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THE IMMORALITY OF ORIGINALISM

JACK M. BEERMANN[+]

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

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It appears that there may now be a majority of originalists on the Supreme Court of the United States. That's too bad, because in most cases, originalism is not the appropriate methodology for decision. The central claim of this essay is that in interpreting the U.S. Constitution, it is immoral to choose original intent over social welfare, broadly conceived. Once this argument is laid out and defended on its own terms, I support the central claim with a variety of arguments, including the defective process pursuant to which the Constitution was enacted, the deeply flawed substantive content of the Constitution, the incongruity of fidelity to the views of a generation of revolutionaries, the current virtual imperviousness of the Constitution to amendment, the failure of the Constitution to resolve fundamental questions concerning the allocation of power within the government, which leads to dependence on the un-democratic Supreme Court to resolve important and controversial social issues and finally originalism's tendency to force otherwise honorable people to lie or obfuscate about the reasons for their official decisions.

Although it is less central to my thesis, I also point out the multiple ways in which originalism fails on practical grounds as a methodology. Most of this should be familiar to the reader: originalist judges are at best amateur historians whose pronouncements are unreliable; original intent is often impossible to discern and hopelessly ambiguous even on important matters concerning the structure and powers of the government which means that just about anything can be justified under the guise of originalism; originalists feel free to pick and choose when they will actually follow their best sense of the original intent on important matters; and originalism can lead to terrible results for society by disabling the federal and state governments from taking effective action against terrible social problems, for example the scourge of gun violence in the United States.

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

category of cases. For example, following clear constitutional text in structural matters may be socially beneficial by avoiding the costs of uncertainty and instability and because the Framers of the Constitution may have arrived at welfare-enhancing arrangements.

Thus, in my view, originalist arguments should be sidelined in favor of debates consisting largely of arguments of social policy and legal principle, framed against the background of the democratic, federalist structure of American government. An important ingredient in these debates should be what has been termed the "aspirational Constitution" that legitimizes arguments drawn from aspirations contained in general principles that point toward a decidedly non-originalist result. This is how Frederick Douglass treated the Constitution when he relied on it to argue against the Constitution's own original sin of sanctioning slavery.[1] It allows the development of constitutional law in light of society's underlying principles adapted to present-day needs and preferences. I would flavor these discussions with a touch of textualism, not because the text of the U.S. Constitution occupies a morally privileged place in these debates but because it provides a non-arbitrary starting point, constrains unelected judges and advances social stability.

The title is, of course, designed to get attention the way that scholars often do with outlandish or extreme claims. A better title might have been "Originalism versus Welfare." In fact, this essay was inspired, in part, by Louis Kaplow and Steven Shavell's article and book entitled "Fairness versus Welfare."[2] The idea is that in designing a system of constitutional interpretation and enforcement, it would be wrong to sacrifice social welfare on the altar of original intent, just as Kaplow and Shavell argued that society should not sacrifice its welfare on the altar of fairness or some other related principle of justice.[3] In fact, originalism seems to be one of those considerations that Kaplow and Shavell would banish, since their analysis lumps all non-social welfare considerations such as "'fairness.' 'justice,' 'rights,' and similar terms together as the considerations that should not be considered in making legal rules.[4] As will become clear, I will not argue that original intent is irrelevant. Rather, originalism plays the same role in my analysis that fairness occupied in Kaplow and Shavell's, i.e., as a taste that might be satisfied and as a device that may enhance social welfare in some circumstances.

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

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1. Frederick Douglass, *The Seventeenth Anniversary of the American Anti-Slavery Society*, N. STAR, May 15, 1851.

2. LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 967 (2001).

3. Kaplow & Shavell, *supra* note 2, at xvii.

4. Kaplow & Shavell, *supra* note 2, at 5 n.7.

of the Constitution, and treats those intentions as binding law.[5] I recognize that there are multiple versions of originalism, some of which are flexible enough to allow courts to ignore or sidestep original intent in the name of other values; my focus is on a stricter form of originalism under which a judge aims to follow their understanding of original intent. Further, I'll lump all originalist methodologies together, including "intent of the framers," textualism, and "original public meaning," recognizing that there are differences among these methodologies and that some of my criticisms may apply more strongly to some than to others.

By "immorality," well, my use of "immorality" may be overstated, because I do not mean to suggest or imply that originalists are evil or acting in bad faith to gain personal advantage or oppress people they hold in low regard. I mean that the practice of originalism should be condemned as a matter of principle for reasons sounding in morality. In my view, government officials owe a duty to their constituents or subjects to work toward advancing their welfare, and they should not sacrifice the common good in favor of a principle like originalism, party loyalty, ideological purity or any other such abstraction. In other words, government officials should use their power to enhance social welfare, not to decrease it in the name of a methodology or ideology. I recognize that claiming that a particular practice, such as originalist constitutional interpretation, is immoral is treacherous because there is likely to be great disagreement over any assertion of immorality, and there is no way to prove the truth of the assertion that a practice is immoral. I will attempt to persuade the reader that originalism is an immoral decision standard, but I cannot prove it, just as no defender of originalism or any other theory of interpretation can prove that their method is morally sound or otherwise desirable and just as no moral theorist has ever proven the correctness of their moral theory.

In 2013, in response to "living constitutionalism," a decidedly non-originalist methodology of constitutional interpretation, Justice Antonin Scalia famously, and with characteristic rhetorical panache, proclaimed that the Constitution is "not a living document, it's dead, dead, dead."[6] Justice Scalia was right, the Constitution is not alive, and unlike viruses, its non-living status is unambiguous. But the Justices of the Supreme Court are alive, the President, the Members of Congress, and the millions of other government officials who act under the Constitution, are alive, and every day they apply the Constitution to hundreds of millions of living Americans whose lives and welfare depend on its application. The dead hand of the Framers of the Constitution is no better a

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5. *See generally* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate Structure of the Great Debate*, 113 NW. U.L. REV. 1243 (2019).

6. Tasha Tsiaperas, *Constitution a 'dead, dead, dead' document, Scalia tells SMU audience*, DALLAS MORNING NEWS (Jan. 29, 2013), https://www.smu.edu/News/2013/antonin-scalia-dmn-29jan2013.

guide to the welfare of today's Americans than the results of a Ouija board in the hands of a clairvoyant with the foresight of Nostradamus.

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

I. IMMORALITY IN PRINCIPLE

The central argument of this essay is that rules of constitutional law should be constructed based primarily on social welfare and decidedly not based on the original intent of the Framers or adopters of the Constitution, however discerned. This argument builds on Lewis Kaplow and Steven Shavell's article and book, "Fairness versus Welfare." Their decades-old thesis, that "legal rules should be selected entirely with respect to their effects on the well-being of individuals in society" and that "notions of fairness . . . should receive no independent weight in the assessment of legal rules" is controversial, to say the least.[7] Some readers were left shaking their heads at the notion that a system of justice should ignore notions of justice and fairness. But Kaplow and Shavell's point was much more moderate, and sensible, than it appears at first glance.

Their main point was that legal rules should be constructed with "individuals' welfare" as the sole consideration. Their concern was that a legal rule constructed on the basis of some other consideration such as fairness could leave everyone subject to it worse off, a truly perverse result and inconsistent even with the insights of liberal legal philosophers who were extremely concerned with fairness. Even John Rawls claimed that rational people would agree to social structures that produced unequal results so long as the least well off in society were made at least marginally better off.[8] To Kaplow and Shavell, the only significant role fairness should play in constructing legal rules is to recognize that people have a taste for fairness and that because they prefer to live in a society that treats them, and all of its members, fairly, social welfare would be diminished if fairness played no significant role in legal decision-making.[9] Thus, in measuring the social utility of any legal rule, one consideration must be whether enforcing it would reduce social welfare because peoples' taste for fairness would not be satisfied. This should not be a controversial observation; people are often concerned with how the law treats

7. KAPLOW & SHAVELL, *supra*, note 2, at 3–4.

8. JOHN RAWLS, A THEORY OF JUSTICE 75 (1971); JOHN RAWLS, POLITICAL LIBERALISM 282 (1993).

9. *See* KAPLOW & SHAVELL, *supra* note 2, at 431–36.

others and are willing to lend political support to efforts to change laws that they expect will never be applied to them, such as welfare laws, criminal laws and provisions of the tax code that apply only to the poor or the wealthy.

There is an important aspect of their thesis that is left unclear, which is whether a rule that has crushingly terrible consequences for a small group of people but significantly enhances the welfare of society as a whole is acceptable under their theory. Their repeated references to "the well-being of individuals" and "the well-being of individuals in society" makes it appear that they are adopting some form of Pareto-optimality, under which rules are unacceptable if they make some "individuals in society" or group of individuals worse off. [10] Since they cannot rely on fairness for the choice between pure utilitarianism and Pareto-optimality, it must be either that they believe that peoples' taste for fairness would prevent adoption of rules that made some people terribly worse off or that their definition of the "well-being of individuals in society" necessarily implies such a principle. The only light I can throw on this is to speculate that perhaps Kaplow and Shavell were confident that policymakers would not be likely to adopt rules that were overly harmful to some people, and they could thus be vague on this score. My own view is that rules of law, regardless of methodology, often have terrible effects on individuals and groups of individuals (whether justified or not), but the welfare of individuals, as they put it, or social welfare, as I would phrase it, is a more defensible guiding principle in constitutional law than the original intent of the Framers of the Constitution, however discerned.

In my view, originalism should be viewed as parallel in constitutional law to the fairness of Kaplow and Shavell's work in all areas of law. The conventional argument for originalism, especially as an exclusive or binding requirement for constitutional decision-making, is based largely on principles, some contested, such as the nature of a written constitution or a requirement for the legitimacy of legal decision-making, and not on considerations of social welfare.[11] And insofar as the original intent of the Framers of the Constitution produces superior results for social welfare, it ought to be followed, but not because of any principle of fidelity to the original intent. In fact, if I could be persuaded that judges, legislators and executive officials would make better decisions overall if they felt that they were bound by original intent, I would endorse it as a guiding principle in constitutional law, but again not as a matter of principle but because of its superiority as a matter of social welfare.

Social welfare emanates from constitutional decisions in different ways depending on the sort of issue involved. For example, a decision on constitutional rights may have immediate and direct social welfare impacts. More freedom to engage in an activity, for example, allowing the use of

10. *See, e.g.*, KAPLOW & SHAVELL, *supra* note 2, at 12, 16, 18, 23, 71, 431.

11. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980).

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

There is one area in which originalism has been justified as welfare-enhancing: strict adherence to the ideal of separation of powers is often portrayed as necessary to preserve liberty. But the causal chain between separation of powers and the preservation of liberty is usually difficult to discern. Two examples of current controversy are illustrative. The Supreme Court has in several recent decisions made it more difficult for Congress to impose restrictions on the President's power to remove executive branch officials.[12] Is this likely to enhance liberty? It depends on numerous factors including the definition of liberty, the policies of the President and the likely policies of officials subject to more or less presidential control. As Abraham Lincoln famously said, "The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as his liberator, while the wolf denounces him for the same act as the destroyer of liberty. Plainly, the sheep and the wolf are not agreed upon a definition of liberty."[13] If liberty is defined simply as freedom from regulation, i.e., from the perspective of Lincoln's wolf, then more presidential control might enhance liberty if the particular President takes a deregulatory or anti-regulatory approach, and makes appointment and removal decisions with that in mind. The opposite would be true if the President identified more with the sheep and supported strong regulation. In short, presidential control of the administrative state has no logical link to enhancing liberty.

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

12. *E.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010); Collins v. Yellen, 141 S. Ct. 1761, 1783 (2021).

13. Abraham Lincoln, Address at Sanitary Fair, Baltimore, Maryland (Apr. 18, 1864) *in* 7 COLLECTED WORKS OF ABRAHAM LINCOLN 302 (1953).

would be the opposite of the effect under the previous definition. Of course, this all depends on whether presidential control would have a significant effect on agency policy, which is subject to multiple additional influences such as legal constraints, judicial review and pressure from interest groups and congressional oversight.

There is also no immediately or intuitively discernible social welfare effect of these decisions. Who knows whether a removable director of the Consumer Finance Protection Board would do a better job of enhancing social welfare than a director who can be removed only for cause?[14] It may not matter at all. It may enhance social welfare by subjecting the director to political control or it may reduce social welfare by hampering the director's ability to take action against politically powerful entities or others who may diminish social welfare for their own selfish reasons. The only thing we do know is that a removable director is somewhat more likely to advance the President's policies, which means the most important social welfare indicator is likely to be the wisdom, in social welfare terms, of the President's preferences.

A similar analysis applies to the possibility that the Supreme Court will create a strict nondelegation doctrine under which Congress may not delegate the power to make important policy decisions to agencies.[15] Who knows whether this would enhance or decrease welfare? The nondelegation doctrine's enhancement of liberty allegedly occurs mainly due to a lower volume of law—there is no way that Congress could or would produce the volume of law that agencies produce on important matters. Law made by a representative body such as Congress may also be more attentive to social welfare and individual liberty than law made by an agency not directly subject to voter approval. As Justice Gorsuch stated in a recent dissent advocating for a strict nondelegation norm, "[s]ome occasionally complain about Article I's detailed and arduous processes for new legislation, but to the framers these were bulwarks of liberty."[16] The preference for less law is based on an assumption that law decreases liberty, but as in the above example, that is far from clear. Is there more liberty in a society in which government is not involved in protecting the environment or safeguarding consumers from fraud and dangerous products, where government does not help ensure the availability of adequate and safe medical care, safe and healthful working conditions, adequate food and shelter and sufficient education to prepare all members of society for participation in economic and political affairs? Answers to questions like these are highly dependent on the definition of liberty.

There is also no clear path between a strictly enforced nondelegation doctrine and enhanced social welfare. In fact, research on the costs and benefits of

14. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191 (2020).

15. *See* Gundy v. United States, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting) (arguing for reinvigoration of the nondelegation doctrine).

16. *Id.* at 2134.

regulation cuts both ways with some analyses concluding that regulation enhances social welfare while others claim it has the opposite effect.[17] There are many vocal opponents of regulation among business interests that chafe at the effects of regulation on their bottom lines, but opposition from the subjects of regulation is to be expected and does not necessarily reflect overall social welfare effects. Small increases to the welfare of millions of people may attract less attention than decreases to the wealth of the few whose aggregate losses are lower.

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

Further, the idea that unelected judges should override Congress's choices regarding the structure of government because Congress is a superior deliberative body is dripping with irony. After all, the result of judicial intervention is to reject Congress's judgments, arrived at after the desired deliberation, concerning the optimal structure of agencies and their optimal range of policymaking discretion. To create agencies and delegate powers to them requires Congress to deliberate and navigate the procedural shoals that originalists like Justice Gorsuch identify as the normative underpinnings of their view. There is no reason to believe that legal training and experience as an attorney, Circuit Judge and Supreme Court Justice leads to better judgment than Congress's, which is ensured through its bicameral deliberative processes that are allegedly the bulwarks against low quality excessive infringements of liberty. And I have not even mentioned the role of the President whose veto pen further enhances the reliability of Congress's determinations.

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

17. *See, e.g.*, Paul L. Joskow & Nancy L. Rose, *The Effects of Economic Regulation*, *in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1450, 1452 (Richard L. Schmalnensee & Robert D. Willig eds., 1989); Brian Wallheimer, *Why Less Regulation Isn't Necessarily Better*, CHI. BOOTH REV. (Feb. 25. 2019), https://www.chicagobooth.edu/review/why-less-regulation-isnt-necessarily-better; John F. Morrall, III, *A Review of the Record*, REGULATION, Nov.-Dec. 1986, at 25, 31; Lisa Heinzerling & Frank Ackerman, *The Humbugs of the Anti-Regulatory Movement*, 87 CORNELL L. REV. 648, 649 (2002).

loyalty to interests that would benefit from less regulation than by actual evidence of the welfare effects or even the overall effects on individual liberty.

It is important at this point to dispel the impression that my argument is designed to attack conservative arguments rather than make a broad, neutral attack on originalism. The above examples are drawn from current events in a situation that involves a rising and active conservative Supreme Court majority. But I would apply the exact same analysis to developments that move constitutional law in a more liberal direction. If evidence established that confining delegation would enhance social welfare, I would support strict application of a nondelegation principle. Similarly, if it could be shown that expansive application of the Fourth Amendment's exclusionary rule was inconsistent with social welfare, I would favor cutting back on its protections regardless of the intent of the Framers.[18] Because constitutional law is rarely debated in policy terms, it is difficult to analyze the social effects of most doctrines of constitutional law without conducting extensive empirical research for which I, and the judges who make the decisions, lack both the skill and the resources.

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

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

18. In fact, I have always been deeply concerned about the exclusionary rule's truth-crushing effects and its imposition of the social costs of officers' Fourth Amendment violations on society as a whole. And I am skeptical that the exclusionary rule does much to deter police misconduct. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 413 (1971) (Burger, C.J., dissenting).

and their views dominate even after their utility has vanished with the years, but in a society with a choice, there is no principled reason to go down that path.[19]

Another reason that has been cited to cast doubt on originalism as an appropriate methodology for construing the Constitution is that the Framers were more likely to embrace natural law theories than the sort of radical positivism that strict originalism entails.[20] I do not want to make too much of this observation for two reasons: the first being the obvious irony in citing originalist reasons for rejecting originalism and the second being that the argument is, in my view, based on the sort of cherry-picking of Framers' statements that infects all forms of originalism. While it is true that the Framers made many statements consistent with natural law theory, they also made plenty of statements consistent with a more positivist view of law, including the 1798 decision in *Calder v. Bull* that is often cited as evidence of Justice Chase's embrace of a non-textual, natural law theory of constitutional interpretation.[21] In that case, most of the Justices relied upon the original meaning of the Ex Post Facto clause to reject the Calders' argument against retroactive civil legislative action, a decidedly positivist methodology.[22]

Justice Thomas, an avowed originalist, has made an interesting argument for limited incorporation of natural law into constitutional interpretation. At his confirmation hearings, and in a more recent documentary, he explained why he believes that constitutional law includes natural law elements.[23] He agrees with the view that the Framers adhered to natural law ideas and would reject positivism as the predominant method of understanding legal rights. It's a bit more complicated than this because Justice Thomas, citing the Declaration of Independence's statement that people "are endowed by their Creator with certain unalienable Rights," equates natural law with divinely granted rights.[24] In other words, the rights of Americans are God-given, transmitted by the Framers

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19. Strict forms of originalism also prevent social progress through the learning process inherent in a system of precedent in which legal change is allowed. *See* Theodore P. Seto, *Originalism vs. Precedent: An Evolutionary Perspective*, 38 LOY. L.A. L. REV. 2001, 2017–19 (2005).

20. *See* Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 L. & HIST. REV. 321, 333 (2021); John Mikhail, *Does Originalism Have a Natural Law Problem?*, 39 L. & HIST. REV. 361, 361 (2021).

21. Calder v. Bull, 3 U.S. 386, 388 (1798).

22. *See* Calder v. Bull, 3 U.S. 386, 397 (1798) (opinion of Paterson, J.) ("ex post facto laws must be taken in their technical, which is also their common and general, acceptation . . ."); *id.* at 399 (Iredell, J.) ("If . . . the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice.").

23. *Hearings Before the Committee on the Judiciary, United States Senate, One Hundred Second Congress, First Session, On the Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States*, 102d Cong., 16–17, 147 (1993); CREATED EQUAL: CLARENCE THOMAS IN HIS OWN WORDS (Manifold Productions, Inc. 2020). His comments on natural law occur near the end of the film, at about the 1 hour 49-minute mark.

24. *See* Thomas, *supra* note 23.

through the Constitution. But then Justice Thomas insists that we are bound by the version of natural law adopted by the Framers, not because of any notion that they and only they have true insight into divine providence but because the intent of the Framers is binding positive law. In other words, Justice Thomas's argument for originalism, at bottom, adds nothing to the simple assertion that the Framers' intent is binding law, and it paradoxically cuts off contemporary discussion of natural law principles and the nature or content of divine providence. Just as a simple example, some believers in divine providence may think that reading the Constitution to require the government to provide food, shelter and medical care to people who otherwise could not afford it is more plausible than reading it to sanction slavery and prohibit two layers of for-cause protection for government officials exercising discretionary executive power.

The difficulty of amending the Constitution contributes to the immorality of tying American society to it, or more accurately tying society to the judicially-imagined version of the original intent underlying it. The Framers themselves ignored two aspects of the country's prior constitution, The Articles of Confederation, when they constructed the Constitution, namely its declaration that it had created a perpetual union and its unanimous consent requirement for alterations. This was wise—social realities revealed the Articles' defects and the architects of the new Constitution did not allow intent of the framers of the Articles to hinder social welfare. I have written elsewhere that this important episode in our history is precedent for a new constitutional convention. The 20 most populous states could follow the example of the Framers when they discarded the Articles and frame a new constitution among themselves, and then invite the others to join them the way Rhode Island was invited to join the new union after not participating in the Philadelphia convention.[25]

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

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25. Jack M. Beermann, *The New Constitution of the United States: Do We Need One and How Would We Get One?*, 94 B.U. L. REV. 711, 738 (2014).

It might be different if the process for enacting the Constitution gave it a special claim to legitimacy, but, alas, it does not.[26] The majority of Americans were excluded from the political process that led to the adoption of the Constitution. Imagine what Americans would think if another country embarked on a process of creating a new Constitution and did not allow women, racial minorities, and millions of enslaved people to participate in the project. It may not be wrong to view what happened in 1789 as a product of the times, but that's the point. While it might excuse the Framers' conduct from a moral standpoint, the product of those times has no good claim to legitimacy for binding us today.

The discriminatory nature of the process for framing the Constitution might be forgivable if in operation the Constitution created a model of equality and inclusion. But this did not occur. Millions of Americans remained enslaved for the first six decades of the Constitution's existence, and after more than a half million Americans died in the fight to end it, the former slaves and their ancestors were thrown into a new form of subjugation nearly as toxic as the old when federal troops were withdrawn from the South and the Supreme Court endorsed racial segregation.[27] Officially sanctioned discrimination against racial minorities continues, perhaps to die a slow painful death as demographics eventually outrun the ability of currently dominant groups to restrict voting rights and minimize non-white political power,[28] but perhaps not. The Constitution facilitates barriers to full membership in society for tens of millions of Americans and suppresses their economic, social and spiritual growth.[29] A constitution made today with full and equal participatory rights for all Americans would likely turn out radically different from what we have, although given the current divisions in American society, it is difficult to predict exactly how.

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26. Although I would adhere to my view that originalism is an inappropriate methodology in constitutional cases, I recognize that in jurisdictions governed by a constitution framed and adopted more recently and in a more open process, the intent underlying such a constitution may deserve greater respect than the Constitution of the United States insofar as it may represent a consensus on the polity's values.

27. *See* Plessy v. Ferguson, 163 U.S. 537, 543 (1896); The Civil Rights Cases, 109 U.S. 3, 24–25 (1883); Hall v. DeCuir, 95 U.S. 485, 487–88 (1878).

28. *See* Sandra L. Colby & Jennifer M. Ortman, *Projections of the Size and Composition of the U.S. Population: 2014 to 2060*, US CENSUS (Mar. 2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf ("by 2044, more than half of all Americans are projected to belong to a minority group (any group other than non-Hispanic White alone)"); *see generally* William H. Frey, *The Nation Is Diversifying Even Faster than Predicted, According to New Census Data*, BROOKINGS (July 1, 2020), https://www.brookings.edu/articles/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted/.

29. *See* William J. Aceves, *Amending a Racist Constitution*, 170 U. PENN. L. REV. Online 1, 7 (2021) (citing Ibram X. Kendi, Stamped from the Beginning: The Definitive History of Racist Ideas in America 116 (2016) and Michelle Alexander, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012)).

In fact, the injustices that have plagued American society are an independent reason for rejecting originalism as a morally justifiable method of constitutional interpretation. The original Constitution's codification of slavery and its enhancement of slave power in Congress render excessive attention to the intentions of the people who framed it morally questionable, at a minimum. The Constitution's decades-long impotence to prevent the injustice of Jim Crow and lynch law, the mistreatment of North America's indigenous people, the subjugation of waves of immigrants beginning, perhaps, with the Chinese and the internment of loyal citizens of Japanese descent during World War II are further evidence of the moral frailty of the document. The Court's citation in its recent decision overruling the right to abortion to authorities from as long ago as the thirteenth century[30] reinforces the absurdity of originalism's apparent view that law's moral compass is static. Consider the ways in which the role of women in society has been radically transformed in the twentieth and twenty-first centuries in countries like ours that are, thankfully, hundreds of years ahead of, for example, the Afghan Taliban's views on women's place in society. Originalists expect society to surrender to the intentions of those who set in motion a social system that achieved greatness at the expense of the weak and marginalized and in which inequality has only grown, not only inequality of achievement but inequality of opportunity, which is one of the great social problems facing today's United States.[31] Constitutional law remains one of the great contributors to inequality.[32]

The strongest argument for originalism is that it has the potential, allegedly more than any other theory, to create the stability necessary for a society to thrive in virtually all dimensions, including economics, politics, religion, science, the arts and humanities, and even more mundane social pursuits such as sports and entertainment. It is undoubtedly true that stability is important, and that

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30. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2249 (2022) (citing, *inter alia*, "Henry de Bracton's 13th-century treatise").

31. *See* Angela Hanks, Danyelle Solomon & Christian E. Weller, *Systematic Inequality: How America's Structural Racism Helped Create the Black-White Wealth Gap*, THE CENTER FOR AMERICAN PROGRESS (Feb. 21, 2018), https://www.americanprogress.org/article/systematic-inequality/; Counselor for Racial Equity Janis Bowdler and Assistant Secretary for Economic Policy Benjamin Harris, *Racial Inequality in the United States*, U.S. DEPARTMENT OF THE TREASURY (July 21, 2022),
https://home.treasury.gov/news/featured-stories/racial-inequality-in-the-united-states#:~:text=These%20earnings%20differences%20have%20changed,Black%20and%20Hispanic%20families%2C%20respectively.

32. For example, in the name of the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court's originalist wing has made it increasingly difficult for state and local governments to combat racial inequality. *See* Richmond v. J. A. Croson Co., 488 U. S. 469, 510–11 (1989); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007). More recently, it has prohibited colleges and universities from considering race in their admissions processes even when it is employed to increase opportunities for historically disadvantaged groups. Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 143 S. Ct. 2141 (2023).

instability is destructive of all aspects of social life. For example, there are those who think that life in Iraq under Saddam Hussein was preferable to what that society has become in the wake of the invasion that deposed him and his government.[33] This may seem pragmatic and not principled, but in my view, it at least occupies space along a fuzzy border between the practical and the principled. There is great moral value in the establishment of a stable order in which social institutions can thrive. Any particular stable order may, of course, suffer from deep, even irredeemable, moral failings. But in light of human nature, stability itself is a virtue, as unalloyed as it may be.

In this regard, the U.S. Constitution has only partially succeeded in creating a stable society. It has facilitated a society stable enough to permit unprecedented economic prosperity, with wealth and privilege for some beyond most people's wildest dreams. The American Dream has been a realistic goal for millions of people not fortunate enough to have been born into wealth and privilege, and has been a beacon to immigrants from around the world. But it was insufficient to prevent Civil War, and the run up to that conflict revealed the Constitution's failure to resolve key issues concerning the relative powers of state and national governments. Social unrest has continued throughout the period since then. Only violence, public and private, resolved the unrest that erupted in the twentieth century over racial injustice, and labor peace was won in part by crushing labor unions through constitutional law that limited the ability of unions to compel employees to support their efforts.[34] What has resulted is a deeply divided polity that could not even come together to fight a deadly pandemic.

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

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33. Professor Vali Nasr, State Department Adviser during the Obama Administration and Professor of International Relations at Johns Hopkins University had this to say in a recent discussion of the invasion of Iraq:

> [I]t's difficult to see that the United States and the Middle East are better off.
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> Firstly, we removed a brutal, dangerous dictator, but we replaced him with chaos. And Iraqis went through hell and back in the aftermath of what transpired. And I don't believe that they feel that they're better off. I was recently in Iraq. And most of the young people, even the Shia young people, have a nostalgia for the Saddam era.
>
> Secondly, by dismantling the Iraqi military, shattering the Iraqi state, we opened the Arab world for a level of Iranian infiltration into the Arab world that was not possible before the removal of Saddam from power. It has been at a scale that we cannot reverse it. We have been for 20 years trying to put the Iranian genie back in the box, and we can't.

Interview with Vali Nasr, *The long-lasting impact of the U.S. invasion of Iraq*, PBS NEWS HOUR (Mar. 29, 2023), https://www.pbs.org/newshour/show/the-long-lasting-impact-of-the-u-s-invasion-of-iraq.

34. Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 761–62 (1988); Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021).

includes individual happiness, autonomy, respect for the rights and interests of humans and other living creatures, equality, opportunity (both economic and non-economic) and community. But I do not believe that this inconsistent with Kaplow and Shavell's insistence that fairness is relevant only when linked to human satisfaction based on a preference for realizing fairness and other similar values.[35] My view is that values are a necessary element of human society and that societies that realize the ambitions inherent in their values are better places to live and flourish than those that do not. In other words, social welfare is a broad concept that embraces creating and maintaining a better world. What it does not include is acting out of an abstract commitment to an ideological premise, although satisfaction of ideological preferences may be an element of human welfare. The problem is that such preferences are fraught with danger of harming social welfare due to ideological blinders and out of a sense of loyalty to the abstract.

II. THE PRACTICAL IMPRACTICALITY OF ORIGINALISM

In addition to the immorality of originalism as a matter of principle, there are multiple practical reasons to reject originalism as a theory of constitutional interpretation. These include the unreliability of what has been termed "law office history" which is more akin to advocacy than genuine historical research; the fact that so many issues cannot be definitively resolved with reference to text and history which cries out for a different methodology; the tendency of otherwise honorable people to dissemble by justifying decisions made on other grounds with reference to original intent; and the terrible practical results that originalists impose on society while disabling pragmatic challenges to their conclusions. There is no secret society with special access to the true history of the Constitution enacted by mythic creatures known as the Framers and there was no group of Framers whose views were easily identifiable as consistent on major issues that arise today. Rather, there are competing views, contradictory texts and conflicting histories, leaving originalism as a singularly unattractive method of constitutional construction.

A. Amateur History and Gaping Holes

In my view, the most fundamental practical difficulty with originalism is that the Framers left many important issues unresolved in the Constitution's text and history. This means that another method of interpretation is necessary to answer vital constitutional questions. Let me name just one unresolved issue, a pretty important one: the power of the President to use military force without a declaration of war from Congress. The Constitution is clear on two matters: the

35. *See* KAPLOW & SHAVELL, *supra* note 2, at 431 ("[I]f individuals in fact have tastes for notions of fairness—that is, if they feel better off when laws that exist or events that they observe are in accord with what they consider to be fair—then analysis under welfare economics will take such tastes into account when measuring individuals' well-being.").

President is commander in chief of the armed forces and Congress has the power to declare war.[36] That's about where clarity ends; there is not even agreement on what it means to "declare war," whether such a declaration is necessary to commence military action or is it more simply a declaration that the United States considers itself legally in a state of war with another nation?[37]

To muddy the waters further, Congress has the power to "make Rules for the Government and Regulation of the land and naval Forces,"[38] raising questions concerning the extent of the President's commander in chief powers. In 1973, Congress passed the War Powers Act over President Richard Nixon's veto, restricting the President's power to take military action without Congress's consent.[39] Although Presidents have abided by the terms of the Act, they have often stated on the record that they do so out of courtesy to Congress because, in their view, the Act unconstitutionally restricts their power as commander in chief.[40] Originalists have not succeeded in resolving this basic matter of constitutional law.

When the text leaves gaping holes such as these, originalists hunt for evidence of the Framers' intent in documents such as the Federalist Papers, other contemporary writings, early Supreme Court decisions, early actions by Congress and the President, and the debates at the constitutional convention. There, lawyerly cherry picking reaches the level of high art; comments are yanked out of context and presented as proof of one view or another and contrary comments are ignored or explained away. Practices and judicial decisions that may have been hotly contested in the 1790s are held up as proof of underlying

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36. U.S. CONST. art. I, § 8, cl. 11; Art. II, § 2, cl. 1.

37. *See generally* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) (providing a historical survey of how the political branches have viewed the legislature's power to regulate the President's role as "Commander in Chief" as prescribed by the Constitution); Phillip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364, 1370, 1373–74 (1994).

38. U.S. CONST. art. I, § 8, cl. 14.

39. *See* War Powers Resolution, Pub. L. 93-148, 87 Stat. 55 (1973) (codified at 50 U.S.C. §§ 1541–50).

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

settled intent.[41] And in the vast majority of cases, original intent happily coincides with the political preferences of the Court majority, for example, finding that the absence of a Takings Clause in the Fourteenth Amendment is of no moment since the Framers intended to incorporate the compensation requirement into the Due Process Clause of the Fourteenth Amendment.[42] More often than not, a sober account would admit that the most that can be said is that the Framers had differing views or, in many cases, did not consider the matter in the depth necessary to resolve questions that arise.[43] Instead, scholars and judges claim that history is on their side, when in reality text and history can justify multiple results and support none with the clarity that ought to be present before making an important constitutional decision that disables the other branches from acting.

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

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41. An important example with current salience involves whether the first Congress confirmed through legislative action the view that the Framers intended for the President to have unlimited power to remove Officers of the United States. Professor Sai Prakash has said that it did, at least with regard to officers exercising purely executive functions. *See* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1068 (2006) ("Congress held that the Constitution granted the President the power to remove secretaries of the executive departments."). However, Professor Jed Shugerman has demonstrated convincingly that Prakash's conclusion is not actually supported by Congress's 1789 action. *See* Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PENN. L. REV. 753, 757 (2023) (arguing that the "Decision of 1789" was either indecision or a rejection of the unitary theory of unchecked presidential powers).

42. On the political salience of takings law, *see* Christopher Serkin, *The New Politics of New Property and the Takings Clause*, 42 VT. L. REV. 1, 2–8 (2017). Whether broad application of takings norms is consistent with the original intent of the Framers of the Constitution seems less important to conservative jurists than simply protecting the right of private property. For example, in his dissenting opinion in Kelo v. City of New London, 545 U.S. 469, 505–23 (2005), Justice Thomas repeatedly refers to the original understanding of the Takings Clause of the Fifth Amendment and barely mentions the fact that the Takings Clause does not, of its own force, apply to the state and local government.

43. *See* Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421 (2021); Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PENN. L. REV. 753 (2023).

unresolved, preventing open debate about the true, perhaps more attractive, bases for decisions.

A prime example of competing histories is the debate over whether the Framers of the Second Amendment intended it to protect an individual right to own a firearm for self-defense and whether such a right is enforceable against only federal regulation or also against state and local gun control measures. The Supreme Court's opinions on this reveal, at best, uncertainty and perhaps division among the Framers, but each side, pro and con, claims that the history certainly supports their view.[44] Whether the easy availability of handguns is catastrophic to the well-being of millions of Americans is virtually irrelevant to judges who pledge fealty to their (contested) view of the intent of the Framers. In its latest decision striking down a gun control measure, the Court, in an opinion by Justice Thomas, declared that for any regulation that appears inconsistent with the text of the Second Amendment, "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[45] On my reading, the history is inconclusive and the text leans in the direction of an inextricable link between military preparedness and gun ownership. In fact, handguns for personal use are not, in my view, addressed at all by the Second Amendment; textualists may have a better argument for private ownership of military weaponry. Of course, I do not claim that my view reflects the actual intent of the Framers. I actually have no firm idea, but I do not think the Supreme Court majority that has effectively struck down dozens of gun control measures knows either.

Notably for present purposes, the Court also declared off limits any means-ends analysis in the gun control area, such as justifying gun control based on a compelling governmental interest.[46] This means, in short, that even if application of the Court's understanding of the history and tradition of gun control in this country has disastrous consequences, the only remedy is a constitutional amendment. *Fiat justitia ruat caelum*.[47]

A similar analysis could be applied to numerous fundamental constitutional issues. For example, there is perhaps no more significant structural constitutional argument than whether the Framers of the Fourteenth Amendment intended that amendment to apply the Bill of Rights against the states. Without

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44. *See* District of Columbia v. Heller, 554 U.S. 570, 603 (2008). Justice Scalia stated:

> Justice Stevens relies on the drafting history of the Second Amendment—the various proposals in the state conventions and the debates in Congress. It is dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one. But even assuming that this legislative history is relevant, Justice Stevens flatly misreads the historical record.

Id.; *see also* McDonald v. City of Chicago, 561 U.S. 742, 804 n.9 (2010) ("[t]he historical analysis of the principal dissent in *Heller* is as valid as the Court's only in a two-dimensional world that conflates length and depth.").

45. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2130 (2022).

46. *Id.* at 2129.

47. "Let justice be done though the heavens fall."

what is termed "incorporation" of the Bill of Rights, very few practices of state and local governments would be touched by federal constitutional law. The text certainly does not answer this fundamental question and even originalist judges and scholars have disagreed over it for decades, perhaps dating back to the adoption of the Fourteenth Amendment.[48] As in the gun control area, there is good evidence on both sides and no conclusive evidence one way or the other. My inclination is to doubt that incorporation was within the amendment's intent, if only on the basis that if the Framers meant to resolve such an important issue, they would have included text to that effect. But that's only an inclination of which I am far from confident. That is not to say, however, that I disagree as a normative matter with the decisions that have applied nearly all of the Bill of Rights to state and local government action.

The incorporation debate is, in fact, a good example of a legal dispute over methodology that ultimately carried little practical importance. One faction on the Court, led originally by Justice Benjamin Cardozo, argued for "selective incorporation," pursuant to which only some of the provisions of the Bill of Rights would be applied against the states. Cardozo's standard was to incorporate those rights that are "of the very essence of . . . ordered liberty" and embody "a principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."[49] Later, as the Court applied Justice Cardozo's standard, Justice Black became the standard bearer for an originalist argument for total incorporation: in his view, "one of the chief objects that the provisions of the [Fourteenth] Amendment's first section . . . intended to accomplish was to make the Bill of Rights, applicable to the states."[50] In addition to historical research which, to Black, supported his view of the Framers' intent, Justice Black rejected selective incorporation as built on the erroneous view that "this Court is endowed by the Constitution with boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what, a particular time, constitutes 'civilized decency' and 'fundamental liberty and justice.'"[51] He thus

48. While Representative John Bingham, the principal author of the Fourteenth Amendment, argued that it incorporated the entire Bill of Rights against the states, *see* Adamson v. California, 332 U.S. 46, 95 (1947) (Black, J,. dissenting), the Supreme Court did not immediately agree. In United States v. Cruikshank, 92 U.S. 542 (1876), the Court held that the First and Second Amendments did not apply to state action. In 1897, the Supreme Court held that the Fourteenth Amendment's Due Process Clause required compensation for takings of private property, Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U.S. 226 (1897) and in 1947, the Supreme Court "assumed" that the First Amendment, applied to the states. Gitlow v. New York, 268 U.S. 652 (1925). Then, in the middle of the twentieth century, the Justices engaged in a spirited debate over whether the Bill of Rights was completely or only partially incorporated into the Fourteenth Amendment. *See* Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937).

49. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

50. Adamson v. California, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting).

51. *Id.* at 69.

attacked selective incorporation as granting too much discretion to judges who might smuggle their own viewpoints into the law.

The reason that this methodological dispute turned out to carry little importance is that, while the Court adhered to the Cardozo approach, and incorporated only those rights deemed fundamental, over the decades virtually all of the provisions of the Bill of Rights have qualified under that standard, resulting in nearly total incorporation.[52] The only exceptions to total incorporation still standing are the Sixth Amendment's requirement of a jury of twelve in a criminal case[53] and the Seventh Amendment's right to a jury trial in civil cases, which prohibits the reexamination of facts tried to a jury other than "according to the course of the common law."[54] But there is one positive element to the triumph of partial incorporation theory over total incorporation theory, namely the refreshing discussion on the Court over whether particular rights were essential to a system of ordered liberty or rooted in the conscience of our people. That, in my view, is a more sensible way of deciding cases than tying the law to the intent of the eighteenth-century constitutional Framers.

B. The Effect on Judges and Scholars

The felt necessity to base important decisions on original intent also forces judges to dissemble, essentially leading to misleading opinions that obscure their true bases. A prime example is the Supreme Court's decision requiring law enforcement officers to "knock and announce" when executing a warrant at a private dwelling.[55] The originalist basis for the Court's decision, in an opinion by Justice Clarence Thomas, is that the Fourth Amendment's reasonableness requirement incorporates the common law requiring an announcement. The Court acknowledged that the rule did not apply to felony arrests, citing an 1884 treatise making the point, but then concluded that "[t]he common-law principle gradually was applied to cases involving felonies."[56] The Court's earliest citation for this point is an 1822 English decision (there goes the aversion to citing foreign law in U.S. constitutional cases) which post-dates the adoption of the Fourth Amendment by more than thirty years, making it impossible for the Framers of the Fourth Amendment to have incorporated the rule. An originalist like Justice Thomas simply cannot admit that the reasons for applying knock and

52. *See* Ramos v. Louisiana, 140 S. Ct. 1390 1435–36 (2020) (Alito, J., dissenting).

53. Williams v. Florida, 399 U.S. 78, 103 (1970). In McKeiver v. Pennsylvania, 403 U.S. 528, 541, 551 (1971), the Court held that there is no right to a jury trial in state juvenile proceedings, but the basis for that decision appears to be that juvenile proceedings are simply not covered at all by the Sixth Amendment. The most recent incorporation decision held that juries in state criminal cases must be unanimous, overruling an earlier decision that this requirement was not incorporated. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020), overruling Apodaca v. Oregon, 406 U.S. 404 (1972).

54. *See* Minneapolis & St. Louis Ry. Co. v. Bombolis, 241 U.S. 211, 216 (1916).

55. Wilson v. Arkansas, 514 U.S. 927, 930 (1995).

56. *Id.* at 935.

announce in most circumstances are normative, that knock and announce likely results in less violence, greater respect for property and privacy and more orderly execution of warrants.[57] Instead, originalism forces judges to dissemble and obfuscate on the reasons for their decisions.

While this may be more of a principled objection than a practical one, I actually find the form of originalism that claims that the Framers incorporated well-established features of English common law into the United States Constitution the most bizarre claim of all. The Framers overthrew a system of government they rejected as tyrannical. It seems odd to suppose that simultaneously with rejecting a system of government they intended to incorporate (implicitly) that system's well-established features into their new, highly experimental Constitution. Incorporation might be a good idea; some features of English common law may be well-suited for application in the United States, and the ability to draw upon a preexisting set of rules might increase stability and add an air of legitimacy to the decisions of federal judges. The practical problem is that because the entire enterprise is so dubious, there is no developed standard for determining which features of English common-law are incorporated and which are not. For example, was English common law's rejection of slavery incorporated into American law?[58]

This reinforces the greatest practical difficulty with originalism, that in virtually all controversial cases originalism can be deployed to support the arguments of both sides if only to debunk the supposedly originalist claims of the party seeking to overturn the political decision under attack. Thus, at least as practiced in the Supreme Court of the United States, originalism does not provide either of the virtues that might otherwise support such an enterprise; it does not meaningfully constrain judges and it does not apply positive law to cases involving controversial constitutional issues. This tends to be true of legal reasoning more generally; on close examination, the claim that legal reasoning constrains judges rings hollow and the rule of law ideal of judges applying a determinate neutral body of rules is rarely even approached, even in cases applying positive law such as statutory and constitutional text. And yet judges and scholars are forced to pretend, and perhaps have even convinced themselves, that their historical research has revealed the single correct answer to questions that the Framers did not answer and perhaps never even considered.

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57. Consider the recent heartbreaking example that occurred in Minneapolis, Minnesota. The police, executing a no-knock warrant shot and killed an innocent man within 10 seconds of breaking down the door to an apartment where a homicide suspect might have been. The man, Amir Locke, apparently woke up and grabbed his legally-owned gun, exercising his constitutional right to bear arms for self-defense. The officers, seeing the gun and apparently fearing for their safety, shot Locke numerous times, killing him. *See* Jesus Jimenez & Amanda Holpuch, *Minneapolis Releases Video of Shooting*, N.Y. TIMES, Feb. 5, 2022, at A17.

58. *See* Somerset v. Stewart (1772) 98 Eng. Rep. 499 (KB), 509–10 (opinion of Lord Mansfield, C.J.).

A case of statutory construction by one of the Court's avowed originalists provides another good example of the way that originalism forces judges to pretend that the socially preferable results happen to coincide with the views of lawgivers. In the *Bostock* decision, Justice Gorsuch's opinion for the majority extended the protections of Title VII of the Civil Rights Act of 1964 to transgender and homosexual individuals who are discriminated against by their employers based on that status.[59] Justice Gorsuch conceded that "[t]hose who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result" and declared that "[t]his Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."[60] His opinion then goes through lengthy unconvincing gyrations in an attempt to convince the reader that the Court's decision is consistent with the "ordinary public meaning" of the statutory language.[61] In dissent, Justice Alito, joined by Justice Thomas, characterized the Court's reading of the statute as "preposterous."[62] Justice Kavanaugh, in his separate dissent, argued convincingly that while the Court's reading of the statute might be literally correct, it was not consistent with the text's "ordinary meaning" which, as Justice Gorsuch stated, is the current originalist touchstone.[63] In my view, Justice Gorsuch's most convincing argument is one that he did not make: that reading Title VII to prohibit discrimination against homosexual and transgender individuals is a better fit in today's society than excluding them and that the prohibition advances social welfare by outlawing irrational employment decisions and making ours a more inclusive, just society.[64]

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

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59. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

60. *Id.* at 1737, 1738.

61. *See id.* at 1740–49.

62. *Id.* at 1755 (Alito, J., dissenting).

63. *Id.* at 1824–25 (Kavanaugh, J., dissenting).

64. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 302–03 (1994).

III. THE RESPONSE

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

My response to the first critique is anticipated by the prior discussion of the basis for originalism. Assertion is an insufficient substitute for persuasive argument when it comes to a foundational issue such as the proper methodology for interpreting and applying the Constitution. Unless it can be established that originalism is the only plausible method of constitutional interpretation or that constitutional law would be a disaster without strict adherence to the original meaning, simply asserting that originalism is entailed by the nature of law is an insufficient basis for recognizing judicial power to override political decisions on important social issues. There is nothing illogical or paradoxical or implausible about a method of constitutional interpretation that would be sensitive to factors other than the intent of the Framers, such as social welfare or acceptability according to evolving principles of justice or social needs. It happens in the United States and countries across the globe every day.[65] Some of these systems of justice are admirable and some are horrifying, but the difference does not lie in whether their judges adhere to originalism as a method of constitutional interpretation.

Justice Antonin Scalia's self-described "faint-hearted originalism," laid out in his 1988 Taft Lecture, is an example of a methodology that expands the frame of reference to include factors other than the original meaning of the Constitution.[66] In explaining his views, Justice Scalia conceded that even an originalist would not uphold corporal criminal penalties that would have been viewed as routine and perfectly acceptable by the Framers of the Eighth Amendment. Presumably, an impure form of originalism such as Justice Scalia's is what allows originalists to support applying the Equal Protection

65. *See* Jamal Greene, On the Origins of Originalism, 88 TEX. L. REV. 1, 19 (2009) (Originalism "is an exceedingly unpopular view around the world").

66. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

Clause to discrimination against women despite strong evidence that the Framers of the Fourteenth Amendment did not intend to outlaw sex-based discrimination.[67] Of course, "pure originalists" such as Randy Barnett viewed Justice Scalia's self-characterization as a betrayal, if not personal, then at least a betrayal of the originalist ideal.[68] To them, any deviation from the original meaning of the Constitution is heresy especially when the deviation is made by the Supreme Court. In my view, the simple insistence that constitutional *law* requires adherence to original meaning or some other form of originalist theory is the weakest argument for originalism.

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

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

My first reply to this is to remind the reader that the main problem with originalism, as I see it, is that originalists would sacrifice the welfare of society in service of originalist ideals, which I believe is not only wrong but an immoral

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67. *See* Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1230 (2000) ("[T]he view that emerges from the record nevertheless is clear enough. The Amendment was understood not to disturb the prevailing regime of state laws imposing very substantial legal disabilities on women, particularly married women.").

68. Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13–15 (2006).

use of government power. Government officials should use their power to increase and advance social welfare, not decrease and hinder it. Now, if originalism of some form turned out to be better in that it proves to be the best methodology for advancing social welfare, then I would endorse originalism as our methodology. Some originalists appear to recognize this when they stress that adherence to the text and meaning of the Constitution, especially the procedural and structural aspects of it, enhances liberty. But that does not support the argument that adherence to original intent provides more constraint than other possible methodologies and it is not clear that originalism is better at preserving liberty than other potential methodologies, such as a non-originalist aggressive application of the Due Process or Privileges and/or Immunities Clauses to invalidate legislation perceived by judges to infringe on liberty. It also depends on contested views of the nature of liberty. Robert Bork, an originalist, favored judicial restraint and famously espoused the view that judicial invalidation of legislation interferes with the right of the majority to govern.[69] Perhaps the liberty of businesses was enhanced during the *Lochner* era, but what about the liberty of workers and consumers? People who breathe can credibly argue that their liberty is enhanced by strict environmental regulation of polluting businesses unless perhaps the definition of liberty includes the right to spend money on medical bills and funeral services.

The unconstrained freedom of judges to declare the law—even if it is necessary to maintain an independent judiciary—is unfortunate not only because of the highly political nature of the appointment process. It is also inconsistent with democratic values to entrust so many important matters to decision by unaccountable federal judges. Because the Constitution leaves so many important issues unresolved, federal courts are constantly faced with the question of whether they should defer to legislative and executive judgments or impose their own views of the requirements dictated by the Constitution. If judges were more concerned with social welfare or more deferential to others' judgments, the openness of the Constitution might not be as problematic as it has become under current circumstances.

Even if we meet the rule of law argument on its own ground, I do not believe there are reasonable grounds to conclude that originalism would provide the sort of constraint that rule of law originalists claim, at least as applied to the Constitution of the United States. Although we know that past performance does not guarantee future results, I find it fair to bring up our historical experience with originalism to show that it is not likely to succeed in constraining judges. As we have seen, even Justices who purport to be originalists do not always follow original intent, and even when they claim they are, close examination reveals, as in the knock-and-announce case, that they bend original intent to suit their normative views. Another methodology is necessary for the numerous

69. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 139 (Free Press 1990).

issues for which original intent is undiscoverable, and open-ended provisions like the Ninth and Tenth Amendments provide minimal constraint on judicial decision-making. We are talking about a group of human judges with different experiences and differing views, not a set of machines that can be relied upon to spit out mathematically correct responses to complicated problems.

This most important aspect of the rule of law is the imperative that government officials, and all people from the least to the most privileged members of society, must obey the law as decreed by judges who enjoy a significant measure of independence.[70] It does imply a preference for certainty in legal rules, but that concern places a distant second to the fundamental requirement of obedience to the law as decreed by courts. The preference for clear rules is an established element of legal reasoning, not primarily because unclear legal standards are inconsistent with the rule of law, but mainly because clear legal rules tend to improve social welfare and minimize the opportunity for arbitrary judicial decision-making.

IV. DISPLACING AND REPLACING ORIGINALISM

It would perhaps be the height of arrogance to propose a method of constitutional reasoning cleansed of originalism and proclaim it as the ideal substitute for current practice. So here it goes! (At this point, if this were a text message I would insert the appropriate emoji, probably a winking smiley face.) Actually, I will not pretend to have an answer. The irony, of course, is that anything I propose is vulnerable to my principal indictment of originalism, that it is insufficiently attentive to social welfare. But while I do not pretend to have confidence that banishing originalism would necessarily be socially beneficial, or that any replacement I propose would produce superior results as a matter of social welfare, I can promise that my views are based solely on notions of social welfare, without conscious taint of ideology or adherence to methodological principles regardless of social welfare.

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

70. *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 180–81 (3d ed. 1889); PAUL CRAIG, ADMINISTRATIVE LAW 4 (6th ed. 2008).

welfare ought to be the primary value pursued in legal decision-making, even in the face of what would be regarded as unambiguous text.

What I mean to rule out is "originalism for the sake of originalism," the idea that the original intent, however discerned, should be treated as binding law subject to alteration only through the procedures specified in the Constitution for amending it. In my view, as described above, it is immoral for government officials, including judges, to place adherence to original intent above social welfare.

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

In terms of the shape of constitutional law sans originalism for the sake of originalism, it is important to understand that this whole discussion takes place against the background of a constitutional law that currently contains substantial non-originalist reasoning in the many areas of law in which original intent is non-existent, not discernible, or so abhorrent or outdated that even originalists decline to follow it.

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

David Driesen's work provides an excellent example of a way in which a superior form of constitutional reasoning might supplant originalism in the area

of separation of powers.[71] He describes how allegedly originalist application of the unitary executive theory raises the specter of the erosion, or even the destruction of, American democratic governance, and how constitutional decision-making informed by that danger could respond to it without departing from the outlines of our constitutional system and the traditions that have preserved a democratic system for more than 230 years.

The elimination of originalism for the sake of originalism might open constitutional law to greater consideration of what has been termed "aspirational constitutional law." As Kim Lane Scheppele has described it, "[a]spirational constitutionalism refers to a process of constitution building . . . in which constitutional decision makers understand what they are doing in terms of goals that they want to achieve and aspirations they want to live up to."[72] Similarly, Robin West has characterized aspirational constitutional law, at least as practiced in the legislative branch, as "a law of ideal moral principles—those principles of distributive justice toward which our politics aspire."[73] But the idea of aspirational constitutionalism is in no way a recent creation. For example, in 1851, Frederick Douglass proclaimed that the Constitution is an anti-slavery document that can be "wielded on behalf of emancipation,"[74] and on July 5, 1852, he characterized the Constitution as a "glorious liberty document."[75] This despite the Constitution's implicit and explicit endorsement of slavery.

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

The key question that confronts me is whether courts should explicitly or exclusively consider social welfare in making their decisions. There are

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71. *See* DAVID M. DRIESEN, THE SPECTER OF DICTATORSHIP: JUDICIAL ENABLING OF PRESIDENTIAL POWER 140 (2021). *See especially* Chapter Seven, in which Driesen describes how concern over autocratic government might inform constitutional law without departing from traditional American principles and constitutionally informed customs of governance. *Id.* at 139.

72. Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence through Negative Models*, 1 INT'L J. CONST. L. 296, 299 (2003).

73. Robin West, *The Aspirational Constitution,* 88 NW. U. L. REV. 241, 263 (1993).

74. Frederick Douglass, *The Seventeenth Anniversary of the American Anti-Slavery Society*, N. STAR, May 15, 1851.

75. Frederick Douglass, Oration Delivered in Corinthian Hall, Rochester (July 5, 1852), *in* FREDERICK DOUGLASS, ORATION DELIVERED IN CORINTHIAN HALL, ROCHESTER 36 (Rochester, Lee, Mann & Co. 1852).

numerous pros and cons to explicit judicial consideration of social welfare. On the positive side, in my view, basic morality requires government officials, including judges, to pursue social welfare in everything they do in their official roles. It would be odd to expect them to do that while prohibiting them from openly considering the matter in their deliberations and decisions. My hesitation to endorse explicit judicial focus on social welfare is that they may not really be equipped to do so.[76] When they have done so in the past, they have sometimes made disastrous errors. A good example is qualified immunity of government officials from damages for constitutional violations. In 1982, for reasons sounding purely in social welfare, the Court eliminated the requirement that government officials act in good faith in order to be protected by qualified immunity.[77] The Court based its decision on what it saw as the negative social effects of litigation against government officials alleging that they had acted in bad faith; according to the Court, too many insubstantial cases were getting past summary judgment and litigation was distracting government officials and making them reluctant to take socially beneficial actions that might provoke litigation. By removing the most realistic avenue for challenging abuse of government power, this change appears to have disabled the legal system from dealing with police misconduct which, in some eyes, has reached epidemic proportions in the United States.[78] Importantly for present purposes, the Court's decision was purely normative as all traditional versions of immunity had included the good faith requirement.[79]

A similar critique applies to the Court's campaign finance jurisprudence and some aspects of its expansion of First Amendment speech rights more generally. American constitutional law vigorously protects political, commercial, and artistic speech. In recent decades, the Court has extended constitutional protection to commercial speech, brought pornography within its traditional protection of artistic speech and equated financial support for political candidates with political speech.[80] The Court's decisions have swept away

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76. Professor and Judge Richard A. Posner is perhaps the most vocal and ardent believer in the view that judicial decisionmaking, particularly under the common law, is welfare maximizing whether or not the judges explicitly consider social welfare. *See* Isaac Erhlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993); Richard A. Posner, THE ECONOMIC ANALYSIS OF LAW (9th ed. 2014).

77. Harlow v. Fitzgerald, 457 U.S. 800, 816–17 (1982).

78. *See The Other Epidemic: Fatal Police Shootings in the Time of COVID-19*, ACLU (2020), https://www.aclu.org/sites/default/files/field_document/aclu_the_other_epidemic_fatal_police_shootings_2020.pdf; Lynne Peeples, *What the Data Say About Police Brutality and Racial Bias—and Which Reforms Might Work*, NATURE (June 19, 2020), https://www.nature.com/articles/d41586-020-01846-z.

79. *See* Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 67–70 (1989) (providing more on the Court's abandonment of the good faith basis for qualified immunity).

80. The conservative majority in a 5-4 decision struck down limits on corporate campaign expenditures as violating free speech rights. *See* Citizens United v. Fed. Election Comm'n, 558

mountains of regulation in all three areas; for example, pornography is now freely available due to the Court's obscenity decisions that treat it as artistic speech, pharmaceutical companies and lawyers, among others, freely advertise due to the Court's commercial speech decisions and the voices of big money interests in the political arena have been vastly amplified due to the Court's campaign finance decisions.[81] While some of these changes have been bipartisan, conservatives at the Court have extended greater protection to commercial speech, employed free speech rights as a basis for weakening labor unions and have pressed a conservative agenda in the campaign finance area.[82]

Originalism plays virtually no role in the First Amendment basis for judicial invalidation of campaign finance regulation.[83] In fact, First Amendment originalism is virtually impossible since, as Robert Bork famously reminded us, "[t]he first amendment, like the rest of the Bill of Rights, appears to have been a hastily drafted document upon which little thought was expended."[84] The Court's decisions have unleashed a flood of money into the political system which, to some, has had disastrous effects on our elections and the quality of government in the United States.[85] Campaign finance law, influenced by concern for the preservation of democratic governance, might not so eagerly accept this influx of corporate money into elections. Like qualified immunity, the Court's decisions are based, at least in part, on its policy judgments, here that "any 'undue influence' generated by a speaker's 'large expenditures' was outweighed 'by the loss for democratic processes resulting from the restrictions upon free and full public discussion.'"[86] However, in the First Amendment area, considerations of social welfare, other than generalities concerning the importance of political speech to preserving democratic accountability of government, are in the background as compared to discussions of principles and precedent. The Court concludes, in its most (in)famous campaign finance

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U.S. 310 (2010). A similar conservative majority, joined by Justice Breyer, held that states may not limit independent expenditures supporting political candidates or causes. Randall v. Sorrell, 548 U.S. 230 (2006).

81. *See generally* Richard F. Hixson, *Privacy, Pornography, and the Supreme Court*, 21 J. MARSHALL L. REV. 755 (1988); Lawrence O. Gostin, *Marketing Pharmaceuticals: A Constitutional Right to Sell Prescriber-Identified Data?*, 307 J. AM. MED. ASS'N 787 (2012); Lauren Bowen, *Advertising and the Legal Profession*, 18 JUST. SYS. J. 43 (1995); James Sample, *The Decade of Democracy's Demise*, 69 AM. U. L. REV. 1559 (2020).

82. *See* Adam Liptak, *How Conservatives Weaponized the First Amendment*, NEW YORK TIMES, July 1, 2018, at A1.

83. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 352 (2010).

84. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 22 (1971).

85. *See* John Craig & David Madland, *How Campaign Contributions and Lobbying Can Lead to Inefficient Economic Policy*, CTR. FOR AM. PROGRESS (May 2, 2014), https://americanprogress.org/article/how-campaign-contributions-and-lobbying-can-lead-to-inefficient-economic-policy/.

86. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 343–44 (2010) (Rutledge, J., concurring) (quoting United States v. CIO, 335 U.S. 106, 155 (1948)).

decision, that independent political expenditures do not corrupt politicians, but it has no basis in fact for that conclusion; likewise, it concludes without empirical support, that "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy."[87] These assertions are unsupported by research or scientific examination and, in light of the consistent critiques of federal elections in recent years, may be sadly inaccurate. The Court's view that political spending is a form of speech worthy of the strongest form of protection under the First Amendment has not been subjected to a sustained examination from the point of view of social welfare and in my view, the Court does not seem to really care. There is no serious consideration of the social welfare effects of equating campaign-related expenditures with other forms of political speech.

In recent years, many have come to believe that these protections have had significant negative social effects by, *inter alia*, facilitating the election-related spreading of divisive speech and false information, the difficulty caused by the inability to curb defamatory speech, the perversion of our political process by big money interests, and the easy availability of pornography on the internet. It has been argued that the Supreme Court uses the First Amendment as a vehicle for engaging in *Lochner*-like social engineering (based on ideology, not considerations of social welfare) that has been virtually unanimously repudiated in the realm of economic regulation.[88]

What unites these areas of law? In my judgment, which I realize is subject to dispute and disagreement, the Court has exercised its power in ways that are destructive of social welfare. What makes it interesting to consider them together is that while neither the Court's First Amendment or qualified immunity jurisprudence is heavily influenced by originalist thought, qualified immunity considers only social welfare, while the other, First Amendment protection of campaign-related expenditures, focuses primarily on principles and precedent. These are anecdotes, of course, in isolated and politically-charged areas of the law, and thus cannot be the basis for general conclusions about the quality of the Court's decision-making. I also do not mean to suggest that I have sufficient evidence to conclude that courts are uniformly bad at making decisions in light of social welfare concerns. It may be, for example, that state courts have been very good at shaping the common law to further social welfare where that is a primary focus in areas such as the law of property, torts, and contracts. That is why some law and economics scholars privileged state common law as a model of rational decision making[89] and perhaps explains the canon of construction that statutes in derogation of common law should be strictly construed. And it may even be the case that the constitutional law decisions of the Supreme Court of the United States have greatly increased social welfare. But considering the fact

87. *Id.* at 360.

88. *See, e.g.*, Amanda Shanor, *The New Lochner*, 2016 WISC. L. REV. 133, 136–37 (2016).

89. Richard A. Posner, *The Law and Economics Movement*, 77 AM. ECON. REV. 1, 5–6 (1977).

that, as far as I am aware, no Supreme Court Justice would qualify under the *Daubert* standard[90] as an expert witness on any of the policy matters that either come explicitly before the Court or are at stake in its decisions.

CONCLUSION: THE EFFECTS OF NON-ORIGINALIST DECISION-MAKING

Given the difficulty of obtaining empirical support, it may not be possible to come to strong or even tentative conclusions on the social welfare effects of delegitimizing originalist constitutional decision-making. The most direct way to increase the quality of judicial decision-making is likely to simply increase the quality of judges, avoiding those who are blinded by ideological or partisan commitments or committed to methodologies with no apparent connection to social welfare. Perhaps federal courts, including the Supreme Court, should have professional staffs dedicated to analyzing the likely effects of competing legal rules, much like Congress employs entities such as the Government Accountability Office, the Congressional Research Service and the Congressional Budget Office. Imagine a requirement that the Supreme Court accompany major decisions with a regulatory impact statement embodying the Court's judgment on the likely social welfare effects of a change in constitutional law or statutory understandings. Barring that, perhaps courts should admit that they are not competent to make the types of judgments that ought to govern when they are asked to reject the judgments of the legislative and executive branches and they should act only in extremis and only when they are confident of the likely effects of their interventions.

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

While in an ideal world, some may advocate junking the entire system and starting from scratch, in the real world there is, to my mind, nothing wrong with

90. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 588 (1993) (establishing standard for admitting expert's testimony under the Federal Rules of Evidence).

beginning judicial decision-making with a presumption in favor of following precedent. Holmes was certainly correct when he said, in the Path of the Law,

> It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[91]

However, in many situations, precedent appears to be a useful repository of knowledge and, more importantly, experience. When longstanding precedent has not been legislatively reversed or has not provoked strong social opposition, e.g., in constitutional areas not subject to legislative overruling, precedent may embody sound policy. Put simply, when social forces have settled on a status quo without significant agitation for change, there is reason to believe that any achievable alternatives are less attractive.

So, is there reason to believe that non-originalist constitutional reasoning would lead to better decisions than originalism? Here, I have to confess that I do not know and I am not sure this is an answerable question. I would hope that by focusing on social welfare, legal principles and other policy concerns, decision-making would be better than if it were constrained by originalism detached from social welfare concerns. But I have no evidence that this would be the case, and there is a chance that things would get worse, that judges freed from the perceived constraint of originalism would stray into decisions as harmful and pernicious as *Dred Scott*,[92] *The Civil Rights Cases*,[93] *Plessy v. Ferguson*,[94] *Lochner v. New York*,[95] *Citizens United*,[96] *District of Columbia v. Heller*[97] and *McDonald v. City of Chicago*.[98] Notice, however, that the decision

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91. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (address given at the opening of the Boston University School of Law's new building). I would not subscribe to everything Holmes said in that address, especially including his advocacy of banishing all language evocative of moral concerns from legal discussions. *Id.* at 464.

92. Dred Scott v. Sandford, 63 U.S. 393, 427 (1857) (holding that African-American descendants of slaves are not citizens of the United States capable of suing in diversity jurisdiction; Congress lacks power to legislative concerning status of slavery in states).

93. The Civil Rights Cases, 109 U.S. 3, 24–25 (1883) (holding that the Civil Rights Act of 1875, outlawing racial discrimination in public accommodations, is unconstitutional).

94. Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896) (holding that the state statute requiring "equal but separate" accommodations on railroads does not violate the Equal Protection Clause of the Fourteenth Amendment).

95. Lochner v. New York, 198 U.S. 45, 53 (1905) (holding that the state law setting maximum hours for bakers violates Due Process). Many similar state labor regulations were struck down on these grounds during the period known as the "Lochner era."9

96. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340, 365 (2010) (applying strict scrutiny and striking down limits on campaign-related expenditures involving speech).

97. District of Columbia v. Heller, 554 U.S. 570, 628–29, 635 (2008) (recognizing Second Amendment right to own a handgun for personal protection and striking down District of Columbia gun control ordinance).

98. McDonald v. City of Chicago, 561 U.S. 742, 749–50 (2010) (holding for the first time that the Second Amendment limits state and local gun control).

makers of these terrible decisions were convinced, or at least claimed that they were convinced, that they were obeying the meaning of the Constitution as understood by the Framers. Certainly, they were all made while under the influence of originalist thinking. While some of them may have honestly believed that they were doing the right thing in social welfare terms, without explicit attention to what ought to be the primary guiding star of all government action, who knows?