

A PRAGMATIC DEFENSE OF ORIGINALISM

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Originalism and pragmatism are uneasy companions. This Essay will attempt to make them friends. The usual view is that pragmatic interpretation has the essential virtue of ensuring that the consequences of legal decisions will be good.¹ Originalism, in contrast, is thought to focus on fidelity to the past and therefore to permit the Court to reach undesirable, outdated results.² This Essay argues that originalism, although it does require judges to focus on the past, actually produces desirable rules today and, further, that originalism is the genuinely pragmatic way to interpret the Constitution.

Originalists largely have failed to meet pragmatic objections. The argument that judges should be originalists simply because that is what the Framers intended is not only circular, but fails to offer any assurance that good consequences attend originalism. The argument that originalism advances democracy seems weak and undeveloped, because originalism sometimes requires judges to strike down a result of the democratic process when statutes or executive actions conflict with the original meaning of the Constitution.³ Finally, although the ar-

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1. See, e.g., Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 90 (2005) (stating that pragmatism “asks judges to focus on the practical consequences of their decisions”).

2. See, e.g., Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 26 (arguing that originalism seems to be characterized by its “inattention” to “future consequences”).

3. For an argument asserting that originalism advances democracy, see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143–53 (1990) (“In truth, only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy.”).

gument that originalism offers clearer rules to constrain judges than other interpretive approaches contains some truth, that alone is not enough to sustain the case for originalism.⁴ The benefits of judicial constraint are limited if judicial decisions, despite their non-discretionary nature, still impose substantial harms. Conversely, if constraint is the overriding objective, non-originalist doctrine may sometimes provide more constrained rules than the original meaning.⁵

Pragmatic interpretation—which is usually thought to involve judges deciding particular cases based on their policy consequences—faces severe problems as an approach to resolving cases. People disagree about whether the consequences of particular decisions are good or bad. If the Constitution is to provide a framework for governance, it cannot simply replicate these disagreements.⁶ Or, to put the objection to pragmatic constitutionalism in pragmatic terms, if a constitution is to have an independent settlement function in our polity—one that promotes the important ends of political stability, liberty, and prosperity—it cannot depend on judges deciding the same issues that are endlessly politically disputed. Moreover, judges seem a curious group to interpret the Constitution if consequences are key. As well-respected as its members may be, the Supreme Court is still a small and insulated group of legal ex-

4. See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856, 863–64 (1989).

5. See Eduardo M. Peñalver, *Restoring the Right Constitution?*, 116 YALE L.J. 732, 758 (2007) (stating that an “overriding desire to honor the Constitution’s writtenness, understood as a constraint on interpretation, does not by itself necessitate an exclusive commitment to original-meaning textualism” because “[b]etween original-meaning textualism and utter disregard of a written text, there are a number of intermediate positions that . . . still take seriously the Constitution’s writtenness.”). For an example of the constraint rationale of originalism animating judicial decisions, see *Employment Division v. Smith*, 494 U.S. 872, 872–90 (1990), in which Justice Antonin Scalia, a notable originalist, spends little time investigating the original meaning of the Free Exercise Clause, but emphasizes that the Court’s result will provide a clearer rule than other constructions.

6. See Larry Alexander, “*With Me, It’s All er Nuthin’*”: *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 534 (1999) (describing the framework for governance as requiring the elimination of “coordination problem[s]” and regarding the propriety of decisions and other “attempts by agents to undertake mutually incompatible actions”).

perts who lack the institutional capacity or electoral accountability for evaluating policy consequences.⁷

Originalism can be given a strong pragmatic justification by focusing on the process by which constitutional provisions are created. Provisions created through the strict procedures of constitutional lawmaking are likely to have good consequences. Sustaining these good consequences, however, depends on adhering to the Constitution's meaning when it was ratified. Justified in this manner, originalism allows judges to achieve good consequences through formal legal interpretation without making policy case by case. In a paper of this brevity, we cannot provide exhaustive support for this position, but this Essay will sketch the main elements of a pragmatic defense of originalism. Because such defenses of originalism have been neglected, this Essay strives to encourage a broader debate about the consequences of originalism and other interpretative methodologies.

I. SUPERMAJORITY RULES AND DESIRABLE CONSTITUTIONAL PROVISIONS

This Essay's pragmatic argument for originalism can be briefly summarized. First, desirable, entrenched laws should take priority over ordinary legislation because such entrenchments operate to establish a structure of government that preserves democratic decision-making, individual rights, and other beneficial goals. Second, appropriate supermajority rules tend to produce desirable entrenchments. Third, the Constitution and its amendments have been passed primarily under appropriate supermajority rules; therefore, the norms entrenched in the Constitution tend to be desirable. Although there is one significant way in which those supermajority rules were not appropriate—the exclusion of African Americans and women from participating in the selection of constitutional drafters and ratifiers—this defect, addressed below, has rightly been removed.⁸

7. Scalia, *supra* note 4, at 863 (stating, in reference to the weaknesses of a system of judicial review, that “[i]t is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are ‘fundamental to our society’”).

8. See *infra* notes 54–63 and accompanying text discussing the exclusion of African Americans and women from a role in selecting drafters and ratifiers of the Constitution.

Finally, this argument for the desirability of the Constitution requires that judges interpret the document based only on its original meaning because the drafters and ratifiers used only that meaning in deciding to adopt constitutional provisions. In short, it is the supermajoritarian genesis of the Constitution that explains both why the Constitution is desirable and why that desirability depends on its original meaning.

The structure of this defense of originalism merits description. It defends the quality of constitutional provisions by reference to the likely consequences flowing from the process that created them. It avoids the Scylla of completely formal defenses of originalism and the Charybdis of completely contestable assertions of what constitutes goodness. The structure is also consistent with perhaps the most common defense of originalism: that it generally ties judges to rules.⁹ These rules consist of the interpretative rule of originalism itself as well as the substantive rules in the Constitution.¹⁰ But to the virtue of rule-following, it adds the even more important virtue of following beneficial rules.

The essence of our argument is that the strict supermajoritarian rules that governed the Constitution's enactment make it socially desirable. If the Constitution were simply enacted by majority rule, like statutes, there would be no strong reason to privilege provisions that happen to be in a document called "the Constitution."¹¹ The supermajority rules of the Constitution's enactment, however, make them good enough to enforce when they conflict with mere majoritarian enactments.¹²

9. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 856 (1995) (arguing that originalism is animated by the belief that "the rule of law requires judges to follow externally imposed rules").

10. To be more exact, statutes are passed not under simple majority rule but under a tricameral process that creates the equivalent of a mild supermajority rule. See John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 769-74 (2002). But this process is not nearly as stringent as the supermajoritarian process for enacting and amending the Constitution, and is not stringent enough to correct for the serious defects in majoritarian entrenchment.

11. The Constitution does consist mainly, albeit not entirely, of rules rather than standards.

12. See Brent Wible, *Filibuster vs. Supermajority Rule: From Polarization to a Consensus- and Moderation-Forcing Mechanism for Judicial Confirmations*, 13 WM. & MARY BILL RTS. J. 923, 958 (2005) ("Although historical evidence presents no express rationale for the supermajority provisions included in the Constitution, a more apt, albeit general, characterization is that they were intended to promote

Entrenchment of norms offers significant potential benefits.¹³ It establishes a framework for government and sets out ground rules that protect against predictable dangers of ordinary democratic governance. Entrenchments, however, last long into the future, and bad entrenchments are at least as harmful as good entrenchments are beneficial. Although majority rule generally is thought to produce desirable, ordinary legislation, permitting a majority to entrench norms would be problematic because majorities have a tendency to pass undesirable entrenchments for a variety of reasons.¹⁴ By contrast, the passage of entrenchments under supermajority rules compensates for these tendencies and produces, on average, good entrenchments. This Essay briefly explains a few of the reasons for the superiority and the desirability of supermajoritarian entrenchment.

First, because entrenched norms cannot easily be eliminated, controversial entrenchments can be extremely divisive. Majorities, even narrow ones, tend to pass such entrenchments if they believe that these norms will make for good entrenchments. Moreover, even if a majority recognizes that entrenchments should have consensus support, it might still be reluctant to refrain from entrenching controversial norms for fear that a future majority will entrench its preferred norms despite the lack of a consensus.¹⁵ If a majority enacts controversial entrenchments, minorities may strongly oppose them and may be furious that bad norms, which cannot be repealed by the ordinary democ-

good decision making in instances where majority rule would have proved problematic in some respect.”).

13. A good summary of the benefits can be found in Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1670–73 (2002). See also John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 419–22 (2003).

14. The reasons for the view that majority rule is beneficial are complex, but include both preference and epistemic arguments. See Frank I. Michelman, *Why Voting?*, 34 LOY. L.A. L. REV. 985, 995–96 (2001). One important exception to the presumed beneficence of majority rule occurs if citizens have preferences of different intensity about an issue. In that case, a majority that enjoys modest benefits can get a law enacted, even if the minority suffers much greater costs. Entrenchment actually tempers this problem as well. See John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rule: Three Views of the Capitol*, 85 TEX. L. REV. 1115, 1174 (2006).

15. McGinnis & Rappaport, *supra* note 14, at 1180 (“If the current majority refrains from entrenching a norm that has majoritarian but not consensus support, it cannot be confident that a different majority in the future would be similarly restrained.”).

matic process, will govern the nation. The minorities' alienation will lessen their allegiance to the Constitution and the regime.

Supermajority rules, however, address this problem by permitting only the entrenchment of norms with substantial consensus.¹⁶ A broad consensus for the Constitution creates legitimacy, allegiance, and even affection as citizens come to regard the entrenched norms as part of their common bond.¹⁷ Such a Constitution helps individuals transcend their differences, such as ethnicity or geography, and makes them citizens of a single nation.

Second, majorities in a party system tend to be partisan. Because of partisanship, majorities will tend to abuse their power for at least two reasons. First, partisanship may lead majorities to adopt a non-rational "us versus them" attitude that will focus their attention away from the merits of legislation. More rationally, majorities may decide to entrench legislation that they do not really believe should be entrenched, if only to foreclose legislation that they fear the opposing party will entrench when it comes to power.¹⁸ For instance, legislators from one party might decide to entrench low taxes and low debt to prevent the other party from entrenching entitlements, even if both parties believe the nation would be better off without entrenching either program. Supermajority rules can also decrease the ill effects of partisanship by making it less likely that entrenchments can be passed with the support of only one party. If the two parties must cooperate to pass legislation, they

16. See Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 937-39 (2003) (arguing that consensus is key to democratic legitimacy).

17. Cf. Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 394 (1998) (stating that state constitutionalism helps transcend communal identities).

18. It might be argued that parties could avoid the prisoner's dilemma created by majoritarian entrenchment simply by entrenching a prohibition on matters that the other party would entrench when it came to power. One difficulty with this strategy is that a party cannot necessarily predict the full range of measures the other party will want to entrench and thus faces far more uncertainty in determining what entrenchments to prohibit than in determining what entrenchments to make. For instance, one party may seem to be interested in entrenching health care entitlements. Although that entrenchment could be prohibited, when that party comes to power, it might desire to make a different entrenchment. Given the difficulty in blocking the other party's desired entrenchments, the majority party may decide it is more attractive to entrench an item central its own party's ideology.

are less likely to indulge in “us versus them” attitudes.¹⁹ Moreover, supermajority rules will prevent the destructive competition by which one party races to entrench its political program before the other party entrenches its own program.

Third, the long-term nature of entrenchments makes it less likely that legislative majorities will enact desirable entrenchments. Individuals have a heuristic problem in thinking about the future: they are too disposed to believe that current trends will continue.²⁰ Similarly, majorities may be prone to support constitutional provisions out of the mistaken belief that present circumstances will continue in the future. In addition, citizens cannot easily hold legislators accountable for their entrenchment votes because most legislators will leave office years before the long-term effects of the entrenchments appear.

Although supermajority rules would not address these problems directly, they would improve legislative entrenchment decisions in other ways that would compensate for these deficiencies. For example, supermajority rules restrict the agenda of proposals because fewer proposals have a realistic chance of passing. A restricted agenda encourages a richer stream of information about the proposals, which improves legislative determinations. More significantly, a strict supermajority rule—coupled with the requirement that the constitutional entrenchment can be repealed only by a similarly strict supermajority—also improves the quality of entrenchments by creating a limited veil of ignorance.²¹ Because proposals deeply entrenched under

19. For support for the assertion that supermajoritarianism diminishes partisanship, see Michael J. Gerhardt, *The Special Constitutional Structure of the Federal Impeachment Process*, 63 *LAW & CONTEMP. PROBS.* 245, 250 (2000).

20. The roots of this tendency lie in the “representativeness” heuristic. That heuristic tends to make people extrapolate overconfidently about predicted characteristics of a class based upon a small sample size of which they happen to be aware. Amos Tversky & Daniel Kahneman, *Belief in the law of small numbers*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 23, 24–25 (Daniel Kahneman et al. eds., 1982). If the sample consists of events rather than objects, the heuristic should tend to make people extrapolate in a similarly irrational manner from events of which they are aware to uncertain future events. For an important present-day application, see ROBERT J. SCHILLER, *IRRATIONAL EXUBERANCE* 143–44 (2000) (using work on the representativeness heuristic to suggest that people will think stock market patterns of today will be like those of tomorrow).

21. On the veil of ignorance, see Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 *MICH. L. REV.* 917, 922–23 (1990).

supermajority rules cannot be repealed easily in the future, citizens and legislators cannot be certain how the provisions will affect them personally. If they are unable to cater to their own, unknown interests, then they are more likely to consult the interests of all future citizens to determine whether they will support a provision. For these reasons, strong supermajority rules are likely to overcome the problems that afflict majoritarian entrenchment and to produce beneficial entrenchments.

II. THE BENEFITS OF SUPERMAJORITARIAN ENACTMENT OF THE ORIGINAL CONSTITUTION

It is clear that the Constitution and its amendments were mainly a product of the kind of stringent supermajority rules that generate beneficial entrenchments.²² Constitutional amendments must be approved by two-thirds of each house of Congress and ratified by three-quarters of state legislatures.²³ The original Constitution was also a product of a double supermajoritarian process. Article VII expressly required nine of the thirteen states to ratify the Constitution before it took effect.²⁴ In addition, a supermajority of states originally had to support the Constitutional Convention.²⁵

This kind of consensus-forcing process creates very substantial real world benefits, not only abstract goods. This is particularly true when one considers the effect that the veil of ignorance had in the construction of the Constitution. For example, when considering the extent of the President's power, the Framers had to recognize that sometimes they would support the President's policies and sometimes they would not.

22. Again, the one glaring defect in those supermajority rules was their exclusion of African Americans and women from the franchise, discussed below. See *infra* notes 54–62 and accompanying text.

23. U.S. CONST. art. V.

24. U.S. CONST. art. VII; see also CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787*, at 225–28 (3d ed. 1986) (discussing the Constitutional Convention and the events that precipitated the decision to require the approval of nine states to ratify the Constitution).

25. See BOWEN, *supra* note 24, at 11–13.

Accordingly, they parceled out his authority based on public interest, rather than partisan considerations.²⁶

The supermajoritarian constitution-making process helps to account for the beneficence of the Constitution. Although most Americans believe that the amended Constitution is an exemplary document, most do not seek a reason for believing in its excellence. Rather than view the document as the product of a few great men, this Essay's argument considers it largely the result of the supermajoritarian process that enacted it. That process generated some of the most distinctive and praised features of the Constitution. Because of the need to compromise to obtain consensus at the Convention, the nationalist forces conceded an indestructible role for the states, which led to constitutional federalism.²⁷ To obtain ratification in the necessary nine states, the nationalists had to promise the enactment of a bill of rights once the new government was established.²⁸ Thus, the supermajoritarian ratification process was the big bang of our constitutional universe and brought into effect the key elements of a document admired throughout the world.

III. ORIGINALISM AS THE NECESSARY MEANS FOR PRESERVING THE SUPERMAJORITARIAN BASIS OF THE CONSTITUTION

Finally, beneficial judicial review requires originalism because the original meaning of the Constitution was the crucial factor in obtaining the consensus that makes constitutional provisions desirable. The ratifiers in the supermajority of states approved the provisions based on commonly accepted meanings and the interpretive rules of the time.²⁹ Some of the provi-

26. See, e.g., THE FEDERALIST NO. 69 (Alexander Hamilton) (discussing the four-year presidential term and impeachment as checks on the authority of the executive).

27. See Martin Diamond, *What the Framers Meant by Federalism*, in AMERICAN INTERGOVERNMENTAL RELATIONS: FOUNDATIONS, PERSPECTIVES, AND ISSUES 39, 43–44 (Laurence J. O'Toole, Jr., ed., 2d ed. 1993) (seeing American federalism as a compromise between nationalists and true federalists).

28. See LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 234–35 (1985) (describing the Bill of Rights as a tactical compromise between Federalists and Anti-Federalists).

29. See BORK, *supra* note 3, at 144 (stating that “what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean”).

sions approved had clear meanings. Others may have seemed ambiguous, but the ratifiers believed their future application would be based on familiar interpretative rules. Following the original meaning of their provisions as construed through the Framers' own interpretative rules remains faithful to their expectations of the likely effects of the provisions.³⁰ In contrast, following a meaning whose substance or derivation was not endorsed at the Framing severs the Constitution's connection with the process responsible for its beneficence.

Additionally, if interpretative rules at the time of the Framing are important, this suggests a need to reorient originalist constitutional scholarship. The first model of originalism focused on original intent.³¹ When originalists recognized that focusing on original intent wrongly emphasized the subjective purposes of the Framers, most originalists embraced the original meaning of the text as a better, second model of originalist interpretation.³² A debate then arose over how to define the original meaning and the best means of ascertaining it.³³ Although some originalists avoid using interpretative rules from the Framers' time, this Essay suggests that these rules are necessary both for the definition of originalism and for originalism to have beneficial consequences.³⁴ Thus, the third model for originalism will help resolve ambiguities in meaning by deploying the Framers' interpretative rules.³⁵

30. See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1494 n.21 (2005).

31. See BORK, *supra* note 3, at 143 (arguing that "the dominant view of constitutional law" used to be that judges ought "to apply the Constitution according to the principles intended by those who ratified the document").

32. For an explanation of the distinction between original intent and original meaning, see ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38–41 (Amy Gutmann ed., 1997); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105–08 (2001).

33. See, e.g., DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 91 (2005) (describing the debate in terms of "hard" and "soft" originalism).

34. For an example of an originalist who does not believe in following the interpretive conventions of the Framers, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525 n.23 (2003) (citing GREGORY BASSHAM, *ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY* 70 (1992)).

35. For a discussion of the enterprise of using interpretive rules to fix meaning, see *id.* at 525–29.

A comparison of constitutional lawmaking through case-by-case Supreme Court norm creation reveals the problems with the theories that usually support pragmatism. First, constitutional lawmaking through judicial review gives a very small number of Justices the power to generate norms through their decisions, whereas constitutional lawmaking requires the broader participation of many citizens. Second, the Supreme Court is drawn from a very narrow class of society: elite lawyers who then work in Washington.³⁶ In contrast, constitutional lawmaking includes diverse citizens with a wide variety of attachments and interests. Finally, constitutional lawmaking is supermajoritarian, while the Supreme Court rules by majority vote. In short, these reasons suggest that the doctrines created by Supreme Court Justices are likely to lead to worse consequences than doctrines flowing from the original meaning of the Constitution.³⁷

Some scholars argue that the Supreme Court will provide better results by embracing the incremental and case-by-case manner of the common law rather than following the original meaning of the Constitution.³⁸ This argument, however, fails to recognize that traditional common law crafted by judges differs crucially from constitutional common law. Under traditional common law, the legislature could overrule common law decisions, while constitutional common law allows judges to invalidate the decisions of the legislature. Thus, to justify common law constitutionalism, one would have to show not merely that it is good enough to exist in the absence of statutes, like the ordinary common law, but that it is good enough to override statutes. To our knowledge, no one has made a persuasive case that constitutional common law possesses such an extraordinary quality. Furthermore, the characteristics of Supreme Court judging noted above, including its insularity and lack of consensus, militate against claims of superior quality.

36. See John O. McGinnis, *Justice without Justices*, 16 CONST. COMMENT. 541, 542–43 (1999) (discussing factors that make Supreme Court Justices remote).

37. For similar but distinct arguments for why the Constitution and its amendments should take priority over judicial doctrine, see Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 34–48 (2000).

38. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (arguing that “it is the common law approach . . . that best explains, and best justifies, American constitutional law”).

Therefore, not only does the Constitution's original meaning possess a high enough quality to displace ordinary democratic lawmaking, but more free-form methods of judicial interpretation do not provide similar assurance of superiority to democratic lawmaking.³⁹ Although this Essay defends originalism as a pragmatic interpretive approach, originalism cannot be evaluated in isolation. The salient question—and the question any good pragmatist should recognize as salient—is what other approach is more likely to reach consequences that are as sound as the consequences reached by originalism. Conceding that originalism is not ideal, this Essay asserts that originalism is likely to have better consequences than competing approaches.⁴⁰

IV. COUNTERARGUMENTS: ANCIENT ORIGINS AND THE EXCLUSION OF BLACKS AND WOMEN

The cornerstone of this Essay's pragmatic defense of originalism faces two significant challenges. The first is that long-dead, bewigged ancestors created the Constitution, rather than the living; the second is that these ancestors excluded crucial parts of the polity, such as African Americans and women from the creative process.⁴¹ These lines of attack have not been limited to academics but have been pressed more generally in the public

39. Some might argue that because the supermajoritarian process establishes only a presumption of beneficence, judges should be able to use non-originalist methods of construing a particular provision if they independently determine that the provision is undesirable. The difficulty with this approach is that judges have no adequate process for determining either when the presumption in favor of the original constitutional norm should be overcome or what new norm to use as a replacement. Moreover, judges of various ideologies cannot be expected to reach agreement on any alternative method, or even to apply their own chosen method consistently, because of biases unchecked by others who adhere to a different ideology but work within the same methodology. As a result, the norms selected would tend to be unpredictable and partisan.

40. Some might argue that this pragmatic argument for originalism is as contestable as those made in the usual pragmatic theories of justice. But the argument is based on a procedural theory demonstrating the virtues of supermajoritarian entrenchments. In contrast, arguments about the beneficence of particular decisions generally must rest on substantive theories based on broader notions of the good. This argument asserts that procedural arguments can command greater consensus than substantive ones. In addition, only a single point needs to be defended, whereas case-by-case pragmatism must predict and defend the consequences of an endless series of discrete decisions.

41. See, e.g., Amar, *supra* note 37, at 35.

sphere for many years. Thus, one could argue that these critiques enjoy a sufficient consensus to be taken seriously, and that their public resonance confirms that the key question originalists must answer is whether the process of framing was good enough to be respected now.

A. *Ancient Origins*

The first complaint lodged against originalism has been around at least since the Progressive Era.⁴² This argument is based on the proposition that today is for the living and those long buried should no longer rule.⁴³ An extreme version of this “dead hand” complaint—that a current majority must be able to change the past constitutional rules at will, either directly or through free-form interpretation of their own—is simply inconsistent with constitutionalism. A constitution is designed to restrain current majorities, either to prevent temporary passions from doing damage to the social order or to prevent majorities from trampling on minority rights.⁴⁴ Moreover, if the dead hand objection is actually correct, society must question the need to pay attention to the constitutional text, given that the text is as much a product of the past as the meaning a past generation understood it to convey. Finally, even if this critique were sound, it would only justify upholding current democratic decisions when they conflicted with the original meaning. A focus on the dead hand hardly suggests that the Supreme Court—itsself the product of the original constitutional settlement—enjoys the power to displace the decisions of living legislators.

A more plausible concern about relying on a historical document would ask whether a past generation had more power to influence the document than the current generation. If the Framers could insert provisions into the Constitution more easily than living individuals, then the Framers would have an unjustified advantage in establishing fundamental law. No purpose is served by granting an earlier generation more in-

42. See David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 815 (1998) (discussing this progressive attack).

43. See Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1128–29 (1998).

44. See *id.* at 1130.

fluence on the content of the Constitution than any other generation. Originalist constitutionalism, however, does not suffer from this malady. The original Constitution came into being through stringent supermajority rules, and each generation can amend the Constitution through similar, though not identical, rules. Thus, each generation has essentially equal formal authority to place its political principles into the Constitution.

Although it may be harder, as a practical matter, to amend the Constitution today than it was to frame the original Constitution, that is largely the result of the Constitution's success; people are loath to amend a document under which the United States has become the most prosperous large nation on Earth.⁴⁵ The difficulty of amending the Constitution is also the result of the Supreme Court's now frequent disregard of the original meaning. More constitutional amendments would pass if the Court did not revise the Constitution every time a principle becomes popular enough that the public might be willing to place it in the Constitution.

Additionally, judicial anticipation of the amendment process is not harmless. First, the Court is unlikely to establish the same norm that the amendment process would have produced because it is difficult to know what consensus would have emerged from the supermajoritarian process. Second, the Court is unlikely to limit its decisions to the probable political consensus. For example, the consensus likely favors a right of contraception without encompassing the right of abortion, but Justices who strongly favor abortion rights could include the right to abortion within a nebulous right of privacy. Third, the prospect of non-originalist judging makes it harder to obtain a consensus on an amendment, because ratifiers of the amendment understandably are concerned that a subsequent activist court will unwind their constitutional text. The Equal Rights Amendment foundered in part on fears that activist courts

45. See Stephen L. Carter, *The Constitution, The Uniqueness Puzzle, and The Economic Conditions of Democracy*, 56 *GEO. WASH. L. REV.* 136, 140 (1987) (describing the Theory of Democratic Prosperity, which asserts that "the success of constitutional government in the United States" is because of "the growth over time of the economy, the generally improving standard of living," and "the continued flourishing of the middle class").

would seize on it to enforce unisex bathrooms and other ideological extravagances.⁴⁶

A variation on this progressive attack might be thought to have more bite than the dead hand objection *per se*. According to this view, it is all very well to say that the consensus nature of constitutional provisions made them desirable when they were enacted, but argues that those provisions are now archaic and no longer produce the benefits they once did, given that the world has changed. This kind of attack may be implicit in translation theories of the Constitution that purport to take account of social change by applying the Framers' values in the context of the present day.⁴⁷

This objection might have force if the Constitution purported to frame a code of rules of primary conduct, but the Constitution does not.⁴⁸ Those who framed the original Constitution and the amendments *never forgot that it was a Constitution they were expounding*.⁴⁹ Therefore, they accounted for the fact that the Constitution should contain only a framework for a government that would respond to the enduring realities of human nature and the problems of social governance.⁵⁰ In this way, the reality of change was already taken into account in the making of the Constitution.

The best proof of the Framers' perspective lies in the Constitution itself. The Constitution permits substantial avenues to address social change. The States have few restrictions on their powers absent congressional action.⁵¹ Individual experiments to

46. See Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 412 (2000).

47. See, e.g., *Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984) (Bork, J., concurring) ("[The judicial duty] is to ensure that the powers and freedoms the framers specified are made effective in today's circumstances."); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1170-74 (1993).

48. With the exception of the Thirteenth Amendment, the Constitution does not regulate private conduct at all. Nor does it prescribe many substantive regulations for the government. Instead it largely sets out decision-making rules for governmental institutions to regulate both private and governmental conduct.

49. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

50. See Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 306-09 (1989) (articulating the position that the Framers meant for the vagueness of the Constitution to eventually fix into a settled meaning).

51. The original Constitution contained a quite modest set of restrictions on states. See U.S. CONST. art. I, § 10 (containing certain limits on states, such as pro-

address changes can be readily adopted by other states, given the free flow of information and free movement guaranteed by the Constitution.⁵² The Constitution also granted Congress substantial power to legislate under the Commerce Clause and the Necessary and Proper Clause, albeit not the unlimited power modern case law has bestowed.⁵³

Finally, the Constitution creates an amendment process to replace outdated provisions. Unsurprisingly, a legal document produced by a high quality process would offer many ways to address social change; its many avenues for democratic change reflect its quality.

In the face of this structure, there is no reason to be confident that a clamor for judges to substitute a new meaning for the original meaning is a response to changing social conditions and not an attempt by special interests, numerical minorities, or transient majorities to change the Constitution to reflect their peculiar values. Furthermore, even if the Supreme Court is sincerely attempting to update the Constitution, the Court as an elite and centralized institution lacks the ability to elicit the consensus that can reliably differentiate responses to social changes from constitutional putsches.

B. *The Exclusion of Blacks and Women*

The second attack on constitutional lawmaking comes from the 1960s. The key complaint is that, until recently, African Americans and women did not vote on the Constitution and key amendments.⁵⁴ This defect in constitutional lawmaking supposedly deprives it of legitimacy, or should at least lower our estimation of the Constitution's quality. The exclusion of

hibitions on states coining money or entering into compacts with other states). Although the restrictions of the Fourteenth Amendment are more extensive, particularly if one believes that the Fourteenth Amendment incorporates the Bill of Rights, even those provisions, if construed according to their original meaning, do not impose draconian restrictions on the States.

52. See Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1599–1607 (2004) (discussing competitive federalism as an engine for social change).

53. U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); U.S. CONST. art. I, § 8, cl. 18 (Necessary and Proper Clause).

54. See Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

these groups from constitutional lawmaking is a defect. In fact, these exclusions actually go to the theoretical heart of the supermajoritarian argument, which is that supermajority rules are only desirable when they require a reflection of all interests in the electorate. Thus, the absence of African Americans from the Framing and the blatant disregard of their interests may well have meant that the Constitution did not bind them.

From today's perspective, these points are largely moot because these defects in the Constitution have been corrected. The Thirteenth Amendment prohibits slavery, the Fourteenth Amendment forestalls government racial discrimination, and the Fifteenth Amendment prevents denial of the franchise based on race.⁵⁵ Moreover, the Voting Rights Act has implemented these constitutional provisions to guarantee that African Americans can fully participate in elections.⁵⁶

That the Constitution now grants all people the freedoms once only guaranteed to white, male property owners suggests the elimination of the defects of the original Constitution. The Constitution does not contain items like a mandate for racial preferences, but given the disagreement about such policies even today, it is implausible to believe that the Constitution would have included them, even if all groups were represented. Thus, these defects of the original process do not provide reasons for ignoring the original meaning as amended.

A related criticism of the original Constitution is that its tragic countenancing of slavery was the fatal defect that rendered the document illegitimate.⁵⁷ While slavery was certainly tragic, the responsibility cannot be laid at the feet of the Constitution or its supermajoritarian basis. A serious attempt to eliminate slavery would have defeated any constitution and probably fractured the nation.⁵⁸ Despite its acquiescence to slavery, the original Constitution contributed to a social order based on markets and freedoms that helped persuade Americans that

55. U.S. CONST. amends. XIII, XIV, & XV.

56. 42 U.S.C. § 1973 (2000).

57. See, e.g., Marshall, *supra* note 54, at 3–5 (discussing how treatment of African Americans constituted an “inherent defect” of the original Constitution).

58. See Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J.L. & HUMAN. 413, 415 (2001) (stating that the Framers could not have abolished slavery and passed the Constitution).

slavery is wrong.⁵⁹ 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.

A similar complaint can be made about the absence of rights for women in the original Constitution. This complaint is less powerful because there is a strong counterargument that women were virtually represented at that time by their male relatives and that many women apparently believed they should not have the right to participate.⁶⁰ The Nineteenth Amendment now grants women the right to vote.⁶¹ Moreover, the Constitution would have likely been amended to prevent government sex discrimination had the Supreme Court not guaranteed such a right through its construction of the Fourteenth Amendment.⁶² Thus, the Constitution has now been corrected to provide equal rights to all Americans.⁶³

One final objection to this pragmatic defense of originalism is simply to find a constitutional provision widely believed to be defective and suggest that the provision demonstrates that the Constitution is of low quality. An example might be the provision that prevents a foreign-born citizen, like Governor Arnold Schwarzenegger, from becoming President.⁶⁴ This Essay argues

59. See ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 7–9 (1992) (noting that the original Constitution was written to accommodate abolition and equality).

60. See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 982–83 (2002) (discussing the argument that women were virtually represented by the heads of their households); HELEN KENDRICK JOHNSON, *WOMEN AND THE REPUBLIC* 12–13, 316 (1913) (arguing that suffrage is inconsistent with democratic principles and that voting would be detrimental to the institution of the home).

61. U.S. CONST. amend. XIX.

62. See JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 46 (1986) (suggesting that the Supreme Court's innovations in applying the Fourteenth Amendment as a principle of gender equality undermined the case for ratification of the Equal Rights Amendment).

63. Although this Essay addresses 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 also had a different substantive agenda. Yet there is not 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 good entrenchments.

64. U.S. CONST. art. II, § 1, cl. 5.

only that the Constitution taken *as a whole* is of high enough quality that its original meaning should be enforced. Some provisions may become undesirable and yet remain law because they are not so bad that a supermajority will repeal them. Following any legal rule has costs; therefore, retaining a bad constitutional provision is simply a cost of following a supermajoritarian enactment rule when that rule generates a constitution with benefits that exceed its costs.

CONCLUSION

Debates about originalism have often resembled skirmishes between two armies that never really confront one another. Originalists talk about the rule of law and democracy, while non-originalists talk about indeterminacy, social change, and the consequences of individual cases. Providing a consequentialist defense of originalism maps out a new field of engagement. This theory recasts the old arguments for originalism by using democracy and the rule of law to defend originalism's consequences. This Essay argues that originalism provides a theory of constitutional interpretation that has good consequences, even though it does not force judges to assess consequences on a case-by-case base.

In doing so, this Essay presents a new, frontal challenge to non-originalists. To meet this challenge, non-originalists must show that their theories generate better consequences and provide some metric for assessing those consequences that does not merely reflect a narrow theory of substantive good. Until this challenge is met, originalists can defend their respect for the original meaning attached to the Constitution with the understanding that this meaning offers the best protection of the living.