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Reply to Commentators

I do not know Michael Stokes Paulsen or his writings, but I will do my best to reply to his gracious and elegantly impartial review. His absolute refusal to engage in sycophancy should be a model to us all. I cannot imagine why he likens himself to "a skunk."[1]

It is difficult, however, to respond to objections to your work when the objector repeatedly objects to the exact opposite of what you are saying. Consider, for example, what Paulsen says about *Home Building & Loan Ass'n v. Blaisdell*.[2]

Blaisdell is important because it is one of the very few cases of modern constitutional law—perhaps the only one—in which the Supreme Court seems to explicitly repudiate a foundational Application Understanding. *Blaisdell* therefore stands as a counterexample to the pattern I describe as otherwise ubiquitous in constitutional law. Despite this, and even though the central thesis of my book is that courts must inviolably adhere to foundational Application Understandings, Paulsen says I "accept[]" the decision.[3]

According to Paulsen, I say that *Blaisdell*, even though it violated a foundational Application Understanding, is a "'widely admired decision' and should be understood as creating a new interpretive paradigm—a new constitutional commitment, as it were."[4] My endorsement of *Blaisdell* is supposed to look bad when contrasted, as Paulsen contrasts it,[5] with my arguing in other contexts against judges violating foundational Application

1. Michael Stokes Paulsen, *How To Interpret the Constitution (And How Not To)*, 115 YALE L.J. 2037, 2040 (2006).
2. 290 U.S. 398 (1934).
3. Paulsen, *supra* note 1, at 2037, 2054 & n.39.
4. *Id.* at 2054.
5. *Id.* at 2055.

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Understandings. And I guess my endorsing *Blaisdell* would be pretty embarrassing – if I had endorsed it.

It is true that, on page sixty-seven of my book, I say that *Blaisdell* "is a widely admired decision."[6] It is also true that on page sixty-eight, at the conclusion of the very same paragraph, I say that *Blaisdell* – if in fact it does repudiate a foundational Application Understanding – "is wrong and should be overturned."[7]

Very few readers would view "is wrong and should be overturned" as "acceptance." For the record, nowhere in my book do I say that *Blaisdell* "creat[ed] . . . a new constitutional commitment."[8] The whole point of my entire argument, as any minimally competent reader – without some peculiar axe to grind – would know, is that a decision abandoning a foundational Application Understanding *violates* a constitutional commitment.

Or consider the opening of Paulsen's "review," which takes issue with the opening of my book. I begin *Revolution by Judiciary* by contrasting constitutional law with statutory and administrative law, where the Supreme Court has at least in principle established legally authoritative interpretive rules and protocols that lower court judges are supposed to follow when construing statutes or regulations.[9] By contrast, I point out, there are "no official interpretive rules" of constitutional interpretation.[10] While there is a law of statutory and regulatory interpretation, "[t]here is no law of constitutional interpretation."[11] I write, "Incredibly, American constitutional case law has almost nothing to say about what judges are supposed to be doing when they go about the business of interpreting the Constitution."[12]

Paulsen, calling this "nonsense," says:

> If there is a problem with constitutional law today, it surely is *not* that it has "almost nothing to say" about how to "go about the business of interpreting the Constitution." It is that it has far too much to say! Our cases, our practice, and our theorists point in wildly different directions, offer and illustrate competing interpretive theories, and reveal a cacophony of voices virtually screaming for attention. . . .

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6. JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 67 (2005).
7. *Id.* at 68.
8. Paulsen, *supra* note 1, at 2054.
9. RUBENFELD, *supra* note 6, at 4-5.
10. *Id.* at 5.
11. *Id.*
12. *Id.* at 4.

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> Surely Rubenfeld jests. We suffer not from a deficit but a surfeit of constitutional theory.[13]

There are so many foolish errors in this paragraph it's hard to know where to begin. I will focus on the two most important.

First, the subject of my sentence was "American constitutional case law." When Paulsen reads the term "case law," he evidently thinks it includes "theorists." It does not. Everyone knows that constitutional theorists have a great deal to say about how judges should interpret the Constitution. But when I say "case law," I mean case law. There are plenty of theories of constitutional interpretation; it remains true, however, that "[t]here is no law of constitutional interpretation."

Second, as to everything else in his paragraph, Paulsen seems to think that restating my point counts as refuting it. Of course the cases "point in wildly different directions." Of course they "offer and illustrate competing interpretive theories." I never said constitutional law lacks exemplars of different interpretive approaches. I said (in the sentence immediately preceding the one Paulsen criticizes) that the case law "lacks an *accepted* account" of interpretation.[14] I said (on the very next page) that the whole problem with current constitutional case law is that the cases are so all-over-the-map interpretively that practitioners can argue from "text, precedent, original meaning, morality, tradition, structure, and so on," but "there is no knowing why or whether or when or in what priority these 'modalities' of argument will be considered in any given case."[15] How could a minimally competent reader think he had objected to this point by saying that the existing cases "offer and illustrate competing interpretive theories"?

"There is no *law* of constitutional interpretation": It is logically impossible to read this statement as denying the existence of "theorists" espousing different views of constitutional interpretation. "Under current case law, judges are fully authorized" to "rely[] on" or to "ignor[e] original intent"[16]: A first-year law student would understand that this sentence does not deny, but rather asserts, the fact that the cases offer competing interpretive theories. "Practitioners know they can argue from text, precedent, original meaning, morality, tradition, structure, and so on," but "there is no knowing why or whether or when or in what priority" judges will accept these arguments: No

13. Paulsen, *supra* note 3, at 2053-54.

14. RUBENFELD, *supra* note 6, at 4.

15. *Id.* at 5.

16. *Id.*

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reasonable person would think he had objected to this proposition by exclaiming that "our practice . . . points in wildly different directions."[17]

There is little point responding to a "review" so manifestly unable or unwilling to follow relatively simple arguments. Therefore I am going to skip over the rest of what Paulsen says about my book and offer a word about what he says of his own approach.

Paulsen describes himself as an originalist who believes in "read[ing] the text carefully and faithfully."[18] I leave it to readers to judge whether Paulsen has demonstrated a capacity to read a text carefully.

He seems to think he scores points for his version of originalism by saying he is against "grand theories" of constitutional interpretation.[19] This is just vacuous rhetoric.

Originalism is of course a theory of constitutional interpretation. Perhaps it is not very grand intellectually. But originalism is indeed "grand" if "grand" implies, as I suppose it is meant to do, that the theory rests on a large philosophy of some kind (whether political, linguistic, or something else) that in turn rests on fundamental (and controversial) premises concerning the status, purpose, and legitimacy of constitutional law. To be sure, originalists may not like having to explicate and defend the foundations of their theories, but that does not make their theories less grand. It merely makes them half-baked.

Consider Paulsen's particular brand of originalism. He purports to reject "crude intentionalism."[20] Original meaning, says Paulsen, is properly understood to be the "objective linguistic meaning of the words of a text (in historical context),"[21] as distinct from any "subjective," "concrete historical understandings"[22] of the text, including any "historical beliefs" about the applicability of the text in specific settings.[23]

This position is either incoherent or fundamentally misguided or both.

It is of course conceptually possible to divorce the "objective linguistic meaning" of uttered words from the subjective, concrete historical understandings of those words held by the people who wrote or spoke them. What we might call the "semantic content" of words, derived from the

17. Paulsen, *supra* note 3, at 2053.

18. *Id.* at 2061.

19. *Id.* at 2056-58.

20. *Id.* at 2059.

21. *Id.*

22. *Id.* (quoting Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002)).

23. *Id.* at 2060 & n.43.

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linguistic rules of the relevant community, can always differ from the speaker's or author's "intended meaning." People often employ words whose semantic content (in the above sense) differs slightly or significantly from their intended meaning. When we hear such words, we always have a choice in principle between interpreting them according to their semantic content or their intended meaning. Paulsen wants to say that only by following the original linguistic meaning can interpreters interpret correctly, remaining faithful to the actual written law as opposed to creating new law.[24]

The fallacy in this thinking is easy to demonstrate. A recipe says "flour" where "sugar" may have been intended. An interpreter of this recipe can certainly choose to use flour, saying "flour means flour, and it meant flour at the time the recipe was written." The words "means" and "meant" in this declaration would refer to the semantic content of the word—derived from the general rules and usage of English—which in this case (let's suppose) is not open to doubt. But someone else trying to follow the recipe could always say, "I think the writers of this recipe may have meant sugar." He may then pursue a "crude intentionalism" and try to uncover the authors' actual subjective historical understandings. If he discovers that sugar was in fact intended, he will say, "See—they did mean sugar," and use sugar.

In the case of a recipe, it would probably be stupid to use objective linguistic meaning when it is known to contravene intended meaning. In any event, whether stupid or merely adventurous, using linguistic meaning would in an important sense not be faithful to the original recipe. It would produce a new recipe.

What is true of a miswritten recipe is not, of course, necessarily true of a constitution. There may be good reasons to follow historical linguistic meaning in constitutional law when linguistic meaning departs from widely shared, well-understood concrete historical understandings. But one thing that cannot be said in favor of doing so is that following linguistic meaning will not produce "new" law.

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24. *Id.* at 2061. Others fall into the equivalent but opposite error, insisting that texts can be correctly interpreted only in accordance with the intended meaning and denying the possibility of interpretation according to any "semantic meaning" other than the intended meaning. *See, e.g.*, Paul Campos, *The Chaotic Pseudotext*, 94 MICH. L. REV. 2178, 2189 n.25 (1996) (claiming that "the semantic meaning of a text is identical to the [communicative] intentions of its author, and it follows from this that the correct interpretation of a text is always the act of successfully determining those intentions"); Steven Knapp & Walter Benn Michaels, *Against Theory*, *in* AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM 11 (W.J.T. Mitchell ed., 1985).

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There is an excellent example of this point in Robert Bork's *The Tempting of America*.[25] Like Paulsen, Bork tries to defend an originalism that casts aside the actual concrete historical understandings of the Constitution in favor of a supposed objective meaning of the text. He does so in an effort to make originalism safe for *Brown v. Board of Education*.

Yes, Bork admirably concedes, "those who ratified the amendment did not think it outlawed segregated education or segregation in any aspect of life."[26] Nevertheless, Bork asserts, *Brown* could "have clearly been rooted in the original understanding."[27] How? Well, "equality and segregation were mutually inconsistent, though the framers did not understand that," says Bork, and "equality, not separation, was written into the text."[28]

In other words, the subjective understanding of the ratifiers – their concrete historical understandings – were out of whack with the objective meaning of the words written into the text. Equality means equality; this is not anachronistic; equality meant equality in the 1860s; equality was written into the text; segregation is unequal; hence segregated public schools are unconstitutional. Paulsen indicates that he essentially agrees with this analysis: "[T]he result in *Brown* . . . makes entire sense if one focuses on the original linguistic meaning of the Fourteenth Amendment rather than on the mistaken subjective views or expectations of some individuals at the time that the Amendment's principle did not extend to segregated education."[29]

The problem is not that *Brown* cannot be squared with the original linguistic meaning of the Fourteenth Amendment. Of course it can. The problem is that a great many other things can too. An originalism that cuts anchor with concrete historical understandings in this way can no longer coherently present itself as originalism.

The one virtue of originalism was that it purported to offer determinate, demonstrable answers to real constitutional controversies. Does the Eighth Amendment ban the death penalty? "Of course not," an originalist could say; "I can easily prove to you that it was not so understood at the time of enactment. Any contrary reading by the Court today would therefore be a usurpation – government by judiciary."

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25. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

26. *Id.* at 75-76.

27. *Id.* at 82.

28. *Id.*

29. Paulsen, *supra* note 3, at 2060.

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But when originalism cuts anchor with concrete historical understandings, the death penalty's unconstitutionality certainly could be "rooted in the original understanding." "Capital punishment was inconsistent with abolishing cruel and unusual punishment," a Borkian originalist judge could say, "though the framers did not understand that, and the bar on cruel and unusual punishments was written into the text." Even a Marxist judge could now be an originalist: "Private property and equality were mutually inconsistent, though the framers did not understand that, and equality was written into the text." Or how about abortion? "*Roe v. Wade* makes entire sense if one focuses on the original linguistic meaning of the Thirteenth Amendment's prohibition of 'involuntary servitude,' rather than on the mistaken subjective views or expectations of some individuals at the time that the amendment's principle did not extend to laws banning abortion."

Nothing in the objective linguistic meaning of "cruel and unusual" in the 1780s or "involuntary servitude" in the 1860s—when considered at a level of generality that excludes reference to concrete historical understandings—blocks the conclusion that the death penalty or a ban on abortion is unconstitutional. What prevents a clear-thinking originalist from reaching these conclusions is not the objective linguistic meaning. It is rather, precisely, a set of concrete historical understandings, consisting of the "subjective" views or expectations of a great many individuals at the time concerning the applicability of the text in specific settings.

As soon as an originalist starts saying that the framers' and ratifiers' concrete historical understandings of a constitutional provision were "mistaken" and may therefore be ignored in favor of the semantic or objective linguistic meaning of the words at the time of enactment, he is no longer an originalist but a Dworkinian. Dworkin's distinction between "concept" and "conception" (with Dworkin claiming to honor the concept as opposed to the conception) tracks very closely, if it is not identical to, a distinction between the original semantic meaning of the words in the text and the concrete historical understandings of how that text would apply to particular cases.[30]

Proper interpretation of constitutional terms like "the equal protection of the laws" or "involuntary servitude" starts not from objective linguistic meaning, but from concrete historical understandings: namely, from the foundational paradigm cases. That's what gives the Thirteenth and Fourteenth Amendment their core meaning, and that core meaning properly structures all subsequent Thirteenth and Fourteenth Amendment doctrine. Many of our

30. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 75-76 (1996); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134-46 (1977).

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constitutional guarantees are like this: They take their core meaning from historical paradigm cases.

The account of constitutional interpretation that I give in my book captures this phenomenon and explains it. Neither a Dworkinian account of interpretation, nor an account based on objective linguistic meaning that repudiates Americans' concrete historical understandings of the provision they were enacting into the Constitution, ever can.

As to Professor Powell's commentary, I can only say that his criticisms of some parts of my book are quite well-taken, and that his praise of other parts is very kind and probably undeserved.

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