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Chapman Law Review Debate: Does Originalism Work?

Kurt Eggert and Lee Strang,† moderated by Tom Campbell‡*

PROFESSOR CAMPBELL:

Good afternoon. We're very happy to put together this debate stemming from Professor Eggert's paper, *Originalism Is Not What It Used to Be*, published by the *Chapman Law Review*.¹ We are looking forward to a presentation by Professor Eggert, and I wanted to give a brief introduction of him, and then a response followed by Professor Strang. For background, I think all of us here know Professor Eggert, but I did the research, so I'm going to share it with you.

Professor Eggert is, of course, the director of the Alona Cortese Elder Law Clinic here at Chapman Law School, and full Professor of Law. He has his J.D. from UC Berkeley. He has given Congressional testimony and published on consumer protection, mortgages, gambling regulation, and, of course, elder law, and was a member of the Federal Reserve Board's Consumer Advisory Council. Professor Eggert is the author of the piece which is up in this debate.

Professor Lee Strang, most graciously, has come across the continent to be with us today. He is the John W. Stoepler Professor of Law and Values at the University of Toledo Law School. He has his law degree from University of Iowa and his Masters of Law from Harvard University. Professor Strang is chair of the Ohio Advisory Committee of the United States Commission on Civil Rights and

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¹ Kurt Eggert, *Originalism Isn't What It Used to Be: The Nondelegation Doctrine, Originalism, and Government by Judiciary*, 24 CHAP. L. REV. 707 (2021), <http://digitalcommons.chapman.edu/cgi/viewcontent.cgi?article=1468&context=chapman-law-review>.

was a Visiting Fellow at the James Madison Program of Princeton University. Professor Strang is author of *Originalism's Promise: A Natural Law Account of the American Constitution* and, also, the author of his own Constitutional Law textbook.

So, we will proceed today with fifteen minutes from Professor Eggert, followed by fifteen by Professor Strang, and then fifteen where the three of us will have a conversation, and then the last fifteen for questions and comments from the students. So let us introduce, with a warm welcome, our colleague, Professor Kurt Eggert.

PROFESSOR EGGERT:

Thank you. I appreciate all of you attending this debate. This is wonderful. I wrote the article we are discussing, *Originalism Isn't What It Used to Be*,² two years ago and never did I think that two years later I'd be addressing such a big and hopefully enthusiastic crowd about it. I have to tell you that I come to this issue from a different angle than many people who are debating originalism. Most people who do these debates are Constitutional Law professors and have an encyclopedic knowledge of Constitutional Law cases stretching back to antiquity, no, stretching back to the beginning of the Constitution. But I came to it because a couple of years ago we had a symposium on the nondelegation doctrine and *Chevron*—which are administrative law ideas—and I decided to write a piece on the nondelegation doctrine.

The more I researched the nondelegation doctrine, the more I became concerned, upset, outraged, worried, about the effect of originalism and how originalism was being used to turbocharge this doctrine which isn't in the Constitution and which would give the Supreme Court great power over how Congress decides the administrative state should act. To some extent the nondelegation doctrine is a fight between the Supreme Court and Congress about how big and powerful the administrative state should be and how much regulation there should be of society. I want to frame this debate in those terms. I view originalism as a sort of philosophical buttress for the Supreme Court enforcing its policy preferences. And, in my view, the Supreme Court should not make policy. That's the job of Congress, put in place by the Executive Branch. The Supreme Court should be enforcing laws and the Constitution, though doing so will naturally have policy implications. But, as so many people testifying in their confirmation hearings have said,

² *Id.*

they should be calling the balls and strikes, not deciding what our country should be like.

I'd like to thank the *Chapman Law Review* for setting this debate up, it's great. I've worked with them on their symposia. I've had a wonderful experience doing so. I'd like to thank Professor Campbell for moderating and Professor Strang for coming and providing me with this opportunity.

To frame the argument, let's talk about a case that came out in early March. The Fifth Circuit decided the case *United States v. Rahimi*,³ involving whether people who are subject to a restraining order for domestic violence can, as part of that order, have their guns taken away which, as you can imagine, is a very important topic. The Fifth Circuit had previously said we permit this encroachment on the Second Amendment because it seems justified and workable, and therefore, it's permissible.⁴ However, after the Supreme Court's most recent Second Amendment case, *N.Y. State Rifle & Pistol Ass'n v. Bruen*,⁵ the Fifth Circuit said now the task is not to make this reasonableness determination but rather to see whether the restrictions put in place are sufficiently similar to historical restrictions on firearms and place a comparable burden on the right of armed self-defense. The court said you can only restrict guns in the same way restrictions were done when the Second Amendment was ratified. It has to be pretty similar. That case involved somebody who was involved in five different shootings and had allegedly assaulted and threatened his ex-girlfriend. She had received this restraining order by saying, essentially, "I'm in fear, he shouldn't have guns." So the court in her restraining order case took away his guns.

Now, if you look at the Second Amendment, it doesn't say anything about restraining orders. The Court in *Bruen* said we have to look at what similar restrictions were in place back then, and whether the government, back in the time of the Second Amendment, took guns away from people it viewed as dangerous. The Fifth Circuit in *Rahimi* looked at such examples, parsed them out, and concluded that in each case, the historic examples were not similar enough to taking guns away from somebody subject to a domestic violence restraining order that we can abide by restraining order gun removal. So the Fifth Circuit held that the federal law banning the possession of firearms for specified

³ *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023).

⁴ *See United States v. McGinnis*, 956 F.3d 747, 759 (5th Cir. 2020).

⁵ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

restraining orders is unconstitutional. In a stroke they took away important protections for victims of domestic violence. So that's the framework.

Let's talk about originalism. Originalism is very difficult to define because there have been so many different forms of it. Here, the court was applying originalism as directed by the Supreme Court. But originally, originalism focused on the original intent of the Founders. What did the Framers think when they drafted the Constitution? However, that focus on original intent quickly fell by the wayside, or fairly quickly fell by the wayside, because people pointed out there's no way to know what this collective body intended. Collective bodies can't intend. We may know what individual Framers thought about specific issues, but we can't say the Framers intended this just because Madison said it, or just because Hamilton said it. There was also a great article by H. Jefferson Powell in 1985 where he said not only that, but also that the evidence at the time indicates that the Framers didn't want their original intent to be binding, but rather expected that the Constitution would be interpreted according to the plain meaning of the text, just like we do with everything else.⁶ And so, Powell said we shouldn't have this idea that original intent governs, both because it is hard to figure out what that is, but also if the Framers didn't want original intent to govern, if we want to honor their original intent, that means we should not do originalism. So, it was a pretty strong argument.

One can find quotations from the time of the founding that support both sides. Some indicate that the intentions of the Framers should have significance in interpreting the Constitution. Others indicate the opposite. I think it was Madison who said that the Framers of the Constitution should not be considered a great oracle for the interpretation of the Constitution.⁷

An important indication that the Framers of the Constitution did not want their intent to govern is how secretive they were about their discussions. You would think that if they were going to say, "our intent should be what people follow," we would have had great records of the debates, which would be the best

⁶ See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

⁷ Madison stated: "But, after all, whatever veneration might be entertained for the body of men who formed our constitution, the sense of that body could never be regarded as the oracular guide in the expounding the constitution." James Madison, *Jay's Treaty* (Apr. 6, 1796), in *UNIV. PRESS OF VA., 16 THE PAPERS OF JAMES MADISON* 290, 295–96 (David B. Mattern et al. eds., 1989).

expression of their intent. But instead, they met in secret, and their debates weren't published until long after the Constitution was ratified. They didn't put out to the public, "hey, ratify this only if you agree with our intent." Instead, I think Madison's notes, which are probably the best record of the Constitution, weren't published until 1840, long after the original period. If they'd wanted their intent to govern, I think they naturally would have said "here is what we intend by this, here are the debates," but they did not do that.

So, with these criticisms, the idea that it was the original intent of the Framers that governed was kind of blown up. So originalists scrambled around and said, "well it's not the Framers we care about, it's the Ratifiers, because it's the ratification that really put the Constitution into place." But there are bigger problems because there are a lot more Ratifiers, thus a much bigger collective body of which to figure out their intent. A lot of the records of ratification debates are either non-existent or really sloppy, so you can't really ascertain what the Ratifiers intended, and, by and large, the Ratifiers were only asked one question of "do we ratify?" From that, you can't conclude that they agreed to any intention about any particular statement in the Constitution. So then that way of originalism passed by and then we come to the next one.

Next emerged the third wave of originalism. This one was probably led off by Justice Scalia who said, in effect, "we should stop talking about original intent and start talking about original meaning." So, the third wave is labeled original public meaning originalism, also known as the new originalism. I like the term "new originalism" because it is sort of like "jumbo shrimp." The two words don't go together. How can originalism keep changing if what it purports to be is the original understanding? The new original public meaning originalism was supposed to be more objective. We were not to depend on the subjective intent of the Framers or the Ratifiers, but rather on what the Constitution meant to the public. The claim is that the original public meaning is an objective standard. There are big problems with this, and this form of originalism is what I think a lot of originalists still use. Professor Strang has been studying this more so please correct me if I'm wrong in thinking that most originalists currently use some form of original public meaning. But the problem is how do you pin down how the public of the day understood the terms of the Constitution? Especially since many of those terms were written, I think, somewhat vaguely, as if to say we don't know exactly what

this means, but they'll figure it out as they go along in the future. Madison talked about how some terms of the Constitution will not have an exact meaning, either because of the difficulty of drafting or differences of opinion among drafters, and their more exact meaning will be settled and liquidated by practice as people decide on the meaning of vague terms, like cruel and unusual punishment.⁸ Do you mean cruel and unusual punishment at the time the Eighth Amendment was ratified? Or do you mean what is considered cruel and unusual punishment in the future when people are deciding that? There's no way to use originalism to decide which approach to take. And so, people choose between them based on what they want to do.

The other problem with original public meaning is how do we figure out what people thought in 1781? As Scalia put it, that is an enormous challenge. It's very difficult to put yourself back in the perspective of that distant time and forget everything you've learned in the modern day.⁹ And so, they say you look at old dictionaries, but dictionaries are terrible at interpreting something like the Constitution because they just give you the meaning of one word and, often, they give you multiple meanings of the same word, so you have to pick which one is most accurate. They rip the words out of context and they aren't built for the context of the Constitution because the dictionaries at the time were written before the U.S. Constitution even existed.

One way some have tried to get around those problems was by saying, "well, let's use the big data." Something called corpus linguistics: taking a big corpus of a huge number of documents from the Founding Era and then using that to analyze what those old documents meant when they used the terms in question. But think about what we're asking judges to do now. A problem with originalism is it calls on judges to do things for which they are untrained and have very little time to do. We're asking them to be legal historians. We're asking them to be linguistic historians – not only ask what the legal framework was then but also how people spoke and what they meant when they said things. Judges are really unable to do that in an effective way. Even Scalia, who was probably

⁸ Madison remarked:

It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise, in expounding terms & phrases necessarily used in such a Charter. . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them.

Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 447, 450 (Gaillard Hunt ed., 1908).

⁹ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989).

the best legal historian on the Court, said judges aren't given the time or the research assistance to do that kind of historical analysis.¹⁰ The Supreme Court is not really set up to do that. He said it's still better than any other system, but it is very problematic.

There are also a number of other forms of originalism that have sprung up since then. This allows judges to kind of pick and choose which form of originalism they want to use. Can they just look at original intent if that helps them? Can they use original public meaning if the original intent isn't in their favor? They can pick the form of originalism to use based on the policy outcome it produces, which means that it's not a constraint on their actions. Originally, originalism was designed to restrain judges and force judges to defer to Congress to set policy and only step in if it was pretty clear that Congress had acted unconstitutionally. Originalism now, though, encourages courts to say "Hey, because you violate our chosen idea of the original meaning, we can set aside legislation kind of willy nilly." Instead of judicial restraint, what we have is judicial activism—though some conservatives call it "judicial fortitude"—be brave enough to set aside laws that you think violate the originalist view.

I have a couple minutes to get to nondelegation. The nondelegation doctrine is based on the idea that Congress can't delegate to federal agencies the ability to make rules that bind the public. It is an idea that has been bouncing around for a long while, but has really been put back into play by Justice Gorsuch in a recent dissent in the case *Gundy v. United States*.¹¹ He based reinvigorating the nondelegation doctrine on originalist principles, but the problem is if the Supreme Court can say no delegation, that would mean that the Environmental Protection Agency ("EPA") or the Securities and Exchange Commission ("SEC") or all the people who are writing these rules that regulate private conduct couldn't write them anymore. Congress would have to write the specific regulation that agencies have been creating. However, Congress cannot write, in a timely fashion, regulations to govern the environment because everything we know about it changes so quickly. The purpose of this requirement is to make sure there is a lot less regulation of private behavior.

What I argue is that the Framers hated the idea of judges making policy. During the drafting of the Constitution, there was a proposal that a Counsel of Revision, mostly made up of judges, would

¹⁰ See *id.* at 860–61.

¹¹ 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

veto legislation they didn't think was good law, even if it wasn't unconstitutional.¹² The proposed Council of Revision was rejected because of the idea that courts should not be in the business of making policy. Courts are supposed to call balls and strikes, to overturn laws if they are unconstitutional, but not make policy and overturn laws just because they disagree with them. Now, the Supreme Court has become one of the central policymakers in the federal government. It wants to make policy on what regulations the EPA can make. It wants to make a great amount of policy based on its originalist conceptions and doing so causes the Court to act in a manner that the Framers in the founding era never intended. They never wanted people to turn to the Supreme Court for major policy decisions, to say, "what is the rule on guns? Well, it's up to the Supreme Court. What's the rule on global warming? Well, it really depends on what the Supreme Court says." They would be appalled by the idea that the Supreme Court has become one of the primary policy making bodies in Washington, but that's where we are.

I think my time is up, so thank you.

PROFESSOR CAMPBELL:

Happy to welcome Professor Lee Strang. Thank you, Professor Strang.

PROFESSOR STRANG:

Thank you so much. Good afternoon. Great to be with you here at Chapman. It's my first time at the law school. Beautiful law school, beautiful campus. Thank you, Professor Eggert, for inviting me to come and debate. He and I first met virtually a couple of years ago when he published the article that was published with the *Chapman Law Review*. I read it. He and I corresponded. I gave him some thoughts. Good article, I thought. I learned from it, so I appreciate it. And then he reached out and said, "let's do an exchange like this." So, I really am looking forward to learning from our exchange.

Our debate today is—does originalism work? And there are a number of ways that question could be interpreted. The question *could* mean, does originalism work based on its own terms? That is, originalism tells us a story. Here's how you do it. Professor Eggert, I thought you did a great job talking about three to four different

¹² See generally James T. Barry III, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235 (1989) (discussing the historical context of the proposed Council of Revision and concluding that, by rejecting the proposed Council: "the Framers effectively chose to preclude the courts from deciding matters of public policy").

instantiations of how to do originalism. Originalism tells us a story of how we do it, and is originalism actually able to live up to its promise about how to do it?

There's a second way to interpret the question: even if originalism lives up to its goals—in other words, original intent, original meaning, whatever—is that the right way for us to interpret our Constitution? I'm going to focus in my initial remarks on the first question, and then in my conversation point, I want to respond to Professor Eggert's direct criticisms as well. I'm looking forward to your questions and comments. There are a lot of things that I can't say in fifteen minutes!

My argument this afternoon, in my initial remark, is that originalism, as it promises, is an effective means to faithfully follow and implement our written Constitution. In some ways, when you think about originalism, these are the best of times to be an originalist, at least since the New Deal. When you look at nominee Kagan's remarks during her 2010 confirmation hearings, my living constitutionalist friends were scandalized when she said, "we're all originalists now." And just this past year, nominee Brown-Jackson stated during her hearing, "I am focusing on the original public meaning because I'm constrained to interpret the text." And she elaborated: "I do not believe that there is a living Constitution . . . in the sense that it's changing and it's infused with my own policy perspective or the policy perspectives of the day. The Supreme Court has made clear that when you're interpreting the Constitution, you're looking at the text at the time of the founding."¹³ I think that's strong evidence that originalism is really becoming a powerful force, not just on the Court, but elsewhere.

My remarks are meant to provide reasons why it is that people like Justice Kagan and Justice Brown-Jackson, who you might think are not inclined towards originalism, at least as it's currently or conventionally understood, still describe themselves as originalists. So, first, to know how originalism works by its own standards, we need to know what originalism is.

Originalism in its modern scholarly form came to the forefront in the 1970s. Judge Bork was an original intent originalist and then segued over to original meaning originalism, as Professor Eggert talked about. Since that time, originalism has grown in sophistication and influence. I think a recent powerful piece of

¹³ Adam Liptak, *By Turns Cautious and Confident, Judge Jackson Takes the Stage*, N.Y. TIMES (Mar. 22, 2022), <http://www.nytimes.com/2022/03/22/us/ketanji-brown-jackson-judicial-philosophy.html>.

evidence is the *Dobbs* case. When you compare the *Roe* Court, where you had two dissenters, to the *Dobbs* Court, where you had six to three—six originalist justices overruling or limiting—you see the influence of originalism on the Supreme Court.

One other thing I would suggest is that the Supreme Court oral arguments are available publicly on the Oyez website. Go back and listen to the *Roe* oral argument and then compare it to the *Dobbs* oral argument. And I think not only do you see a change of outcome; what you see is a change of focus of what the judges and the advocates think it is they're focusing on. Compare the *Roe* Court's way of thinking about what the role of a court is and then compare it to that of the *Dobbs* Court, and I think it shows you the influence that originalism has had in focusing legal argument on text, structure, history, and precedent.

Second, how do you do originalism? Originalism in principle is the idea that the public meaning of the text, when it was ratified, is the Constitution's authoritative meaning. So, let's say that we were trying to find out the original meaning of the word religion in the First Amendment. We'd see that the word appears twice, first in the Religious Test Clause in the original Constitution and then also in the First Amendment. And so, we know that the text says the word "religion." And we also know that the Framers and Ratifiers were speaking a language that looks a lot like our language. But you also know, especially if you're an English major, that there's a phenomenon of linguistic discontinuity: that in natural languages that people are speaking—living languages—the language's meanings change over time, haphazardly and unexpectedly. And so, we can't just rely on the text and today's conventional meaning.

Next, we look at the structure of the Constitution. We see that in every instance where the word "religion" appears, it's as a limit on the federal and then later state governments. That gives us more information. It tells us that religion is something that the government is interested being involved with. And it tells us that the American people in two instances said, "no government, stay hands-off of this phenomenon called a religion." But it doesn't give us enough information to answer a lot of questions.

Third step: you look at the framing ratification debates. Now, the ideal would have been if James Madison, when he introduced in 1789 what became the Bill of Rights, had said "by the word religion, I mean..." and then went on to define it. But he didn't do that, and we shouldn't expect him to do that because he was speaking English in the same way that you and I speak English.

We don't define the terms that we're using. Instead, he relied on the language conventions in use at the time. And so, what the originalist will do is look for every time where the word religion was used in the first session of the first Congress and when the First Amendment was introduced in the state ratification conventions, and see what was the conventional meaning for the word religion at that time.

Next step, expand the data set, because what we're looking for isn't simply what James Madison thought the word religion meant. We're finding out what was the public meaning of the word religion in 1791. And in principle, you can find evidence for that public meaning anywhere where conventional English was used in the United States at that time period. It can be in speeches, sermons, state statutes; it can be in private letters between people who are facile with the use of the word religion.

And then lastly, you look at the cultural, philosophical, and religious context and you ask: in a political community like this, with its commitments and its understanding, its concepts, what would those folks understand the word religion to mean? And the reason why I picked the word religion was because, in a series of articles, I went through an originalist inquiry for the word "religion." And my conclusion, for what it's worth (we can talk about it later), was that religion is a belief system with belief in a deity, with duties in this life—thou shalt and thou shalt not—and a future state of rewards and punishments. So that's what I've argued the original meaning of the word religion was.

Last comment—corpus linguistics. Professor Eggert had identified corpus linguistics, and it's a tool that originalists identified maybe five or so years ago as an additional way to help provide information for and checking of originalist scholarship and research. And so, after I did research on the original meaning of religion using the contentional techniques, I went back and did a corpus linguistics search to try and uncover additional evidence about the word religion. And what you do is you utilize massive bodies of electronically searchable documents. They're called corpora, and then you search them for every instance where the word religion is used. And then you can use the tools of corpus linguistics. It has its own terminology and tools including things like "co-location": what word appears most often with the word religion within five words? And then what you are able to find is that the language practice at the time, what did people, when they used the word "religion," think it was similar to or synonymous

with? So, corpus linguistics is another tool that originalists are using to make sure that they're more accurate.

Up to this point, you might say, "okay, I think I know how to do originalism," but our legal system, as law students know from when you take your first-year courses, has a lot of precedent. There's a lot of stare decisis. And I haven't said anything about stare decisis. In fact, what I've said seems inconsistent with stare decisis. Because what I have said is that you identify the original meaning and you follow it, and there's not a word about stare decisis. Indeed, many critics have plausibly argued that originalism's commitment to following the Constitution's fixed original meaning means that adopting originalism would lead to the overruling and destabilization of broad areas of American law. Confirming critics' worse fears, Justice Thomas recently argued, in a concurrence in the *Gamble* case in 2019, that originalism doesn't quite have no space for stare decisis, but it's a really small space. So, he's basically saying, "we don't do stare decisis around here." But I don't think that's right. My view, as I argue in my book *Originalism's Promise*,¹⁴ is that federal judges create and, in turn, are required to follow constitutional precedent because the Constitution itself commands that they do so. The original meaning of judicial power in Article III, the power federal judges utilize, requires them to follow precedent. So, the very first questions that a federal judge asks when deciding a case is, "is there precedent on point?" And then there's a little bit of nuance if the precedent is an originalist precedent—that the precedent fully identified and articulated and applied the original meaning versus a non-originalist precedent. But even non-originalist precedent in some instances, in my view, will be followed.

So, at this point, you might say, "okay, I understand how originalism might operate. I understand how it incorporates stare decisis. Stare decisis plays a big role in originalism." But, as the title of our discussion asks: does originalism work well meeting its goal? Over the past twenty years, originalists have articulated a sophisticated and nuanced approach to constitutional interpretation, one that simultaneously gives pride of place to identifying and following the original meaning, which is what I've just argued, while also recognizing that the original meaning may not always clearly answer a question. So, originalists have identified the Constitution's own mechanisms

¹⁴ LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019).

to implement the Constitution's original meaning, even when it might not be clear initially.

First, it's important to note that my view is that there is significant consensus on most of the original meaning of most of the important provisions in the Constitution. These include things like Article I, Section 7 – how Congress creates law. They include the Interstate Commerce Clause, the Necessary and Proper Clause, the Establishment Clause, the Privileges or Immunities Clause, and the Cruel and Unusual Punishments Clause. Professor Eggert had mentioned “cruel” from the Eighth Amendment. I think there's a deep and broad consensus on the original meaning of all those provisions and others.¹⁵ I picked those because you covered all, or almost all of those in your Constitutional Law classes, and I think that there is a deep consensus on them. Professor Eggert mentions the nondelegation doctrine in his remarks, and his article—a good article—is about the nondelegation doctrine. I think there's a consensus on that too, and I'd be interested to see Professor Eggert's response. The consensus is not that there's no nondelegation doctrine, and not that the nondelegation doctrine is something where administrative agencies can't do anything. I think it's something in the middle, and I think there's reasonable debate about what that something in the middle is. The consensus is that Congress can delegate some power, but not unlimited power. Now, maybe in my remarks later I can say a little bit more about where I think that line is at.

This doesn't mean there's unanimity. My claim isn't that everybody thinks the Establishment Clause means X or Y, but I don't think unanimity is the standard for any human practice, because we humans have a penchant for disagreeing. So instead, I think the standard is—the relevant metric is—a consensus among scholars.

Second, originalism has identified four methods to identify further consensus. So, in other words, even if there's not a consensus right now, here are four ways to identify further consensus. First is the method of triangulation. The method of triangulation has three distinct ways of identifying the original meaning. And the key is, if all three ways point towards the same original meaning, you've got a lot of confidence that you've arrived

¹⁵ To be clear, my claim is that there is a broad consensus among scholars about the original meaning of these (and other provisions), not that all of the meaning of those provisions has been liquidated.

at the correct original meaning. If they point in different directions, you don't have much confidence at all. You need to go back to the drawing board and try again and in different ways.

The methods of triangulation include historical immersion, where one immerses oneself in the conceptual world of the Framers and Ratifiers. Second, studying the record, where one reads the primary sources of drafting and ratifying constitutional text. And third is corpus linguistics, which is something that both Professor Eggert and I talked about.

The second tool to build consensus is called the scholarly division of labor. Professor Eggert, I think, appropriately criticized the Supreme Court justices who talk about themselves using originalism to identify limits and meanings of the Constitution because, as he said, they don't have time and they don't have the experience. But through the scholarly division of labor, scholars research and debate and come to consensuses about what the original meaning is, and then judges use that consensus. Justice Thomas does this. So, for those of you who have taken Property and studied the Takings Clause, you know that Justice Thomas, in his dissent in *Kelo v. New London, Connecticut*, relied on originalist scholars to identify the original meaning of the Public Use Clause.

Third tool: scholars have developed consensuses on many areas of constitutional meaning. The consensus has three points, actually. First, there's consensus about what we agree on, so you can have a high degree of confidence that the Constitution includes that as the original meaning. Second, there's consensus about disagreement. In other words, we know we don't agree on a proposition. And then, third, there are areas about which there's actually disagreement about what scholars (dis)agree on. That's a really deep area of disagreement. And the detailed example I would give of each of these three aspects would be the Privileges or Immunities Clause, if we had more time.

Fourth are closure rules. An important example is called the best-available-legal-evidence rule, and here's how it works. If you're a Supreme Court justice presiding over a case, you have two parties before you. One party says the Constitution means X, and the other party says it means Y. And the justice has to make a decision—that's what Article III requires—so the justice should rule for whichever party has presented the best available legal evidence. Maybe not the best evidence in all possible worlds, maybe it's not the best in the overall scheme of things, but the best of the two arguments being presented to the justice in that case, and the justice makes a decision based on that. Is that something

judges can do? The answer is clearly yes, because that's what they do on a regular basis.

Third, originalism identified institutional mechanisms to resolve remaining underdeterminacy. The two institutional mechanisms are stare decisis and constitutional construction. Because I am nearly out of time, I will say one thing only about constitutional construction. Constitutional construction is the idea that there are times when the Constitution's original meaning runs out. Originalists agree with what Professor Eggert is saying. And in that situation, what originalists have said, is that the relevant interpreter needs to "construct" constitutional meaning.

I actually think the nondelegation doctrine may be an example of construction. I think that there are two propositions that are clear: (1) Congress can delegate some powers to agencies; and (2) Congress can't delegate all its power to agencies. And the relevant rule, which we can talk more about in our conversation, is somewhere in the middle, and that the precise contours of how that relevant rule is applied might be an area of construction: where the original meaning is underdetermined. And so, the relevant interpreter, the Court or Congress, is the one that constructs constitutional doctrine.

In conclusion, I made two moves this afternoon in my initial remarks. First, I described originalism. Second, I showed that originalism is faithful to its commitment to the original meaning and sophisticated in its approach to implementing that original meaning. Thank you very much.

PROFESSOR CAMPBELL:

So this is the interrogatory part. We are going to give the first comment to Professor Eggert to raise any subject he wanted to from Professor Strang's remarks, and then we will give the reciprocal privilege to Professor Strang. So, Professor Eggert.

PROFESSOR EGGERT:

Thank you. I appreciate your comments and I think that you have referred to one of the most important, but little discussed, issues that originalism faces, which is: If the Court is facing a question where even the Court thinks it's kind of muddy what the original public meaning was, when should the Court act? So, for example, if the Court thinks it's really unclear what the original public meaning of a term of the Constitution was, but then there's a fifty-one percent chance that the public meaning means "X," and hence, Congress' act is unconstitutional, should the Court

overturn that act? I think that's fundamentally wrong, that the Court should not be overruling—the Court should initially defer to Congress to say “this is a tough area, you're Congress, you're the one who's setting policy. If we're not sure that what you're doing is unconstitutional, we should just let it go.” The Court should just say “okay, that's your decision. We can't say for sure that you're wrong.” But what we see from the Supreme Court now is application of the best available legal evidence rule. If the Court concludes that the best available legal evidence, which may not be that great, indicates that maybe the act is probably unconstitutional – the Court can overturn legislation it disagrees with for policy reasons. That allows the Court to find legislation unconstitutional based on flimsy evidence of original public meaning, in order to make policy decisions that really usurp Congress's power to make policy through its legislative power.

PROFESSOR STRANG:

Thank you Professor Eggert for that question. So, Professor Eggert described, as I understand it, a situation where an action by Congress is being challenged as being beyond Congress' power or violating some constitutional right. And so, under the best-available-legal-evidence standard, a court could have a low degree of confidence of Congress not having the power or the right being infringed, and still strike down Congress' action.

The way I would evaluate this situation, as an originalist, would be: I would find out what judges are authorized to do by Article III, because if, in fact, Article III authorizes them to do as Professor Eggert had said—which is to defer to Congress in areas of, let's say, low certainty—then I don't think it's a question of ethics, I think it's a question of law, and they should do exactly what Professor Eggert had said. From my perspective, then, it's simply a question of what does our law in fact require. And I made the argument in my initial remarks that our Constitution in fact requires deference to Congress in areas of stubborn constitutional underdeterminacy.

Just to be clear: I think it remains an open question whether to and what degree federal judges should defer to Congress. I have good friends who are scholars in this area who say that the original meaning of “judicial power” requires judges to defer to congressional judgments, unless there is a clear error by Congress; so in other words, their argument is a historical argument about the original meaning of Article III. I haven't been persuaded yet, so I think that's an area where there's a debate, but they are thoughtful scholars,

and they might ultimately be right on that point, and if they are, then that would support Professor Eggert's position.

There's one more thing I would say about Professor Eggert's concern. His concern is Congress won't be able to act. But actually, it doesn't always turn out that way because there can be situations where, for example, it can be a state versus an individual, it can be Congress versus a state, or it can be two states versus each other. And so, there are lots of instances where there is constitutional underdeterminacy, where there is a low-degree of confidence about who is ultimately right, and Congress wouldn't be a loser one way or the other. So I actually don't think that the concern you have applies to all, or perhaps even most, situations.

PROFESSOR CAMPBELL:

Professor Strang, do you have a point you want to bring up relative to Professor Eggert?

PROFESSOR STRANG:

Yes. The burden of Professor Eggert's remarks was that originalism was this malleable, evolving theory from which judges can pick and choose. And I think he graciously didn't say they intentionally do it. I don't think he said that people are intentionally misinterpreting the law to achieve their policy goals, which I think is probably true. When I look at the justices, I view them as mostly acting in good faith, even if I disagree with them. But what ends up happening, according to Professor Eggert, is that the originalist judges choose things like the nondelegation doctrine and use that as a way to limit Congress in an inappropriate way. I don't think that's true.

I believe the consensus of the nondelegation doctrine isn't that there's no doctrine—Professor Eggert had called the doctrine a myth, so I think that might be his position. The consensus isn't that the nondelegation doctrine means that Congress can transfer all of its power.

The consensus is in the middle. And I think that middle is actually represented by a case many of you have read. Those of you who have had administrative law, you probably read *Wayman v. Southard*, an 1825 opinion by Chief Justice John Marshall. Marshall says basically two things. Congress can transfer power to the executive branch or to the judiciary, and these branches can decide unimportant issues. Now, what is unimportant I think may be part of the construction zone. For example, Congress can give to another branch the power to fill in the details of an important

issue that Congress has decided. I think a position like that is actually where most originalist scholars are at.

This seems to me to be a reasonable position because, under Professor Eggert's view, which is that the nondelegation doctrine is a myth, nothing would prevent Congress from passing a statute, we'll call it the Goodness and Peace statute. The statute directs the new Goodness and Peace administrative agency run by former-Governor Newsom and now secretary Newsom, to create regulations for the goodness and peace of Americans. And then Congress decides to go into recess *sine die*. And so, since there's no nondelegation doctrine, in your view, it seems like they can do that.

PROFESSOR CAMPBELL:

Professor Eggert gets to respond and then we'll open it up a bit.

PROFESSOR EGGERT:

I think that's a great hypothetical, and I've had several people propose it to me and here's my answer to that. You cannot find the nondelegation doctrine in the Constitution, so if you're an original public meaning person there are no words to attach it to and so the nondelegation doctrine should not be enforced. However, the Constitution does vest legislative power in Congress. So, that is an express provision that we can interpret. The hypothetical that you mentioned, if it were to happen, I think violates the Vesting Clause because Congress can delegate powers to federal agencies, but it can't vest its legislation powers in federal agencies. And, if the Congress passed a law as you described, I think that would be a re-vesting because Congress would not have the power to ride herd over what the agency did or to pull back or to change laws. It would just have transferred its legislative power away which I think violates the Constitution's vesting clauses by vesting legislative power somewhere else rather than in Congress.

PROFESSOR CAMPBELL:

Go ahead Professor Strang.

PROFESSOR STRANG:

I'll just change the hypothetical slightly. So, Congress didn't go into recess forever. It went into pro forma recess for C-SPAN viewers like me, once every six months, and then the Speaker of the House says to the empty chamber, "Is Secretary Newsom doing a good job with peace and goodness?" and the answer is "yes."

PROFESSOR CAMPBELL:

I think your hypothetical works even if you don't have the *sine die*, so you'd probably want to take that out. I'm going to interrupt you, to be aggressive because it is within my nature. I have an aggressive question to both. First of all, to Professor Strang and then I'll give you your question too, Professor Eggert. Professor Strang, tell me one example where an originalist, using the originalist approach, comes to a conclusion that she or he would not have on policy grounds. In other words, I'd love to know if this is a null set, does it actually constrain, or is it just a makeweight? I have actually one to give if you don't. Professor Eggert, so what are the constraints? Admittedly, originalism isn't perfect. None of these sources are perfect. Some statutory constructionists debating what the committee said and what was said on the floor, it's not perfect but it's something. And, as Professor Strang put with his hypothetical, you have these mores, the word that Justice John Paul Stevens used in the case striking down the use of exclusionary race by colleges. Somebody must determine what the mores are. Are you comfortable with the Supreme Court deciding what the mores of our time happen to be? So, first question to you.

PROFESSOR STRANG:

So, I think the evidence of my answer to Professor Campbell's question is ubiquitous. I'll just speak for myself. There are a number of aspects of the Constitution's original meaning that I don't think are wise, and some of them not even just. I'll pick one example. I think the free exercise of religion should be robustly protected, but I don't think the original meaning of the Free Exercise Clause protects it very robustly. I think *Employment Division v. Smith* was probably right. The author of *Smith* is another example. Famously, the author of *Smith* was Justice Scalia, an originalist, and he articulated a decision that was relatively unprotective of religious liberty.

And even on the point that we were talking about, nondelegation, Justice Scalia authored what I think is probably still the most recent important Supreme Court decision on the nondelegation doctrine, *Whitman v. American Trucking Association*. In his majority opinion, he effectively said that the nondelegation doctrine, outside the context of the National Industrial Recovery Act—those are the *Panama Refining* and *Schechter Poultry* cases from the New Deal—and the *Mistretta v. United States* delegation of pure legislative power to the Sentencing

Commission, there is not an enforceable nondelegation doctrine, and I am very confident he does not think that is a wise decision.

PROFESSOR CAMPBELL:

I was going to give you Justice Stevens' concurrence in the flag-burning opinion.

PROFESSOR STRANG:

Or Justice Scalia's!

PROFESSOR CAMPBELL:

Or Justice Scalia's too. And to you Professor Eggert, so how do you keep the mores from just being decided by the majority of the nine?

PROFESSOR EGGERT:

You posed two questions to me. The first question was: If we don't do originalism what do we do? And I think the answer to that is that we do care about what the original intent seems to be, even though we recognize the issues with determining it. We do care about the original public meaning, but we don't say it is dispositive, that it is binding. We say that that the original intent and public meaning create a great jumping-off point that we always have to be cognizant of, but we also have to look at how society has changed. We have to look at how the law has developed, how other laws have developed. We have to try to put it in the context of today to recognize the ideals and principles of yesterday. But we have to contextualize it, and I think that's where originalism often breaks down. In the Second Amendment case involving firearm restrictions in restraining orders, they didn't address the fact that we didn't have domestic violence restraining orders back then that removed guns, in part because domestic violence wasn't really frowned on that much. Domestic violence was not illegal everywhere and restraining orders for domestic violence didn't exist as we know them today, and so, of course they didn't have rules limiting firearms for domestic violence restraining orders back then. We shouldn't say that if they didn't have rules like that back then we can't have rules like that now because that is too much a constraint on the popular will which I think does support such rules. As to the mores of society, I think that's something that Congress should have the first crack at because members of Congress are representatives of the people; if they get off track from what the people want, they'll lose an election. Supreme Court justices can sit for thirty or forty years, they have little worry about

popular opinion and so I think are much less reflective of the popular mores of the day, and that's a real problem.

PROFESSOR STRANG:

I'll just say one thing. Professor Eggert, in his initial remarks and just now had said one of the challenges with originalism, one of the problems with originalism, is that it's a cover for the justices' policy decisions. So, remember what someday-justice, but right now Professor Eggert had said.

PROFESSOR EGGERT:

Not going to happen...

PROFESSOR STRANG:

He said: we care about the original meaning but it's not dispositive, it's a jumping off point. So, think about what we've been debating. I've been saying that, within limits, one can identify and follow the Constitution's original meaning. Professor Eggert has given us a standard where the original meaning, it seems like it matters, but we don't know how much, we don't know to what extent, and we don't know based on what reasons one doesn't have to follow it. It seems like what *characterizes*—in other words the characteristic that is central to his version of living constitutionalism—is judges making their own decisions. Whereas originalism is *characterized* by following the original meaning.

PROFESSOR CAMPBELL:

The description of Congress being subject to the election every two years, and hence a natural check, speaks to where Congress is acting against the popular will. But Congress often acts completely consistent with the popular will, just in some ways which are abhorrent to some constitutional principles, such as segregation for many, many years, quite consistent with the popular will in those states that had it. And so, I put forward to you a third possibility, and that is amending the Constitution. We have not discussed that today, but it seems to me a very important part of the separation of powers doctrine. So, rather than say the Congress will eventually correct itself, because it won't, we could amend the Constitution. No one ever gets re-elected by saying, "I'm standing for criminal rights. I am going to work hard to get more people out of jail earlier." You don't win elections that way. And similarly, I mistrust a justice who has no guardrails, and obviously, Professor Eggert, you're not suggesting this as well.

But suppose you say the Constitution can be amended and that is the ultimate of both because it is the popular will, admittedly a high bar. For example, the Second Amendment says “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.”¹⁶ That means you’ve got the right to get a bazooka because the Framers intended to get a bazooka to take out the national government if they became onerous. But we don’t want that today, so let’s amend the Constitution. It seems to me that the amendment process is ignored as we divide up, is this going to be Congress or is it going to be the courts? And lastly, for those who say it never happens, when I was in college, I couldn’t vote. The Supreme Court said that the federal law allowing eighteen-year-olds to vote was unconstitutional. That decision was in December of 1970. In July 1971, fewer than seven months later, the Constitution was amended. It can be done if there’s a consensus.

PROFESSOR EGGERT:

I want to get to questions.

PROFESSOR CAMPBELL:

Very good, no rebuttal.

PROFESSOR EGGERT:

You can’t rebut that.

PROFESSOR CAMPBELL:

Alright so I think I should choose questions from this side and then we’ll go over there. Please go ahead sir.

QUESTION ONE:

So, I would like to know from all three of you, do you think that the ability to amend the Constitution is still a practical reality? And as a follow-up to one little remark you said about the impossibility of getting elected on the platform of criminal rights, I am pretty comfortable that that’s false. I’m from Philadelphia, and that is one of the places where it is very much possible to get elected on a reform platform or an abolition of police imprisonment platform.

PROFESSOR CAMPBELL:

I’ll give this to my colleagues because I’ve already spoken on this.

¹⁶ U.S. CONST. amend. II.

PROFESSOR EGGERT:

I'd like to jump in. I think amendment is possible, but what we're talking about is interpretation of the existing words, and how existing words are interpreted is almost impossible to change by amendment. For example, with cruel and unusual punishment, there's a great disagreement on what those words mean. What we consider cruel and unusual today or what was cruel and unusual back then? How do you amend the Constitution to change the meaning of the words if you want to keep the words as is?

PROFESSOR STRANG:

I think it is very hard to amend the Constitution on anything about which Americans reasonably disagree, which in today's world, because of polarization, is virtually everything of importance. I actually think that my friend Professor Eggert's view of interpretation is partially to blame for that. I don't think it's a coincidence that the New Deal is when Americans stopped adopting important amendments. We, of course, changed voting rights from twenty-one to eighteen, and I think that was supported by reasons, but I don't think it's of the same importance as how do we elect senators? Should we have non-discrimination in voting? Should we have a progressive income tax? Those are what I would think are fundamental and transformational. We don't do *that* anymore.

And here's a way that you can test it yourself. When it comes to presidential elections, what do you say to your fellow citizens? You say, I bet, "vote for this candidate or against this candidate," in part because of the justices that that person will nominate. When's the last time you said to a fellow citizen, "vote for or against a particular constitutional amendment?" I think the answer for most of us is zero, if at all, right? And so, that suggests to me that, because we all know what the "game" is, we'll just get our justices appointed to the Supreme Court where they will interpret the Constitution the way we want to.

PROFESSOR CAMPBELL:

We amend our Constitution in California every two weeks. Question from this side? Yes sir.

QUESTION TWO:

Professor Strang, you stated that Professor Eggert's viewpoint is characterized by justices' discretion. It seems like, in one of his law review articles, Justice Scalia suggests that we would abandon originalism if there was a true bitter outcome.

And so, I think he was talking about cruel and unusual punishment there, and so what makes that perspective different from Professor Eggert's?

PROFESSOR STRANG:

Justice Scalia was one of the leading lights for originalism for a long period of time. That doesn't mean that I agree with everything that Justice Scalia has said. He's a human being, so he makes mistakes. Justice Scalia later came to regret the statement that you are identifying, because I think he would agree with the position that I'm going to take now, which is that: when he swore to uphold the Constitution, he swore to uphold its original meaning. And if one is put in a position where one's oath requires one to take actions that, in fact, are deeply unethical, then one has, I think, one or two options: resign from the office that one is in or, if possible, recuse oneself in some way from taking that action (if allowed by the law). That is a summary of the position that I take.

And I think that position is widely shared among people. In other words, if you're a judge, you're bound to run into situations that are ethically tenuous. If you're against the death penalty, for example, and you think that the death penalty is constitutional, then you are going to come into ethical conflict. And so, I think the right originalist approach is to be up front about the potential for conflict.

I think what living constitutionalism invites people to do is what the Supreme Court did in the 1970s, which is to "creatively" interpret the Eighth Amendment to say the death penalty has always been unconstitutional, even though we never knew it.

PROFESSOR CAMPBELL:

From this side, please.

QUESTION THREE:

So, you talked about corpus linguistics in your talks. Every year we have breakthroughs in sentiment and intent analysis through natural language processing. One of those breakthroughs has been 3D vector analysis where we sort words based on a 3D vector space where each axis assigns to sentiment, or intent, or something like that. To what extent do legal scholars or judges have a duty to use these tools? And similarly, if they do have a duty, either ethical or legal, what duty do they have to use this for normal statutory interpretation, using a corpus from the sixties to interpret law written in the sixties.

PROFESSOR EGGERT:

I think that's a great question. I'm interested to hear how Professor Strang responds. But I think this shows the impossibility of this task because very few judges would understand the process of using corpus linguistics that you're talking about. And if you're a judge, how can you say, "Well I think that this is constitutional based on my legal reasoning, but this program spit out something that indicates otherwise, I don't really understand it, but I still have to go with it." That is enormously problematic.

PROFESSOR STRANG:

Corpus linguistics is a subset of something that humans have experienced, and Americans in particular, for as long as we've been around: which is technological change. And normally, we say there is a new tool, a technological change that's allowed us to do something we've already been doing, but do it better. We normally say it might be more complicated, it might be more challenging, but we should embrace it because it allows us to do what we're already doing in a better way. So, my short answer would be, yes, if the addition to corpus linguistics allows us to better understand whatever it is we're aiming for, let's use it. I don't think judges typically should be doing it unless they have special training, which is unusual. I think what they need to rely on is a community of scholars who, through debate and discussion, come to a consensus on what they agree on, a consensus on what they disagree on, and then there is remaining dissensus.

PROFESSOR CAMPBELL:

I wish to note that we have a scholar at our law school named James Phillips who is nationally recognized as a leader in the field of corpus linguistics.¹⁷ So perhaps on another occasion, we'll hear from him. But it's really true, if you go across the country, you won't find a better cited or respected scholar in just this field than my colleague James Phillips. Now we're at the point now for concluding comments so I'm going to allow the first comment to come from Professor Eggert and then to our gracious visitor to have the last word.

¹⁷ Associate Professor of Law, Dale E. Fowler School of Law, Chapman University, <http://www.chapman.edu/our-faculty/james-phillips>.

PROFESSOR EGGERT:

My central thesis is that originalism has become a method by which the Supreme Court can justify overturning legislation it disagrees with for policy reasons. And the Court seems increasingly willing to do just that and seize policy-making power from Congress. The original originalists would have been horrified generally at the idea that the Court should set policy, because originalism was originally designed to enforce judicial restraint. Now, instead of judicial restraint, originalism is being used by the Court to make policy decisions, and it makes me worried about what will happen in the future.

PROFESSOR STRANG:

We should try and interpret our Constitution the way that, by our own lights, we think is supported by sound reasons. If originalism is the way to do that, then we should do originalism, and if not, then not. As I've written in my book, *Originalism's Promise*, I think originalism is supported by sound reasons, and so to the extent that we can identify a consensus on the original meaning, I think judges should follow it. And to the extent they are not making policy, what they're doing is following the Constitution in the way that we currently think is best supported by reasons.

PROFESSOR CAMPBELL:

We are deeply grateful to the *Chapman Law Review* for allowing us to come together and creating this opportunity, specifically to discuss the issue of originalism but other subjects, no doubt, in the future as well. We're so grateful to the author of the article who gave us the opportunity, Professor Eggert, and to Professor Strang with your insight and experience that brought such light to this subject. Will you all join me in thanking them?