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Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory

MICHAEL C. DORF*

As an initial matter, I owe a great debt to Professors Lawson, Lessig, and Fleming for their thoughtful responses to my article.[1] The richness of the positions each takes demonstrates the inevitable artificiality of the categories of constitutional theory and theorists utilized in my principal article, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*.[2] To cast Lawson in the role of originalist, Lessig as moderate originalist, and Fleming as nonoriginalist would be to understate the degree to which each shares the premises of the other two (and myself) and to mask the degree to which each of the broad categories includes a great many variants. In the space below, I consider (some of) their specific objections and try to avoid treating each scholar as a spokesperson for, or representative of, some interpretive camp.

I. INTERPRETATION AND ADJUDICATION

Lawson takes me and other mainstream constitutional scholars[3] to task for failing to distinguish between interpretation—the "search for the meaning of the interpreted document"—and adjudication—the "search for the morally correct course of action."[4] My initial goal here will be to show that our failure to distinguish between interpretation and adjudication reflects a fundamental disagreement between Lawson and us mainstream scholars, rather than mere sloppiness on our part.

Lawson's distinction between interpretation and adjudication tracks the legal positivist distinction between law and morality. However, positivism is only one school of interpretation. Positivism's leading contemporary critic, Professor Ronald Dworkin, would challenge Lawson's claim that the meaning of a legal text will invariably be distinct from the morally correct course of action. According to Dworkin, at least some provisions of the Constitution require interpretation "on the understanding that they invoke moral principles about

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1. I am indebted as well to the editors of *The Georgetown Law Journal* for assembling this talented cast of scholars.

2. Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765 (1997).

3. According to Lawson, my combination of interpretation and adjudication places me "squarely in the mainstream of modern constitutional scholarship." Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1824 n.9 (1997).

4. *Id.* at 1824.

political decency and justice."[5]

Lawson's views about language lead him to prefer positivism to interpretive approaches informed by political or moral principles. His example of the fried chicken recipe illustrates his position. Lawson asks us to imagine that we have discovered in an old Philadelphia house a late-eighteenth-century document that appears to be a recipe for fried chicken. Although he concedes that one can imagine a sense of the word "interpretation" in which the document is viewed as a poem or a private diary, "[t]he presumptive meaning of a recipe is its original public meaning."[6] Thus, if one were to use rosemary where the recipe called for pepper, Lawson argues, the substitution would best be described as departing from, rather than changing, the meaning of the recipe—at least absent some indication in the recipe itself that such substitutions should be permitted.[7] Interpreting a recipe, in the sense of discerning its meaning, does not plunge the reader into the realm of indeterminacy or call for the use of moral theory.[8]

As with recipes, so, for Lawson, with the Constitution—at least absent some textual instruction or other clear indication that derogations from the original meaning should be treated as constructions of the document itself. Finding no such indication in the text or structure of the Constitution, nor in the original understanding thereof, Lawson concludes that the meaning of the Constitution is its original public meaning.[9]

Lawson holds a plausible, but certainly not the only plausible, view of meaning. Whether we equate meaning with original public meaning, or with speaker's meaning, or with a dynamic conception of meaning, or with something else, depends on why we care about the meaning of whatever it is we are interpreting. For example, if a judge were construing a contract under which there arose a dispute as to "what is chicken?"[10] he would undoubtedly look to the terms of the contract, any applicable trade usage of those terms, dictionary definitions, definitions in government regulations invoked by the contract, and the course of conduct of the parties in carrying out the contract.[11] The meaning

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5. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996).

6. Lawson, *supra* note 3, at 1826.

7. *See id.* at 1830-31.

8. I find it deliciously ironic that the canonical cooking example, first published 160 years ago, makes a somewhat opposite point. *See* Francis Lieber, *Legal and Political Hermeneutics, or Principles of Interpretation and Construction*, *in* LAW & POL. 18 (William G. Hammond ed., 3d ed.) (1837), *reprinted in* 16 CARDOZO L. REV. 1883, 1904 (1995) (illustrating how the clarity of the instruction, "fetch some soupmeat," depends upon a great many social conventions that will have differing implications in different times and social settings). For an extended discussion of this example, see *Law and Linguistics Conference*, 73 WASH. U. L.Q. 941 (1995). For my own modest contribution, see Michael C. Dorf, *A Comment on Text, Time and Audience Understanding in Constitutional Law*, 73 WASH. U. L.Q. 983 (1995).

9. Lawson, *supra* note 3, at 1834.

10. Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 117 (S.D.N.Y. 1960) (Friendly, J.).

11. *See id.* at 118-20.

thus defined might closely resemble original public meaning, but the two would not be identical, and for good reason: contract law serves a variety of policies, some of which may be better advanced by rules that, on occasion, select a different conception of meaning.

My difficulty with Lawson's account of how to describe departures from the original understanding of a chicken recipe is not merely that it artificially separates interpretation from the goal of interpretation. Even taken on its own terms, Lawson's recipe example provides an incomplete analogy to constitutional interpretation. In his example, the fried chicken recipe lay hidden in an old house for hundreds of years.[12] By contrast, the Constitution has been in continuous use during that period. A closer analogy might be a family's written recipe (for fried chicken, let us assume) handed down from generation to generation.

We can imagine that, over the years, some provisions of the recipe might be expressly deleted or amended. For example, if the family had moved from a farm to a city, the instruction to "slaughter a large chicken," might be crossed out and replaced with "obtain a large chicken from the market." The meaning of other instructions might evolve through interpretation. Thus, even if everyone originally understood the recipe's requirement that the chicken be fried in "shortening" to mean that it should be fried in lard, with a greater health-consciousness, "vegetable oil" might replace lard as the accepted meaning of shortening. If, some years after this transition to health-consciousness has occurred, a family historian were to announce that her research definitively showed that when great-great-granddaddy first devised the recipe shortening meant lard, the family members would almost certainly treat this announcement as a curiosity and continue to use vegetable shortening. Indeed, an attempt to return to the original meaning would likely be met with justifiable resistance by family members, all of whom would accept that the *traditional* construction of shortening is now vegetable oil.

I am willing to concede that it would not be wholly unreasonable to say that the family practice of using vegetable oil when the recipe calls for shortening could be described as a departure from the recipe's meaning. I think it better to say that the recipe's meaning has changed, but there is no need to be pedantic about the point. Whether we say that the meaning has changed or that the meaning has remained constant but that practice has departed from the meaning depends on why we care about what the recipe means.[13]

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12. *See* Lawson, *supra* note 3, at 1825.

13. If I may be permitted one more analogy, I would invoke the story of the ship of Theseus. The ship of Theseus is constructed of wooden planks. Over the years, some of the planks become worn and are replaced by new planks. Eventually, all the planks are replaced; nonetheless, we would not object to identifying the resulting ship as *the* ship of Theseus. Indeed, if someone were now to discover and reassemble the discarded planks into the original configuration, we would probably hesitate to declare the reassembled planks *the* ship. We might say that part of what it means to be the ship of Theseus today is to have come through the continuous experience of the past. Nevertheless, our linguistic practice leaves open the possibility that one might refer to either ship as the ship of Theseus. Whether

However, the choice of a conception of meaning makes a great deal of difference for what Lawson would call adjudication. To make matters concrete, when a Supreme Court Justice is asked to invalidate an act of Congress as unconstitutional, according to Lawson the Justice should first consider what the Constitution means (that is, what it originally meant), and then decide whether to vote in accordance with the Constitution or in accordance with some other principle. Putting the matter this way, it is hard to imagine that the Justice would ever choose to invalidate a law based upon some nonconstitutional principle because, at least in our legal culture, the only warrant for judicial invalidation of legislation is inconsistency with the meaning of the Constitution.[14] To adopt Lawson's approach would give adjudication—and thus moral principles—a negligible role[15] compared with the role granted to the discovery of original meaning.[16] But of course, if linguistic practice does not by itself select original meaning over evolving meaning, then we must have some other reason for framing the initial question the way Lawson does.

Whether to treat the Constitution's original meaning as its current meaning is not a linguistic question. When our linguistic practices leave an open space, something else must help us decide whether to prefer originalism or some other interpretive methodology to fill it. To Lawson's credit, he avoids the hubris of those originalists who assume that originalism is not even a theory but the natural and only way to approach the Constitution and other legal texts.[17] Lawson recognizes that originalism must be justified in normative terms.[18] As

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we prefer one or the other depends upon the reason we have for caring about the ship of Theseus. For an excellent discussion of this topic, see ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 33-34 (1981). *See also* Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2081 (1996).

14. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 397-400 (1798) (Iredell, J.). This is why *stare decisis* is a problematic doctrine for originalists; a system of precedent demands that they sometimes *sacrifice* their account of constitutional meaning. *See generally* Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988). By contrast, for an eclectic, precedent is part of meaning.

15. I say "negligible" rather than "nonexistent" because there might be circumstances in which the result ordained by the Constitution is so monstrous that the Court would feel justified in overriding the Constitution. Claims brought by slaveowners under the Fugitive Slave Act placed northern abolitionist judges in such circumstances. *See* ROBERT COVER, JUSTICE ACCUSED 54-55 (1975); RONALD DWORKIN, LAW'S EMPIRE 219 (1986).

16. Unless, that is, one believes that the original meaning itself invokes broad moral principles whose content later interpreters supply. I do not read Lawson to take such a view.

17. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 5 (1990) (stating that for a judge to be bound by the law "means that he is bound by the only thing that can be called law, the principles of the text, whether the Constitution or statute, as generally understood by the enactments"); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37-41 (1997) (contrasting originalism and textualism with dynamic modes of interpretation, which are deemed lawmaking).

18. Lawson's reason for seeking a normative justification for originalism is rather different from my own. He believes that the decision to treat meaning as original meaning can be made on linguistic grounds alone; he then asks whether there are good normative reasons to treat the Constitution's (necessarily original) meaning as binding. *See* Lawson, *supra* note 3, at 1824-25. I disagree with the former claim, but applaud the latter inquiry.

he acknowledges, however, his comment only hints at the "form that such a [normative] defense might take."[19] Nevertheless, it is worth noting just how weak that defense appears to be.[20]

Lawson categorically rejects what my principal article treats as the standard normative justification for originalism: social contract theory. He agrees with me that a past act of ratification cannot hind the present generation.[21] Indeed, Lawson goes further, arguing that even present-day acceptance does not establish the Constitution's authority. As he puts it, "[t]here is simply no way to bridge the gap between *A*'s acceptance and *B*'s obligation."[22]

At the conclusion of his tale of the fried chicken recipe, Lawson suggests an alternative justification for selecting original over evolutionary meaning: what he calls "the argument from *coordination.*"[23] The argument from coordination posits that even if there is general consensus that the original meaning of the Constitution is imperfect, if there is no consensus about how to remedy its imperfections, securing agreement on what should replace the original meaning may be so costly that as a society we are better off sticking with the original meaning.[24] So long as the original meaning does not lead to dreadful consequences, it will be better than the available alternatives.[25]

One of the three key assumptions in this argument is dubious and the other two are dead wrong. The dubious assumption is that it will be easier to reach agreement about original meaning than about meaning determined through some other method. Perhaps there are occasions when this is true, but it is often untrue, especially with respect to matters of great importance.[26]

Second, even if we thought that originalism were more often determinate than the alternative methods of discovering meaning, the coordination costs of adopting originalism would be, in many instances, much greater than those of other methods. Invalidation of the administrative state or of paper money on the grounds that they are inconsistent with the original understanding would be

19. *Id.* at 1825.

20. I half suspect that this is deliberate on Lawson's part, as he states that he comes close to being "a strict interpretive originalist [while] forcefully deny[ing] that the Constitution has any political legitimacy." *Id.* at 1825 & n.10.

21. *Id.* at 1835.

22. *Id.* Lawson thus rejects what he deems my "present-day acceptance theory." *Id.* at 1836. The passage in my principal article to which Lawson refers states that "[t]he authority of the Constitution today rests on its general acceptance as authoritative rather than on its adoption in 1787." Dorf, *supra* note 2, at 1772. I meant (and mean) this in the positivist sense that rough popular consensus warrants legal actors and other observers in treating the Constitution as binding law, as the sources I cited indicate. *See id.* at 1772 n.28. I do not contend that contemporary consensus provides a *normative justification* for the legal order that the Constitution establishes, although it certainly plays a role in such a justification.

23. Lawson, *supra* note 3, at 1832.

24. *See id.* at 1832-33.

25. *See id.* at 1833.

26. The debate about whether state-imposed term limits on members of Congress are consistent with the original understanding illustrates how contentious questions of original meaning can be. *See* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1856-60 (1995).

extremely disruptive of the existing political order. In this sense, Lawson's suggestion that we face a choice between "keeping with" original meaning[27] and adopting something new gets most matters exactly backwards: honoring original meaning would usually require fundamental changes in the status quo.

Finally, the assumption that originalism does not lead to dreadful consequences ignores originalism's greatest weakness. Quite apart from the social disruptions that a reversion to original meaning would entail, such a reversion would require adoption of what are now generally understood to be substantively unjust principles—such as permitting state-sponsored racial segregation,[28] nearly all forms of sex discrimination,[29] and state and local establishment of particular religious sects.[30] The Herculean efforts of originalists to reclaim *Brown v. Board of Education*[31] illustrate how seriously they take this criticism.[32]

II. TRANSLATION

Much of the foregoing criticism of Lawson's approach is consistent with Lessig's theory of fidelity as translation. Lessig's theory primarily aims to dislodge accounts of fidelity (such as Lawson's) that privilege original understanding. Recall that Lessig believes it possible for a changed reading of text to remain faithful to the original meaning because the object worth preserving is the combination of text plus context, or meaning.[33] As I noted in my principal article, that basic observation is sound; indeed, much of originalism's residual force for nonoriginalists may derive from the need to resort to context to locate a suitable starting point for interpretation.[34] Yet translation is a problematic metaphor for the very same reason that Lawson's metaphor of discovery is problematic: both ignore the period of interpretation and experience that transpired between the Constitution's adoption and the present.

Translation of a document from one language to another is essentially a quantum event, not a continuous process. For example, to translate a document from Swedish to Italian, one would not first translate from Swedish to Danish,

27. *See* Lawson, *supra* note 3, at 1833.

28. *See, e.g.*, Herbert Hovenkamp, *Cultural Crisis of the Fuller Court*, 104 YALE L.J. 2309, 2337-43 (1995) (book review).

29. *See* Ruth Bader Ginsberg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 161 (stating that "the Framers of the Fourteenth Amendment did not contemplate sex equality"). *But cf.* Nina Morris, Note, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L.J. 1153 (1988) (arguing that the women's suffrage movement had some influence on the congressional debate over the Fourteenth Amendment).

30. *See* Mark DeWolfe Howe, THE GARDEN AND THE WILDERNESS 23 (1965).

31. 347 U.S. 483 (1954).

32. *See, e.g.*, BORK, *supra* note 17, at 82-83 (describing the original understanding of equal protection at a higher level of abstraction than originalists usually invoke); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

33. Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837, 1840.

34. *See* Dorf, *supra* note 2, at 1796-1800.

then from Danish to German, then from German to French, and finally from French to Italian, even though if one were to embark on a journey from Sweden to Italy, one might well pass through Denmark, Germany, and France en route. Moving from spatial to temporal dimensions, Lessig's metaphor of translation implies that the meaning of the eighteenth-century Constitution may be obtained by blocking out the historical journey that the Constitution and the nation have taken since then.[35] Translation, therefore, is an imperfect metaphor because it would replace constitutional history with a time machine.

One might argue that this objection lacks practical bite because the present context will usually reflect changes that have occurred in the past. Although this will often be true, it will not inevitably be so, and in any event, excluding a more direct consideration of post-enactment events robs constitutional interpretation of the richness of history's lessons. To use an example I explored in my principal article, the question at the heart of *U.S. Term Limits, Inc. v. Thornton*[36]—whether the federal government derives its power from the people of the several states or from the people of the United States—would, under Lessig's quantum approach, proceed without direct consideration of the lessons taught by the Civil War.

A more fundamental problem with the translation metaphor is that it privileges original meaning in much the same way as Lawson's discovery metaphor does. To return to our language translation analogy, we would expect that a translation from Swedish to Danish to German to French to Italian would preserve less of the original meaning than would a direct translation from Swedish to Italian. Indeed, in the former case we would expect the meaning to become considerably garbled, as in the parlor game "telephone." Yet to state the matter this way immediately begs the central question that divides originalists and nonoriginalists: namely, is an interpretation that departs substantially from the original meaning *ipso facto* an inferior interpretation than one that is closer to the original meaning of the text? For Lessig to answer this question in the affirmative, as his use of the translation metaphor appears to require, he must have in mind a normative reason for preferring originalism; he must have a reason to care about fidelity to the suitably translated original meaning of the Constitution, rather than to some other, nonoriginalist conception of the Constitution's meaning. As I have argued above with respect to Lawson's views,[37] as well as in my principal article and elsewhere, there are good reasons to be skeptical about the possibility of such an account.

35. This statement must be qualified by the fact that Lessig recognizes interaction effects occasioned by new pieces of text; thus, Bolling v. Sharp, 347 U.S. 497 (1954), is legitimate on his view because the Fourteenth Amendment alters the meaning of the Fifth Amendment. *See* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 409 (1995). Although I am skeptical whether Lessig's view of interaction effects is consistent with his other interpretive commitments, we may put such matters aside. The main point is that Lessig does not give interpretive weight to the continuous unfolding of events that do not give rise to textual change.

36. 115 S. Ct. 1842 (1995).

37. *See supra* text accompanying notes 26-32

III. THEORIES, GREAT AND SMALL

Lessig's comment in this volume challenges the need for a normative theory of constitutional law by associating theory with the kinds of foundationalist accounts of knowledge that postmodernists routinely criticize.[38] He disagrees with the notion that "constitutional practice rests upon theory."[39]

My account of arguments based on original meaning can illustrate Lessig's objection to foundationalist constitutional theory. I argue in my principal article that conventional originalists invoke original meaning because they subscribe to a social contract theory of the legitimacy of the Constitution and constitutional interpretation. Lessig disagrees. In his view, neither social contract theory nor anything else need underlie originalism.[40] He argues that the important thing is the practice of originalism, rather than the theory that happens to be associated with it.

It is for this reason, according to Lessig, that although my originalism is not that of the conventional originalists, it is "originalism nonetheless."[41] Fleming, by contrast, takes me to task for labeling my ancestral and heroic accounts of original meaning forms of "originalism."[42] Their disagreement is not merely semantic; indeed, it implicates the very important question of whether one needs to provide a justificatory account of constitutional practice. Fleming appears to say that practice requires justification; Lessig thinks not. Although it will take some explaining, I would like to agree with both of them.

The targets of Lessig's antifoundationalism are normative theories that attempt to deduce concrete results in particular cases from a relatively small number of foundational norms. Dworkin's moral reading appears to be such an account because it asks judges "to find the best conception of constitutional moral principles—the best understanding of what equal moral status for men and women really requires, for example—that fits the broad story of America's historical record."[43] Lessig correctly notes that some passages of my principal article could be read to endorse the view that the goal of normative constitutional theory is thus to justify the best descriptive account of constitutional practice at the wholesale level.[44] To defend my approach against Lessig's

38. For my own brief account of postmodernism and the law, see Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133, 144-52 (1997).

39. Lessig, *supra* note 33, at 1838.

40. *Id.* Note that this is not a claim about what most originalists actually believe (although Lawson makes such a claim, at least on his own behalf).

41. *Id.* at 1837.

42. James E. Fleming, *Original Meaning Without Originalism*, 85 GEO. L.J. 1849, 1855 (1997). I consider this a friendly suggestion, and would be happy to substitute "ancestral and heroic models of the utility of arguments based on original meaning" for the pithier but, I recognize, less accurate "ancestral and heroic originalism."

43. DWORKIN, *supra* note 5, at 11.

44. Lessig asks whether I might mean "to deduce from th[e] structure of eclecticism the values, or set of values, implicit, or inherent, or permanent, or grounding of our constitutional tradition." Lessig, *supra* note 33, at 1847. I do not mean to suggest this, although in a footnote, my principal article cites Dworkin for a somewhat narrower claim that could be construed along these lines. *See* Dorf, *supra* note 2, at 1772 n.30.

critique might therefore seem to require a defense of foundationalism, but I shall not offer one. In my view, Lessig mistakenly assumes that a normative account must be foundationalist. As I have argued elsewhere with respect to Dworkin, however, a normative theory of constitutional interpretation need not be a form of foundationalism.

Let us distinguish between two conceptions of justification. Fleming illustrates the distinction when he writes that for my project to succeed, I "need to provide a full normative account of constitutional interpretation" and to "show how such an account entails or requires, or is otherwise linked to [my] descriptive account."[45] What would it mean for a normative account to entail a descriptive account? One possibility is that the normative account underlies the descriptive account, in a manner that Lessig argues (and I agree) reflects an outmoded way of picturing the world:[46] the descriptive theory sits atop the normative theory just as a small turtle might sit atop the back of a larger turtle.[47] A second possibility, and one that I think fits more comfortably with Fleming's, Dworkin's, and certainly my own overall commitments, is simply that one must constantly test one's descriptive account against principles of justice. There is no reason to suppose that this normative process must, as a whole, *undergird* the descriptive account. Instead, the descriptive and normative accounts sit on the same plane, where they make contact at a variety of places. On this view, when I say that some political theory (such as social contract theory) *underlies* some interpretive method (such as originalism),[49] I mean only that if one is asked what normative reasons she has for applying the interpretive method, she will point to the political theory (and possibly to other places as well).

To use a familiar philosophical image, we may think of the body of constitutional law as a web of text, history, practice, and other conventional sources of law.[49] In most of the interesting constitutional cases, these sources will be consistent with a variety of outcomes. Best understood, normative constitutional theory is simply a fancy name for the process by which a judge, when faced with ambiguous guidance from this web of sources, takes into account considerations of justice.

Such normative considerations interact with the descriptive account in two ways. First, when the Court decides a case based upon, among other things, principles of justice, that decision itself becomes assimilated into the body of law that will be applied in future cases. In other words, the very nature of precedent integrates descriptive and normative accounts. This process of integra-

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45. Fleming, *supra* note 42, at 1850.

46. Of course the fact that a view is out of fashion is not by itself proof that the view is erroneous. It may even make a comeback, as bellbottom jeans did in 1993.

47. I mean to evoke the familiar criticism of foundationalism based upon the infinite regress captured by the picture of "turtles all the way down." *See* Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 1-2 (1986) (tracing the example to William James).

48. *See* Dorf, *supra* note 2, at 1767 (stating that there is a political theory underlying strict originalism).

49. *See generally* W.V. QUINE & J.S. ULLIAN, THE WEB OF BELIEF (1970).

tion pulls and pushes on the web, subtly changing its shape. The changes are small, because the overall pattern of constitutional practice, like other sets of beliefs about the world, resists wholesale change. The pragmatist view that knowledge accumulates incrementally provides a close analogue to the ways in which constitutional doctrine and theory change as new social arrangements are tested against evolving normative views.[50]

Second, principles of justice sometimes directly challenge, rather than incrementally supplement, the other sources of law. Especially in times of social transformation, old doctrines and methodologies have a difficult time accommodating new understandings premised on principles with which they are fundamentally inconsistent. Borrowing a term from Professor Cornel West, Professor William Eskridge invokes "prophetic pragmatism"[51] to describe the challenge that new attitudes created by sympathetic stories of same-sex love pose for the military's anti-homosexual policy and the legal regime that supports it. Here the principles of justice self-consciously attack the existing web of practice and belief.

The difficulty *Brown* poses for originalists illustrates this direct confrontation between principles of justice and the other sources of law.[52] Minor tinkering with the originalist view of legitimacy cannot reconcile it with the virtually unchallengeable proposition that *Brown* was rightly decided. Instead, *Brown*'s rightness challenges originalism head-on. The procrustean efforts that originalists make to explain *Brown* demonstrate their recognition that a mode of argument that leads to manifest injustice stands in need of substantial justification. Likewise, those few originalists who recognize that *Brown* is wrongly decided under their theory invoke some purportedly higher moral principle to

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50. William James writes:

> The individual has a stock of old opinions already, but he meets a new experience that puts them to a strain. Somebody contradicts them; or in a reflective moment he discovers that they contradict each other; or he hears of facts with which they are incompatible; or desires arise in him which they cease to satisfy. The result is an inward trouble to which his mind till then had been a stranger, and from which he seeks to escape by modifying his previous mass of opinions. He saves as much of it as he can, for in this matter of belief we are all extreme conservatives. So he tries to change first this opinion, and then that (for they resist change very variously), until at last some new idea comes up which he can graft upon the ancient stock with a minimum of disturbance of the latter, some idea that mediates between the stock and the new experience and runs them into one another most felicitously and expediently.
>
> This new idea is then adopted as the true one. It preserves the older stock of truths with a minimum of modification, stretching them just enough to make them admit the novelty, but conceiving that in ways as familiar as the case leaves possible.

WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING (1907), *reprinted in* THE WRITINGS OF WILLIAM JAMES: A COMPREHENSIVE EDITION 376, 382-83 (John J. McDermott ed., 1967).

51. William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 621-31 (1994) (citing Cornel West, *The Limits of Neopragmatism*, *in* PRAGMATISM IN LAW AND SOCIETY 121, 121 (Michael Brint & William Weaver eds., 1991)).

52. *See* DWORKIN, *supra* note 5, at 294-300 (arguing that Robert Bork's defense of *Brown* contradicts Bork's other interpretive commitments).

support originalism—typically the claim that judicial review's supposedly anti-democratic character makes it illegitimate except when it enforces the codified intentions of an earlier supermajority.[53]

In my principal article, I argued that the conventional social-contractarian justification for strict originalism is problematic, especially when it leads to substantially unjust results. The point I wish to emphasize here is that *Brown* does not merely render strict originalism problematic; it also challenges moderate originalism, in a way that less momentous cases do not, because it forces us to reexamine why we care about original understanding at all. When moderate originalists attempt to construct a normative case for giving some weight, but not decisive weight, to original understanding, we find that social contract theory does a poor job. On its own it is a problematic theory, and if accepted, it crowds out principles of justice that we are unwilling to sacrifice. Thus we are led, I contend, to quite different sorts of reasons for caring about original meaning—what my principal article terms contextual, ancestral, and heroic conceptions of original meaning.

I do not understand Lessig to object to normative constitutional theory characterized in the way I have been describing. What makes this account *normative* is that it gives an important role to principles of justice. What makes it *theory* is that it attempts to explain the relationship between our past and present interpretive practices on the one hand, and our reasons for thinking these practices should continue to guide us on the other. But there is no reason to believe that such an explanation is a single structure undergirding the descriptive account.

Thus, I find Lessig's criticism of my analysis of *Bradwell v. Illinois*[54] mysterious. He says that I attempt to show that *Bradwell* is wrong by attributing to the Court a factually mistaken view, but he overlooks the degree to which I disapprove of *Bradwell* on normative grounds.[55] He attributes to me the view that changed factual predicates justify changed constitutional readings, while changed value judgments only justify change through the political process.[56]

I do not deny that I regard the *Bradwell* decision as based in part on factually mistaken views. Part of the contemporary objection to the decision in *Bradwell* is that it rested on faulty biological, that is to say *factual*, claims about the innate differences between men and women. Of course, these factual claims must be judged relative to our current understandings of the world, rather than from an absolute perspectiveless position. How else could they be judged? But recognizing that the *Bradwell* opinion is factually outdated does not deny that it is also morally outdated—as I noted by referring to its rhetoric as "distasteful"

53. *See, e.g.*, Earl M. Maltz, *A Dissenting Opinion to* Brown, 20 S. ILL. U. L.J. 93, 93 (1995) (arguing that *Brown* conflicts with the original understanding and is therefore wrongly decided).

54. 83 U.S. 130 (1872).

55. *See* Lessig, *supra* note 33, at 1844.

56. *See id.* at 1845.

in my principal article.[57] The whole enterprise in which I am engaged—integrating descriptive and normative accounts—dissolves the dichotomy between "fact" and "value" that Lessig claims I embrace. Or, to put it more affirmatively, Lessig and I do not appear to disagree.[58]

IV. CONFESSION AND AVOIDANCE

What then, can I say in response to Fleming's charge that my principal article does not, in fact, integrate normative and descriptive constitutional theory because it fails to provide a full normative account?[59] I confess that he is right. I chose to omit such an account for two reasons.

First, as Lessig correctly observes,[60] my goal in the principal article is primarily negative: to dislodge an account of the relevance of original understanding that is widely accepted, even among scholars and judges who reject strict originalism. I doubt very much that I could propound a full normative account of constitutional law that all of these scholars and judges would accept. What I can do, however, is explain why anyone who rejects a static view of social contract theory should see the relevance of original meaning in contextual, ancestral, and heroic terms—regardless of the particular nonsocial-contractarian normative account she actually holds. Thus, Fleming is right that throughout my principal article "the term 'nonoriginalism' basically serves as a placeholder for a normative account that is never developed."[61] To have developed such an account would have limited the effectiveness of my negative program by linking it with what would inevitably have been a controversial positive program.

Second, and more importantly, I chose not to develop a complete normative account because I believe that such a project is misguided—if what is meant by a complete normative account is the sort of foundationalism Lessig critiques. Fleming suggests that I could borrow a normative account from Dworkin, or from Professor Lawrence Sager, or from himself. Although Fleming rightly observes that my jurisprudential commitments have much in common with Dworkin's moral reading, Sager's justice-seeking constitutionalism,[62] and Fleming's own Constitution-perfecting constructivism, as a rhetorical matter, I think that each of these theories is too easily described—or misdescribed—as founda-

57. Dorf, *supra* note 2, at 1809.

58. We do not appear to disagree on this point, anyway. As I have noted, I am skeptical about the utility of Lessig's preferred metaphor of interpretation as translation, even in its relatively modest form.

59. *See* Fleming, *supra* note 42, at 1850.

60. *See* Lessig, *supra* note 33, at 1837 (applauding "theorists who work to wrest a theory of constitutional fidelity from the hands of mindless originalists").

61. Fleming, *supra* note 42, at 1851. He is also right that this terminology runs the risk of reinforcing "the assumption that originalism, rightly conceived, is the best (or indeed the only) conception of fidelity in constitutional interpretation." *Id.* at 1855.

62. *See* Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. REV. 410, 417 (1993) (discussing the "justice-seeking Constitution").

tionalist.[63] The *best* reading of Dworkin[64] takes the principle of integrity as equivalent to the postmodernist's account of a web of knowledge. But that is by no means the only, nor even the most common, reading of Dworkin. Even without setting forth a foundationalist normative theory, I seem to have misled Lessig into thinking that I did and Fleming into thinking that I meant to; to have incorporated by reference the views of Dworkin, Sager, or Fleming would have likely exacerbated the problem.

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63. *See, e.g.*, DENNIS PATTERSON, LAW AND TRUTH 111-17 (1996).

64. By which I mean, of course, the reading that makes Dworkin's theory the best theory it can be.