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Why, or Why Not, Be an Originalist?

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The Federalist Society Presents:

**SHOWCASE PANEL II:
WHY, OR WHY NOT, BE AN ORIGINALIST?+**

With an Introduction by Dean Reuter, Esq.

November 15, 2019
National Lawyers Convention
The Mayflower Hotel
Washington, D.C.

*Featuring*¹:

HON. AMY CONEY BARRETT
United States Court of Appeals, Seventh Circuit

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PROF. SAIKRISHNA B. PRAKASH
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Sudler Family Professor of Constitutional Law, New York University Law
School

MODERATOR: HON. THOMAS HARDIMAN
United States Court of Appeals, Third Circuit

⁺ On November 15, 2019, the Federalist Society hosted the second showcase panel of the 2019 National Lawyers Convention at the Mayflower Hotel in Washington, DC. The topic of the panel was “Why, or Why Not, Be an Originalist?” There are a variety of arguments for following originalism today, such as justifications rooted in language, positivism, sovereignty, and consequences. This panel would look at many normative positions for and against originalism.

1. Please note that the Speakers have reviewed and edited this Transcript.

TRANSCRIPT

DEAN REUTER: Good morning. Let's get started if we could. Thank you very much. I'm Dean Reuter, Vice President, General Counsel, and Director of Practice Groups at The Federalist Society. Welcome and thank you all. Welcome back, or welcome, as the case may be. This is the second and best day of The Federalist Society National Lawyers Convention, so thank you for being here. This is our showcase panel on "Why, or Why Not, Be an Originalist?" And as Justice Kagan has said, and as we heard again last night, we're all originalists now.² So one could wonder, if we're all originalists, why do we have a panel on or why or why not be an originalist? I'm interested to find that out myself, so we'll find out momentarily.

But I thought we had a great day yesterday, capped last night by what I thought was a very personal and touching address by Justice Kavanagh, just splendid. And I don't think people in this room necessarily know, but that event was sold out before we could advertise it. So it's a good time to be in The Federalist Society. And I apologize for the delay in getting into the room last night, into the building. That was caused by a last minute security, a second security sweep of the entire building. It turns out a security sweep that was almost perfect but not quite perfect, as we did have one protestor in the room.

So the good news is that that protestor last night, if you were there—who tried to interrupt the proceedings—she apparently did pay for her dinner ticket.

[Laughter]

Someone suggested it might be nice for us to take that money and do something meaningful or useful with it. We charged \$250 for dinner last night for nonmembers, and I'm pretty confident she was not a member. So you all know me. If you have a great idea of how The Federalist Society should spend that \$250, let me know. I was thinking staff bonuses, but you might have better ideas.

[Laughter]

In terms of special things going on today, there's an exhibit today upstairs in the Rhode Island Room of one of the original copies of *The Federalist Papers*. If you get a chance, you should really take a look. It's going to be on display tomorrow as well, but only part of the day tomorrow. So that's the Rhode Island Room upstairs. We've got more book signings today as well—but please don't sign the *Federalist Papers* upstairs—several panel discussions, and an address, of course, by Labor Secretary Eugene Scalia. And then we'll end the day with an address by Bill Barr, the Olson Lecture.

One thing we've added this year—actually, we had it last year—is the livestream of all of our proceedings, virtually all the proceedings. So I would encourage folks to email and tweet your friends and family, let them know they

2. *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. On the Judiciary*, 111th Cong. (2010) (statement of Elena Kagan, Nominee to the Supreme Court of the United States).

can watch all these proceedings online. Just go to The Federalist Society website, fedsoc.org.

With that, it becomes my duty to introduce our moderator, Judge Hardiman. I've urged all our moderators to introduce their panelists very briefly, so I'm going to introduce him only briefly by saying he's a great friend of the organization, a repeat performer here. And I welcome him. Please join me in welcoming Judge Tom Hardiman.

HON. THOMAS HARDIMAN: Thank you, Dean. It is a great privilege for me to be here to moderate this panel of outstanding thinkers and scholars. Our first presenter this morning will be the Honorable Amy Coney Barrett. She has served as a judge of the United States Court of Appeals for the Seventh Circuit for the past two years. She spent some time here in Washington serving as a law clerk to Judge Laurence Silberman and Justice Antonin Scalia. She also practiced law at Miller, Cassidy, Larroca & Lewin for three years before returning to a place that is near and dear to my heart, the University of Notre Dame. In 2002, Judge Barrett returned to her alma mater, where she became a distinguished professor of law. In addition to her extensive duties on the Seventh Circuit, she continues to teach at Notre Dame.

After Judge Barrett, we're going to hear from Professor Richard Pildes. He's the Sudler Family Professor of Constitutional Law at NYU Law School. He's one of the nation's leading scholars of constitutional law and a specialist in legal issues concerning democracy. A former law clerk to Justice Thurgood Marshall, Professor Pildes has been elected into the American Academy of Arts and Sciences and the American Law Institute. He also received recognition as a Guggenheim Fellow and a Carnegie Scholar. Professor Pildes authored an acclaimed casebook on *The Law of Democracy*.³ And we'll hear more from Professor Pildes about the law of democracy during his remarks.

Our third presenter will be Professor Sai Prakash. He's the James Monroe Distinguished Professor of Law and the Paul G. Mahoney Research Professor of Law at the University of Virginia Law School. A graduate of Stanford University and Yale Law School, Professor Prakash clerked for, like Judge Barrett, Judge Laurence Silberman here in Washington. And he also clerked for Justice Clarence Thomas. A widely respected scholar of the separation of powers in general and executive power in particular, Professor Prakash's forthcoming book, *The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers*, will be published by Harvard University Press next year.⁴

Last, but certainly not least, Professor Michael Dorf is the Robert S. Stevens Professor of Law at Cornell Law School where he has taught since 2008. A

3. SAMUEL ISSACHAROFF, PAMELA KARLAN, RICHARD PILDES & NATHANIEL PERSILY, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (5th ed. 2016).

4. SAIKRISHNA BANGALORE PRAKASH, *THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS* (2020).

prolific author of more than 100 articles and essays, Professor Dorf is co-author with Professor Laurence Tribe of *On Reading the Constitution*.⁵ A graduate of Harvard College and Harvard Law School, Professor Dorf clerked on the Ninth Circuit for Judge Stephen Reinhardt and on the Supreme Court for Justice Anthony Kennedy.

In the grand tradition of The Federalist Society, we will have opening statements of approximately ten minutes from each of our panelists, followed by diverse opinions and vigorous discussion. We will conclude with questions, I reiterate, *questions*, from the audience at the tail end of the presentation. So without further ado, Judge Amy Barrett.

[Applause]

HON. AMY CONEY BARRETT: Thank you, Judge Hardiman. I'm delighted to be at the convention and on this panel this morning. I look forward to a lively debate.

At bottom, I think one ought to be an originalist because the Constitution, no less than a statute, is law. It's not merely a statement of our aspirations, as some have described it, nor, as others have said, is it simply a symbol of our political culture's commitment to the idea of fundamental rights. Those things are true of the Declaration of Independence, a document that we revere. But the Declaration does not bind us, and the Constitution does. It's more than an expression of political ideals. It has the force of law.

Why is the Constitution law? As an initial matter, the original Constitution, along with each of its amendments, was adopted in an exercise of popular sovereignty through a process self-consciously designed to create authoritative law. And the authoritative law that the people created is the text that they ratified. That text is what satisfied the onerous process of ratification. That is what has supermajority buy-in. And if a constitutional provision became authoritative because the people consented to it, then we need to know what they consented to. And to discern that, we look at the meaning that the text had at the time it was drafted and ratified.

Two features of our Constitution make that possible. The fact that it is written enables us to identify the content of our constitutional commitments, and the fact that the Constitution and its amendments become authoritative through a formal process enables us to put the text in its historical context. The same isn't true of an unwritten constitution, for example, like the British Constitution. If fundamental law grows through a largely unwritten tradition, it is difficult to pin down its precise content, much less to isolate the moment at which any given principle becomes fundamental law.

Our Constitution is structured differently. Its meaning was fixed at the time it was written and formally adopted, and it stays the same until it is lawfully changed. And this fixation of the text is part of our constitutional design because it sharpens the constraint. The content of the commitment does not change even

5. LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* (1991).

if popular attitudes wax and wane. Even if a majority of the country thinks that free speech is passé, the First Amendment stands.

Arguments that the text is authoritative raise a number of objections, but a common one is the dead hand objection. We were not among the people who ratified any of these constitutional provisions, nor, when some of these constitutional provisions were ratified, would many of us have been able to participate in their ratification. So why should we be bound to the text as those who ratified it understood it?

This is more than an objection to originalism. It's an objection to the Constitution's status as law. On this view, the Constitution has no claim on us because we didn't participate in the process of its adoption. But this idea doesn't really have purchase in real life. For example, we've recently seen criticisms of the Electoral College and of equal representation in the Senate. But we don't see serious proposals to simply abandon the Electoral College in the next election or to seat more than two senators from California.

We wouldn't make either change without a constitutional amendment because, in our ongoing society, each generation treats the law as authoritative until it is lawfully changed. And the constitutional law that is handed down is—I'm going to borrow this from Professor Stephen Sachs—the founder's law plus lawful changes.⁶ To figure out what the law is, we go to the source. We identify the meaning of the text that the people ratified and account for any lawful changes that have happened since.

Now, it's indisputably true that a constitutional change is hard to come by. The hurdles of the Article V process are steep. Does the difficulty of that process mean that we're stuck with the Founders' law, no matter how much we might want to change it? Or, put differently, is the Constitution a straitjacket? No. For one thing, it bears emphasis that the Constitution itself leaves plenty of room for change, political, legal, social, and otherwise. The Constitution is less than 6,000 words, and it makes no attempt to regulate every aspect of American life. It leaves change largely in the hands of the states and of the political branches of the federal government.

The Constitution may be hard to amend, but legislation is easier to pass. And state constitutions are much easier to amend than our federal Constitution. As Judge Sutton has reminded us, we have 51 imperfect solutions, not one.⁷ Our Constitution is not supposed to be the mechanism by which we accomplish every change, even significant ones.

Moreover, when the Constitution does speak, it does so through a mix of rules and standards. That has given the Constitution the flexibility to last. It speaks not only in specifics but also in generalities. And fidelity to the Constitution

6. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 819 (2015).

7. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

means respecting the level of generality at which the text is written, not to transform standards into rules or vice versa. As Justice Scalia said, text should not be construed strictly.⁸ It should not be construed leniently. It should be construed reasonably to contain all that it fairly means.

Now, notwithstanding the ways in which the Constitution leaves us flexibility, there is no denying that it also imposes constraints. After all, entrenching certain values and structural features of government is the point. Is that reason to say that we ought not be bound by this law, including by the mechanisms that it proscribes for change? Again, no.

The difficulty of constitutional amendment is, in my view, one of the things that enables us to hang together as a country. Amending the Constitution is difficult not simply because Article V makes it so. It's because the size and diversity of our country makes supermajority buy-in very difficult to achieve. But perhaps that's okay. Having fewer, rather than more, national and entrenched rules, thereby permitting regional differences to flourish, is necessary in a country like ours. It's remarkable, really, that the people of Louisiana and California, of New York and New Mexico are able to live under one constitutional roof.

We compare ourselves to Western European countries. But consider that Germany, closest to us in size, is roughly 138,000 square miles and has a population of roughly 83 million. The United States has a population of roughly 330 million and is roughly 3.8 million square miles. While I haven't looked at the statistics, I think it's a pretty safe bet that we have more racial, cultural, and religious diversity than any of our Western European peers or our Canadian neighbors. The Constitution that we have may not be the one that we would adopt if we started from scratch with our own constitutional convention today. Then again, I'm skeptical that we would be able to agree on any constitution at all today. But we do agree on the one that we have, as reflected by our continued acceptance of it.

We treat our original Constitution as law, and we are right to do so. If we abandon it, if judges or elected officials seize the authority to change it outside of the lawfully proscribed process, then we're imposing constraints on the People to which they have not consented. And I think that undermines the ability of the citizens of our very large and diverse country to live peaceably together under one constitutional roof.

I'll sum up by saying this: in keeping with the theme of "we're all originalists now," the really interesting questions involve the mechanisms for lawful constitutional change, not whether the Constitution binds. Identifying the level of generality at which provisions are written, analyzing the authority of precedent, and determining how one builds out the more general language of the

8. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23 (1997).

Constitution are all areas in which a lot of fruitful debate is occurring. Thank you.

[Applause]

PROF. RICHARD H. PILDES: Up until now, I have largely avoided getting caught in the crossfire of the debates between originalists and non-originalists. In my academic work, I haven't engaged extensively with the debates over the proper method or methods of interpreting the Constitution. But now that this event thrusts me onto that battlefield, maybe I can add a bit of a different perspective to these debates by engaging them from a somewhat different perspective, which as Judge Hardiman said, is the perspective of the substantive body of law much of my work addresses—the body of law I call the “law of democracy.”

Starting from a focus on the law of democracy, I want to raise the particular question, for those who are originalists, whether originalism should be understood as a complete theory of constitutional interpretation or only a partial theory. More specifically, are there some domains of law that even originalists do recognize or should recognize that are not and should not be governed by originalism—that are, in fact, legitimately even anti-originalist? Not surprisingly, perhaps, I want to suggest one of those domains is the law of democracy. This body of law is probably the most radically non-originalist body of constitutional law that we have. It's been deeply established for 50 years or so now. Much of this law is widely accepted and not controversial, although some aspects of it, of course, are.

Here is a list of just four of the fundamental building blocks of the law of democracy, just to ensure that everyone knows what constitutional doctrines I'm talking about. First, there is the Court's recognition of the right to vote as a fundamental right under the Equal Protection Clause, although this could easily also be called an application of substantive due process.⁹ Second is the Court's recognition that grossly malapportioned legislative districts violate Article I, Section 2 of the Constitution or the Fourteenth Amendment—that is the establishment of the one-person, one-vote principle.¹⁰

Third, there is the body of constitutional law that strikes down, under the First Amendment, ballot access laws that make it unjustifiably difficult for third parties or independent candidates to get onto the ballot—the doctrine that John McCain benefited from when he challenged George Bush in the 2000 election primary because New York law for decades had made it virtually impossible in the Republican presidential primary for anyone other than the candidate the party establishment had anointed even to get on the primary ballot.¹¹ Fourth, there is the corpus of constitutional law that recognizes that political parties have constitutional rights that prohibit states from allowing, for example, independent

9. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

10. *Reynolds v. Sims*, 377 U.S. 533, 561–68 (1964).

11. *See Williams v. Rhodes*, 393 U.S. 23, 25 (1968).

voters to vote in a party's primary, even though the states can impose a primary on the parties in the first place.¹²

I can't explain in detail here why all of these doctrines are so dramatically non-originalist. Nor have I included in this list of four central, non-originalist areas of the law of democracy other constitutional doctrines in this area that some would argue (while some would not) are more closely tied to the specific text of the constitution, such as constitutional law decisions involving campaign finance, racial vote dilution, or racial gerrymandering. I want to focus just on key doctrines in this area that pose the most direct challenge to originalism. And with respect to the four areas I've mentioned—constitutional protection of the vote or access to the ballot box or the design of legislative districts or the role of political parties—it is simply not easy to square any of these with the text of the Constitution or with any version of originalism (whether that originalism focuses on public understandings at the time the relevant constitutional provisions were enacted, the expected application of those provisions, or original intent understood more narrowly). Indeed it's not even easy for *non-originalists* to square this body of law with interpretive approaches based on the evolving historical practices of American democracy. These lines of constitutional development were more radical even than that.

The underlying reason it is difficult to square this body of law with originalism or even some non-originalist approaches to interpretation stems from one of the paradoxes of our Constitution. The paradox is that, precisely because we are the oldest continuous constitutional democracy, the Constitution itself is remarkably thin and underdeveloped when it comes to much of how the democratic process and the frameworks for elections should be constructed. Many reasons exist for that, including that the Framers could not anticipate certain aspects of how democracy would develop. More modern constitutions frequently spell out in detail issues concerning individual political rights, or the rights of political parties, or the institutions that oversee the democratic process (such as independent electoral commissions). But the text of our Constitution contains much less than most Americans realize with respect to the basic rights and structures of democratic process.

Most historians agree, for example, that the glorious Fourteenth Amendment, for example, was not intended, or publicly understood, to include political rights. Similarly, modern issues the Framers could not have anticipated did not even arise until far later in our history. Constitutional issues concerning state regulation of the ballot couldn't even arise, for example, until the states began to take over the process of printing an official state ballot, which didn't happen until the rise of the secret ballot in the 1890s. Once the state took over that function, state regulation over access to the ballot inevitably followed, along with concerns about state actors using that control for their own partisan

12. Cal. Democratic Party v. Jones, 530 U.S. 567, 581–82 (2000); United States v. Classic, 313 U.S. 299, 316–18 (1941).

advantage—which, in turn, generated questions about whether constitutional doctrine had anything to say about this risk. Political parties were thought to be anathema to the system the Constitution was designed to set up, the quintessential form of Federalist No. 10’s faction.¹³ Yet, by the time of World War II, almost all the new constitutions came to protect the rights of political parties as one of the foundational principles of democracy; in the aftermath of one party totalitarian states, two or more political parties competing for power came to be understood as almost definitional of democracy—despite our constitution not saying anything about political parties.

Moreover, much of the law of democracy, which began to be created in the early 1960s, was born directly in the teeth of contrary constitutional text, or at least so a textualist or an originalist might argue. The Elections Clause in Article I, for example, gives Congress the power to regulate how congressional districts are drawn.¹⁴ Thus, the text of the Constitution expressly empowered Congress to end the massive malapportionment of congressional districts. That textual grant of power to Congress played a role in the Court’s decisions, for many decades, to treat malapportionment as a political issue, not appropriate for judicial resolution.

But eventually, the Court learned something that the Framers couldn’t have known. With the rise of political parties, members of Congress and state legislators would come to share common political interests, common incentives, and common fates. As a result, the vision that Congress would stand above and independent of state legislative politics and serve as an effective institutional check on practices like state-legislative manipulation of the way districts are designed become unrealistic. One way of understanding the one-person, one-vote doctrine that eventually emerged is that, once it became more clear how our political institutions functioned after political parties became established, the Court concluded that constitutional law needed to assume the role that congress would not in ensuring that the way election districts are drawn does not undermine a fundamentally fair and equal political process.

What should we call the approach to constitutional interpretation that justifies the doctrines I’ve briefly described here, along with the rest of the law of democracy? To offer a brief, single sentence answer to that I turn to none other than Justice Scalia, who once wrote, “The first instinct of power is the retention of power”¹⁵ That highly pragmatic, functional statement—surprising, perhaps, from Justice Scalia—was offered to explain his then-dissenting view that the Court should strike down a campaign finance law. More generally, that statement suggests that one of the primary functions of judicial review is precisely to provide a check against letting “the instinct to retain power” be turned into legislation.

13. THE FEDERALIST NO. 10 (James Madison).

14. U.S. CONST. art. I, § 4.

15. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 263 (2003) (Scalia, J., dissenting).

Let me elaborate on Justice Scalia's point. As a general matter, we know that in any democratic system those who temporarily gain power will be tempted to leverage that power into more enduring forms, through policies that entrench themselves and their allies more securely in control. Those efforts might entail using legislation to reduce competitive threats from opposition parties or using temporary power to undermine the other checks and balances meant to hold political power accountable.

If we had grown complacent about that threat, we just have to look at the rise in formerly democratic countries today, for example, in Hungary and Poland, of what's been called electoral authoritarianism: governments that continue to hold competitive elections, or at least nominally competitive elections, in order to get legitimation from the political process, but use their power in office to capture control of the courts, the media, and of the electoral process itself through gerrymandering election districts and other structural manipulations that create significant hurdles to meaningful political opposition.

This risk of political self-entrenchment that insiders will rig the system for their own benefit is one all democracies face. We know that. That makes quite powerful an understanding of judicial review that sees one of its most important functions of judicial review to be the protection of democratic self-government against these always-present risks, which cannot easily be protected against from within the democratic process itself.

Is this a matter of constitutional interpretation? Shall we call this a representation-reinforcing approach to judicial review, à la John Ely, or an approach based on the Constitution's underlying structures and relationships, à la Professor Charles Black? Perhaps. But, rather than a matter of what might be called interpretation, maybe this is even better understood as a matter of applying principles constitutive of the very idea of government by consent that we understand underwrites the Constitution as a whole: the idea that the coercive power of the state is legitimate only when it arises through processes of political competition not distorted through these kinds of manipulations of that process by incumbent political forces.

Let me conclude by asking how originalist constitutional theory deals with this major, but non-originalist, body of law? Others here can answer that perhaps better than me. In general, I do not think that originalists have grappled much yet with the law of democracy as a body of law—I don't think non-originalists have done enough of that either. But here are three options I can briefly identify in the work of some non-originalists.

The first is flat out rejection: for originalists to deny the legitimacy of most or all of the law of democracy. That is the approach Robert Bork appears to have taken in *The Tempting of America*, but he only spends a couple of sentences on this area of law.¹⁶

16. ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990).

The second option is a kind of partial accommodation, coming up with heroic interpretations of the text to accommodate at least some of this body of law. That's what one of our best originalists, my friend Professor Michael McConnell, has done to justify the Court taking on the issue of malapportionment. He argues that the Republican Form of Government Clause should be understood to bar the kind of malapportionment that existed before the Court stepped in.¹⁷ But even that approach, which is designed to protect effective majority rule, as he says, only deals with one aspect of the general problem of self-entrenchment and not with the full range of anticompetitive laws courts have struck down in the name of the First Amendment or the Fourteenth Amendment to preserve the processes of democratic competition.

A third option for originalists is the one I suggested at the beginning: to accept that at least some domains of our most important constitutional law are legitimately not originalist or even anti-originalist. It is a simple reality of democratic politics everywhere that a major risk to democratic self-government is that those with power will use it to entrench themselves more deeply in power, and, for that reason, one of the primary needs and justifications for constitutionalism itself, and judicial review, is to protect the democratic process against that risk.

Of course, even if this non-originalist justification is persuasive as a general matter, we will still disagree in practice about how to apply judicial review in concrete cases involving the democratic process. But unless originalists are prepared to shut the door completely for any such role for the courts, we should at least acknowledge some role for a non-originalist approach to constitutional interpretation. Thank you.

[Applause]

PROF. SAIKRISHNA B. PRAKASH: Well, it's an absolute pleasure to be here today. I'm very impressed with the size of the audience, and I'm honored to be with these wonderful speakers. I can see many people in the audience that know about as much about originalism as I do.

The topic today is, "Why, or Why Not, be an Originalist?" And it's an odd question to me because it's a bit like asking why or why not be a human. I think originalism—this is my first point—originalism is the natural way of understanding utterances. I think Richard Fallon in his book, *Implementing the Constitution*, writes that most of his students come to Harvard Law as originalists.¹⁸ They try to understand what the law makers are trying to enact. And he says most people are originalist. And I don't know what happens to those students once they leave Harvard Law School, but they came with the right instinct. I was an originalist before I went to law school, before I went to college.

17. Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 105–06 (2000).

18. RICHARD H. FALLON, *IMPLEMENTING THE CONSTITUTION* 13 (2001).

You try to understand people's utterances. You try to understand what they're trying to convey.

Law making is a form of communication. We're trying to discern what the law-maker's trying to provide. If we're honest with ourselves, we don't try to invest what meanings we prefer. Parents give instructions to children. If children are manipulating the meaning of those instructions to serve their own ends, they're not really trying to understand what the parents are saying. That's not true interpretation. So I think Fallon is right. It's the natural way of understanding utterances. It's the natural way of understanding communications. It's the natural way of understanding law, as well.

And I think we can see this today. If you are fortunate enough to watch the impeachment hearings, you will hear ad nauseum hundreds, if not thousands, of times over the next several months "What did the Founders think about impeachment?" Half of the Congress will say the Founders would have wanted Donald Trump to be impeached because he's committed high crimes and misdemeanors. They'll quote Article II, Section 4, which talks about "shall be" impeached for the following high crimes and misdemeanors.¹⁹ And if you're a Republican, you'll talk about perhaps the Founders rolling over in their graves. This is not an impeachable offense, they will argue. But I'm not interested in the specifics of the arguments.

My point is they're both making this argument because it is precisely what people expect. If a member of Congress goes up there and says, "We don't really care what this clause was meant to do. We just want to get rid of the President, or we just want to save the President, come what may," that's just not a legitimate argument in Congress, I don't think, certainly not at this point. And these sorts of arguments are going to be made because people expect to hear them. In my view, the marks on a page, the utterances that people make are not an invitation to readers or to listeners to generate meanings that are at variance with what the speaker was trying to convey or what a reasonable reader would take the text to mean.

My second point is that originalism is not about whether we should honor some meaning. I think I perhaps disagree with Judge Barrett, with all due respect. I think meaning is different and separate from decisions to act, to honor, and to be bound by. In other words, saying what some text means does not establish that we ought to abide by whatever injunction, cautions, and warnings are in the text.

Using originalism, I can tell you what the Articles of Confederation mean. That's not a reason for us to follow the Articles of Confederation. I can tell you about the 1788 Treaty of Alliance with France. That treaty is defunct, declared by Congress as such during the quasi-war with France.²⁰ A Canadian using originalism can understand our Constitution. Obviously, the Canadian does not

19. U.S. CONST. art. II, § 4.

20. Act of July 7, 1798, ch. 67, 1 Stat. 578.

need to follow our Constitution or feel any allegiance to it. When talking about some defunct law or expired law, I think we understand this. Not much turns on the Fugitive Slave Clause. We can still figure out what it means. Not much turns on it because of the Thirteenth Amendment.²¹

So in my view, originalism properly understood is not a normative theory. It's a theory of interpretation about what something means. I think I've gotten this notion from Randy Barnett and Gary Lawson. It's not a theory of normativity. It's a theory of what something means. And you need something else to decide what to do with what the text means. So whether we should honor something requires a normative theory.

Let me unpack that. Some people say that we should follow the Constitution because it was adopted by means of popular sovereignty. I think Judge Barrett said that, and other people have eloquently also made that sort of argument. But I don't think that follows. If the question is, "What does the Constitution mean?"—I don't think it follows that we should be originalists because it was adopted by means of popular sovereignty.

It seems to me someone can be an originalist, someone can try to make sense of a text, whether or not they agree with popular sovereignty. There will be some people, call them libertarians, who may blanch at what comes through or what emerges from a process reflecting popular sovereignty. And there'll be other people who have different points of view. So I think one can be an originalist. One can be a believer in popular sovereignty.

One can also reject this Constitution on the grounds that it's no longer a reflection of the popular sovereignty of today. One can take the Jeffersonian position that the Earth belongs to the living and that the past shouldn't be able to control the present, certainly not the past of 200 years ago. I agree with Judge Barrett. It's often said of originalism that it allows the past to control the present. It really doesn't. It's a mode of interpretation. Whether you choose to be bound by the past is up to you. It's not ascribable to the theory of interpretation.

So again, if what I've said is true, originalism is a theory of interpretation. It's not a normative theory. And this takes me to my last point. I think the last point reflects the curious position we're in. Everyone in this country wants to say that they subscribe to the Constitution, they believe in the Constitution. Then the fight is, well, what do we make of it? I think originalists have on their side this intuition that the meaning of the Constitution ought to be understood by reference to what it meant in 1789, because, again, I think that's the natural way of understanding words.

And people that believe in change on and change in the Constitution on a more progressive vision of the Constitution, they have cases and doctrines that many people actually like. There's a good portion of the country that likes much of what the Warren Court did. There's a good portion of the country that likes some of the things that the more recent Court has done. And they're able to

21. U.S. CONST. amend. XIII.

point to those things. Professor Pildes just did that. They're able to point to those things and say, "If you're an originalist, you have to reject all these things."

So what we see is a struggle, I think, over how to make sense of the words of the Constitution to account for both of these impulses. And I think the originalists have the idea that originalism is the natural way of understanding the Constitution. And living constitutionalists have in their corner the idea that there are many innovations in constitutional law that people favor. Many people would favor some of the innovations that Professor Pildes mentioned earlier.

Let me end with two points. First, Justice Scalia wrote a wonderful article called "Originalism: The Necessary Evil."²² And I commend it to you. I think the Justice was wrong. It's not an evil at all. Interpretation is not evil. What you do with a clause may or may not be evil. So the Fugitive Slave Clause has a meaning. The Clause itself is evil, but the act of interpreting it is not. So I think it was a mistake to talk about it as an evil. I think what he was trying to suggest was, as compared to other ways of deciding cases or deciding meaning, it's less evil. But I don't know why you would call originalism evil any more than you would call interpretation evil. I don't understand that.

And my second point is to end with a hypothetical. Suppose you've got a grandfather on his deathbed, and he whispers to you, "Stay off the grass." And you promise to abide by his injunction. He smiles. He seems relieved, and he passes. You know precisely what he means, what he meant to say. He was a drug addict during the '70s, and he is telling you to stay off marijuana. But you like to smoke marijuana. So you instead understand that command and your faithfulness to it as a requirement that you stay off grass. You don't play football on grass. You play it only on artificial turf. You always use the concrete pathways. You're not really honoring your grandfather's wishes, and you should just give up the game. If you don't want to honor it, don't pretend that your misinterpretation is what he was trying to convey.

To be clear, I'm not here to sermonize against marijuana. I've never inhaled. I'm like the former President. But my point is it's a mistake to misinterpret the Constitution to achieve some end. Professor Pildes' point, I think, is well-taken. If you wish to pursue other ends, if you wish to salvage some portions of the Court's jurisprudence that you favor, you're going to have to use something other than originalism. Our jurisprudence is awash with non-originalist doctrines. So thank you so much.

[Applause]

PROF. MICHAEL C. DORF: I want to begin by thanking The Federalist Society, Judge Hardiman for moderating, my fellow panelists, and all of you for coming out here today.

My position on the question why or why not to be an originalist is first we need to figure out what exactly it is we mean by originalism because, by my count, there are originalisms, not a single originalism. I want to talk in particular

22. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

about two lines of cleavage that one can see in the historical evolution of originalism from its, if you will, original instantiation.

The idea that the original understanding of the words of the Constitution is very important in constitutional interpretation is not originalism. That's an idea that is accepted across the jurisprudential ideological spectrum. What makes originalism distinctive, it's sometimes said, is the notion that those words are determinative of the results in concrete cases.

But if you dig into that claim a little bit, however, you'll see, that it can't be right for at least two reasons. One reason is that all originalists accept some version of *stare decisis*. Even Justice Thomas, who is the Justice least committed to precedent in the face of contrary evidence of the original understanding, believes that precedent has some weight. More broadly, any acceptance of *stare decisis* entails that sometimes a judge or justice will accept a case as precedential even though it is inconsistent with the original understanding. So then you need a further theory of when to be an originalist and when to be somebody who, on prudential and pragmatic grounds, accepts *stare decisis*.

The other reason to question originalism, understood as the claim that the original understanding should be dispositive rather than just important, is that the original understanding is often quite underdeterminate. Not always, of course. Often it's determinate. Judge Barrett gave a number of examples: two senators per state. That's pretty fully determinate. But there are all sorts of other questions in which the original understanding of the text is underdeterminate. Thus, even originalists are not going to be deciding cases simply in virtue of the original understanding in all cases. So the proposition that what distinguishes originalists from non-originalists is that originalists always follow the original understanding, whereas non-originalists just think it's relevant, doesn't quite work.

If originalism is not the view that judges should always accept the original understanding as determinative, what is it? What makes originalism distinctive? My view is that originalism is an ism. It's an ideology. And to understand an ideology, it's helpful to think about where it came from. You can find numerous statements in Supreme Court and lower court cases, and the treatises of opinion writers throughout the nineteenth century into the twentieth century, talking about the importance of original understanding, usually in terms of original intent. To be sure, those uses sometimes meant by intent something different from the subjective intentions and expectations of the Founders; they meant something more like what we would call objective purpose.

In any event, even putting aside the difference between subjective intent and objective purpose, you don't really see what comes to be known as originalism as a distinctive ideology until the 1970s and 1980s. It arises roughly simultaneously with the birth of The Federalist Society, and for more or less the same reason: both originalism and the early Federalist Society are reactions

against what are perceived to be some of the excesses of the Warren Court and the early Burger Court.

In the view of people who then called themselves originalists, the mostly liberal Justices were using the Constitution to impose their own values to accomplish what they were unable to achieve through the democratic process. The core idea of the *original* originalism was to constrain constitutional interpretation and thereby render it more legitimate. Many of the original originalists coupled originalism with an ideology of judicial restraint. That's another somewhat ambiguous term, so let me add that as I'm using it here, judicial restraint means that courts oughtn't to strike down the outputs of legislative and other majoritarian processes unless there's a very clear answer in the Constitution's text and history. Long before originalism was a distinctive view, the leading advocate of judicial restraint in constitutional interpretation was James Bradley Thayer, who wrote a very influential article in the late nineteenth century arguing that courts both practiced judicial restraint (which was dubious as a descriptive claim) and *should* practice it, which was a normative claim rooted in democratic principles.²³ Thayerist justices practicing judicial restraint will not invalidate the outputs of majoritarian processes unless they're convinced beyond a reasonable doubt that that's what is required.

But modern originalism is not coupled with judicial restraint. At some point originalists came to reason like this: "As long as we're being bound by the Constitution's original meaning, we don't also have to be judicially restrained. So we can use the Constitution as a sword, not just as a shield. We can use originalism to strike down laws that we think are unconstitutional as inconsistent with the original meaning." Cases finding a right to individual ownership and possession of firearms, the modern federalism decisions, state sovereign immunity, campaign finance are all instances of the Court ostensibly using the original understanding to support striking down laws.

Does originalism entail judicial restraint? It originally did. It doesn't anymore.

Now I want to pose a different question about what originalism entails: whether one should look at the original, subjective expectations and intentions of the founders, including some combination of the people who attended the 1787 Philadelphia Convention, those who attended the state ratifying conventions, and the general public? Should we ask what they had in mind with respect to concrete cases? Or, alternatively, should we ask a different question, one about what is often called original public meaning? This alternative approach looks at the semantic content of the words of the Constitution rather than the subjective intentions and expectations of the drafters, ratifiers, and general public.

23. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

Over the last twenty to thirty years the vast majority of academic originalists have shifted from subjective intentions and expectations—“stay off the grass” means “don’t smoke the marijuana,” to use Professor Prakash’s example—to objective public meaning. In a moment, I’ll critique original public meaning, but first I want to acknowledge that there were good reasons why originalists moved from subjective expectations and intentions to public meaning. I’ll discuss four such good reasons for the shift.

First, as a general matter, we believe that the law should be comprehensible to the public and that the law consists of the authoritative utterances of the legitimate lawmaking bodies. The law is the authoritative utterances of the law-makers, meaning the words, not what the law-makers might have had in their heads. That’s true not just of constitutional interpretation. It’s true of statutory interpretation as well.

Second, the obligation to focus on the utterances rather than the intentions or expectations behind them is especially pressing, given the historical process that gave rise to the Constitution. The Convention met in secret. We didn’t get Madison’s notes until fifty years later. The Framers quite self-consciously adopted a procedure by which we wouldn’t be looking to what they had in mind. Rather we look to what was ratified.

Third, what makes the Constitution law, at least originally, was a process that was very wide open in which people had divergent intentions and expectations. There were ratifying conventions in each of the states. There were many different people expressing different views. In order to find something on which we can agree, it makes sense to look at original public meaning rather than subjective expectations and intentions because you’re more likely to find a shared understanding on meaning than you are as to expectations and intentions.

As an illustration of that phenomenon, just think about some of the questions that vexed the early Republic, such as whether the first bank of the United States was valid. This was an issue that divided the Washington administration. Hamilton’s position in favor of the bank eventually won, but there were strong statements of the contrary positions by Edmund Randolph and by Thomas Jefferson. Yet they all were very familiar with what had just happened. They had different intentions and expectations. Maybe meaning helps us there. Maybe we can find something dispositive at the level of meaning.

Finally, as Professor Pildes has pointed out, there are contexts in which the original intentions and expectations are going to lead to very unpalatable results. For example, the people who wrote and ratified the Fourteenth Amendment almost certainly did not intend the Equal Protection Clause of its Section One to require sex equality.²⁴ We can have confidence in that assessment because they expressly included permission for sex discrimination in favor of men with respect to voting in Section Two of the very same Fourteenth Amendment.

24. U.S. CONST. amend. XIV.

There are other examples of immoral results from associating the Constitution's meaning too closely with the intentions and expectations of its framers and ratifiers. Consider Chief Justice Taney's opinion in *Dred Scott*. He says African Americans can't be citizens because that was the intention, understanding, and expectation of virtually everybody who was politically active in the late eighteenth century.²⁵ You can escape some of these normative problems by moving to original public meaning because original public meaning necessarily operates at a much higher level of abstraction. Indeed, the vagueness of meaning is a feature, not a bug. It's what enables a consensus to form in favor of words even when there is disagreement about what people intend or expect from words.

Thus I agree with the self-styled originalist scholars who pushed away from expectations and intentions to original public meaning, because doing so does solve some of the core problems with intentions and expectations. But it does so at substantial cost. The main cost is that the level of generality that one needs to go to in order to locate consensus in the late eighteenth century or the post-Civil War period, if you're talking about the Reconstruction Amendments, is so abstract as to be very substantially underdeterminate in concrete cases. That's also true of the level of abstraction you need to avoid the sorts of odious results that intentions and expectations yield.

Once you go to that higher level of abstraction, however, originalism becomes virtually indistinguishable from living constitutionalism. This is why Professor Jack Balkin was able to write a book with the title *Living Originalism*, in which he argues that originalism and living constitutionalism are opposite sides of the same coin.²⁶ Ronald Dworkin said that same thing in a book he wrote in the mid-1990s. He said that if you define originalism simply as what the Framers intended to say as opposed to what other intentions and expectations they may have had, then originalism is consistent with his view.²⁷

Professors William Baude and Stephen Sachs take the view that originalism is already our law, because once you understand that originalism only operates at a very high level of abstraction and you see courts not professing to contradict the original understanding, you've got originalism.²⁸ Yet if the way to save originalism is to render it equivalent to living constitutionalism in virtually all concrete cases that we really care about, then the answer to the question why or why not be an originalist is "who cares?" That is to say, if we are all originalists but originalism is no longer a distinctive position, there's really nothing at stake.

I'll nonetheless conclude by offering one reason why we ought to care. I think that sophisticated audiences, like the people in this room and the people on this

25. *Scott v. Sandford*, 60 U.S. 393, 426–27 (1857).

26. JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011).

27. RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 291 (1996).

28. William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 *Nw. U. L. Rev.* 1455, 1476–77 (2019).

panel, understand the difference between original public meaning and original intentions and expectations. And usually when they talk about originalism they mean original public meaning, although there are contexts of course, like Professor Prakash's example, where it's better to be a subjective intentionalist originalist. You want to honor your grandfather's wishes and not smoke marijuana.

Still, despite that example, the overall the argument for constitutional interpretation has generally shifted and, I think, been pretty decisively won by the original public meaning originalists. However, if you look at the public discourse, you see something else. Consider confirmation hearings for Supreme Court justices. Or consider impeachment proceedings about which I'll say a little more during the comments. In these public settings, you routinely see legislators, and even judges and justices, resorting to expectations and intentions. You even see this phenomenon from jurists that you think would know better. In an article I wrote some years ago, I gave examples of Justice Scalia and Justice Thomas talking the talk of original public meaning, but then in particular cases using concrete intentions and expectations.²⁹

Thus one reason why you might not want to call yourself an originalist is that, although you may have in mind the legitimate original public meaning version that's equivalent to living constitutionalism, when you make arguments that justify originalism, you will thereby license politicians, judges, and justices to use the discredited form of originalism. And of course, we don't want people to be acting dishonestly in that way.

I've got lots more to say, so hopefully someone will ask me during the Q&A, "What else were you going to say, Professor Dorf?"

[Laughter and applause]

HON. THOMAS HARDIMAN: Well, that was terrific. Why don't we start by giving the panelists an opportunity to respond, if they wish, to anything said by their co-panelists? Judge Barrett, do you want to begin?

HON. AMY CONEY BARRETT: Sure, I will. I actually think that Professor Prakash and I don't disagree about whether originalism is a theory of interpretation or normative theory of justification. For me, it is both. My position is that, if, for reasons of popular sovereignty, you accept the proposition that the Constitution is law, then it follows that the original public meaning of the text is law. I'm also persuaded by the Will Baude and Steve Sachs argument that we treat the Constitution's original meaning as law as a positive matter.³⁰ (Related to that point, I think Professor Prakash's example of members of Congress invoking original meaning in the impeachment proceedings shows that our public officials, not just our courts, treat the Constitution as law. But I

29. Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2020–22 (2012) (book review).

30. Baude & Sachs, *supra* note 28, at 1487.

digress.) The popular sovereignty and positivist arguments are reasons why one might say, as I do, that the original meaning of the text is law.

That said, I agree with Professor Prakash that the normative and interpretive aspects can be disaggregated. In other words, one can believe in originalism as a method of interpretation without taking a position on whether the text is law. As Professor Prakash said, “Originalism is the natural way to interpret words.” That is true whether or not the words are law.

PROF. SAIKRISHNA B. PRAKASH: Oh, you want me to follow up? I also agree with Judge Barrett. And we had a phone call before our talk today. And she said something worth repeating—I don’t know if it made it into your comments—but originalism is not about rules versus standard. It’s not about judicial restraint. It’s not about being against rights. It’s not about any of those things. It’s a method of interpretation.

I think Professor Dorf is right that some people may have glommed on to originalism originally for those sorts of purposes, but there’s no way that you can know *ex ante* whether the Constitution systematically favors rules versus standards or systematically favors judicial restraint. So I agree with the comments that Judge Barrett made in our private conversation.

[Laughter]

HON. THOMAS HARDIMAN: Which is not very private. Professor Pildes?

PROF. RICHARD H. PILDES: Well, I was surprised by Sai Prakash’s comments because I’m trying to understand what’s at stake if the only question is whether originalism is an appropriate *method* of interpretation, as a matter of what seems like literary theory, if you don’t think anything normative follows for law once you identify a “correct” method of interpretation. His approach seems, if I understand it, disconnected from the reason we discuss and debate these interpretive issues because we’re talking about how the Constitution should be interpreted to apply to some of the most charged issues in American democracy.

But if you take Sai’s view that his analysis of originalism as a method of reading a text still leaves us completely free to decide what the appropriate normative theory of constitutional application is that follows, and that there’s nothing about originalism as he analyzes it that dictates anything about that question, then I’m left a little surprised about what it is we’re exactly debating here and why it matters. So if you could say more about that, I would appreciate it.

PROF. SAIKRISHNA B. PRAKASH: Sure. I think I get nervous when I tell people that they have to believe something, and they have to do something, and I—

PROF. RICHARD H. PILDES: —You should be a computer scientist then!

[Laughter]

PROF. SAIKRISHNA B. PRAKASH: And I get nervous when people tell me that I have to accept the Warren Court’s jurisprudence or Justice Kennedy’s

jurisprudence or anyone's jurisprudence as a matter of law. So you're right that my claim is narrow. I think it's helpfully narrow. I think if you're going to tell people that they have to believe that the country can't do X or must do Y, you've got to have a normative theory. I think you're right that some people have a normative theory, and you can judge it.

People who are originalists have given us reasons they believe should compel us to follow the original meaning. I don't have such a theory because I'm wary of telling you what you should or shouldn't do. I'm not in the business of telling you what you should or shouldn't do. So for that reason my claim is more narrow. I agree.

PROF. MICHAEL C. DORF: I just want to make two points. The first one continues my earlier remarks but using the example of impeachment. I think that Professor Prakash is exactly right about who will be making what arguments, that these arguments will be roughly the inverse of the positions that the parties took with respect to the Clinton impeachment, that the votes will largely reflect the political priors of the members of the House and the Senate, and that what this shows is that arguments about original understanding are not determinative, or at least not used in a way that is determinative.

Yes, originalism is the rhetorical envelope into which people can fit their normative priors, but that doesn't mean that original meaning is actually doing the work. We should distinguish between what people say and their actual motivations. Now you might say, well, it's understandable that politicians would use original meaning simply to justify their priors, but the same thing is true of Supreme Court Justices. The overwhelming empirical evidence we have from the political science literature on the Court tells us that the single greatest determinant of how Justices vote is their ideological priors. That's true whether they call themselves originalists, living constitutionalist; whether they follow Ely, whether they follow somebody else. That evidence strongly suggests that originalism is merely a rhetorical move. It's not a method for deciding cases.

Now, the way that I think the best originalist scholars deal with the under-determinacy problem is to use a distinction that Keith Whittington has expounded between interpretation, which is what Professor Prakash was talking about—just what the words mean—and construction, which allows judges and others to fill gaps.

Randy Barnett and Evan Bernick have a paper that suggests that even in the construction zone, judges are at least somewhat constrained.³¹ I think that's an admirable normative view. However, I don't think one sees evidence of such constraint in the actual practices of judges and justices. Thus I end up thinking that originalism is not actually doing any real work in the world.

HON. THOMAS HARDIMAN: Let me jump in and defend the judges. If our priors are so important, then how do you account for the remarkable number of

31. Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 5–6 (2018).

unanimous opinions on the Supreme Court and even more remarkable number of 3-0 panel opinions on the courts of appeals among judges whose priors are so different?

PROF. MICHAEL C. DORF: In many of those cases, the ideological stakes are low or very difficult to identify. In addition, much of the agreement may reflect shared values across ideology. I'm a liberal; most of you in the audience are conservative, but we have much in common. I like you people. We're in many ways the same. We went to the same schools. We send our kids to the same schools. We're not that different. You're part of the same social world. There's not that much difference between libertarians and civil libertarians. I think a lot of the consensus is actually rooted in ideological agreement. It's only when you have ideological disagreement that I think priors become important.

And of course, I'm not a nihilist. I do think law has some constraining force. So the question is what's going to happen where ideology becomes very, very highly salient. And then I just think that there's no evidence that originalism or any other methodology is doing real work.

PROF. SAIKRISHNA B. PRAKASH: Just to respond to Professor Dorf's comment about what's going on with respect to impeachment, I think he's absolutely right, descriptively. People are going to flip 180 degrees this time around. But it seems to me that's hypocrisy. What's that old statement that hypocrisy is the tribute that vice pays to virtue? And the virtue is they understand that to make sense of the Constitution, you should understand what the people writing the Constitution and ratifying it, the ratifiers, what they took it to mean, what it would have meant at the time.

So they're making the right sort of argument. They're just humans. They do what everyone else does. They try to use arguments in their favor. The fact that none of us are able to perfectly hew to any particular theory doesn't mean that the theory's wrong. You might say you shouldn't lie, or you shouldn't steal, but some people might find themselves in a situation where they have to steal because they're starving. And I don't know if that means that the theory is wrong. It just means that people can't be expected to be perfect, certainly not the people in the halls of Congress, with all due respect to the people in the halls of Congress.

HON. THOMAS HARDIMAN: Professor Pildes, if I took it down right—he'll correct me if I didn't—you indicated that some large domains of our constitutional law are neither originalist or, in some cases, are anti-originalist. Do any of the panelists, particularly perhaps Judge Barrett or Professor Prakash, but also Professor Dorf, would you like to agree or disagree or modify that claim?

PROF. SAIKRISHNA B. PRAKASH: I think he's absolutely right, and he gave us various options. My view is that much of the jurisprudence about democracy is not grounded in the Constitution. I don't think equi-populous districts are required by the Republican Guarantee Clause, unlike Professor McConnell. Remember the Senate is certainly gerrymandered in a sense. I'm

wondering what's to prevent a litigant, say Eric Holder, going to court and saying the equal protection component of the Due Process Clause of the Fifth Amendment renders the Senate unconstitutional.

Now, I heard someone laugh. But that argument could be made. And if it's accepted by the Court twenty years from now, enough people might think it's not a bad or silly idea. My point is that's just not an originalist reading of the Constitution. The laughter is an artifact of the fact that such an argument hasn't been made and it hasn't been accepted. But it could equally be made of the Senate, just like it was made of the state legislatures.

PROF. MICHAEL C. DORF: I would just add that what Professor Pildes says is true of the law of democracy is also true of most of the law of the First Amendment. There is pretty good evidence that the First Amendment, as originally understood with respect to freedom of speech, implied the Zenger principles³² in defamation cases and probably forbade prior restraints. Maybe there's a good argument that the Sedition Act was unconstitutional under the First Amendment, but much of modern First Amendment law, including all of the campaign finance regulation doctrine, goes much further than that.

I'm not going to say that the bulk of modern First Amendment doctrine is necessarily anti-originalist, but you can't derive it from the original understanding. The best you can do is to say that if we understand freedom of speech at a suitably high level of generality, then the modern doctrine is consistent with it. That is the second move that Professor Pildes described. And I think that it fairly characterizes a great deal of our modern constitutional law, which raises a question for the defenders of originalism: Do you envision originalism as a theory of reform—that is, as what the courts and others ought to be doing—or as a currently descriptively accurate theory? That could be a question for Judge Barrett and Professor Prakash.

HON. AMY CONEY BARRETT: Well, I won't give a complete answer to your question, but the examples that you gave of the First Amendment are about expected applications. You're saying that, at the time, people thought that many of these things were unconstitutional—but, as you pointed out in your remarks, originalists don't consider the expected applications to be binding. The Constitution lays down some rules, and it lays down some standards. The First Amendment is partly a standard, and people in the founding era may have been wrong about how it applied in particular circumstances. So some of your examples might not be inconsistent with the original understanding. I haven't done the work in those particular areas.

But I don't think it makes originalism meaningless to say that, for some things, like free speech, the content may be at a high enough level of generality that we're going to disagree about what it requires. Originalism doesn't purport to give an answer to every question, nor does it hold itself out as making all

32. See A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 675 (T. B. Howell, ed., 1813).

constitutional questions easy. I mean, Justices Scalia and Thomas disagreed. So I guess I'm there with you. I will accept that, yes, originalism doesn't answer every question, and it sometimes operates at a high level of generality—but those are features of the constitutional text.

PROF. SAIKRISHNA B. PRAKASH: I guess I would add, I think, Professor Dorf, you mentioned the role that the precedent plays. And I think Justice Scalia understood precedent as sort of an extra non-constitutionally grounded factor that he would use to decide cases. And that certainly suggests there's something more than originalism going on. And the question is, well, why can't there be still more beyond those two things?

There are scholars who claim that part of the judicial power included some requirement to consider precedent. John McGinnis and Michael Rappaport and I think my colleague Caleb Nelson have written along these lines.³³ So there's a dispute amongst originalists about what role precedents should play in adjudication. You're quite right that if you have the view, as some originalists do, that judges should not consider precedent, then judges who consider it aren't being strict originalists.

PROF. RICHARD H. PILDES: I want to clarify one point about my remarks. I am not defending here what some scholars call living constitutionalism, per se. I'm not saying anything about many of the Constitution's individual rights provisions and how they should be interpreted or whether there should be unenumerated rights as a general matter. For purposes of our discussion today, I'm trying to resist framing the choice as one between originalism or non-originalism across the board. Instead, I am putting forward the more modest argument that, at least in some domains, non-originalism plays a role that is not broadly challenged. We have good reasons for being non-originalists in the area of "the law of democracy." Most of the Court accepts non-originalism in those domains. But that's not a broad argument for living constitutionalism and a rejection of originalism across the board. I want to carve this down to that narrower focus to understand better how originalists respond to the powerful non-originalist nature of much of the law of democracy.

HON. THOMAS HARDIMAN: Does that mean you'd agree that originalism should be, as I think Professor Prakash wrote, the default rule? But when it does violence to the law of democracy, then the judge should move in a different direction?

PROF. RICHARD H. PILDES: Well, I'm persuaded by a lot of what Professor Dorf says about the difficulty of pinning down exactly what is meant by originalism, both among academics and among judges and, to the extent there's a conflict between the two, what choice I would make. I certainly agree

33. John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U.L. REV. 803, 803–04 (2009); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 2–3 (2001).

that all judges should take into account the text of the Constitution. Where the text is determinate, it applies.

No one thinks to litigate the constitutionality of the Senate, for example, even though the population disparity between the largest and smallest states today vastly exceeds the institution the Framers created. When the Senate was first formed, the disparity in population between the largest and smallest state was thirteen to one—and that's if you count the enslaved people in Virginia who were not permitted to vote. If you actually count people who were eligible to vote, the disparity was about six to one between the largest and smallest state. Now that population disparity is something like seventy to one, California to Wyoming.

So the institution has changed quite dramatically in terms of the representational basis for it. But even so, no one thinks to bring that case. No one thinks they would win such a case. Similarly with the Electoral College, I find it hard to believe we would adopt that today on a clean slate. I don't know exactly what we would adopt instead. But no one's arguing it's unconstitutional. It's just not a winning argument and we understand why: it's written into the text of the Constitution itself.

PROF. MICHAEL C. DORF: Let me just say a word about that. Professor Balkin has a useful metaphor for thinking of this. He talks about arguments that are off the wall versus arguments that are, and here he coined a phrase, "on the wall."³⁴ The argument that the Senate is unconstitutional is currently off the wall. But of course, what makes an argument off the wall is not simply the semantic content of the constitutional text. A lot of it is social understanding. So it's not currently off the wall to say that money is legal tender. That claim would have been regarded as off the wall early in the nineteenth century, but now the idea that paper money is legal is very much on the wall. Indeed, a challenge to paper money would be off the wall. How did the shift occur? It was a result of the felt necessities of the times, economic pressures, and all sorts of other extra-legal considerations that pushed an argument from being off the wall to on the wall.

However, I want to emphasize again that I'm not a nihilist. I think that there are some words that are so determinate that there will be positions that are permanently off the wall. But a lot of what we now think of as off the wall is not off the wall because it's so much more of a textual stretch than a lot of the doctrines we actually have. And that includes doctrines that conservatives like, as well as doctrines that liberals like.

PROF. SAIKRISHNA B. PRAKASH: My aim is not to get the Senate declared unconstitutional. I completely agree with Professor Dorf that, right now, that argument's off the wall. But if thirty percent of the country comes to believe it, in part for instrumental reasons, it's no longer off the wall. And let

34. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011).

me give you another off the wall argument that's not off the wall anymore, which is that the death penalty is unconstitutional even though the Constitution talks about depriving someone of life, liberty, or property. The notion that the Senate is unconstitutional seems inconceivable where we sit now, but a lot of things were inconceivable twenty years ago that have come to pass.

I know that Professor Pildes denies that he favors living constitutionalism. That's fine. I want to say that I favor, as a policy matter, one person, one vote. I'm not saying that I'm against it. But I'm against the idea that the Constitution has to solve all of our problems and that whatever we really feel strongly about we have to find within the Constitution. The Constitution was not a perfect document when it was made. We know that because it basically fostered slavery by giving the South more representation in the House and by allowing the South to have a disproportionate role in the selection of presidents. There was the Virginia series of presidents because of the three-fifths clause.

The Constitution is not perfect today. So it's quite true that if you're an originalist you have to question or perhaps jettison several Supreme Court precedents. But they're doing that anyway. They've been doing that for hundreds of years. One final comment I think for Professor Dorf about originalism, there's the word originalism and there's the concept. So maybe the word was coined in the sixties or seventies. I don't really know. That would be an interesting study. But I think early constitutional jurisprudence was originalist in the sense that they did not believe that the meaning of words should change over time or the meanings of provisions should change over time.

I believe my colleague Ted White has said this about the period before the progressive era. And I think that's an accurate assessment of what was going on. There were differences of opinion about what the Constitution meant. There were serious differences of opinion, but they were still bounded by this notion that the meaning of the Constitution is fixed. They were just trying to take advantage of whatever ambiguities they saw in it.

PROF. MICHAEL C. DORF: I mostly agree with that, although I would point out that the original meaning is not playing a determinative role in those cases. It is generally thought that the Marshall Court engaged in what Charles Black later called structural interpretation.³⁵ A lot of his decisions were controversial. What was he doing? He had a nationalist and, in some sense, Court-empowering agenda. He pursued that agenda while saying that he was just applying the fixed meaning of the Constitution because the fixed meaning of the Constitution turns out to be very underdeterminate on the questions that are most highly contested.

PROF. RICHARD H. PILDES: So again, I want to resist having these debates cast as you are saying, that the Constitution means anything you like because, at least with respect to the argument I'm trying to make, there's a much more specific set of issues I'm trying to address. That issue is how can the outcomes of a democratic process be accepted as legitimate—why should courts defer to

35. CHARLES L. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

them—if the democratic process itself is manipulated in such a way by those in power to insulate themselves from the kind of political competition that is essential to making the process of self government—of free and fair elections—legitimate?

When those who temporarily are vested with political power manipulate the framework for future elections, it is often difficult for the rest of us to restructure that process from the inside precisely because those are the elected officials to whom you would have to appeal to end these distortions of democracy. The argument that these manipulations violate fundamental principles of democratic self-government under the Constitution is a very specific argument for why non-originalism in this area is justified—and why we have such a strong body of non-originalist constitutional law in this area.

As I say, Justice Scalia distilled this notion down in a very powerful way, as he often did, with that line about the instinct of power being the retention of power.³⁶ So I think at least for me, that's what I'm asking you to think about. I want non-originalists to think about this domain and to ask themselves hard questions about how originalism does or should apply in this domain, if at all. Do originalists want to follow Judge Bork and abandon all of this law, or do they want to find some other accommodation with this body of law, and, if so, what the terms of accommodation ought to be.

HON. AMY CONEY BARRETT: I'll add one thing. I think that part of Professor Dorf's objection is that originalism can't yield determinate answers. As I said before, I don't think that's what's on offer. But that's true of all constitutional theories. There's always going to be disagreement about what the Constitution requires, no matter what interpretive approach you take. So I don't think that's a fatal flaw in originalism. I think that's just the reality on the ground: constitutional law, especially in the set of cases that make it to the Supreme Court, involves indeterminacy and some disagreement.

PROF. MICHAEL C. DORF: I agree with that, that all the theories on offer are vastly underdeterminative. I do think that, at least in public debate, originalism is often sold as much more determinate than it is as part of a rule-of-law agenda. So one reason why I don't want to use the word originalism, although I don't so much object to the concept, is precisely to avoid this kind of confusion in public debate about how much work is being done by the theory of meaning versus construction and so forth.

Here's a possible answer to Professor Pildes's question, but it is not along the dimension of originalism versus non-originalism. It comes from your colleague Jeremy Waldron, who says that the problem with Ely-style representation-reinforcing judicial review is that it doesn't have a natural stopping point because there are lots of controversial theories about democracy.³⁷ Moreover,

36. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 263 (Scalia, J., concurring in part and dissenting in part).

37. JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

Waldron says, courts aren't necessary to police democracy. England got rid of the rotten boroughs through legislative action. So, he says, it's possible to use majoritarian processes to cure the majoritarian defects. Now, maybe the answer to Waldron is that possible does not mean certain. If the system becomes too undemocratic, it will be too late for anyone to do anything about it, because by then you've got the Brownshirts in the streets.

PROF. RICHARD H. PILDES: Yes. And it's certainly true, as Judge Barrett said. And I would agree with her on this, that most theories on offer of constitutional interpretation have—as my colleague from Israel, Professor Joseph Weiler, likes to say, every border has its guerrillas. Every theory has its boundary problems. And that's certainly true of representation-reinforcing approaches to judicial review. And of course, it could be a danger, too, because it can lead courts to do things that they ought not to do in the name of preserving the democratic process under the Constitution.

But, as with all of these theories, we're faced with a choice. Do we abandon this central role for the Court and just live with distortions like massive malapportionment of legislative districts for seventy years, as was the case? Based on the belief, or hope, that eventually Congress or some other actor might take care of the problem? I think that's exactly what Supreme Court thought in the 1940s when it stayed out of these issues in the *Colegrove v. Green* case;³⁸ England around that time was adopting independent boundary commission to draw its district and I think the Court, or at least members like Justice Frankfurter, thought the United States might soon do the same. But then, after another twenty years went by with nothing changing, and as these population disparities grew greater and greater, even Justices who had not been inclined for the Court to get involved finally decided fundamental principles of democratic self-government required them to get involved.

So yes, the barriers to change can be extremely high within the existing structure when it's been manipulated to protect incumbent powers. Might you eventually be able to change it with enough public pressure in some context? Yes, if most of politics gets devoted to that. But I don't think that that justifies those structures. I don't think it's an argument for courts staying out of this altogether. I think that we are better off for the body of law, even though I disagree with some of it.

The question is not adopting some ideal theory of democracy. It's saying that certain manipulations of democracy that can only be justified by nothing more than naked political self-interest, rather than any legitimate public policy purpose, become unconstitutional. That leaves lots of room for different theories and different approaches to democracy. It's not, of course, imposing one vision. It's saying that certain manipulations are off limits.

HON. THOMAS HARDIMAN: But how do judges know what those manipulations are? Should we know it when we see it?

38. *Colegrove v. Green*, 328 U.S. 549 (1946).

PROF. RICHARD H. PILDES: Well, the courts have decided, for example, that ballot access laws in presidential elections that require a non-major party candidate, like John Anderson back in the 1980 election, to get enough signatures to get on the ballot one year before the election—before you even know who the major party candidates are—violate the First Amendment because they impose an unjustifiable burden on non-party candidates.³⁹ I assume, by the way, this same doctrine is going to be the basis for the Court striking down California’s effort to require presidential candidates to disclose their tax returns in order to be listed on the ballot.

It’s going to be this same body of law that says ballot access rules can become unconstitutional when they impose severe burdens, without adequate justification, particularly in presidential election contests. The Court has been explicit in acknowledging that there’s no litmus test for making these judgements. It’s a balancing of burdens and justifications, as in many areas of the law. But there is—over time, we accrue precedents, and later cases work to figure out how best to apply those decisions to new contexts. No one argues this is straightforward and mechanical, but it’s what courts do.

HON. THOMAS HARDIMAN: All right. Let me throw a question from left field. We’ve been talking about methods of interpretation, and obviously textualism is a critical part of the originalism discussion. What do our panelists think, if they have thought about it at all, about addressing Professor Prakash’s stay off the grass hypothetical by having recourse to corpus linguistics to figure out whether grandpa was talking about marijuana or the lawn?

HON. AMY CONEY BARRETT: Well, even corpus linguistics isn’t going to answer every question—language, as Professor Prakash pointed out, is a social construct and it depends on context. Modern textualism and modern originalism accept that. So I imagine that if you plug in “stay off the grass” into a corpus linguistics database, you may well generate answers that are both “stay off the green stuff on the lawn” as well as “stay off of pot.”

We know which one it is because of the grandfather being a drug addict in the 1970s. It was the context of the situation that answered the question. So I don’t think that interpretation, whether we’re talking about statutes or the Constitution, is a kind of mechanical exercise where you can look in dictionaries or even a corpus linguistics database to generate every answer.

PROF. MICHAEL C. DORF: If you’re going to be an originalist in constitutional interpretation or an original textualist in statutory interpretation, then corpus linguistics can be helpful, especially for identifying idiomatic usages or terms of art. I do think that one can run away with this approach and that often, the game isn’t worth the candle because you go so far deep into the weeds that you lose sight of the fact that the language is underdeterminate. But one thing that I think you find if you do this work is that the line between subjective

39. *Anderson v. Celebrezze*, 460 U.S. 780, 802, 805–06 (1983); *Williams v. Rhodes*, 393 U.S. 23, 30–32 (1968).

intentions/expectations on one side and meaning on the other gets a little blurred because language is a social act, and so it's often hard to separate meaning from intentions. This is a point Stanley Fish has made in his intentionalist phase that the line that I highlighted, that people have drawn between meaning as an objective fact about language and subjective intentions and expectations, is not necessarily coherent in light of our best theories of language.⁴⁰

HON. THOMAS HARDIMAN: We're going to have final comments from our panelists, but I'm going to invite the audience to line up at our two microphones. I do want to give folks a chance for questions. Go ahead, Professor Pildes.

PROF. RICHARD H. PILDES: I was just going to say that one of the things that we have to be careful of with textualism or corpus linguistics—and I do agree it has value—is that, precisely because language is social, it's used always in a particular context. So you have to know when you see certain words what were they being used against. To make this concrete, let me use this recent example from the Constitution. The Constitution, in the Elections Clause, gives the power to the “legislatures” of the states to do various things in the first instance, such as regulate the manner of national elections.⁴¹

Now, when the Framers used the word “legislature,” what did that word mean to them or the public at the time? I think it's pretty clear they were considering where to place that power among the other institutional possibilities that existed at the time and that they would have had in mind. They debated whether to give this power to Congress or to the states. And since courts and executives existed at the time and were being made part of the structure of government, the word “legislature” made clear that it was not courts or the executive who would have this power.

But today we get to a question that simply could not have been posed when these terms were written and that no one would have understood themselves to be addressing. The question is, if a state constitution chooses to give the voters of the state lawmaking power, through voter-initiated direct democracy, and the voters decide that independent districting commissions designating elections districts will better serve democracy, does the Elections Clause deny voters the power to make this choice? Must this power always remain in the hands of the state legislatures, no matter how corruptly a majority of citizens come to believe that power is being used, absent a constitutional amendment. Or, given the context in which the word “legislature” was put into the Elections Clause, is that term best understood to mean the lawmaking process a state uses, which in the modern era has come to include, in some states, direct democracy?

40. See, e.g., Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109, 1129–33 (2008).

41. U.S. CONST. art. I, § 4.

That was the question the Supreme Court faced in the *Arizona Independent Redistricting*,⁴² where the Court in a sharply divided 5-4 vote held that voters, acting as legislators through direct democracy, could determine the “manner” of structuring election-district design. You can look at corpus linguistics all you want to decide how “legislature” was used in 1789, but because the social context in which that word was used at the time didn’t include the option of direct popular lawmaking—that just was not one of the options on the table—then if corpus linguistics didn’t identify anyone who referred to “legislature” as including voter initiatives when voters were part of the lawmaking process of a state, then the Framers must have meant to deny voters the power to regulate the “manner” of national elections, even though no one gave any thought to a question that would have been unintelligible at the time. I think when we use resources like corpus linguistics, we have to be careful to understand the social context in which words were used at the time, in order to be faithful to what the drafters of language understood themselves to be doing and how the public would have understood those words. That’s true whether you’re an originalist or not: words alone need to be understood in the context in which they are being used.

To further illustrate some of the complexity regarding this specific issue, states have enacted many laws that regulate the national election process. And as far as I know, when the governor normally has a veto power over ordinary legislation, he also has that same veto power over this type of legislation. The governor is part of the lawmaking process, and legislatures have not generally even claimed that the governor has no power over state laws that regulate ballot access, or the use of absentee ballots, in national elections. So if you ask what has the historical practice been about whether only “the legislature” can play any role in regulation of national elections under the Elections Clause, the historical practice is that “legislature” has meant the lawmaking process of the state. I’m not arguing which side of this particular debate is right. I’m identifying a concern that even textualists need to be aware of the social context in which words were drafted to give them their proper meaning, including when using corpus linguistics.

HON. THOMAS HARDIMAN: Any final comments before we go to questions? No? Okay. Recognizing that the last shall be first, I’m going to start with the—I wish I could see. I think there’s a lady at the microphone there. Okay. Please, your question. And please, keep your questions as short as you can, and let’s do sort of a lightning round here so everyone gets a chance to ask their question. Ma’am?

QUESTIONER 1: So I first wanted to say thank you for coming to speak to current law students like myself. It’s very helpful in class discussions and everything. But I also wanted to ask about your opinions on the effects of the

42. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2677 (2015).

kind of pro-socialism movement on the sustainability of this originalism ideology in the next coming years.

PROF. RICHARD H. PILDES: I think Michael's closest to being appropriate for that question.

HON. AMY CONEY BARRETT: It sounds like a law of democracy kind of question to me.

QUESTIONER 1: It's a hard question.

PROF. RICHARD H. PILDES: In America and in other, major established democracies, we are facing more populist forms of politics, in versions from both the right and the left, that we haven't experienced through most of our history here, or in post-World War II history. I have no idea how any of these forces will play out, which of these forces will prevail, how they'll get moderated if they ever gain power.

I don't know how to link those still unfolding developments to originalism in constitutional interpretation. But what I can say is the American system of separated powers and staggered elections for the House, the Senate, the presidency, makes it very difficult for ideological forces to capture all of government unless there's fairly sustained support over a substantial period of time. So yes, you could imagine all sorts of forces coming to power and putting pressure on various constitutional understandings. But I think we have a pretty robust and resilient system, and so I'll leave it at that.

PROF. MICHAEL C. DORF: I'll take a crack at it. I'm not a socialist of any kind, but first I'd say that the people in the U.S. now who have gained some traction call themselves democratic socialists. That's supposed to be more like Sweden in the 1970s than the Soviet Union at the same time. And then the question is, is that consistent with the Constitution? In many respects, yes. In Holmes's phrase, the Constitution does not enact "Herbert Spencer's Social Statics,"⁴³ so there's plenty of room to do legislatively things that are quite redistributionist.

There are limits, however. There is the Takings Clause. There are various other protections for private property. I think it's notable that the people now calling themselves democratic socialists have not generally said that the Constitution requires socialism, which is a view I think we would regard as off the wall. But that view was almost on the wall in the early seventies. Frank Michelman wrote a *Harvard Law Review* Foreword discussing ways in which the Constitution might require redistribution.⁴⁴ That position now seems like a period piece, but there was a possibility of it becoming on the wall. So I think the answer to the broader question of what happens to originalism or constitutionalism in an era of democratic socialism is we don't really know.

43. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

44. Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

CHRIS GREEN: Chris Green from Ole Miss. Two questions, chiefly for Professors Pildes and Dorf. Do we have the oldest currently operational constitution in the world? And what is the object of the Article VI oath?

PROF. RICHARD H. PILDES: We're the longest continuous constitutional democracy with a written constitution. So the U.K., as Judge Barrett said, of course has operated under what they call an unwritten constitution or a set of constitutional-like conventions. But in terms of continuous operation under a written constitution, we are.

CHRIS GREEN: What is the object of the Article VI oath? When we swear to support *this* Constitution, are we swearing to support the same thing that George Washington did, given that Reynolds seems inconsistent with it?

PROF. RICHARD H. PILDES: Well, yes. We will still have arguments about how to interpret and apply that Constitution, as the country always has, but of course we're supporting the same Constitution.

PROF. MICHAEL C. DORF: Yeah. I'm not so sure.

[Laughter]

Part of the answer depends on what you think happened during Reconstruction. The amendment processes used to enact the Thirteenth and Fourteenth Amendments were mutually inconsistent with each other and arguably inconsistent with Article V. Bruce Ackerman's theory is that we actually had a quiet revolution at the end of the Civil War.⁴⁵ There is also a very good book by Zachary Elkins, Tom Ginsburg, and James Melton on comparative constitutionalism regarding the longevity of constitutions.⁴⁶ They find that easy-to-amend constitutions tend to last longer. The U.S. Constitution is an outlier in that it is very difficult to amend but has lasted for a very long time. Their explanation is that flexible interpretation by the Court has enabled substantial change without many formal amendments.

I don't buy Ackerman's view. I would say we have the same Constitution we had in 1789, but only in the way that you are the same person you were when you were an infant, even though all the atoms in your body are different. The Constitution is like the ship of Theseus. We replace one plank at a time. Do we have the same ship at the end of the day? In some sense yes, in another sense no. That's a very academic answer. I apologize for that.

[Laughter]

HON. THOMAS HARDIMAN: Before we get into Heraclitus, never step in the same river twice, let's go to the rear microphone, please.

JOHN VORPERIAN: John Vorperian, Westchester County, New York. Professor Prakash, I enjoyed the illustration, "Keep off the grass." May I offer, if ever called upon to operate a power plant, "Remember, you can never put too much water into a nuclear reactor."

45. BRUCE ACKERMAN, *WE THE PEOPLE*, VOLUME 1: FOUNDATIONS 81–83 (1991).

46. ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

To the panel, I would ask, given the tenor of our political times and the divisiveness, the heightened confrontation between left and right, does the ascendancy of originalism give impetus or the green light to political activists to simply seek remedy via constitutional amendment?

PROF. SAIKRISHNA B. PRAKASH: I'm sorry. Is the question whether we can just change the Constitution to do what we want to do? Is that the question?

JOHN VORPERIAN: Essentially, in essence, yes, it is. Does it give political activists of both left and right simply go out and seek amendment for their particular paradigms?

PROF. SAIKRISHNA B. PRAKASH: I'll say something. I think the answer is obviously yes. I think one of the reasons why we have so much amendment outside of Article V is because Article V is just too difficult to navigate. So it was an improvement over the Articles of Confederation, which required unanimity, but it's still very hard to amend the Constitution. We would have more formal amendments if the Court didn't amend the Constitution for us.

So I would say, given how difficult it is to amend the Constitution, it's understandable in some way that political movements try to channel their amendments through the courts. If you're going to make it impossible to do something via this route, the water's going to flow in the other direction.

PROF. MICHAEL C. DORF: There is speculation that the Virginia legislature is now going to ratify the ERA, which would be enough states to get it over the top, assuming you treat the deadline that Congress initially imposed and then extended and which then expired as non-operative. I don't want to take a position on whether the ratification is valid or not. I do think it's interesting that, if it happens, it will mean the last two amendments were both ratified long after they were originally proposed.

The ERA would be nothing compared to the Twenty-seventh Amendment, which was finally ratified in 1992, having been proposed in 1789. But I think it says something about the difficulty of amendment that you can only actually get amendments that are controversial in their day long after they're no longer controversial. And that should lead you to question the utility of the amendment process.

HON. THOMAS HARDIMAN: Professor Barnett?

PROF. RANDY BARNETT: Hi, Randy Barnett from Georgetown Law. I want to adjudicate a little bit the disagreement between Professor Prakash and Judge Barrett on what originalism is. I think originalism is a family of theories that surrounds two different propositions. The first is the fixation thesis, which is that the meaning of the text of the Constitution is fixed at the time it's enacted, whatever that time may be. And the originalists disagree about exactly how and why it's fixed. That's where you see differences between public meaning, original methods, original law. That's a disagreement about exactly how it's fixed, but they all agree that it is fixed. And that's an empirical question. If you believe it's fixed, you think that the fixed meaning is empirically discoverable. That's what Professor Prakash was calling interpretation, I think, accurately.

But there's a second part of originalism, which is the constraint principle. And that is that constitutional actors ought to follow or be constrained or be influenced in their decisions by the fixed meaning of the Constitution. And that's not an empirical proposition. That's a normative proposition. And there are different reasons why originalists hold the second proposition, popular sovereignty, rule of law, natural rights. There's different other—consequentialism—theories for the second proposition as well. So there's some disagreements there. And I think that's Judge Barrett's view. So I think that these views are ultimately reconcilable if you see that there are two components of originalism, not just one.

The other brief point I wanted to make in response to Michael Dorf, level of generality move, is that, in my experience, originalists—there's a consensus that most of the Constitution is relatively determinate: two senators, two houses of Congress, presentment, a bunch of other stuff. Most of the Constitution is really quite determinative. What the move is, is that the stuff we're interested in, the stuff we debate about, that's the stuff that happens at a high enough level of generality to be very underdeterminate or indeterminate. I think there's a lot of underdeterminacy.

But I think the more research one does into the more underdeterminate general provisions—like the Equal Protections of the Laws Clause or the Due Process of the Laws Clause or the Cruel and Unusual Punishment Clause—the more research you do, the more determinate it actually becomes. It's not as thin a meaning as non-originalists both assume and persist in assuming and insist on assuming in order to give them more room to run. But that's, of course, the proof of the pudding of that is in the eating.

[Applause]

HON. THOMAS HARDIMAN: Do you want to take the first point at all?

HON. AMY CONEY BARRETT: I don't think I really have anything to add. Professor Prakash?

PROF. SAIKRISHNA B. PRAKASH: I think Randy's right. Most originalists favor the original Constitution. But if you understand the first part of Randy's point, it's possible to be an originalist who doesn't like the original Constitution as amended. And there's nothing wrong with that, to say that. Obviously, I like the original Constitution as amended, but I think Randy's right that there's an interpretational aspect to originalism. And then there's a normative claim. But of course, as Randy well knows, people have different normative arguments for why we should follow the Constitution.

PROF. MICHAEL C. DORF: I would characterize your point as the selection bias idea. That is to say, we don't see the ways in which the Constitution is determinative because there's a selection bias in contested cases for things that are contestable, and that's especially true as you go up to the U.S. Supreme Court level because they're going to take those cases that are most contestable. I fully agree with that. That's why, as I say, I am not a legal nihilist. I do think that law is often quite determinate.

Then, on this further question of what do you find when you look at the original understanding, I agree as a general matter that it is possible that you will discover that the original meaning is determinative on some point as to which you thought it was underdeterminative. However, I don't see evidence yet of any Justices of the Supreme Court who claim to be originalist or originalist lite actually doing that. If you look at the empirical evidence, you see that ideological priors are deciding the concrete cases.

Now, when I posted that point on my blog a couple years ago, Professor Barnett's colleague, Larry Solum, said that's because there are no real originalists on the Supreme Court.⁴⁷ That move reminded me of what I used to hear from communists in the days when there was communism. Non-communists like me would say that every attempt to implement communism, whatever one thinks of its ideals in theory, has resulted in totalitarian states that trample on basic human rights.

And then my friends, or the people I was talking to, anyway—

[Laughter]

—would say, “Oh, those people aren't real communists. They're not really faithful to the writings of Marx and Engels and so forth. They've perverted the true ideals of communism.” It seems to me, at some point, you have to judge a theory or an ideology by how it gets used in practice, whether that theory is communism or originalism.

PROF. SAIKRISHNA B. PRAKASH: Just a quick response, I do think that judges decide cases against their ideology. I recall Justice Thomas's dissent in the gay rights case where he said, “I think this is an uncommonly silly law.”⁴⁸ He's quoting another Justice who was saying something similar about another law. So I don't think it's the case that judges are just deciding on the basis of their personal preferences about the content of the law.

I don't think that's true for the liberal Justices either. I think they're often deciding cases against their ideological preferences. I agree that their ideological preferences might have some weight in their thinking because, again, they're human. And you can have a perfect theory, but when you put humanity into it, it's just not going to be implemented perfectly.

PROF. MICHAEL C. DORF: So Chris Eisgruber, who's now the president of Princeton, wrote a book back—it must have been close to twenty years ago—on this question. One of the things that he says, which I actually think is very accurate, is that a lot of the examples of Justices voting against their ideological priors are actually not them voting against their ideological priors, because their

47. Lawrence Solum, *Comments on Dorf on Originalism & Determinacy: Part One, Concepts and Terminology*, LEGAL THEORY BLOG (Aug. 25, 2017, 5:11 PM), <https://lsolum.typepad.com/legaltheory/2017/08/comments-on-dorf-on-originalism-determinacy-part-one-concepts-and-terminology.html>; Michael Dorf, *How Determinate is Originalism in Practice?*, DORF ON LAW (Aug. 25, 2017, 7:00 AM), <http://www.dorfonlaw.org/2017/08/how-determinate-is-originalism-in.html>.

48. *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting).

ideological priors are complex.⁴⁹ For example, people often talked about Justice Scalia voting in favor of criminal defendants in Sixth Amendment Confrontation Clause cases, but perhaps that wasn't Scalia simply following the text and original understanding; perhaps Scalia's ideological priors included criminal justice libertarianism.

I think you see some of that in Justice Gorsuch who is proving to be a worthy successor to Justice Scalia on criminal procedure cases. I like a lot of Justice Gorsuch's opinions in this area. I think he does a really nice job with them. But I don't think these are necessarily against type simply because we say he's a conservative. He's a certain kind of conservative. He's a libertarian conservative in certain respects. That's a perfectly respectable position, but it means that Justice Gorsuch's votes in favor of the rights of criminal suspects are not contrary to his ideological priors.

But I agree with Professor Prakash that no Justice simply asks in any particular case, "What is my first-order normative view about the best policy, and how do I implement that in this case?" Rather, my claim based on the empirical literature is that the ideological priors are doing a lot more work than the jurisprudential skein in which the Justices wrap them.

HON. THOMAS HARDIMAN: Back microphone.

QUESTIONER 5: Thank you, your honor. This is specifically a question for Mr. Pildes. I completely understand the concerns you've expressed that the law of democracy is necessary in order to assure fair competition for power and that there are real problems with the potential entrenchment of those in power to avoid any check on their authority. I can't help noticing, though, that that body of law, as you've represented it, ceases the check on that of the judiciary, which is, of course, the most entrenched and hardest to check of our branches.

That seems a bit of a problem especially in an era where, for several decades, some judges have seemed to be adherents of judicial supremacy. So I ask, what exactly would be the check on that entrenched power seeking to prevent any check on itself?

PROF. RICHARD H. PILDES: So that's a great question. And something implicit in what I have talked about and certainly implicit in the Court's development of this doctrine is that, in the United States, we do not have—have not created, for the most part—institutions that a lot of other democracies have to oversee the political process, if you will, or to take on various functions that right now we have in the hands of sitting legislators. Many modern constitutions themselves create certain independent institutions to set the ground rules for the political process.

So we are the only country that uses election districts that allows the people most self-interested in that process to draw the districts for themselves. I think, as most other countries, as all other countries do, that's an inherently pathological situation. And you're going to get what we see. It's a very

49. CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE* 85 (2007).

interesting question that fascinates me about why in the United States we have been so unable to create various kinds of institutions to take on this role. And we in the United States have this political culture, which I think does go fairly deep in our DNA, that is just much more skeptical about creating these sorts of independent or maybe bipartisan institutions to oversee parts of the electoral process. If we had more of those institutions, I think you would see courts playing less of this role.

It's the absence in the U.S. of other institutions that can rein in politically self-interested manipulations of the democratic process that has generated so much pressure on courts to fill this gap, as they have. We have used the courts in that way for a long time now, and the courts will continue to be pressed to play that role in the absence of creating other institutions that might more appropriately take on those tasks. But it's, in the United States, a very difficult matter to get people to accept the institutions that you're talking about.

QUESTIONER 5: Just to be clear, who would guard us from the guardians?

PROF. RICHARD H. PILDES: Well, there's no answer to that question. You can ask that about any sets of institutions that are designed to create checks and balances on other institutions. It goes all the way down. There's no ultimate guardian to guard us against the guardians that, in a democratic system, will not potentially create similar kinds of risks of the ones that you're raising. That's an inescapable problem. We do the best we can in designing institutions in a way that hopefully minimizes that risk and have other institutions that also help check and balance those institutions. But I think that's the best any system can do.

HON. THOMAS HARDIMAN: Ilya Shapiro?

ILYA SHAPIRO: Ilya Shapiro from Cato and it looks like, based on the time, I might be the last question, which is somewhat apt because my question is orthogonal to the panel's topic, really. If this is about why we should be originalists, well, that's great. Most of us in this room probably already identify as originalists, and we're appreciative of the further support or adjustment to our understanding of that. The law students here, I guess, have the most to gain from that kind of perspective. But wouldn't this panel be even better placed at an ACS convention?

Because it seems like, to invoke Jack Balkin or, yesterday, Elizabeth Wydra of the Constitutional Accountability Center, we've long been now, for a decade or so, all have been textualists. Now, we're sort of all becoming originalists. And maybe ten years from now, the battle will be all among competing originalists where the word originalist will no longer mean anything, and it's back to what's the best method of constitutional interpretation or what have you. So in the sense, if that comes to pass or to the extent that we're seeing that trend now, which could be reversed, and certainly could be reversed if the balance of the courts is reversed, then will that mean a victory for originalism or would it mean kind of a, well, we're back to square one in that originalism means whatever you want it to mean?

Or as advanced by the new originalists, there's now competing progressive originalists, living originalists, as much as there are original meaning—the sort of thing that we had in *Heller*,⁵⁰ for example, to use practical purposes where we're all competing on the same battleground, which is healthy in a certain sense.

HON. THOMAS HARDIMAN: I'm looking at Professor Dorf because I understood you to say that original public meaning has gotten to a level of abstraction as to make it somewhat indistinguishable from living constitutionalism. Is that the import to your question?

PROF. MICHAEL C. DORF: I think, Ilya, the point you make is true of most concepts. To choose a more concrete example, think about the debate in the *Bakke* case between the liberals and the conservatives, putting Justice Powell aside for the moment.⁵¹ The question that divided them was whether race-based affirmative action should be judged under the same strict scrutiny standard as applies to conventional race discrimination, or should it be judged under intermediate scrutiny? And the strict scrutiny team won that case.

But then, twenty years later, the people who lost said, “Well, it's strict scrutiny, but it's not the same strict scrutiny that you apply in these other cases.” Whenever there's a victory for one side, the other side doesn't go away. What they do is they regroup and now they make the same kinds of arguments within the new framework. So I think what you described is inevitable if it is true that we are all originalists now. I think that's probably true of lots of other areas of the law, too.

HON. THOMAS HARDIMAN: Okay. Great. I have two tasks remaining as the moderator. The first is to invite you to remain seated. Apparently, a brief video will be played. I know not what it is, but one will be shown for your pleasure. But before we do that, please join me in thanking our outstanding panel.

[Applause]

50. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

51. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

