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Talking Originalism

Andrew B. Coan

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Talking Originalism

*Andrew B. Coan**

I. INTRODUCTION.....	847
II. INTERPRETATION	849
III. DEMOCRACY	852
IV. CONSTRAINING JUDGES	857
V. CONSEQUENCES	865
VI. STABILITY.....	869

I. INTRODUCTION

What is old is new. Twenty-five years ago, commentators were declaring originalism dead.¹ Yet today the law reviews are positively awash with it. The New Originalism.² Semantic Originalism.³ Pragmatic Originalism.⁴ Redemptive Originalism.⁵ Even “Simple-minded Originalism.”⁶ Nor is the trend limited to the academy. In one of the most anticipated decisions of recent years, *District of Columbia v. Heller*,⁷ all nine Justices joined originalist opinions, including a majority opinion one prominent academic originalist has

* Assistant Professor, University of Wisconsin Law School. J.D., Stanford Law School, 2005; B.A., University of Wisconsin, 2000. I thank Anuj Desai, David Schwartz, and Brad Snyder for helpful comments. Special thanks to my father, William Coan, whose probing questions were the inspiration for this work.

1. See, e.g., Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611 (1999) (“The received wisdom among law professors is that originalism is dead, having been defeated in intellectual combat sometime in the eighties.”); Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 378 (1982) (“I think it is fair to say that [textualism and originalism] are increasingly without defenders, at least in the academic community.”).

2. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004).

3. Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law Research Paper, Paper No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244>.

4. John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007).

5. Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007).

6. Larry Alexander, *Simple-Minded Originalism* (San Diego Legal Studies Paper, Paper No. 08-067, 2008), available at <http://ssrn.com/abstract=1235722>.

7. 128 S. Ct. 2783 (2008).

called “the finest example of . . . ‘original public meaning’ jurisprudence ever adopted by the Supreme Court.”⁸ In light of this resurgence, the chief arguments for and against originalism are ripe for critical re-examination.

The following dialogue provides such an examination. For the most part, the arguments it presents are not new. But until now, they have been scattered through a voluminous literature, spanning several decades. One purpose of this dialogue is simply to collect them in a single place. A second purpose is to examine them afresh, which, for long-running debates like this one, is worth doing at least a few times every generation.⁹ To this end, I have made one of my fictional interlocutors an intelligent layperson, reasonably well informed about history and politics, but unafraid of asking questions a lawyer (not to mention a constitutional theorist) might be inclined to dismiss as obvious. The result is to refocus attention on three central factors that have received too little discussion in the recent literature: the extreme age of most constitutional provisions; the extreme difficulty of constitutional amendment; and the need to justify legal arrangements—including constitutional arrangements—by reference to consequences. Many subsidiary issues are cast in a new light along the way.

Like Henry Hart’s classic dialogue on the power of Congress to control federal jurisdiction, my goal is “not to proffer final answers but to ventilate the questions.”¹⁰ As will soon be obvious, however, I do not pretend to anything like perfect neutrality.¹¹

8. Randy Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13.

9. Cf. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 897–98 (1984).

10. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1363 (1953).

11. One more proviso while I am at it: this dialogue covers a broad range of arguments for and against originalism, but it does not purport to be a comprehensive survey of the originalism literature. Among other important topics, it does not address Lawrence Lessig’s notion of interpretive translation, Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993), or Jack Balkin’s similar notion of text and principles, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007). It also does not address internecine disputes among originalists about the proper object of originalist interpretation—intent, understanding, meaning, etc. See, e.g., Alexander, *supra* note 6; Solum, *supra* note 3; Whittington, *supra* note 2. Finally, it only glancingly addresses arguments that the indeterminacy and multivocality of original meaning render originalism infeasible or worse. See, e.g., Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST.

II. INTERPRETATION

Q: What is originalism, anyway?

A: That is complicated. Very briefly, originalists believe that judges should interpret the Constitution to mean what it was understood to mean at the time it was ratified. In fact, many originalists argue, originalism is the only approach deserving of the name “interpretation.”¹² Judges employing other approaches don’t mine the Constitution for meaning, as interpretation implies; they make their own.

Q: That seems dead on. When historians interpret the Articles of Confederation or the Declaration of Independence, they are interested in the meaning of those documents at the time they were drafted.¹³ Why should constitutional interpretation be any different? Of course, other people might be interested in the meaning of those documents to contemporary Americans. But that’s a sociological inquiry, not an interpretive one.

A: So many originalists claim. But this is argument by definitional fiat. It is an attempt to resolve a normative debate about how judges should decide constitutional cases through redefinition of a normatively charged term—in this case, interpretation.

Q: I’m not sure I follow.

A: It’s like this. There is broad agreement that judges should interpret, rather than make, the law. Thus, by redefining interpretation to include only originalist interpretation, originalists appear to answer the normative question of how judges should decide constitutional cases. But it is only an appearance. Their argument sheds no light on the actual normative question at issue, which is how we should want judges to decide constitutional cases.

Q: So the agreement that judges should “interpret” the Constitution really masks disagreement about what interpretation means?

A: Exactly. And that disagreement cannot be resolved by reference to a contested definition.

COMMENT. 159 (1996); Larry Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 636–37 (1985).

12. See Barnett, *supra* note 1; Gary Lawson, *On Reading Recipes . . . and Constitutions*, 15 GEO. L.J. 1823 (1997); Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors Are Wrong for America*, 106 COLUM. L. REV. 2207 (2006).

13. Alexander, *supra* note 6, at 10–11.

Q: That makes sense, but I still don't understand why the definition is contested. In every other context I can think of, interpretation of a written document involves the search for some kind of original meaning—either the intended meaning of the original author or the meaning that a text or statement would have conveyed to its original audience.

A: That is because, in most contexts, the goal of the interpreter is to discover some kind of original meaning. That is the whole point of reading a recipe or a grocery list or, in most circumstances, the Articles of Confederation. The goal of judges interpreting the Constitution is different. Their decisions have real consequences—for the actual litigants before the Court, for other affected citizens, and for the separation of powers. Moreover, a constitutional decision of the Supreme Court can be overridden only by an extremely onerous process of constitutional amendment. This makes constitutional interpretation a whole different ball of wax.

Q: That's what I'm afraid of. I don't want a Constitution made of wax. The whole point of putting it in writing was to fix its meaning against the whims of subsequent generations. If judges feel free to depart from that meaning in the name of "interpretation," we may as well have no Constitution at all.

A: Well, you're in good company. Chief Justice Marshall made a similar argument in *Marbury v. Madison*.¹⁴ And in recent years, a number of prominent originalists have argued that an originalist interpretive approach follows logically from "our commitment to a written Constitution."¹⁵ But this is a mistake. Nothing—or virtually nothing—follows from the writtleness of the Constitution. One can be committed to a written constitution in any number of ways for any number of reasons, the vast majority of which do not entail an originalist interpretive approach.

Q: Like what? Stripped of its original meaning, the Constitution is no more than a bunch of squiggly marks on a page.

A: Well, to take just one example, we can be—and in fact, are—committed to the constitutional text as a useful focal point for legal coordination. We need some basic and stable ground rules just to get government off the ground—the basic structure of the three

14. 5 U.S. 137, 178 (1803).

15. Balkin, *supra* note 5, at 429; Barnett, *supra* note 1, at 636; *see also* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999).

branches, a division of powers among them, the manner of selecting representatives, etc. Within broad limits, it is more important that these questions be settled than that they be settled right. And since the Constitution is already in place and enjoys wide support, it is the best candidate for doing so.¹⁶

Q: This just proves my point. In order to serve as a basis for coordination, the text must have a fixed and determinate meaning. That's an argument for originalism.

A: A fixed and determinate meaning is certainly helpful in this context. But strictly speaking, it could just as easily be contemporary as original meaning. More important, most of the Constitutional provisions that primarily serve a coordination function are sufficiently precise that there has been little change in their meaning over time. I'm thinking specifically of things like the presidential age requirement, equal state representation in the Senate, proportional representation in the House of Representatives, and the procedures for appointing and confirming federal judges.

Q: That's a pretty small subset of the constitutional text. Certainly, there are many constitutional provisions that no one would describe as precise. What reason could a nonoriginalist possibly have for adhering to those?

A: There are lots of reasons. Even an imprecise constitutional text can serve as a useful platform for common law reasoning—a framework for judges to fill in and reshape over time in light of changing social needs.¹⁷ An imprecise constitutional text can also serve as a locus of normative discourse in a flourishing constitutional culture—at least when it embraces as many inspiring, but ill-defined ideals as the American Constitution does.¹⁸ In fact, one might even regard imprecision, instability, and malleability in the hands of judges as the Constitution's central virtue—a reason for constitutional losers to remain committed to the system in the hopes of prevailing another day.¹⁹

16. See David Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717 (2003).

17. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); see also Strauss, *supra* note 16.

18. See Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003).

19. LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* (2001).

The key question, as I emphasized earlier, is how we should want judges to decide constitutional cases. Our “commitment to written constitutionalism” may mean that we are unlikely to accept an answer that does not accord some role to the constitutional text. But all plausible theories—not just originalism—do that. The writtenness of the Constitution can therefore provide no ground for choosing originalism over other plausible contenders.

III. DEMOCRACY

Q: Surely, there is more to be said for originalism.

A: Yes, different originalists subscribe to the theory for different reasons. Another common one is that the original meaning of the Constitution is the only meaning the People have democratically endorsed.²⁰ But the People who endorsed the Constitution’s original meaning are long dead, at least in the case of most constitutional provisions, and in most cases were also exclusively white, male, and economically well-off. This is known as the “dead-hand problem.” Why should the People of today be stuck with a Constitution adopted by our long-dead ancestors, and such a narrow stratum of them at that?²¹

Q: Just out of curiosity, do critics of originalism feel that a narrow stratum of our ancestors forced their values on the public at large? Has anyone gone back and looked at the opinions of the general public in 1789? It would be interesting to know what kind of constitution we might have had if a broader spectrum of interests had been consulted.

A: It is very difficult to measure public opinion from 220 years ago with any confidence. Certainly, at least the provisions on slavery (or lack thereof) would have been different had blacks participated in the ratification process as equal citizens. Women would likely have

20. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); ROBERT BORK, *THE TEMPTING OF AMERICA* 143 (1990); WHITTINGTON, *supra* note 15, at 110–59; Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 234 (1988).

21. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11 (1980); CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY RADICAL RIGHT WING JUDGES ARE WRONG FOR AMERICA* 74–76 (2005); Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 204–38 (1980); Michael Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997).

been allowed to vote had they participated. But beyond that, it is difficult to say.

In the end, the breadth or narrowness of the Constitution's support at the founding is a secondary issue. The main issue is that everybody who voted to ratify the Constitution is dead and has been for a long time. None of them had seen a car or a telephone or an electrical outlet, much less an M-16 or a Predator drone or a neutron bomb.²² It would be crazy to consider ourselves bound by their understanding of the blueprint they laid out for us.

Q: Maybe. But aren't you forgetting about Article V? If we think the original meaning is crazy, why don't we just amend it?

A: Yes, originalists make exactly that point. Original meaning is a constraint on judges, they say; the People are free to amend the Constitution any time.²³ But this freedom is largely illusory. The deck is so heavily stacked against amendment—and stacked not by us but by the very dead ancestors whose grip amendments are supposed to shrug off—that the Constitution is, in almost all important respects, frozen in its current form.²⁴

Q: But we're not constrained by a bunch of dead white guys. We're constrained by the generation that came after them and the generation after that and the one after that, and so on. After all, the generation of 1810 could have changed the constitution. It chose not to. The generation after that could have changed it but did not. And so on up to the present day. I think it's silly to say that we, today, are constrained by dead guys from 1787.

A: To be really precise, we are constrained by a majority of dead, property-holding white guys circa 1790²⁵ and the small minorities of every generation since that were sufficient to block the many changes to the Constitution that majorities of those generations supported. At least we would be so constrained, if the Supreme Court had subscribed to a rigid originalist theory of interpretation throughout our history. Fortunately, it has not.

Consider the Equal Rights Amendment, which easily passed in both houses of Congress and the legislatures of 35 states,

22. See Klarman, *supra* note 21, at 384–85.

23. See, e.g., BORK, *supra* note 20, at 170–71.

24. Donald Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 237–40 (1995).

25. The Constitution was ratified in 1788 and the Bill of Rights in 1791.

representing a large majority of the national population, but still fell three states short of ratification.²⁶ Measured by modern standards, the ERA has a much stronger democratic pedigree than the Constitution itself, almost all of which was ratified before women could vote. But it is the Constitution, not the ERA, that remains law. At least, this would be the case if originalists had their way. In fact, nonoriginalists on the Court have read much of the ERA into the Equal Protection Clause of the Fourteenth Amendment.²⁷

Still, the ERA does not make a perfect club with which to flog originalism. Even if the Court had not read gender equality into the Equal Protection Clause, the amendment's supporters would be free, with a few minor exceptions, to pursue the same goals in the legislative arena. So long as these goals command majority support, originalist judges present no obstacle to their achievement; should they cease to command majority support, that cessation—and not originalist judges or the onerous amendment process—will be the cause of their demise.

But such isn't always the case. The ERA would have imposed on state and federal governments constraints not imposed by the Constitution's original meaning, constraints whose ultimate goals could for the most part be achieved equally well through democratic self-restraint. Other amendments, by contrast, would free the democratic process from constraints placed on it by the Constitution's original meaning and enforced by originalist judges.

Q: This suggests a thought experiment. What ideas have lost popular support today but continue to be protected by originalist interpretations of the constitution? What ideas have lost popular support at other periods of our history but continued to be protected?

A: One example from today: state sovereign immunity—the originalist notion that unconsenting states should be immune from

26. See generally DONALD G. MATHEWS & JANE SHERRON DE HART, *SEX, GENDER, AND THE POLITICS OF ERA* 55–65 (1990); GILBERT YALE STEINER, *CONSTITUTIONAL INEQUALITY: THE POLITICAL FORTUNES OF THE EQUAL RIGHTS AMENDMENT* (1985).

27. Reva Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1324 (2006) (“The Court began to interpret the Fourteenth Amendment in ways that were responsive to the amendment's proponents—so much so that scholars have begun to refer to the resulting body of equal protection case law as a ‘de facto ERA.’”).

suit by individual citizens whose rights they have violated.²⁸ We can be reasonably sure sovereign immunity has lost popular support, since Congress has voted to override it in so many modern statutes.²⁹ At the founding, however, a Supreme Court decision that threatened states' immunity was greeted by massive outrage.³⁰

One example from an earlier historical period: the Child Labor Amendment, which would have overturned unpopular originalist restrictions on federal power to regulate child labor. The amendment was passed by Congress in 1924 but, despite broad popularity, was ratified by only twenty-eight states—eight short of the three-fourths required by Article V.³¹ As a consequence, a whole generation of children labored in the fields and factories before the Court ultimately reversed itself in 1941.³²

Q: Would we be better off today if the Constitution had allowed for amendment by a 51% majority? What if the Constitution retained its super-majority requirement for amendment, but the decision would be made by direct vote rather than through the medium of state legislatures?

A: The latter would be an improvement; I don't know about the former. The track record of states that allow relatively easy amendment of their constitutions by referendum or initiative is certainly not encouraging. They pass too many amendments, which are frequently stupid, in part because voters are evaluating the proposals in a vacuum.³³ So on balance I don't think I would favor such an easy amendment procedure. As I hinted earlier, the Supreme Court does a pretty good job of adapting the Constitution to the times and keeping it in accord with large-scale trends in public opinion.³⁴ It could stand to be a little more deferential to

28. *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

29. See statutes challenged in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001); and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000).

30. Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 NOTRE DAME L. REV. 1135 (2009).

31. HUGH D. HINDMAN, *CHILD LABOR: AN AMERICAN HISTORY* 74–81 (2002).

32. *United States v. Darby*, 312 U.S. 100 (1941). The Court first held federal regulations of child labor unconstitutional in *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

33. See generally Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293.

34. See, e.g., ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J.

the democratic branches, but that's a fairly minor complaint. Given the institutional constraints it operates under, the Court, I believe, is for most purposes a better mechanism for updating the Constitution than a 51% rule would be.

Q: Another thought experiment: What would the differences be, starting today, if all originalists were purged from the Supreme Court and never allowed to return? What would the differences be if they had been purged in 1860? 1910? 1935?

A: That is a great question, though it is basically impossible to answer. Nonoriginalists are too diverse a group. For example, if you replaced Scalia and Thomas, the only committed originalists on today's Court, with clones of John Roberts and Samuel Alito, relatively little would change. Most of the time, their conservative brand of judicial pragmatism leads them to the same results Scalia and Thomas embrace on originalist grounds. This illustrates a very important point. Knocking down originalism is only the beginning. One still has to decide what to recommend in its place.

Q: Forget about originalist judges for a moment. Let's remember that Robert Byrd carries a copy of the Constitution in his breast pocket at all times.³⁵ Is he an anachronism? Or do his constituents appreciate this behavior? Or is it both?

A: The Constitution is a religious object as much today as at any time in our history, so I don't think Byrd is an anachronism. It is also a genuinely wise document in many respects, from which present-day government officials can still learn a great deal. What is unhealthy is the view that the founding generation was blessed with "a wisdom more than human," and that its understanding of the Constitution ought therefore to be treated with "sanctimonious reverence . . . too sacred to be touched."³⁶ To paraphrase Thomas Jefferson, whom I have just quoted: The founding era was very like the present, but without the experience of the present; and 200 years of experience in government is worth a millennium of book reading; and this the founders would say themselves, were they to rise from the dead.

POL. SCI. 635 (1992); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003).

35. See Carl Levin, Tribute to Senator Robert Byrd, <http://levin.senate.gov/newsroom/release.cfm?id=256972> (last visited Aug. 28, 2009).

36. Thomas Jefferson, Letter to Samuel Kercheval (July 12, 1816), *available at* <http://classicaliberal.tripod.com/jefferson/kercheval.html>.

Q: Actually, in my own case any reverence I feel toward the Constitution is based on the principles it embodies, not on the fact that it was adopted in any particular way.

A: This is orthogonal to debates over originalism. Plenty of nonoriginalists think many of the founders' principles are intrinsically attractive; I certainly do. But originalism says we should be bound not just by the constitutional principles we find intrinsically attractive but to every aspect of an eighteenth century understanding of the constitutional text. Originalists cannot defend the results this would produce to a mainstream contemporary audience, so they have to appeal to the higher principle of democracy. What they always fail to mention, of course, is the virtual impossibility of amending the Constitution to conform to the wishes of contemporary democratic majorities.

IV. CONSTRAINING JUDGES

Q: Okay, fine. You have convinced me that originalism cannot be readily defended by reference to the Constitution's democratic pedigree or by the definition of interpretation. But, as you conceded up front, those are hardly the only arguments for originalism.

A: That's true. Originalists do have another string to their bow. Without the constraints imposed by original meaning, they argue, the Supreme Court would become a "naked power organ"³⁷ whose decisions the politically accountable branches could neither influence nor reverse.

Q: Better a naked power organ than a cloaked one, I say. But honestly, I don't see how the power exercised by the Justices is affected one way or the other by the nature of their deliberations. If the judges condemn me to death on the basis of original meaning, is that less powerful than condemning me to death on the basis of their personal convictions?

A: If judges can decide cases only how and when original meaning authorizes them to, they are less powerful than if they can decide cases how and when they personally see fit. This is unlikely to comfort you, the condemned, since the Constitution's original meaning places few limits on the power of judges to impose the

37. The epithet originated with a nonoriginalist, Herbert Wechsler. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12 (1959).

death penalty.³⁸ But originalists think it should comfort the People who want to kill you, since they can be sure originalist judges won't stand in the way, even if those judges personally oppose capital punishment.³⁹

Q: I think you have misinterpreted my point, which is that power derives from the Court's relationship to society and to the other branches of government, not from its methodology. I grant that the Court's methodology, or more particularly, the results it arrives at, can influence the Court's relationship to society and to the other branches of government. But in an individual case, what the court says goes, regardless of methodology.

A: It is true that in individual cases what the court says goes, barring unusual behavior by the other branches or the extreme case of popular revolt. But it's also true that if judges feel constrained to act in accordance with original meaning, they are in a real sense less powerful—in individual cases and across the run of cases—than if they feel free to decide cases as they personally see fit. Think of the originalist judge as a well-trained Doberman on a leash and the nonoriginalist a feral pit-bull. Both have fearsome jaws, but one is clearly scarier than the other.

At least, that's how the originalists see it. Critics would point out that nonoriginalist judges are also leashed—by the constitutional text, public opinion, legal culture, periodic appointment of new Justices, and the Court's dependence on Congress and the President to carry out its decisions. Moreover, unlike the originalist's leash, the nonoriginalist's leash is not tied to the fixed post of original meaning and then abandoned; it is held by a sentient—albeit not extraordinarily attentive—master, who can yank on the Court's choke collar should a toothsome infant crawl by, or flee to a different neighborhood if there's a flood or an earthquake, or let out some more line if the crime rate rises. But I am getting ahead of myself.

Q: How so?

A: Well, the critics have several responses to the judicial-restraint, or rule-of-law, argument for originalism, and it makes sense to consider them in order. First, they note that this is a consequentialist argument. That means its power depends not on any overriding

38. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 46 (1997).

39. *Id.* at 41–42.

political principle (like democratic legitimacy) but on the costs and benefits, broadly defined, of adopting an originalist theory of interpretation. This observation changes the whole complexion of the debate. It means that originalists must show that the consequences of adhering to original meaning are better than the consequences of alternative approaches, systemically and in individual cases.⁴⁰ Seen in this light, most people—including some originalists—would think the costs of a rigid originalist philosophy unacceptably high. Such a philosophy might well permit the segregation of public schools and other public facilities;⁴¹ bans on inter-racial marriage;⁴² all manner of racial covenants in the sale of private property;⁴³ bans on the sale of contraceptives;⁴⁴ and, quite possibly, established state churches.⁴⁵ Perhaps worse, it might invalidate social security; federal bans on discrimination in employment and public accommodations; federal minimum wage laws; and the entire modern administrative state (on which more later). Almost no one, including Justice Scalia, believes that adherence to original meaning on these issues would exceed the costs of departing from it.⁴⁶

Q: What's the second point?

A: That original meaning is itself a very weak constraint on judicial decision-making. On most controversial questions, the original meaning of the constitution is ambiguous, so it is easy for judges to find support in the history for whatever position they are predisposed to favor on policy grounds. In fact, in many contexts, the history invoked in originalist opinions gives an insidious veneer

40. See Cass R. Sunstein, *If People Would be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 167 (2007); Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 COLUM. L. REV. 2234, 2236 (2006).

41. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); Michael Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1884 (1995).

42. *Loving v. Virginia*, 388 U.S. 1 (1967); Edward Gary Spitko, Note, *A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication*, 1990 DUKE L.J. 1337, 1358–59 (1990).

43. *Shelley v. Kraemer*, 334 U.S. 1 (1948); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 15–17 (1971).

44. *Griswold v. Connecticut*, 381 U.S. 479 (1965); Bork, *supra* note 43, at 7–11.

45. See *Newdow v. Elk Grove Unified Sch. Dist.*, 542 U.S. 1, 51 (2004) (Thomas, J., concurring).

46. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861–62 (1989).

of objectivity and passivity to judicial decisions that are in reality the product of political choices, unconscious or deliberate.⁴⁷ If we dispensed with originalist rhetoric, judges would be forced to defend these choices on their own terms, to everyone's benefit. The result might actually be a more cautious Court, since once it was clear to everyone that many of the choices in constitutional cases are political, it would be more difficult for the Court to justify making those choices itself, rather than deferring to the political branches. Shall I continue?

Q: Sure. We might as well get the whole argument on the table.

A: The third point—and the final one—is that original meaning is far from the only imaginable means of constraining judicial discretion. For example, instead of following original meaning, courts could adopt a strong presumption that all validly passed laws are constitutional. This was Oliver Wendell Holmes's favored approach. He called it the puke test—a law was unconstitutional only if it made him want to vomit.⁴⁸ It is also known as Thayerism, after its first prominent proponent, Professor James Bradley Thayer.⁴⁹ Whatever you call it, this approach limits the power of judges at least as severely as originalism—a law must be patently unconstitutional before a Court will strike it down—but it is likely to yield superior practical consequences for obvious reasons. The present-day majorities to whom it defers are likely to be a far better gauge than the Constitution's original meaning of core national values, not to mention the solutions required by modern social and economic problems.

Q: I don't want to be ruled by core national values. Think of the "seditionists" who went to prison in the early twentieth century merely for expressing an opinion that the United States should stay out of World War I. Think of how our core national values have changed from 1965 to 2005.

A: Too bad. You're going to be governed by them. The only question is whether they'll be the core national values of the

47. See Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 39–45 (2005); cf. Andrew B. Coan, *Text as Truce: A Peace Proposal for the Supreme Court's Costly War Over the Eleventh Amendment*, 74 FORDHAM L. REV. 2511(2006) (noting appearance of political decision-making in disputes over Eleventh Amendment's original meaning).

48. Letter from Justice Oliver Wendell Holmes to Harold Laski (Oct. 23, 1926), reprinted in 2 HOLMES-LASKI LETTERS 888 (Mark DeWolfe Howe ed., 1953).

49. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 17 (1893).

1790s (or the late 1860s, when the Civil War amendments were adopted) or the core national values of today (as interpreted by the democratic branches) or the core national values of a group of unelected judges “tuning” the Constitution to the times as they see fit. The middle alternative sounds best to me, though given the institutional constraints that keep courts basically in line with public opinion, the third certainly sounds better than the first. You might agree if you consider that the first sedition act was passed in 1798⁵⁰ by the founders themselves and that political dissidents did not receive robust protection under the First Amendment until the late 1960s.⁵¹

Q: I guess it depends on what you mean by “core” national values. My point is that I don’t want to be thrown in prison for offending 51% of the population. Of course, I don’t want to be thrown in prison for offending 75% of the population (or 90% of the population) either, but my point is that I want the Constitution to protect me when I’ve offended 51–75% or 51–90% of the population, but not the whole population and not the “core” national values theoretically enshrined in the Constitution.

A: So there is one core value you want the Constitution to embrace—your right to walk into the local library carrying a sign that says “Fuck the Troops and Your Idiotic Yellow Ribbons Too.” Or perhaps you’d prefer to paint this on the back of a leather jacket.⁵² In any case, the next question—and the fundamental one—is what approach to constitutional interpretation is most likely to protect this and other values you would like the Constitution to protect, without unduly restraining government power to promote the general welfare? The answer cannot be originalism, which would protect few of the constitutional freedoms you hold dear (remember that many of the framers voted for the Alien and Sedition Acts) and saddle the country with an eighteenth century government most ill-equipped to deal with today’s constitutional challenges.

Q: Okay, you made your point. But I am still concerned about the oppression of despised minorities. I don’t want judges to defer to legislatures that do the oppressing. But I don’t trust them to their

50. *See* An Act for the Punishment of Certain Crimes against the United States, July 14, 1798, ch. 74, 1 Stat. 5.

51. *See, e.g.,* *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

52. *Cf. Cohen v. California*, 403 U.S. 15 (1971).

own devices either. What do you do about a problem like segregated swimming pools?

A: I'm glad you asked. Another approach to judicial self-restraint is the theory of famous constitutional law scholar John Hart Ely, who urged the Court to defer to democratic institutions except where the actions of those institutions undermine the integrity of the democratic process. Ely favored aggressive judicial review of speech restrictions, burdens on the franchise, and racial discrimination—all of which have the potential to distort the democratic process and so cannot be trusted to it alone—but virtually complete deference on other questions. His theory provides one non-originalist answer to your question about segregated swimming pools. Since this segregation was a part of a concerted effort to brand blacks as second-class citizens and exclude them from political and social life, Ely's view was that courts owed such laws none of the deference usually accorded to the actions of democratic institutions.⁵³

Another answer to your question, the answer James Bradley Thayer would give, is that we cannot trust judges with questions of racial justice any more than we can trust them with other kinds of questions.⁵⁴ It is safer to leave all such questions to the democratic process. This answer seems much less drastic in light of recent scholarship convincingly demonstrating that decisions like *Brown v. Board of Education* did relatively little to improve the plight of southern blacks. Substantial progress in dismantling Jim Crow, it turns out, was achieved only with the passage of the Civil Rights Act of 1964,⁵⁵ ten years after *Brown*.⁵⁶ *Lawrence v. Texas*, the sodomy law case of a couple years ago, is another example of courts' limited ability to effect social change. In fact, the Court's decision in *Lawrence* may have done gays more harm than good, since the fears it stoked on the religious right were a major catalyst for the rash of state bans on gay marriage.⁵⁷ The sodomy laws that *Lawrence* struck

53. ELY, *supra* note 21.

54. *See* Thayer, *supra* note 49.

55. Pub. L. No. 88-352, 78 Stat 241 (1964).

56. MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 344-442 (2004); GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 42-71 (2d ed. 2008).

57. *See* Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431 (2005).

down, by contrast, remained on the books in only a handful of states, which rarely if ever enforced them.⁵⁸

Returning to the question of constraint, yet another view emphasizes the many institutional constraints under which courts operate, quite apart from theories of constitutional interpretation. The more notable of these are legal culture and the institutional weakness of courts relative to Congress and the president. Legal culture values tradition, precedent, and incremental change, all of which tend to make courts cautious about breaking new ground. The institutional weakness of courts, in particular their powerlessness to enforce their own decisions, forces them to husband their public image carefully. This, in turn, causes their decisions to track public opinion quite closely, certainly much more closely than does the original meaning of the constitution. This last claim, as I mentioned earlier, is backed by decades of empirical evidence.⁵⁹

Q: And yet, when we think of the majesty of the Court, we think of those cases where it has resisted public opinion, do we not?

A: This is not as true as you might think. A surprising number of the Court's most admired decisions—including its crown jewel, *Brown v. Board of Education*—were supported by national majorities.⁶⁰ Perhaps more important, the converse is equally true. The two most maligned decisions in the Supreme Court's history—*Dred Scott v. Sandford*⁶¹ and *Lochner v. New York*⁶²—were unpopular at the time they were decided. The bottom line is that the Court very rarely gets very far out ahead of public opinion, nor does it often lag far behind. When it does either, the bad results, historically speaking, have arguably outweighed the good. This is especially true when those results are evaluated from a liberal perspective, which makes conservative attacks on the Supreme Court and liberal defenses of it somewhat ironic.⁶³

Q: This is certainly food for thought. Let's review what we've covered.

58. See WILLIAM N. ESKRIDGE, *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003* (2008).

59. See *supra* note 34.

60. Michael Murakami, *Desegregation*, in *PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 18, 21 (Nathan Persily et al. eds., 2008).

61. 60 U.S. 393 (1857).

62. 198 U.S. 45 (1905).

63. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

A: Sure. To summarize: deprived of its democratic pedigree and fallacious definitional arguments, originalism is forced to justify itself on practical grounds. It attempts to do this by emphasizing the need to constrain the power of judges but fails to make a persuasive case that original meaning is the best constraint. Judge Richard Posner illustrated this point beautifully in his classic essay “Bork and Beethoven.”⁶⁴ The concept for the essay grew out of a single issue of the conservative magazine *Commentary* that coincidentally contained two articles on originalism. One of the articles was a piece ridiculing a quixotic school of musical thought that favors the use of original arrangements and period instruments in performances of composers like Beethoven. The author’s perspective: the music sounds terrible, so why should we listen to it? The other article was a piece praising Robert Bork’s originalist judicial philosophy, which Bork defends on the same two grounds we have just discussed, democratic legitimacy and the need to constrain judges. I am sure you can see where this is going. After demolishing the democratic legitimacy argument, Posner simply posed the music critic’s question: if the original meaning of the Constitution sounds terrible, why should we listen to it?

Q: If what sounds terrible, democratic majorities or the constraint of them?

A: The constraints imposed by original meaning. Of course, the way I phrased this leaves open the question—sounds terrible to whom? The answer is to democratic majorities, which may make it seem like my critic would never favor constitutional constraints. When, after all, will a democratic majority ever like the sound of limits on its own power? Surprisingly often, it turns out. People are fully capable of supporting unconstitutional legislation one moment and the constitutional principles that make it so the next. Really serious problems arise only in the relatively rare circumstance when the Supreme Court’s interpretation of the Constitution is so out of step with the public’s wishes that the public finds the results intolerable. When this happens, the Court, not the People, should yield. As Dean Larry Kramer is fond of saying, the Court is the People’s servant, not the other way around.⁶⁵

64. Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990).

65. LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 248 (2004).

V. CONSEQUENCES

A: Here is a greatly simplified way to think about the point I've been trying to articulate: in order for originalists to show that originalism is the best theory of constitutional interpretation, they need to convince us that we'll like the Constitution it yields better than the Constitution we'd get under plausible alternative approaches. This is the essence of what I have been calling consequentialism and what Judge Posner calls pragmatism. Seems pretty simple, right? How else would you demonstrate the superiority of a theory of Constitutional interpretation? But many originalists want no part of it. They refuse to defend original meaning on the merits. They do so partly because they believe original meaning is the command of the sovereign People, which judges are without authority to disobey. They also believe that adhering to original meaning without regard to consequences will produce better consequences in the long run than allowing judges to consider consequences in some or all circumstances. The former, as I hope I have demonstrated, is a fallacy of the first order. The latter is plausible and logically coherent, and if true, may require an originalist judge like Justice Scalia to ignore consequences in deciding individual cases. But it cannot absolve Scalia, the constitutional theorist, of the responsibility to convince us that we'd actually like an originalist Constitution better than its rivals. That is his basic burden.

So we're back to my original point: Would we like an originalist Constitution better than the Constitution we could expect to end up with under any of the nonoriginalist approaches sketched earlier? Perhaps the question is sharper in reverse: Would we expect nonoriginalist judges of every stripe to produce a Constitution worse than one that permits Jim Crow segregation; criminal punishment of political dissent, blasphemy, and pornography; official state religions; blanket bans on abortion; and most kinds of sex discrimination, all while dramatically limiting the power of the federal government to deal with problems of a truly national scope like the environment and social security? If yes, we should be originalists; otherwise, not.

Q: Would Scalia accept this burden, or would he argue that it is the People's burden to decide what they like and want? By "the People," of course, I mean whatever percentage of people it takes to amend the Constitution. Might not Scalia argue that the People

would have risen up and amended the Constitution more often if Supreme Court Justices had consistently adhered to originalism?

A: Who in the world would such an argument persuade? Only someone who believes (a) that 10–25% of the People have an absolute moral right to block changes to the system of government devised by our long dead ancestors; or (b) that original meaning is so close to ideal (and judges so mistake-prone) that it's better to permit changes only when they are supported by 75–90% of the People.⁶⁶ Note that, where judges deviate from original meaning, opponents are just as free to override the decision by amendment as they would be if it were based on original meaning; the difference is that the nonoriginalist default is the decision of relatively recently appointed judges rather than long-dead popular majorities. For reasons we have already discussed, (a) strikes me as a completely wacky view. Some serious people, including Scalia, do believe (b), though their courage almost always fails them in key situations (e.g., school segregation, interracial marriage, free speech, affirmative action⁶⁷). I don't believe (b) and I don't think most ordinary citizens would either if they gave it serious thought. But that is not the essential point. The point is that the case for originalism stands or falls based on the relative desirability of the Constitution it would produce. This is almost tautological. Why would you favor originalism if you believe some other theory would produce a better Constitution, all things considered?

Q: I don't see anything wrong with this in principle, but apparently we'll never know what amendments might have been made under an originalist tradition, since you argue that the Supreme Court has in effect amended the Constitution on its own throughout our history.

A: No, and we'll never know which necessary changes wouldn't have been made (though there are some we can be pretty sure

66. A negative vote in one house of thirteen state legislatures is sufficient to block any proposed amendment. And this is on top of the requirement of a two-thirds majority in both houses of Congress. As a practical matter, this means that amendment is impossible without support from a very substantial supermajority of the public. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW THE PEOPLE CAN CORRECT IT)* 20–21 (2007); Lutz, *supra* note 24, at 257–60.

67. Justices Scalia and Thomas both have joined numerous opinions holding affirmative action unconstitutional without any mention of original meaning, which does not seem to have prohibited affirmative action. See Marvin Lett, Grutter, Gratz, and *Affirmative Action: Why No "Original" Thought?*, 1 STAN. J. C.R. & C.L. 417 (2005).

about). We have to make an educated guess whether the consequences of a rigidly originalist Court would have been better or worse. My strong feeling is worse.

Q: To what extent does this depend on the difficulty of the amendment process? What if, as I suggested earlier, the Constitution could be amended by a simple 51% majority? Would originalism still be fatally flawed, in your view?

A: I would not use the term “fatally flawed.” Originalism would be much more defensible in this situation. In fact, it would be a downright plausible approach. But where a provision is sufficiently old (or even if it is not old is responsive to a factual context that has radically changed since the provision was ratified) and its consequences sufficiently bad in the eyes of recently appointed judges (even after accounting for the benefits of stability in the law), a meliorative judicial construction would still be appropriate. Even a relatively lenient 51% amendment rule is costly—both in terms of the resources required to mobilize public support and the risk that the amendment will fail despite popular support (perhaps because too few resources could be collected to raise the issue to the fore of public consciousness). This means that, other things being equal, we should favor the judicial approach most likely to render amendment unnecessary.⁶⁸ In the situation I’ve just described, pragmatism is a better bet than originalism. If pragmatist judges get it wrong—as they inevitably will in some cases—the costs would be relatively small; a 51% vote would be sufficient to overturn their decision.

Q: I don’t feel I have a horse in this race, but I am puzzled by the concept of pragmatism or consequentialism. In order to justify a decision based on its outcome, don’t you need a scale that allows you to weigh outcomes? What is that scale?

A: You’re right that a scale is necessary—and not only that. In the constitutional context, justification depends on empirical assumptions like the relative competencies one attributes to state and federal governments; courts and legislatures; etc., as well as normative issues like the importance one assigns to rights like freedom of speech and equal protection; whether one believes these rights should be protected no matter what or balanced against other government interests; and a myriad of similar considerations. Most

68. Cf. EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION (2008); WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 133–34 (1994).

pragmatists take a broadly utilitarian view on these questions (meaning, roughly, that they think the Constitution, like other law, should be formulated to maximize social welfare). But one need not accept this view to accept the consequentialist point I've been making about constitutional interpretation. That point does not depend on one's ultimate view about what the Constitution should mean. It depends only on the more modest claim that a theory of constitutional interpretation must be justified with respect to ultimate views; it cannot be self-justifying. This means that proponents of originalism cannot duck the responsibility to defend the Constitution an originalist approach would yield. To do so is to forfeit the debate.

Q: Another thought experiment: what language would you have to incorporate into a constitution so that originalism would never be an issue? For example, could you incorporate references to community values? That way, the Constitution would automatically live and breathe as community values live and breathe. Would any society ever embrace such a constitution? What would be the outcome if it did?

A: To answer your second question first, sure you could incorporate references to community values; arguably the Constitution already does (in the Eighth Amendment⁶⁹ and the Due Process clause⁷⁰). But it would be a bad idea to incorporate them in any extensive way, since judges have no special training or talent for discerning community values and their mistakes are harder to correct than the mistakes of legislatures. That's why many pragmatists cast a jaundiced eye on decisions like *Roe v. Wade*⁷¹ and *Roper v. Simmons*⁷² (which bans the execution of criminals who committed their crimes as minors).⁷³ As for your first question, you can never completely get rid of the originalism issue, since whatever language you used to do so would itself have to be interpreted. But you might be able to force the originalists to judge more pragmatically by writing in a provision requiring judges to interpret the Constitution according to the theory I've been advocating.

69. *Trop v. Dulles*, 356 U.S. 86 (1958).

70. *Lawrence v. Texas*, 539 U.S. 558 (2003); *Rochin v. California*, 342 U.S. 165 (1952).

71. 410 U.S. 113 (1973).

72. 543 U.S. 551 (2005).

73. *See* Posner, *supra* note 47.

Q: This all strikes me as distressingly anti-democratic. Are you really arguing that judges should just decide cases in accordance with the Constitution they personally think best?

A: Not exactly. My discussion of consequentialism has really been addressed to the question: what kind of judges should ordinary citizens want their President to appoint and their Senators to confirm? The answer is that they should support the kind of judges who they think most likely to interpret the Constitution as they, the citizens, would like it to be interpreted. As Posner wrote in the conclusion to “Bork and Beethoven”:

In a representative democracy, the fact that many (it need not be most) people do not like the probable consequences of a judge’s judicial philosophy provides permissible grounds for the people’s representatives to refuse to consent to his appointment, even if popular antipathy to the judge is not grounded in a well thought out theory of adjudication. The people are entitled to ask what the benefits to them of originalism would be, and they will find no answers in [Robert Bork’s] *The Tempting of America*.⁷⁴

It may be that originalism’s proponents can yet persuade the people that these benefits exist. And if they do so often enough, maybe they’ll get a truly originalist Supreme Court. But I don’t see this happening. Virtually no one would like the music.

VI. STABILITY

Q: It seems to me we are still missing something. I am reminded of the old adage that business can cope with any tax code the public decides to impose. What it can’t cope with is capricious change, because in that case there is no way to assess risks, and business can’t move forward except by assessing risks.

A: This is an undeniably important point, though it is one to which consequentialism is quite sensitive. Stability is an important goal of the legal system and pragmatist judges take it into account in deciding cases.

Q: I’m not persuaded. Even if pragmatist judges individually pay attention to the relative importance of stability, they are bound to have different ideas about it. If this is true and if pragmatism tells them to follow their best all-things-considered judgment, it seems

74. Posner, *supra* note 64, at 1382.

likely to create a great deal of systemic instability. I am beginning to think the case for originalism stands on the concept that government is impossible without some stable ground rules, and no one would be able to agree on any ground rules if the rules were understood to have no fixed meaning.

A: Some originalists do make this argument, but there is an obvious response: after two centuries of nonoriginalist judging, a return to pure originalism would generate massive instability in the legal system. All kinds of settled expectations would be upset.

Q: I don't like the sound of that. But maybe short-term instability is the price we have to pay for long-term stability. If your house was built on a foundation of quicksand, you wouldn't hesitate to replace it with concrete, even if that meant tearing the house down.

A: We've never had a consistently originalist Supreme Court, but we haven't sunk into the quicksand yet. Pragmatist judges aren't stupid or reckless. They understand the importance of stable ground rules as well as anyone. That's why they consider the Constitution's original meaning, and especially its original purpose, as an important factor in deciding constitutional cases.⁷⁵ They also take precedent seriously, especially where it has induced public reliance. But unlike originalists, pragmatists understand that stability is a matter of degree and in some cases must give way to other goods.

Q: No one would have ratified the Constitution if the meaning had been understood to be provisional. Or maybe they would have, but they would have insisted on knowing what the provisions were.

A: No one who ratified the Constitution seriously expected it to remain in force for 220 years. Their most recent example of a "perpetual" constitution was the Articles of Confederation, which collapsed after less than a decade. Even if the founders had expected the Constitution to survive two centuries, they certainly wouldn't have wanted—at least they shouldn't have wanted—its content to remain constant unless 75–90% of the population approved changes.⁷⁶ That would simply have been foolish. Ultimately, though, what Americans of the founding generation wanted is beside the point. They are no longer the ones who have to live with the

75. See Richard Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165 (2008).

76. Cf. ELHAUGE, *supra* note 68, at 9–10 (making a similar point in the context of statutory interpretation).

Constitution they ratified; we are. That means the relevant question is what method of constitutional interpretation will make the Constitution work best for us. The answer is one that carefully weighs the benefits of stability and clarity, the relative competencies of judges and other government bodies, and likely consequences of adopting one Constitutional rule or another. This is the approach that eleven generations of Americans have developed for keeping the Constitution current and have lived with tolerably well. Given the practical impossibility of invoking the stringent Article V amendment procedures, it is the provision I would endorse. Justice Scalia's many departures from a rigid originalist interpretation suggest this is the view he really endorses, too. He just attaches greater value to stability, defers less to legislatures, and most important, likes the content of original meaning more than I do.

Q: I am coming around.

A: Wait, there is more. On top of everything we have discussed, there are plenty of questions originalism can't answer; maybe more than it can. And it is not just that original meaning is fraught with ambiguity (in the abstract and as applied). Even where everyone agrees what the Constitution requires, it is often difficult or costly (sometimes to other constitutional values) to determine whether those requirements have been violated. And whatever approach the Court adopts will produce systematic errors—either over-enforcing or under-enforcing the Constitution, or both. Put more dramatically, the Court has to choose—in every constitutional context—whether to err on the side of forbidding constitutional government action (as it does in *Miranda v. Arizona*,⁷⁷ which excludes evidence from confessions obtained without the required warning, though the Fifth Amendment requires merely that a confession be voluntary)⁷⁸ or on the side of complicity in constitutional violations (as it would if it abandoned *Miranda*'s warning requirement, knowing that courts would admit some unconstitutionally obtained confessions as a result).

Another example: everyone agrees that a bill only becomes law if it passes both houses of Congress and is signed by the President. But how should the Supreme Court determine whether this has

77. 396 U.S. 868 (1969).

78. See Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 19 (2004).

occurred?⁷⁹ (This may seem like a fanciful question, but it is the subject of a famous Supreme Court case.)⁸⁰ There are a number of plausible approaches. The Court could refuse to enforce a law whenever it believes that the law probably did not pass through the constitutionally required procedures. It could apply the standard of proof from criminal cases, striking down laws only where there is no reasonable doubt the procedures were defective (or the reverse—upholding laws only where there is no reasonable doubt they were properly passed). Or it could do what it actually has done, which is to conclusively presume that all bills certified by the speaker of the house have been validly passed into law. There are good reasons for this presumption, not least of which that it will generally square with the facts. It will also minimize judicial interference with congressional self-governance. But there's also no question that it will cause the Court to enforce the occasional constitutionally defective law. Sometimes there is a clerical error in the bill the speaker certifies. One can even imagine the Speaker of the House sneaking in some extra pork for her district while no one was looking. But the Court has decided that the costs of identifying these violations—both the risk of error, which would nullify legitimately passed laws, and the intrusion on congressional self-governance—exceed the benefits. This is a quintessentially pragmatic calculation, one of many that virtually no one questions the Court's right to make.⁸¹

Q: The more I think about it, the more originalism seems like a trivialization of the much larger question of how the Justices—to invoke a golf metaphor—should address the ball.

A: Exactly. There is a rigidity and formalism to the normative thinking behind originalism that parallels the rigidity and formalism of originalist interpretation. Much of originalist argument seems premised on the notion that we must either accept the original meaning of the Constitution as binding law or reject the Constitution altogether. But constitutional law is not an all or nothing proposition. We can accept original meaning as authoritative for some purposes and not for others. We can treat the text not as a body of fixed and determinate rules, but as a site of contestation in

79. *See id.* at 72–74.

80. *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892).

81. RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 132–33 (2001).

constitutional culture or a flexible framework for common-law constitutionalism or a hundred other things. Nor should we forget that the constitutional text, however interpreted, is far from the only constraint on judicial decision-making and probably not the most important. Theories of interpretation are simply one aspect of a larger social practice of constitutional adjudication, in which legal culture and the Court's weak institutional position play an important constraining role. They must be considered in light of that practice, and like the other aspects of it, they must be justified by reference to their consequences.

