

ESSAY: A RESPONSE TO ORIGINALISM AND PRECEDENT: ORIGINALISM AND PRECEDENT: PRINCIPLES AND PRACTICES IN THE APPLICATION OF STARE DECISIS

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Text

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Introduction

The proper understanding of the relationship between constitutional interpretation that is faithful to the text of the Constitution and the relative importance of precedent or stare decisis is a complicated matter, as the contributions to the recent symposium published in this journal indicate. ¹ On the one hand, adherence to the structure and text of the Constitution would seem to argue in favor of strict attention to the document's words and phrases, unfettered by ancillary concerns about matters such as maintaining stability, reliance, and order in the court system. And yet, there are a host of reasons that could be put forward as to why the courts, and the Supreme Court specifically, should adhere to precedent - within reason. ²

The argument in defense of "original intent" jurisprudence was brought into the public realm in a substantial way by Attorney General Edwin Meese during the 1980s, in response to what was taken to be an abandonment of both text and tradition by the Supreme Court. ³ The most notable public defender of original intent **[*156]** on the Court over the past two decades has been Justice Antonin Scalia, a position he has staked out in a plethora of opinions, but perhaps most elaborately in his 1997 work appearing in *A Matter of Interpretation: Federal Courts and the Law*, ⁴ and in his earlier William Howard Taft Lecture at the University of Cincinnati in 1989, *Originalism: The Lesser Evil*.

¹ See Symposium, *Originalism and Precedent*, [5 Ave Maria L. Rev. 1 \(2007\)](#).

² Any significant contemporary discussion of precedent is indebted to Gary Lawson's seminal article, *The Constitutional Case Against Precedent*, 17 Harv. J.L. & Pub. Pol'y 23 (1994).

³ See Edwin Meese III, U.S. Att'y Gen., *Interpreting the Constitution*, Address to the American Bar Association (July 9, 1985), in *Interpreting the Constitution: The Debate Over Original Intent* 13-21 (Jack N. Rakove ed., 1990).

⁴ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 3 (Amy Gutmann ed., 1997).

⁵ Justice Clarence Thomas has become a stalwart in defense of the approach, having authored in his time on the Court what have been called "perhaps the most uncompromising originalist opinions in decades." ⁶

Yet the relative lack of influence of the originalist approach among contemporary judicial interpreters can be seen in a variety of ways, most notably by an examination of the general thrust of opinions over a period of decades. The result of this state of affairs can be seen in the fact that if a majority of the contemporary Supreme Court Justices were suddenly to begin to take originalism seriously, it could have significant consequences; as Henry Paul Monaghan argues, "insistence upon original intent as the only legitimate standard for judicial decisionmaking entails a massive repudiation of the present constitutional order." ⁷ And were such an approach to be adopted, one clear problem such a Court majority would face would be found in addressing how one deals with the immense assemblage of Court decisions over the decades that appear to have violated originalist principles.

Precedent is undoubtedly an important concern on the part of the Court, and of the legal and political community as a whole. ⁸ Questions are routinely raised in public discourse about the consistency between the letter of the law and its enforcement, while in the judicial appointment process one can surely count on nominees being asked about their willingness to abide by precedent, or - where [*157] the precedent is disfavored - their willingness to overturn earlier Court decisions. ⁹

A variety of arguments are made in defense of reliance on precedent. Chief Justice Rehnquist, in the 1991 *Payne v. Tennessee* case, provided this rationale for precedent, and when to accept or reject it: "Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." ¹⁰ Thus, the Court, generally speaking, attempts to avoid overturning precedent, since adherence to it "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." ¹¹ In the absence of precedent, judges, attorneys, clients, legislators, and executives would all be in the position of supplying meaning to constitutional or statutory language in an ad hoc manner, attempting to divine what approach would pass muster when reviewed by subsequent interpretive bodies. ¹² The degree of uncertainty that such a system would produce would likely leave even its most ardent advocates hard pressed to defend it as a system animated by the rule of law. ¹³

⁵ Antonin Scalia, *Originalism: The Lesser Evil*, [57 U. Cin. L. Rev. 849 \(1988\)](#).

⁶ Sanford Levinson, *The Operational Irrelevance of Originalism*, in *Liberty Under Law: American Constitutionalism, Yesterday, Today and Tomorrow* 113, 118 (Kenneth L. Grasso & Cecilia Rodriguez Castillo eds., 2d ed. 1998).

⁷ Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, [88 Colum. L. Rev. 723, 727 \(1988\)](#).

⁸ See, for example, William E. Nelson, *The Historical Foundations of the American Judiciary*, in *The Judicial Branch* 3, 10-15 (Kermit L. Hall & Kevin T. McGuire eds., 2005), for a discussion on the development of precedent in the early Court.

⁹ We even occasionally hear talk of different categories of precedent, including, of late, "super-precedents," or even "super-duper-precedents." See, e.g., Jeffrey Rosen, *So, Do You Believe in "Superprecedent"?*, *N.Y. Times*, Oct. 30, 2005, § 4, at 1.

¹⁰ [Payne v. Tennessee, 501 U.S. 808, 827 \(1991\)](#) (citing [Vasquez v. Hillery, 474 U.S. 254, 265-66 \(1986\)](#)). Chief Justice Rehnquist also notes that the Court had overturned, in whole or in part, thirty-three decisions in the prior twenty Terms. *Id.* at 828.

¹¹ [Vasquez v. Hillery, 474 U.S. 254, 265-66 \(1986\)](#).

¹² Chief Justice Rehnquist notes that stare decisis has a greater claim "in cases involving property and contract rights" than it does in cases "involving procedural and evidentiary rules." [Payne, 501 U.S. at 828](#).

¹³ For an extended discussion of the importance of precedent, see 1 Laurence H. Tribe, *American Constitutional Law* § 3-3 (3d ed. 2000).

And yet, while precedent is regarded by virtually all interpreters as an important factor in jurisprudence, it is not always rigorously adhered to, nor is it understood to be an infallible guide. As Justice Felix Frankfurter put it, "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, [*158] and verified by experience."¹⁴ The claim in favor of precedent is always going to be open to challenge, and it is unlikely that it will ever be passively embraced as if it were a fixed principle, the appeal to which required no justification.

I. The Search for Standards in Precedent

A. The Relative Authority of Stare Decisis

In his A Matter of Interpretation exchange, Justice Scalia is assailed by some of his critics for his inconsistency, for while he supposedly follows the principles of original intent, he is willing to abandon those principles in favor of precedent in some areas. Indeed, Laurence Tribe suggests that at times Justice Scalia's willingness to put his stamp of approval on precedent marks him as an aspirationist, a fellow traveler of the non-originalist who looks beyond the text for workable and desirable judicial conclusions.¹⁵ Justice Scalia's rejection of Tribe's attribution is grounded in his analysis of the relative importance of factors other than originalism: "As I have explained, stare decisis is not part of my originalist philosophy; it is a pragmatic exception to it."¹⁶ The examples that Tribe cites of Justice Scalia's apparent abandonment of originalism are his votes in the Texas v. Johnson¹⁷ flag-burning case, the cross-burning at issue in R.A.V. v. City of St. Paul,¹⁸ and the ritualistic animal slaughtering addressed in Church of the Lukumi Babalu Aye v. City of Hialeah.¹⁹ Justice Scalia's defense of his votes in these cases is to acknowledge that they were not animated by adherence to originalism. Rather, he notes: "All three of the examples [Tribe] selects involve the First Amendment, for which the Court has developed long-standing and well-accepted principles (not out of accord with the general practices of our people, whether or not they were constitutionally required as an original matter) that are effectively irreversible."²⁰ Justice Scalia's defense of what Tribe takes to be non-originalism, then, is that every theory of [*159] interpretation must, in practice, deal with the phenomenon of precedent, and that the virtue of originalism is found not so much in the way in which it grapples with the question of precedent - "old principles" - but in its contribution to the "rejection of usurpatious new ones."²¹ The acceptance of stare decisis, Justice Scalia argues, is a compromise for any theory as it requires accepting an interpretation as "true" while recognizing that it is not; after all, if the precedent is rightly anchored, there is no need to rely on stare decisis as the Court can simply follow constitutionally established principles.²²

A further example of Justice Scalia's approach to precedent can be found in his dissent in the challenge to the presidential line-item veto in Clinton v. City of New York.²³ Here he distinguished between the original intent and

¹⁴ [Comm'r v. Hallock, 309 U.S. 106, 119 \(1940\)](#).

¹⁵ See Laurence H. Tribe, Comment, in A Matter of Interpretation: Federal Courts and the Law, supra note 4, at 65, 80-83.

¹⁶ Antonin Scalia, Response, in A Matter of Interpretation: Federal Courts and the Law, supra note 4, at 129, 140.

¹⁷ [491 U.S. 397 \(1989\)](#).

¹⁸ [505 U.S. 377 \(1992\)](#).

¹⁹ [508 U.S. 520 \(1993\)](#).

²⁰ Scalia, supra note 16, at 138.

²¹ [Id. at 138-39](#).

²² [Id. at 139-40](#).

²³ [524 U.S. 417, 453 \(1998\)](#) (Scalia, J., dissenting).

quite long-standing practice, from the time of the early republic on: "It was certainly arguable, as an original matter, that Art. I, § 7, also prevents the President from canceling a law which itself authorizes the President to cancel it. But as the Court acknowledges, that argument has long since been made and rejected." ²⁴ The majority opinion, signed on to by Justice Thomas and Chief Justice Rehnquist, saw the issue differently, and did not acknowledge the line-item veto as of a piece with earlier discretionary spending power. ²⁵ Here Justice Scalia was operating on the principle that there is a harmony between this case and well-established precedent, a principle the majority did not accept.

This analysis compels us to return to the question addressed at the outset - when should precedent be followed, or when might one abandon precedent in light of the search for a conclusion more closely tracking the original design of the Constitution? Among the most famous articulations of this question is the one forwarded by President Abraham Lincoln, in his First Inaugural Address. ²⁶ President Lincoln made clear that he would in fact abide by the **[*160]** decision of the Supreme Court in *Dred Scott v. Sandford*, ²⁷ and that it is incumbent upon the executive to enforce the Court's ruling:

I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration, in all paralel [sic] cases, by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. ²⁸

Yet after articulating this position, President Lincoln then noted that he might not be compelled to acknowledge the authority of the principle or argument proffered by the Court, but that doing so would turn on the persuasiveness of the argument:

At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal. ²⁹

On the Court, Justice Bradley, in a concurring opinion in the 1871 *Legal Tender Cases*, ³⁰ offered a justification for reversing *Hepburn v. Griswold*, ³¹ decided in just the prior year, suggesting in his opinion a variety of criteria that might be used in assessing the relative merits of relying on previous decisions:

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²⁴ *Id. at 464* (emphasis omitted). Part of the complication in *Clinton* may very well be a result of the majority's attempt to distinguish *Field v. Clark*, *143 U.S. 649 (1892)*, a case arguably not relying on originalism. *Clinton*, *524 U.S. at 442-46*.

²⁵ *Clinton*, *524 U.S. at 446-47*.

²⁶ Abraham Lincoln, First Inaugural Address (March 4, 1861), in Abraham Lincoln: Speeches and Writings, 1859-1865, at 215, 219-21 (Don E. Fehrenbacher ed., Literary Classics of the U.S. 1989) (1953).

²⁷ *60 U.S. (19 How.) 393 (1857)*.

²⁸ Lincoln, *supra* note 26, at 220-21. See also Abraham Lincoln, Address at Cooper Institute, New York City (Feb. 27, 1860), in Abraham Lincoln: Speeches and Writings, 1859-1865, *supra* note 26, at 111, 126-27.

²⁹ Lincoln, *supra* note 26, at 221.

³⁰ *79 U.S. (12 Wall.) 457, 554 (1871)* (Bradley, J., concurring).

³¹ *75 U.S. (8 Wall.) 603 (1870)*.

Where the decision is recent, and is only made by a bare majority of the court, and during a time of public excitement on the subject, when the question has largely entered into the political discussions of the day, I consider it our right and duty to subject it to a further examination, if a majority of the court are dissatisfied with the former decision.³²

Justice Bradley went on to note that the Court also had new members appointed (including himself), and that it had quickly agreed to rehear the earlier case, thus "apprising the country that the decision was not fully acquiesced in" ³³ The result of the decision by the Court to accept an immediate review was that everyone knew the first decision rested on a less-than-solid foundation.

Chief Justice Rehnquist provided a defense of stare decisis, within reason, in 1991 in *Payne v. Tennessee*, in the course of arguing for reversal of two precedents:

Applying these general principles, the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions. *Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by Members of the Court in later decisions and have defied consistent application by the lower courts.³⁴

The previous year, Justice Scalia had laid out a series of principles that might be useful in thinking through the conditions within which a jurisprudence of precedent operates. In *Rutan v. Republican Party of Illinois*, Justice Scalia's dissent pointed to the problems inherent in upholding precedent when clearly wrong:

Even in the field of constitutional adjudication, where the pull of stare decisis is at its weakest, one is reluctant to depart from precedent. But when that precedent is not only wrong, not only **[*162]** recent, not only contradicted by a long prior tradition, but also has proved unworkable in practice, then all reluctance ought to disappear.³⁵

Here one can see how Justice Scalia's professed originalism might very well lead him to adopt precedent, under the proper conditions, but might also lead him to be more critical of what he takes to be the adoption of less formal, more contemporary principles and practices.

B. When Is Precedent "Settled"?

But just how far should adherence to precedent go, especially in the face of decisions that an interpreter would be unlikely to accept on originalist grounds? Or, when is a decision in a case so ingrained in the political and judicial landscape that it ought to be accepted, even if wrongly decided? The best-known contemporary defense of stare decisis looked at in this light is found in the Supreme Court's ruling in the 1992 case *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³⁶ in the course of upholding - while modifying - the 1973 decision *Roe v. Wade*.³⁷ The Court went to great lengths to justify upholding *Roe*, largely in terms of reliance on precedent, arguing that the decision has stood the test of time, and has proven largely "workable" over a period of almost two

³² [The Legal Tender Cases, 79 U.S. \(12 Wall.\) at 570](#) (Bradley, J., concurring).

³³ Id. It is somewhat surprising that Justice Bradley would mention the change in personnel on the Court as a factor lending a rationale for reconsideration of the *Hepburn* decision, given the implication that personnel guides interpretation.

³⁴ [Payne v. Tennessee, 501 U.S. 808, 828-30 \(1991\)](#) (footnote omitted). The two cases being overturned were [Booth v. Maryland, 482 U.S. 496 \(1987\)](#), and [South Carolina v. Gathers, 490 U.S. 805 \(1989\)](#). See Stephen L. Wasby, *The Supreme Court in the Federal Judicial System* 275 (4th ed. 1993), for the effect that *Payne* and other decisions of the same Term had on the controversy over the reversal of precedent.

³⁵ [Rutan v. Republican Party of Ill., 497 U.S. 62, 110-11 \(1990\)](#) (Scalia, J., dissenting) (citation omitted).

³⁶ [505 U.S. 833 \(1992\)](#).

³⁷ [410 U.S. 113 \(1973\)](#).

decades.³⁸ Thus, Justice O'Connor noted, the Court could rest its case, and the assertion of stare decisis could, or should, suffice.³⁹ Yet there is a reason for developing further the Court's rationale, and O'Connor did so by setting Roe in the context of other watershed precedents:

The sustained and widespread debate Roe has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies and taken on the impress of the controversies addressed. Only two such decisional lines from the past century present themselves for **[*163]** examination, and in each instance the result reached by the Court accorded with the principles we apply today.⁴⁰

The "decisional lines" of cases that the Court was referring to were the New Deal cases that struck down major Commerce Clause statutes, and the racial discrimination cases marked by *Plessy v. Ferguson*⁴¹ and its progeny. The first line resulted in the overturning of *Lochner v. New York*⁴² and *Adkins v. Children's Hospital of District of Columbia*,⁴³ beginning with the 1937 case of *West Coast Hotel v. Parrish*;⁴⁴ the second line culminated in *Brown v. Board of Education* in 1954.⁴⁵ The Court's conclusion in *Casey* was that these two sets of cases resulted in the adoption of fundamentally new principles,⁴⁶ which (relatively) quickly came to be recognized as legitimate, affirmed as they were by subsequent decisions and statutes.⁴⁷ The *Casey* majority argued that the nation would not be well served by a weakening or a reversal of Roe's "central holding."⁴⁸ In rather remarkable language, the Court called on those involved in this "intensely divisive controversy ... to end their national division by accepting a common mandate rooted in the Constitution."⁴⁹ The majority opinion then reasons that because Roe has proven

³⁸ See [Casey, 505 U.S. at 854-69](#).

³⁹ [Id. at 861, 869](#).

⁴⁰ [Id. at 861](#). *Casey* reaffirmed Roe's central holding, relying in large part on the doctrine of stare decisis. [Id. at 870](#). Thus, *Casey* followed the lead that the Court had laid out in its 1983 decision in [City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 419-20 \(1983\)](#), wherein the Court declared, while "reaffirming" Roe, that stare decisis "demands respect in a society governed by the rule of law."

⁴¹ [163 U.S. 537 \(1896\)](#).

⁴² [198 U.S. 45 \(1905\)](#).

⁴³ [261 U.S. 525 \(1923\)](#).

⁴⁴ [300 U.S. 379 \(1937\)](#).

⁴⁵ [347 U.S. 483 \(1954\)](#).

⁴⁶ See [Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861-64 \(1992\)](#). *Casey* reasoned:

West Coast Hotel and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.

[Id. at 863-64](#).

⁴⁷ See, e.g., [Armstrong v. Bd. of Educ., 323 F.2d 333, 340 \(5th Cir. 1963\)](#) (*Brown* is "starting point" in any school segregation case); [Arnold v. Bd. of Barber Exam'rs, 109 P.2d 779, 783 \(N.M. 1941\)](#) (*West Coast Hotel* is "now familiar").

⁴⁸ [Casey, 505 U.S. at 855, 869](#).

⁴⁹ [Id. at 866-67](#).

so [*164] intensely controversial, Roe requires extra fortification ("precedential force") against the "inevitable efforts to overturn it and to thwart its implementation."⁵⁰ Thus, Casey appears to be asking in rather clear and bold terms that the other branches of the federal government bolster Roe's holding in the same kind of way that they strengthened *West Coast Hotel* and *Brown* in the years subsequent to those decisions.

One difficulty with the Court's argument is that the other two lines of cases mentioned here did in fact include a degree of clarity and finality that the abortion-privacy line of reasoning has never enjoyed. The 1937 line of cases initiated by *West Coast Hotel* were reaffirmed sharply in the following years, and within just a few short years unanimously.⁵¹ *Brown v. Board of Education* was a unanimous decision by the Court, and though implementation of *Brown* would take substantial further effort, the decision marked the end of the line for any serious constitutional defenses of segregation or violations of equal protection.⁵²

The Court in *Casey* developed a further point, though, concerning the importance of precedent in establishing - or maintaining - the legitimacy of the Court before the tribunal of the American people, and this consideration strengthens its resolve in upholding *Roe*:

A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore [*165] imperative to adhere to the essence of *Roe*'s original decision, and we do so today.⁵³

The Court's profound attachment to precedent in this instance, based as it is in part on an expansive understanding of the relative importance of the Court in the American political order, is not something one would expect to find in an originalist argument.⁵⁴ From the point of view of originalism, it is harder to see how the rejection of any particular precedent - especially one that has proven to be so divisive and unsettled - in favor of an originalist reading, could be understood to threaten the people's attachment to the rule of law and constitutionalism.

C. The (Limited) Case for Precedent

⁵⁰ [Id. at 867.](#)

⁵¹ On the change inaugurated by *West Coast Hotel*, see [United States v. Darby, 312 U.S. 100 \(1941\)](#), stating:

Since our decision in [West Coast Hotel Co. v. Parrish, 300 U.S. 379](#), it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours.

[Id. at 125](#); see also [Wickard v. Filburn, 317 U.S. 111, 118 \(1942\)](#) ("The question would merit little consideration since our decision in [United States v. Darby, 312 U.S. 100](#), sustaining the federal power to regulate production of goods for commerce" (footnote omitted)).

⁵² On the aftermath of *Brown*, see generally, Stephen L. Wasby, Anthony A. D'Amato & Rosemary Metrailler, *Desegregation from Brown to Alexander 108-425* (1977), detailing the implementation of *Brown* and its effect.

⁵³ [Casey, 505 U.S. at 869.](#)

⁵⁴ Although sharply critical of Justice Scalia's dissent in *Casey* (calling it "a paroxysm of rhetorical overstatement"), Laurence Tribe does note that the Court's argument is "expressed in unusually self-referential and grandiose terms." [Tribe, supra note 13](#), § 3-3, at 242 n.148.

Christopher Wolfe has addressed the issue in his article *When Constitution and Precedent Collide*, wherein he takes up the challenge of consistency in adjudication.⁵⁵ Reflecting on the view expressed by President Lincoln in his First Inaugural Address on the executive response to *Dred Scott*, Wolfe concludes with a summary of the argument for reliance: "Settled decisions, then, will be especially those that are agreed to by large or unanimous Court majorities, that conform to the expectations of the educated public, that are supported by the practice of government generally, and that have been reaffirmed over time."⁵⁶ It does seem likely that such principles would be able to garner support among virtually all interpreters, including those devoted to a jurisprudence of original intent. Gary Lawson, among the most trenchant critics of precedent, himself defends some limited role for it in his contribution to the "Originalism and Precedent" symposium.⁵⁷ To take one part of the analysis, for [*166] example, unanimity is a principle that virtually everyone recognizes as desirable and as an indication of the strength of the Court's opinion,⁵⁸ whether it be a case such as *Brown v. Board of Education*⁵⁹ or *United States v. Nixon*.⁶⁰ And the absence of a unanimous decision in countless cases, including *Bush v. Gore*,⁶¹ has been cited repeatedly by critics as evidence of uncertainty or confusion or political bias on the part of the Court.⁶² Yet judicial unanimity, as one can see, is only one part of the analysis; the more a judicial opinion is supported by executive action and deference, and by subsequent congressional legislation, the greater the likelihood that succeeding courts will endorse the holding.

Support for this position can be found in the dissent of Justice Scalia in the *Pennsylvania v. Union Gas* decision in 1989.⁶³ In responding to the Court's decision to allow Congress to abrogate state sovereign immunity, thus allowing liability claims to go forward, Justice Scalia defended the Court's century-old position articulated in *Hans v. Louisiana*.⁶⁴ In *Hans*, the Court had read the Eleventh Amendment⁶⁵ as barring suits against non-consensual

⁵⁵ See Christopher Wolfe, *When Constitution and Precedent Collide*, in *Liberty Under Law: American Constitutionalism, Yesterday, Today and Tomorrow*, supra note 6, at 95, 96-97.

⁵⁶ [Id. at 102.](#)

⁵⁷ Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, [5 Ave Maria L. Rev. 1, 19-20 \(2007\)](#) ("If precedent is being used for epistemological reasons as good evidence of the right answer, and if all of the conditions for believing specific precedents to qualify as such evidence are met, the Constitution permits its use."). Lawson notes, however, that this is a "very thin doctrine of precedent." *Id.* at 20.

⁵⁸ Of course, the Court may very well have an interest in ensuring that the opinion turns out to be unanimous, as in both [Brown v. Board of Education, 347 U.S. 483 \(1954\)](#), and [United States v. Nixon, 418 U.S. 683 \(1974\)](#).

⁵⁹ [Brown, 347 U.S. 483.](#)

⁶⁰ [Nixon, 418 U.S. 683.](#)

⁶¹ [Bush v. Gore, 531 U.S. 98 \(2000\).](#)

⁶² See, e.g., David A. Strauss, *Bush v. Gore: What Were They Thinking?*, in *The Vote: Bush, Gore, and the Supreme Court 184, 184-86* (Cass R. Sunstein & Richard A. Epstein eds., 2001); Michael L. Wells, "Sociological Legitimacy" in *Supreme Court Opinions*, [64 Wash. & Lee L. Rev. 1011, 1059-60 \(2007\)](#) (citing critics who believe the five Justices who stopped the Florida recount "so ruled because they preferred that Bush become President"); Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of Bush v. Gore* 4-17, <http://www.law.gmu.edu/faculty/papers/docs/01-09.pdf> (last visited Jan. 28, 2008) (identifying the primary puzzle of the case as why seven of the Justices based their opinion on equal protection without explanation, so that critics and other commentators have been left to propose possible doctrinal alternatives).

⁶³ [Pennsylvania v. Union Gas Co., 491 U.S. 1, 29 \(1989\)](#) (Scalia, J., dissenting), overruled by [Seminole Tribe v. Florida, 517 U.S. 44, 66 \(1996\)](#).

⁶⁴ [Id. at 30-35](#) (citing [Hans v. Louisiana, 134 U.S. 1 \(1890\)](#)).

states, the language of the Amendment implying that citizens cannot sue a state, their own or another, without that consent.⁶⁶ In defending *Hans*, Justice Scalia outlined the importance of reliance on the case:

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Even if I were wrong, however, about the original meaning of the Constitution, or the assumption adopted by the Eleventh Amendment, or the structural necessity for federal-question suits against the States, it cannot possibly be denied that the question is at least close. In that situation, the mere venerability of an answer consistently adhered to for almost a century, and the difficulty of changing, or even clearly identifying, the intervening law that has been based on that answer, strongly argue against a change... It is impossible to say how many extant statutes would have included an explicit preclusion of suits against States if it had not been thought that such suits were automatically barred.⁶⁷

Yet the statutory importance of reliance is not the only argument Justice Scalia made for upholding *Hans*, as he suggested that there is an important constitutional dimension to the issue as well:

Indeed, it is not even possible to say that, without *Hans*, all constitutional amendments would have taken the form they did. The Seventeenth Amendment, eliminating the election of Senators by state legislatures, was ratified in 1913, 23 years after *Hans*. If it had been known at that time that the Federal Government could confer upon private individuals federal causes of action reaching state treasuries; and if the state legislatures had had the experience of urging the Senators they chose to protect them against the proposed creation of such liability; it is not inconceivable, especially at a time when voluntary state waiver of sovereign immunity was rare, that the Amendment (which had to be ratified by three-quarters of the same state legislatures) would have contained a proviso protecting against such incursions upon state sovereignty.⁶⁸

As Laurence Tribe notes, the Court accords a significant role to reliance "on the part of those who structured their activities on the basis of then-prevailing Supreme Court precedent."⁶⁹

Henry Paul Monaghan argues for some reliance on *stare decisis* by laying out a theory of constitutional adjudication that would justify the (limited?) abandonment of originalism:

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This justification supports the use of *stare decisis* only to prevent disruption of practices and expectations so settled, or to avoid the revitalization of a public debate so divisive, that departure from the precedent would contribute in some perceptible way to a failure of confidence in the lawfulness of fundamental features of the political order.⁷⁰

It may be true that an attempt to revive the original intent of a constitutional phrase could conceivably cause significant disruption. Yet it may also be the case that a return to the original principle or interpretation might itself boost confidence in the system and its legitimacy, and assuage concerns that the judiciary has become complicit in the abandonment of important constitutional principles.

II. The Challenge of Precedent and the Judicial Function

⁶⁵ [U.S. Const. amend. XI](#).

⁶⁶ [Hans](#), 134 U.S. at 15, 20 (under the Eleventh Amendment, "the obligations of a State ... cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself to the court").

⁶⁷ [Union Gas](#), 491 U.S. at 34-35.

⁶⁸ [Id.](#) at 35; see also [Tribe](#), [supra note 13](#), § 3-3, at 240-41 (commenting on Justice Scalia's dissent in *Union Gas*).

⁶⁹ [Tribe](#), [supra note 13](#), § 3-3, at 240.

⁷⁰ Monaghan, [supra note 7](#), at 750.

A. The Authority of Precedent for the Court

Among the undesirable consequences of adherence to original intent jurisprudence may very well be the willingness to allow what seems to be a certain degree of harshness in the laws, or in the judicial system. Or, as Justice Scalia has noted, one runs the risk of being identified as a "formalist," seemingly insensitive to the plight of the citizens who are the litigants in the cases before the Court.⁷¹ In *United States v. Morrison*,⁷² for instance, the Court held it to be congressional overreaching to try to extend federal power to the protection of victims of violence in the Violence Against Women Act,⁷³ thus looking to some as if they were lacking compassion for such victims.

Indeed, Justice Scalia speaks of himself as a "faint-hearted" originalist, using the example of the constitutionality of hand-branding as a way of pointing out that even he could not necessarily bear the thought of carrying through the principles of originalism.⁷⁴ [*169] Some suggest that Justice Scalia's record belies that faint-heartedness, whether the case involves questions such as capital punishment for younger criminals,⁷⁵ or the Professional Golf Association Tour's rejection of Casey Martin's challenge under the Americans with Disabilities Act to its policy of not allowing participants in its tournaments to ride golf carts.⁷⁶

Yet Justice Scalia's defense of originalism, as he notes, includes a broad understanding of the law as a protector of rights.⁷⁷ Part of his own criticism of alternative approaches to interpretation is in fact that abandoning originalism is no guarantee that rights will be expanded rather than restricted.⁷⁸ Justice Scalia employs a few examples of how individual rights, such as property rights and the rights of criminal suspects, have come to be compromised by the rejection of originalism.⁷⁹ In addition to these examples, one might argue that a diminution has taken place also in the protection of the right of free speech, as in *McConnell v. Federal Elections Commission*;⁸⁰ in the rights of subjects of criminal investigations, as in *Morrison v. Olson*;⁸¹ and in the rights of individuals generally to be free of federal regulations such as those found in the Commerce Clause cases noted earlier,⁸² such that in the language

⁷¹ See Scalia, *supra* note 4, at 25; see also Samuel A. Marcossan, *Original Sin: Clarence Thomas and the Failure of the Constitutional Conservatives* 25-27 (2002) (criticizing Justice Thomas's dissent in [Hudson v. McMillian](#), 503 U.S. 1, 17-18 (1992), in which Justice Thomas argued that the beating of an inmate by prison guards was not cruel and unusual punishment where the inmate did not sustain "a significant injury").

⁷² [529 U.S. 598, 613, 627 \(2000\)](#).

⁷³ Violence Against Women Act of 1994, **Pub. L. No. 103-322**, §§40001-40703, **108 Stat. 1796**, 1902 (codified as amended in scattered sections of titles 8, 16, 18, 28 and 42 of the United States Code).

⁷⁴ Scalia, *supra* note 5, at 861, 863-64.

⁷⁵ See [Roper v. Simmons](#), 543 U.S. 551, 607 (2005) (Scalia, J., dissenting).

⁷⁶ [PGA Tour, Inc. v. Martin](#), 532 U.S. 661, 691 (2001) (Scalia, J., dissenting).

⁷⁷ See Scalia, *supra* note 5, at 862.

⁷⁸ Scalia, *supra* note 4, at 41.

⁷⁹ *Id.* at 41-44 (referring to [Home Bldg. & Loan Ass'n v. Blaisdell](#), 290 U.S. 398, 415-25, 444-48 (1934), and [Maryland v. Craig](#), 497 U.S. 836, 840, 849-50 (1990)).

⁸⁰ **540 U.S. 93, 350-51 (2003)**.

⁸¹ [487 U.S. 654 \(1988\)](#).

⁸² See, e.g., [Lochner v. New York](#), 198 U.S. 45 (1905); [Adkins v. Children's Hosp. of D.C.](#), 261 U.S. 525 (1923); [W. Coast Hotel v. Parrish](#), 300 U.S. 379 (1937).

of Justice Thomas the federal government has been granted something approaching the general "police power" traditionally exercised only by states.⁸³

A similar point was made by Justice Black in his dissent in *Griswold v. Connecticut*, in the context of criticizing the invention of a general non-textual right to privacy: "I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used."⁸⁴ While it may be tempting [*170] to interpret the language of the Constitution by means of revised language, whether that approach is adopted as a result of precedent or simply changed circumstances, Justice Black's point is that there is no guarantee that the novel approach will result in an expansion of the rights of the people. A further illustration of this point can be found in *INS v. Chadha*,⁸⁵ the facts of which reveal a systematic abandonment of separation of powers concerns, which were meant as protections for the people over against the government. While one might acknowledge that the rise of the "administrative state" has challenged the original understanding of the operation of the separation of powers, that fact alone does not justify jettisoning the constitutional structuring of power.⁸⁶

How would one go about laying out the groundwork for a reassessment of precedent, while accepting the general thrust of contemporary constitutional jurisprudence? Here one might consider the opinions that Justice Clarence Thomas has written in a series of cases, in both concurrences and dissents, wherein he distinguishes the Court's rationale from his own. For example, in 2000 a unanimous Court in *Jones v. United States* decided that a federal arson statute could not apply to a case where the building in question was a private domicile not "used" in a commercial activity.⁸⁷ Justice Thomas wrote a separate concurrence, joined by Justice Scalia, the entirety of which reads as follows: "In joining the Court's opinion, I express no view on the question whether the federal arson statute, [18 U.S.C. § 844\(i\)](#) (1994 ed., Supp. IV), as there construed, is constitutional in its application to all buildings used for commercial activities."⁸⁸ The reason for the concurrence seems to be that the opinion of the Court, while striking down the application of the law in this instance, did not address the constitutionality of the statute, and indeed upheld the application of [*171] the arson law in a prior case to buildings "used" as domiciles, but which had been rented, not purchased.⁸⁹

In *United States v. Lopez*, Justice Thomas addressed the effect of the Court adopting a more originalist approach to the case: "This extended discussion of the original understanding and our first century and a half of case law does

⁸³ [Gonzales v. Raich, 545 U.S. 1, 65-66 \(2005\)](#) (Thomas, J., dissenting).

⁸⁴ [Griswold v. Connecticut, 381 U.S. 479, 509 \(1965\)](#) (Black, J., dissenting) (citing [N.Y. Times Co. v. Sullivan, 376 U.S. 254, 293 \(1964\)](#) (Black, J., concurring); [City of El Paso v. Simmons, 379 U.S. 497, 517 n.1 \(1965\)](#) (Black, J., dissenting) (identifying eight additional cases wherein Justice Black dissented); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865 (1960)).

⁸⁵ [462 U.S. 919, 956-59 \(1983\)](#).

⁸⁶ See [id. at 977-84](#) (White, J., dissenting) for a critique of the older, more rigid understanding of the separation of powers. For an argument against the constitutionality of the post-New Deal administrative state, see Gary Lawson, *The Rise and Rise of the Administrative State*, [107 Harv. L. Rev. 1231, 1231 \(1994\)](#) (footnote omitted), stating: "The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution."

⁸⁷ [Jones v. United States, 529 U.S. 848, 859 \(2000\)](#). The prosecution had sought to apply the federal statute by arguing that the building was "used" in interstate commerce because the owner of the property had a mortgage and insurance from out-of-state companies, and the natural gas used to heat the house had been transported across state lines. [Id. at 855](#).

⁸⁸ [Id. at 860](#) (Thomas, J., concurring).

⁸⁹ The Jones Court upheld [Russell v. United States, 471 U.S. 858 \(1985\)](#), as a legitimate extension of federal regulatory power over commerce, by distinguishing the rental property in *Russell* from the owner-occupied property in *Jones*. See [Jones, 529 U.S. at 853-54, 856](#).

not necessarily require a wholesale abandonment of our more recent opinions." ⁹⁰ Yet in the footnote that follows this sentence, Justice Thomas added, in a quite circumspect manner:

Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clean. ⁹¹

Evidence of Justice Thomas's willingness to revisit a whole series of cases can be seen, though, in a number of places, such as in his concurring opinion in *United States v. Morrison*:

The very notion of a "substantial effects" test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases. By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce. ⁹²

[*172] In addition, in *Randall v. Sorrell*, ⁹³ Justice Thomas argued that *Buckley v. Valeo* ⁹⁴ was wrongly decided, and its wrongfulness "is further underscored by the continuing inability of the Court (and the plurality here) to apply *Buckley* in a coherent and principled fashion." ⁹⁵ The critique of the non-originalist approach thus leads to an assessment of the proper role of the Court in the American system, and how that understanding might be related to the question of interpretation.

It might be argued that the original intent approach is far more likely to produce a judiciary that fulfills the Founders' design for the Court than other approaches, especially modern-day positions like those operating under the rubric of "non-interpretivism," or, more popularly, the "living Constitution" approach. ⁹⁶ The prominence given to the contemporary Court in America has been noted by many; Lino Graglia, for example, has argued that "in terms of the issues that determine the nature and quality of life in a society, the Supreme Court has become our most important institution of government." ⁹⁷ One reason why this has occurred, to the extent that it has, is the

⁹⁰ [United States v. Lopez, 514 U.S. 549, 601 \(1995\)](#) (Thomas, J., concurring).

⁹¹ [Id. at 601 n.8.](#)

⁹² [United States v. Morrison, 529 U.S. 598, 627 \(2000\)](#) (Thomas, J., concurring). Another example of Justice Thomas's willingness to reexamine established precedent is found in [Dickerson v. United States, 530 U.S. 428, 444-46 \(2000\)](#) (Scalia, J., dissenting), wherein Justice Thomas joined the dissent, which argued that the Court's decision effectively gave *Miranda* "a permanent place in our jurisprudence," and accused the majority of justifying the result by grossly straying from the original understanding of the Constitution and "adopting a significant new ... principle of constitutional law."

⁹³ [126 S. Ct. 2479 \(2006\)](#).

⁹⁴ [425 U.S. 946 \(1976\)](#).

⁹⁵ [Randall, 126 S. Ct. at 2502](#) (Thomas, J., concurring).

⁹⁶ For an example of the "living Constitution" approach, see Justice Holmes's opinion in [Missouri v. Holland, 252 U.S. 416, 433 \(1920\)](#), stating that: "The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." See generally, William H. Rehnquist, *The Notion of a Living Constitution*, 54 *Tex. L. Rev.* 693, 694-95 (1976) (comparing two different meanings of the phrase "living Constitution").

⁹⁷ Lino A. Graglia, *How the Constitution Disappeared*, in *Still the Law of the Land? Essays on Changing Interpretations of the Constitution* 37, 38-39 (Joseph S. McNamara ed., 1987); see also Keith E. Whittington, *The Political Foundations of Judicial Supremacy*, in *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change* 261, 263 (Sotirios A. Barber &

intervention by the Court into the domain of legislative power.⁹⁸ This is not to disparage the role of the Court in exercising judicial review, but the proper role of the Court is to remain out of the policy-making [*173] process. Chief Justice John Marshall put the point this way in 1824, in *Osborn v. Bank of the United States*:

Courts are the mere instruments of the law, and can will nothing... . Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.⁹⁹

As Hamilton, writing as Publius, put it in *Federalist 78*, when the Court strikes down a congressional statute it does so not because it is exercising its will, but rather its judgment that the law violates the Constitution.¹⁰⁰

One aspect of the *Federalist Papers* argument that brings out the relative importance of the Court, or the judiciary generally, to the scheme of the separated powers, can be found in *Federalist 51*, for while Madison lays out the argument for what he takes to be the proper understanding of how the separation works in practice, there is no mention of the judiciary.¹⁰¹ The selection of judges is mentioned at the outset of the essay, as a way of contrasting the selection process with that by which all other officers are chosen.¹⁰² But when it comes to discussing the combination of constitutional powers with personal motive, to the well-known discussion of ambition, to the operation and powers of the branches, again there is no mention of the judiciary.¹⁰³ Instead, Madison describes the need for two separate chambers within Congress, the need for strengthening the executive by means of the veto power, and the need for combining the executive with the Senate as a bulwark against the ambitious House of Representatives.¹⁰⁴

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B. Constitutional Tests and the Judicial Function

One of the devices that the Court has developed which allows it to operate at a remove from original intention jurisprudence is the creation of constitutional tests. What are often described as "tests" or "doctrines" from the Court

Robert P. George eds., 2001) (perceptively noting the connection between judicial supremacy and the political circumstances within which the Court operates).

⁹⁸ One might suggest the following as examples of judicial intervention in the legislative process: [Baker v. Carr, 369 U.S. 186, 237 \(1962\)](#) (constitutionality of Tennessee statute that apportioned members of the General Assembly between counties was a justiciable cause of action because it allegedly denied voters equal protection); [Roe v. Wade, 410 U.S. 113, 164 \(1973\)](#) (Texas criminal abortion statute was unconstitutional); and [Romer v. Evans, 517 U.S. 620, 623-24, 635-36 \(1996\)](#) (amendment to Colorado constitution that prohibited legislative or judicial action designed to create homosexual, lesbian, and bisexual protected classes, was unconstitutional).

⁹⁹ [Osborn v. Bank of the U.S., 22 U.S. \(9 Wheat.\) 738, 866 \(1824\)](#).

¹⁰⁰ *The Federalist No. 78*, at 433, 437 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.").

¹⁰¹ *The Federalist No. 51*, at 288-93 (James Madison) (Clinton Rossiter ed., 1961).

¹⁰² [Id. at 289](#). In general, Madison argues, the various branches of the federal government ought to "have as little agency as possible in the appointment of the members of the others." *Id.* For this principle to be rigorously adhered to, all branches would then have to be elected by the people. *Id.* He continues, however, that because judges must necessarily possess "peculiar qualifications," and because of their "permanent tenure," it may be necessary - in the context of judicial appointments - to deviate from the principle that branches of the federal government ought not participate in the selection of members of a sister branch. *Id.*

¹⁰³ [Id. at 290-91](#).

¹⁰⁴ See *id.*

are, more often than not - indeed, perhaps by necessity always - contrivances that the Court has constructed in order to make it easier to assess cases or controversies before it, or to provide a "bright line" guide to lower courts. ¹⁰⁵ Analyzing these tests is worthwhile as a way of reflecting on the Court's adherence to an original intent interpretation, and while performing that examination would require an ample, separate treatment, this Article can at least suggest what the outlines of such a study would entail. ¹⁰⁶ One might take as one's guide here the oft-neglected dissent of Justice Hugo Black in the 1965 *Griswold v. Connecticut* case, in which Justice Black suggested the way in which misinterpretations of constitutional passages are often introduced:

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures." "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted [***175**] as a constitutional ban against many things other than searches and seizures. ¹⁰⁷

The encrustation of Court analysis that piles precedent upon precedent while avoiding addressing the language of the text of the Constitution makes it far more difficult for promoters of original intent to even get a hearing when seeking to address the real meaning of the Constitution.

An example of the kind of "doctrine" that all too easily gets in the way of original intent interpretation is found in the transformation of the language of the Establishment Clause of the First Amendment, most importantly through the 1947 case *Everson v. Board of Education*. ¹⁰⁸ There, the Court, substituting the language of the First Amendment with that of Thomas Jefferson's famous, or infamous, letter to the Danbury Baptists in 1802, concluded that the meaning of the Establishment Clause is that there is a "wall of separation between church and State." ¹⁰⁹ Over the following decades the Court then took upon itself the task of analyzing the meaning of the "wall of separation" metaphor, and became disengaged from the text of the Amendment, which says nothing about such a wall. ¹¹⁰ This approach was highlighted in 1985, when then-Justice Rehnquist, in a dissent in the *Wallace v. Jaffree* case, revisited the text of the Constitution in order to reassess the Court's trajectory of interpretation. ¹¹¹ The crux of this

¹⁰⁵ But see Robert F. Nagel, *The Formulaic Constitution*, [84 Mich. L. Rev. 165, 165, 181 \(1987\)](#). Nagel argues that the Court's "formulaic style" of interpretation - "expressed in elaborately layered sets of 'tests' or 'prongs' or 'requirements' or 'standards' or 'hurdles'" - reflects, inter alia, "the Court's felt responsibility to convince ... [because c]onstitutional answers can no longer be thought certain ... enough [to] ... simply be announced". Id. Nagel also posits that the Court's formulaic style is addressed primarily to "itself, its clerks, and the lower courts" in an effort to obtain "standardization," and specifically, to "create impersonal, formal rules" that allow judges a measure of "objectivity." [Id. at 178, 181](#). Nagel, however, doubts that such "objectivity" can be achieved by resorting to formulaic interpretivism, describing the attempt as mere "aspiration." [Id. at 181](#).

¹⁰⁶ One analyst has provided such an overview of constitutional "tests," largely by examining case law in civil liberty cases. Richard H. Fallon, Jr., *Implementing the Constitution 76-101* (2001). Fallon also points out that many tests used by the Court actually reflect a combination of interests on the part of the Court. Id. at 79-80 (pointing to, inter alia, [United States v. O'Brien, 391 U.S. 367, 376-77 \(1968\)](#) (implementing a combination of several tests to determine whether a government regulation is justified)).

¹⁰⁷ [Griswold v. Connecticut, 381 U.S. 479, 509 \(1965\)](#) (Black, J., dissenting).

¹⁰⁸ [330 U.S. 1 \(1947\)](#). For discussion of the transformation of the Establishment Clause, see [id. at 14-16](#).

¹⁰⁹ [Id. at 16](#) (quoting [Reynolds v. United States, 98 U.S. 145, 164 \(1879\)](#)).

¹¹⁰ On this question, see generally Philip Hamburger, *Separation of Church and State 1-3* (2002). *Everson* is also discussed in detail therein. [Id. at 454-78](#).

¹¹¹ [Wallace v. Jaffree, 472 U.S. 38, 92-97 \(1985\)](#) (Rehnquist, J., dissenting).

dissent was to point out the anomalies that the Court's jurisprudence has created, and to note that the line of cases following *Everson* relied on an incorrect reading of the historical evidence.¹¹² Thus, commenting on the issue under consideration, then-Justice Rehnquist pointed out that "stare decisis may bind courts as to matters of law, but it cannot bind them as to matters of history."¹¹³

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C. Originalism and the Non-Political Function of the Judiciary

One practical problem that arises from the authority accorded precedent in general is the effect that opinion-writing has on the Justices who write them. Knowing that subsequent courts might very well be using their holding and opinion some day as precedent, the incentive for Justices to construct a comprehensive set of guidelines, a "test," or a bright line or constitutional "doctrine" might become very enticing indeed.¹¹⁴ One striking example of this - and one that may have become in the intervening years largely workable - is the tripartite analysis given to the exercise of executive power by Justice Jackson in his concurring opinion in the *Steel Seizure* case.¹¹⁵ And yet there is a host of other attempts at laying out definitive guidelines for interpretation that are problematic, either because they are so complicated as to be impossible to follow, or simply because they do not reflect the language of the Constitution or the principle behind a constitutional term or phrase, thus leaving the relying court with a misleading touchstone for adjudication.¹¹⁶

A different kind of test that might properly be applied to judicial interpretation can be found in considering the connection between interpreters' judicial opinions and their personal convictions. One might suggest that if a judge were to adhere to the principle of the rule of law embodied in an originalist approach, sooner or later that judge would have to vote in a case in a manner that is at odds with the judge's personal predilections. But how would one know that, if the judge is not empowered to rule on the basis of his will, but only to exercise his judgment? The answer to that query is fairly straightforward: sometimes they tell us. For example, in the Court's 2005 decision *Gonzales v. Raich*, concerning the California medical marijuana bill, Justice John Paul Stevens, writing for the Court, implied that the Court doubts the correctness of a congressional finding that [*177] marijuana has no valid therapeutic purpose.¹¹⁷ But for Justice Stevens, that fact alone did not justify him in voting in favor of the law; his duty required him to uphold the congressional law, and if people want it changed, they should do so through the legislature, not through the court system.¹¹⁸ But that same principle led Justice O'Connor to draw the opposite conclusion in *Raich*: "If I were a California citizen, I would not have voted for the medical marijuana ballot initiative;

¹¹² *Id. at 99* (revealing the Court's "repetition of ... error" in *Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948); *Engel v. Vitale*, 370 U.S. 421 (1962); and *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963)).

¹¹³ *Id.*

¹¹⁴ A corollary of this in the legislative realm might be the insertion of a panoply of statements and articles into the Congressional Record, in the expectation that they will thus become part of the "legislative history" that later litigants and judges may come to rely on in searching for "legislative intent." See Scalia, *supra* note 4, at 29-37.

¹¹⁵ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

¹¹⁶ See generally *Lemon v. Kurtzman* 403 U.S. 602, 612-13 (1971) (establishing the three-pronged establishment test); *Miller v. California*, 413 U.S. 15, 24-25 (1973) (establishing the current obscenity law tests); *Baker v. Carr*, 369 U.S. 186, 207-08 (1962) (developing what jurists call the "one-man, one-vote" principle); *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (referring to the "wall of separation" principle).

¹¹⁷ See *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

¹¹⁸ See *id. at 9, 33*.

if I were a California legislator I would not have supported the Compassionate Use Act." ¹¹⁹ Yet, she argued, her position as a Justice required her to uphold the state law as constitutional. ¹²⁰

In his dissent in *Griswold*, Justice Black fully noted his personal opposition to the law under consideration:

I feel constrained to add that the law is every bit as offensive to me as it is to my Brethren of the majority There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe ¹²¹

Yet, Justice Black pointed out, that is an insufficient basis for drawing the conclusion that the law is unconstitutional. ¹²² In the 2003 case *Lawrence v. Texas*, Justice Thomas writing in dissent noted that if he were a legislator he would not have voted for the law under review, but that is not a concern for him in his role as a judge. ¹²³ And Justice Scalia, writing for the Court in *R.A.V. v. City of St. Paul* in 1992, addressed the "defense" of cross-burning under the First Amendment: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." ¹²⁴ Finally, as Justice Thomas pointed out in his concurring opinion in *Bennis v. Michigan*: "This [*178] case is ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable." ¹²⁵ That is, from the vantage point of the bench, Justice Thomas does not see it as the business of the Court to be about the remedying of all social ills. ¹²⁶

This assessment, of course, cuts both ways - sometimes one might wish that a congressional statute would be legitimate, because one thinks it good public policy, but one may draw the conclusion that Congress has no proper authority to pass such a law. On the other hand, one can disfavor the legislation, but still draw the conclusion that it is perfectly within the contours of congressional power to enact such a statute. And, one should note, Supreme Court Justices do not have a mandate to inform us when they are voting in a way that is supportive of or at odds with their political proclivities.

One danger of following one's political inclinations is that there is a real likelihood that the judge will sacrifice fidelity to the principles that serve as the standard for interpretation. ¹²⁷ This is precisely, in fact, the argument that many critics have made against the Court's decision in *Bush v. Gore*. ¹²⁸ This is also the charge sometimes made against the Supreme Court in the aftermath of the 1954 desegregation cases. ¹²⁹ Ruling as it did in *Brown v. Board*

¹¹⁹ [Id. at 57](#) (O'Connor, J., dissenting).

¹²⁰ *Id.*

¹²¹ [Griswold v. Connecticut, 381 U.S. 479, 507 \(1965\)](#) (Black, J., dissenting).

¹²² *Id.* (Black, J., dissenting).

¹²³ [Lawrence v. Texas, 539 U.S. 558, 605 \(2003\)](#) (Thomas, J., dissenting) ("I join Justice Scalia's dissenting opinion. I write separately to note that the law before the Court today 'is ... uncommonly silly.' If I were a member of the Texas Legislature, I would vote to repeal it." (citation omitted)).

¹²⁴ [R.A.V. v. City of St. Paul, 505 U.S. 377, 396 \(1992\)](#).

¹²⁵ [Bennis v. Michigan, 516 U.S. 442, 454 \(1996\)](#) (Thomas, J., concurring).

¹²⁶ See *infra* Part III.A for a discussion on the proper role of natural law in constitutional interpretation, particularly in the context of [Troxel v. Granville, 530 U.S. 57, 70, 75 \(2000\)](#) (plurality opinion) (affirming the refusal of grandparents' visitation rights on grounds that parents have the constitutional right to make decisions concerning the care, custody, and control of their children).

¹²⁷ For those inclined to think about such things, this is a corollary of an understanding that applies in a variety of circumstances. One might think, for instance, of the danger of placing one's political affiliations over one's religious belief.

¹²⁸ See, e.g., Strauss, *supra* note 62, at 184-86..

of Education that segregated schools violated the Equal Protection Clause of the Fourteenth Amendment,¹³⁰ the Court was in a dilemma, for it had before it a companion case, *Bolling v. Sharpe*, which challenged the segregated system in Washington, D.C.¹³¹ The difficulty the Court faced was that the Fourteenth Amendment refers to the states, and not the District of Columbia, so the Court had to find some other way of striking down the D.C. system, recognizing as it did the peculiarity [*179] that the Constitution might protect segregation in some areas while requiring its abolition elsewhere.¹³²

One benefit of the original intent approach, then, is the extent to which originalism counsels the judiciary to adhere to its assigned function in the American constitutional arrangement.¹³³ Maintaining that function is made more difficult, though, as then-Justice Rehnquist pointed out in his *Wallace* dissent, because the Court has established precedent that widely abandons the text of the Constitution.¹³⁴ Wolfe argues for just such a judicial limitation in his analysis of the assessment of precedent:

Perhaps most fundamentally, judicial decisions that commit the Court itself to the ongoing exercise of nonjudicial power would seem open to question. On this ground it was sensible for the Court to reconsider its free exercise doctrine, which under *Sherbert v. Verner* and *Wisconsin v. Yoder* had required constant judicial balancing or policy-making, and to return to the more traditional doctrine reinstated in *Employment Division v. Smith*, which relieved it of the task of constant legislating in this area.¹³⁵

This turn, or return, to the more routine exercise of judicial power would likely counsel restraint on the part of Justices - at least restraint from routine political decision making.

III. Higher Law and the Court: Or, What Counts as Originalism?

When an interpreter looks for original intent, one of the questions that must be answered is what precisely counts as part of the original intent, or original meaning, of the Constitution. But that means that, in addition to precedent, which looks forward from the Constitution, the interpreter may have to look back, to see what pre-constitutional practices or principles may affect the conclusions drawn in a particular case.¹³⁶ For originalists, one significant

¹²⁹ See, e.g., Martha C. Nussbaum, Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism, [121 Harv. L. Rev. 4, 28-29 \(2007\)](#) (summarizing view of Prof. Herbert Wechsler that school desegregation cases were decided according to "mere (illicit) politics" rather than neutral principles).

¹³⁰ [Brown v. Bd. of Educ., 347 U.S. 483, 493, 495 \(1954\)](#).

¹³¹ [Bolling v. Sharpe, 347 U.S. 497, 498 \(1954\)](#).

¹³² See [id. at 498-99](#).

¹³³ For a discussion of the ways in which abandoning an originalist approach can be problematic, see generally Stephen B. Presser, Was Ann Coulter Right? Some Realism About "Minimalism," [5 Ave Maria L. Rev. 23, 36-45 \(2007\)](#).

¹³⁴ [Wallace v. Jaffree, 472 U.S. 38, 112-13 \(1985\)](#) (Rehnquist, J., dissenting).

¹³⁵ Wolfe, *supra* note 55, at 107.

¹³⁶ Looking back" may be especially necessary in assessing cases arising under the Debts and Engagements Clause in [U.S. Const. art. VI, cl. 1](#) or ascertaining the meaning of [U.S. Const. amend. IX](#), but it may also be necessary in interpreting the meaning of phrases such as the "Law of Nations" in [U.S. Const. art. I, § 8, cl. 10](#), "other public Ministers and Consuls" in [U.S. Const. art. III, § 2, cl. 1](#), "Privileges and Immunities" in [U.S. Const. art. IV, § 2, cl. 1](#), and "due process of law" in [U.S. Const. amend V](#).

issue in this regard [*180] must be the extent to which appeals to a "higher law" might be employed as background in informing the meaning of the word or phrase under consideration in any given case. ¹³⁷

A. The Contemporary Disagreement on "Higher Law" Interpretation

The willingness to appeal to some kind of "higher law" principle marks a striking point of disagreement between and among advocates of original intent jurisprudence. Justice Scalia, for instance, made his position clear in his dissenting opinion in *Troxel v. Granville*, decided in 2000:

In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all men ... are endowed by their Creator." And in my view that right is also among the "other [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. ¹³⁸

[*181] The role of the judge, in Justice Scalia's view, is to uphold the law as embodied in the Constitution and statutes, not as it might be understood through the lens of a natural rights or natural law analysis. ¹³⁹ Justice Scalia was clearly not denying the existence of natural law or natural rights (he explicitly defended the Declaration's proclamation of natural rights), but was only denying that the judge, rather than the legislature, is the vehicle by which such rights are vindicated. ¹⁴⁰

Against Justice Scalia's position in *Troxel* is Justice Thomas's, who voted with the majority to defend the parent's right to control visitation on the grounds that "this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case." ¹⁴¹ And in his dissent in *Kelo v. City of New London*, in the context of interpreting the Public Use Clause of the Fifth Amendment, Justice Thomas noted that the clause "embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from "taking

¹³⁷ Cf. Steven D. Smith, *Stare Decisis in a Classical and Constitutional Setting: A Comment on the Symposium*, [5 Ave Maria L. Rev. 153, 163-69 \(2007\)](#) (advancing the premise that the Constitution is only the supreme law of the land because it rests on "something more ultimate or authoritative" than the text itself).

¹³⁸ [Troxel v. Granville, 530 U.S. 57, 92 \(2000\)](#) (plurality opinion) (Scalia, J., dissenting). Justice Scalia continued:

Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children - two of them from an era rich in substantive due process holdings that have since been repudiated. See [Meyer v. Nebraska, 262 U.S. 390, 399, 401 \(1923\)](#); [Pierce v. Society of Sisters, 268 U.S. 510, 534-35 \(1925\)](#); [Wisconsin v. Yoder, 406 U.S. 205, 232-33 \(1972\)](#). Cf. [West Coast Hotel Co. v. Parrish, 300 U.S. 379 \(1937\)](#) (overruling [Adkins v. Children's Hospital of D. C., 261 U.S. 525 \(1923\)](#))... . While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context.

Id. (footnote omitted).

¹³⁹ See [id. at 91-92](#).

¹⁴⁰ It is worth noting here that Justice Scalia was not making a normative judgment about the claims of the Declaration of Independence. He simply noted that the right of parents to direct the upbringing of their children is among the inalienable rights referred to in that document, but stopped short of endorsing such as an accurate account of the human condition. Id. This hesitancy to embrace the "doctrine" of natural rights may very well be one reason why some originalists are distrustful of appeals to natural law or higher law in constitutional interpretation.

¹⁴¹ [Id. at 80](#) (Thomas, J., concurring).

property from A. and giving it to B.'" ¹⁴² While recognizing a natural right in that case, Justice Thomas also noted that the right is embodied in the language of the Amendment. ¹⁴³

One might compare Justice Scalia's reference to the natural rights of the Declaration of Independence with the argument forwarded by Justice Thomas in the 1995 case *Adarand Constructors v. Pena*, rejecting the constitutionality of affirmative action programs:

There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with [***182**] certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness"). ¹⁴⁴

Justice Scalia wrote a separate concurrence in *Adarand*, wherein he cited the Equal Protection Clause, the Fifteenth Amendment, the attainder of treason provision, and the denial of titles of nobility, as well as his concurrence in *Richmond v. J.A. Croson Co.*, ¹⁴⁵ as rationales for striking down the affirmative action statute under review. ¹⁴⁶ One might conclude that for Justice Scalia, the judge's function is to vindicate rights as they are found embodied in the language of the law; it does not suffice to draw the conclusion that such rights do exist or ought to exist in theory. ¹⁴⁷

It is for this reason that in his 1997 "Response" contained in *A Matter of Interpretation*, Justice Scalia critiques the position taken by Laurence Tribe that the "roaming provisions" of the Constitution (those vague enough to be subject to a variety of interpretations) were designed to reflect "the aspirations of the former colonists about what sorts of rights they and their posterity would come to enjoy." ¹⁴⁸ Justice Scalia asserts that there is no such language to be found in the Constitution, as it is fundamentally different from other, broad declarations of principles: "There is no such philosophizing in our Constitution, which, unlike the Declaration of Independence and the [French] Declaration of the Rights of Man, is a practical and pragmatic charter of government." ¹⁴⁹ Instead, Justice Scalia argues, what one finds in the Constitution are concrete, particular terms and phrases, such as references to jury trials, unreasonable searches and seizures, and the exclusion of peacetime quartering of soldiers without a homeowner's consent. ¹⁵⁰

Similarly, in a well-known exchange that took place in Rome following an address he gave there in 1996, Justice Scalia responded [***183**] to an appeal by a questioner to a supra-majoritarian principle, such as that found in the Declaration of Independence, as grounding for constitutional interpretation, by dismissing the matter:

¹⁴² [Kelo v. City of New London, 545 U.S. 469, 510-11](#) (Thomas, J., dissenting) (quoting [Calder v. Bull, 3 U.S. \(3 Dall.\) 386, 388 \(1798\)](#)) (alteration in original).

¹⁴³ *Id.*

¹⁴⁴ [Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 \(1995\)](#) (Thomas, J., concurring). Interestingly, the Declaration of Independence is the sole authority Justice Thomas cites in support of his assertion that "the principle of inherent equality ... underlies and infuses our Constitution." *Id.* He refers neither to past cases nor to any particular constitutional provision - either in the text of his argument or in any footnote. *Id.* For a sharp criticism of Justice Thomas's *Adarand* concurrence, see Marcossou, *supra* note 71, at 23-24, 28-29.

¹⁴⁵ [488 U.S. 469, 520 \(1989\)](#) (Scalia, J., concurring).

¹⁴⁶ [Adarand, 515 U.S. at 239](#) (Scalia, J., concurring).

¹⁴⁷ See *id.*

¹⁴⁸ Scalia, *supra* note 16, at 134 (emphasis omitted) (quoting [Tribe, supra note 15, at 81](#)).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

[Neither] the Supreme Court of the United States, [nor any other] federal court to my knowledge, in 220 years has ever decided a case on the basis of the Declaration of Independence. It is not part of our law. It expresses the underlying sentiment which gave rise to the creation of the Constitution. But it is the Constitution that is the document that governs us. ¹⁵¹

As Christopher Wolfe has pointed out, there is a lively and important debate between and among originalists as to the extent to which the Court should rely on natural law principles, or on natural law principles independent of constitutional or statutory language. ¹⁵² Wolfe's observation is that there is "more agreement than might appear at first sight" among such critics, such that even among the strictest constructionists there is some recognition of the need to appeal to some form of "higher law" argument to justify their strict construction approach. ¹⁵³

B. "Higher Law" and the Early Court

It is true that references to higher law principles, or to fundamental or natural rights, do appear more regularly in early Court decisions, but there is likely a reason for this. ¹⁵⁴ When the Court was still in the process of establishing its own operative principles, it was far more likely to appeal to elevated principles as a way of buttressing what might otherwise appear to be relatively [*184] pedestrian readings of the documentary evidence - the Constitution - that bound their analysis. ¹⁵⁵ Once the Court has established its own set of operative principles, and precedent, then there is likely to be less of a felt need to rely on first principles as a guide or standard of reference in adjudication.

Evidence of this movement away from "natural rights" or higher law jurisprudence has been gathered by David R. Upham in his work on the meaning of the Privileges and Immunities Clause. ¹⁵⁶ Upham notes that the Supreme Court's references to either natural rights, natural law, or the law of nature declined precipitously in the second half of the nineteenth century, so that in the 1880s there was only one case in which more than two references to these terms were utilized. ¹⁵⁷

¹⁵¹ Justice Antonin Scalia, *Of Democracy, Morality and the Majority: Address Given at the Gregorian University in Rome* (May 2, 1996), in 26 *Origins* 81, 89 (1996).

¹⁵² Christopher Wolfe, *Judicial Review*, in *Natural Law and Contemporary Public Policy* 157, 157-58, 173-78 (David F. Forte ed., 1998).

¹⁵³ *Id.* at 174-75. I am not certain that the justification for originalism itself must appeal to a "higher law," though such an appeal may perform the function of making the approach more attractive to some.

¹⁵⁴ The two most commonly cited examples in this regard are [Calder v. Bull, 3 U.S. \(3 Dall.\) 386, 387-88 \(1798\)](#) (seriatim opinion) (Chase, J.) ("I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without controul; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State."), and [Fletcher v. Peck, 10 U.S. \(6 Cranch\) 87, 143 \(1810\)](#) (Johnson, J., concurring) ("I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.").

¹⁵⁵ See, e.g., Hadley Arkes, *Beyond the Constitution* 10 (1992) ("If we would try to understand the principles of the American law, it would be necessary to move outside the Constitution."); Harry V. Jaffa, *Storm Over the Constitution* 43 (1999) ("The positive law of the Constitution cannot be understood without [the principles enunciated in the Declaration] because they are the ground of that positive law.").

¹⁵⁶ David R. Upham, *Protecting the Privileges of Citizenship: Founding, Civil War, and Reconstruction*, in *Challenges to the American Founding: Slavery, Historicism, and Progressivism in the Nineteenth Century* 139, 151-55 (Ronald J. Pestritto & Thomas G. West eds., 2005).

¹⁵⁷ [Id. at 154](#). Upham notes:

While in the 1850s, there had been twenty references to these terms ["natural rights," "natural law," or "law of nature"] in roughly 2,700 pages of the lawyers' edition of the court reports, in the 1860s there were only fourteen references in approximately 3,300 pages; in the 1870s there were only sixteen references in more than 5,600 pages; and in the 1880s there were only twenty-one

By contrast, in the early Court, Chief Justice John Marshall routinely included in his opinions passages that constituted reflections on the principles and purposes of government, and that thus served as the grounding for the authority of the Court, or of the Constitution. For example, in the 1803 decision in *Marbury v. Madison*, Marshall acknowledged that the Court is both given power and limited by the exercise of the authority of the people through the ratification of the Constitution:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very [*185] great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental.¹⁵⁸

Marshall's invocation of the Declaration of Independence indicates his awareness of the overarching standard that the Constitution itself seems to point toward.¹⁵⁹ Yet he does not leave the question there, but also in the opinion relies on a more particular and concrete standard, and that is the text of Article III of the Constitution, which, in the Court's view, had been violated by Section 13 of the Judiciary Act of 1789.¹⁶⁰

In addition, in the 1821 case *Cohens v. Virginia*, the Marshall Court addressed the question of the relationship between the state and federal governments, in particular responding to the assertion that the federal judiciary and the state governments are so independent of each other as to void any attempt by the Supreme Court to review decisions of the state court:¹⁶¹

Let the nature and objects of our Union be considered; let the great fundamental principles, on which the fabric stands, be examined, and we think the result must be, that there is nothing so extravagantly absurd in giving to the Court of the nation the power of revising the decisions of local tribunals on questions which affect the nation, as to require that words which import this power should [*186] be restricted by a forced construction. The question then must depend on the words themselves ...¹⁶²

references in more than 8,600 pages. Moreover, in the 1870s there was not one case in which there were more than two references to these terms, and in the 1880s, only one.

Id. That one case in the 1880s was [Mugler v. Kansas, 123 U.S. 623, 629-31, 631-33 \(1887\)](#). Upham, *supra* note 156, at 160 n.98.

¹⁵⁸ [Marbury v. Madison, 5 U.S. \(1 Cranch\) 137, 176 \(1803\)](#).

¹⁵⁹ Presumably, Chief Justice Marshall was referring to the passage in the Declaration of Independence that the people have the right to alter or abolish the government when it fails to secure their natural rights, "and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." The Declaration of Independence para. 2 (U.S. 1776).

¹⁶⁰ [Marbury, 5 U.S. \(1 Cranch\) at 173-76](#) (reasoning that Congress had no power to expand the Court's original jurisdiction beyond the specific instances listed in [U.S. Const., art. III, § 2](#)).

¹⁶¹ [Cohens v. Virginia, 19 U.S. \(6 Wheat.\) 264, 413 \(1821\)](#). The Court's analysis of federal review was put precisely in terms of reliance on the text of the Constitution:

This hypothesis is not founded on any words in the constitution, which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it, and on the incompatibility of the application of the appellate jurisdiction to the judgments of State Courts, with that constitutional relation which subsists between the government of the Union and the governments of those States which compose it.

Id.

¹⁶² [Id. at 422-23](#). The Court then explained that it would not examine the construction of those words here, because it had already exhaustively treated the same issue (jurisdiction over state courts of last resort) in [Martin v. Hunter's Lessee, 14 U.S. \(1 Wheat.\) 304, 333-38 \(1816\)](#). [Cohens, 19 U.S. \(6 Wheat.\) at 423](#).

Moreover, the Court asserted, where it has sufficient guidance on the issue by employing a fair interpretation of the Constitution, there is no need to give "particular consideration" to the multitude of varying, opposing arguments before it, where the arguments are "essentially the same" and are founded on a "forced construction" of the Constitution. ¹⁶³ There are additional examples one could point to of members of the Court advancing "higher law" principles as the basis of a judicial conclusion, ¹⁶⁴ but one would have to say that such instances stand out as anomalies more than they serve as exemplars of judicial analysis.

In one final Marshall Court opinion there is a peculiar statement that might lead to the misleading conclusion that Marshall was willing to jettison textual authority for a higher law reading. In *Dartmouth College v. Woodward*, ¹⁶⁵ Marshall discoursed on the meaning of the Contract Clause, ¹⁶⁶ and addressed the question of whether the analysis of a college charter might have been in the intentions of the Founders when they drafted and ratified the Constitution. ¹⁶⁷ Even if one could prove that such was not the case, one would have to prove a further point, that if the Framers had contemplated such a case they would have excluded the contract from the protections of Article I, Section 10. ¹⁶⁸ Marshall concluded that unless one can show that, then:

The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to **[*187]** the general spirit of the instrument, as to justify those who expound the constitution in making it an exception. ¹⁶⁹

But, one might object, does not Marshall's reference to what is at odds with the "general spirit" of the Constitution open the door for a plethora of "natural justice" approaches to enter in to the judge's analysis? Not necessarily, as Laurence Tribe has shown in his discussion of resistance to new meanings of constitutional clauses. ¹⁷⁰ For example, Article IV, Section 4 provides for protection of the states against "domestic violence," ¹⁷¹ but at the time of the ratification the phrase "domestic violence" clearly did not mean that which the Violence Against Women Act meant to address, and it would thus be improper for states to invoke the clause to deal with domestic abuse. ¹⁷² Similarly, while Article II, Section 1 requires that the president be a "natural born Citizen," ¹⁷³ no one could draw the legitimate conclusion from the "literal construction" that anyone born by caesarean section is ineligible for the

¹⁶³ [Cohens, 19 U.S. \(6 Wheat.\) at 422-23.](#)

¹⁶⁴ See Upham, *supra* note 156, at 151-55 (gathering evidence of the movement away from "higher law" principles).

¹⁶⁵ [17 U.S. \(4 Wheat.\) 518, 644-45 \(1819\).](#)

¹⁶⁶ [U.S. Const. art. I, § 10, cl. 1](#) ("No State shall ... pass any ... Law impairing the Obligation of Contracts ...").

¹⁶⁷ [Dartmouth Coll., 17 U.S. \(4 Wheat.\) at 627-29, 644](#) (expounding the Court's understanding of the Contract Clause in light of the drafters' intentions, and addressing the question of whether a college charter is governed by the Contract Clause).

¹⁶⁸ [Id. at 644.](#)

¹⁶⁹ [Id. at 644-45.](#)

¹⁷⁰ [Tribe, supra note 13](#), § 1-14, at 52-53.

¹⁷¹ [U.S. Const. art. IV, § 4.](#)

¹⁷² [Tribe, supra note 13](#), § 1-14, at 52-53.

¹⁷³ [U.S. Const. art. II, § 1, cl. 5](#) ("No person except a natural born Citizen ... shall be eligible to the Office of President ...").

office. ¹⁷⁴ Thus, when Marshall argued that there may be cases that seem to fall within the literal language of the Constitution and yet do not rightly, he is not necessarily advocating the abandonment of originalism. ¹⁷⁵

[*188] The turn to higher law jurisprudence on the part of originalists is generally the result of an unwillingness to be seen as abandoning larger questions of justice and first principles. ¹⁷⁶ While no originalist wants to be thought of as jettisoning such concerns, neither do they want to prepare the groundwork for the rejection of the text of the Constitution in favor of some conception of "higher law" which they reject, whether that be an appeal to human dignity or the individual sentiments of sitting Justices. Indeed, the protection of liberty and rights is precisely the rationale given by many originalists for adhering to first principles, principles which they hold are enshrined in the text of the Constitution itself. ¹⁷⁷ It is for this reason that a defense of "higher law" ought to be made by originalists - but a higher law tied to the Constitution itself, not drafted from an external source and employed to undermine or replace the language of the text itself. This does not entail an abandonment of first principles, but the recognition that for those principles to serve the educative role that they can, it is imperative to indicate how they are embedded in the Constitution itself.

Conclusion

There is a significant reason for advocates of original intent jurisprudence to state their principles in a clear and consistent manner, even when Supreme Court precedent seems settled in opposition to their position, and that is the possibility that the articulation of fundamental principles may very well serve the order of civil government and the rule of law. An example of this can be found in Justice Scalia's then-seemingly quixotic solitary dissent in the 1988 case *Morrison v. Olson*, where he could not even garner the support of Chief Justice Rehnquist for his defense of the separation of powers violation he found blatantly obvious in the Ethics in Government Act's Independent Counsel provision, ¹⁷⁸ providing for **[*189]** the appointment and oversight of special prosecutors. ¹⁷⁹

¹⁷⁴ For a challenge to this assumption, see M.B.W. Sinclair, Postmodern Argumentation: Deconstructing the Presidential Age Limitation, [43 N.Y.L. Sch. L. Rev. 451, 457 n.30 \(1999\)](#) ("In this era in which 'natural childbirth' is distinguished from 'childbirth,' it should be rather easy to argue that this provision precludes those born by Caesarean section."), quoted in James C. Ho, Unnatural Born Citizens and Acting Presidents, [17 Const. Comment. 575, 579 n.20](#). However, Ho's understanding seems to be the only plausible one. [Ho, supra, at 579](#) ("One presumes, of course, that the natural born citizen requirement does not additionally exclude otherwise eligible individuals born by Caesarean section.").

¹⁷⁵ [Dartmouth Coll. v. Woodward, 17 U.S. \(4 Wheat.\) 518, 644-45 \(1819\)](#). Chief Justice Marshall specifically stated:

Although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule ... unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the Convention, when the [Constitution] ... was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception.

Id. at 644.

¹⁷⁶ Arkes, *supra* note 155, at 247-48; Jaffa, *supra* note 155, at 55-58.

¹⁷⁷ See, e.g., Scalia, *supra* note 4, at 41-43. This is not to gainsay the argument that upholding some precedent is the best way to foster adherence to constitutionalism. See Monaghan, *supra* note 7, at 752 ("A practice of judicial adherence to this body of precedent will further foster conservative values. In the end, therefore, stare decisis reflects a political conception of the nature of our constitutional government, and it must be defended in those terms.").

¹⁷⁸ [28 U.S.C. §§591-599](#) (2000).

¹⁷⁹ [Morrison v. Olson, 487 U.S. 654, 697-734 \(1988\)](#) (Scalia, J., dissenting). Justice Scalia's description of the act is oft-noted:

Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

One of the great ironies of modern politics was the phenomenon that occurred in the late 1990s surrounding the impeachment and trial of President Clinton, when critics of the investigation assailed the provision as an unchecked political tool, often employing arguments forwarded originally by Justice Scalia in the Olson case.¹⁸⁰ Justice Scalia's forceful defense of the separation of powers in the case, then, served the function of allowing political actors to see the relative defects of the Act (long criticized by Republican administrations), and both parties, having recognized the partisan uses and abuses countenanced by the Act, allowed it to die out when it came up for reauthorization at the end of the Clinton administration.¹⁸¹

Occasionally, judges will acknowledge that the precedent they are relying on is a new one, and thus does not have the venerable status accorded other precedents, but, seemingly without irony, will use that **[*190]** very fact as a reason for adhering to it. Thus, for example, in *United States v. Ash*, Justice Brennan opined that "today's decision marks simply another step towards the complete evisceration of the fundamental constitutional principles established by this Court, only six years ago."¹⁸² This innovative defense of precedent is one that those such as Justice Thomas cannot abide; as he argued in *Kelo v. City of New London*:

The Court relies almost exclusively on this Court's prior cases to derive today's far-reaching, and dangerous, result. But the principles this Court should employ to dispose of this case are found in the Public Use Clause itself, not in Justice Peckham's high opinion of reclamation laws. When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning.¹⁸³

[*Id.* at 699.](#)

¹⁸⁰ See, for example, President Clinton's lawyer, Robert Bennett, who cited Justice Scalia's dissent when testifying against the Independent Counsel Act:

Senators, beware of a lawyer with one case who has an endlessly deep pocket to finance it and no time limit in which to get the job done. As Justice Scalia stated in his now-prescient dissent in *Morrison v. Olson*, "How frightening it must be to have your own Independent Counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile"

The Future of the Independent Counsel Act: Hearings Before the Comm. on Governmental Affairs, 106th Cong. 149 (1999) (prepared statement of Robert S. Bennett, Attorney for President Clinton).

¹⁸¹ See, for example, the testimony of Attorney General Janet Reno, arguing against reauthorization of the Independent Counsel Act:

However, after working with the Act, I have come to believe - after much reflection and with great reluctance - that the Independent Counsel Act is structurally flawed and that those flaws cannot be corrected within our constitutional framework.

... .

... Accountability is no small matter. It goes to the very heart of our constitutional scheme. Our Founders believe that the enormity of the prosecutorial power - and all the decisions about who, what, and whether to prosecute - should be vested in one who is responsible to the people. That way - and here I'm paraphrasing Justice Scalia's dissent in *Morrison v. Olson* - whether we're talking about over-prosecuting or under-prosecuting, "the blame can be assigned to someone who can be punished."

[*Id.* at 248, 250](#) (prepared statement of Janet Reno, Att'y Gen. of the United States).

¹⁸² [*United States v. Ash*, 413 U.S. 300, 326 \(1973\)](#) (Brennan, J., dissenting) (footnote omitted). One scholar has observed that even non-originalists now claim to be originalists, in a way. Keith E. Whittington, Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation, 62 Rev. Pol. 197, 197-98 ("Dworkin's strategy for escaping [the legitimacy crisis among 'noninterpretivists'] shifted to collapsing the distinction between originalists and non-originalists. He now argues that the Founders had many intentions, and traditional originalists do not have a monopoly on historical pedigrees for their interpretive conclusions. [Thus, w]e are all 'originalists' now.") (footnote omitted).

¹⁸³ [*Kelo v. City of New London*, 545 U.S. 469, 523 \(2005\)](#) (Thomas, J., dissenting) (citations omitted).

Judges can use the text of the Constitution as the standard for ruling, or they can rely on some other source, be it John Rawls's *A Theory of Justice*, St. Thomas Aquinas's *Summa Theologiae*, the current issue of the *Harvard Law Review*, or their own finely tutored sense of justice, which may or may not be consonant with one or more of these authorities.¹⁸⁴ While we might prefer that judges choose one or the other of these sources, any precedent that rests on these grounds will likely become a matter to be revisited by subsequent courts, and more likely to result in significant upheaval within the legal system.

As the Court itself argued in *INS v. Chadha*, there may arise reasonable justifications, both practical and political, for abandoning the original understanding of the Constitution, in that case as it [*191] concerned the principle of the separation of powers.¹⁸⁵ But those reasons do not justify jettisoning that principle, because the practicality or desirability of policy approaches must yield to the doctrine of separation of powers, as following such a course is the only "way to preserve freedom" that "we have ... yet found."¹⁸⁶ Rather, the Court notes, the purpose of government is justice, the protection of the rights of the citizenry, and that is precisely why the process established under the Constitution must be adhered to; to do otherwise is to abandon the best means available for ensuring the full vindication of the citizens' interests. As Justice Kennedy put it in his concurrence in *Clinton v. City of New York*, "the Constitution's structure requires a stability which transcends the convenience of the moment."¹⁸⁷ Or, to put the matter differently, one can readily imagine a whole host of government approaches and programs that might be efficient or workable, but if they entail a rejection of constitutional first principles then they ought not and cannot be sustained.

The fact that originalists are sometimes, under some circumstances, willing to modify their position in light of long-established precedent and settled practice is an indication that originalism itself as an operative principle gives way to a more fundamental interest, that of constitutionalism. The Constitution attempts to embody the touchstone principle of the rule of law, and originalism provides us with the best means of preserving that principle, grounded as it is in the attempt to discern the fundamental will of the people, expressed through the founding document. Thus, it is imperative to bear in mind that the rationale for adhering to the originalist approach is not the mere defense of a theory or system of interpretation, but rather it is that it is the approach that is best suited to sustaining the bedrock principle - the Constitution and the rule of law.

Thus, when an originalist is confronted with lines of precedent that seem to be at odds with an originalist reading of the Constitution, it is perhaps not always the case that the interpreter is compelled to [*192] jettison precedential lines for the sake of interpretive purity. The criteria for interpretation set down by President Lincoln and by Chief Justice Rehnquist and Justices Bradley, Scalia, and Thomas indicate that one can readily discover reasonable grounds for rejecting precedent when it is faulty, but also provide fairly consistent standards for assessing the value of precedent. The reason for following original intent, then, is that a choice has been made about the process put in place for best protecting all of the rights, privileges, and interests of the people. If this is right, then it is imperative that originalists not shy away from making the moral high ground argument, and not abandon it to defend instead only the technicalities of clause-bound interpretation.

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¹⁸⁴ See Richard A. Posner, *Overcoming Law* 234 (1995).

¹⁸⁵ *INS v. Chadha*, 462 U.S. 919, 951, 958-59 (1983) ("[Adherence to the doctrine of separation of powers] imposes burdens on governmental processes that often seem clumsy, inefficient, even unworkable," and sometimes thwarts "even [the] accomplish[ment of] desirable objectives.").

¹⁸⁶ *Id.* at 959. Justice White's dissent in *Chadha*, defending the law in question despite its clear violation of constitutional principles, seems to look only at its utility as a tool in the hands of the administrative state. See *id.* at 999-1001 (White, J., dissenting).

¹⁸⁷ *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring).

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