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THE THREE STEPS REQUIRED FOR ORIGINALIST INTERPRETATION: HOW DISTORTIONS APPEAR AT EACH STAGE

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Originalism is often the most satisfactory method of interpreting texts. But originalism is only one of a number of modalities of interpretation, all of which have to be kept in mind. Sometimes originalism is not the best method of reading a text.

Originalist interpretation requires three distinct steps. First, a court must determine that originalism is the preferred method of finding meaning in the text at issue. This decision can create problems if originalism is actually not the method the court plans to use even though the court has said so. And sometimes the court may decide in the midst of the process to use parts of another method.

The second step is to find the original meaning. Here, the problem is that there are many sources one can consult to find this meaning, ranging from those close to the time of the event to those spread over time. Finally, the third step is to fit the original meaning to the different circumstances of today. Sometimes, this step receives only casual treatment, perhaps because the court has already slogged through the hard work inherent in the first two steps and implicitly finds this accomplishment enough. Sometimes the differences are so great that originalism cannot reliably be used.

The only way to deal with these problems is for the court to try its way through the process, retaining an awareness of the difficulties in each step and the possibility of their cumulating.

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TABLE OF CONTENTS

I. INTRODUCTION

Originalism is often the superior modality for reading texts.[1] This historical method must be understood, however, as only one of many modalities for the purpose. Professor Bobbitt's[2] list of six methods of reading the Constitution is one of the most authoritative descriptions of different modalities of interpretation.[3] As this article will argue, originalism is the method that most often gives satisfactory results,[4] although not always.

In Bobbitt's taxonomy, there are six modalities of constitutional interpretation: textual, historical, structural, doctrinal, prudential, and ethical.[5] The textual method focuses upon the logic of the language, while the historical method looks to a past meaning:[6] the meaning at the time of adoption of the language, in the case of originalism. The structural method seeks to preserve institutions set up by the provisions at issue, the doctrinal method finds meaning from earlier decisions, the prudential modality provides a "policy" rationale by considering the effects of the various interpretations, and the ethical method attempts to find meaning that has an appropriate moral significance.[7]

But the point here is that the historical method, and specifically the originalist modality, often provides satisfactory results.[8] Still, all of the

1. *See infra* Part II.
2. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).
3. *See* Jack M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1774-75 (1994) (treating Bobbitt's categories as authoritative).
4. There is authority for the view that originalism is usually the superior method. *See* Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067 (2018).
5. Balkin & Levinson, *supra* note 3, at 1775.
6. *Id.*
7. *See* BOBBITT, *supra* note 2, at 12-13.
8. *See infra* Part II. *See also Wis. Cent. Ltd.*, 138 S. Ct. at 2074 (explaining why originalism is the preferred method of analysis).

other methods have their places,[9] and virtually no one claims that sound determination of which test to apply is easy.[10]

The trouble is, however, that the appeal of originalism often comes wrapped in difficulties that can leave the result vulnerable to fundamental criticisms.[11] The difficulties are hard to avoid. To use an originalist method of interpretation, one has to go through three discrete steps.[12] First, the interpreter must recognize the need for a reading that goes beyond the obvious and the literal: a reading, that is, that requires originalism.[13] Second, the reader must figure out the original meaning, a puzzle that often is confusing.[14] Finally, there is the third step: analogizing the original meaning with the claimed parallels of today.[15] All three steps can, in particular cases, be challenging in practice.

This article begins, in Part II, by considering the meaning of originalism and its potential advantages. This section describes different ways of using originalism. The article then moves on to consider the steps in applying this modality. Part III begins by considering the first step, recognizing the need for interpretation, and then takes on the second step: that of assigning an accurate historical meaning to the doctrines at issue. The next part of this article then sets out the difficulties inherent in the third step: fitting the historical meaning to the situations of today.

A final section sets out the author's conclusions. These include recognition of the tendency of interpreters to cease their hard work after generating apparently sound results in step two by figuring out historical meanings, and then simply finessing the third step by settling on too-facile analogies of historical meanings to modern doctrines. Another set of conclusions deals with the situations that tend to confuse or frustrate sound completion of each step and with methods for avoiding prevarication. These conclusions make clear another thrust of the article, which is to point out that sometimes, the three steps make originalism so unpredictable and uncertain that in the end, it may not always furnish the best method of reading the text.

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9. *See* BOBBITT, *supra* note 2, at 8-9, 119 (explaining that all six modalities can confer legitimacy).

10. *Id.* at 12-13.

11. *See infra* Part III (describing the steps involved in originalism and the difficulties inherent in them).

12. *See infra* Part III.

13. *See infra* Section III.A.

14. *See infra* Section III.B.

15. *See infra* Section III.C.

It is believed that this description of the three steps is original with the author. Each step is analyzed here, together with examples showing how each can lead to dubious results if not properly applied.

II. THE ORIGINALIST APPROACH

In simple terms, originalism means the application of the original meaning of a doctrine. That is, it uses the general meaning of the concepts underlying the doctrine at the time of its adoption.[16] In interpreting the Constitution, for example, originalism would call for applying the understanding that the Framers would have shared about the doctrines they adopted in 1789.[17] In interpreting the Civil Rights Act of 1964, originalism would require a focus on the general meaning as understood by the legislators at the time they passed the statute.[18]

But this simple statement raises a range of subsidiary questions. One inquiry concerns the precise incident that should concentrate the search for meaning. Is it the Framers' settlement of the terms of the Constitution in Philadelphia that matters, or is it the debates and votes on ratification?[19] Different answers to that question may give different meanings to an originalist interpretation.[20] And then, where does one find authoritative indications of the meanings that the Founders shared? Perhaps the answers lie in their debates, although this approach leaves gaps when only one side of an obviously live controversy draws forth most of the commentary.[21]

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16. *See* BOBBITT, *supra* note 2, at 12-13.

17. That is, during the year of adoption of the Constitution. *See, e.g.*, *infra* Section III.B.

18. See *infra* Section III.A for an example.

19. *See generally Elliot's Debates – About*, LIBR. OF CONGRESS, https://memory.loc.gov/ammem/amlaw/lwed.html (last visited Jan. 4, 2021) (collecting sources, including Madison's notes at the Constitutional Convention and debates in the State legislatures on ratification).

20. For example, the debates on ratification contain a great deal that explains the Contract Clause, which prohibits impairment by the States of the obligations of the contracts. The debates at the Constitutional Convention contain little that explains it, and the economic purposes of the Clause would not appear if an interpreter looked only to the Convention. *See generally* David Crump, *The Economic Purpose of the Contract Clause*, 66 SMU L. REV. 687 (2013) (analyzing the original meaning of the Clause).

21. *Cf.* Howard Jarvis Taxpayers Ass'n v. Padilla, 363 P.3d 628, 674-75 (Cal. 2016) (Liu, J., concurring) (citing 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 176-77 (1881)). In THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, Jonathan Elliot memorialized the unopposed statement of James Iredell in the South Carolina ratification debates concerning the role of state legislatures in the amendment process. *Id.* In spite of lack of real debate, the court in *Howard Jarvis Taxpayers Ass'n* used Iredell's statement to resolve issue of power of state legislature to have voters determine whether to send advisory message to Congress. *Id.*

Or perhaps the answers lie in much broader sources, such as dictionaries of the times.[22] One might even conclude that these different sources call forth analyses that resemble not just different answers, but different kinds of originalism.[23]

Then, there are still more diffuse historical approaches that are related to, if not exactly equivalent to, originalism. For example, an interpreter might try to discern the historical issue to which a given doctrine was supposed to supply a solution.[24] This method sometimes tends to elevate the highly specific question at issue, which may have no close analog today,[25] over the greater principles established by the doctrines at issue, which probably ought to prevail in the interpretation of a Constitution composed of grandiloquent generalities.[26]

Textual interpretation, or direct focus on the words and context of the provision being interpreted, is closely related to originalism,[27] and, in fact, it sometimes is considered a type of originalism.[28] After all, the Framers did not all agree on the terminology they used in their debates, or on dictionary definitions, or on the desired solutions to divisive issues.[29] Instead, what they agreed on is the texts of the provisions they adopted. Sometimes, a conclusion about the meaning of a text is different from a construction resulting from a focus on the original understanding of the provision adopted. In that situation, a textual approach may be, but is not necessarily, superior to an originalist one.

22. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2671 (2015) (consulting several dictionaries written near in time to the Constitution).

23. In shifting from Framers' debates to the dictionaries, for example, a court consults not the terms used by the Framers but the meanings observed by others.

24. *See infra* Section III.C (dealing with the decision in United States v. Jones, 565 U.S. 400 (2012)).

25. *See infra* Section III.C (discussing the *Jones* case in which specific circumstances were given more weight than general principles).

26. *See* David Crump, *How Do the Courts* Really *Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J. L. & PUB. POL'Y 795, 837-38 (1996) (explaining that a constitution ought to be so composed, because a constitution sets out fundamental principles).

27. Both of these modalities focus upon the doctrine at issue, while other methods use extrinsic considerations. *See* Ilya Somin, *"Active Liberty" and Judicial Power: What Should Courts Do to Promote Democracy?*, 100 NW. U. L. REV. 1827, 1851 (2006).

28. *See id.* at 1851-52 (pointing how a Justice of the Supreme Court had conflated the two methods).

29. *See id.* at 1832.

III. THE THREE STEPS REQUIRED FOR ORIGINALIST INTERPRETATION

A. Recognizing the Need for an Originalist Approach (and Using It)

Sometimes the question for interpretation depends on an initial recognition of the need for an originalist approach. This issue depends upon a court's conclusion that interpretation is better resolved by resorting to originalism than to another method, such as textualism. Justice Gorsuch's opinion in *Bostock v. Clayton County*[30] exemplifies the struggle to decide between these two modalities. The question, there, was the meaning of the provision in the Civil Rights Act of 1964 prohibiting employment decisions made on account of "sex."[31] Did that term encompass differences based on sexual orientation, or did it cover only those involving gender?[32]

Justice Gorsuch could have begun the analysis with observations he had made in *Wisconsin Central Ltd. v. United States*,[33] which provide a solid description of the originalist approach:

> Written laws are meant to be understood and lived by. If a fog of uncertainty surrounded them, if their meaning could shift with the latest judicial whim, the point of reducing them to writing would be lost. That is why it's a "fundamental canon of statutory construction" that words generally should be "interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute."[34]

In fact, the opinion in *Bostock* suggests this approach as a beginning.[35] This would have seemed to end the inquiry, because there was no basis for saying that the word "sex" included sexual orientation in 1964, and the parties agreed to this assumption for the sake of argument.[36]

But Justice Gorsuch did not follow his own advice. Instead, his *Bostock* opinion pronounces that the originalist approach is "just a starting point,"[37] and it takes a twist that, instead of originalism, wanders into what seems to be textualism.[38] It considers the statute not by what

30. Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020).
31. *Id.* at 1738; *see* 42 U.S.C. §§ 2000e(k), 2000e-2(a)(1) (1964).
32. *Bostock*, 140 S. Ct. at 1739.
33. Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067 (2018).
34. *Id.* at 2074 (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)).
35. *Bostock*, 140 S. Ct. at 1738 (calling for interpretation "in accord with the ordinary public meaning of its terms at the time of its enactment").
36. *Id.* at 1739.
37. *Id.*
38. The opinion focuses on the language and its meaning today. *Id.* ("The question isn't what 'sex' meant, but what Title VII says about it.").

the legislators meant by the term "sex" when they wrote it, but rather what is meant by their words.[39] The opinion seems to make the question resolve itself by the overall logic of the language as used today, not as in 1964.[40] A difference based on sexual orientation, Justice Gorsuch reasoned, necessarily includes a difference based on sex, because differences in sexual orientation cannot occur absent differences in sex.[41] By now, Justice Gorsuch had arrived at a result that seemed most unlikely to resemble the meaning of the words at the time Congress enacted the statute.[42]

The dissenters instead saw a steady reliance on the historical approach as more appropriate.[43] If one considered what was meant publicly by the term "sex" during the 1960's, the conclusion would be clear.[44] It did not include sexual orientation.[45] The result reached by this originalist approach, according to the dissenters, was more closely aligned with the understanding of the legislators.[46] Thus, originalism gave a meaning coinciding with what the adopters of the language thought they meant, while Justice Gorsuch's deviation into what appears to be a textualist approach depended instead on the logic of today, applied to the language itself. Justice Alito labeled the *Bostock* opinion as a "brazen abuse" and as "preposterous."[47]

To some commentators, the switcheroo applied by Justice Gorsuch was not just wide of the mark, but far wide of it. One usually circumspect source became unusually colorful in describing the Justice's "living Constitution trance."[48] This staid commentator, the *Wall Street Journal*, went on to speculate that "[a]n alien appears to have occupied the body of Justice Neil Gorsuch as he wrote Monday's opinion in *Bostock v. Clayton County*, which sometimes happens when Justices breathe the rarified air of the Supreme Court building."[49]

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39. *Id.*

40. *Id.* at 1740.

41. *Bostock*, 140 S. Ct. at 1741 (explaining that an employer firing a male employee who is attracted to men but not a female employee who is attracted to men is discriminating based on sex).

42. The parties so stipulated. *Id.* at 1739.

43. " ' [S]ex' still means what it has always meant." *Id.* at 1755 (Alito, J., dissenting).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Bostock*, 140 S. Ct. at 1755. Justice Kavanaugh also dissented. *Id.* at 1822 (Kavanaugh, J., dissenting).

48. The Editorial Board, Editorial, *Gorsuch v. Gorsuch*, WALL ST. J. (June 16, 2020, 7:38 PM), https://www.wsj.com/articles/gorsuch-vs-gorsuch-11592350714.

49. *Id.*

B. The Second Step: Finding an Original Meaning

If a court first decides upon a historical approach such as originalism, it must next assign an original meaning to the doctrine at issue. The Supreme Court's tortuous path in interpreting the Confrontation Clause and its exclusion of some hearsay statements in criminal cases provides an example.[50] A textual approach was impractical in resolving the issue, because the prohibition of hearsay is not explicit in the clause, and the language requires a large measure of implication to give it meaning.[51] The resultant series of decisions shows the difficulty of the ostensibly simple exercise involved in assigning an original meaning to a doctrine of long ago.[52]

The Confrontation Clause story begins with the Court's decision in *Ohio v. Roberts*,[53] which required the Justices to fashion a test for determining which types of hearsay were excluded by the clause.[54] Some kinds of hearsay, such as statements against interest[55] by codefendants, are equivalent to unconfronted witness statements, but other kinds, such as business records[56] and excited utterances,[57] hardly seem to fit that characterization. One type of declaration carried a substitute for created evidence, while the other did not. The *Roberts* Court made the distinction with a relatively clear and workable test. Hearsay could be admitted in compliance with the Confrontation Clause if it carried indicia of reliability (or trustworthiness),[58] which was a historical basis for establishing exceptions to the hearsay rule.[59]

Then came *Crawford v. Washington.*[60] The Court's prior decisions about the doctrine of stare decisis[61] indicated that *Ohio v. Roberts* should

50. *See generally* David Crump, *Overruling Crawford v. Washington: Why and How*, 88 NOTRE DAME L. REV. 115 (2012) [hereinafter Crump Confrontation] (discussing standards for interpreting the Confrontation Clause).

51. That is, the interpretive issue is not set forth in the language of the Clause. *See generally id.* (discussing the proper interpretation of the Clause).

52. *Id.* at 116-18 (discussing varied treatment of the Clause).

53. Ohio v. Roberts, 448 U.S. 56 (1980).

54. *Id.* at 66 (holding that the Confrontation Clause does not exclude hearsay that "bears adequate 'indicia of reliability' ").

55. FED. R. EVID. 804(b)(3).

56. FED. R. EVID. 803(6).

57. FED. R. EVID. 803(2).

58. *Roberts*, 448 U.S. at 66.

59. See FED. R. EVID. 803 advisory committee's notes to 1972 proposed rules.

60. Crawford v. Washington, 541 U.S. 36 (2004).

61. *See* Crump Confrontation, *supra* note 50, at 120-25 (discussing the Court's decisions about departure from stare decisis).

have been preserved,[62] but Justice Scalia's opinion ignored that issue.[63] The main question, said Justice Scalia, was whether the hearsay statements at issue were "testimonial."[64] This allegedly originalist meaning, Justice Scalia said, derived from the history of the hearsay rule as it was treated before the adoption of the Confrontation Clause.[65] The *Crawford* opinion offered a number of decisional examples in which Justice Scalia claimed that the outcome depended on whether the evidence at issue was testimonial, although none of the examples explicitly made the answer depend on that question.[66]

Justice Scalia emphasized, as an example, *Sir Walter Raleigh's Case* in which the defendant was accused of conspiring against the king.[67] A principal piece of evidence against Raleigh was a written statement by a purported witness, Lord Cobham, who was incarcerated nearby.[68] Raleigh objected, arguing that the Crown instead should produce Lord Cobham as a live witness, but the judges refused.[69] From this precedent, Justice Scalia concluded that the concern of the Confrontation Clause, and its original meaning, was the exclusion of "testimonial" hearsay.[70]

But the opinion shows how slippery, and how subject to manipulation, the determination of original meaning can be. There was a second and equally offensive item of evidence at issue in *Raleigh's Case*. This second piece of evidence did not fit Justice Scalia's theory, and he simply ignored it. Another witness against Raleigh had repeated statements allegedly made by an absent and unnamed Portuguese gentleman, accusing Raleigh of participation in the conspiracy at issue.[71] Raleigh again objected: "[B]ut what proof is it against me?"[72] And so, the second item of evidence raised the issue of trustworthiness. The alleged statement by the unknown and unknowable Portuguese

62. Ohio v. Roberts, 448 U.S. 56 (1980). *See* Crump Confrontation, *supra* note 50, at 124-27 (discussing absence of factors recognized by the Court for departure from stare decisis).

63. *See* Crump Confrontation, *supra* note 50, at 124-27.

64. *Crawford*, 541 U.S. at 50-51.

65. *Id.* at 50-51.

66. *See* Crump Confrontation, *supra* note 50, at 127-30.

67. *Crawford*, 541 U.S. at 44-45.

68. *The Trial of Sir Walter Raleigh, knt. at Winchester, for High Treason*, *in* T.B. HOWELL, 2 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 15-16, 22-24 (1603); *see also* DAVID JARDINE, CRIMINAL TRIALS 435-520 (1832); Crump Confrontation, *supra* note 50, at 130.

69. *See Crawford*, 541 U.S. at 44-45.

70. *Id.*

71. *See* JARDINE, *supra* note 68, at 436.

72. *See id.*

gentleman lacked any indicia of reliability,[73] which was precisely the deciding issue under *Ohio v. Roberts*.[74] But Justice Scalia was so determined to overrule that decision that his historical analysis bent the evidence.

The aftermath of *Crawford v. Washington* was, in fact, the introduction of a series of unnecessary and unresolvable dilemmas. If a victim during an incident of domestic violence calls 9-1-1, are her recorded statements testimonial efforts to convict the defendant, or are they excited utterances or contemporaneous statements motivated instead to escape the victim's immediate plight?[75] Or, if the admissibility of DNA evidence[76] calls for inputs by up to forty different people, are all of their statements testimonial, so that all of them must be called to testify?[77] These were among the questions the Court faced after *Crawford*.[78]

But the confusion created by *Crawford* is not the immediate issue; instead, the problem lies in the second step of originalist interpretation, that of finding the historical meaning of the doctrines at issue.[79] In this case, the question involved the meaning of the Confrontation Clause as a limit on hearsay evidence.[80] The holding in *Ohio v. Roberts* was justified by a long history of decisions calling for indicia of reliability in hearsay evidence.[81] That line of decisions included the principal case cited by Justice Scalia, if only he had not omitted key aspects of the case.[82] Today, the Court is split in its interpretation of the prohibition of hearsay by the Confrontation Clause, but it arguably follows an originalist approach. At least five Justices will exclude evidence that fits the core concern of the Clause: formal statements of evidence such as affidavits or depositions by witnesses, offered instead of testimony.[83] This approach, actually, is arguably closer to the historical concern than the complex construction erected by Justice Scalia.[84]

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73. The declarant was unknown, and so were any possible reasons for inferring reliability.

74. *See supra* notes 53-58 and accompanying text.

75. These issues arose in Davis v. Washington, 547 U.S. 813, 829-30 (2006).

76. These issues arose in Melendez-Diaz v. Massachusetts, 557 U.S. 303 (2009) and Bullcoming v. New Mexico, 564 U.S. 647 (2011).

77. *Bullcoming*, 564 U.S. at 677.

78. *See* Crump Confrontation, *supra* note 50, at 132-43 (discussing these cases).

79. *See supra* Section III.B.

80. *See supra* notes 52-58 and accompanying text.

81. *See supra* notes 52-58 and accompanying text.

82. *See supra* notes 69-73 and accompanying text.

83. *See* Crump Confrontation, *supra note* 50, at 150-55 (discussing this outcome).

84. *See id.* at 154-55 (discussing this possibility).

In summary, the second step in applying an originalist interpretation is the finding of an appropriate historical meaning of the doctrine at issue. Making such a finding can be difficult and debatable. Sometimes, it is subject to result-oriented manipulation, as it was, unfortunately, in *Crawford*.[85]

C. The Third Step: Fitting the Original Meaning to the Present Day

The third step is sometimes the hardest one. Having decided that originalism is the best approach, and having discerned an original meaning that seems convincing, the interpreter now has the task of fitting that original meaning to the circumstances of the present day.[86] The difficulty lies in making analogies between a simpler time in America and the complexities of the modern day. Radio and television did not exist when the First Amendment was adopted, but the original understanding included the freedom of speech, and therefore, the reader must attempt to fit this fundamental liberty to these very different media.[87] The differences are fearsome, since the spectrum is limited and radio frequencies must be assigned by licenses, and they are scarce; and so, doctrines that fit naturally for newspapers require serious adaptation to fit the electronic media.[88]

United States v. Jones[89] provides a vehicle for consideration of the third step. There, the FBI had surreptitiously attached a GPS device to the undercarriage[90] of the defendant's car.[91] This electronic addition allowed law enforcement officers to track the paths taken by the defendant and furnished evidence used to convict him of cocaine-related offenses.[92] But the installation of the device did not conform to the

85. This conclusion, result-orientation, follows from Justice Scalia's failure to consider whether departure from stare decisis was justified as well as his treatment of the historical meaning of the Contract Clause, which included omission of contradictions in such authorities as *Raleigh's Case*. *See supra* notes 59-62 and accompanying text; *see supra* notes 66-73 and accompanying text.

86. *See supra* Part II (discussing how originalism is determined).

87. The radio spectrum is limited, whereas the quantity of print media is not, and this difference affects how Government may perceive a need to make radio usage available. *Cf.* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375-76 n.4 (1969) (discussing effect of limited spectrum in creating need for regulation). The proliferation of cable channels has changed the situation, but the fundamental issue remains.

88. *See id.* at 373-77 (requiring free air time for commentators' response to personal attacks by broadcasters).

89. United States v. Jones, 565 U.S. 400 (2012).

90. *Id.* at 403.

91. The vehicle actually was registered to Jones's wife, *id.* at 402, but used by Jones, and so the GPS device was used to track Jones's movements, *id.* at 403.

92. *Id.* at 402-04.

warrant that allowed it,[93] and therefore the Supreme Court, again per Justice Scalia, analyzed the case as one in which the Government's actions were warrantless.[94] The issue was deceptively simple: Did the use of the GPS monitor amount to a "search?"[95]

The ostensible guide in such a situation was furnished by the venerable case[96] of *Katz v. United States.*[97] The act was a search, under this decision, if it intruded upon the defendant's "expectation of privacy."[98] If this were the test, the case might be easily solved, because few of us are concerned with privacy as it is manifested on the underside of our vehicles,[99] and none of us can claim a privacy right to avoid being seen as we drive our cars.[100]

But Justice Scalia was more of a history buff than that. He concluded that the idea of a search, at the time the Fourth Amendment was adopted, depended more heavily upon property rights than the *Katz* test did.[101] The Founders, he thought, would have recognized a search in official conduct that amounted to a trespass.[102] The entry upon another's property was trespassory even if it was free of harm,[103] and thus, the *Jones* case included a search by reason of the trespassory nature of the installation of the GPS device.[104]

There were, of course, several arguments to the contrary offered by concurring Justices, whose opinions were really dissents to the trespass-equals-search rationale. For example, the "intrusion" was so slight that it hardly seemed an intrusion at all, and therefore hardly seemed a trespass.[105] The device was not placed inside of the defendant's property, but outside of it.[106] And the trespass theory was so different from modern approaches that it seemed not to provide an analogy to the law of search today.[107] In fact, the *Katz* approach seemed a better

93. *Id.* at 402-03.
94. *Jones*, 565 U.S. at 404.
95. *Id.* at 402.
96. The importance of the *Katz* decision is shown by its use throughout "[o]ur later cases." *Id.* at 406.
97. Katz v. United States, 389 U.S. 347 (1967).
98. This test actually comes from Justice Harlan's concurring opinion in *Katz*. *Id.* at 360-61 (Harlan, J., concurring).
99. *See Jones*, 565 U.S. at 424-25 (Alito, J., concurring) (arguing that the intrusion was "so trivial" that should not affect the outcome).
100. Items visible in public do not create an expectation of privacy. *See id.* at 408-11.
101. *Id.* at 404-05.
102. *Id.* at 405.
103. That is, even if it caused "no damage at all." *Id.*
104. *Id.* at 404.
105. *See Jones*, 565 U.S. at 424 (Alito, J., concurring).
106. *Id.* at 424-25.
107. *Id.* at 420.

analogy.[108] At one point, Justice Alito suggests that a better comparison would be presented if "a constable secreted himself somewhere in a coach and remained there . . . to monitor the movements of the coach's owner."[109] This possibility would seem to call for a very, very small constable, if he were equivalent to the GPS.

And there was a difficulty that the members of the Court did not recognize. Justice Scalia's solution kept both the trespass theory and the *Katz* test in place.[110] The result thus created a concept of searches that was deliberately wider than the concept as it existed at the time the Fourth Amendment was adopted, and this effect would seem to have violated the principle of originalism, which tries to keep meaning as it originally was. Justice Scalia was untroubled, however, by this outcome. He treats the broadened Fourth Amendment as acceptable if the narrower one adopted by the Founders was acceptable.[111] But covering activity as a search when it was not a search at the time of the Constitution would seem to offend originalist thinking just as surely as failing to cover a search that was so defined at the historical time.

Jones shows the difficulty of the third step in originalism. Justice Scalia's logic about the historical analogy of trespass does have force. But his nonrecognition of the slight nature of the alleged intrusion, as well as his acceptance of the ill-fitting trespass theory in today's treatment of privacy, make the analogy to the present day much weaker. This kind of difficulty seems likely to haunt originalism claims frequently, because the circumstances of today are always likely to represent change, either minor or monumental, from the circumstances of the Founders' day.

IV. CONCLUSION

One conclusion to which this discussion points is that the three steps required for originalist analysis can conspire to produce a result that is inferior to other possible methods of interpretation. Each stage produces a certain quantum of ill-fitted applications, and the inevitable off-target nature of all three can cumulate. And when they do, the degree to which the result deviates from sound interpretation can be significant. But the deviation tends to remain unrecognizable, because each step will have seemed to make sense. A court should be aware of this problem and use a different modality of interpretation if the end result of originalism does not make sense. This decision, however, will be difficult to implement.

108. *See id.* at 422-24 .
109. *Id.* at 420.
110. *See id.*
111. *Jones*, 565 U.S. at 406 n.3, 420 (2012).

Sometimes, the most treacherous step will be the third. For one reason, it is undertaken after the first and second steps have been navigated with apparent success, and it is natural for the third step, then, to seem less important. For another reason, changes between the eighteenth century and today are inevitable and likely to be significant. And for yet another reason, the fitting of the original meaning to today's very different institutions, mores, and customs is impossible to measure accurately, because it often is done by analogy, as is shown by the comparison of newspapers of the constitutional time to electronic media of today. The uncertain application of the long-dead trespass theory in *Jones* also demonstrates this effect.

The first step, calling for recognition of the need for originalism, can draw the interpreter into using the approach when it is not warranted or failing to use it when it might be the best method. The solution to this dilemma may be simply to try originalism and to compare it to the result of another method such as textualism. As for the second step, that of assigning original meaning to the doctrine at issue, Justice Scalia's *Crawford* debacle suggests a similar approach: a court probably should attempt multiple methods of finding the original meaning, ranging from prior doctrine to dictionary definitions of the time. Such an approach in *Crawford* probably would have resulted in retention of the simple, but accurate, test of *Ohio v. Roberts*, calling for a focus upon indicia of reliability in the type of hearsay at issue. This doctrine was justified by a mass of pre-constitutional decisions, including the analysis in the *Raleigh* case that Justice Scalia ignored.

Above all, a court could do better in adopting and applying originalism by retaining an awareness of the three distinct steps inherent in originalist analysis: first, recognizing the need for originalism; second, assigning an original meaning to the doctrine at issue; and third, adapting that meaning to the circumstances of today. With that awareness, a court can take account of potential distortions at each stage and of their tendency to cumulate into real deviation from sound interpretation. And then, only with a degree of humility not always found in judges who apply originalist methods, can a court make the best path to originalist, or to nonoriginalist, interpretations of ambiguous language.