generations the task of defining their scope. BALKIN, *supra* note 112, at 7. Although this view claims the sanction of original understanding, it does have a certain resemblance to non-originalism, as shown by the following passage:

> Each generation is charged with the obligation to flesh out and implement text and principle in their own time. They do this through building political institutions, passing legislation, and creating precedents, both judicial and non-judicial. Thus, the method of text and principle is a version of framework originalism, and it views living constitutionalism as a process of permissible constitutional construction.

Id. at 23. Although Balkin defends this approach as a legitimate application of originalism, it clearly verges on non-originalist methods of decision-making.

127. For instance, we cannot very well read "all men are created equal" in the Declaration as meaning "all human males have Y chromosomes," though this might not be an untenable reading of the same phrase in some other contexts.

may also make the methodology too flexible to provide meaningful constraint. For the anti-originalist, the dilemma is how to trade off a primary allegiance to current norms with a commitment to maintain a viable link with the text and its history.

In short, neither originalists nor non-originalists can afford to move too far to the opposing pole, but neither can they be successful if they adopt a purist form of iconic or historic meaning. Both must negotiate the essential tension between the claims of the past and the demands of the present.

CONCLUSION

As we have seen, interpretation can involve either of two forms of meaning. At one extreme of interpretation, we might consider an old deed describing the metes and bounds of property. If the deed refers to one corner of the property as being "the old oak," the legally relevant place is the location where that particular oak once grew, not that of some other old oak that may have grown up elsewhere on the property in the meantime. In this situation, historic meaning matters.

At the other extreme is the statement "Equal Justice Under Law" on the portico of the Supreme Court.[128] What matters there, as the Court made clear in *Summum*, is not the way that phrase may have been understood by the architect or the community in 1935, but what it means to us today.[129]

128. *See The Supreme Court Building*, http://www.supremecourt.gov/ about/courtbuilding.aspx (last visited Feb. 27, 2016).

129. The phrase had an interesting history, seemingly dating back to Chief Justice Fuller's opinion in *Caldwell v. Texas*, 137 U.S. 692 (1891), a case dismissing a challenge to the sufficiency of an indictment. Fuller identified the phrase with formal legal equality:

> By the Fourteenth Amendment the powers of the States in dealing with crime within their borders are not limited, but no State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and, when secured by the law of the State, the constitutional requisition is satisfied. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. The power of the state must be exerted within the limits of those principles, and its exertion cannot be sustained when special, partial, and arbitrary.

Id. at 697–98 (citations omitted). The Court seems to have in mind only that laws be uniform across the community. But by the time of *Cooper v. Aaron*, 358 U.S. 1 (1958), the phrase had acquired a broader meaning:

> The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws.

Id. at 19.

As we have seen, the Declaration of Independence has been subject to both forms of interpretation. Chief Justice Taney's interpretation in *Dred Scott* was self-consciously originalist.[130] Taney carefully distinguished between the more enlightened views of his own time and the racially exclusionary interpretation that he attributed to the Founders and considered definitive. Champions of racial justice, both in Taney's days and in the Civil Rights Era a century later, made the same words into an icon for social equality. To invoke the Declaration in a fight against racial segregation is not to make a serious historical claim about how Thomas Jefferson and his cohort understood the term "equality" in that context. It is to make quite a different claim about the gap between American ideals and realities.

Within constitutional law, a battle has raged for a generation between originalists, who view constitutional meaning as being as fixed as that of the old deed, and non-originalists, who favor a living Constitution that responds to present-day ideals. For non-originalists, for instance, it may seem obvious that the Fourth Amendment's protections should include electronic communications, whereas originalists are faced with a difficult problem of historical reconstruction to determine whether "papers and effects" had a meaning in the late eighteenth century that encompassed all communicative media including those not yet imagined.

In principle, there is a stark distinction between originalists and their opponents. Originalists, however, can find themselves drawn to more flexible methods of interpretation that allow them to respond to present-day imperatives. Otherwise, they risk interpretations that are so unpalatable as to be unable to maintain public support. Meanwhile, non-originalists struggle with finding a balance between fidelity to the text and its history and the needs of the present.

It is not clear that there is any "right answer" to these difficulties. As Fred Schauer puts it, given that "nothing about originalism is obligatory as a matter of language or necessary to the very idea of having something that we call a constitution," we are then faced with "a range of political, moral, social, and institutional design questions to which there is more than one answer."[131] However, regardless of whether we favor iconic or historic

130. *See generally* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 410 (1856).

131. Frederick Schauer, *Defining Originalism*, 19 HARV. J.L. & PUB. POL'Y 343, 345 (1996). Similarly, Cass Sunstein maintains that "without transgressing the legitimate boundaries of interpretation, judges can show fidelity to texts in a variety of ways," and "[w]ithin those boundaries, the choice among possible approaches depends on the claim that it makes our constitutional system better rather than worse." Sunstein, *supra* note 83, at 193–94. "Importantly," he adds, "this conclusion

meaning, we remain subject to the competing claims of the past and present, requiring continual negotiation—and renegotiation—of the interpreter's dilemma.[132]

does not by itself rule out any of the established approaches, including originalism in its various forms, democracy-reinforcement, 'moral readings,' minimalism, or broad deference to political processes." *Id.* at 194 (footnotes omitted).

132. For an extended discussion of methods for negotiating the tensions inherent in judicial review while upholding the values involved in the rule of law, see generally FARBER & SHERRY, *supra* note 71.