



6-2-2014

Constitutional Theory and the Activismometer: How to Think About Indeterminacy, Restraint, Vagueness, Executive Review, and Precedent

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**CONSTITUTIONAL THEORY AND THE
ACTIVISMOMETER: HOW TO THINK ABOUT
INDETERMINACY, RESTRAINT, VAGUENESS,
EXECUTIVE REVIEW, AND PRECEDENT**

Christopher R. Green*

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INTRODUCTION

Constitutional theory, particularly its discussion of originalism, is bedeviled by five persistent controversies: (1) what to do when historical evidence is difficult to assess and does not readily resolve particular controversies; (2) how to define judicial activism and decide how much of it is proper; (3) how to deal with vagueness and borderline cases; (4) how to understand the relationship of judicial and executive review of the constitutionality of legislation; and (5) how to reconcile interpretive theory with possibly-erroneous precedent. This article contends that all of these problems can be solved, or at least framed in a way that makes a solution possible, if we understand the relationship of *knowledge* to the Constitution.

Originalism and non-originalism are *ontological* positions, differing on what the Constitution *is*: whether the Constitution is something that changes or grows over time, and if so, how. But ontology is not epistemology. The temporal extent of the Constitution—the ontological entity—is one issue; the extent of our *knowledge of* the Constitution—the epistemic phenomenon—is another. A third independent issue is the distribution of officials' obligations to obtain knowledge of the Constitution in order to enforce it. A Constitution might be (a) unchanging, and yet (b) not fully known, and (c) not fully enforced always and everywhere by all officials. Change, knowledge, and enforcement are thus independent constitutional phenomena.

The epistemic/ontological distinction is captured well by the well-worn joke about a drunk looking for his keys under a lamppost. A police officer sees him and asks him if he lost his keys there. "No," the drunk replies, "I lost them down the street. But the light is much better here." The originalist in this metaphor is the one who insists that the Constitution was "dropped"—that is, had its meaning fixed—down the street, mainly in 1787 (with some other important bits

dropped in 1791 and 1868 or so). The indeterminacy objection to originalism made by Professor David Strauss and others¹ is, then, the complaint that the Constitution simply *couldn't* have been dropped there, because the light is so poor. Contrary to that objection, the Constitution's requirements cannot always be assessed where the light is best.

The indeterminacy argument *for* originalism, however, fails for the same reason. Justice Antonin Scalia and others² have insisted that originalism is the only way to obtain sufficient certainty about constitutional requirements. From the perspective of the living constitutionalist who thinks there is good reason to think that the Constitution's requirements change over time, albeit in a way that we may not be able to discern perfectly, Justice Scalia might be compared to a second keys-dropping drunk, this one dropping his keys in good light, but on a moving walkway leading to the dark. The second drunk's looking in the *same* place and the first drunk's looking in a *different* one, both merely on the basis of better light, confuse ontology and epistemology in exactly the same way. The possible epistemic advantages of a fixed Constitution no more guarantee its identity with the actual Constitution than do the possible epistemic advantages of a changing, up-to-date one.

Because of the divide between epistemic and ontological constitutional controversy, there is much more to constitutional theory than the rejection or acceptance of particular forms of originalism. In addition to having a theory about the Constitution itself, and how it should be interpreted, we need principles for (a) assessing when we have knowledge about the Constitution, (b) deciding what to do when, as often happens, we *don't* know what the Constitution requires, and (c) deciding who has an obligation to pursue knowledge of the Constitution.

I propose three knowledge-related principles, all of which can be used by either originalists or non-originalists. While I take them from modern epistemologists—those professionally devoted to better understanding concepts like knowledge—the justification of these principles as constraints on judges or other officials would ultimately be based on the meaning and

1. See *infra* notes 17–25 and accompanying text.

2. See *infra* notes 13–16 and accompanying text.

relationship of “judicial power,” “legislative power,” and “executive power” in the Constitution.³ Here are the principles:

First, assertions about the Constitution require knowledge. He who asserts must prove; “the Constitution requires X, but for all I know, it doesn’t” is not a sensible thing for a court, or anyone, to say.

Second, knowledge about the Constitution requires more evidence if the stakes are higher. The weightier an occasion we deem judicial review to be, the more certainty courts need for it.

Third, evidence relevant to the Constitution’s requirements should not be ignored by those in a position to speak authoritatively about those requirements. A potential speaker has the duty to acquire evidence before speaking; only if unable to acquire enough evidence should the potential speaker remain silent. The duty not to speak without sufficient evidence is thus matched by a potential speaker’s duty to acquire evidence. However, not all officials are always and everywhere in a position to speak authoritatively about the Constitution.

How do these principles resolve our five controversies?

Controversy (1), involving what to do when evidence is unavailable, and which is deployed in indeterminacy objections to originalism, can be resolved by distinguishing issues of constitutional *ontology*—what the Constitution is, particularly its temporal extent and location—from issues of constitutional *epistemology*—what counts as sufficient confidence of the Constitution for various purposes, governed by the three principles above. Because originalism can be paired with independent principles of restraint, there is no need to adjust our assessment of what the Constitution’s nature is simply out of a desire for it to be knowable. Like the drunk’s keys, the Constitution may lie where light is not perfect.

Controversy (2), defining judicial activism, can be resolved by applying our three principles. Improper judicial activism is the breach of either the first principle by making declarations about the law despite judicial ignorance of key considerations, the breach of the second principle by using too

3. I canvass the historical evidence from each state in a work in progress.

low a standard for knowledge given the stakes, or the breach of the third principle by speaking to constitutional issues without proper authority. Improper judicial passivity is the breach of the third principle either by suppressing evidence relevant to constitutional requirements or by improperly abdicating the responsibility to speak, or the breach of the second principle by using too high a standard for knowledge, given the stakes.

Controversy (3), vagueness, can be resolved if we adopt an epistemic view of vagueness, which many philosophers do. Fuzzy boundaries to constitutional categories, on this view, are simply places where it is not perfectly clear how far a constitutional requirement goes, and should be treated like any other issues where we lack perfect clarity about what the Constitution requires. If vagueness-as-ignorance philosophers are right, then, we should refuse to make assertions about the Constitution unless we are far enough away from the borderline, given the stakes, to have knowledge. Further, many philosophers who resist epistemic views of vagueness characterize vagueness as the lack of clarity. If judicial review requires clear and convincing evidence of unconstitutionality, then the lack of clarity in borderline cases would require deference to elected branches instead of the exercise of judicial power, even if vagueness is not merely an epistemic phenomenon.

Controversy (4), the relationship of executive and judicial review of legislation, can be made clearer if we consider the possibility that the stakes in executive review might be higher than the stakes in judicial review, and thus more evidence required for the executive branch than for the judicial branch to invalidate a statute in the name of the Constitution. An enforce-but-don't-defend (EBDD) posture, as in the Obama Administration's approach to DOMA litigation, would be sensible in such cases.

Controversy (5), precedent, can be seen as an intertemporal application of principle three. Not all officials dealing with the Constitution are necessarily in a position to speak afresh to constitutional requirements. Those in temporal or hierarchical subordination to other interpreters—such as the executive obeying legislative commands, lower-level executives obeying higher-level executives, or later courts following earlier interpreters when those

interpretations have been liquidated or settled by prescription—do not always have an obligation, or the power, to speak about the Constitution for themselves.

The following sections tackle the five controversies in turn: indeterminacy, activism, vagueness, executive review, and precedent.

I. INDETERMINACY AND ORIGINALISM

A. *Originalism and Non-Originalism as Ontological Claims*

In order to properly consider indeterminacy objections to originalism or the living constitution, it is critical to frame the dispute between the views properly. Indeterminacy is insufficient evidence, but insufficient evidence of *what*, precisely? Originalists and non-originalists use different criteria to assess claims of constitutionality. That is, originalists and non-originalists use different *constitutional truthmakers*: entities that make claims of the form “X is constitutional” or “X is unconstitutional” true.⁴ Originalists of various stripes claim that the truth of constitutional claims is ultimately controlled by something that happened at the time of the Founding, while living constitutionalists of various stripes claim that constitutionality is ultimately determined by an event extending across generations or occurring today.⁵ If we take “unconstitutional” to mean

4. For much, much more on the nature of truthmakers, see, e.g., TRUTH AND TRUTH-MAKING (E.J. Lowe & A. Rami eds., 2009); TRUTHMAKERS: THE CONTEMPORARY DEBATE (Helen Beebe & Julian Dodd eds., 2005); D.M. ARMSTRONG, TRUTH AND TRUTHMAKERS (2004).

5. To say that constitutionality is *ultimately* determined by either a temporally-confined or intergenerational event is consistent with the relevance of other facts and events. My original-textually-expressed-sense view, for instance, assesses constitutionality based on the sense expressed by constitutional text at the founding, but also based on the reference-yielding facts that are true today, making it a half-dead, half-alive zombie Constitution. See Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 555 (2006). Living constitutionalists can likewise see the original history as relevant, though not ultimately dispositive. See, e.g., Mitchell Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 21 (2009) (“Originalism is not the view that some feature of the original character of the U.S. Constitution—the intent of the framers, the understanding of the ratifiers, the text’s original public meaning, or an amalgam of these things—‘matters’ or ‘is relevant’ to proper constitutional interpretation. So understood, Originalism would be a trivial thesis without dissenters.”). I, then, view non-historical considerations as interpretively relevant only because, and to the extent that, historical considerations make them relevant. A non-originalist someone like

“inconsistent with ‘the Constitution,’” differences in the constitutional truthmaker translate naturally into different implicit definitions of “the Constitution.” The originalist’s basic truthmaker—that is, the originalist’s “Constitution”—will be historically-confined, but the non-originalist’s will not. Adding a bit of nuance, we can identify at least six different approaches⁶ to the questions “what makes constitutional claims true?” or “of what does the Constitution consist?”:

- (1) the adopters’ original goals and purposes;⁷
- (2) the adopters’ original applications;⁸
- (3) the meaning originally expressed by the constitutional text when it was adopted;⁹

Berman sees historical considerations as relevant, but only because, and to the extent that, later considerations do not trump them.

6. This grid does not use distinctions which some have infused with great significance: for instance, the distinction between “original intent” and “original understanding,” or the distinction between ratifiers and proposers. To the extent that these distinctions are important and produce different criteria for assessing constitutionality, they too might be put in terms of differences in constitutional ontology. For some deflationary comments on the significance of these distinctions, see Christopher R. Green, *“This Constitution”: Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1628–30 (2009).

7. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 116 (2005) (extolling “purposes (particularly abstractly stated purposes)”); *Bell v. Maryland*, 378 U.S. 226, 288–89 (1964) (Goldberg, J., concurring) (stating that oath requires justices to “effectuate the intent and purposes of the Framers”); Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 728 (2009) (“The proper originalist way to undertake these inquiries would be to look at the ideas of the Framers and ratifiers of the Constitution to discern why establishment of religion was regarded as a bad thing and what principle condemned it. The interpreter would then try to figure out how that principle applied to the case being decided.”).

8. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 21–22 (2d ed. 1997); *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 896 (2005) (Scalia, J., dissenting) (“[T]hese official actions show *what it [the Establishment Clause] meant*”); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 410 (1857) (“[T]he men who framed this declaration were great men—high in literary acquirements, high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting.”).

9. See, e.g., Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992) (stating that key is “the text’s original public meaning”); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 553 (1994) (suggesting that the key is “the original public meaning that the text had to those who had the recognized political authority to ratify it into law”); Green, *supra* note 5, at 560 (“[T]he *sense* of a constitutional expression is fixed at the time of the framing, but the *reference* is not, because it depends on facts about the world, which can change.”); *Vill. of Euclid v. Ambler*

- (4) the meaning expressed by the constitutional text today;¹⁰
- (5) evolving common-law concepts associated with the constitutional text;¹¹ and
- (6) essentially-contested philosophical concepts associated with the constitutional text, elucidated only over an extended time.¹²

Realty Co., 272 U.S. 365, 387 (1926) (“[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise. . . . [A] degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles . . .”).

10. See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* ix–x (1948) (“[The Constitution] derives whatever validity, whatever meaning, it has, not from its acceptance by our forefathers one hundred and sixty years ago, but from its acceptance by us, now. . . . What do We, the People of the United States, mean when we provide for the freedom of belief and of the expression of belief?”); *id.* at 15, *quoted in* BREYER, *supra* note 7, at 25 (“In those words [the Preamble] it is agreed, and with every passing moment it is re-agreed, that the people of the United States shall be self-governed.”); Tom W. Bell, *The Constitution As If Consent Mattered*, 16 *CHAP. L. REV.* 269, 272 (2012) (“A consensualist approach *interprets* the Constitution’s words according to their plain, present, public meaning—the meaning that we, the living, faced with claims of federal authority, give to the Constitution’s text.”).

11. See, e.g., Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 *YALE L.J.* 1119, 1178 (1995) (“[T]he case-law development of constitutional law is the interpretation of the Constitution as written: a process of elaborating constitutional principles of application on the basis of paradigm cases; of establishing new paradigm cases (although inferior in status to the original ones); and of working out the requirements of principled commitments as they unfold in practice. In other words, it is a textual process entirely distinct from any hypothetical dialogue in which some authoritative figures somewhere else are enabled to speak their minds.”); David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. CHI. L. REV.* 877, 877 (1996) (“[W]hen people interpret the Constitution, they rely not just on the text but also on the elaborate body of law that has developed, mostly through judicial decisions, over the years.”); Charles Evan Hughes, Governor of N.Y., Address before the Chamber of Commerce (May 3, 1907) (“We are under a Constitution, but the Constitution is what the judges say it is. . .”).

12. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 147 (1977) (“The difficult clauses of the Bill of Rights, like the due process and equal protection clauses, must be understood as appealing to moral concepts rather than laying down particular conceptions”); *id.* at 103 (citing W.B. Gallie, *Essentially Contested Concepts*, 56 *PROC. ARISTOTELIAN SOC’Y* 167 (1956) (discussing Gallie’s concept-conception distinction)); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, *NW. U. L. REV.* 410, 417 (1993) (describing “justice-seeking Constitution”).

Answers (1) and (2) are non-textualist forms of originalism, while (4) to (6) can be seen as non-originalist forms of textualism. Answer (3) aims to be simultaneously textualist and originalist. We can thus arrange the ontologies in a grid:

	Historically -confined	Temporally -extended
Non- Textualist	(1), (2)	
Textualist	(3)	(4), (5), (6)

B. Justice Scalia's Indeterminacy Arguments For Originalism

Justice Scalia has argued that non-originalism's fatal flaw is its failure to constrain judges. He put it this way in his Tanner Lecture: "the most glaring defect of Living Constitutionalism . . . is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution. *Panta rei* ['everything changes'] is not a sufficiently informative principle of constitutional interpretation."¹³ Defending a tradition-based approach to substantive due process, but setting out principles which would apply equally to interpretive method generally, he wrote in his *McDonald v. Chicago* concurrence,

the question to be decided is not whether the historically focused method is a *perfect* means of restraining aristocratic judicial Constitution-writing; but whether it is the *best means available* in an imperfect world. Or indeed, even more narrowly than that: whether it is demonstrably much better than what Justice Stevens proposes. I think it beyond all serious dispute that it is much less subjective, and intrudes much less upon the democratic process.¹⁴

13. Antonin Scalia, *Common-Law Courts in a Civil Law System*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 44–45 (Amy Gutmann ed., 1997).

14. *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3057–58 (2010) (Scalia, J., concurring).

The fundamental coin of the constitutional realm, for Scalia, is thus avoidance of “aristocratic judicial Constitution-writing.” Whatever best accomplishes that task must, Scalia thinks, count as the Constitution. Scalia’s most recent statement of the rationale for originalism, in his book with Bryan Garner, is likewise focused on the judicial role:

Originalism is the *only* approach to a text that is compatible with democracy. When government-adopted texts are given a new meaning, the law is changed; and changing written law, like adopting written law in the first place, is the function of the first two branches of government. . .¹⁵

Note especially here the limitation to “written” law, which Scalia apparently thinks encompasses executive decrees, but not common-law subjects like tort and contract law. A few pages later, Scalia reiterates his argument that originalism is uniquely democratic:

[O]nce a nation has decided that democracy, with all its warts, is the best system of government, the crucial question becomes which theory of textual interpretation is compatible with democracy. Originalism unquestionably is. Nonoriginalism, by contrast, imposes on society statutory prescriptions that were never democratically adopted. When applied to the Constitution, nonoriginalism limits the democratic process itself, prohibiting (through imaginative interpretation of the Bill of Rights) acts of self-governance that ‘We the people’ never, ever, voted to outlaw. With nonoriginalism, these limitations will be determined, term by term, by Justices of the Supreme Court.¹⁶

C. Indeterminacy Arguments Against Originalism

Many critics of originalism make exactly the same argument as Scalia, only in reverse: they criticize forms of originalism for promising certainty about constitutional law based on the historical materials, but failing to deliver. David Strauss lists three problems with originalism in his recent book: indeterminacy of original meaning, indeterminacy in translating that meaning to the present

15. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 82 (2012).

16. *Id.* at 88.

day, and the dead-hand moral objection to intergenerational assertions of authority. Here is his explanation of the first problem:

On the most practical level, it is often impossible to uncover what the original understandings were: what people thought they were doing when they adopted the various provisions of the Constitution. Discovering how people in the past thought about their world is the task of historians, and there is no reason to think that lawyers and judges are going to be good at doing that kind of history—especially when they are dealing with controversial legal issues that arouse strong sentiments.¹⁷

Professor Paul Horwitz makes a similar complaint about originalism in a recent blog post:

[O]riginalism, of whatever variety, is an approach to constitutional law that actively *forces* judges into a field in which they arguably lack expertise. It *increases* rather than decreases the epistemological problem. If you were looking for a judicial methodology of constitutional interpretation that avoided putting judges in a position for which they're ill-suited, presumably you would focus on what judges do well and often—crunching doctrine—rather than on an approach that requires them to do history. Originalists argue that they are required to do some form of history because *that* is what legitimate constitutional interpretation requires. Presumably, then, they would argue that whether they can do it well or not, it's what they're called upon to do just the same . . .¹⁸

In a later short article, Strauss elaborates on the indeterminacy of historical materials:

[T]he originalist project [is] a particularly difficult, challenging form of intellectual history and one that often will, to the honest originalist, turn up the answer “I don't know,” or “there were various ideas and none clearly prevailed,” or “they were just confused back then.” That is one difficulty with originalism. Too often, it will be just too hard to figure out the answers to the relevant historical questions.¹⁹

17. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 18 (2010).

18. Paul Horwitz, *Blackman on “History” and Biochemistry*, PRAWFSBLAWG (Apr. 17, 2013), <http://prawfsblawg.blogs.com/prawfsblawg/2013/04/blackman-on-history-and-biochemistry.html>.

19. David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34

In addition to the epistemic difficulties regarding history, Strauss adds epistemic difficulties regarding constitutional theory: not knowing how, exactly, to translate original history to present-day circumstances. This is the dispute that divides textualist from non-textualist forms of originalism, or between options (1), (2), and (3) on the constitutional-ontology list above.²⁰ Strauss thinks that our poor epistemic condition with respect to this dispute means that none of these originalist options can be right. He puts it this way in his book:

Even if we could uncover the original understandings, we would be faced with the task of translating those understandings so that they address today's problems. The framers or ratifiers of the Constitution had, at best, understandings about *their* world. How do we apply those understandings to *our* world?²¹

Strauss gives this point a bit more depth in his article:

The second problem, which is even more severe, is what you might call the problem of adaptation or translation. Suppose we have a very clear idea of what people in an earlier generation were thinking when they adopted the First, Second, Fourth, or Fourteenth Amendment. Still, their understanding pertained to their world—they were adopting the constitutional provision for the world in which they lived. It is fanciful to suppose that Americans would have had a clear understanding, in the late eighteenth or mid-nineteenth century, about our twenty-first century world—a world that would have been, to them, in every way wildly hypothetical, and in some respects literally inconceivable.²²

Strauss's Living Constitution thus aims to make a virtue out of what Scalia saw as its major fault. "Nothing changes" is, upon inspection, no more "sufficiently informative [as a] principle of constitutional evolution"²³ than is "everything changes."

Critics of originalism have further taken overconfidence about historical questions as a defining feature of originalism.

HARV. J. L. & PUB. POL'Y 137, 140 (2011).

20. See *supra* notes 7–9 and accompanying text.

21. STRAUSS, *supra* note 17, at 18. The third objection, beyond the two epistemic objections I quote, is the dead-hand problem.

22. Strauss, *supra* note 19, at 140.

23. See Scalia, *supra* note 13, at 45.

Legal analyst Jeffrey Toobin says, for instance, that “conservatives . . . have claimed that they can identify the original intent of the framers and use their eighteenth-century wisdom to resolve any modern controversy.”²⁴ Professor Andrew Koppelman comments: “one of the central stated purposes of originalism, and perhaps its chief selling point in the popular press, is to produce unique and indisputable answers to legal questions in order to eliminate the possibility of judicial discretion.”²⁵ Koppelman thinks, of course, that this purpose is unfulfilled.

D. A Declaration of Epistemic / Onto-Temporal Independence

All of these criticisms, I claim, are mistaken. Originalism is conceptually tied neither to majoritarian democracy nor to historical or theoretical overconfidence. Majoritarian non-originalism, originalist government by judiciary, and suitably humble originalism are all possible.

Scalia’s conceptual tie between originalism and democracy can be unfastened on either end. Majoritarian democracy can be made consistent with non-originalist interpretation, and originalism can be implemented in a way that allows judges to make virtually unconstrained decisions based on their policy preferences.

The first obvious counterexample to Scalia’s claim that “written” law must be adopted and changed only by elected legislatures or executive officials is the common law. Paradigmatic common-law subjects like torts and contracts are, in fact, written, at least today: they are embodied in a long line of *written* opinions. True, these opinions are not legislation, but neither are executive decrees, which Scalia has classified as “written.” If a presidential order implementing legislation is deemed to be “written law,” simply because it is (a) law and (b) in writing, then judicial opinions expounding the common law should count too. But if that is right, then there is nothing inherently improper or undemocratic about judges changing “written law.”

24. Jeffrey Toobin, *The People’s Choice*, THE NEW YORKER (Jan. 28, 2013), http://www.newyorker.com/talk/comment/2013/01/28/130128taco_talk_toobin.

25. Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1919 (2012).

Moreover, Scalia's emphasis on the Article III lifetime tenure of *federal* judges undermines any argument for originalist interpretation of *state* constitutions, many of which allow for elected judiciaries. Should state constitutions with elected judiciaries therefore be interpreted by a common-law method?²⁶ Further, because Scalia's argument for originalism is confined to proper methods of *judicial* interpretation, it leaves entirely open whether *legislative* interpretation might be properly non-originalist. Should elected representatives, when they interpret the Constitution for themselves, feel freer to depart from its historic meaning? Neither of these ideas would appeal, I suspect, to Justice Scalia. And neither of these ideas is plausible if we take the Constitution—as I think both the federal Constitution and state constitutions present themselves²⁷—as a collection of expressions obtaining their meaning at the time that constitutional provisions are adopted. But whether the Constitution *is* such a collection is a matter of constitutional ontology, not epistemology: where we dropped the Constitution, not where the light is most favorable for picking it back up. There is thus no conceptually-necessary reason why a constitution that changes over time inherently restricts democratic processes.

Turning to the other side of the coin, Scalia also wrongly assumes that originalism “unquestionably” is consistent with democracy. Imagine a constitution, uncontroversially understood to have expressed meaning at the time of the framing, but which is (a) very murky and difficult to assess,

26. Justice Scalia considers this objection, to be sure, but his response turns on factors that are at best contingently true: “This corrosion of democracy occurs even when law-revising judges are elected, as they are in many states. The five or seven or nine members of a state supreme court, lawyers all, can hardly be considered a representative assembly.” SCALIA & GARNER, *supra* note 15, at 83. Many other elected officials, though, are lawyers, and are certainly not demographically representative. To be a lawyer is hardly to be incapable of representing others; indeed, representing others is lawyers’ paradigmatic job. Scalia worries that if courts become mini-legislatures, “[t]he selection of judges—even appointed judges—thus becomes an eminently political, results-oriented process.” *Id.* at 84. Maybe so, but that normative question does not seem tied either way to the issue of when constitutional meaning is fixed. A parliamentary system could do without judicial review; alternatively, the judiciary might be converted into the third house of a tricameral legislature. Neither of these changes would necessarily alter a Constitution’s temporal ontology.

27. See generally Green, *supra* note 6 (proposing a mode of interpretation for Constitutions).

and also (b) interpreted and implemented by judges according to a strict preponderance-of-the-evidence standard. It is logically consistent with originalism to have an unchanging Constitution that explicitly authorized judges to use a very low standard of proof regarding very-difficult-to-discern constitutional provisions. Such a Constitution would be originalist, but would, as Strauss and others fear,²⁸ invite judges to see the Constitution as a mirror of their own values. Sufficient inscrutability, combined with a sufficiently minimal burden of proof, can let judicial policymaking run riot. Imagine a judge reasoning this way:

Generally speaking—other things being equal and in the absence of reason to think otherwise—the sensible Framers enacted sensible requirements into the Constitution. I too am generally a sensible person. I think X is a sensible requirement. In the absence of any evidence that X was *not* enacted into the Constitution, I therefore conclude that the preponderance of the evidence supports the conclusion that X is (and always was!) a constitutional requirement.

This is, I think, cogent reasoning from the premises; the-framers-were-probably-like-me reasoning does supply *some* evidence, though not much. Originalism only undermines judicial activism if, as a contingent matter of fact, we either have enough clarity in historical materials to contradict judicial preferences, or our constitution sets a standard of proof higher than the minimal amount of evidence supplied by the-framers-were-probably-like-me reasoning. The latter is, I think, the case under our actual Constitution, but not all originalist Constitutions need do so.

Strauss, Toobin, and Koppelman likewise misconstrue the question to which originalism and its denial give rival answers. To be sure, Justice Scalia poses originalism as an answer to the question, “How can we resolve constitutional

28. See Strauss, *supra* note 19, at 142–43 (“If the original materials are routinely murky, the purportedly originalist interpreter will be tempted to read his or her own views into them. This need not be a matter of bad faith. There is a natural tendency for any interpreter to think that the founding generations were composed of smart, sensible people, like—well, the interpreter himself. It is very difficult, when the historical materials are unclear, not to see things through one’s own eyes. If judicial restraint means abjuring one’s own views in favor of the law, then originalist interpretation is, contrary to its claims, an open invitation to be unrestrained.”).

controversies with maximal certainty?” A better question, however, is simply “How is the Constitution situated temporally?” That question frames the controversy over originalism simply as a dispute over the temporal extent and location of truthmakers for constitutional claims, not in terms of purported epistemic advantages.

The dispute between historically-confined and temporally-extended views of the Constitution is closely analogous to a dispute over the size of an object. Instead of size in space, however, the constitutional dispute concerns time: the duration of the constitutional event. How long does the constituting take (or did it take, if it is already complete)? Was it short, or long? The length of an event in time (e.g., “Notre Dame home football games last four hours”) is the same kind of issue as, say, the height of a building (e.g., “The Freedom Tower is 1776 feet high”), or the length of a state (e.g., “Mississippi is 291 miles from the Louisiana border to the Tennessee border”). Any of those sizes can *exist* independently of our ability to *assess* those sizes.

We should also distinguish the Constitution’s “temporal size”—the issue for originalism as I see it—from size in “policy space”: how many issues are settled by the Constitution itself and how many issues are left for resolution by the political branches. Many of those who call for restraint are really calling for small Constitutions in this sense.²⁹ That is not really restraint by judges, but restraint by those adopting constitutions in the first place.

Indeterminacy-based objections to originalism (and, of course, much of the determinacy-based originalist advertising, like Justice Scalia’s, to which they respond) thus confuse the issue properly related to originalism—what the Constitution is, and where it is located historically—with the epistemic issue of how much access we have to that entity. Think again of the drunk and his keys. We have left critical portions of our constitutional truthmakers, the originalist says, somewhere in the eighteenth and nineteenth centuries—mainly around 1787, 1791, and 1868. The indeterminacy objector complains that looking so far in the past for our constitutional requirements is too hard, because the light there is very bad; it’s hard to tell exactly what was

29. See *infra* notes 33–34 and accompanying text.

going on. The light of 2013 is much better. But whatever epistemic advantages 2013 might have do not supply good reason to think that the relevant parts of our actual Constitution which render constitutional claims true or false are themselves located in 2013.

Justice Scalia's answer to the indeterminism challenge to originalism is to minimize indeterminacy, not to distinguish epistemic from ontological issues. Essentially, he tells the searcher under the lamppost that the light actually is tolerably good, or even better, where the keys were dropped: better the difficult job of deriving answers from 250 or 150 years ago, Scalia might say, than the impossible one of justifying the proper next chapter in the common-law constitution's chain novel. This relative epistemic advantage of history, however, is at best contingently true, and probably frequently false. Many historical questions are quite obscure, and judges who have sufficiently internalized common law methods and habits of mind can, at least sometimes, seem to have adequate justification for their results.

Originalists have sometimes advertised their theory as a refuge of certainty (or at least relative certainty) from the raging seas of the living constitution, and such advertising has not disappeared entirely. Justice Scalia's argument that originalism preserves democracy by restraining judges is certainly one such instance. But such promises of relative certainty have no necessary connection to originalism as such. Originalism, to be originalism, need only promise an *unchanging* Constitution, not a perfectly *knowable* one. Likewise, originalists need not disparage the possible epistemic virtues of a changing Constitution. Tort law and contract law, for instance, extend temporally across generations, but are still knowable. Common-law constitutionalism simply claims that the Constitution is like these common-law subjects. In short, we must distinguish positions like originalism from their advertising.

The epistemologically-rooted principles of judicial restraint I will set out below govern what to do precisely when sufficient certainty about historical materials is not available. *Some* originalists are overconfident, to be sure, but they are not so simply by definition. If it is impossible to uncover what the original understandings were (with sufficient certainty given the interests at stake—of this more

below), we are simply ignorant of what the Constitution means. We then need principles for dealing with ignorance, to be sure, but modifying our assessment of the temporal extent of the Constitution should not, I think, be one of them. Constitutional truthmakers do not always lie where the light is best.

The restraint principles I suggest here are independent of originalism as such. Non-originalists could adopt them too, by requiring a great level of certainty in judgments about the requirements of a common-law constitution before striking down statutes. Originalism is consistent with them, and the original meaning of “judicial power” might require them, but this is true only as a contingent matter. On my view of constitutional meta-theory, a form of originalism is required not because of its contingent relation to judicial restraint, but instead because it fits with the constitutional self-presentation—“This Constitution”—in Article VI.³⁰ The no-assertion-without-knowledge, no-knowledge-without-sufficient-evidence-given-the-stakes, and no-suppression-of-relevant-evidence principles can, I think, help judges from substituting their own values for those of the Constitution, but these principles do not just fall out of originalism by definition. Depending on what the history turns up, these principles might or might not fit with the meaning expressed by “judicial power” at the Founding. I suspect they do, but that depends on the contingent historical investigation.³¹

30. U.S. CONST. art VI; see Green, *supra* note 6, at 1628–30.

31. Because these restraint principles are consistent with either originalist or non-originalist views of the nature of the Constitution, an interpreter might also apply them who is *unsure* about constitutional ontology. That is, the interpreter might be unsure whether to be an originalist or not, and so conduct parallel inquiries. First, given originalism, how good are the grounds for thinking the original meaning of the constitutional text requires result X? Second, given the living constitution, how good are the grounds for thinking that the evolving common-law constitutional principles require result X? If theoretical issues are closer or more difficult than particular disputes, an interpreter might have sufficient evidence to assert that the Constitution requires X even while lack such evidence regarding the basic nature of the Constitution itself. That would be an instance of “incompletely theorized agreement.” Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995).

II. THE JUDICIAL ACTIVISMOMETER: ACTIVISM AS THE BREACH OF EPISTEMIC PRINCIPLES

What, then, should courts or others charged with applying the Constitution do when the originalist evidence is not perfectly clear? Principles about how to accommodate lack of certainty do not follow necessarily from a resolution of the temporal location of the Constitution. I propose three principles from modern epistemology to govern when courts or executive officials should declare that statutes violate the Constitution. I think that my three principles are true moral norms, but that they also fit the meanings of “judicial power,” “executive power,” and “legislative power” in the Constitution. I thus aim to reconcile, to the extent that I can, the insights of modern epistemology—which are themselves really just refined common sense—with historical understandings of the interpretive powers of the three branches of government. We can define activism (and improper passivity) as the breach of these three principles.

Defining judicial activism and restraint in terms of these epistemic offers an appropriately nuanced account of notions that puzzle many observers.³² An epistemic approach to judicial activism avoids the pitfalls of other definitions. Some define activism simply in terms of the raw frequency with which judges hold statutes or executive actions unconstitutional.³³ That approach confuses the activism issue with the issue of whether we have a *large* Constitution, putting many restraints on officials, or a *small* one, letting them do more of what they want.³⁴ Others define activism directly in terms of departures from originalism, rendering common-law-constitutionalism ipso facto activist.³⁵ That

32. See, e.g., Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401 (2002) (“Everyone scorns judicial ‘activism,’ that notoriously slippery term.”); Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 520 (2012) (“The term ‘judicial self-restraint’ is a chameleon.”).

33. See, e.g., Cass R. Sunstein, *A Hand in the Matter: Has the Rehnquist Court pushed its agenda on the rest of the country?*, LEGAL AFFAIRS (Mar.–Apr. 2003), http://www.legalaffairs.org/issues/March-April-2003/feature_marapr03_sunstein.msp (“I suggest that it is helpful to measure judicial activism in the way just mentioned—by seeing how often a court strikes down the actions of other parts of government, especially the actions of Congress.”); Easterbrook, *supra* note 32, at 1405 (defining activism as “pro-judge decision making”).

34. See *supra* note 29 and accompanying text.

35. BERGER, *supra* note 8, at 21–22 (“[A]ntiactivists (originalists) maintain

definition ignores critical differences in the different ways which fellow originalists can approach the extent of judicial power (distinguishing, say, Lino Graglia from Randy Barnett³⁶), as well as rendering unintelligible the differences in the degree of restraint characterizing non-originalists (distinguishing, say, J. Harvie Wilkinson from Ronald Dworkin³⁷). Still others define activism as substituting personal views for the Constitution's actual requirements.³⁸ But the normative force of the activism charge, on this view, goes little further than the simple charge of error: if the Constitution is obligatory, after all, departing from it is the chief sin, no matter what we use instead. An epistemic approach gives more nuanced advice to judges while remaining compatible with a broad range of views about what the Constitution *is*: big or small, originalist or non-originalist.

Philosophers have spent a great deal of care developing their ideas about how language works and how language ought to work. Other things being equal and in the absence of reason to think otherwise, we can assume that their ideas probably match how constitutional language works and ought to work, but historical investigation would be required to nail down the point fully. We can generally rely on philosophers to produce distinctions that are coherent, relatively free of conceptual confusion, and as clear as they can reasonably be made. Whether those distinctions describe the actual Constitution and the methods proper to its enforcement and application is, of course, distinct from the philosophical value of those distinctions in contemporary epistemology. A full

that judges are not authorized to revise the Constitution and that it is to be construed in light of the Founders' explanations of what they meant to accomplish, no more, no less.") (citation omitted).

36. Compare, e.g., RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004), with Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719 (1996).

37. Compare, e.g., J. HARVIE WILKINSON, III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE (Geoffrey R. Stone eds., 2012), with DWORKIN, *supra* note 12.

38. See, e.g., *Judicial Activism*, WIKIPEDIA, http://en.wikipedia.org/wiki/Judicial_activism ("Judicial activism describes judicial rulings suspected of being based on personal or political considerations rather than on existing law.") (last visited Mar. 27, 2014); Easterbrook, *supra* note 32, at 1401 ("Many of the papers prepared for this symposium are aware of the problem, denounce any definition of 'activism' that just equates to 'wrong decisions, as I see them'—and then offer a definition of 'activism' that equates, once again, to Judges Behaving Badly.").

weighing of all of the relevant historical evidence regarding the meaning of “judicial power,” “executive power,” and “legislative power” to explain when courts or executive officials are justified in refusing to enforce legislation is beyond the scope of this article. I do, however, hope to present enough selections of the historical evidence to suggest that the basic approach of many contemporary philosophers is not too jarring a fit with the original understanding of the relationship of the three branches in interpreting and applying the Constitution.

This section will first explain the relevant philosophical norms and then explain judicial activism in terms of their breach, resulting in the “activismometer”: a device for measuring activism.

A. Imports from Philosophy-Land: Williamson, Grice, DeRose, Hawthorne, and Stanley

The two basic ideas that I will take from epistemology are neither particularly obscure nor technical, but are rather refinements of common sense: we should know whereof we speak, and demand more confidence before speaking to higher-stakes propositions. The first idea is that that knowledge is the norm of assertion, which has become very popular since British philosopher Timothy Williamson’s work on the subject in a 1996 paper³⁹ and his 2000 book,⁴⁰ but which were explored in detail by 20th Century philosopher Paul Grice and many earlier thinkers.⁴¹ The second idea is the interest-sensitivity of knowledge, which has become increasingly popular since the work of American

39. Timothy Williamson, *Knowing and Asserting*, 105 PHIL. REV. 489 (1996).

40. TIMOTHY WILLIAMSON, *KNOWLEDGE AND ITS LIMITS* (2000).

41. PAUL GRICE, *STUDIES IN THE WAYS OF WORDS* 27 (1989) (“Logic and Conversation” lectures originally given in 1967) (“Under the category of Quality falls a supermaxim—‘Try to make your contribution one that is true’—and two more specific maxims: 1. Do not say what you believe to be false. 2. Do not say that for which you lack adequate evidence.”). Not all justified true belief is, of course, knowledge, see Edmund L. Gettier, *Is Justified True Belief Knowledge?*, 23 ANALYSIS 121 (1963), but it is plausible that knowledge must be true, justified, and believed by the subject. Williamson’s account would thus entail Grice’s 3 Quality maxims, but not vice-versa, given Gettier. For another prominent defense of the knowledge account of assertion, see Keith DeRose, *Assertion, Knowledge, and Context*, 111 PHIL. REV. 167 (2002). For earlier very similar ideas, see the sources cited infra at notes 52 to 53 and accompanying text.

philosopher Keith DeRose beginning in 1992⁴² and books by John Hawthorne in 2004⁴³ and Jason Stanley in 2005.⁴⁴

1. *Knowledge and Assertion*

The idea behind knowledge as the norm of assertion is that we normally should not assert what we don't know. We should stick to what we know, and, if we are ordinary participants in a conversation on the topic, say what we do know without deliberately staying unnecessarily ignorant or leaving others unnecessarily ignorant. If someone makes an assertion, it is normally proper to ask in response, "How do you know that?" If someone asks me a multiple-choice question, and the answers are "Yes," "No," and "I don't know," then usually these answers are both exhaustive of the possible replies (as long as a reply is reasonably expected) and non-overlapping. Ordinarily if I say "Yes," I'm not also tempted to say "I don't know." If I don't know, I shouldn't answer yes. On the other hand, if I *do* know, so that "I don't know" isn't a proper response, then I should be willing to assert either "Yes" or "No" in response.

The twin obligations to restrict assertions to areas in which we have knowledge, but also to contribute whatever relevant knowledge we *do* have, are reflected in Paul Grice's conversational maxims of Quality and Quantity. Grice's three-part Quality requirement (requiring truth, belief, and evidence) amounts to a justified-true-belief requirement for assertions.⁴⁵ The twin Quantity rules are to "[m]ake your contribution as informative as is required (for the current purposes of the exchange)," but "[d]o not make your contribution more informative than is required."⁴⁶

42. See Keith DeRose, *Contextualism and Knowledge Attributions*, 52 PHIL. & PHENOMENOLOGICAL RES. 913 (1992) [hereinafter DeRose, *Knowledge Attributions*]; see also Keith DeRose, *Solving the Skeptical Problem*, 104 PHIL. REV. 1 (1995).

43. JOHN HAWTHORNE, *KNOWLEDGE AND LOTTERIES* (2004).

44. JASON STANLEY, *KNOWLEDGE AND PRACTICAL INTERESTS* (Peter Ludlow & Scott Sturgeon eds., 2005). Hawthorne and Stanley's version of interest-sensitivity turns on the stakes *for the one who believes* a particular proposition, while DeRose's version turns on the stakes *in the context of the use of the term "knowledge."* I agree with Hawthorne and Stanley on this point, but DeRose's bank examples illustrate interest-sensitivity nicely, even if his particular contextualist epistemology does not flow from them inevitably.

45. See GRICE, *supra* note 41.

46. *Id.* at 26.

These two maxims leave open, of course, exactly how much information—i.e., how many knowledgeable assertions—are “required” in different conversational contexts. When exactly is it proper to inform a conversation partner about something? Courts frequently hold that it is improper to address certain questions about law through jurisdiction-limiting doctrines like those concerning political questions, standing, and the like. These doctrines literally limit the speaking of the law—jurisdiction. Those lacking jurisdiction are not in a position to enforce the Constitution—to speak the law—in that context. Courts’ conversational context makes certain assertions appropriate and other assertions inappropriate.

These sorts of contextually-imposed limits on when it is proper to speak, and to whom, are common features of social life. One version of a duty to speak is embodied in the New York Metropolitan Transportation Authority slogan, now licensed to the Department of Homeland Security: “If you see something, say something.”⁴⁷ Those with knowledge have an obligation to speak. Such an obligation to speak is, of course, not universal. Someone who sees evidence of a terrorist plot has an obligation to say something *to the relevant antiterrorist authorities*—not, say, to the press, or those who might tip off the terror plotters—and has no individual obligation to enforce the law and stop the plot individually. Social life is filled with other limits—confidences, invasions of privacy, and the like—on the obligation or permissibility of saying what we know. My grandfather used to tell his children frequently, “Your powers of observation exceed your tact.” Not all truths are always and everywhere to be told by everyone. Further, obtaining information is costly, and there are issues about how much investigation can reasonably be expected, even from those with authority to speak to an issue. Obviously, those who *have* pertinent information and are properly engaged in a conversation on a topic should use the information, but the extent of their duty to obtain more information will depend on its cost. Limits on judicial duties to speak are similar.

47. “If You See Something, Say Something” Campaign, U.S. DEPT OF HOMELAND SEC., <http://www.dhs.gov/if-you-see-something-say-something-campaign> (last visited Mar. 30, 2014).

The distribution of official duties to speak about the Constitution produced by an application of Grice's Quantity maxim in a contextually-sensitive way represents the distribution of authority to enforce the Constitution. Below, I will argue that not everyone at all times is required to enforce the Constitution according to his best understanding of the Constitution's meaning; sometimes some officials must allow others' actions to stand without presuming to contradict these other officials' authority in the name of the Constitution. Immanuel Kant's 1784 comments in *What is Enlightenment?*, distinguishing between "public" and "private" use of individual judgment—approximately the opposite of what such terms would ordinarily connote—aptly describe the same sort of limits on the free use of one's reason in fulfilling governmental functions:

[T]he *public* use of reason must at all times be free, and it alone can bring about enlightenment among men; the *private* use of reason, however, may be very narrowly restricted without the progress of enlightenment being particularly hindered. I understand, however, under the public use of his own reason, that use which anyone makes of it *as a scholar* before the entire public of the *reading world*. The private use I designate as that use which one makes of his reason in a certain *civil post* or office which is entrusted to him. Now a certain mechanism is necessary in many affairs which are run in the interest of the commonwealth by means of which some members of the commonwealth must conduct themselves passively in order that the government may direct them, through an artificial unanimity, to public ends, or at least restrain them from the destruction of these ends. Here one is certainly not allowed to argue; rather, one must obey. . . . [I]t would be very destructive, if an officer on duty should argue aloud about the suitability or the utility of a command given to him by his superior; he must obey.⁴⁸

The "use which one makes of his reason in a certain *civil post* or office which is entrusted to him" is, of course, the sort of knowledge of the Constitution that is at stake in judicial or executive review. Kant properly notes that complete freedom

48. Immanuel Kant, *An Answer to the Question: What is Enlightenment?*, in *WHAT IS ENLIGHTENMENT? EIGHTEENTH-CENTURY ANSWERS AND TWENTIETH-CENTURY QUESTIONS* 59–60 (James Schmidt ed. & trans., 1996).

of individual judgment for those occupying official positions is generally not practicable. “Artificial unanimity”—that is, the distribution of authority among particular officials with responsibility to speak about the Constitution on behalf of the whole government—must sometimes be imposed. The application of this point to issues like executive review and precedent will be explored below.

Is knowledge as the norm of assertion a limit on the proper scope of “judicial power” under the Constitution? There is some reason to think that it is.⁴⁹ *Marbury v. Madison*, of course, justifies judicial review as an application of the judicial duty to *declare* the law: “It is emphatically the province and duty of the Judicial Department to *say* what the law is.”⁵⁰ Absent special reason to think that judicial assertions about the law are a radically different sort of assertion than the sort of assertions governed by philosophical norms, we would expect them to require knowledge.⁵¹ If knowledge requires some degree of proof, the knowledge-as-norm-of-assertion principle entails the familiar idea that “he who asserts must prove.”⁵² Many early cases

49. In works in progress, I canvass the historical support more thoroughly.

50. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

51. Knowledge as the norm of assertion can thus supply a philosophical basis—though a historical basis would be critical to originalists—for the sort of rule that Michael Paulsen, Robert Bork, and Lino Graglia have advocated. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* 166 (1990) (“The judge who cannot make out the meaning of a provision is in exactly the same circumstance as a judge who has no Constitution to work with. There being nothing to work with, the judge should refrain from working.”); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *GEO. L.J.* 217, 333 (1994) (“An individual (or branch) should have an especially high degree of certainty in the correctness of his (its) conclusions before upsetting the cooperative project by advancing a view at odds with that of a co-equal interpreter.”); Lino A. Graglia, “*Interpreting the Constitution: Posner on Bork*,” 44 *STAN. L. REV.* 1019, 1044 (1992) (“[judicial review appropriate] only when (as would very rarely be the case) the choice is clearly disallowed by the Constitution.”) (citation omitted). Lynn Baker has complained that the Bork-Graglia-Paulsen view lacks foundations. See Lynn A. Baker, *Constitutional Ambiguities and Originalism: Lessons From the Spending Power*, 103 *NW. U. L. REV.* 495, 501 (2009) (“[N]owhere does the Constitution state that uncertainties in constitutional meaning should be resolved by the courts in favor of sustaining the challenged legislation.”). However, the knowledge-as-norm-of-assertion rule, if historically substantiated, could supply one.

52. “The proposition that he who asserts must prove is a basic principle of rational thinking, not a normative theory of governance.” Gary Lawson, *Dead Document Walking*, 92 *B.U. L. REV.* 1225, 1235 (2012); see also Lawson, *supra*

quote the maxim Justinian's Digest attributes to second- and third-century jurist Paul: *Ei incumbit probatio, qui dicit, non qui negat*—he who asserts, not who denies, must prove.⁵³ *Sadler v. Langham*, from the Alabama Supreme Court in 1859, explicitly ties the presumption of constitutionality to the *ei incumbit probatio* maxim:

Unquestionably, it is our duty to presume that the legislature, in the enactment of any given statute, has not transcended its powers. This presumption is but the result of two maxims of the law, namely, *omnia presumuntur rite esse acta* [all things are to be presumed done in due form], and *ei incumbit probatio, qui dicit*. In all cases, then, where the constitutionality of a statute is brought in question, the burden of proof is on him who asserts the unconstitutionality.⁵⁴

It is possible, however, to construe judicial review as something other than an affirmative assertion that a statute is unconstitutional. Professor Gary Lawson, for instance, has contended that those who seek to enforce federal statutes must prove that they fall within federal powers.⁵⁵ “Judicial review” would thus, on Lawson's view, encompass failures of proof as well as affirmative assertions that statutes are in

note 9, at 871 (“Whenever the fact finder is not satisfied that the available evidence meets the threshold for either truth or falsity with respect to a relevant proposition, leaving ‘I don't know’ as the epistemologically appropriate answer, the law imposes the burden of that uncertainty upon someone, enabling the fact finder to render a decision in the case without necessarily fixing the legal truth value of the claim.”).

53. DIG. 22.3.2 (Julius Paulus Prudentissimus). For early citations of the rule, see, e.g., 3 WILLIAM BLACKSTONE, COMMENTARIES *366; *Dufour v. Camfrancq*, 8 Mart. (o.s.) 235, 269 (La. 1820); *Clark v. Dodge Healy*, 5 F. Cas. 949, 951 (E.D. Pa. 1827); *Bentley v. Bentley*, 7 Cow. 701, 704 (N.Y. Sup. Ct. 1827); *Ross v. Gould*, 5 Me. 204, 209 (1828); *Patterson v. Gaines*, 47 U.S. (6 How.) 550, 597 (1848); *Potts v. House*, 6 Ga. 324, 335 (1849); SAMUEL MARCH PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 150 (2d ed. 1815); SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 74, at 85 (1842); W.M. BEST, A TREATISE ON THE PRINCIPLES OF EVIDENCE § 254, at 191 (1849).

54. *Sadler v. Langham*, 34 Ala. 311, 320–21 (1859).

55. Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J. L. & PUB. POL'Y 411, 426 (1996) (“[T]he first allocation of the burden of proof always will be on the federal government to prove that it is not acting ultra vires. If there is indeterminacy, and one cannot establish (given the appropriate standard of proof) the meaning of one of the provisions granting powers to the federal government, the federal government loses in any case in which it must rely on that provision. To uphold an action of the federal government, one must be able to say affirmatively that the government has the power to act.”).

fact unconstitutional. A key issue is whether enforcing a statute in court counts as an implicit assertion that the statute is constitutional. Lawson thinks that it is,⁵⁶ but without offering significant historical support.⁵⁷ In work in progress, I will canvass the historical data to test his views. A second possible alternative formulation might be the assertion that the legislature has breached its own duty not to pass unconstitutional laws.⁵⁸ The legislature's own failure to consider constitutional questions sufficiently carefully does not, of course, mean that the statute actually conflicts with the Constitution. Lynn Baker offers a third possible way for judges to respond to indeterminacy: by adopting constitutional rules that will be the most likely to be overturned through the Article V process.⁵⁹ Judicial review would under Baker's theory merely assert that a rule is consistent with what is known about the actual Constitution, as well as maximize the potential for Article V correction.

56. *Id.* at 425–26 (“[T]here is always at least an implicit assertion in any exercise of federal power that there is something in the Constitution that affirmatively authorizes the federal government to act.”).

57. Indeed, Lawson says that “virtually everybody in the founding era who had anything at all interesting to say about judicial review” took the view that “if the meaning of the relevant constitutional provision is indeterminate, the challenged law stands.” *Id.* at 424 (citing SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* (1990)).

58. Modern strict scrutiny doctrine under the Equal Protection Clause and the First Amendment seems to use such an approach when it strikes down statutes because the government has failed to show that it was actually motivated by interests known to be sufficiently important when it passed legislation. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 199 n.7 (1976) (suggesting that only “the true purpose,” not a “post hoc rationalization,” is relevant in applying intermediate scrutiny); *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2739 n.8 (2011) (stating that insufficient “degree of certitude,” and agnosticism on effects of violent video games, means statute fails strict scrutiny); *id.* at 2740 (stating that strict scrutiny only satisfied if “the government is in fact pursuing the interest it invokes”). Other interpretations of the doctrine are possible, however. We might instead interpret later courts as inferring the lack of a proper justification from the failure of the legislature to justify it at the time it acted. *See infra* notes 94–99 and accompanying text.

59. Baker, *supra* note 51, at 496 (“[W]henver possible, the Supreme Court should interpret any ambiguities in the text of the Constitution such that the party disadvantaged by the interpretation is the party more likely, as matter of logical possibility, to be able to obtain a constitutional amendment to ‘correct’ the Court’s interpretation. Put differently, when choosing among plausible interpretations of an ambiguous constitutional provision, the Court should choose the interpretation favored by (or most likely to benefit) the party that is less likely, as a matter of logical possibility, to be able to obtain a constitutional amendment to ‘correct’ the Court’s interpretation.”) (citations omitted).

Whether judicial review should be understood in one of these more limited ways—or to put it the other way around, whether these more limited circumstances would justify judicial review—is another question I leave open pending a full historical investigation.

2. *Knowledge and Interests*

The second basic idea that I import from current epistemology to the law is the interest-sensitivity of knowledge. How much we have riding on a proposition will help determine whether we know it. More at stake means that the “knowledge” honorific requires more evidence (and, if we accept knowledge as the norm of assertion, so does assertion). The standard example⁶⁰ is varying levels of evidence required in order to know a proposition like “the bank is open on Saturday.” It’s Friday and I’m thinking of going to the bank, but I’ve got other things to do, so if I know it’ll be open tomorrow morning, I’ll wait until then. Now, if I need to go to the bank to get cash for a poker game on Saturday, that’s a low-stakes context. A vague recollection of seeing cars at the bank on a Saturday last month would count. But if I need to deposit a paycheck to avoid eviction or a mortgage default on Monday, that’s a high-stakes context: if I only have a vague recollection, I’d say, “Well, I don’t know it’s open tomorrow.” Knowledge requires more evidence in that context.⁶¹

A great many early explanations of judicial deference to the legislature argue in very similar terms. The 1787 correspondence between James Iredell and Richard Dobbs Spaight, while Spaight was attending the Philadelphia Convention only a month before the Convention submitted the Constitution for signing and ratification, is instructive. Iredell, who had held several judicial positions in North Carolina, had defended judicial review in a 1786 essay, “To the Public,”⁶² and the North Carolina Supreme Court had

60. See DeRose, *Knowledge Attributions*, *supra* note 42, at 913.

61. Gary Lawson made a similar point earlier (1992) than most of the philosophers considered here. See Lawson, *supra* note 9, at 879 (“The degree of certainty, and hence the standard of proof, that people require before accepting propositions as true for particular purposes varies with the consequences of that acceptance.”).

62. JAMES IREDELL, *TO THE PUBLIC* (Aug. 17, 1786), *reprinted in* 2 GRIFFITH J. MCREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 145–49

embraced the idea in *Bayard v. Singleton* in 1787.⁶³ Spaight was alarmed, because he thought that judicial review of the legislature's assessments of constitutionality would lack any further review by others. Put another way, he thought that type-II errors of commission⁶⁴ (that is, cases where courts act but should have remained passive) were more serious than type-I errors of omission (that is, cases where courts remained passive but should have acted) because such errors were less likely to be remedied. Spaight argued,

If they possessed the power, what check or control would there be to their proceedings? or who is there to take the same liberty with them, that they have taken with the Legislature, and declare their opinions to be erroneous? . . . [W]henver the judges should become corrupt, they might at pleasure set aside every law, however just or consistent with the Constitution, to answer their designs; and the persons and property of every individual would be completely at their disposal.⁶⁵

Iredell replied that this fear of judicial self-aggrandizement would apply equally to many uncontroversial cases of judicial power, and so were not a good argument against judicial review as such. However, the worry about irreversibility would nonetheless support caution in “a doubtful matter:” “[W]hen once you establish the necessary existence of any power, the argument as to abuse ceases to destroy its validity, though in a doubtful matter it may be of great weight.”⁶⁶ Iredell then qualified his support of judicial review with a rule of deference: “In all doubtful cases, to be sure, the Act ought to be supported: it should be unconstitutional beyond dispute before it is pronounced such.”⁶⁷ Later judicial statements of deference refer repeatedly to the “delicacy,” “magnitude,” “gravity,” and “importance” of the occasion of judicial review as justifications for a measure of deference to legislative

(1857).

63. *Bayard v. Singleton*, 1 N.C. 5 (1787).

64. On the distinction between type-I and type-II errors, see, e.g., DAVID J. SHESKIN, *HANDBOOK OF PARAMETRIC AND NONPARAMETRIC STATISTICAL PROCEDURES* 59 (3d ed. 2004).

65. IREDELL, *supra* note 62, at 169.

66. *Id.* at 173–74.

67. *Id.* at 175.

judgments regarding the Constitution.⁶⁸

68. See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810) (“The question, whether a law be void for its repugnancy to the constitution, is, at all times, a *question of much delicacy*, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case.”) (emphasis added); *Bliss v. Commonwealth*, 12 Ky. 90, 94 (1822) (“Whether or not an act of the legislature conflicts with the constitution, is, at all times, a question of great delicacy, and deserves the most mature and deliberate consideration of the court.”); *Runnels v. State*, 1 Miss. 146, 146–47 (1823) (“In the opinion, which will be expressed on this momentous question, I cannot feel insensible either as it regards the ‘*magnitude of the case,*’ or the *delicacy of our situation*. The constitutionality of a legislative act, forms the subject of our enquiries, and on more occasions than one, I have expressed the diffidence and reluctance, and consequently ‘the caution and circumspection,’ with which I approach such investigations.”) (emphasis added); *Dyer v. Tuscaloosa Bridge Co.*, 2 Port. 296, 303 (Ala. 1835) (“An investigation into the constitutionality of an act of a co-ordinate department of the government, is *always a delicate, if not a painful duty*.”) (emphasis added); *Trs. of Caledonia Cnty. Grammar Sch. v. Burt*, 11 Vt. 632, 637 (1839) (“The *most delicate and most important duty ever to be discharged by the judiciary*, is to pronounce upon the validity of an act of the legislature”) (emphasis added); *State v. Baltimore & Ohio R.R. Co.*, 12 G. & J. 399, 400 (Md. 1842) (“To declare an act of a co-ordinate department of the government an unwarrantable assumption or usurpation of power, because it is a violation of a constitutional prohibition, is an exercise of the judicial office, of a grave and delicate nature, which never can be warranted but in a clear case.”); *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 209 (1848) (“It must be a very clear and palpable case, which would warrant the Judiciary to exercise *this delicate duty of declaring a law unconstitutional . . .*”) (emphasis added); *Santo v. State*, 2 Iowa 165, 208 (1855) (“[A]lthough the power is universally admitted, *its exercise is considered of the most delicate and responsible nature*, and is not resorted to, unless the case be clear, decisive, and unavoidable.”) (emphasis added); *Cotten v. Cnty. Comm’rs*, 6 Fla. 610, 613–16 (1856) (“Instances are not lacking to show that the judiciary, in essaying to shield the Constitution against the presumed aggressions of the Legislature, has itself become the greater aggressor. Every enlightened court will be admonished by these instances, of *how delicate a character is the duty imposed upon it*, when called to decide upon the constitutionality of an act of the Legislature. While it is an essential element in the character of an independent judiciary firmly to maintain and resolutely to exercise its appropriate powers when properly invoked, it is equally its duty to be careful not rashly and inconsiderately to trench upon or invade the precincts of the other departments of the government. That the judicial department is the proper power in the government to determine whether a statute be or be not constitutional will not, at this day, be questioned. . . . But it is a *most grave and important power, not to be exercised lightly or rashly. . .*”) (emphasis added); *Att’y Gen. v. Burbank*, 12 Cal. 378, 385 (1859) (“The *delicate office of declaring an Act of the Legislature unconstitutional* and void should never be exercised, unless there be a clear repugnancy between the inferior and the organic law”) (emphasis added); *State ex rel. Morrell v. Fickle*, 71 Tenn. 79, 81 (1879) (“The duty of the court to pass upon the constitutionality of legislative acts is a very grave and responsible one. Every presumption should be made in favor of the validity of the laws.”).

3. *A Philosophically-Informed Activismometer*

We can combine these ideas about the relationship of knowledge and assertion and the relationship of knowledge and practical interests into an “activismometer” with 5 levels. The levels on both ends correspond to the two ways to breach the knowledge norm of assertion (or its close kin): (a) to make assertions about the law while remaining confessedly agnostic about critical facts (violating Grice’s maxim of Quality) or (b) to refuse to make assertions even about matters that are able to be known (violating Grice’s maxim of Quantity). These are levels 5 and 1. Level 1 is, if a court has jurisdiction to interpret (and so, authority to enforce) the Constitution, too passive, because a court remains silent in the face of known or knowable constitutional problems. Level 5 is too active, because it makes assertions contrary to the elected branches even in the face of agnosticism about critical facts.

Between these two rejections of knowledge as the norm of assertion we have courts that accept knowledge as the norm of assertion, but see judicial review as a relatively-high-stakes or relatively-low-stakes proposition. These are levels 2, 3, and 4. The three traditional levels of burdens of proof—beyond a reasonable doubt, clear and convincing evidence, and preponderance of the evidence—correspond to decreasing levels of the gravity of a pronouncement. Criminal punishment is a high-stakes context, so we require a relatively large amount of evidence—sufficient to prove guilt beyond a reasonable doubt—before we encourage juries to make the assertion that criminal defendants are guilty.⁶⁹ But

69. See *In re Winship*, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring) (“The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each. When one makes such an assessment, the reason for different standards of proof in civil, as opposed to criminal, litigation becomes apparent. In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant’s favor than for there to be an erroneous verdict in the plaintiff’s favor. A preponderance of the

compensatory civil liability is a relatively low-stakes context, in which less evidence is required (even for the same assertion, e.g., “A purposely killed B”). The termination of parental rights⁷⁰ and civil confinement⁷¹ are middle-stakes context requiring clear and convincing evidence. Of course, while these three levels of proof are the three levels traditionally distinguished by the law, the stakes involved in particular contexts, and the amount of evidence we might therefore require, lie along a continuum.⁷²

Courts committed to staying at Level 2 activism would find constitutional violations only if they are established beyond reasonable doubt. Those at Level 3 would also allow judicial assertions of unconstitutionality if they are clear. Level 4 activists would allow judicial assertions of constitutional violations if shown by a preponderance of the

evidence standard therefore seems peculiarly appropriate, for, as explained most sensibly, it simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence before (he) may find in favor of the party who has the burden to persuade the (judge) of the fact’s existence.’ In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.” (citations omitted).

70. See *Santosky v. Kramer*, 455 U.S. 745, 755, 768 (1982) (“In any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . [A]t a parental rights termination proceeding, a near-equal allocation of risk between the parents and the State is constitutionally intolerable.”).

71. See *Addington v. Tex.*, 441 U.S. 418, 427 (1979) (“[T]he individual’s interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.”).

72. The three chief standards of appellate review—*de novo*, “clearly erroneous” review of judicial factfinding, and “substantial evidence” review of juries and agencies—correspond roughly to these three standards. See *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (“A finding is ‘clearly erroneous’ when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”); *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc), *rev’d on other grounds*, *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (“If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.”).

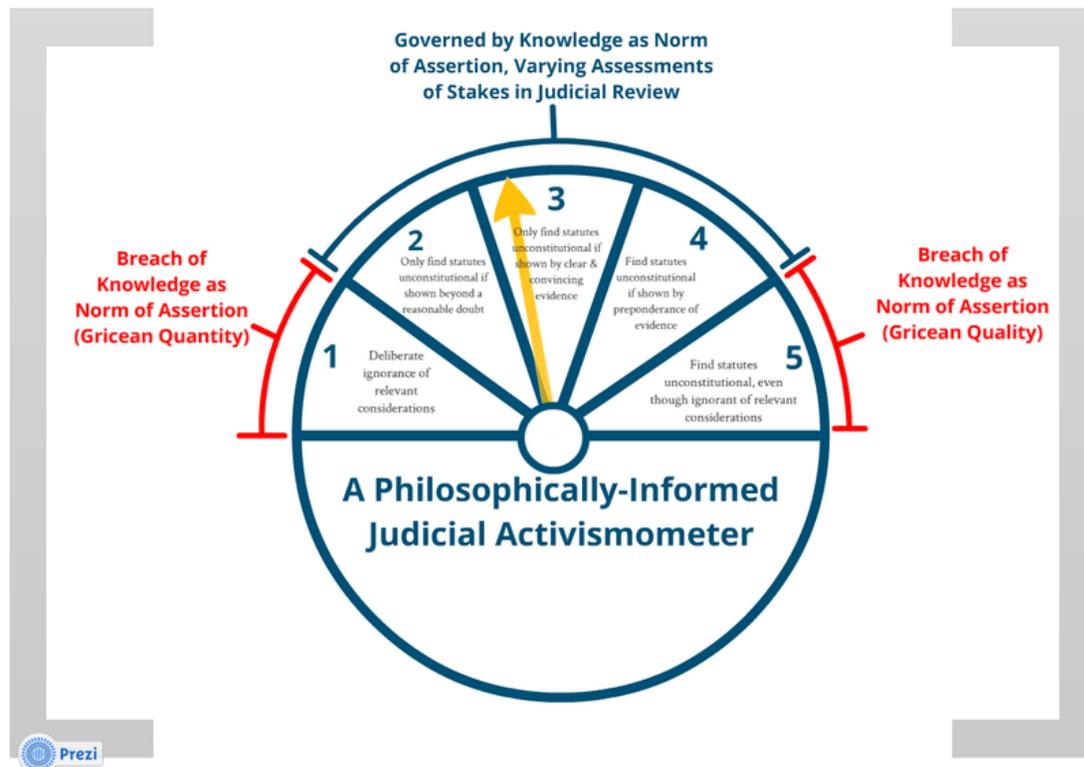
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THE ACTIVISMOMETER

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evidence.

Here, then, is our activismometer:



B. Examples of the Five Activismometer Levels

To recapitulate the story so far: “Knowledge,” the central concern of epistemologists, constrains permissible assertion and supplies the goal of those in a position to speak to issues. Those who speak about the Constitution should stick to what they know, but also (if in a position to enforce the Constitution) not neglect relevant sources of knowledge. Neglecting sources of information relevant to constitutionality is the level 1 too-passive error, while forging ahead with assertions about the Constitution ignorant of relevant details is the level 5 too-active error. Between these two errors lie different assessments of the stakes in judicial review, and so of the level of proof required for “knowledge” in that context, because knowledge (and thus permissible

assertability) are stakes-sensitive. This part of our activismometer is really a spectrum, but I assign the three conventional options for burdens of proof—beyond a reasonable doubt, clear and convincing evidence, and preponderance of evidence—to levels 2, 3, and 4, respectively.

1. *Level 5: Knowledge-Exceeding Declarations of Law*

Level-5 errors are confessions of ignorance on critical facts coupled with the use of judicial power to strike down statutes or executive action. Justice Jackson's famous 1952 *Youngstown* concurrence claimed that the original history of executive and legislative power was just too enigmatic to be helpful:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.⁷³

Note that Jackson does not begin by rejecting the relevance of originalist evidence: he says that the original history would have genuine "authority" over his decision if it were clear enough. He then moves on to consider other rationales for his decision only because the historical materials (and later cases as well) were not clear enough. Despite this uncertainty, however, Jackson ultimately voted with the majority in striking down the steel seizure.

But insufficient clarity regarding matters that would be authoritative if they were clear is simply ignorance of relevant considerations. And if knowledge is a genuine norm of assertion—that is, if level 5 is too high on our activismometer—ignorance of the relevant considerations should end the issue; Truman's actions should have been allowed, absent sufficient knowledge that the actual

73. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring).

Constitution forbade them. The alternative, of course, is to dig into the Helvidius/Pacificus debates and other relevant material,⁷⁴ but unless Jackson is willing to do that, he should either (a) explain why that material is irrelevant, i.e., why his initial inclination is wrong, or (b) refrain from making assertions about the Constitution contrary to Truman's.⁷⁵

Roe v. Wade's famous agnosticism about the beginning of life is another classic case:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

If knowledge is the norm of assertion, this should be the prelude to deference to elected officials regarding whether fetal life is a sufficiently-important interest to justify abortion restrictions. But not for *Roe*.⁷⁶

74. See, e.g., ALEXANDER HAMILTON & JAMES MADISON, THE PACIFICUS-HELVIDIUS DEBATES OF 1793–94: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING (Morton J. Frisch ed. 2007); MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS (2007).

75. Matt Estrin in conversation suggests an alternative Level-4 interpretation of Jackson's reasoning. If Jackson genuinely thinks that the historical materials are not merely enigmatic, but genuinely in equipoise, and if he is searching for the preponderance of evidence, even the slightest bit of evidence from other sources would be enough to tip the balance. Given his complete lack of engagement with the history, Jackson certainly wouldn't be justified in claiming that the evidence is in equipoise, but he also doesn't even seem to be claiming that. Rather, he asserts that it is too hard for him to tell how much historical evidence there is on either side of the debate. Turning to other considerations because considerations initially thought to be authoritative are too difficult to assess is, of course, the drunk-under-the-lamppost error.

76. Moreover, *Roe* itself undermines the chief argument for supporting a right to abortion notwithstanding possible fetal personhood: Judith Thomson's "violinist" argument from bodily integrity. See Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48–49 (1971). Speaking of Fourteenth Amendment personhood, the Court says, "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument." *Roe v. Wade*, 410 U.S. 113, 156–57 (1973).

Thomson would not agree, because the personhood of an aggressor—a burglar, say—does not give the aggressor an absolute right not to be killed (or forced to evacuate the premises). There are, to be sure, issues about whether the fetus is relevantly similar to a burglar. But *Roe* entirely ignores this issue, claiming that the status of the fetus would, if resolved in favor of a sufficiently

The agnosticism about the relative value of heterosexual family environments in the Ninth Circuit's decision in the Proposition 8 case, *Perry*,⁷⁷ followed by the Second Circuit in the DOMA case, *Windsor*,⁷⁸ poses a very similar issue. The Ninth Circuit spoke at length, and persuasively, about the symbolic power and social meaning of the word "marriage" to the plaintiffs, above and beyond the specific rights regarding adoption, hospital visitation, and the like, which gay couples still have in California, Proposition 8 notwithstanding:

[W]e emphasize the extraordinary significance of the official designation of 'marriage.' That designation is important because 'marriage' is the name that society gives to the relationship that matters most between two adults. A rose by any other name may smell as sweet, but to the couple desiring to enter into a committed lifelong relationship, a marriage by the name of 'registered domestic partnership' does not. . . . [T]he designation of 'marriage' itself . . . expresses validation, by the state and the community, and . . . serves as a symbol, like a wedding ceremony or a wedding ring, of something profoundly important.⁷⁹

high status, settle the case. Given the later statement of agnosticism about the status of the fetus and knowledge as the norm of judicial assertions about the Constitution, *Roe* should have stayed its hand.

It is true that the Court's statement about the case for abortion rights collapsing was in the context of constitutional personhood, not the general question of when life (or personhood or rights-bearing-status) begins more generally; Blackmun states that constitutional personhood begins only at birth, while he is agnostic on personhood generally. However, given the Court's equation of liberty interests with genuine policy interests, Thomson's arguments on the limits to the right to life as a moral matter would presumably have led Blackmun—if he recognized those arguments as legitimate—to recognize a corresponding limit on the constitutional obligations assuming the personhood of the fetus. At any rate, even aside from whether Blackmun's constitutional-obligation-to-protect-constitutional-persons point undermines Thomson's policy argument, Blackmun does not say anything that would suggest any agreement with Thomson. Of the two possible policy justifications for abortion rights, then—(a) fetal non-personhood and (b) even-assuming-personhood arguments from bodily integrity—Blackmun is explicitly agnostic on justification (a), and at best completely unaware of justification (b), at worst expressly hostile to (b) when put in the garb of a constitutional obligation.

77. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

78. *Windsor v. United States*, 699 F.3d 169, 188 n.6 (2d Cir. 2012), *aff'd*, 133 S.Ct. 2675 (2013).

79. *Perry*, 671 F.3d at 1078 (citations omitted).

However, when it came to the possible effect of an expansion of the word “marriage” to new cases, the court’s sensitivity to the dynamics of social meaning suddenly disappeared. Unlike Judge Walker’s decision at the district court, which straightforwardly rejected on the merits the argument that heterosexual child-rearing environments have special qualities worth encouraging,⁸⁰ the Ninth Circuit refused to engage the issue, because it now considered labels irrelevant absent a difference in underlying rights:

We need not decide whether there is any merit to the sociological premise of Proponents’ first argument—that families headed by two biological parents are the best environments in which to raise children—because even if Proponents are correct, Proposition 8 had absolutely no effect on the ability of same-sex couples to become parents or the manner in which children are raised in California. As we have explained, Proposition 8 in no way modified the state’s laws governing parentage, which are distinct from its laws governing marriage. Both before and after Proposition 8, committed opposite-sex couples (“spouses”) and same-sex couples (“domestic partners”) had identical rights with regard to forming families and raising children. Similarly, Proposition 8 did not alter the California adoption or presumed-parentage laws, which continue to apply equally to same-sex couples. In order to be rationally related to the purpose of funneling more childrearing into families led by two biological parents, Proposition 8 would have had to modify these laws in some way. It did not do so.⁸¹

The positive social meaning of the term “marriage” thus seems, in the Ninth Circuit’s view, to have no costs; it is a completely free resource. Courts and commentators analyzing trademark dilution cases, however, have seen the obvious effect that expansion of a symbol will have on the value of the symbol for its original uses, referring to the “gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use upon non-competing goods”⁸² or to the dilution of the “drawing

80. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980–81, 1000 (N.D. Cal. 2010) (making finding of fact and applying it in lack-of-rational-basis context).

81. *Perry*, 671 F.3d at 1086–87 (citations omitted).

82. Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 825 (1926). In fuller context:

power of a congenial symbol.”⁸³ This is not to say, of course, that “marriage” is literally a trademark, or even that the sort of social-meaning dilution that is presumed in trademark law would necessarily impair the value of “marriage” as an honorific. But the social meaning of “Coca Cola” and the social meaning of “marriage” might reasonably be taken to operate the same way—that is, in a way that is diluted and weakened as a term extends to different kinds of products and relationships. If Judge Walker is right, of course, the value of “marriage” would be maintained by his decision, precisely because, on his view of the facts, homosexual child-rearing environments are just as good as heterosexual ones. But that is the very issue on which the Ninth Circuit claimed agnosticism, and the point of knowledge as the norm of assertion is that agnosticism is not enough. I thus classify *Perry* and *Windsor* as Level 5 instances: breaches of knowledge as the norm of assertion.

The real injury in all such cases can only be gauged in the light of what has been said concerning the function of a trademark. It is the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use upon non-competing goods. The more distinctive or unique the mark, the deeper is its impress upon the public consciousness, and the greater its need for protection against vitiation or dissociation from the particular product in connection with which it has been used.

Id.

83. *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*, 316 U.S. 203, 205 (1942). In fuller context:

The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising shortcut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress.

Id.

2. *Levels 2, 3, and 4: No-Reasonable-Doubt, Clarity, and Preponderance Standards*

Dialing down to the middle part of our activismometer, we find those who adhere to knowledge as the norm of assertion, but who use different thresholds for what counts as “knowledge.” Traditionally, the law uses three chief standards—preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt—but these categories are neither perfectly distinct from each other nor perfectly clear.

I will note in passing two ways in which these concepts are not perfectly clear, so that we may avoid confusion in the application of these labels. First, is the inquiry regarding “reasonable doubt” a *hypothetical* inquiry—the doubt of any reasonable person—or does it refer to *actual* doubts of the particular interpreter or factfinder (i.e., the particular judge exercising judicial review, or particular jury finding criminal guilt)? Interpreters like James Bradley Thayer use the concept to refer to hypothetical reasonable persons, and at least some courts use similar language.⁸⁴ However, if a “no reasonable doubt” standard is confined to the doubts of a particular interpreter, it is actually a *less* demanding standard of proof than a simple “no doubt” standard, because only *reasonable* doubts now need apply.⁸⁵

84. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (“It [the court] can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, —so clear that it is not open to rational question. That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply, —not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it. This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.”); *Grimball v. Ross*, 1 Ga. Cases 63, 64–65, T.U.P. Charlt. 175, 178–79 (Ga. Sup. Ct. 1808) (“ought to be as obvious to the comprehension of everyone, as an axiomatic truth”).

85. James Whitman’s history of the theological origins of the reasonable-doubt rule suggests that the rule was adopted to make convictions *easier*, relative to an “any doubt” rule, by soothing the consciences of jurors afraid of convicting an innocent man. JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE*

Second, at what time is clarity to be assessed under a clear-and-convincing standard? If clarity is to be considered at the time a legislature acts, the standard of evidence will be much more demanding than if it is to be considered in the light of later judicial clarification by further analysis and research. The existence of a clarity standard confined to the time of legislation would make the judicial task much easier, but if courts are required to exert themselves to make constitutional requirements as clear as possible, that will be a lot of work.⁸⁶

Level-2 activism is articulated in Justice Bushrod Washington's separate opinion—one of several seriatim opinions, with Marshall in dissent for 3 justices on the basic issue—in *Ogden v. Saunders*:

It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the Constitution is proved beyond all reasonable doubt.⁸⁷

Washington claims that “[t]his has always been the language of this Court, when that subject has called for its decision,”⁸⁸ but without citation; *Ogden* seems to be the first use of such language at the U.S. Supreme Court.⁸⁹

A level-3 clear-and-convincing standard for activism is exemplified by Marshall's opinion in *Fletcher v. Peck*:

The question, whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations

DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 114–24 (2008). That suggests that the inquiry is not a search for hypothetical reasonable people who might have doubts, but an examination of our actual doubts to see if they are reasonable.

86. See *infra* notes 98–101 and accompanying text.

87. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827) (opinion of Washington, J.).

88. *Id.*

89. In works in progress I survey other historical examples. The earliest instances that I have found are *Grimball*, 1 Ga. Cases 63, 64–65 and Commonwealth *ex rel. O'Hara v. Smith*, 4 Binn. 117, 123 (Pa. 1811) (Tilghman, C.J.). The next state supreme court to adopt the language was apparently *In re Wellington*, 33 Mass. (16 Pick.) 87, 95 (Mass. 1834).

which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.⁹⁰

To keep our activismometer levels clear and distinct, it is helpful to distinguish between what Marshall means by “doubtful case” and what later interpreters like Thayer have taken him to mean by it.⁹¹ A “doubtful case” refers to doubts in the judge’s *own* mind. For Marshall in *Fletcher*, “the judge” is the one who must “feel[] a clear and strong conviction of their incompatibility.” If “no reasonable doubt” likewise refers to subjective, actual doubt, it actually allows judicial review *more* liberally than a “no doubt” rule taken literally.⁹² I have arranged the activismometer, however, on the theory that reasonable doubt means doubt in a reasonable person other than the judge.

Level 4 activism, requiring only a preponderance of the evidence for judicial review, is advocated particularly clearly by Professor Steven Calabresi:

Since judgments of constitutionality are made by all three branches of the federal government acting together, a law that arrives in court with the imprimatur of two of the three branches should be presumed to be constitutional. And, the courts should be restrained in striking the law down except where it appears by a preponderance of the evidence to conflict with the Constitution. I would not go as far as James Bradley Thayer and invalidate only laws that are clearly and beyond a reasonable doubt unconstitutional. But I do think the burden of proof lies on those who are challenging the constitutionality of a law or of an executive branch action.⁹³

90. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810).

91. See Thayer, *supra* note 84, at 145 (appealing to Marshall’s “doubtful case” language for support).

92. See *supra* note 85 and accompanying text.

93. Steven G. Calabresi, *Introduction: A Critical Introduction to the Originalism Debate*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 22 (Steven G. Calabresi ed., 2007). Gary Lawson and Christopher Moore offer a more extended argument against deference, which they concede is in the teeth of most early commentators on judicial review, though they do not explicitly advocate a preponderance-of-the-evidence standard. See Gary Lawson &

I have found, however, no early instances of courts—even with a very liberal approach to “early”—adopting such a view. A requirement that constitutional violations be clear and convincing or something more substantial seems to be universal among early courts discussing the issue of judicial deference to legislative judgments. It is true that some courts discuss judicial review without affirmatively mentioning a clarity requirement—*Marbury* is an instance—but none consider and reject one. If we treat the state-constitutional standards as a laboratory and give more weight to earlier evidence as most probative of what “judicial power” expressed in the Constitution, it seems most reasonable to say that our activismometer should be set either at level 2 or level 3, and probably level 3. My historical conclusion, however, is quite tentative.

3. *Level 1: Deliberate Ignorance of Relevant Considerations*

Activismometer level 1 is the deliberate failure to consider evidence relevant to a statute’s constitutionality in a case in which a court has jurisdiction to assess it. The approach to the presumption of constitutionality taken in 1931 in *O’Gorman & Young v. Hartford Fire Insurance*, in which the Court said that, in order to sustain a statute, it would assume the legislative fact-finding necessary to sustain the distinctions drawn in legislation, even where the legislature itself found no such facts, is such an example.⁹⁴ The Court refused to make any inference at all from the legislative silence on the relevant justificatory facts. That failure, however, is profoundly relevant to whether the legislature’s distinction was in fact justified.

Compare the situation with criminal self-defense justifications. A criminal defendant who wants a jury to be able to consider the issue of whether his actions are justified (say, in killing someone) must present some evidence in order to receive a jury instruction on self-defense. A criminal defendant who supplies no evidence to show he was justified is treated as unjustified. Moreover, even if the defendant

Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1275–78 (1996).

94. See *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257–58 (1931).

produces evidence at trial that his actions were justified, most reasonable observers would think it suspicious if that defendant had never told that story before trial. *Griffin v. California*⁹⁵ and *Doyle v. Ohio*,⁹⁶ to be sure, protect criminal defendants against such adverse inferences. But those rules are not rooted in the fact that inferences from silence are, as a general matter, irrational or unreliable. Rather, they are rooted in the particular circumstances of an individual testifying in own defense and the desire to protect arrestees from implicit pressure to talk to the police.

When *O’Gorman* is used in the context of a legislature who adopts a legislative distinction without actually articulating any facts that could justify that distinction, it operates like a *Griffin* or *Doyle* rule for the government’s justifications for its statutes, shorn of any Fifth Amendment anti-self-incrimination rationale. Under *O’Gorman*, courts use the presumption of constitutionality as a “fact-finding” tool—really, a device for suppressing adverse inferences from the government’s failure to justify a distinction at the proper time. Indeed, when *O’Gorman* is used to find facts when the government has failed to articulate its justification even after the fact, it goes far beyond even *Griffin* and *Doyle*, because it operates to suppress the adverse inference from the government’s failure to justify its distinctions at any time, akin to a rule requiring the prosecution to disprove justification defenses on which the criminal defendant has offered no evidence at all.

The failure to draw reasonable inferences from governmental silence in defense of its own statutes is not the proper application of a high burden of proof (i.e., Level 2 activism), but instead an instance of deliberate ignorance (i.e., Level 1 excess passivity). Deliberate ignorance is of course sometimes a good idea—self-incrimination and the exclusionary rule may be instances, and respect for others’ privacy is obviously another—but judicial review does not seem to be one of them.

The model of self-defense justifications in the criminal law shows why departing from *O’Gorman* need not take us any higher than Level 2 on our activismometer. The criminal

95. 380 U.S. 609 (1965).

96. 426 U.S. 610 (1976).

defendant has a burden of production with respect to explaining his justification defense—that is, he is subject to an adverse inference from the failure to produce such evidence. But under most states' approach, once the defendant produces some evidence on the issue, the prosecution still retains the burden of showing guilt—i.e., disproving the self-defense justification, if offered—beyond a reasonable doubt.⁹⁷ Whether to be at Level 2, 3, or 4 is an issue of how much evidence is required to show unconstitutionality, but the *O'Gorman* issue is whether legislative silence itself counts as evidence that can help meet that burden. Ignoring relevant silence is staying at Level 1; we can pay attention to it but still require unconstitutionality to be shown beyond a reasonable doubt, and thus go no higher than Level 2.

Another way to get stuck at Level 1 is to fail to see the contingency of clarity or plainness. Questions that initially seem unclear can frequently *become* clear with sufficient research and analysis.⁹⁸ The existence of a relatively high burden of proof is, therefore, not way for judges to decide cases more *easily*, but instead a reason for judges to consider cases and search the mines of historical materials more diligently. Many of the early cases establishing clarity or beyond-a-reasonable-doubt requirements for judicial review state at the same time that this relatively high burden of proof should impel judges to work *harder*, rather than concluding prematurely that the task is impossible. Many early courts insist that courts have a duty to consider constitutional questions long and carefully, despite the existence of a deferential standard.⁹⁹ The clear majority rule

97. See, e.g., *State v. Robinson*, 351 N.E.2d 88, 108 (Ohio 1976).

98. The Supreme Court's recent case on the timing of plain-error review, *Henderson v. United States*, 133 S. Ct. 1121 (2013), presupposed that constitutional issues that are not plain at the time of a trial-court's error might become plain by the time of an appeal. The Court found that the later time was relevant, a result analogous to the time-of-later-judicial-assessment rule for a judicial review clear-error deference rule. *Id.* at 1127 (allowing plain error in "case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified." (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993))).

99. See, e.g., *Whittington v. Polk*, 1 H. & J. 236, 245 (Md. 1802) ("[issue must be] fully discussed by counsel learned in the law, and the court decide on mature consideration."); *Bliss v. Commonwealth*, 12 Ky. (1 Litt.) 90, 94 (1822) ("[issue must receive] the most mature and deliberate consideration of the

is that courts are to work hard to meet the demanding standard of proof, not simply note that it is difficult and give up in advance.¹⁰⁰

James Bradley Thayer, however, harshly criticized Daniel Webster for making exactly this point in the *Charles River Bridge* case of 1829, accusing him of denying the rule of deference to legislatures entirely.¹⁰¹ Webster argued,

court”); *In re Wellington*, 33 Mass. (16 Pick.) 87, 95 (1834) (Shaw, C.J.) (“[W]hen called upon to pronounce the invalidity of an act of legislation . . . courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject . . .”); *Landon v. Litchfield*, 11 Conn. 251, 265–66 (1836) (“[legislation not to be overturned] by an immatured judicial opinion . . . [and] courts . . . shall carefully review former decisions . . .”); *Cotten v. Leon Cnty. Comm’rs*, 6 Fla. 610, 613 (1856) (stating that courts have “duty to be careful not rashly and inconsiderately to trench upon or invade the precincts of the other departments of the government”); *Rich v. Flanders*, 39 N.H. 304, 312 (1859) (same language as *Wellington*); THOMAS MCINTYRE COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST . . . 182 (1868) (same language as *Wellington*); *Varnier v. Martin*, 21 W. Va. 534, 543 (1883) (nothing that judicial review requires “approaching the question involved in this case with great caution and delicacy” and “careful examination”; “that presumption [of constitutionality] is not only not conclusive, but it is not so strong as to prevent a free and full enquiry into the subject . . .”); *Farm Inv. Co. v. Carpenter*, 61 P. 258, 263 (Wyo. 1900) (stating that reliance on statute “is not to preclude a careful investigation of the serious question presented . . .”).

For two of the very few cases using a presumption of constitutionality as a basis for judicial passivity, both trial courts, see *Grimball*, 1 Ga. Cases 63, 64–65 (“[N]o nice doctrines, no critical exposition of words, no abstract rules of interpretation, such as may fit the elucidation of principles in a legal contest between individuals, can, or rather ought, to be resorted to in deciding on the constitutional operation of a statute. This violation of a constitutional right ought to be as obvious to the comprehension of everyone, as an axiomatic truth; as that the parts are equal to the whole.”); *Byrne’s Adm’rs v. Stewart’s Adm’rs*, 3 S.C. Eq. (3 Des. Eq.) 466, 476–77 (1812) (“This confidence in the wisdom and integrity of the legislature, is necessary to ensure a due obedience to its authority; for if this is frequently questioned, it must tend to diminish that reverence for the laws which is essential to the public safety and happiness. I am not, therefore, disposed to examine with scrupulous exactness the validity of a law . . . The validity of a law ought not, then, to be questioned, unless it is so obviously repugnant to the constitution, that when pointed out by the Judges, all men of sense and reflection in the community may perceive the repugnancy.”).

100. For more on this issue, see John McGinnis, *Is Judicial Restraint Part of the Originalist Method?*, Presented at the Fourth Annual Hugh and Hazel Darling Foundation Originalism Works-in-Progress Conference at the University of San Diego Center for the Study of Constitutional Originalism (Feb. 15–16, 2013), available at <http://www.sandiego.edu/law/school/events/webcasts/2013.php> (last visited Apr. 3, 2014).

101. Thayer, *supra* note 84, at 145–46. Amazingly, Professor Thayer then immediately cites *Wellington* on the beyond-reasonable-doubt standard of

Some general remarks have been made, to show the solicitude of courts not to overturn a legislative act unless its unconstitutionality is manifest. Certainly if a judge has doubts, they will weigh in favor of the act. But it should be considered, that all cases of this sort will involve some doubt; for it is not to be supposed that the legislature will pass an act which is palpably unconstitutional. The correct ground is this, that the Court shall interfere and declare an act to be void, where the case, which may have been doubtful, shall be made out to be clear by examination.¹⁰²

Note the tense of Webster's descriptions: though the case "*may have been* doubtful," it may yet later "*be made out to be clear* by examination." Webster is not arguing that courts should strike down legislation while they still have doubts about its unconstitutionality; rather, doubts are to be dissolved by careful examination of the relevant evidence. Such a duty of examination is simply the Gricean duty of Quantity—obtaining and supplying information about constitutional requirements when conversationally appropriate. In urging courts to neglect this duty, Thayer thus advocates inappropriate Level 1 judicial passivity.

C. Different Proper Activismometer Settings for Different Kinds of Judicial Review?

Not all judicial review of elected branches' actions is necessarily subject to the same standard. In a historical sequel to this paper, I will assess several distinctions that might be made. Are state legislatures due the same deference as Congress? Thayer's approach to judicial review was limited to Congress,¹⁰³ a sentiment echoed by Justice Holmes's dictum that the Union could survive the lack of judicial review, but not the lack of federal supremacy over state laws.¹⁰⁴ The earliest statements of enhanced burdens of

deference as if it refutes Webster's point, without noting Chief Justice Lemuel Shaw's statement of the extreme care with which courts must examine constitutional questions, rather than simply assessing the situation from the legislature's perspective. See *In re Wellington*, 33 Mass. (16 Pick.) at 95.

102. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 24 Mass. (7 Pick.) 344, 449–50 (1829).

103. Thayer, *supra* note 84, at 154 (stating that federal courts reviewing conflict between state legislation and federal constitution is "a different matter" from reviewing act of Congress).

104. Oliver Wendell Holmes, *Law and the Court: Speech at a Dinner of the*

proof for judicial review in federal cases concern state legislation—*Fletcher* and *Ogden*, for instance—while the earliest instances in which Congress’s legislation was reviewed—*McCulloch* and *Marbury*—have no such explicit statement.¹⁰⁵ In the case of *McCulloch*, that may be because there were two conflicting elected actors—the legislatures of Maryland, attacking the Bank, and Congress, setting it up—at issue. A survey of cases involving such conflicts and how courts handle them would likely produce different standards of proof, or perhaps a more complicated inquiry into comparative deference for the two conflicting elected actors. Cases of conflict between executive and legislative constitutional claims present similar issues and would deserve a separate historical canvass.

III. VAGUENESS

Vagueness—the existence of fuzzy boundaries at the edges of constitutional concepts—is Larry Solum¹⁰⁶ and Randy Barnett’s¹⁰⁷ chief instance of the sort of phenomenon that must be accommodated by “constitutional construction,” which they (with Keith Whittington,¹⁰⁸ as well as others) use to refer to the aspects of constitutional *adjudication* not governed by constitutional *interpretation*.¹⁰⁹ Because I

Harvard Law School Association of New York, February 15, 1913, in THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 147 (Richard A. Posner ed., 1997) (“I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states.”).

105. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

106. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 97–98 (2010).

107. See BARNETT, *supra* note 36, at 118–30; Randy Barnett, *Interpretation and Construction*, 34 HARV. J. L. & PUB. POL’Y 65 (2011).

108. KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (2001).

109. It is interesting that Justice Scalia, despite his disparagement of the interpretation-construction distinction, *see* Scalia, *supra* note 13, at 14–15, nonetheless acknowledges that vagueness is an important phenomenon, distinct from the problem of ambiguity. SCALIA & GARNER, *supra* note 15, at 84–85 (“Usually . . . the change produced by nonoriginalists gives a different meaning to provisions that are not ambiguous but vague.”). McGinnis and Rappaport likewise acknowledge the existence of vagueness, even as they advocate resolving it with rules they deem interpretive. John O. McGinnis & Michael B.

distinguish my principles of judicial restraint from the interpretive issues at stake in the originalism controversy, these principles of restraint likewise are placed in the “construction” category, if we are not using “interpretation” broadly to encompass all issues pertaining to adjudication.

Principles of judicial restraint can help solve the problem of vagueness as it arises in constitutional adjudication if we take certain views of the general phenomenon of vagueness. While vagueness has attracted a lot of attention from legal theorists, it has attracted an enormous amount more from philosophers. Timothy Williamson—he of forementioned knowledge-as-the-norm-of-assertion fame, though this is other, earlier work—has popularized the epistemic view of vagueness.¹¹⁰ The idea is that there is some particular number of hairs that will cause Harry to be bald,¹¹¹ but one

Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 773 (2009) (“[T]he evidence that we have found suggests that interpreters believed that ambiguity and vagueness could be resolved through the applicable interpretive rules, and thus through originalist methods.”). Like Barnett and Solum but unlike McGinnis and Rappaport, I am inclined to use the term “interpretation” to refer only to the process of extracting meaning from a text, and some other term to refer to the methods by which we resolve vagueness in that meaning. However, like McGinnis and Rappaport but (apparently) unlike Barnett and Solum, I am inclined to use the methods of resolving vagueness that were prevalent at the framing, because those methods would likely reflect the meaning expressed in terms like “judicial power,” “legislative power,” and “executive power.”

It is also striking that Timothy Endicott, though he criticizes epistemic theories of vagueness for denying the existence of genuine indeterminacy in language, see TIMOTHY A.O. ENDICOTT, VAGUENESS IN THE LAW 99–136 (2001), also presents vagueness in terms of clarity. See *id.* at 2 (explaining ‘higher-order’ vagueness as the vagueness of phrases like ‘clear case’ and ‘borderline case’).

110. TIMOTHY WILLIAMSON, VAGUENESS (1994). Moreover, Grice is among the many philosophers who have also explained vagueness in epistemic terms. See GRICE, *supra* note 41, at 151–52 (“Should we say . . . that *we would not know* whether to say that it would be correct or to say that it would be incorrect to apply the expression ‘cauliflower’ to roses (that is, that the situation would fall within the margin of vagueness between ‘being correct’ and ‘being incorrect’ . . .) (emphasis added); see *id.* at 177 (“To say that an expression is vague (in a broad sense of vague) is presumably, roughly speaking, to say that there are cases (actual or possible) *in which one just does not know* whether to apply the expression or to withhold it, and one’s not knowing is not due to ignorance of the facts. For instance *one may not know* whether or not to describe a particular man as ‘bald’; and it may be of no help at all to be told exactly how many hairs he has on his head.”) (emphases added).

111. Or bald-to-degree-1, if we are using scalar degrees of baldness to better match ordinary English use the term, which would describe some people as only “somewhat bald,” i.e., bald to a degree between 0 and 1.

fewer hair would render him not bald.¹¹² There is such a number; we just don't know what it is.

Barnett and Solum present their paradigm cases of vagueness in terms of a lack of clarity. Barnett says, "Drafters who, perhaps for political reasons, wish to avoid appearing to endorse a controversial result in a particular situation may use a phrase whose meaning is sufficiently 'fuzzy at the edges' that it is *unclear* whether or not it would reach that result."¹¹³ Solum says, "There are persons who are *clearly* tall and *clearly* not tall, but there are also borderline cases."¹¹⁴ If our no-assertion-without-knowledge and no-knowledge-without-sufficient-evidence-given-the-stakes principles tell us what to do about lack of clarity in general, they should be able to handle at least these paradigm cases of vagueness.

While exclusively-epistemic views of vagueness have not caught on nearly as well as Williamson's views about the relationship of knowledge and assertion, the theory seems to produce satisfying results when applied to vagueness in constitutional interpretation. Consider an instance of vagueness in the law as I see it: my anti-outlier view of the fundamental rights component of the Privileges or Immunities Clause.¹¹⁵ Exactly how many states must give a particular privilege to their citizens for that privilege to count as a "privilege or immunity of citizens of the United States," which all states must respect? Well, it's vague, which is to say, I don't know. 28 out of 50 would clearly not be enough; 48 out of 50 would clearly be enough. In between I have varying levels of certainty. And depending on the stakes, my requisite level of certainty might vary. The line is uncertain, and as we approach it, we lose bits of confidence. 48 states? Definitely yes. 47 states? Definitely yes. 46 states? Definitely yes. 45? Well, pretty definitely yes. At some point, I know not quite where, my confidence level will slip below the confidence level I need for judicial review. Lack of

112. Or not bald-to-degree-1.

113. BARNETT, *supra* note 36, at 118.

114. Solum, *supra* note 106106, at 98.

115. CHRISTOPHER R. GREEN, THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE: INTEGRATING EQUAL CITIZENSHIP, FUNDAMENTAL CIVIL RIGHTS, AND THE CONSTITUTIONAL TEXT (2010), available at <http://ssrn.com/abstract=1658010>.

knowledge about precisely when we lack knowledge matches Williamson's view of higher-order vagueness.¹¹⁶

What if Williamson's account of vagueness is paired with the activismometer? In that case, we can only legitimately assert that something is a privilege of citizens of the United States—and thus, only strike down statutes on that basis—if we are far enough away from the boundary line that we meet the stakes-sensitive standard for knowledge. Relatively activist courts by my definition—that is, who view judicial review as a relatively low-stakes proposition—will be willing to go closer to the line. Resolving issues of vagueness thus involves (a) deciding how much clarity is required for judicial review—i.e., where on our activismometer we should be on the Level-2-to-Level-4 spectrum—and (b) reserving judicial review for cases far enough away from the blurry boundary line to achieve that level of clarity. This isn't a terribly exciting account of how to respond to vagueness, of course, but theories of judicial restraint should probably strive to be mundane.

IV. INTERBRANCH ISSUES AND A DEFENSE OF ENFORCE-BUT-DON'T-DEFEND

Does judicial restraint necessarily increase legislative and executive flexibility? We might think so; less judicial review seems to leave more room for other branches to operate. But my theory of judicial restraint—limiting judicial assertions about the Constitution to occasions when a court has knowledge, judged by the proper stakes-sensitive standard without neglecting sources of relevant evidence—does not mean that legislatures are free from similar obligations. Thomas Cooley has a nice statement of the applicability of restraint principles to all three branches of government in his 1868 treatise:

But when all the legitimate lights for ascertaining the meaning of the Constitution have been made use of, it may still happen that the construction is a matter of doubt. In such a case it seems clear that everyone called to act where, in his opinion, the proposed action would be

116. Put in epistemic modal logic terms, it amounts to the denial of the "4" axiom, $\Box p \rightarrow \Box \Box p$, with " \Box " representing knowledge. See *Modal Logic*, WIKIPEDIA, http://en.wikipedia.org/wiki/Modal_logic.

of doubtful constitutionality, is bound from that doubt alone to abstain from acting. Whoever derives his power from the Constitution to perform any public function, is disloyal to that instrument, and grossly derelict in duty, if he does that which he is not reasonably satisfied the Constitution permits. Whether the power be legislative, executive, or judicial, there is manifest disregard of constitutional and moral obligation by one who, having taken an oath to observe that instrument, takes part in an action which he cannot say he believes to be no violation of its provisions. A doubt of the constitutionality of any proposed legislative enactment should in any case be reason sufficient for refusing to adopt it; and, if legislators do not act upon this principle, the reasons upon which are based the judicial decisions sustaining legislation in very many cases will cease to be of force.¹¹⁷

If the mere act of legislation is an implicit assertion that the legislation is constitutional, then we can use the interest-sensitivity of knowledge and knowledge as the norm of assertion to construct a legislative activismometer as well. Legislatures might remain too passive by failing to conduct an investigation into evidence relevant to their constitutional responsibilities (legislative activismometer level 1, too low). They might remain confessedly ignorant of whether legislation is constitutional, but pass it anyway, leaving it to the courts to decide (legislative activismometer level 5, too high). Finally, they might apply different standards of proof to the conclusion that their own actions are constitutional (beyond a reasonable doubt, clear and convincing, or preponderance of the evidence, levels 2, 3, and 4).

Because the stakes in judges striking down legislation might not be the same as the stakes in legislatures passing legislation, the proper levels on the two activismometers might not be the same. Indeed, there are strong distinctions between the cases of legislative and judicial action; the concern of judicial finality, which motivated Iredell to impose a “beyond dispute”/“not doubtful” limit on judicial review in his 1787 correspondence with Spaight, and which motivated the Supreme Court to impose a clear-and-convincing requirement for loss of parental rights in *Santosky v.*

117. COOLEY, *supra* note 99, at 73–74.

Kramer,¹¹⁸ would not apply to most cases of legislation.¹¹⁹

Further, there might be different proper levels on the legislative activismometer—or a different assessment of the threshold is-there-an-implicit-assertion-here-at-all issue—for rights and powers. Perhaps a legislature passing a law is implicitly asserting that the law is within the legislature’s constitutional power, but not implicitly asserting that the law does not violate anyone’s constitutional rights.¹²⁰ The level of proof required with respect to those two issues could also differ.

One consequence of the legislative duty to consider constitutional questions, and not to act if in doubt that their actions are constitutional, is that a legislature might misbehave by passing legislation that only *might* be constitutional—as opposed to legislation the legislature *knows* is constitutional—and courts would, if the situation is not any clearer by the time of judicial review, properly allow it to stand because, after all, it might be constitutional. Of course, as noted above, courts would take the legislative failure to properly digest the constitutional question as both a reason to consider the issue quite carefully themselves, and as the grist for a negative inference on relevant facts that might help make unconstitutionality of legislation sufficiently clear. But the possible paradox, if it is a paradox, remains: it might be that legislatures clearly *misbehave* (by failing to

118. 455 U.S. 745 (1982).

119. In some cases, however, judicial review would probably not be available, for instance if no one would be likely to have standing to challenge legislation, perhaps because its effects are secret. *See, e.g.*, *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138, 1154 (2013) (finding no standing based on a fear of being wiretapped) (“[T]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.”) (citation omitted).

120. Gary Lawson sharply distinguishes powers from rights. Lawson, *supra* note 55, at 426 (“If the federal government has satisfied its initial burden of proof by showing that it has the enumerated power to act, then the burden of proof would naturally shift to the person who is claiming that the Constitution affirmatively *forbids* that which the government has done. The person challenging the government action—saying, ‘No, you can’t do this because there’s a provision in the Constitution that says that you can’t’—becomes the asserter, and hence assumes the burden of proof, and hence the burden of indeterminacy. If one cannot establish (given the appropriate standard of proof) the meaning of a rights-bearing provision of the Constitution, such as a provision of the Bill of Rights, then anyone who seeks to rely on that provision will lose, as that person is now making an insupportable claim about what the text allows.”).

consider constitutional issues) even if they do not clearly *act unconstitutionally*. Judicial review under Level 3 activism is limited to clearly unconstitutional laws, not clear instances of legislative Level 5 error—i.e., cases where the legislature went ahead and legislated, heedless of whether a statute was constitutional.¹²¹

Similarly for executive action: does the taking of executive action implicitly assert that the action is constitutional, and if so, how much proof of constitutionality is required? We can also have a special activismometer for executive review—that is, executive action finding statutes unconstitutional. We could thus have executive-action and executive-review activismometers. Indeed, as Federalist 78 seems to contemplate (the judiciary “must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments”), we might also have executive constitutional review of judicial decrees, and again different standards to govern it—an executive-judgment-enforcement activismometer. Those horrified at the prospect of such a power might limit it to super-super-clear cases. Judicial, executive, or legislative supremacy can thus come in degrees.

The distinction between our judicial-review and executive-review activismometers supplies a possible foundation for the Obama Administration’s enforce-but-don’t-defend (EBDD) approach to the constitutionality of the Defense of Marriage Act (DOMA).¹²² If judicial review

121. That is, I understand judicial review as making an assertion about the Constitution itself, not just an assertion about the legislature’s duty with respect to the Constitution. See *supra* note 58 and accompanying text.

122. See Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 13, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (“[T]he President has instructed the Department not to defend the statute [DOMA] in Windsor and Pedersen, now pending in the Southern District of New York and the District of Connecticut. I concur in this determination. Notwithstanding this determination, the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive’s obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law’s constitutionality. This course of action respects the actions of the prior Congress that enacted DOMA, and it recognizes the judiciary as the final arbiter of the constitutional claims raised.”). For criticism, see, e.g., Michael Ramsey, *Standing and Gay Marriage*, THE ORIGINALISM BLOG (Dec. 13, 2012), <http://originalismblog.typepad.com/>

requires a smaller degree of proof than executive review, and the administration thought the level of proof fell between those two thresholds—enough for judicial review, not enough for executive review—then the administration could take a position in favor of a court striking down the law, even though unwilling to refuse enforcement on constitutional grounds. Such a resolution would be akin to a compensate-but-don't-imprison (CBDI) policy when evidence falls between civil and criminal standards of proof.¹²³

If executive review requires even a minimal amount of proof, then the implicit-assertions-of-constitutionality-from-executive-action trigger for the executive-action activismometer must be limited, perhaps to situations in which executive officials have discretion under statutes. Imagine a case in which the legislature tells the executive to do X, and executive officials are unsure whether X is constitutional. If simply doing X—i.e., obeying the statute—is the implicit assertion that X is constitutional, and executive officials don't know that (by whatever standard), then the mere existence of such uncertainty would be warrant for executive review in refusing to enforce a statute on constitutional grounds. That would be inconsistent with the need for knowledge of unconstitutionality in order to exercise executive review. Sufficiently poor information to support agnosticism on a particular constitutional issue would

the-originalism-blog/2012/12/standing-and-gay-marriagemichael-ramsey.html (“[T]his procedural mess is entirely the fault of the Obama administration, which I think is acting unconstitutionally (or at least, improperly) in enforcing the statute in the first place but then refusing to defend it. Either the President thinks the statute is unconstitutional, in which case he should not enforce it, or the executive branch thinks the statute is (or may be) constitutional, in which case he should enforce and defend it. That follows from, among other things, the President’s oath to ‘preserve, protect and defend the Constitution’ (Art. II, Sec. 1). It’s inexcusable, in my judgment, for the President to take Windsor’s money, and then say that the law by which he took her money is unconstitutional.”).

123. At the DOMA oral argument in Windsor, Chief Justice Roberts asked why the president did not have the “courage of his convictions.” See Transcript of Oral Argument at 12, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-307_c18e.pdf. EBDD would make sense, though, if the president had mid-range convictions on the constitutional issue. Justice Scalia suggested the president had decided that DOMA was not “not so unconstitutional that [he was] not willing to enforce it.” *Id.* at 21. But the scalarity could be epistemic, not ontological: DOMA was not so *clearly* unconstitutional, perhaps, that the president was not willing to enforce it.

produce a conflict between the knowledge-required-for-executive-review and knowledge-required-for-executive-action norms.

Limits on which executive actions count as implicit assertions of such actions' constitutionality correspond to the limits on the Gricean Quantity maxim. Speakers are only obligated to supply information to the extent of the "current purposes of the exchange,"¹²⁴ and the obligation to make assertions about the Constitution, simply from the existence of executive action, would similarly be limited to cases where the legislature has not already taken responsibility for the constitutionality of an action. If executive review requires sufficient evidence, and it is possible for that burden not to be met, then the obligation to speak to constitutional issues must be limited to cases when executive action does not contradict statutory requirements. If failing to act would contradict what a statute requires, and if it is possible for an executive official to lack sufficient evidence to do *that* (i.e., to fail to enforce the statute), then it would be perverse to require the executive to have, in *all* cases, sufficient evidence of the constitutionality of its own actions in order to comply with the statute. Executive officials need at least the theoretical power to pass the constitutional buck to Congress in appropriate cases: the power to say that deciding the constitutionality even of the official's own actions is, in the absence of adequate evidence, not the official's job, but Congress's.

Intra-executive distributions of interpretive responsibility and authority are even clearer examples of the not-my-job defense to charges of constitutional unfaithfulness. Privates in the Army, for instance, are not implicitly asserting the constitutionality of their conduct pursuant to the President's orders, simply in virtue of their actions executing those orders. In particular cases there might be a duty not to follow orders, of course, but the entire concept of being a subordinate in the executive branch means that *following* orders is not ipso facto *agreeing* with them. The judicial branch, too, has a hierarchy of courts, with a distribution of interpretive responsibility and authority among them. The jury, too, might be authorized or

124. See *supra* note 46 and accompanying text.

responsible for making determinations related to constitutionality; there is nothing necessarily wrong with judges refraining from judgment, or even investigation, in areas that are constitutionally assigned to others. In short, jurisdictional limits—limits on the authority and responsibility to speak about the law, and therefore to obtain knowledge about it as best one can—are pervasive in our constitutional scheme.¹²⁵

One consequence of this conclusion is that Marbury's oath argument¹²⁶ must be combined with others, such as the province-and-duty-to-say-what-the-law-is argument,¹²⁷ in order to justify judicial review. Low-level executive officials take the Article VI oath as well. Taking an oath to obey the Constitution is consistent, without more, with lacking authority to interpret for oneself.¹²⁸

V. PRECEDENT AND THE NOT-MY-JOB DEFENSE

Finally, we can apply an inter-temporal version of the distribution-of-interpretive-authority issue to think about

125. Recall as well Kant's comments on the need for "artificial unanimity," *supra* note 48 and accompanying text.

126. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179–80 (1803) ("[I]t is apparent, that the framers of the Constitution contemplated that instrument, as a rule for the government of courts, as well as of the Legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?").

127. See *id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.").

128. This criticism of the oath argument, and a not-my-job limit to the responsibility to speak about the Constitution, is essentially the same argument presented in *Eakin v. Raub*, 12 Serg. & Rawle 330, 353 (Pa. 1825) (Gibson, J., dissenting) ("The oath to support the constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty; otherwise it were difficult to determine what operation it is to have in the case of a recorder of deeds, for instance, who in the execution of his office has nothing to do with the constitution. But granting it to relate to the official conduct of the judge, as well as every other officer, and not to his political principles, still it must be understood in reference to supporting the constitution, *only as far as that may be involved in his official duty*; and consequently if his official duty does not comprehend an inquiry into the authority of the legislature, neither does his oath.") (emphasis added).

precedent. Gary Lawson has suggested that *Marbury's* argument for judicial review entails that precedent is unconstitutional; a court's decision at time 1 has no more right to be preferred to a statute by a court at time 2 than would a statute.¹²⁹ Adhering to an earlier court decision rather than the Constitution is, to Lawson, abdication of one's responsibility in virtue of the constitutional oath. However, the interbranch and intraexecutive not-my-job defenses can be used intertemporally as well to justify such adherence. Precedent can represent a temporal division of interpretive labor, rather than, as Lawson sees it, necessary unfaithfulness in performing one's own job.

The not-my-job defense allows that some officials, even those whose jobs directly involve constitutional issues, come to the scene with those constitutional issues already settled, or with others having taken responsibility for decisions regarding the Constitution. Courts frequently decline to revisit questions of constitutional law because it is "too late in the day"¹³⁰ to do so. Two early instances of the same idea

129. Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J. L. & PUB. POL'Y 23, 27 (1994) ("Suppose now that a court is faced with a conflict between the Constitution on the one hand and a prior judicial decision on the other. Is there any doubt that, under the reasoning of *Marbury*, the court must choose the Constitution over the prior decision? If a statute, enacted with all the majestic formalities for lawmaking prescribed in the Constitution, and stamped with the imprimatur of representative democracy, cannot legitimately be given effect in an adjudication when it conflicts with the Constitution, how can a mere judicial decision possibly have a greater legal status?").

130. For instances in which the Supreme Court or its individual justices have said that it is (or may be) "too late in the day" to reconsider various precedents. See, e.g., *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1959 (2008) ("[I]t is too late in the day in effect to overturn the holding in [*Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969)], that case (nor does *CBOCS* ask us to do so) on the basis of a linguistic argument that was apparent, and which the Court did not embrace at that time."); *Philip Morris USA v. Williams*, 549 U.S. 346, 360–61 (2007) (Stevens, J., dissenting) ("It is far too late in the day to argue that the Due Process Clause merely guarantees fair procedure and imposes no substantive limits on a State's lawmaking power."); *Kowalski v. Tesmer*, 543 U.S. 125, 135 (2004) (Thomas, J., concurring) ("It is doubtful whether a party who has no personal constitutional right at stake in a case should ever be allowed to litigate the constitutional rights of others It may be too late in the day to return to this traditional view."); *Till v. SCS Credit Corp.*, 541 U.S. 465, 483 (2004) ("Because our decision in [*Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997)] assumes that cramdown interest rates are adjusted to 'offset,' to the extent possible, the risk of default . . . and because so many judges who have considered the issue (including the authors of the four earlier opinions in this case) have rejected the risk-free approach, we think it too late in the day

appeared in *Stuart v. Laird* in 1803¹³¹ and (hypothetically) in *McCulloch v. Maryland* in 1819.¹³² Following the resolution

to endorse that approach now.”); *United States v. Ursery*, 518 U.S. 267, 314 (1996) (Stevens, J., dissenting) (“The notion that the label attached to the proceeding is dispositive runs contrary to the trend of our recent cases. . . . Indeed, in reaching that conclusion [in a 1989 case], we followed a 1931 decision that noted that a tax statute might be considered punitive for double jeopardy purposes. It is thus far too late in the day to contend that the label placed on a punitive proceeding determines whether it is covered by the Double Jeopardy Clause.”); *Hubbard v. United States*, 514 U.S. 695, 710 (1995) (“[T]he adjudicative functions exception to section 1001 has been suggested or recognized by appellate decisions since 1962, not long after the Supreme Court decided that section 1001 applies to matters within the jurisdiction of the judicial branch. In these twenty-three years, there has been no response on the part of Congress either repudiating the limitation or refining it. It therefore seems too late in the day to hold that no exception exists.” (quoting *United States v. Mayer*, 775 F.2d 1387, 1390 (9th Cir. 1985)); *United States v. Lopez*, 514 U.S. 549, 601 n.8 (1995) (Thomas, J., concurring) (“Although I might be willing to return to the original understanding [of the Commerce Clause], I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean.”); *White v. Ill.*, 502 U.S. 346, 352–53 (1992) (“Such a narrow reading of the Confrontation Clause which would virtually eliminate its role in restricting the admission of hearsay testimony, is foreclosed by our prior cases. . . . We think that the argument presented by the Government comes too late in the day to warrant reexamination of this approach.”); *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 579 (1990) (“[I]t is too late in the day for this Court to profess that the Seventh Amendment preserves the right to jury trial only in cases that would have been heard in the British law courts of the 18th century.”); *Jefferson Cnty. Pharm. Ass’n v. Abbott Labs.*, 460 U.S. 150, 154 n.6 (1983) (“It is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities.”); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (“It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege”).

131. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (considering constitutional objection to circuit riding, with Marshall recused because he was the one who had ridden circuit in the case below: “To this objection, which is of recent date, it is sufficient to observe, that practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.”).

132. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) (“[H]as Congress power to incorporate a bank? It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested [sic] by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.”).

of two of their disagreements, Alexander Hamilton and James Madison each acquiesced in the contrary judgments of history: the Senate's power to prevent an officer's removal, where history favored Madison, and Hamilton thus regarded it as "settled in practice,"¹³³ and the federal power to charter a bank, where history favored Hamilton, and Madison thus agreed to "waiv[e] the question" as president.¹³⁴

Expressions of the idea that it is sometimes too late in the day to revise settled precedents are much more frequent than precise accounts of exactly how late is too late. Richard Epstein has stated, "I do not have, nor do I know of anyone who has, a good theory that explains when it is appropriate to correct past errors that have become embedded in the legal system."¹³⁵ A problem for which even Richard Epstein lacks a theory is a difficult problem indeed!

133. THE FEDERALIST NO. 77, at 202 (Alexander Hamilton) (George F. Hopkins ed., 1802) ("It has been mentioned as one of the advantages to be expected from the co-operation of the senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint. [Footnote:] This construction has since been rejected by the legislature; and it is now settled in practice, that the power of displacing belongs exclusively to the president."). For the issue of Hamilton's approval of the footnote, see, e.g., Seth Barrett Tillman, *The Puzzle of Hamilton's Federalist No. 77*, 33 HARV. J. L. & PUB. POL'Y 149, 166–67 n.38 (2010).

134. See Memorandum from James Madison to the Senate of the United States, Veto Message on the National Bank (Jan. 30, 1815), available at <http://millercenter.org/president/speeches/detail/3626> ("Waiving the question of the constitutional authority of the Legislature to establish an incorporated bank as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation. . . .").

135. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1455 (1987). There has been a lot of work done on precedent since 1987, of course, but precise criteria are hard to come by. For one excellent investigation providing some historical support for a reliance-based preservation of entrenched precedent, while still applying a presumption that demonstrably-erroneous precedent should be overruled, see Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 20 n.62 (2003) (citing *Rogers v. Goodwin*, 2 Mass. (2 Tyng) 475, 477 (1807); *Bevan v. Taylor*, 7 Serg. & Rawle 397, 401–02 (Pa. 1821); *Girard v. Taggart*, 5 Serg. & Rawle 19, 539–40 (Pa. 1818) (opinion of Duncan, J.); *Kerlin's Lessee v. Bull*, 1 Dall. 175, 179 (Pa. 1786); *Nelson v. Allen*, 9 Tenn. (1 Yer.) 360, 376–77 (1830); *Taylor v. French*, 19 Vt. 49, 53 (1846); *Fisher v. Horicon Iron & Mfg. Co.*, 10 Wis. 351, 353–55 (1860)).

One established model for deciding too-embedded-to-correct questions is adverse possession. Adverse possession is a well-worn, time-tested model for rendering systems of property rights workable and for preventing a strict requirement for practically-unobtainable consent from causing complete gridlock. Sometimes it is *much* more important that something be settled than that it be settled right, and this applies both to constitutions and to property rights. “If we had no doctrine of adverse possession, we should have to invent something very like it.”¹³⁶ My suggestion here will, however, not offer any precise criterion to govern the retention of possibly-incorrect precedent. I suggest only that the power to retain and follow old precedent without re-asserting the *correctness* of the precedent—that is, without saying that the precedent is authorized by the Constitution—simply assigns the power to interpret the Constitution to the Court at time 1, not the Court at time 2. Precedent is thus a buck-passing move precisely analogous to the buck-passing moves from the executive branch to the legislative branch, which a requirement of proof for executive review must allow, and buck-passing moves among executive officials, which any non-anarchic system of executive power would need.

When to let old constitutional determinations lie is, like the principles of restraint defended above, an issue of constitutional construction. It is not part of constitutional interpretation—the derivation of meaning from the constitutional text—but it is yet a critical component of a full account of constitutional adjudication. Principles of constitutional prescription govern *when* to interpret the Constitution, and that issue is a distinct question from deciding *what* it means. Allowing an earlier possibly-incorrect decision about the Constitution to stand is an instance of deciding not to interpret the Constitution for oneself—or at least, of not allowing one’s interpretation of the Constitution to interfere with one’s job. Accordingly, a theory of constitutional interpretation that only tells us *how* to interpret a constitution, once we have decided that interpretation is required by our job, will generally not

136. WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 860 (3d ed. 2000).

resolve when to keep erroneous decisions. Of course, a constitution may have particular provisions relevant to when it is proper, or not, to let possibly-incorrect decisions stand, and a theory of interpretation as applied to those provisions would help resolve such issues, but the theory of how to interpret would not resolve them on its own. Because when-to-interpret questions are critical to the manner in which a Constitution will be applied and implemented, yet are distinct from straightforward questions of constitutional interpretation, they are, like principles for handling uncertainty, issues of constitutional construction.

Recognizing the distinction between *when* to interpret and *how* to interpret is the key to seeing why recognizing the power to adhere to a possibly-incorrect earlier decision does not entail recognizing a general power to revise the Constitution freely. Deciding that it is more important that some issues are more importantly settled than settled correctly does not alter the criterion for what answers are actually correct. The Constitution still means what it means, and interpreters subject to an adverse-possession rule need neither surrender their convictions about its meaning through the equivalent of an intellectual lobotomy, nor believe that interpreters are free to shift and morph the meaning of the Constitution without any constraint. Precisely because it is part of constitutional construction, and not constitutional interpretation, an adverse-possession model for adherence to incorrectly-decided precedent would merely limit the power of present interpreters to *give effect* to their interpretations; it would not affect their interpretations as such.

CONCLUSION

Constitutional ontology—what renders constitutional claims *true* or *false*—is distinct from constitutional epistemology—what renders constitutional claims *known* or *unknown*. The constitutional epistemology I present here requires those who apply the constitution to do four things. First, they should refrain from making pronouncements about the Constitution when ignorant of relevant facts. Second, they should recognize the contingency of particular jobs' responsibility and authority to speak about the Constitution and stay within those parameters, which

sometimes means leaving constitutional interpretation to others, even when others err. Third, they should apply a level of proof for constitutional questions appropriate to the discharge of their particular job, recognizing the contingency of that level of proof for those in different jobs. Fourth, they should not ignore any considerations relevant to the Constitution's requirements for issues properly within their jurisdiction.