

## WE ARE ALL CAFETERIA ORIGINALISTS NOW (AND WE ALWAYS HAVE BEEN)

Jack M. Balkin\*

### INTRODUCTION: FEWER VEGETABLES, MORE DESSERT PLEASE!

In *Memory and Authority*, I argue that Americans, both in politics and in constitutional culture, are “cafeteria originalists.’ They pick and choose when to follow the views of the founders, framers, or adopters (as they understand them) and often artfully recharacterize these principles to support contemporary political and legal arguments.”<sup>1</sup> Like customers in a cafeteria who take the chocolate cake and leave the boiled kale, Americans pick the features of the framers they like to support their arguments, and leave other, less savory, features behind.

The term “cafeteria originalism” is a play on the expression “cafeteria Catholics,” sometimes used to describe American Catholics who “pick and choose which parts of the Church’s teachings to accept and under what conditions.”<sup>2</sup> But there is an important difference between the two expressions. As a general rule, Catholics are supposed to follow the teachings of the Church;<sup>3</sup> doing otherwise opens one up to criticism, as when Cardinal Wilton Gregory criticized President Joe Biden, who supports abortion and LGBTQ+ rights, for being a cafeteria Catholic.<sup>4</sup> But being a cafeteria originalist does not make you a bad American or a bad lawyer. As I shall soon explain, it does not even make you a bad originalist. It is just what we do here in this country.

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\* Knight Professor of Constitutional Law and the First Amendment, Yale Law School. My thanks to Mark Graber and Sanford Levinson for their comments on a previous draft.

<sup>1</sup> JACK M. BALKIN, *MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION* 71–72 (2024) [hereinafter BALKIN, *MEMORY AND AUTHORITY*].

<sup>2</sup> *Id.* at 71; see Peter Pinedo, *New Study Suggests Rampant ‘Cafeteria Catholicism,’* NAT’L CATH. REG. (May 7, 2024), <https://www.ncregister.com/cna/new-study-suggests-rampant-cafeteria-catholicism> [<https://perma.cc/K3Q6-F6MU>] (“The term ‘cafeteria Catholic’ refers to a Catholic who picks and chooses which Church teachings he or she affirms and adheres to.”).

<sup>3</sup> 1983 CODE c.752 (“[A] religious submission of the intellect and will must be given to a doctrine which the Supreme Pontiff or the college of bishops declares concerning faith or morals when they exercise the authentic magisterium . . . therefore, the Christian faithful are to take care to avoid those things which do not agree with it.”).

<sup>4</sup> Brian Fraga, *D.C.’s Cardinal Gregory Criticizes Biden’s ‘Cafeteria’ Catholicism*, NAT’L CATH. REP. (Apr. 1, 2024), <https://www.ncronline.org/news/dcs-cardinal-gregory-criticizes-bidens-cafeteria-catholicism> [<https://perma.cc/944W-URHS>].

The Supreme Court's October 2023 Term featured a host of important cases for the Court's six-person conservative majority to decide. The Court continued its constitutional revolution, making significant changes in administrative law and the law of the Presidency, not to mention expanding the First Amendment rights of social media companies.<sup>5</sup> Yet despite the fact that the conservative majority consists of at least four self-described originalists (Justices Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett), one "practical originalist"<sup>6</sup> (Justice Samuel Alito), and one fellow traveler (Chief Justice John Roberts), many of its innovations did not employ originalism as their central method of constitutional interpretation. The two biggest cases of the Term, *Trump v. Anderson*<sup>7</sup> and *Trump v. United States*,<sup>8</sup> were not originalist decisions.<sup>9</sup>

Nor has this been unusual. For decades now, conservative originalists on the Court have preached that originalism is the only proper way to interpret the Constitution while joining and often writing opinions that pay no attention to originalist sources and methodology, announcing doctrines that have no basis in the Constitution's original meaning, and, in many cases, are simply inconsistent with the Constitution's original meaning.<sup>10</sup> These inconsistencies are not limited to cases involving precedents of long standing that the Justices are reluctant to disturb. They also include cases of first impression.<sup>11</sup> Over many decades, it has become abundantly clear that the Court's conservative Justices are originalist only when they want to be. In this respect, they are cafeteria originalists, just like everyone else in American legal culture.

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<sup>5</sup> *E.g.*, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (overruling *Chevron* doctrine); *Trump v. United States*, 603 U.S. 593, 606–08 (2024) (creating doctrine of criminal immunity for former presidents); *Trump v. Anderson*, 601 U.S. 100, 110 (2024) (per curiam) (limiting the practical effect of the disqualification clause of Section 3 of the Fourteenth Amendment); *Moody v. NetChoice, LLC*, 603 U.S. 707, 713–17, 733–34 (2024) (applying First Amendment to protect content curation by social media companies); *Murthy v. Missouri*, 603 U.S. 43, 48–50 (2024) (finding Article III standing obstacles to First Amendment challenges to contacts between governments and social media companies).

<sup>6</sup> See Matthew Walther, *Sam Alito: A Civil Man*, AM. SPECTATOR (Apr. 21, 2014, 12:00 AM), [http://spectator.org/58731\\_sam-alito-civil-man/](http://spectator.org/58731_sam-alito-civil-man/) [<https://perma.cc/RQ2L-2M3R>] ("I think I would consider myself a practical originalist.").

<sup>7</sup> 601 U.S. 100.

<sup>8</sup> 603 U.S. 593.

<sup>9</sup> See *infra* text accompanying notes 63–64.

<sup>10</sup> See ERWIN CHERMERINSKY, *WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM* 139–65 (2022) (offering examples); ERIC J. SEGALL, *ORIGINALISM AS FAITH* 3–4 (2018) (same); Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 223–24 (2023) ("In large swathes of cases spread across multiple areas of law, the Justices make little or no effort to justify their rulings by reference to original constitutional meanings.").

<sup>11</sup> See, e.g., *Trump v. Anderson*, 601 U.S. 100; *Trump v. United States*, 603 U.S. 593.

To explain these points in more detail, I will introduce some ideas from *Memory and Authority*. My central claim is that cafeteria originalism is not a pathology or a falling away from a pure or correct version of constitutional interpretation. Quite the contrary, the persistence of cafeteria originalism in American constitutional culture reveals the deep rhetorical structure of American constitutional law. That is why non-originalists make originalist arguments all the time without thereby being converted to the originalist creed. Conversely, that is why conservative originalists who argue that originalism is the only legitimate approach have always had to leaven their theories with qualifications, exceptions, and epicycles, and why originalist judges routinely ignore originalist arguments in many cases. It is also why conservative originalists appointed to the Supreme Court will inevitably disappoint their fellow originalists in the academy who insist on theoretical purity and logical consistency. The disappointment, however, stems from an unrealistic vision of what originalist argument really is and how it works in American legal culture.

My goal in this Essay is not to offer yet another theoretical refutation of conservative originalism. There are plenty of those in the literature, and they have yet to put a halt to the conservative legal movement. Nor could they, for, to paraphrase Oliver Wendell Holmes, Jr., the life of the conservative legal movement has not been logic; it has been politics.

Conservative originalists are well aware that a fully originalist jurisprudence has not yet been achieved. But for them, it is an admirable goal to strive for, even if perpetually out of reach. The fact that judges fall short is reason to try better next time. Perhaps one more election, one more Supreme Court appointment, will get them to the jurisprudential Promised Land. However, because conservative originalism is a reform project within a larger legal culture, that longed-for day is still far off, and indeed, it may never come. It is one thing to reverse particular doctrines; it is quite another to alter the basic forms of legal argument that both originalists and non-originalists employ. Interpretive theories like originalism lie downstream from constitutional culture. The conservative legal movement may reform particular elements of American law—indeed, it already has—but it is unlikely to fully displace the basic structures of American legal culture.

The fact that Americans are cafeteria originalists, I hasten to emphasize, does not mean that their selections are well-judged, or that their non-originalist arguments are always the best ones. I do not think that *Trump v. United States* is correctly decided, for example. (Sometimes people at the cafeteria make bad choices.) My point is about the practices of constitutional argument and not about whether people make bad decisions within the practice.

Whether our constitutional interpretations are right or wrong in any particular case, we are all cafeteria originalists, and we always have been. The most plausible versions of interpretive theory—including, as I shall explain, the most plausible versions of originalism—make their peace with cafeteria originalism; indeed, they enjoy the smorgasbord.

## I. THE RHETORIC OF CONSTITUTIONAL ARGUMENT

*Memory and Authority* is a book about the structures of rhetoric in American constitutional culture and the role that history plays within them. A key theme is the relationship between history and the rhetoric of legal justification. To understand how lawyers use history, one must understand legal argument. Therefore, the study of the uses of history in constitutional law becomes the study of legal rhetoric. I mean “rhetoric” not in the pejorative sense of mere style or manipulation but in Aristotle’s sense: Rhetoric is an art that seeks to discover the available means of persuading an audience about matters that cannot be determined for certain.<sup>12</sup> Thus, rhetoric is an art or skill; its goal is persuasion; it is directed at an audience; and its subjects are matters that cannot be known for certain but for which there are better and worse arguments. Rhetoric deals in what is more probable and less probable, what is a better reason and a worse reason. Thus, recourse to rhetoric in the Aristotelian sense presumes that not anything goes in law. Rather, it assumes that some legal arguments are stronger and more persuasive than others. The rhetorical theory that deals with finding the best versions of an argument for a given audience is called “invention.”<sup>13</sup> We are therefore interested in how lawyers employ history in the art of invention.

Lawyers argue about the Constitution through standard forms of argument, often called “modalities,” a term coined by Philip Bobbitt, who offered a famous list.<sup>14</sup> Aristotle would have called the modalities the special topics or *topoi* of legal argument.<sup>15</sup> The modalities represent commonplaces or widely accepted rules of thumb about how to interpret the Constitution. Examples are arguments from text, purpose, structure, precedent, and consequences. Depending on how you count, there are eleven of these basic *topoi* in American constitutional law: arguments from (1) text, (2) purpose, (3) structure, (4) consequences, (5) precedent, (6) convention, (7) custom, (8) natural law and natural rights, (9) national ethos, (10) tradition, and (11) honored authority.<sup>16</sup>

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<sup>12</sup> ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE bk. I, ch. 2, at 38 [1356a] (George A. Kennedy trans., 2d ed. 2007); see also Andrew Koppelman, *The Ugly Rhetoric of Dobbs, or, Why Jack Balkin Is History*, 33 WM. & MARY BILL RTS. J. 351 (2024) (emphasizing the role of the audience in the Aristotelian account).

<sup>13</sup> J.M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 211, 212 (Peter Brooks & Paul Gewirtz eds., 1996) (explaining that, in classical rhetoric, invention is the art of “discovering and formulating arguments on any subject, opinions on the resolution of any problem, or reasons for or against any proposed course of action”).

<sup>14</sup> See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–13 (1991); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7 (1982).

<sup>15</sup> Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 146, 170 (2018) [hereinafter Balkin, *Arguing About the Constitution*].

<sup>16</sup> BALKIN, MEMORY AND AUTHORITY, *supra* note 1, at 18–20.

In interpreting the Constitution, lawyers never simply make arguments from history. Instead, lawyers channel their historical claims, either explicitly or implicitly, through one of the standard forms of argument—a modality such as structure, purpose, custom, convention, or precedent. That is because the modalities serve an important purpose in constitutional argument. They connect legal claims to reasons to interpret the Constitution in one way rather than another. The modalities are commonplaces that tell you why an argument is an argument *about the Constitution*, rather than simply a good idea.<sup>17</sup> The modalities are what give historical claims legal authority, which, in legal argument, is the name of the game.

Moreover, the modalities shape what lawyers look for in history and what they find in history, what matters to them and what does not matter to them. The modalities of constitutional argument, which are the pathways to authority, shape what lawyers see in the past, and how they use the past. The modalities are like colored glasses that lawyers put on. Like colored glasses, they affect both how lawyers see things and how they describe what they see to other people.

## II. ORIGINALISM VERSUS ORIGINALIST ARGUMENT

Today, debates about the uses of history in constitutional interpretation are connected to debates about originalism and its opposite number, living constitutionalism. As I explain in *Memory and Authority*, originalism and living constitutionalism “are just two sides of a single coin.”<sup>18</sup> They are “twins separated at birth,” twin cultural approaches to the problem of constitutional modernity, two different languages for performing the same task of adapting an ancient constitution to a constantly changing world.<sup>19</sup> Originalism is the lingua franca of the modern conservative movement, and originalist rhetoric serves much the same function for modern conservatives that the rhetoric of living constitutionalism does for modern liberals.<sup>20</sup> Reva Siegel and Robert Post have argued that originalism is the living constitutionalism of modern conservatives.<sup>21</sup> It allows conservatives to connect their changing values to the Constitution and the law. It allows them to assert their values as the values of the Constitution itself.

It is important to distinguish the practice of making *originalist arguments* from *originalism* as an interpretive theory.<sup>22</sup> Everyone makes originalist arguments, but not everyone is an originalist.

Originalist arguments, like other historical arguments, channel adoption history through the eleven modalities of constitutional argument. For example, an argument

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<sup>17</sup> *Id.* at 20.

<sup>18</sup> *Id.* at 58.

<sup>19</sup> *Id.* at 67.

<sup>20</sup> *Id.* at 67, 92–93.

<sup>21</sup> Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545, 565, 569 (2006).

<sup>22</sup> BALKIN, *MEMORY AND AUTHORITY*, *supra* note 1, at 62–63.

about the framers' purposes, or the adopters' views about the Constitution's structure and proper function are originalist arguments. Everyone in American legal culture makes originalist arguments from time to time, whether they are originalists or living constitutionalists. That is because everyone in American legal culture employs the same basic modalities of argument and invokes adoption history within the modalities. So the fact that one makes originalist arguments does not mean that one is an originalist or that one accepts that originalism is the correct way to interpret the Constitution. It simply means that, in this particular controversy, one thinks that arguments from adoption history are persuasive.

The interpretive theory called originalism is more than the practice of occasionally making originalist arguments. Originalism is an "ism." It is a general and comprehensive theory of constitutional interpretation that arose during the twentieth century in response to constitutional modernity.<sup>23</sup> Conservative originalists sometimes like to claim that the Framers were originalists, but this is an anachronism.<sup>24</sup> The Framers were not originalists; they were the originals. Originalism is an attempt to copy an original. The framers were not trying to copy themselves; nor were they attempting to return to their own practices of interpretation. In fact, the founding generation had no generally agreed-upon theory of constitutional interpretation.<sup>25</sup> Instead, people used familiar ideas borrowed from the common law. They appealed to text, purpose, structure, and indeed, almost all of the *topoi* we still use today.<sup>26</sup>

There are many versions of originalism, and many theoretical disputes among originalists that are very interesting to the participants and less interesting to most other people. Most originalist theories argue that when we interpret the Constitution, we are bound by something that was fixed at the time of adoption, whether that thing is original public meaning, original legal meaning, original intention, or original understanding.<sup>27</sup> The different flavors correspond to what was fixed and controls interpretation.

Not all originalists are members of the conservative legal movement; therefore, in this Essay I will refer to the versions produced by the movement as "conservative originalism," to distinguish it from, for example, the originalism of constitutional liberals such as Akhil Reed Amar and myself.<sup>28</sup>

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<sup>23</sup> *Id.* at 62–63, 70.

<sup>24</sup> JONATHAN GIENAPP, AGAINST ORIGINALISM 173–76 (2024).

<sup>25</sup> BALKIN, MEMORY AND AUTHORITY, *supra* note 1, at 125.

<sup>26</sup> Balkin, *Arguing About the Constitution*, *supra* note 15, at 197 ("These eleven topics are the descendants in contemporary legal practice of the various methods that Founding-era lawyers used to argue with each other. We can trace examples of these topics back to the Founding, and for that matter, to Reconstruction.").

<sup>27</sup> Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013) [hereinafter Solum, *Originalism and Constitutional Construction*].

<sup>28</sup> *E.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012); JACK M. BALKIN, LIVING ORIGINALISM (2011).

Most versions of originalism are exclusivist theories of interpretation. They claim that originalism is the only correct way to decide constitutional questions, and if a decision departs from what originalism requires, the decision is presumptively illegitimate.<sup>29</sup> Thus, from the perspective of these originalist theories, cafeteria originalism is heretical because it treats originalist reasoning as optional rather than mandatory. To be sure, originalists may sometimes make exceptions for precedents of long standing, but the goal of constitutional interpretation should be to make as much of the law consistent with originalism as possible.

My own theory of interpretation, called living originalism or framework originalism, is both originalist and living constitutionalist. It is originalist because I argue that we should interpret the Constitution consistent with the Constitution's basic framework. The basic framework consists of the original public meaning of the text (as amended over time) and the adopters' choice of rules, standards, and principles.<sup>30</sup> By the original public meaning, I mean "the original semantic meaning of the text," "any generally recognized legal terms of art," and any "inferences from background context necessary to resolve ambiguities and make sense of the text."<sup>31</sup>

Over time, lawyers and judges produce constitutional constructions to apply and implement the Constitution's rules, standards, and principles in practice. I agree with conservative originalists that something at the time of adoption is still binding on us today unless it has been changed by subsequent amendment. In my theory, that something is the basic framework. But the premise is perfectly consistent with living constitutionalism, which, in my view, is not a distinctive theory of constitutional interpretation but simply the development of the processes of constitutional construction over time. Set a political system with a constitution in motion, and you will have living constitutionalism whether you like it or not.

The major difference between living originalism and most versions of conservative originalism is that living originalism has a thin theory of original public meaning and a wide zone for constitutional construction.<sup>32</sup> By contrast, most versions of conservative originalism have a thick account of original meaning (or original understanding) and a very narrow zone for constitutional construction, or they do not recognize the concept of constitutional construction at all.<sup>33</sup>

Originalists with a thick account of original meaning look for evidence of how people at the time of adoption—and especially lawyers—would have analyzed legal questions and understood the legal effect of the Constitution.<sup>34</sup> This is a highly stylized account of the past constructed by contemporary lawyers to make it easy for

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<sup>29</sup> BALKIN, *MEMORY AND AUTHORITY*, *supra* note 1, at 100, 106.

<sup>30</sup> *Id.* at 100–02.

<sup>31</sup> *Id.* at 101. The theory is a bit more complicated than that, but the details are not important for purposes of my argument here.

<sup>32</sup> *Id.* at 106–07.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 60–67, 106.

them to decide contemporary cases. It is a conception of historical meaning that discards a great deal of the past in its quest for legal authority.

In fact, “original public meaning” is not a linguistic term but a legal one.<sup>35</sup> There is no necessary way to cash out the concept of “original public meaning.” It is a legal construction of meaning designed for lawyers’ purposes, and there are multiple versions.<sup>36</sup> One of the most widely used formulas of original meaning originalism asks how a fully informed hypothetical individual would have understood and applied the Constitution’s legal meaning at the time of adoption.<sup>37</sup> In Gary Lawson and Guy Seidman’s words, one searches for “the hypothetical understandings of a reasonable person who is artificially constructed by lawyers.”<sup>38</sup> This is not a historically accurate account of what people meant by their uses of language; it is a theoretical construction employed to facilitate legal analysis.

The same is true, by the way, of living originalism; it has a thin theory of original meaning coupled with a broad zone of constitutional construction for making historical arguments. This is also a theoretical construction of meaning designed for legal purposes. But I argue that the combination of a thin theory of original meaning and a broad zone of construction is the best account of constitutional meaning for four reasons.<sup>39</sup> First, it is based on a better theory of how constitutions actually work, and it better explains the Constitution’s democratic legitimacy over time. Second, it better captures the nation’s actual practices of constitutional argument and how people actually use adoption history in constitutional interpretation. Third, “it is better able to learn from and make use of the work of professional historians that conservative originalists often downplay or ignore.”<sup>40</sup> Fourth, “it can also accommodate and make use of many different kinds of history from many historical periods, and the views and experiences of many different kinds of people,”<sup>41</sup> including people who were previously shut out of constitution-making by the anti-democratic features of our constitutional past.

By contrast, most conservative originalists prefer a thick account of original meaning because they hope to resolve as many contested issues as possible by reference to original meaning, or, at the very least, greatly narrow the possible range of permissible answers. Because original meaning resolves most constitutional questions,

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<sup>35</sup> *Id.* at 121–22.

<sup>36</sup> *Id.* at 120–22.

<sup>37</sup> *Id.* at 122; *cf. id.* at 167 (“There is no guarantee that the founders, framers, and adopters—much less the general public—were actually aware of all of the law in the various states (and colonies before the Revolution) or the history of English law dating back to the thirteenth century and earlier.”).

<sup>38</sup> Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006).

<sup>39</sup> BALKIN, MEMORY AND AUTHORITY, *supra* note 1, at 127–28.

<sup>40</sup> *Id.* at 127.

<sup>41</sup> *Id.*

the judge's job is merely to apply it to the case at hand. The judge's personal values do not play a part in the decision and the judge is not responsible for the answer.<sup>42</sup> The responsibility lies with choices made by the founders, framers, and adopters.

For reasons described in *Memory and Authority*, I do not regard this as a plausible account of judicial interpretation. Among the many reasons why it is not plausible is that originalist judges do not consistently apply a thick theory of original meaning to decide cases; and when they do engage in originalist reasoning, they do not leave their values aside. Quite the contrary, their values affect how they understand history and how and when they employ originalist argument. As noted above, sometimes originalist judges completely ignore adoption history. At other times, as in cases involving the Freedom of Speech and Equal Protection Clauses, originalist judges treat parts of the Constitution as stating vague or abstract principles that must be cashed out in existing doctrinal categories and they do not apply the original legal meaning or understanding of the text.<sup>43</sup> In many of the Court's race cases, for example, the originalist Justices have not relied on the history of the Reconstruction Amendments<sup>44</sup>—a history that does not support conservative claims of a color-blind Constitution.<sup>45</sup> Instead, they have quoted Justice Harlan's dissent in *Plessy v.*

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<sup>42</sup> *Id.* at 108; see *United States v. Rahimi*, 602 U.S. 680, 718 (2024) (Kavanaugh, J., concurring) (“History establishes a ‘criterion that is conceptually quite separate from the preferences of the judge himself.’” (quoting A. Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989))).

<sup>43</sup> *E.g.*, *Janus v. AFSCME*, 585 U.S. 878 (2018); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (plurality opinion); *id.* at 748 (Thomas, J., concurring); Fallon, *supra* note 10, at 228–29, 251–52.

<sup>44</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll. (SFFA)*, 600 U.S. 181 (2023) (applying strict scrutiny to university admissions policies); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (striking down federal race-conscious affirmative action program under the Due Process Clause of the Fifth Amendment, adopted in 1791); *Parents Involved*, 551 U.S. at 701 (applying strict scrutiny to school placement program). Over the course of four decades, neither Justice Scalia nor Thomas ever tried to explain their opposition to affirmative action programs in terms of the original meaning of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment (for federal affirmative action plans). See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 346–49 (2003) (Scalia, J., concurring in part and dissenting in part); *id.* at 349–78 (Thomas, J., concurring in part and dissenting in part); *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 240 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas finally made an attempt with respect to the Fourteenth Amendment in his concurrence in *SFFA v. Harvard*, but his arguments are remarkably weak and none of the other originalist Justices joined his opinion. 600 U.S. at 232 (Thomas, J., concurring).

<sup>45</sup> See, e.g., Kate Masur & Gregory Downs, *Designed to Ameliorate the Condition of People of Color: The Reconstruction Republicans and the Question of Affirmative Action*, 2 J. AM. CONST. HIST. 625 (2024); BALKIN, *supra* note 28, at 222–23; Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 431–32 (1997); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985).

*Ferguson*<sup>46</sup> (while misunderstanding Harlan's actual views),<sup>47</sup> and relied on the memory of the Civil Rights Movement and *Brown v. Board of Education*.<sup>48</sup> All of this is yet another way of saying that originalist judges who believe that originalist theory requires a thick account of original meaning are nevertheless cafeteria originalists in practice. They pick and choose when to apply a thick account and, indeed, when to be originalist in the first place.

A far more plausible account, which better matches our actual practices of constitutional argument, is the one offered by living originalism: The constitutional text, where clear, is binding, but there is a wide zone for constitutional construction, in which some arguments are stronger and more persuasive than others. That is where most contested cases are decided.

This approach does not eliminate the need for originalist argument. To the contrary, it advocates originalist argument as a valuable tool of construction.<sup>49</sup> For example, the actual history of Reconstruction offers persuasive reasons to think that at least some race-conscious affirmative action programs are constitutional. The framers of the Fourteenth Amendment did not think that race-conscious remedies were inconsistent with guarantees of racial equality. Rather, they believed that they were complementary strategies for achieving equal citizenship.<sup>50</sup>

Living originalism does not regard cafeteria originalism as heresy. In fact, as I shall now explain, the theory of living originalism shows why almost everyone who debates constitutional law in the United States turns out to be a cafeteria originalist.

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<sup>46</sup> 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

<sup>47</sup> Despite the ubiquitous invocation of Justice Harlan's dissent for the colorblindness principle, his view is not colorblindness in our modern sense. Harlan's arguments applied only to questions of civil equality, not social equality. *Id.* at 559, 561 (arguing that social equality was not at stake in *Plessy*). Where Harlan thought social equality was involved, he had no difficulty upholding racial discrimination. *Pace v. Alabama*, 106 U.S. 583, 584, 585 (1883) (upholding harsher penalties for interracial couples living together than couples of the same race). In addition, Harlan had no problem excluding Chinese people from citizenship on the grounds of their race. *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting) ("There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.").

<sup>48</sup> *Parents Involved*, 551 U.S. at 746–47 (plurality opinion); *id.* at 772 (Thomas, J., concurring) ("My view of the Constitution is Justice Harlan's view in *Plessy* . . . . And my view was the rallying cry for the lawyers who litigated *Brown*.").

<sup>49</sup> BALKIN, MEMORY AND AUTHORITY, *supra* note 1, at 13, 172–74 (explaining why everyone, including non-originalists, should make originalist arguments).

<sup>50</sup> See Masur & Downs, *supra* note 45, at 647. To give only one example, the Second Freedman's Bureau Act, Act of July 16, 1866, ch. 200, 14 Stat. 173, contained both race-conscious provisions for the benefit of the freedmen and a general prohibition on racial discrimination in civil rights. See *id.* § 14. That the bill contained both kinds of provisions suggests that the Reconstruction Framers saw no conflict between them.

### III. THE SURPRISING CONSEQUENCES OF THE INTERPRETATION- CONSTRUCTION DISTINCTION

The New Originalism (of which living originalism is an example) makes an important theoretical distinction between interpretation and construction.<sup>51</sup> Once again, this distinction does not come from linguistic theory; it comes from legal theory. Interpretation involves ascertaining the meaning of words and phrases; construction involves giving effect to meaning in practice through doctrines, conventions, and institutions.<sup>52</sup> Most constitutional law, and most of the cases students read in their constitutional law casebooks, involve previous constitutional constructions. That should not be remarkable: most contested constitutional questions are questions of constitutional construction, or to use Lawrence Solum's phrase, they fall in "the construction zone."<sup>53</sup> The goal of most constitutional interpretation (in the ordinary and non-technical sense of the term) is to decide which constructions of the Constitution are the best ones and how to apply—or in some cases whether to modify—existing constructions.

To argue for the best constructions and apply them in specific cases, people employ the modalities of constitutional argument. These modalities are the central tools of constitutional construction. They help people analyze and solve problems of constitutional law, articulate their reasons, persuade others, and, in general, build out constitutional law through decisions, doctrines, and conventions.

Now the fact that most constitutional questions are questions of constitutional construction does not mean that every construction is just as good as any other. Lots of constructions are permissible in the sense that they are logically consistent with the basic framework. But that does not make these proposals good constructions, much less the best constructions. Recall my point about legal argument as a species of rhetoric. In constitutional law, and in law more generally, lawyers attempt to offer persuasive arguments about matters that cannot be demonstrated with certainty. The modalities are an indispensable tool in this practice of invention. The modalities connect claims about the law to the Constitution; they are the ways (i.e., the modes) through which one persuades others about what the Constitution means in practice. When we say that there are better and worse interpretations of the Constitution in contested cases, we usually mean that there are better and worse *constructions* at any point in history.

Some uses of adoption history resolve ambiguities in the text. They are aids to determining the original meaning of the text in the thin sense described above. But it follows from what I have said that most arguments from adoption history—that

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<sup>51</sup> Solum, *Originalism and Constitutional Construction*, *supra* note 27, at 455–58 (explaining that the distinction between interpretation and construction is characteristic of the New Originalism).

<sup>52</sup> BALKIN, *MEMORY AND AUTHORITY*, *supra* note 1, at 11.

<sup>53</sup> Solum, *Originalism and Constitutional Construction*, *supra* note 27, at 458.

is, most originalist arguments—occur in the zone of constitutional construction.<sup>54</sup> Indeed, this is true of the initial constructions of the adopting generation. They are the adopting generation’s initial attempt to apply the constitutional text to concrete problems.

That most originalist arguments are constructions is the key theoretical insight that follows from the interpretation-construction distinction.<sup>55</sup> In the construction zone, originalist arguments are persuasive rather than mandatory; they are resources rather than commands. People use adoption history and the views and values of the founders, framers, and adopters to argue about the best way to construct the Constitution in practice. That is why living constitutionalists make originalist arguments even if they oppose originalism as a comprehensive philosophy of interpretation. That is also why originalist judges behave as cafeteria originalists.

This is a different model of constitutional argument than the portrait offered by most conservative originalists. Conservative originalists assume that we look into the past to decide the correct rule to apply, a rule that was always already there from the beginning. All we have to do is find it and apply it. In this model, originalist interpretation is a kind of excavation or discovery of a finished artifact. Moreover, originalist analyses are mandatory, not persuasive. Originalist analyses do not merely offer reasons for decision; they tell us what the law is. We must attempt to discern the original meaning, and where it is known, we must apply it.

But that is not how constitutional argument actually works. We are trying to solve legal problems in the present. We look to history for materials to construct arguments that we hope will persuade others. What we find in the past are not commands but resources for constitutional construction—precedents, arguments, opinions, theories, early state legislation, and practices—that we channel through the modalities to make legal arguments. Those resources and their meaning to us may look different to one generation than it did to previous ones, because the past often gains new meanings and associations as time passes.

In some cases, it is fairly clear how people in the past would have dealt with a particular problem in the present. Then we must decide whether the previous construction remains the best one or needs modification. But in most cases, history offers us something less: materials from a different world with different assumptions and facing different problems. That requires us to draw analogies and make extensions.

In fact, originalist argument almost always involves a certain degree of creativity: We employ an incomplete historical record from a different world to answer questions that may never have been posed in precisely the way we ask them today.<sup>56</sup> But “to say that an argument employs an imaginative extension from the past does not mean that it is a bad argument or an improper use of history.”<sup>57</sup> Rather, “[i]t

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<sup>54</sup> BALKIN, *MEMORY AND AUTHORITY*, *supra* note 1, at 117–18.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 109–10.

<sup>57</sup> *Id.* at 111.

simply means that it is a creative act of legal reasoning from an incomplete historical record to draw conclusions in a vastly different context of judgment.”<sup>58</sup> That is how constitutional construction works and how it must work.

In this sense, arguments from adoption history are just like all other historical arguments: they channel history through the standard modalities of argument. The primary difference between originalist arguments and other arguments that use history is that regardless of the modality they employ—text, purpose, structure, consequences, and so on—originalist arguments are also usually “appeals to national ethos, political tradition, and honored authority.”<sup>59</sup> Originalist arguments in American legal culture are hybrids. This is what gives them their distinctive flavor. And that is why the Supreme Court’s recent turn to a jurisprudence of “text, history, and tradition”<sup>60</sup> is not much of an innovation. Instead, the Court simply stated more clearly what it had long been doing.

#### IV. WHAT EXPLAINS CAFETERIA ORIGINALISM?

Now if originalist arguments were always authoritative in constitutional law, then judges would always rely on them in writing their opinions; lawyers would always make originalist arguments, and judges would always demand that they do so. But that is not what happens in American constitutional culture. Sometimes lawyers and judges make originalist arguments, and sometimes they ignore originalist arguments altogether.

All this makes perfect sense if, as I have just argued, most originalist arguments are proposed constructions that appeal to national ethos, tradition, and honored authority. “Where appeals to past traditions are normatively attractive to judges, they make originalist arguments; where they are not, judges ignore them.”<sup>61</sup> In fact, sometimes famous quotes from the Founders appear only as window dressing, with ritual citations to the Founders stated at a very high level of generality, but not really driving the decision of the case. (An example is the ritual invocation of Hamilton’s statement in *Federalist* No. 70 that “Energy in the Executive is a leading character in the definition of good government.”)<sup>62</sup> These quotes are originalist decoration, and I call this practice of employing quotes from honored authorities “decorative originalism.” It is a favorite device of originalist and non-originalist justices who decide cases on other grounds.

In the two *Trump* cases in the October 2023 Term, *Trump v. Anderson* and *Trump v. United States*, the majority opinions—joined by the Court’s originalist Justices—were not decided on originalist grounds. In both cases, the Court’s consideration of

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 7, 12, 118, 159–60.

<sup>60</sup> *Id.* at 166–68.

<sup>61</sup> *Id.* at 161.

<sup>62</sup> THE FEDERALIST NO. 70 (Alexander Hamilton).

adoption history was brief and perfunctory.<sup>63</sup> In fact, both cases were decided in the face of considerable evidence from text and adoption history that went in the opposite direction.<sup>64</sup>

In *Trump v. Anderson*, the majority opinion selected one piece of evidence—*Griffin's Case*<sup>65</sup>—to support its position, while ignoring an entire body of evidence that argued to the contrary.<sup>66</sup> This was no ordinary case of cherry-picking historical sources. It was like picking a single cherry in an enormous field of cherry trees.

In *Trump v. United States*, the majority opinion offers a little decorative originalism—a famous quote from Hamilton's *Federalist* No. 70.<sup>67</sup> But the opinion as a whole is not originalist at all. It relies on two opinions from the Burger and Vinson Courts: *Nixon v. Fitzgerald*<sup>68</sup> from the 1980s and Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* from 1952.<sup>69</sup> Neither of these opinions sought to decide their cases on originalist grounds, and Justice Jackson began his analysis by arguing that adoption history was of little use.<sup>70</sup>

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<sup>63</sup> See, e.g., *Trump v. Anderson*, 601 U.S. 100, 109 (2024) (relying primarily on *Griffin's Case*, 11 F. Cas. 7, 26 (C.C.D. Va. 1869) (No. 5,815) (Chase, Circuit Justice)); *Trump v. United States*, 603 U.S. 593, 638–39 (2024) (distinguishing and rejecting originalist evidence).

<sup>64</sup> On the originalist evidence in *Trump v. Anderson*, see generally William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605 (2024); Gerard N. Magliocca, *Background as Foreground: Section Three of the Fourteenth Amendment and January 6th*, 25 U. PA. J. CONST. L. 1059 (2023); Mark Graber, *Section Three of the Fourteenth Amendment: Our Questions, Their Answers* (U. Md. Francis King Carey Sch. L. Legal Stud., Rsch. Paper No. 2023-16), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4591133](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4591133) [<https://perma.cc/3MJF-DUSN>]; Mike Rappaport, *The Originalist Disaster in Trump v. Anderson*, ORIGINALISM BLOG (Mar. 5, 2024, 8:00 AM), <https://originalismblog.typepad.com/the-originalism-blog/2024/03/the-originalist-disaster-of-trump-v-andersonmike-rappaport.html> [<https://perma.cc/4UZY-BRE9>].

On the originalist evidence in *Trump v. United States*, see Saikrishna Bangalore Prakash, *Prosecuting and Punishing Our Presidents*, 100 TEX. L. REV. 55, 65–76 (2021) (summarizing evidence from text and early history); Brief of Scholars of the Founding Era as Amici Curiae Supporting Respondent, *Trump v. United States*, 603 U.S. 593 (No. 23-939), 2024 WL 1586752 (summarizing evidence from ratification debates); Mike Rappaport, *Trump v. United States: Another Originalist Disaster*, ORIGINALISM BLOG (July 15, 2024, 8:00 AM), <https://originalismblog.typepad.com/the-originalism-blog/2024/07/trump-v-united-states-another-originalist-disastermike-rappaport.html> [<https://perma.cc/DS6V-AEQE>] (arguing that inferring presidential immunity from the need for “the energy of the executive is a bad—a really bad—originalist argument”). For a response, see Amandeep S. Grewal, *The President's Criminal Immunity*, 77 SMUL. REV. F. 81, 93–103 (2024) (arguing that adoption-era evidence is inconclusive and that criminal immunity for official acts is justified by the Supreme Court's previous precedents).

<sup>65</sup> 601 U.S. at 109 (citing *Griffin's Case*, 11 F. Cas. at 7, 25–26).

<sup>66</sup> See *supra* note 64.

<sup>67</sup> See 603 U.S. at 610.

<sup>68</sup> 457 U.S. 731 (1982).

<sup>69</sup> 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

<sup>70</sup> *Id.* at 634–35.

The failure to take originalist sources seriously is especially noteworthy in *Trump v. Anderson* and *Trump v. United States* because both were cases of first impression.<sup>71</sup> They did not present a situation in which the Justices might have to make peace with existing bodies of precedents that had generated substantial reliance. Nothing prevented the Justices from following the text and the original meaning of the Constitution—other than their own personal preferences.

The *Trump* cases are not outliers. They are only the latest examples of a long-standing phenomenon. If even self-described originalist Justices cannot manage to apply originalism regularly and consistently, that is strong evidence that cafeteria originalism is characteristic of American legal culture. To paraphrase William Baude, originalism is not our law.<sup>72</sup> Cafeteria originalism is our law.<sup>73</sup>

#### *A. Individual Hypocrisy or Legal Culture?*

What explains this phenomenon? The explanation that comes most naturally to liberal opponents of originalism is that originalist judges are hypocrites, who say one thing and do another according to their ideological preferences.<sup>74</sup> The Justices, moreover, do themselves no favors by sanctimoniously pronouncing that originalism is the only way to be faithful to the Constitution and then departing from it when it suits their interests and preferences.<sup>75</sup>

Here is a striking example. After the Court moved away from a rigid originalist analysis in *United States v. Rahimi*<sup>76</sup> (about which more later), Justices Gorsuch and Kavanaugh felt compelled to write vigorous concurrences reaffirming their faith in originalism.<sup>77</sup> They denounced the very idea that judges would apply contemporary values—much less judges’ own values—to contemporary problems and asserted that only recourse to history could avoid judicial policymaking.<sup>78</sup>

The Framers’ commands, Justice Gorsuch proclaimed, are a law “‘trapped in amber,’ [and] our only lawful role is to apply them in the cases that come before us.”<sup>79</sup> Quoting Chief Justice Roberts, Justice Kavanaugh insisted that “[j]udges are

<sup>71</sup> See *Trump v. Anderson*, 601 U.S. 100, 108–10 (2024); *Trump v. United States*, 603 U.S. at 605–06.

<sup>72</sup> William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2352 (2015).

<sup>73</sup> *Cf. id.* (arguing that our law is an “inclusive originalism” that allows for evolution consistent with the text’s original meaning).

<sup>74</sup> CHEMERINSKY, *supra* note 10, at 139 (describing originalism’s “Hypocrisy Problem”).

<sup>75</sup> Fallon, *supra* note 10, at 232 (“[W]hen the originalist Justices trumpet their originalism, it is often to deride judicial nonoriginalists and especially liberals for infidelity to the Constitution. In this pattern, nonoriginalists readily discern opportunism and hypocrisy.” (footnotes omitted)).

<sup>76</sup> 602 U.S. 680 (2024).

<sup>77</sup> *Id.* at 708–09 (Gorsuch, J., concurring); *id.* at 714 (Kavanaugh, J., concurring).

<sup>78</sup> *Id.* at 712 (Gorsuch, J., concurring); *id.* at 717–18 (Kavanaugh, J., concurring).

<sup>79</sup> *Id.* at 709 (Gorsuch, J., concurring) (citation omitted). In his majority opinion in *Rahimi*, Chief Justice Roberts asserted that “our recent Second Amendment cases. . . . were

like umpires.”<sup>80</sup> Quoting Judge Robert Bork, he asserted that “there ‘is no principled way’ for a neutral judge ‘to prefer any claimed human value to any other.’”<sup>81</sup> Quoting Justice Scalia, he assured us that “[h]istory establishes a ‘criterion that is conceptually quite separate from the preferences of the judge himself.’”<sup>82</sup> (Especially delicious is Kavanaugh’s quotation of Antonin Scalia, the Crown Prince of Cafeteria Originalism.)<sup>83</sup>

Although “[d]iscerning what the original meaning of the Constitution requires in this or that case may sometimes be difficult,” Justice Gorsuch wrote in *Rahimi*, “[a]sking that question . . . at least keeps judges in their proper lane, seeking to honor the supreme law the people have ordained rather than substituting our will for theirs.”<sup>84</sup> If we

[a]llow judges to reign unbounded by those materials, or permit them to extrapolate their own broad new principles from those sources, . . . no one can have any idea how they might rule. (Except the judges themselves.) Faithful adherence to the Constitution’s original meaning may be an imperfect guide, but I can think of no more perfect one for us to follow.<sup>85</sup>

Stirring words. But a little more than a week after *Rahimi*, both Gorsuch and Kavanaugh joined the majority opinion in *Trump v. United States*, which created a new constitutional privilege that held former presidents immune for acts performed in their official capacities.<sup>86</sup> The conservative legal movement is committed to a powerful and unencumbered President.<sup>87</sup> The historical evidence on presidential immunity was not useful to the conservative Justices, who sought to protect presidential

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not meant to suggest a law trapped in amber.” *Id.* at 691 (majority opinion). Justice Gorsuch borrowed the phrase to make the opposite point.

<sup>80</sup> *Id.* at 718 (Kavanaugh, J., concurring).

<sup>81</sup> *Id.* (quoting Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 8 (1971)).

<sup>82</sup> *Id.* (quoting Scalia, *supra* note 42, at 864).

<sup>83</sup> Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 *U. CIN. L. REV.* 7, 13 (2006) (“Whatever virtues [Scalia] attributes to originalism, he leaves himself not one but three different routes by which to escape adhering to the original meaning of the text. These are more than enough to allow him, or any judge, to reach any result he wishes.”).

<sup>84</sup> 602 U.S. at 711 (Gorsuch, J., concurring).

<sup>85</sup> *Id.* at 712.

<sup>86</sup> 603 U.S. 593, 606 (2024).

<sup>87</sup> Charlie Savage, *Legal Conservatives’ Long Game: Amp Up Presidential Power but Kneecap Federal Agencies*, *N.Y. TIMES* (July 4, 2024), <https://www.nytimes.com/2024/07/04/us/politics/conservative-legal-movement-supreme-court.html> [<https://perma.cc/K3Y6-AQJN>].

prerogatives and write an opinion “for the ages,” as Justice Gorsuch put it.<sup>88</sup> So the opinion ignored text and history and enacted the Justices’ policy preferences.

Nor is that all.<sup>89</sup> The *Trump v. United States* majority constructed an elaborate tripartite scheme consisting of core official acts with complete immunity, official acts outside the core with presumptive immunity, and non-official acts with no immunity.<sup>90</sup> This scheme was made up out of whole cloth and had no basis in the Constitution’s text or original meaning. Only two years previously, in *Dobbs v. Jackson Women’s Health Organization* (also joined by Gorsuch and Kavanaugh),<sup>91</sup> Justice Alito excoriated the decision in *Roe v. Wade*<sup>92</sup> and its trimester system for being “egregiously wrong and deeply damaging.”<sup>93</sup> Justice Alito explained: “The weaknesses in *Roe*’s reasoning are well-known. Without any grounding in the constitutional text, history, or precedent, it imposed on the entire country a detailed set of rules much like those that one might expect to find in a statute or regulation.”<sup>94</sup>

Apparently making up such rules in *Trump v. United States* is less troubling when they accord with one’s policy preferences.

These kinds of inconsistencies would be head-spinning if they were not so frequent. And yet the Justices’ constant inconstancy is part of the point. Whether the charge of hypocrisy is true in any particular case, it is not an adequate general explanation of cafeteria originalism in American legal culture. I would venture to guess that if we staffed the Supreme Court with nine originalists tomorrow, we would continue to see much of the same thing, albeit perhaps in different proportions. The Justices would make originalist arguments in some cases, ignore originalist arguments in many others, and in still others would reach decisions that are unsupported by any serious investigation into originalist sources.<sup>95</sup>

When critics treat cafeteria originalism as a personal failing of originalist judges and Justices, they miss a larger point about the structure of legal argument in the United States. Cafeteria originalism is not simply a pathology of weak-willed judges and Justices. It reflects fundamental features of American political and legal culture, and that is why everyone, including originalist judges and Justices, are cafeteria originalists.

Let me offer some larger cultural explanations of the phenomenon. The first two apply more narrowly, and they do not fully account for the phenomenon. Nevertheless,

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<sup>88</sup> Transcript of Oral Argument at 140, *Trump v. United States*, 603 U.S. 593 (No. 23-939) (remarks of Justice Gorsuch).

<sup>89</sup> This paragraph is adapted from Jack Balkin, *Presidential Immunity: Discussion Questions on Trump v. United States*, BALKINIZATION (July 26, 2024, 9:30 AM), <https://balkin.blogspot.com/2024/07/presidential-immunity-discussion.html> [<https://perma.cc/H8NY-EFWE>].

<sup>90</sup> *Trump v. United States*, 603 U.S. at 606, 611–16.

<sup>91</sup> 597 U.S. 215 (2022).

<sup>92</sup> 410 U.S. 113 (1973).

<sup>93</sup> *Dobbs*, 597 U.S. at 268.

<sup>94</sup> *Id.* at 270–71.

<sup>95</sup> *Cf.* Fallon, *supra* note 10, at 232 (“As a practical matter . . . we do not now have and never have had any originalist Justices who were not selective originalists.”).

I offer them because they helpfully explain some of the key uses of originalist argument in American legal culture. By contrast, my third explanation of cafeteria originalism is the most comprehensive. Because it rests on general features of American legal culture, I think it is the best one.

*B. Originalist Argument as a Strategy of Reform or Revolution*

First, in American legal culture, originalist arguments are often arguments for reform or even revolutionary change.<sup>96</sup> Employing originalist argument is often part of a reform program. That is especially true for the modern conservative legal movement, which hopes to reshape American law to reflect conservative values.<sup>97</sup>

The legal historian Alfred H. Kelly called originalist argument a “precedent-breaking instrument.”<sup>98</sup> To displace the authority of precedent, it is necessary to find something that has even greater legitimacy and authority. Adoption history serves this function. Originalist argument treats bodies of doctrine as a wrong turn and argues for going back to the correct path, which is the true source of constitutional authority. A lot of originalist argument functions in precisely this way, and as I note in *Memory and Authority*, both people on the left and the right have adopted this approach.<sup>99</sup>

But if originalist argument is a tool of revolution, revolutions do not upset everything in a society or culture. Much practice remains more or less the same. Even in the midst of constitutional revolutions, there are whole bodies of law where there is no desire to uproot everything and start over.<sup>100</sup> On these questions, originalist arguments are unlikely to make much of an appearance—except as originalist decoration—because they are not really needed.<sup>101</sup>

Moreover, most revolutions end at some point. Judges then have to consolidate the revolution and develop new doctrines, categories, and distinctions to reason with. Then we go back to ordinary times, or what Thomas Kuhn would have called “normal science.”<sup>102</sup> (In using this phrase, I do not mean to suggest that law is a science like physics; I mean “science” in the older sense of the word: that law is a body of organized knowledge.)

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<sup>96</sup> BALKIN, *MEMORY AND AUTHORITY*, *supra* note 1, at 72, 87–93.

<sup>97</sup> *Id.* at 91–93.

<sup>98</sup> Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 125.

<sup>99</sup> BALKIN, *MEMORY AND AUTHORITY*, *supra* note 1, at 87–93.

<sup>100</sup> See Mila Sohoni, *The Puzzle of Procedural Originalism*, 72 DUKE L.J. 941, 949 (2023) (pointing out that the originalist Justices have not tried to make most of the law of civil procedure consistent with originalism).

<sup>101</sup> Cf. Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 922–29 (2021) (arguing that precedent acts as a permissible option for run-of-the-mill cases and for situations in which judges do not wish to uproot whole areas of the law).

<sup>102</sup> THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 5 (4th ed. 2012) (explaining that “normal science” is “the activity in which most scientists inevitably spend almost all their time”).

Therefore, in areas of the law where no legal revolution has occurred, or in areas after most of the revolutionary work has been done, ordinary, non-originalist forms of doctrinal argument will tend to dominate.

According to this explanation, a turn to originalist argument usually reflects a desire for change. It seeks to uproot and displace bodies of law that have strayed from the correct path. Because the revolution does not displace everything, originalist argument does not occur everywhere. In fact, in periods of “normal science,” we are likely to see originalist argument more in dissenting opinions that reflect dissatisfaction with the status quo. Originalism remains a weapon of critique.

The first explanation for cafeteria originalism, then, is that originalist argument works best as a revolutionary practice, so we are most likely to see it in these contexts (whether in majority or dissenting opinions), and less so elsewhere.

This explanation of cafeteria originalism cannot be a complete explanation, however. Sometimes the law makes big changes without employing originalist arguments. The two *Trump* cases are an example; the Court’s recent social media case, *Moody v. NetChoice, LLC*,<sup>103</sup> is another. Conversely, the Court may decide to incorporate a historical test into doctrine, as it has in the case of the Second and Seventh Amendments.<sup>104</sup> In that case, later courts are expected to make arguments from adoption history as a matter of doctrine—as a part of normal science.

### *C. Originalist Argument as Ground-Clearing Work*

A second explanation for cafeteria originalism is that originalist arguments are especially useful in cases of first impression or in cases in which a new body of law is being formed. In these situations, judges need to clear an intellectual space and shape the initial direction of doctrinal development. But once that initial work has been done, judges will begin to create doctrines, distinctions, and categories to decide successive cases. Therefore, over time, doctrinal exegesis will tend to dominate over originalist argument, except, of course, for dissenting opinions that object to what the majority is doing and seek to start over.

Akhil Reed Amar has helpfully compared this phenomenon to the difference between using a chainsaw and a chisel.<sup>105</sup> A chainsaw is helpful for clearing the

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<sup>103</sup> 603 U.S. 707 (2024).

<sup>104</sup> *E.g.*, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 24 (2022) (“When the Second Amendment’s plain text covers an individual’s conduct . . . [t]he government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.”); *SEC v. Jarkesy*, 603 U.S. 109, 122 (2024) (noting that the Seventh Amendment jury trial guarantee applies to cases that are “legal in nature” judged by reference to historical practices (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989))).

<sup>105</sup> Akhil Reed Amar, *The Court’s Originalism About Face*, *AMERICA’S CONST.*, at 12:31–15:15 (June 25, 2024), <https://amaricasconstitution.podbean.com/e/the-courts-originalism-about-face/> [<https://perma.cc/2KEC-WNGC>].

brush, but a chisel is better for making fine adjustments. Originalism is like a chainsaw. It is good for clearing away lots of old doctrine or announcing basic principles. But a tool that cuts so broadly and indiscriminately is not good for making fine doctrinal distinctions.<sup>106</sup> For that we need a different tool. Doctrinal argument, when well-employed, is like a chisel. It is good for making analogies, drawing lines, and crafting useable tests.

Under this account, judges will tend to make originalist arguments when they need to get started building out a new doctrinal structure, but rely on it increasingly less over time.<sup>107</sup> That is because to develop such a workable doctrinal structure, one needs different skills. Judges building an enduring body of doctrine have to create doctrinal categories and rules and develop and apply them in a series of cases. Deciding each successive case by excavating historical sources is more difficult and may even prove unworkable over time.

We saw an example of this tendency in *United States v. Rahimi*,<sup>108</sup> decided, like the *Trump* cases, this past Term. Two years previously, in *New York State Rifle & Pistol Association, Inc. v. Bruen*,<sup>109</sup> Justice Thomas sought to establish a strict form of thick originalism to decide Second Amendment cases. He argued that gun regulations are unconstitutional unless they are consistent with the Nation's tradition of firearm regulation, which determines the scope of the Second Amendment right.<sup>110</sup> In order to apply the new test, courts were required to decide each new case by comparing contemporary firearm regulations to older statutes from the period of adoption. The relevant period was either circa 1791, when the Second Amendment was adopted, or 1868, when the Fourteenth Amendment was adopted. Confusingly, Justice Thomas did not specify which.<sup>111</sup>

As Justice Ketanji Brown Jackson pointed out in her *Rahimi* concurrence, this approach turned out to be quite difficult for lower court judges.<sup>112</sup> Moreover, as in

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<sup>106</sup> *See id.*

<sup>107</sup> Amar has explained:

The first big opinion in a field, if done well, can lay out the first principles of constitutional text, history, and structure, and an originalist/textualist judge is well-suited to this task. Once the foundation has been properly laid, later cases can begin to build on it. Doctrinalist skills become particularly useful as the judicial inquiry shifts from first principles to fine points. Many of the Second Amendment cases to come will revolve around the doctrinal tiers, tests, and formulas that dominate appellate case law. There will be time enough for . . . nonoriginalists to take the lead.

Akhil Reed Amar, Heller, HLR, and *Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 179 (2008).

<sup>108</sup> 602 U.S. 680 (2024).

<sup>109</sup> 597 U.S. 1 (2022).

<sup>110</sup> *Id.* at 24.

<sup>111</sup> *Id.* at 37–38.

<sup>112</sup> *See Rahimi*, 602 U.S. at 742 (Jackson, J., concurring) (“The message that lower courts

the Fifth Circuit opinion in *Rahimi*, it sometimes produced unpalatable results.<sup>113</sup> The Fifth Circuit, applying Thomas’s test, struck down a federal law that disarmed people who were subject to restraining orders for domestic violence.<sup>114</sup> The case involved a drug dealer who threatened his girlfriend with a pistol, attempted to kidnap her, and shot at her in a parking lot when she tried to escape.<sup>115</sup> *Rahimi*’s girlfriend obtained a restraining order, but he continued on a shooting spree over the course of several months.<sup>116</sup> He was convicted under 18 U.S.C. § 922(g)(8), which makes it a federal crime for individuals to possess a firearm while subject to a domestic violence restraining order.<sup>117</sup> *Rahimi* argued that he could not be punished because there was no historical tradition of laws disarming people subject to restraining orders, and the Fifth Circuit agreed.<sup>118</sup>

The Supreme Court was not about to hold that the Second Amendment stood in the way of keeping guns out of the hands of violent men who threatened their wives and girlfriends. Therefore it moved in a different direction. It held that lower courts should decide “whether the challenged regulation is consistent with the principles that underpin our regulatory tradition.”<sup>119</sup> In other words, courts should derive general principles from adoption-era legislation and apply them to contemporary regulations. Hence modern regulations do not have to match the laws that eighteenth- and nineteenth-century legislatures enacted in very different times and circumstances. Instead, the relevant question is whether modern statutes serve the same purposes as the older ones and use regulatory methods that are sufficiently similar.

Justice Thomas believed that the scope of constitutional rights was largely determined by past examples.<sup>120</sup> Therefore the job of judges was a treasure hunt for comparables. But that is an awkward way of developing doctrine. And, as Justice Thomas himself demonstrated in his opinion in *Bruen*, it also invites cherry-picking

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are sending now in Second Amendment cases could not be clearer. They say there is little method to *Bruen*’s madness.”).

<sup>113</sup> See *United States v. Rahimi*, 61 F.4th 443, 460–61 (5th Cir. 2023).

<sup>114</sup> See *Rahimi*, 602 U.S. at 684–89.

<sup>115</sup> *Id.* at 686.

<sup>116</sup> *Id.* at 686–87.

<sup>117</sup> *Id.* at 688–89.

<sup>118</sup> *Id.* at 689; *Rahimi*, 61 F.4th at 457 (“The purpose of laws disarming ‘disloyal’ or ‘unacceptable’ groups was ostensibly the preservation of political and social order, not the protection of an identified person from the threat of ‘domestic gun abuse,’ posed by another individual.” (citation omitted)).

<sup>119</sup> *Rahimi*, 602 U.S. at 692.

<sup>120</sup> See *id.* at 775 (Thomas, J., dissenting) (arguing that “[t]he Second Amendment recognizes a pre-existing right” with the scope it was understood to have when people adopted the Second Amendment); *id.* at 767 (“[Section] 922(g)(8) addresses a societal problem—the risk of interpersonal violence—that has persisted since the 18th century, yet was addressed ‘through [the] materially different means’ of surety laws.” (quoting *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 26 (2022))).

of sources to get to the desired result.<sup>121</sup> Hence the Court shifted to a different test that allowed greater flexibility. It sought a chisel rather than a chainsaw.

This second explanation for cafeteria originalism argues that different kinds of arguments work better for different situations and functions. Originalist argument is likely to appear when it is most useful—that is, in clearing the brush and starting on a new path. But in crafting a body of law, originalist argument may be relatively less valuable and may actually hamstring the rational development of doctrine. So it will tend to recede as doctrinal development continues, except, as always, for dissenting opinions and opinions that employ originalist decoration.

This second explanation, too, is incomplete. There are cases of first impression that judges, including self-styled originalist judges, do not decide on originalist grounds. In the area of freedom of speech, the Justices often pay little attention to originalist arguments when they strike out in new directions.<sup>122</sup> The *NetChoice* case<sup>123</sup> decided in the October 2023 Term is a good example. In *Brown v. Entertainment Merchants Ass’n*,<sup>124</sup> Justice Scalia held that interactive video games were protected by the First Amendment. He did not engage in any serious degree of originalist reasoning.<sup>125</sup> Justice Thomas’s dissent did look to originalist sources, but not on that particular question. Rather, he argued, on the basis of literature on parenting dating back to the 1600s, that children had no independent First Amendment rights.<sup>126</sup>

#### *D. Originalist Argument as the Expression of Contemporary Values Through Selective Invocation of the Memory of the Past*

So far, I’ve offered two explanations for why even self-described originalist judges would be cafeteria originalists. The first is that originalist argument is a tool of reform or revolutionary change rather than a mainstay of the “normal science” of

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<sup>121</sup> BALKIN, MEMORY AND AUTHORITY, *supra* note 1, at 207, 335 n.66 (describing how Justice Thomas selectively accepted and discounted evidence in *Bruen* to reach his desired conclusion).

<sup>122</sup> Fallon, *supra* note 10, at 251–52 (noting that modern First Amendment scrutiny rules have no basis in the original meaning of the First Amendment); *id.* at 254 (“[A]ppeals to evidence of the original constitutional understanding constitute a subtheme, at most, in the Supreme Court’s free speech jurisprudence, which many legal historians maintain deviates significantly from original constitutional understandings.”).

<sup>123</sup> *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024).

<sup>124</sup> 564 U.S. 786 (2011).

<sup>125</sup> Justice Scalia relied on abstract statements of the purposes of the First Amendment taken from three twentieth-century doctrinal opinions rather than discussing the views of the Founding generation. *Id.* at 790 (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948); *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 818 (2000); and *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

<sup>126</sup> *See Brown*, 564 U.S. at 823–35 (Thomas, J. dissenting).

doctrinal development. The second is that originalist argument is good for clearing obstacles and starting on a new path but not as good for developing the fine distinctions necessary for a durable and rational body of doctrine. Note that both of these accounts focus on the needs of the present.

My third explanation is broader. It argues that cafeteria originalism is an example of how we remember and use the past to argue with each other about what to do in the present. This account, too, is about the uses of the past to express our present-day values.

In *Memory and Authority*, I argue that originalist arguments are hybrids.<sup>127</sup> Regardless of the modality they present, they are also either explicitly or implicitly appeals to national ethos, tradition, and honored authorities. Originalist arguments have special rhetorical force in American legal culture because they appeal to the nation's collective memory.

Originalist appeals argue that We the People have already made a decision about a contested question of value. Because We the People have already decided what to do, we must do what we have already decided.<sup>128</sup> In this way, originalist arguments assume a commonality between ourselves in the present and the people who adopted the Constitution and its amendments. This commonality explains why we can assert that by following the framers we rule ourselves rather than being ruled by an alien force from the past. If we do not like our previous decision, we can change the Constitution through an amendment or a new convention.

This belief in an identity between ourselves and the adopters is the metaphysics that makes originalist argument both plausible to the present and an exercise of democratic self-government.<sup>129</sup> But this identification only works if we can plausibly view the values of the founders, framers, and adopters as our values, and not as an imposition by generations long dead.<sup>130</sup>

The point of making legal arguments is to resolve present-day legal controversies in ways that make sense to people living today. So we should expect that originalist arguments will appear when they are most persuasive to the people making them and they are less likely to be employed when they are least persuasive.

When are originalist arguments most persuasive? As I explained in *Memory and Authority*, originalist arguments tend to be persuasive when people can identify with

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<sup>127</sup> BALKIN, *MEMORY AND AUTHORITY*, *supra* note 1, at 7, 12, 118, 159–60.

<sup>128</sup> *See id.* at 12, 224–25.

<sup>129</sup> *See, e.g.*, *United States v. Rahimi*, 602 U.S. 680, 709–10 (2024) (Gorsuch, J., concurring) (“As judges charged with respecting the people’s directions in the Constitution . . . our only lawful role is to apply them in the cases that come before us. . . . If changes are to be made to the Constitution’s directions, they must be made by the American people.”); Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 29 (1990) (arguing that “the authority of historical interpretation will in significant measure depend” on our present “identification, [or] a community of interest, with the framers or ratifiers” so that “[t]heir consent . . . is ‘our’ consent; they spoke ‘for’ us”).

<sup>130</sup> BALKIN, *MEMORY AND AUTHORITY*, *supra* note 1, at 12, 118; Post, *supra* note 129, at 29.

the values of the founders, framers or adopters, at least as they understand or reinterpret them.<sup>131</sup> Originalist arguments are most persuasive when people can understand the framers' values as their values or can describe them at a sufficient level of generality so that people can consider them to be their own values.<sup>132</sup> Respect for the past, and a desire for continuity with the great deeds, achievements, and values of the past (as we understand them) can be part of people's present-day values. But when the values of the founders, framers or adopters appear too alien, irrelevant, or embarrassing, people generally do not make originalist arguments or simply ignore them.<sup>133</sup>

Not only do people find originalist arguments plausible when they cohere with their present-day values, but the converse is also true. When people want to promote policies consistent with their present-day values, they often find ways to express them through originalist argument, offering interpretations of the past that support their views. This is an example of historical ventriloquism, in which "[w]e make the past speak our normative values in the form of commands so that we can then obey them."<sup>134</sup> When people use originalist argument in this way, they can maintain that they are not advocating or enforcing their own values; rather they are defending the values already enacted into law by the founders, framers, and adopters. They are absolved of responsibility. And when people have no settled views on a technical matter, an inquiry into originalist materials offers a handy way of resolving a question without taking any responsibility for it. One discovers the law already there and simply applies it.

These practices produce cafeteria originalism. We take from the founders, framers, and adopters what coheres with our present-day values, or we reinterpret the founders, framers, and adopters so that their values cohere (or do not strongly conflict) with our own values.

This account is consistent with what the Court did in the two *Trump* cases and in *Rahimi*. Historical evidence strongly suggests that Section 3 is self-executing, and that former presidents are not immune from criminal prosecution after they leave office.<sup>135</sup> But the Court's conservative majority believed that the consequences of these two positions were bad. So they mostly ignored adoption history.

The results in the two *Trump* cases—and especially *Trump v. United States*—are consistent with contemporary conservative ideology, which favors a strong and unaccountable presidency (and a weak administrative state).<sup>136</sup> But they are not necessarily consistent with the values of the framers. In fact, the results in the *Trump* cases are consistent with an approach that interprets the Constitution according to

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<sup>131</sup> BALKIN, MEMORY AND AUTHORITY, *supra* note 1, at 118.

<sup>132</sup> *Id.* at 12.

<sup>133</sup> *Id.* at 12, 118.

<sup>134</sup> *Id.* at 12–13.

<sup>135</sup> *See supra* note 64.

<sup>136</sup> Savage, *supra* note 87.

contemporary needs and conditions, which is to say, they are a conservative version of living constitutionalism.<sup>137</sup>

In *Rahimi*, the Court asserted that it was applying an originalist test. But it changed the test to make it easier for courts to reinterpret and re-describe the lessons of the past. In *Bruen*, Justice Thomas had held that the scope of Second Amendment rights is determined by the scope of specific firearm regulations contemporaneous with the adoption of the Second Amendment (or the Fourteenth Amendment—he does not decide which).<sup>138</sup> If a modern regulation does not sufficiently match the historical examples, it is unconstitutional. Because disarming men who harm their wives and girlfriends had no close historical analogues in the legislation of the eighteenth and early nineteenth centuries, the Fifth Circuit concluded that the law was unconstitutional.<sup>139</sup>

This account of what the past commanded was unacceptable to the majority because of present-day values.<sup>140</sup> We live in a culture that thinks about domestic violence—and government’s obligations to prevent it—quite differently than the eighteenth and early nineteenth centuries. Hence the majority moved to a new test that allowed courts to understand the past differently. Now courts are directed to draw principles of permissible regulation from early examples.<sup>141</sup> As a result, modern regulations that eighteenth- and nineteenth-century legislatures never thought of can still be constitutional if contemporary courts can draw analogies to (1) the reasons for older statutes (as we understand them in the present) and (2) the methods used to regulate firearms in older legal regimes (as we understand them in the present).

Drawing principles from past practice offers courts considerable flexibility to choose doctrines that mesh with present-day values. That is because principles do not determine the scope of their own extension. One has to decide the proper scope of a principle both when one constructs it from a set of older examples *and* when one decides how to apply the principle to new situations. The usual way of expressing this is that one can state principles at different levels of generality.<sup>142</sup> But that is not quite accurate. One can derive two different substantive principles from the same concrete examples even if both principles are roughly at the same level of generality or if each principle is more general in some respects and more specific in others.

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<sup>137</sup> See BALKIN, MEMORY AND AUTHORITY, *supra* note 1, at 65–66.

<sup>138</sup> N.Y. State Rifle & Pistol Ass’n v. Bruen, 597 U.S. 1, 37–38 (2022).

<sup>139</sup> United States v. Rahimi, 61 F.4th 443, 457 (5th Cir. 2023).

<sup>140</sup> The next five paragraphs are adapted from Jack M. Balkin, *Text, History, and Tradition—and Principle: Discussion Questions on United States v. Rahimi*, BALKINIZATION (July 26, 2024, 8:30 AM), <http://balkin.blogspot.com/2024/07/text-history-and-tradition-and.html> [<https://perma.cc/M3RZ-WWEJ>].

<sup>141</sup> United States v. Rahimi, 602 U.S. 680, 692 (2024) (“[T]he appropriate analysis involves . . . whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. . . . [and] whether the new law is ‘relevantly similar’ to laws that our tradition is understood to permit.”).

<sup>142</sup> See *id.* at 739–40 (Barrett, J., concurring) (acknowledging the problem).

In *Rahimi*, for example, Chief Justice Roberts argues that “[t]aken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed.”<sup>143</sup> But one might also derive the principle that when there is sufficient reason to believe that people are dangerous, they can be required to give financial guarantees and fined or subsequently punished if they cause harm to others or breach the peace. That is the rule that Justice Thomas took from examining the very same history.<sup>144</sup> This alternative principle is more specific in some ways and more general in others (for example, it does not require a “clear threat of physical violence,” and it offers a broader choice of remedies). And in still other ways Thomas’s principle is neither more general nor more specific, but just different. While Roberts’s principle would allow disarming people who are subject to a restraining order, Thomas’s principle would simply allow states to require surety bonds, enforce civil fines, and impose subsequent criminal punishments.

The choice between these two principles is not determined by the set of examples used to construct them, since both fit the historical facts more or less. Rather, the choice between them is determined by which principle makes the most sense in contemporary contexts. In other words, *Rahimi*’s requirement that judges construct principles from past examples allows judges to use the past to enforce contemporary values, in this case, the desire to protect victims of domestic violence.<sup>145</sup>

Of course, Chief Justice Roberts does not admit that his opinion is driven by his own values or by the values of modern society. Instead, he simply describes the past so that it appears to produce results in line with modern views about domestic violence. In *Bruen*, Justice Thomas had rejected the idea that judges should engage in traditional scrutiny rules or balancing of interests because this draws on judges’ values and policy judgments.<sup>146</sup> The Court’s new test in *Rahimi* allows judges to do this *sub rosa* through choosing the right set of principles at the right level of generality and applying them in the right way. Perhaps not surprisingly, Justice Barrett concurred on the ground that the majority had adopted a set of principles that were

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<sup>143</sup> *Id.* at 682 (majority opinion).

<sup>144</sup> *Id.* at 764–67 (Thomas, J., dissenting) (noting that surety laws did not disarm people, allowed Second Amendment activities like public carry, and only resulted in fines); *id.* at 768–71 (noting that affray laws were aimed at breaches of the peace, not domestic violence, and were enforced by subsequent punishment, not by disarming).

<sup>145</sup> See Reva B. Siegel, *The Levels-of-Generality Game: “History and Tradition” in the Roberts Court*, 47 HARV. J.L. & PUB. POL’Y (forthcoming 2024).

<sup>146</sup> *Bruen*, 597 U.S. at 22–23. Of course, it is hardly clear that historical argument avoids drawing on judges’ values and policy judgments. See Rebecca Brown et al., *Guns, Judges, and Trump* 17–23 (Univ. S. Cal. L. Legal Stud., Working Paper No. 24-31, 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4873330](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4873330) [<https://perma.cc/5XP9-6E7H>] (empirical study finding that lower court judges appointed by President Donald Trump are far more likely to support Second Amendment claims than all other judges, regardless of the party of the appointing president).

neither too concrete nor too general, but at “just the right level of generality.”<sup>147</sup> But what makes it “just the right level of generality”? The consequences that the principles are likely to produce in the present.

Originalist arguments, as I have said, are either explicitly or implicitly appeals to tradition. But if people find a tradition irrelevant, misconceived, or abhorrent, the tradition loses most of its persuasive force. Therefore people will either avoid this kind of argument, or they will find ways to re-describe the tradition—selectively, broadly, narrowly, concretely, or abstractly—so that it better comports with their values and common sense. This is what happened in *Rahimi*. Moreover, because different people have different values, they do not always agree when to make originalist arguments and when to ignore them.<sup>148</sup> So some people may offer originalist justifications because they find the tradition (as they understand it) sensible and want others to follow it. Others may find the originalist analysis not useful or unreasonable and simply ignore it.

Conversely, and for similar reasons, it is possible for people to disagree strongly about contemporary legal issues while both sides are making originalist arguments. People may offer different accounts of our traditions that mesh with different values, policies, and legal conclusions. People may often find it possible to describe adoption history in contrasting ways and at varying degrees of abstraction so that it coheres with their values.<sup>149</sup> That is what we also see in *Rahimi*. The majority saw in the history of gun regulation principles that allowed the government to disarm dangerous individuals.<sup>150</sup> Justice Thomas, looking at the same history in his dissent, found no evidence that the state could disarm such individuals; at most it could only fine or imprison people after the fact if they injured their domestic partners.<sup>151</sup>

#### CONCLUSION

Originalist argument is a familiar feature of constitutional rhetoric that has been with us since the early Federalist period. By contrast, originalism—at least the kind practiced by movement conservatives today—is an interpretive theory that developed in the twentieth century. This theory grew up within—and was superimposed over—the deep structures of constitutional culture in the United States. American political and constitutional culture normally reveres the Founding and treats the framers as culture heroes. Originalism builds on that reverence. But the practices of constitutional argument are plural and eclectic, and they have been so since the beginning of the nation.

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<sup>147</sup> *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring).

<sup>148</sup> See BALKIN, MEMORY AND AUTHORITY, *supra* note 1, at 12.

<sup>149</sup> See *id.* at 163.

<sup>150</sup> See *Rahimi*, 602 U.S. at 699–700.

<sup>151</sup> *Id.* at 763–67 (Thomas, J., dissenting).

One should not confuse the interpretive theories that law professors fight over with the culture of constitutional argument that these theories live within. Within this culture, everyone makes originalist arguments as part of a larger collection of rhetorical strategies. This structure produces the effect I have called “cafeteria originalism.” From the standpoint of conservative originalism, this fact is a problem. But from the standpoint of American constitutional culture, it is perfectly normal. It is just what we do around here.