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Originalism

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ESSAY

ORIGINALISM

*Cass R. Sunstein**

Originalism might be defended on two very different grounds. The first is that it is in some sense mandatory—for example, that it follows from the very idea of interpretation, from having a written Constitution, or from the only legitimate justifications for judicial review. The second is that originalism is best on broadly consequentialist grounds. While the first kind of defense is not convincing, the second cannot be ruled off limits. In an imaginable world, it is right; in our world, it is usually not. But in the context of impeachment, originalism is indeed best, because there are no sufficiently helpful precedents or traditions with which to work and because the original meaning is (at least) pretty good on the merits. These points are brought to bear on recent defenses of originalism; on conflicts between precedents and the original meaning; on conflicts between traditions and original meaning; and on nonoriginalist approaches, used shortly after ratification.

INTRODUCTION

I have two goals in this Essay. The first, and the narrower, is to square two convictions: (a) there is a strong argument for originalism in the context of the Impeachment Clause and (b) there is no strong argument for originalism in the context of the Equal Protection Clause. (I mean the two clauses as examples of sets of provisions for which originalism does and does not make sense.) The second, and the broader, is to suggest that originalism must be defended pragmatically, which means (in my understanding) that it must be defended on the ground that it will produce good consequences. In imagi-

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* Robert Walmsley University Professor, Harvard University. This Essay is the basis for the Clynes Chair Lecture, delivered at Notre Dame Law School in November 2017. I am most grateful to the faculty and students of the Notre Dame community for extraordinary hospitality and for their valuable thoughts and suggestions on that occasion. Participants in a Public Law Workshop at Harvard Law School also provided superb comments. I am also grateful to William Baude, John Manning, Eric Posner, Lawrence Solum, Daphna Renan, David Strauss, Mark Tushnet, and Adrian Vermeule for a great deal of help; none of them bears responsibility for my errors.

nable worlds, that defense would be convincing. But it is not convincing in our world, at least not as a general rule. (I will qualify this conclusion, because the answer depends on what, exactly, originalism is taken to entail.)

The two goals are related. The pragmatic argument for originalism is most powerful under two conditions. First, there is nowhere else to turn with respect to interpretation of the constitutional text, in the sense that other legally relevant materials are absent. Judges or other interpreters lack precedents or traditions that can be taken to help solve interpretive puzzles. Second, the original meaning is excellent, or at least good or good enough, and it is far from clear that judges or other interpreters can improve on it.¹ One way to put it is that the original meaning is a reasonable focal point. Another (and in my view preferable) way to put it is that in such cases, originalism has low decision costs, at least compared to imaginable alternatives, and it also has low error costs, again compared to alternatives. (Pragmatists like to focus on decision costs and error costs.)

It follows that the pragmatic argument for originalism is not strong under mirror-image conditions, in which interpreters have relevant precedents or traditions, and in which the original understanding is pretty bad and judges or other interpreters are clear that they can improve on it. In such cases, nonoriginalist approaches will have acceptably low decision costs (because of those precedents or traditions) and, under plausible assumptions, they will have lower error costs as well (because the original understanding is pretty bad).

Harder cases arise in which only one of the two conditions is met, and I will have something to say about such cases as well. My basic conclusion is that if precedents or traditions are both longstanding and clear, the argument for rejecting them, by reference to the original meaning, is usually quite weak.

Two clarifications before we begin. First, I will argue that any approach to interpretation must be defended on the basis of its consequences. But I mean this claim to be ecumenical, in the sense that the idea of “consequences” should be taken very broadly. It need not be identified with utilitarianism or welfarism. It might include ideas about rights and self-government. We might well be able to obtain an incompletely theorized agreement on some approach to an interpretation—that is, an approach that obtains support from different theoretical foundations.²

Second, my central argument leads to the following question: Within the (broad) constraints of the concept of interpretation, and within the constraints of existing law governing that topic,³ shouldn’t judges do whatever

1 Changed circumstances might render the original understanding less than good. I am assuming that they have not done that.

2 See generally CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (2d ed. 2018).

3 See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1143–44 (2017). Baude and Sachs convincingly argue that existing law limits judicial freedom to produce new approaches to interpretation; judges cannot choose approaches

they deem best? If what judges deem best is in fact best, the answer should be obvious: yes, at least if we have a suitable and suitably broad conception of what is best.

The problem, of course, is that what judges deem best may not be best. Theories of interpretation must be developed with close reference to the risk of judicial fallibility. One of the attractions of originalism, at least for some people (including the present author), is that it is highly responsive to that risk;⁴ other theories of interpretation can claim to be similarly responsive. In evaluating originalism, I will emphasize the importance of taking account of judicial fallibility.

I. WHAT IS ORIGINALISM?

There is of course a voluminous literature on originalism and in particular on what it entails.⁵ Reasonable people, committed to originalism in the abstract, disagree about how best to understand that commitment. In recent years, there has been an outpouring of illuminating work on the topic. Today's originalism is not your grandfather's originalism, or even your father's, and probably not your older sister's.

The origins of originalism are intriguing and in some ways surprising. The term was first used by Paul Brest in an article that purported to be, and in some ways seemed to be, devastating to the whole idea.⁶ Notwithstanding Brest's objections, the idea was enthusiastically taken up by President Reagan's Attorney General Edwin Meese and his Office of Legal Counsel.⁷ At that point, originalism seemed to be a highly political weapon in a highly political war over the future direction of the Supreme Court. Whether right or wrong, originalism served as a foundation for an objection to the Warren

on the fly. We should therefore make a distinction between two questions: (1) What should a judge do in a particular case? (2) From the standpoint of outsiders evaluating a claim about interpretation, what approach is best? For the first question, the judge is bound by the law of interpretation; for the second, the outsider is evaluating existing law and not bound by it. I will try to keep the two questions separate here. Attempting to evaluate originalism as an approach to constitutional law, I focus mainly on question (2). With respect to question (1), originalism has been rejected in numerous important areas, and to that extent, the law of interpretation forecloses judicial resort to it.

4 Note, however, that there is strong evidence that originalism does not eliminate a significant role for judges' political inclinations. See FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* 165 (2013).

5 For a valuable account, see Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015) [hereinafter Solum, *The Fixation Thesis*]; Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (Mar. 24, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215 [hereinafter Solum, *The Constraint Principle*].

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

7 See Edwin Meese III, Attorney Gen., Speech Before the American Bar Association (July 9, 1985), in *THE FEDERALIST SOC'Y, THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 1, 9–10 (1986).

Court and to *Roe v. Wade*.⁸ It seemed to provide an intellectual basis (or, far less charitably, a cover) for embracing conservative results in constitutional law, and hence it was no surprise that it had (and has) far more appeal to the political right, and its academic and judicial analogues, than to the political left.

Whether fairly or unfairly, many of the critics of originalism took it to be politically motivated and result-oriented, notwithstanding its claim of neutrality. Importantly, and in response to some serious objections, there was a shift from a focus on “original intent” to a focus on “original meaning.”⁹ But the political valence appeared clear, at least to many observers, sympathetic or not. A clue: at meetings of the Federalist Society, originalism often had a prominent place; at meetings of the American Constitution Society, not so much.¹⁰

At least in the law journals, the longstanding political drama has (I think) been quieted by some of the most interesting current work on originalism, which seems to proceed under a veil of ignorance, and hence to abstract from, and even not to answer, the question whether it leads to particular results.¹¹ We might even give it a name: Veil of Ignorance Originalism.

In the hands of some of its best contemporary defenders and expositors, the idea of originalism has also become quite capacious, so that it can accommodate a wide range of modern doctrines that seem, at first glance, to be forbidden on originalist grounds. If we insist on a distinction between interpretation and construction, and find a large “construction zone,”¹² there might well be a large overlap between certain forms of originalism and certain forms of nonoriginalism. I aim to limit the level of complexity and detail,¹³ and to understand originalism as committed to the simple idea, on which there is now a near consensus, that interpreters are bound by the *original meaning* of constitutional provisions.¹⁴

8 410 U.S. 113 (1973).

9 See Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism* 8 (Jan. 17, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3049056.

10 A recent search for events related to “Originalism” on the Federalist Society and American Constitution Society websites produced 178 results and 5 results, respectively.

11 See Solum, *The Fixation Thesis*, *supra* note 5; Solum, *The Constraint Principle*, *supra* note 5.

12 See Solum, *The Constraint Principle*, *supra* note 5.

13 Public meaning originalism is the dominant approach, but there are other versions with some support, including (1) continued support for intentionalism, see Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 969 (2004), (2) original methods originalism, see John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 769 (2009), and (3) original law originalism, see Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 875 (2015).

14 See ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 47 (Amy Gutmann ed., 1997).

A. *Semantic Originalism*

That conception of originalism leaves many open questions.¹⁵ On a very thin view, what governs is the original semantic meaning, understood as the meaning of the words in the English language at the time.¹⁶ Call this Semantic Originalism.¹⁷ If the words “domestic violence” did not originally mean spousal abuse, then they cannot mean spousal abuse today. If the words “equal protection” originally had nothing to do with condoms, then they cannot now have anything to do with condoms. If the English language changed radically, so that “due” meant “awesome,” “cruel” meant “wonderful,” and “vested” meant “wearing a vest,” the meaning of the Constitution would not change, because the original semantic meaning is what governs.

Is Semantic Originalism correct? In the cases that I have given, it seems to be. Generally it is. But it does not capture all of our actual practice. Consider three examples:

1. The federal government is not governed by the Equal Protection Clause, which applies only to the states, and yet the Due Process Clause is said to have an “equal protection component” forbidding the federal government from discriminating on the basis of race and sex.¹⁸
2. The First Amendment says that “Congress shall make no law . . . abridging the freedom of speech,”¹⁹ and yet the protection of freedom of speech is applied to the executive branch and the courts.
3. If we are Semantic Originalists, it will not be easy to defend the conclusion that the Equal Protection Clause forbids racial segregation in public parks and public golf courses; at the time of ratification, the word “protection” had a specific meaning.

With respect to each, I would not reject our current practice, and the examples support David Strauss’s argument that our constitutional principles emerge from a common-law process in which even the text is not always decisive.²⁰ We should therefore agree that, in some ways, our practice confounds

15 I have referred to recurring questions, on which there is a significant literature, about the size of the “construction zone” and about what is to be done within it. See generally Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453 (2013). For a careful, highly illuminating discussion of the construction zone, and of the origins and development of originalism more broadly, see Barnett & Bernick, *supra* note 9.

16 See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 *NW. U. L. REV.* 549, 552 (2009) (“Fidelity to ‘original meaning’ in constitutional interpretation refers only to the first of these types of meaning: the semantic content of the words in the clause.”).

17 My understanding of the term is thinner than that in Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law & Legal Theory Research Paper Series, No. 07-24, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244. I have learned a great deal from Solum (but I fear not enough).

18 See generally *Bolling v. Sharpe*, 347 U.S. 497 (1954).

19 U.S. CONST. amend. I (emphasis added).

20 See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010). It is true that on originalist grounds, one or more of these results might be rescued under other provisions of the Constitution, such as the Privileges or Immunities Clause.

Semantic Originalism. Nonetheless, it is usually true that judges act in accordance with it. But if it is taken as I have described it here, it is generally trivial in the sense that it rarely dictates results that nonoriginalists would reject.

B. *Historical Context Originalism*

On a much thicker view, the original meaning is not limited to semantic meaning. It captures what the relevant English speakers, at the time, would have understood the words to mean in their context. The much thicker view is that the original meaning goes beyond the original semantic content of the constitutional text and includes an understanding of the historical context, used to eliminate ambiguity.²¹ Call this Historical Context Originalism, to which most contemporary originalists subscribe.²²

Suppose, for example, that “the freedom of speech” did not include commercial advertising or libel and that “the equal protection of the laws” had nothing to do with school segregation or sex discrimination. If so, originalists would be inclined to say that the issue is at an end. It should be clear that if the historical context is decisive, originalism would have a great deal of bite. But there is a complication, to which I now turn.

1. Expectations About Applications

An important question for Historical Context Originalism is raised by the role of public expectations about the application of the text to particular issues. As originalists are aware, things can get messy here.

We might think that if the Equal Protection Clause was not originally understood to forbid racial segregation or sex discrimination, then that is the end of the matter, even if the original semantic meaning of the term would not have forbidden the contrary view. On the premises that underlie Historical Context Originalism, that conclusion seems attractive: *the original meaning of a constitutional provision is coextensive with the originally expected applications*. But another view, even more attractive and now held by most originalists, is that originalism does not necessarily entail that constitutional interpretation is settled by the originally expected applications,²³ which are evidence of original meaning but not decisive.

The most plausible way (and I think the only way, consistent with Historical Context Originalism) to make sense of this view is to suggest that in its

21 See Barnett & Bernick, *supra* note 9. In the philosophy of language and theoretical linguistics, the role of context in the production of meaning is called “pragmatics” and is contrasted to “semantics.” See Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1124–39 (2015). In my view, Solum has done the most powerful, subtle, and illuminating work on these issues. For better or for worse, I am trying to bracket some of the subtleties for purposes of the current discussion.

22 For helpful discussion, see Barnett & Bernick, *supra* note 9.

23 See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292–93 (2007). An especially helpful discussion is found in Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555 (2006).

historical context, the original meaning of a constitutional provision might have been taken to outrun the originally expected applications.²⁴ For example, those who ratified the free speech provision might have taken it to be a broad concept, capable of evolution over time, or a delegation of authority to the future (including judges). If so, use of the originally expected applications would actually be inconsistent with the original meaning. On originalist premises, the crucial point is that the original meaning is a question of *fact*—a matter of history.²⁵

As originalists are also aware, the historical question might be exceedingly difficult to answer. Suppose that we want to know whether, in 1789, the freedom of speech was understood by those who ratified the Constitution to be defined by reference to the originally expected applications. If you took a group of ratifiers, you would probably get an assortment of reactions, including “yes,” “no,” “we haven’t really thought about that,” and “what exactly do you mean?” But for some constitutional problems, the historical question might not be difficult at all.

2. A Thought Experiment

To sharpen the issue, take the text of the never-ratified Equal Rights Amendment:

“Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”²⁶

24 Green, *supra* note 23, has relevant discussion. See also the helpful and convincing discussion in Solum’s *The Fixation Thesis* about narrow interpretations (identifying original meaning with expected applications) and broad interpretations (identifying original meaning with broad concepts):

From the perspective of originalism, the question is which of these two competing interpretations provides the actual communicative content of the Fourteenth Amendment. What kind of evidence bears on this question? One kind of evidence is based on armchair speculation about which interpretation is more likely, given our knowledge of the communicative situation and our general knowledge of the human situation: call this kind of evidence “armchair speculation.” Another kind of evidence is based on linguistic facts (patterns of usage during the Reconstruction Era) and context (the circumstances in which the Fourteenth Amendment was drafted and ratified): call this kind of evidence “historical facts.”

Solum, *The Fixation Thesis*, *supra* note 5, at 46. Consistent with Historical Context Originalism as I am understanding it, Solum urges that we should focus on historical facts. *Id.* at 47 (“That evidence will be found in historical fact—that is, evidence about how the relevant language was actually being used at the time and evidence about the context in which the language was used.”).

25 See Solum, *The Fixation Thesis*, *supra* note 5, at 12 (“Interpretation is an empirical inquiry. The communicative content of a text is determined by linguistic facts (facts about conventional semantic meanings and syntax) and by facts about the context in which the text was written. Interpretations are either true or false—although in some cases we may not have sufficient evidence to show that a particular interpretation is true or false.”).

26 H.R.J. Res. 33, 115th Cong. (2017).

Let us suppose that the Equal Rights Amendment (ERA) was in fact ratified in, say, 1980, and that at some point in the future (2015, 2030, 2050, 2100) the following questions arise: (1) Does the ERA forbid same-sex bathrooms? (2) Does the ERA forbid discrimination on the basis of sexual orientation? (3) Does the ERA forbid discrimination against transgender persons? (4) Does the ERA forbid meat eating? (5) Does the ERA require gender quotas for women, to assure that they are adequately represented in certain domains?

In 1980, it is reasonable to say that among those who voted to ratify the ERA, all five questions would receive a firm “no” answer. I would also say that for some of the questions—say, (2)—the percentage of “yes” answers would not be trivial, but would be far lower than fifty percent. To the extent that we are speaking of originally expected applications, the five questions are easy.

Now suppose, however, that the ratifiers are asked: *Does the meaning of the Equal Rights Amendment freeze your current understanding of its reach, or does it entail a general concept whose reach changes over time?* My guess is that they would respond with some version of the former, but it is not at all clear that most people would have ready answers to that question, and responses could well depend on exactly how the question is framed. If people were informed, or if they speculated, that a changing reach could produce results that they would deplore, they would not welcome the idea of a changing reach. But if people believed that a changing reach would result in increasingly enlightened judgments about the real meaning of “equality of rights under the law,” they might think that a frozen meaning would be a mistake. In other words, their answers would depend on what information they have and what assumptions they would make about how history would run under different interpretive regimes.

Consider in this regard the words of Justice Anthony Kennedy, writing in the 2015 case that ruled that all states must recognize same-sex marriages:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.²⁷

Is Justice Kennedy an originalist? On one view, he certainly is, because he is speaking for the “generations that wrote and ratified” constitutional provisions, which, on his view, “entrusted to future generations a charter.” But did they, really? Again, originalists will insist that the answer is a *fact*, which is entirely fair—but it might prove very hard to know what that fact is and Justice Kennedy might well have it wrong. (If you forced me to guess, I would say that he was indeed wrong.)

27 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

For Historical Context Originalism, things are relatively easy if constitutional provisions were plainly meant to be coextensive with their expected applications. But the historical question might turn out to be tough to answer. None of this should be taken as a decisive objection to originalism, or anything close to it. The point is only that originalism might leave challenging questions—again, as originalists are well aware.²⁸

3. Blurred Lines

To the extent that originalists see some constitutional provisions as broad concepts or as delegations, the line between originalism and nonoriginalism becomes blurry in practice.²⁹ It might even evaporate, in the sense that in actual cases, originalists and nonoriginalists might not much differ about how to proceed.³⁰

But suppose, plausibly, that some constitutional provisions cannot be seen that way. Suppose that, originally and in context, the First Amendment was not taken to be a broad concept, and was understood not to protect against libel laws, or was taken to be limited to prior restraints. Suppose too that originally and in context, the Due Process and Equal Protection Clauses were not understood to be general terms capable of evolution and were clearly taken to have nothing to say about same-sex marriage. If so, matters are at an end. That is sufficient for my purposes here.

28 Barnett & Bernick, *supra* note 9, has valuable discussion.

29 See Solum, *The Constraint Principle*, *supra* note 5, for a valuable treatment of why this is so.

30 Recall the importance of the distinction between interpretation and construction, emphasized by some contemporary originalists. See *supra* note 13 and accompanying text; see also William Baude, *Essay, Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2352 (2015) (“[A] version of originalism is indeed our law. That version is a somewhat inclusive version of originalism—a version that allows for some precedent, for some evolving construction of broad or vague language. At the same time, that version is not infinitely inclusive—it allows for precedent and evolving interpretations only to the extent that the original meaning *itself* permits them.”).

If the words “somewhat inclusive” and “some evolving” are taken in a certain way, the argument is not self-evidently wrong. At the same time, countless decisions are inconsistent with the original meaning, as Baude himself seems to suggest. See William Baude & Stephen E. Sachs, *Originalism’s Bite*, 20 GREEN BAG 2D 103, 108 (2016) (listing a number of cases and principles that seem to violate the original meaning, including the “one person, one vote” rule). To that extent, originalism is not our law. See STRAUSS, *supra* note 20; see also, e.g., *Obergefell*, 135 S. Ct. 2584; *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

To be sure, it is possible for originalism to be our law even if some particular decisions are hard to defend on originalist principles. The broader point is that, in any year, the original meaning of the Constitution is unlikely to have “bite” in even one constitutional decision of the Supreme Court, and it is rare for the Court even to inquire into it. In my view, those facts make it difficult to urge that originalism is our law, even if the Court rarely says, in terms, “Our ruling today is inconsistent with the original meaning, and we just do not care about that.”

4. Impeachment

I am going to be speaking a fair bit about impeachment, and I will be defending an originalist approach to the Impeachment Clause.³¹ As I understand it, and consistent with originalism as generally defended and practiced, that approach asks: *What did the words “high Crimes and Misdemeanors” originally mean?*³² And as I understand that question, the best answer (as a matter of history!) is relatively concrete, not in the sense that it is an exhaustive list of all imaginable cases, but in the sense that it covers most real-world ones and gives us a principle that has far more specificity than the semantic meaning of those words.³³

One way to put that answer is to insist that as a matter of history, the ratifiers emphatically did not understand “high Crimes and Misdemeanors” to be a reference to some abstract concept whose particular meaning would change over time.³⁴ They understood it to include certain abuses of authority (such as abuse of the pardon power or invasions of liberty) and not to include certain bad actions (terribly mistaken judgments and poor administration). If there are gray areas, they are to be resolved with reference to a clear principle—and in terms of sheer numbers, the gray areas are dominated by those that are not gray at all. In other words, Historical Context Originalism imposes sharp constraints on the meaning of “high Crimes and Misdemeanors.”

II. WHY ORIGINALISM?

Why should anyone be an originalist? We can distinguish between two kinds of answers. The first avoids any arguments about consequences and says that originalism is built into something, or intrinsic to something—perhaps the very idea of law, perhaps the very idea of a Constitution, perhaps the very idea of a written Constitution, perhaps the very idea of interpretation, perhaps the very idea of obedience to law, perhaps the only legitimate justification for judicial review, perhaps the only way to capture what the Constitution “really means.”³⁵ On that approach, nonoriginalists are refusing to follow the Constitution and are essentially amending it. The second kind is pragmatic and focused directly on consequences, broadly understood.³⁶ It focuses on *what will happen* under different interpretive regimes. It urges

31 U.S. CONST. art. II, § 4.

32 *Id.*

33 The principle can plausibly be seen as a way to help resolve cases within the construction zone.

34 See CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN’S GUIDE* (2017).

35 See Randy E. Barnett, *The Golden Mean Between Kurt & Dan: A Moderate Reading of the Ninth Amendment*, 56 *DRAKE L. REV.* 897, 909 (2008).

36 See JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013). An assortment of consequentialist arguments can be found in Solum, *The Constraint Principle*, *supra* note 5.

that originalism will produce better results, on balance, than any alternative.³⁷ (Recall that the notion of “results” is meant to be ecumenical.)

A. *Choice and Choicelessness*

The first kind of answer discussed above builds on something that is true: any interpreter has to interpret the Constitution’s text. If a judge pays no attention to the words of the Constitution, she is not engaged in interpretation at all. Though it is less than entirely clear, we might also agree that any interpreter has to pay attention to the semantic meaning of the words, taken in their original context. If the word “protection” comes to mean “cell phone” or “guard dog,” it would not be permissible for a judge to understand the Equal Protection Clause to mandate something with respect to cell phones or guard dogs. In that sense, Semantic Originalism, as I have understood it here, does seem to follow from the very idea of interpretation. (Recall, however, that some established doctrines violate Semantic Originalism, and I approve of those doctrines, which requires a qualification of the claim that Semantic Originalism is mandatory.)

Is anything in the original understanding *mandatory* beyond this? Is Historical Context Originalism also mandatory? That is not easy to see. Suppose (or stipulate, for purposes of argument) that if we follow originalism, the Free Speech Clause must be taken to be limited to prior restraints; that the Equal Protection Clause must be taken to allow racial segregation; that the religion clauses must be understood to permit compulsory school prayer. If interpreters rely on the text, but not on the original meaning, *they have not amended the Constitution unless the original meaning is part of the Constitution—and that is the very question that we are debating*. There is no *need* to take the original meaning to be part of the Constitution, or to insist that we *need* to do that if we are to engage in interpretation at all.³⁸

37 Baude, *supra* note 30, argues that originalism is “our law.” If he is correct, he is not making a consequentialist argument on behalf of originalism, and he is not quite making an argument about choicelessness in the sense in which I am understanding that kind of argument. (Compare: the invalidity of bans on same-sex marriage is just our law.) I have suggested that originalism is not our law, *see supra* note 30, but that is a separate claim.

38 In defense of originalism, Randy Barnett urges:

I start with the proposition that the Constitution was put in writing so it could provide *the law that governs those who govern us*. A written constitution cannot serve this purpose if the very people who are to be governed by it can themselves, alone or in combination, alter the meaning of the constraints imposed upon them. None of us can alter the meaning of the statutes or regulations imposed upon us without going through the amendment process, and neither can our rulers, who are supposed to be our agents.

Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411, 417 (2013). With respect, this seems to me a stipulation, or perhaps a circle. A constitution’s text is in writing and provides the law that governs us even if it does not mean what it originally meant. Those who put the Constitution in writing do not have the authority to settle the question of how it should be interpreted, unless we think they should.

It is common to “interpret” a judicial precedent to mean something other than what it originally meant to the author, to the Court, or to the public. Nothing in the ideas of fidelity to law, of constitutionalism, or of interpretation compels us to read texts in accordance with their original meaning.³⁹ To be sure, we might *choose* to understand fidelity or constitutionalism in a way that makes original meaning authoritative. But that is a choice, and it is not compulsory. For example, Ronald Dworkin understands interpretation to be a matter of placing the existing legal materials in their best constructive light.⁴⁰ Whether or not he is right, it is hard to argue that his approach does not involve interpretation at all.⁴¹

Justice Scalia contends that we must be originalists if we want to adhere to the only principle that legitimates judicial review.⁴² In his account, the

Barnett might be making a pragmatic point about the not good consequences that would follow if constitutional meaning changes over time—fair enough. But the meaning of the U.S. Constitution has changed over time, and it still serves the purpose of providing the law that governs those who govern us.

39 Lawrence Solum argues that “[t]he Fixation Thesis is based on our commonsense understandings of the way that communication works. When we communicate using language, we rely on linguistic conventions and context—and both are time-bound.” Solum, *The Fixation Thesis*, *supra* note 5, at 76. On that point, Solum is convincing. But in constitutional law, we might not rely on those commonsense understandings, in the sense that we might depart from Historical Context Originalism in interpreting such phrases as “equal protection” and “freedom of speech.” I do not believe that “commonsense understandings of the way that communication works” are decisive against such departures (though in so saying, I might be objecting to what Solum calls “the Constraint Principle”). See Solum, *The Constraint Principle*, *supra* note 5.

40 See RONALD DWORKIN, *LAW’S EMPIRE* (1986).

41 “As several of the newer originalists have written, if we start with the premise that the Constitution is binding law, then perhaps our task should simply be to read the Constitution and do what it says. Sometimes it may result in constraints, and sometimes it may not.” William Baude, Essay, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2228 (2017) (footnote omitted). The problem with this view is that it is question begging to say that “to read the Constitution and do what it says,” we must rely on original meaning. We can read the Constitution and do “what it says” without adhering to that meaning. Whether we *should* do that cannot be resolved by pointing to the importance of reading the Constitution.

42 The principal theoretical defect of nonoriginalism, in my view, is its incompatibility with the very principle that legitimizes judicial review of constitutionality. Nothing in the text of the Constitution confers upon the courts the power to inquire into, rather than passively assume, the constitutionality of federal statutes. . . . Central to that analysis [of judicial review in *Marbury*], it seems to me, is the perception that the Constitution, though it has an effect superior to other laws, is in its nature the sort of “law” that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law. If the Constitution were not that sort of a “law,” but a novel invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts rather than to the legislature?

Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989) (footnote omitted). Justice Scalia might well be right to suggest that the ratifiers did not invite

power to strike down legislation is legitimated if, and only if, the Constitution “has a fixed meaning ascertainable through the usual devices familiar to those learned in the law.”⁴³ But why? Fixed meanings are neither necessary nor sufficient for the legitimation of judicial review.

If the Constitution has a fixed original meaning, and it is thoroughly evil and rotten, and it was adopted by dead people well over 200 years ago, is it legitimate? If the meaning of the Constitution is not fixed, and if the document with unfixed meaning serves “We the People” exceedingly well as its meaning departs from the original one and evolves over time, is it illegitimate? We do better, I think, to avoid abstract talk of legitimacy, and instead to investigate consequences—acknowledging that protection and preservation of democratic self-government, properly understood, is an important consequence.⁴⁴

Here is a way to put the point, ventured tentatively but with some conviction: those who believe that Historical Context Originalism is mandatory are (I think) in the grip of a picture. It is a bit like the “duck or rabbit” image, which looks like a duck, if you see it a certain way, or a rabbit, if you see it another way.⁴⁵ Some people have a picture of constitutional interpretation such that originalism just is what it means to engage in it (legitimately). But that is only one way of looking at things. It may be right, but it is optional. Whether it is the right option depends on the consequences.

It is tempting to defend originalism by reference to analogies. Suppose that you work for a principal; you are his agent, perhaps his employee. He gives you certain directions. You might well be an originalist, certainly as a presumption, and perhaps more than that: if he tells you to do something and his instructions are not clear, you will try to figure out what he meant. (To be sure, that question might lead you to original intentions rather than original meaning, but let us treat that as a detail.) Perhaps judges, and others governed by the Constitution, should be seen as agents (or fiduciaries). They must follow instructions, which means that they must be originalists.

The analogy goes too quickly. The role of an agent can be understood in different ways, and if an agent should or must be an originalist, it must be for broadly pragmatic reasons. On plausible assumptions, the principal-agent relationship usually works best, or usually is best, if agents are originalists. Of course we could imagine assumptions, also plausible, on which

courts to “apply current societal values”; that is a question of history. But even if they did not issue any such invitation, the question is whether a nonoriginalist approach to interpretation makes our constitutional system better, rather than worse, and that question cannot be answered by asking about the very principle that legitimates judicial review. It should be clear that in my view, the principle that legitimizes judicial review is consequentialist: judicial review has good consequences. If it did not, we should not embrace it.

43 *Id.*

44 *See* Solum, *The Constraint Principle*, *supra* note 5.

45 The “duck or rabbit” image originates in JOSEPH JASTROW, *FACT AND FABLE IN PSYCHOLOGY* 295 (1901).

agents should adopt some other approach. Perhaps their principal is aware of what he does not know; perhaps he wants his agent (a doctor, a lawyer, a construction company) to exercise some discretion, on the ground that the agent's decisions will be better if he has the freedom to do that. Perhaps the principal has not thought that question through.

The point is not to make a claim about the proper role of agents. It is only to suggest that any justification of a particular view about that role cannot rest content with saying that an agent "just is" one thing or another.

B. Pragmatism (*Herein of Consequences*)

The pragmatic argument on behalf of Historical Context Originalism (hereinafter originalism, for short) is far more plausible; it certainly cannot be ruled out of bounds. In imaginable circumstances and under imaginable assumptions, it is convincing.⁴⁶ Under imaginable assumptions, it is even convincing in our world. We may not be able to rule out the possibility that things would have been as good, or better, if judges had always been originalist.⁴⁷

For general orientation, let us suppose that if the Constitution is understood to mean what it originally meant, it will be good or even excellent. Let us suppose too that if judges depart from the original understanding, they will make a terrible mess of things. The idea of a terrible mess can be understood in many ways, but roughly, law will become unpredictable; judges will compromise the rule of law; judges will be tyrannical in a relevant sense; judges will be insufficiently protective of rights; judges will make moral judgments that do not deserve respect; and judges will restrict the power of self-government in ways that cannot be defended.⁴⁸ Let us suppose finally that to the extent that the Constitution, as originally understood, does not protect (what many people now consider to be) a sufficiently ample set of rights, the democratic process will pick up the slack, as it has, for example, through

46 A more pragmatic argument can also be found:

A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect "current values." Elections take care of that quite well. The purpose of constitutional guarantees—and in particular those constitutional guarantees of individual rights that are at the center of this controversy—is precisely to prevent the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable.

Scalia, *supra* note 42, at 862.

47 As we shall see, much depends on what originalism means or entails. In addition, it is a very different question whether judges should not be or become originalist. We might think that if judges had always been originalist, things would be fine or better, without also thinking that judges should become originalist starting now.

48 Solum contends that "concern for the rule of law and for legitimacy do provide the strongest reasons of political morality for originalism." Solum, *The Constraint Principle*, *supra* note 5, at 85. Solum makes plausible arguments that the rule of law and democratic self-government (my term, not his) are best promoted by originalist approaches.

legislation akin to the Religious Freedom Restoration Act and the Americans with Disabilities Act.⁴⁹

In such circumstances, there would be strong claims on behalf of originalism, and it is not easy to see why anyone would reject those claims. It follows that the real debate between originalists and nonoriginalists is intensely pragmatic. In some respects, it is about counterfactual history. It is not about anything abstract, but about what is being supposed.⁵⁰ Those who reject originalism think that as originally understood, the Constitution is not excellent enough; that if judges depart from the original meaning they will not make such a mess; and that judicial departures from the original meaning are essential to create a well-functioning democracy and a sufficiently robust system of rights. Suppose that these claims are right. If so, originalism would be the right approach in an imaginable world, but not our own.

Rejection of originalism does not, of course, specify an alternative approach. We could imagine several. Some people favor a “democracy-reinforcing” approach to judicial review, calling for an aggressive judicial role to protect rights that are central to the democratic process, or to protect groups that are systematically disadvantaged in that process.⁵¹ Other people think that courts should adopt a strong presumption in favor of constitutionality and strike down legislation only when the violation is unambiguous.⁵² Still other people think that courts do (and should) adopt a common-law approach, proceeding incrementally and with close reference to precedents and traditions.⁵³

All of these approaches raise serious questions, and while I will return to them, I do not mean to answer those questions in this space. It is both true and important that any final conclusion must be comparative.⁵⁴ Perhaps originalism is not so great, but perhaps any alternative is worse. I have not

49 See Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 5 U.S.C. § 504 and 42 U.S.C. §§ 1988, 2000bb–2000bb-4 (2012)), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.). These points hardly exhaust the consequentialist argument on behalf of originalism. Nonoriginalist approaches might weaken democratic processes by shifting energy from politics to courtrooms. Such approaches might politicize the judiciary and undermine its (legitimate) role.

50 Some qualifications emerge from Solum in *The Constraint Principle*, which outlines arguments (involving tyranny and the rule of law) that appear to involve general principles and that do not seem to be rooted in suppositions. See Solum, *The Constraint Principle*, *supra* note 5. In the end, I think that they are, at least in the sense that the weight to be given to those arguments depends on some empirical projections. But it is true that if we value the rule of law, we might find significant advantages in a system in which constitutional meaning does not change. Note again that even if originalism would have been a good or acceptable course starting in, say, 1800, it does not follow that becoming originalist would be a good or acceptable course starting in, say, this present year.

51 See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1981).

52 See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* (2006).

53 See STRAUSS, *supra* note 20.

54 See Solum, *The Constraint Principle*, *supra* note 5, at 50.

ruled that conclusion out of bounds. For now, the only point is that in terms of consequences, it is easily imaginable that at least one alternative, and maybe at least two, are superior to originalism.

III. IMPEACHMENT

A. *Originalism When You Have Nothing Else*

To focus on my methodological concerns, I am going to make some long stories shamefully short. The Constitution states that the President, the Vice President, the cabinet, federal judges, and many other officials are impeachable for “high Crimes and Misdemeanors.”⁵⁵ Those words could be interpreted in different ways. For example, a contemporary English speaker might understand those words to mean “very bad violations of the criminal law,” even if they are technically misdemeanors—as distinguished from felonies. In fact, that seems like the most natural reading for a contemporary English speaker. In other words, an action is not a legitimate basis for impeachment unless it is a crime.

Alternatively, such a speaker might understand the words to mean “bad crimes and other bad actions.” That interpretation is linguistically admissible if we understood the word “misdemeanors” to refer not to technical violations of the criminal law, but to wrongful actions that reach a certain threshold of wrongfulness. We could take these alternative interpretations to suggest the possibility of a continuum: from a minimalist understanding of high crimes and misdemeanors where what is required is a violation of the criminal law—and a truly terrible one at that—to a maximalist understanding where all that is required is a judgment by the House of Representatives that the relevant official has done something that is bad enough. What is the right point on the continuum? A nonoriginalist will have some answers (see below), but none of them are obvious, or obviously correct.

For their part, originalists (as I am understanding them here) would reject both of the alternative interpretations, would reject both poles of the continuum, and would have no enthusiasm for the idea of a continuum. On the basis of what history tells us, they would insist that “high Crimes and Misdemeanors” refers to “egregious abuses of public power.”⁵⁶ That was the original meaning of the phrase. For that reason, a crime is not required. At the same time, it is not enough that, say, the President has engaged in bad actions. To qualify as impeachable offenses, such actions must involve abuses of distinctly presidential authority (as opposed to, say, income tax fraud, shoplifting, or perjury about sexual conduct), and they must rise to a high level of egregiousness.

An originalist approach to the Impeachment Clause answers most questions. It demonstrates that President Richard Nixon was impeachable and

55 U.S. CONST. art. II, § 4.

56 SUNSTEIN, *supra* note 34, at 124.

that President Bill Clinton was not. If an originalist approach leaves some difficult questions, it has the merit of explaining why they are difficult.⁵⁷

An originalist approach to the Impeachment Clause has two advantages. First, it greatly simplifies life. Without the original understanding, where would interpreters go? The conventional legal materials are absent. (I will turn to a counterargument shortly.) At least, there are no judicial precedents on which interpreters could draw. Second, the original understanding is good, even excellent, and it is not clear that contemporary interpreters could improve on it.

For example, a minimalist approach to the Impeachment Clause would forbid use of the mechanism when the President has grossly abused his authority without committing a crime. The President could go on vacation in Rome for a year, lock people up because of their skin color, make wars on a pretext and for political purposes, or pardon people who promised that they would campaign for his reelection. Refusing to allow impeachment for such abuses would be pretty terrible.

A maximalist approach would allow the House to invoke the mechanism simply because a majority of its members dislike the President and are able to identify some action or omission that is, in their view, very bad. That would also be pretty terrible. If you do not agree that a minimalist or maximalist approach would be pretty terrible, and if you enthusiastically embrace one or the other, then the argument for originalism in this context is definitely weakened. But if you do agree, originalism is not easy to reject.

Here is a related point: in the context of impeachment, originalism provides a good focal point, one that allows people to coordinate on something that is useful and good, whatever their differences. In game theory, focal points solve coordination problems, even in the absence of communication.⁵⁸ For lawyers and judges, the original meaning might serve a similar function.⁵⁹ In the context of impeachment, the coordinating function seems especially important. In my view, it is not decisive—we need to inquire into consequences more generally, and coordinating onto something terrible would not be a good idea, even if it is focal. But in the context of impeachment, taking the original meaning as focal is very far from terrible.

I am aware that many originalists would not be at all satisfied with this argument on behalf of impeachment originalism. In their view, it is too consequentialist: opportunistic, contingent, result oriented, an exercise of discretion disrespectful of the arguments that make originalism mandatory. But if my argument thus far is correct, no other kind of argument on behalf of originalism makes much sense, unless it is a very thin version, limited to original semantic meaning.

57 I realize that these claims about originalism and the Impeachment Clause raise many questions. If you think that the claims might not be correct, take them as stipulations, designed to clarify the methodological issues.

58 See Robert Sugden, *A Theory of Focal Points*, 105 *ECON. J.* 533, 533 (1995).

59 See STRAUSS, *supra* note 20 (arguing that text is similarly focal).

B. *Impeachment Nonoriginalism*

Nonoriginalist approaches to the Impeachment Clause could take various forms. Let me sketch three.

1. Active Liberty

Suppose that we believe, with Justice Stephen Breyer, that constitutional provisions should be interpreted with reference to the idea of “active liberty.”⁶⁰ Offhand, that approach would lead to the view that participants in the political process could define “high Crimes and Misdemeanors” however they wish.⁶¹ Would that be a good idea?

Almost certainly not. It would be deeply destabilizing. In a period in which the opposing party (whether Republican or Democratic) is not known for self-restraint, there is a grave risk that this approach would allow resort to the impeachment mechanism in circumstances in which the real driver is not misconduct, but instead policy disagreement or political gain.⁶² That would be a serious problem for national institutions. It would convert our system of separation of powers into something quite different from what it now is and something much worse.

2. Traditions

Suppose that we believe, with Justice Felix Frankfurter, that traditions can operate as a “gloss” on the Constitution, so that the meaning of constitutional provisions might be settled by longstanding practices, even if the result is very different from the original understanding.⁶³ If so, we would want to ask: What are the relevant traditions with respect to impeachment? To simplify, let us imagine two possible answers to that question. First, an investigation of American history reveals a clear understanding of what count as high crimes and misdemeanors. The nation has converged on that understanding. Second, an investigation of American history reveals no clear understanding of what count as high crimes and misdemeanors. The relevant practices are a mess.

If traditions reflect a clear understanding, and if that understanding diverges from the original understanding, we have a legitimate question: Should the tradition yield to the original understanding or vice versa? I will turn to that question in due course. But if the relevant practices are a mess,

60 See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

61 That is not entirely clear. After all, the President is elected, and so ready invocation of the impeachment mechanism might compromise the idea of active liberty. To the extent that the idea turns out to be indeterminate, the argument in favor of its use is weaker still.

62 The Clinton impeachment is an example and a warning. See SUNSTEIN, *supra* note 34, at 101–04.

63 See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

we have no such question. In my view, the tradition is a mess. It does not say anything that we can use; it does not suggest convergence on any kind of principle.⁶⁴ If that is right, and for present purposes, it should be taken as a stipulation, then interpreters have nothing with which to work.

3. Moral Readings

Ronald Dworkin argues for a “moral reading” of the Constitution.⁶⁵ On that view, interpreters are bound by the text, but they are authorized to give the text the reading that is best from the moral point of view.⁶⁶ Under that approach, it would be necessary to ask: What understanding of the Impeachment Clause makes it the best that it can be? One moral reader might conclude that a maximalist understanding of the clause would be best; another moral reader might favor a minimalist understanding. They would argue with one another. On Dworkin’s view, that is not so bad—in fact it is not bad at all. They are arguing about exactly the right question.

Originalists are not enthusiastic about Dworkin’s claim. In fact, they are appalled by it. Instead of asking about the morally best understanding of constitutional provisions, they want to ask: What was the original meaning? In the context of impeachment, I agree with them, but it will immediately be observed that my account of the occasions for originalism has a Dworkinian dimension. I have not argued that interpreters should stick with the original understanding if it is awful. Indeed, my account converges with Dworkin’s if it is taken to suggest that interpreters should follow the original understanding if, and because, it is morally best. And if that is the approach, then originalism as such is essentially irrelevant. What is doing the work is a moral judgment about what is best—not the original understanding. It just turns out that the original understanding is best. What a nice coincidence!

My response is that the originalist reading of the Impeachment Clause is emphatically not based on an independent judgment that it is best. The requirement is much softer than that. Two judgments are needed. The first is that the original understanding is good or good enough; the second is that it is not obvious that an alternative view would be much better. For example, a reader of the Constitution might prefer a maximalist interpretation of the Impeachment Clause on Dworkinian grounds, but might conclude, on grounds of humility, that she ought to follow the original understanding. For the Impeachment Clause, a reader might (and I think should) decide to be an originalist even if she thinks that the original meaning does not make the text the best that it can be.

64 See SUNSTEIN, *supra* note 34.

65 See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

66 See *id.* at 10.

C. *Clause-by-Clause Originalism?*

A possible response to the argument I am making here would take the following form. To be sure, originalism makes more sense for some provisions than for others. If we are pragmatists with respect to interpretation, that conclusion seems inevitable. But there is something wrong with provision specific interpretive choices. A theory of interpretation should be Constitution general, not provision specific.

To see why this objection might be right, imagine that a judge announced that she would be an originalist with respect to the free speech provision in the context of prior restraints, but a moral reader in the context of libel law, and a Thayerian in the context of pornography. It would be natural to ask: Isn't that an objectionable form of picking and choosing?⁶⁷ Shouldn't you choose your interpretive method and stick with it? Isn't that more objective?

In a way, these questions are misleading. On pragmatic grounds, it might indeed be best to stick with a single interpretive method, if that would reduce decision costs and error costs. Case-by-case choices among approaches to interpretation might seem messy and ad hoc—and might disguise political preferences. But clause-by-clause choices are far less awkward. Indeed, current law reflects such choices. For the Second Amendment, the Court has been quite originalist,⁶⁸ as it has not been for the First.⁶⁹ Indeed, a pragmatic approach of the kind that I have sketched here seems to account for a great deal of existing practice.

IV. WHEN ORIGINALISM IS TOUGH TO DEFEND (IN A HURRY)

Suppose that it turned out that if the original meaning is authoritative, racial segregation is consistent with the Equal Protection Clause.⁷⁰ Suppose too that no other provision of the Constitution forbids racial segregation. Or suppose that the First Amendment, read in accordance with the original meaning, prohibits licensing schemes and other prior restraints, but does not forbid subsequent punishment for speech. In either case, it would be difficult to argue that judges should return to original understanding.⁷¹

The simplest reason is that originalism would have bad consequences. It would lead to a weaker and worse system of rights. If judges are not bound by the original understanding, they do have somewhere to turn: the body of precedents that judges have themselves developed. To be sure, elaboration of those precedents leaves them with a degree of discretion. We will con-

67 I use the conventional phrase, but there is a big difference between picking and choosing. See generally EDNA ULLMANN-MARGALIT ET AL., *NORMAL RATIONALITY* (2017).

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

69 Cf. STRAUSS, *supra* note 20, at 51–61 (“[T]he First Amendment . . . has been a tremendous success story in American constitutional law. But where did [its] successful principles come from? They did not come from the text of the Constitution.”).

70 See U.S. Const. amend. XIV.

71 For valuable discussion, see STRAUSS, *supra* note 20.

tinue to see changes over time, but that is not so bad. If it turns out to be a price, it is a price worth paying. And it might not be a price at all. It might be a gift.

To the extent that originalism is understood not to have bad consequences, of course, this objection has no force. We could imagine a view of history such that originalism would not have bad consequences, in the sense that if we reran constitutional law counterfactually, originalist constitutional law would not be bad at all.⁷² Perhaps it would be pretty good. It is also possible that originalism would have some bad consequences, but that overall, it would have good consequences.⁷³ Perhaps it would lead to weaker protection of freedom of expression, but a stronger system of democratic self-government. It is admittedly inadequate to point to a few results that originalism would not have made possible, or would now question, and then to declare victory. The question must be answered at the level of the system as a whole, not that of particular cases.

We have also seen that some forms of originalism emphasize semantic meaning and that others take constitutional language at a high level of abstraction (on originalist grounds), in a way that would authorize contemporary understandings of the Equal Protection Clause and the First Amendment. These forms of originalism are not subject to the objection I am making here. Recall, however, that if it is taken in these forms, originalism is close to nonoriginalism in the sense (crucial in my view) that the judicial role is not more constrained.⁷⁴

My answer to a simple question—is originalism good?—is therefore equivocal. As I have suggested, there is a big difference between two questions: (1) Should the Court have been originalist since, say, 1800? (2) Should the Court become originalist today? To answer either question, a great deal depends, of course, on what originalism is taken to entail. We have seen that question (1) is especially challenging because it requires us to answer some questions about counterfactual history. (I will return to this point.) I do not believe that American constitutional law would be better if the Court had been originalist, but it is not easy to be confident on that score, partly because of the challenge of specifying what originalism means, and partly because of the challenge of rerunning history under different assumptions. Question (2) is a bit easier, because a turn to originalism would be so destabilizing, and it is not clear how much or what would be gained by it. But I am more interested in identifying the relevant issues than in insisting on particular conclusions.

72 For a superb discussion, see Solum, *The Constraint Principle*, *supra* note 5.

73 *See id.*

74 *But see* Baude, *supra* note 41, at 2214 (“[O]riginalist scholars today are much more equivocal about the importance and nature of constraining judges. This is a point that may be obvious to those steeped in the latest originalist theory, but apparently cannot be stated often enough or clearly enough to those who are not.”). In my view, the argument on behalf of originalism is much stronger if it is defended as a means of constraining judges.

V. CONFLICTS

I now turn to three sets of questions: (1) What happens when traditions are in conflict with the original understanding? (2) What happens when judicial precedents are in conflict with the original understanding? (3) What happens when judges want to follow their own moral reading of a constitutional provision, shortly after ratification? Answers to these questions should sharpen the pragmatic case for and against originalism.

A. *Traditions vs. Original Meanings*

Suppose that the United States has had a longstanding practice, accepted by both Congress and the President. Suppose that the practice, while not inconsistent with the text, is in tension with or defies the original understanding. What then? Some imaginable examples: (1) Congress enacts legislative vetoes, and the President signs the relevant legislation, over a period of many decades. (2) The President uses military force, without congressional authorization, over a period of many decades, and Congress, as such, does not appear to object. (3) Over a period of many decades, the President makes recess appointments in circumstances that seem to defy the original meaning of the Appointments Clause, and the Senate, as such, does not appear to object.

We can distinguish a continuum of cases, and even provide a matrix, depending on the clarity of the original meaning and the tradition. In the easiest cases, the original meaning is ambiguous and the tradition is clear. In the hardest, the original meaning clearly supports *X* and the tradition tends to support not-*X*. In the intermediate cases, the original meaning is best understood to support *X*, but matters are not entirely clear; the tradition tends to support not-*X*.

In my view, the tradition should presumptively prevail in all of these cases. If a tradition is longstanding, there is probably a good argument on its behalf, certainly in the domain of separation of powers. On Burkean grounds,⁷⁵ the tradition has weight; it has been accepted by many minds. Acceptance by Congress and the President, over an extensive period, suggests that it has real benefits. Why should the original meaning overcome it?

On pragmatic grounds, that is a difficult question to answer. The most important qualification points to the possibility that *while Congress and the President have accepted the practice, Americans generally lose from it*. The legislative veto question can be understood in these terms. If the one-house or two-house veto gives rise to a risk of factionalism or a threat to liberty, then the longstanding practice might not be so important.⁷⁶ It follows that traditions are not self-justifying, and if there is a rights-based or structural objection to them, they might have to yield. But the reason is not that the original under-

⁷⁵ See CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE* (2009).

⁷⁶ See Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977).

standing is a trump card. It is that there is a rights-based or structural objection to them.

B. *Precedents vs. Original Meanings*

Suppose that we have a series of precedents that defy the original meaning. The Takings Clause is an arguable example, to the extent that it treats some diminutions of the value of property as “takings” even if there is no physical invasion. Suppose that by 2017 (and long before), the judiciary had settled the issue in favor of the view that the clause is not limited to physical takings and that it includes “regulatory takings.” Suppose that on the original meaning, it turns out that the clause was so limited. Should the judge follow the precedents or the original meaning?

If the original meaning identified with the Constitution, the answer might seem to be easy: follow the original meaning. But even on originalist grounds, that might not be so clear. Perhaps the original meaning was that the Takings Clause offered a general concept, not a particular conception limited to physical takings. Or suppose that the original meaning incorporated respect for stare decisis and so authorized judgments to (continue to) depart from the original meaning. But suppose that is a dodge—an effort to avoid the problem. Suppose that the precedents really do defy the original meaning.

If all a judge has is a flat conflict between the two, the precedents deserve priority. Respect for precedents has the familiar justifications: it promotes stability in the law, protects reliance interests, and limits decisional burdens imposed on judges. By itself, the original meaning is not sufficient to overcome those justifications. Suppose, for example, that originalists discovered that the Second Amendment does not protect an individual right to own guns, that the Fourteenth Amendment does not ban racial segregation, and that the First Amendment does not protect commercial advertising. Because the argument for use of the original meaning is pragmatic, such discoveries would not justify undoing the fabric of existing law.

To be sure, the stare decisis principle can be overcome. If a series of precedents has produced chaos, if it is based on palpably false assumptions, or if it is otherwise plainly wrong, a precedent can be reconsidered. But inconsistency with the original meaning is not sufficient justification.

C. *Originalism, Originally*

Suppose that it is 1875. Suppose that the Equal Protection Clause has been ratified and that the original meaning permits racial segregation. By this I mean that “We the People” take the meaning to be that racial segregation is acceptable. Suppose too that there are no judicial precedents or relevant traditions. Suppose finally that a judge believes, on principle, that the Equal Protection Clause is far better if it is read (as the text allows) to forbid racial segregation. What then?

Here is a case in which use of the original meaning can be supported by the absence of anything else with which to work—but in which the judge believes that the original meaning leads to an approach that is morally inferior. We could imagine a pragmatic justification for insisting on respect for the original meaning understanding: *the constitutional order is likely to be better if judges defer to the original meaning, because their own judgments are not reliable.* A judge who expands on that meaning, or who contracts it, might well make things worse. But if we had real faith in judicial capacities, we might think that the original understanding has to yield. On pragmatic grounds, that argument seems hard to resist if we had such faith.

But that approach seems to miss something. A constitutional amendment is an exercise of authority by “We the People.” Is it really acceptable for judges, a week after an amendment was ratified, to repudiate the general understanding of what that exercise of authority entailed? Is that legitimate? I confess that my own intuitive reaction is a firm “no, that is not acceptable.” But if the argument here is correct, that reaction is best understood as a kind of heuristic. If it is to be defended, it is because it reflects a second-order judgment, which is that judicial departures from the original meaning, made soon after ratification, are more likely to be wrong than right.

D. *The Second Amendment: Testing Cases*

Let us briskly test some of these claims by reference to the Second Amendment. Assume that it is 2007. Assume also that the Supreme Court has not authoritatively ruled whether the Second Amendment includes an individual right to possess firearms. Assume finally that the text of the Second Amendment is not clear, and that consistent with that text, and with its original semantic meaning, the Supreme Court could interpret it either way.

We could imagine conscientious judges, focused on the history, reaching opposing conclusions on whether, as an original matter, the Second Amendment did include such an individual right. Suppose that a judge reaches a particular conclusion. Is that the end of the matter?

The argument here can easily be taken to suggest that the answer is “yes.” We are essentially stipulating that judges do not have any other place to look; precedents and traditions do not speak with any kind of clarity. (If they did, we would face a different problem, addressed above.) To be sure, the problem would be harder if the judge believes, with great conviction, that if the Second Amendment is taken in accordance with the original meaning, it is far worse than it would be if it were not so taken. A judge might believe that according to the original meaning, the Second Amendment does not include an individual right to possess firearms, but that interpretation is morally abhorrent. Or she might believe that according to the original meaning, the Second Amendment does include that right, but so taken, the Amendment is morally abhorrent.

On the stated assumptions, and without a lot of clarity about what is morally better, the judge should follow the original meaning. With a lot of clarity about what is morally better, the issue becomes more complicated.

One more time: any judgment about what to do will have to depend on our faith in the moral convictions of judges.

VI. COMPARED TO WHAT?

I have been exploring whether originalism can be defended on pragmatic grounds and (mostly and with multiple qualifications) answered that, in our world, it cannot be. But it would be reasonable to object that the question is not whether originalism is great or even good. It is insistently comparative: Is originalism better than the alternatives?⁷⁷ Nothing here rules out the possibility that for all its flaws, the answer is “yes.”

The question is not simple to answer. One reason is that we need to know whether we are dealing with an idealized version of originalism (and the alternatives) or instead a more realistic version. In practice, originalism might be faithful to the historical sources (for better or worse), or it might be used in a way that reflects the ideological commitments of the users,⁷⁸ or it might be mostly faithful but sometimes not. Those who ask the comparative question probably need to take a stand on what originalism would look like in the real world—and if they do not, they should acknowledge that they are using an idealized version. Of course, the same things can be said about the alternatives. An idealized version of any alternative to originalism might be good, but a real-world version might be horrendous.

What are the alternatives? I have briefly referred to some possibilities. Some people who reject originalism think that judges should uphold legislation unless the violation is unambiguously clear. Let us call it Thayerism, after its original academic defender, James Thayer.⁷⁹ As stated, Thayerism is an incomplete theory of judicial review, because it also requires a theory of meaning, which would enable us to know whether the violation of the Constitution is clear. We could even imagine Thayerian originalists, who would say that unless a practice violates the original meaning, it must be upheld. There is nothing incoherent about this position. On one view, it fits comfortably with one justification for originalism, which is to simplify decisions and reduce judicial discretion.

To distinguish Thayerians from originalists, rather than to marry them, let us understand Thayerians to say that if a practice does not unambiguously violate the *text*, it is constitutional. On that view, for example, restrictions on private gun ownership are fine even if the original meaning suggests that they are not. Is Thayerism, thus understood, superior to originalism? Note that Thayerism, thus understood, would produce a severely truncated system of rights: school segregation would be fine, bans on school prayer would be fine, regulatory takings would be fine, sex discrimination would be fine.

⁷⁷ See Solum, *The Constraint Principle*, *supra* note 5.

⁷⁸ See CROSS, *supra* note 4.

⁷⁹ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

Some people, most prominently John Hart Ely,⁸⁰ think that judges should take on an especially strong role in order to protect democracy itself—by, for example, striking down restrictions on the right to vote and protecting groups that are at a systematic disadvantage in the political process.⁸¹ Is democracy-reinforcing judicial review, thus understood, superior to originalism? There is probably no way to answer that question without exploring normative questions and also making some empirical projections. Is it good, for example, to require a regime of “one person, one vote”? What would Supreme Court Justices actually do, if they were firmly committed to democracy-reinforcing judicial review? Might they strike down wonderful things and uphold horrific things? (What have they actually done?)

Pragmatists think that the best way to answer the comparative questions would be to see what the world would look like if judges were committed to one or another approach. Ideally, we would have a randomized controlled trial in which American history runs along various different tracks, with various different approaches. As between theories, we could begin with pairwise comparisons, and ultimately we could try to envision some kind of horseshoe. If judges had been originalists since (say) 1900, what would American law look like? If judges had been Thayerians, would racial segregation still exist? What would be the state of freedom of speech? Of freedom of religion? Of property rights?

The problem is that because history is only run once (outside of science fiction), we cannot easily get clear answers to such questions. Counterfactual history is notoriously challenging.⁸² It is tempting to say that other things being equal, Thayerian judges, and perhaps originalist judges, would prevent all sorts of desirable developments from occurring—rights-protecting decisions that we now honor and celebrate. In fact, I tend to believe that is true. But history might be like a spider’s web; if you pull on one part (the Supreme Court does not strike down racial segregation), something will be felt in another part (perhaps the movement for racial equality will start earlier or push harder).

There is another possibility. If we rerun history, and if most judges had been originalists, perhaps things would not be so different from how they are now, and perhaps they would not be different in a very bad way. Perhaps they would be different in all sorts of good ways. Who knows? Some originalists are at pains to say that under their approach, “fixed points” in American constitutional law, such as *Brown v. Board of Education*,⁸³ would come out the same way.⁸⁴ Even if the Equal Protection Clause could not have its current interpretation, the Privileges or Immunities Clause would have filled the

80 See ELY, *supra* note 51.

81 See *id.* at 181–83.

82 See Solum, *The Constraint Principle*, *supra* note 5, at 88.

83 347 U.S. 483 (1954).

84 See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

gap.⁸⁵ An originalist United States of America might turn out to look very similar to the current United States of America, and perhaps it would not be any worse; it might even be better.⁸⁶ If this is so, then originalism might stand vindicated on pragmatic grounds. A pragmatist might have to make this confession: *I have my hunches, but I am not sure whether our nation, and our system of constitutional law, would be better if judges committed themselves to originalism starting in (say) 1880. I have to be agnostic on that question.*

For present purposes, let me offer some simpler conclusions. Our own practice is not originalist, and it is not Thayerian, and it is not democracy reinforcing. Or more precisely: It is one of these, and not another, on occasion, but it is not consistently any of them. As David Strauss has shown, our constitutional tradition is a common-law tradition, developed by increments, and allowing for significant departures from one decade to the next.⁸⁷ Of course a common-law tradition can take many different forms. It could veer right or it could veer left. It could remain quite stable or it could allow for significant changes. It could have Thayerian or democracy-reinforcing features. It could be great or it could be horrible.

Our common-law tradition is not horrible, and, in some ways it is great. I think, though I am not sure and cannot prove, that it is a lot better than what we would have gotten, or would get, from originalism.⁸⁸

CONCLUSION

If originalism has bite, it must be defended on the basis of its consequences, broadly conceived, and the defense would make sense under imaginable circumstances. For orientation and simplification: If the original understanding is excellent, and if judicial judgments about the (nonoriginalist) meaning of the text would misfire in a relevant sense, then originalism would be best. Originalism would stand defended on consequentialist grounds. And indeed, some defenders of originalism speak in pragmatic terms.⁸⁹ Some originalists are also at pains to say that their preferred approach would not endanger “fixed points” in constitutional law—perhaps above all, the ban on racial segregation.⁹⁰ They emphasize the real-world risks that accompany nonoriginalist approaches.

85 See Philip Hamburger, *Privileges or Immunities*, 105 Nw. U. L. REV. 61 (2011).

86 See Solum, *The Constraint Principle*, *supra* note 5, at 98 (“[M]y claim is not that the original meaning of the Privileges or Immunities Clause supports contemporary constitutional gender equality doctrine. Rather, my point is that advocates of gender equality have not, for the most part, engaged in a serious inquiry into the original public meaning of the relevant provisions. If this is so, then their belief that originalism ‘stacks the deck’ against gender equality is not well founded.”).

87 See STRAUSS, *supra* note 20.

88 By this I mean Historical Context Originalism. Other forms of originalism look like nonoriginalism, from the pragmatic point of view. See BALKIN, *supra* note 16.

89 That is how I understand the argument in Solum, *The Constraint Principle*, *supra* note 5.

90 See, e.g., McConnell, *supra* note 84.

I have not embraced originalism in general, and indeed I have suggested that originalism usually lacks much appeal in our world, certainly if the suggestion is that judges should now embrace it.⁹¹ On that count, my conclusion is more qualified and tentative than I expected it to be—but there we are.

In the context of impeachment, however, originalism does seem best. In that context, interpreters lack precedents or traditions with which to work. In that context, adherence to the original meaning leads to an attractive approach to the Impeachment Clause. Under those assumptions, the case for originalism is quite powerful on pragmatic grounds.

91 Because of the potential capaciousness of some forms of originalism, and the need to study history to know what originalism specifically entails, I state this conclusion tentatively; recall that some forms would avoid the consequentialist objections I have offered here.