

## Essay: The Immorality of Originalism

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### Abstract:

The central claim of this essay is that in interpreting the U.S. Constitution, it is immoral to choose original intent over social welfare, broadly conceived. Once this argument is laid out and defended on its own terms, I support the central claim with a variety of arguments, including the defective process pursuant to which the Constitution was enacted, the deeply flawed substantive content of the Constitution, the incongruity of fidelity to the views of a generation of revolutionaries, the current virtual imperviousness of the Constitution to amendment, the failure of the Constitution to resolve fundamental questions concerning the allocation of power within the government, which leads to dependence on the un-democratic Supreme Court to resolve important and controversial social issues and finally originalism's tendency to force otherwise honorable people to lie or obfuscate about the reasons for their official decisions.

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## Essay: The Immorality of Originalism

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It is with great trepidation that I wade into the waters of constitutional theory, especially into the debate over originalism as a proper (or the proper) method of interpreting the Constitution of the United States. Unfortunately, the temptation to do so is irresistible. Although I have been teaching law for nearly four decades, I came to teach basic constitutional law only recently, and after three times through the course in the span of four years, my aversion to constitutional theory generally has been strengthened and my aversion to originalism as a method of interpretation has been reinforced even more.

My reluctance to put my view of originalism on paper is based on two related factors, first that I have read little scholarship on the matter, largely because I tend to fall asleep or visit the kitchen repeatedly whenever I open a work of constitutional theory, and second I fear that I am extremely unlikely to say anything that has not been said (and debunked) before. Still, I will press on with the hope that a nugget of what I have to say will make an impression on people

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thinking about the privileged place occupied by originalism in the current constitutional law canon.

The central claim of this essay is that in interpreting the U.S. Constitution, it is immoral to choose original intent over social welfare, broadly conceived. Once this argument is laid out and defended on its own terms, I support the central claim with a variety of arguments, including the defective process pursuant to which the Constitution was enacted, the deeply flawed substantive content of the Constitution, the incongruity of fidelity to the views of a generation of revolutionaries, the current virtual imperviousness of the Constitution to amendment, the failure of the Constitution to resolve fundamental questions concerning the allocation of power within the government, which leads to dependence on the un-democratic Supreme Court to resolve important and controversial social issues and finally originalism's tendency to force otherwise honorable people to lie or obfuscate about the reasons for their official decisions.

Although it is less central to my thesis, I also point out the multiple ways in which originalism fails on practical grounds as a methodology. Most of this should be familiar to the reader: Originalist judges are at best amateur historians whose pronouncements are unreliable; original intent is often impossible to discern and hopelessly ambiguous even on important matters concerning the structure and powers of the government which means that just about anything can be justified

under the guise of originalism; originalists feel free to pick and choose when they will actually follow the best sense of the original intent on important matters; and originalism can lead to terrible results for society, for example by disabling the federal and state governments from taking effective action against the scourge of gun violence in the United States.

The final question I must address in this essay is that if originalist arguments are off limits in constitutional interpretation, what arguments are not off limits, i.e. what should originalism's replacements be? Here, I must digress to make clear that I do not mean to suggest that non-originalist decisionmaking will produce socially superior results in all or even most or many cases. That depends on the wisdom of the judges making the decisions, including their attitude toward the role of the judiciary in a democratic society. Just as schoolchildren tend to do better with a good teacher regardless of class size, the quality of constitutional law depends to a great extent on the judgment of the judges and justices who make the decisions, regardless of methodology. For example, while first amendment jurisprudence is decidedly not originalist, many people view the Court's first amendment decisions regarding campaign finance regulations as socially harmful, perhaps as much so as its originalist second amendment jurisprudence. Although I disagree with many of the Court's first amendment decisions, the debates are refreshing when compared, for example, to the originalist framework in gun rights

cases. Further, originalist arguments may be permissible if resolving a set of issues based on original intent enhances social welfare either in a specific case or in a category of cases. For example, following clear constitutional text in structural matters may be socially beneficial by avoiding the costs of uncertainty and instability and because the Framers of the Constitution may have arrived at welfare-enhancing arrangements. Further, originalist arguments may be permissible if resolving a set of issues based on original intent enhances social welfare either in a specific case or in a category of cases. For example, following clear constitutional text in structural matters may be socially beneficial by avoiding the costs of uncertainty and instability and because the Framers of the Constitution may have arrived at welfare-enhancing arrangements.

Thus, in my view, originalist arguments should be sidelined in favor of debates consisting largely of arguments of social policy and legal principle, framed against the background of the democratic, federalist structure of American government. An important ingredient in these debates should be what has been termed the “aspirational Constitution” that legitimizes arguments drawn from aspirations contained in general principles that point toward a decidedly non-originalist result. This is how Frederick Douglass treated the Constitution when he relied on it to argue against the Constitution’s own original sin of sanctioning slavery. It allows the development of constitutional law in light of society’s

underlying principles adapted to present-day needs and preferences. I would flavor these discussions with a touch of textualism, not because the text of the U.S. Constitution occupies a morally privileged place in these debates but because it provides a non-arbitrary starting point, constrains unelected judges and advances social stability.

The title is, of course, designed to get attention the way that scholars often do with outlandish or extreme claims. A better title might have been “Originalism versus Welfare.” In fact, this essay was inspired, in part, by Louis Kaplow and Steven Shavell’s article and book entitled “Fairness versus Welfare.”<sup>1</sup> The idea is that in designing a system of constitutional interpretation and enforcement, it would be wrong to sacrifice social welfare on the altar of original intent. As will become clear, I will not argue that original intent is irrelevant. Rather, originalism plays the same role in my analysis that fairness occupied in Kaplow and Shavell’s, i.e. as a taste that might be satisfied and as a device that may enhance social welfare in some circumstances.

Two words in the title must be defined, “immorality” and “originalism.” I’ll take them in reverse order. By “originalism” I mean a method of constitutional interpretation that privileges the original intent of the framers and/or the ratifiers of

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<sup>1</sup> Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (2002); Louis Kaplow and Steven Shavell, *Fairness versus Welfare*, 114 Harv. L. Rev. 961 (2001).

the Constitution and treats those intentions as binding law. I recognize that there are multiple versions of originalism, some of which are flexible enough to allow courts to ignore or sidestep original intent in the name of other values; my focus is on a stricter form of originalism under which a judge cannot ignore clear original intent. Initially, I'll lump all originalist methodologies together, including "intent of the framers," textualism, and "original public meaning." Later, textualism will be discussed separately because, in my view, following the plain meaning of the text of the Constitution is morally defensible in some circumstances.

By "immorality," well, my use of "immorality" may be overstated, because I do not mean to suggest or imply that I think originalists are evil or acting in bad faith to gain personal advantage. I mean that the practice of originalism should be condemned as a matter of principle for reasons sounding in morality. In my view, government officials owe a duty to their constituents or subjects to work toward advancing their welfare, and they should not sacrifice the common good in favor of a principle like originalism or ideological purity or any other such abstraction. In other words, government officials should use their power to enhance social welfare, not to decrease it in the name of a methodology or ideology. I recognize that claiming that a particular practice, such as originalist constitutional interpretation, is immoral is treacherous because there is likely to be great disagreement over any assertion of immorality and there is no way to prove the

truth of the assertion that a practice is immoral. I will attempt to persuade the reader that originalism is immoral, but I cannot prove it, just as no defender of originalism or any other theory of interpretation can prove that their method is morally sound or otherwise desirable and just as no moral theorist can prove the correctness of their moral theory.

This essay proceeds as follows. In Part I, I lay out my argument that originalism is immoral in principle. In Part II, I illustrate that originalism is not a workable or practical theory of constitutional decisionmaking. In Part III, I address some of the major criticisms of the ideas laid out in this essay. In Part IV, I discuss what legal reasoning cleansed of originalist thought would like like. In Part V, I conclude with observations of the possible consequences of abandoning originalism for legal reasoning and the quality of constitutional decisionmaking.

## I. Immorality in Principle

The central argument of this essay is that rules of constitutional law should be constructed based primarily on social welfare and decidedly not based on the original intent of the Framers or adopters of the Constitution, however discerned. This argument builds on Lewis Kaplow and Steven Shavell's article and book, "Fairness versus Welfare." Their decades-old thesis, that "legal rules should be selected entirely with respect to their effects on the well-being of individuals in



society” and that “notions of fairness . . . should receive no independent weight in the assessment of legal rules,”<sup>2</sup> is controversial, to say the least. Some readers were left shaking their heads at the notion that a system of justice should ignore notions of justice and fairness. But Kaplow and Shavell’s point was much more moderate, and sensible, than it appears at first glance.

Their main point was that legal rules should be constructed with “individuals’ welfare” as the sole consideration. Their concern was that a legal rule constructed on the basis of some other consideration such as fairness could leave everyone subject to it worse off, a truly perverse result and inconsistent even with the insights of liberal legal philosophers who were extremely concerned with fairness, such as John Rawls, who claimed that rational people would agree to social structures that produced unequal results so long as the least well off in society were made at least marginally better off by unequal results than equal ones.<sup>3</sup> To Kaplow and Shavell, the only significant role fairness should play in constructing legal rules is to recognize that people have a taste for fairness and that because they prefer to live in a society that treats them, and all of its members, fairly, social welfare would be diminished if fairness played no significant role in legal decisionmaking. Thus, in measuring the social utility of any legal rule, one

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<sup>2</sup> Kaplow and Shavell, *supra* note x at 3-4.

<sup>3</sup> John Rawls, *A Theory of Justice* (1971); John Rawls, *Political Liberalism* (1993).

consideration must be whether enforcing it would reduce social welfare because peoples' taste for fairness would not be satisfied. This should not be a controversial observation; people are often concerned with how the law treats others and are willing to lend political support to efforts to change laws that they expect will never be applied to them, such as welfare laws, criminal laws and provisions of the tax code that apply only to the poor or the wealthy.

There is an important aspect of their thesis that is left unclear, which is whether a rule that has crushingly terrible consequences for a small group of people but significantly enhances the welfare of society as a whole is acceptable under their theory. Their repeated references to "the well-being of individuals in society" makes it appear that they are adopting some form of Pareto-optimality, under which rules are unacceptable if they make some "individuals in society" or group of individuals worse off. Since they cannot rely on fairness for the choice between pure utilitarianism and Pareto-optimality, it must be either that they believe that peoples' taste for fairness would prevent adoption of rules that made some people worse off or that their definition of the "well-being of individuals in society" necessarily implies such a principle. The only light I can throw on this is to speculate that perhaps Kaplow and Shavell were confident that policymakers would not be likely to adopt rules that were overly harmful to some people and they could thus be vague on this score. My own view is that rules of law,

regardless of methodology, often have terrible effects on individuals and groups of individuals (whether justified or not), but the welfare of individuals, as they put it, or social welfare, as I would phrase it, is a more defensible guiding principle in constitutional law than the original intent of the Framers of the Constitution, however discerned.

In my view, originalism should be viewed as parallel in constitutional law to the fairness of Kaplow and Shavell's work in all areas of law. The conventional argument for originalism, especially as an exclusive or binding requirement for constitutional decisionmaking, is based largely on principles, some contested, such as the nature of a written constitution or a requirement for the legitimacy of legal decisionmaking, and not on considerations of social welfare. And insofar as the original intent of the Framers of the Constitution produces superior results for social welfare, it ought to be followed, but not because of any principle of fidelity to the original intent. In fact, if I could be persuaded that judges, legislators and executive officials would make better decisions overall if they felt that they were bound by original intent, I would endorse it as a guiding principle in constitutional law, but again not as a matter of principle but because of its superiority as a matter of social welfare. (I will elaborate below on why I am skeptical of this last notion.)

Social welfare emanates from constitutional decisions in different ways depending on the sort of issue involved. For example, a decision on constitutional

rights may have immediate and direct social welfare impacts. More freedom to engage in an activity, for example allowing the use of previously banned substances in religious rituals, may immediately enhance the welfare of those desiring to engage in it. Assuming no negative effects on others or on the participants themselves, a right like this ought to be recognized in a sensible understanding of constitutional law regardless of whether the Framers would have intended it. The social welfare effects of other rights may be less immediately ascertainable. For example, the social costs or benefits of an expansive application of the right to be free from unreasonable search and seizure may be due to the effects on police practices generally (which could be socially harmful or beneficial) and not on the case in which the right is recognized or applied, where a crime may go unpunished and a criminal undeterred.

Strict adherence to the ideal of separation of powers is often portrayed as necessary to preserve liberty, but the causal chain between separation of powers and the preservation of liberty is usually difficult to discern. Two examples of current controversy are illustrative. The Supreme Court has in several recent decisions made it more difficult for Congress to impose restrictions on the President's power to remove executive branch officials.<sup>4</sup> Is this likely to enhance

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<sup>4</sup> E.g., *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010); *Collins v. Yellen*, 141 S. Ct. 1761 (2021).

liberty? It depends on numerous factors including the definition of liberty, the policies of the President and the likely policies of officials subject to more or less presidential control. As Abraham Lincoln famously said, “The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as his liberator, while the wolf denounces him for the same act as the destroyer of liberty. Plainly, the sheep and the wolf are not agreed upon a definition of liberty.” If liberty is defined simply as freedom from regulation, i.e. from the perspective of Lincoln’s wolf, then more presidential control might enhance liberty if the particular President takes a deregulatory or anti-regulatory approach. The opposite would be true if the President identified more with the sheep and supported strong regulation.

A more sophisticated view of liberty might consider whether regulation would enhance peoples’ ability to develop their lives and participate in social, economic and political life and would view regulation designed to achieve that end as enhancing liberty overall even if regulated parties’ were subject to more restrictions. Liberty to pollute the environment might enhance the liberty of the owners of the polluting enterprises while reducing the liberty of those who die premature deaths and suffer serious health consequences from the pollution. Under this definition, the likely effect of more presidential control on liberty would be the opposite of the effect under the previous definition. Of course, this all

depends on whether presidential control would have a significant effect on agency policy, which is subject to multiple additional influences such as legal constraints, judicial review and pressure from interest groups and congressional oversight.

There is also no immediately or intuitively discernible social welfare effect of these decisions. Who knows whether a removable director of the Consumer Finance Protection Board would do a better job of enhancing social welfare than a director who can be removed only for cause? It may not matter at all, it may enhance social welfare by subjecting the director to political control or it may reduce social welfare by hampering the director's ability to take action against politically powerful entities or people who may diminish social welfare for their own selfish reasons. The only thing we do know is that the removable director is somewhat more likely to advance the President's policies, which means the most important social welfare indicator is likely to be the wisdom, in social welfare terms, of the President's preferences.

A similar analysis applies to the possibility that the Supreme Court will create a strict nondelegation doctrine under which Congress may not delegate the power to make important policy decisions to agencies.<sup>5</sup> Who knows whether this would enhance or decrease welfare? The nondelegation doctrine's enhancement of

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<sup>5</sup> See *Gundy v. United States*, 139 S. Ct. 2116, 2131-48 (2019) (Gorsuch, J., joined by Roberts, C.J. & Thomas, J., arguing for reinvigoration of the nondelegation doctrine).

liberty allegedly occurs mainly due to a lower volume of law—there is no way that Congress could or would produce the volume of law that agencies produce on important matters. Law made by a representative body such as Congress may also be more attentive to social welfare and individual liberty than law made by an agency not directly subject to voter approval. As Justice Gorsuch recently stated, “[s]ome occasionally complain about Article I’s detailed and arduous processes for new legislation, but to the framers these were bulwarks of liberty.” The preference for less law is based on an assumption that law decreases liberty, but as in the above example, that is far from clear. Is there more liberty in a society in which government is not involved in protecting the environment or safeguarding consumers from fraud and dangerous products, where government does not help ensure the availability of adequate and safe medical care, safe and healthful working conditions, adequate food and shelter and sufficient education to prepare all members of society for participation in economic and political affairs? Answers to questions like these are highly dependent on the definition of liberty.

There is also no clear path between a strictly enforced nondelegation doctrine and enhanced social welfare. In fact, in research on the costs and benefits of regulation cuts both ways with some analyses concluding that regulation

enhances social welfare while others claim it has the opposite effect.<sup>6</sup> There are many vocal opponents of regulation among business interests that chafe at the effects of regulation on their bottom lines, but opposition from the subjects of regulation is to be expected and does not necessarily reflect overall social welfare effects. Small increases to the welfare of millions of people may attract less attention than decreases to the wealth of the few whose aggregate losses are lower.

Another alleged effect of restricting agency policymaking and reserving authority to Congress is enhanced deliberation which leads to higher quality rules and standards. But once again there is no empirical support for the conclusion that Congress makes higher quality decisions than the agencies to which Congress routinely delegates broad policymaking discretion. At a minimum, agency expertise and their ability to act with dispatch when confronted with pressing problems are logical counterweights to the value of legislative deliberation and delay.

Further, the idea that unelected judges should override the Congress's choices regarding the structure of government because Congress is a superior deliberative body is dripping with irony. After all, the result of judicial

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<sup>6</sup> See, e.g., Paul L. Joskow & Nancy L. Rose, The Effects of Economic Regulation in Handbook of Industrial Organization, Vol. 11 (Richard L. Schmalensee & Robert D. Willig eds. 1989); Brian Wallheimer, Why Less Regulation Isn't Necessarily Better, Chicago Booth Review (Feb. 25. 2019) available at <https://www.chicagobooth.edu/review/why-less-regulation-isnt-necessarily-better>; John F. Morrall, III, A Review of the Record, Regulation, Nov./Dec. 1986; Lisa Heinzerling & Frank Ackerman, The Humbugs of the Anti-Regulatory Movement, 87 Cornell L. Rev. 648 (2002).



intervention is to reject Congress's judgments, arrived at after the desired deliberation, concerning the optimal structure of agencies and their optimal range of policymaking discretion. To create agencies and delegate powers to them requires Congress to deliberate and navigate the procedural shoals that originalists like Justice Gorsuch identify as the normative underpinnings of their view. There is no reason to believe that legal training and experience as an attorney, Circuit Judge and Supreme Court Justice leads to better judgment than Congress's, acting through its bicameral deliberative process that are allegedly the bulwarks against low quality excessive infringements of liberty. And I have not even mentioned the role of the President whose veto pen further enhances the reliability of Congress's determinations.

The lack of empirical support for these assertions leads me to sense that they are motivated more by adherence to ideological principle or loyalty to interests that would benefit from less regulation than by actual evidence of the welfare effects or even the overall effects on individual liberty. This all depends, in part, on an assessment of how the agencies have done up to now, and that's a complicated and politically controversial question. In short, answers to empirical questions are often ideological, and ideology is often destructive of rational thought and sober assessment. It should not be the basis for constructing substantial limits on the democratically accountable branches of government.

It is important at this point to dispel the impression that my argument is designed to attack conservative arguments rather than make a broad, neutral attack on originalism. The above examples are drawn from current events in a situation that involves a rising and active conservative Supreme Court majority. But I would apply the exact same analysis to developments that move constitutional law in a more liberal direction. If it could be shown that the Framers intended to allow broad delegations of policy and political decisionmaking to administrative agencies, but evidence established that confining delegation would enhance social welfare, I would support strict application of a nondelegation principle. Similarly, if it could be shown that expansive application of the Fourth Amendment's exclusionary rule was inconsistent with social welfare, I would favor cutting back on its protections regardless of the intent of the Framers. (In fact, I have always been skeptical of the exclusionary rule's truth-crushing function and its imposition of the social costs of officers' violations on society as a whole.) Because constitutional law is rarely debated in policy terms, it is difficult to analyze the social effects of most doctrines of constitutional law without conducting extensive empirical research for which I, and the judges who make the decisions, lack both the skill and the resources.

My main point is that originalism is wrong on principle insofar as it sacrifices the welfare of society to a fantastic idea of what the Framers intended

when they crafted the Constitution in the 1780s. To me, it's simply a bizarre notion that the welfare of the more than three hundred twenty five million people living in the United States is less important than what the Framers agreed to in the context of the social problems and political disagreements that occupied them nearly 250 years ago and in a process that excluded the vast majority of inhabitants of the country from participation. Perhaps if the Framers were oracles of truth and justice the case for originalism would be stronger, but we all know that they made mistakes and compromised moral principle in favor of the welfare of those in the dominant race, gender and social class of their generation to which they belonged. There is no convincing argument that we should be stuck with their decisions.

It also strikes me as an extremely odd idea that the views of a revolutionary generation should be forever frozen into the fabric of our society's constitutional law. Although I do not want to make the paradoxical error of rejecting originalism based on the original intent of the Framers, I have been able to find little indication that the Framers themselves thought or intended that their views would govern future constitutional understandings. They were reacting to a unique set of challenges and opportunities and they constructed what they viewed at the time as the best, politically palatable solutions. It is perhaps an unfortunate historical reality that successful revolutionaries become entrenched and their views dominate

even after their utility has vanished with the years, but in a society with a choice, there is no principled reason to go down that path.

Another reason that has been cited to doubt that originalism is an appropriate methodology for construing the Constitution is that the Framers were more likely to embrace natural law theories than the sort of radical positivism that strict originalism entails.<sup>7</sup> I don't want to make too much of this observation for two reasons, the first being the obvious irony in citing originalist reasons for rejecting originalism and the second being that the argument is, in my view, based on the sort of cherry-picking of Framers' statements that infects all forms of originalism. While it is true that the Framers made many statements consisting with natural law theory, they also made plenty of statements consistent with a more positivist view of law, including the 1798 decision in *Calder v. Bull* that is often cited as evidence of Justice Chase's embrace of a non-textual, natural law theory of constitutional interpretation.<sup>8</sup> In that case, most of the Justices relied upon the original meaning of the Ex Post Facto clause to reject the *Calders'* argument against retroactive civil legislative action, a decidedly positivist methodology.

Justice Thomas, an avowed originalist, has made an interesting argument for limited incorporation of natural law into constitutional interpretation. In a 2021

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<sup>7</sup> See Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 *Law & History Review* 321 (2021); John Mikhail, *Does Originalism Have a Natural Law Problem?*, 39 *Law & History Review* 361 (2021).

<sup>8</sup> *Calder v. Bull*, 3 U.S. 386 (1798).

speech at a Heritage Foundation event celebrating his thirty years on the Supreme Court, he explained why he believes that constitutional law includes natural law elements.<sup>9</sup> He agrees with the view that the Framers adhered to natural law ideas and would reject positivism as the predominant method of understanding legal rights. It's a bit more complicated than this because Justice Thomas, citing the Declaration of Independence's statement that people "are endowed by their Creator with certain unalienable Rights," equates natural law with divinely granted rights. In other words, the rights of Americans are God-given, transmitted by the Framers through the Constitution. But then Justice Thomas insists that we are bound by the version of natural law adopted by the Framers, not because of any notion that they and only they have true insight into divine providence but because the intent of the Framers is binding positive law. In other words, Justice Thomas's argument for originalism, at bottom, adds nothing to the simple assertion that the Framers' intent is binding law, and it paradoxically cuts off contemporary discussion of natural law principles and the true nature or content of divine providence. Just as a simple example, some believers in divine providence may think that reading the Constitution to require the government to provide food, shelter and medical care to people who otherwise could not afford it is more plausible than reading it to

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<sup>9</sup> Address by Justice Clarence Thomas at event entitled Justice Thomas' Thirty-Year Legacy on the Supreme Court, Oct. 21, 2021, available at <https://www.heritage.org/courts/event/evening-lecture-justice-thomass-thirty-year-legacy-the-court>.

sanction slavery and prohibit two layers of for-cause protection for government officials exercising discretionary executive power.

The difficulty of amending the Constitution contributes to the immorality of tying American society to it, or more accurately to the judicially-imagined version of the original intent underlying it that has been created by judicial decisions. The Framers themselves ignored two aspects of the Articles of Confederation when they constructed the Constitution, namely its declaration that it had created a perpetual union and its unanimous consent requirement for alterations. This was wise—social realities revealed the Articles’ defects and the architects of the new Constitution did not allow intent of the framers of the Articles to hinder social welfare. I have written elsewhere that this important episode in our history is precedent for a new constitutional convention: the 20 most populous states could follow the example of the Framers when they discarded the Articles and frame a new constitution among themselves, and then invite the others to join them the way Rhode Island was invited to join the new union after not participating in the Philadelphia convention.<sup>10</sup>

Of course, the cumbersome process for amending the Constitution is certainly viewed by many as a feature, not a bug. More than shifting political

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<sup>10</sup> Jack M. Beermann, *The New Constitution of the United States: Do We Need One and How Would We Get One?* in Symposium, *America's Political Dysfunction: Constitutional Connections, Causes and Cures*, 94 Boston University Law Review 711 (2014).

winds should result in major changes to the country's governing structure. An easily amendable Constitution could lead to instability and provide opportunities for powerful interests to subvert government power for private gain. These are empirical assertions, not matters of principle detached from considerations of social welfare. But in current circumstances with deep divisions and widespread dissatisfaction with government institutions across the political spectrum, something is amiss, and it ought to be more than theoretically possible to do something about it. For those of us tired of feeling hamstrung by the unwillingness of a major segment of society to recognize reality and move into the twenty-first century, radical actions like framing a new constitution outside the current Constitution's amendment process have become increasingly attractive.

It might be different if the process for enacting the Constitution gave it a special claim to legitimacy, but alas it does not. The majority of Americans were excluded from the political process that led to the adoption of the Constitution. Imagine what Americans would think if another country embarked on a process of creating a new Constitution and did not allow women, racial minorities, and millions of enslaved people to participate in the project. It may not be not wrong to view what happened in 1789 as a product of the times, but that's the point. While it might excuse the Framers' conduct from a moral standpoint, the product of those times has no good claim to legitimacy for binding us today.

The discriminatory nature of the process for framing the Constitution might be forgivable if in operation the Constitution created a model of equality and inclusion. But this did not occur. Millions of Americans remained enslaved for the first six decades of the Constitution's existence, and after more than a half million Americans died in the fight to end it, the former slaves and their ancestors were thrown into a new form of subjugation nearly as toxic as the old. Officially sanctioned discrimination against racial minorities continues, perhaps to die a slow painful death as demographics eventually outrun the ability of currently dominant groups to restrict voting rights and minimize non-white political power. The Constitution facilitates barriers to full membership in society for tens of millions of Americans and suppresses their economic, social and spiritual growth. A constitution made today with full and equal participatory rights for all Americans would likely turn out radically different from what we have, although given the divisions in American society it is difficult to predict exactly how.

In fact, the injustices that have plagued American society are an independent reason for rejecting originalism as a morally justifiable method of constitutional interpretation. The original Constitution's codification of slavery and its enhancement of slave power in Congress render excessive attention to the intentions of the people who framed it morally questionable, at a minimum. The Constitution's decades-long impotence to prevent the injustice of Jim Crow and



lynch law, the mistreatment of North America's indigenous people, the subjugation of waves of immigrants beginning, perhaps, with the Chinese and the internment of loyal citizens of Japanese descent during World War II are further evidence of the moral frailty of the document. Originalists expect society to surrender to the intentions of those who set in motion a social system that achieved greatness at the expense of the weak and marginalized and in which inequality has only grown, not only inequality of achievement but inequality of opportunity, which is one of the great social problems facing today's United States. Constitutional law is one of the great contributors to inequality.

The strongest argument for originalism is that it has the potential, allegedly more than any other theory, to create the stability necessary for a society to thrive in virtually all dimensions, including economics, politics, religion, science, the arts and humanities, and even more mundane social pursuits such as sports and entertainment. It is undoubtedly true that stability is important and that instability is destructive of all aspects of social life. For example, there are those who think that life in Iraq under Saddam Hussein was preferable to what that society has become in the wake of the invasion that deposed him and his government. This may seem pragmatic and not principled, but in my view it is at least occupies space along a fuzzy border between the practical and the principled. There is great moral value in the establishment of a stable order in which social institutions can thrive.

Any particular stable order may, of course, suffer from deep, even irredeemable, moral failings. But in light of human nature, stability itself is a virtue, as unalloyed as it may be.

In this regard, the U.S. Constitution has only partially succeeded in creating a stable society. It has facilitated a society stable enough to permit unprecedented economic prosperity, with wealth and privilege for some beyond most people's wildest dreams. But it was insufficient to prevent Civil War, and the run up to that conflict revealed the Constitution's failure to resolve key issues concerning the relative powers of state and national governments. Social unrest has continued throughout the period since then. Only violence, public and private, resolved the unrest that erupted in the twentieth century over racial injustice, and labor peace was won in the long run by crushing labor unions through constitutional law, imposing limitations on the ability of unions to compel employees to support their efforts and enhancing the ability of corporations to influence political campaigns. What has resulted is a deeply divided polity that cannot even come together to fight a deadly pandemic.

I want to make one important aspect of the argument perfectly and unmistakably clear: this is not an argument for privileging economic prosperity over all other values. My definition of "social welfare" includes everything that makes a society a better place for people. This includes prosperity, but it also

includes individual happiness, autonomy, respect for the rights and interests of humans and other living creatures, equality, opportunity (both economic and non-economic) and community. In this, my view is likely inconsistent with Kaplow and Shavell's insistence that fairness is relevant only when linked to human satisfaction based on a preference for realizing fairness and other similar values. My view is that values are a necessary element of human society and that societies that realize the ambitions inherent in their values are better places than those that do not. In other words, social welfare is a broad concept that embraces creating and maintaining a better world. What it does not include is acting out of an abstract commitment to an ideological premise, although I would include satisfaction of ideological preferences as an element of social welfare even though I find such preferences fraught with danger of harming social welfare out of a sense of loyalty to the abstract.

## II. The Practical Impracticality of Originalism

In addition to the immorality of originalism as a matter of principle, there are multiple practical reasons to reject originalism as a theory of constitutional interpretation. These include the unreliability of what has been termed "law office history" which is more akin to advocacy than genuine historical research; the fact that so many issues cannot be definitively resolved with reference to text and history which cries out for a different methodology; the tendency of otherwise

honorable people to dissemble by justifying decisions made on other grounds with reference to original intent; and the terrible practical results that originalists impose on society while disabling pragmatic challenges to their conclusions. There is no secret society's with special access to the true history of the Constitution enacted by mythic creatures known as the Framers. Rather, there are competing views, contradictory texts and conflicting histories, leaving originalism as a singularly unattractive method of constitutional construction.

#### A. Amateur history and gaping holes

In my view, the most fundamental practical difficulty with originalism is that the Framers left many important issues unresolved in the Constitution's text and history. This means that another method of interpretation is necessary to answer vital constitutional questions. Let me name just one unresolved issue, a pretty important one, the power of the President to use military force without a declaration of war from Congress. The Constitution is clear on two matters: the President is commander in chief of the armed forces and Congress has the power to declare war. That's about where clarity ends; there is not even agreement on what it means to "declare war," whether such a declaration necessary to commence

military action or is it more simply a declaration that the United States considers itself legally in a state of war with another nation?<sup>11</sup>

To muddy the waters further, Congress has the power to “make Rules for the Government and Regulation of the land and naval Forces” raising questions concerning the extent of the President’s commander in chief powers. In 1973, Congress passed the War Powers Resolution over President Richard Nixon’s veto, restricting the President’s power in this area,<sup>12</sup> and although Presidents have abided by the terms of the Act, they have stated on the record that they do so out of courtesy to Congress because, in their view, the Act unconstitutionally restricts their power as commander in chief.<sup>13</sup> Originalists have not succeeded in resolving this basic matter of constitutional law.

When the text leaves gaping holes such as these, originalists hunt for evidence of the Framers’ intent in documents such as the Federalist Papers, other contemporary writings, early Supreme Court decisions, early actions by Congress

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<sup>11</sup> See, generally, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 Harv. L. Rev. 941 (2008); Phillip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 Mich. L. Rev. 1364 (1994)

<sup>12</sup> See War Powers Act, Pub. L. 93-148, 87 Stat. 55 (1973), codified at 50 U.S.C. §§ 1541 et. seq.

<sup>13</sup> For example, when he signed a resolution authorizing the use of military force in Lebanon in 1983, President Ronald Reagan declared in a signing statement that his signature should not be viewed as acknowledging the constitutionality of the restrictions on the use of force imposed by the War Powers Resolution. See Statement on Signing the Multinational Force in Lebanon Resolution (Oct. 12, 1983) available at <https://www.reaganlibrary.gov/archives/speech/statement-signing-multinational-force-lebanon-resolution>. President Biden’s recent letter to the Speaker House and President Pro Tempore of the Senate reporting on U.S. military activity carefully characterized the report as “consistent with the War Powers Resolution” not in compliance with it. See Letter to the Speaker of the House and President Pro Tempore of the Senate Regarding the War Powers Report (June 8, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/08/letter-to-the-speaker-of-the-house-and-president-pro-tempore-of-the-senate-regarding-the-war-powers-report/>.

and the President and the debates at the constitutional convention. There, lawyerly cherry picking reaches the level of high art; comments are yanked out of context and presented as proof of one view or another and contrary comments are ignored or explained away. Practices and judicial decisions that may have been hotly contested in the 1790s are held up as proof of underlying settled intent. And in the vast majority of cases, original intent happily coincides with the political preferences of the Court majority, for example finding that the absence of a Takings Clause in the Fourteenth Amendment is of no moment since the Framers intended to incorporate the compensation requirement into the Due Process Clause of the Fourteenth Amendment. More often than not, a sober account would admit that the most that can be said is that the Framers had differing views or, in many cases, did not consider the matter in the depth necessary to resolve questions that arise. Instead, scholars and judges claim that history is on their side, when in reality text and history can justify multiple results and support none with the clarity that ought to be present before making an important constitutional decision.

A prime example of competing histories is the debate over whether the Framers of the Second Amendment intended it to protect an individual right to own a firearm for self-defense and whether such a right is enforceable against only federal regulation or also against state and local gun control measures. The Supreme Court's opinions on this reveal, at best, uncertainty and perhaps division

among the Framers, but each side, pro and con, claims that the history certainly supports their view.<sup>14</sup> Whether the easy availability of handguns is catastrophic to the well-being of millions of Americans is virtually irrelevant to Judges who pledge fealty to their (contested) view of the intent of the Framers. On my reading, the history is inconclusive and the text leans in the direction of an inextricable link between military preparedness and gun ownership. In fact, handguns for personal use are not in my view addressed at all by the Second Amendment; textualists may have a better argument for private ownership of military weaponry. Of course, I don't claim that my view reflects the actual intent of the Framers, I actually have no firm idea, but I don't think the Supreme Court majority that has effectively struck down dozens of gun control knows either.

A similar analysis could be applied to numerous fundamental constitutional issues. For example, there is perhaps no more significant structural constitutional argument than whether the Framers of the Fourteenth Amendment intended that amendment to apply the Bill of Rights against the states. Without what is termed "incorporation" of the Bill of Rights, very few practices of state and local governments would be touched by federal constitutional law. The text certainly does not answer this fundamental question and originalist judges and scholars have disagreed over it for decades, perhaps for more than a century. As in the gun

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<sup>14</sup> See *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

control area, there is good evidence on both sides and no conclusive evidence one way or the other.

Of course, there is nothing untoward when historians form opinions without conclusive evidence or when they stack inference upon inference to come up with likely understandings. But historians don't impose their views on others through law and the mechanisms of state coercion. When the Supreme Court imposes its will on hundreds of millions of people, fifty state governments, Congress and the President, it ought to base its actions on something more than contested views of history based on flimsy research. At the very least, there should be strong indications that the Court's judgment rests on or will improve social welfare. But another negative practical effect of originalist thought is that it displaces other methods of constitutional law-making by rendering them presumptively illegitimate. Jurists are rightly afraid to admit when their decisions are purely normative when historical sources leave important issues unresolved, preventing open debate about the true, perhaps more attractive, bases for decisions.

#### B. The Effect on Judges and Scholars

The felt necessity to base important decisions on original intent also forces judges to dissemble, essentially leading to misleading opinions that obscure their true bases. A prime example is the Supreme Court's decision requiring law



enforcement officers to “knock and announce” when executing a warrant at a private dwelling.<sup>15</sup> The originalist basis for the Court’s decision, in an opinion by Justice Clarence Thomas, is that the Fourth Amendment’s reasonableness requirement incorporates the common law requiring an announcement. The Court acknowledged that the rule did not apply to felony arrests, citing an 1884 treatise making the point, but then concluded that “[t]he common-law principle gradually was applied to cases involving felonies.”<sup>16</sup> The Court’s earliest citation for this point is an 1822 English decision (there goes the aversion to citing foreign law in U.S. constitutional cases) which post-dates the adoption of the Fourth Amendment by more than thirty years, making it impossible for the Framers of the Fourth Amendment to have incorporated the rule. An originalist like Justice Thomas simply cannot admit that the reasons for applying knock and announce in most circumstances are normative, that knock and announce likely results in less violence, greater respect for property and privacy and more orderly execution of warrants. Instead, originalism forces judges to dissemble and obfuscate on the reasons for their decisions.

While this may be more of a principled objection than a practical one, I actually find the form of originalism that claims that the Framers incorporated

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<sup>15</sup> *Wilson v. Arkansas*, 514 U.S. 927 (1995).

<sup>16</sup> *Id.* at 935.

well-established features of English common law into the United States Constitution the most bizarre claim of all. The Framers overthrew a system of government they rejected as tyrannical. It seems odd to suppose that simultaneously with rejecting a system of government they intended to incorporate (implicitly) that system's well-established features into their new, highly experimental Constitution. Incorporation might be a good idea; some features of English common law might be well-suited for application in the United States, and the ability to draw upon a preexisting set of rules might increase stability and add an air of legitimacy to the decisions of federal judges. The practical problem is that because the entire enterprise is so dubious, there is not developed standard for determining which features of English common-law are incorporated and which are not. For example, was English common law's rejection of slavery incorporated into American law?<sup>17</sup>

This reinforces the greatest practical difficulty with originalism, that in virtually all controversial cases originalism can be deployed to support the arguments of both sides if only to debunk the supposedly originalist claims of one party seeking to overturn the political decision under attack. Thus, at least as practiced in the Supreme Court of the United States, originalism does not provide either of the virtues that might otherwise support such an enterprise; it does not

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<sup>17</sup> See *Somerset v. Stewart*, 98 English Reports 499 (King's Bench 1772) (Lord Mansfield, J.).

meaningfully constrain judges and it does not apply positive law to cases involving controversial constitutional issues. This tends to be true of legal reasoning more generally: on close examination the claim that legal reasoning constrains judges rings hollow and the rule of law ideal of judges applying a determinate neutral body of rules is rarely even approached, even in cases applying positive law such as statutory and constitutional text. And yet judges and scholars are forced to pretend, and perhaps have even convinced themselves, that their historical research has revealed the single correct answer to questions that the Framers did not answer and perhaps never even considered.

I understand that there are originalists who, in good faith, believe that their view of the intent of the Framers is correct, whether it is consistent with the text of the Constitution or not. My guess is that it is a common experience for skeptics like me to encounter people who insist that they have discovered the true original intent and that courts ought to apply that intent because it is the correct view of positive, binding law. Usually, these conclusions “just happen” to be consistent with the holders’ general political opinions. People who support gun rights have strong views about the intent underlying the Second Amendment; people who oppose federal regulation have strong views about the intent underlying the Commerce Clause and so on. In short, in my experience views on original intent follow the heart, not vice versa.

### III. The Response

Needless to say, my thesis in this paper has provoked strongly negative reactions from many colleagues unfortunate enough to have been exposed to it. While there are multiple credible bases to dispute my thesis and analysis, I will respond here to the two most obvious critiques. The first repeats the assertion that is the basis for most originalist thought, that only originalism is consistent with the status of the Constitution as positive law, and in fact fidelity to the original intent underlying the Constitution is an imperative that is implicit in the nature of a written document representing higher law. The second, most common practical criticism is that, similar to reactions to the indeterminacy critique more generally, without methodological constraints, judges are completely free to impose their will on the law. This is even worse when it comes to constitutional law because without the constraining influence of originalism, the Constitution, adopted by the people and purposely made difficult to amend, becomes whatever the Justices of the Supreme Court say it is. In other words, it ceases to be worthy of the appellation “Constitution.”

My response to the first critique is anticipated by the prior discussion of the basis for originalism. Assertion is an insufficient substitute for persuasive argument when it comes to a foundational issue such as the proper methodology for interpreting and applying the Constitution. Unless it can be established that

originalism is the only plausible method of constitutional interpretation or that constitutional law would be a disaster without strict adherence to the original meaning, simply asserting that originalism is entailed by the nature of law is an insufficient basis for recognizing judicial power to override political decisions on important social issues. And there is nothing illogical or paradoxical or implausible about a method of constitutional interpretation that would be sensitive to factors other than the intent of the Framers such as social welfare or acceptability according to evolving principles of justice. It happens in the United States and countries across the globe every day. Some of these systems of justice are admirable and some are horrifying, but the difference does not lie in whether their judges adhere to originalism as a method of constitutional interpretation.

Justice Antonin Scalia's self-described "faint-hearted originalism," laid out in his 1988 Taft Lecture, is an example of a methodology that expands the frame of reference to include factors other than the original meaning of the Constitution.<sup>18</sup> In explaining his views, Justice Scalia conceded that even an originalist would not uphold corporal criminal penalties that would have been viewed as routine and perfectly acceptable by the Framers of the Eighth Amendment. Of course, "pure originalists" such as Randy Barnett viewed Justice Scalia's self-characterization as

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<sup>18</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849 (1989).

a betrayal, if not personal than at least a betrayal of the originalist ideal.<sup>19</sup> To them, any deviation from the original meaning of the Constitution is heresy especially when the deviation is made by the Supreme Court. In my view the simple insistence that constitutional *law* requires adherence to original meaning or some other form of originalist theory is the weakest argument for originalism.

The principal problem with the second critique, that without originalism the Constitution devolves into an application of the subjective views of the judges deciding cases is that much if not virtually all of the Constitution already is composed of the subjective views of the judges deciding cases, and always has been. Originalism did not prevent the Court from interpreting the Equal Protection Clause to allow racial discrimination or later prohibit gender-based discrimination, it did not hinder the Court's imposition of laissez faire economics during the Lochner era, it did not prevent the twentieth century expansion of the commerce power or the creation of extensive non-economic rights under the due process clauses, and it did not prevent the Supreme Court from overthrowing state and federal attempts to preserve election fairness through campaign finance regulation. In short, even without a thoroughgoing rejection of originalism, the Supreme Court is not and has never been actually constrained by any theory of interpretation

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<sup>19</sup> Randy E. Barnett, Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism, 75 U. Cinn. L. Rev. 7 (2006).

including originalism. In each case it simply applies whatever methodology best supports the current decision.

A likely response to my conclusion that the Court's decisions have not previously been constrained is that the whole point of originalist argument is to correct that error. Their goal is to persuade the Court to adopt originalism and if it did so, it would be constrained. Justice Thomas, for example, has consistently advocated for a more originalist view of the Constitution, and if a majority of Justices joined him, the Court would operate under the constraint of the originalist methodology. On this view, my argument against originalism is unfair because my problem is not with originalism but with the failure to adopt and apply originalism. It's like criticizing nutritionists because people still eat French fries.

My first reply to this is to remind the reader that the main problem with originalism as I see it is that originalists would sacrifice the welfare of society in service of originalist ideals, which I believe is not only wrong but an immoral use of government power. Government officials should use their power to increase social welfare, not decrease it. Now if originalism of some form turned out to be better in that it proves to be the best methodology for advancing social welfare, then I would say sure, we should employ originalism as our methodology. Some originalists appear to recognize this when they stress that adherence to the text and meaning of the Constitution, especially the procedural and structural aspects of it

enhances liberty. But that does not support the argument that adherence to original intent provides more constraint than other possible methodologies and it is not clear that originalism is better at preserving liberty than other potential methodologies, such as a non-originalist aggressive application of the Due Process or Privileges and/or Immunities Clauses to invalidate legislation perceived by judges to infringe on liberty. It also depends on contested views of the nature of liberty. Robert Bork, an originalist, favored judicial restraint and famously espoused the view that judicial invalidation of legislation interferes with the right of the majority to govern.<sup>20</sup> Perhaps the liberty of businesses was enhanced during the *Lochner* era, but what about the liberty of workers and consumers? People who breathe can credibly argue that their liberty is enhanced by strict environmental regulation of polluting businesses unless perhaps the definition of liberty includes the right to spend money on medical bills and funeral services.

The freedom of judges to declare the law is unfortunate not only because of the highly political nature of the appointment process. It is also because it is inconsistent with democratic values to entrust so many important issues to decision by unaccountable federal judges. Because the Constitution leaves so many important issues unresolved, federal courts are constantly faced with the question whether they should defer to legislative and executive judgments or impose their

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<sup>20</sup> Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 139 (Free Press 1990).



own views of the requirements dictated by the Constitution. If judges were more concerned with social welfare or more deferential to others' judgments, the openness of the Constitution might not be as problematic as it has become under current circumstances.

Even if we meet the rule of law argument on its own ground, I do not believe there are reasonable grounds to conclude that originalism would provide the sort of constraint that rule of law originalists claim, at least as applied to the Constitution of the United States. Although we know that past performance does not guarantee future results, I find it fair to bring up our historical experience with originalism to show that it is not likely to succeed in constraining judges. As we have seen, even Justices who purport to be originalists don't always follow original intent, and even when they claim they are, close examination reveals, as in the knock-and-announce case that they bend original intent to suit their normative views. Another methodology is necessary for the numerous issues for which original intent is undiscoverable, and open-ended provisions like the Ninth and Tenth Amendments provide minimal constraint on judicial decisionmaking. We are talking about a group of human judges with different experiences and differing views, not a set of machines that can be relied upon to spit out mathematically correct responses to complicated problems.

This most important aspect of the rule of law is the imperative that government officials, and all people from the least to the most privileged members of society, must obey the law as decreed by judges who enjoy a significant measure of independence. It does imply a preference for certainty in legal rules, but that concern places a distant second to the fundamental requirement of obedience to the law as decreed by courts. The preference for clear rules is an established element of legal reasoning but not primarily because unclear legal standards are inconsistent with the rule of law but mainly because clear legal rules tend to improve social welfare and minimize the opportunity for arbitrary judicial decisionmaking.

#### IV. Displacing and Replacing Originalism

It would perhaps be the height of arrogance to propose a method of constitutional reasoning cleansed of originalism and proclaim it as the ideal substitute for current practice. So here goes! (At this point, if this were a text message I would insert the appropriate emoji, probably a winking smiley face.) Actually, I will not pretend to have an answer. The irony, of course, is that anything I propose is vulnerable my principal indictment of originalism, that it is insufficiently attentive to social welfare. But while I do not pretend to have confidence that banishing originalism would be socially beneficial or that any replacement I propose would produce superior results as a matter of social welfare,

I can promise that my views are based solely on notions of social welfare, without conscious taint of ideology or adherence to methodological principles regardless of social welfare.

I also need to clarify my attitude toward originalist constitutional law before moving on to the issue of the appropriate replacement. I do not mean to suggest that courts should never follow the text or original meaning of the Constitution under any circumstances. Quite the contrary. When the text or meaning of the Constitution is clear and it does not appear that social welfare is harmed by following it, then in all likelihood the stability and predictability gain is worth the cost of losing out on potential gains from marginal adjustments in constitutional law. I recognize that pure textualism is impossible since at a minimum, context and conventions are necessary background to understanding the meaning of any text, but many issues are easily resolved by referring largely to unambiguous constitutional text. But again, pursuing social welfare ought to be the primary value pursued in legal decisionmaking, even in the face of what would be regarded as unambiguous text.

What I mean to rule out is “originalism for the sake of originalism,” the idea that the original intent, however discerned, should be treated as binding law subject to alteration only through the procedures specified in the Constitution for

amending it. In my view, as described above, it is immoral to place adherence to original intent above social welfare.

In controversial issues judges, even those purporting to be originalists, pretty much do what they think is right regardless of allegedly binding authority. And by “right” I mean a combination of political ideology, political affiliation and crude, relatively uninformed, policy judgment. Given what I view as disastrously bad constitutional law in some areas, it would be nice to have a theory that would replace current practice and produce better results, but I don’t see any competing comprehensive theory on the horizon. Perhaps encouraging judges to show a bit more restraint when they are asked to overturn the will of a majority in areas with great social consequences such as campaign finance and gun control, coupled with better judges, would do the trick. But given the highly politicized nature of appointment of federal judges and the current partisan divide, there can only be faintest of hopes that the quality of federal judicial appointments will change for the better in the foreseeable future. It is extremely unlikely that the federal judiciary will be staffed by judges swayed less by the ideological aspects of controversial cases than about their social welfare effects.

In terms of the shape of constitutional law sans originalism for the sake of originalism, it is important to understand that this whole discussion takes place against the background of a constitutional law that currently contains substantial

non-originalist reasoning in the many areas of law in which original intent is non-existent, not discernible or so abhorrent or outdated that even originalists decline to follow it.

Non-originalist legal reasoning is familiar to all lawyers. It consists of the application of legal texts, legal principles and precedent, informed by policy considerations and colored by evolving social consensus more or less influenced by society's power dynamics. Analysts disagree over the degree to which consideration of principle and policy do or should overwhelm judicial consideration and application of text and precedent; in this regard I identify with those who believe that policy should be the primary consideration, and I also believe that legal principles often embody policy considerations. However, narrow diversity of experience and background among judges means that these instinctive senses of good policy are likely to be colored by social background, self-interest and other biases.

The elimination of originalism for the sake of originalism might open constitutional law to greater consideration of what has been termed "aspirational constitutional law." As Kim Lane Scheppele has described it, "[a]spirational constitutionalism refers to a process of constitution building . . . in which constitutional decision makers understand what they are doing in terms of goals

that they want to achieve and aspirations they want to live up to.”<sup>21</sup> Similarly, Robin West has characterized aspirational constitutional law, at least as practiced in the legislative branch, as “a law of ideal moral principles-those principles of distributive justice toward which our politics aspire.”<sup>22</sup> But the idea of aspirational constitutionalism is in no way a recent creation. For example, in 1851, Frederick Douglass proclaimed that the Constitution is an anti-slavery document that can be “wielded on behalf of emancipation” and in 1852, he characterized the Constitution as a “glorious liberty document.” This despite the Constitution’s implicit and explicit endorsement of slavery.

My disagreement with these, and other, characterizations of aspirational constitutional law is that they focus too much on principle to the exclusion of policy. I recognize that many constitutional controversies revolve around principles such as equality and autonomy, but surely preservation of health, safety and prosperity are also important social goals relevant to constitutional law. Too often, ideological commitments obscure clear thinking and rational policy choices. In my view, originalism is one among many ideological commitments whose role in constitutional decisionmaking ought to be minimized.

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<sup>21</sup> Kim Lane Scheppele, Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models, 1 International Journal of Constitutional Law 296, 299 (2003).

<sup>22</sup> Robin West, The Aspirational Constitution, 88 Nw. U. L. Rev. 241, 263 (1993).

The key question that confronts me is whether courts should explicitly or exclusively consider social welfare in making their decisions. There are numerous pros and cons to explicit judicial consideration of social welfare. On the positive side, in my view basic morality requires government officials, including judges, to pursue social welfare in everything they do in their official roles, and it would be odd to expect them to do that while prohibiting them from openly considering the matter in their deliberations and decisions. My hesitation from endorsing explicit judicial focus on social welfare is that when they may not really be equipped to do so. When they have done so in the past they have sometimes made disastrous errors. The best example is qualified immunity. In 1982, for reasons sounding purely in social welfare, the Court eliminated the requirement that government officials act in good faith in order to be protected by qualified immunity.<sup>23</sup> The Court based its decision on what it saw as the negative social effects of litigation against government officials alleging that they had acted in bad faith; according to the Court, too many insubstantial cases were getting past summary judgment and litigation was distracting government officials and making them reluctant to take socially beneficial actions that might provoke litigation. By removing the most realistic avenue for challenging abuse of government power, this change appears to have disabled the legal system from dealing with police

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<sup>23</sup> Harlow v. Fitzgerald, 457 U.S. 800 (1982).

misconduct which, in some eyes, has reached epidemic proportions in the United States.<sup>24</sup> Importantly for present purposes, the Court's decision was purely normative as all traditional versions of immunity had included the good faith requirement.<sup>25</sup>

A similar critique applies to the Court's campaign finance jurisprudence. American constitutional law more vigorously protects political, commercial and artistic speech than the law in any other country in the world with which I am familiar. Traditionally, liberals favored broad protections for political and artistic speech, while conservatives were most anxious to expand constitutional protection of commercial speech, and they added monetary expenditures to the definition of political speech. The Court's decisions have swept away mountains of regulation in all three areas; for example, pornography is now freely available due to the Court's obscenity decisions that treat it as artistic speech, pharmaceutical companies and lawyers, among others, freely advertise due to the Court's commercial speech decisions and the voices of big money interests in the political arena have been vastly amplified due to the Court's campaign finance decisions.

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<sup>24</sup> See ACLU, *The Other Epidemic: Fatal Police Shootings in the Time of COVID-19* (2020) available at [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_the\\_other\\_epidemic\\_fatal\\_police\\_shootings\\_2020.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_the_other_epidemic_fatal_police_shootings_2020.pdf); Lynne Peeples, What the data say about police brutality and racial bias—and which reforms might work *Nature.com* (June 19, 2020).

<sup>25</sup> For more on the Court's abandonment of the intent basis for qualified immunity, see Jack M. Beermann, A Critical Approach to Section 1983 with Special Attention to Sources of Law, 42 *Stan. L. Rev.* 51, 67-70 (1989).



Originalism plays virtually no role in the First Amendment basis for judicial invalidation of campaign finance regulation.<sup>26</sup> In fact, First Amendment originalism is virtually impossible since, as Robert Bork famously reminded us, “[t]he first amendment, like the rest of the Bill of Rights, appears to have been a hastily drafted document upon which little thought was expended.”<sup>27</sup> The Court’s decisions have unleashed a flood of money into the political system which, to some, has had disastrous effects on our elections and the quality of government in the United States.<sup>28</sup> Like qualified immunity, the Court’s decisions are based, at least in part, on its policy judgments, here that “any ‘undue influence’ generated by a speaker’s ‘large expenditures’ was outweighed ‘by the loss for democratic processes resulting from the restrictions upon free and full public discussion.’”<sup>29</sup> However, in the First Amendment area, considerations of social welfare, other than generalities concerning the importance of political speech to preserving democratic accountability of government, are in the background as compared to discussions of principles and precedent. The Court does conclude, in its most (in)famous campaign finance decision, that independent political expenditures do not corrupt politicians, but it has no basis in fact for that conclusion; likewise it concludes

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<sup>26</sup> See generally *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010).

<sup>27</sup> Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 22 (1971).

<sup>28</sup> See Center for American Progress *How Campaign Contributions and Lobbying Can Lead to Inefficient Economic Policy* <https://americanprogress.org/article/how-campaign-contributions-and-lobbying-can-lead-to-inefficient-economic-policy/>

<sup>29</sup> *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 344 (2010), quoting *United States v. CIO*, 335 U.S. 106, 155 (1948) (Rutledge, J. concurring in the result).

without empirical support, that “[t]he appearance of influence or access . . . will not cause the electorate to lost faith in our democracy.”<sup>30</sup> These are assertions unsupported by research or scientific examination and, in light of the consistent attacks on federal elections in recent years, may be sadly inaccurate. The Court’s view that political spending is a form of speech worthy of the strongest form of protection under the First Amendment has not been subjected to a sustained examination from the point of view of social welfare and in my view, the Court does not seem to really care. There is no serious consideration of the social welfare effects of equating campaign-related expenditures with other forms of political speech.

In recent years, many have come to believe that these protections have had significant negative social effects by, inter alia, facilitating the election-related spreading of divisive speech and false information, the difficulty caused by the inability to curb defamatory speech, the perversion of our political process by big money interests and the easy availability of pornography on the internet. It has been argued that the Supreme Court uses the First Amendment as a vehicle for engaging in *Lochner*-like social engineering (based on ideology, not considerations

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<sup>30</sup> Citizens United v. Federal Election Comm’n, 558 U.S. 310, 360 (2010).

of social welfare) that has been virtually unanimously repudiated in the realm of economic regulation.<sup>31</sup>

What unites these two areas of law? In both, in my judgment, which I realize is subject to dispute and disagreement, the Court has exercised its power in ways that are destructive of social welfare. What makes it interesting to consider them together is that while neither is heavily influenced by originalist thought, one, qualified immunity, considers only social welfare, while the other, First Amendment protection of campaign-related expenditures, focuses primarily on principles and precedent. These are anecdotes, of course, in isolated and politically-charged areas of the law, and thus cannot be the basis for general conclusions about the quality of the Court's decisionmaking. I also do not mean to suggest that I have sufficient evidence to conclude that courts are uniformly bad at making decisions in light of social welfare concerns. It may be, for example, that state courts have been very good at shaping the common law to further social welfare where that is a primary focus in areas such as the law of property, torts and contracts. That is why some law and economics scholars privileged state common law as a model of rational decision making<sup>32</sup> and perhaps explains the canon of construction that statutes in derogation of common law should be strictly

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<sup>31</sup> See, e.g., Amanda Shanor, *The New Lochner*, 2016 Wisc. L. Rev. 133 (2016).

<sup>32</sup> Richard A. Posner, *The Law and Economics Movement*, 77 *American Economic Review* 1, 5-6 (1977).

construed. And it may even be the case that the constitutional law decisions of the Supreme Court of the United States have greatly increased social welfare. But consider the fact that, as far as I am aware, no Supreme Court Justice would qualify under the *Daubert*<sup>33</sup> standard as an expert witness on any of the policy matters that either come explicitly before the Court or are at stake in its decisions.

## V. Conclusion: The Effects of Non-originalist Decisionmaking

Without what may be impossible-to-obtain empirical support, it may not be possible to come to strong or even tentative conclusions on the social welfare effects of delegitimizing originalist constitutional decisionmaking. The most direct way to increase the quality of judicial decisionmaking is likely to be simply increasing the quality of judges, avoiding those who are blinded by ideological or partisan commitments or committed to methodologies with no apparent connection to social welfare. Perhaps federal courts, like the Supreme Court, should have professional staffs dedicated to analyzing the likely effects of competing legal rules, much like Congress employs entities such as the Government Accountability Office, the Congressional Research Service and the Congressional Budget Office. Imagine a requirement that the Supreme Court accompany major decisions with a regulatory impact statement embodying the Court's judgment on the likely social

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<sup>33</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (establishing standard for admitting expert's testimony under the Federal Rules of Evidence).

welfare effects of a change in constitutional law or statutory understandings.

Barring that, perhaps courts should admit that they are not competent to make the types of judgments that ought to govern when they are asked to reject the judgments of the legislative and executive branches and they should act only in extremis and only when they are confident of the likely effects of their interventions.

Given the extreme unlikelihood of a transformation in the judicial branch's structure or its role in the United States government, banishing arguments based on originalism for originalism's sake would likely result in decisions influenced somewhat more by principle, policy and precedent, hopefully with an extra dose of judicial restraint in light of the limitations on judges' ability to make sensible policy decisions. This may be due in part to my sense that when decisionmakers shift their focus to disputes over the social welfare effects of competing rules, their lack of competence to make a judgment may be revealed, even to themselves. Non-originalist decisionmaking might reveal strengths and weaknesses in policy judgments that might otherwise be obscured by originalist rhetoric. In addition to increased deference to the political branches and the expertise of agency decisionmakers, the ground could be shifted to more sustained consideration of human dignity, social welfare, individual autonomy and other values, in other

words the grounds upon which many informed members of society argue over Supreme Court decisions.

While in an ideal world, some may advocate junking the entire system and starting from scratch, in the real world there is, to my mind, nothing wrong with beginning judicial decisionmaking with a presumption in favor of following precedent. Holmes was certainly correct when he said, in *The Path of the Law*, that “It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”<sup>34</sup> However, in many situations, precedent appears to be a useful repository of knowledge and, more importantly, experience. When longstanding precedent has not been legislatively reversed or has not provoked strong social opposition, e.g., in constitutional areas not subject to legislative overruling, precedent may embody sound policy. Put simply, when social forces have settled on a status quo without significant agitation for change, there is reason to believe that any achievable alternatives are less attractive.

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<sup>34</sup> Oliver Wendell Holmes, *The Path of the Law*, 1 Boston L. Sch. Mag., Feb. 1897, at 1, 11, republished at 10 Harv. L. Rev. 457 (1897) (address given at the opening of the Boston University School of Law’s new building). I would not subscribe to everything Holmes said in that address, including especially his advocacy of banishing all language evocative of moral concerns from legal discussions. 1 Boston L. Sch. Mag., Feb. 1897 at 7.

So, is there reason to believe that non-originalist constitutional reasoning would lead to better decisions than originalism? Here, I have to confess that I do not know and I am not sure this is an answerable question. I would hope that by focusing on social welfare, legal principles and other policy concerns, decisionmaking would be better than if it were constrained by originalism detached from social welfare concerns. But I have no evidence that this would be the case, and there is a chance that things would get worse, that judges freed from the perceived constraint of originalism would stray into decisions as harmful and pernicious as *Dred Scott*,<sup>35</sup> the Civil Rights Cases,<sup>36</sup> *Plessy v. Ferguson*,<sup>37</sup> *Lochner v. New York*,<sup>38</sup> *Citizens United*,<sup>39</sup> *District of Columbia v. Heller*<sup>40</sup> and *McDonald v. City of Chicago*.<sup>41</sup> Notice, however, that the decisionmakers in this list of greatest hits of terrible decisions were convinced, or at least claimed that they were convinced, that they were obeying the meaning of the Constitution as understood

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<sup>35</sup> *Dred Scott v. Sandford*, 63 U.S. 393 (1857) (African-American descendants of slaves are not citizens of the United States capable of suing in diversity jurisdiction; Congress lacks power to legislate concerning status of slavery in states).

<sup>36</sup> The Civil Rights Cases, 109 U.S. 3 (1883) (Civil Rights Act of 1875, outlawing racial discrimination in public accommodations, is unconstitutional).

<sup>37</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896) (state statute requiring “equal but separate” accommodations on railroads does not violate the Equal Protection Clause of the Fourteenth Amendment).

<sup>38</sup> *Lochner v. New York*, 198 U.S. 45 (1905) (state law setting maximum hours for bakers violates Due Process). Many similar state labor regulations were struck down on these grounds during the period known as the “Lochner era.”

<sup>39</sup> *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010) (applying strict scrutiny and striking down limits on campaign-related expenditures involving speech).

<sup>40</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008) (recognizing Second Amendment right to own a handgun for personal protection and striking down District of Columbia gun control ordinance).

<sup>41</sup> *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (holding for first time that the Second Amendment limits state and local gun control).

by the Framers of the Constitution. Certainly they were all made while under the influence of originalist thinking. While some of them may have honestly believed that they were doing the right thing in social welfare terms, without explicit attention to what ought to be the primary guiding star of all government action, by society, who knows?