

## A CRITICAL INTRODUCTION TO THE ORIGINALISM DEBATE

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Since its founding in 1982, the Federalist Society and many of its members have promoted originalism as the correct philosophy to use in interpreting the Constitution. The originalism debate is of central importance to the Society's mission of promoting the rule of law, constitutionally limited government, and the separation of powers. We believe that ours should be a government of laws and not one of men or of judges.

Over the last quarter century, originalism has been the subject of much discussion. That debate, which had been proceeding quietly in American law schools, burst into noisy and public view in July 1985 with a speech by then-Attorney General Edwin Meese III to the American Bar Association that called for a jurisprudence of original intention.<sup>1</sup> Supreme Court Justice William J. Brennan, Jr., entered the fray that October with an address at Georgetown University,<sup>2</sup> to which Meese responded the next month in a speech before the Federalist Society Lawyers Division.<sup>3</sup> These speeches remain among the most enduring statements of the originalist creed and its critics.

The originalism debate continues to be of central importance to the Federalist Society's mission. The Society celebrated the twentieth anniversary of Attorney General Meese's speech to its Lawyers Division by making originalism the theme of its 2005 National Lawyers Division Convention. This Issue of the

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1. Edwin Meese III, U.S. Att'y Gen., Speech Before the American Bar Association (July 9, 1985), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 47 (Steven G. Calabresi ed., 2007).

2. Justice William J. Brennan, Jr., Speech to the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), in ORIGINALISM, *supra* note 1, at 55.

3. Edwin Meese III, U.S. Att'y Gen., Speech Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), in ORIGINALISM, *supra* note 1, at 71.

*Harvard Journal of Law & Public Policy* includes essays developed from several of the panel presentations during that retrospective symposium. The essays show that the issues Ed Meese raised more than twenty years ago are still hotly contested. President George W. Bush's recent appointments of Reagan Administration alumni John Roberts as Chief Justice of the United States and Samuel Alito as an Associate Justice have led many to hope that there may now be four Supreme Court Justices sympathetic to originalism. Given the likelihood of multiple Supreme Court vacancies in the next several years, the symposium essays that follow address the question of what judicial philosophy we should look for in selecting new members of the Supreme Court. The reader will find in these pages the best and most brilliant defenders and opponents of the originalist creed. We hope these essays will inform and shape the ongoing great debate over the merits of constitutional originalism.<sup>4</sup>

The remainder of this Introduction offers a critical guide to the ideas raised by originalism's seminal speeches as well as an opinionated review of the symposium essays that follow.

#### I. ATTORNEY GENERAL MEESE'S SPEECH TO THE ABA

The first theme of Attorney General Ed Meese's 1985 speech to the American Bar Association (ABA) was the primacy of the rule of law. Meese began by noting that Americans "pride ourselves on having produced the greatest political wonder of the world—a government of laws and not of men."<sup>5</sup> This emphasis on the rule of law is central to originalism. Originalists believe that the written Constitution is the fundamental law and that it binds everyone—even Supreme Court Justices. Those Justices

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4. The publication of these essays comes at a time when three brilliant originalist books have recently been published. THE HERITAGE GUIDE TO THE CONSTITUTION (Edwin Meese III et al. eds., 2005); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004). Strikingly, the Meese and Amar books both go through the Constitution clause by clause from the Preamble through the Twenty-Seventh Amendment. The Barnett book offers a general originalist theory of constitutional law, which is sound on constitutional theory and enumerated powers, but faulty as to the Fourteenth Amendment. This flurry of originalist writing shows the continuing hold that the originalism debate has on the public mind even after nearly a quarter century.

5. Meese, *supra* note 1, at 47.

who abandon the original meaning of the text of the Constitution invariably end up substituting their own political philosophies for those of the Framers. Americans have to decide whether they want a government of laws or one of judges. Is the constitutional text going to bind the Supreme Court, or will the Justices in essence write and rewrite the text? Attorney General Meese came down squarely in favor of the idea “that the Constitution is a limitation on judicial power as well as executive and legislative” powers.<sup>6</sup>

The argument for the rule of law is in part that the alternative is to give judges too much discretion, which would produce large swings in constitutional law that would be destabilizing and undemocratic. But there is much more to it than that. Those who convert the Constitution into a license for judges to make policy pervert a document that is supposed to *limit* the exercise of power into one that *sanctions* it. For this reason, Meese rightly said that “[a] constitution that is viewed as only what the judges say it is no longer is a constitution in the true sense.”<sup>7</sup>

This leads to a second theme of Meese’s ABA speech, which was that the whole idea of constitutionally limited government itself is at stake in the originalism debate. If the original meaning of the text of the Constitution does not bind the Supreme Court, why should it bind the President or the Chairman of the Joint Chiefs of Staff? Once we abandon originalism in the Supreme Court, why not abandon it everywhere else as well? Such a decision is perverse because, as Meese pointed out, judges and Supreme Court Justices were supposed to be the “bulwarks of a limited constitution”<sup>8</sup> and not a French Revolution-style Committee of Public Safety that would legislate on the most sensitive issues of morality and religion by five-to-four votes without the limitations imposed on the legislature of bicameralism and presentment.<sup>9</sup> Indeed, the only reason judges have power to hold laws unconstitutional is because the Constitution is a higher law that binds legislative and executive officials and trumps unconstitutional actions those officials might take.<sup>10</sup> But if the Constitu-

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6. *Id.* at 54.

7. *Id.* at 53.

8. *Id.* at 47.

9. See U.S. CONST. art. I, § 7.

10. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–80 (1803).

tion does not bind the Justices, why should it bind the President or Congress? Accordingly, abandoning originalism means abandoning the rationale that *Marbury v. Madison* uses to justify judicial review. Without originalism there can be no constitutionally limited government and no judicial review.

Moreover, if we abandon originalism in constitutional interpretation, then why not abandon it with respect to interpreting all other legal writings, including statutes, contracts, wills, deeds, and even old Supreme Court decisions? How many non-originalists would defend the idea that lower federal court judges are not bound by the original meaning of Justice Blackmun's opinion in *Roe v. Wade*,<sup>11</sup> but are free instead to give that opinion a moral reading in light of today's evolving standards of decency? Not many. Yet, if non-originalism is right when it comes to Supreme Court interpretation of the People's Constitution, then surely it is right when district judges are applying made-up Supreme Court case law. The correct answer on this, as on so many other questions, was long ago expressed by Justice Joseph Story when he said, "The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties."<sup>12</sup>

## II. JUSTICE BRENNAN'S 1985 SPEECH AT GEORGETOWN UNIVERSITY

The main theme of Justice William Brennan's speech in response to Attorney General Meese was what he called the "transformative purpose" of the constitutional text,<sup>13</sup> which he argued "embodies the aspiration to social justice, brotherhood, and human dignity that brought this country into being."<sup>14</sup> Justice Brennan argued that Meese's vision of reading the text in light of its original meaning was "little more than arrogance cloaked as humility,"<sup>15</sup> because it was arrogant at our vantage point to claim that we could discern how the Framers would

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11. 410 U.S. 113 (1973).

12. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 383 (1833).

13. Brennan, *supra* note 2, at 62.

14. *Id.* at 55.

15. *Id.* at 58.

apply the moral-philosophic natural law principles he thought they wrote into the Constitution to late twentieth-century problems. Justice Brennan added that

[w]e current Justices read the Constitution in the only way we can: as twentieth century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.<sup>16</sup>

To say that the genius of a constitution lies in the fluidity of its meaning is a little bit like saying that the genius of the brakes on your car is the way they can be used for acceleration. The whole point of having a constitution or a bill of rights in the first place is to memorialize and entrench certain fundamental rights so that they can prevail in moments of passion when a crazed mob might want to cast them aside. To praise the Constitution primarily for its ability to be adapted to current problems and needs is thus to overlook the very reasons why we entrenched principles in the Constitution in the first place. More fundamentally, there are four specific errors permeating Justice Brennan's reasoning that deserve elaboration.

The first error is that Justice Brennan totally cast aside the constitutional idea that it is feasible to have a system of intergenerational lawmaking, in which current generations agree to be bound by constitutional rules their great-grandfathers made so that they in turn can adopt new constitutional amendments that will bind their great-grandchildren. Justice Brennan denied that such intergenerational lawmaking was desirable, or indeed even feasible.<sup>17</sup> He believed the text of the Constitution was like the text of a poem, to which each generation of readers brings most of the meaning.<sup>18</sup> The fact of the matter is that there are many circumstances where it is essential that entrenched rules be in place in order for liberty to flourish. Who would go to the trouble of writing a controversial book if he could not

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16. *Id.* at 61.

17. *See id.* at 59–62.

18. *See id.* at 61. The "poem" analogy is the Author's, not Justice Brennan's.

know for sure that he would not be imprisoned for it in twenty years, in violation of the First Amendment? Who would work hard to start a business if he could not be certain that it would not be taken from him without just compensation, in violation of the Takings Clause?<sup>19</sup> Without the ability to entrench freedom of speech and of the press, or constitutional protections for private property rights, we would all have less freedom today. Each generation gives up something by agreeing to be bound by the rights its predecessors entrenched, yet gains something by being able to entrench new rights for its posterity. This system of intergenerational lawmaking would be completely undone if each generation read the Constitution like a poem to which it brought most of the meaning.

Justice Brennan's second error came with his dismissive talk about the undesirability of moderns being bound by "a world that is dead and gone."<sup>20</sup> Non-originalists frequently argue that none of us living today should be bound down by the "dead hand of the past,"<sup>21</sup> that is, by the Framers' Constitution. One might note, however, that there is a lot of law written by now-dead people on the books today by which even non-originalists assume we must be bound. No one argues that the Social Security laws or the Civil Rights Act of 1964 or the Sixteenth Amendment giving Congress the power to impose an income tax should be ignored because those laws were made by people who are now dead. For that matter, most non-originalists would be appalled by the suggestion that district judges should be free not to follow *Roe v. Wade* just because all nine Justices who participated in the decision of that case are now dead. Justice Brennan could not possibly have meant to dismiss all laws enacted by people who are now dead, because the result would be chaos. What he probably meant was that he and his fellow Justices ought to be able to pick and choose which laws written by dead people we are bound by and which ones we are not.

But this view would license the Supreme Court to conduct regular spring cleanings of the Constitution, throwing out some, but not most, of the laws made by the dead. Five out of nine Jus-

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19. U.S. CONST. amend. V.

20. Brennan, *supra* note 2, at 61.

21. See, e.g., Michael S. Moore, *A Natural Law Theory of Interpretation* 58 S. CAL. L. REV. 277, 357 (1985).

tices 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.<sup>22</sup> 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? Justice Brennan’s position here is simply not credible.

Third, Justice Brennan accused originalists of acting with “arrogance cloaked as humility,”<sup>23</sup> but, in fact, it was his position that was arrogant. Justice Brennan’s view was that the present generation is better than our benighted ancestors, exceeding them not only in technology but also in moral worth.<sup>24</sup> The American Constitution has survived for two centuries, is the oldest and first such document in existence, and has inspired countless spin-offs around the world. Is it not arrogant to dismiss the original meaning of that document lightly, as Justice Brennan did? We should not engage in ancestor worship, but the amended Constitution is nonetheless a good document that has carried Americans a long way and makes us still today the freest and most fortunate people in the world—the last best hope of man on Earth. It is not arrogant ancestor worship to respect such a text the way children respect their parents. It would, however, be arrogant to discard such a text and instead follow modern intellectual fads or one’s personal proclivities.

Justice Brennan’s final error was that he raised the level of generality of the Constitution in order to justify his desired left-wing outcomes. He described the Bill of Rights as protecting human dignity, for example, and then asked whether the death penalty is compatible with human dignity.<sup>25</sup> This is nothing more than the lawyerly sleight of hand used by Justice Douglas

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22. See U.S. CONST. art. I, § 7.

23. Brennan, *supra* note 2, at 58.

24. See *id.* at 63.

25. See *id.* at 63, 68.

in *Griswold v. Connecticut*.<sup>26</sup> The text of the Constitution does not speak vaguely of human dignity; it speaks specifically about freedom of speech and of the press,<sup>27</sup> about unreasonable searches and seizures,<sup>28</sup> and about property not being taken absent the payment of just compensation.<sup>29</sup> At the end of the day, Justice Brennan's primary concern was that the text of the Constitution be construed to produce what he deemed to be good consequences. Doing this makes "the rule of law and not of men" impossible, which leads to very bad long-term consequences. Playing games with the level of generality of the constitutional text to produce good consequences is as bad as saying that the nine Justices have commissions to legislate from the bench. Legislating from the bench turns out to be what Justice Brennan's speech was all about.

### III. ATTORNEY GENERAL MEESE'S 1985 SPEECH TO THE FEDERALIST SOCIETY

The first theme of Attorney General Meese's 1985 Federalist Society speech was the accessibility of the historical materials about the framing of the Constitution and its original meaning. Meese pointed out how incredibly young the United States is, how the Founding was not really that long ago, how the America of the 1780s was awash in pamphlets, newspapers, and books, how much writing was done by Federalists and Anti-Federalists during the ratification debates, and how detailed were the notes James Madison took of the deliberations at the Constitutional Convention.<sup>30</sup> As Meese noted, "the Constitution is not buried in the mists of time. We know a tremendous amount of the history of its genesis."<sup>31</sup> Additionally, the most authoritative sources of all for original-meaning textualists—dictionaries and grammar books from the 1780s—abound, and

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26. 381 U.S. 479, 484–85 (1965) (holding that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees" that "create zones of privacy" that a law against marital use of contraceptives unconstitutionally invades).

27. U.S. CONST. amend. I.

28. U.S. CONST. amend. IV.

29. U.S. CONST. amend. V.

30. Meese, *supra* note 3, at 72.

31. *Id.*

are easily consulted. We also have at our disposal legal textbooks used by the Framers, such as Blackstone's *Commentaries*, which shed light on the meaning of legal terms of art in the Constitution. And, for all the information available from the 1780s, even more information is available from the Civil War Era when the three critical Reconstruction amendments were adopted. In short, Justice Brennan was simply wrong to the extent that he portrayed the "period surrounding the creation of the Constitution [as] a dark and mythical realm."<sup>32</sup>

A second theme of Meese's Federalist Society speech was his close focus on the words of the constitutional text. Meese noted that the text is exactly specific in some places, such as where it requires that the President be at least thirty-five years old, is more general in other places, such as where it empowers Congress to regulate commerce and not merely trade and barter, and is still more general in other clauses, such as the Fourth Amendment's ban on unreasonable searches and seizures.<sup>33</sup> Meese was clear that it is the original meaning of the words, and not merely the intention of those who wrote them, that is the law:

Where the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the Framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.<sup>34</sup>

A third theme of Meese's Federalist Society speech was that the Constitution's "undergirding premise remains that democratic self-government is subject only to the limits of certain constitutional principles."<sup>35</sup> Part of what is at stake in the originalism debate is the power of cities, states, and Congress to exercise self-government. Representative democracy is one of the prime freedoms the Constitution protects, and a philosophy of constitutional interpretation that fails to protect democracy in its proper sphere is itself unconstitutional. The

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32. *Id.*

33. *Id.* at 73–74.

34. *Id.* at 76.

35. *Id.* at 75.

Constitution imposes very few limits on democratic government, and there are many foolish things that legislatures can do under our Constitution without violating that document at all. One of the chief flaws of Justice Brennan-style non-originalism is that it takes hotly contested issues like abortion out of the democratic process in the fifty states, where compromise is possible, and puts them under the power of the Supreme Court, which cannot produce compromise solutions. The constitutionalization and nationalization of the abortion dispute in *Roe v. Wade* has embittered the confirmation process for all federal judges and has roiled our politics for more than three decades. Whatever one's personal position on the abortion question, all Americans should be able to see that the Supreme Court's thirty-five-year effort to write a national abortion code has been a bitter and poisonous mistake.

A fourth and final theme of Meese's Federalist Society speech was that following Justice Brennan and construing the Constitution in light of evolving standards of human dignity can lead the Court badly astray.<sup>36</sup> We must never forget that *Dred Scott v. Sandford*,<sup>37</sup> *Lochner v. New York*,<sup>38</sup> and *Korematsu v. United States*<sup>39</sup> were all substantive due process decisions where the Court was guided by its own twisted ideas about what human dignity required. One could make a powerful case that the history of judicial review has been largely one of errors and tragedies. *Dred Scott* brought on the Civil War; the *Slaughter-House Cases*<sup>40</sup> and *Civil Rights Cases*<sup>41</sup> strangled the Fourteenth Amendment in its crib; *Plessy v. Ferguson*<sup>42</sup> sanctioned an era of state-sponsored segregation; *Lochner* delayed the implementation of progressive labor laws for decades; *Hammer v. Dagenhart*<sup>43</sup> delayed the implementation of laws against child labor for a generation; *Korematsu* sanctioned racially-discriminatory government concentration camps; and *Roe v. Wade*<sup>44</sup> led to the slaughter

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36. See *id.* at 77–79.

37. 60 U.S. 393 (1857).

38. 198 U.S. 45 (1905).

39. 323 U.S. 214 (1944).

40. 83 U.S. 36 (1872).

41. 109 U.S. 3 (1883).

42. 163 U.S. 537 (1896).

43. 247 U.S. 251 (1918).

44. 410 U.S. 113 (1973).

of millions of innocent human lives. In any rational cost-benefit analysis of the institution of judicial review over the last two hundred years, the tragedy side of the scales of justice is heavily weighed down. There is good reason, in short, to be very skeptical of Supreme Court Justices who promise to promote “human dignity.”

#### IV. PANEL ESSAYS ON ORIGINALISM AND PRAGMATISM

Pragmatic theories of constitutional interpretation have enjoyed renewed interest. Are they necessarily critiques of originalism, or can originalism be defended on pragmatic grounds? More generally, pragmatism asserts that the ultimate defense of constitutional law, like that of other human institutions, is the good it can do for people now. Can adherence to the original meaning of a two-hundred-year-old document still be defended as beneficial today? Essays from the first symposium panel address these questions and others.

Chief Judge Frank H. Easterbrook maintains that both pragmatism and originalism have roles in constitutional practice, albeit in distinct spheres.<sup>45</sup> Pragmatism is properly exercised by the political branches of government.<sup>46</sup> The Constitution is a short, old document, and cannot supply solutions for all problems.<sup>47</sup> Accordingly, it is up to Congress and the President—acting under the authority their election gives them—to provide pragmatic answers for modern difficulties.<sup>48</sup> Unelected judges, however, derive their power only from the Constitution itself. If they are to disapprove of a pragmatic choice by the elected branches, it must be because the higher law of the Constitution has denied them that choice.<sup>49</sup> Originalism, Judge Easterbrook contends, is the only interpretative approach that explains why judges have the final say under judicial review.<sup>50</sup>

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45. Frank H. Easterbrook, *Pragmatism's Role in Interpretation*, 31 HARV. J.L. & PUB. POL'Y 901 (2008).

46. *Id.* at 902–04.

47. *Id.* at 902.

48. *Id.* at 902–04.

49. *Id.* at 904–05.

50. *Id.*

Dean Larry Kramer argues that originalism is at odds with both history and pragmatism.<sup>51</sup> It is at odds with history because there was no original consensus as to the meaning of constitutional provisions, that is, no original “public meaning.”<sup>52</sup> Sharp disagreements arose, then as now, about the proper interpretation of various provisions and how to fill in the Constitution’s gaps and resolve its ambiguities.<sup>53</sup> A judge today professing to apply the original understanding of the Constitution is merely taking one side of a historical debate that the Framers themselves could not readily resolve.<sup>54</sup> Originalism is also at odds with pragmatism, Dean Kramer continues, because it ignores that whenever a constitutional provision is interpreted—by whatever method—it causes readjustments by other parts of government that change the constitutional structure in subtle (and unsubtle) ways.<sup>55</sup> Originalism asks judges to ignore such developments and look solely to the original constitutional “blueprint,” even if it no longer resembles its structure today.<sup>56</sup> Whatever this method’s virtues, Dean Kramer argues, it is surely *not* pragmatic.<sup>57</sup> The better method, he concludes, is to use the Constitution’s original understanding as a starting point, but also to recognize how subsequent generations have refashioned it to solve the problems of their day, before interpreting it to solve our own problems.<sup>58</sup>

Professors John O. McGinnis and Michael B. Rappaport argue that originalism and pragmatism are not incompatible because originalism *is* the most pragmatic method of constitutional interpretation, most likely to produce desirable results.<sup>59</sup> They emphasize the process for adopting constitutional provisions. Because ratifying the Constitution and its amendments requires supermajority votes, the norms they entrench enjoy

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51. Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL’Y 907 (2008).

52. *Id.* at 910–12.

53. *Id.* at 911.

54. *Id.* at 912–13.

55. *Id.* at 912–15.

56. *Id.* at 914–15.

57. *Id.*

58. *Id.* at 914–16.

59. John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL’Y 917 (2008).

broad, consensus support and tend to be desirable.<sup>60</sup> The only way to maintain these provisions' good consequences, however, is faithfully to adhere to their meaning as understood by the people who chose to entrench them in the Constitution.<sup>61</sup> Thus originalism allows judges to be pragmatic—that is, to achieve desirable consequences—without making policy case by case.<sup>62</sup>

Professor Jeffrey Rosen closes the first panel by arguing that neither originalism nor pragmatism is a meaningful restraint on judges in hard cases.<sup>63</sup> He notes that in cases involving difficult issues—affirmative action, federalism, and religion among them—discussion of history and original meaning is conspicuously absent or wanting, even from self-described originalists.<sup>64</sup> Pragmatism, too, is no certain restraint on judges: pragmatic jurists such as Justice O'Connor can be among the most activist.<sup>65</sup> The best way to promote democracy, Professor Rosen concludes, is judicial restraint expressed by a reluctance to strike down statutes enacted by the people's elected representatives.<sup>66</sup> In a word (or three), his preferred theory of interpretation is: "defer, defer, defer."<sup>67</sup>

Modern-day advocates of pragmatism as the correct theory of judicial decision-making think judges should give a lot of weight to the consequences their decisions produce.<sup>68</sup> There is an obvious problem with pragmatic, results-oriented judging, which is that it produces bad results by gutting the rule of law. *Robert's Rules of Order* informs us that "[w]here there is no law, but every man does what is right in his own eyes, there is the

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60. *Id.* at 919–24.

61. *Id.* at 924–27.

62. *Id.* at 931, 935.

63. Jeffrey Rosen, *Originalism and Pragmatism: False Friends*, 31 HARV. J.L. & PUB. POL'Y 937 (2008).

64. *Id.* at 939–42.

65. *Id.* at 942–44.

66. *Id.* at 944.

67. *Id.* at 938.

68. The leading advocates today of such a results-oriented jurisprudence are doubtless Justice Stephen Breyer and Judge Richard Posner. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); RICHARD A. POSNER, *OVERCOMING LAW* (1995).

least of real liberty.”<sup>69</sup> This statement is indisputably true. A Supreme Court whose Justices decide cases in a results-oriented way is nothing less than a nine-member French Revolution Committee of Public Safety. Why on Earth should the citizens of a democracy allow a committee of unelected lawyers to make binding rules on the most sensitive issues of morality and religion on a five-to-four vote based on their own personal moral and religious beliefs? Again, why especially should we allow this when laws implementing mundane matters like trucking deregulation must pass two Houses of Congress, overcome a filibuster in the Senate, and be either signed by the President or repassed by a two-thirds vote of both Houses?<sup>70</sup>

Telling judges to be policymakers is itself unpragmatic and will lead to bad results, not good ones. Judges are not good at making policy or judging consequences on a case-by-case basis. They have much less information at their disposal than do legislators because they cannot hold hearings, they cannot visit their home districts and talk to constituents, and they cannot engage in *ex parte* contact with experts. Because they are carefully insulated from popular sentiments,<sup>71</sup> judges have no incentive to find out and implement the will of the people.

What judges in theory might be good at is dispassionately interpreting legal texts and the deeply rooted traditions of the American people. They should stick to doing precisely that. Instead of worrying about the result in particular cases, judges should follow the rule of law in thousands of cases because doing so leads to better results than not doing so. The problem with Justice Breyer’s and Judge Posner’s consequentialism is that it produces bad consequences on a system-wide basis.

#### V. PANEL ESSAYS ON ORIGINALISM AND PRECEDENT

Some have argued that precedent is impossible to reconcile with originalism because only the original understanding of the text matters, not later judicial interpretations of the text. Article VI of the Constitution makes only the Constitution itself, not Su-

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69. HENRY M. ROBERT, ROBERT’S RULES OF ORDER NEWLY REVISED, at v (Sarah C. Robert et al. eds., Perseus Publ’g 10th ed. 2000).

70. See U.S. CONST. art. I, § 7.

71. See U.S. CONST. art. III, § 1 (tenure and salary protections for federal judges).

preme Court case law, “the supreme Law of the Land.”<sup>72</sup> On the other hand, jurisprudential giants as diverse as Alexander Hamilton, James Madison, and Chief Justice John Marshall all seemed to put stock in precedent.<sup>73</sup> This symposium panel considers the role precedent ought to play for originalists, and whether precedent poses a greater problem for originalism than it does for other theories of constitutional interpretation.<sup>74</sup>

Professor Akhil Reed Amar describes the rival camps in the originalism-versus-precedent debate as “unoriginal originalists” and “unprecedented precedentialists.”<sup>75</sup> Unoriginal originalists, he says, pay close attention to text, history, and structure, but lack a definite theory about what to do when they conflict with precedent—sometimes following precedent, sometimes not.<sup>76</sup> Rather than simply “muddling through,” they should develop an originalist theory of precedent from the Constitution’s text, history, and structure itself.<sup>77</sup> Precedentialists, on the other hand, are “unprecedented”: the Court’s pronouncements on when it follows precedent, and when it does not, are often at odds with its earlier precedents on precedent.<sup>78</sup> Professor Amar concludes with his own theory of precedent, suggesting that the Supreme Court should treat its precedents as presumptively correct, noting that acceptance by earlier Justices is evidence that a precedent *is* the correct interpretation.<sup>79</sup> Nonetheless, when that presumption is rebutted—when the Justices are convinced a precedent is wrong—the Court should candidly admit that it has made a mistake.<sup>80</sup>

72. U.S. CONST. art. VI, § 1, cl. 2.

73. See R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, but the Enlightenment Tradition Represented by Locke, Madison, and Marshall*, 26 ST. MARY’S L.J. 1051, 1069 n.57 (1995).

74. The Author of this Introduction participated in this panel as both moderator and panelist. Accordingly, his views are stated in an essay appearing later in this Issue and will not be restated here. See Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POL’Y 947 (2008).

75. Akhil Reed Amar, *On Text and Precedent*, 31 HARV. J.L. & PUB. POL’Y 961, 961–62 (2008).

76. *Id.*

77. *Id.* at 961.

78. *Id.* at 961–62.

79. *Id.* at 965–66.

80. *Id.* at 965–67.

Professor David A. Strauss argues that conservatives actually should prefer following precedent to originalism.<sup>81</sup> The difficulties in ascertaining original understanding and applying it to modern problems leave questions too wide open, allowing judges to read their own views into the law while purporting to speak for the Framers.<sup>82</sup> If one is concerned about restraining judicial discretion, then one should emphasize adherence to precedent.<sup>83</sup> This requires judges to be candid when they overrule or extend precedent, forcing them to defend their reasons openly.<sup>84</sup> Originalism, on the other hand, tempts judges to decide cases according to their own views while using the “Framers’ understanding” as a shield against having to justify their decisions.<sup>85</sup> Only when judges must defend sweeping use of their powers will they be reluctant to exercise them.<sup>86</sup>

Professor Thomas W. Merrill gives more reasons why conservatives ought to support precedent over originalism.<sup>87</sup> Precedent provides thicker legal norms than originalism. It provides concrete answers to modern questions that original materials do not address, thus fostering greater consensus in deciding cases.<sup>88</sup> Precedential materials are also more accessible than materials from the Founding, facilitating efficient decision of cases.<sup>89</sup> In the same vein, reasoning from legal precedent is more in tune with the skill set of judges than reasoning from historical materials.<sup>90</sup> Finally, accepting precedents as final will change the tenor of judicial nominations. Although this would “lock in” precedents that conservatives oppose, such as the abortion cases, it would also lock in “good” precedents and make the courts less attractive generally for waging cultural and social

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81. David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969 (2008).

82. *Id.* at 970–71.

83. *Id.* at 973.

84. *Id.* at 974.

85. *Id.*

86. *Id.* at 974–76.

87. Thomas W. Merrill, *The Conservative Case for Precedent*, 31 HARV. J.L. & PUB. POL'Y 977 (2008).

88. *Id.* at 980.

89. *Id.*

90. *Id.* at 980–81.

battles.<sup>91</sup> The result, Professor Merrill concludes, would be less rancor and less ideological focus in judicial confirmations, allowing nominees' legal skills and temperament to take their proper place as the key criteria for selecting judges.<sup>92</sup>

The symposium panel on precedent concludes with an essay by Michigan Supreme Court Justice Stephen J. Markman, wherein he explains how his court's approach to precedent has reshaped Michigan law.<sup>93</sup> Although respectful of past decisions, the Michigan Supreme Court has resisted ratifying existing precedents when it has the opportunity to get the law right.<sup>94</sup> Its adherence to the plain, original meaning of constitutions and statutes has forced litigators to make textual arguments. It has also encouraged the state legislature to be more careful drafting legislation, because they know that the supreme court will hold them responsible for their work product and refuse to bail them out from poor decisions.<sup>95</sup> At the same time, it allows citizens to determine a law's meaning simply by reading it, instead of needing an attorney to discover the many unwritten exceptions judges have added to it.<sup>96</sup> This, Justice Markman says, "give[s] the people at least a fighting chance to comprehend the public rules by which they are governed."<sup>97</sup>

#### VI. THE ORIGINAL MEANING OF THE COMMERCE, SPENDING, AND NECESSARY AND PROPER CLAUSES

Essays from the final symposium panel apply originalism to the central legal questions of federalism. What commentators have labeled "the modern federalism revolution"<sup>98</sup> began with the Court's construction of the Commerce Clause<sup>99</sup> in *United*

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91. *Id.*

92. *Id.*

93. Stephen J. Markman, *Resisting the Ratchet*, 31 HARV. J.L. & PUB. POL'Y 983 (2008).

94. *Id.* at 984.

95. *Id.* at 985.

96. *Id.*

97. *Id.*

98. Michael C. Blumm & George Kimbrell, *Flies, Spiders, Toads, Wolves, and the Constitutionality of the Endangered Species Act's Take Provision*, 34 ENVTL. L. 309, 314 (2004).

99. U.S. CONST. art. I, § 8, cl. 3.

*States v. Lopez*.<sup>100</sup> But recently the Court has upheld federal statutes on the basis of the Spending Clause<sup>101</sup> and the Necessary and Proper Clause.<sup>102</sup> Although Justice Thomas has written extensively about the original understanding of the Commerce Clause,<sup>103</sup> the Justices in general have spent little time exploring the original meaning of those clauses. Essayists from this panel consider the proper original understanding of all three clauses and whether that understanding can or should be revised to prevent Congress from exercising plenary authority.

Professor Michael Stokes Paulsen contends that the federal government's powers under the Constitution, while enumerated, are nonetheless broad enough to be effectively plenary.<sup>104</sup> This is because the Necessary and Proper Clause grants Congress sweeping power to enact laws it reasonably believes necessary to carry out the national government's other powers; as long as Congress's action falls within the fair range of the Constitution's text, judges are not empowered to strike it down.<sup>105</sup> This broad power acts on top of other already-broad powers, such as the commerce power, making congressional power virtually unlimited.<sup>106</sup> Similarly, Congress possesses plenary power to spend money under the Property Clause,<sup>107</sup> without tying its expenditures even to the nominally-limited enumerated powers in Article I, Section 8.<sup>108</sup>

Professor Randy Barnett disagrees with Professor Paulsen regarding the proper scope of the Necessary and Proper Clause.<sup>109</sup> The Court never actually expanded the meaning of "commerce" under the Commerce Clause; rather, it was the New Deal Court's willingness to expand the meaning of the Neces-

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100. 514 U.S. 549 (1995).

101. U.S. CONST. art. I, § 8, cl. 1.

102. U.S. CONST. art. I, § 8, cl. 18.

103. *See, e.g.,* *Gonzales v. Raich*, 545 U.S. 1, 58–59 (2005) (Thomas, J., dissenting); *Lopez*, 514 U.S. at 584–93 (Thomas, J., concurring).

104. Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL'Y 991 (2008).

105. *Id.* at 992–94.

106. *Id.* at 992–93.

107. U.S. CONST. art. IV, § 3, cl. 2.

108. Paulsen, *supra* note 104, at 998–99.

109. Randy Barnett, *The Choice Between Madison and FDR*, 31 HARV. J.L. & PUB. POL'Y 1005 (2008).

sary and Proper Clause that made federal power so comprehensive.<sup>110</sup> Professor Barnett criticizes this “Rooseveltian” view of the Necessary and Proper Clause, which defers almost entirely to congressional determinations of necessity.<sup>111</sup> Instead, he supports the “Madisonian” view, in which the courts are empowered to enforce textual limits on federal power and must not permit Congress to augment its own powers.<sup>112</sup>

The debate between Professors Paulsen and Barnett on this panel is one of the finest debates the Federalist Society has ever sponsored. I do not, however, find myself in complete agreement with either of them. I will focus, as they do, on the Necessary and Proper Clause, and the Property Clause that Paulsen argues confers the spending power, because I agree with them that all the famous New Deal-era Supreme Court cases that are thought to be broad readings of the Commerce Clause in fact rest on the Necessary and Proper Clause.<sup>113</sup>

I agree with Professor Paulsen that the Necessary and Proper Clause does give Congress the implied power to regulate wholly intrastate activities that substantially affect interstate commerce. I think the New Deal decisions in *United States v. Darby*<sup>114</sup> and in *NLRB v. Jones & Laughlin Steel Corp.*<sup>115</sup> are rightly decided. I disagree with Professor Paulsen, however, to the extent that he implies that *Wickard v. Filburn*<sup>116</sup> and *Raich v. Gonzales*<sup>117</sup> are correct.<sup>118</sup> Like Chief Justice Rehnquist and Justices O’Connor and Thomas, I do not think that regulating the growth of small home-grown amounts of wheat or marijuana for personal consumption is a “necessary and proper” means to achieve the end of regulating interstate commerce.<sup>119</sup> Congress could wholly forbid the intrastate sale of wheat or marijuana (a commercial

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110. *Id.* at 1006–07.

111. *Id.* at 1013–15.

112. *Id.* at 1012–15.

113. My understanding of the Necessary and Proper Clause here is shaped by the scholarship of Professor Gary Lawson and Patricia Granger. See, e.g., Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

114. 312 U.S. 100 (1941).

115. 331 U.S. 416 (1947).

116. 317 U.S. 111 (1942).

117. 545 U.S. 1 (2005).

118. See Paulsen, *supra* note 104, at 997.

119. See *Raich*, 545 U.S. at 42–43 (O’Connor, J., dissenting).

activity) or ban its shipment across state lines (pure interstate commerce). But growing crops at home for one's own consumption is an activity that so thoroughly lacks a nexus to interstate commerce that I do not think Congress has the power to regulate it. This is not to say that Congress cannot, under the Necessary and Proper Clause, regulate the possession of some items. Doubtless Congress could outlaw private possession of a homemade nuclear bomb or some lethal virus on the ground that doing so was "necessary and proper" to carrying out the other enumerated powers.

It might seem that I favor judicial activism because I would let Supreme Court Justices substitute their own notions of what laws are "necessary and proper" for those of Congress. The correct approach, however, is to recognize that the Constitution does not leave the meaning of the words "necessary and proper" either to Congress alone or to a five-Justice majority of the Supreme Court applying the Justices' personal, idiosyncratic ideas of what is "necessary and proper." The meaning of these words and their application to present-day problems depends, in the end, on what the American people think they mean acting over a long period of time through our three-branch process of constitutional interpretation. A federal law barring guns in schools, in a world where more than forty states already bar them,<sup>120</sup> hardly seems to be "necessary," much less "proper." The same point might be made more generally to attack the federalization of the criminal law. Why would it be "necessary" and "proper" for Congress to outlaw a lot of things that are already outlawed by almost all of the states? It might be "necessary and proper" to have a federal ban on possession of a nuclear weapon or on criminal civil rights violations, but a federal ban on bringing a gun into a school zone when virtually every state already outlaws it? That is quite a stretch.

A federal law barring the growth for personal consumption of a standard and safe farm commodity like wheat<sup>121</sup> veers so far in the direction of recognizing a new unenumerated power to regulate agriculture that it is unlikely most of the American people would have thought such a law to be "necessary and

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120. See *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

121. See *Wickard*, 317 U.S. 111.

proper.” The same is true of a law forbidding possession of home-grown marijuana for medical purposes.<sup>122</sup> The large number of states and huge majorities of people in national public opinion polls who think that the medicinal use of marijuana is unthreatening prove this fact.<sup>123</sup> The three dissenting Justices in the *Raich* case thus were not simply substituting their own personal and idiosyncratic views of what was “necessary and proper” for Congress’s views. They were applying instead the widely-held social understanding of the American people.

To borrow a rule from Article V’s amendment procedure, the understanding of the American people of what is “necessary and proper” should be determined by the consensus of three-fourths of the states. In the 1790s, laws like those the Court upheld in *Darby* or *Jones & Laughlin Steel* would not have been deemed to be “necessary and proper,” but no one doubts that three-fourths of the states would deem such laws permissible today. It is far less clear that three-fourths of the states believe it is “necessary and proper” to have federal laws against guns in schools.

As Professor Paulsen argues,<sup>124</sup> the Court ought to show a lot of deference to Congress before it strikes down a law on the ground that it exceeds the scope of the power granted by the Necessary and Proper Clause. It may even be that the Court should strike down only one egregious such law every ten or twenty years, doing just enough to prompt Congress to do a better job of policing itself. But when Congress uses the Necessary and Proper Clause to federalize criminal law or to regulate what one grows on one’s own land when numerous states would allow cultivation of that commodity, Congress has gone too far. At that point, it is appropriate for the Supreme Court to intervene so that Congress does not become the sole judge of the scope of its own powers.<sup>125</sup>

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122. See *Raich*, 545 U.S. 1.

123. See MARK EDDY, CONG. RESEARCH SERV., MEDICAL MARIJUANA: REVIEW AND ANALYSIS OF FEDERAL AND STATE POLICIES 16 (2005), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-8244:1>.

124. Paulsen, *supra* note 104, at 995–97.

125. See Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752 (1995) (further detailing the Author’s views on federalism).

The other congressional power addressed by this panel is the spending power. Here I must disagree with Professor Paulsen that the spending power flows out of the Property Clause in Article IV, which gives Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>126</sup> Professor Paulsen argues this is a plenary grant of power,<sup>127</sup> but to read it as the source of the spending power seems a stretch. The more plausible source of the spending power is the Necessary and Proper Clause. Structurally, one would expect to find the spending power in Article I, Section 8 along with the taxing power. The spending power is one of the major powers of Congress, so it would be odd for the Framers to describe it not in Article I, which is about Congress, but in Article IV, which is largely about the federal government and the states.

Confirmation of this construction comes from the Clause in Article I, Section 9 that provides that: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>128</sup> In general, Article I, Section 9 limits powers granted to Congress by Article I, Section 8. The Appropriations Clause's appearance in Article I, Section 9 thus strongly suggests that the Spending Power already has been conferred by Article I, Section 8, rather than anticipating the Property Clause of Article IV.

The Property Clause theoretically could be read as the source of the Spending Power as Professor Paulsen argues, but this view is a stretch. It is far more likely that the property of which the Property Clause gives Congress plenary power to dispose is either real property or the equivalent of tangible personal property, not all taxpayer money. This suggests that the test for whether spending is permissible under the Constitution is one that calls for determining whether the spending in question is "necessary and proper" for executing any or all of the enumerated powers of the federal government. This may well lead to a doctrinal test very much like the one the Court adopted in *South Dakota v. Dole*.<sup>129</sup>

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126. U.S. CONST. art. IV, § 3, cl. 2.

127. Paulsen, *supra* note 104, at 999–1000.

128. U.S. CONST. art. I, § 9, cl. 7.

129. 483 U.S. 203 (1987).

In short, Ronald Reagan was right when he urged us all to “[h]old on to” the amended Constitution of 1787 because it is a miracle the likes of which has not been seen in 6,000 years of world history.<sup>130</sup> The United States is the freest nation on Earth and the arsenal of democracy because we have a better Constitution than does Britain, or France, or Germany, or Canada. Restoring the force of the original Constitution will lead to good consequences, not bad ones.

The symposium essays that follow represent the best of the current debate on how, and whether, to achieve that goal.

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130. President Ronald Reagan, Remarks at the Investiture of Chief Justice William H. Rehnquist and Associate Justice Antonin Scalia at the White House (Sept. 26, 1986), in ORIGINALISM, *supra* note 1 at 95, 97.