

THE LAW AND MORALS OF INTERPRETATION

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Andrew Coan offers a fresh and forthright response to the long disagreement over constitutional interpretation. Instead of entering the debate between originalism and nonoriginalism, he proposes to settle it, through an amendment proclaiming nonoriginalism as the law of the land. Under the Coan Amendment, the entire Constitution would be construed “to accommodate the practical exigencies of human affairs and the evolving standards of decency that mark the progress of a maturing society.”¹ This Amendment, he writes, would “eliminat[e] a huge quantity of basically unproductive debate about the legal and moral necessity of originalism,” thereby “redirect[ing]” that effort “to far more pressing matters of constitutional substance.”²

Coan offers his suggestion as a “thought experiment,” not a “serious proposal.”³ This is a good thing, because the substantive effect of his proposal would be unambiguously bad. But even as a thought experiment, it’s unclear how much the Amendment shows. The legal debate over the status of originalism can indeed be settled by new law. But the moral status of originalism is less tractable, as is that of our law more generally. The question Coan would have us consider — “Just how strong is the presumptive obligation to follow the law?”⁴ — will not be

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1. Andrew Coan, *Amending the Law of Constitutional Interpretation*, 13 DUKE J. CONST. L. & PUB. POL’Y 83, 85 (2018).

2. *Id.* at 86.

3. *Id.* at 101.

4. *Id.*

settled, or even particularly well posed, by a new constitutional amendment.

I.

Start with the substance. At present, forthright defenses of nonoriginalism are found mostly within the academy. Judges and officials still claim—with varying degrees of plausibility—that their constitutional decisions are rooted in Founding-era law,⁵ and that “we are all originalists.”⁶ Commitments like these lead some to conclude that originalism is actually our positive law,⁷ a claim that Coan is willing for argument’s sake to entertain.⁸ If nothing else, these claims are important to our political culture, and they impose some constraints of plausibility on any attempts at legal innovation.

By contrast, openly declaring our independence from preexisting law may open up new doors that can’t easily be closed. After all, nothing in the Amendment says that *judges* are to judge the “exigencies of human affairs,” which can involve questions of separation-of-powers no less than federalism or individual rights. When the Senate refuses to act on a nomination, may the nominee just claim the office anyway, to avoid the exigent harm caused by a long vacancy?⁹ If Congress refuses to raise the debt limit, can the President safeguard the economy by ordering the Treasury to issue new bonds?¹⁰ Could future exigencies lead the Joint Chiefs to initiate military action in the face of orders from a weak-willed President, as society evolves beyond civilian control of the armed forces? Or, if the courts have allowed something that’s highly controversial (abortion, affirmative action, what have you), may the President conclude that our evolving standards of decency have

5. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (“The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment . . . entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.”).

6. *The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan, Solicitor General) (“[S]ometimes [the Framers] laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists.”).

7. See, e.g., William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817 (2015).

8. Coan, *supra* note 1, at 83–84.

9. See Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940 (2013).

10. See Louis Michael Seidman, *Let’s Give Up on the Constitution*, N.Y. TIMES, Dec. 31, 2012, at A19.

evolved to forbid it, and that this extraordinary exigency requires him to suspend habeas for any Justices who disagree?

In raising these questions, the Amendment resembles other proposals to extricate modern decisionmaking from the dead hand of our ancient law. Louis Michael Seidman, for example, has argued that we should “disregard” the Constitution in favor of “arguing about what is to be done.”¹¹ But who, exactly, is to make these arguments, and to whom are the arguments to be made? Once the Amendment is enacted, what are ordinary clerks of court, treasury officials, military officers, or U.S. marshals supposed to do when they receive contrary instructions from persons claiming to be their superiors? And how are the people to judge their representatives, without knowing which powers those representatives are supposed to hold?

We generally find it useful to have legal institutions settle questions like these, establishing chains of command in legal decisionmaking rather than leaving everything up to the independent judgment (or, more likely, the loyalty networks and tribal affiliations) of rank-and-file officeholders or private citizens. Maybe the latter must always keep some independent legal judgment in reserve—deciding, for example, whether a given person really is a government officer, or whether a given order really is a “lawful order.”¹² Yet the existence and structure of the chain of command is usually easier to determine (if only after the manner of the drunk looking under the streetlight) than the substantive questions the higher-ups have purported to settle. That’s one powerful reason why “[w]e the living” find it useful to obey law established in the past, because it provides a useful framework for governance in the present.¹³

We might expect, should the Amendment be adopted, that citizens and officeholders would respond to the resulting uncertainty by assembling some sort of agreement on such questions, to avoid dangerous conflicts in times of crisis. They might want some sort of ground rules specifying who answers to who, who gets to do what, and whose decisions will be binding on others. Perhaps these rules could be preserved in a particular legal document, which could describe, in general terms, how the U.S. government is supposed to be constituted. A “Constitution of the United States,” if you will. Little might then be

11. *Id.*

12. 10 U.S.C. § 892(2) (2012).

13. Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120 (1998).

gained by the exercise: we'd only have replaced one constitution with another. (One remembers the proposal from Rep. Elliott Levitas, in the wake of the Supreme Court's decision in *INS v. Chadha*,¹⁴ to convene a "Conference on Power Sharing" among the branches of the federal government—and the response of the young John Roberts, that there had already "been a 'Conference on Power Sharing'" in "Philadelphia's Constitution Hall in 1787," and that "someone should tell Levitas about it and the 'report' it issued."¹⁵)

This argument can be put too strongly. Originalism doesn't provide determinate answers to every question on which determinacy is needed. Viewed purely as an academic pursuit, it often raises more questions than it settles.¹⁶ If it's really legal determinacy we want, we might be better off applying the original meaning of some *other* country's constitution, or "the U.S. Constitution with the Fifth and Fourteenth Amendments removed,"¹⁷ or a simple program of parliamentary sovereignty or executive rule-by-decree.

Instead, what originalism might offer is an account of our law: an explanation of why *this* old constitution's constraints remain legally relevant today, and a solution to the problem "that the *choice of constraint* is [otherwise] so unconstrained."¹⁸ It supplies a framework for officials and the public to answer legal questions, one that's good enough for government work,¹⁹ and one that lets us adopt new answers by explicit amendment before any exigencies set in. Perhaps in a *real* crisis these rules would all go by the wayside; perhaps government officials would deliberately ignore them, in the hopes of saving "all the laws, but one."²⁰ Yet the attempt to settle them in advance still has value, in the same way that an absolute prohibition on torture (even if it fails to dissuade in some ticking-bomb scenarios) can prevent the practice from becoming routine.²¹ Building escape-hatches into the

14. 462 U.S. 919 (1983).

15. Memorandum from John G. Roberts to Fred F. Fielding (Aug. 4, 1983), <http://media.washingtonpost.com/wp-srv/politics/documents/levitas.pdf>.

16. See Sachs, *supra* note 7, at 885 ("If we have to go through all this complicated theoretical apparatus, and we still don't know the answers when we're done, what good is it to originalism?"); see also Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011) (arguing that originalism has become more sophisticated but less determinate).

17. Sachs, *supra* note 7, at 886.

18. *Id.*

19. See generally William Baude, *Impure Originalism* (July 26, 2013) (unpublished manuscript, on file with author).

20. ABRAHAM LINCOLN, Message to Congress in Special Session (July 4, 1861), in LINCOLN: SELECTED SPEECHES AND WRITINGS 300, 307 (Don E. Fehrenbacher ed., 1992).

21. Cf. David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1445

constitutional design may be even worse than knowing that officials might carve some on their own.

The question here isn't just originalism versus nonoriginalism. The proposed Amendment offers even less advance guidance on these points than do a variety of alternative nonoriginalist theories. An amendment that ratified David Strauss's common-law constitutionalism,²² or Bruce Ackerman's "constitutional moments,"²³ or even Mitch Berman's "principled positivism,"²⁴ would still rule certain things in and certain things out, as a matter of agreed-on social principles rather than abstract judgments of what is to be done. Importantly, Coan's proposal doesn't offer any particular legal approach to replace originalism; it says only that, whatever the existing rules might be, they can be departed from in order to accommodate exigencies. This is nonoriginalism *tout court*; but it's not a very helpful approach to law. One important purpose of a legal system is to replace the "real answers" to policy questions "with fake ones": "answers that hopefully are somewhat close to the real ones, but on which society (mostly) agrees and which allow us (mostly) to get along."²⁵ Maybe the fake answers offered by these alternative theories are better than those offered by originalism; maybe we could do better by adopting one of them instead. But the Amendment proposed here does virtually nothing to generate social agreement on which fake answers we should use.

II.

This refusal to generate social answers is a deliberate feature of the proposal, not a bug. It's crucial to the Amendment's suggested usefulness as a thought experiment. Again, Coan describes the Amendment's payoff as "eliminating a huge quantity of basically unproductive debate about the legal and moral necessity of originalism," and "redirect[ing]" this effort "to far more pressing

(2005).

22. See generally DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (Geoffrey R. Stone, 1st ed. 2010).

23. See, e.g., Bruce Ackerman, *De-Schooling Constitutional Law*, 123 *YALE L.J.* 3104, 3121–22 (2014).

24. Mitchell N. Berman, *Our Principled Constitution*, 166 *U. PA. L. REV.* (forthcoming 2018) (manuscript at 5), <http://ssrn.com/id=2935085>.

25. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 *HARV. L. REV.* 1079, 1096 (2017).

matters of constitutional substance.”²⁶ Whether the Amendment would achieve this goal, even in theory, depends crucially on whether it can transform what we now see as questions of law into questions of morals instead. If it can’t achieve that goal—indeed, if no legal enactment can—then even as a thought experiment, it may not teach us very much.

The moral focus of the paper is evident from Coan’s claim that nonoriginalism and originalism are importantly asymmetric. He argues that “the Constitution could not have been written to compel [an originalist] approach,”²⁷ but also that the proposed Amendment could succeed in compelling a nonoriginalist one, even for most originalists.²⁸ What sort of “compel” is this? It’s certainly not a *physical* “compel.” Constitutional amendments are parchment barriers; no matter what they say, they can’t reach out and shake you until you comply. Nor is it a *legal* “compel.” Coan isn’t arguing for a Dworkinian moral reading of the Constitution, and he agrees that an Originalism Amendment, if worded with sufficient clarity, would “pretty clearly be part of the positive law.”²⁹ So any debate over the legal necessity of originalism could be settled by an Originalism Amendment just as easily as by Coan’s proposal. Instead, the only compulsion plausibly at issue here is *moral* compulsion. As Coan argues, whatever the text might demand, “constitutional decision-makers would still have good normative reasons for ignoring that mandate.”³⁰ And the only debate that the Amendment might uniquely claim to help us avoid would have to be the moral debate.

But how could it do that? If all the Amendment did were to replace originalism with some other theory of constitutional law—common-law constitutionalism, say, or constitutional moments—then we’d have to face moral debate over *that*. A Constitutional Moments Amendment might equally fail to compel, if there were important moral considerations that no constitutional moment had yet recognized. So shutting down the debate over originalism, in particular, would be no great achievement; we’d just be moving the field of debate somewhere else. Even a minor revision to the proposed Amendment, making clear that Article III judges have the final say about exigencies, would be no less subject than the current system to moral critique. (What if courts

26. Coan, *supra* note 1, at 86.

27. *Id.* at 85.

28. *Id.*

29. *Id.* at 89.

30. *Id.* at 85.

lack institutional competence on particular issues? Why should we obey judges' answers to exigent questions, if the answers they provide are wrong? Etc.) This is why Coan's proposal offers nonoriginalism in so stark a form: because the only way to force us to confront the "vital questions of constitutional substance" is to make them all open for revision, all the time.³¹

Perhaps that's part of the point. No matter what the law might be, every official and private citizen, at every moment, still has to decide what he or she really ought to do. One can't respond to moral questions with legal answers. But the "vital questions of constitutional substance" to which Coan would have us turn—questions, presumably, like whether the Joint Chiefs should be able to start wars on their own hook—are impossible to answer in a vacuum. They presuppose a thick context of existing social arrangements, which will inevitably be themselves the subject of moral debate. It's hard to "disregard" these arrangements, as Seidman might urge, in favor of "arguing about what is to be done," simply because any precise answers to "what is to be done" turn on what social arrangements are already in place.

And the moral obligations involved will range well beyond questions of substance. By way of illustration: Suppose that, on her next trip to the archives, a constitutional historian unearths a previously unknown Founding-era manuscript. This manuscript provides irrefutable evidence (to your own satisfaction) that regulating backyard wheat production is outside the original Constitution's grant of federal power. If she publicizes the manuscript's contents, or if others discover it, opponents of federal regulation will seize on the issue, and *Wickard v. Filburn*³² and all its progeny will be overturned—producing "a rollback of much of the modern federal regulatory state."³³ To Coan, this result would be very bad indeed; so bad, in fact, a judge might be morally justified in disregarding an explicit constitutional amendment mandating originalism in order to avoid it.³⁴ So what should our historian do? Should she report her discovery of the manuscript to the world, knowing that others might turn it to bad ends? Or should she burn it, before anyone else finds out?

The question involves more than just the merits of *Wickard*. For example, what norms govern the historian's role as a member of an

31. Coan, *supra* note 1, at 96.

32. 317 U.S. 111, 129 (1942).

33. Coan, *supra* note 1, at 90.

34. *Id.*

academic community and profession? What specific promises did she make to the archivists, just to be allowed into the archives? What respect would she owe to the informed choices of her fellow citizens, however ill-advised? And so on.

In the same way, the moral question whether judges and other officials should follow preexisting law is always a live one, yet also one that's immensely fact-specific. As with the historian, it might involve role-sensitive obligations (such as the constraints of political morality), specific promises the officials made to get into their current positions of power (such as the Article VI oath),³⁵ the respect they owe to their fellow citizens, and many other considerations. Coan notes that even "pragmatist judges" would have good reason to avoid "instability and disruption of expectations";³⁶ and surely at least some instability is caused by any departure, however minor, from the existing positive law. (If originalism were *not* our positive law, as the French Civil Code is not, the judge's job in rejecting it would be that much easier.) In focusing on what is to be done in the future—on the "pressing matters of constitutional substance"³⁷—we can't help thinking, at least a little bit, about what the existing law requires; and once we do, we can't help spending time debating whether one ought, morally, to comply.

Maybe there are some questions to which the substantive moral answers are so clear that these situational issues are irrelevant—questions on which society's agreement on fake answers is a "covenant with death and [an] agreement with hell,"³⁸ which everyone should agree must be disobeyed. But most questions, including the question of what to do with *Wickard*, aren't like this. "What is to be done" might often depend, at least in part, on "what the law requires." And if our moral obligations sometimes take account of our legal and social ones, then Coan's thought experiment can't prevent debate over the moral status of our law, because it's just as embedded within a legal system as anything else. Neither rank-and-file officeholders nor private citizens can know what they're supposed to do unless they have some idea what everyone else is supposed to do, and this requires *some* more systemic approach. "Do the right thing" is not a very helpful legal rule.³⁹

35. See, e.g., Christopher R. Green, "*This Constitution*": *Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1638–39 (2009) (discussing the oath).

36. Coan, *supra* note 1, at 90.

37. *Id.* at 86.

38. *The Union*, LIBERATOR (Boston, Mass.), Nov. 17, 1843, at 182.

39. See Larry Alexander, *Law and Politics: What is Their Relation?*, 41 HARV. J.L. & PUB.

III.

Even so, “do the right thing” is one injunction we are all required, at every moment, to obey. The ultimate question Coan poses is why one should care about originalism in the first place. If one doesn’t think that originalism is substantively the right thing to do (for reasons of popular sovereignty,⁴⁰ individual rights,⁴¹ good consequences,⁴² the Article VI oath,⁴³ etc.), then why use it at all—even if, as Coan is willing to assume,⁴⁴ it reflects our current positive law? “How could anyone care very passionately about defending originalism,” if not on substantive grounds?⁴⁵

This is an odd question to ask academics, who often care passionately about strange things like extinct ferns or transfinite sets. Perhaps it’s enough for them, as it was for G.H. Hardy, to “have added something to knowledge, and helped others to add more.”⁴⁶ It might seem a more appropriate question to ask officials, who force real people to comply with their understandings of the law. When raw power is involved, the “intellectual feast” of pure legal reasoning is rather inadequate support.⁴⁷ Yet while some accuse positive law of being “normatively inert,”⁴⁸ to the extent that officials are expected to defend their actions to others in legal terms, the question of what law currently governs us is anything but.⁴⁹ Positive law may or may not have a claim to our obedience, but it certainly has a claim to our honesty. The writer of a State Department report, for example, might feel at least some obligation to present an accurate discussion of the Armenian Genocide, even at the risk of complicating current U.S. relations with the Republic

POL’Y 355, 356 (2018).

40. See, e.g., Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1444–46 (2007); Lawrence B. Solum, *Statement of Lawrence B. Solum, Carmack Waterhouse Professor of Law, Georgetown University Law Center*, 31 DCPE ONLINE 575, 579 (2017), <http://www.dpceonline.it/index.php/dpceonline/article/view/428/417>.

41. See, e.g., RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 22–26 (2016).

42. See, e.g., JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 2 (2013).

43. See, e.g., Baude, *supra* note 7, at 2394–95; Green, *supra* note 35, at 1638–39; Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 313–05 (2016).

44. Coan, *supra* note 1, at 83–84.

45. *Id.* at 99.

46. G.H. HARDY, A MATHEMATICIAN’S APOLOGY 151 (Canto ed. 1992) (1940).

47. See *The Bork Hearings; An Intellectual Appetite*, N.Y. TIMES, Sept. 20, 1987, at 50.

48. Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 110 (2016).

49. See Mikolaj Barczentewicz, *The Limits of Natural Law Originalism*, 93 NOTRE DAME L. REV. ONLINE (forthcoming 2018) (manuscript at 17–19), <https://ssrn.com/id=2955184>.

of Turkey (or, alternatively, with the Republic of Armenia). So if originalism actually is the law, why would we be surprised by people saying so, if they happen to think it's true? Indeed, why would we then expect them to say otherwise?

Coan argues that only the “substantive” fans of originalism would have any arguments for “reversing a nonoriginalism amendment—or even for lamenting originalism’s demise.”⁵⁰ But one doesn’t need strong priors about the wisdom of current policies to worry that *particular* departures from current law might be unwise. For example, one might think that current tax rates are too high, but also think that the recent tax cuts were poorly structured, and that in the meantime the IRS should collect precisely as much in taxes as current law prescribes. In the same way, someone who could take or leave originalism as an abstract matter might still think that some particular flavor of nonoriginalism might make things worse rather than better, and also that the government has good reasons for operating according to law.

The strength of these reasons isn’t lessened by the fact that they rest on social convention. To say (as Coan does) that any existing social convention favoring originalism “would dissolve like a rope of sand” if a “critical mass” of people disapproved strongly of its substance⁵¹ is to say nothing more than what positivism already admits, namely that existing law depends on the existing beliefs and practices of real people in real societies. If enough Americans decided tomorrow to pledge fealty to the Queen, America would rejoin the British Empire; someone who decried the change could still acknowledge it as fact, and could also acknowledge the various ways in which these new social arrangements might influence one’s moral duties. But we haven’t actually rejoined the Empire yet, and this fact matters morally as well as politically or legally.⁵²

IV.

Again, the point of Coan’s thought experiment is to focus us on a fundamental question, one that faces private citizens and officeholders

50. Coan, *supra* note 1, at 99.

51. *Id.* at 97.

52. *Cf.* Leslie Green, *Introduction* to H.L.A. HART, *THE CONCEPT OF LAW*, at xxiii (3d ed. 2012) (noting that Britons might obey Parliament based “not only on a common practice of treating [it] as supreme, but also on a belief that this practice is democratic or is central to our culture”).

alike: “Just how strong is the presumptive obligation to follow the law?”⁵³ This question, he argues, has “received comparatively little attention from constitutional theorists.”⁵⁴ While its importance can’t be doubted, its obscurity can. My own view is that modern constitutional theory already focuses on such questions, perhaps to the point of obsession. The primary theme of this scholarship is the “counter-majoritarian difficulty”⁵⁵—so much so that we might say, borrowing Whitehead’s quip, that modern constitutional theory consists of a series of footnotes to Bickel.⁵⁶

If anything, it’s the tendency to move quickly from legal duties to moral duties, to consider constitutional questions as fundamentally *normative* questions, from which American constitutional scholarship needs to break free. The counter-majoritarian difficulty has served so effectively as a shiny object to distract law professors because it confuses legal and moral issues in this way. What is the long history of responses to this difficulty but an attempt to explain how judges might make good use of their influence over the law—an influence that’s well understood as merely *de facto*, and not *de jure*? Except for Sandy Levinson,⁵⁷ no one spends nearly as much time arguing about the obvious countermajoritarian difficulty faced by the Senate, because the Senate’s role in lawmaking is so obviously lawful. It’s only because the Court’s assumed role is *not* so obviously conferred by positive law that it generates endless tortured pages on the duties of the Justices and of others to obey them.

“[W]hether [we have] a moral obligation to obey the law” is a “traditional”⁵⁸ (indeed, ancient)⁵⁹ question, and it’s not likely to be solved specifically by reference to American constitutional law. Maybe our constitutional law will turn out to offer useful illustrations or examples for the problem. But it’s hardly the central case, and it contains an extraordinary number of complicating factors that can

53. Coan, *supra* note 1, at 101.

54. *Id.*

55. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986) (1962).

56. ALFRED NORTH WHITEHEAD, *PROCESS AND REALITY* 39 (David Ray Griffin & Donald W. Sherburne eds. 1978) (1929).

57. *E.g.*, Sanford Levinson, *Still Complacent After All These Years: Some Ruminations on the Continuing Need for a “New Political Science,”* 89 B.U. L. REV. 409, 417–18 (2009).

58. Frederick Schauer, *Deconstructing Law’s Normativity* 13 (Nov. 29, 2017), available at <http://ssrn.com/abstract=3080437>.

59. See SOPHOCLES, *Antigone*, in *THREE THEBAN PLAYS* 126, 127–28 (E.F. Watling trans., Penguin Books 1974).

distract from the issues at hand. The problem of political obligation is one best suited for more general philosophical inquiry, using more general philosophical tools. By contrast, legal scholars already have a good deal to do within their own field, in establishing the content and nature of American constitutional law. That may seem less important than the problem of political obligation, but perhaps it's enough to go on with.