

## A PRAGMATIC DEFENSE OF ORIGINALISM<sup>†</sup>

John O. McGinnis\* & Michael B. Rappaport\*\*

### INTRODUCTION

Originalism and pragmatism are uneasy companions. This essay will attempt to make them friends. The usual view is that pragmatic interpretation has the essential virtue of making sure that the consequences of legal decisions will be good.<sup>1</sup> Originalism, by contrast, is thought to focus on fidelity to the past and therefore to permit courts to reach undesirable, outdated results.<sup>2</sup> We argue that originalism, although it requires judges to focus on the past, actually produces desirable rules today. Thus, it is originalism that is the genuinely pragmatic way to interpret the Constitution.

Originalists in our view have largely failed to meet pragmatic objections. The argument that judges should be originalists simply because that is what the Framers intended not only is circular but fails to offer any assurance that good consequences attend originalism. The argument that originalism advances democracy seems weak and undeveloped because originalism sometimes requires judges to strike down a result of the democratic process when statutes or executive actions conflict with the original meaning of the Constitution.<sup>3</sup> Finally, the argument that originalism offers clearer rules to constrain judges than other interpretive approaches contains some truth, but may not be enough to sustain the case for originalism.<sup>4</sup> The

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<sup>†</sup> This Essay was previously published in the *Northwestern University Law Review Colloquy* on January 16, 2007, as John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. COLLOQUY 68 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/1/>.

\* Professor, Northwestern University School of Law.

\*\* Professor, University of San Diego School of Law. The authors thank Larry Alexander, Nelson Lund, Mark Movsesian, Scott Shapiro, and Steve Smith for comments, as well as participants in workshops at Northwestern and University of Texas Law Schools.

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

<sup>2</sup> See, e.g., Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 26 (1998) (arguing that originalism seems to be characterized by its “inattention” to “future consequences”).

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

<sup>4</sup> See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863–64

benefits of judicial constraint are limited if judicial decisions, even though they are not discretionary, still impose substantial harms. Conversely, if constraint is the overriding objective, non-originalist doctrine may sometimes provide more constrained rules than the original meaning.<sup>5</sup>

However, pragmatic interpretation—which is usually thought to involve judges deciding particular cases based on their policy consequences—faces severe problems as an approach to resolving cases. People disagree about whether the consequences of particular decisions are good or bad. If the Constitution is to provide a framework for governance, it cannot simply replicate these disagreements.<sup>6</sup> Or to put the objection to pragmatic constitutionalism in pragmatic terms, if a constitution is to have an independent settlement function in our polity—one that promotes the important ends of political stability, liberty, and prosperity—it cannot depend on judges deciding the same issues that are endlessly politically disputed. Moreover, judges seem a curious group to interpret the Constitution if consequences are key. The Supreme Court is a small and insulated group of legal experts, which lacks the institutional capacity or electoral accountability for evaluating policy consequences.<sup>7</sup>

We believe that originalism can be given a strong pragmatic justification by focusing on the process by which constitutional provisions are created. Provisions created through the strict procedures of constitutional lawmaking are likely to have good consequences. Sustaining these good consequences, however, depends on adhering to the Constitution's meaning when it was ratified. Justified in this manner, originalism allows judges to achieve good consequences through formal legal interpretation without having to make policy case by case.

In a paper of this brevity, we cannot provide exhaustive support for our views. Instead, we are content to sketch the main elements of a pragmatic defense of originalism. Because we believe that such defenses of originalism have been neglected, we hope that this essay will help encourage a broader debate about the consequences of originalism and other interpretative methodologies.

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(1989).

<sup>5</sup> The constraint rationale for originalism may animate *Employment Division v. Smith*, 494 U.S. 872, 872–90 (1992), in which Justice Antonin Scalia, a notable originalist, spends little time investigating the original meaning of the Free Exercise Clause, but emphasizes that his result will provide a clearer rule than other constructions.

<sup>6</sup> See Larry Alexander, “*With Me, It’s All or Nuthin’*”: *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 534 (2000).

<sup>7</sup> Scalia, *supra* note 4, at 863.

### I. SUPERMAJORITY RULES AND DESIRABLE CONSTITUTIONAL PROVISIONS

Our pragmatic argument for originalism can be briefly summarized. First, entrenched laws that are desirable should take priority over ordinary legislation, because such entrenchments operate to establish a structure of government that preserves democratic decisionmaking, individual rights, and other beneficial goals. Second, appropriate supermajority rules tend to produce desirable entrenchments. Third, the Constitution and its amendments have been passed in the main under appropriate supermajority rules, and thus the norms entrenched in the Constitution tend to be desirable. While there is one significant way in which those supermajority rules were not appropriate—the exclusion of African-Americans and women from participating in the selection of constitutional drafters and ratifiers—this defect, which we address below, has rightly been removed.<sup>8</sup> Finally, this argument for the desirability of the Constitution requires that judges interpret the document based only on its original meaning because the drafters and ratifiers used only that meaning in deciding to adopt constitutional provisions. In short, it is the supermajoritarian genesis of the Constitution that explains both why the Constitution is desirable and why that desirability depends on its being given its original meaning.

Note the structure of this defense of originalism. It defends the quality of constitutional provisions by reference to the likely consequences flowing from the process that created them. It avoids the Scylla of completely formal defenses of originalism and the Charybdis of completely contestable assertions of what constitutes goodness. It is also consistent with perhaps the most common defense of originalism: that originalism generally ties judges to rules.<sup>9</sup> These rules consist of the interpretative rule of originalism itself as well as the substantive rules in the Constitution.<sup>10</sup> But to the virtue of rule following, originalism adds the even more important virtue of following beneficial rules.<sup>11</sup>

The essence of our argument is that the strict supermajoritarian rules that govern the Constitution's enactment make it socially desirable. If the Constitution were simply enacted by majority rule, like statutes, there would be no strong reason to privilege provisions that happen to be in a

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<sup>8</sup> See *infra* notes 49–55 and accompanying text (discussing the exclusion of African Americans and women from a role in selecting drafters and ratifiers of the Constitution).

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

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

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

document called “the Constitution.” The supermajority rules of the Constitution’s enactment, however, make them good enough to enforce when they conflict with mere majoritarian enactments.

Entrenchment of norms offers great potential benefits.<sup>12</sup> It establishes a framework for government and sets out ground rules that protect against predictable dangers of ordinary democratic governance. Entrenchments, however, last long into the future, and bad entrenchments are at least as harmful as good entrenchments are beneficial. While majority rule is thought to generally produce ordinary legislation that is desirable,<sup>13</sup> permitting a majority to entrench norms would be problematic, because majorities will have a tendency to pass undesirable entrenchments for a variety of reasons. By contrast, the passage of entrenchments under supermajority rules would compensate for these tendencies and produce on average good entrenchments. Given the brief nature of this essay, we here explain only a few of the reasons for the superiority and desirability of supermajoritarian entrenchment.<sup>14</sup>

First, because entrenched norms cannot easily be eliminated, controversial entrenchments can be extremely divisive. Majorities, even narrow ones, will tend to pass such entrenchments if they believe that these norms will make for good entrenchments. Moreover, even if a majority recognizes that entrenchments should have consensus support, it might still be reluctant to refrain from entrenching controversial norms for fear that a future majority will entrench its preferred norms despite the lack of a consensus. If controversial entrenchments are enacted, minorities may strongly oppose them and be furious that the nation will be governed by bad notions that cannot be repealed by the ordinary democratic process. Their alienation will lessen their allegiance to the Constitution and the regime.<sup>15</sup>

Supermajority rules, however, address this problem by permitting only norms with substantial consensus to be entrenched. A broad consensus for

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<sup>12</sup> A good summary of the benefits can be found in Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1670–73 (2002). See also John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003).

<sup>13</sup> The reasons for the view that majority rule is beneficial are complex, but include both preference and epistemic arguments. See Frank Michelman, *Why Voting*, 34 LOY. L.A. L. REV. 985, 996 (2001). One important exception to the presumed beneficence of majority rule occurs if citizens have preferences of different intensity about an issue. In that case a majority that enjoys modest benefits can get a law enacted, even if the minority suffers much greater costs. Elsewhere we suggest that entrenchment actually tempers this problem as well. See John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rule: Three Views of the Capitol*, 85 TEX. L. REV. (forthcoming May 2007).

<sup>14</sup> We argue for the desirability of supermajoritarian entrenchment in a series of articles, including: McGinnis & Rappaport, *supra* note 13; John O. McGinnis & Michael B. Rappaport, *The Condorcet Case for Supermajority Rules*, 15 SUP. CT. ECON. REV. (forthcoming 2007); McGinnis & Rappaport, *supra* note 10, at 734–742.

<sup>15</sup> See Posner & Vermeule, *supra* note 12, at 1673 (noting that “[a]cademics object to legislative entrenchment on the ground that it gives the past too much power over the present”).

the Constitution creates legitimacy, allegiance and even affection as citizens come to regard the entrenched norms as part of their common bond.<sup>16</sup> A supermajoritarian constitution helps individuals to transcend their differences, like ethnicity or geography, making them citizens of a single nation.<sup>17</sup>

Second, majorities in a party system tend to be partisan. Because of partisanship, majorities will tend to abuse their power for at least two reasons. First, partisanship may lead them to adopt a non-rational “us versus them” attitude that will focus their attention away from the merits of legislation. More rationally, majorities may decide to entrench legislation that they do not really believe should be entrenched if only to foreclose legislation that they fear the opposing party will entrench when it comes to power. For instance, legislators from one party might decide to entrench low taxes and low debt to prevent the other party from entrenching entitlements even if both parties believe the nation would be better off without entrenching either program.<sup>18</sup>

Supermajority rules can decrease the ill effects of partisanship by making it less likely that entrenchments can be passed only with the support of one party.<sup>19</sup> If the two parties must cooperate to pass legislation, they are less likely to indulge in “us versus them” attitudes. Moreover, supermajority rules will prevent the destructive competition by which one party races to entrench its political program before the other party entrenches its own program.

Third, the long-term nature of entrenchments makes it less likely that legislative majorities will enact desirable entrenchments. Individuals have a heuristic problem in thinking about the future: they are too disposed to believe that current trends will continue.<sup>20</sup> They may, for example, be too

<sup>16</sup> See Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 937–39 (2003).

<sup>17</sup> Cf. Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 394 (2004).

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

<sup>19</sup> It is well recognized, for instance, that the supermajority for the convictions required for impeachment tamps down on partisanship. See Michael J. Gerhardt, *The Special Constitutional Structure of the Federal Impeachment Process*, 63 LAW & CONTEMP. PROBS. 245, 250 (2000).

<sup>20</sup> The roots of this tendency lie in the “representativeness” heuristic. That heuristic tends to make people extrapolate overconfidently about predicted characteristics of a class based upon a small sample size of which they happen to be aware. See Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 23, 24–25 (Daniel Kahneman et al. eds., 1982). If the sample consists of events rather than objects, the heuristic should tend to

prone to support constitutional provisions out of the mistaken belief that present circumstances will continue in the future. In addition, citizens cannot easily hold legislators accountable for their entrenchment votes, because most legislators will be long gone before the long-run effects of the entrenchments are felt.

While supermajority rules would not address these problems directly, they would improve legislative entrenchment decisions in other ways that would compensate for these deficiencies. Supermajority rules restrict the agenda of proposals, because fewer proposals have a realistic chance of passing. A restricted agenda encourages a richer stream of information about the proposals, improving legislative determinations. More significantly, a strict supermajority rule (coupled with the requirement that the constitutional entrenchment can be repealed only by a similarly strict supermajority) also improves the quality of entrenchments by helping to create a limited veil of ignorance. Because proposals so entrenched under supermajority rules cannot be easily repealed, citizens and legislators cannot be certain how the provisions will affect them and their children in the future when circumstances have changed.<sup>21</sup> Hence they are more likely to consult the interests of all future citizens—the public interest—to determine whether they will support a provision.

For these reasons, strong supermajority rules are likely to overcome the problems that afflict majoritarian entrenchment and produce beneficial entrenchments.

## II. THE BENEFITS OF SUPERMAJORITARIAN ENACTMENT OF THE ORIGINAL CONSTITUTION

It is clear that the Constitution and its amendments were in the main a product of the kind of stringent supermajority rules that generate beneficial entrenchments.<sup>22</sup> Constitutional amendments must be approved by two-thirds of each house of Congress and ratified by three-quarters of the states.<sup>23</sup> The original Constitution was also a product of a double supermajoritarian process. Article VII expressly required nine of the thirteen states to ratify the Constitution before it took effect.<sup>24</sup> But what may be less clear

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make people extrapolate in a similarly irrational manner from events of which they are aware to uncertain future events. For an important present-day application, see ROBERT J. SCHILLER, *IRRATIONAL EXUBERANCE* 144 (2000) (using work on the representativeness heuristic to suggest that people will think stock market patterns today will be those of tomorrow).

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

<sup>22</sup> Again, the one glaring defect in those supermajority rules was their exclusion of African-Americans and women from the franchise, which we discuss below. See *infra* notes 49–55 and accompanying text.

<sup>23</sup> U.S. CONST. art. V.

<sup>24</sup> *Id.* at art. VII.

is that a supermajority of states also had to support the Constitutional Convention in the first place.<sup>25</sup>

This kind of consensus-forcing process is not merely good in some abstract sense; it creates very substantial real world benefits. Take the effect of the veil of ignorance: in considering the extent of the President's power, citizens had to recognize that sometimes they would like the President and sometimes they would not, and therefore they parceled out his authority based on public interest rather than partisan considerations.<sup>26</sup>

It is the supermajoritarian constitution-making process that helps to account for the beneficence of the Constitution. While most Americans believe that the amended Constitution is an exemplary document, there are few explanations for its excellence. Rather than view the document as the product of a few great men, we see it as largely the result of the supermajoritarian process that enacted it. That process generated some of the most distinctive and praised features of our Constitution. Because of the need to obtain consensus at the convention, the most nationalist forces conceded an indestructible role for the states and gave us constitutional federalism.<sup>27</sup> To obtain ratification in the necessary nine states, the nationalists had to promise that a bill of rights would be enacted once the new government was established.<sup>28</sup> Thus, the supermajoritarian ratification process was the big bang of our Constitutional universe—bringing into effect the key elements of a document admired around the world.

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

A last step to our argument is that beneficial judicial review requires originalism, because it was the original meaning that was crucial to obtaining the consensus that makes constitutional provisions desirable. The drafters wrote the provisions and the ratifiers in a supermajority of states approved them based on commonly accepted meanings and the interpretative rules of the time. Some of the provisions approved had clear meanings. Others may have seemed ambiguous, but the drafters and ratifiers would have believed their future application would be based on the interpretative rules with which they were familiar. Following the original meaning of the Framers' provisions as construed through their own interpretative rules thus

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<sup>25</sup> See CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787*, at 225–28 (1st ed. 1966).

<sup>26</sup> See, e.g., *THE FEDERALIST* NO. 69 (Alexander Hamilton).

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

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

remains faithful to their expectations of the likely effects of the provisions.<sup>29</sup> In contrast, following a meaning whose substance or derivation was not endorsed at the Framing severs the Constitution's connection with the process responsible for its beneficence.

Parenthetically, if interpretative rules at the time of the Framing are as important as we believe they are, this analysis suggests that originalist constitutional scholarship should be reoriented. The first model of originalism focused on original intent. When originalists recognized that focusing on original intent wrongly emphasized the subjective purposes of the Framers, most originalists embraced the original meaning of the text as a better, second model of originalist interpretation.<sup>30</sup> A debate then arose over how to define the original meaning and the best means of ascertaining it. While some originalists eschew using interpretative rules from the Framers' time, our view suggests that these rules are necessary both for the definition of originalism and for originalism to have beneficial consequences.<sup>31</sup> Thus, the third model for originalism will help resolve ambiguities in meaning by deploying the Framers' interpretative rules.<sup>32</sup>

A comparison of constitutional lawmaking with case-by-case Supreme Court norm creation reveals what is wrong with the theories that usually fly the flag of pragmatism. First, only a very small number of Justices generate norms through their decisions, but constitutional lawmaking requires the participation of legislatures throughout the country. Second, the Supreme Court is drawn from a very narrow class of society: elite lawyers who then work in Washington.<sup>33</sup> In contrast, constitutional lawmaking includes diverse citizens with a wide variety of attachments and interests. Finally, constitutional lawmaking is supermajoritarian, while the Supreme Court rules by majority vote. These several reasons suggest that the doctrines fabricated by Supreme Court justices are likely to lead to worse consequences than doctrines that flow from the original meaning of the Constitution.<sup>34</sup>

Sometimes it is claimed that the Supreme Court will provide better results by embracing the incremental and case-by-case manner of the com-

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<sup>29</sup> See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1494–95 n.21 (2005).

<sup>30</sup> For an explication of the distinction between original intent and original meaning, see ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1998); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105–08 (2001).

<sup>31</sup> For an example of an originalist who does not believe in following the interpretive conventions of the Framers, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525 n.23 (2003) (citing GREGORY BASSHAM, *ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY* 70 (1992)).

<sup>32</sup> For a discussion of the enterprise of using interpretive rules to fix meaning, see *id.*

<sup>33</sup> See John O. McGinnis, *Justice without Justices*, 16 CONST. COMMENT. 541, 542–43 (1999) (discussing factors that make Supreme Court Justices remote).

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

mon law rather than following the original meaning.<sup>35</sup> But traditional common law crafted by judges crucially differs from constitutional common law. The legislature could overrule traditional common law decisions, while judges through constitutional review can invalidate the decisions of the legislature. Thus, to justify common law constitutionalism, one would have to show not merely that it is good enough to exist in the absence of statutes, like the ordinary common law, but that it is good enough to override statutes. To our knowledge, no one has made a persuasive case that constitutional common law possesses such extraordinary quality, and the very characteristics of Supreme Court judging we note above—its insularity and lack of requisite consensus—militate against such claims of quality.

Thus, not only is our Constitution's original meaning of high enough quality to displace ordinary democratic lawmaking, more free-form methods of judicial interpretation do not provide similar assurance of their superiority to democratic lawmaking.<sup>36</sup> While we here defend originalism as a pragmatic interpretive approach, originalism cannot be evaluated in isolation. The salient question—and the question any good pragmatist should recognize as salient—is what other approach is more likely to reach as sound consequences as originalism? We do not believe originalism is ideal, but we do believe it is likely to have better consequences than competing approaches.<sup>37</sup>

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

The cornerstone of our pragmatic defense of originalism faces two significant challenges. The first is that the Constitution was made by be-wigged ancestors long dead rather than by the living; the second is that

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<sup>35</sup> See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (arguing that “it is the common law approach . . . that best explains, and best justifies, American constitutional law”).

<sup>36</sup> Some might argue that since the supermajoritarian process establishes only a presumption of beneficence, judges should be able to use non-originalist methods of construing a particular provision if they independently determine that the provision is undesirable. The difficulty with this approach is that judges have no adequate process for determining either when this presumption in favor of the original constitutional norm should be overcome and what new norm it should be replaced with. Moreover, judges of various ideologies cannot be expected to reach agreement on any alternative method or even apply their own chosen method consistently because of biases unchecked by others of different ideology working within the same methodology. As a result, the norms selected would tend to be unpredictable and partisan.

<sup>37</sup> Some may argue that our pragmatic claim for originalism is as contestable as those made in the usual pragmatic theories of justice. But our claim is based on a procedural theory demonstrating the virtues of supermajoritarian entrenchments. In contrast, arguments about the beneficence of particular decisions generally must rest on substantive theories based on thicker notions of the good. Procedural arguments can command greater consensus than substantive ones. In addition, we need only defend a single claim, whereas case-by-case pragmatism must predict and defend the consequences of an endless series of discrete decisions.

these ancestors excluded crucial parts of the polity, such as African Americans and women.<sup>38</sup> These lines of attack have not been limited to academics but have been pressed more generally in the public sphere for many years. Thus, these critiques themselves enjoy a sufficient consensus, as it were, to be taken seriously, and their public resonance confirms that the key question for originalism is whether the process of framing was good enough to be respected now.

#### A. *Ancient Origins*

The first complaint has been around at least since the Progressive Era.<sup>39</sup> Today is for the living and Americans should no longer be ruled by those long buried.<sup>40</sup> An extreme version of this “dead hand” complaint—that a current majority must be able to change the past constitutional rules at will, either directly or through free form interpretation of their own—is simply inconsistent with constitutionalism. A constitution is designed to restrain current majorities—either to prevent temporary passions from doing damage to the social order or to prevent majorities from trampling on minority rights.<sup>41</sup> Moreover, if the dead hand objection is really right, why should we ever pay attention to the constitutional text, formulated long ago, regardless of whether it is to be given its original meaning? That text is as much a product of the past as the meaning a past generation understood it to convey.

Finally, even if this critique were sound, it would justify judges only in upholding current democratic decisions when they conflicted with the original meaning. A focus on the dead hand hardly suggests that the Supreme Court—itself the product of the original constitutional settlement—enjoys the power to displace the decisions of living legislators.

A more plausible concern about relying on a historical document would ask whether a past generation had more power to influence the document than the current generation. If the Framers could insert provisions into the Constitution more easily than we can, the Framers would have an unjustified advantage in establishing our fundamental law. There is no purpose served by granting an earlier generation more influence on the content of the Constitution than any other generation. Originalist constitutionalism, however, does not suffer from this malady. The original Constitution came into being through stringent supermajority rules and each generation can amend the Constitution through similar, even if not exactly

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<sup>38</sup> See, e.g., Amar, *supra* note 34, at 35.

<sup>39</sup> See David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 815 (1998) (discussing this Progressive attack).

<sup>40</sup> See Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1128, 1128–29 (1998).

<sup>41</sup> *Id.* at 1130.

the same, rules. Thus, each generation has essentially equal formal authority to place its political principles into the Constitution.

It may be harder practically to amend the Constitution today than it was to frame the original Constitution or to amend it earlier in the republic, but that is largely the result of the Constitution's success: people are loath to amend a document under which the United States has become the most prosperous large nation on earth. The difficulty of amending the Constitution is also sadly the result of the Supreme Court's now frequent disregard of the original meaning. There would be more constitutional amendments if the Court itself did not frequently revise the Constitution every time a principle becomes popular enough that the public might be willing to place it in the Constitution.

This judicial anticipation of the amendment process, moreover, is not harmless. First, the Court is unlikely to establish the same norm that the amendment process would have produced, because it is difficult to know what consensus would have emerged from the supermajoritarian process. Second, the Court is unlikely to seek to limit its decisions to the probable political consensus. For instance, a substantial consensus likely favors a right of contraception without encompassing a right of abortion, but justices who strongly favor abortion rights are motivated to include them within a nebulous right of privacy. Third, the prospect of non-originalist judging makes it harder to obtain a consensus on an amendment, because ratifiers of the amendment are understandably concerned that a subsequent activist court will unwind the deal they encode in the constitutional text. The Equal Rights Amendment foundered in part on fears that activist courts would seize on it to enforce unisex bathrooms and other ideological extravagances.<sup>42</sup>

A variation on this progressive attack might be thought to have more bite than the dead hand objection *per se*. According to this view, it is all very well to say that the consensus nature of constitutional provisions made them desirable when they were enacted but they are now very old and no longer produce the benefits they once did in a changed world. This kind of attack may be implicit in translation theories of the Constitution that purport to take account of social change by applying the Framers' values in the context of the present day.<sup>43</sup>

This objection might have force if the Constitution purported primarily to frame a code of rules of primary conduct, but of course the Constitution does not.<sup>44</sup> Those who framed the original Constitution and the amend-

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<sup>42</sup> See Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 412 (2000).

<sup>43</sup> See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1170–74 (1993).

<sup>44</sup> With the exception of the Thirteenth Amendment, the Constitution does not regulate private conduct at all. Nor does it prescribe many substantive regulations for the government. Instead it largely sets out decisionmaking rules for governmental institutions to regulate both private and governmental

ments never forgot that it was a Constitution they were enacting.<sup>45</sup> They already took account of the fact that the Constitution should contain only a framework for government that would respond to the enduring realities of human nature and the problems of social governance.<sup>46</sup> Thus, the fact of change was already taken into account in the making of the Constitution.

The best proof of the Framers' perspective lies in the Constitution itself. The Constitution permits substantial avenues to address social change. The states themselves have few restrictions on their powers absent congressional action.<sup>47</sup> Their experiments to address changes can be readily adopted by other states in a continental republic with a free press.<sup>48</sup> Congress can legislate, under the Commerce Clause and the Necessary and Proper Clause, both of which grant Congress substantial power, albeit not the unlimited power modern case law has bestowed.

Finally, the Constitution creates an amendment process by which to replace provisions that have become outmoded. It is, of course, no accident that a legal document produced by a high quality process would offer many ways to address social change: its many avenues for democratic change reflect its quality.

In the face of this structure, why should one be at all confident that a clamor for judges to substitute a new meaning for the original meaning is a response to changing social conditions and not an attempt by special interests, numerical minorities, or transient majorities to change the Constitution to reflect their peculiar values? Even if the Supreme Court is sincerely attempting to update the Constitution, the Court as an elite and centralized institution lacks the ability to elicit the consensus that can reliably differentiate responses to social changes from constitutional putsches.

### *B. The Exclusion of Blacks and Women*

For the second attack on constitutional lawmaking, we move from the Progressive Era to the 1960s. The complaint here is that until recently African Americans and women did not vote on the Constitution and key amendments.<sup>49</sup> Thus, this defect in constitutional lawmaking deprives it of

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conduct.

<sup>45</sup> Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407–08 (1819).

<sup>46</sup> See Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 306–09 (1989).

<sup>47</sup> The original Constitution contained a quite modest set of restrictions on states. See U.S. CONST. art. I, § 10 (containing certain limits on states such as forbidding states from coining money or entering into compacts with other states). The restrictions of the Fourteenth Amendment are more extensive, particularly if one believes that the Fourteenth Amendment incorporates the Bill of Rights. But even the provisions of the Bill of Rights construed according to their original meaning do not impose draconian restrictions on the states.

<sup>48</sup> See Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1599–1607 (2004) (discussing competitive federalism as an engine of social change).

<sup>49</sup> See, e.g., Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*,

legitimacy or at least should lower our estimation of the Constitution's quality. We certainly agree that the exclusion of these groups from constitutional lawmaking is a defect. In fact, we believe that these exclusions go to the theoretical heart of the supermajoritarian argument: the desirability of supermajority rules requires that all interests be reflected in the electorate. Thus, the absence of African Americans from the Framing and the blatant disregard of their interests may well have meant that the Constitution was not even binding on them.

But from today's perspective these defects in the Constitution have been corrected. The Thirteenth Amendment prohibits slavery, the Fourteenth Amendment forestalls government racial discrimination, and the Fifteenth Amendment prevents denial of the franchise on account of race.<sup>50</sup> Moreover, the Voting Rights Act has implemented these constitutional provisions to guarantee that African-Americans can fully participate in elections.

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

A related criticism of the original Constitution is that its tragic countenancing of slavery was the fatal defect that rendered the document illegitimate.<sup>51</sup> While slavery was certainly tragic, the responsibility cannot be laid at the feet of the Constitution or its supermajoritarian basis. A serious attempt to eliminate slavery would have defeated any constitution and probably caused a fracturing of the nation. Despite its acquiescence to slavery, the original Constitution contributed to a social order based on markets and freedoms that helped persuade Americans that slavery is wrong.<sup>52</sup> It seems unlikely that African Americans would have been better off with a failure of the Constitution in 1789 and a retreat to sectional governments.

A similar complaint can be made about the absence of women. But this complaint is less powerful, both because there is stronger argument that women were virtually represented at the time by their male relatives and because many women apparently believed that they should not have the right to participate. In any event, the Nineteenth Amendment now grants

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101 HARV. L. REV. 1, 2 (1987).

<sup>50</sup> See U.S. CONST. amends. XIII, XIV, & XV.

<sup>51</sup> See, e.g., Marshall, *supra* note 49, at 3–5.

<sup>52</sup> See ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 7–9 (1992) (noting that the original Constitution was used to argue for abolition and equality).

women the right to vote.<sup>53</sup> Moreover, the Constitution would have likely been amended to prevent government sex discrimination had not the Supreme Court itself guaranteed such a right through its construction of the Fourteenth Amendment.<sup>54</sup> In short, the Constitution has now been corrected to provide equal rights to all Americans.<sup>55</sup>

One final kind of objection to this pragmatic defense of originalism is simply to find a constitutional provision that is widely believed to be defective, and suggest that the provision demonstrates that the Constitution is not of high quality. An example might be the provision that prevents a foreign-born citizen, like Arnold Schwarzenegger, from becoming President.<sup>56</sup> But our argument is only that the Constitution taken *as a whole* is of high-enough quality that its original meaning should be enforced. It is to be expected that some provisions may become undesirable and yet remain law because they are not so bad that a supermajority will repeal them. But following any legal rule has costs. Retaining a bad constitutional provision is simply a cost of following a supermajoritarian enactment rule when that rule generates a constitution with benefits that exceed its costs.

#### CONCLUSION

Debates about originalism have often resembled skirmishes between two armies that never really confront one another. Originalists talk about the rule of law and democracy, while non-originalists talk about indeterminacy, social change, and the consequences of individual cases. By providing a consequentialist defense of originalism itself, we have mapped out a new field of engagement. Our theory recasts the old arguments for originalism sounding in democracy and the rule of law into a defense of originalism's consequences. We argue that originalism provides a theory of constitutional interpretation that has good consequences even though it does not force judges to assess consequences on a case-by-case basis.

Thus, we present a new, frontal challenge to non-originalists. To meet this challenge, non-originalists must show that their theories both generate better consequences and provide some metric for assessing those conse-

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<sup>53</sup> See U.S. CONST. amend. XIX.

<sup>54</sup> See JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 46 (1986) (suggesting that the Supreme Court's innovations in applying the Fourteenth Amendment as a principle of gender equality undermined the case for ratification of the Equal Rights Amendment).

<sup>55</sup> While here we have addressed the most obvious defects arising from the exclusion of women and African-Americans from the framing, it might be argued that their absence caused subtler, more wide-ranging problems. Under this view, these groups would have not only sought equality provisions, but would also have had a different substantive agenda. We do not, however, believe that one can make a strong case that the Constitution would have been systematically different had these excluded groups been included. In the absence of strong evidence that the Constitution would have been transformed by these other voters, the original Constitution's rules should be followed, because they still offer the best evidence of what good entrenchments would have resembled.

<sup>56</sup> U.S. CONST. art. II, § 1, cl. 5.

quences that does not merely reflect a narrow theory of substantive good. Until this challenge is met, originalists can defend their respect for the meaning attached to the Constitution by those long dead as the best protection for the living.

