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## Article

# Originalism and Political Ignorance

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### INTRODUCTION

Original meaning originalism may now be the most popular version of constitutional theory in the legal academy. It has been endorsed by well-known conservative scholars such as Robert Bork, John McGinnis, Michael Stokes Paulsen, and Steven Calabresi,<sup>1</sup> libertarians such as Randy Barnett, Gary Law-

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1. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990); Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 1, 12, 35 (Steven G. Calabresi ed., 2007) [hereinafter Calabresi, *Introduction*] (arguing that constitutional interpretation should be based on “the original meaning of the constitutional text”); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 3–4 (2011); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 NW. U. L. REV. 663, 664, 701 (2009); Vasav Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1141–45 (2003); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 791 (2002) [hereinafter McGinnis & Rappaport, *Our Supermajoritarian Constitution*]; Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POLY 991, 991 (2008) (“There is only one correct way to interpret the Constitution, and that is original public meaning textualism.”). McGinnis and Rappaport have more recently advanced the theory of “original methods originalism.” John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009) [hereinafter McGinnis & Rappaport, *Original Methods Originalism*]. However, I treat this as a variant of “original meaning.” See discussion *infra* Part I.A.2.

son, and Michael Rappaport,<sup>2</sup> prominent left of center academics such as Akhil Amar, Jack Balkin, and James Ryan,<sup>3</sup> and other leading scholars such as Larry Solum.<sup>4</sup> It is also advocated by well-known originalist jurists such as Antonin Scalia and Clarence Thomas.<sup>5</sup>

Some leading scholars still reject original meaning originalism and continue to criticize the theory forcefully.<sup>6</sup> And a few originalists still adhere to the original intent school.<sup>7</sup> But

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2. See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 89 (2004) [hereinafter BARNETT, RESTORING THE LOST CONSTITUTION]; Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999) [hereinafter Barnett, *An Originalism for Nonoriginalists*]; Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006) (arguing that the Constitution should be interpreted as understood by the “reasonable American” in 1788, the time of ratification); McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 1, at 802–05.

3. See, e.g., JACK M. BALKIN, LIVING ORIGINALISM 6–7 (2011) [hereinafter BALKIN, LIVING ORIGINALISM]; Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 28–29 (2000); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293 (2007) [hereinafter Balkin, *Abortion and Original Meaning*]; Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007) [hereinafter Balkin, *Original Meaning*]; James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1524 (2011). Ryan describes the theory he and others endorse as “textualism.” But it is clear from the context that the version of textualism he has in mind is based on the original public meaning of the text. He refers to “original meaning” as the newly dominant view in constitutional theory. *Id.* at 1524–26.

4. See, e.g., Lawrence B. Solum, *Semantic Originalism* 1–2 (Ill. Pub. Law & Legal Theory, Research Papers Series No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244>.

5. See, e.g., *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3075 (2010) (Thomas, J., concurring) (arguing that we should return to the “original meaning” of the Privileges or Immunities Clause, defined as “what the public most likely thought the Privileges or Immunities Clause to mean” at the time of enactment); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., 1997) [hereinafter SCALIA, INTERPRETATION]; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 857 (1989).

6. See, e.g., DAVID A. STRAUSS, THE LIVING CONSTITUTION 7–31 (2010); Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 8 (2009); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714 (2011); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 583 (2011).

7. See, e.g., KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 3 (1999); Larry Alexander & Saikrishna Prakash, *“Is That English You’re Speaking?” Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 974–77 (2004).

there is little doubt that original meaning has attracted widespread support in recent years.

In contrast to original intent, which focuses on the personal intentions of the Framers, original meaning is usually interpreted as depending on the public understanding of the meaning of a constitutional provision at the time of ratification. Justice Clarence Thomas, for example, describes the original meaning of the Privileges or Immunities Clause as “what the public most likely thought the Privileges or Immunities Clause to mean” when the Fourteenth Amendment was enacted.<sup>8</sup> Many other leading originalists define the concept in similar terms.<sup>9</sup>

This understanding of original meaning makes it important to determine what the public actually knew and understood about the meaning of specific parts of the Constitution at the time they were enacted. If most voters knew little or nothing about the constitutional provision in question, it may be difficult or impossible to determine its original meaning. At the very least, the original meaning might turn out to be very imprecise, especially in cases where the text is ambiguous enough to admit more than one plausible interpretation.

Survey data showing extensive public ignorance on even very basic political issues suggests that cases where the public has little knowledge of ambiguous parts of the Constitution at the time of ratification might well be common.<sup>10</sup> Yet none of the rapidly growing literature on original meaning has so far grap-

8. *McDonald*, 130 S. Ct. at 3075 (Thomas, J., concurring).

9. See, e.g., BORK, *supra* note 1, at 144 (defining original meaning as “what the public of that time would have understood the words to mean”); AMAR, *supra* note 3, at 29 (“What counts as text is the document as understood by the American People who ratified and amended it, and what counts as history is accessible public meaning, not secret private intent.”); see also BARNETT, *An Originalism for Nonoriginalists*, *supra* note 2, at 620–21 (same).

10. See, e.g., SCOTT L. ALTHAUS, COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS 10–14 (2003) (summarizing evidence of extensive voter ignorance); MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 62–104 (1996) (same); RICK SHENKMAN, JUST HOW STUPID ARE WE? FACING THE TRUTH ABOUT THE AMERICAN VOTER 13–36 (2008) (same); Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1304–29 (2004) (same); Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413, 416–19 (1998) [hereinafter Somin, *Voter Ignorance*] (same). For an extensive recent review, see ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE (forthcoming 2013) (manuscript at ch. 1) (on file with author) [hereinafter SOMIN, DEMOCRACY AND POLITICAL IGNORANCE].

pled with the reality of widespread public ignorance and its implications for originalism.

In this Article, I begin the task of filling the gap in the literature. Part I describes the ways in which various theories of original meaning implicitly depend on assumptions about public knowledge. As a result, original meaning originalists must take account of the problem of political ignorance. This is fairly obvious in the case of theories that explicitly define original meaning as the understanding held by the public at the time.<sup>11</sup> But it also applies, in somewhat different form, to more complex variants of originalism, such as John McGinnis and Michael Rappaport's "original methods originalism," which argues that provisions of the Constitution should be interpreted in accordance with the methodology expected at the time of enactment.<sup>12</sup> It is similarly relevant to Bruce Ackerman's quasi-originalist theory of "constitutional moments," under which the relevant original meaning is determined during periods of constitutional change that may not always involve formal constitutional amendments.<sup>13</sup>

Political ignorance even turns out to be a potential problem for theories that base original meaning on the perspective of a hypothetical well-informed observer.<sup>14</sup> Although political ignorance is a less significant problem for original intent theories, it does create a challenge for Keith Whittington's more populist approach to original intent, under which the relevant intent is that of the people rather than a small group of framers.<sup>15</sup>

Political ignorance also has implications for the theories of those scholars and jurists who believe that original meaning should be one of several factors in constitutional interpretation, even if not the only one.<sup>16</sup> To the extent that the original mean-

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11. See sources cited *supra* note 9.

12. See McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 1, at 751–52.

13. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 285–88 (1991) (outlining his theory).

14. See, e.g., Lawson & Seidman, *supra* note 2, at 72–73 (theory based on a hypothetical well-informed observer); see also Kesavan & Paulsen, *supra* note 1, at 1144 (same).

15. See WHITTINGTON, *supra* note 7, at 110–59.

16. Even Supreme Court Justices who are not consistent originalists have sometimes used originalist arguments to justify their positions. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 641–70 (2008) (Stevens, J., dissenting); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 101–16 (1996) (Souter, J., dissenting). Some nonoriginalist legal scholars also recognize that originalist arguments have at least a limited role to play in constitutional interpretation.

ing is a factor in their theories of constitutional interpretation, partial originalists will still have to consider the problem of political ignorance.

In all of these cases, original meaning may be difficult or impossible to determine if voters at the time of ratification lacked adequate knowledge, which may not have been an unusual state of affairs. The problem is most severe with respect to determining the original meaning of provisions that are relatively vague and open-ended and least so when it comes to those that are relatively clear and precise.<sup>17</sup> However, many of the most important disputes in constitutional law involve the former. The problem of political ignorance is also likely to be more acute with regard to issues that were not a major focus of public debate at the time of enactment.

Unfortunately, the available empirical evidence on current political ignorance suggests that the public may well have been poorly informed about many constitutional issues at the time of ratification. Indeed, acquiring little or no political knowledge is actually rational behavior for most voters.

In Part II, I consider several possible solutions to the challenge posed by political ignorance. These include relying on the perceptions of political elites, looking to contemporary coverage of constitutional issues in the popular media, and assuming that the public divined an original meaning after all by relying on “information shortcuts.”

Each of these approaches has some merit. But all of them also have important shortcomings. Ultimately, originalists may have to rely on a hybrid combination of all these methods to meet the challenge of political ignorance. Even so, there will be cases where the problem of political ignorance makes original meaning nearly impossible to divine. To address such situations, original meaning originalism may have to be supplemented by other interpretative methodologies.

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*See, e.g.,* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11–13 (1980) (admitting that “interpretivist” originalism has some value and may be useful in interpreting some parts of the Constitution); Larry Kramer, *Panel on Originalism and Pragmatism*, in *ORIGINALISM: A QUARTER-CENTURY OF DEBATE*, *supra* note 1, at 158 (criticizing original meaning originalism, but noting that “[i]t does not follow that originalism is irrelevant. To solve a given problem, I am still going to want to start with the original design. . . . [T]he sensible way to think about constitutional interpretation is to begin with the original understanding.”).

17. *See* discussion *infra* Part I.D.1.

Part III briefly considers two ways in which originalists could respond to the challenge of political ignorance by modifying their theories: adopting a presumption in favor of literal over figurative interpretations of constitutional text, and leaving more issues to be resolved by construction rather than interpretation. These strategies address the problem of political ignorance by modifying originalist theory itself, rather than by trying to work within its existing confines.

This Article does not lay out a comprehensive theory of originalism or even a comprehensive statement of the ways in which originalists should deal with the problem of political ignorance. It does, however, begin the conversation about this important but so far neglected problem.

I do not believe that the issue of political ignorance is a fatal flaw of originalism. Indeed, I remain sympathetic to originalist theories of constitutional interpretation generally, and original meaning originalism in particular. However, political ignorance does pose challenges to originalism that deserve greater attention from critics and defenders of the theory alike.

## I. ORIGINAL MEANING AND THE CHALLENGE OF POLITICAL IGNORANCE

Theories of original meaning rely on implicit assumptions about public knowledge of various constitutional provisions at the time of enactment. These assumptions are at least partially undermined if the majority of the public is in fact ignorant about the issue in question. Unfortunately, the available data on political knowledge suggests that such ignorance may well have been common. Widespread political ignorance also has important implications for at least some versions of original intent theories. It has similar ramifications for nonoriginalist theories of interpretation that appeal to original meaning as one of several relevant factors in determining the meaning of the Constitution.

### A. ASSUMPTIONS OF KNOWLEDGE IN THEORIES OF ORIGINAL MEANING

Theories of original meaning are based on implicit assumptions of public knowledge about relevant constitutional provisions. This is most obvious in relatively simple formulations of theory, which interpret original meaning in terms of “what the public of that time would have understood the words to mean,”

as Robert Bork puts it.<sup>18</sup> Many other prominent originalists have endorsed similar formulations, including Akhil Amar, Justice Clarence Thomas, and Randy Barnett.<sup>19</sup> They view original meaning as what the public at the time of enactment believed the meaning to be.

This version of originalism long predates the recent debate between advocates of original meaning and original intent. James Madison endorsed a similar view, arguing that the Constitution should be interpreted in accordance with “the sense in which [it] was accepted and ratified by the nation,”<sup>20</sup> which he earlier described more precisely as “the sense attached to it by the people in their respective State Conventions where it recd. [sic] all the authority which it possesses.”<sup>21</sup>

Political ignorance may be less of an obstacle for theories of original meaning that do not focus primarily on the understanding of the general public at the time. But as we shall see, they do not avoid the problem entirely.

#### 1. Knowledge Prerequisites of Original Meaning Theories that Rely on the Actual Understanding of the Public

This approach implicitly assumes several elements of knowledge on the part of the public at the time of ratification. First, it implies that the public knows that the relevant constitutional provision has been enacted, or at least is under consideration. A person who does not know about the Fourteenth Amendment is unlikely to have an opinion about its meaning. Second, it assumes that the public knows that the relevant provision applies to whatever issue happens to be under consideration by the observer seeking to determine the original meaning—for example, that the Equal Protection Clause of the Fourteenth Amendment is relevant to sex discrimination.<sup>22</sup>

In addition, the public must have some knowledge or understanding of how that particular issue would be resolved under the Amendment. In the case of sex discrimination, they would need to have some understanding of what kind of sex

18. BORK, *supra* note 1, at 144.

19. See sources cited *supra* notes 2–5.

20. BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 2, at 99 (quoting Letter from James Madison to Henry Lee (June 25, 1824), in 9 THE WRITINGS OF JAMES MADISON 191–92 (G. Hunt ed., 1910)).

21. *Id.* at 98 (quoting Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), reprinted in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 447–48 (Max Farrand ed., rev. ed. 1937)).

22. See Calabresi & Rickert, *supra* note 1, *passim* (considering this issue).

discrimination is forbidden by the Equal Protection Clause, if any.

The second and third requirements might to some extent be obviated by those versions of originalism that hold that the original meaning consists only of general principles or “semantic” meanings rather than “originally expected applications.”<sup>23</sup> For example, Jack Balkin argues that originalism requires fidelity only to the “semantic meaning” of the words of the constitutional text, defined as “the concepts that the words . . . referred to at the time the clause was originally enacted.”<sup>24</sup> Thus, the Equal Protection Clause may refer to a general “anticaste” principle that forbids caste-like classifications regardless of whether the public at the time of enactment actually believed that sex discrimination was an example of the kind of discrimination forbidden by that principle.<sup>25</sup> Professor Balkin himself argues that the Clause embodies a principle that bars “class legislation” as well as “caste legislation.”<sup>26</sup>

However, this reformulation reduces the relevant knowledge requirements only modestly. The public is still implicitly assumed to understand what the relevant general principle is and what criteria are used to determine whether a particular case falls under the principle or not.<sup>27</sup> In the case of sex discrimination and the Equal Protection Clause, the public would have to have known that the Clause adopts the anti-caste principle and have some idea of what counts as a caste-like legal distinction. Even if the public may not realize whether gender discrimination specifically is banned, the original public meaning surely includes some general sense of the criteria by which we would go about answering such a question.

Depending on the situation, understanding a general principle may require as much, or greater, knowledge as understanding specific applications of a rule. Principles such as due process, nondiscrimination, and the anticaste principle have numerous complexities that have led to intense disagreements

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23. See, e.g., BALKIN, LIVING ORIGINALISM, *supra* note 3, at 13; Calabresi, *Introduction*, *supra* note 1, at 35; Calabresi & Rickert, *supra* note 1, at 42.

24. BALKIN, LIVING ORIGINALISM, *supra* note 3, at 13. For a recent critique of Balkin’s emphasis on “abstract” general principles, see John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737. For Professor Balkin’s response, see Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 822–29.

25. Calabresi & Rickert, *supra* note 1, at 20–27, 46–51.

26. Balkin, *Original Meaning*, *supra* note 3, at 450.

27. See *id.* at 452–53.

about their nature and scope even among experts.<sup>28</sup> Shifting the focus from applications to principles reduces the need for public knowledge of specific cases, but increases the need for philosophical understanding of general principles.

Some of the advocates of the public understanding theory modify it by suggesting that they are actually looking for the understanding of the “reasonable person” at the time. These include Randy Barnett and Justice Antonin Scalia.<sup>29</sup> This would narrow the inquiry to the views of those members of the public who are “reasonable.” However, a person can be reasonable without necessarily having much knowledge of law and politics. Therefore, the reasonable observer is not necessarily knowledgeable unless being well-informed is built into the definition of what counts as reasonable. I address the latter approach later in the Article.<sup>30</sup>

The reasonable person might also be conceptualized as a hypothetical construct rather than any actually existing member of the public.<sup>31</sup> But if this hypothetical individual is not assumed to be knowledgeable by definition, he or she presumably would have knowledge limitations similar to those of actual members of the public at the time. Therefore public ignorance would still be a problem for a theory of original meaning that relies on the views of this type of hypothetical observer.

The knowledge implications of this kind of originalism also apply to Professor Bruce Ackerman’s famous “constitutional moments” theory, under which constitutional change can be legitimately implemented outside the Article V Amendment process if it attracts sufficiently broad popular and elite support.<sup>32</sup>

28. See, e.g., DAVID E. BERNSTEIN, *REHABILITATING LOCHNER* chs. 3–6 (2011) (describing the long history of expert disagreement over the meaning of “due process”); Calabresi & Rickert, *supra* note 1, at 20–27, 46–66 (discussing the complexity of the anticaste principle); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2413–28 (1994) (describing three different understandings of the anticaste principle).

29. See, e.g., BARNETT, *RESTORING THE LOST CONSTITUTION*, *supra* note 2, at 92 (“[O]riginal meaning’ originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of enactment.”); SCALIA, *INTERPRETATION*, *supra* note 5, at 17 (arguing that original meaning is “the intent that a reasonable person would gather from the text of the law”); see also Barnett, *An Originalism for Nonoriginalists*, *supra* note 2, at 621.

30. See discussion *infra* Part I.A.3.

31. See Kesavan & Paulsen, *supra* note 1, at 1162.

32. See ACKERMAN, *FOUNDATIONS*, *supra* note 13, at 53–56; 2 BRUCE A. ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 414–16 (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*]; Bruce Ackerman, *Constitutional Poli-*

Ackerman's theory is a sort of originalism, insofar as it urges courts to interpret the Constitution on the basis of meanings established during past periods of constitutional change.<sup>33</sup> The difference between Ackerman and traditional originalists is that, for him, the relevant periods where original meaning should be found are not exclusively those where the Constitution has been altered through the formal amendment process. Ackermanian constitutional moments can occur at other times as well.<sup>34</sup>

Ackerman contends that, during "constitutional moments," the public pays heightened attention to constitutional issues and the resulting changes to the constitutional system are ones endorsed by majority public opinion<sup>35</sup>—unlike policies adopted during periods of "normal politics," when he recognizes most voters pay little attention.<sup>36</sup> Thus, Ackerman's theory relies crucially on the claim that the general public understood and endorsed the constitutional changes enacted during constitutional moments.<sup>37</sup>

## 2. Knowledge Prerequisites of Original Methods Originalism

Leading originalist scholars John McGinnis and Michael Rappaport have proposed an alternative approach to original meaning, which they call "original methods originalism."<sup>38</sup> Instead of relying on original public meaning directly, they argue that constitutional interpreters should use the "interpretive methods that the constitutional enactors would have deemed applicable to it" at the time of enactment.<sup>39</sup>

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*tics / Constitutional Law*, 99 YALE L.J. 453, 489–90 (1989) (discussing several examples of what could be considered "constitutional moments").

33. Cf. Richard A. Primus, *Judicial Power and Mobilizable History*, 65 MD. L. REV. 171, 178 n.17 (2006) (describing Ackerman as a "multiple originalist" because he recognizes several different historical periods as sources of original meaning); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 932 (2009) (noting that "Ackerman's theory seemed to require an account of original meaning").

34. See ACKERMAN, *TRANSFORMATIONS*, *supra* note 32, at pt. III (describing the New Deal "constitutional moment" of the 1930s, when no formal amendments occurred).

35. ACKERMAN, *FOUNDATIONS*, *supra* note 13, at 285–88.

36. *Id.* at 272.

37. I discuss the knowledge implications of Ackerman's theory in greater detail in Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 595 (2003).

38. McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 1, *passim*.

39. *Id.* at 751.

This theory can be seen as a variant on original public meaning, with the focus on the public's original understanding of interpretive methodology rather than their understanding of substantive rules. Like more traditional versions of original meaning originalism, the original methods approach focuses on public understanding at the time of enactment and ratification.<sup>40</sup> McGinnis and Rappaport themselves argue that their theory is an alternative to original public meaning originalism rather than a subvariant of it.<sup>41</sup> For my purposes, nothing turns on the distinction between these two descriptions of their theory. Even if it is not actually a form of original meaning originalism, original methods originalism has much in common with it.

Original methods originalism shifts the knowledge burden from understanding of the substantive requirements of specific parts of the Constitution to knowledge of the rules by which those provisions are likely to be interpreted. The theory seems to assume that the enacting public had relevant knowledge of the interpretive rules that were expected to control future interpretations of the constitutional provisions they had just adopted.

Under this approach, the public would have knowledge of the relevant interpretive rules that they expect to be used to interpret a given constitutional provision. For example, the public would know whether the Fourteenth Amendment is expected to be interpreted using textualism,<sup>42</sup> originalist methodologies, "living Constitution" theories, pragmatic theories of interpretation,<sup>43</sup> or perhaps other options. The voters need not have an understanding of the full range of alternatives. But they presumably do need to know which methodology is actually expected to be used to interpret the provision they have enacted and how it works. Otherwise, they cannot really be said to have "decided whether to vote for the Constitution

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40. *Id.* at 751–52.

41. *Id.* at 761–65.

42. For a discussion of the difference between textualism and originalism, see Ilya Somin, "Active Liberty" and Judicial Power: What Should Courts Do to Promote Democracy?, 100 NW. U. L. REV. 1827, 1851–53 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)).

43. For a defense of judicial pragmatism, see, for example, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003).

based on the meaning it would have had under the original interpretive rules.”<sup>44</sup>

It is possible to interpret McGinnis and Rappaport’s theory as requiring only legal experts to have such knowledge, with the views of the general public largely irrelevant. McGinnis and Rappaport themselves suggest the possibility that the public might deliberately defer to the superior expertise of legal experts in determining what methods to use in interpreting a constitutional provision.<sup>45</sup> But they also emphasize that a key advantage of the original methods approach is that it uses those rules that were adopted in a supermajority process by the enactors: “The enactors would have decided whether to vote for the Constitution based on the meaning it would have had under the original interpretive rules . . . . Severing the Constitution’s meaning from these rules gives effect to a different Constitution than the one originally enacted.”<sup>46</sup> They contend that a constitutional rule enacted by a supermajority process is more likely to be beneficial than one developed by other means, such as later judicial decision-making.<sup>47</sup> These benefits of supermajoritarianism seem to depend at least in part on the members of the supermajority understanding the interpretive methods they are voting for.

### 3. Theories That Base Original Meaning on the Views of Hypothetical Well-Informed Observers

Some theories of original meaning emphasize the views of hypothetical well-informed observers rather than the actual beliefs of the public at the time of ratification. For example, Michael Paulsen and Vasan Kesavan contend that original meaning should be interpreted in light of the perceptions of an “ordinary, reasonably well-informed user of the language” at the time of enactment.<sup>48</sup> Gary Lawson and Guy Seidman rely

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44. McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 1, at 782 (citation omitted).

45. *Id.* at 765. I discuss the implications of this idea in more detail *infra* Part I.D.3.

46. McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 1, at 782–83 (citation omitted).

47. *Id.*; see also John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 388–89 (2007) (discussing the benefits of the supermajoritarian enactment of the original Constitution); McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 1, at 785–90 (discussing the reasons for a supermajority requirement to amend the Constitution).

48. Kesavan & Paulsen, *supra* note 1, at 1144.

on an even better-informed hypothetical “reasonable person,” whom they describe as “conversant with legal traditions and conventions of the time” as well as “highly intelligent and educated and capable of making and recognizing subtle connections and inferences.”<sup>49</sup> The Lawson-Seidman hypothetical arbiter of original meaning is, as they put it, “a formidable intellectual figure.”<sup>50</sup>

At first glance, it seems as if hypothetical observer theories of original meaning can avoid the problem of political ignorance altogether, simply by defining it away. Their hypothetical “reasonable” person is well-informed *by definition*.

The hypothetical observer version of originalism is indeed less vulnerable to the challenge of political ignorance than other approaches. But it does not avoid the problem entirely. Widespread political ignorance still creates significant difficulties even for this version of original meaning originalism.

Advocates of the hypothetical observer theory implicitly assume that the well-informed reasonable observer is simply an ordinary member of the public with the addition of greater knowledge and intelligence. However, much research shows that increases in knowledge significantly alter attitudes towards political issues. Survey respondents with high levels of political knowledge have very different views from those of the general population on a variety of political issues, even after controlling for numerous demographic and political variables, such as race, gender, income, age, and partisan identification.<sup>51</sup>

Thus, the increased knowledge of the hypothetical observer is also likely to affect his or her political attitudes, which in turn could easily influence their interpretations of ambiguous parts of the Constitution. We know that political ideology influences constitutional interpretation by judges,<sup>52</sup> and it is likely to do so among lay observers as well. To understand how the hypothetical well-informed observer is likely to interpret the Constitution, we need to consider the impact that increased political knowledge may have on his views.

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49. Lawson & Seidman, *supra* note 2, at 73.

50. *Id.*

51. See, e.g., ALTHAUS, *supra* note 10, at pt. III; BRYAN CAPLAN, MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES 50–93 (2007); DELLI CARPINI & KEETER, *supra* note 10, at 218–67, 334–36.

52. For a summary of the relevant evidence, see JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL RE-VISITED (rev. ed. 2003).

Advocates of the hypothetical observer theory can try to ignore this issue. They can model the hypothetical reasonable person as simply an individual with heightened political and legal knowledge whose normative views remain completely unchanged. But this move increases the extent to which the hypothetical observer is distanced from the general public whose understanding he or she is supposed to be a stand-in for.

If the hypothetical observer is vastly more informed than the actual public at the time of ratification, using the former as a proxy for the latter risks undercutting many of the claimed advantages of original meaning originalism. For example, some scholars contend that originalist interpretations of the Constitution are superior to the alternatives because the original meaning of a constitutional provision is the one that was enacted by a supermajoritarian political process,<sup>53</sup> or at least embodies “popular sovereignty.”<sup>54</sup> But if there is a great difference between the views of the knowledgeable hypothetical observer and those of the general public that ratified the relevant part of the Constitution in the real world, then the interpretation endorsed by the former is probably *not* the one that succeeded in getting supermajority political support. Nor is it a product of popular sovereignty. Perhaps only a tiny fraction of the general public actually held the same views as the hypothetical observer, or even was aware that such an interpretation was a logical possibility.

Other scholars defend original meaning originalism on the ground that it provides a binding framework for government that can extend across time,<sup>55</sup> or that it “locks in” important features of the Constitution against change adopted by means other than the amendment process.<sup>56</sup> It is not clear, however, why we would want to adopt a framework that reflects the views of a purely hypothetical observer, or lock in her hypothetical preferences if they have little or no connection to the views of actual living people who adopted the Constitution and its amendments.

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53. See generally McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 1, at 785–90 (discussing the reasons for a supermajority requirement to amend the Constitution).

54. Amar, *supra* note 3, at 37–38.

55. See, e.g., BALKIN, *LIVING ORIGINALISM*, *supra* note 3, at ch. 3.

56. See, e.g., BARNETT, *RESTORING THE LOST CONSTITUTION*, *supra* note 2, at 103–09.

Perhaps the views of the hypothetical well-informed observer are to be preferred precisely because of his or her superior knowledge. People with greater political and legal knowledge are likely to adopt better rules than those with less.<sup>57</sup> But if that is the true rationale for adopting the hypothetical observer's viewpoint, why not simply follow whatever legal rules a hypothetical well-informed observer would wish to impose, regardless of whether they happen to accord with the Constitution? For example, we could urge judges and other constitutional interpreters to impose whatever rules would be adopted by highly knowledgeable observers in a hypothetical social contract framework, such as John Rawls's famous "original position."<sup>58</sup>

In sum, the informed hypothetical observer theory does not completely avoid the problem of political ignorance. If there is a large gap between the hypothetical observer's knowledge and that of the general public, reliance on the former as the basis of constitutional interpretation cuts against the major rationales for adopting original meaning originalism in the first place.

#### B. IMPLICATIONS OF IGNORANCE FOR ORIGINAL INTENT

On the whole, political ignorance is far less of a problem for the original intent version of originalism than for original meaning. In contrast to original meaning's emphasis on the understanding of the general public, most theories of original intent focus on the views of a small elite of constitutional framers.<sup>59</sup> On average, these elites are likely to be highly knowledgeable about the constitutional issues they addressed. It is not likely that that they lacked a clear intent on a key issue because they were simply ignorant about it. But this possibility cannot be categorically ruled out. Even generally well-informed elites might still be ignorant about the implications of a new

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57. I argue for this idea in SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 10, at Introduction (explaining that effective democratic accountability requires voters to have at least some political knowledge). See generally CAPLAN, *supra* note 51.

58. See generally JOHN RAWLS, A THEORY OF JUSTICE 3–40 (1971) (laying out the philosophical underpinnings for such a theory). For other well-known hypothetical social contract theories, see JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); DAVID GAUTHIER, MORALS BY AGREEMENT (1986).

59. For examples of the standard approach to original intent, see generally RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION (2005).

part of the Constitution for some issues, especially if those issues were not a major focus of attention at the time of ratification.

Moreover, at least one prominent version of original intent theory has a less elite-centric focus. Keith Whittington, a leading constitutional theorist, has advocated a version of original intent that links the concept to popular sovereignty and takes into account the intentions of the people as a whole.<sup>60</sup> In Whittington's view, originalism should be based on the "sovereign intent" of the "popular will."<sup>61</sup>

This populist version of original intent has close affinities with original meaning. Both shift the focus of interpretive attention from a small, elite group of framers to the general public; both implicitly assume a degree of knowledge on the part of the latter. For these reasons, political ignorance is a potential problem for the popular sovereignty model of original intent in much the same way as for original meaning originalism. More generally, the wider the range of people whose intent is considered relevant, the more likely it is that political ignorance is going to be a factor.

#### C. ASSESSING THE RELEVANT EXTENT OF POLITICAL IGNORANCE

Original meaning originalism's implicit dependence on public political knowledge may not be a problem if knowledge levels are relatively high. In reality, however, the evidence suggests that they are often quite low. Both general political knowledge and constitutional knowledge in particular leave much to be desired.

##### 1. Political Ignorance in the Modern Era

Decades of survey data reveal that the majority of the public is at a very low level of political knowledge.<sup>62</sup> Majorities are often ignorant of very basic facts about politics and public policy. In the immediate aftermath of the 2010 election, only 46% of adults knew that the Republicans won the House of Repre-

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60. WHITTINGTON, *supra* note 7, at 110–59.

61. *Id.* at 155 (arguing that originalism preserves popular will and adheres to sovereign intent).

62. *See supra* text accompanying note 10, and *infra* text accompanying note 71 (summarizing evidence of extensive voter ignorance).

sentatives, but not the Senate.<sup>63</sup> In 2004, 70% of the public were unaware of the enactment of President George W. Bush's prescription drug plan, the largest new federal program in decades.<sup>64</sup> A 2009 poll showed that only 24% of Americans realized that an important "cap-and-trade" proposal then recently passed by the House of Representatives as an effort to combat global warming was an "environmental" policy.<sup>65</sup> Some 46% believed that it was either a "health care reform" or a "regulatory reform for Wall Street."<sup>66</sup>

Ignorance about basic aspects of the Constitution is also extensive. For example, a 2006 Zogby poll found that 58% of Americans cannot name the three branches of the federal government.<sup>67</sup> Only 28% can name two or more of the five rights guaranteed by the First Amendment.<sup>68</sup> The majority also does not know which branch of government has the power to declare war.<sup>69</sup> According to a 2002 survey, only 31% realize that Karl Marx's famous dictum "from each according to his ability, to each according to his needs" is *not* in the Constitution.<sup>70</sup>

Such widespread ignorance is not a recent phenomenon. It dates back many decades to the very beginning of modern public opinion polling in the 1930s.<sup>71</sup> A 1952 survey found that only

63. *Public Knows Basic Facts About Politics, Economics, but Struggles with Specifics*, PEW RES. CENTER FOR PEOPLE & PRESS, Nov. 18, 2010, at 1, available at <http://people-press.org/reports/pdf/677.pdf>.

64. See Ilya Somin, *When Ignorance Isn't Bliss: How Political Ignorance Threatens Democracy*, 525 POL'Y ANALYSIS, Sept. 22, 2004, at 5–6, available at <http://www.cato.org/publications/policy-analysis/when-ignorance-isnt-bliss-how-political-ignorance-threatens-democracy>.

65. *National Survey of 1,000 Likely Voters*, RASMUSSEN REP. (May 7–8, 2009), [http://www.rasmussenreports.com/public\\_content/politics/toplines/pt\\_survey\\_toplines/may\\_2009/toplines\\_cap\\_trade\\_i\\_may\\_7\\_8\\_2009](http://www.rasmussenreports.com/public_content/politics/toplines/pt_survey_toplines/may_2009/toplines_cap_trade_i_may_7_8_2009).

66. *Id.*

67. Brit Hume, *Zogby Poll: Most Americans Can Name Three Stooges, but not Three Branches of Gov't*, FOX NEWS (Aug. 15, 2006), <http://foxnews.com/story/0,2933,208577,00.html>.

68. *Americans' Awareness of First Amendment Freedoms*, MCCORMICK TRIB. FREEDOM MUSEUM (Mar. 1, 2006), <http://www.forumforeducation.org/node/147>.

69. DELLI CARPINI & KEETER, *supra* note 10, at 70.

70. Michael C. Dorf, *Whose Constitution Is It Anyway? What Americans Don't Know About Our Constitution—and Why It Matters*, FINDLAW (May 29, 2002), <http://writ.news.findlaw.com/dorf/20020529.html>.

71. For studies showing the consistency of political ignorance over time, see generally DELLI CARPINI & KEETER, *supra* note 10, at 62–134; ERIC R.A.N. SMITH, *THE UNCHANGING AMERICAN VOTER* (1989); Stephen E. Bennett, "Know-Nothings" Revisited Again, 18 POL. BEHAV. 219, 219–31 (1996); Stephen E. Bennett, "Know-Nothings" Revisited: The Meaning of Political Igno-

19% of Americans could name all three branches of the federal government and only 27% could name at least two, an even worse level of knowledge than today.<sup>72</sup> Overall, knowledge levels have not increased significantly even in the wake of the technological revolution in information technology wrought by the internet and modern cable television.<sup>73</sup>

## 2. Political Ignorance in the Eighteenth and Nineteenth Centuries

Obviously, modern evidence of political ignorance is only indirectly relevant to the historical periods when the original Constitution and its most important amendments were enacted: 1787–91 in the case of the original Constitution and the Bill of Rights, and 1865–70 for the three Reconstruction amendments. Were political knowledge levels higher back then than they are today? It is impossible to answer this question with any certainty because we do not have systematic public opinion polling for any period prior to the 1930s.<sup>74</sup> There is no eighteenth and nineteenth century political knowledge data comparable to that which exists for the last seventy-five years.

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*rance Today*, 69 SOC. SCI. Q. 476, 476–92 (1988); Stephen E. Bennett, *Trends in Americans' Political Information, 1967–1987*, 17 AM. POL. Q. 422 *passim* (1989); Michael X. Delli Carpini & Scott Keeter, *Stability and Change in the U.S. Public's Knowledge of Politics*, 55 PUB. OPINION Q. 583, 590–93 (1991). For an exception showing a very small increase in knowledge when comparing the 1980–88 period to the 1990–98 period, see ALTHAUS, *supra* note 10, at 215. The increase shown in Althaus's study is very small (from an average of 52% correct answers in the earlier period to 54% in the later one), and may be an artifact of the particular questions studied. *Id.* For evidence of widespread political ignorance during the 1930s, see Somin, *supra* note 37, at 620–28.

72. DELLI CARPINI & KEETER, *supra* note 10, at 71.

73. See, e.g., *Public Knowledge of Current Affairs Little Changed by News and Information Revolutions*, article in *What Americans Know: 1989–2007*, PEW RESEARCH CENTER FOR PEOPLE & PRESS (Apr. 15, 2007), <http://www.people-press.org/2007/04/15/public-knowledge-of-current-affairs-little-changed-by-news-and-information-revolutions> (showing little or no increase in political knowledge since the rise of the internet and other modern media); see also BRUCE BIMBER, *INFORMATION AND AMERICAN DEMOCRACY: TECHNOLOGY IN THE EVOLUTION OF POLITICAL POWER* 229–30 (2003) (arguing little or no increase in political knowledge since the rise of the internet and other modern media); MATTHEW HINDMAN, *THE MYTH OF DIGITAL DEMOCRACY* 60–61 (2009). See generally Markus Prior, *News vs. Entertainment: How Increasing Media Choice Widens Gaps in Political Knowledge and Turnout*, 49 AM. J. POL. SCI. 577 (2005).

74. See JOHN G. GEER, *FROM TEA LEAVES TO OPINION POLLS* 5 (1996) (describing origins of public opinion polling in the 1930s).

Nonetheless, there is at least some reason to doubt that political knowledge levels in eighteenth and nineteenth century America were especially high. One of the main reasons why political ignorance has proven to be so persistent over time is that, for most citizens, it is actually rational behavior.<sup>75</sup> Because the chance of any one vote influencing the outcome of an election is infinitesimally small, there is little or no incentive to become knowledgeable about politics if the only reason for doing so is to become a “better” voter.<sup>76</sup> The rationality of widespread political ignorance helps explain why it has persisted for decades despite impressive increases in education levels and in the availability of information through various types of media.<sup>77</sup>

Although the cost of acquiring information has declined thanks to modern technology, it is still high enough to make it rational for most citizens to remain ignorant about most issues; the key constraint on political knowledge is not the availability of information, but citizens’ willingness to spend time and energy learning and understanding it.<sup>78</sup> Rational ignorance may have been an even greater barrier to information acquisition in an era when information was more difficult to find than today, literacy levels were much lower, and most people had to work longer hours, leaving less time for learning about political issues.

At the time of ratification, some of the Founding Fathers themselves believed that public knowledge of politics was low and, worried about allowing too much public influence over policy.<sup>79</sup> When the Constitution came up for ratification in Virginia, James Madison wrote in a letter to Thomas Jefferson that the issue at hand “certainly surpasses the judgment of the

75. See SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 10, at ch. 3 (arguing that because one person’s vote has only an infinitesimal chance of affecting the outcome of an election, voters remain ignorant).

76. See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 238–59 (1957) (introducing the theory of rational political ignorance). For recent defenses and extensions of the theory, see generally CAPLAN, *supra* note 51, at 114–41; SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 10, at chs. 2–3, discussing the extent of voter ignorance and why this is rational behavior for most voters; and Ilya Somin, *Knowledge About Ignorance: New Directions in the Study of Political Information*, 18 CRITICAL REV. 255, 257–60 (2006), discussing low individual utility of political knowledge for most voters.

77. For a detailed discussion of this point, see SOMIN, DEMOCRACY AND POLITICAL IGNORANCE, *supra* note 10, at ch. 3.

78. See *id.* at chs. 2, 4 (surveying the evidence in detail).

79. See BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, THE RATIONAL PUBLIC 3 (1992) (describing the Founders’ attitudes on this subject).

greater part of” the people of Virginia,<sup>80</sup> though he also was pleased that the people decided “contrary to their most popular leaders,” many of whom were opposed to ratification.<sup>81</sup>

Some readers may assume that the voters who chose delegates for the state ratifying conventions in 1787–88 were highly knowledgeable because the franchise was tightly restricted. However, the franchise was actually quite broad at the time.<sup>82</sup> By 1790, some 60–70% of white adult males were legally allowed to vote, even in spite of laws in many states that limited the franchise to property owners.<sup>83</sup> Moreover, eight of the thirteen states lowered their property qualifications for the ratifying convention election, and two others already had laws allowing “virtually all” taxpaying adult male citizens to vote.<sup>84</sup> Free black males had the franchise on the same terms as whites in five states.<sup>85</sup> Despite the exclusion of women and most African-Americans, states did not restrict the ratifying convention electorate to a small, highly knowledgeable elite. By the 1860s, the period when the post-Civil War amendments were ratified, the franchise was broader still.<sup>86</sup>

The autonomous decision-making of late eighteenth and early nineteenth century voters was to some degree restricted by a tradition of deference to the judgment of social and political elites.<sup>87</sup> The implications of deference for political knowledge are ambiguous. On the positive side, one can view deferential voters as being guided by the potentially superior knowledge of elites. The knowledge of the latter could poten-

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80. Letter from James Madison to Thomas Jefferson (Dec. 9, 1787), in 8 RATIFICATION OF THE CONSTITUTION BY THE STATES: VIRGINIA 227 (John P. Kaminski & Gaspare J. Saladino eds., 1988) [hereinafter Madison Letter to Jefferson].

81. *Id.*

82. See ALEX KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 24 (2000).

83. *Id.* at 54–60.

84. See AKHIL REED AMAR, AMERICA’S CONSTITUTION 7, 503–05 (2005) (detailing property qualifications by state). The three exceptions were Rhode Island, Delaware, and Virginia. *Id.* at 505.

85. This was famously pointed out by Justice Benjamin Curtis in his dissent in the *Dred Scott* case. See *Dred Scott v. Sandford*, 60 U.S. 393, 572–73 (1857) (Curtis, J., dissenting).

86. See KEYSSAR, *supra* note 82, at 50–52 (detailing substantial liberalization of franchise laws in the 1820s–1850s).

87. See, e.g., Ronald P. Formisano, *Deferential-Participant Politics: The Early Republic’s Political Culture, 1789–1840*, 68 AM. POL. SCI. REV. 473 (1974) (describing how “deferential politics” was only slowly displaced by the rise of political parties).

tially be imputed to the former. On the other hand, deference makes it less likely that voters would acquire and consider substantial information about constitutional issues on their own. It is also unclear whether voters who participated in the elections for ratifying convention delegates actually did behave in a deferential manner.<sup>88</sup>

Possibly the most thorough modern study of American political engagement in the nineteenth century, Glenn Altschuler and Stuart Blumin's *Rude Republic*, finds that "the majority of enfranchised citizens . . . turned only episodically and often in qualified ways to political matters" and generally displayed relatively low levels of interest in political issues.<sup>89</sup> The crises of secession and the Civil War may have led to an increase in political engagement.<sup>90</sup> But even during the war, a large proportion of voters may have been "indifferen[t] to party tickets and platforms," demonstrating little knowledge of issues.<sup>91</sup> After the war—the period when the Fourteenth Amendment was enacted—engagement may have returned to its previous, lower levels.<sup>92</sup> Other scholars contend that most nineteenth century voters based their decisions on "ethnocultural" affinity with their preferred political party rather than detailed consideration of issues.<sup>93</sup> To the extent this was true, it makes it less likely that they considered constitutional issues in any depth.

88. See, e.g., Madison Letter to Jefferson, *supra* note 80, at 227 (expressing his opinion that they did not have such deference, and indeed voted contrary to the judgment of "their most popular leaders").

89. GLENN C. ALTSCHULER & STUART M. BLUMIN, *RUDE REPUBLIC: AMERICANS AND THEIR POLITICS IN THE NINETEENTH CENTURY* 272 (2000) [hereinafter ALTSCHULER & BLUMIN, *RUDE REPUBLIC*]. For other studies reaching similar conclusions, see RICHARD FRANKLIN BENSEL, *THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY*, at ix (2004) (noting that "ordinary men" had a limited understanding of and interest in politics); RICHARD J. JENSEN, *GRASS ROOTS POLITICS: PARTIES, ISSUES, AND VOTERS, 1854–1983*, at 29–35 (1983) (claiming that narrow material incentives, rather than careful consideration of issues, often motivated nineteenth-century voters); Glen C. Altschuler & Stuart M. Blumin, *Limits of Political Engagement in Antebellum America: A New Look at the Golden Age of Participatory Democracy*, 84 J. AM. HIST. 855 *passim* (1997); Samuel DeCanio, *State Autonomy and American Political Development: How Mass Democracy Promoted State Power*, 19 STUD. AM. POL. DEV. 117, 118–21 (2005) (arguing that public ignorance in the nineteenth century was widespread).

90. ALTSCHULER & BLUMIN, *RUDE REPUBLIC*, *supra* note 89, at 155–60.

91. *Id.* at 177.

92. See generally *id.* at 184–251.

93. For a discussion of this literature, see Ronald P. Formisano, *The Invention of the Ethnocultural Interpretation*, 99 AM. HIST. REV. 473 *passim* (1994), and see also BENSEL, *supra* note 89, at 290, for an argument that such

Altschuler and Blumin's work relies on qualitative evidence such as contemporary diaries and newspaper reports.<sup>94</sup> It is therefore difficult to tell whether or not their sources are fully representative of general popular attitudes. Instead, it may be that these sources actually overstate levels of political knowledge. The sorts of literate men<sup>95</sup> who kept regular diaries and read political coverage in the press were likely to have been more knowledgeable than the average voter. Like James Madison in 1787,<sup>96</sup> future president Rutherford B. Hayes wrote in 1875 that American democracy often amounted to "rule by ignorance," especially in areas with a "large uneducated population."<sup>97</sup>

At the same time, some factors suggest that political knowledge might have been higher in the eighteenth and nineteenth centuries than today. Government was considerably smaller and simpler in that era than in the twentieth and twenty-first centuries, which meant that there were far fewer issues for voters to keep track of.<sup>98</sup> As a result, the average amount of knowledge *per issue* might have been higher than today, even if the total amount of knowledge across all issues was not. This would tend to increase knowledge of constitutional issues at the time of ratification, since these matters would have fewer competitors for public attention than they would today.

Similarly, the quantity, quality, and variety of public entertainment in the eighteenth and nineteenth centuries was generally far lower than today. Nineteenth-century Americans did not have television, radio, movies, the internet, or (until the 1870s) large-scale professional sports.<sup>99</sup> As a result, many people attended political speeches and lectures in part as a form of

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affinities were often more important determinants of voting decisions than issue platforms.

94. ALTSCHULER & BLUMIN, *RUDE REPUBLIC*, *supra* note 89, at 142–46.

95. I refer to men here because only men had the right to vote at the time.

96. *See supra* notes 80–81 and accompanying text.

97. DeCanio, *supra* note 89, at 126 n.82 (quoting Letter from R. Hayes to J. Sherman (June 29, 1875), in 3 *THE DIARY AND LETTERS OF RUTHERFORD B. HAYES* 262 (1922), available at [ww2.ohiohistory.org/onlinedoc/hayes](http://ww2.ohiohistory.org/onlinedoc/hayes)).

98. I emphasized this point in Somin, *Voter Ignorance*, *supra* note 10, at 434–35.

99. The National League—the first major professional sports league—was founded in 1876. *See* GEORGE VECSEY, *BASEBALL: A HISTORY OF AMERICA'S FAVORITE GAME* 31 (2006).

entertainment.<sup>100</sup> The Lincoln-Douglas debates, for example, drew large audiences who came in part for that reason.<sup>101</sup> One study claims that “half or more of the [mid-nineteenth century] population” attended political speeches, rallies, picnics, and parades.<sup>102</sup>

Even if political knowledge in the eighteenth and nineteenth centuries was significantly higher than today, it still might not have translated into substantial public awareness of the sorts of complex issues that interest modern jurists and constitutional theorists. The average citizen in 1868 might well have understood that the Fourteenth Amendment was intended to protect the rights of recently freed African-Americans in some general sense. But that does not mean he had any clear idea of the full range of rights protected by the Privileges or Immunities Clause, whether the Amendment banned all racial discrimination by state governments or just some types,<sup>103</sup> or whether the Equal Protection Clause was meant to establish a general “anticaste principle.”<sup>104</sup>

More research is needed to better understand the extent of public knowledge on constitutional issues at the time when the Constitution and its most important amendments were ratified. At this point, the available evidence suggests that knowledge levels were likely to have been relatively low. However, it is certainly possible that future research will find important exceptions to this generalization, or potentially even overturn it.

#### D. VARIATION ACROSS ISSUES

Political ignorance is likely to be more of a problem for originalists on some issues than others. It is least likely to matter when it comes to interpreting constitutional provisions that are clear and precise and those that were widely debated at the time of enactment.<sup>105</sup> The implications of ignorance may also differ as between those parts of the Constitution that use technical legal language and ones that do not.<sup>106</sup>

100. See, e.g., JENSEN, *supra* note 89, at 31 (suggesting that these activities were as much a form of entertainment as golf, tennis, and skiing are today).

101. ALLEN C. GUELZO, *LINCOLN AND DOUGLAS: THE DEBATES THAT DEFINED AMERICA*, at xvii–xviii (2009).

102. JENSEN, *supra* note 89, at 31.

103. See generally ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1991) (describing controversy over this issue at the time of ratification).

104. See sources cited *supra* note 28.

105. See discussion *infra* Part I.D.1.

106. See discussion *infra* Part I.D.3.

### 1. Textual Ambiguity

Ignorance is less likely to be a problem for determining the original meaning of clear and precise parts of the Constitution, as opposed to more ambiguous ones. For example, Article II of the Constitution sets out very clear qualification requirements for the presidency, mandating that the president must be thirty-five years old, a “natural born” American citizen, and a resident of the United States for at least fourteen years.<sup>107</sup> Even a voter with little or no knowledge of politics is unlikely to have any difficulty interpreting this provision, despite the attempts of a few legal scholars to claim that it is more complex than it seems.<sup>108</sup> It is possible, of course, that many people at the time of ratification might simply have been unaware of the existence of a clause in the Constitution setting out qualifications for the presidency. But at least anyone who read the clause was likely to have a clear sense of its meaning, even if they knew little or nothing about contemporary law and politics. The same goes for many other parts of the Constitution that are similarly unambiguous. For example, it is easy to grasp the meaning of the requirement that each state is entitled to two senators,<sup>109</sup> or that the president serves a four-year term<sup>110</sup> and can only be reelected once after serving a complete first term.<sup>111</sup>

The situation is very different for those clauses that use broad or ambiguous language. For example, the text of the Equal Protection Clause does not clearly indicate what types of discrimination are forbidden, either with respect to the range of issues covered or the types of classifications that are to be banned. Both questions have been much debated by legal scholars and jurists from the nineteenth century to the present.<sup>112</sup> Similarly, Article II of the Constitution does not clearly

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107. U.S. CONST. art. II, § 1, cl. 5.

108. See, e.g., Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1174 (1985) (suggesting that scholars could interpret the age requirement to mean merely that the president must have at least as much maturity as the average thirty-five-year-old).

109. U.S. CONST. art. I, § 3, cl. 1.

110. U.S. CONST. art. II, § 1, cl. 1.

111. U.S. CONST. amend. XXII, § 1.

112. See, e.g., *Bradwell v. State*, 83 U.S. 130, 138–39 (1872) (unsuccessful early effort to argue that the Fourteenth Amendment forbade discrimination against women, but that argument was nonetheless endorsed by the Supreme Court Chief Justice Salmon P. Chase); KULL, *supra* note 103, at 67–112 (describing some of the debates on these issues at the time of the framing and soon after).

specify the limits of the president's wartime executive powers. Scholars and jurists are deeply divided over the question of what the original meaning requires here. Some endorse a very broad interpretation of executive authority, while others argue for a much narrower one.<sup>113</sup> These include such issues as whether the president has the power to begin an armed conflict without congressional consent, and whether he needs congressional authorization to take such measures as trying prisoners in military commissions.<sup>114</sup>

The First Amendment does not clearly specify what forms of expression are protected by the Free Speech Clause.<sup>115</sup> As a result, there is great disagreement over such issues as whether the original meaning of the Clause protects symbolic expression,<sup>116</sup> and whether it protects speech by corporations as well as "natural" persons.<sup>117</sup>

Many more such examples can be cited. The key point is that a large proportion of the most contentious issues in constitutional interpretation are cases where the text does not provide a clear indication of original meaning by itself. To address this problem, scholars and jurists have to resort to extrinsic evidence of meaning, such as tradition, precedent, statements by legal and political elites, and so on. These are precisely the sorts of evidence that relatively ignorant voters might not have been aware of at the time of ratification. While even a voter with little or no political knowledge can easily discern the meaning of a constitutional provision that is simple and clear, the same is not true of more complex and ambiguous clauses.

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113. Compare MICHAEL RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* (2007) (arguing for a narrow interpretation), with JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005) (defending a very broad interpretation).

114. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008) (latest of several closely divided Supreme Court decisions on the military commission issue); RAMSEY, *supra* note 113, at 91–114 (arguing that the original meaning supports a relatively narrow interpretation of wartime executive power); YOO, *supra* note 113, at 143–81 (defending broad interpretation).

115. See U.S. CONST. amend. I.

116. See, e.g., Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057 (2009) (challenging the conventional wisdom that the original meaning did not protect symbolic expression).

117. See generally *Citizens United v. FEC*, 558 U.S. 310 (2010) (resulting in a closely divided 5-4 decision on this issue where the majority and dissent disagreed on the original meaning of the First Amendment, among other disputed points).

This is not to say that low-knowledge voters are necessarily completely ignorant about the latter. A low-knowledge voter might still have at least a general sense of a clause's meaning. For example, he or she might realize that the Free Speech Clause of the First Amendment protects political speech against flagrant attempts at censorship by the government,<sup>118</sup> or that the Fourteenth Amendment forbids the most blatant forms of state government discrimination against African-Americans, such as the "Black Codes" that many southern states enacted in the immediate aftermath of the Civil War.<sup>119</sup>

Given the evidence suggesting that much of the public in the twentieth and twenty-first centuries is often ignorant about even very basic political information,<sup>120</sup> we cannot take for granted the idea that most voters at the time of ratification understood even relatively simple elements of the amendments that were being enacted. But it is at least plausible to believe that many did understand these points—or least would have easily grasped them upon reading the constitutional text. By contrast, public knowledge of more complex points that are not immediately evident in the text is likely to have been significantly lower.

## 2. Prominence of Issues at the Time of Ratification

Ignorance is also especially likely to be a problem in the case of interpretive questions that were not widely discussed at the time of enactment but which have become important since. These include such crucial modern issues as how the First Amendment applies to new technology<sup>121</sup> and whether Congress's powers under the Commerce Clause extend to the regulation of activity that is remote from actual trade and movement across state lines.<sup>122</sup>

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118. U.S. CONST. amend. I.

119. *See, e.g.*, THEODORE B. WILSON, *THE BLACK CODES OF THE SOUTH* 61–80, 96–115 (1965) (describing the Black Codes). For a discussion on the role of the Black Codes in inspiring the Fourteenth Amendment, *see, for example*, AMAR, *supra* note 84, at 383–85.

120. *See supra* Part I.C.1.

121. *See, e.g.*, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969) (holding that the First Amendment allows for greater regulation over the new technology of television).

122. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 32–33 (2005) (holding that the Commerce Clause allows Congress to forbid the possession of medical marijuana even in cases where the marijuana had never crossed state lines or been sold in any market anywhere).

The implications of the Fourteenth Amendment for racial discrimination were widely debated at the time of ratification, making it more likely that members of the public would have at least some relevant knowledge on this issue.<sup>123</sup> By contrast, there was much less debate about the potential impact of the Amendment for gender discrimination,<sup>124</sup> and almost none at all for discrimination on the basis of sexual orientation. Public ignorance would therefore be more of an obstacle to efforts to determine the original meaning of the Amendment with respect to the latter two issues.

### 3. Technical Legal Terms Versus Ordinary Language Terms

Initially, it may seem obvious that political ignorance is likely to be more of a problem when it comes to the original meaning of many technical legal phrases in the Constitution than with respect to those clauses that use ordinary language. Phrases such as “Bill of Attainder,”<sup>125</sup> “privileges or immunities,”<sup>126</sup> and “Habeas Corpus”<sup>127</sup> are likely to be unintelligible to voters lacking in legal training. If so, the presence of many such legal terms of art in the Constitution could exacerbate the problem of political ignorance from the standpoint of original meaning.

However, it is possible that legal terms of art actually create less of a challenge than those clauses of the Constitution that use ordinary language. If a phrase in the Constitution looks like a technical term, ordinary citizens might assume that it is a legal term of art that they can leave to the experts to interpret. They could deliberately decide to delegate the task of interpreting it to judges and other legal experts.<sup>128</sup> In that event, the original meaning might simply be that interpretation of the term is to be left up to judges using professional interpretive tools.<sup>129</sup>

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123. See KULL, *supra* note 103, at 67–87 (discussing the extensive deliberation that led to the creation of the Fourteenth Amendment).

124. For a recent review of the evidence, see Calabresi & Rickert, *supra* note 1, at 51–57.

125. U.S. CONST. art. I, § 9, cl. 3.

126. U.S. CONST. amend. XIV, § 1.

127. U.S. CONST. art. I, § 9, cl. 2.

128. See McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 1, at 765 (asserting that the public might allow lawyers to determine the meaning of certain aspects of the Constitution).

129. *Id.* at 772.

By contrast, it is unlikely that citizens would make a similar assumption about plain language provisions of the Constitution, which include such ordinary sounding terms as “Equal Protection,”<sup>130</sup> “liberty,”<sup>131</sup> “property,”<sup>132</sup> and “Commerce . . . among the several States.”<sup>133</sup> In some cases, these seemingly ordinary terms could still have a technical meaning for legal experts. But it is unlikely that members of the general public—even “reasonable” ones<sup>134</sup>—would have understood them in that way.

Most voters might plausibly assume that seemingly ordinary language in the Constitution should be interpreted in accordance with everyday usage rather than some technical meaning known only to legal experts. The Supreme Court itself has emphasized that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.”<sup>135</sup> This principle was recently reaffirmed by the Court in *District of Columbia v. Heller*.<sup>136</sup> If even Supreme Court Justices assume that the Constitution was written in ordinary language intended to be understood by laypeople, voters might well see it that way too.

It also seems unlikely that voters would be willing to give the experts a blank check to interpret parts of the Constitution that implicate major ideologically contested issues. For example, it is doubtful that voters in 1787 would have agreed to allow legal professionals unconstrained authority to determine the scope of federal power under Article I of the Constitution, or that the voters of 1868 would have given them similar control over the determination of what kinds of discrimination are forbidden by the Fourteenth Amendment.

It is, of course, theoretically possible that the voters at the time of ratification chose to leave constitutional interpretation completely to the discretion of legal experts, using whatever methods the latter deemed appropriate. But the existence of such an extraordinarily high degree of deference to expertise

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130. U.S. CONST. amend. XIV, § 1.

131. *Id.*; U.S. CONST. amend. V.

132. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

133. U.S. CONST. art. I, § 8, cl. 3.

134. For works that claim that original meaning is the meaning understood by “reasonable” observers at the time, see sources cited *supra* note 29.

135. *United States v. Sprague*, 282 U.S. 716, 731 (1931).

136. 554 U.S. 570, 576–77 (2008).

would, at the very least, have to be proven by historical research, not simply assumed. And it is unlikely to have been present throughout the ratification of the original Constitution and subsequent amendments. Broad deference of this kind may be plausible with regards to interpretation of uncontroversial technical points, but seems less likely on major substantive issues of the sort that are the focus of the most important controversies over constitutional interpretation. The extent to which the public at the time of the Founding and the enactment of the post-Civil War amendments was willing to defer to expert opinion on constitutional issues is an important potential topic for future research.

In sum, the issues on which political ignorance is likely to be an especially serious problem are often the very ones that are most controversial today: cases where the text of the Constitution is imprecise and the issue was not a major focus of public discussion at the time of ratification. In these cases, voter ignorance may make it difficult or impossible to determine what the original meaning is, or even whether there was a single meaning endorsed by the majority of the public at all.

## II. SOME POSSIBLE SOLUTIONS TO THE PROBLEM

Although the problem of political ignorance creates a serious challenge for original meaning originalism, there are several potential solutions. Here, I review some of the most important: reliance on elite opinion, deriving the original meaning from contemporary media coverage, information shortcuts, and a hybrid approach that combines two or more of the above. Each of these potential solutions has some merit. But each also has important shortcomings. Ultimately, there may not be any one solution that fully addresses the issue. There may be some situations where the challenge posed by political ignorance is insuperable.

### A. RELYING ON THE OPINIONS OF INFORMED ELITES

The simplest and perhaps most obvious originalist solution to the problem of political ignorance is to base interpretations of original meaning on the views of informed legal and political elites. The elites can be used as proxies for the general public. This differs from the strategy of defining original meaning itself in terms of the views of a hypothetical well-informed ob-

server.<sup>137</sup> The latter seeks to ascertain the views of a hypothetical construct, while the former focuses on those of actual well-informed elites in the real world. In addition, original meaning originalists who rely on elite opinion are presumably doing so for the purpose of determining the meaning of the Constitution for the population as a whole rather than those elites alone.

Although no major theorist of originalism has explicitly advocated relying on elite opinion exclusively, much originalist research relies heavily on elites' views in practice.<sup>138</sup> This is understandable in light of the fact that elites tend to think about constitutional meaning in greater depth than ordinary voters and leave a far more extensive written record of their opinions.

Some degree of reliance on elite opinion is probably an inevitable attribute of originalist jurisprudence. In many cases, political elites really do represent public opinion accurately.<sup>139</sup> As already noted, in some situations the voters might deliberately choose to support an imprecise amendment and then leave it to judges and other legal elites to work out the details of application.<sup>140</sup>

However, exclusive or near-exclusive reliance on elite views creates serious problems for originalists. One danger is that it leaves original meaning vulnerable to the same sorts of criticisms that undermined the previously dominant original intent version of originalism. The classic attacks on original intent that undermined its reputation in the minds of many jurists and scholars were that it was unworkable because it is impossible to ascertain the intentions of a multitude of Framers,<sup>141</sup> and that the Framers themselves did not want their in-

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137. See *supra* Part I.A.3.

138. For well-known recent works of originalist scholarship that rely extensively on elite interpretations to ascertain original meaning see, for example, AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); BALKIN, *LIVING ORIGINALISM*, *supra* note 3; BARNETT, *RESTORING THE LOST CONSTITUTION*, *supra* note 2; PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008); RAMSEY, *supra* note 113; Amar, *supra* note 3.

139. See, e.g., SHMUEL LOCK, *CRIME, PUBLIC OPINION, AND CIVIL LIBERTIES: THE TOLERANT PUBLIC* 54–88 (1999) (showing a variety of surveys demonstrating that elites and the public have similar views on many civil liberties issues).

140. See McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 1, at 765 (suggesting this possibility). *But see supra* Part I.A.2 (noting some limitations of this argument).

141. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 229–31 (1980).

tentions to be a guide for constitutional interpretation.<sup>142</sup> Original meaning originalism achieved its present popularity in large part because it avoids these problems.<sup>143</sup>

But if original meaning is determined solely by considering the views of contemporary political elites, it would exhibit many of the same flaws as original intent after all. Trying to ascertain a single coherent interpretation from the views of multiple elite commentators risks the same problem of incoherence as trying to meld together the original intentions of multiple Framers.<sup>144</sup> Indeed, it may be more difficult, since the commentators probably include a wider range of viewpoints than the Framers did. The former are more likely to include opponents as well as supporters of the constitutional provision at issue. Similarly, if it turns out that the relevant elites believed that their views should *not* guide later judicial interpretations of the Constitution,<sup>145</sup> then ignoring this aspect of their interpretive methodology while embracing the general view that their views are binding seems contradictory.

Exclusive reliance on elite views also undercuts some of the other arguments used to justify original meaning as a normative theory. For example, some scholars contend that the original meaning should guide judicial interpretations of the Constitution because it was adopted through a supermajoritarian political process.<sup>146</sup> However, that may not be true of elite interpretations of the document that are unknown to most of the general public. No supermajority ever approved *them*. Similarly, reliance on elite interpretation is in tension with claims that the original meaning is special because it has the legitimacy of popular consent to a “public act” of lawmaking at the time of enactment.<sup>147</sup> The public cannot be said to have accepted an

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142. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903–13 (1985).

143. For detailed discussions of these criticisms and the reasons why original meaning originalism is not vulnerable to them, see BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 2, at 89–100, and Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory* 6–17 (Apr. 28, 2011), available at <http://ssrn.com/abstract=1825543>, describing the rise of original meaning as the dominant school of originalist thought.

144. See Brest, *supra* note 141, at 229–31.

145. See Powell, *supra* note 142, at 903–13.

146. See sources cited *supra* notes 47, 53–54.

147. See BORK, *supra* note 1, at 144–45.

elite interpretation of the Constitution of which they were not even aware.<sup>148</sup>

Despite these criticisms, originalists can, to some degree, rely on elite views to help ascertain original meaning. In some cases, elite views really are a good proxy for public views, and the latter may sometimes choose to delegate more technical interpretative issues to the former. For example, survey data suggests that public and legal elite opinion on many civil liberties and defendants' rights issues are far less divergent than is often assumed.<sup>149</sup> To the extent this was true at the time of the Founding, elite opinion could serve as a useful proxy for public opinion on these questions. But whether either of these scenarios actually occurred in a particular situation has to be proven by evidence, not simply assumed.

In many cases, unfortunately, the opinions of knowledgeable elites might differ from those of the general public. Differences in political knowledge are often highly correlated with differing opinions on issues.<sup>150</sup> In other situations, the public might simply be unaware of the issues considered by elites. When that occurs, there may be no clear original public meaning even if there is a great deal of agreement among legal elites.

Contemporary elite interpretations of the Constitution will always be an important resource for originalists. But it is dangerous to place exclusive reliance on them—at least in cases where political ignorance makes it unlikely that the elites' views are representative of those of the general public.

#### B. RELIANCE ON MEDIA COVERAGE AIMED AT THE GENERAL PUBLIC

If elites are not always a reliable guide to understanding the public, why not look at information available in media directed at the ordinary voter? Newspapers and other publications intended to be read by the general public may provide a better guide to voters' understanding of the Constitution at the time of enactment than the statements of well-informed elites. In an important recent article, George C. Thomas III advocates precisely this strategy and uses extensive evidence from con-

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148. A possible exception could be a case where the public trusts elites to come up with an interpretation to such an extent that they do not check to see what the result was.

149. See LOCK, *supra* note 139, at 35–58 (describing the relevant evidence).

150. See sources cited *supra* note 10.

temporary newspapers to shed interesting light on the perennial question of whether or not the Privileges or Immunities Clause of the Fourteenth Amendment was meant to incorporate the Bill of Rights against the states.<sup>151</sup>

Contemporaneous media accounts can indeed be a useful resource for originalists, and more scholars should emulate Thomas's research strategy. Modern databases make it possible to search a much wider range of nineteenth-century newspapers in a short period of time than was possible in the past.<sup>152</sup>

But it would be a mistake to assume that most of the public is necessarily aware of information published in the media. Modern survey research shows that the majority of the public is often ignorant of basic facts that received extensive media coverage.<sup>153</sup> Many such examples could be cited.<sup>154</sup> Political ignorance often extends even to relatively basic matters that knowledgeable insiders take for granted. It is likely to be even more severe on detailed points of constitutional interpretation that are controversial among scholars and jurists.

Media interpretations may also fail to accurately represent public opinion for a different reason: reporters and editors often hold views on political and legal issues that vary greatly from those of the general population. Over the last several decades, survey research and content analysis strongly suggests that the majority of editors and reporters are significantly more liberal than the average of the general population.<sup>155</sup> Whether media opinion diverged from public opinion to a comparable degree in the eighteenth and nineteenth centuries is far less clear. We do not have systematic quantitative survey data on either elite or

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151. George C. Thomas III, *Newspapers and the Fourteenth Amendment: What Did the American Public Know About Section 1?*, 18 J. CONTEMP. LEGAL ISSUES 323, 353–59 (2009). Michael Kent Curtis previously made more limited use of newspaper sources to address the same question. See MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 132–35 (1986); Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1137–38 (2000).

152. See Thomas, *supra* note 151, at 323–27 (describing the relevant databases and noting that they include thousands of different publications).

153. See examples discussed *supra* Part I.C.1.

154. See SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE*, *supra* note 10, at ch. 1 (listing many examples); see also DELLI CARPINI & KEETER, *supra* note 10, at 70–71 (same).

155. See, e.g., TIM GROSECLOSE, *LEFT TURN* (2011) (presenting evidence that the media today is more liberal than the general population); S. ROBERT LICHTER ET AL., *THE MEDIA ELITE* 20–53 (1986) (discussing survey evidence for reporters in the 1970s and 1980s).

public opinion during those periods.<sup>156</sup> But we should at least be aware of the possibility.

Diverging ideologies will not necessarily lead members of the media to interpret the Constitution differently from ordinary citizens. Some issues are so clear that any reasonably intelligent observer will come to the same conclusion. In other cases, reporters and citizens might be able to resist the effects of ideological predispositions and come to more objective judgments. Nonetheless, ideology often does have an influence on constitutional interpretation, and members of the media are no more immune to its effects than lawyers, judges, and academics.<sup>157</sup>

Despite these limitations, media evidence is a useful source of data that originalist scholars are only beginning to fully exploit. Some of its potential shortcomings can potentially be remedied through more careful research. For example, the problem of ideological bias can be mitigated by looking for areas of agreement between media sources that have different political biases. Cases where both Republican and Democratic newspapers agreed on the meaning of an important provision of the Fourteenth Amendment qualify as more powerful evidence than ones where partisans of the two sides differed. Ideological bias is also more easily detectable in nineteenth-century media, an era when most newspapers were openly identified with a political party.

Nonetheless, there is no clear way to solve the problem of cases where information that is widely available in the media nonetheless fails to penetrate the consciousness of most of the public. In such situations, media evidence may well be an unreliable guide to the beliefs of the general population.

### C. INFORMATION SHORTCUTS

Some scholars claim that political ignorance is relatively unimportant because even comparatively ignorant voters can use “information shortcuts” to offset their lack of knowledge.<sup>158</sup>

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156. See GEER, *supra* note 74, at 2–5 (describing the lack of public opinion polls prior to the 1930s).

157. For evidence of ideological effects on judicial interpretation, see, for example, SEGAL & SPAETH, *supra* note 52, *passim*.

158. See, e.g., JOHN H. ALDRICH, WHY PARTIES?: A SECOND LOOK 171–76 (2011); VINCENT L. HUTCHINGS, PUBLIC OPINION AND DEMOCRATIC ACCOUNTABILITY: HOW CITIZENS LEARN ABOUT POLITICS 11 (2003); ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? 13 (1998); PAGE & SHAPIRO, *supra* note 79, at

Such shortcuts enable generally ignorant voters to use small bits of information as a substitute for larger bodies of knowledge. Possible shortcuts include deriving information from party identification (where a candidate's policies can be inferred from those of his party),<sup>159</sup> reliance on better-informed "opinion leaders,"<sup>160</sup> "retrospective voting" by which voters can gauge a party's or candidate's future performance based on their past record,<sup>161</sup> and others.<sup>162</sup> So far, there have not been any studies of the extent to which voters may have used information shortcuts to try to determine the meaning of the original Constitution or major amendments at the time of enactment. We therefore do not know to what degree such shortcuts may have offset the effects of political ignorance.

Nonetheless, it seems unlikely that shortcuts fully solved the problem or came close to doing so. Elsewhere, I have argued that information shortcuts are often insufficient to make up for ignorance of basic political information, and in some cases may even make the problem worse.<sup>163</sup> Even most of the more optimistic research on shortcuts does not claim that shortcuts enable voters to understand complex, nuanced issues in a sophisticated way.<sup>164</sup> Rather, they contend that these shortcuts help voters get a basic understanding of the issues at stake and

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1–37 (proposing that the shortcuts individuals take in gathering knowledge still lead to a rational public opinion); SAMUEL L. POPKIN, *THE REASONING VOTER* 44–72 (1991) (examining shortcuts voters take in evaluating, obtaining, and storing information to fill gaps in knowledge); DONALD A. WITTMAN, *THE MYTH OF DEMOCRATIC FAILURE* 12–14 (1995) (arguing that informed judgments can be made with little information); Philip E. Converse, *Popular Representation and the Distribution of Information*, in *INFORMATION AND DEMOCRATIC PROCESSES* 369, 382 (John A. Ferejohn & James Kuklinski eds., 1990).

159. See, e.g., ALDRICH, *supra* note 158, at 176 (discussing how the goals, policies, and records of parties lead to a sense of partisan identification).

160. See, e.g., HUTCHINGS, *supra* note 158, at 30–31 (discussing media coverage and the possibility of constituents relying on other elites, such as political challengers or interest group leaders); LUPA & MCCUBBINS, *supra* note 158, at 184–201 (arguing that reliance on opinion leaders is a useful information shortcut).

161. See generally MORRIS P. FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS* 6–11 (1981) (presenting a classic account of this idea).

162. For a review and critique of many different shortcut mechanisms, see SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE*, *supra* note 10, at ch. 4.

163. See *id.*; Somin, *supra* note 64, at 9–15.

164. See, e.g., POPKIN, *supra* note 158, at 71 (listing limitations and broad assumptions that information shortcuts require).

make a reasonably informed choice between competing candidates in an election.<sup>165</sup>

Information shortcuts might enable voters to understand some basic aspects of various constitutional provisions at the time of enactment. For example, they could use shortcuts to deduce that the original Constitution gave Congress greater powers to regulate, tax, and spend than it possessed under the Articles of Confederation, or that the Fourteenth Amendment was “designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons.”<sup>166</sup> But this is a far cry from being able to use shortcuts to determine what sorts of activities Article I of the Constitution allows Congress to regulate, or understand the implications of the Fourteenth Amendment for state discrimination on nonracial grounds. It may also not have been enough to enable voters to determine what rights actually qualify as civil rights protected by the Amendment, as opposed to political and social rights that perhaps were not.<sup>167</sup>

In addition, information shortcuts are likely to be less useful with respect to issues that were not a central focus of public debate at the time the relevant constitutional provision was ratified. Parties, opinion leaders, and other sources of information shortcuts were less likely to take clear positions on such low-visibility issues, and voters are therefore less likely to pick up on them. The more complex the issue in question and the less it was a major focus of contention at the time of ratification, the less likely it is that voters would have successfully used information shortcuts to determine the implications of the provision for that issue.

While we do not have scientific survey data on voter knowledge and the use of information shortcuts in 1787, 1791 or 1868, there is some partially relevant, more-recent evidence from studies of voter performance on state constitutional referendum initiatives. Some studies claim that relatively ignorant voters can effectively leverage information shortcuts to vote in accordance with their policy preferences on such initiatives.<sup>168</sup>

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165. See sources cited *supra* note 158.

166. *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880).

167. See *Ex parte Virginia*, 100 U.S. 339, 367 (1880) (Field, J., dissenting) (distinguishing between these three and claiming that the Amendment protects only “civil rights,” which did not include, in his view, the right to serve on a jury).

168. See, e.g., THOMAS CRONIN, *DIRECT DEMOCRACY* 87–89 (1999) (concluding that voter competence in initiatives is not as good as would be desirable,

Others are much more pessimistic, concluding that political ignorance often skews voter decisions.<sup>169</sup> But even the more optimistic scholars do not claim that voters understand the detailed implications of ballot initiatives or their potential impact on issues that go beyond those that were the central focus of public debate at the time of the vote. Rather, they claim that voters can use shortcuts to make a roughly accurate decision about whether or not voting in favor of the initiative will promote their policy preferences or not.<sup>170</sup>

This is a long way from the more complex interpretive issues that are the focus of many debates over original meaning. An 1868 voter using such information shortcuts might correctly conclude that the Fourteenth Amendment is preferable to the preexisting status quo because he generally favors giving recently freed slaves greater legal protections. But that does not mean he would have any idea of the full range of rights that might be protected by the Privileges or Immunities Clause, the full extent to which the Equal Protection Clause forbids racial discrimination, or its implications for laws that discriminate on the basis of other characteristics, such as gender or homosexuality.

Moreover, both the original Constitution and several of the most important amendments differ from referendum initiatives in a crucial way that increases the knowledge burden on voters.

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but still relatively strong); Craig M. Burnett et al., *The Dilemma of Direct Democracy*, 9 ELECTION L.J. 305, 317 (2010) (“[U]ninformed voters appear to make decisions that are indistinguishable from voters who have knowledge of key facts and voters who have knowledge of a voting cue.”); Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 72 (1994) (concluding that uninformed voters effectively emulate those who are well-informed).

169. See, e.g., Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949, 961–65 (2005) (concluding that voters often ignore relevant tradeoffs and context); Shauna Reilly & Sean Richey, *Ballot Question Readability and Roll-Off: The Impact of Language Complexity*, 64 POL. RES. Q. 59, 66 (2009) (concluding that most ballot questions are too complex for the majority of voters to understand); Craig M. Burnett, *Informed Democracy? How Voter Knowledge of Initiatives Influences Consistent Voting* 16–17 (undated) (unpublished manuscript), available at [http://www.olemiss.edu/depts/political\\_science/state\\_politics/conferences/2009/papers/20.pdf](http://www.olemiss.edu/depts/political_science/state_politics/conferences/2009/papers/20.pdf) (finding low levels of cue knowledge and little evidence of such knowledge affecting vote choice in ballot-initiative elections); Christopher S. Elmendorf & David Schleicher, *Informing Consent* 30–31 (UC Davis Legal Studies Res. Paper Series, Working Paper No. 285, 2012), available at <http://ssrn.com/abstract=2010115> (reviewing recent pessimistic literature on this issue).

170. See sources cited *supra* note 168.

In many states, the range of issues covered by a referendum initiative is limited by the “single subject rule,” which prevents a ballot question from addressing more than one issue at a time.<sup>171</sup> Although the merits of this rule are debatable,<sup>172</sup> it does at least somewhat reduce the amount of information voters need to understand any given initiative.

By contrast, the original Constitution, the Bill of Rights, and the Fourteenth Amendment all addressed a wide range of issues simultaneously, many of them complex and multifaceted. The 1787 Constitution allocates numerous different powers to Congress, establishes the structure of the executive and the judiciary, and addresses a variety of other issues as well. The Bill of Rights includes many different rights, from freedom of speech, to property rights, to criminal procedure. And the Fourteenth Amendment has several complex and open-ended clauses, such as the Equal Protection Clause and the Privileges or Immunities Clause. This variety and complexity makes it less likely that voters dedicated the time and effort to considering all of the relevant issues, or indeed any beyond a small fraction of them.

Another relevant body of evidence is my own earlier work testing Bruce Ackerman’s claim that voters increase their knowledge levels during constitutional moments—periods of constitutional change that may operate outside the Article V process.<sup>173</sup> Unlike in the case of 1787 and 1868, Ackerman’s theory is subject to testing by survey evidence, since one of his three major constitutional moments is the New Deal constitutional revolution of the 1930s, a period that coincided with the rise of modern public opinion polling.<sup>174</sup> My article demonstrated that political knowledge levels generally remained low during the relevant period and that some of the major New Deal-era changes in constitutional legal doctrine probably lacked majority public support.<sup>175</sup>

Neither state constitutional referenda nor the 1930s constitutional moment are perfect analogues for the events of 1787 and 1868. It is possible that voters pay less attention to state constitutional change than federal because the stakes are usu-

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171. Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 704–09 (2010).

172. *See id.* at 709–12 (describing opposing arguments).

173. *See Somin, supra* note 37.

174. *See id.* at 620.

175. *Id.* at 620–63.

ally lower. It is also possible that public knowledge levels were higher in 1787 or 1868 than in the 1930s.<sup>176</sup> It is even possible that voters paid more attention to constitutional issues because the use of the formal amendment process alerted them to the fact that constitutional change was on the table. The constitutional stakes may have been more ambiguous in the 1930s, when the relevant change occurred outside the bounds of Article V. The evidence from these two sources is necessarily suggestive rather than definitive.

At the same time, it is notable that both types of evidence seem to support the conclusion that voter ignorance is often a serious problem when constitutional changes are under consideration. It is also worth reiterating that some of the differences between constitutional referenda and the New Deal period on the one hand, and 1787 and 1868 on the other imply that political knowledge may have been higher during the later period. Modern media made it easier to acquire political information today and—to a lesser extent—in the 1930s than in the eighteenth and nineteenth centuries. And the limited scope of referendum initiatives imposes a lower knowledge burden on voters than did the sweeping constitutional transformations of the Founding and Reconstruction periods.

Despite my skepticism about the possibility that information shortcuts can solve the problem of political ignorance with respect to original meaning, this is an issue that requires greater study. Scholars have conducted only very limited research on the extent of public knowledge about constitutional change in the eighteenth and nineteenth centuries.<sup>177</sup> It is possible that future scholarship will discover that voters used information shortcuts to assess the meaning of various provisions of the Constitution on least some important issues. These may include some where effective use of such shortcuts seems initially unlikely.

Unfortunately, the necessary research will be difficult to conduct because of the absence of scientific public opinion surveys prior to the 1930s. Scholars will therefore have to rely on

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176. See *supra* Part I.C.2 (discussing differences between those eras and the modern period).

177. See discussion in *supra* Part I.C.2.

more anecdotal data, such as diaries, political communications targeted at lay audiences, and others.<sup>178</sup>

#### D. HYBRID STRATEGIES

Reliance on elite accounts, evidence from contemporary media, and information shortcuts all have significant shortcomings as potential solutions to the challenge of political ignorance for originalists. But it is possible that a hybrid approach that makes use of all three strategies simultaneously might do better. For example, an interpretation of a constitutional provision that is supported by both elite statements and contemporary media accounts is more likely to be an accurate description of what the general public believed than a theory that is supported by only one of these two types of evidence. The theory becomes even stronger if it is also backed by evidence suggesting that voters became aware of it by using information shortcuts.

To some extent, the differing methodologies may compensate for each other's weaknesses. For example, one of the shortcomings of relying on elite interpretations alone is that elites often rely on information that is unknown to most of the general public.<sup>179</sup> Media evidence can partly remedy that flaw because press accounts are usually geared to the ordinary layperson rather than knowledgeable elites. Moreover, an interpretation that is advanced by a broad cross-section of both elites and the media is more likely to be picked up by "rationally ignorant" voters than one that is promoted by only one of these sources.

Since research on the relationship between original meaning and political ignorance is only beginning, it is likely that new approaches to the problem will emerge. Both law professors and scholars from other disciplines, such as economics, history, and political science, may have much to contribute on this score.

At the same time, there may well be important cases where the challenge of political ignorance is insuperable. Given widespread political ignorance on even fairly basic issues, it is quite possible that there are some important constitutional questions on which there is no original meaning because most of the pub-

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178. For an important example of research on nineteenth-century public opinion utilizing such sources, see ALTSCHULER & BLUMIN, *RUDE REPUBLIC*, *supra* note 89, *passim*.

179. *See supra* Part II.A.

lic was simply unaware of either the question or the possible answers to it. Indeed, historical research into particular issues might actually reinforce such a conclusion by providing additional evidence in support of it. Some issues may even have been deliberately ignored by political elites or the media for the purposes of avoiding public attention. A rationally ignorant public might be more vulnerable to such manipulation than one that is better-informed.<sup>180</sup>

### III. MODIFYING AND LIMITING ORIGINALISM

Instead of seeking to solve the problem of political ignorance within the confines of existing theories of original meaning, advocates of originalism could instead address it by modifying the theories themselves or limiting their scope. The former might be achieved by interpreting ambiguous parts of the Constitution in ways that are more literal and intuitive; the latter by relying less on interpretation and more on construction.

Given widespread political ignorance, it is arguable that originalists are more likely to find a consensus original meaning by using literal and intuitive, rather than metaphorical, meanings of disputed phrases. A literal meaning is more likely to be understood by a casual reader of the text who has little knowledge of the political or legal controversies that led to an amendment. For example, there is a longstanding debate over whether the Public Use Clause of the Fifth Amendment should be interpreted to restrict the power of eminent domain to cases of literal “public use”—where the condemned property is owned by the government or the public has a legal right of access to it—or figurative “uses” such as transfers to private parties that provide a public benefit.<sup>181</sup> While it is possible that a sophisticated legal interpreter at the time of the Founding would have interpreted public use to mean any sort of public benefit,<sup>182</sup> this

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180. For the argument that public ignorance increases vulnerability to manipulation, see SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE*, *supra* note 10, at ch. 3.

181. This longstanding debate was most recently considered by the United States Supreme Court in *Kelo v. City of New London*, 545 U.S. 469 (2005). Justice Clarence Thomas presented originalist arguments for the literal view. *Id.* at 507–11 (Thomas, J., dissenting). The majority endorsed the figurative view. *Id.* at 473–78.

182. See, e.g., William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 859–80 (1995) (defending this claim).

seems unlikely in the case of a less knowledgeable member of the general public.

Obviously, preferring literal meanings to figurative ones is not a panacea. In some cases, there may be more than one possible literal meaning of a particular clause of the Constitution. In others, resort to the literal meaning may simply not be enough to answer the question of how the clause applies to the problem at hand. For example, nothing in the literal meaning of “equal protection of the laws” gives us an answer to the question of whether the Equal Protection Clause of the Fourteenth Amendment forbids state discrimination on the basis of gender.<sup>183</sup> To answer that question from an originalist perspective, we would have to look to other kinds of evidence.<sup>184</sup> Finally, in some cases, it is possible that most of the public really did understand and endorse a figurative meaning rather than a literal one. Widespread political ignorance reduces the likelihood of such an outcome. But it certainly does not make it impossible. At most, therefore, the preference for literal meanings should be a presumption rather than a rigid rule. And even the presumption is only a tentative suggestion. Although it could help address the problem posed by political ignorance, it might suffer from other weaknesses that outweigh this potential advantage.

Even with a presumption in favor of literal meanings, there are likely to be cases where political ignorance makes it difficult or impossible to establish any clear original meaning. Originalists could try to address some of these hard cases by relying more on construction rather than interpretation of the text.<sup>185</sup> As Randy Barnett puts it, “[c]onstitutional construction fills the inevitable gaps created by the vagueness of [the] . . . words [of the text] when applied to particular circumstances.”<sup>186</sup> Taking due account of political ignorance might lead to the conclusion that there are more gaps in the original meaning than

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183. U.S. CONST. amend. XIV, § 1.

184. See, e.g., Calabresi & Rickert, *supra* note 1, *passim* (surveying that evidence).

185. For originalist scholarship explicating this distinction, see, for example, BALKIN, *LIVING ORIGINALISM*, *supra* note 3, at 36, 104–05; BARNETT, *RESTORING THE LOST CONSTITUTION*, *supra* note 2, at 1183–0; KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

186. BARNETT, *RESTORING THE LOST CONSTITUTION*, *supra* note 2, at 100.

we would like to believe. If so, more analytical heavy lifting may have to be done by construction and less by interpretation.

This might well be a perfectly acceptable result. But it has two potential downsides from an originalist perspective. One is that fewer constitutional problems will be solved by analysis of original meaning and more by other means. Resorting to construction might shore up originalism's theoretical underpinnings. But this gain would come at the cost of making originalism less useful for addressing real-world constitutional controversies. More of the heavy lifting needed to resolve these issues would be done by construction and less by the original meaning of the text.

Second, greater reliance on construction diminishes one of the potential advantages of originalism: the possibility that it will give us determinate answers to disputed constitutional questions and limit judicial discretion. If the original meaning leaves numerous gaps for courts to fill in by applying construction, there are likely to be more opportunities for judges to make decisions on the basis of their own ideological or political preferences.<sup>187</sup>

#### CONCLUSION

The reality of widespread political ignorance poses a serious challenge for original meaning originalism, a theory that has attracted widespread support among constitutional theorists. In some cases, there may not be any clear original meaning of a constitutional provision because a rationally ignorant electorate simply did not know about the issue. In others, public ignorance may make the original meaning more difficult to discern. These difficulties are particularly acute with respect to constitutional issues that are complex in nature or were not widely discussed at the time of ratification. Many of the most hotly contested modern constitutional questions fall into one or both of these categories.

Originalists can resort to a variety of strategies in order to address these problems. These include relying on interpretations of the Constitution by knowledgeable elites, focusing on media accounts, and investigating the possibility that even relatively ignorant voters could grasp the issue in question by relying on information shortcuts. They can also modify their the-

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187. For this type of objection to the use of construction, see McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 1, at 675–79.

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ories by preferring literal to figurative interpretations of constitutional text, and relying more on construction rather than interpretation. Yet each of these approaches has drawbacks. Even in combination, they may not be able to solve all or even most of the hard cases that bedevil scholars and judges.

The existence of such insuperable cases need not be a death blow to original meaning originalism. The methodology does not have to give us the answer to all difficult constitutional questions in order to be useful. Moreover, its shortcomings must be weighed against the flaws of rival theories, originalist and otherwise. Both living constitution theories and alternative accounts of originalism have weaknesses of their own.

Greater reliance on construction and literal meanings are not the only possible ways to deal with cases where the original meaning is indeterminate because of political ignorance. They may not even be the best. Fuller consideration of the possible alternatives is a task for another article. There is probably no single magic bullet that will resolve the dilemma once and for all. But the beginning of wisdom is to increase our knowledge of the challenge posed by ignorance.