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Originalism and Original Exclusions

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Originalism and Original Exclusions

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In this article, I consider how the interpretation of today's Constitution should be affected by the antebellum Constitution's accommodation of slavery and by the limitation of the franchise, at the time of the antebellum Constitution, to a small minority of the adult population. I refer to these defects in the antebellum Constitution and the political system that produced it as "original exclusions."

In view of these original exclusions, the mere ratification of provisions of the antebellum Constitution cannot imbue them with sufficient moral legitimacy to override contemporary statutes. Thus, a justification for originalism based on notions of popular sovereignty must fail. The original exclusions also straightforwardly defeat the argument that originalism achieves desirable results because the Constitution was produced under supermajoritarian voting rules. In fact, as the Constitution is so hard to amend, and as there has been moral progress since the time of the antebellum Constitution, it makes sense to assume that the original meaning of some remaining antebellum provisions is morally retrograde and undesirable.

The progressive elimination of the original exclusions was accomplished, in part, through nonoriginalist means and has increased the moral legitimacy of the Constitution. As the moral legitimacy of the Constitution derives, in part, from past nonoriginalism, future nonoriginalism should require less justification.

There are some cases in which the text or original meaning of a constitutional provision was plausibly affected by an original exclusion. There are also cases in which application of a constitutional provision specially affects a previously-excluded class. If one or both of these conditions apply, the originalist position becomes even weaker.

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Most fundamentally, originalism is objectionable because it seeks to fix the meaning of antebellum provisions in the legal and political culture that produced the original exclusions.

INTRODUCTION

FROM a contemporary perspective, the antebellum Constitution had questionable moral legitimacy.[2] Only a small minority of the adult population was able to participate in ratifying the Constitution or its amendments.[3] Among those excluded from the franchise were women, African–American slaves, almost all Native Americans,[4] and many poor white males, who were excluded by property qualifications and poll taxes.[5] The antebellum Constitution was produced by a slave society,[6] and it accommodated and protected slavery in several provisions. The fugitive slave clause in Article IV, Section 2 of the Constitution required that slaves who escaped to a free state be returned to slavery;[7] Article I, Section 9 prohibited Congress from banning the African slave trade until 1808;[8] Article V prohibited any amendment of this provision before 1808;[9] and the Three–Fifths Clause in Article I, Section 2 increased the representation of slave states in Congress and the electoral college beyond the representation they would have received if slaves had not been counted.[10]

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2 *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (discussing the concept of moral legitimacy as applied to constitutions).

3 *See* Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?*, 73 CAL. L. REV. 1482, 1498 n.44 (1985) (collecting sources and estimating that "roughly 2.5% of the population voted in favor of the Constitution's ratification").

4 The issue of Native American suffrage is complicated, from the perspective of democratic theory, as Native Americans then enjoyed some degree of self–rule, as reflected in the Constitution's reference to "Indians not taxed." U.S. CONST. art. I, § 2. "Native Americans apparently voted in parts of New England," but the general failure of states to offer the franchise to Native Americans could be considered a democratic deficit. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 406 n.10 (2000).

5 The percentage of white males who were excluded is the subject of some uncertainty and debate, and there were different suffrage rules in different states. *See* Simon, *supra* note 3, at 1498 n.44; AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 7 (2005). While some states permitted free blacks to vote, Keyssar notes that "most free blacks could not meet property and taxpaying requirements." KEYSSAR, *supra* note 4, at 55.

6 I use the term "slave society" to refer to a society in which slavery exists.

7 U.S. CONST. art. IV, § 2.

8 U.S. CONST. art. I, § 9.

9 U.S. CONST. art. V.

10 U.S. CONST. art. I, § 2; *see also* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 3–36 (2d ed. 2001) (explaining that the Constitution also contained a number of other provisions that directly or indirectly accommodated slavery).

I refer to these defects in the antebellum Constitution and the political system that produced it as "original exclusions." There has been surprisingly little sustained discussion of how such original exclusions should bear on the interpretation of the Constitution. Participants in the originalism debate sometimes address these issues, but usually only in passing.[11] In this Article, I offer a broad and sustained treatment.

Many people, undoubtedly, have the intuition that the original exclusions count against originalism as a theory of constitutional interpretation. I share that intuition, and I try here to offer arguments that can support and develop it. Yet in the end, at least some of these arguments must be addressed, again, to moral intuition.

Originalists believe that courts should enforce as law the original meaning of the 1787 Constitution and the original meaning of each constitutional amendment. Nonoriginalists believe that courts need not enforce original meaning. I follow Professor Mitchell Berman in identifying as nonoriginalists those who would sometimes enforce original meaning and sometimes not;[12] originalism, as reflected in the views of self-identified originalists, seems to admit few or no exceptions other than the possible exception of precedent.[13]

Nonoriginalism is a matter of occasion and a matter of degree. Nonoriginalists may be prepared to depart from original meaning on some occasions but not others, and they may be prepared to depart *farther* from original meaning on some occasions than on others.[14] Nonoriginalists need not deny, and I do not deny, that courts should be constrained, to some extent, by the language and original meaning of the Constitution.[15]

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11 The following provide important, but brief treatment: 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 316–19 (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 88–91 (1998); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 229–31 (1980); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1132–33 (1998); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 394–96 (2007); Simon, *supra* note 3, at 1498.

Two recent and important sustained treatments, from a nonoriginalist perspective, are R. George Wright, *Originalism and the Problem of Fundamental Fairness*, 91 MARQ. L. REV. 687 (2008) and Malla Pollack, *Dampening the Illegitimacy of the United States' Government: Reframing the Constitution from Contract to Promise*, 42 IDAHO L. REV. 123 (2005). Wright and Pollack are most concerned with what I call exclusion-specific nonoriginalism. *See infra* Part IV.

12 Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 19–20 (2009). Originalists disagree among themselves as to whether they should follow nonoriginalist precedent. *See infra* notes 182–83 and accompanying text.

13 *See* Berman, *supra* note 12, at 19–20; *see also infra* notes 182–83 and accompanying text.

14 Part IV, *infra*, illustrates these points with respect to the impact on previously excluded groups of constitutional provisions affected by the original exclusions.

15 Suppose that the original meaning of the First Amendment would not protect the burning of an American flag as a means of protest, so that *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990), are nonoriginalist decisions. To endorse

There are a number of divisions among originalists. Some would enforce the original intent of the framers,[16] others the original understanding of the ratifiers,[17] and still others—now probably the dominant group—the original "public meaning."[18] I use the term "original meaning" to embrace all three possibilities.

Originalism has long been associated with a politically conservative outlook.[19] More recently, the legal academy has seen the growth of liberal originalism[20] and libertarian originalism.[21] However, originalist judges still tend to be conservative; the two self-avowed originalists on the Supreme

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these nonoriginalist decisions is not to say that the First Amendment can be interpreted as meaning anything at all. For example, endorsement of these cases would not imply that the First Amendment can be interpreted as guaranteeing the right to health care.

16 *See, e.g.*, William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694–95, 706 (1976); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

17 *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 36 (1999) ("ratifying intent") [hereinafter WHITTINGTON, CONSTITUTIONAL INTERPRETATION]; Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 610 (2004) [hereinafter Whittington, *The New Originalism*]. Madison himself expressed some support for this view. *See* Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 447–48 (Max Farrand ed., 1966) ("[I]f a key is to be sought elsewhere [than the text itself], it must be not in the opinions or intentions of the Body which planned & proposed the Constitution, but in the sense attached to it by the people in their respective State Conventions where it recd. all the authority which it possesses.").

18 *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3 (Amy Gutmann ed., 1997) [hereinafter Scalia, *Common-Law Courts in a Civil-Law System*]; Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 304 (2007); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 627–28 (1999); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 853 (1989) [hereinafter Scalia, *Originalism: The Lesser Evil*]; Lawrence B. Solum, *Semantic Originalism*, Ill. Pub. L. Research Paper No. 07-24 (2008), *available at* http://ssrn.com/abstract=1120244.

19 *See, e.g.*, BERGER, *supra* note 16; BORK, *supra* note 18; Rehnquist, *supra* note 16.

20 Jack Balkin has recently embraced the originalist label while retaining liberal views. *See* Balkin, *supra* note 18; Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 550–59 (2009) [hereinafter Balkin, *Framework Originalism*].

Bruce Ackerman and Ronald Dworkin have been referred to by others as liberal originalists, but they have not self-identified as such. Akhil Amar has come close to embracing the label. *See* Akhil R. Amar, *Rethinking Originalism*, SLATE, Sept. 21, 2005, http://www.slate.com/id/2126680/.

21 Randy Barnett is the most well-known libertarian originalist. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 89–130 (2004) [hereinafter BARNETT, RESTORING THE LOST CONSTITUTION]; Randy E. Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405 (2007) [hereinafter Barnett, *Underlying Principles*]; Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. 257 (2005) [hereinafter Barnett, *Trumpeting Precedent*]; Barnett, *supra* note 18.

Court are Justices Antonin Scalia and Clarence Thomas.[22]

A major issue that divides originalists is to what extent the original meaning of a constitutional provision includes the original expected application of that provision.[23] To some extent, the dispute between expected–applications originalists and unexpected–applications originalists (as I will call the two camps)[24] divides originalists along ideological lines. Conservative originalists are more likely to believe that original meaning includes original expected application, while liberal and libertarian originalists are more likely to deny that original meaning includes original expected application.

Closely related to the issue of whether original meaning includes original expected applications is the issue of how nonoriginalist constitutional law has become. Until recently, both originalists and nonoriginalists seemed to agree that vast areas of Supreme Court doctrine were nonoriginalist. There were attempts by originalists to justify *Brown v. Board of Education*[25] on originalist grounds,[26] but originalists did not seek to justify constitutional doctrine in general; they sought to critique constitutional doctrine.

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22 Scalia, *Common–Law Courts in a Civil–Law System*, *supra* note 18; Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 1–7 (1996).

23 The following scholars, among others, oppose the inclusion of expected applications: Balkin, *supra* note 18, at 292–93; Barnett, *Underlying Principles*, *supra* note 21, at 410; Solum, *supra* note 18, at 20. Balkin and Barnett both credit Ronald Dworkin with clearly elucidating the distinction between original meaning and original expected application. *See* Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION, *supra* note 18, at 115, 116.

The following scholars are, most or all of the time, in favor of including expected applications: Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION, *supra* note 18, at 129, 148–49 [hereinafter Scalia, *Response*]; John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371 (2007) [hereinafter McGinnis & Rappaport, *Original Interpretive Principles*]; John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 NW. U. L. REV. 751 (2009) [hereinafter McGinnis & Rappaport, *Original Methods Originalism*]; *see also* Jed Rubenfeld, *Reply to Commentators*, 115 YALE L.J. 2093, 2099 (2006).

Some unexpected–applications originalists frame the issue as whether we should be bound by original expected applications as well as by original meaning. Balkin, *supra* note 18, at 292–93; Solum, *supra* note 18, at 20. Expected–applications originalists, however, do not accept this framing; they insist that original expected applications are part of original meaning. Scalia, *Response*, *supra*, at 144, 148–49.

24 These are ugly neologisms, but I think they are clearer than some alternative possible terms.

25 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

26 BORK, *supra* note 18, at 82; *see also* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 957–60 (1995). McConnell's innovative originalist justification for *Brown* was based on behavior of political actors *subsequent* to the ratification of the Fourteenth Amendment. *Id.* It provoked an important exchange with Professor Michael Klarman. *See* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1882–85, 1928–36 (1995); Michael W. McConnell, *The Originalist Justification for* Brown*: A Reply to Professor Klarman*, 81 VA. L. REV. 1937, 1938, 1954–55 (1995).

It is probably still the majority view that a great deal of constitutional doctrine is nonoriginalist. In a much-cited account, Professor Henry Monaghan concludes that "no acceptable version of original understanding theory can yield a convincing descriptive account of the major features of our 'Bicentennial Constitution': nontextual guarantees of civil liberties; a powerful, presidentially centered national government; a huge administrative apparatus; and national responsibility for what had long been conceived of either as local responsibilities or as not the responsibility of government at all."[27] Professor Richard Fallon, likewise, concludes that "a great deal of existing constitutional doctrine—including much that we are likely to think most important—cannot be justified on originalist principles."[28] As examples of reigning nonoriginalism, Fallon mentions First Amendment doctrine and equal protection doctrine as applied to both state and federal governments.[29]

With the growth of unexpected-applications originalism, there are now more ambitious attempts to reconcile originalism with current doctrine. Professor Jack Balkin argues that the constitutional protection of abortion is justified on originalist grounds.[30] Professor Lawrence Solum suggests that there may be no cases of "full inconsistency" between a Supreme Court decision and the original semantic meaning of the Constitution; in the few cases of partial inconsistency, he suggests, the Court's opinion could be rewritten to achieve the same result by relying on other provisions of the Constitution.[31]

For purposes of this Article, I will assume the traditional conception of original meaning, under which original meaning includes a fair amount of original expected application. In the Conclusion, I will revisit the issue and consider how various arguments based on the original exclusions apply to unexpected-applications originalism.

This Article is part of the literature on the "countermajoritarian difficulty,"[32] as well as part of the originalism debate. I will use the term "judicial restraint" to denote a reluctance or refusal to strike down statutes as unconstitutional.[33] I will use the term "judicial review" to

27 Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 739 (1988).

28 RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 15 (2001).

29 *Id.* at 15–16; *see also* BORK, *supra* note 18, at 155; Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 940 (1998); Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 177 (2008) ("Many doctrines that are central to modern constitutional law are not reconcilable with original constitutional meanings.").

30 Balkin, *supra* note 18.

31 *See* Solum, *supra* note 18, at 138. While these conclusions might be welcomed by liberals, Solum resists ideological classification. *Id.*

32 *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (Yale Univ. Press 2d ed. 1986) (1962).

33 This is probably the most prominent meaning of "judicial restraint." *See* Frank B.

denote a willingness to strike down statutes as unconstitutional, or to denote the striking down of statutes.[34] There is originalist judicial review and nonoriginalist judicial review. Some arguments against originalism, including arguments based on the original exclusions, are more powerful against originalist judicial review than as arguments in favor of nonoriginalist judicial review.

When conservatives embraced originalism to attack the liberal decisions of the Warren and Burger Courts, originalism was strongly identified with judicial restraint.[35] After conservatives gained ascendancy on the Supreme Court, however, the association between originalism and restraint became attenuated.[36] According to a study by Professor Lori Ringhand, Justices Scalia and Thomas have voted to overturn federal statutes more often than their liberal nonoriginalist colleagues.[37] The same study shows that Justices Scalia and Thomas have voted to overturn state statutes less often than their liberal nonoriginalist colleagues,[38] but that may be because preemption cases (involving judicial review under the Supremacy Clause)[39] were not included in the study.[40]

This Article draws on concepts of constitutional legitimacy. Fallon has usefully distinguished among moral legitimacy, sociological legitimacy, and legal legitimacy.[41] The moral legitimacy of a constitution refers to its "moral justifiability or respect-worthiness."[42] The sociological legitimacy of a constitution refers to its acceptance by citizens.[43] Thus, moral legitimacy is a normative concept, while sociological legitimacy is a positive concept (albeit with normative implications).[44] Originalists as well as nonoriginalists

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Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1759 (2007).

34 I use the term "judicial review" in place of "judicial activism" because the latter term is too often used as a political epithet. *See id.* at 1756–58.

35 Reva B. Siegel, *Heller & Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1401, 1406–08 (2009).

36 Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. 43, 45–54, 61 (2007).

37 *Id.* at 49. Cross and Lindquist obtain similar results using a more complicated measure. Cross & Lindquist, *supra* note 33, at 1775.

38 Ringhand, *supra* note 36, at 59.

39 U.S. CONST. art. VI.

40 Ringhand, *supra* note 36, at 50.

41 Fallon, *supra* note 2.

42 *Id.* at 1796.

43 *Id.* at 1795–96. Legal legitimacy, in the case of a constitution, depends on sociological legitimacy. *Id.* at 1805 ("With respect to the most fundamental matters, sociological legitimacy is not only a necessary condition of legal legitimacy, but also a sufficient one.").

44 *See* Legal Theory Lexicon: Legal Theory Lexicon 046: Legitimacy, http://lsolum.typepad.com/legal_theory_lexicon/2005/06/legal_theory_le_2.html (Oct. 12, 2008). Solum uses the terms "normative legitimacy" and "sociological legitimacy." *Id.*

often assert that the source of the Constitution's moral legitimacy points us to the proper method of interpreting the Constitution.[45] A large part of this Article is organized around the possible sources of the Constitution's moral legitimacy, which I divide broadly into consent-based accounts and result-based accounts.[46]

What impact should the original exclusions have on constitutional interpretation? They bear on constitutional interpretation in various ways. Most straightforwardly, they undercut democratic-theoretical justifications for originalism. In Part I of this Article, I consider whether the mere ratification of provisions of the antebellum Constitution can provide sufficient moral legitimacy to justify overriding laws passed by contemporary, more fully democratic legislatures. If mere ratification gives moral legitimacy, there is an argument for originalism based on democratic theory and notions of popular sovereignty. Professor Keith Whittington has offered such an argument,[47] and Professor Bruce Ackerman, though not an originalist, has made a compelling case for popular sovereignty that might give comfort to originalists.[48] But the originalist argument from popular sovereignty does not work because of the original exclusions.

In Part II, I review result-based or consequentialist accounts of the moral legitimacy of the Constitution. Some of these could support nonoriginalism, while others could support originalism. I believe that the moral legitimacy of the Constitution has been enhanced by nonoriginalist decisions and nonoriginalist political behavior—in particular, by the elimination of original exclusions. If the moral legitimacy of the Constitution derives in part from past nonoriginalism, future nonoriginalism may need less justification.

One audacious result-based argument, from an originalist perspective, is offered by Professors John McGinnis and Michael Rappaport, who claim

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45 *See, e.g.*, WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 17, at 152; *see also* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 637–39 (2008). Professor Samaha is also skeptical of the connection. *Id.* at 610–11.

Originalists who rely on theories of meaning and interpretation often depart more aggressively from the idea that the source of moral legitimacy points to the proper interpretive method. As discussed below in Part VI, they claim that if we accept the Constitution as binding law, for whatever reason, originalism is the proper method of interpretation (or the only method of interpretation).

Often scholars making the connection between moral legitimacy and proper interpretation use the term "authority" rather than "moral legitimacy." *See id.* at 637–39. I prefer the term "moral legitimacy" because the term "authority" is ambiguous as between moral legitimacy and sociological legitimacy. To the extent that scholars believe that sociological legitimacy should guide interpretation irrespective of whether sociological legitimacy contributes to moral legitimacy, they are advancing a different position than the one I discuss.

46 *See infra* Parts II and III.

47 WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 17.

48 1 ACKERMAN, *supra* note 11; 2 ACKERMAN, *supra* note 11; Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1800–02, 1809–12 (2007) [hereinafter Ackerman, *The Living Constitution*].

that originalism produces desirable results because the Constitution was approved under a supermajority process.[49] Their argument, however, fails in light of the original exclusions and their attempts to save it are unavailing. Indeed, the mirror image of the McGinnis–Rappaport position is more credible: as the Constitution is so hard to amend, and as there has been moral progress since the time of the antebellum Constitution, it makes sense to assume that the original meaning of some remaining antebellum provisions is morally retrograde and undesirable.

In Part III, I consider theories of moral legitimacy that rely on contemporary consent. These approaches are more consistent with nonoriginalist methods of interpretation than is the untenable popular–sovereignty approach. However, some aspects of contemporary consent–based legitimacy could give support to originalism.

In some cases, the text or original meaning of a constitutional provision was plausibly affected by an original exclusion and in some cases, application of a constitutional provision specially affects a previously–excluded class. If one or both of these conditions apply, the case for nonoriginalism is arguably stronger.[50] I discuss such issues of exclusion–specific nonoriginalism in Part IV. I also consider there the history of the requirement in Article V of the Constitution that three–fourths of the states must ratify any amendment.[51] This provision was inserted after the narrow defeat of a proposal to require that only two–thirds of the states must ratify an amendment;[52] the defeat of that proposal appears to reflect the interest of the deeper– South states in protecting the slave trade.[53]

In Part V, I offer my most radical arguments. First, the authority of original meaning is fundamentally tainted insofar as that authority is said to derive from any source in the antebellum period. Second, originalism is objectionable as a method of constitutional interpretation because it seeks to fix the meaning of antebellum provisions in the legal and political culture that produced the original exclusions. These two antebellum–taint arguments are particularly relevant to versions of originalism, discussed in Part VI, that rely on theories of meaning and/or authority, and that profess to be unconcerned with the source of the Constitution's moral legitimacy.

In the Conclusion, I review the various arguments I have offered by considering how each fares under the minimalist conception of original meaning that characterizes what I have called unexpected–applications originalism. In general, arguments based on the original exclusions are less powerful against unexpected–applications originalism than against

49 McGinnis & Rappaport, *supra* note 11.

50 *See* Wright, *supra* note 11, at 697–98; Pollack, *supra* note 11, at 208.

51 U.S. CONST. art. V.

52 *See* FINKELMAN, *supra* note 10, at 33; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 558–59 (Max Farrand ed., 1911).

53 *See* FINKELMAN, *supra* note 10, at 33.

expected–applications originalism. Indeed, many of these arguments could be used by unexpected–applications originalists to support their view that original meaning should not be considered to include original expected application.

I. Popular Sovereignty

One normative basis for originalism is situated in democratic theory and focuses on the justification for judicial review. According to some originalists, it is only by relying on the authority of a previous, higher–law, democratic process—the ratification of the Constitution or amendments—that judges can justifiably override the will of contemporary democratic majorities. And since the authority for imposing constitutional limits on contemporary majorities comes from these past democratic processes, the limits imposed should be those expressed at the time of ratification. Professors Keith Whittington[54] and Robert Bork,[55] among others, have argued along these lines. Professor Bruce Ackerman, while not precisely an originalist, has offered a similar argument.[56]

For an originalism based in democratic theory, the original exclusions are uncomfortable facts. The processes that generated the Constitution seem obviously inferior and less democratic than the processes that generate contemporary federal statutes. True, the original Constitution was ratified by a supermajority of representatives elected by propertied white men, but that is a supermajority of a small minority. Surely, the will of a simple majority, in a free society with universal suffrage, should have greater democratic legitimacy than the will of the privileged few in a slave society with very limited suffrage.

The taint of slavery actually undercuts the democratic legitimacy of the Constitution in at least two ways. Slavery was a feature of the political processes that produced the Constitution, and the Constitution itself accommodated and protected slavery. Put another way, slavery tainted both the adoption process and the substantive provisions of antebellum constitutionalism.

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54 *See* Whittington, Constitutional Interpretation, *supra* note 17, at 35–37, 78–79, 140–41.

55 Bork, *supra* note 18, at 143.

56 *See, e.g.*, 1 Ackerman, *supra* note 11, at 316–18. As Professor Michael Dorf explains, Ackerman accepts important assumptions of originalism, but Ackerman avoids originalism through a number of moves, the most important of which is his argument that the Constitution can be amended, and has been amended, outside the Article V process. *See* Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 Geo. L.J. 1765, 1774–81 (1997).

A. Preliminary Distinctions

It is important, at this preliminary stage, to distinguish the argument based on original exclusions, offered here, from the "presentist" or "dead hand" argument that maintains that present people should not be bound by the decisions of people long dead.[57] Some, unfortunately, do not recognize this distinction. Judge Michael McConnell, for example, writes that "the oft–heard complaint that the Constitution has no legitimate claim of authority to bind us because blacks and women were excluded from the franchise in 1787, seems beside the point. No one now alive was represented in 1787."[58]

But regardless of one's view of the presentist argument against originalism or constitutionalism, the argument from original exclusions has independent force. Suppose we believe that it is sometimes morally legitimate for the decisions of contemporary people to be constrained by the decisions of people long dead. We can and should still say that the processes that generated constraining law cannot provide it moral legitimacy if they are far less democratic than contemporary processes, and if they also produced a Constitution that accommodated slavery.

McConnell's argument that the original exclusions are "beside the point"[59] would have some plausibility if it were offered by an *opponent* of originalism. An opponent of originalism could say that the lack of representation of contemporary people is enough to rule out originalism, regardless of who was represented at the Founding. But a friend of originalism, such as McConnell, needs to overcome both the presentist objection and the argument based on original exclusions.

Originalists also sometimes fail to distinguish between the moral legitimacy of the antebellum Constitution and the moral legitimacy that the Constitution of today can claim. McConnell writes: "Americans whose predecessors were excluded from voting on the original Constitution—such as women and African–Americans—apparently venerate the Constitution no less ardently than propertied white males.... [B]lacks and women today are no more inclined than any other portions of the population to jettison the Constitution."[60] The suggestion here is that defects in the antebellum Constitution bear only on whether the Constitution should today be considered legitimate; they do not bear on the merits of originalism. In fact, the opposite is more nearly true. Elected representatives in America are no

57 *Compare* WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 17, at 196, *with* Michael S. Moore, *Interpretation Symposium: Philosophy of Language and Legal Interpretation: A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279 (1985).

58 McConnell, *supra* note 11, at 1132. When this article was published, Judge McConnell was Professor McConnell.

59 *Id.*

60 *Id.* at 1132–33.

longer selected by propertied white males; the Constitution today prohibits federal and state governments from denying the right to vote on the basis of race or gender.[61] Further, the Constitution today no longer accommodates slavery; it prohibits slavery.[62] These defects of the antebellum Constitution have been remedied (by the Civil War, various constitutional amendments, state-law expansion of the franchise, and Supreme Court decisions),[63] so they do not suggest that the current Constitution is morally illegitimate. But the remediation of the Constitution does not establish that the mere ratification of provisions of the antebellum Constitution justifies overriding the democratically-passed laws of today. On the contrary: our awareness that the Constitution has gained greater legitimacy by eliminating original exclusions reinforces the conclusion that original ratification cannot alone provide moral legitimacy. As Justice Thurgood Marshall put it, "'We the People' no longer enslave, but the credit does not belong to the framers."[64]

Though I deny that the mere ratification of the antebellum Constitution supplies the Constitution of today with enough moral legitimacy to override a contemporary statute,[65] I do not deny that the Constitution of today *has* enough moral legitimacy to override a contemporary statute. The Constitution's moral legitimacy derives from other sources, as discussed in Parts II and III below.

The conclusions I urge in this Part are based on contestable judgments and intuitions concerning democratic legitimacy. Democratic legitimacy, as the concept is usually understood, is a kind of moral or normative legitimacy (though it is not the whole of moral legitimacy). The criteria for democratic legitimacy are not agreed upon. Suppose it were accepted that a political process in which the great majority of adults are eligible to vote has greater legitimacy than a political process in which a small minority of adults are eligible to vote, and suppose further it were accepted that the political processes of a free society have greater legitimacy than the political processes of a slave society. Under these criteria, an originalism based in democratic theory would be ridiculous. Obviously, however, originalists who rely on democratic theory do not accept, or do not fully accept, these criteria of democratic legitimacy.

61 U.S. CONST. amend. XV; U.S. CONST. amend. XIX.

62 U.S. CONST. amend. XIII.

63 *See infra* notes 128–31, 139–50 and accompanying text.

64 Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987).

65 I use the somewhat inexact phrase "mere ratification" as shorthand for mere production, which includes all the processes that lead to the adoption of a constitutional provision.

B. The Concept of Popular Sovereignty

How, then, could it be thought that the mere ratification of the original Constitution provides sufficient moral legitimacy to override a contemporary statute? The idea here is that of "popular sovereignty." The Constitution, it is said, was the work of the People, while contemporary statutes are merely the work of the People's representatives. As the work of the People takes precedence over the work of the representatives of the People, the mere ratification of the Constitution does provide moral legitimacy to override a contemporary statute and, moreover, we must interpret the Constitution as it was interpreted by the People at the time of adoption.

The two leading contemporary exponents of popular sovereignty, with respect to American constitutionalism, are Ackerman and Whittington. As noted, Ackerman is not actually an originalist; his chief departure from originalism is his insistence that the Constitution can be amended, and has been amended, outside the Article V process.[66] However, Ackerman accepts important assumptions of originalism,[67] and his eloquent exposition of the concept of popular sovereignty can be relied on by originalists of a more traditional bent. Whittington, in his own treatment of popular sovereignty, acknowledges some debt to Ackerman.[68] Of course, the idea of popular sovereignty as connected with judicial review goes far back in American constitutionalism—Chief Justice John Marshall expressed it in *Marbury v. Madison*,[69] as did Alexander Hamilton, even more energetically, in Federalist No. 78.[70]

Ackerman describes the American constitutional system as one of "dualist democracy,"[71] in which there is a sharp distinction between higher lawmaking, accomplished by the People, and ordinary lawmaking. He writes that "our normally elected representatives are only 'stand-ins' for the People and should not be generally allowed to suppose that they speak for *the People themselves* . . . ."[72] The Supreme Court, he believes, is and should be "an ongoing representative of a mobilized People during the lengthy periods of apathy, ignorance, and selfishness that mark the collective life of

66 *See* 1 ACKERMAN, *supra* note 11, 316–19; 2 ACKERMAN, *supra* note 11, 88–91; Ackerman, *The Living Constitution*, *supra* note 48.

67 *See* Dorf, *supra* note 56, at 1774–81. In Dorf's terminology, Ackerman is not a "strict originalist." *Id.*

68 WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 17, at 270 n.59 ("As will become evident, there are similarities between my arguments in this chapter and those of Bruce Ackerman.").

69 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173–79 (1803).

70 THE FEDERALIST No. 78 (Alexander Hamilton).

71 1 ACKERMAN, *supra* note 11, at 6.

72 *Id.* at 236.

the private citizenry of a liberal republic."[73]

Whittington embraces the concept of "dualism,"[74] and similarly elevates the authority of the People, as opposed to the authority of government:

> Originalism insists that government has no intrinsic authority; other approaches position government officials as autonomous political actors. By depending on the authority of the constitutional conventions to define constitutional meaning, originalism indicates and draws upon the constitutional foundation of popular sovereignty—that the people alone determine the higher law.[75]

There is a certain mystical quality to such claims, which may be more attractive to some than to others. I confess that I do find the romantic idealization of popular sovereignty, in authors such as Ackerman and Whittington, to be surprisingly inspiring.[76] But a dualism between higher, popular constitutionalism and lower, representative government still does not require us to say that the mere ratification of the antebellum Constitution imbues it with sufficient moral legitimacy to override contemporary laws. Once again, the distinction between the presentist argument and the argument over original exclusions is crucial. We might accept a mystical view of the People speaking in a higher voice, through constitutional enactments, so as to bind representative government centuries in the future. But we can also, simultaneously, deny that the purported work of the People has the moral legitimacy to bind subsequent generations, merely from the processes that produced it, if it is not the work of the People at all, but only the product of a small privileged minority.

C. In Search of People-ness

What is it about the creation of the original Constitution that suggests it was produced by "the People?" And do contemporary federal statutes have these same features to an equal or greater extent? I will review the various reasons to believe that the antebellum Constitution was produced by the People, mentioning the relevant positions of Ackerman and Whittington. After surveying these possible aspects of People-ness, I will conclude that

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73 *Id.* at 265.

74 WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 17, at 135, 137.

75 *Id.* at 155. Whittington also states that "'the people,' in their sovereign capacity, do not always exist.... Rather, the people emerge at particular historical moments to deliberate on constitutional issues and to provide binding expressions of their will, which are to serve as fundamental law in the future when the sovereign is absent. Between these moments, the only available expression of the sovereign will is the constitutional text, and government agents are bound by the limits of that text." *Id.* at 135.

76 I find it even more inspiring in Ackerman than in Whittington, perhaps because Ackerman is not actually an originalist.

if "the People" is a moralized concept, the antebellum Constitution should be considered less the product of the People than a contemporary federal statute. If "the People" is a stipulated concept, then of course it is possible to say that the antebellum Constitution was produced by the People. In that event, however, we should still conclude that the mere ratification of the antebellum Constitution provides it with insufficient democratic legitimacy and (most fundamentally) insufficient moral legitimacy to override a contemporary statute.

Ackerman capitalizes "the People," while Whittington does not. I will follow Ackerman's usage, as it better represents the concept sought to be conveyed.

1. *Direct Consent.*— In countries other than the United States, constitutions are often ratified by plebiscite or referendum. It certainly can be claimed that a constitution approved by referendum has been approved by the People, rather than merely by the People's representatives. However, none of the provisions in the United States Constitution were approved by referendum. The production of the Constitution, like the production of contemporary laws, was a representative process. White males (those who were able to satisfy the applicable property requirements or pay the applicable poll taxes) voted for elected representatives to the ratifying conventions, and those representatives, not the people themselves, voted to ratify the Constitution.[77] If there is a plebiscitary element to People-ness, the Constitution does not possess that element.[78]

Whittington argues that it actually adds to the legitimacy of the Constitution that the pro–Constitution federalists won perhaps a minority of popular votes and were able to secure ratification only by convincing delegates to vote unrepresentatively.[79] Whatever the merit of this argument, it does not reflect a plebiscitary view of democratic legitimacy. Ackerman is more favorable to the plebiscitary approach. He argues that watershed elections during Reconstruction and the New Deal should, in effect, be considered constitutional plebiscites, and he supports introducing a formal

77 U.S. CONST. art. VII.

78 The ratification of the original Constitution might still be thought more direct, more similar to a plebiscite, than the passage of a contemporary statute or than the ratification of constitutional amendments by state legislatures, as the only issue in the convention elections of 1787–88 was ratification of the Constitution.

79 WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 17, at 148 ("The initial election of delegates to the ratification conventions favored the opponents of the Constitution. An immediate majority vote based simply on the strength of numbers would have found the Federalists in the minority. In order to win ratification, proponents of the Constitution necessarily had to 'convert' some of their opponents. In allowing such deliberation, the anti-Federalists threw the outcome of the conventions into doubt and eventually lost control over the results. In doing so, however, they enhanced the authority of the adopted Constitution.").

plebiscitary element into the American constitutional process.[80] Yet Ackerman does not claim that any part of the antebellum Constitution was approved directly by the People.[81]

2. *Mobilized Deliberation.*— Key to Ackerman's conception of the People is the idea of "mobilized deliberation."[82] Ackerman complains that normal politics is beset by "apathy, ignorance, and selfishness."[83] By contrast, he suggests, constitutional politics is characterized, to a much greater degree, by engagement, knowledge, and the citizen's motivation to choose between alternatives based on "the rights of citizens and the permanent interests of the community."[84] In a similar vein, Whittington claims that factions and party politics are "inconsistent with constitutional deliberation."[85]

This is, of course, a highly idealized vision of constitutional politics. As Ackerman recognizes, this idealized vision corresponds far more closely to other periods of American constitutional politics than to the Founding.[86] The Constitution was the product of bargaining between interests groups or factions, including the slavery faction (comprising the five Southern states) and the slave-trading faction (comprising the three deeper-South states).[87]

One structural feature of American constitutional politics that does correspond to the value of mobilized deliberation is our two-stage process of enactment. Constitutional provisions are first approved by elected representatives (or, in the case of the original Constitution, delegates selected by elected representatives).[88] Then the constitutional proposals are submitted for ratification to a second set of representatives.[89] This two-stage process may be conducive to greater deliberation.

3. *Supermajority.*— Another structural feature of our process, of course, is the supermajority requirements in Article V and Article VII. Whittington appears to attach considerable significance to supermajority requirements, stating that "[o]riginalism provides that current majorities can only be

80 1 ACKERMAN, *supra* note 11, at 54–55. He opposes, however, quickie ratifications that occur in other countries. *Id.*

81 *See id.*

82 *Id.* at 285.

83 *Id.* at 235.

84 *Id.* (quoting THE FEDERALIST NO. 10 (James Madison)). Ackerman notes that this is a slightly modified quotation from Federalist No. 10. *Id.* at 352 n.4; *see also id.* at 240.

85 WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 17, at 147.

86 2 ACKERMAN, *supra* note 11, at 87–91.

87 *See* FINKELMAN, *supra* note 10, at 3–36; *see also* DAVID BRIAN ROBERTSON, THE CONSTITUTION AND AMERICA'S DESTINY 180–81 (2005).

88 U.S. CONST. arts. V, VII.

89 *Id.*

restricted by the demonstrable intentions of prior supermajorities."[90] Ackerman places less emphasis on supermajority requirements, consistent with his view that the Constitution can be amended through plebiscitary processes that do not meet those formal requirements.[91] In any event, we now know that what may have seemed a supermajority in 1788 was in fact a "sub–minority."[92] Far fewer people, as a percentage of the population, were entitled to participate in voting for representatives who ratified the Constitution than are entitled to participate in voting for representatives who pass a contemporary federal statute (and of course, the difference in the absolute number of people entitled to participate in voting now and at the Founding is even more enormous).

4. *Common Thread: Representativeness.*— The criteria of People–ness thus far discussed—the directness of voting, the political engagement of the population, the two–stage process, the supermajority requirements—all concern the representativeness of the enactment: is it representative of the popular will? While the antebellum Constitution and its amendments may score higher on some of these measures than a contemporary federal statute, they must score lower as to the ultimate standard of representativeness. The unrepresentativeness of the antebellum franchise—the exclusion of the great majority of people from voting—must surely wash away any other indicia of representativeness. Even if the antebellum Constitution had scored higher on some relevant criteria—even if, for example, it had been approved by a referendum, with an overwhelming percentage of propertied white male voters participating—it would still have a relatively poor claim to be the work of the People. The most trivial and obscure contemporary federal statute is much more the work of the People of the United States than was the antebellum Constitution.

5. *Slavery as Negating the Existence of the People.*— The discussion thus far has not even taken into account that the society that produced the antebellum Constitution was a slave society. The existence of slavery, in and of itself, should negate any claim of popular sovereignty at the Founding. The mythical concept of popular sovereignty requires a single sovereign will. But if the population includes both a master class and a slave class, they cannot be said to be part of the same political body, with a single collective will. Whittington comes very close to recognizing this problem in his

90 WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 17, at 203.

91 1 ACKERMAN, *supra* note 11, at 265 ("mobilizing a majority"), 286 ("mobilized majority").

92 To elucidate the term "subminority," first deprive at least one–half of the population of suffrage (women). That produces a minority rule. Then, deprive other groups of suffrage *seriatim* (African American slaves, poor men, Native Americans who might have voted) and the ruling minority becomes smaller and smaller.

general discussion of the sovereign will. He writes:

> As Rousseau noted, the general law is expressed through majority voting, but the minority authors that law by accepting it as their own. . . . The continued rejection of the general law by the minority indicates that there is in fact no common society between the majority and minority; they do not form a single people and therefore possess no common sovereign.[93]

Whittington fails, however, to draw the appropriate conclusion: in a slave society, there is no People.

6. *The People as Defined by the Franchise?*— It is, of course, possible to adopt a stipulated, non-moralized account of People-ness, according to which the Constitution was the work of the People, while a contemporary federal statute is not the work of the People. We could say that whenever a constitution becomes effective, whoever was entitled to vote on its ratification *ipso facto* comprised the People. If the original Constitution had been ratified by the governors of the thirteen states, we could say, it would still have been the work of the People.

While he elsewhere advocates a somewhat idealized conception of popular sovereignty, Whittington at one point comes close to this stipulated account of the People as being defined by the franchise. He takes the position that women, African-American slaves, and disenfranchised poor whites were not initially part of the People.[94] Whittington states that "[t]he people did not exist until they constituted themselves through the action of forming a constitution.... Similarly, since the founding, the people have modified themselves, expanding the rights of full citizenship to include blacks, women, the poor, and young adults."[95]

Although the idea of the People as being defined by the franchise is not restricted to originalists,[96] such an idea is fundamentally inconsistent with any theory of popular sovereignty. The mystical concept of "the People," in a theory of popular sovereignty, claims a normative force beyond that of political success; a stipulated definition based purely on political success does not fit that concept. We should not say that thirteen governors, if they

93 WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 17, at 146.

94 *Id.* at 145.

95 *Id.*

96 *See, e.g.*, Justice Ginsburg's opinion for the Court in *United States v. Virginia*, 518 U.S. 515, 531 (1996) ("Through a century plus three decades and more of [United States] history, women did not count among voters composing 'We the People'; not until 1920 did women gain a constitutional right to the franchise."); Marshall, *supra* note 64, at 5 ("'We the People' no longer enslave, but the credit does not belong to the framers.").

These references to "the People" by Justices Ginsburg and Marshall may be somewhat ironic. They may not represent a considered view that the People is a relevant concept in normative democratic theory and that the People is defined by the franchise.

are able to establish an effective constitution, are the People. If we do, we are really talking about sociological legitimacy and/or acceptance over time, as discussed below,[97] not popular sovereignty.

In any event, with a stipulated definition of the People as defined by the franchise, there can be no serious claim to democratic legitimacy. If the People exclude the vast majority of the population, the work of the People is due no respect as a matter of democratic theory. Thus, arguments that the Constitution was produced by the People either boil down to claims about representativeness, in which case they are false, or they involve a stipulated definition of the People that is not worthy of respect.

D. Objections and Qualifications

It may be wondered whether my discussion of the moral legitimacy of the antebellum Constitution is inappropriately anachronistic. Is it fair to criticize the Constitution of 200 years ago by the standards of today? As Professor Akhil Amar and other admirers of the 1787 Constitution have stressed, it was ratified under processes that were democratic for their time (at least if one ignores the effect on democratic legitimacy of the institution of slavery, which was controversial even then).[98] Maybe we should take a relativistic approach, saying that the antebellum Constitution was the work of the People, judged by the standards of the time.

In response, originalist judicial review presents a cross–temporal conflict: the antebellum Constitution of the past versus the more democratically–legitimate law of today. Assessing this cross–temporal conflict is not a matter of deciding which moral standards to apply to conflicts in the past. Originalists (at least those who rely on democratic theory) do not merely claim that ratification of the antebellum Constitution provided moral legitimacy to override laws of antebellum America; they claim that ratification of the antebellum Constitution provides moral legitimacy to override laws of today. Under these circumstances, it is appropriate to evaluate the claimed moral legitimacy of original ratification by the standards of a free society with universal suffrage.[99]

Separate objections could be raised as to the significance of slavery in this discussion. I have argued that the democratic legitimacy of the antebellum Constitution was doubly undermined by slavery: the Constitution was produced by a slave society, and the Constitution protected slavery. Some might disagree; they might believe that slavery in no way affects the democratic legitimacy of the antebellum Constitution. As to the constitutional provisions accommodating slavery, they might argue that

97 *See infra* Part III.

98 AMAR, *supra* note 5, at 18.

99 Simon, *supra* note 3, at 1498 n.44.

democratic legitimacy is determined only by process, not by substance. As to the production of the Constitution in a slave society, they might argue that the only democratic defect was the denial of voting rights to slaves. The Constitution would have had no greater democratic legitimacy, they might say, if there had been a denial of voting rights to the same individuals, but without slavery.

These hypothetical arguments, which might or might not be congenial to defenders of the antebellum Constitution, demonstrate the observation I made early in this Part that democratic legitimacy is a normative and contested concept that is not the whole of moral legitimacy. We should reject a concept of democratic legitimacy under which slavery is irrelevant. But even if we were to entertain such a concept of democratic legitimacy, it would be impossible to ignore slavery when we consider the ultimate standard of moral legitimacy.

Another objection that could be raised concerning slavery involves counterfactual reasoning. It could be argued that the founding generation acted out of necessity in accommodating slavery. If we say that the slavery–accommodating provisions of the antebellum Constitution taint the constitutional processes of the time, we implicitly take the position that the Northern states should not have agreed to those provisions. Would not the result have been a separate slave confederacy, precisely the result that the Civil War was fought to prevent?[100]

In response, there is no reason our evaluation of moral legitimacy need hold constant the motivations of the Southern states, and ask only what the opponents of slavery could have done to combat it. We can have a moral evaluation of the system as a whole, and that evaluation must be negative.[101]

I pause here for some clarifications. Thus far, the argument does not claim to show that originalism fails; it claims merely that one justification for originalism fails, that the ratification of the antebellum Constitution does not provide moral legitimacy for originalist judicial review. Also, the argument does not, thus far, establish any ground for nonoriginalist judicial review. Discrediting ratification of the antebellum Constitution as a ground for originalist judicial review may be a step toward justifying nonoriginalist judicial review. With this step taken, the nonoriginalist can argue that the moral legitimacy of the Constitution resides elsewhere than in original

100 *See* McGinnis & Rappaport, *supra* note 11, at 395 (presenting a view along these lines as to the slavery issue).

101 There is also debate among historians as to whether the Southern states or states of the "Deep South" would have refused to accept the Constitution without various slavery–accommodating provisions. *See* FINKELMAN, *supra* note 10, at 31–32. Assuming there had been a separate slave Confederacy, the absence of a fugitive slave clause might have weakened it and hastened the demise of slavery. Some would emphatically consider the accommodation of slavery to be wrong even if non–accommodation had results that were even worse. But these are, in my view, only subsidiary arguments.

ratification, in some source that supports nonoriginalist judicial review. On the other hand, it may be that if originalist judicial review is not justified, no judicial review is justified.[102]

E. Post–Exclusion Popular Sovereignty

The provisions of our Constitution were produced at different times, and they differ in the extent to which the mere processes by which they were created provide sufficient moral legitimacy to override a contemporary law. The originalist argument based in democratic theory becomes progressively stronger with provisions added after the abolition of slavery,[103] the Nineteenth Amendment,[104] the end of Jim Crow,[105] and the Twenty–Sixth Amendment.[106] With the elimination of each original exclusion, the argument that mere ratification provides moral legitimacy becomes stronger. The contemporary American political system is subject to some democratic–theoretical objections, but obviously it is far superior to the antebellum system. A popular sovereignty argument can be made for originalist interpretation of recent and future constitutional amendments, and such an argument would not be refuted by the original exclusions.

A separate question is how amendments ratified under universal suffrage bear on the interpretation of constitutional provisions that were ratified under the exclusion–tainted processes. Suppose each constitutional amendment in American history was accompanied by the following reauthorization clause: "Aside from the changes made in this amendment, all provisions of this Constitution are hereby reauthorized, according to their original meanings." Such reauthorization clauses would certainly rehabilitate the popular–sovereignty justification for originalism. However, no such originalist reauthorization clauses actually appear in the Constitution; nor are they implicit. The ratification of an amendment means that its supporters

102 I cannot address here, but should briefly mention, the argument made by a number of originalists that some instances of originalist judicial review, involving federalism, do not implicate the countermajoritarian difficulty because they merely determine which democratic government has responsibility for an area of regulation. *See, e.g.*, Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1385–94 (1998). I believe that the national self–identity of Americans supports federal responsibility beyond what most originalists would allow, and that many originalist federalism decisions do, therefore, contravene democracy.

103 *See* U.S. CONST. amend. XIII.

104 U.S. CONST. amend. XIX (extending franchise to women).

105 *See* Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (1964), Civil Rights Act of 1968, Pub. L. No. 90–284, 82 Stat. 73 (1968) (codified at 42 U.S.C. § 2000a *et seq* & 18 U.S.C. § 245 (2000)) (in effect overruling Jim Crow laws); Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1 (2000)) (same).

106 U.S. CONST. amend. XXVI, § 1 (extending franchise to those eighteen and older).

have achieved the high level of consensus necessary to change some part of the Constitution,[107] but the ratification of an amendment does not mean that the high level of consensus, necessary for ratification, actually exists to retain the other provisions of the Constitution.[108] Some inferences about the sociological legitimacy of the Constitution might be drawn from the use of the amendment process,[109] but sociological legitimacy, discussed in Part III, is not popular sovereignty. And in any event, even if the ratification of an amendment did implicitly reauthorize existing provisions, it would not necessarily authorize the originalist interpretation of those provisions. More plausibly, a reauthorization of existing provisions would license whatever methods of interpretation reigned at the time of later ratification. The most recent amendments, of course, were passed during what is often considered a nonoriginalist period.

1. *Whittington's Reciprocal Originalism.*— As an adjunct to his argument that popular sovereignty provides moral legitimacy, Whittington argues that the contemporary generation, which can claim democratic legitimacy for any possible amendments, should recognize a "reciprocating relationship" with the founders.[110] He writes:

> [O]riginalism secures the effectiveness of a future expression of the popular will. By maintaining the principle that constitutional meaning is determined by its authors, originalism provides the basis for future constitutional deliberations by the people. Present and future generations can only expect their own constitutional will to be effectuated if they are willing to give effect to prior such expressions. . . . Unless we accept the authority of the past, we cannot assert our own authority over the future, whether understood as a matter of decades or as a matter of weeks.[111]

It is not completely clear, in the passage above, whether Whittington is making a point about moral consistency, an actual prediction about the production of constitutional amendments in a nonoriginalist system, or both. Berman interprets Whittington as making an actual prediction.[112] I interpret Whittington as conveying both meanings, but I focus on the

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107 *See* U.S. CONST. art. V.

108 *Id.*

109 For example, the ratification of an amendment shows that amendment is possible, which means that a failure to amend other provisions demonstrates a weak kind of sociological legitimacy.

110 WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 17, at 133.

111 *Id.* at 156. This reciprocity argument is really a separate argument, different from the argument that mere ratification provides moral legitimacy. I note it here because it is integral to Whittington's theory.

112 Berman, *supra* note 12, at 74–75.

argument from moral consistency.[113]

Suppose we held ourselves morally bound to deal with the formal constitutional product of prior generations (the Constitution and past amendments) as we would have future generations deal with our own formal constitutional product. An originalist such as Whittington could then argue that since we want to preserve the original meaning of any contemporary amendments, we must likewise abide by the original meaning of the Constitution and past amendments. An initial problem with this argument, of course, is that not everyone in the current generation shares the objective of preserving the original meaning of constitutional amendments. I certainly do not share that objective. I would like the meaning of any contemporary amendments to be capable of drift over time, in a manner similar to the way the meaning of past enactments has drifted over time.[114]

Nevertheless, suppose that the current generation did want to prevent any future drift in the meaning of contemporary amendments. Or, more realistically, suppose we wanted to assure that the meaning of contemporary amendments would never drift as much as has the meaning of some past constitutional enactments. We could still justify a nonoriginalist reading of past enactments, at least of the antebellum Constitution. Our maxim, to speak in Kantian terms,[115] would be "preserve the original meaning of constitutional amendments enacted under democratically legitimate procedures." This maxim might commit us to originalism in interpreting all amendments subsequent to the Nineteenth Amendment, or all those subsequent to the Civil Rights movement. It would not, however, commit us to originalism in interpreting the original Constitution or the Bill of Rights.

2. *Ackerman on the Original Exclusions.*— Whittington does not seriously confront the original exclusions. Ackerman does seriously confront them, in both volumes of *We the People*, and reaches somewhat different conclusions in each volume.[116] In the first volume, *Foundations*, Ackerman considers the original exclusions to be troubling, but decides that they should not shake our commitment to dualism and popular sovereignty.[117] In the second volume, *Transformations*, Ackerman revisits the original exclusions and makes them a part of his argument for the recognition of informal

113 *See id.* (discussing Whittington's reciprocity argument as an actual prediction).

114 Some of the reasons for this view are given in Parts II and III of this Article.

115 IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 88 (H. J. Paton trans., Hutchinson & Co. 1964) (1785) ("Act only on that maxim through which you can at the same time will that it should become a universal law.").

116 *See* 1 ACKERMAN, *supra* note 11, at 314–19; 2 ACKERMAN, *supra* note 11, at 87–91.

117 1 ACKERMAN, *supra* note 11, at 314–19.

constitutional amendment.[118] Ackerman argues, in this second volume of *We the People*, that the original exclusions, along with other defects of popular sovereignty at the Founding, should help to convince us that later exercises of popular sovereignty suffice to amend the Constitution, even if those later exercises of popular sovereignty do not satisfy the requirements of Article V.[119] He writes:

> I hardly wish to deny that the Federalists fell far short of the ideal of popular sovereignty, even as it was understood in the eighteenth century. When judged in modern terms, the Founding looks even worse.
>
> . . . .
>
> . . . *Perhaps* you might be justified in granting Article Five a monopoly on constitutional change if the Founding had approximated the ideal of popular sovereignty more closely than any later constitutional transformation in American history. But the facts refute such a supposition. . . . Given these Founding deficits, it seems morally bizarre, as well as legally inappropriate, to grant the Federalists the constitutional authority to lay down the rules for subsequent efforts to speak in the name of the People.[120]

I do not here join the debate over Ackerman's theories, but he might be well advised, for his own purposes, to take a further step in addressing the significance of the original exclusions. Instead of claiming that defects of popular sovereignty at the Founding allow us to give equal status to later exercises of popular sovereignty, perhaps he should claim that the only real exercises of popular sovereignty came later. By taking the mantle of popular sovereignty away from the Founding, Ackerman would be better positioned to argue that the Reconstruction Amendments should be interpreted broadly, and that the New Deal was a "constitutional moment."

II. Result-Based Moral Legitimacy

The popular–sovereignty strategy for dissolving the countermajoritarian difficulty is to say that judicial review upholds the product of a higher and truer democratic process, albeit one removed in time. As discussed in Part I, such an argument cannot be convincing in the face of the original exclusions, at least as to provisions that originated in the antebellum Constitution. First, the antebellum Constitution was less the product of "the People" than is a contemporary statute. Second, and more fundamentally, the antebellum Constitution derives less democratic legitimacy from the

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118 2 Ackerman, *supra* note 11, at 87–91.

119 *Id.*

120 *Id.* at 87–88.

ratification process than a contemporary statute derives from its manner of production. Third, and most fundamentally, the mere ratification of the antebellum Constitution provides less moral legitimacy than the production of a contemporary statute.

In Part III below, I discuss the alternative strategy of justifying judicial review by reliance on some form of contemporary consent. Here, I consider result–based moral legitimacy. Many believe that moral legitimacy can reside in result–based or consequentialist considerations in addition to (or instead of) consent–based considerations. Under a result–based approach, law is morally legitimate if it produces good results. The results on which moral legitimacy is based may involve the content of law, the predictability of law, or other matters.

For purposes of this discussion, I class as "consequentialist" even views that are considered non–consequentialist in contemporary moral philosophy. For example, there are libertarians who believe that rights are absolute constraints, never to be violated even if failure to violate them will result in more rights–violations.[121] This is considered a non–consequentialist position. But if a libertarian argued for the moral legitimacy of a law on the ground that it embodied the libertarian conception of rights as absolute constraints, [122] I would consider that a consequentialist, result–based conception of the moral legitimacy of law.

The idea of result–based moral legitimacy is of course troubling to those who have any formalist impulse,[123] which is probably most of us. On the other hand, most of us probably accept result–based moral legitimacy to some extent. An obvious example is *Brown v. Board of Education*.[124] While initially controversial, *Brown* is now almost universally accepted. Moreover, it is held up as a test of interpretive method. Rather than questioning whether *Brown* was correctly decided, we take it as given that the result is correct and measure the legitimacy of interpretive methods, such as originalism, by whether they can support *Brown*.[125]

I have already discussed a reverse example, of result–based illegitimacy, at length in Part I: the illegitimacy of the slavery–accommodating provisions of the antebellum Constitution.[126] Regardless of the processes that produced the slavery–accommodating provisions, we do not consider them

121 Perhaps it would be most accurate to say "hardly ever" rather than "never." Even Nozick, in his most libertarian period, entertained the idea that rights can be violated to avert a large amount of suffering. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 41 (1974).

122 Of major constitutional theorists, Barnett is closest to this position. *See* BARNETT, *supra* note 21, at 48–52.

123 Fallon, *supra* note 2, at 1834–36.

124 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

125 *See supra* note 26 (debate over originalism and *Brown*).

126 As I have noted, some might deny that substance bears on democratic legitimacy; but it surely bears on moral legitimacy.

morally legitimate, and some of us (including some originalists), believe that they tainted the moral legitimacy of the antebellum Constitution as a whole.[127]

The Reconstruction Amendments provide another important example of result-based legitimacy.[128] As detailed by Ackerman, the Thirteenth Amendment has a questionable originalist pedigree, and the Fourteenth Amendment has an even shakier claim, on originalist grounds, to be part of the Constitution.[129] President Andrew Johnson obtained ratification of the Thirteenth Amendment through military pressure, and the Reconstruction Congress refused to seat representatives from the Southern states until they ratified the Fourteenth Amendment.[130] Professor Kent Greenawalt has speculated that given "the especially troublesome aspect of federal coercion of state approval" of the Thirteenth and Fourteenth Amendments, "it is possible that the Supreme Court would review the validity of a modern amendment ratified in circumstances similar to those surrounding the two amendments."[131]

Ackerman believes that the Reconstruction Amendments exemplify consent-based legitimacy in the form of unconventional popular sovereignty.[132] His arguments are powerful. But consider what might be our attitude to the Fourteenth Amendment if, instead of protecting civil rights, it enacted some narrow rule of sectional advantage. Suppose that the Fourteenth Amendment enacted a rule on tariffs that benefited the industrial North at the expense of the agricultural South.[133] We might then take more seriously the argument that the Fourteenth Amendment is not a valid part of the Constitution. The moral legitimacy of the Fourteenth Amendment, I believe, derives in large part from its good content.

Fallon endorses some degree of result-based moral legitimacy, though he also considers it "a controversial and even dangerous form of

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127 Solum, *supra* note 18, at 9 n.27.

128 *See* U.S. CONST. amends. XIII, XIV.

129 2 ACKERMAN, *supra* note 11, at 99–252.

130 *Id.* at 99–101; *see also* Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 640 (1987) (noting that "serious questions can be raised about the original validity of the thirteenth and fourteenth amendments") (relying on Ackerman's analysis); Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 934–35 (1998) (same).

In contrast to Ackerman, Amar argues that the Thirteenth and Fourteenth Amendments were ratified in accordance with Article V. AMAR, *supra* note 5, at 364–80. However, Amar's argument is almost explicitly nonoriginalist. He relies on a "dynamic" interpretation of the Republican Guarantee Clause in Article IV, Section 4, even though he notes that "certain passages from *The Federalist* seemed to lean toward a static test." *Id.* at 371. *See* Ackerman, *The Living Constitution*, *supra* note 48, at 1747 n.25 (Ackerman responding to Amar).

131 Greenawalt, *supra* note 130, at 641.

132 2 ACKERMAN, *supra* note 11, at 99–252.

133 Having congratulated myself on thinking up this example, I see that Amar thought of it first. *See* AMAR, *supra* note 5, at 377.

argument."[134] As an example of result–based moral legitimacy, Fallon discusses *Bolling v. Sharpe*,[135] in which the Supreme Court held that racial segregation in the District of Columbia schools was a violation of the Due Process Clause of the Fifth Amendment, thereby effecting a reverse incorporation of the Fourteenth Amendment's Equal Protection Clause into the Fifth Amendment. Fallon and others consider *Bolling* harder to justify on originalist grounds than *Brown* itself.[136] Nevertheless, Fallon states:

> I would say that the Supreme Court acted morally legitimately in deciding *Bolling v. Sharpe* as it did, even if the Court's constitutional holding was erroneous or possibly even illegitimate as a strictly legal matter, as some have argued. Among the relevant considerations, the lack of a constitutional norm forbidding the federal government from discriminating against racial minorities was a serious moral deficiency in the preexisting constitutional regime. In my view, the moral importance of the situation would have justified the Court in appealing less to the letter of positive law than to principles of moral right and what Lincoln termed 'the better angels of our nature' in calling upon the parties and the nation to accept its decision as deserving of lawful status.[137]

While moral legitimacy can guide interpretation, theorists who believe that the Constitution derives moral legitimacy from result–based considerations do not necessarily have a theory of legitimacy that actually drives their method of interpretation. As Professor Adam Samaha observes, such theorists may have a normative standard that they apply directly both to constitutional interpretation and to the evaluation of constitutional legitimacy.[138] Or they may skip any consideration of constitutional legitimacy and proceed immediately to evaluate methods of interpretation on consequentialist grounds; some of the arguments considered in this Part of the Article are of that nature. Still, even if a result–based theory of moral legitimacy does not generate or drive a result–based theory of interpretation, the one may license the other. I may say, for example, that if the moral legitimacy of the Constitution was based only on popular sovereignty, it might be wrong to evaluate methods of interpretation

134 Fallon, *supra* note 2, at 1835.

135 Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

136 Fallon, *supra* note 2, at 1835 n.216.

137 *Id.* at 1835 (quoting Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1859–1865, at 224 (Don E. Fehrenbacher ed., 1989)). In support of this result–based approach to the moral legitimacy of *Bolling*, Fallon also appeals to what I have called exclusion–specific nonoriginalism. *See infra* notes 211–14 and accompanying text.

138 Samaha, *supra* note 45, at 651.

based on consequentialist considerations; but since the moral legitimacy of the Constitution is itself largely consequentialist, there is no bar to a consequentialist evaluation of methods of interpretation.

A. Moral Legitimacy from Nonoriginalist Results

I believe that the Constitution has greater result–based moral legitimacy because of past departures from originalism. These legitimacy–enhancing departures from originalism have involved nonoriginalist judicial restraint, nonoriginalist judicial review, and nonoriginalist behavior by non–judicial political actors. They have occurred in at least three major areas: equality and nondiscrimination, the establishment and judicial acceptance of the welfare state, and the expansion of personal liberty.

The foregoing brief paragraph contains massively controversial assertions. I cannot begin to justify them. But to the extent it is accepted that the moral legitimacy of the Constitution derives in part from past nonoriginalist decisions, the legitimacy of nonoriginalist constitutional interpretation may be enhanced.

While I cannot address the enormous swath of contested issues raised by my assertion of nonoriginalist moral legitimacy, I will focus briefly on the elimination of the original exclusions. Few, probably, would dispute that the elimination of the original exclusions (falling under the "equality and nondiscrimination" rubric discussed above) has increased the moral legitimacy of the Constitution. More controversial is the issue of to what extent the elimination of the original exclusions was accomplished in nonoriginalist fashion.

As discussed above, the Thirteenth and Fourteenth Amendments have a shaky originalist pedigree.[139] It might be wondered whether the legitimacy–enhancing nonoriginalist *political* behavior that produced the Thirteenth and Fourteenth Amendments can be grouped together with, and can justify, *judicial* nonoriginalism. If the only nonoriginalist behavior that augmented the moral legitimacy of the Constitution was political nonoriginalism, that might be a telling concern. But the elimination of the original exclusions has involved a mix of political nonoriginalism and judicial nonoriginalism. Moreover, the validity of the Fourteenth Amendment was challenged in court during the Civil Rights movement,[140] and the Supreme Court did discuss and affirm the validity of the Fourteenth Amendment in a 1939 case concerning the proposed Child Labor Amendment.[141] To the

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139 *See supra* notes 128–33 and accompanying text.

140 *See* Md. Petition Comm. v. Johnson, 265 F. Supp. 823 (D. Md. 1967), *aff'd*, 391 F.2d 933 (4th Cir. 1968); United States v. Ass'n of Citizens Councils, 187 F. Supp. 846 (W.D. La. 1960); United States v. Gugel, 119 F. Supp. 897 (E.D. Ky. 1954). These cases are noted in Greenawalt, *supra* note 130, at 641 n.56; *see also* U.S. CONST. amend. XIV.

141 Coleman v. Miller, 307 U.S. 433, 448–50 (1939).

extent the Fourteenth Amendment is questionable on originalist grounds, the decisions upholding it are also questionable on originalist grounds.

As noted, the school desegregation decisions in *Brown*[142] and *Bolling*[143] are certainly questionable on originalist grounds.[144] Also questionable are laws prohibiting private discrimination and the decisions upholding these laws under Congress' commerce power.[145] The Nineteenth Amendment appears to have a good originalist pedigree;[146] however, equal protection doctrine in the area of gender is on very shaky ground.[147]

As to the exclusion of the poor, through property qualifications and poll taxes, the improvements once again have a mixed originalist pedigree. The Twenty–Fourth Amendment (prohibiting poll taxes in federal elections)[148] is unobjectionable on originalist grounds, as is the state–law expansion of the franchise. However, the Supreme Court's decisions invalidating property qualifications[149] and state–election poll taxes[150] can be criticized on originalist grounds. One critic, as to property qualifications, is Justice Scalia.[151]

In summary, the original exclusions were eliminated, over time, through measures that were often questionable on originalist grounds. If the elimination of the original exclusions has increased the moral legitimacy of the Constitution, perhaps future nonoriginalist interpretation requires less justification than originalists believe. I am tentative in stating this conclusion because it does not ineluctably follow from what has gone before. It is possible to believe that past legitimacy–enhancing nonoriginalism does not justify future nonoriginalism. As discussed below in Part III, it is even possible to believe that past nonoriginalist improvements have made

142 Brown v. Board of Ed. 347 U.S. 483 (1954).

143 Bolling v. Sharpe, 347 U.S. 497 (1954).

144 *See supra* notes 26, 135–37 and accompanying text.

145 *Compare* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 242–43 (1964) (upholding Title II of the Civil Rights Act of 1964), *with* United States v. Lopez, 514 U.S. 549, 587 (1995) (Thomas, J., concurring) ("The Constitution . . . does not support the proposition that Congress has authority over all activities that 'substantially affect' interstate commerce."); *see also* U.S. CONST. art. I, § 8, cl. 3.

146 Consider, however, that the Nineteenth Amendment was challenged, unsuccessfully, in Leser v. Garnett, 258 U.S. 130 (1922).

147 *See* United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) ("[I]n my view the function of this Court is to *preserve* our society's values regarding (among other things) equal protection, not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees.") (emphasis in original).

148 U.S. CONST. amend. XXIV.

149 *See, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 675 (1966).

150 *Id.* at 664.

151 Scalia, *Common-Law Courts in a Civil Law System*, *in* A MATTER OF INTERPRETATION, *supra* note 18, at 42.

future nonoriginalism less necessary.

B. McGinnis and Rappaport

Originalists as well as nonoriginalists can claim to draw support from result-based moral legitimacy. A particularly audacious argument in favor of originalism, on the ground that it produces good results, is offered by McGinnis and Rappaport.[152] McGinnis and Rappaport argue, based on theoretical considerations of public choice, that legal norms created through rules requiring supermajority consent will produce desirable results. Because our Constitution was created through supermajority rules, they argue, it produces desirable results. And since the original meaning of the constitutional provisions was the meaning subjected to the supermajoritarian process, courts should adhere to that meaning, at the risk of losing the desirable results.[153]

All parts of McGinnis and Rappaport's argument are debatable. As Professor Ethan Leib has observed, there is disagreement among public-choice scholars as to the merit of supermajority rules.[154] Critics of supermajority rules observe that they privilege the status quo.[155] As it may be possible to improve on the status quo, we should not uncritically accept the premise that supermajority rules tend to produce better results.

But McGinnis and Rappaport's factual premise, that the Constitution was adopted through supermajority rules, is even more problematic. That premise is simply false—the Constitution was adopted not by a supermajority, but by a subminority. Moreover, McGinnis and Rappaport essentially concede that the Constitution was not approved under a supermajority process endorsed by their theory. They lament the exclusion of women and African-Americans (though not the exclusion of the poor),[156] and then state: "[T]hese exclusions go to the theoretical heart of the

152 McGinnis & Rappaport, *supra* note 11. In a later article, McGinnis and Rappaport specify that their criterion for evaluating the goodness of results is utilitarian. John O. McGinnis & Michael B. Rappaport, *The Desirable Constitution and the Case for Originalism* 5 n.4 (San Diego Legal Studies, Working Paper No. 08-022). That is also my ultimate criterion for evaluating the goodness of results. Thus, the disagreement I express with McGinnis and Rappaport is one among utilitarians.

153 McGinnis & Rappaport, *supra* note 11. I have addressed McGinnis and Rappaport's theory in Part I, as they essentially argue that mere ratification confers moral legitimacy. In McGinnis and Rappaport's argument, however, it is not the process of ratification itself that confers moral legitimacy, but the asserted tendency of supermajority ratification to produce good results.

154 Ethan J. Leib, *Why Supermajoritarianism Does Not Illuminate the Debate Between Originalists and Non-Originalists*, 101 NW. U. L. REV. 1905 (2007).

155 *Id.* at 1910.

156 McGinnis & Rappaport, *supra* note 11, at 394-95. They appear to be aware of the exclusion of the poor in light of a subsequent reference to "white, male property owners," but they do not actually mention it. *Id.* at 395.

supermajoritarian argument: the desirability of supermajority rules requires that all interests be reflected in the electorate."[157]

Despite this admirable concession that an essential premise of their argument is false, McGinnis and Rappaport gamely assert that "from today's perspective these defects in the Constitution have been corrected. . . . [T]he Constitution now grants all people the freedoms of white, male property owners. . . . [T]he Constitution has now been corrected to provide equal rights to all Americans."[158] In a footnote, they continue:

> While here we have addressed the most obvious defects arising from the exclusion of women and African–Americans from the framing, it might be argued that their absence caused subtler, more wide–ranging problems. Under this view, these groups would have not only sought equality provisions, but would also have had a different substantive agenda. We do not, however, believe that one can make a strong case that the Constitution would have been systematically different had these excluded groups been included. In the absence of strong evidence that the Constitution would have been transformed by these other voters, the original Constitution's rules should be followed, because they still offer the best evidence of what good entrenchments would have resembled.[159]

As detailed at length by Professor Paul Finkelman, the original Constitution's accommodation with slavery and the slave trade is reflected in several provisions that persist to this day.[160] McGinnis and Rappaport also fail even to mention the exclusion of the white male poor, through property qualifications and poll taxes, from the production of the Constitution and the Bill of Rights. The exclusion of the white male poor was accentuated by the exclusion of women, African–Americans, and Native Americans, as all of the latter excluded groups were doubtless poorer on average than white males. Though their reference to "white, male property owners"[161] suggests that they are aware of the exclusion of the poor, McGinnis and Rappaport do not consider what effect it may have had upon the Constitution. Thus, McGinnis and Rappaport's blithe assertion that today's Constitution is unaffected by original exclusions does not inspire confidence.

But these problems aside, McGinnis and Rappaport's attempt to allocate the historical burden of proof in their favor is inconsistent with their own theory. Should we presume that the Constitution in its original meaning produces desirable results unless there is "strong evidence" that the exclusion from politics of all but a privileged minority changed

157 *Id.* at 395.

158 *Id.* at 395–96.

159 *Id.* at 396 n.55.

160 FINKELMAN, *supra* note 10, at 3–36.

161 McGinnis & Rappaport, *supra* note 11, at 395.

constitutional provisions or their meaning for the worse?[162] Under McGinnis and Rappaport's own theory, the presumption should be reversed. Since there was no supermajority, and in fact several classes of people (constituting the majority of people) were excluded, we should *not* presume that the original meaning of the provisions of the antebellum Constitution produce desirable results.

McGinnis and Rappaport's argument for the beneficence of the original meaning of the Constitution, it will be remembered, is theoretical. They do not survey all the provisions of today's Constitution, determine that their original meanings are good according to some normative standard, and then demand proof that the original exclusions of the past have contaminated those provisions.[163] Instead, they simply assume that the original meaning of the original constitutional provisions produces good results because those provisions were adopted under a supermajoritarian process. When this premise proves false—as they themselves concede—their entire argument must collapse. Just as the original exclusions defeat Whittington's popular sovereignty and his reciprocal originalism, they also defeat McGinnis and Rappaport's consequentialist originalism.

The only kind of supermajority support that the original Constitution can claim is a supermajority of ruling minority interests in each state—a regional supermajority. Unfortunately, the Constitutional provisions that most obviously resulted from a desire to achieve a regional supermajority are the provisions protecting the African slave trade. Only the three deeper-South states—South Carolina, North Carolina and Georgia—wanted the Constitution to protect the slave trade, but they were able to obtain protection of the slave trade by threatening to withhold ratification.[164] At the Constitutional Convention, John Rutledge of South Carolina is reported to have said: "If the Convention thinks that N.C.; S.C. & Georgia will ever agree to the plan, unless their right to import slaves be untouched, the expectation is vain. The people of those States will never be such fools as to give up so important an interest."[165]

McGinnis and Rappaport do not specifically mention the constitutional provisions protecting the slave trade. On the Constitution's protection of slavery in general, they write:

> A serious attempt to eliminate slavery would have defeated any constitution and probably caused a fracturing of the nation. Despite its acquiescence to slavery, the original Constitution contributed to a social order based

162 *Id.* at 396 n.55.

163 McGinnis and Rappaport do mention federalism and the Bill of Rights as examples of beneficent original meaning. *Id.* at 389.

164 Although they opposed the slave trade, Virginia and Maryland had what they considered a surplus of slaves. FINKELMAN, *supra* note 10, at 27.

165 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 52, at 373.

> on markets and freedoms that helped persuade Americans that slavery is wrong. It seems unlikely that African Americans would have been better off with a failure of the Constitution in 1789 and a retreat to sectional governments.[166]

This argument could be extended to address the specific provisions protecting the African slave trade.[167] With this move, however, McGinnis and Rappaport's theory takes on a distinctly Panglossian character. Their argument for the good consequences of originalism is based on the false premise of supermajority approval. When the lack of supermajority approval is pointed out, they must shift to the dubious argument that a regional supermajority of ruling minority interests can substitute for a true supermajority. When the provisions protecting the African slave trade are identified as those most obviously resulting from a desire to achieve a regional supermajority, they must shift again, retreating from the argument that the approval process resulted in good provisions (the thrust of their theory all along) to an argument that the bad provisions were not as bad as having no constitution at all.

C. Moral Progress

Relying on the original exclusions, I now offer an argument for the substantive undesirability of originalist constitutional law that is, in a way, the mirror image of the public–choice argument of McGinnis and Rappaport that I rejected in the previous Section. There has been moral progress since the Constitution required the return of fugitive slaves and protected the slave trade, and since the franchise was basically limited to propertied white men. As the antebellum Constitution and the political culture that produced it were morally inferior in these respects, it makes sense to assume that they were morally inferior in other respects as well. Further, since the Constitution is so hard to amend, it makes sense to assume that there remain provisions that are morally problematic, at least if interpreted according to their original meaning. To achieve the benefits of moral progress, we should allow the meaning of these provisions to drift in a process of common–law constitutionalism.

So while McGinnis and Rappaport blithely assume that the abolition of slavery and the expansion of the franchise excised from the Constitution all provisions with a morally questionable original meaning, I submit that the reverse is more likely true: the existence of some morally retrograde provisions suggests that there are other morally retrograde provisions,

166 *Id.* at 395.

167 Finkelman would object because he believes that the deeper–South states were bluffing in their insistence that the Constitution protect the slave trade. FINKELMAN, *supra* note 10, at 31.

and also perhaps morally retrograde omissions. And for this part of the argument, it does not much matter which normative theory one adopts. Under basically all views, it was moral progress to eliminate the original exclusions of the antebellum Constitution and its political culture—whether one is a utilitarian, an egalitarian, a libertarian, a neo–Aristotelian, or a conservative of almost any contemporary variety.

The argument from moral progress assumes that judges engaged in common–law constitutionalism can move away from the morally retrograde parts of the Constitution's original meaning while preserving the noble parts of its original meaning. This is not a heroic assumption: judges are part of the political and legal culture that has experienced moral progress.[168] But like many nonoriginalist arguments considered in this Article, the argument from moral progress is somewhat better as an argument against originalist judicial review than as an argument for nonoriginalist judicial review. If contemporary judges have benefited from moral progress, so, one would assume, have contemporary legislatures. At least where a federal statute is concerned, the argument from moral progress does not seem, in itself, to justify nonoriginalist judicial review. Nevertheless, it might justify the courts in bringing straggler states into line with majority state practice.

The idea of moral progress as a counterweight to originalism is front and center in *United States v. Virginia* [herein *VMI*],[169] one of the most unapologetically nonoriginalist Supreme Court decisions. In *VMI*, the Court held that it was a violation of the Equal Protection Clause of the Fourteenth Amendment for the state of Virginia to deny women admission to a state military school.[170] Writing for the Court, Justice Ginsburg asserted the moral inferiority of the historical treatment of women in American society.[171] In effect, this was a preemptive strike against the originalist argument for state–supported single–sex military schools: yes, the framers of the Fourteenth Amendment (or the ratifiers, or the public of the time) probably did not think that it prohibited state–supported, single–sex, military schools, but they also thought the Fourteenth Amendment was consistent with laws and practices that we know to be morally insupportable. Therefore, we need not consult the original meaning further.

Justice Ginsburg's opinion in *VMI* provoked a memorable dissent from Justice Scalia:

> Much of the Court's opinion is devoted to deprecating the closed–

168 *See* DOUGLAS E. EDLIN, JUDGES AND UNJUST LAWS: COMMON LAW CONSTITUTIONALISM AND THE FOUNDATIONS OF JUDICIAL REVIEW 121–24 (2008).

169 United States v. Virginia, 518 U.S. 515 (1996).

170 *Id.* at 519.

171 *Id.* at 531 ("Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history . . . ."). The response was not to embrace history, but to reject it. *Id.*

> mindedness of our forebears with regard to women's education, and even with regard to the treatment of women in areas that have nothing to do with education. Closed minded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable. The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: They left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter–majoritarian preferences of the society's law–trained elite) into our Basic Law.[172]

The appeal to democracy in Justice Scalia's dissent is so forceful that it bears repeating that originalism is not restraint. By some measures, Justice Scalia believes our forbears left us less "free to change"[173] than his liberal nonoriginalist colleagues.[174] But leaving that aside, it is striking how Justice Scalia is driven here almost to moral skepticism by Justice Ginsburg's assertion of moral progress.

Moral skepticism is one possible originalist response to the nonoriginalist argument from moral progress. In general, moral skepticism can be an ally of formalism, including originalist formalism: if we cannot know what is morally right, we might as well exclude moral considerations. However, the moral skeptic is typically on the defensive against the moral advocate. Justice Scalia himself, famously, appeared to endorse a moral–progress exception to originalism in his 1989 article *Originalism: The Lesser Evil*.[175] In that article, he suggested that he could not uphold, as consistent with the Eighth Amendment,[176] some punishments that were not "cruel and unusual" under the original meaning of the Eighth Amendment, but are considered "cruel and unusual" today.[177]

A more vigorous originalist response to the argument from moral progress would be to assert that there has been moral decay, as well as moral progress, over the life of the Constitution.[178] Allegations of moral decay could be

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172 *Id.* at 566–67 (Scalia, J., dissenting).

173 *Id.*

174 *See supra* notes 36–40 and accompanying text.

175 Scalia, *Originalism: The Lesser Evil*, *supra* note 18, at 861–64.

176 U.S. CONST. amend. VIII.

177 Scalia, *Originalism: The Lesser Evil*, *supra* note 18, at 864.

178 Scalia has also suggested this, at least as a possibility: "I'm afraid that societies don't always mature. Sometimes they rot. What makes you think that, you know, human progress is one upwardly inclined plane every day and every way we get better and better? It seems to

raised against various decisions asserted to be nonoriginalist, such as *Roe v. Wade*[179] and the school prayer decisions.[180] The originalist could then argue that since the original meaning is at least sometimes morally superior to nonoriginalist decisions, we cannot assume that it is only originalism, rather than nonoriginalism, that prevents the realization of moral progress.

Ultimately, then, the force of the argument from moral progress depends on the extent to which one believes there has been moral progress, as opposed to moral decay, from the time of the antebellum Constitution to our own time. I believe that there has mostly been moral progress (a position I will not attempt to justify here), so that the argument from moral progress has some force. There may be countervailing considerations, but it should at least be recognized that the argument from moral progress is more convincing than McGinnis and Rappaport's consequentialist originalist argument; that argument has no force at all because it relies on a false premise of supermajority approval.

D. Other Nonoriginalist Considerations

Other consequentialist considerations have been adduced both for and against originalism. I now rapidly review and endorse some familiar nonoriginalist considerations. As they have little to do with original exclusions, I do not explore them in detail.

First, the original meaning of older constitutional provisions is old. Regardless of whether the original meaning is morally retrograde, it may be inappropriate for contemporary life.[181] Second, originalism is destabilizing; as Professor David Strauss and others have argued, originalism is inherently less respectful of precedent than is common-law constitutionalism.[182] While originalists differ among themselves in their respect for precedent,[183]

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me that the purpose of the Bill of Rights was to prevent change, not to encourage it and have it written into a Constitution." Full Written Transcript of Scalia-Breyer Debate on Foreign Law, http://www.freerepublic.com/focus/news/1352357/posts (Feb. 27, 2005, 20:44:50 EST) [hereinafter Scalia-Breyer Debate].

179 Roe v. Wade, 410 U.S. 113 (1973).

180 *See* Engel v. Vitale, 370 U.S. 421 (1962); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

181 *See* Primus, *supra* note 29, at 177. For a response, see McGinnis & Rappaport, *supra* note 11, at 393–94.

182 David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969 (2008) [hereinafter Strauss, *Why Conservatives Shouldn't Be Originalists*]; David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 300–01 (2005); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1729 (2003); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996); *see also* Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 271–73 (2005).

183 *See* Scalia, *Response*, *supra* note 23, at 138–40 (asserting that the doctrine of *stare decisis* is a limitation on originalist method); Barnett, *Trumping Precedent*, supra note 21, 257–58

it is fair to say that they are, on average, less respectful of precedent than nonoriginalists. Third, Strauss is also convincing in arguing that originalism suppresses candor. Originalists, like nonoriginalists, pursue favored results, but "[t]he temptation, for an originalist, is to 'discover' that the original understanding about some controversial issue is, conveniently, identical to one's own views."[184]

Though I have breezed through these arguments, I do not wish to denigrate their importance. The inference that original meaning may be inappropriate to contemporary life is doubtless more important than the inference, discussed at length above, that original meaning may be morally retrograde. Strauss's arguments are very important because they hit at the appeal of originalism to formalists, at both the doctrinal level and the psychological level. Formalism offers a kind of theoretical stability, but that can seem less attractive if it is purchased at the cost of real-life instability in the law and in the lives of people.

III. CONTEMPORARY CONSENT

Result-based legitimacy probably has some appeal to most of us, but it is also probably troubling to most of us. In this Part, I return to consent-based arguments. As discussed in Part I, a popular-sovereignty justification for judicial review cannot convincingly be advanced in the face of original exclusions, at least as to provisions that originated in the antebellum Constitution. An alternative strategy is to justify judicial review by reliance on some form of contemporary consent. Possibly the moral legitimacy necessary to justify judicial review comes from the sociological legitimacy of the Constitution, or of the Supreme Court, or of judicial review itself. Or possibly we can characterize federal judges as indirectly elected, rather than unelected, so as to portray judicial review as part of ordinary democratic politics. Once again, I will move rapidly through some issues that have little relation to the original exclusions.

A. Sociological Legitimacy

As noted, the sociological legitimacy of a constitution refers to its acceptance by citizens. There are various possible measures of sociological legitimacy, from weak (acquiescence) to strong (active endorsement).[185] The American Constitution enjoys considerable sociological legitimacy.[186]

(expressing an anti-precedent view); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 159 (2006) (expressing a pro-precedent view).

184 Strauss, *Why Conservatives Shouldn't Be Originalists*, *supra* note 182, at 974.

185 Fallon, *supra* note 2, at 1795–96.

186 *See, e.g.*, GFK CUSTOM RESEARCH NORTH AMERICA, AP–NATIONAL CONSTITUTION

While it is important to distinguish sociological legitimacy from moral legitimacy, we may think that the sociological legitimacy of the Constitution contributes to its moral legitimacy[187] and further gives some indication of how the Constitution should be interpreted.

1. *A Contemporary Phenomenon.*— As sociological legitimacy is based on the views of contemporary people, the Constitution should arguably be interpreted according to a contemporary meaning, even when that is different from the Constitution's original meaning. Arguing along these lines, Professor Michael Dorf writes:

> For living Constitutionalists, the act of ratification by people who are long dead, and whose numbers did not include any women or enslaved African-Americans, does not suffice to make the Constitution effective today. For us living-Constitutionalists, the Constitution's current authority derives at least in substantial part from the fact that we the living people accept it as authoritative. And if our acceptance validates the Constitution, then, . . . the way in which contemporary Americans understand the Constitution's language should play a substantial role in how the courts interpret that language.[188]

This is a nonoriginalist argument of the kind suggested above in Part I. The problem of original exclusions, as well as the "dead hand" argument, is used to dispose of original ratification as a source of moral legitimacy. Then the way is clear to propose a different source of moral legitimacy—in this case, sociological legitimacy—that arguably points to a nonoriginalist approach to interpretation.

However, the argument that the sociological component of moral legitimacy privileges contemporary meaning is once again more powerful as an argument against originalist judicial review than as an argument in favor of nonoriginalist judicial review. Legislators, as well as judges, have a contemporary understanding. As Justice Scalia puts it,

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CENTER POLL 2009, http://www.ap-gfkpoll.com/pdf/AP_GfK_Poll_Constitution_Topline.pdf (last visited Oct. 20, 2009). In this poll, 75% of respondents agreed with the statement that "[t]he United States Constitution is an enduring document that remains relevant today," as opposed to 23% who agreed with the statement that "[t]he United States Constitution is an outdated document that needs to be modernized." *Id.* Those who agreed with the second statement might still be considered supporters of the Constitution if they favored "modernization" through Article V amendment or judicial interpretation. On the other hand, those who agreed with the first statement that the Constitution "remains relevant" might not be expressing very strong support.

187 That is my view, not necessarily Fallon's.

188 Michael C. Dorf, *Who Killed the "Living Constitution"?*, FINDLAW, Mar. 10, 2008, http://writ.news.findlaw.com/dorf/20080310.html.

> If the Constitution were . . . a novel invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature? One simply cannot say, regarding *that* sort of novel enactment, that "[i]t is emphatically the province and duty of the judicial department" to determine its content. Quite to the contrary, the legislature would seem a much more appropriate expositor of social values, and *its* determination that a statute is compatible with the Constitution should, as in England, prevail.[189]

Scalia's point is powerful. The sociological component of moral legitimacy does not seem, in itself, to justify nonoriginalist judicial review, at least where a federal statute is concerned. Once again, however, the privileging of contemporary meaning could justify the courts in bringing straggler states into line with majority state practice.

The Supreme Court as an institution also has considerable sociological legitimacy.[190] In theory, a method of constitutional interpretation could have sociological legitimacy (or could lack sociological legitimacy). But, as Fallon says, "the public's relative lack of attentiveness makes it impossible to gauge the substantive sociological legitimacy—in the strong sense of active endorsement—of controversial methods of constitutional interpretation."[191]

Even if the sociological legitimacy of the Court does not directly extend to any particular method of constitutional interpretation, it does plausibly extend to the practice of judicial review itself. As Professor Barry Friedman argues, judicial review may be part of what people accept, even if they support the law that has been struck down.[192] Perhaps, then, the countermajoritarian difficulty becomes less difficult for both originalists and nonoriginalists.

2. *Indirect Sociological Legitimacy of Nonoriginalist Doctrine.*— Though methods of constitutional interpretation cannot claim direct sociological legitimacy, popular acceptance of the results of these methods might give them indirect legitimacy. As indicated in the Introduction, major elements of Supreme Court doctrine are widely perceived as nonoriginalist. To the extent that nonoriginalist doctrine has sociological legitimacy, the nonoriginalist method could have some indirect sociological legitimacy.

To be sure, some liberal Supreme Court decisions perceived as

189 Scalia, *Originalism: The Lesser Evil*, *supra* note 18, at 854.

190 *See* Fallon, *supra* note 2, at 1828–30; Lydia Saad, *High Court to Start Term With Near Decade-High Approval*, GALLUP, Sept. 9, 2009, http://www.gallup.com/poll/122858/High-Court-Start-Term-Near-Decade-High-Approval.aspx.

191 Fallon, *supra* note 2, at 1830.

192 Barry Friedman, *Judging Judicial Review:* Marbury *in the Modern Era: Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2606, 2608, 2631 (2003).

nonoriginalist have provoked great political opposition. In at least two areas—abortion and school prayer—it is unlikely that liberal nonoriginalism will ever be able to claim even weak sociological legitimacy. Yet in a number of areas, especially those relating to the elimination of original exclusions, liberal nonoriginalism does seem to have some indirect sociological legitimacy. Each inclusion of a previously-excluded group was controversial at one point, but each subsequently gained wide acceptance.[193]

In Part II above, I argued that the elimination of the original exclusions, accomplished partly through nonoriginalist means, had increased the result-based moral legitimacy of the Constitution. I am now suggesting that the consent-based moral legitimacy of the Constitution, as well, is partly based on the wide acceptance of nonoriginalist improvements such as the elimination of the original exclusions. This puts into ironic relief Judge McConnell's observation, which he takes to support originalism and traditionalism, that "women and African-Americans . . . today are no more inclined than any other portions of the population to jettison the Constitution."[194] Perhaps McConnell is right; but perhaps women and African-Americans, as well as members of other groups, would venerate the Constitution less if it had been interpreted in a consistently originalist manner. Insofar as the sociological legitimacy of the Constitution derives, in part, from nonoriginalist improvements, originalists who rely on sociological legitimacy may be claiming justification from a nonoriginalist source.

Paradoxically, originalists do seem in general to gain some benefit from the increase in result-based moral legitimacy and consent-based moral legitimacy that nonoriginalism has brought to the Constitution. The older generation of originalists wanted to roll back liberal nonoriginalism, and some contemporary originalists certainly share that goal. But originalism today can also appeal to those who believe that liberal nonoriginalism, though once justified, is no longer necessary. The work of nonoriginalist constitutional improvement, they might think, has already been done—by the Reconstruction Congress, the New Deal Democrats, the majoritarian New Deal Court, and the liberal Warren and Burger Courts. Even with a turn to originalism, most nonoriginalist constitutional improvements are unlikely to be undone, for several reasons. First, respect for political settlement and judicial precedent will limit the decisions that originalists are willing or able to revisit. Second, favored precedents that were once considered nonoriginalist can be provided with retroactive originalist justification, as with *Brown*.[195] Third, public mores have changed so that some kinds of legislative action that previously provoked liberal nonoriginalist judicial review (such as egregiously sexist laws) are now less likely. Previous

193 *See supra* notes 128–31, 139–50 and accompanying text.

194 McConnell, *supra* note 11, at 1132–33.

195 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

constitutional interpreters, it might be thought, have done the dirty work of nonoriginalist constitutional improvement, and their success now licenses us to be originalists, without suffering the constitutional consequences that originalism would have brought in the past.

I am not sure that the view just described is theoretically coherent. As a theoretical matter, I believe, future nonoriginalism is bolstered to the extent that past nonoriginalism has contributed to the moral legitimacy of the Constitution. As a practical matter, however, originalists may be trading on nonoriginalist legitimacy to some extent.

3. *Veneration of the Founders.*— Popular sovereignty at the Founding is a myth, and public acceptance of this myth cannot make it true. If we accept the Founders as representing the People of the Founding, that doesn't make white male property owners "the People," just as thirteen governors wouldn't be "the People" if we were to accept them as such. However, public acceptance of the myth of popular sovereignty at the Founding might lend some indirect sociological legitimacy to popular–sovereignty originalism.

Veneration of the Founders could also give support to a different kind of originalism, a folk originalism that is rarely advocated in academic circles. Folk originalism tells us that the Founders were wise and great. We lesser mortals should be guided by their will and should not tinker with their handiwork.[196]

Veneration of the Founders and acceptance of the myth of popular sovereignty doubtless play a role in sustaining originalism. Nevertheless, I deny that these elements of popular culture provide much sociological legitimacy for originalism, because they coexist with acceptance of the great improvements that Americans have made to their Constitution, some in nonoriginalist fashion. As before, past nonoriginalist achievements make it paradoxically easier for us to indulge ourselves in mythology about the Founders and the Founding; it would be harder to venerate the Founders if we actually had to live under their Constitution.

4. *Sociological Legitimacy and Result–Based Legitimacy.*—Legitimacy based on contemporary consent is not a value that is wholly independent from result–based legitimacy. One goal in the development of the law can be the retention of sociological legitimacy. It might be thought, for example, that *Roe v. Wade*[197] simultaneously increased the moral legitimacy of the Constitution, because of the rule it adopted, and decreased the moral legitimacy of the Constitution, because it provoked unending disapproval by a substantial segment of the population.

196 Whittington rejects this folk originalism as inconsistent with continuing popular sovereignty. *See* WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 17, at 126.

197 Roe v. Wade, 410 U.S. 113, 162–67 (1973).

B. Indirect Election of Federal Judges

Though Supreme Court justices are not directly elected, they are appointed by an elected president and confirmed by an elected Senate.[198] To one degree or another, Professors Barry Friedman, Jack Balkin, Sanford Levinson, Robert Post, and Reva Siegel have all justified (or partially justified) judicial review as part of ordinary democratic politics.[199] If we accept that the Supreme Court is part of ordinary democratic politics, the countermajoritarian difficulty once again becomes less difficult both for originalist judicial review and for nonoriginalist judicial review. When indirectly elected judges override legislatures, that does not seem to require as much justification as when "unelected judges" override legislatures.

The concept of indirect election can provide a nonoriginalist response to one originalist argument that may be provoked by a discussion of the original exclusions. Originalists may argue that nonoriginalism recapitulates the original exclusions, except in far more objectionable form. By departing from original meaning, five justices on the Supreme Court can make a law;[200] that is a far smaller and far more privileged minority than the minority responsible for creating and ratifying the antebellum Constitution. This is, of course, more powerful as an argument against nonoriginalist judicial review than against nonoriginalist judicial restraint. Nonoriginalist judicial restraint can draw on the democratic legitimacy of contemporary majorities in upholding a contemporary law. But even as to nonoriginalist judicial review, nonoriginalists can claim that contemporary presidents and contemporary senators are elected under a broadened franchise in a free society, thus providing the contemporary Supreme Court with greater (albeit indirect) democratic legitimacy than any antebellum body. Both originalists and nonoriginalists can draw on the asserted legitimacy of indirect democracy, but nonoriginalists may need it more.

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198 U.S. CONST. art. II, § 2, cl. 2.

199 Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 494–95 (2006); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067–68 (2001); Friedman, *supra* note 192, at 2606; Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.–C.L. L. REV. 373, 375 (2007).

200 *See* Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL'Y 875, 880–81 (2008) ("Five out of nine Justices would then have the power, for example, to eliminate the death penalty, even though a comparatively trivial bill to deregulate the trucking industry would need to pass the House of Representatives, overcome a filibuster and pass the Senate, and then be signed by the President–or be passed by two–thirds majorities of both Houses over the President's veto–in order to become law. What are the odds that the Framers, who created our cumbersome system for national law–making, meant to give five–to–four majorities of the Supreme Court the power to legislate on the most sensitive issues of morality and religion?").

Locating judicial review in ordinary democratic politics could provide originalists, in their turn, with a ready-made response to one liberal nonoriginalist argument based on sociological legitimacy. Liberal nonoriginalists may argue that their approach has some sociological legitimacy, albeit of the very weak variety, because not a single liberal precedent has been overturned by constitutional amendment. However, a number of liberal precedents have become issues in presidential campaigns won by Republicans, and those Republican presidents have made appointments leading to the undermining or rejection of some liberal precedents (not necessarily the same ones that figured in the campaigns).[201]

On the other hand, the very pretension of originalism to avoid result-oriented judging means that originalist judicial review may not always be able to claim the fullest extent of indirect democratic legitimacy. When Republican presidents are elected on a gun-rights platform and appoint originalist judges, who in turn determine that there is an individual right to bear arms under the Second Amendment,[202] this arguably has indirect democratic legitimacy. But if originalist judges were to impose a narrow vision of the eighteenth century understanding of the Commerce Clause, as Justice Thomas has urged,[203] the argument for indirect democratic legitimacy would be much weaker. So ironically, the more originalism is a genuine attempt to discover original meanings, rather than a pose covering clearly understood conservative politics, the less democratic legitimacy it may have—that is, unless originalism itself becomes an issue in election campaigns. Until now, of course, it has been more persuasive that Republican voters vote for conservative results than that they vote for the originalist method.[204]

C. Consent over Time

The Constitution has enjoyed sociological legitimacy over time in the minds of successive generations of Americans. Plausibly, the continuing sociological legitimacy of the Constitution contributes more to its democratic legitimacy, and its moral legitimacy, than would its sociological legitimacy to contemporary people alone. That is my view, though I believe that contemporary sociological legitimacy is far more important than past sociological legitimacy. Past sociological legitimacy may seem relevant to us because we believe that it shows that present sociological legitimacy will

201 *See, e.g.*, Herring v. United States, 129 S. Ct. 695, 704 (2009) (undermining the exclusionary rule); Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2516–17 (2009) (undermining the Voting Rights Act).

202 District of Columbia v. Heller, 128 S. Ct. 2783, 2791 (2008).

203 Gonzales v. Raich, 545 U.S. 1, 57–59 (2005) (Thomas, J., dissenting).

204 *See* Fallon, *supra* note 2, at 1830.

continue in the future.

IV. Exclusion-Specific Nonoriginalism

I have so far discussed the general significance of original exclusions for constitutional interpretation, regardless of whether the original meaning of the constitutional provision at issue was plausibly affected by an original exclusion, and regardless of whether application of that provision affects a previously–excluded class. If one or both of these conditions apply, the case for nonoriginalism is arguably stronger. A direct connection between an original exclusion and a current constitutional issue might also give some guidance in resolving the constitutional issue, though here there are complications and paradoxes.

A. Examples Involving Landmark Cases

Constitutional theorists have used exclusion–specific nonoriginalism to justify some major decisions. In his famous article titled *The Misconceived Quest for the Original Understanding*,[205] Professor Paul Brest suggests such a justification for *Home Building & Loan Ass'n v. Blaisdell*.[206] In *Blaisdell*, a Depression–era case, the Court upheld a state mortgage moratorium law[207] even though the Contract Clause in Article I, Section 10 forbids states from passing any law "impairing the obligation of contracts."[208] *Blaisdell* is often considered to be a particularly strong deviation from originalism.[209] In support of *Blaisdell*, Brest writes: "[T]he assumption that the contract clause reflected widely held norms of eighteenth century America is weakened to the extent that creditors were well–represented and debtors underrepresented in the Philadelphia and state ratifying conventions."[210]

Another suggestion of exclusion–specific nonoriginalism can be found in Fallon's discussion of *Bolling v. Sharpe*.[211] In *Bolling*, the Court held that school desegregation in the District of Columbia violated a principle of equal protection inherent in the Due Process Clause of the Fifth Amendment.[212] I noted above in Part II that Fallon mentions *Bolling* as an example of a case where result–based moral legitimacy is persuasive: "[T]he lack of a constitutional norm forbidding the federal government from discriminating against racial minorities was a serious moral deficiency in the preexisting

205 Brest, *supra* note 11.

206 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

207 *Id.* at 444–48.

208 U.S. Const. art. I, § 10, cl. 1.

209 *See, e.g.*, Rubenfeld, *supra* note 23, at 2093–94.

210 Brest, *supra* note 11, at 230.

211 *See* Fallon, *supra* note 2, at 1835.

212 Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

constitutional regime."[213] Fallon also suggests that *Bolling* is justified as an exclusion–specific nonoriginalist decision:

> It might be objected that by forging a new constitutional norm, the Court offended principles governing the fair allocation of political power: the Court should leave the implementation of constitutional change to political majorities acting through the Article V amendment process, not arrogate a power of innovation to itself. It bears emphasis, however, that the status quo ante had been established by political processes from which racial minorities were almost wholly excluded. Under those circumstances, the argument that the Court should have stayed its hand based on concerns about the fair allocation of political power rings slightly hollow.[214]

The application of equal protection principles to gender could also be considered an area in which exclusion–specific nonoriginalism is justified. In *VMI*, Justice Ginsburg noted that women were unable to vote for the first "century plus three decades and more" of the Constitution, and were otherwise subordinated.[215] As indicated above, Ginsburg's opinion in *VMI* reflects the view that the historical subordination of women makes it inappropriate to consult the original meaning of the Fourteenth Amendment on gender–specific issues.[216]

B. Recent Proposals

Professors Malla Pollack[217] and R. George Wright[218] have recently published articles that address exclusion–specific issues at length. Pollack makes a number of arguments, one of which might be considered the least ambitious proposal as to how constitutional interpretation should accommodate original exclusions. Though not herself an originalist, Pollack argues that public–meaning originalists should include formerly excluded groups in the "public" when determining meaning.[219] Surprisingly, it does not appear that any major public–meaning originalist has directly addressed the question of whether the relevant public for determining constitutional meaning includes formerly excluded groups.[220] Pollack argues that "[t]hose

213 Fallon, *supra* note 2, at 1835.

214 *Id.*

215 United States v. Virginia, 518 U.S. 515, 531 (1996).

216 *See id*; *see also supra* note 171 and accompanying text.

217 Pollack, *supra* note 11.

218 Wright, *supra* note 11.

219 Pollack, *supra* note 11, at 144.

220 Sometimes it appears implicitly that public–meaning originalists mean to exclude formerly disenfranchised groups from the relevant public, as in Bork's statement that Madison's notes "are merely evidence of what informed public men of the time thought the words of the

wedded to historicism could increase the legitimacy of their constitutional interpretations (at least slightly) . . . [by asking] what the entire public of the United States heard when the document was ratified. This makes the Constitution more legitimate by providing a method of somewhat empowering 1789's political outcasts."[221]

Pollack's truly modest proposal would probably have its greatest impact in cases applying constitutional provisions to previously excluded groups. For example, if the "public" in 1867 included only men, the Fourteenth Amendment might have a determinate original meaning that does not challenge the traditional subordination of women; but if the "public" also included women, the original meaning of the Fourteenth Amendment might become indeterminate in this respect.

Wright, for his part, offers an extremely ambitious argument, based on the original exclusions, for reading "economic subsistence rights" into the Constitution.[222] He notes that leading liberal nonoriginalists do not claim that the Constitution protects economic subsistence rights.[223] Indeed, when confronted with the argument that they find in the Constitution whatever they desire to be there, leading liberal nonoriginalists use economic subsistence rights as an example of a Constitutional provision they would like to see in the Constitution but is not, alas, there.[224] Wright, however, writes that "[w]e can responsibly speculate . . . that many of those persons who were excluded from direct influence on the Founders' Constitution, or on the Civil War amendments, would have been sympathetic to some culturally appropriate minimal floor of economic provision as a matter of last resort."[225]

Another very recent proposal, from an originalist perspective, comes from McGinnis and Rappaport. They justify respect for some nonoriginalist precedent based on exclusion–specific nonoriginalism:

> [P]recedent should be followed when it corrects a supermajoritarian failure. Unfortunately, the original supermajoritarian process for enacting the Constitution had some serious defects, such as the exclusion of blacks and women. Where a precedent operates to correct the results of these defects, a strong argument exists for following it.[226]

Constitution meant." BORK, *supra* note 18, at 144. Whether or not they accept Pollack's suggestion, public–meaning originalists should at least explain their position on this issue.

221 Pollack, *supra* note 11, at 144.

222 Wright, *supra* note 11, at 703.

223 *Id.* at 700–03.

224 *Id.*

225 *Id.* at 702.

226 John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 805 (2009).

McGinnis and Rappaport argue that in general, courts should hesitate to attempt to correct "supermajoritarian failures," among other things, because it may be too difficult to determine what result an actual supermajoritarian process would have produced.[227] But when a corrective nonoriginalist precedent already exists, they believe, the balance of considerations shifts toward following it.[228]

C. Evaluation

As suggested in the Introduction, nonoriginalism is a matter of occasion and a matter of degree.[229] When a case involves a constitutional provision affected by an original exclusion and of special concern to a previously-excluded class, that might be taken as a particularly good reason to depart from original meaning. Exclusion-specific cases might also be thought to justify departing farther from original meaning than would otherwise be appropriate.

The *VMI* case,[230] along with other cases applying the Fourteenth Amendment to gender,[231] could demonstrate in at least two ways how an exclusion-specific case can be an occasion for nonoriginalism. In this Article, I have mainly been concerned with the significance of original exclusions for the interpretation of constitutional provisions ratified in the antebellum period. With the Reconstruction Amendments, the original exclusions were to some extent remedied: slavery was eliminated, there was virtually universal suffrage for white men, and African-American men in the South began to vote (until they effectively lost that right under the Jim Crow laws).[232] Some might believe that the popular-sovereignty case for originalism is generally strong with respect to the Reconstruction Amendments, but they might be willing to depart from originalism on gender-specific issues because women were excluded from the franchise during Reconstruction. Some might also believe that it is harder to justify nonoriginalist judicial review (striking down a statute against original meaning) than nonoriginalist judicial restraint (upholding a statute against original meaning); they might, however, accept nonoriginalist judicial review in exclusion-specific cases such as those involving the application of the Equal Protection Clause to gender.

Exclusion-specific nonoriginalism is both narrower and more powerful than other nonoriginalist arguments based on the original exclusions.

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227 *Id.* at 841–42.

228 *Id.* at 842.

229 *See supra* notes 14–15 and accompanying text.

230 United States v. Virginia, 518 U.S. 515 (1996).

231 *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686 (1973); Reed v. Reed, 404 U.S. 71, 76 (1971); *see also* U.S. CONST. amend. XIV.

232 *See* U.S. CONST. amends. XIII, XIV, XV.

Elsewhere in this Article, I advance arguments based on the original exclusions in an effort to discredit originalism generally,[233] but none of those arguments purports to justify a departure from original meaning in any particular case. I argue elsewhere in this Article that the original exclusions should lead courts to conclude that they are not bound to follow original meaning;[234] I, of course, do *not* argue that courts should generally determine what original meaning provides, and then do the opposite. Exclusion-specific nonoriginalism, by contrast, does point to particular kinds of cases, particular occasions on which a nonoriginalist interpretation might be justified.

As suggested, exclusion-specific nonoriginalism might also justify a further departure from original meaning than would otherwise be appropriate.[235] This aspect of exclusion-specific nonoriginalism may be exemplified by *Blaisdell*[236] and *Bolling*,[237] both of which appear to involve strong departures from original meaning. *VMI*[238] also involves a strong departure from original meaning under expected-applications originalism, though it can easily be endorsed by unexpected-applications originalists.[239]

What accounts for the widespread intuitive appeal of exclusion-specific nonoriginalism? There can be a consent-based rationale, a result-based rationale, or a mix of the two. A straightforward consent-based approach is that excluded groups (blacks, or women, or the poor) should not be bound by the original rules because they were not able to participate in making the original rules. This approach, however, seems to assume a concept of group rights that many would reject, and so it may not explain the intuitive force of exclusion-specific nonoriginalism.

A more complicated consent-based rationale might treat exclusion-specific nonoriginalism as an exception to popular-sovereignty originalism. Though popular sovereignty at the Founding is a myth,[240] some of us may be reluctant, as a general matter, to surrender our belief in that myth. We may be more willing to depart from originalism when the ridiculousness of popular sovereignty becomes utterly apparent, as with the application of constitutional provisions to groups that were excluded from any role in adopting those provisions.

Result-based rationales for exclusion-specific nonoriginalism are derivative of consent-based defects; they consider consent-based defects

233 *See supra* Parts I, II, III. *See infra* Parts V, VI.

234 *Id.*

235 *See* discussion *supra* Part IV(A).

236 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

237 Bolling v. Sharpe, 347 U.S. 497 (1954).

238 United States v. Virginia, 518 U.S. 515 (1996).

239 *See* Balkin, *supra* note 18, at 321–25.

240 *See supra* Part I.

as an indication that following original meaning could lead to bad results. It might be wondered why, under a result–based approach, we should concern ourselves with consent–based defects at all. Shouldn't we pursue the interpretive approach that will have the best result, regardless of what has happened in the past? Insouciance about the past would be a logical way to proceed, *if* we were fully confident in our ability to produce the best results in the future. If, however, we are not fully confident in our ability to produce the best results, we may take consent–based defects of the past as a signal of when it is advisable to depart from originalism.

McGinnis and Rappaport offer a rather stark example of such a result–based approach. As indicated, they believe that the best results are those that would have been achieved if there had been no "supermajoritarian failures."[241] McGinnis and Rappaport would pursue counterfactual rectification of supermajoritarian failures, at least to the extent of accepting nonoriginalist precedents.[242]

I favor a somewhat different result–based approach, one that does not take originalism to be so strong a default position. The original meaning of the Constitution, on issues relating to a previously excluded group, is likely to be unfair to that group because the original meaning was established during the time of the unfair original exclusion. The original meaning is likely to embody the unfair exclusionary attitudes that produced the original exclusion; it is likely to perpetuate the effect of the original exclusion even after the exclusion has been eliminated.[243] This is a result–based inferential approach, somewhat analogous to the argument from moral progress I offered above in Part II,[244] but considerably more powerful. I argued above that we should assume that the original meaning of some antebellum provisions is morally retrograde,[245] simply because those provisions were generated at the time of greatest exclusion and because the Constitution is so hard to amend. The inference of morally retrograde character becomes specific and much stronger when the original meaning at issue relates specifically to a previously–excluded group.

The view that exclusion–specific nonoriginalism is justified to avoid perpetuating unfairness does not, I think, impose the same heavy counterfactual burden that McGinnis and Rappaport's counterfactual–rectification approach suggests; those who seek to depart from original meaning do not necessarily have to prove that absent original exclusions, the rule they favor would have been written into the Constitution as part of original meaning. In *VMI*,[246] for example, the exclusion–specific

241 McGinnis & Rappaport, *supra* note 226, at 805.

242 *Id.*

243 *See also* Pollack, *supra* note 11, at 700–17; Wright, *supra* note 11, at 167–69, 173.

244 *See supra* Part II.

245 *Id.*

246 *See* United States v. Virginia, 518 U.S. 515 (1996).

nonoriginalist would not necessarily have to show that if women were enfranchised during Reconstruction, the Fourteenth Amendment would have explicitly prohibited gender-segregated state military schools.[247] It might be enough to show that the original meaning of the Fourteenth Amendment (or the original expected application) ratified the subordination of women as a group excluded from politics.

On the other side, the unfairness-perpetuation approach would allow the inference of unfairness to be rebutted. For example, the Thirteenth Amendment was generated largely without the participation of African-Americans in the South.[248] This lack of African-American participation could support an exclusion-specific nonoriginalist argument concerning the interpretation of the Thirteenth Amendment. The exclusion-specific argument might be resisted, however, on the ground that the Thirteenth Amendment was designed to benefit African-Americans in the South, even though it was produced without their participation, so it does not, when interpreted in originalist fashion, perpetuate the unfairness of an original exclusion.[249]

If exclusion-specific arguments do not face a full counterfactual burden, they may liberate us from original meaning, but they may not tell us the proper nonoriginalist result.[250] Exclusion-specific nonoriginalism most convincingly points to a given result when the correct nonoriginalist decision is obvious, or at least highly prominent, if only originalism can be rejected. Thus, in *Blaisdell*, the Court adopted the prominent solution of judicial restraint after departing from original meaning.[251] In *Bolling*, although the Court did not practice restraint, it also adopted a prominent solution by harmonizing desegregation law and, more broadly, equal protection law, across state and federal governments.[252]

Suppose it is accepted that an exclusion-specific case provides an occasion for nonoriginalism, and indeed for departing farther from original meaning than would otherwise be appropriate. A remaining question may be whether the favored nonoriginalist interpretation will in fact be more beneficial to the previously-excluded group than would be the original meaning. When a policy seeks to benefit a disadvantaged group, opponents of the policy often argue that it will in fact harm the group. At times these arguments have little credibility – even slavery was once justified on the

247 *See* U.S. CONST. amend. XIV.

248 *See* KEYSSAR, *supra* note 4, at 87–91; 2 ACKERMAN, *supra* note 11, at 99–159.

249 In suggesting this originalist response, I do not mean to endorse an originalist interpretation of the Thirteenth Amendment.

250 Even under the fully counterfactual approach, it may be impossible to know what a properly inclusive process would have produced.

251 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 448 (1934).

252 Bolling v. Sharpe, 347 U.S. 497, 498–500 (1954).

ground that it was better for African–Americans than freedom.[253] But at times the argument is not completely ridiculous: for example, perhaps the Contract Clause actually benefited generations of debtors by making credit slightly cheaper.[254]

D. Is the Three–Fourths Rule in Article V Tainted by the Slave Trade?

One exclusion–specific issue deserves separate mention. Some of the provisions of the antebellum Constitution were inserted to protect slavery, or to protect the interest of the three deeper–South states in continuing the African slave trade.[255] Several of these slavery–tainted provisions survived Reconstruction, and one of them may be the requirement in Article V that amendments must be approved by three–fourths of the states.[256]

At the Constitutional Convention of 1787, James Wilson of Pennsylvania proposed that approval by two–thirds of the states should suffice for amendments.[257] Wilson's motion was defeated by a vote of only six to five.[258] The six states voting against the motion were Massachusetts, Connecticut, New Jersey, North Carolina, South Carolina, and Georgia.[259] Wilson then moved to require approval of three–fourths of the states, which was adopted unanimously.[260]

It appears that much or most of the opposition to Wilson's initial two–thirds proposal was related to the protection of the African slave trade. The three deeper–South states that were interested in protecting the slave trade—North Carolina, South Carolina, and Georgia—voted as a bloc against the two–thirds proposal.[261] This vote occurred before a provision was inserted in Article V making the protection of the African slave trade until 1808 completely unamendable;[262] that provision was inserted later on the same day.[263] Moreover, Massachusetts and Connecticut, two of the three Northern states that voted against the two–thirds proposal, had allied themselves with the deeper–South states on matters concerning the African

253 *See, e.g.*, GEORGE FITZHUGH, CANNIBALS ALL! OR SLAVES WITHOUT MASTERS 220–24 (C. Vann Woodward ed., 1960).

254 *See* U.S. CONST. art. I, § 10, cl. 1; *see also Blaisdell*, 290 U.S. at 398.

255 *See* FINKELMAN, *supra* note 10, at 3–36.

256 *See* U.S. CONST. art. V; FINKELMAN, *supra* note 10, at 7–8.

257 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 52, at 558.

258 *Id.* at 558–59.

259 *Id.*

260 *Id.* at 559.

261 *Id.* at 558–59.

262 "[N]o amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article[.]" U.S. CONST. art. V.

263 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 17, at 559.

slave trade, in order to gain approval for what became the Commerce Clause.[264] The votes of Massachusetts and Connecticut against the two-thirds proposal may have represented a continuation of their support of the slave-trading interest, although these states may also have had other concerns.[265]

In any event, the bloc vote of the deeper-South states suggests that the Constitution would have been a little easier to amend if it were not for the interest of some states in protecting the slave trade.[266] What implications does this history have for constitutional interpretation? The difficulty of amending the Constitution is sometimes offered as a justification for nonoriginalism, and it might be thought that the case for nonoriginalism is stronger because the taint of slavery and the slave trade remains on Article V.[267] As before, however, there are complications. There is once again an issue of counterfactual burden: must the nonoriginalist show that the Constitution would likely have been amended, under a two-thirds rule, to depart from original meaning in the way the nonoriginalist now favors? Is the Commerce Clause itself tainted by the bargain between the deeper-South states intent on protecting the slave trade and their New England allies? My own view is that the origin of the three-fourths rule in Article V adds a little strength to the case for a majoritarian approach as a counter to both originalist judicial review and nonoriginalist judicial review; it supplies an additional reason for judicial restraint in the review of federal statutes and in the review of those state statutes that are common to many states.

V. The Antebellum Taint

I now offer two arguments that may be more radical than anything I have previously asserted. First, the authority of original meaning is fundamentally tainted insofar as that authority is said to derive from a source in the antebellum period. Second, it is, without more, a point against originalism that originalism would fix the meaning of antebellum constitutional provisions in the political and legal culture of the antebellum period.

The Constitution has many sources of moral legitimacy that I endorse, including contemporary acceptance, acceptance over time, result-based legitimacy (including the progressive elimination of the original exclusions), and indirect election of the federal judges who are tasked with interpreting

264 *See* David Brian Robertson, The Constitution and America's Destiny 180–81 (2005); Finkelman, *supra* note 10, at 27–31.

265 *Id.*

266 To my knowledge, this history has not previously been discussed in connection with the originalism debate. Finkelman mentions the three-fourths requirement in Article 5, but does not discuss it in detail. *See* Finkelman, *supra* note 10, at 8.

267 U.S. Const. art. V.

the Constitution.[268] I deny, however, that the Constitution can derive much moral legitimacy from anything that happened in the antebellum period, including the Founding. Relative to the Constitution of today, the Constitution of the antebellum period has a high deficit of consent–based legitimacy (it was produced by an exclusive slave society) and a high deficit of result–based legitimacy (it protected slavery). Insofar as the authority of the Constitution is said to derive from the antebellum period, that authority is fundamentally tainted by the original exclusions.

Interpretive methods, like the Constitution itself, can have or lack moral legitimacy. Just as the authority of the Constitution is tainted insofar as it derives from antebellum sources, so is the authority of originalism and original meaning.

The present argument that the antebellum–derived authority of original meaning is fundamentally tainted is an extension of the argument I offered in Part I and was, in fact, prefigured there. I argued in Part I that the original exclusions defeat any justification for originalism that relies on democratic theory and notions of popular sovereignty.[269] I there noted that under some conceptions of democracy or popular sovereignty, the antebellum Constitution's substantive accommodation with slavery, in the Fugitive Slave Clause and other provisions, might not be considered a democratic deficit;[270] the democratic legitimacy of the Constitution, it might be thought, depends only on the processes that produced it.[271] Further, I noted, the fact that the Constitution was produced by a slave society might even be deemed irrelevant to the democratic provenance of the Constitution.[272] But while rejecting any conception of democracy that deemed it irrelevant that the Constitution was produced by a slave society and substantively protected slavery, I also noted that these features of the antebellum Constitution clearly affect its moral legitimacy.[273] Now I make a more generalized argument: the original exclusions rebut any justifications for originalism, not just democratic–theoretical justifications, that seek to trace the authority of original meaning to the antebellum period.

What justifications for originalism, then, other than those based on popular sovereignty, does the argument against antebellum–derived authority address? Primarily, it addresses justifications for originalism based on theories of meaning, interpretation, or legal authority, discussed in Part VI below. As noted there, however, the argument against antebellum–derived authority does not directly confront such theories; it assumes that

268 *See supra* Parts II and III.

269 *See supra* Part I.

270 *Id.*

271 *Id.*

272 *Id.*

273 *Id.*

their claims of originalist necessity are false.[274]

While the authority of original meaning is tainted insofar as it derives from an antebellum source, it need not derive from an antebellum source; there are many putative justifications for originalism that are unaffected by the present argument. If the originalist method produced good results for contemporary people (a supposition I doubt), original meaning would enjoy result–based moral legitimacy. If a presidential candidate were elected after campaigning on a promise to appoint originalist judges, original meaning would enjoy indirect democratic legitimacy. Originalism can make increasingly persuasive claims based on popular sovereignty for constitutional amendments ratified as the original exclusions were eliminated. In all such cases, some nonoriginalist arguments might still have weight (including arguments based on original exclusions), but originalism could claim a source of authority untainted by the original exclusions. Thus, the argument against antebellum–derived authority affects major versions of originalism, but not all of them.

A second kind of antebellum taint does attach to all varieties of originalism, as it relates not to the antebellum origin of the supposed authority of original meaning, but to the fixation of meaning in the antebellum period. Constitutional interpretation requires us to decide whether we will allow the meaning of older provisions to evolve or whether we will hold constitutional meaning fixed at the time of adoption. And the time of adoption, for antebellum provisions, is the time of greatest exclusion. However good may be the case for allowing the evolution of constitutional meaning, based on all the various nonoriginalist arguments, I submit that there is an additional, general point in favor of nonoriginalism: if the meaning of antebellum provisions cannot evolve, the meaning of those provisions will remain fixed in the political and legal culture of an exclusionary slave society.

Originalism is tied to the political and legal culture of the antebellum Constitution. That culture is morally illegitimate, from a contemporary perspective, in that it protected slavery and excluded most of the population from politics. Even if we assume that a contested provision was not itself the result of original exclusions, and even if we reject the public choice–type argument that the original meaning of some provisions is likely to retard moral progress, and even if originalism can claim some source of authority that is not itself tainted by the original exclusions, still the unattractiveness of fixing meaning in antebellum culture gives us some reason to reject originalism.

There has been debate recently over whether it is proper for American courts to look to foreign law in interpreting the Constitution.

274 *See infra* Part VI.

In his dissenting opinion in *Atkins v. Virginia*,[275] Justice Scalia rejected a consideration of foreign law, and made, in passing, a pejorative reference to the legal systems of other countries: "Equally irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people."[276]

It does seem that when a court proposes to look to foreign law, certain unsavory features of the foreign legal system can counsel caution. Suppose that an American court sought to support its interpretation of the Constitution by citing the law of a foreign country that permitted slavery, whose constitution actually protected the institution of slavery, and in which the vast majority of people were excluded from suffrage. This would not be a very persuasive reference to foreign law, even if the law in question had no apparent relationship to the unsavory aspects of the foreign legal system.[277]

The analogy is, of course, inexact and overblown. Still, there is a sense in which the legal and political culture of antebellum America is (thankfully) foreign to us, and the meaning of the Constitution should not be fixed in that period.

The argument against antebellum stasis is stronger as to expected applications than as to original meaning (assuming one believes the two can be separated). An original expected application that is not part of original meaning is more obviously part of a time-bound culture. For example, if one believes that the expected application of the Eighth Amendment's ban on cruel and unusual punishments is severable from the original meaning of the term "cruel and unusual punishments,"[278] the expected application would clearly be more of a time-bound part of antebellum culture than would the original meaning.

In this Part, I have argued that the authority of original meaning is tainted insofar as it derives from an antebellum source, and that constitutional meaning should not be fixed in the political and legal culture of an exclusionary slave society. Unlike prior arguments, such as the rejection of Whittington's reciprocal originalism and McGinnis and Rappaport's consequentialist originalism, the two I have offered in this Part can claim no syllogistic verity; you buy them or you don't. Originalists will not buy them, but for nonoriginalists, they may enunciate more clearly the intuitive sense that the original exclusions support a fairly general rejection

275 Atkins v. Virginia, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting).

276 *Id.*. (Scalia, J., dissenting).

277 Justice Breyer, who believes reference to foreign law is acceptable, has admitted some embarrassment at citing a decision from a court in Zimbabwe: "I think I may have made what I call a tactical error in citing a case from Zimbabwe—not the human rights capital of the world. (Laughter.) But it was at an earlier time—Judge Gubei (ph) was a very good judge." Scalia-Breyer Debate, *supra* note 178.

278 U.S. CONST. amend. VIII.

of originalism.

VI. "HARD" ORIGINALISM AND ORIGINAL EXCLUSIONS

Originalists often rely on theories of meaning and interpretation, or theories about the nature of legal authority, to argue that the only way to interpret the Constitution is according to its original meaning. A legal interpretation of the Constitution that departs from its original meaning, they often say, is not in fact an interpretation at all.[279] They further claim that the correctness of original-meaning interpretation does not depend on any considerations of political morality. Following are representative statements of such views:

Randy Barnett: "We are bound [by original meaning] because we *today*—right here, right now—profess our commitment to a written constitution, and original meaning interpretation follows inexorably from that commitment."[280]

Robert Bork: "If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended. . . . There is no other sense in which the Constitution can be what article VI proclaims it to be: 'Law.'"[281]

Lawrence Solum: "[The] semantic content of the Constitution (the *linguistic meaning* of the Constitution) is fixed at the time of adoption."[282]

Keith Whittington: "[T]he meaning of a text derives from the author, not from the reader. An interpreter may succeed or fail in understanding a text, but the original meaning is the meaning to be interpreted."[283]

Berman uses the term "hard originalism" to describe this approach.[284] For the sake of uniformity, I will largely accede to Berman's usage, though I would prefer a different term: "Borgian originalism." The term "Borgian" is not a misspelled reference to Robert Bork. It is, rather, a reference to the relentless cyborgs in the Star Trek universe, who make statements such as "Resistance is futile; you must comply," and who dismiss the values of other species as "irrelevant." One motto of hard or Borgian originalism could be "Moral legitimacy is irrelevant; you must comply."

Theorists who advocate hard originalism often have separate arguments based on considerations of moral legitimacy or arguments that are at least sensitive to such considerations. Thus, Whittington's hard originalism is

279 Solum, *supra* note 18, at 67–69. Balkin has given partial support to this view. Balkin, *Framework Originalism*, *supra* note 20, at 559–60. I do not adopt this tendentious convention as to the term "interpretation," as it comes close to assuming the correctness of originalism.

280 Barnett, *supra* note 18, at 636.

281 BORK, *supra* note 18, at 145.

282 Solum, *supra* note 18, at 2 (emphasis in original).

283 Whittington, *The New Originalism*, *supra* note 17, at 610.

284 Berman, *supra* note 12, at 6; *see also id.* at 37.

supplemented by an appeal to popular sovereignty,[285] Bork's is supplemented by an appeal to democracy,[286] and Barnett's is supplemented by an appeal to libertarian political theory.[287] But in their hard originalist aspect, these theorists do indeed claim that moral legitimacy is irrelevant;[288] once the Constitution is acknowledged to be legally binding, for whatever reason, the only possible interpretation is an originalist one.[289]

For hard originalists, any accretion to the moral legitimacy of the Constitution inures to the benefit of originalism. If the elimination of original exclusions—abolition of slavery and expansion of the franchise—increases the moral legitimacy of the Constitution, that simply gives people additional reason to treat the Constitution as law, which, in turn, necessarily requires that provisions of the antebellum Constitution be given the same meaning they had when the original exclusions were in effect.

As noted in the Introduction of this Article, originalists disagree among themselves as to whether they should uphold the original intent of the framers, the original understanding of the ratifiers, or the original public meaning. Hard originalism seems to best fit framer-intentionalism. Offhand, it seems more plausible to argue that the only possible meaning is the drafters' intended meaning than to argue that the only plausible meaning is the meaning as understood by a particular group of ratifiers or by hypothetical people of a certain period. The greater superficial plausibility of intentionalist hard originalism may explain why Whittington refers to authorship in his hard originalist aspect, even though he would actually uphold the understanding of the ratifiers, consistent with his theory of popular sovereignty.[290]

Recently, however, Solum has offered an important argument that the only possible meaning of the Constitution is its original public meaning. Solum concludes:

> The success conditions for framers meaning were not met when the United States Constitution was proposed, ratified, and implemented. So

285 WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 17, at 36.

286 BORK, *supra* note 18, at 143.

287 BARNETT, RESTORING THE LOST CONSTITUTION, *supra* note 21, at 32–89, 253–73.

288 The only issue of political morality that hard originalists are prepared to recognize is whether one should obey the law or obey the Constitution. *See* Barnett, *supra* note 18, at 636; Solum, *supra* note 18, at 10.

289 *See* Barnett, *supra* note 18, at 636; Solum, *supra* note 18, at 10.

290 *See* WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 17, at 36 ("ratifying intent"); Whittington, *The New Originalism*, *supra* note 17, at 610 ("As the founders themselves noted, the constitutional text is meaningless unless and until it is ratified. It is the adoption of the text by the public that renders the text authoritative, not its drafting by particular individuals.").

One could say that the ratifiers are actually the authors of the text; but that way of posing the issue has a number of problems, including that it is false as a matter of fact.

> the meaning of the Constitution cannot be understood on the model of speakers meaning.... It is *not* that we *chose not* to attribute framers meaning to the Constitution. Rather, it is that the Constitution *does not have* framers meaning.[291]

As a nonoriginalist, I welcome any contentiousness among hard originalists of different kinds.[292] Contentions that two different versions of original meaning are necessary interpretations suggest that neither may be a necessary one.

My short response to hard originalism is that the Constitution obviously can be interpreted in a nonoriginalist fashion, since it *has* been interpreted in a nonoriginalist fashion. While hard originalists purport to offer theories that are impervious to considerations of political morality, in fact their theories seem to rely on intensely normative, political, and contestable conceptions of what fidelity to the Constitution requires. This, of course, is just a conclusory verdict. Each hard originalist theory must be confronted on its own terms, something that is beyond the scope of this Article. Berman and others have undertaken this effort, and I endorse their (nonoriginalist) conclusions.[293] I will not here undertake a general refutation of hard originalism, but will instead consider how various nonoriginalist arguments based on the original exclusions apply to hard originalism.

There are several avenues through which arguments about original exclusions can address hard originalism. To a limited extent, arguments about original exclusions can play a role within the framework of hard originalist theory. Some hard originalists are willing to recognize a meaningful distinction between original meaning and original expected application.[294] They believe that the Constitution must be interpreted in accordance with original meaning, but that no such necessity attaches to original expected application. Such a hard originalist theory could accept arguments about original exclusions as a reason to deviate from original expected applications. The arguments that might be accepted most readily, in this regard, are exclusion-specific arguments—for example, the argument that original expectations should not control the operation of the Equal Protection Clause in sex-discrimination cases because women were

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291 Solum, *supra* note 18, at 50.

292 The dispute between them is like a confrontation between two rival Borg colonies:

> "Resistance is futile; you must comply."
>
> "No, *your* resistance is futile; *you* must comply."
>
> "No, *your* resistance is futile; *you* must comply."

293 Berman, *supra* note 12, at 37–68 (focusing on intentionalism); *see also* Frederick Schauer, *Defining Originalism*, 19 HARV. J.L. & PUB. POL'Y 343 (1995) (same).

294 *See supra* note 23.

disenfranchised when the Fourteenth Amendment was adopted.

Even when the issue is framed as one of original meaning rather than original expected application, exclusion-specific arguments might be pressed within the framework of hard originalist theory. Hard originalists typically leave open the possibility of nonoriginalist interpretation if only it is given another (often pejorative) description.[295] Solum, for example, distinguishes between the Constitution and constitutional law.[296] He claims that the Constitution can only be interpreted in originalist fashion, but he concedes that constitutional law can have nonoriginalist elements.[297] Accordingly, arguments about original exclusions might be deployed, within the framework of Solum's theory, to urge that constitutional law be to some extent nonoriginalist.

This is only a narrow avenue, however. Hard originalists have such a strong commitment to originalist methodology that even limited nonoriginalist considerations cannot easily gain a hearing. Perhaps a hard originalist could be persuaded to allow some limited exception to originalism based on exclusion-specific arguments, but that is unlikely to happen very often.

Other nonoriginalist arguments based on the original exclusions cannot claim a place in hard originalist theory, but they can still be urged against hard originalism. In Parts II and III, I argued that the moral legitimacy of the Constitution derives in part from nonoriginalism. In Part V, I argued that the meaning of antebellum constitutional provisions should not be fixed in the legal and political culture of an exclusionary slave society. These arguments apply to all versions of originalism, including hard originalism.

I also argued, in Part V, that the authority of the Constitution, or of a method of constitutional interpretation, is tainted insofar as it is said to derive from the antebellum period. This argument does not apply to all versions of originalism, but it does apply to hard originalism. Hard originalists believe that whenever a provision becomes part of the Constitution, the original meaning of that provision gains supreme interpretive authority.[298] Hard originalists therefore think that the authority of the original meaning of antebellum provisions derives from the antebellum period.[299]

All these various arguments based on the original exclusions do not directly confront the hard originalist insistence that originalist interpretation is necessary. For those who are not fully prepared to accept such claims of

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295 Berman, *supra* note 12, at 12–14.

296 Solum, *supra* note 18, at 109.

297 *Id.*

298 *See supra* notes 279–84 and accompanying text.

299 The argument against antebellum-derived authority may apply less to Solum than to other hard originalists because Solum believes that the obligation to follow original meaning exists only insofar as original meaning is law, and that the status of original meaning as law depends on its contemporary acceptance as law. Solum, *supra* note 18, at 135.

originalist necessity, however, the exclusion–based arguments may have some impact.

CONCLUSION

In this Article, I have set one kind of backward–looking consideration—the illegitimacy of original exclusions—against the backward–looking originalist approach to constitutional interpretation. My ideal outcome, I confess, is the mutual exhaustion of backward–looking considerations. I feel the intuitive appeal of backward–looking considerations, both originalist and nonoriginalist, but ultimately I align myself with those who would interpret the Constitution so as best to promote the well–being of the living.[300] The troubling illegitimacy of original exclusions, I hope, will counteract the appeal of originalism, leaving the field clearer for forward–looking approaches.

I noted in the Introduction to this Article that a major issue dividing originalists is the extent to which original meaning includes original expected applications.[301] In advancing various arguments based on the original exclusions, I have for the most part assumed a traditional conception of original meaning, under which original meaning *does* include a fair amount of original expected application. While this traditional conception is probably still dominant, among both originalists and nonoriginalists,[302] there is now a vigorous new movement of unexpected–applications originalists who advocate a minimalist conception of original meaning. I now consider the relevance of my arguments to unexpected–applications originalism. Doing so will provide a review of the various arguments based on the original exclusions, as well as addressing their significance to an important new strain in originalist theory.[303]

The original exclusions powerfully undercut justifications for originalism that rely on normative democratic theory or notions of popular sovereignty. If unexpected–applications originalism relies on popular sovereignty, it, too, is undercut by the original exclusions. Suppose, however, that unexpected–applications originalists do not base their approach on popular sovereignty.[304] Then the original exclusions furnish them with an argument

300 *See, e.g.*, Brest, *supra* note 11, at 226 ("Having abandoned both consent and fidelity to the text and original understanding as the touchstones of constitutional decisionmaking, let me propose a designedly vague criterion: How well, compared to possible alternatives, does the practice contribute to the well–being of our society–or, more narrowly, to the ends of constitutional government?").

301 *See supra* Introduction.

302 *See* FALLON, *supra* note 28, at 15; Monaghan, *supra* note 27, at 739.

303 I address some related issues in Mark S. Stein, *The Domestic Violence Clause in "New Originalist" Theory*, 37 HASTINGS CONST. L.Q. 129 (2009).

304 This seems to be the case with Balkin, Barnett, and Solum, though Whittington, who is partly in the unexpected–applications originalist camp, does rely on popular sovereignty.

against those expected–applications originalists who do rely on popular sovereignty.

The theory of popular sovereignty seems most consistent with a detailed understanding of original meaning. If we apply a constitutional provision in a way that is very different from original expectations, are we not thwarting the will of the People? Expected–applications originalists can argue that we must respect original expectations because they were the expectations of the People. But unexpected–applications originalists can respond that the expectations were not those of the People, but of a small and privileged minority in a slave society.

Similarly, the original exclusions provide unexpected–applications originalists with a ready counter to McGinnis and Rappaport. Based on their theory that supermajority rules produce good results, McGinnis and Rappaport explicitly reject unexpected–applications originalism; they argue that original expected applications should normally be respected.[305] But since there was in fact no supermajority approval for the provisions of the antebellum Constitution, McGinnis and Rappaport's theoretical defense of expected–applications originalism has no validity.

I have argued that the mirror image of McGinnis and Rappaport's argument is more valid: as the antebellum Constitution had morally retrograde provisions, and as the Constitution is so hard to amend, it makes sense to assume that some morally retrograde provisions remain (perhaps along with morally retrograde omissions). This argument from moral progress is less persuasive against unexpected–applications originalism, with its minimalist conception of original meaning: such a conception allows the Constitution to undergo moral progress without formal amendment. Moreover, unexpected–applications originalists can once again adopt the argument for their own use; they can argue that a refusal to depart from original expectations frustrates moral progress.

The elimination of the original exclusions, I have argued, has increased the result–based moral legitimacy of the Constitution. It has also increased the consent–based moral legitimacy of the Constitution: each inclusion of a previously–excluded group was controversial at one point, but subsequently gained wide acceptance. I have argued that since the original exclusions were eliminated, in part, through nonoriginalist means, the moral legitimacy of the Constitution is based in part on nonoriginalist doctrine. Therefore, I have suggested, future nonoriginalism may require less justification than originalists believe.

Unexpected–applications originalists may respond that the elimination of the original exclusions was accomplished through measures that deviated from original expected application, but not from original meaning.

See supra Part I.

305 *See* McGinnis & Rappaport, *Original Interpretive Principles*, *supra* note 23, at 378–79; McGinnis & Rappaport, *Original Methods Originalism*, *supra* note 23.

Therefore, they may argue, the moral legitimacy of the Constitution is based in part on unexpected–applications originalism; it is not based on nonoriginalism. This unexpected–applications originalist position seems somewhat plausible. I would agree that a minimalist conception of original meaning can easily support inclusive liberal precedents that are often considered nonoriginalist, such as *Brown*.[306] I am more skeptical that even a minimalist conception of original meaning can justify the coercive measures used to gain ratification of the Thirteenth and Fourteenth Amendments;[307] only nonoriginalism, I suspect, can fully justify these constitutional improvements. Even so, however, we could confront a situation, under unexpected–applications originalism, in which the only nonoriginalist behavior that contributed to the moral legitimacy of the Constitution was political nonoriginalism rather than judicial nonoriginalism. In that situation, I have suggested, it could be more legitimately wondered whether past political nonoriginalism supports future judicial nonoriginalism.

In Part IV above, I discussed exclusion–specific cases—cases involving a previously–excluded class and an exclusion–affected constitutional provision. Nonoriginalists may use such cases as an occasion for departing from original meaning, or as an occasion for departing farther from original meaning than they might otherwise want to do. Similarly, unexpected–applications originalists may use exclusion–specific cases as an occasion for departing from original expected application, or as an occasion for departing farther from original expected application than they might otherwise want to do.

Some exclusion–specific cases can be seen by unexpected–applications originalists as being a rejection only of expected application and not a rejection of original meaning. Other exclusion–specific cases, however, cannot so easily be accepted by unexpected–applications originalists. As noted, two cases that have been justified on the ground of exclusion–specific nonoriginalism—*Bolling*[308] and *Blaisdell*[309]—involve strong departures from originalism; it is questionable whether unexpected–applications originalism can accommodate them.[310] This raises the question whether unexpected–applications originalists would ever be prepared to make an exception in exclusion–specific cases.

In Part V above, I argued that that the authority of original meaning is tainted insofar as it derives from any antebellum source. This argument against all antebellum–derived authority, like the more limited argument against antebellum popular sovereignty, would seem to apply both to

306 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

307 *See supra* notes 128–33 and accompanying text.

308 Bolling v. Sharpe, 347 U.S. 497 (1954).

309 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

310 Solum does suggest that the result in *Bolling* may be consistent with the original meaning of the Ninth Amendment. Solum, *supra* note 18, at 138.

expected–applications originalism and to unexpected–applications originalism. I also argued in Part V that the meaning of the Constitution should not be fixed in the legal and political culture of the exclusionary slave society that was antebellum America. As previously observed, this argument against stasis in antebellum culture is stronger as applied to expected applications than as applied to a hard core of original meaning; an original expected application that is not part of original meaning is more obviously part of a time–bound legal and political culture. And once again, unexpected–applications originalists can adopt this argument as a reason not to be bound by expected applications. They can argue that to give original expectations the force of law is to bind ourselves, unnecessarily, to the expectations of an exclusionary slave society.

In sum, the various arguments based on the original exclusions are not as effective against unexpected–applications originalism as they are against expected–applications originalism (which is not to say they are no good at all against unexpected–applications originalism). Moreover, unexpected–applications originalists can adopt, in modified form, some of the arguments based on original exclusions.

Unexpected–applications originalism is a welcome development in originalist theory. I am not prepared to sign on to it because I believe it still leaves constitutional interpretation too much the hostage of the past. I would not take it amiss, however, if my arguments were seen to support unexpected–applications originalism as an alternative to expected–applications originalism.