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Original Meaning Without Originalism

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I. INTRODUCTION

Is it possible for a constitutional theorist to give due regard to original meaning in constitutional interpretation without being an originalist? Narrow originalists, such as Robert H. Bork and Justice Antonin Scalia, have asserted that it is not.[1] On their view, it is hypocritical for anyone who is not a narrow originalist to make recourse to original meaning—a clear case of the devil quoting scripture. Their view is bogus. Nevertheless, constitutional theorists who are not narrow originalists have not paid sufficient attention to how arguments based on original meaning function in constitutional law. One of the many virtues of Michael C. Dorf's excellent article[2] is that it shows that one can take original meaning seriously without being a narrow originalist. Dorf argues persuasively that the Supreme Court itself, when it makes arguments based on original meaning, is not typically being originalist in the conventional, narrow sense. This is a significant argument and an important contribution to constitutional theory.

Dorf's larger project, as he puts it, is to integrate normative and descriptive constitutional theory.[3] He posits two gaps between normative and descriptive accounts of constitutional law.[4] Dorf's first gap poses a challenge for originalists: Constitutional theorists who accept an originalist normative account must acknowledge that they cannot account descriptively for many nonoriginalist constitutional law decisions. His second gap poses a challenge for nonoriginalists: theorists who accept a nonoriginalist normative account must acknowledge that they cannot account descriptively for the significant role that arguments based on original meaning play in constitutional law.

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1. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 187-240 (1990) (arguing that constitutional theorists who are not narrow originalists advocate forms of revisionism that reject original meaning and substitute other methods of constitutional interpretation); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37-47 (1997) (same); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-64 (1989) (same). We should distinguish narrow or conventional originalists such as Bork and Scalia, who conceive original meaning at a relatively specific level of abstraction, from broad originalists like Bruce Ackerman and Lawrence Lessig, who conceive original meaning at a considerably higher level of abstraction. *See infra* note 6 and accompanying text.

2. Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765. In this response, I use the term "original meaning" because that is the term that Dorf uses. I intend here to bracket, and not take a position on, questions concerning the difference or relationship between original meaning, original understanding, original intention, and the like.

3. *Id.* at 1767.

4. *Id.*

Dorf accepts the first gap as unbridgeable, and he does so without evident regret. It would require a conservative counterrevolution beyond the wildest apocalyptic dreams of Bork and Scalia to close that gap, and the moment of closure would be fleeting for courts promptly would resume their practice of drawing upon sources besides original meaning. Dorf's article is notable, and laudable, for the extent to which it assumes that we inhabit, if you will, a "postoriginalist" world. Because of this assumption, he rejects two other attempts to bridge the first gap. He provides insightful and incisive critiques of broad originalism—which he calls "a kinder, gentler originalism"[5]—of the sort propounded by Bruce Ackerman and Lawrence Lessig.[6] He also advances cogent critiques of the eclecticism proposed by Henry P. Monaghan, Philip Bobbitt, and Richard F. Fallon.[7]

Dorf takes up the challenge of bridging the second gap. He does so by attempting to integrate a nonoriginalist normative account of constitutional decision-making with a descriptive account of how arguments based on original meaning actually function in Supreme Court opinions. In his descriptive account, Dorf introduces the evocative categories of ancestral originalism and heroic originalism, and provides an instructive analysis of the role of post-enactment history in constitutional interpretation.[8] This descriptive account is quite illuminating and helpful. I fear, however, that Dorf does not succeed in integrating his descriptive account with a normative account, and thus fails to bridge the second gap. In Part II, I contend that he does not develop a full normative account, nor does he show how such an account entails or requires, or is otherwise linked to, his descriptive account. Dorf could narrow the second gap by embracing a normative account like Ronald Dworkin's moral reading of the Constitution,[9] Lawrence Sager's justice-seeking constitutionalism,[10] or my own

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5. *Id.* at 1774.

6. *Id.* at 1774-87 (criticizing 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995); and Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993)). Other scholars have sought to develop similar forms of broad originalism. *See, e.g.*, Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. (forthcoming 1997); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

7. Dorf, *supra* note 2, at 1768-69, 1787-96 (criticizing PHILIP BOBBITT, CONSTITUTIONAL FATE (1982); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); and Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988)).

8. *Id.* at 1800-16.

9. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 1-38, 72-83 (1996) (arguing for the moral reading of the Constitution: that the Constitution embodies abstract moral principles—not particular historical conceptions—and that interpreting and applying those principles requires fresh judgments of political theory about how they are best understood); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249 (1997) (same).

10. *See* Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 415-16 (1993) (arguing for a justice-seeking account of the Constitution:

Constitution-perfecting theory of constitutional constructivism.[11] Such normative accounts entail a commitment to construct the interpretation that best fits and justifies the constitutional text, history, and structure, as well as practice, tradition, and culture. In Part III, I suggest that Dorf's descriptive account significantly contributes to our understanding of the quest for fit with such constitutional materials. My critique is largely sympathetic and mostly architectural; that is, it focuses on how Dorf frames and structures certain issues and arguments.

II. BRIDGING THE GAP BETWEEN DORF'S NORMATIVE AND DESCRIPTIVE ACCOUNTS

To succeed in bridging the second gap, Dorf would need to provide a full normative account of constitutional interpretation, provide a full descriptive account, and integrate the two by elaborating how the first entails or requires the second.

Does Dorf provide a full normative account? He states that he rejects the normative account of narrow originalism, and accepts the normative account of nonoriginalism.[12] But he does not fully develop a nonoriginalist normative account or adopt any well-developed account of that sort. Instead, throughout the article, the term "nonoriginalism" basically serves as a placeholder for a normative account that is never developed. Moreover, the term "nonoriginalism" does not present Dorf's arguments in their best light. Dorf is vulnerable in calling his normative account "nonoriginalism," because he plays into the derogatory terms that the narrow originalists have used to stack the deck against views like his own.[13] I believe that Dorf's own normative views have deep affinities with the normative accounts of Dworkin, Sager, and myself[14] and that

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that the abstract, liberty-bearing provisions of the Constitution cannot be given concrete meaning without engaging the interpreter's judgments of political justice); Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893, 893 (1990) (same); *see also* Lawrence Sager, *The Betrayal of Judgment*, 65 FORDHAM L. REV. 1545, 1552 (1997) (same).

11. *See* James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 15 (1995) (arguing for a Constitution-perfecting theory that reinforces not only the procedural liberties but also the substantive liberties embodied in the Constitution); James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 214-18 (1993) [hereinafter Fleming, *Constructing*] (same). In this response to Professor Dorf's article, I draw upon, and further develop, arguments that I have made previously. *See* James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335 (1997) [hereinafter Fleming, *Fidelity*].

12. Dorf, *supra* note 2, at 1767.

13. I reject the distinction between originalism and nonoriginalism, just as I reject the distinction between interpretivism and noninterpretivism. *See* Fleming, *Constructing*, *supra* note 11, at 221 n.42; Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 471-76 (1981) (rejecting these distinctions).

14. The affinities between Dorf's normative views and Dworkin's normative account are evident throughout his article. *See, e.g.*, Dorf, *supra* note 2, at 1772 & n.30, 1809 n.219; *see also* Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133 (1997) (reviewing RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION (1996)). In turn, there are deep affinities between Dworkin's account and those of Sager and myself.

any of these accounts would provide firmer normative ground for his project than does nonoriginalism.

Does Dorf provide a full descriptive account? Again, here is where Dorf's most significant contributions lie. His descriptive account considerably advances our understanding of how arguments based on original meaning actually function in Supreme Court opinions. I shall assess this account more fully below.

Finally, does Dorf integrate his normative account with his descriptive account? I do not believe that he makes an argument for why his "nonoriginalist" normative account entails or requires his descriptive account or that he otherwise establishes a link between the two. He does not explain why persons accepting a nonoriginalist normative account would care about, much less be required to make recourse to, original meaning in the sense of ancestral originalism and heroic originalism—nor does he explain why a nonoriginalist would consider it appropriate to ponder the lessons of history contained in post-enactment history.

What explains this curious disjuncture between Dorf's normative account and his descriptive account, given that his stated aim is to integrate them? I have two thoughts. First, what drives his descriptive account is not his normative account but rather his aim to describe how arguments based on original meaning actually function in Supreme Court opinions. Thus, it should come as no surprise that his descriptive account does not seem to follow from his normative account. Second, having provided a rich descriptive account, Dorf does not take the next step of addressing what normative account would justify constitutional interpretation that accords with that descriptive account. Instead, he simply states that he accepts a nonoriginalist normative account.

How might a normative account be integrated with a descriptive account? For example, what provides the link between the normative account and the descriptive account of well-developed constitutional theories, such as narrow originalism and Dworkin's moral reading? I believe that this link is provided by conceptions of fidelity in constitutional interpretation. The question of fidelity poses the questions "*What* is the Constitution?" and "*How* should it be interpreted?"[15] Corollaries of the first question would include: "Does the Fourteenth Amendment embody abstract moral principles or enact relatively concrete historical rules?" and "Does the Constitution presuppose a political theory of majoritarian democracy or one of constitutional democracy?" With respect to the second question, one might ask: "Does fidelity to the Fourteenth Amendment require recourse to political theory to elaborate general moral concepts, or does fidelity prohibit such recourse and instead require historical research to discover relatively specific original understanding?" and "Does the quest for fidelity in interpreting the Constitution exhort us to make it the best it

15. *See* Fleming, *Fidelity*, *supra* note 11, at 1335; *see also Symposium: Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997).

can be or forbid us from doing so in favor of enforcing an imperfect Constitution?" Both narrow originalism and Dworkin's moral reading answer these questions with normative accounts that entail particular descriptive accounts.

Narrow originalists, such as Bork and Justice Scalia, have claimed a monopoly on concern for fidelity in constitutional interpretation, asserting that fidelity requires following the rules laid down by, or giving effect to the relatively specific original understanding of, the framers and ratifiers.[16] They have charged that constitutional theorists who reject these claims are "revisionists" who disregard fidelity and thereby subvert the Constitution.[17] Dworkin has vigorously and cogently punctured the narrow originalists' pretensions to a monopoly on fidelity, turning the tables on them by arguing that commitment to fidelity requires the pursuit of integrity with the moral reading of the Constitution and that they, the narrow originalists, are the real "revisionists."[18] Dorf effectively criticizes narrow originalists' normative and descriptive accounts, but he is silent concerning their claim to a monopoly on fidelity. Indeed, Dorf remains curiously silent concerning the question of fidelity generally.

How does a conception of fidelity integrate Dworkin's normative account with his descriptive account? His normative account entails a descriptive account that carries with it an obligation of fidelity—an obligation to search for the best interpretation along two dimensions: fit and justification.[19] Thus, the commitment to fidelity is both a matter of fit with historical materials and a matter of justification in political theory.

A conception of fidelity like Dworkin's would help bridge Dorf's second gap. It would explain why normative accounts like Dworkin's moral reading, Sager's justice-seeking constitutionalism, or my own constitutional constructivism—all of which are similar to Dorf's normative views[20]—entail a descriptive account such as that elaborated by Dorf. They do so because of the obligation that the best interpretation must fit and justify the historical materials: the constitutional text, history, and structure, as well as practice, tradition, and culture.

III. RECONCEIVING DORF'S DESCRIPTIVE ACCOUNT

One might view Dorf's descriptive account as an attempt to develop an alternative to both narrow originalism of the sort advocated by Bork and Justice Scalia and broad originalism of the type developed by Ackerman and Lessig.

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16. Michael H. v. Gerald D., 491 U.S. 110, 123-27, 127 n.6 (1989) (plurality opinion of Scalia, J.); BORK, *supra* note 1, at 143-60; Scalia, *supra* note 1, at 852-54.

17. BORK, *supra* note 1, at 187-240; SCALIA, *supra* note 1, at 37-47; Scalia, *supra* note 1, at 852-56, 862-64.

18. DWORKIN, *supra* note 9, at 74-76; RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 125-29 (1993); Dworkin, *supra* note 9, at 1250.

19. *See, e.g.*, DWORKIN, *supra* note 9, at 90. Dorf generally accepts Dworkin's account of best interpretation as having two dimensions: fit and justification. *See, e.g.*, Dorf, *supra* note 2, at 1772, 1809 n.219.

20. *See supra* text accompanying notes 9-11, 14.

Elsewhere, I have argued that some liberal constitutional theorists resist constitutional theories like Dworkin's moral reading and attempt to develop a broad originalism because they believe that Dworkin's theory does not take fit with historical materials seriously enough—in other words, that it suffers from a "problem of fit."[21] In response, I have distinguished Dworkin's theory of fidelity as integrity with the moral reading from Dworkin's own application of it, urging theorists to: "Do as Dworkin says, not as he does."[22] That is, I would argue that Dworkin's theory of fidelity as integrity is the best conception of fidelity, while conceding that Dworkin himself may not always satisfactorily do the "fit work" called for by his own theory—or that he may do it too abstractly to overcome criticism that he does not take fit as seriously as he should. I have suggested that the appropriate response is not to reject Dworkin's theory, but to undertake the fit work that it calls for.

Dorf's descriptive account richly elaborates certain ways of doing fit work, and it nicely accords with the type of fit work called for by normative accounts such as Dworkin's, Sager's, and my own. Dorf's categories of ancestral originalism and heroic originalism, along with post-enactment history, are species of an aspirational and hortatory constitutionalism of the sort entailed by such normative accounts. Ancestral originalism, in part, underscores the notion that an interpretation should fit with our practice, tradition, and culture. Heroic originalism, in part, shows that an interpretation should be in accord with our deepest aspirations and the best in us as a people. We should conceive fidelity to the Constitution in terms of *honoring* our aspirational principles rather than merely *following* our historical practices and concrete original understanding, which no doubt have fallen short of those principles. Dorf's categories of ancestral and heroic originalism illustrate important types of fit work sanctioned by the best available normative accounts.

Moreover, Dorf's descriptive account usefully shows that many arguments based on original meaning operate at an intermediate level of abstraction. Dworkin's theory meets with some resistance because of the high level of abstraction in his own analyses of original meaning. By contrast, Scalia's theory meets with some resistance because his own analyses of original meaning (supposedly) are at a specific level of abstraction. What is needed are demonstrations of analyses of original meaning at intermediate levels of abstraction and accounts of how they operate at such levels. Dorf's notions of ancestral and heroic originalism are instructive in this regard. Constitutional interpreters make recourse to ancestral and heroic originalism not because they are being narrow originalists, but rather to demonstrate that their proffered interpretations fit with our historical materials, including our practice, tradition, and culture. The appeals to original meaning analyzed by Dorf under the categories of ancestral and heroic originalism are neither as specific as those advocated by Bork and

21. Fleming, *Fidelity*, *supra* note 11, at 1348-49.
22. *Id.* at 1349.

Justice Scalia, nor as abstract as those of Dworkin. Instead, they sit at an appropriate intermediate level of abstraction where much aspirational or hortatory constitutional argument actually functions in Supreme Court opinions.

My interpretation of Dorf's descriptive account also would more comfortably accommodate Dorf's account of the role of post-enactment history in constitutional interpretation than does his idea that he is developing a "nonsocial-contractarian originalism."[23] It seems odd to make appeals to post-enactment history as part of an originalist program, however conceived. It is not at all strange to make appeals to such history, however, if one views the purpose of historical argument as being to show that a proffered interpretation fits with our historical materials (which would include both pre-enactment and post-enactment materials). After all, post-enactment historical materials are not part of the original meaning to which fidelity is owed on the narrow originalist account. But those materials may be part of our constitutional practice, tradition, and culture, which Dorf, like Dworkin, believes conscientious constitutional interpreters have an obligation to fit and justify.

This brings me to a more general criticism. Above, I praised Dorf's analysis of original meaning for being quite "postoriginalist." For that reason, I am surprised and disappointed that he characterizes his descriptive account in terms of developing a "nonsocial-contractarian originalism." Again, Dorf is persuasive in arguing that "much of what passes for social-contractarian originalism in Supreme Court opinions may be better understood as some combination of ancestral and heroic originalism."[24] Put another way, he correctly argues that appeals to original meaning in Supreme Court opinions are not necessarily or even usually originalist in the conventional, narrow sense. Nevertheless, I would reject calling these appeals to original meaning forms of "originalism"—even "nonsocial-contractarian originalism."

Elsewhere, I have argued that some liberal and progressive constitutional theorists who have sought to develop broad forms of originalism, such as Ackerman and Lessig, are in the grip of what I call the "originalist premise."[25] This is the assumption that originalism, rightly conceived, is the best (or indeed the only) conception of fidelity in constitutional interpretation.[26] Similarly, Dorf's characterization of appeals to original meaning as heroic originalism and ancestral originalism, along with references to "nonsocial-contractarian originalism,"[27] may unwittingly reinforce, or worse, reflect the originalist premise. (I do not believe that Dorf's descriptive account reflects that premise, but I fear that such formulations may reinforce it.) This is unfortunate and surprising given Dorf's own persuasive critique of the broad originalists. One would not expect him, unwittingly or otherwise, to evince that problematic premise. Nor

23. Dorf, *supra* note 2, at 1770.
24. *Id.*
25. Fleming, *Fidelity*, *supra* note 11, at 1344.
26. *Id.*
27. Dorf, *supra* note 2, at 1770.

would one expect him to reflect the related problematic premise that all appeals to original meaning are necessarily a form of originalism—narrow, broad, or otherwise.

IV. CONCLUSION

I conclude with an exhortation prompted by Dorf's cogent descriptive account. Our constitutional culture is not as originalist as the narrow and broad originalists seem to assume.[28] It certainly requires constitutional lawyers and scholars to pay homage to history and to fit with historical materials, but that is not to say that it is originalist. Originalism is an *ism*—a conservative ideology that emerged in reaction to the Warren Court. Before Richard Nixon and Robert Bork launched their attacks on the Warren Court, originalism as we now know it did not exist. Constitutional interpretation in light of original understanding did exist, but original understanding was regarded as merely one source of constitutional meaning among several—not as a general theory of constitutional interpretation, much less the exclusive legitimate theory. Moreover, original understanding, especially at a relatively specific level, was understood to be largely indeterminate and inconclusive. Regrettably, many constitutional lawyers and scholars in recent years seem to have lost sight of this great wisdom. Dorf's project promises to recapture this wisdom and to provide an eminently reasonable and sensible approach to arguments based on original meaning in a "postoriginalist" world. It holds out the hope of developing a constitutional theory that gives due regard to original meaning without being originalist.

28. Fleming, *Fidelity*, *supra* note 11, at 1347-48.