DISINGENUOUS INTERPRETATION

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INTRODUCTION

At least once a day—in discussions, conferences, social media sites, or listservs—the following argument takes place. Someone criticizes a theory of constitutional interpretation, arguing that the theory's adherents are using it as cover to further their personal, political goals. Defenders of the theory respond, arguing that this criticism, at most, calls out an instance of a bad faith actor applying the theory in an incorrect or inconsistent manner. The theory itself, however, remains untouched. From there, the debate often peters out or continues with each side making variations of the same point.[1]

This Article examines, then moves beyond this exchange, demonstrating how arguments on both sides of the debate attempt to answer the larger question of whether a particular theory of

[1] *See* Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 7 (2009) (noting that originalism's critics have argued "[o]ver the years" that original public meaning is undiscoverable and leads to bad outcomes, while originalists respond "that the bad outcomes laid at originalism's door have no bearing on the proper interpretive method" and that this debate is "now largely spent").

constitutional interpretation is desirable. The claim that incorrect or disingenuous applications of an interpretive theory have no bearing on the theory itself involves several hidden assumptions. These assumptions tend to lead to theorists speaking past one another—a likely reason why these discussions tend to go nowhere.

The bulk of this Article focuses on one of these key assumptions: the notion that theories of interpretation do not inherently restrict or encourage disingenuous or shoddy interpretation. Often, it's simply assumed that "any . . . method or theory[] is not self-enforcing" and that any critique of disingenuous interpretation targets the interpreters rather than the interpretive theory itself.[2] The theory is a tool—it can be used for good or for bad, it can be applied poorly by those who do not know what they're doing, and it can be abused or stretched beyond its purpose by those with ulterior motives. The devil can cite scripture for his own ends.[3] Surely the same can be true of a theory of constitutional interpretation like originalism.[4]

This Article was inspired by debates between originalists and their critics and is therefore written with these debates in mind. As a result, a number of the examples and disproportionate amount of the discussion address this theory of constitutional interpretation. This should not be taken to mean that the broader claims regarding

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[2] Randy E. Barnett, *Common-Good Constitutionalism Reveals the Dangers of Any Non-Originalist Approach to the Constitution*, THE ATLANTIC (Apr. 3, 2020) https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/ [https://perma.cc/WZ3H-KKK3]; *see also* William Baude, *Originalism As a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2223-24 (2017) (characterizing originalism as an "internal constraint" meant to limit the options of a judge who "would like to be able to apply the law without importing nonlegal considerations").

[3] *See* WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act I, sc. iii, l. 98-103 ("Mark you this, Bassanio, / The devil can cite Scripture for his purpose. / An evil soul producing holy witness / Is like a villain with a smiling cheek, / a goodly apple rotten at the heart. / O, what a goodly outside falsehood hath!"); Luke 4:9-12 (New International Version) (in which the devil urges Jesus to throw himself off "the highest point of the temple," quoting Psalms 91:11-12 which states that angels will lift up the Son of God—to which Jesus replies, " 'It is said: "Do not put the Lord your God to the test,"' " quoting Deuteronomy 6:16); *see also* Ernest A. Strathmann, *The Devil Can Cite Scripture*, 15 SHAKESPEARE QUARTERLY, 17, 17 (1964).

[4] *See* Stephen E. Sachs (@StephenESachs), TWITTER (Dec. 21, 2021, 4:14 PM) https://twitter.com/StephenESachs/status/1473431656405028870 [https://perma.cc/Z5TB-A76B] ("If 'the devil can cite scripture for his purpose,' surely originalism has nothing to be embarrassed about").

disingenuousness, clarity, and transparency are irrelevant to other theories of interpretation. Indeed, this Article goes on to address several alternate theories of interpretation to further illuminate distinctions between them. This Article is, however, limited to questions of constitutional interpretation. The notion of disingenuous and incompetent interpreters may be of interest to debates over methods of statutory interpretation or contractual interpretation. But delving into those alternate interpretive endeavors is beyond the scope of this Article.

Part I introduces a set of potential theories of interpretation. These range from better-known approaches like originalism, traditionalism, and common law constitutionalism, to novel and specialized theories like moral readings, common good constitutionalism, pragmatism, and the notion that interpretation should be governed by the flip of a coin. Part II introduces the disingenuous interpreter and incompetent interpreter—characters who are no strangers to those living and practicing in the real world, yet who tend to be ignored, dodged, or minimized in the constitutional interpretation literature. Part III delves into this tendency to dodge or minimize the disingenuous interpreter, illustrating examples of this maneuver from theorists of all stripes. Part V then compares theories of interpretation and how they hold up to the stress test of disingenuous and ignorant interpreters. I find that, contrary to frequent assertions by these theories' defenders, some theories do a better job of accounting for or preventing abuse. Other theories, however, lend themselves to abuse by providing more and easier opportunities for the nefarious activities of disingenuous interpreters. Part V explores what aspects of theories make them more resilient to disingenuous and ignorant interpreters, concluding that theories that are more transparent and simpler are less vulnerable to abuse. I also urge that implementation itself be treated as its own normative consideration in determining whether to accept a particular theory of constitutional interpretation over alternatives.

I. THE CAST OF CHARACTERS: THEORIES OF INTERPRETATION

This Section introduces several theories of constitutional interpretation—some more popular than others, and at least one that is likely supported by nobody. I survey a wide variety of

theories because doing so will aid in the comparative analysis that comes later. As a result, my treatment of these theories is necessarily brief and may overlook some nuances in the process of getting the key components across.[5]

A. Originalism

Originalism gets the most attention in this article due to its prominent place in the literature of constitutional interpretation,[6] in public debates over judicial nominations and the proper role of the judiciary,[7] and in the reasoning of multiple Justices on the Supreme Court.[8] As will become clear, the term "originalism" is an umbrella term that covers a wide range of sub-theories. Lawrence Solum has provided a thorough breakdown of varieties of originalism, arguing that originalism is best conceptualized as a family of theories:

> When "originalism" is used in academic discourse as the name for a constitutional theory without qualification, the word should be used to refer to members of the family of constitutional theories that affirm both the Fixation Thesis (the meaning of the constitutional text is fixed at the time each provision is drafted) and the Constraint Principle (constitutional practice should, at a minimum, be consistent with the original meaning . . .), and that offer a reasonable account of original meaning and of the extent of constitutional underdeterminacy, where underdeterminacy is understood as

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[5] Author's note: Recognizing this, I provide footnotes throughout that lead to more complete formulations of each of the theories discussed.

[6] *See* Lawrence B. Solum, *"We Are All Originalists Now", in* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 1 (2011).

[7] *See* NEIL GORSUCH, JANE NITZE & DAVID FEDER, A REPUBLIC, IF YOU CAN KEEP IT 10, 25 (2019); *see also* Brian Naylor, *Barrett, An Originalist, Says Meaning of Constitution "Doesn't Change Over Time"*, NPR (Oct. 13, 2020, 10:08 AM), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time [https://perma.cc/HN4T-LUWK].

[8] Sol Wachtler, *Brett Kavanaugh Is an Originalist*, N.Y. L.J. (Sept. 20, 2018, 11:57 AM),https://www.law.com/newyorklawjournal/2018/09/20/brett-kavanaugh-is-an-originalist/ [https://perma.cc/AEP2-XP5N] (describing Justice Kavanaugh as an originalist); Kyle Peterson, *The Weekend Interview with Neil Gorsuch: The High Court's Rocky Mountain Originalist*, WALL ST. J. (Sept. 7, 2019), https://www.wsj.com/articles/the-high-courts-rocky-mountain-originalist-11567792378 [https://perma.cc/G5H2-6BTJ].

> referring to cases and issues with respect to which the communicative content of the constitutional text rules out some outcomes but does not fully determine which outcome is correct.[9]

In legal academia, theories of originalism include original public meaning originalism—the notion that the Constitution should be interpreted based on its public meaning at the time it was ratified.[10] This is the dominant form of originalism, at least in academic circles.[11] Other variations include "original intent originalism," or "intentionalism," the notion that the Constitution's original meaning is determined by "the communicative intentions of the individuals who drafted various portions of the constitutional text."[12] "Original methods originalism" is an alternate approach that "maintains that the original meaning of the text is fixed by the original methods of constitutional interpretation and construction."[13] Yet another theory some scholars embrace is

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[9] Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1245-46 (2019)

[10] *See Id*. at 1251 ("orginalists aim to recover the public meaning of the constitutional text at the time each provision was farmed and ratified").

[11] *Id*.

[12] *Id*. Richard Kay is one of the primary proponents of this approach. *See generally* Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009) (arguing in favor of a renewed focus on the intent of the Constitution's drafters and warning that an original public meaning approach undermines the stability and clarity that early originalism promised); *see also* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988) (responding to arguments against original intent originalism); Richard S. Kay, *Construction, Originalist Interpretation and the Complete Constitution*, 19 U. Pa. J. CONST. L. ONLINE 1, 3 (2017) (arguing that constitutional construction is unnecessary "if we adopt an alternative understanding of originalist interpretation, one that seeks the meaning of the constitutional rules that was actually intended by the people whose decisions made the Constitution law"). Donald Drakeman has also written extensively on an approach that incorporates the intentions of the Constitution's drafters to a greater degree than most modern originalists urge. *See generally* DONALD L. DRAKEMAN, THE HOLLOW CORE OF CONSTITUTIONAL THEORY: WHY WE NEED THE FRAMERS (2020).

[13] Solum, *supra* note 9, at 1251. John McGinnis and Michael Rappaport urge this approach to interpretation, arguing that the nature of the Constitution—particularly the supermajoritarian support required for its initial ratification and subsequent amendments—tends to lead toward better results for American society, and that these benefits can only be realized by adhering to the original methods of interpreting the Constitution in order to derive its original meaning. *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 116-21 (2013).

"original law originalism," a theory that contends that the Constitution's meaning consists of the original law in place at the time of the founding, as lawfully changed.[14]

This is just the academic side of things. Factoring in judicial originalism and "originalism" as referenced by politicians and the general public further complicates the matter. Solum acknowledges that "self-identified judicial originalists" interpret the Constitution in a manner that "is likely to diverge from the versions of originalism advocated by legal scholars," noting that judicial originalists may place "greater emphasis on precedent" than academic constitutional theorists.[15] This results in an "eclectic" approach to originalism that Solum labels as "Judicial Originalism."[16] Solum recognizes a "likely" gap "between originalist constitutional theory as articulated by legal scholars and the use of the word 'originalism' by politicians and pundits," although he does not elaborate on the breadth of this gap and how the use of the term differs between academic and political contexts.[17] He does, however, assert that many instances of political uses of the term, "originalism" tend to be "mere rhetorical flourishes, without any theoretical content at all."[18] While Solum does not go into much more detail on political originalism, it is worth noting that political references to originalism may occasionally overlap with various

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[14] Solum, *supra* note 9 at 1251; *see also*, Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 818 (2015); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 (2015) (describing an "inclusive originalism" under which "the original meaning of the Constitution is the ultimate criterion for constitutional law, including the validity of other methods of interpretation or decision" so long as those alternate methods were incorporated or permitted by the Constitution's original meaning). Baude and Sachs synthesized their work in more recent writings, arguing that originalism should be thought of as a legal inquiry—rather than a historical inquiry—in that it seeks to "grant continuing force to the law of the past." *See* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809, 810 (2019).

[15] Solum, *supra* note 9, at 1254.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 1255.

academic theories, including original public meaning originalism[19] and original intent originalism.[20]

This treatment of the various approaches to constitutional interpretation that may fall under the "originalist" label is, admittedly, only a brief sketch of the respective variations on the theory. This Article does not seek to exhaustively survey and define originalist theories, but to instead illustrate the range of meanings that may be in play in day-to-day debates over "originalism," as well as how the context of these debates may bear on the meaning of terms discussed. Moving forward, I will primarily address the mainstream, academic approach to originalism as seeking to determine the original public meaning of the Constitution.

B. Traditionalism

A traditionalist approach to constitutional interpretation does not seek out the original meaning of the Constitution's text, but instead looks to historic practices. Marc Degirolami has written extensively on traditionalism and formulates it as follows: "Traditionalist constitutional interpretation takes political and cultural practices of long age and duration as constituting the presumptive meaning of the text."[21] Under this formulation, while the inquiry may involve evidence consisting primarily, or entirely, of historical practices, the ultimate goal is to determine the

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[19] *See, e.g.*, 152 Cong. Rec. S10121-01, S10121 (2006) (statement of Sen. Orrin Hatch) (quoting Justice Scalia as stating that originalism means giving "the text the meaning that it bore when it was adopted by the people" and arguing that this theory is preferable to the alternative of putting "judges rather than the people in charge of the law's meaning of the nation's values," noting that "Originalism limits a judge's ability to make law")

[20] *See, e.g.*, 163 Cong. Rec. S2055-06, S2060 (2017) (statement of Sen. John Cornyn) (referring to the founders' beliefs that Justices would "call[] balls and strikes" based on the "fixed meaning" of the Constitution and that this approach is, "sometimes . . . called originalism"); 153 Cong. Rec. H14239-01, H14245 (2007) (statement of Rep. Steve King) ("[W]ithout originalism, without textualists, without the original intent of the Constitution as the foundational criterion for determining the constitutionality of current law, without that, the Constitution is no guarantee at all, except a guarantee to the justices to be able to manipulate their decisions to move this society in the direction they choose, as if they were legislators.").

[21] *See* Marc O. Degirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1655 (2020).

meaning of the Constitution by reference to these practices.[22] Degirolami argues that this approach is "pervasive, consistent, and recurrent across the Court's constitutional doctrine" as are "the Court's criticisms of traditionalist interpretation."[23]

The Supreme Court's October 2021 term was defined by multiple, high-profile decisions that engaged in traditionalist analysis.[24] As Degirolami notes, the Court appears to have "roundly embraced" traditionalist methodology in deciding cases involving the Due Process Clause, the Second Amendment, and the First Amendment.[25] Despite the impact this interpretive method had in the Court's 2021 term, little attention has been paid to traditionalism's role—as many commentators characterize the Court's recent abortion, Second Amendment, and First Amendment rulings as originalist rather than traditionalist.[26]

C. The Moral Readings Approach

Ronald Dworkin is most commonly associated with the "moral readings" approach to constitutional interpretation—an approach that holds that the Constitution "embodies abstract moral principles rather than laying down particular historical conceptions and that interpreting and applying those principles require fresh

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[22] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them."); *see also* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (stating that the Fourteenth Amendment's Due Process Clause protects "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,'" and that those rights must be carefully described when engaging in the historical inquiry) (quoting Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503 (1977)).

[23] Marc O. Degirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1124 (2020).

[24] *See* Marc O. Degirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9, 10-12 (2024).

[25] *Id.* at 3-4.

[26] *See* Michael L. Smith, *Abandoning Original Meaning*, 86 ALB. L. REV. 43, 76-79 (2023) (collecting examples of commentators labeling recent Supreme Court opinions as "originalist" and arguing that these characterizations are incorrect).

judgments of political theory about how they are best understood."[27] Dworkin argues for a "fusion of constitutional law and moral theory," arguing that modern progress in moral and political theory provides ample resources for this approach.[28] Cass Sunstein suggests that "[m]uch of constitutional law does seem to reflect some kind of moral reading, for judicial judgments about the best moral understanding of constitutional principles play an occasionally large role in the Court's conclusions.[29]

The moral readings approach consists of determining both the "fit" and "justification" of a given interpretation—how an interpretation fits the text and how that text has previously been interpreted, and the moral justification for that interpretation.[30] In determining whether a given interpretation has an appropriate level of "fit," Dworkin's version of the moral readings approach requires that interpreters must read the Constitution in line with its overall structure and in a manner consistent with judges' prior interpretation of the Constitution.[31]

This approach, Dworkin argues, is not as dissimilar to originalism as it may initially seem, as it maintains fidelity to the abstract principles that make up the original meaning of the Constitution.[32] James Fleming also argues that the moral readings approach is consistent with the Constitution's history and purpose, writing that the approach accomplishes "one of the main purposes" of the Constitution, which is to "exhort us to change in order to honor our aspirational principles embodied in the Constitution and affirmatively to pursue good things like the ends proclaimed in the

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[27] JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS 73 (2015); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2-3 (1996); *see also* Lawrence B. Solum, *Themes from Fallon on Constitutional Theory*, 18 GEO. J. L. & PUB. POL'Y 287, 298 (2020) (describing the moral readings approach as "the view that the constitutional law is the outcome of the constructive interpretation of the legal materials that makes the law the best that it can be").

[28] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 149 (1978) (referencing work by John Rawls); *see also* James E. Fleming, *The Moral Reading All Down the Line*, 95 B.U. L. REV. 1801, 1802-03 (2015).

[29] *See* Cass R. Sunstein, *If People Would Be Outraged By Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 204 (2007).

[30] RONALD DWORKIN, LAW'S EMPIRE 239 (1986).

[31] DWORKIN, *supra* note 27 at 10.

[32] *Id.* at 72-74.

Preamble . . . require[ing] rather than forbid[ding] change."[33] Applying Fleming's formulation of the moral readings approach, Linda McClain argues that Justice Kennedy's opinion in *Obergefell v. Hodges*,[34] finding that same-sex couples had the right to marry, exemplified a moral reading of the Constitution.[35] McClain highlights Kennedy's focus on equal dignity and moral progress as an approach to constitutional law that best fits with a moral readings approach.[36] Elsewhere, McClain and Fleming contrast *Roe v. Wade*[37] with *District of Columbia v. Heller*,[38] arguing that the former involves a moral readings approach while the latter exemplifies an originalist approach.[39]

While the bulk of my discussion of moral readings will focus on versions of the theory espoused by Dworkin and Fleming, I will also address alternative formulations that take a broader approach to constitutional interpretation. Dworkin's moral readings approach requires that an interpreter determine whether an interpretation fits with the Constitution's text and how courts have previously interpreted the provision.[40] In response to criticism that Dworkin failed to adequately constrain his theory and gave too much weight to "justification" rather than "fit," Dworkin's present defenders argue that one should "'[d]o as Dworkin says, not as he does,'" and continue to urge attention to how a moral reading fits with the text and historic application of the constitutional text.[41]

But what about a theory of moral readings that takes a far more relaxed approach to "fit," and minimizes or even abandons the question of whether a moral reading of the Constitution's text aligns with the document's history and application by prior

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[33] James E. Fleming, *Fidelity, Change, and the Good Constitution*, 62 AM. J. COMP. L. 515, 517 (2014).

[34] 576 U.S. 644 (2015).

[35] *See* Linda C. McClain, *Reading* DeBoer *and* Obergefell *Through the "Moral Readings Versus Originalisms" Debate: From Constitutional "Empty Cupboards" to Evolving Understandings*, 31 CONST. COMMENT. 441, 475-78 (2016).

[36] *Id.*

[37] 410 U.S. 113 (1973).

[38] 554 U.S. 570 (2008).

[39] *See* James E. Fleming & Linda C. McClain, *Ordered Gun Liberty: Rights with Responsibilities and Regulation*, 94 B.U. L. REV. 849, 866 (2014).

[40] *See* DWORKIN, *supra* note 30; DWORKIN, *supra* note 27, at 10.

[41] *See* FLEMING, *supra* note 27, at 73.

courts?[42] In discussing the moral readings approach, I will address this alternative as well, and examine how the abandonment of side-constraints urged by Dworkin and Fleming impacts the efforts of the disingenuous and incompetent interpreter.

D. Common Good Constitutionalism

2020 saw the introduction of "common good constitutionalism," a theory that's gained attention in recent years.[43] Adrian Vermeule is the most prominent supporter of this theory, and urges that the Constitution be interpreted "in light of principles of political morality that are themselves part of the law," which, in turn, is the "classical tradition" of law as "an ordinance of reason for the common good, promulgated by a public authority who has charge of the community."[44] According to Vermeule, the "ultimate genuinely common good of political life is the happiness or flourishing of the community," flourishing, that Vermeule is quick to add, "includ[es]

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[42] Adam Samaha formulates, for the sake of a broader argument, a version of the moral readings approach that appears similar to this version. *See* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 650 (2008) ("Consider a moral theorist—egalitarian, libertarian, utilitarian, cosmopolitan, or whatever—who adopts two commitments: (1) respect a norm as law only if its content adequately comports with the relevant moral theory and (2) interpret legal texts to adequately comport with that moral theory. Thus, respect for the Constitution would be conditioned on its moral goodness, and interpretation would be consciously employed to satisfy this same normative criterion.").

[43] *See* Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ [https://perma.cc/YNS9-QP7Z] (arguing for an approach to constitutionalism that "take[s] as its starting point substantive moral principles that conduce to the common good" and that this approach should replace originalism). Vermeule's theory was met with initial critical reactions from both originalists and liberal commentators. *See* Garrett Epps, *Common-Good Constitutionalism Is an Idea as Dangerous as They Come*, THE ATLANTIC (Apr. 3, 2020), https://www.theatlantic.com/ideas/archive/2020/04/common-good-constitutionalism-dangerous-idea/609385/ [https://perma.cc/YNS9-QP7Z] (arguing that common good constitutionalism is a vehicle to achieve the end of Catholic integralism, that Vermeule "is an authentic Christian nationalist to whom the Constitution is only an obstacle," and that the rhetoric underlying common good constitutionalism mirrors the language of fascist regimes); Randy E. Barnett, *Common-Good Constitutionalism Reveals the Dangers of Any Non-Originalist Approach to the Constitution*, THE ATLANTIC (Apr. 3, 2020), https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/ [https://perma.cc/BR9K-6CNC] (characterizing common good constitutionalism as "conservative living constitutionalism" and urging progressives to take up originalism in response).

[44] ADRIAN VERMUELE, COMMON GOOD CONSTITUTIONALISM 3, 6 (2022).

the flourishing of individuals."[45] This "flourishing," in turn, is defined as "ends and goods objectively constitutive of human eudaimonia or felicitas – happiness" and includes goods like "health; bodily integrity; vigor; safety; the creation and education of new life; friendship in its various forms ranging from neighborliness to its richest sense in marriage; and living in a well-ordered, peaceful, and just polity."[46]

Vermeule traces the notion of the common good through legal history, and argues that provisions of the Constitution lend themselves to interpretation that strives to achieve the common good.[47] He further argues that the classic legal tradition is built into America's legal history.[48] Citing cases from the late 1800s into the 1900s, such as *Riggs v. Palmer*,[49] *United States v. Curtis-Wright Export Corp.*,[50] and Justice Harlan's dissent in *Lochner v. New York,*[51] Vermeule argues that "the classical legal tradition . . . was our law, right from the inception."[52]

Supporters of common good constitutionalism argue that the theory is not an abstract theory of jurisprudence, legal history, or political theory—it is a theory for practicing lawyers, a notion that "workaday lawyering can[not] ignore" in light of the common appearance of terms like "'common good,' 'social justice' 'general welfare,' 'public interest,' public good,' 'peace, order and good government'" in statutes and constitutions.[53] Seeking to accomplish the common good provides a means for "construction" or the application of these texts to particular circumstances.[54] Vermeule provides several examples of specified outcomes warranted by the common good constitutionalism approach, including "a strong

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[45] VERMUELE*, supra* note 44, at 28-29.

[46] Conor Casey & Adrian Vermeule, *Myths of Common Good Constitutionalism*, 45 HARV. J.L. & PUB. POL'Y. 103, 114-15 (2022). Critics of the common good constitutionalist approach argue that these terms will, in practice, likely be little more than synonyms for conservative policy results, drawing parallels with Dworkin's moral readings approach discussed above. *See* Barnett, *supra* note 43.

[47] Casey & Vermeule*, supra* note 46, at 130-32.

[48] *Id.* at 144-55.

[49] 115 N.Y. 506 (1889).

[50] 299 U.S. 304 (1936).

[51] 198 U.S. 45 (1905).

[52] VERMEULE, *supra* note 44, at 89.

[53] *Id*; *see also* VERMEULE, *supra* note 44, at 30-31.

[54] Casey & Vermeule*, supra* note 46, at 109.

canon of interpretation" that the highest public authorities are able to "exercise prudential judgment" as to whether subsidiary institutions have failed in some way and to assert its own power in the place of that subsidiary.[55] Free expression historically protected under First Amendment cases would need to be revised under the common good constitutionalist approach, which calls for a lack of protection for false statements that negatively impact some common good (like the military honors system)[56] and pornography.[57] Standing to sue may also be affected in various ways, as Vermeule appears to suggest that common good constitutionalism would seek to "exclude suits for strictly private individual benefit," in favor of lawsuits that implicate "general common harm."[58]

Common good constitutionalism has its critics. Brian Leiter, for example, labels the theory as "idiosyncratic and objectionable," and "a kind of crude, results-oriented legal realism, in which the judiciary and the administrative agencies are to be enlisted on behalf of a political agenda that is unlikely to win democratic support.[59] I happen to agree, yet common good constitutionalism remains a useful example for this survey—largely because of its results-oriented nature that Leiter critiques.

E. Pragmatism

A pragmatic approach to constitutional interpretation is characterized by a focus on the consequences of a decision's

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[55] *See* VERMEULE, *supra* note 44, at 162-63.

[56] *Id.* at 170 ("To say that 'the freedom of speech' requires decentralized private enforcement of the military honors system is akin to saying that the constitutional prohibition on unreasonable searches and seizures requires decentralized, vigilante efforts to enforce the criminal laws. Only a Court systematically oblivious to the common good . . . could imagine such a restriction.").

[57] *Id.* at 171 ("Public prohibition of pornography is a form of environmentalism for morals and should be left to the reasonable determination of public authorities on the same terms, and under the same deferential limits, as the other issues we have discussed.").

[58] *Id.* at 174.

[59] Brian Leiter, *Politics by Any Other Means: The Jurisprudence of "Common Good Constitutionalism"*, 90 U. CHI. L. REV. 1685, 1689 (2023).

outcome.[60] Considerations of precedent and text are often relevant, but a determination's impacts play a key role in the decision-making process.[61] Judge Richard Posner, likely the highest profile modern legal pragmatist, argues that there are "three 'essential' elements" to pragmatism: (1) "a distrust of metaphysical entities ('reality,' 'truth,' 'nature,' etc.) viewed as warrants for certitude"; (2) "an insistence that propositions be tested by their consequences"; and (3) "an insistence on judging our projects . . . by their conformity to social or other human needs rather than to 'objective,' 'impersonal' criteria."[62] Elsewhere, Posner expands on pragmatism, identifying twelve "generalizations" to help explain the pragmatist method, including the qualification that pragmatism "involves consideration of systemic and not just case-specific consequences[,]" that "[t]he ultimate criterion of pragmatic adjudication is reasonableness," and that looking to precedent is "a (qualified) necessity rather than . . . an ethical duty."[63]

In the statutory context, Posner urges that statutory interpretation proceed in a manner that aims for "socially beneficial effects" and urges an interpretive approach that seeks to improve

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[60] *See* Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1341-43 (1988). Within this broad framing, variations on pragmatism are possible, although this Article will not delve into their details. *See* Mark S. Kende, *Constitutional Pragmatism, The Supreme Court, and Democratic Revolution*, 89 DENV. U. L. REV. 635 (2012) (describing variations on constitutional pragmatism, including "commons-sense" pragmatism based in the "common-sense temperament" of founding-era Americans, "compromise pragmatism," that pays special attention to political trends, "democratic pragmatism," which seeks outcomes that align with society's democratic will, and "economic pragmatism," associated with Judge Richard Posner and addressed at greater length in this subsection).

[61] *See* R. Randall Kelso, *Contra Scalia, Thomas, And Gorsuch: Originalists Should Adopt a Living Constitution*, 72 U. MIAMI L. REV. 112, 125-27 (2017) (describing an "instrumentalist" approach to constitutional decision-making and arguing how it aligns with modern circumstances and historical examples of judicial methodology).

[62] Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL L. REV. 1653, 1660-61 (1990).

[63] RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 59-60 (2003). *See also* Philip C. Kissam, *Triangulating Constitutional Theory: Power, Time, and Everyman*, 53 BUFF. L. REV. 305-06 (2005) (characterizing pragmatism as applying in "difficult cases" where a judge's "instincts or preferences for fashioning good results" should take hold, requiring the judge to "turn[] away from interpretation as a central aspect of decision-making and from grounding constitutional decisions in time or history[.]").

society.[64] Posner argues for a reduced role for tradition and precedent:

> A pragmatist judge always tries to do the best he can do for the present and the future, unchecked by any felt duty to secure consistency in principle with what other officials have done in the past[.][65]

Posner's pragmatism is influenced by economics, as he draws parallels between the judge and economist, both of whom, he argues, are tasked with determining "practical consequences rather than engaging in a logical or semantic analysis of legal doctrines."[66] In evaluating questions of interpretation, there seem to be parallels between the reasoned judgment of the common good constitutionalist and the pragmatist, as Posner (quoting Justice Cardozo) suggests that "the knowledge that is needed to weigh the social interests that shape the law" may be derived from "experience and study and reflection; in brief, from life itself."[67] Posner applies his pragmatic approach to constitutional decisions, analyzing decisions on constitutional rights like *Roe v. Wade* from a cost-benefit analysis perspective.[68] Critics frame the approach in a starker manner, characterizing pragmatism as the "methodological claim that judges are not bound by any constitutional rules at all" and "should simply decide cases in whatever way will produce the best future results."[69]

Some pragmatists treat precedent as secondary. Posner, for example, takes such a position: "[the pragmatist judge] does not regard the maintenance of consistency with past decisions as an end in itself but only as a means for bringing about the best results in the present case."[70] "[P]recedent, statutes, and constitutions" are "merely . . . sources of information" about "the likely best result in

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[64] *See* RICHARD A. POSNER, THE FEDERAL JUDICIARY 17, 80 (2017).

[65] Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 4 (1996).

[66] *See* RICHARD A. POSNER, HOW JUDGES THINK 238 (2008).

[67] Posner, *supra* note 62, at 1657 (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1921))*; see also* Kende, *supra* note 60, at 636 ("Consequences are key, though I will show that moral principles can also matter.").

[68] Posner, *supra* note 62, at 1668.

[69] *See* Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 564 (1999).

[70] Posner, *supra* note 65, at 5.

the present case" and are "limited constraints on [the judge's] freedom of decision."[71] Pragmatism is similar to the moral readings approach in that it takes a forward-looking perspective to law, focusing not on the origins of a law, but on the goals and outcome of legal decisions.[72] Pragmatism's defenders argue that this method is advantageous because it best deals with hard cases, encourages "incremental decision making rather than global remedies" and therefore encourages cooperation between courts and other branches of governments, and "prompt[s] a healthy concern about the societal impact of law."[73] Precedent may remain an important method, but it should be treated as one of a wide range of tools available when interpreting the Constitution.[74]

Robert Tsai argues that pragmatism, more broadly formulated, pervades numerous theories of constitutional interpretation.[75] One can see the influence of pragmatism in the Court's recent decisions on constitutional law even if the justices are not explicit that they are taking a pragmatic approach to interpretation. In *New York State Rifle & Pistol Association, Inc. v. Bruen*, for example, Justice Breyer's dissent took the majority to task for adopting an interpretive approach that would prohibit the consideration of the consequences of firearm restrictions.[76] The Court's focus on history and tradition, Breyer warned, would "restrict[] different States (and the Federal Government) from working out solutions to these problems through democratic processes."[77] Moreover, Breyer criticized the majority's focus on history and tradition by arguing that the interpretive method was "deeply impractical" and would lead to problems of implementation by judges and lawyers in the lower courts.[78] Justice Alito responded to Breyer's concerns in a similarly pragmatic manner, contending

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[71] Posner, *supra* note 65, at 5.

[72] *See* Posner, *supra* note 62, at 1657.

[73] Farber, *supra* note 60, at 1342-43.

[74] *See Id.* at 1332 (urging the consideration of "every tool that comes to hand, including precedent, tradition, legal text, and social policy" rather than attempting to discern "a theoretical foundation for constitutional law").

[75] *See* Robert L. Tsai, *Legacies of Pragmatism*, 69 DRAKE L. REV. 879, 880-81 (2021).

[76] N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen, 142 S. Ct. 2111, 2168 (2022) (Breyer, J., dissenting).

[77] *Id.*

[78] *Id.* at 2177 (Breyer, J., dissenting).

that the legal regime at issue would not prevent the mass shootings that Breyer canvases in his dissent.[79]

For purposes of this article, pragmatism will be treated as an interpretive method that is determined, in whole or in significant part, on the basis of an interpretation's consequences. These consequences may be economic (interpretations that result in increased economic activity or GDP are favorable to alternatives that lower productivity and reduce the GDP), social welfare (interpretations that are likely to result in increased injuries or deaths are disfavored), or moral (consequences that result in morally repugnant outcomes are disfavored).[80]

F. Common Law Constitutionalism

In discussing the "common law constitutionalism" approach to constitutional interpretation, I refer primarily to the method discussed by David Strauss.[81] Strauss provides an outline of the theory in his book, *The Living Constitution*:

> Our constitutional system, without our fully realizing it, has tapped into an ancient source of law, one that antedates the Constitution itself by several centuries. That ancient kind of law is common law. The common law is a system built not on an authoritative, foundational, quasi-sacred text like the Constitution. Rather, the common law is built out of precedents and traditions that accumulate over time. Those precedents allow room for adaptation and change, but only within certain limits and only in ways that are rooted in the past. Our constitutional system—I'll maintain—has become a common law system, one in which precedent and past practices are, in their own way, as important as the written U.S. Constitution itself.[82]

This approach to constitutional interpretation, Strauss argues, is not only desirable but is consistent with how the Court reasons through and decides cases—as the Court typically refers to

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[79] *Id.* at 2157 (Alito, J., concurring).

[80] *See* Kende, *supra* note 60, at 636 ("Consequences are key, though I will show that moral principles can also matter.").

[81] *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 3 (2010).

[82] *Id.*

the preexisting doctrine in areas of constitutional law rather than the constitutional text itself.[83] By adhering to precedent, yet accounting for changes in facts as new cases arise, common good constitutionalism is constrained by prior decisions, yet maintains a degree of flexibility to adapt to changing circumstances.[84] Not only is common law constitutionalism desirable for these reasons, Strauss argues that this approach best explains the Court's actual approach to deciding constitutional cases.[85]

G. Present Public Meaning

The present public meaning approach to constitutional interpretation parallels originalism to a substantial degree. Mainstream academic originalism, as addressed above, seeks to determine the original public meaning of the Constitution.[86] The present public meaning approach accepts originalism's focus on the text and public meaning, but rejects the "fixation thesis" that the meaning of the Constitution is fixed at the time of the Constitution's ratification. Instead, the present public meaning approach (as the name of the theory implies) looks to the present day to derive the meaning of constitutional provisions.

This approach to interpretation is a relatively recent development and one that has not attracted a substantial amount of attention. Tom Bell argued for such an approach in 2013, arguing that this approach best achieves the ideal that those governed by the Constitution consent to its terms.[87] More recently, Frederick Schauer argues that the Constitution should be interpreted based on its present public meaning, arguing that such an approach is not only possible, but desirable to the extent that it provides more effective guidance to judges and government officials who are bound by the Constitution, and to the public to the extent that they assert their Constitutional rights.[88] In the context of statutory

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[83] *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 883 (1996); *see also* STRAUSS, *supra* note 81, at 44.

[84] *See* STRAUSS, *supra* note 81, at 3; Strauss, *supra* note 83, at 926.

[85] *See* Strauss, *supra* note 83, at 887.

[86] Solum, *supra* note 9, at 1251.

[87] Tom W. Bell, *The Constitution as if Consent Mattered*, 16 CHAP. L. REV. 269, 275 (2013).

[88] Frederick Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825, 840-41, 846-47, 857-59 (2022).

interpretation, Cary Franklin argues that modern values and considerations impact interpretations that are purportedly textualist or based on original public meaning—suggesting that even self-proclaimed originalists are, in fact, proceeding from something closer to the present public meaning approach.[89]

I have argued elsewhere that the present public meaning approach is at least preferable to originalism to the extent that it better constrains judges, is more transparent, and is more consistent with democratic legitimacy, among other normative considerations.[90] Beyond this, there is not much discussion of the present public meaning approach in the legal literature.

H. The Coin-Flip Method

Having addressed respected theories of constitutional interpretation discussed by well-respected scholars, this Article now turns to a different kind of approach: the notion that the Constitution should be interpreted based on the flip of a coin. While coin flipping may be foreign to discussions of constitutional interpretation, this method has an impressive pedigree in other contexts, such as arbitration awards,[91] the sale of cattle,[92] the election of public officials—but only after a judicial determination that the election was tied,[93] the determination of whether a defendant is guilty of a crime,[94] which state senators would get an

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[89] *See* Cary Franklin, *Living Textualism*, 2020 SUP. CT. L. REV. 119, 125-28 (2020).

[90] *See generally*, Michael L. Smith, *The Present Public Meaning Approach to Constitutional Interpretation*, 89 TENN. L. REV. 885 (2022).

[91] *See* Matter of Estate of Roush, No. 3110, 1994 WL 264246, at *1 (Ohio. Ct. App., June 15, 1994). In a dispute over the ownership of a "Cobra replica kit car," a referee ordered that each party could acquire the other's interest in the car for $15,000, and that if both elected that option, "the arbitrator shall decide the purchaser by a coin flip."). *Id.*

[92] Savage v. Moore, 119 P.2d 535, 536 (Kan. 1941) (finding that flip of coin to determine the price of cattle was "merely a part of the preliminary negotiations" and did not invalidate the transaction); *see also* Berigan v. United States, 257 F.2d 852, 856-59 (8th Cir. 1958).

[93] Taft v. Cuyahoga Cnty. Bd. of Elections, 854 N.E.2d 472, 479-80 (Ohio. 2006) (holding that Ohio law stating that determination of a tied vote for city counsel was to be eventually determined "by lot," permitted a determination of the election through a coin flip, but holding that the coin flip at issue in the case had been done prior to a judicial determination of a tie vote and was therefore impermissibly premature).

[94] Reyes v. Seifert, 125 Fed. Appx. 788, 789 (9th Cir. 2005) (habeas petitioner not entitled to a new trial despite juror's testimony that "he based his decision to vote guilty on the result of a coin flip").

extra two years in office,[95] and the selection of the Chief Justice of the Nevada Supreme Court.[96] While the specific practice of flipping a coin to decide the merits of a dispute may be anathema to judges,[97] other forms of randomization—such as random case assignments—pervade the judicial system.[98] The notion of constitutional interpretation on the basis of coin-flipping is not entirely unheard of in the literature, although it is typically cited as a foil to other, more desirable methods of interpretation.[99] Still, randomness in governance has attracted its share of prominent supporters, with some going so far as to propose a system of governance based on the random selection of representatives.[100]

The coin flip method requires that where there are two potential meanings of a constitutional provision, the meaning that

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[95] NEV. CONST. art. 17, § 9 ("The Senators to be elected at the first election under this Constitution shall draw lots, so that, the term of one half of the number as nearly may be, shall expire on the day succeeding the general election in A.D. Eighteen Hundred and Sixty-Six; and the term of the other half shall expire on the day succeeding the general election in A.D. Eighteen hundred and sixty-eight."). *See also* Beau Sterling, *An Interview with Chief Justice Mark Gibbons*, NEVADA LAWYER (Jan. 1, 2008) (equating the Nevada Constitution's reference to "drawing lots" with flipping a coin).

[96] NEV. CONST. art. 6, § 3 ("[The State Supreme Court Justices] shall meet as soon as practicable after their election and qualification, and at their first meeting shall determine by lot, the term of office each shall fill, and the justice drawing the shortest term shall be Chief Justice, and after the expiration of his term, the one having the next shortest term shall be Chief Justice, after which the senior justice in commission shall be Chief Justice; and in case the commission of any two or more of said justices shall bear the same date, they shall determine by lot, who shall be Chief Justice."); *see also* Sterling, *supra* note 95 ("Every two years there's a mandatory change based on terms of office, or you can agree to divide the two-year term for one term each. Justice Maupin and I got together, and we could have either flipped a coin to see who would do a two-year term or we could make an agreement between ourselves as to each of us doing a one-year term, and which year we would do. So that's what he and I did. We agreed that he would do the 2007 year and I'd do 2008.").

[97] *See In re* Brown, 662 N.W.2d 733, 736-37 (Mich. 2003) (recommending order of public censure for family court judge based, in part, on the fact that the judge ordered which parent would have custody of children on Christmas Day rather than Christmas Eve based on a coin flip, and ordering that the judge shall "[r]efrain from resolving any disputed issue by the flip of a coin").

[98] *See* Adam M. Samaha, *Randomization and Adjudication*, 51 WM. & MARY L. REV. 1, 5 (2009).

[99] *See, e.g.*, Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 272 (2009) (describing a "new (and entirely inane) theory of constitutional interpretation—say, that the Constitution should be interpreted by flipping a coin or by reading the stars").

[100] *See* HELENE LANDEMORE, OPEN DEMOCRACY: REINVENTING POPULAR RULE FOR THE TWENTY-FIRST CENTURY 11-13, 142 (2020).

the Supreme Court will select is to be determined through the flip of a coin. If there are more than two meanings at issue, these meanings may be selected using dice or a similar method of random selection.[101] The coin used will be a U.S. quarter, minted during the year the Supreme Court's term began. The Chief Justice will flip the coin, and a different Justice will designate which interpretive outcome corresponds to the head's or tail's side of the coin.[102] When not in use, the coin will be stored in a locked safe or vault somewhere in the Supreme Court building—I'm sure there are more than a few impenetrable safes in that building that are used to store important papers, draft opinions, and the like.

II. DISINGENUOUS (AND INCOMPETENT) INTERPRETERS

At this point, most of the relevant characters have been introduced. But there are still two more actors needed to round out the cast: the disingenuous interpreter and the incompetent interpreter.

A. The Disingenuous Interpreter

The disingenuous interpreter is a common character in discussions of constitutional law. This actor goes through the motions of interpreting the Constitution and reaching conclusions about its meaning. But all the while, the disingenuous interpreter only wishes to reach conclusions that comport with his political and moral goals.

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[101] The use of dice of varying complexity dates back many centuries, suggesting a respectable historical pedigree. *See Twenty-Sided Die (Icosahedron) with Faces Inscribed with Greek Letters*, THE MET, https://www.metmuseum.org/art/collection/search/551072 [https://perma.cc/KJ8P-FRA2] (describing a twenty-sided die dating back to the second through fourth centuries). Similar dice are available today, for reasonable prices, which will likely draw the support of any budget hawks necessary to form a coalition to pass the required constitutional amendments. *See 10-Pack of D20 Dice Random Color D20 Polyhedral Dice 20-Sided D&D Dice for DND RPG MTG Table Game*, AMAZON, https://www.amazon.com/Smartdealspro-Random-Color-Polyhedral-Table/dp/B00QC5545S/ [https://perma.cc/KC9F-5A5J] (last visited June 19, 2023) ($8.99 for ten twenty-sided polyhedral dice).

[102] Author's Note: One variation of the theory may have the most senior Justice making this determination. Alternatively, Justices may be assigned this role in successive cases in order of decreasing seniority, cycling back to the most senior Justice after every eighth case. I'll leave details like this up to someone with better handwriting than me who will be writing up the Constitutional amendment.

The disingenuous interpreter may play several relevant roles. He may be an attorney, arguing in favor of a particular constitutional interpretation before a court. She[103] may be a legislator—applying a particular method of interpretation and arguing that a particular law or recent Supreme Court opinion is inconsistent with the Constitution's true meaning. He may be a president, vetoing a particular bill that he claims violates the Constitution. And she may be a Supreme Court Justice, purporting to apply some means of constitutional interpretation but ultimately reaching a conclusion entirely preordained by her political views.

Depending on who you ask, just about everyone may be a disingenuous interpreter. The Justices on the Supreme Court certainly catch their fair share of criticism for deciding cases based on their political views. Justices that proclaim themselves as originalists are critiqued for using originalism as a cover to reach desired political outcomes.[104] As for Justices that rely on non-originalist methodologies, they tend to be labeled as relying on "living constitutionalism,"—an amorphous concept with little definition beyond the practice of reaching whatever outcome a

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[103] Author's Note: I've chosen to use alternating pronouns in describing hypothetical interpreters. Unlike constitutional theories, gender does not constrain interpreters' shenanigans.

[104] *See*, *e.g.*, Harry Litman, *Originalism, Divided*, THE ATLANTIC (May 25, 2021), https://www.theatlantic.com/ideas/archive/2021/05/originalism-meaning/618953/ [https://perma.cc/6BV8-WLE6] ("Progressive critics in particular charged that originalism was a clever, neutral-sounding methodology designed to produce the results conservatives wanted for their own ideological reasons."); *see also* Michael Waldman, *Originalism Run Amok at the Supreme Court*, BRENNAN CTR. FOR JUST. (June 28, 2022), https://www.brennancenter.org/our-work/analysis-opinion/originalism-run-amok-supreme-court [https://perma.cc/VA9T-AY76] ("Right now, as used by this Court, originalism just provides cover for a right-wing political agenda."); *see also* ERIC J. SEGALL, ORIGINALISM AS FAITH 178 (2018) ("Originalism does not take politics or ideology out of constitutional decision making but instead gives judges any number of ways to reach whatever results they choose in virtually any constitutional case.").

Justice's personal beliefs or policies dictate.[105] Other theories of interpretation may also be employed with the goal of achieving results consistent with the Justices' political views.[106]

For the sake of simplicity, and due to their central role in the process of constitutional interpretation, this Article will present the disingenuous interpreter as a Supreme Court Justice, unless otherwise noted. But this is an approach taken primarily for the sake of simplicity and efficiency. Indeed, disingenuous interpretation may be more likely among politicians and attorneys, who face pressure (political and ethical) to advance particular positions in their arguments, whatever the dictates of some theory of interpretation may be.[107]

B. The Incompetent Interpreter

Unlike the disingenuous interpreter, the incompetent interpreter does not set out to reach a particular outcome when deciding a case or making an argument. Instead, this interpreter genuinely attempts to interpret the Constitution in accordance with a theory of interpretation but is prone to error when doing so. As a result, while the incompetent interpreter attempts to apply a theory of interpretation in good faith, her conclusions end up being incorrect when evaluated on that theory's terms.

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[105] *See, e.g.*, Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 272-73 (2018) (describing "living constitutionalist approaches" as those "that require the judges to rely on their own values when deciding constitutional cases"). To his credit, Solum does briefly acknowledge the existence of more sophisticated versions of living constitutionalism at the end of his article. *Id.* at 275-76. Even originalism's critics tend to portray "living constitutionalism" in this manner. *See* SEGALL, *supra* note 104, at 178 ("Originalism does not take politics or ideology out of constitutional decision making but instead gives judges any number of ways to reach whatever results they choose in virtually any constitutional case. *In that specific sense, originalism and living constitutionalism are no different*.") (emphasis added).

[106] *See* William P. Marshall, *The Judicial Nomination Wars*, 39 U. RICH. L. REV. 819, 827-32 (2005) (arguing that Justices Scalia and Thomas frequently overturn laws, that they do so in a manner that favors originalist results, and that they sometimes abandon originalist methodology in favor of alternative methods in order to achieve these conservative outcomes).

[107] *See* Michael L. Smith & Alexander S. Hiland, *Originalism's Implementation Problem*, 30 WM. & MARY BILL RTS. J. 1063, 1089 (2022) (describing attorney's ethical obligations as advocates for their clients and the negative implications this has for the prospects of these attorneys conducting balanced and rigorous historical analysis when advancing originalist arguments).

Also, unlike the disingenuous interpreter, the incompetent interpreter's erroneous application of interpretive theories does not boil down to a single explanation. The disingenuous interpreter is motivated by personal political views, and it is this singular feature about the interpreter that leads him to misapply and abuse interpretive theories. As for the incompetent interpreter, the basis for error may vary. Error may result from a lack of expertise in a particular field or discipline. It may result from a lack of time or resources. The incompetent interpreter tends to be defined by the fact that he errs in implementing a particular theory of interpretation rather than her reason for making mistakes. Where possible, I draw on mistakes that have been identified, or warned of, in the literature for each relevant theory of interpretation.

If this description did not already make it clear, the term "incompetence" is not meant to denote legal or mental incompetence. Rather, "incompetence," simply labels this interpreter as prone to making mistakes in applying a theory of constitutional interpretation. As will be discussed, "incompetence," can be a relative term: someone who is otherwise a highly skilled attorney or judge may turn out to be prone to mistake in conducting historical, cost-benefit, or moral analysis.

III. DODGING DISINGENUOUS INTERPRETERS

With the stage set, I turn to the landscape of debates over theories of constitutional interpretation. There's no shortage of literature on the matter. Originalism alone is a veritable sub-discipline within the field of constitutional law—inspiring countless articles, dozens of books, and specialized conferences and institutes devoted to this one theory.[108] Originalism's rise has prompted critics to propose alternative theories of interpretation in response, several of which are described above.

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[108] *See Call for Papers*, CTR. FOR THE STUDY OF CONST. ORIGINALISM, https://www.sandiego.edu/law/centers/csco/call-for-papers.php [https://perma.cc/C9DJ-JPC2] (a call for papers for the annual Hugh and Hazel Darling Foundation Originalism Works-in-Progress Conference, hosted by the Center for the Study of Constitutional Originalism at the University of San Diego School of Law); James R. Rogers, *Originalism's Expanding Popularity*, LAW & LIBERTY (Oct. 15, 2019), https://lawliberty.org/originalisms-expanding-popularity/ [https://perma.cc/HD74-QUXW] (describing originalism's rise in the legal academy and elsewhere, including the willingness of progressive scholars to engage in originalist work).

In the early days of modern originalism, Justice Scalia asserted that despite originalism's difficulties, critics had failed to present an alternative approach to constitutional interpretation, and that it takes a theory to beat a theory.[109] Despite the wealth of alternate theories of interpretation and the associated sub-literatures that have arisen in the decades since Scalia's 1989 article, many originalists continue to simply assert that critics have failed to propose alternate interpretive methods.[110] While such claims may have held more force decades ago, they are no longer applicable to the present landscape of the lively debate between constitutional theories.[111] When originalists do manage to address these alternative theories, they assert that originalism remains the best approach—arguing that it leads to greater constraint for judges, predictability, and democratic legitimacy.[112]

This Article is inspired by a specific, yet frequently repeated, subset of the debate over originalism. As noted above, mainstream originalism urges that the Constitution be interpreted based on its original public meaning. Early originalists urged this approach to interpretation because it would constrain Justices from deciding cases based on their personal political views.[113] While defenses of originalism have grown more sophisticated as the years have gone

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[109] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855, 862-63 (1989) ("I also think that the central practical defect of nonoriginalism is fundamental and irreparable: the impossibility of achieving any consensus on what, precisely, is to replace original meaning, once that is abandoned."); *see also* SOLUM, *supra* note 6, at 73-75.

[110] *See, e.g.*, William Baude, *Of Course the Supreme Court Needs to Use History. The Question is How*, WASHINGTON POST (Aug. 8, 2022, 9:27 AM) https://www.washingtonpost.com/opinions/2022/08/08/supreme-court-use-history-dobbs-bruen/ [https://perma.cc/QP9R-76AA] ("In recent years, many critics of the court — including some dissenting justices — have ceded the initiative. They have tried to shield themselves behind precedents or to poke holes in the majority's arguments without advancing a competing constitutional theory.").

[111] *See* Fleming, *supra* note 33, at 543 ("[C]onstitutional theory is richer today, and there are cogent alternatives to originalism, including Strauss's common law constitutional interpretation and Dworkin's moral reading.").

[112] A summary of originalists' claims that originalism best achieves these and other normative values can be found throughout Smith, *supra* note 90.

[113] *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 465 (2d ed. 1997) ("The nation . . . should not tolerate the spectacle of a Court that pretends to apply constitutional mandates while in fact revising them in accord with the preference of a majority of the Justices who seek to impose *their* will on the nation.").

on, the argument from constraint remains a major justification for originalism.[114]

All of this inspires two lines of criticism. The first implicates the issue of disingenuous interpreters: critics argue that originalism serves only as a cover for Justices to reach conservative political outcomes. While the Court may claim to go through the motions of historical analysis and determining original meaning, it picks and chooses evidence and exercises discretion in a directed manner in determining which evidence has persuasive weight—all with an aim to achieving conservative results.[115] For all the historical arguments the Court makes and all the evidence the Court claims to consider, this is all ultimately nothing more than a smokescreen disguising politically motivated Justices reaching their desired conclusions.

The second line of criticism turns to the incompetent interpreter. This critique argues that even if Justices attempt to engage in good faith originalist analysis, they are unlikely to do so with the necessary accuracy and historical rigor. The Justices are not historians, and are ill-prepared to undertake the historical analysis necessary to answer complex questions of what people at the time of the Constitution's ratification would have understood the Constitution to mean.[116] As a result, Justices are likely to reach conclusions that are incorrect—finding that the Constitution's

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[114] *See* Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 578 (2011) ("Originalism is often described and justified as a means of preventing modern courts from imposing their moral preferences on cases"); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013).

[115] *See* ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 63 (2022); Editorial Board, *The Supreme Court Isn't Listening, and It's No Secret Why*, N.Y. TIMES (Oct. 1, 2022), https://www.nytimes.com/2022/10/01/opinion/supreme-court-legitimacy.html [https://perma.cc/NWZ2-P8KJ] (arguing that the Court's "rulings are now in line with the views of the average Republican voter" and that this has resulted in the Court "unmoor[ing] itself from both the Constitution it is sworn to protect and the American people it is privileged to serve").

[116] *See* Joshua Zeitz, *The Supreme Court's Faux "Originalism,"* POLITICO (June 26, 2022, 7:00 AM), https://www.politico.com/news/magazine/2022/06/26/conservative-supreme-court-gun-control-00042417 [https://perma.cc/U7RS-HW3A] ("The broader problem is that originalism essentially requires judges and their law clerks to earn a Ph.D. in American (and probably, as well, early modern English) history. A legal theory constructed on historical foundations doesn't work if jurists aren't well-versed in history.").

meaning is something other than its original meaning, or concluding that there was indeed one original meaning of a constitutional provision when in fact there was no single, accepted meaning. While incompetent originalists may not be overtly motivated by political goals, their non-rigorous historical investigation may end up incorporating the biases of the interpreter, including political biases.

Originalists have a uniform response to both of these critiques: just because an *originalist* is disingenuous or incompetent, this does not impact the correctness or desirability of *originalism* as a theory. Even if one concedes the existence of disingenuous or incompetent interpreters, originalism as a theory remains untouched.

Originalists may take this response even further, pointing out that a result cannot be labeled correct or incorrect without applying originalism in the first place—meaning that all this argument has done is strengthen the theory rather than weaken it. William Baude and Stephen Sachs make such a move—arguing that even if it is true that judges will misapply originalism as a result of motivated reasoning, this "would do more to support originalism than undermine it" as "originalism is a criterion of validity, not a drafting guide or decision procedure."[117] And how bad can a disingenuous or incompetent interpreter be if the very notion of such an interpreter presumes the application of an originalist theory in the first place?

Some examples will help illustrate and clarify this tactic. In his article, *Time, Institutions, and Interpretation*, Michael McConnell, a prominent originalist and Director of the Constitutional Law Center at Stanford Law School, takes on the critique that originalists rely on "bad history" in interpreting the

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[117] William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1486 (2019). This Article will not delve too far into the weeds on Baude's & Sachs's assertion that originalism is a criterion of validity rather than a procedure—although the conclusions reached here are likely relevant to those who would seek to detach interpretive theories from the realities of particular cases, legal reasoning and argumentation, and the need for judges to reach outcomes. Section VI.A below delves into this issue further, and for a fuller treatment, see generally Michael L. Smith, *Originalism and the Inseparability of Decision Procedures from Interpretive Standards*, 58 CAL. WEST. L. REV. 273 (2022).

Constitution.[118] Rather than contest this assertion, McConnell admits that it is "all too true."[119] McConnell acknowledges that "justices and judges, lawyers, and even law professors often lack the training to evaluate historical evidence."[120] But the objection goes further than mere incompetence: critics also argue that self-proclaimed originalists "find it convenient to twist the evidence in the direction they would prefer it to go."[121] McConnell responds:

> However depressingly accurate this critique may be, it is not logically an argument against originalism. Every methodology can be abused. Precedents can be twisted as easily as historical evidence, and frequently have been. That is not an argument against following precedent. As to the normative approach, no one who is well informed would claim that justice and judges, lawyers, or even law professors are particularly adept at normative theory. If you entertain any suspicion that the Court has a reliable moral compass, read *Dred Scott v. Sandford*, *Plessy v. Ferguson*, *Buck v. Bell*, and—dare I say it?—*Roe v. Wade*. *All methodologies can be executed well or poorly. Poor execution is not a reason for dispensing with them*, which would be impossible in any event.[122]

Saikrishna Prakash, another prominent originalist, takes a similar approach to critiques of originalism. In responding to criticism of originalism from the perspective of historians, Prakash contemplates the objection that originalism fails to constrain judges—that it "cannot bind like the laws of physics."[123] Such an objection, Prakash concludes, is unconvincing because it is not unique to originalism:

> More importantly, originalism will never constrain judges (or any other interpreter) because no theory can accomplish this

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[118] Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1761 (2015).

[119] *Id.*; *see also Oh My God He Admit It Tim Robinson GIF*, TENOR, https://tenor.com/view/oh-my-god-he-admit-it-tim-robinson-i-think-you-should-leave-gif-22595484 [https://perma.cc/V43Z-L9EA] (last visited September 30, 2022).

[120] McConnell, *supra* note 118.

[121] *Id.*

[122] *Id.* (emphasis added).

[123] *See* Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 537 (1998).

> hopeless task. A judge dedicated to a particular theory in the abstract may betray it in specific cases. Even a judge committed to deciding cases in line with her personal preferences may occasionally conclude that the text constrains her.[124]

For an example of an argument and response over the issue of incompetent interpreters, in early 2017, Professor David Rudenstine wrote a column arguing against Justice Gorsuch's nomination to the Supreme Court because of Gorsuch's support for originalism—the theory that the Constitution should be interpreted based on its original public meaning.[125] Rudenstine made several arguments, all of which Professor Randy Barnett—a prominent originalist—took on in his own responsive column.[126]

Rudenstine argued:

> Originalism requires judges to be historians, and judges are not educated to be historians. Indeed, it is frequently stated in critical terms that judges practice "law office history," which is not history at all. Judges lack the time to honor the demanding historical method, which requires familiarity not only with secondary sources, but with primary sources such as diaries, letters, memoranda and newspapers.[127]

Barnett took issue with this—arguing first that judges need not be historians to determine the Constitution's original public meaning.[128] While I address arguments like this in detail elsewhere,[129] it's the next part of Barnett's response that is of interest to me in this Article: "[b]ut at any rate, neither judges nor scholars ought to employ "law office history," if what is meant by this is "cherry-picking" evidence to fit the conclusions they may

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[124] Prakash, *supra* note 123, at 538.

[125] David Rudenstine, *Gorsuch's Adherence to Originalism Should Keep Him From SCOTUS*, NAT. L.J. (Mar. 13, 2017, 12:00 AM), https://www.law.com/nationallawjournal/almID/1202781091772/ [https://perma.cc/QQN9-4U92].

[126] *See* Randy Barnett, *Another Oblivious Critique of Neil Gorsuch and Originalism*, WASH. POST (Mar. 14, 2017, 9:23 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/14/another-oblivious-critique-of-neil-gorsuch-and-originalism/ [https://perma.cc/V43Z-L9EA].

[127] Rudenstine, *supra,* note 125.

[128] Barnett, *supra* note 126.

[129] *See generally*, Smith & Hiland, *supra* note 107.

wish to reach. An argument against *bad* originalism is not an argument against originalism."[130]

Here we see a preview of arguments to come. Rudenstine's argument is that originalism, by its nature, will lead to mistaken results. It is not that there are some instances or occasions where judges will make mistakes. It is that determining original public meaning requires rigorous historical analysis that is unreasonable to expect from judges, all of whom lack the necessary expertise, or at least the time to engage in the analysis needed to reach correct conclusions. Under Rudenstine's formulation, all originalism—at least once implemented—tends to be bad originalism. Barnett's argument is not responsive to this version of the argument.

This same response appears in defense of other theories of interpretation. Ronald Dworkin heads off a similar critique in defending the moral readings theory that the Constitution ought to be read in a manner that furthers moral principles of treating individuals with equal concern and respecting their freedom—acknowledging that judges may "abuse" this approach by "pretending to observe the important restraint of integrity" to the Constitution's text and structure while "really ignoring it."[131] In response to this concern, Dworkin states that abuse of power is not a problem exclusive to judges, and that his approach to interpretation "is a strategy for lawyers and judge acting in good faith, which is all any interpretive strategy can be."[132] Again we see the broad assertion that no theory can account for the prospect of a disingenuous interpreter who seeks to manipulate a theory to his own goals.

A similar critique and response may apply to debates over pragmatism as well. One may attack a pragmatic approach to constitutional interpretation, arguing that judges and attorneys are ill-equipped to weigh complicated empirical questions regarding the

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[130] Barnett, *supra* note 126.

[131] DWORKIN, *supra* note 27, at 11.

[132] *Id.*

harms or benefits a law may cause.[133] The response to such an attack is that this is not a problem with pragmatism itself. The critique does nothing to disprove why judges should not look to the outcomes of their decision in deciding which way to rule—it just rightfully calls out instances where judges fail to apply the method effectively due to a lack of expertise or careful analysis.

Or consider a critique against traditionalism that those who apply the method will frame the historical tradition at issue to reach desired results. With abortion, for example, a traditionalist can guarantee a far stronger case for restricting abortion on historical grounds by requiring evidence of historical laws and regulations that permit or strike down restrictions on the right to abortion—rather than historical laws or cases that permit or strike down restrictions on the right to bodily autonomy more generally.[134] A disingenuous traditionalist will frame the right at issue in a manner that will guarantee the desired outcome—a narrowly framed right will make it far more difficult to find evidence of historical laws or regulations respecting the right, while a broader framing will make finding analogous historical evidence a far easier task. As a result, the method may be shaped to fit the political goals of the interpreter. In response to this critique, supporters of traditionalism may argue that the theory still has value so long as interpreters apply it in good faith. Just because some interpreters will abuse the method in a manner to achieve desired outcomes does not mean that the method is without promise when it is properly employed.

Sometimes the dismissal of the disingenuous and incompetent interpreter goes farther than claiming that a theory cannot account for them. Some theorists argue that such interpreters are irrelevant

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[133] For an example of such an empirical approach being rejected in favor of a traditionalist approach, see N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen, 142 S.Ct. 2111, 2130 (2022) ("[R]eliance on history to inform the meaning of constitutional text—especially text meant to codify a pre-existing right—is, in our view, more legitimate, and more administrable, than asking judges to 'make different empirical judgments' about 'the costs and benefits of firearms restrictions,' especially given their 'lack [of] expertise' in the field.") (quoting McDonald v. City of Chicago, 561 U.S. 742, 790-91 (2010) (plurality opinion)).

[134] *See* Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2258 (2022) (framing the inquiry as one into historical traditions involving the right to abortion, rather than "a broader right to autonomy and to define one's 'concept of existence'").

to the theory itself—which operates at a different level from those who may have difficulties applying the theory. Recent scholarship by Stephen Sachs illustrates this divorce of theory from practice, in which he urges a focus on originalism as a standard for determining the correctness of claims of constitutionality rather than a procedure for reaching a determination of what the Constitution means.[135] Christopher Green, as well, suggests that appeals to how difficult it may be to implement a theory of interpretation does not undermine that theory—arguing that these arguments operate at the epistemic level (that is, the limits of interpreters' knowledge) rather than the ontological level (what the Constitution actually means).[136] Green suggests that "enigmatic" questions over the Constitution's original meaning may just result from the fact that "the Constitution is enigmatic," and that "we cannot infer ontological vices from epistemic ones without supporting premises."[137]

The problem with such a tactic is that attorneys, judges, and the general public still need to make determinations about what the Constitution means. And they must do so in a world in which disingenuous and incompetent interpreters exist and seek to take advantage of whatever theory of interpretation is chosen. Focusing on the theory alone, independent of its implementation, may create the appearance of progress at a high level of theoretical abstraction, but it does little for those who operate in the real world and are affected by the actions of disingenuous and incompetent interpreters. Additionally, to the extent that any scholar of constitutional law seeks to explain or predict how the actions of the Supreme Court or any court are influenced by theories of interpretation, these comments assume that theories of

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[135] *See generally* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777 (2022).

[136] Christopher R. Green, *Constitutional Truthmakers*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 497, 511 (2018).

[137] *Id.*

interpretation have some bearing on how these actual decisions are made.[138]

But the biggest problem with dismissing concerns about disingenuous and incompetent interpreters is that theories of interpretation do, in fact, affect the level of impact an interpreter's disingenuousness or incompetence has on conclusions about constitutional meaning. Contrary to the unambiguous assertions of constitutional law scholars of all political and theoretical orientations, I argue that constitutional theories, by their nature, may be more or less subject to manipulation or misuse by disingenuous and incompetent interpreters in comparison with other theories of interpretation. This Article now turns to the constitutional theories themselves, analyzes how easy it is for disingenuous and incompetent interpreters to abuse or misuse the theories, and uses these comparisons to identify aspects of theories that promote or discourage abuse.

IV. ABUSING THEORIES OF INTERPRETATION

This Article now puts the various theories addressed above through the stress tests of disingenuous and incompetent interpreters. Most discussions of interpretive theories and whether they are desirable tend to take for granted that the actors interpreting the Constitution will apply the theory in good faith. Here, I assume that the interpreter is, in fact, dishonest. I also account for an incompetent interpreter who is prone to error, despite his good faith efforts. The bar for success here is low: remember that most people who even bother to contemplate the possibility of errors or abuse in implementation tend to conclude that nothing can be done about these interpreters.[139]

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[138] *See, e.g.*, William Baude, *Of Course the Supreme Court Needs to Use History. The Question is How*, WASH. POST (Aug. 8, 2022, 9:27 AM), https://www.washingtonpost.com/opinions/2022/08/08/supreme-court-use-history-dobbs-bruen/?utm_medium=social&utm_campaign=wp_opinions&utm_source=twitter [https://perma.cc/QP9R-76AA]; Lawrence B. Solum, *Judge Barrett is an Originalist. Should We Be Afraid?*, LOS ANGELES TIMES (Oct. 14, 2020, 1:31 PM), https://www.latimes.com/opinion/story/2020-10-14/amy-coney-barrett-supreme-court-originalism-conservative [https://perma.cc/7L9A-ALB3].

[139] *See, e.g.*, Barnett, *supra* note 43 ("[O]riginalism, like any other method or theory, is not self-enforcing. Instead, it provides a basis to criticize judges who fail to adhere to original meaning when it really matters.").

Before getting into the theories, a disclaimer. In the interest of presenting a wider array of examples, the treatment of each of these theories will be necessarily brief. Variations on some of the theories are set aside for the moment.[140] Some of the analysis is necessarily brief due to space constraints. This is not meant to foreclose or dismiss alternate arguments or further nuance. Rather, the following evaluations serve as an initial attempt at evaluating how various theories stand up to scrutiny, with the hope that these theories' defenders will acknowledge the reality of disingenuous and incompetent interpreters and advance their own arguments about whether these theories stand up to these actors' abuse.

A. Originalism

Debates over originalism inspired this Article, as they involve frequent exchanges invoking both disingenuous and incompetent interpreters. Originalists claim that they are deriving the original public meaning of the Constitution. But doing so is a complex task, as this determination involves deriving what provisions meant to people living hundreds of years ago, requires the interpreter to determine the identify of who the reasonable interpreter at the time of ratification was, and makes the bold assumption that a

[140] For example, my focus on original public meaning originalism does not include variations on originalism that focus on the original intent of the Constitution's framers or their original interpretive methods—theories that several originalist scholars advance. *See* Richard Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009) (arguing for an original intent approach to originalism); John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371 (2019) (arguing for an original methods approach to originalism).

particular public meaning even existed at the time of ratification (rather than multiple, contested meanings).[141]

1. The Disingenuous Interpreter

All of this is fertile ground for a judge or Justice who wants to interpret the Constitution to reach results consistent with their personal political beliefs—whether or not the end result is consistent with the true original meaning of the Constitution.[142] The breadth, complexity, and gaps in the body of historical evidence gives interpreters the choice to pick and choose what they may use—an opportunity that the disingenuous interpreter will undoubtedly use to lend the appearance of support to his desired outcome.[143] Justices Scalia's and Stevens's dueling opinions in *District of Columbia v. Heller* illustrate how this may occur, as both justices drew on the same historical evidence, yet used different evidence and different characterizations of that evidence to reach opposite conclusions as to whether the Second Amendment protected an individual right to keep and bear arms.[144]

The probability of manipulation is increased as a result of the academic originalist literature—articles purporting to reach conclusions about original public meaning that are written and reasoned in the manner of a non-historian legal advocate hoping to

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[141] For examples of critics describing the complexity of this task and arguing that it invites abuse and mistakes, see generally Smith & Hiland, *supra* note 107. *See also* Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate Over Originalism*, 23 YALE J. L. & HUM. 295, 300-01, 305-07 (2011) (critiquing originalist assumptions that a uniform original public meaning existed and highlighting founding-era debates between lawyers and laypeople over whether popular or legal meaning would govern questions of constitutional interpretation); Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 BYU J. PUB. L. 283, 298-99 (2014) (arguing that originalists' attempts at deriving original public meaning is inaccurate because "originalists disregard context, contingency, and subtext" out of a desire to "find a fixed objective meaning" even though the Constitution "is roiling with subtexts").

[142] Author's Note: Assuming, perhaps incorrectly, that there is such a meaning.

[143] *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 558-60 (2006) (arguing that conservatives who employ originalism are motivated by political goals and engage in selective references to those aspects of the past that support them).

[144] *See* District of Columbia v. Heller, 554 U.S. 570 (2008).

reach a particular outcome.[145] With such a wealth of goal-oriented scholarship, disingenuous interpreters have little problem finding scholarship to cite in support of any claim about original public meaning—whether or not the cited scholarship sufficiently engages with contrary scholarship or historical evidence.[146] What's more, disingenuous judges will have little problem finding cherry-picked citations and manipulable evidence because the submissions of the parties before them advocate for each party's preferred interpretation—a far cry from any attempt at balanced historical analysis.[147]

The Court has all but conceded that it is unconcerned with the prospect of disingenuous or incompetent interpreters. While I argue elsewhere that the Court's opinion in *New York State Rifle & Pistol Association v. Bruen* is not an originalist opinion, the *Bruen* Court did attempt to address a common objection to originalism: that the Court is ill-equipped to engage in the rigorous historical analysis necessary to determine the Constitution's original meaning:

> The job of judges is not to resolve historical questions in the abstract; it is to resolve *legal* questions presented in particular cases or controversies. That "legal inquiry is a refined subset" of a broader "historical inquiry," and it relies on "various evidentiary principles and default rules" to resolve

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[145] *See* Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-In-Law*, 71 CHI.-KENT L. REV. 909, 918-26 (1996) (describing examples of "law office history" in the academic legal literature in which law professors present history in an argumentative and persuasive manner designed to accomplish desired legal outcomes).

[146] Justice Gorsuch repeatedly demonstrates how this approach may be employed through undiscussed citations and stacking examples of scholarship against each other to create the suggestion of a scholarly consensus. *See* NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 113-14 (2019) (responding to the longstanding, extensive literature that Brown v. Board of Education is not consistent with original understanding by asserting this is incorrect) ("Take a look, for example, at Michael McConnell's, Steven Calabresi's, and Michael Perl's originalist defenses of Brown itself and count me convinced."). What those scholars' arguments are and how they convinced Justice Gorsuch remain a mystery. *See also* West Virginia v. Env't Prot. Agency, 142 S.Ct. 2587, 2625, n.6 (2022) (responding to the dissent's citation of "two recent academic articles" disputing the historic existence of the nondelegation with the remark, "[b]ut if a battle of law reviews were the order of the day, it might be worth adding to the reading list" and citing nine articles and a book without any analysis or clarification of what these sources say, how they address the articles cited by the dissent, and why the (presumably) contrary conclusions in these alternate sources are more convincing).

[147] Smith & Hiland, *supra* note 107, at 1089, 1102.

> uncertainties. W. Baude & S. Sachs, Originalism and the Law of the Past, 37 L. & Hist. Rev. 809, 810–811 (2019). For example, "[i]n our adversarial system of adjudication, we follow the principle of party presentation." *Courts are thus entitled to decide a case based on the historical record compiled by the parties*.[148]

The historical inquiry necessary to determine original meaning in indeterminate or contested circumstances makes it easier for disingenuous judges to pass off goal-oriented reasoning as good faith legal reasoning. Most people are not historians and may find courts' historical claims and analysis convincing or, at the very least, difficult to criticize without a fair amount of independent work. Those with the requisite expertise may write their own evaluations and critiques, but this commentary must make its way into the public eye to have a broad impact. Evaluations meant for circulation within academia alone will not cut through the opacity of disingenuous historical reasoning.

It may not be so hard to fool people into thinking that a disingenuous judge is making a good faith attempt at originalism. Will Baude and Stephen Sachs confront the notion that originalists are engaging in a pretense—purporting to look to founding-era law, yet seeking only to impose their political preferences.[149] Baude and Sachs do not think that this is happening with real-world originalist arguments, since those involved in originalist argumentation and adjudication "formulate originalist claims as actual *arguments*: as if they cared about convincing others and not as mere ceremony."[150] Citing a single example of a dispute that involved extensive briefing on historical meaning, in which several advocates changed their conclusions after being presented with contrary evidence, Baude and Sachs conclude that "[t]his looks to us like a process that takes originalist arguments seriously" and that if originalism is a ritual, "it's a ritual that obeys the full form of legal argument."[151] "If originalism is a pretense, the pretense

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[148] N.Y. State Rifle & Pisol Ass'n., Inc. v. Bruen, 142 S.Ct. 2111, 2130 n.6 (2022) (emphasis added) (internal citations omitted).

[149] Baude & Sachs, *supra* note 117, at 1484.

[150] *Id.* at 1485.

[151] *Id.* at 1485-86.

runs deep."[152] If a single case of a party admitting a mistake is all it takes to dispel originalists' concerns over abusive implementation, there's little standing in the way of disingenuous interpreters taking originalism wherever they please.

2. The Incompetent Interpreter

The incompetent interpreter fares little better when taking an originalist approach. While she may not intend to manipulate the historical evidence to reach preferred outcomes, the incompetent interpreter's lack of historical expertise and inability to make informed choices between various instances of historical evidence may present an avenue for political biases to work their way into the decisions. This is exacerbated by the Supreme Court's failure to provide consistent standards for what historical evidence is relevant or irrelevant to inquiries and how much evidence is enough to inform a conclusion regarding a historical fact or tradition.[153] And, for judges, it is further exacerbated by the adversarial process, as parties before courts will present evidence of original meaning in a manner tailored to accomplish each party's goals. Accordingly, just about all meaningful balanced historical analysis will result from the judge's own initiative—a task that requires time and expertise that most judges lack.

Without this time and expertise, judges are unlikely to undertake the rigorous analysis necessary to determine original public meaning. As a result, they may fail to reach a determination that is consistent with the Constitution's original meaning as a result of a mistake. Alternatively, while the incompetent interpreter may not intend to read the Constitution in a manner that reaches desired political goals, the biases of this interpreter may work their way into how he makes discretionary calls over what evidence to consider and what weight to give the evidence. A correct interpretation is possible, but only through coincidence.

Through originalism, incompetent interpreters may end up causing more lasting damage than disingenuous interpreters. To explain this point, some initial background on originalist treatment

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[152] Baude & Sachs, *supra* note 117.

[153] *See* Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. 797 (2023).

of precedent is necessary. Originalists frequently grapple with what is to be done if an originalist interpretation of a constitutional provision is contrary to established precedent in a certain area of law—recognizing that a persistent commitment to originalism may result in disruption to a wide body of settled law.[154] Some originalists do not worry all that much about the issue, arguing that—with the exception of certain legal regimes upon which many people rely—overruling precedent on originalist grounds is not as radical an outcome as it may initially sound.[155] Others, like Lawrence Solum, attempt a more balanced approach. Solum's solution to the tension between originalism and nonoriginalist Supreme Court precedent suggests that where the Court had previously engaged in "a good faith attempt to determine the original meaning of the constitutional text," the Court should grant deference to that precedent absent "clear and convincing evidence" that "produce[s] a substantial consensus that there had been an error."[156]

Solum's approach may address some issues of disingenuous interpretation, although it is an optimistic assumption that the Court will apply a "good faith" inquiry regarding prior precedent in a consistent, unbiased manner. But even if we grant the substantial assumption that this can be done, a deferential approach to prior attempts at originalism does not account for the problem of the incompetent interpreter. A prior Court that made a genuine effort at an originalist inquiry, but failed to do so correctly, is worth a fair amount of deference under Solum's approach—meaning that there's a higher probability that errors resulting from incompetence

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[154] *See generally* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017) (recognizing an apparent tension between originalism and precedent, exploring Justice Scalia's approach to precedent, and suggesting methods for minimizing conflict between originalist methodology and precedent); *but see* Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022) (in which now-Justice Barrett joined with the majority to overrule the 50-year-old precedent of *Roe v. Wade*).

[155] *See generally* Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. 257 (2005) (arguing that where precedent and originalism are inconsistent, the Supreme Court should reach originalist outcomes—although noting that certain circumstances (like Social Security) where people have relied to their detriment on arguably nonoriginalist laws may be exceptions).

[156] Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 466 (2018).

will remain binding law.[157] As for reversing that good faith, erroneous determination, the loaded terms of "clear and convincing evidence" and "substantial consensus," are themselves indeterminate and lend themselves to motivated reasoning and application.

B. Traditionalism

Traditionalism leads to similar results as originalism in the hands of both the disingenuous interpreter and the incompetent interpreter. This is likely because the two theories are similar in their approach and rely on overlapping evidence to reach conclusions. Originalists often caution that while they may rely on evidence of historical practices and traditions as evidence of original public meaning, this history and tradition is not determinative of meaning.[158] For traditionalists, however, those practices end up defining the constitutional provision at issue, whether or not this definitional role is made explicit.[159]

Traditionalism differs from originalism by providing a narrower standard for determining constitutional meaning. Originalism's focus on "original public meaning" presents potential complications. One may need to determine how the "public" meaning may be derived—a complex question that often involves inventing a reasonable reader who exited at the time of the founding and deriving the impressions of the Constitution's text on this reader.[160] This requires making calls about the reader's experience, education level, place in society, linguistic community, and other calls that may serve as discretion points that a disingenuous interpreter may use to his advantage. Determining

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[157] *See id.*

[158] *See, e.g.*, Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1637-38 (2017) ("Although original expected applications do not *constitute* the original meaning of the constitutional text, they are nonetheless relevant to constitutional interpretation because they can provide *evidence* of the original public meaning.").

[159] For examples of this approach in recent cases, see Smith, *supra* note 26.

[160] *See* Rakove, *supra* note 114, at 584-86 ("An imaginary originalist reader who never existed historically can never be a figure from the past; the reader remains only a fabrication of a modern mind. How the existence of such a figure can offer a constraint on the excesses of judicial discretion seems equally a fabrication as well. It is, in effect, a legal fiction in a novel sense of the term.").

public meaning also may involve the canvassing of sources, including through research and interpretation or through a broader survey of passages using corpus linguistics technology and methodology.[161] This approach involves the selection of sources or corpus that could skew the direction of the investigation and prioritize certain writings and perspectives on the meaning of terms above others—again, granting the disingenuous interpreter an avenue to skew the investigation.[162]

In comparison, traditionalism involves fewer avenues for manipulation because the type of evidence traditionalism employs is limited to historical laws and practices. With this framing, traditionalism seems to be more like "ordinary lawyer's work," requiring an investigation into a "refined subset of the historical inquiry."[163] In employing a traditionalist approach, the Court has defended this method for its comparatively narrow focus in response to critiques that "judges are relatively ill equipped to 'resolve difficult historical questions'."[164]

The narrower inquiry required by a traditionalist approach may constrain the disingenuous interpreter to a greater degree than originalism. Limiting the scope of potential evidence from which an interpreter may cherry-pick may reduce the options a disingenuous interpreter has to obscure his true reasoning. It also reduces the opportunities for discretion this interpreter may use to choose between alternate approaches to interpretation under the umbrella of a single interpretive theory. For example, a disingenuous interpreter purporting to discern original public meaning may choose between investigating founding-era documents, corpus linguistics, or some alternate immersive method—selecting the method that best supports a preferred

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[161] *See* Solum, *supra* note 158, at 1629-49.

[162] *See* Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379 (2018) (discussing the lack of diversity in the sources typically relied upon by originalists and steps needed to increase this diversity); Donald L. Drakeman, *Is Corpus Linguistics Better Than Flipping a Coin?*, 109 GEO. L. J. ONLINE 81, 86-87 (2020) (raising concerns over whether the Corpus of Founding Era American English is representative and noting that "[t]he large percentage of the documents" from the Founders Online collection in the corpus derives from six people and skews "the collection strongly towards elite communication patterns and word use").

[163] *See* Baude & Sachs, *supra* note 14, at 811-12 (framing originalism as requiring an investigation into the law of the past).

[164] N.Y. State Rifle & Pisol Ass'n., Inc. v. Bruen, 142 S.Ct. 2111, 2130 n.6 (2022).

outcome.[165] A traditionalist approach eliminates this option of choosing between procedures for implementing a theory of interpretation and may foreclose approaches that better serve preferred political outcomes.

Traditionalism may also help mitigate the incompetent interpreter's tendency toward mistakes. Where the disingenuous interpreter uses methodological complexity to guide analysis to desired outcomes, the incompetent interpreter is faced with more history, citations, and literature to survey, and more opportunities for mistaken interpretations or analysis. A focus on historic laws and practices narrows the scope of the inquiry, which may benefit judges who have limited time, resources, and expertise.

But traditionalism only goes so far in countering disingenuous and incompetent interpreters. Investigations into historical tradition may require an extensive inquiry ranging back hundreds of years.[166] Complicating the matter is the frequent involvement of multiple jurisdictions' laws, which may vary widely.[167] And contrary to claims that investigating legal history is akin to the routine task of tracing a chain of title, the law of the past may not be so easy to trace.[168] It may involve facts so vastly different that adoption to present circumstances becomes less a matter of history and more a matter of judgment.[169] There also may be circumstances where there is no law of the past on a particular issue—requiring a complex inquiry with what evidence there is or, more likely, simply treating the absence of law in a manner that supports a desired

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[165] *See generally* Solum, *supra* note 158 (describing these various methods). While Solum urges using all three in tandem to identify overlaps, Solum is approaching the inquiry in good faith, unlike our hypothetical disingenuous interpreter.

[166] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228, 2249 (beginning an inquiry into historical tradition with a survey of authorities ranging back to the thirteenth century, including Blackstone, Coke, Hale, and Bracton).

[167] *See, e.g.*, *Bruen*, 142 S.Ct. at 2142-56 (surveying gun restrictions throughout history in multiple colonies, territories, and states).

[168] *See* Baude & Sachs, *supra* note 14, at 811-12 (raising examination of a chain of title as an example of how lawyers routinely look to the past).

[169] *See, e.g.*, Mahanoy Area School Dist. v. B.L., 141 S.Ct. 2038 (2021) (evaluating whether a suspension of a student from a cheerleading squad based on her use of "vulgar language and gestures" in social media posts that she posted off-campus and "outside of school hours" violated the student's First Amendment rights).

outcome.[170] And the existence of varying laws across multiple jurisdictions raises the question of what, precisely, the law of the past is in circumstances when different states had different laws, or laws that varied across time.[171]

There may be room for a thicker traditionalist approach that includes detailed rules for how courts are to approach history. Examples of such rules may include, by way of example only: (1) how much evidence is enough to establish a history or tradition; (2) whether partial restrictions on freedoms or rights are analogous to restrictions on other aspects of the same freedoms or rights; and (3) how to factor in the length of time a law or practice existed in determining its present force and relevance. For now, such an approach remains theoretical, as the Supreme Court's embrace of a thinner traditionalism refuses to answer these questions and opts for a contradictory approach to traditionalist analysis across different cases.[172] As a result, plenty of confusion and opportunities for discretion remain, leaving disingenuous interpreters free to abuse traditionalism, and incompetent interpreters free to continue making mistakes.

C. The Moral Readings Approach

While traditionalism provided the disingenuous interpreter with fewer places to hide, the moral reading approach presents an entirely different perspective on the problem of the disingenuous interpreter. Under the moral readings approach, the interpreter seeks to interpret the Constitution in a manner consistent with abstract moral principles the Constitution embodies.[173] When difficult or novel issues of constitutional interpretation arise, the moral reading approach requires the interpreter to "decide how an abstract principle is best understood" and "whether the true ground

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[170] *See, e.g.*, *Dobbs*, 142 S.Ct. at 2255 (2022) ("[T]he fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so.").

[171] *See* N.Y. State Rifle & Pisol Ass'n., Inc. v. Bruen, 142 S.Ct. 2111, 2142-56 (2022) (surveying gun restrictions throughout history in multiple colonies, territories, and states).

[172] *See generally* Smith, *supra* note 153.

[173] FLEMING, *supra* note 27; DWORKIN, *supra* note 27.

of the moral principle" to the extent that it "has been incorporated into American law" extends to the case at hand.[174]

1. The Disingenuous Interpreter

Under Dworkin's formulation, though, there are some limits to the approach. It is "not appropriate" for clauses of the Constitution "that are neither particularly abstract nor drafted in the language of moral principle."[175] Additionally, judges are not free to "read their own convictions into the Constitution," and may only read abstract clauses as expressing a moral judgment to the extent that such a reading is "consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges."[176] Accordingly, under Dworkin's formulation of the moral readings approach, the disingenuous interpreter remains a concern. Dworkin himself acknowledges this, admitting that "judges can abuse their power" and stating that "[t]he moral reading is a strategy for lawyers and judges acting in good faith, which is all any interpretive strategy can be."[177]

But how a disingenuous interpreter will abuse the moral readings approach may not be immediately clear. A disingenuous interpreter may assert that a provision of the Constitution is open to interpretation as a moral principle when this is contrary to the Constitution's language or structure. But this requires the interpreter to assert the existence of moral language where there is none or to conjure up a structural argument in support of such an approach. While doing so may be possible, it is more difficult to smuggle moral principles into the analysis without the resources of historical citations and various forms of historical evidence available to the traditionalist or originalist. To the extent that the moral readings approach eschews such an involved historical approach, there are fewer resources for the disingenuous interpreter to muster in support of cloaking desired results.

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[174] *See* DWORKIN, *supra* note 27, at 2.
[175] *Id.*
[176] *Id.*
[177] *Id.*

More notably, though, to the extent that the moral reading approach involves an appeal to moral values that align with political goals, this is precisely in line with what disingenuous interpreters are seeking to do in the first place. The primary concern over disingenuous interpreters—that they will apply an interpretive method in pursuit of moral or political ends—becomes a nonsensical problem if considering and aiming for moral and political ends *are required steps* in the interpretive process. When the moral readings approach aligns with these moral and political ends, there is no need to use interpretation as a disguise for these goals. The theory of interpretation incorporates these goals into its very nature.

Things may not always be that easy for the disingenuous interpreter. Under Dworkin's formulation of the moral readings approach, there are several constraints or "fit" requirements on the interpreter, such as the requirement that the reading be consistent with the Constitution's structural design and prior judicial interpretation of the Constitution.[178] These requirements of determining fit, the constitution's structure, and engaging in a thorough review of prior interpretation all present avenues for the disingenuous interpreter to slip up and get things wrong.

Still, one may hypothesize an alternate formulation of Dworkin's method that includes weakened side-constraints, or without any such side-constraints whatsoever. Under this approach, moral and political goals take a central role in the process of interpretation. At this point, it becomes unclear how the standard disingenuous interpreter may abuse the interpretive process, as that interpreter's moral and political considerations are now the focal point of the method. The interpretive process focuses on the precise moral and political views that motivate the disingenuous interpreter and simply requires the interpreter to apply these views. No subterfuge or dishonesty is necessary, and it becomes unclear if an interpreter's disingenuousness has any meaningful impact on the interpretive task.

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[178] *See* DWORKIN, *supra* note 27, at 10.

2. The Corrupt Interpreter

One possible response may be to note an alternate type of disingenuous interpreter: the corrupt interpreter. This interpreter may seek to abuse a theory of interpretation for non-political reasons. For example, a judge may be inclined to read a constitutional provision in a certain way because doing so leads to an outcome that enriches the judge (perhaps a company in which the judge or a judge's relative holds stock will come out ahead, or perhaps the judge has been bribed by a party to reach a certain result).[179] The corrupt interpreter may act in a disingenuous manner by purporting to engage in the relevant moral readings analysis while actually skewing that analysis to reach the result that will benefit the judge. In such circumstances, it again becomes conceivable that a judge may interpret the constitution in a disingenuous manner by employing reasoning that appeals to broader moral principles with the true, hidden goal of personal benefit or enrichment.

While the issue of judicial corruption and self-interest is an important one, corrupt motivations seem to operate on a level apart from the moral and political interests that influence the reasoning of the standard disingenuous interpreter. Because of this, the

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[179] All of these scenarios are drawing a great deal of attention in recent years. *See* Joshua Kaplan, et al., *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, 5:00 am), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/L9ZW-2YKJ] (revealing that Justice Clarence Thomas has been receiving regular opportunities to fly on private jets, travel on yachts, and experience various other luxories provided by "real estate magnate and Republican megadonor Harlan Crow"); Justin Elliott et. al., *Billionaire Harlan Crow Bought Property From Clarence Thomas. The Justice Didn't Disclose the Deal*, PROPUBLICA (Apr. 13, 2023, 2:20 pm), https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus [https://perma.cc/UG23-NW2R] (reporting on Crow's purchase of a property from Thomas, which Thomas failed to report); Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation With GOP Billionaire Who Later had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 pm), https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court [https://perma.cc/UQ8A-TA4P] (reporting on Justice Samuel Alito's acceptance of a private jet flight to a resort in Alaska, paid for by "Paul Singer, a hedge fund billionaire who has repeatedly aske the Supreme Court to rule in his favor in high-stakes business disputes"); *see also* James V. Grimaldi, Coulter Jones & Joe Palazzolo, *131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, WALL ST. J. (Sept. 28, 2021, 9:07 AM), https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421 [https://perma.cc/R9PH-9MG7].

corrupt interpreter may be distinguished from the disingenuous interpreter that motivates the current project. The interests of these actors are meaningfully distinct, and how to deal with the corrupt interpreter may therefore be largely bracketed from the present discussion of disingenuous and incompetent interpreters.

Still, a few words on the corrupt interpreter are warranted. Once the motivations of the corrupt interpreter are specified and separated from the standard disingenuous interpreter, it becomes apparent that legal measures beyond theories of interpretation may stymie the corrupt interpreter's efforts. Recent laws containing enhanced reporting requirements for stock trades by judges are one example of such a measure.[180] Further measures that prohibit judges from owning individual stocks and securities may do even more to counter corrupt interpreters.[181] Criminalizing the bribery of judges and attorneys involved in cases may also deter the corrupt interpreter. These proposals demonstrate that selecting a theory of constitutional interpretation may not be the only approach worth considering and, in the context of the corrupt interpreter, may not be the most effective avenue to take in response to the corrupt interpreter.

But this does not mean that constitutional interpretation should be counted out altogether. One potential theory noted above is the coin-flip method. As I note later in this section, this approach to interpretation is effective at preventing disingenuousness and incompetence from impacting how the Constitution is read (although there are other normative reasons to reject this approach). The coin-flip method's feature of trading judicial discretion and analysis for randomness seems to prevent the corrupt interpreter from interpreting the Constitution in a manner that serves the interpreter's selfish goals. After all, the inquiry

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[180] *See* Debra Cassens Weiss, *New Law Toughens Stock Disclosure Requirements for Federal Judges; Separate Ethics Bill Faces "Steep Climb,"* ABA J. (May 17, 2022, 8:35 AM), https://www.abajournal.com/news/article/new-law-imposes-tougher-stock-disclosure-requirements-on-judges-separate-ethics-bill-faces-steep-climb [https://perma.cc/5FW6-DSWC] (reporting on a requirement that judges "report stock trades of more than $1,000 within 45 days").

[181] *See* S.4177, Judicial Ethics and Anti-Corruption Act of 2022 (May 10, 2022) (available at https://www.congress.gov/bill/117th-congress/senate-bill/4177 [https://perma.cc/RW3M-TL3J]).

comes down to the result of a coin flip, which not even the corrupt interpreter can fake.

3. The Incompetent Interpreter

An incompetent interpreter tasked with interpreting the Constitution with an eye to the moral principles the Constitution embodies is required to take on several tasks. First, the interpreter must determine what those moral principles are.[182] The interpreter must then interpret the Constitution in a manner that aims to uphold and accomplish these principles, while potentially being subject to limiting factors such as maintaining fidelity to the Constitution's structure and existing precedent.[183]

At each of these stages, there are plenty of opportunities for the incompetent interpreter to slip up. He may fail to correctly elucidate the appropriate moral standards at the outset, leading to a flawed application of these principles to the provision at issue.[184] Or, if she happens to get the moral standards correct, she may fail to implement them in a proper manner. For example, the interpreter may be mistaken about the facts before the court or the consequences of the decision and mistakenly believe that a particular interpretation will result in a certain morally salient outcome.

Choosing an interpretation based on such a mistaken belief may result in consequences inconsistent with the applicable moral framework.[185] Alternatively, if a moral readings theory like that proposed by Dworkin is employed, an incompetent interpreter may

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[182] *See* FLEMING, *supra* note 27, at 73; DWORKIN, *supra* note 27, at 2-3.

[183] *See* DWORKIN, *supra* note 27, at 8-10.

[184] To borrow from the next section, something like this may occur in the context of an alternate moral readings approach, like common good constitutionalism, where one purports to engage in a common good approach to constitutional interpretation, yet focuses on individual rights rather than common social goods. *See* VERMEULE, *supra* note 44, at 6 n.17 (emphasizing that common good constitutionalism focuses on the common good as the highest constitutional principle and rejecting Dworkin's notion of potential conflict between individual rights and the interests of society).

[185] Drawing on an example from the field of ethics, G. E. Moore raises a similar scenario in the context of a utilitarian theory in which the morality of an action is determined based on the actual consequences of that action. G.E. MOORE, ETHICS 118-19 (1947 ed.). Under such an ethical theory, an action may end up being morally wrong even if an unforeseen event affecting the outcome of action that otherwise would have had the best possible consequences. *Id*.

have the correct moral standards in mind but fail to apply them in a manner that accounts for the Constitution's structure or prior judicial treatment of the provision.

To an extent, if certain constraints on the moral readings theory are removed, it seems less likely that an interpreter's incompetence will end up affecting the outcome of an instance of constitutional interpretation. If, for example, one was to apply a far more permissive moral readings approach without Dworkin's "fit" requirements that a reading align with the Constitution's text and historical interpretation, there would be fewer opportunities for the incompetent interpreter to make mistakes. As with the disingenuous interpreter, the removal or weakening of side constraints makes it less likely that the incompetent interpreter's tendency toward error will have a meaningful impact on her interpretive task.

And yet, unlike the disingenuous interpreter who is focused on preferred outcomes, the incompetent interpreter may nevertheless commit a host of errors in interpretation under a simplistic moral readings approach. Such a hypothetical theory may not lend itself to errors of fit, but the incompetent interpreter may still make mistakes regarding the consequences of a particular interpretation or the rules of the moral theory that is to be employed. Accordingly, while a simplified moral readings theory is relatively unaffected by a disingenuous interpreter, it may still be misapplied by incompetent interpreters.

D. Common Good Constitutionalism

The previous section on the moral readings approach to constitutional interpretation focused primarily on the versions of the theory expounded by Ronald Dworkin and James Fleming. Both Dworkin and Fleming offer sophisticated versions and defenses of the approach, consisting of requirements that the interpretive process involve determining both the fit and justification of a given provision. I address these versions of moral readings, but also ask that the reader consider an alternate moral readings approach with fewer side constraints.

Thanks to the rise of common good constitutionalism, this alternate version of the moral readings approach is no longer a pure hypothetical. As noted above, common good constitutionalism, as

formulated by Adrian Vermeule, aims to read the Constitution in a manner that conforms with the common good, which involves "reviv[ing] the principles of the classical law."[186] This, in turn, involves the classical legal tradition of law as "an ordinance of reason for the common good."[187] Definitions of this term tend to lead from one loaded and malleable notion to another. To start, there's the most immediate definition: the "happiness or flourishing of the community, the well-ordered life in the polis."[188] The common good may also be defined by what it aims to achieve, which is the "famous trinity" of peace, justice and abundance," which Vermeule equates with "health, safety, and economic security" and "solidarity and subsidiarity."[189]

Those desiring a more specific definition are rewarded with plenty of additional "subsidiary principles," although questions remain if these principles clear anything up, as they include:

> Respect for legitimate authority; respect for the hierarchies needed for society to function; solidarity within and among families, social groups, and worker' unions, trade associations and professions; appropriate subsidiarity, or respect for the legitimate roles of public bodies and associations at all levels of government and society; and a candid willingness to "legislate morality" – indeed, a recognition that all legislation is necessarily founded on some substantive conception of morality, and that the promotion of morality is a core and legitimate function of authority.[190]

In response to the concern that these broad attempts at a definition leave the nature of the common good unresolved, Vermeule and Conor Casey acknowledge that there is "an extremely rich and extensive philosophical debate in the natural law tradition over this question that we cannot do justice to here," although they are quick to qualify this response by noting that they proceed from "fundamentally different assumptions than those

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[186] VERMEULE, *supra* note 44, at 5.
[187] *Id.* at 3.
[188] *Id.* at 28.
[189] *Id.* at 7.
[190] *Id.* at 37.

underpinning some contemporary liberal and progressive jurisprudence."[191]

With broad formulations like this, it seems that common good constitutionalism is a version of the moral readings approach discussed above that is untethered by concerns about fit.[192] While Vermeule seems enthusiastic about drawing from historical practices, he elsewhere refuses to tie his theory down to historical tradition, arguing that his approach "translate[s] and adapt[s]" this tradition to modern practice.[193] As a result, common good constitutionalism seems constrained by little more than its promised, far-reaching results—results which, each day, veer closer to strict Catholic integralism.[194]

While such an approach may (rightfully) raise concerns, it is unclear how a disingenuous interpreter can twist this approach to one's desired political ends. Between Vermeule's argument that historical practice should not constrain common good constitutionalism and the theory's failure to define "common good" without references to numerous, morally loaded terms, the

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[191] Casey & Vermeule, *supra* note 46, at 114.

[192] Three decades before Vermeule's book on common good constitutionalism, Robin West sketched out a similar formulation in the context of describing progressive and conservative jurisprudence and how recent (at the time) cases demonstrated these approaches and how the conservative approach involved the "natural lawyer's identification of law with morality." Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 659 (1990).

[193] Adrian Vermeule, *The Common Good as a Universal Framework*, BALKINIZATION (July 27, 2022), https://balkin.blogspot.com/2022/07/the-common-good-as-universal-framework.html [https://perma.cc/3CCK-QPVK]; *see also* VERMEULE, *supra* note 44, at 3; Julia D. Mahoney, *A Common Good Constitutionalist Feminism?*, LAW & LIBERTY (Aug. 24, 2022), https://lawliberty.org/forum/a-common-good-constitutionalist-feminism/ [https://perma.cc/X8VB-L4S3] ("The classical legal tradition, in Vermeule's account, is sufficiently malleable to allow for what he describes as his 'methodological project,' which is to 'translate and adapt the principles of the classical legal ontology' to the world of the twenty-first century.").

[194] *See* VERMEULE, *supra* note 44, at 134-78 (detailing a wide range of promised results, including a far stronger administrative state, significant rollbacks to free speech and expression, banning pornography, prohibiting abortion, and other outcomes); *see also* Adrian Vermeule, *Liberalism's Good and Faithful Servants*, COMPACT (Feb. 28, 2023), https://compactmag.com/article/liberalism-s-good-and-faithful-servants [https://perma.cc/4SRB-WEEN] (critiquing those on the intellectual right who are not involved in "integralism or, as I think a more accurate term, political Catholicism" and arguing that [w]hat is at stake is no less than authority, the full authority of a reasoned political order, composed of both temporal and spiritual powers in right relation to the natural and divine law, that would put a mere Rome to shame").

disingenuous interpreter can argue that just about any moral or political end the interpreter favors contributes to the common good and should be read into the Constitution.[195] No abuse or dishonesty is needed: the disingenuous interpreter may simply define the "common good" to match that interpreter's desired results and proceed.[196]

Similarly, the incompetent interpreter seems to have little impact when proceeding under a common good constitutionalism rubric. The possibility remains that this interpreter may have a certain goal or outcome in mind but, due to a mistake of fact, reach an interpretation that ends up failing to achieve that goal. But there are far fewer opportunities for mistake when comparing common good constitutionalism to the historic-fact-intensive approaches of originalism and traditionalism, and even the moral readings approach—at least as formulated by Dworkin and Fleming.

To be sure, should common good constitutionalism continue to gain momentum as a theory of interpretation, its supporters may do the work needed to define the "common good" their theory is aimed to achieve. Vermeule himself acknowledges that much remains to be done, characterizing his recent book on the subject as a "broad sketch," and claiming "no pretense of historical or doctrinal completeness."[197] If common good constitutionalism ends up defining its methodology with less-loaded terminology or ends up developing grounding principles, this addition of detail may result in constraints similar to those set forth by Dworkin. If this occurs, it becomes at least conceivable that disingenuous and incompetent interpreters will be able to abuse the theory.[198]

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[195] *See* William H. Pryor, Jr., *Against Living Common Goodism*, 23 FED. SOC. REV. 24, 26 (2022) (warning that one might easily read "human dignity" into the place of "common good" and end up with a theory that "sounds a lot like [Justice] Brennan's living constitutionalism").

[196] *See* Leiter, *supra* note 59, at 1693-95, 1699-1700, 1702-04 (raising this argument against Vermeule's formulation of common good constitutionalism and against the practice of relying on natural law more generally).

[197] VERMEULE, *supra* note 44, at 25.

[198] Although critics have doubts. *See* Leiter, *supra* note 59, at 1693-95, 1699-1700, 1702-04.

E. Pragmatism

Under a pragmatic approach to constitutional interpreter, the interpreter's focus is on the consequences of interpretive decisions. Pragmatism, broadly stated, requires that the interpreter consider the consequences and choose the determination that results in the best outcome. Precedent, text, and other considerations may play a role, but a common theme across varied pragmatic approaches is the central role of consequences.[199]

Pragmatism presents a mixed bag for the disingenuous interpreter. On one hand, most formulations of pragmatism are decidedly anti-formalist—urging attention to a broad range of considerations and outcomes rather than a focus on rules or theories of interpretation.[200] Rejecting the rules and constraints that characterize some of the alternate approaches to constitutional interpretation discussed above means that there are fewer aspects of the theory that a disingenuous interpreter must work around.

Indeed, a broad version of pragmatism may be similar to the broad version of the moral readings approach discussed above: with few, if any, side constraints, a disingenuous interpreter may place his desired outcome as the goal that must be achieved, and interpret the Constitution in a manner likely to achieve that outcome. Under such a broad approach, the interpreter's disingenuousness has no apparent impact on the interpretive methodology.

A disingenuous interpreter may be more of a problem for a pragmatic approach that constrains interpreters to certain analytical methodologies or outcomes. Rather than the open-ended pragmatism of the last paragraph, consider a pragmatic approach that requires an interpreter to engage in constitutional interpretation with an eye to what interpretation will produce the best economic outcomes (higher GDP, lower unemployment, etc.).[201]

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[199] *See* Kende, *supra* note 60, at 636.

[200] *See* Posner, *supra* note 62, at 38 (describing pragmatism as a "powerful antidote to formalism"); Farber, *supra* note 60, at 1332 ("Constitutional law needs no grand theoretical foundation.").

[201] *See, e.g.*, Posner, *supra* note 62, at 42 (defending "the idea that law should strive to support competitive markets and to simulate their results in situations in which market-transaction costs are prohibitive").

This more fleshed-out version of pragmatism may lend itself to more overt manipulation by a disingenuous interpreter. An interpreter who wishes to reach particular political or moral outcomes, for example, may use the complexities of economic analysis as cover for an interpretation that achieves the desired moral outcome rather than one that is the most economically beneficial.[202]

It's a similar story with the incompetent interpreter. Under a broad pragmatist approach, the only influence an interpreter's incompetence will have will be that interpreter's misjudgment over whether an interpretation leads to certain consequences. This impact, of course, may be significant. An incompetent interpreter may desire a specified outcome, but the unpredictability of a decision's impact and how other laws or events may interfere with the realization of a desired outcome could prevent that desired outcome from occurring. This probability of mistaken outcomes may increase in more complicated factual situations where consequences are harder to predict—even with a simplified theory of pragmatic interpretation.

Chances of mistake become more likely if side constraints are added. Returning to the version of pragmatism that requires interpretations that will produce the best economic outcome, the potential complexity of determining a decision's impact on the economy may result in a hopeless task for the incompetent interpreter. This concern is not academic alone. Returning to *New York State Rifle & Pistol Association, Inc. v. Bruen*, the concern over courts being asked to resolve "'difficult empirical judgments'" over the impact of firearms restrictions was treated as justification

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[202] *See, e.g.*, Adam M. Samaha, *Low Stakes and Constitutional Interpretation*, 13 J. CONST. L. 305, 318 (2010) ("[A]ll too often we do not know enough about institutional design, future states of the world, or the appropriate ranking of normative goals in a diverse and complex society to confidently predict or judge the effects of constitutional choices, including any special impact of judicial intervention."); David M. Driesen, *Cost-Benefit Analysis and the Precautionary Principle: Can They Be Reconciled?*, 2013 MICH. ST. L. REV. 771, 776-77 (2013) (describing cost-benefit analysis methodology in the context of carbon emission abatement, and surveying some controversial and challenging aspects of the method, including applying monetary values to peoples' lives, and accounting for the well-being of people in less-developed countries with lower per capita income than other countries).

enough for the Court to adopt an approach to firearms regulation focusing almost entirely on history and tradition.[203]

The *Bruen* majority treated this as reason enough to jettison consideration of these consequences altogether in favor of a traditionalist approach.[204] While this may be an extreme reaction to the complications pragmatism may raise, these complications do present problems when disingenuous and incompetent interpreters are involved.

F. Common Law Constitutionalism

Common law constitutionalism requires legal actors to interpret the Constitution based on the body of case law that has built up over the centuries, rather than by resorting to the Constitution's text and original meaning.[205] Defenders of this approach argue that it is in line with the Court's actual practice, and is also well within the wheelhouse of lawyers and judges who engage in analogizing to prior case law on a routine basis.[206] Rather than engage in the historical investigation required by alternative approaches like originalism and traditionalism, the common law approach to interpreting the constitution requires judges and lawyers to "[r]eason[] from precedent, with occasional resort to basic notions of fairness and good policy."[207]

Anyone who's spent a bit of their time litigating cases should be able to identify a wealth of mechanisms a disingenuous interpreter may use to overstate, underemphasize, and otherwise misrepresent existing precedent. Through the process of "confining a case to its facts," a court can abandon old legal principles and replace them with new ones, all while avoiding the appearance of outright overruling precedent.[208] By blurring the line between a prior opinion's holding and dicta, courts and attorneys may frame earlier opinions as overly broad or narrow, depending on whether the present actor wants to extend the rule of the prior case or

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[203] N.Y. State Rifle & Pisol Ass'n., Inc. v. Bruen, 142 S.Ct. 2111, 2130 (2022).

[204] *Id.* at 2131.

[205] *See* STRAUSS, *supra* note 81, at 3.

[206] *See* STRAUSS, *supra* note 81, at 43; David A. Strauss, *supra* note 83, at 926.

[207] *See* STRAUSS, *supra* note 81, at 43.

[208] Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 VA. L. REV. 865, 867, 874-82 (2019).

distinguish the present interpretive task from a prior instance.[209] A court or attorney might distinguish a case based on facts or dicta of dubious relevance to the prior court's holding, thereby sidestepping relevant or controlling authority.[210]

Using a wall of authority that, upon close examination, ends up being of only tangential relevance may create an illusion of overwhelming authority in support of a legal rule or proposition.[211] All of this is made more likely to occur in light of attorneys' ethical obligations to represent their clients. While ethical rules may require the occasional acknowledgment of "directly adverse" precedent, the "directly" qualifier narrows the scope of this rule, and the rule itself does little to prevent attorneys from using every trick they can think of to minimize, distinguish, or otherwise bury such adverse precedent under as many arguments as they can make.[212]

These are just a few tactics that courts and attorneys may use to manipulate and abuse precedent so that it appears to support whatever result is desired. Each of these strategies is an opportunity for the disingenuous interpreter to claim to be faithfully following a common law constitutionalism approach, while truly pursuing desired moral and political ends. Those interpreters with extensive experience writing and arguing motions and appeals will likely be experts in such manipulation and therefore well positioned to be disingenuous interpreters.

But this expertise and experience cuts both ways. A disingenuous interpreter who wishes to manipulate precedent under a common law constitutionalism approach is operating in an environment filled with other actors with plenty of experience

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[209] Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2028, 2058-60 (1994) (addressing lawyers' "uncertainty in distinguishing between holdings and dicta" and the impacts this may have on legal rules to be derived from case law); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177-78 (1989) (Justice Scalia describing the evolution of his views on the scope of a holding—from a narrow view, to a broader, present, view that not only the outcome but also the mode of analysis used by the Supreme Court in a decision will be applied by lower courts).

[210] *See* Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 242 (2010).

[211] Author's Note: I haven't found any sources specifically discussing this argumentative tactic, but after about eight years of motion-heavy practice, I've learned that this happens far more often than it should.

[212] *See* MODEL RULES OF PRO. CONDUCT r. 3.3(a)(2) (AM. BAR ASS'N 1983).

making and responding to similar arguments. An attorney advancing a goal-oriented set of arguments from precedent will likely meet heavy resistance from the opposing party's counsel, who will almost certainly be well-versed in responding to similar tactics.

A court taking a similar approach will likely face criticism as well, as its primary audience will be other judges and attorneys with experience in legal reasoning. Unlike traditionalism's and originalism's reliance on historical argument—a method alien to most legal practitioners—common good constitutionalism has foundations in the job that attorneys and judges are trained to do.[213] Disingenuous interpreters will therefore have a tougher time getting away with twisting the meaning of the Constitution to suit their desired ends.

As for the incompetent interpreter, there's no denying that the process of reasoning from precedent and applying it to present cases is a task that requires training, practice, and experience. Many of the manipulation techniques described above may also be carried out by accident—one does not need to have nefarious intent to misread or misapply precedent.

Beyond all this, the nature of common law constitutionalism may mitigate the impact of the incompetent interpreter. Where attorneys' and judges' expertise and experience in legal reasoning gives them the resources to call out disingenuous interpreters, this same experience will help them call out and potentially correct instances of incompetent interpretation. Additionally, while the hypothetical incompetent interpreter is assumed to make mistakes wherever possible, the fact that common law constitutionalism aligns with lawyers' training and expertise makes it less likely that incompetence will manifest—at least compared to situations where attorneys and judges are forced into the task of engaging in nuanced historical analysis in which they lack training.

G. Present Public Meaning

Under an approach requiring that the Constitution be interpreted based on its present public meaning, a disingenuous interpreter may face more of a challenge than he might otherwise under an originalist or traditionalist theory. Recall that originalism

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[213] *See* STRAUSS, *supra* note 81, at 43.

and traditionalism provide an avenue for the disingenuous interpreter to make claims about historic constitutional meaning backed by selective investigation and reliance on authority. Even if the conclusions reached are out of step with the correct historical meaning, there is a fair chance that the disingenuous interpreter will get away with it. Historical analysis is complicated and may be an obstacle to those who would critique these conclusions. And even after a rigorous historical analysis, uncertainty remains as to what people living hundreds of years ago truly thought of the Constitution's meaning and whether the evidence that has survived is enough for us to reach the correct conclusions.

This landscape changes, though, if the Constitution is to be interpreted based on its *present* public meaning. Rather than make claims about the meaning of the Constitution during the reconstruction or founding eras, interpreters must claim that the meaning they are deriving is what the general public at the present moment interprets the text to mean. Framed this way, the present public meaning approach to interpretation resembles common law constitutionalism—except any member of the public has a say in whether the Court's interpretation comports to the present public meaning of the terms. In such an environment, it is far more challenging for the disingenuous interpreter to interpret the Constitution in a manner designed to achieve desired goals rather than comport with the present public meaning. There is simply nowhere for the disingenuous interpreter to hide.

To be sure, the task of determining present public meaning may itself be complex and involve steps that the disingenuous interpreter may manipulate. Defining public meaning is itself a difficult question. Is meaning a manner of popular usage alone?[214] Is there a threshold where an alternate definition becomes so prominent that there is no set public meaning? Who is the public? If the meaning of terms is determined through a survey of modern

[214] *See* Neil Goldfarb, *The Use of Corpus Linguistics in Legal Interpretation*, 7 ANN. REV. LINGUISTICS 473, 476 (2021) (noting judicial references to the "ordinary" use of terms and arguing that "ordinary" occurrences are those which occur most of the time).

usages, how should the context of those other instances be defined to ensure that things have not gone too far off track?[215]

Disingenuous interpreters may choose answers to these questions out of a desire for a particular policy goal, even if there are good reasons to define public meaning in a different manner. Additionally, where there is modern disagreement over the meaning of terms, it may be easier for a disingenuous interpreter to sell a particular reading of the Constitution and engage in selective citation of modern examples in line with the interpretation.

These issues all indicate that the present public meaning approach may not entirely undo the impact of an interpreter's disingenuousness. But it's worth noting that these issues also exist with any approach that seeks out the public meaning of the Constitution's provisions—including originalist approaches. To the extent that disagreement and controversy over the Constitution's meaning may not seem as acute in an originalist context, this may well be due to a lack of evidence and viewing the text in retrospect, rather than the actual existence of a set meaning.[216]

As for the incompetent interpreter, there are still plenty of ways that she may botch the interpretive task when attempting to determine the present public meaning of the Constitution. As noted above, "public meaning" is an inherently complex topic that raises a number of questions, all of which the incompetent interpreter

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[215] *See* Neil Goldfarb, *A Lawyer's Introduction to Meaning in the Framework of Corpus Linguistics*, 2017 BYU L. REV. 1359, 1379 (2017) (arguing that deriving "ordinary meaning" from "overall frequency will often be misguided" because "the meaning of a particular usage of a word is more likely to be determined by the immediate linguistic context in which it appears than by which sense of the word is the most frequent in general").

[216] The political implications of the Constitution and the need to obtain widespread support in order to ratify the Constitution and its amendments lends itself to the likelihood of multiple original public meanings. *See* Leah Ceccarelli, *Polysemy: Multiple Meanings in Rhetorical Criticism*, 84 Q. J. SPEECH 395, 404-06 (1998) (describing "strategic ambiguity," and how such ambiguity may be employed to elicit favorable responses from opposing factions within a speaker's audience); *see also* Alexander Hiland, *Polysemic Argument: Mitt Romney in the 2012 Primary Debates, in Disturbing Argument* in NCA/AFA CONFERENCE ON ARGUMENTATION, 168-73 (Ed. Catherine Palczewiski) (2014*); see also* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 556, 572-80 (2006) (noting that at the time of the Founding, the common law was "far from a unified field" and demonstrating divergences within the common law).

may answer incorrectly. Amassing a range of potential definitions, determining frequency and fit, and accounting for relevant contexts all are tasks the incompetent interpreter may fail.

Still—and again, in a parallel to common law constitutionalism—the chances of mistake by the incompetent interpreter are likely comparatively less than they would be under a traditionalist or originalist approach. The incompetent interpreter is ultimately a member of modern society and is necessarily immersed in modern language and usage. Accomplishing this proficiency with language eliminates a substantial part of the analysis required to accomplish a sufficiently rigorous examination of the Constitution's meaning in the distant past.[217]

H. The Coin-Flip Method

Finally, we arrive back at the coin-flip method. Here we can see how an interpretive approach may have a profound impact on the efforts of the disingenuous and incompetent interpreters.

It is unclear how a disingenuous interpreter can manipulate the coin-flip method. As discussed above, the coin-flip method provides that, when confronted with two or more potential interpretations of a constitutional provision, the toss of a coin or dice will decide which interpretation to adopt. Potential avenues for the disingenuous interpreter can be explained away through procedural adaptations. Concerned that a disingenuous judge will attempt to game the system and build his preferences into both interpretations? Give the task of framing the interpretations to someone other than the judge, such as the parties to the dispute. Concerned that a disingenuous judge will attempt to sabotage the coin or otherwise defeat the randomness of the procedure? Keep the coin and dice under lock and key.

Perhaps disingenuous actors on the Supreme Court will attempt to assert themselves through alternative avenues if the coin-flip method is adopted. They may, for example, place more of a focus on the certiorari determination or non-merits proceedings on

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[217] *See* Solum, *supra* note 158, at 1649-54 (describing the method of historical immersion and how it relates to constitutional interpretation).

the Court's "shadow docket."[218] Even if this occurs, it does not disprove the power of the coin-flip method to stop the disingenuous interpreter. It only shows that the method was so effective that the interpreter needed to abandon constitutional interpretation altogether to achieve his goals.

The incompetent interpreter also faces few challenges with the coin-flip method. There is no history to investigate, no public meaning to determine, no moral philosophizing to engage in, and no precedent to apply. There's only the matter of assigning an interpretation to each side of a coin and letting chance decide the case.

To be sure, the coin-flip method comes at a cost. It is simple and difficult to manipulate, but it results in determinations that are unpredictable, potentially inconsistent, and disconnected from the will of the people. As will be addressed in greater detail in the following section, the choice of an interpretive approach involves a variety of normative considerations, one of which should be whether a theory can be effectively implemented despite disingenuous and incompetent interpreters. Other normative considerations—democratic legitimacy, stability, and predictability, for example—ought to be considered and, in the case of the coin-flip method, likely outweigh the ease of implementation the coin-flip method promises.

V. COUNTERING DISINGENUOUS AND IGNORANT INTERPRETERS

This final section takes what we've learned from subjecting each of the above theories of constitutional interpretation to the stress test of disingenuous and incompetent interpreters. As noted above, some of the theories seemed to be less-affected by disingenuous interpreters—either because they included steps or features that made it more difficult for the theory to be manipulated, or because the theories themselves seemed so consistent with the efforts of the typical disingenuous interpreter that their manipulation was virtually incoherent. Here, I attempt

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[218] *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBR. 1, 4-5 (2015) (describing the Court's non-merits orders and proceedings as the Court's "shadow docket"); *see also* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125, 128-32 (2019) (describing the Court's orders and decisions issued "without full briefing and oral argument" as the Court's "shadow docket").

to parse out what features of the theories made them more or less resistant to disingenuous and incompetent interpreters. But first, a note on where this analysis fits in with larger debates over constitutional theory and why this inquiry is worth following.

A. The Need to Confront Disingenuous Interpreters

At the top of the Article, I situated the present discussion in the context of arguments over which theory of interpretation to accept. At this level, there are several ways of going about deciding on a theory. Some argue that interpreters are required for some reason to apply a particular theory of interpretation, while others treat the matter as one of best achieving normative goals like societal well-being, democracy, or constraint. [219]

This Article takes the latter approach and casts the debate between theories of interpretation as one that appeals to various normative considerations. These considerations include, but are likely not limited to, constraint,[220] predictability,[221] democratic

[219] Stephen Sachs labels the former sets of arguments as "normative," and the latter as "conceptual." Sachs, *supra* note 14. For an example of the former see MCGINNIS & RAPPAPORT, *supra* note 13 (arguing for a variety of reasons that originalism leads to better outcomes than alternative approaches to interpretation). For an example of the latter, see Christopher R. Green, *This Constitution: Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607 (2009) (arguing that the constitutional oath in which officials swear to follow the Constitution, along with various references to "this Constitution" in the Constitution's text mandate that interpreters follow the Constitution's original meaning).

[220] STRAUSS, *supra* note 81, at 2-3 (2010); Rakove, *supra* note 114 ("Originalism is often described and justified as a means of preventing modern courts from imposing their moral preferences on cases . . . .").

[221] *See* LON L. FULLER, THE MORALITY OF LAW 79-81 (Rev. Ed. 1969) (arguing for the importance of consistency in law and noting that people arrange their routines, expectations, and lives around what the law requires).

legitimacy,[222] transparency,[223] and desirable results.[224] Those who wish to argue that something apart from normative considerations demands a particular theory of interpretation may not like this approach, but addressing their attempts at arguing that a certain theory of interpretation is required is an extensive, separate undertaking well beyond the scope of this Article.[225]

Once we accept the premise that the level of the debate is at the stage where one is choosing between theories of interpretation, arguments against the relevance of disingenuous or incompetent interpreters lose their force.

Christopher Green, for example, dismisses arguments that originalism is indeterminate.[226] He uses an analogy involving a drunk searching for his keys underneath a streetlight.[227] When asked by a police officer if he lost his keys in that spot, the drunk responds that he lost them down the street, but the light is much better in the place where he is looking.[228] Green suggests that those raising concerns over originalism's indeterminacy are taking the approach of the drunk—they argue for an approach to interpretation that is easier to implement and involves fewer epistemological challenges, all the while knowing that the truth lies elsewhere.[229]

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[222] *See* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 399 (2013); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1132 (1997).

[223] *See* Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1692 (2016).

[224] Desirable results may range from good results in the abstract, to particular outcomes. For an abstract approach, see MCGINNIS & RAPPAPORT, *supra* note 13. For an approach that focuses on particular outcomes, see Cass R. Sunstein, *"Fixed Points" in Constitutional Theory* (Harvard Public Law Working Paper, Paper No. 22-23, July 21, 2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4123343 [https://perma.cc/DQH2-U2R3] (arguing that debates over theories of interpretation should identify cases that represent "fixed points" that cannot be overruled and select or reject theories based on whether they would uphold or overrule these fixed points).

[225] For an initial formulation against one attempt at arguing that originalism is a required approach to interpretation, see Section IV. of Michael L. Smith, *The Present Public Meaning Approach to Constitutional Interpretation*, 89 TENN. L. REV. 885 (2023).

[226] Christopher R. Green, *Constitutional Theory and the Activismometer: How to Think About Indeterminacy, Restraint, Vagueness, Executive Review, and Precedent*, 54 SANTA CLARA L. REV. 403, 404-05 (2014).

[227] *Id.*

[228] *Id.*

[229] *Id.* at 404-05, 418; *see also* Green, *supra* note 136, at 509-513.

The problem with this formulation is that it assumes from the outset that originalism is the correct standard for determining the meaning of the Constitution. Knowing that the key is in a poorly lit part of the street begs the question that originalism is the correct method of interpretation. Instead, a better analogy is to view the debate between constitutional theories as being faced with multiple streets, each of which has a varying degree of lighting, and each of which includes an identical copy of the key that the drunk is trying to locate. Those streets that are better lit are those that are more resistant to the disingenuous or incompetent interpreter.

As Larry Alexander and Frederick Schauer have suggested, "for each interpretive methodology there is a distinct and different constitution."[230] Indeed, this approach to arguing between different interpretive theories—one which seems to focus on identifying a particular "truthmaker" for constitutional claims (that is, identifying a standard by which a particular claim about the meaning of a constitutional provision is true or false)—seems to be one that Green himself adopts and endorses.[231]

What's the point of this highly theoretical discussion of drunks, lampposts, and truthmakers? The primary purpose is to argue for the engagement of many of the scholars identified at the top of this Article. Those who jump to dismiss concerns about disingenuous interpreters often also minimize or reject the importance of arguments about implementing theories of constitutional interpretation at all. The foregoing discussion seeks to clear up this confusion and demonstrate how much of these dismissals beg the question by assuming that a particular theory of interpretation is the one correct approach.

B. What Makes Theories Resistant to Disingenuous Actors?

With the level of debate and significance of implementing theories of constitutional interpretation confirmed, I now turn to the survey of theories above. From that discussion, it is apparent that some theories of interpretation are more susceptible to

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[230] Larry Alexander & Frederick Schauer, *Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*, in Matthew D. Adler & Kenneth Einar Himma, Eds., THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 183-184 & n.31 (2010).

[231] Green, *supra* note 136, at 509-513.

manipulation than others. Similarly, some are more difficult to implement and carry a higher probability of error than other theories. This raises the question: what is it about theories of interpretation themselves that make them more or less susceptible to the negative influences of disingenuous and incompetent interpreters?

1. Transparency

Whether a theory is susceptible to manipulation or misuse appears to be related to how transparent that theory of interpretation is. Transparency is a measure of how easy it is for a third party to review and evaluate the interpretive work done by the constitutional interpreter. This level of ease is affected by whether each step of the interpretive process is made visible by the interpreter and the level of expertise required to understand each step of the interpretive process.

For an example of the first aspect of transparency, consider a judge issuing a judgment over a motion for summary judgment. Under one approach, the judge might simply overrule the motion or rule in favor of the motion without issuing a written opinion detailing the analysis behind that ruling. Under an alternate approach, the judge may issue the ruling in the form of a written opinion, detailing the arguments and authorities the judge relies upon to reach the final conclusion. The latter approach is more transparent, as the interpretive process is made visible to observers in the form of the written opinion.[232]

As for the level of expertise required to understand each step of the interpretive process, this relates both to the level of education and experience required to review and confirm the accuracy of each step of the interpretive process, as well as the type of education and experience required. Methods that do not require specialized training or experience and that may be understood by a member of the general public are more transparent on this front. Methods that require a legal education and training in the practice of law and

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[232] *See* Nancy S. Marder, *The Supreme Court's Transparency: Myth or Reality?*, 32 GA. ST. L. REV. 849, 851 (2016) ("[T]he starting point for assessing the Court's transparency is that its proceedings are public and its opinions are written and published.").

legal argumentation may be less transparent than such an approach, but still fairly transparent in practice, as most interpretation is performed and reviewed by those with legal training and experience. A theory of interpretation that requires education and experience in a field of non-legal expertise is far less transparent, requiring those who practice the law to not only understand the law and legal practice, but also master a separate discipline such as history.

Applying this to the theories above, there seems to be a correlation between transparency and ease of manipulation or misuse by disingenuous and incompetent interpreters. Originalism, for example, lacks transparency because determining the original public meaning of the Constitution requires expertise and experience in history—something that most lawyers, judges, and members of the public lack.[233] Disingenuous interpreters may take advantage of the opacity of originalism and assert interpretations that are not, in fact, in line with original meaning (assuming there is indeed a coherent original meaning). Incompetent interpreters may approach the interpretive task in good faith but find themselves out of their depth in light of the expertise required, resulting in a high probability of mistaken conclusions.

The impact of transparency is apparent when comparing originalism to the present public meaning approach to constitutional interpretation. These two theories have a lot in common. Both are textualist—beginning their analysis with the text of the Constitution.[234] Both theories focus on the "public meaning" of the text as well, meaning that the task of determining what "public meaning" is and how it may be determined in practice is a parallel undertaking for both originalist and present public meaning interpreters. But the theories differ on the timing of the relevant public meaning.

Present public meaning interpreters reject the originalist requirement that one must return to the time of the Founding or

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[233] Author's Note: Here, as above, I am referring to "originalism" to mean determining the original public meaning of the Constitution.

[234] *See* Katie Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW 115, 125 (2022) (arguing that alternate versions of originalism like, "original expected applications" are nontextualist, but acknowledging that original public meaning originalism, as formulated in modern, mainstream academia, "explicitly stress[es] the importance of text as critical").

Reconstruction to determine the meaning of the Constitution, and instead focus on the Constitution's present-day meaning. In doing so, the present public meaning approach is more transparent. It no longer requires historical expertise to determine the Constitution's meaning—there's no need to sift through historical sources or immerse oneself in the past if the present meaning is what is at issue. Indeed, those without legal education or experience can play an involved role in reviewing those who apply the present public meaning approach, as these observers are immersed in modern society and present-day language.[235]

This increased transparency appears to be responsible for the increased difficulty that disingenuous interpreters face under a present public meaning approach. Disingenuous interpreters can no longer point to the complexities of history to explain reaching a desired result that is out of step with modern understandings of the Constitution's meaning. Instead, they must convince their audience that their desired meaning of the Constitution is, in fact, the present meaning of the Constitution. Because observers are far more familiar with the present meaning of the Constitution by virtue of their immersion in present day linguistic conventions, they are far more likely to spot and call out instances where disingenuous interpreters attempt to pull one over on them.

Increased transparency means that observers, both within and beyond the legal system, may review the process that interpreters follow and call out mistakes and manipulation. As a result, disingenuous interpretation becomes more difficult. The disingenuous interpreter is more likely to face criticism and backlash if his tactics are spotted. For an attorney arguing in court, these impacts may be profound—resulting in adverse rulings, sanctions, and other consequences.

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[235] Of course, there are limits, such as where the Constitution's text itself veers into legal terms of art. *See, e.g.*, Matthew J. Steilen, *Bills of Attainder*, 53 HOUS. L. REV. 767 (2016) (undertaking an in-depth analysis into the meaning of "bills of attainder," as stated in Article I, Section 9 of the Constitution). How much of the Constitution consists of legal terms of art, as opposed to language directed to the ordinary speaker of English, remains a separate matter of debate that is bracketed for purposes of this Article. *See* John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1326-30 (2018) (arguing that the Constitution should be read in the "language of the law" rather than in ordinary English).

Disingenuous judges—especially federal judges—may not face consequences that are as dramatic or immediate, but they too will likely be concerned with backlash out of fear that this may undermine their, or the judiciary's, legitimacy.[236] Fear of political consequences and loss of legitimacy may deter disingenuous interpreters from pursuing their moral and political ends. All of this suggests that theories of interpretation that, by their nature, are more transparent are more likely to counteract the efforts of disingenuous interpreters.

2. Complexity

In addition to a theory's transparency, the complexity of a theory of constitutional interpretation appears to affect the level of impact that a disingenuous or incompetent interpreter may have when applying the theory. Theories with higher numbers of steps, qualifications, or side constraints tend to have more opportunities for a disingenuous interpreter to manipulate the approach, or for an incompetent interpreter to make mistakes.

Comparing the moral readings approach and common good constitutionalism demonstrates this. The moral readings approach, as formulated by scholars like Dworkin and Fleming, requires not only that interpreters determine what reading of the Constitution is most in line with moral goals like human dignity, but also that these interpreters determine that the interpretation fit with the Constitution's text and historical application.[237] The requirement that the moral reading "fit" the Constitution is a side constraint beyond a less-complex version of the moral readings theory that minimizes or eliminates this requirement of consistency with the

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[236] RICHARD H. FALLON JR., LAW AND LEGITIMACY IN THE SUPREME COURT 130 (2018) ("[L]egitimacy in Supreme Court decision making requires good faith in argumentation and consistency in the application of legal norms."); *see also* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2272-73 (2019) (describing the external sources of modern arguments against the Court's legitimacy and the challenge the Court faces in attempting to uphold its legal and sociological legitimacy); Editorial Board, *The Supreme Court Isn't Listening, and It's No Secret Why*, N.Y. TIMES (Oct. 1, 2022), https://www.nytimes.com/2022/10/01/opinion/supreme-court-legitimacy.html [https://perma.cc/96MS-R5JY] (arguing that the Supreme Court's pursuit of "partisan victories" has "squandered" its legitimacy).

[237] DWORKIN, *supra* note 30, at 239; DWORKIN, *supra* note 27, at 10; FLEMING, *supra* note 41, at 94.

Constitution's structure and prior application. Common good constitutionalism exemplifies a move in this direction, with its modern defenders urging its application to broad constitutional terminology and refusing to tie down their definition of the "common good" to be achieved by references to any historical laws or practices.[238]

As discussed above, the move to fewer steps and side constraints undoes the influence of the disingenuous interpreter. Recall that the standard disingenuous interpreter that prompted all of this discussion in the first place is the actor who seeks to manipulate constitutional interpretation to accomplish his desired political and moral ends. When the theory of interpretation itself is defined as little more than those ends, however, the disingenuousness of the interpreter ends up making little difference.

The influence of the incompetent interpreter is also reduced when theories of interpretation are less complex. Sticking with the moral readings approach and common good constitutionalism, both demonstrate that the more constraints that are built into a theory of interpretation, the more opportunities there are for an incompetent interpreter to make a mistake. Broad versions of both theories require little more than the interpreter to interpret the Constitution in a manner that will accomplish whatever moral goals the interpreter prefers. To be sure, the incompetent interpreter may still mistakenly believe that certain outcomes will accomplish certain moral goals. But the risk that the incompetent interpreter will be attempting to accomplish the wrong sort of moral goals, or do so in a manner inconsistent with constitutional structure, no longer exists as it has been defined out of the theory.

The impact of complexity may not only be felt at the level of the theory of constitutional interpretation an actor employs. It seems that complexity also affects the likelihood of disingenuous or incompetent interpretation at the level of the constitutional provision that is at issue. Some constitutional provisions are relatively simple to interpret and apply. There are few books or law review articles debating the meaning of the Constitution's requirement that each state is to be represented by two senators,

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[238] *See* VERMEULE, *supra* note 44, at 5-6, 37.

for example.[239] Other constitutional provisions, however, are more open-ended and ambiguous, and these provisions tend to attract far more debate and attention than other, straightforward provisions.[240]

Where the underlying constitutional language is not a simple, numeric rule or statement but rather a more complicated, morally loaded term, debates over meaning tend to flourish and the impact of disingenuous and incompetent interpreters tends to be more profound.[241] Whether complexity at the constitutional level gives the same leeway to disingenuous and incompetent interpreters as complexity at the level of interpretive theory is worth flagging now. As for parsing out this puzzle, that is a task for another day.

C. Implementation As a Normative Consideration

As noted above, this Article is meant to contribute to debates over what theory of constitutional interpretation ought to be adopted. Normative considerations at this level of debate abound—

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[239] *See* U.S. CONST. art. 1, § 3. This provision certainly draws its share of criticism and calls for reform, but those making these arguments do not doubt or debate the meaning of the provision at issue. *See, e.g.*, Suzanna Sherry, *Our Unconstitutional Senate*, 12 CONST. COMMENT. 213, 213 (1995) (arguing that, were Article I, section 3 not part of the Constitution, it "would undoubtedly be unconstitutional" because it "is in conflict with the most basic principles of democracy underlying our Constitution and the form of government it establishes").

[240] *See* Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319, 320 (2009) (arguing that when dealing with constitutional "rules," rather than "standards," the Supreme Court tends to take a literal approach rather than an "evolutionary approach" that may result in the updating or adaptation of the provision to novel circumstances).

[241] The Fourteenth Amendment's Due Process Clause is one such example of a complex term that has led to a vast literature and intense debate, with accusations of motivated reading throughout. *See* Hugh Baxter, *Why the "Originalism" in Balkin's Living Originalism*, 92 B.U. L. REV. 1213, 1217 & n.30 (2012) (arguing that Jack Balkin's broad approach to original meaning allows for modern interpretations to be applied to numerous constitutional provisions, including the Due Process Clause); Daniel Kelly, *Substantive Due Process: The Trojan Horse of Judicial Legislation*, 51 JOHN MARSHALL L. REV. 261, 261-62 (2018) ("Unlike most constitutional doctrines, [substantive due process theory] has no cognizable ties to a clause about *process*, and this paper submits it is nothing more than a thinly veiled pretext for the most odious form of judicial legislation."); Douglas NeJaime & Reva Siegel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1939-40 (2021) (arguing against objections that strong protections originating in the Due Process Clause will lead to anti-democratic results and claiming that modern substantive due process cases involve questions of political representation and equality).

from concepts like democratic legitimacy and constraint, to preserving or ensuring certain results in canonical cases like *Brown v. Board of Education*.[242]

Identifying common themes that make theories of interpretation more or less susceptible to abuse or mistake is an important task. To the extent that these themes overlap with normative reasons for accepting a theory, those normative considerations become all the more important in debates over theories of interpretation. Transparency, for example, is an important consideration in debating between theories of interpretation because it may encourage values of democratic legitimacy by shedding more light on the machinations of judicial reasoning and revealing mistakes or motivated reasoning.[243] This Article suggests a further reason transparency is important: the light it sheds on the interpretive process makes it less likely that these processes will be abused by disingenuous interpreters.

Still, transparency is not everything. The complexity of the interpretive theory may also have an impact on the disingenuous and incompetent interpreters. Other common elements not addressed in this Article may also play a role. To ensure that theories are weighed with disingenuous and incompetent interpreters fully in mind, it is worth treating whether a theory may be effectively implemented as a separate normative consideration when debating between theories. Under this approach, theories of interpretation that, all things consider, are more likely to be faithfully and correctly implemented are preferable to theories that are more likely to be abused or misapplied.

Treating implementation as its own normative consideration ensures that theories are considered with an eye to how they will eventually be applied in the real world. It's one thing to develop an elegant formulation and defense of a theory of interpretation as a standard for determining constitutional correctness. But this only goes part of the way to making a difference to actual interpreters, who need to put the theory into practice, account for the schemes of

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[242] 347 U.S. 483 (1954).

[243] *See* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 667 (2009) (noting originalists' arguments that "it is most consistent with constitutional democracy to use ideologically neutral and transparent criteria" when judging).

disingenuous actors, and avoid mistakes. Defenses of interpretive theories that account for implementation and demonstrate how this goal is achieved in realistic circumstances are more thorough and useful than arguments that fail to take these considerations into account.

One may object to treating implementation as a separate normative consideration because the consideration of constraint is essentially equivalent and has been around longer.[244] As the argument goes, if we accept that theories that constrain judicial discretion more effectively than alternate theories are more desirable than those alternate theories, there's no need to treat implementation as a separate normative consideration.

One problem with this formulation, however, is that the arguments from constraint tend to assume that a theory of interpretation will be applied in good faith. Justice Scalia, for example, argues that alternatives to originalism leave too much discretion to judges—claiming that alternatives permit judges to weigh "fundamental values," which end up being little more than the personal preferences of the judges.[245] Originalism, Scalia argues, avoids this problem because it "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."[246] But this argument only succeeds if one assumes that self-proclaimed originalists will, in fact, apply the historical criterion in good faith—and the disingenuous interpreter spells doom for this assumption. This is not to say that constraint and implementation are without overlap, but it demonstrates the need for a separate consideration of implementation—one which

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[244] Recall that arguments sounding in constraint motivated the rise of modern originalism, though modern originalists now tend to de-emphasize constraint when defending originalism. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 465 (2d ed. 1997) ("The nation . . . should not tolerate the spectacle of a Court that pretends to apply constitutional mandates while in fact revising them in accord with the preference of a majority of the Justices who seek to impose *their* will on the nation."); Solum, *supra* note 114; Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 392 (2013) (arguing that constraint is no longer "offered as a compelling justification for the adoption of originalism").

[245] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 863 (1989).

[246] *Id.* at 864.

considers the very real possibility of disingenuous and incompetent interpreters.

Another problem with the claim that constraint is equivalent to implementation is that this is not the case when one considers theories like moral readings and common good constitutionalism. Broad formulations of these theories may account for disingenuous interpreters by incorporating the political and moral goals of these interpreters. When this occurs, the impact of a disingenuous interpreter becomes virtually unnoticeable. And yet, one would not claim that such a permissive approach to interpretation constrains the interpreter.

Debates between theories of constitutional interpretation should account for whether the theories discussed can be implemented feasibly by those tasked to do so. Rather than dismissing or hypothesizing away disingenuous and incompetent interpreters, those defending theories of interpretation must assume those interpreters will exist and explain whether and how their theories will mitigate the impacts of these interpreters. Failure to do so will result in a discussion divorced from reality and will be of no use to those who must practice the task of constitutional interpretation.

CONCLUSION

This Article began by setting forth a common back-and-forth between those who defend theories of interpretation and their critics. In the face of objections arising from the potential abusive or mistaken application of theories of interpretation, defenders of the theories tend to dismiss or deny the relevance of disingenuous and incompetent interpreters. In doing so, the discussion of the theory becomes unmoored from a world where interpreters whose moral and political motivations do, in fact, have an impact on how the task of constitutional interpretation is performed.

This Article demonstrates that theories of interpretation may lend themselves to greater manipulation or rates of error than other theories. Theories that are more transparent are less likely to be manipulated, out of concern that the discovery of interpreters pursuing their political goals will be met with backlash. Theories that are less complex also lend themselves to less error and manipulation, as there are fewer avenues for disingenuous actors

to exploit and incompetent interpreters to botch. Debates between theories of interpretation must not assume away the existence of incompetent or disingenuous interpreters. This tactic ignores reality and sidesteps real problems that certain theories of interpretation may have. Rather than find refuge in abstraction, constitutional theorists must wrestle with reality and refine their defenses accordingly.

This Article is meant to be a foundation for further discussion over whether theories of interpretation are more or less susceptible to abuse and mistake.[247] Undoubtedly, more remains to be said, and it is my hope that this will occur once these theories' advocates stop wishing away disingenuous interpreters and begin considering how their arguments operate on a practical level.

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[247] One potential direction of that discussion may be to account for theories of interpretation that I do not discuss here, or which receive briefer treatment, as I do not claim to canvass all theories of interpretation or all variations of each theory. *See, e.g.*, ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 155 (2d ed. 2005) ("'[O]riginalism' is not the title of one particular theory of constitutional interpretation but rather the name of a family of diverse ideas, some of which are actually at odds with each other."); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 260 (2009) (describing the "countless iterations" of modern "original-understanding originalism")