

## TWO CHEERS FOR PROFESSOR BALKIN'S ORIGINALISM

Steven G. Calabresi\* & Livia Fine\*\*

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### INTRODUCTION

Professor Jack Balkin's recent writings on originalism are just superb and are among the best work done on the subject.<sup>1</sup> His paper for this

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\* Steven G. Calabresi is the George C. Dix Professor of Constitutional Law, Northwestern University. Professor Calabresi would like to thank Enrico Colombatto, Gary Lawson, Lee Liberman Otis, and John McGinnis for their extremely helpful comments on this Article and general subject matter over the last twenty-five years.

\*\* Livia Fine is a candidate for Juris Doctor in 2010 at the Northwestern University School of Law.

<sup>1</sup> Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295-303 (2007) [hereinafter Balkin, *Abortion and Original Meaning*]; Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 442-54 (2007) [hereinafter Balkin, *Original*

Symposium raises many fascinating issues.<sup>2</sup> Professor Balkin now takes his rightful place, alongside New Deal Justice Hugo Black and Balkin's Yale Law colleague Akhil Amar, in the pantheon of liberal originalism.<sup>3</sup> Like Amar, Professor Balkin appreciates that constitutional law begins with the text as a framework, and that each generation of citizens and judges works within the constraints of that text in addressing the problems of their time. Ironically, this focus on the original meaning of the constitutional text was more on display in Warren Court decisions such as *Engel v. Vitale*,<sup>4</sup> *Powell v. McCormack*,<sup>5</sup> and *Jones v. Alfred H. Mayer Co.*<sup>6</sup> than it was in many of the landmark majority opinions of the Burger and early Rehnquist Courts—at least until *City of Boerne v. Flores*.<sup>7</sup> On the current Supreme Court, however, originalism is alive and well, as last year's opinions in *District Of Columbia v. Heller*<sup>8</sup> have shown. As a result, there is no question facing constitutional theorists more important than that of deciding whether the originalism of Justice Scalia, Justice Thomas, or Professor Balkin is correct.

When Professor Calabresi came into law teaching, he was determined to start not by talking about how to do constitutional law but by actually doing it. Professor Calabresi has now written about the unitary executive, federalism limits on national power, the political question doctrine and judicial review, and the meaning of Section 1 of the Fourteenth Amendment along with many other topics. In addressing these particular topics and constitutional provisions, Professor Calabresi has relied on, and tried conscientiously to apply, the theoretical framework of original public meaning textualism that he learned from Justice Scalia and Judge Robert H. Bork. Professor Balkin has now powerfully challenged that framework and has offered up an alternative theory of originalism to that of Justice Scalia.

We have some important areas of agreement with Professor Balkin and other areas where there is not so much disagreement as there is a need for

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*Meaning and Constitutional Redemption*].

<sup>2</sup> Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw. U. L. Rev. 549 (2009).

<sup>3</sup> See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2005); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

<sup>4</sup> 370 U.S. 421 (1962).

<sup>5</sup> 395 U.S. 486 (1969).

<sup>6</sup> 392 U.S. 409 (1968).

<sup>7</sup> 521 U.S. 507 (1997); see also Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 676–77 (2006) [hereinafter Calabresi, *The Tradition of the Written Constitution*] (arguing that Justice Kennedy's majority opinion in *City of Boerne* was even more originalist than Chief Justice Rehnquist's majority opinion in *United States v. Lopez*, 514 U.S. 549 (1995)); Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311 (2005) [hereinafter Calabresi, *Text, Precedent, and the Constitution*] (offering an originalist criticism of the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), a case decided by the Rehnquist Court).

<sup>8</sup> 128 S. Ct. 2783 (2008).

elaboration on the themes he has laid out. *Framework Originalism and the Living Constitution* is the story of how the original public meaning of a text—written in 1787 but critically altered in 1868 and in the Progressive Era—has continued to dominate American public life. It is a text that always calls us back to fundamental principles of liberty, democracy, and equality of opportunity—a text with the power to displace longstanding corrupt practices that may have encrusted it like barnacles. Constitutional law is thus not a chain novel with each generation writing its own chapter and taking off from the chapter before<sup>9</sup> because there is a framework to which we must always refer. Along these lines, Professor Balkin's explanation of the relationship between the constitutional framework and living constitutionalism is a powerful addition to constitutional theory.

Part I of this Article discusses three major points of agreement that we have with Professor Balkin's account. Part II then identifies and explores four areas where we hope Professor Balkin will elaborate further in the future. Part III concludes.

## I. POINTS OF AGREEMENT WITH PROFESSOR BALKIN

### A. *Framework Right, Skyscraper Wrong*

Professor Balkin is fundamentally right when he suggests that the correct way to think about originalism and the Constitution is to conceive of it more as a framework than as a skyscraper. The Constitution is famous for its brevity. It is just over four thousand words long—over seven thousand counting the amendments. It also contains some notoriously open-ended clauses, although they are not necessarily the ones that usually get mentioned. As we will explain below, the Privileges or Immunities,<sup>10</sup> Equal Protection,<sup>11</sup> and Due Process Clauses<sup>12</sup> all have very determinate content, but there are other Clauses in the Constitution which do not. The Necessary and Proper Clause of Article I, Section 8<sup>13</sup> and Section Five of the Fourteenth Amendment,<sup>14</sup> are both very open-ended constitutional provisions which have indisputably taken on new meaning over time. The Necessary and Proper Clause authorizes Congress to pass all laws which are necessary and proper for carrying into execution any of the enumerated powers either of Congress, the President, or the federal courts. It is a sweeping grant of implied powers to Congress. Section Five of the Fourteenth Amendment gives Congress power to pass all laws which are “appropriate” to—i.e. convenient to or useful to the end of—protecting the

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<sup>9</sup> See RONALD DWORKIN, *LAW'S EMPIRE* 228–38 (1986).

<sup>10</sup> U.S. CONST. amend. XIV, § 1.

<sup>11</sup> *Id.*

<sup>12</sup> U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

<sup>13</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>14</sup> U.S. CONST. amend. XIV, § 5.

individual rights guaranteed in Section One of the Amendment. Plainly, these two Clauses are open-ended grants of power.<sup>15</sup>

No one today seriously believes that the scope of congressional power under these Clauses is fixed by the problems that the Framers had in mind in 1787–1788 when the Constitution was ratified or in 1868 when the Fourteenth Amendment was ratified. The text of the Necessary and Proper Clause is at best a framework on which we have built, among other things: a federal power to create paper money;<sup>16</sup> a federal power to ban or control immigration;<sup>17</sup> a federal power to redistribute wealth by stopping races to the bottom with respect to minimum wages and maximum hours;<sup>18</sup> a federal role in forbidding discrimination in intrastate commerce;<sup>19</sup> a federal role in providing an Air Force, a space program, and the National Institutes of Health;<sup>20</sup> and finally a federal role in policing all economic activity, even wholly intrastate economic activity.<sup>21</sup>

Similarly, the texts of Section Five of the Fourteenth Amendment and Section Two of the Fifteenth Amendment<sup>22</sup> are but a framework on which we have built federal laws to ban English literacy tests in voting;<sup>23</sup> to secure voting rights;<sup>24</sup> to criminalize certain violations of civil rights;<sup>25</sup> and to protect civil rights by defining discrimination as occurring in some cases where there is a disparate impact that cannot be justified as well as when there is proof of discriminatory intent.<sup>26</sup> Balkin is absolutely right that the bare textual words of the Necessary and Proper Clause and of Section Five provide at best a framework on which lots of new constitutional

<sup>15</sup> See *Katzenbach v. Morgan*, 384 U.S. 641, 648–51 (1966); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

<sup>16</sup> *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 533–44 (1870).

<sup>17</sup> *Fong Yue Ting v. United States*, 149 U.S. 698, 711–12 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

<sup>18</sup> *United States v. Darby*, 312 U.S. 100, 119–23 (1941).

<sup>19</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253–58 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 301–05 (1964).

<sup>20</sup> The scope of the spending power was greatly expanded in Supreme Court decisions in the 1930s. See *Steward Mach. Co. v. Davis*, 301 U.S. 548, 581–83 (1937); *United States v. Butler*, 297 U.S. 1, 64–66 (1936).

<sup>21</sup> *Gonzales v. Raich*, 545 U.S. 1, 17–19 (2005); *Wickard v. Filburn*, 317 U.S. 111, 121–29 (1942).

<sup>22</sup> U.S. CONST. amend. XIV, § 5 (“The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”); U.S. CONST. amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”).

<sup>23</sup> See *Katzenbach v. Morgan*, 384 U.S. 641, 651–56 (1966).

<sup>24</sup> See *South Carolina v. Katzenbach*, 383 U.S. 301, 325–27 (1966).

<sup>25</sup> See *United States v. Guest*, 383 U.S. 745, 753–54 (1966) (holding that Congress has the power to enact laws criminalizing conspiracies to deny citizens’ civil rights). Justice Clark, in a concurrence joined by Justice Black and Justice Fortas, wrote, “there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.” *Id.* at 762.

<sup>26</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 105(a), 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2 (2000)).

constructions have been built out over the last two hundred years.

In our view however, that does not mean Congress can do anything it wants under the Necessary and Proper Clause without going beyond what the framework will support. When Congress in *United States v. Lopez*<sup>27</sup> tried to regulate the bringing of guns within one thousand feet of a school—a law that simply duplicated the criminal law of more than forty states—the Supreme Court was right to draw the line. There were no collective action problems in *Lopez* that made a federal role necessary;<sup>28</sup> there were no economies of scale that called for national action;<sup>29</sup> there was no need for the federal government to intervene based on negative external effects of a Texas law burdening other states more than Texas;<sup>30</sup> and lastly, there were no civil rights issues raised in which the federal government is presumptively more trustworthy than the states.<sup>31</sup> In sum, none of the pathologies of federalism required a federal Gun Free Schools Zone Act, and the Act invaded the traditional state sphere of taking the lead on ordinary, garden-variety criminal law enforcement. The Supreme Court was therefore absolutely right in saying that Congress's build-out of the Gun Free Schools Zone Act was a build-out that the textual framework could not support.

Similarly, we do not think the textual framework of Section Five, open-ended though it might be, supported Congress's build-out of the Religious Freedom Restoration Act<sup>32</sup> (RFRA), which the Supreme Court held unconstitutional in *City of Boerne v. Flores*.<sup>33</sup> To begin with, we agree with Justice Stevens that RFRA was an unconstitutional establishment of religion over irreligion.<sup>34</sup> But aside from that, the Supreme Court was right to say that Congress and the President alone cannot define new discrete and insular minorities that are protected from caste-based discrimination.<sup>35</sup> The Fourteenth Amendment's command of no class-based discrimination is a ban on more than race or gender discrimination.<sup>36</sup> It is difficult to

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<sup>27</sup> 514 U.S. 549 (1995).

<sup>28</sup> See Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 781 (1995).

<sup>29</sup> *Id.* at 780.

<sup>30</sup> *Id.* at 781–82.

<sup>31</sup> See THE FEDERALIST NO. 10 (James Madison).

<sup>32</sup> Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated* by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>33</sup> 521 U.S. at 536.

<sup>34</sup> *Id.* at 536–37 (Stevens, J., concurring).

<sup>35</sup> For a discussion of the need for protection of discrete and insular minorities, see *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938), and JOHN HART ELY, *DEMOCRACY AND DISTRUST* 73–104 (1980).

<sup>36</sup> The extension to gender discrimination occurred in *Reed v. Reed*, 404 U.S. 71, 74, 76–77 (1971); see also *United States v. Virginia*, 518 U.S. 515, 558 (1996) (finding the Virginia Military Institute's refusal to admit women unconstitutional under the Equal Protection Clause); *Craig v. Boren*, 429 U.S. 190, 210 (1976) (relying on the Equal Protection Clause to strike down an Oklahoma statute which

understand, however, how new suspect classifications with sweeping federal enforcement legislation can be created merely by congressional say-so. If American society recognizes a new suspect class through some kind of solemn public act like the Nineteenth Amendment's conferral of the vote on women,<sup>37</sup> the Supreme Court is bound to accept that determination. But we cannot believe that congressional majorities on the paltry factual record that supported RFRA could really force the Supreme Court into concluding that modern day America is a society where religious people are second-class citizens, untouchables who are in practice granted second-class rights of contract, tort, inheritance, and property ownership. To the contrary, modern day America is in the midst of a religious revival<sup>38</sup> and was in such a revival when *City of Boerne* was decided. RFRA, too, then was a build-out that was not supported by the framework of Section Five, and the Supreme Court was right to reject it.

The *Lopez* and *City of Boerne* decisions strike us as key tests of what Professor Balkin means by framework originalism. He endorses unequivocally the "landmark" decisions of *McCulloch v. Maryland*<sup>39</sup> and *Katzenbach v. Morgan*.<sup>40</sup> Some read these two cases, especially footnote 10 of *Katzenbach*, as being not simply a framework on which more can be built but as also being a blank check to Congress to do absolutely anything it wants.<sup>41</sup> So on these two Clauses, we agree with Professor Balkin that the Constitution is more of a framework than it is a skyscraper, but we certainly do not think that the text is a framework that will support build-outs like the Gun Free Schools Zone Act or the RFRA, and the text does not support footnote 10 of *Katzenbach*.

### B. Original Expected Application Not Binding

This brings us to a second major point of agreement with Professor

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prohibited the sale of "nonintoxicating" beer to males under the age of 21 and females under the age of 18); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (holding that a statute which required male but not female spouses of members of the military to prove dependency in order to obtain certain benefits violated the Equal Protection Clause, with a plurality of the Court arguing for a strict scrutiny standard).

<sup>37</sup> U.S. CONST. amend. XIX.

<sup>38</sup> ROBERT WILLIAM FOGEL, *THE FOURTH GREAT AWAKENING AND THE FUTURE OF EGALITARIANISM* 16–18, 25–27 (2000); Bruce Ledewitz, *Up Against the Wall of Separation: The Question of American Religious Democracy*, 14 WM. & MARY BILL RTS. J. 555, 555–58 (2005).

<sup>39</sup> 17 U.S. (4 Wheat.) 316 (1819); see Balkin, *supra* note 2, at 571 n.63 (2009).

<sup>40</sup> 384 U.S. 641 (1966); see Balkin, *supra* note 2, at 571 n.64.

<sup>41</sup> Contrary to the suggestion of the dissent, § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that Clause of its own force prohibits such state laws.

*Katzenbach*, 384 U.S. at 651–52 n.10 (citation omitted).

Balkin, which is his critically important claim that “fidelity to original meaning does not require fidelity to original expected application.”<sup>42</sup> We think this is just plain right. What judges must be faithful to is the enacted law, not the expectations of the parties who wrote the law. It is the text of the original Constitution of 1787 that was ratified by the State ratifying conventions, and it is the text of the Fourteenth Amendment that was ratified in 1868. The enactment into law of these texts was an open democratic process, and every citizen was entitled to think that the words in the texts that were enacted meant what a good dictionary in use at the time said they meant. The fact that the Framers in Philadelphia or Representative Bingham expected a certain application of the text is of no moment at all. Ordinary citizens could not have been expected to know what these original expected applications were, and they could not have responded to them even if they had.

We believe that Congress often passes statutes with a mistaken impression of what they mean or of how they will apply. How else could Congress have gone for years appropriating funds to discourage people from smoking while providing subsidies for the growing of tobacco? Members of Congress respond to interest groups, and they may often cobble together vague language that a lot of interest groups can live with even though they each may think it means different things. A search for original expected applications will often fail because it will often turn out that different groups expected different applications. There is no way to sum these up or determine which group's expectations ought to get priority.

But even if one could be sure about what an original expected application was that still does not mean that legislators succeeded in enacting into constitutional law a text which did what they thought it did. Consider the anti-racial discrimination command of the Fourteenth Amendment. A case can be made that most people in 1868 thought this command was compatible with school segregation, although Judge Michael McConnell makes a convincing response.<sup>43</sup> An even stronger case can be made that most people in 1868 did not understand the Fourteenth Amendment as protecting an individual's right to interracial marriage. Does this clear expected application mean that under originalism *Loving v. Virginia*<sup>44</sup> is wrong?

No. It does not. All originalists, from Raoul Berger to the present, have always conceded that the Fourteenth Amendment was meant at a minimum to codify the antidiscrimination command of the Civil Rights Act

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<sup>42</sup> Balkin, *supra* note 2, at 552 (emphasis omitted).

<sup>43</sup> See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1023–29 (1995).

<sup>44</sup> 388 U.S. 1 (1967) (declaring Virginia's anti-miscegenation statute, the Racial Integrity Act of 1924, unconstitutional and ending all race-based legal restrictions on marriage in the United States).

of 1866.<sup>45</sup> This act required that all citizens should have the same common law rights as were “enjoyed by white citizens.”<sup>46</sup> The final language of the Fourteenth Amendment expands on this and says that all citizens should have the same “privileges or immunities” as were enjoyed by white citizens in 1868. Privileges or immunities includes not only all the common law rights but also other related fundamental rights as discussed in Justice Bushrod Washington’s opinion in *Corfield v. Coryell*.<sup>47</sup>

Did one white citizen enjoy a common law or fundamental right to marry another white citizen of the opposite sex in 1868? Of course he or she did. The common law of families and of contracts had long recognized a right of marriage, and it would be astonishing if that right were not also described in 1868 as having been fundamental. The Civil Rights Act of 1866 then says African Americans shall enjoy “the same right [or, to be precise, privilege or immunity] . . . as is enjoyed by white citizens.”<sup>48</sup> If a white citizen has a right to marry another white citizen then an African American must enjoy “the same right.”<sup>49</sup> You cannot constitutionally give an “abridged,”<sup>50</sup> or shortened, set of rights to some citizens as compared to others on the basis of their race. The text compels this answer. The fact

<sup>45</sup> See generally RAOUL BERGER, GOVERNMENT BY JUDICIARY 22–36 (1977).

<sup>46</sup> The Civil Rights Act of 1866 provided:

All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

<sup>47</sup> 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230) (“The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state . . .”).

<sup>48</sup> Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

<sup>49</sup> *Id.*

<sup>50</sup> The 1828 edition of Noah Webster’s *American Dictionary of the English Language* defined “abridge” as:

1. To make shorter; to epitomize; to contract by using fewer words, yet retaining the sense in substance—used of writings.  
Justin abridged the history of Troglus Pompeius.
2. To lessen; to diminish; as to abridge labor; to abridge power of rights.
3. To deprive; to cut off from; followed by of; as to abridge one of his rights, or enjoyments. [T]o abridge from, is now obsolete or improper.
4. In algebra, to reduce a compound quantity or equation to its more simple expression. The equation thus abridged is called a formula.

NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

that few people realized this at the time simply shows that Congress and the States did not understand what they had done when they enacted the Fourteenth Amendment. But it is not necessary that legislators understand what they have done when they enact a law anymore than it is necessary that individuals understand all aspects of what they have done when they sign a contract.

Law cannot function if you look behind texts for expected applications. Lawmakers will have no incentive to even try to get the text right unless judges read the texts formalistically. The advantage of textualism and formalism is that they create an incentive structure under which lawmakers have the burden of making themselves clear. Lawmakers often do not like bearing this burden. They may in fact prefer to say that a text means one thing in Scranton, Pennsylvania and another in San Francisco.<sup>51</sup> But the job of judges is not to let them get away with this and to hold them to the original public meaning of the words they wrote.

What about school segregation and the Fourteenth Amendment? Obviously, white citizens enjoyed no common law right to public schools in 1868. How is it that a right to a public school education can be called a privilege or immunity as to which government cannot racially discriminate by giving African Americans an abridged right? It turns out that in 1868, thirty-six out of thirty-seven states had clauses in their state constitutions imposing a duty on the respective states to provide a public school education.<sup>52</sup> That is an Article V three-quarters consensus of the states.<sup>53</sup> These constitutional provisions typically read that the state “shall,”—i.e. “must,”—provide a system of free public schools.<sup>54</sup> As Judge Michael McConnell has convincingly shown in the pages of the *Virginia Law Review*,<sup>55</sup> Congress came within a whisker of voting to ban school segregation in the Civil Rights Act of 1875<sup>56</sup>—legislation that was adopted pursuant to Congress’s power under Section Five of the Fourteenth

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<sup>51</sup> Governor Sarah Palin, Speech at the Republican National Convention (Sep. 3, 2008) (“We tend to prefer candidates who don’t talk about us one way in Scranton and another way in San Francisco.”). Thus Senator Obama claimed to be in step with rural values while campaigning in Ohio and Western Pennsylvania, but dismissing those who held rural values as bitterly clinging to guns and religion at a tony upscale fundraiser in San Francisco. See Jeff Zeleny, *Obama Remarks Called “Out of Touch,”* N.Y. TIMES, Apr. 12, 2008, at A15. For a full transcript of Senator Obama’s remarks, see Mayhill Fowler, *Obama: No Surprise That Hard-Pressed Pennsylvanians Turn Bitter*, The Huffington Post, Apr. 11, 2008, [http://www.huffingtonpost.com/mayhill-fowler/obama-no-surprise-that-ha\\_b\\_96188.html](http://www.huffingtonpost.com/mayhill-fowler/obama-no-surprise-that-ha_b_96188.html).

<sup>52</sup> Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 100 (2008).

<sup>53</sup> *Id.*

<sup>54</sup> For a discussion of why “shall” means “must” see Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 239 n.118 (1985).

<sup>55</sup> See McConnell, *supra* note 43.

<sup>56</sup> *Id.* at 1049–86.

Amendment to enforce Section One.<sup>57</sup> Congress could only have thought that it had constitutional power to pass such legislation if it was widely accepted that the right to a public school education was a fundamental right—a privilege or immunity. The fact that many people who voted for the Fourteenth Amendment in 1868 did not understand this—or believed to the contrary—is irrelevant. The only question that matters is: Was a public school education a privilege or immunity in 1868? Thirty-six out of thirty-seven state constitutions said that it was, meaning that from the beginning it was unconstitutional for the states to give African Americans an abridged right to a public school education as compared to white citizens.

In sum, Professor Balkin is absolutely right when he says that fidelity to original meaning does not require fidelity to original expected application. That is why one can be an originalist and say that both *Brown v. Board of Education*<sup>58</sup> and *Loving v. Virginia*<sup>59</sup> were right and would have been right even in 1868, much less in 1896 when *Plessy v. Ferguson*<sup>60</sup> was wrongly decided. One is left to wonder though, whether Professor Balkin agrees that *Brown* and *Loving* were always right or if he thinks they became so only in the middle of the Twentieth Century?

### C. Courts Ought to Enforce Standards as well as Rules

A third point of agreement with Professor Balkin is in his discussion of the importance of constitutional silences where the Drafters deliberately leave details to be filled in by future generations. Balkin says rightly that “the choice of rules, standards, principles, or silence is not accidental.”<sup>61</sup> Adopters use rules because they want to limit discretion; they use standards or principles because they want to channel politics but delegate the details to future generations. In the context of constitutional texts, Balkin adds that “[c]onstitution-makers from the American Constitution to the present day have also included rights guarantees that sound in the vague and abstract language of principles,” and thus “constitutional silences and open spaces reflect the fact that adopters are not omniscient and cannot prepare for every eventuality.”<sup>62</sup> Balkin rightly cautions against Justice Scalia’s occasional efforts to turn every standard into a rule even when doing so means cramming a square peg into a round hole.<sup>63</sup>

Professor Balkin is certainly right that the Constitution contains Clauses like the Necessary and Proper Clause or the Section Five power that employ standards and not rules. “Necessity” and “appropriateness” are

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<sup>57</sup> *Id.* at 997–98.

<sup>58</sup> 347 U.S. 483 (1954).

<sup>59</sup> 388 U.S. 1 (1967).

<sup>60</sup> 163 U.S. 537 (1896).

<sup>61</sup> Balkin, *supra* note 2, at 553.

<sup>62</sup> *Id.* at 554.

<sup>63</sup> See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

matters of degree, and different reasonable constitutional interpreters will differ on how the standard should be applied. It is not an adequate answer in these situations to say, as Justice Scalia sometimes does, that originalist judges ought not to enforce Clauses of this kind because they do not lend themselves to principled judicial application.<sup>64</sup>

That such Clauses should be enforced is evident in the following statement by Chief Justice Marshall in *McCulloch v. Maryland*:

Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.<sup>65</sup>

Marshall goes on to forswear inquiries “into the degree of [a law’s] necessity” but only where such a law is not prohibited and is “calculated to effect any of the objects entrusted to the government.”<sup>66</sup> Marshall does not say that Congress can regulate any wholly intrastate activity that it could rationally have thought when aggregated nationwide might be convenient to or useful to the regulation of interstate commerce.<sup>67</sup> Marshall would have judges interpret and enforce a standard like the one of “necessity” or of “appropriateness” in the Necessary and Proper Clause.

Justice Scalia’s contrary view is that there is no law to apply in standards so there is no basis in the Constitution as higher law to say that the legislature has enacted a law which is not necessary or appropriate. He thinks standards like this are almost void for vagueness. Allowing them to be adjudicated will in his view lead to a very political and unsatisfactory body of caselaw. For this reason, Justice Scalia has repudiated the congruence and proportionality test of *City of Boerne v. Flores* for determining what measures are “appropriate” laws to enforce the Fourteenth Amendment. Scalia decries the congruence and proportionality test as being a flabby test.<sup>68</sup>

We disagree with Justice Scalia here and agree with Professor Balkin.

<sup>64</sup> The “congruence and proportionality” standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking. . . . I would replace “congruence and proportionality” with another test—one that provides a clear, enforceable limitation supported by the text of § 5.

*Tennessee v. Lane*, 541 U.S. 509, 557–58 (2004) (Scalia, J., dissenting).

<sup>65</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

<sup>66</sup> *Id.*

<sup>67</sup> *Cf. Katzenbach v. McClung*, 379 U.S. 294, 303–04 (1964) (“[T]he mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.”).

<sup>68</sup> *Lane*, 541 U.S. at 557.

Standards can make for judicially enforceable law just as much as rules. As Professor Calabresi's friend and erstwhile colleague Gary Lawson has said to him in conversation, "The rule of law is not a law of rules, it is a law of laws." Laws can be phrased as rules, but they can also be phrased as standards, and it has not been our practice over the past two centuries for judges to eschew ever judicially enforcing a standard. The lengthy body of caselaw that has accumulated interpreting the Freedom of Speech and of the Press<sup>69</sup> or the Cruel and Unusual Punishment Clause of the Eighth Amendment<sup>70</sup> are evidence of this fact.<sup>71</sup> We embrace many, although not all, of those cases. Constitution-makers do quite rightly use open-ended standards to delegate the task of filling in the details to future generations of Americans, although not necessarily future generations of judges.

For over a century now, the Cruel and Unusual Punishment Clause of the Eighth Amendment has been understood by the Supreme Court to embrace a proportionality standard.<sup>72</sup> As an original matter that was a debatable proposition, but the words "cruel and unusual" are not as rule-like as other words that could have been used. The Framers could have banned "drawing and quartering, thumbscrews, torture, the rack, and waterboarding," but they instead chose the more abstract phrase "cruel and unusual punishments." It is reasonable to contend that this choice was deliberate and that the Eighth Amendment is a framework that acquires at least some new meaning over time, like the words "necessary and proper" in Article I, Section 8.

What is not reasonable, however, is to contend that because there is a constitutional standard, and because it can acquire new meaning over time, therefore judges and Justices can just issue holdings based on what the word or clause in question means to them. It is not enough for a majority of the Supreme Court to decide that in the views of five Justices the death penalty for rape of a child is cruel and unusual even though society, as represented by the Congress of the United States no less, had decreed the death penalty for child rape only a few years before in the Code of Military Justice.<sup>73</sup> It is the American people's understanding of what is cruel and unusual that evolves, not the understanding of five of the nine Justices.<sup>74</sup> Standards are not void for vagueness, as Justice Scalia sometimes contends,

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<sup>69</sup> U.S. CONST. amend. I.

<sup>70</sup> U.S. CONST. amend. VIII.

<sup>71</sup> Consider also the whole body of judge-made Antitrust Law which interprets a standard: the Sherman Act's rejection of contracts "in restraint of trade." 15 U.S.C. § 1 (2006).

<sup>72</sup> *Weems v. United States*, 217 U.S. 349, 366–67 (1910) ("Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.")

<sup>73</sup> Compare *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), with National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 843, 119 Stat. 3136, 3264.

<sup>74</sup> For a discussion of the role of consensus in constitutional law, see ELY, *supra* note 35, at 63–69.

but they are also not licenses for idiosyncratic, personal judicial lawmaking or policymaking. To figure out what punishments are “cruel and unusual” or what laws are “necessary and proper” for execution of the enumerated powers, one must look to practice, social understanding over many years, the direction in which legal change seems to be evolving, and what works at the state level. We think Professor Balkin agrees with this, but it is an important point that needs to be made clear.

It should also be noted that constitutional standards and rules can come into conflict with each other, and when this occurs, the rule ought to trump. Obviously, an act of Congress is not necessary and proper if it violates an individual rights provision like the ban on double jeopardy. No matter how necessary and proper a law may seem in some crisis, Congress simply may not put someone on trial twice for the same offence. The same point applies when Congress violates the command of the Vesting Clause of Article II, that the President has all, and not merely some, of the executive power.<sup>75</sup> It may seem really necessary to create an independent agency, but the Constitution is rule-like in forbidding it, contrary to Professor Balkin's view.<sup>76</sup> The Constitution says there are three and only three branches of government. It says that all that is legislative is done by bicameralism and presentment and that all that is judicial is done by adjudicating cases or controversies. Everything else that government does that does not involve bicameralism, presentment, or the adjudication of cases and controversies is executive. And all of the executive power is vested in the President. He can delegate that power implicitly, but the delegation always remains subject to his duty to supervise and control law execution. These are structural constitutional rules, and they therefore trump any congressional judgments about necessity and appropriateness to the contrary.<sup>77</sup> Professor Balkin is mistaken to the extent he argues otherwise.

In sum, Professor Balkin's reconciliation of originalism with living constitutionalism has much to recommend it, and on the three major points discussed above, we agree with his views. We turn now to areas where either we think that Professor Balkin's theory needs more fleshing out or where we disagree with him.

## II. WHERE PROFESSOR BALKIN COULD SAY MORE

### A. *The Purposes of Constitutionalism and Their Implications for Interpretation*

First, Professor Balkin's effort to describe positively the role the U.S.

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<sup>75</sup> See generally Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Law*, 104 YALE L.J. 541 (1994).

<sup>76</sup> See Balkin, *supra* note 2, at 564 nn.46–47.

<sup>77</sup> For a full textualist and originalist defense, see Calabresi & Prakash, *supra* note 75.

Constitution plays is somewhat obscure, at least with respect to some of the purposes of constitutionalism.<sup>78</sup> To date, Professor Balkin's papers and scholarship on originalism have offered only a brief account of the purposes behind the U.S. Constitution. He has rightly said, as noted above, that a purpose of the Constitution is to get politics going and to lay a basic framework on which there will of necessity be large and substantial build-outs. Professor Balkin also rightly suggests that in some important respects, the Constitution is more of a framework than it is a skyscraper. He does not discuss, however, why constitution-makers might write a constitution just to get politics going, nor does he defend the argument that the Constitution in its totality is all framework, standards, and principles, when that text also in important places embodies skyscraper-like rules. We think our difference of emphasis with Professor Balkin may be in part the result of the fact that when he thinks of constitutional law, the first Clauses that come to his mind are the ones in Section 1 of the Fourteenth Amendment, whereas for us the first questions that come to mind are the technical power allocation rules in Articles II and III.

In fact, we think Balkin's account of the purposes served by the U.S. Constitution could benefit from a discussion of the purposes of constitutionalism more generally. These purposes do include getting constitutional politics going, but they also encompass a whole lot more. Arguably, the purposes behind the two-century-long movement toward constitutionalism and behind the U.S. Constitution itself ought to inform how we interpret the text. It would be odd to pick an interpretive constitutional theory that undermined rather than reinforced the reasons why we constitutionalized certain things in the first place. Consider the following ten purposes that could be argued as an historical matter to underlie the U.S. Constitution.

*1. Set Up or Constitute the Institutions of the National Government.—*

A first purpose that clearly underlies the U.S. Constitution as an historical matter was to set up or constitute the institutions of the national government.<sup>79</sup> Before 1789, there was no presidency, no Senate or House of Representatives, and no Supreme or inferior federal courts. By creating *ex nihilo* these institutions, the Framers did get constitutional politics going, as Professor Balkin says, but they also did quite a bit more to constrain and channel the constitutional politics they started. The Framers in 1787 put in

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<sup>78</sup> For an excellent discussion of the purposes of constitutionalism, see Jon Elster, *Introduction to CONSTITUTIONALISM AND DEMOCRACY* 1, 1–14 (Jon Elster & Rune Slagstad eds., 1st pbk. ed. 1993).

<sup>79</sup> See MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 72–73 (12th prt. 1944) (describing the adoption in the Philadelphia Convention of a resolution to establish a national government “consisting of a *supreme* Legislative, Executive and Judiciary” (emphasis in original)); CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY* 77 (1922) (describing a concern with “the institution of a department well enough equipped with power to see to it that the laws were faithfully executed”).

place powerful institutional actors who would become constitutional interpreters, and they set rules on when and how those actors could be selected. The Framers' decision in 1787 to establish a six-year electoral cycle with House elections every two years, presidential elections every four years, and Senate elections every six years with one third of the Senate turning over in two-year intervals completely shapes our public life to the present day. This basic electoral framework rule guarantees that we do not have one winner-take-all election in the U.S. roughly every five years as Britain does. It guarantees that for a political movement to prevail nationally, it must win more than one election.<sup>80</sup> To achieve constitutional change by replacing a majority of the Supreme Court, political movements in the U.S. may have to win three to six elections over a six- to twelve-year time period. In Britain or Canada, in contrast, constitutional change can occur by winning just one election.

The Framers' choice of electoral rules, not standards, allows for no judicial or other build-outs, and it is absolutely fundamental. It sets a circadian rhythm to our politics and promotes gradualism and Burkean change rather than French revolutionary style changes. In this respect, we think a better metaphor for the Constitution than a skeletal framework is that of a sea anchor. A sea anchor is a large parachute filled with water that drags behind a boat and slows enormously its movement in any direction even though the anchor never touches bottom. It can hence be used in the middle of the ocean where the water is too deep for a normal anchor. A first purpose of the U.S. Constitution is to set up the electoral cycle to slow change the way a sea anchor does in the middle of the ocean.

The six-year electoral cycle set up by the Constitution serves other purposes as well as slowing down change. It guarantees that the popular will in the U.S. is sampled not in one election every five or so years but in multiple elections held every two years over a six-year cycle. The U.S. method of sampling the popular will is superior to the British method in the same way that a daily tracking poll is superior to a one-time poll. Multiple samplings lead to greater accuracy. The fact that the U.S. samplings of the popular will occur in geographically different congressional districts, states (for the Senate), and the nation (for the presidency) adds to the accuracy of our system.<sup>81</sup>

We are sure that Professor Balkin does not disagree with any of this, but we think that his analysis of the way in which the constitutional text gets politics going would benefit from more specificity. Our relationship to the Framers is not, as Paul Brest once famously claimed, like having a great grandparent fourteen generations ago who came over on the Mayflower.<sup>82</sup>

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<sup>80</sup> Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 57–59 (2001).

<sup>81</sup> *Id.*

<sup>82</sup> Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 234

The Framers' electoral rules did not merely launch constitutional politics. They shape the form it takes today. Parties in control of the White House lose midterm elections, second term Presidents are lame ducks, parties out of power in the White House usually regain it after eight or twelve years,<sup>83</sup> and change on the Supreme Court requires winning many elections in a row.<sup>84</sup> All of this is laid out in stone like the Code of Hammurabi in the structural Constitution. The description of the text of the Constitution as only getting politics going may be more a description of the texts of Sections 1 and 5 of the Fourteenth Amendment than it is a description of the original Constitution. For better or worse—and we think for better—the original Constitution of 1787 with its six-year electoral cycle and its sea anchor-like qualities completely shapes our political and constitutional dialogue. Professor Balkin is not wrong when he says the Constitution gets politics going, but the statement needs elaboration and qualification.

2. *Divide and Allocate Power.*—A second obvious purpose of the U.S. Constitution is to divide and allocate power in four different ways. First, the Constitution divides and allocates power between We the People, who are sovereign, and the government, which is given only limited and enumerated powers. Second, the Constitution divides power horizontally among the Congress, the President, and the federal courts. Third, the Constitution divides power vertically between the national government and the states. And, finally, the Constitution protects certain enumerated and unenumerated individual rights from government intrusion at all levels.

This function of dividing and allocating power in so many different ways again goes somewhat beyond just the creation of a skeletal framework or the getting going of politics. The Framers' Constitution set in motion a whole Newtonian system of planets orbiting around the sun of the sovereign people, each exerting gravitational force on one another. The Madisonian system of checks and balances is, as Michael Kammen has described it, “a machine that would go of itself.”<sup>85</sup> Professor Balkin is absolutely right that there are build-outs in structural constitutional law. At the margins, presidential, congressional, and federal judicial power have been made concrete by practice.<sup>86</sup> One cannot understand presidential power in foreign affairs, or the political question doctrine, or the case and controversy

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(1980).

<sup>83</sup> Steven G. Calabresi & James Lindgren, *The President: Lightning Rod or King?*, 117 YALE L.J. 2611, 2614–15 (2006).

<sup>84</sup> Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 809–18 (2006).

<sup>85</sup> MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* 16–19 (1986).

<sup>86</sup> For a discussion of how practice has made the removal and direction power of the President over his subordinates concrete, see generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008).

limitation without making reference to practice. The gloss of history<sup>87</sup> and of two centuries of tradition does matter a lot, and some institutions like the presidency and the federal courts have clearly turned out to be more powerful than the Framers anticipated. But again, the basic divisions and allocations of power made in the period between 1787 and 1791 still govern with the vital additions of the Reconstruction and Progressive Era Amendments. Presidents still have the veto power, the pardon power, the treaty-making power, and the appointment power because of what happened 220 years ago. There are grey areas to be sure where build-outs (or repairs) have been made, but they are dwarfed by how much has stayed the same.<sup>88</sup> The Framers' system of checks and balances reinforces the sea anchor-like qualities of the Constitution discussed above. It slows down change and provides for certainty which in turn promotes investment and economic growth.<sup>89</sup> For this reason, the Constitution of the Framers has helped make the United States the most prosperous nation on earth.

While we are sure that Professor Balkin does not disagree with the claim that the Constitution divides and allocates power, his endorsement of *McCulloch v. Maryland*, *Katzenbach v. Morgan*, and *Humphrey's Executor*<sup>90</sup> as foundational landmark cases suggests a belief that the Constitution started our politics by empowering Congress to do anything it wants in the structural area. Stripping the President of the removal power over independent agencies, creating a legislative veto, stripping the Article III courts of jurisdiction to hear cases involving terrorists—all of this is constitutionally permissible in his view. We disagree, as Professor Calabresi has explained with respect to Article II in an article with Saikrishna Prakash<sup>91</sup> and with respect to Articles III and II in an article with Gary Lawson.<sup>92</sup> The Constitution gets our politics going, but it also divides and allocates power. With respect to structural constitutional law, Congress

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<sup>87</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (“It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”).

<sup>88</sup> See, e.g., CALABRESI & YOO, *supra* note 86, at 3–9.

<sup>89</sup> See Philip Keefer, *Beyond Legal Origin and Checks and Balances: Political Credibility, Citizen Information and Financial Sector Development* 2–3 (World Bank Dev. Research Group, Policy Research Working Paper No. 4154, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=966674](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=966674) (empirical data showing that political checks and balances, such as those in the United States Constitution, are a strong determinant of financial development).

<sup>90</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

<sup>91</sup> Calabresi & Prakash, *supra* note 75.

<sup>92</sup> Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007).

is not like the British Parliament. It is not a sitting constitutional convention.

3. *Serve as a Gag Rule.*—A third purpose served by the U.S. Constitution is that it functions as a gag rule: it takes certain subjects off the table of discussion in ordinary politics.<sup>93</sup> The Framers of the Constitution meant to do this at the national level when they forbade a national established church, protected the free exercise of religion, and forbade religious tests for holding office. These three prohibitions were meant to prevent a repeat of the English civil wars of the seventeenth century by taking the subject of religion and removing it entirely from ordinary politics. The Framers' effort was a complete success. Religious strife has been greatly reduced. The authors of the Reconstruction Amendments, perhaps inspired by the Framers' success, tried to take the subject of racial discrimination off the table by forbidding laws that distinguish citizens by race. Their effort was less successful—in our opinion in part because the language they used was somewhat more equivocal.

How well does Professor Balkin's version of originalism serve the function of maintaining gag rules? Not all that well. He seems to contemplate a lot of permissible and legitimate doctrinal constitutional change as a result of the efforts of politically persistent social movements. Balkin says that “[s]ocial and political movements express values and press for change both in culture and in politics. . . . Courts also ratify changes in social mores and institutional practices . . . . The sexual revolution and the movement for women's liberation are two obvious examples . . . .”<sup>94</sup> Balkin elaborates, stating that “[c]onstitutional revolutions are changes in expectations about what constitutional provisions mean and how they are likely to be applied; changes in what kinds of positions are thought reasonable and unreasonable, ‘off-the-wall’ and ‘on-the-wall.’ These changes are prompted by the contemporaneous work of the political branches and by *social mobilizations*.”<sup>95</sup> The result is that “[p]artisan entrenchment in the Judiciary combined with changing popular attitudes and shifts in constitutional culture eventually become reflected in judicial decisionmaking using vague texts.”<sup>96</sup> Thus, “[i]f you don't like the living Constitution you get, you should be working harder to get the national politics you like, because that is the engine of constitutional construction.”<sup>97</sup> Indeed, “[h]istory teaches us that courts normally do not engage in significant changes in constitutional doctrine without lengthy prodding from a sustained campaign by *social movements and political parties*,” by

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<sup>93</sup> Stephen Holmes, *Gag Rules or the Politics of Omission*, in CONSTITUTIONALISM AND DEMOCRACY, *supra* note 78, at 19–57.

<sup>94</sup> Balkin, *supra* note 2, at 562 (emphasis added).

<sup>95</sup> *Id.* at 577 (emphasis added).

<sup>96</sup> *Id.* at 584.

<sup>97</sup> *Id.* at 584–85.

using “not only litigation but also political mobilization and cultural and social persuasion.”<sup>98</sup> He concludes that “There is no plausible account of living constitutionalism that does not involve the Court responding to popular culture, *social movement mobilization*, and electoral politics.”<sup>99</sup>

All of this emphasis on constitutional change by social movement mobilization and politics is not in our view consistent with the Constitution's purpose of serving as a gag rule. Under Professor Balkin's account, when Jim Crow-era segregationists mobilized to water down completely the Fourteenth Amendment, that was just a successful social movement.<sup>100</sup> When *some* Christian conservatives mobilize today to make sure that only people of faith are appointed to be judges, or to pass the so-called Religious Freedom Restoration Act mandating preferential legal treatment for people of faith compared to agnostics, that too would be just another successful social movement. As we will explain at more length below, we do not completely disagree with Professor Balkin's *positive* account of change in constitutional doctrine, but we do disagree to the extent there is any *normative* implication drawn. Yes, the Jim Crow social movement succeeded and gave us *Plessy v. Ferguson*, but that success did not change the original meaning of the Fourteenth Amendment which guaranteed racial equality in 1868, in 1896, in 1954, and today. Jim Crow did not succeed, even temporarily, in changing the meaning of the Fourteenth Amendment.

4. *Restrain the Passions of the Moment.*—A fourth purpose of the U.S. Constitution historically was that it was meant to restrain the passions of the moment. Tying ourselves to the constitutional text was to be like Ulysses lashing himself to the mast of his ship so he could listen to, but not heed, the alluring and deadly songs of the sirens.<sup>101</sup> The Framers themselves made it quite clear that they designed the Madisonian system of checks and balances to prevent temporary passions, which might engulf the body politic, from being legislated immediately into law.<sup>102</sup> They guaranteed, as

<sup>98</sup> *Id.* at 593 (emphasis added) (citation omitted).

<sup>99</sup> *Id.* at 597 (emphasis added).

<sup>100</sup> Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 131–40 (1994).

<sup>101</sup> HOMER, THE ODYSSEY, bk. XII, ll. 165–92, reprinted in 4 GREAT BOOKS OF THE WESTERN WORLD: THE ILIAD OF HOMER AND THE ODYSSEY (Mortimer J. Adler ed., Samuel Butler trans., Encyclopedia Britannica, Inc. 1989).

<sup>102</sup> There is a widely told anecdote that “on his return from France, Thomas Jefferson called on George Washington to account at the breakfast-table [sic] for having agreed to a second chamber. ‘Why,’ asked Washington, ‘did you pour that coffee into your saucer?’ ‘To cool it,’ quoth Jefferson. ‘Even so’ said Washington, ‘we pour legislation into the senatorial saucer to cool it.’” 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 359 (Max Farrand ed., rev. ed. 1966); see also THE FEDERALIST NO. 51 (James Madison) (“[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others . . . [a]mbition must be made to counteract ambition.”).

we have said above, that change would be slow and incremental, and that social movements would have to win many elections and not just one to get their way on constitutional changes. We think the U.S. Constitution has been highly successful in this respect, and that that is one reason we have had so much economic growth and liberty as compared with other democracies around the world.

What are the implications of Professor Balkin's originalism for accomplishing the Constitution's purpose of inhibiting the triumph of the passions of the moment? Again, Balkin's apparent validation of efforts by engaged social movements seems to threaten rather than reinforce this aspect of the Constitution. It seems to encourage those who want to trample on constitutional values by promising that so long as they are persistent they will *and they ought to* prevail. We disagree on the normative claim to the extent there is one, as we will explain further below.

5. *A Framework for Private Ordering.*—A fifth purpose that is served by the U.S. Constitution that has already been alluded to is that it serves as a framework to promote private ordering because it makes change of all kinds slow and incremental. This is the case not only because of the Madisonian system of checks and balances and the divisions and allocations of power alluded to above but also because Article V makes it almost impossible to amend the Constitution while the Senate filibuster (a Balkinian build-out in our view)<sup>103</sup> makes it hard to pass even ordinary laws. The net result is that the United States has a very entrenched legal system:<sup>104</sup> It is not just hard to amend the Constitution; it is also very hard to pass an ordinary law. The U.S. legal system is thus super-entrenched and that leaves people a lot of room to make their own choices in terms of economics and personal liberties. One goal of a constitution is to guarantee credibly that if you write a book today you will not be prosecuted for what you said in it twenty years from now. Similarly, if you start a business or build a factory today, it will not be taken away from you without just compensation being paid twenty years from now. The U.S. Constitution accomplishes these goals of promoting private ordering because it is so hard to pass laws and because it is almost impossible to amend the Constitution. This is why, in our opinion, we are the freest and most prosperous nation on earth. The Framers did not say in so many words that they wanted to promote private ordering, but they did make it clear that they wanted to protect life, liberty, and property. Obviously, they succeeded beyond their wildest expectations.

What does Professor Balkin's version of originalism accomplish with

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<sup>103</sup> See *Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied its Right to Consent: Hearing Before the Subcomm. on the Const., Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 108th Cong. 32–46 (2003) (statement of Steven Calabresi, Professor of Law, Northwestern University School of Law).

<sup>104</sup> See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 650–53 (2000).

respect to the promotion of private ordering? Probably it does not change anything very much except, again, insofar as it validates efforts by social movements to change constitutional meaning through court appointments rather than by amendment. On the other hand, it is probably inevitable that a democracy designed to have so much entrenchment would end up in practice accomplishing change by judicial alteration of doctrine. In our view, one of the causes of judicial activism and of enhanced presidential rulemaking authority is the very fact that the rules for ordinary lawmaking in Article I, Section 7 are so onerous that Presidents and judges instinctively look for ways around them. The courts and the executive ought not to do that. They ought to but do not always force change to occur in the consensus promoting and gradual ways prescribed by Article I, Section 7 or by Article V.

6. *A System of Intergenerational Lawmaking.*—A sixth purpose of the Constitution is one that the Framers could only have hoped for rather than expected: the successful creation of a real working system of intergenerational lawmaking. Law can create a freedom or power in people that would not exist if it were not there. This insight is at the bottom of contract law. By giving up the “freedom” to breach their contracts, citizens gain a power to make more certain arrangements in the future, which is liberty- and prosperity-enhancing. Ironically, perhaps, agreeing to be bound by a contract is empowering.

The same thing occurs in constitutional law as to intergenerational lawmaking. There are some problems that are just so big that no one generation can or should have to deal with them on its own. Thus, for example, the U.S. government borrowed a lot of money from future generations to win World War II and the Cold War. The generations that won those wars could not have won them without borrowing from the future. And it made sense to borrow from future generations because those very future citizens would themselves benefit from winning the wars in question. The Constitution similarly allows us, in exchange for giving up our freedom to scrap it, the security of being bound by some pretty sensible rules that have persisted over two hundred years. By agreeing to be bound by our great-great-grandparents' Fourteenth Amendment, we also gain the power to bind our great-great-grandchildren with some new amendment. Constitutional originalism thus acknowledges that the present has obligations both to the past and to the future, and that just as every individual is not an island all by himself, every generation is not an island all by itself. We honor our parents when we give their laws a presumption of validity while reserving the means to change them in a consensus-based way.<sup>105</sup>

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<sup>105</sup> See *Romans* 7:1 (King James) (“Know ye not, brethren, (for I speak to them that know the law,) how that the law hath dominion over a man as long as he liveth?”).

What does Professor Balkin's version of originalism do to the Constitution's system of intergenerational lawmaking? We think Balkinization of the Constitution could to some degree unglue the obligation each generation ought to feel it owes to the laws but not the opinions of its predecessors. If the Constitution is just a very skeletal framework with a lot of build-outs on it secured by past social movements (like the movement for Jim Crow), then why not form our own social movement and pour acid on the intergenerational obligations? The current generation of baby boomer Americans has been famously called the "Me Generation."<sup>106</sup> The point of originalism is to inhibit "Me Generation" thinking in constitutional law and the deadly sins of pride and arrogance that might go with it.

7. *Promote the Rule of Law.*—A seventh purpose of the Constitution is to promote the rule of law and not of individual men or women. As Robert's Rules of Order say at the outset, "where there is no law and where every man does what is right in his own eyes there is the least of real liberty."<sup>107</sup> The original Constitution is an ingenious effort to promote the rule of law because, as James Madison explained in *The Federalist No. 51*, it does not rely on mere parchment barriers for enforcement, but instead sets in play a mechanism by which ambition is made to counteract ambition.<sup>108</sup> Ultimately, We the Sovereign People enforce the Constitution over the six-year electoral cycle, and, as Professor Balkin quite rightly says, the People's interpretations of the text ultimately prevail at least as a positive matter.<sup>109</sup>

What does Professor Balkin's version of constitutional originalism do to the rule of law-enhancing features of the Constitution? On the one hand, the Balkinization of constitutional law would seem to lead to some judicial restraint in changing abruptly judicial doctrine. To that extent, Balkinization would enhance the rule of law features of the Constitution, at least as compared with a Dworkinian alternative. On the other hand, Professor Balkin's legitimation of social movement change in constitutional meaning, as occurred during the Jim Crow era, would be a setback for the rule of law. Balkin rejects the Rule of Judges but replaces it with the Rule of Engaged Social Movements instead of with the Rule of Law.

8. *Promote Democracy.*—An eighth purpose of the Constitution is to promote democracy. As much as they believed in and talked about checks

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<sup>106</sup> See TOM WOLFE, *The Me Decade and the Third Great Awakening*, in MAUVE GLOVES & MADMEN, CLUTTER & VINE 117 (1999).

<sup>107</sup> HENRY M. ROBERT, ROBERT'S RULES OF ORDER NEWLY REVISED v (Sarah Corbin Robert et al. eds., 10th ed. 2000).

<sup>108</sup> THE FEDERALIST NO. 51 (James Madison).

<sup>109</sup> See Steven G. Calabresi, *The President, the Supreme Court, and the Constitution: A Brief Positive Account of the Role of Government Lawyers in the Development of Constitutional Law*, 61 LAW & CONTEMP. PROBS. 61 (1998); see also Calabresi, *The Tradition of the Written Constitution*, *supra* note 7; Calabresi, *Text, Precedent, and the Constitution*, *supra* note 7.

and balances, the Framers were determined to set up a democratic system of government and not an English-style monarchy or aristocracy. The Constitution provides for popular ratification and for popular election of representatives, senators, and, indirectly, Presidents. Judges, whose selection is removed from the people, are picked by the President and Senate and thus indirectly by the people. The Constitution itself commands that Congress shall guarantee to each state a republican form of government,<sup>110</sup> and the Framers must have thought that was the form of government they had prescribed at the federal level. Even the six-year electoral cycle, described above as a series of biannual tracking polls, is an effort to discern what the people *really* want, as opposed to what they might impulsively vote for in one election. The Constitution is famously brief, and it thus leaves future national majorities a lot of space in which to govern. The Fourteenth Amendment importantly constrains the States, but, as we shall explain further below, it still leaves them vast room for experimentation. On balance, the Constitution is a very democratic document in the true sense of the word “democracy.”

Does Professor Balkin's originalism facilitate the Constitution's efforts to protect and encourage democracy? To the extent he rejects the rule of judges we would say that it does, but to the extent that he accepts the rule of engaged social movements we would say that it does not. Balkin seems to contemplate that engaged social movements can legitimately—or do legitimately—impose their views of constitutional meaning in place of the original constitutional meaning.<sup>111</sup> We disagree as is explained further below.

9. *Certainty from Getting Things in Writing.*—A ninth purpose of the Constitution is to make it easier to find the law by getting it down in writing. The Framers grew up with the British unwritten constitution, and they obviously thought it was very important to get constitutional constraints in writing so as to eliminate uncertainty about the law and, in Jefferson's words, to bind down government officials in the chains of the Constitution.<sup>112</sup> The Framers were skeptical about the ability of people to agree on unwritten constitutional commands, and this skepticism seems well warranted. The writtenness of the Constitution reflects the Framers' desire to make concrete the meaning of our fundamental law.

What would adoption of Professor Balkin's version of originalism do

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<sup>110</sup> U.S. CONST. art. IV, § 4.

<sup>111</sup> See McConnell, *supra* note 100, at 116–22 (describing how constitutional moment theory synthesizes the Founders' views of Constitutional meaning with the meaning advanced by social or political movements, subordinating the primacy of text).

<sup>112</sup> THOMAS JEFFERSON, KENTUCKY RESOLUTIONS OF 1798 AND 1799, *reprinted in* 4 THE DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 540, 543 (Jonathan Elliot ed., New York, Burt Franklin, 2d ed. 1888) (“In questions of powers, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.”).

for the certainty of the written constitutional text? We think it would support it to the extent Balkin rejects rule by judges but that it would again undermine it to the extent he means to validate the rule of engaged social movements. Ultimately, we think we need to hear more from Professor Balkin on this subject.

*10. Lead to Good Consequences.*—The tenth and final purpose of the Constitution is aspirational and consequential. The Constitution itself describes its purposes aspirationally and consequentially in the Preamble. The Framers say the purposes of the Constitution include forming a more perfect Union, establishing Justice, ensuring domestic tranquility, providing for the common defense, and securing the Blessings of Liberty to ourselves and our posterity.<sup>113</sup> The Constitution aspires to promote these ends so as to produce good consequences, and the Preamble describes the promotion of these ends as being a purpose of the document. The Preamble is, along with the Declaration of Independence, a statement of national aspirations or hopes. The rest of the document is quite legalistic compared with twentieth-century constitutions in other countries, which often express aspirations to provide equal healthcare and welfare rights and other entitlements of that kind.<sup>114</sup> Our Constitution eschews these kinds of positive entitlements in favor of more limited ambitions.

Is Professor Balkin's take on originalism one that will better help constitutional law achieve the aspirations of the Preamble? The argument that it will not is that Balkin seems to think every generation of engaged social movements will have its own equally legitimate vision of the Blessings of Liberty, which it can urge a majority of the Supreme Court to impose nationally from the bench. This raises the question of whether the text of the Constitution and Amendments as they were originally understood lead on balance to good consequences or bad ones. Balkin mentions a number of bad consequences he thinks flow from following the original meaning in the way Justice Scalia does.<sup>115</sup> We disagree with him for reasons Professor Calabresi has set out in his introduction to *Originalism: A Quarter-Century of Debate*.<sup>116</sup> Specifically, we think *Brown v. Board of Education* is correct on originalist grounds as are incorporation, the extension of the Constitution's equality command to sex discrimination, and the prohibition of race discrimination by the national government. We thus disagree with Professor Cass Sunstein's book *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America*. Sunstein describes a

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<sup>113</sup> U.S. CONST. pmbl.

<sup>114</sup> See, e.g., S. AFR. CONST. 1996, ch. 2, §§ 26–27, 29 (“Everyone has the right to have access to adequate housing . . . . Everyone has the right to have access to health care services . . . . Everyone has the right to a basic education, including adult basic education . . .”).

<sup>115</sup> See Balkin, *Abortion and Original Meaning*, *supra* note 1, at 297–98.

<sup>116</sup> Steven G. Calabresi, *Introduction to ORIGINALISM: A QUARTER-CENTURY OF DEBATE* 32–40 (Steven G. Calabresi ed., 2007).

parade of horrors that he thinks originalism would lead to, like a rejection of incorporation, all of which originalists have disavowed. Sunstein ends up responding to a caricature of the originalist position.<sup>117</sup> These types of attacks on originalism also ignore the fact that the Constitution has made this country, as Abraham Lincoln called it, the last best hope of man on earth.<sup>118</sup> We are a beacon of liberty and prosperity to the rest of the world as is evidenced by the fact that people leave Europe, Asia, Africa, and Mexico to come to the United States and not the other way around.<sup>119</sup> The main doctrinal changes that we would anticipate following the Supreme Court's embrace of originalism are as follows: a modest reduction in the huge role played by the federal government in this country; an enhancement of oversight of the executive branch by nationally elected officials instead of by unelected bureaucrats; and a reduction in legislating from the bench by federal judges on sensitive issues of social policy about which the Constitution is totally silent. Following the original meaning of the Constitution would thus lead to good consequences, not bad ones.

In sum, the purposes we attribute to the written Constitution are considerably more complex than just getting politics going, and the Constitution is more than a framework structure even if it does have many judicial, executive, and legislative branch build-outs. Professor Balkin's originalism does more to promote the purposes underlying American constitutionalism than does Dworkinism, but it errs in so far as it substitutes the rule of engaged social movements for the rule of law.

#### B. *A Positive or a Normative Account?*

All of this discussion of the purposes of American constitutionalism leads naturally to a second major observation as to where Professor Balkin could say more. As we have suggested above, Professor Balkin offers us a positive account of our constitutional regime that has normative implications. He says that the constitutional regime we actually live under is one of living constitution originalism, not Scalia-style originalism, and his implication is that we *ought* to be living constitution originalists because the Scalia project is unworkable.<sup>120</sup> Balkin argues that it is unrealistic to expect the Supreme Court to use a theory which yields so many conclusions that are unworkable in the world we live in. Among the examples of unworkable conclusions that Scalia reaches, he cites the inability to justify

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<sup>117</sup> See generally CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 53–78 (2005).

<sup>118</sup> Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), in 5 COLLECTED WORKS OF ABRAHAM LINCOLN 518, 537 (Roy P. Basler ed., 1953).

<sup>119</sup> See Steven G. Calabresi, "A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law, 86 B.U. L. REV. 1335, 1393–95 (2006).

<sup>120</sup> See Balkin, *Abortion and Original Meaning*, supra note 1, at 295–303; Balkin, *Original Meaning and Constitutional Redemption*, supra note 1, at 442–54.

the decision in *Brown v. Board of Education*,<sup>121</sup> the incorporation of the Bill of Rights, and the extension of the Equal Protection Clause to apply to women.<sup>122</sup> As we mentioned above, we think all these outcomes are correct applying Scalia-style originalism, even if Scalia himself has not realized that.

Professor Balkin explains *Brown* and the extension of the Equal Protection Clause to women as the result of the work of engaged movements for social change, which acting through the executive branch and the Senate brought a change in the view of the Supreme Court.<sup>123</sup> Balkin implies that the work of these social movements is evidence that constitutional change in this country is democratic in some sense. Since the critics of judicial activism have long complained that such activism is undemocratic and that judicial review suffers from a countermajoritarian difficulty, Balkin's thesis about engaged social movements and constitutional change could be read as implying that the countermajoritarian difficulty is overstated.<sup>124</sup> In arguing this, Balkin builds on the claim made fifty years ago by Yale political science Professor Robert Dahl that the Supreme Court essentially follows the national election returns, and that the Court has rarely been out of step with national public opinion for any long period of time.<sup>125</sup> Dahl's dismissal of the countermajoritarian difficulty has been echoed by Gerald Rosenberg in *The Hollow Hope*<sup>126</sup> and by many law professors.<sup>127</sup>

Professor Balkin follows Dahl in arguing that Supreme Court decisions are only "countermajoritarian from a local or regional perspective."<sup>128</sup> They "bring stragglers and outliers—usually local and regional majorities—in line with the constitutional views of the newly dominant national political coalition."<sup>129</sup> This view overlooks the fact that from 1801 to 1836, the Marshall Court imposed Federalist constitutional law on a Jeffersonian and

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<sup>121</sup> See Balkin, *Original Meaning and Constitutional Redemption*, *supra* note 1, at 450–52.

<sup>122</sup> See Balkin, *Abortion and Original Meaning*, *supra* note 1, at 307–10, 319–22.

<sup>123</sup> See *id.* at 302, 320–21; Balkin, *Original Meaning and Constitutional Redemption*, *supra* note 1, at 512–13.

<sup>124</sup> For the most famous discussions of the countermajoritarian difficulty, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (2d ed. 1986) (1962); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 139–41 (1990).

<sup>125</sup> Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

<sup>126</sup> GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* 9–36 (1991).

<sup>127</sup> See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 222–23 (2004).

<sup>128</sup> Balkin, *supra* note 2, at 571.

<sup>129</sup> *Id.* at 565.

Jacksonian nation. The *Dred Scott*<sup>130</sup> Court likewise spoke for no national majority when it held the Missouri Compromise unconstitutional. Nor is it at all likely during the *Lochner* era from 1905 to 1937 that a national majority rejected the constitutionality of worker safety laws, as I will explain below. Neither the Marshall Court nor the *Dred Scott* Court nor the *Lochner* Court spoke for national majorities against regional state stragglers and outliers.

Professor Balkin's positive account of engaged social movements leading us to constitutional change is in some ways inspiring and seems democratic, but we think that the Supreme Court responds to elites and not to social movements. This means the concern over the countermajoritarian difficulty with judicial review is valid, and not overstated as Balkin implies. In some important instances during the last century, the Supreme Court has resisted broad social movements, sometimes indefinitely, at the behest of elites. Consider the following two instances of this behavior.

For a period of thirty-two years, from its decision in *Lochner v. New York*<sup>131</sup> in 1905 until the constitutional revolution of 1937, the Supreme Court resisted the efforts of the Progressive movement to regulate labor conditions in the workplace. As a result, the United States lagged behind other Western democracies for a third of a century.<sup>132</sup> Although Progressives held the Presidency with the two Roosevelts and with Woodrow Wilson during this period and experienced great success in state elections, the federal courts issued decisions invalidating more than two hundred progressive laws.<sup>133</sup> While Franklin Roosevelt eventually brought the Supreme Court to heel in 1937, it took a major constitutional crisis for him to do so. The *Lochner* episode certainly suggests that there is a countermajoritarian difficulty.

More recently, the Supreme Court has also strongly resisted public opinion and engaged social movements. For example, when the Court struck down school prayer as unconstitutional in the 1960s,<sup>134</sup> public opinion polls at the time revealed that that decision was disapproved of by over 70% of all Americans.<sup>135</sup> Public opinion polls today continue to show that 70% of the public disagrees with the Court on school prayer,<sup>136</sup> and the

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<sup>130</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

<sup>131</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>132</sup> William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1144–46 (1989).

<sup>133</sup> Stephen Gardbaum, *New Deal Constitutionalism and the Shackling of the States*, 64 U. CHI. L. REV. 483, 494 (1997).

<sup>134</sup> Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

<sup>135</sup> See William M. Beaney & Edward N. Beiser, *Prayer and Politics: The Impact of Engel and Schempp on the Political Process*, 13 J. PUB. L. 475, 484 (1964); Michal R. Belknap, *God and the Warren Court: The Quest for "A Wholesome Neutrality,"* 9 SETON HALL CONST. L.J. 401, 430–33, 440–42 (1999).

<sup>136</sup> David W. Moore, *Public Favors Voluntary Prayer for Public Schools*, GALLUP NEWS SERVICE,

level of disapproval is deep enough to have created the engaged social movement that many journalists call the Christian Right. How has the Supreme Court responded to this social movement? It has doubled down on the Establishment Clause not only by keeping its ban on school prayer, but also by banning, among other things, Christmas holiday displays<sup>137</sup> and displays of the Ten Commandments.<sup>138</sup> Far from being accountable to public opinion, the Court has responded to elite opinion on cultural matters in the modern day just as it responded to elite opinion on labor laws at the start of the twentieth century.

Nor is the current Court's behavior on school prayer idiosyncratic. The Court's extension of the exclusionary rule to the states in *Mapp v. Ohio*<sup>139</sup> was and is controversial, but the Court has not revisited the issue. The Court's invalidation of statutes banning flag burning in 1989 and 1990<sup>140</sup> was and is controversial, but the Court has held its ground. The Court also took a controversial stance by invalidating the death penalty in 1971.<sup>141</sup> Although it seemed to back down in subsequent years, allowing a few executions,<sup>142</sup> more recently, the Court has reasserted its controversial stance by chipping away at the death penalty and invalidating its use in a whole host of situations, including most recently for child rape.<sup>143</sup> In all of these instances, the Supreme Court has not followed the national election returns—as Dahl would predict—or the behest of engaged social movements, but has instead followed elite opinion.

The bottom line is that Professor Balkin's positive account of We the People enforcing the Constitution through all three branches with the Supreme Court as Our mouthpiece is incomplete. As a positive matter, the Supreme Court appears responsive only to shifts in elite opinion, which means that among other things a countermajoritarian difficulty persists.

Professor Balkin defends the Supreme Court from the charge that it responds to elites who are influenced by elite values by contending that this behavior “is also true of the political elites who operate the national political process. Both sets of elites respond to changes in national public opinion, but both sets also favor elite values to the extent that they differ from those of non-elites.”<sup>144</sup> We are sure that Professor Balkin is correct in stating that members of the House of Representatives, the Senate, and our Presidents and Vice Presidents reflect elite opinion as compared to what

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Aug. 26, 2005, <http://www.gallup.com/poll/18136/Public-Favors-Voluntary-Prayer-Public-Schools.aspx>.

<sup>137</sup> *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

<sup>138</sup> *Van Orden v. Perry*, 545 U.S. 677 (2005).

<sup>139</sup> 367 U.S. 643 (1961).

<sup>140</sup> *Texas v. Johnson*, 491 U.S. 397, (1989); *United States v. Eichman*, 496 U.S. 310 (1990).

<sup>141</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>142</sup> *See Gregg v. Georgia*, 428 U.S. 153, 186–87 (1976).

<sup>143</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

<sup>144</sup> Balkin, *supra* note 2, at 574 (citing LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 285–86 (2008)).

public policy would look like if we had a national system of initiatives and referenda or congressional term limits. The question here, however, is not whether our elected politicians are influenced by elite opinions, but whether elderly, life-tenured lawyers who are disproportionately white males are comparatively even more influenced by these elite opinions. As John Hart Ely wrote in 1980 in *Democracy and Distrust*, Supreme Court judicial activism is likely to have “the smell of the lamp” about it because the Justices are drawn from an educational, financial, and professional elite.<sup>145</sup> Ely’s point has been widely accepted.

It is, of course, theoretically possible that the Supreme Court might be more in touch with mass opinion than members of Congress or of state legislatures, but the argument seems implausible, and in any event it has not yet been made by Professor Balkin. For much of the twentieth century, socialist intellectuals posited that they were the true representatives of the working classes and that their failure to win elections was simply a result of the false consciousness of centuries of social conditioning.<sup>146</sup> These claims turned out not to be true.<sup>147</sup> We should accordingly be skeptical of any claim that appointed judges are no more elite than elected state and federal legislators. If the claim were true, it would mean that our democracy has been largely a failure, and we do not believe that to be the case.

There is a final related point about Professor Balkin’s claims here that deserves mention. From 1789 to 1970 Supreme Court vacancies arose on average once every two years, while during the period between 1970 and 2008 the average has been once every four years. Justices used to serve an average of about fifteen years, but they now serve an average of about twenty-six.<sup>148</sup> The Constitutional text, like the Bible or the Koran, has a powerful ability to disturb and unsettle current practice. Under Balkin’s account of the legitimacy of engaged social movements changing constitutional meaning, *Plessy* was just as normatively justifiable in 1896 as *Brown* was in 1954. Through such an approach, the rule of law with respect to the Fourteenth Amendment gets replaced with the rule of engaged social movements.

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<sup>145</sup> ELY, *supra* note 35, at 59.

<sup>146</sup> See Donald Lazere, *Literacy and Mass Media: The Political Implications*, 18 NEW LITERARY HISTORY 237, 246–48 (1987) (explaining the argument that the working class has been deflected from its role as the vanguard of the socialist movement through false consciousness and the inability to question the social conditioning that endorses the status quo).

<sup>147</sup> There has long been a debate over why socialism never took hold in the United States. Eric Foner, *Why Is There No Socialism in the United States?*, HISTORY WORKSHOP, Spring 1984, at 57, 57. The major reasons for the limited to negligible presence of socialism in the United States have to do with American ideology, social mobility, the nature of the union movement, and the political structure. *Id.* at 58.

<sup>148</sup> Calabresi & Lindgren, *supra* note 84, at 770–71.

*C. How Much of the Constitution is Hardwired and How Much Is Evolutionary?*

The third question on which we would like to hear more from Professor Balkin is on the strong distinction he draws between hard-wired and evolutionary terms in the Constitution. In our opinion, most of the so-called evolutionary terms are more hard-wired than Professor Balkin thinks. Another way of saying this is that, as a matter of original public meaning, there are more rules and fewer standards or principles in the Constitution than Professor Balkin acknowledges. Words or phrases like “necessary and proper,” “appropriate,” “inferior officer,” and “freedom of speech and of the press” are standards, but the great Clauses of Section 1 of the Fourteenth Amendment are far more rule-like than Balkin seems to assume, at least if one looks to original public meaning in dictionaries or use of legal terms of art.

Take, for example, the phrase “due process of law.” It is well known that the Due Process Clauses of the Fifth and Fourteenth Amendments are derived from Magna Carta’s command that no person shall be deprived of life, liberty, or property except by the law of the land.<sup>149</sup> The phrases “due process of law” and “by the law of the land” were synonyms in 1791. State and federal statutes are laws of the land. Hence, any deprivation of life, liberty, or property by the legislature in a statute is per se compatible with the Due Process Clauses. The deprivations those Clauses ban are deprivations made by state and federal executive officials or judges. The Due Process Clauses banned arbitrary and capricious action unsupported in statute by the King’s sheriffs or in our day by federal and state executives. The Clauses simply have no application to legislative deprivation, and they are not at all vague or open-ended on this point. As John Hart Ely argued twenty-eight years ago, the very phrase substantive due process is an oxymoron like “green-pastel-redness.”<sup>150</sup> The original, actual meaning of the words—not their original expected application—makes clear that the Due Process Clauses do not limit the legislature.<sup>151</sup>

Another clause frequently argued to be open-ended is the Privileges or Immunities Clause of the Fourteenth Amendment.<sup>152</sup> This Clause bans systems of caste- or class-based legislation, and it protects certain individual fundamental rights from abridgement by state law. While the

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<sup>149</sup> See *In re Winship*, 397 U.S. 358, 378–85 (1970) (Black, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 510–13 (1965) (Black, J., dissenting); BORK, *supra* note 124, at 32.

<sup>150</sup> ELY, *supra* note 35, at 18.

<sup>151</sup> See Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1531–32 (2008) [hereinafter Calabresi, *Substantive Due Process After Gonzales*]; Steven G. Calabresi, Lawrence, *the Fourteenth Amendment, and the Supreme Court’s Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1107–08 (2004) [hereinafter Calabresi, *An Originalist Reappraisal*].

<sup>152</sup> Calabresi, *An Originalist Reappraisal*, *supra* note 151, at 1108; Calabresi, *Substantive Due Process After Gonzales*, *supra* note 151, at 1532.

text of the Clause is broader than other requirements found in the Constitution, such as the requirement that Presidents be at least thirty-five years old, this breadth in no way renders it an open-ended standard or principle. Consider first the antidiscrimination command of the Clause, as described by Professor John Harrison.<sup>153</sup> Harrison notes that the Clause overrides the so-called Black Codes whereby freedmen in the South were remitted to second-class citizenship. Specifically, the Privileges or Immunities Clause protects common law civil rights to make contracts, own property, sue in tort, or inherit—privileges or immunities of all citizens—which cannot be “abridged” or “shortened” for one class of citizens. Because the Black Codes abridged the civil rights (rights of citizens) of freed slaves, they were rendered unconstitutional by the adoption of the Fourteenth Amendment. Strikingly, however, the Amendment banned *all* class-based abridgements and not only those made on the basis of race. Accordingly, if a state had chosen to adopt the Hindu caste system and treat Brahmins and untouchables differently, this would certainly have been unconstitutional. Similarly, efforts to adopt European-style feudal systems where citizens and their rights were divided between nobility and serfdom as to their civil rights would also have been unconstitutional.

The Privileges or Immunities Clause guaranteed equality of *civil* rights but not equality of *political* rights, such as the right to vote or serve on a jury. It took the Fifteenth Amendment to prohibit discrimination against African Americans as to political rights. Between the adoption of the Fourteenth and Fifteenth Amendments, African Americans were in the same boat as women and children. They had equal civil rights but not equal political rights. This reality was commonplace at the time of the Framing of the Fourteenth Amendment because civil or citizen's rights were enjoyed by women and children while only a subset of the citizenry had the franchise and the political right to vote.

In 1920, the Nineteenth Amendment to the Constitution was ratified, giving women the political right to vote. From that point onward, it became textually plausible to think that if women now had equal political rights with men then maybe laws denying them equal civil rights were class-based laws banned by the Privileges or Immunities Clause. The general ban of that Clause ought to be read by anyone who calls himself a textualist in light of subsequent Amendments like the Nineteenth Amendment. The Supreme Court's extension of the equality command of the Fourteenth Amendment to women is thus *not* inconsistent with Scalia-style originalism, even if Scalia may think that it is.<sup>154</sup> Equal civil rights under the Fourteenth Amendment are a logical consequence of women getting the Constitution *amended* to give them equal political rights. This is especially

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<sup>153</sup> John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

<sup>154</sup> Cf. *United States v. Virginia*, 518 U.S. 515, 565 (1996) (Rehnquist, C.J., concurring in the judgment); *id.* at 566–69 (Scalia, J., dissenting).

the case because everyone who had political rights in 1868 *a fortiori* had civil rights. When the Fourteenth Amendment is read holistically together with the Nineteenth Amendment, it is best understood as condemning most forms of sex discrimination as being class-based laws. It follows from this that no further extensions of the equality command of the Fourteenth Amendment beyond the prohibition of sex discrimination ought to be made unless a constitutional amendment has been passed or at least unless there is an Article V consensus of three-fourths of the states that something that used to be allowed has now come to be seen as a form of caste-based discrimination.

What does the Privileges or Immunities Clause mean in its individual rights-protecting guise? Here the Clause protects individual rights from abridgement just as the First Amendment protects individual rights of freedom of speech and of the press from abridgment. The best evidence of the original understanding of the words “privileges or immunities” is that they were thought to mean the same thing that similar language in Article IV, Section 2 had been construed to mean by Supreme Court Justice Bushrod Washington in *Corfield v. Coryell*.<sup>155</sup> Justice Washington wrote there that: 1) only rights deeply rooted in history and tradition such that they had been recognized since the Founding of America were privileges and immunities; and 2) that even those rights could be trumped by general laws enacted as an exercise of the police power for the good of the whole people.<sup>156</sup> The Washington-*Corfield* test thus supports the very limited substantive due process of Justice Scalia’s opinion in *Michael H. v. Gerald D.*<sup>157</sup> or of Chief Justice Rehnquist’s opinion for the Court in *Washington v. Glucksberg*<sup>158</sup>—the assisted suicide case.<sup>159</sup>

In sum, the Privileges or Immunities Clause of the Fourteenth Amendment is not, as an original matter, open-ended in either its equality command or in its individual rights command as Balkin claims. Rather, it is more of a rule than it is a standard. Balkin, like the majorities in *Plessy v. Ferguson* and *Lochner v. New York*, seems to think the Fourteenth Amendment outlaws unreasonable legislation, be it class-based or impinging on individual rights, but this is simply not what the Clause originally meant. In its own way, the Privileges or Immunities Clause is as specific in meaning as the requirement that the President be at least thirty-

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<sup>155</sup> 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230); see also Calabresi, *An Originalist Reappraisal*, *supra* note 151, at 1109–10; Calabresi, *Substantive Due Process After Gonzales*, *supra* note 151, at 1532–34.

<sup>156</sup> *Corfield*, 6 F. Cas. at 551–52.

<sup>157</sup> 491 U.S. 110, 111 (1989) (finding the plaintiff had no substantive due process right to establish his paternity of a child born to the wife of another man).

<sup>158</sup> 521 U.S. 702 (1997).

<sup>159</sup> Michael McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 693–97 (1997).

five years old.<sup>160</sup>

Another Clause that is argued to be open-ended is the Equal Protection Clause of the Fourteenth Amendment. John Harrison has shown that this Clause was originally about equality in the *protection* of laws already on the books while the Privileges or Immunities Clause was about equality in the *making* of laws by state legislatures.<sup>161</sup> Essentially all the Equal Protection Clause meant as an original matter was that a state could not enforce its general laws against murder or assault so as to protect one class of citizens but not another. Thus, it was not good enough to have laws that nominally did not discriminate on the basis of race. A state also had to enforce its generally applicable, neutrally written laws in a nondiscriminatory way.

None of this goes to the question we have already addressed of what laws in fact impose systems of caste. As we showed above, laws like the Black Codes were prohibited, and since the adoption of the Nineteenth Amendment, laws discriminating on the basis of sex ought to be treated the same way. States therefore may not fail to enforce their general laws against violence or abuse to the particular detriment of women. The state does have a limited affirmative obligation to provide the protection of the laws to all classes of its citizens.<sup>162</sup>

This raises the final question we wish to address regarding these alleged open-ended Clauses: whether either the Privileges or Immunities Clause or the Equal Protection Clause creates a constitutional right of women to have an abortion. Professor Balkin has addressed this question in a major article recently published in *Constitutional Commentary*.<sup>163</sup> He argues that laws against abortion unconstitutionally compel women to allow their bodies to be used for the dangerous condition of pregnancy and force women to become mothers of children—a status which radically alters their lives and their income-earning potential. For these reasons, Balkin argues that there is at least a limited Fourteenth Amendment right of women to have abortions, lest they be relegated to membership in an inferior caste.

Balkin's argument is very clever, but it fails for several reasons. Start with the fact that pregnancies, except in the case of rape, occur as a result of consensual activity, namely voluntary sexual intercourse. There is no privilege or right to have consequence-free sex that is deeply rooted in history and tradition and that dates back to the founding of the Republic. In fact, to the contrary, sexual intercourse was long restricted by laws against prostitution, adultery, fornication, polygamy, and incest.<sup>164</sup> Indeed, until the

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<sup>160</sup> *But see* Calabresi & Agudo, *supra* note 52, at 106–08 (discussing evidence that the Framers of the Fourteenth Amendment may have constitutionalized protection of natural and inalienable rights).

<sup>161</sup> *See* Harrison, *supra* note 153, at 1447–51, 1454–56.

<sup>162</sup> *But see* United States v. Morrison, 529 U.S. 598 (2000), a case we think is wrongly decided.

<sup>163</sup> Balkin, *Abortion and Original Meaning*, *supra* note 1.

<sup>164</sup> DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 10–11 n.25 (Univ. of California Press 1998) (1994).

modern development of the birth control pill, sexual acts were heavily regulated by law. The pill has made voluntary sexual intercourse even more consequence-free than it was when the Fourteenth or Nineteenth Amendments were adopted. There is a simple answer to anyone who is concerned about the burdens, physical or financial, of pregnancy: do not engage in sexual intercourse, or if you do, be sure you use effective methods of birth control, including back up methods if you are concerned enough to want to be one hundred percent safe. Women who have been raped might have a complaint, but ninety-nine percent of abortions do not involve rape or incest.<sup>165</sup>

Laws against abortion do compel women to allow their bodies to be used to nurture a pregnancy, but draft registration currently compels men—and only men—to make their bodies potentially available for the making of war.<sup>166</sup> Historically, there have been a host of laws that have interfered with rights of bodily integrity, including laws against suicide or assisted suicide, laws about the ingestion of drugs or alcohol, laws mandating breathalyzer tests for those suspected of drunk driving, and laws requiring immunization against certain diseases. Because pregnancy involves the creation of new life, there is obviously a state interest in protecting it as Balkin acknowledges. For this reason, pregnancy at common law was regulated after quickening. Today, thanks to ultrasounds and other wonders of modern technology we know that fetal brainwaves, movement, heartbeat, and capacity to feel pain originate well before quickening. It is totally rational, in light of this knowledge, for a state to conclude that laws restricting abortion after seven or eight weeks of pregnancy are general laws enacted for the good of the whole people, to paraphrase Justice Washington in *Corfield v. Coryell*. Nor was there a right of women at common law to have abortions even before quickening such that that right could be said to be deeply rooted in history and tradition going back to 1776, or 1868, for that matter. The mere fact that abortion was not outlawed at common law before quickening because of general ignorance then about the scientific facts of fetal development does not mean that there was a “right” of women to have pre-quickening abortions. Smoking and getting drunk are not outlawed today in the United States, but that does not mean there is constitutional right to smoke or get drunk. Activities can be legal or noncriminal without there being a constitutional right to undertake them.

But, Professor Balkin might say the seizing of women’s—and only women’s—bodies for pregnancy brands them in a caste-like way. A considerable burden is imposed on women but not on men. That is true but

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<sup>165</sup> THE GUTTMACHER INST., AN OVERVIEW OF ABORTION IN THE UNITED STATES 5, 14 (2008) (in 2001, there were approximately 1.3 million abortions, and about 10,000 to 15,000 women aborted pregnancies that were a result of rape or incest).

<sup>166</sup> *The Selective Draft Law Cases*, 245 U.S. 366 (1918).

the burden is not imposed on women *because* they are women, or to make a statement of second-class citizenship, as happened to African Americans during Jim Crow. The burden of state regulation of abortions falls on women because it just so happens that given biology and current technology only women can carry a pregnancy. If scientific advances were to allow men to start a pregnancy, no one doubts that pro-lifers would want to regulate that pregnancy, too. Laws regulating pregnancy apply now only to women for the same reason one might screen only African Americans for sickle cell anemia, or whites for melanoma, or Jews for certain hereditary birth defects. Laws against abortion do not send a social message that women are inferior. They send a message about the importance of life. While some dispute this point, there has never either in 1787 or in 1868 or in 1973 or today been an Article V consensus of three-quarters of the states that laws against abortion send such a message. And it is the rules of Article V that ought to serve as a minimal rule for the recognition of new applications of constitutional guarantees.

It is for this reason as well that Professor Balkin's additional argument that pregnancy imposes unconstitutional financial and lifestyle constraints fails. Laws against abortion do not force women to raise children, they protect fetal life. Any pregnant woman who does not want to bear the financial and career costs of pregnancy has another perfectly good option, which is to put the baby up for adoption. There are more families wanting to adopt now than there are babies being put up for adoption, and the result is long waiting lines.<sup>167</sup> The government could take additional measures to encourage adoption further—like advertising in favor of it—if this were necessary to prevent abortions. The financial/lifestyle constraint argument is not an argument for a constitutional right to an abortion: it is an argument for the right to destroy a child rather than have that child raised by someone else. Such a right is neither deeply rooted in history and tradition, nor is it necessary to prevent women from being branded by the law as second-class citizens.

But, as Professor Balkin might object, many women in the United States do view laws against abortion that way, mainly in the elite social circles he and we travel in. That is true, but it is also true that women as a whole in the United States are slightly more pro-life than men according to public opinion polls.<sup>168</sup> In fact, the most pro-choice demographic in the

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<sup>167</sup> Kate O'Keefe, *The Intercountry Adoption Act of 2000: The United States' Ratification of the Hague Convention on the Protection of Children, and its Meager Effect on International Adoption*, 40 VAND. J. TRANSNAT'L L. 1611, 1618–19 (2007) (for various reasons, there is a decrease in the number of children available domestically for adoption and an increase in demand for both domestic and international adoptions, leading to higher fees and waiting periods that range from one to three years).

<sup>168</sup> For people surveyed between 1972 and 2006, only 39.2% of women favored abortion for any reason, compared to 41.2% of men. At the .05 significance level, these results are highly significant (0.0) for both a two-tailed test and a one-tailed test. NAT'L OPINION RESEARCH CTR., UNIV. OF CHI., GENERAL SOCIAL SURVEYS, 1972–2006 CUMULATIVE DATAFILE, at question 206 (2006), available at

country is men between the ages of 18 and 30.<sup>169</sup> And, we know they are not concerned about messages of second-class citizenship or impairments of bodily integrity. We think Balkin's concern about equal rights for women could be completely accounted for if we had a special rule that state or federal laws against abortion could only be enacted by a referendum in which only women could vote. Public opinion polls suggest a majority of women would vote to restrict significantly current access to abortion on demand, even if they might not vote to overrule *Roe v. Wade*.<sup>170</sup>

In summary, the Constitution contains fewer open-ended, evolutionary Clauses as compared to hard-wired Clauses than Balkin thinks. In particular, the Fourteenth Amendment's Privileges or Immunities Clause, its Due Process Clause, and its Equal Protection Clause are far more determinant than he seems to acknowledge.<sup>171</sup>

*D. What Does the Original Public Meaning of the Text Reveal About Judicial Power and Role?*

A final point on which we would like to hear more from Professor Balkin on originalism is that we disagree with him to the extent he claims that original meaning does not offer any clear advice to judges about deciding cases. We think that it does. The text of the Constitution, as it was originally understood, suggests a very modest and limited role for the federal Judiciary. While it may not lead to a Thayerian rule of clear mistake, the constitutional text does in our view suggest that laws arrive in federal court with a robust and healthy presumption of constitutionality.

This is so, first, because the constitutional text contains no Clause giving the courts in particular either the power of judicial review or the power to interpret and enforce the Constitution. There is no Judicial Review Clause in Article III the way there is a Commerce Clause in Article I or a Commander in Chief Clause in Article II. The power of judicial review exists at all, as Professor Balkin acknowledges, because as Chief Justice Marshall stated in *Marbury v. Madison*, the federal courts have the

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<http://sda.berkeley.edu/cgi-bin/hsda?harcda+gss06>; see also Jennifer Strickler & Nicholas L. Danigelis, *Changing Frameworks in Attitudes Towards Abortion*, 17 SOC. F. 187, 189, 197 (2002).

<sup>169</sup> NAT'L OPINION RESEARCH CTR., *supra* note 168. When asked whether they thought it should be possible for a pregnant woman to obtain a legal abortion if the woman wants it for any reason, 44.5% of men between the ages of 19–25 answered in the affirmative, as compared to 32.5% of women. At the .05 significance level, these results are significant for a one-tailed test, and borderline significant for a two-tailed test (.09). *Id.*

<sup>170</sup> While 60.8% of women surveyed between 1972 and 2006 do *not* think a woman should be able to have an abortion for any reason, 81.1% of women surveyed think a woman who becomes pregnant as a result of rape *should* be able to obtain a legal abortion. *Id.*

<sup>171</sup> *But see* Calabresi & Agudo, *supra* note 52, at 65–68, 104–08 (acknowledging some evidence the Framers of the Fourteenth Amendment might have understood it to constitutionalize natural and inalienable rights).

power to decide cases or controversies according to law.<sup>172</sup> Implicit in this is the idea that courts ought not to give legal effect to unconstitutional statutes or executive branch actions.

But this argument for judicial review also supports executive and legislative branch review for constitutionality—or departmentalism<sup>173</sup>—as Professor Balkin acknowledges. What this means is that the Constitution is interpreted and enforced not by just the courts, but by all three branches of the federal government acting together.<sup>174</sup> It is for this reason, in our view, that cases or controversies about government action arrive in federal court with a presumption of constitutionality. No case or controversy reaches the federal docket without the legislature and the executive having decided that taking a certain action is both wise and is constitutional. By the time a federal court hears a case or controversy, two out of the three branches have decided that government action is constitutionally permissible. It is this fact which creates a presumption of constitutionality which ought to function as a tie-breaker in close cases. Since there must be clear constitutional law, which is higher law, to trump statutes or executive branch actions, ties should go to the government. This is why Professor Randy Barnett is wrong when he claims that there is a presumption of liberty instead of a presumption of constitutionality as an original matter.<sup>175</sup> Barnett wrongly assumes the constitutional text has a Judicial Review Clause in Article III, and such a clause is simply not there.<sup>176</sup>

Even aside from the presumption of constitutionality, it is well known that the Framers of the original Constitution understood the phrase “the judicial power” in a narrow and modest way. The Framers considered putting the Justices of the Supreme Court on a Council of Revision with the President, and they also considered giving them the power to issue advisory opinions. They decided against either option because they thought judges ought not to be judges of policy but should be confined to judicial, legal matters. In the 1790s, the first Supreme Court Justices said as much in two foundational situations. First, in *The Correspondence of the Justices*,<sup>177</sup> Chief Justice John Jay declined to answer twenty-seven hypothetical questions posed to him by Secretary of State Thomas Jefferson. Jay responded that the Court’s power was limited to the deciding of actual

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<sup>172</sup> 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>173</sup> Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 274–76 (1993).

<sup>174</sup> See Calabresi, *The Tradition of the Written Constitution*, *supra* note 7, at 642; Calabresi, *Text, Precedent, and the Constitution*, *supra* note 7, 315.

<sup>175</sup> See Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1088–91 (2005).

<sup>176</sup> See generally Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 SUP. CT. ECON. REV. 115 (2004)

<sup>177</sup> Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), in HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 75 (1953).

disagreements between adverse litigants and that the Court could not issue opinion letters on hypothetical legal problems. Second, in *Hayburn's Case*<sup>178</sup> several Justices riding circuit held that they could not constitutionally review benefits to Revolutionary War veterans subject to their decisions being revised by an executive branch officer. Again, the Justices stressed the limited nature of the judicial role, stating that the courts could only issue decisions in a context where there was a substantial likelihood that their decisions would make a difference in the real world. The *Correspondence of the Justices* and *Hayburn's Case* demonstrate that the first Supreme Court understood the judicial function in a narrow and technical way as had the Framers at Philadelphia. The original meaning of the words “the judicial power of the United States” in Article III, Section 1 was quite limited.

The Framers of the Fourteenth Amendment also had a very limited idea of the judicial role. The whole purpose of the Fourteenth Amendment was in the first instance to overturn a Supreme Court opinion—the Court’s decision in *Dred Scott v. Sandford*.<sup>179</sup> *Dred Scott* was nothing less than the Supreme Court’s first venture in the enterprise known today as substantive due process. The Congress that enacted the Fourteenth Amendment almost certainly contemplated that it would be mostly enforced by federal legislation under Section 5 of that Amendment rather than by the federal courts. It is true that the Framers of the Fourteenth Amendment considered and rejected a draft that would have given only Congress, and not the courts, the power to enforce the Amendment, but there is nothing in the history of the Amendment to suggest that it was meant to greatly expand federal judicial power in contexts such as substantive due process.<sup>180</sup>

In summary, the original understanding of the words “the judicial power” in 1787 and in 1868 was a very modest one. It permits judges to look to text and history, but it does not allow them to be turned into engines of social change at the behest of engaged social movements.

### III. CONCLUSION

Professor Balkin has offered by far the best defense yet made of *Roe v. Wade*, and he has endorsed an approach to constitutional interpretation that has a lot to recommend it. Balkinization of constitutional law is far preferable to Dworkinization of it. But Balkin’s theory requires additional refinement. We hope we have helped assist with that process here. At bottom, constitutional government is limited government: limits imposed by the sovereign people on what the government can do, limits on national versus state power, limits on the powers of one branch against another, and

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<sup>178</sup> 2 U.S. (2 Dall.) 409 (1792).

<sup>179</sup> 60 U.S. (19 How.) 393 (1857).

<sup>180</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 520–24 (1997).

limits on the power of government to invade individual rights. In this sense, framework originalism must of necessity do at least something more than just getting politics going. Words have original meanings that are fixed no matter what current majorities may say to the contrary.

It is for that reason that the Supreme Court in major cases like *Engel v. Vitale* or *Heller v. District of Columbia* justifies its new doctrines with reference to original meaning and not with reference to public opinion polls or the emergence of a new social movement. The Court speaks the language of originalism because the Justices know that public opinion polls indicate sixty percent of the American people think the Court ought to follow the laws and not make them.<sup>181</sup> There is only one Justice on the current Supreme Court who writes openly consequentialist opinions of the living Constitution variety, and that is Justice Breyer.<sup>182</sup> The other eight all at least pretend to be just following and applying the law and not changing it.<sup>183</sup> Hypocrisy here is the tribute that vice pays to virtue.

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<sup>181</sup> See *Supreme Court Update: 60% of Voters Say Supreme Court Should Base Rulings on Constitution*, RASMUSSEN REPORTS, Sept. 5, 2008, [http://www.rasmussenreports.com/public\\_content/politics/mood\\_of\\_america/supreme\\_court\\_ratings/supreme\\_court\\_update](http://www.rasmussenreports.com/public_content/politics/mood_of_america/supreme_court_ratings/supreme_court_update).

<sup>182</sup> See STEPHEN G. BREYER, *ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION* 9–12 (2008).

<sup>183</sup> See *id.* at 105–30.

