The Positivist Foundations of Originalism: An Account and Critique

James A. Gardner

University at Buffalo School of Law

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/articles

Part of the Constitutional Law Commons

Recommended Citation
Available at: https://digitalcommons.law.buffalo.edu/articles/222

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Journal Articles by an authorized administrator of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
THE POSITIVIST FOUNDATIONS OF ORIGINALISM:
AN ACCOUNT AND CRITIQUE

JAMES A. GARDNER*

I. INTRODUCTION

For at least a decade, one of the most vital debates in constitutional law has focused on two related questions: the extent to which the Constitution has a fixed or determinate meaning accessible to current interpreters; and the extent to which constitutional judicial decisions can or should rely for guidance upon sources outside the constitutional text and relevant founding history. This debate, which has at times involved scholars, judges, the Justice Department, the Senate, and even the general public, has been particularly active in recent years. The Justice Department, under the leadership of Attorney General Edwin Meese, has taken a position favoring a theory of constitutional interpretation based on the concept of original intent. This approach, known as originalism, seeks to determine the meaning of the Constitution as it was understood by those who ratified it. The originalist view is in contrast to the modernist perspective, which argues that the Constitution is a living document that evolves over time to meet the needs of contemporary society.

* Assistant Professor of Law, Western New England College School of Law. B.A. 1980, Yale University; J.D. 1984, University of Chicago. This article has benefitted from the helpful suggestions and comments of Don Korobkin, Jay Mootz, and Dennis Patterson. Western New England College School of Law and Dean Howard Kalodner provided financial support.


2 E.g., Brennan, Construing the Constitution, 19 U.C. DAVIS L. REV. 2, 7 (1985) (discussing constitutional interpretation generally and arguing that the meaning of the text must change with the times); Rehnquist, The Notion of a Living Constitution, 54 TEX. L. REV. 693, 695-96 (1976) (discussing the non-majoritarian aspects of the judiciary and arguing that the legislature is the proper forum for constitutional change); Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 856 (1989) (arguing that although originalism is not without its problems, it is preferable to nonoriginalism).


4 Constitutional interpretation became a focal point in the hearings over the
lic,⁵ has produced a wide variety of views. At one end of the spectrum are those who view the constitutional text or the intent of the framers as not only determinate and knowable, but as the only legitimate source of authority for constitutional decisionmaking.⁶ At the other extreme lie those who view the text as radically indeterminate and the interpretational enterprise as virtually open-ended.⁷

Much of the vigor of the debate has been generated by influential advo-

confirmation of Robert Bork for a seat on the United States Supreme Court. See generally Nomination of Robert H. Bork to be Associate Justice, Supreme Court: Hearings Before the Senate Judiciary Comm., 100th Cong., 1st Sess. (1987) [hereinafter Nomination of Bork].

⁵ During the proceedings on Robert Bork's nomination to the Supreme Court the issue was sufficiently in the public mind to prompt the Gallup organization to take a poll asking respondents whether judges should decide cases by reference to the intentions of the framers alone, or whether they should also consult their own values. Fifty-two percent of those polled said that judges should follow the original intentions of the framers, and 40% said judges could also consult their own values. Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82 NW. U.L. REV. 226, 227 n.5 (1988) (citing A Newsweek Poll: Bork, the Court and the Issues, NEWSWEEK, Sept. 14, 1987, at 26).

⁶ See R. BERGER, DEATH PENALTIES 193 (1986) (stating that "all power must be drawn from the Constitution"); R. BERGER, GOVERNMENT BY JUDICIARY (1977) (arguing that the role of the Court is to police the boundaries drawn in the Constitution); Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 4 (1971) ("Value choices are attributed to the Founding Fathers, not to the Court."); Meese, Jurisprudence, supra note 3; Scalia, supra note 2, at 854 ("The principal theoretical defect of nonoriginalism . . . is its incompatibility with the very principle that legitimizes judicial review of constitutionality.").


There is, of course, an enormous and varied middle ground. Some of its occupants include: Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739 (1982) (stating that interpretation is "neither a wholly discretionary nor a wholly mechanical activity"); Fried, Sonnet LXV and the "Black Ink" of the Framers' Intentions, 100 HARV. L. REV. 751 (1987) (advocating a moderate approach to interpretation that maintains respect for the rule of law); Maltz, Foreword: The Appeal of Originalism, 1987 UTAH L. REV. 773 (arguing that originalism is a plausible approach to constitutional adjudication); Perry, The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation," 58 S. CAL. L. REV. 551 (1985) (explaining that judges should consult both tradition and reason when interpreting the Constitution); Sandalow, Constitutional Interpretation, 79 MICH. L. REV. 1033, 1068 (1981) ("Constitutional law . . . emerges not as exegesis, but as a process by which each generation gives formal expression to the values it holds fundamental . . . ."); Schauer, An Essay on Constitutional Language, 29 UCLA L. REV. 797 (1982) (stating that judges should explore the meaning of constitutional language before venturing outside the text).
cates marching under the banner of originalism. Although the originalist position itself covers a variety of views, the core tenet of originalism, as I shall use the term here, holds that the principal task of judges called upon to interpret the Constitution is to ascertain and give effect to the original intentions of the framers and ratifiers of the Constitution.\(^8\) Originalists support their position, as of course they must, by arguing that we can reliably discover the intentions of the framers and faithfully apply them to most contemporary problems.\(^9\)

Critics of originalism, both on and off the bench, have responded almost universally by attacking its premises. They have argued, for example, that it is unclear whom we ought to count as a framer or ratifier whose intent is relevant;\(^10\) that a large group of individuals cannot possess a meaningful collective intent suitable for application to interpretational problems;\(^11\) that

---

\(^8\) See infra notes 21-26 and accompanying text. This version of originalism is sometimes known as "intentionalism." There is another, more extreme, form of originalism, sometimes known as "textualism," which holds that the constitutional text itself is a sufficient source for judicial interpreters. Textualism is far less defensible than intentionalism and consequently has few enough adherents to justify ignoring it for purposes of this Article. For general discussions of textualism and its relation to intentionalism, see, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 205-17 (1980) (examining the method and rationale of textualism); Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984); Kay, *supra* note 5, at 229-35; Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 684 (1985) (arguing that textualism suffers from the same flaws as do originalism and interpretivism).


\(^10\) E.g., R. DWORKIN, LAW'S EMPIRE 318-20 (1986).

\(^11\) See, e.g., Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 456 (1984) (noting the problem of determining group intention in legislative bodies); Brest, *supra* note 8, at 214-15 (discussing the problems involved in finding a meaningful collective intent suitable for application to constitutional interpretation); Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1032 (1977) (noting that "it is especially difficult to identify the intentions of a large group such as the authors of the Constitution"); Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 663-64 (1987) (arguing that originalism fails to address adequately the problem of group intent); see also Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983) (stating that legislatures do not have intentions; rather, legislative process has only outcomes); Eskridge, *Textualism*, supra note 8, at 642.
such an intent is, in any event, impossible to ascertain reliably, and, most significantly, that the process of textual interpretation itself, particularly where the text is old, simply cannot occur in the value-neutral way that originalists suppose.

My project here is somewhat different. Rather than criticize originalism by attacking its assumptions, I propose to grant its premises. Thus, I shall assume throughout my analysis that a meaningful reconstruction of the historical intentions of the founders is both possible and useful, in just the ways that originalists suppose. I shall show, however, that even when we grant most of originalism’s fundamental assumptions, its chief claim—that judges may never legitimately update the Constitution to conform to current norms—does not follow from its premises. I shall argue that this rule of originalist interpretation is not, as originalists sometimes suggest, a formal requirement of originalist political theory, but rather a pragmatic evidentiary rule. Like the Statute of Frauds, this rule simply expresses a preference for a writing in constitutional adjudication.

Before turning to this analysis, however, I want to explain why it is important to undertake it in the first place. If originalism’s assumptions are incoherent, as some have argued, what is the point of demonstrating that it also fails on its own terms? There are several reasons for mounting such a critique. First, despite often powerful and persuasive criticisms, the attraction of originalism as a method of constitutional interpretation persists. The idea of a unique founding moment, a constitutional “Big Bang” that permanently fixed the properties of our legal and social universe, exercises a strong hold on the American imagination. A widely shared cultural premise of this sort simply cannot be ignored even when it is thought to be inappropriate.

Second, our courts, for better or for worse, continue to speak the language of originalism—as indeed they have since the founding of the republic. The Supreme Court routinely consults the intent of the founders in its constitutional decisions, just as it routinely declares its unwillingness or lack of

12 Brest, supra note 8, at 221-22; Gordon, Historicism in Legal Scholarship, 90 Yale L.J. 1017 (1981) (criticizing historicism as inaccurate); Munzer & Nickel, supra note 11, at 1032; Powell, supra note 11, at 673-74; Sandalow, supra note 7, at 1035-36.

13 See, e.g., R. Dworkin, supra note 10, at 318-20 (viewing textual interpretation as a normative process); Brennan, supra note 2, at 7 (stating that “[w]e current Justices read the Constitution in the only way we can: as Twentieth Century Americans”); Levinson, supra note 7, at 377-396; Tushnet, supra note 7, at 784-85.

14 See, e.g., M. Kammen, A Machine That Would Go of Itself (1986) (describing the place of the Constitution in the public consciousness and symbolic life of the American people); Perry, supra note 7, at 592; Grey, supra note 8.

15 From the most recent Term, see, e.g., Collins v. Youngblood, 110 S. Ct. 2715, 2719-20 (1990) (discussing the original understanding of the ex post facto clause); OPM v. Richmond, 110 S. Ct. 2465, 2473 (1990) (discussing the framers’ intent for the appropriations clause of the Constitution); United States v. Munoz-Flores, 110 S. Ct. 1964, 1970-71 (1990) (consulting the framers’ intent for the origination clause); see also
authority to substitute its judgment for that of the founders. Any lawyer knows that he or she cannot respond in court to an argument based on the original understanding of the Constitution by claiming that the concept of original intent is incoherent. The only effective response is to offer an alternative and more persuasive vision of the original understanding; the use of originalist vocabulary is simply obligatory for participants in the legal system.

Third, the presence on the Supreme Court of two of the nation's leading proponents of originalism, Chief Justice William Rehnquist and Associate Justice Antonin Scalia—to say nothing of the dozens of like-minded lower court judges appointed by Presidents Reagan and Bush—seems to guarantee that originalism will be a prominent and unavoidable part of the constitutional landscape for some time. It is thus worth taking seriously.

Finally, criticizing originalism on its own terms may provide at least a limited alternative to the disturbing uncertainty often left in the wake of hermeneutic critiques of originalist interpretation. Critics from this perspective typically argue that texts lack any fixed, objective meaning, and that judges, far from recovering the meaning of the Constitution, in essence create it each time they seek to interpret the text. This approach can easily

Monagahan, supra note 9, at 375 ("[j]udicial opinions at least purport to take originalism seriously").

Justice Harlan, dissenting in Oregon v. Mitchell, 400 U.S. 112 (1970), expressed one of the most complete statements of this view:

[W]hen the Court gives the language of the Constitution an unforeseen application, it does so, whether explicitly or implicitly, in the name of some underlying purpose of the Framers. This is necessarily so; the federal judiciary, which by express constitutional provision is appointed for life, and therefore cannot be held responsible by the electorate, has no inherent general authority to establish the norms for the rest of society. It is limited to elaboration and application of the precepts ordained in the Constitution by the political representatives of the people. When the court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect.

[Thus,] the Court is not justified in substituting its own views of wise policy for the commands of the Constitution . . . .

Id. at 202-04 (footnotes omitted). Accord Harper v. Virginia Board of Elections, 383 U.S. 663, 670 (1966). See also Bork, supra note 6, at 3-4 ("The Supreme Court regularly insists that its results . . . do not spring from the mere will of the Justices in the majority but are supported, indeed compelled, by . . . the Constitution. Value choices are attributed to the Founding Fathers, not to the Court.").

There can be little doubt that interest in originalism has increased markedly in recent years. See, e.g., Federalist Symposium, supra note 1; Symposium: The First Annual Federalist Society Lawyers Convention—1987, 11 HARV. J.L. & PUB. POL'Y 1 (1988).

See generally INTERPRETING LAW AND LITERATURE: A HERMENEUTICS READER (S. Levinson & S. Mailloux eds. 1988).
slide into a sort of moral relativism, or even nihilism. A critique of originalism that does not also challenge the foundations of so many other important contemporary beliefs about the world may thus hold some appeal.

In order to conduct such a critique, it is first necessary to give an account of originalism that takes it seriously at a theoretical level. Accordingly, in Part II of this Article I set out the political theory upon which originalism rests. Specifically, I argue that originalism can best be understood as a familiar form of consent-based positivism. Further, this political theory provides originalism with a coherent account of the intergenerational authority of the framers, something it is often accused of lacking. In Part III, I set out this account.

In Part IV, I examine originalism’s prophylactic rule against judicial updating of the Constitution in light of originalism’s theoretical premises. I argue that this rule at bottom does no more than express a preference for a writing in constitutional adjudication. Finally, in Part V, I conclude that originalists have exaggerated the benefits of the strict prohibition on judicial updating, and that a more flexible approach could accomplish the goals of originalism better than the rigid rule now in use.

II. THE FOUNDATIONS OF ORIGINALISM

A. A Basic Outline of Originalist Claims

To discuss originalism meaningfully, we must begin with a description of its claims. This is easier said than done. Originalism embraces a range of views, and originalists do not always agree among themselves about the content of the doctrine. Nonetheless, I think any fair description of originalism would include the following six premises.

First, the Constitution embodies the authoritative choices that the people of the United States have made about the ways in which their society and government are to be structured. Second, these authoritative choices were made at the time of the framing and ratification of the Constitution and its amendments. Third, the choices so made were intended to be, and are permanent, until altered by the people themselves through the constitutional

---

19 See Fiss, supra note 7, at 740-41; Patterson, Interpretation in Law—Toward a Reconstruction of the Current Debate, 29 VILL. L. REV. 671, 674-82 (1984).

20 The word “positivism” has unfortunately taken on a number of different meanings. See, e.g., Fletcher, Two Modes of Legal Thought, 90 YALE L.J. 970, 975-76 (1981). I use the term here to describe the political view that a constitution is authoritative because it embodies the command of the sovereign people. See infra notes 87-90 and accompanying text.

21 See, e.g., R. BERGER, DEATH PENALTIES, supra note 6, at 66; R. BERGER, GOVERNMENT BY JUDICIARY, supra note 6, at 281.

22 See, e.g., Berger, Originalist Theories of Constitutional Interpretation, 73 CORNELL L. REV. 350, 350-51 (1988); Meese, Jurisprudence, supra note 3, at 9; Scalia, supra note 2, at 862-63.
process of amendment.23 Fourth, the content of these choices, and consequently the meaning of the Constitution, is largely determinate and generally knowable through examination of the constitutional text and by appropriate historical research into the intentions of the Constitution's framers and ratifiers (I shall call these individuals collectively, "the founders").24 Fifth, the role of judges in constitutional cases is simply and exclusively to discover and give effect to the meaning of the Constitution as embodied in the constitutional text and the original intentions of the founders.25 Sixth, any judicial decision that deviates from the original meaning of the Constitution, at least in the absence of a constitutional amendment authorizing such a deviation, is an illegitimate substitution of the value judgments of the court for those of the people.26

B. Originalism as Consent-Based Positivism

Perhaps because they are often cast in the role of critics, originalists often seem to be less concerned with displaying the coherence and positive attributes of their own political theory than with exposing the inadequacies and inconsistencies of their opponents' positions. Nevertheless, it is not difficult to uncover among originalist writings what amounts to a foundational originalist political theory. For the originalist, ultimate authority in our society is lodged in the people.27 The Constitution is the vehicle by which the people consent to the creation of a government and spell out its various powers and the limitations on those powers.28 The Constitution thus creates

---

23 See, e.g., R. Berger, Death Penalties, supra note 6, at 66; Maltz, supra note 7, at 801-02; Monaghan, supra note 9, at 366 ("Our legal gründnorm has been that the body politic can at a specific time definitively order relationships, and that such an ordering is binding on all organs of government until changed by amendment.").

24 See, e.g., R. Berger, Government by Judiciary, supra note 6, at 363-64; Meese, Construing, supra note 3, at 23-24; Meese, Jurisprudence, supra note 3, at 5-6; Rehnquist, supra note 2, at 696-97; Scalia, supra note 2, at 854.


26 See, e.g., R. Berger, Death Penalties, supra note 6, at 66; R. Berger, Government by Judiciary, supra note 6, at 263-64; Berger, Ely's "Theory of Judicial Review," 42 Ohio St. L.J. 87, 87 (1981) ("activist judicial review is inconsistent with democratic theory because it substitutes the policy choices of unleashed, unaccountable judges for those of the people's representatives"); Bork, supra note 6, at 3, 6; Rehnquist, supra note 2, at 695.

27 Rehnquist, supra note 2, at 696 ("The people are the ultimate source of authority . . . .").

28 See, e.g., R. Berger, Government by Judiciary, supra note 6, at 295 (arguing that the founders did not create the Constitution as a "symbol of continuity and unity," but as a means of creating a government by the people's consent); Bork, supra note 6, at 3; Meese, Jurisprudence, supra note 3, at 8, 9 (describing the Constitution as an innovation because it is written, and so formally expresses the consent of the people).
a government whose officials are "the servants of the people." 29 Precisely because they are servants whose power to bind the people is confined to "laws which are made pursuant to and in accord with the Constitution's command," 30 government officials such as judges are powerless to deviate from the terms of "popular consent" 31 expressed in the Constitution. Any such deviations, even if benignly motivated, are "usurpations" by the agents of the sovereign people. 32

This familiar version of constitutional authority is part of a more comprehensive theory of consent-based positivism which I have referred to elsewhere as the "Lockean theory of popular sovereignty." 33 It is a political theory of rightful governance that is allied with, though not necessarily derived from, John Locke's Second Treatise of Government, and which is spelled out with greater or lesser degrees of specificity in the Declaration of Independence, 34 the Constitution, 35 writings of the founders, 36 and the early decisions of the Supreme Court. 37

A somewhat more complete, though still quite abbreviated account of this theory, would go something like the following. Civil society arises from the state of nature when autonomous individuals, self-ruling as a matter of natural law, agree voluntarily for their own mutual security and advantage to band together into a society. 38 A central feature of this transaction is the

---

29 R. BERGER, GOVERNMENT BY JUDICIARY, supra note 6, at 316.
30 Meese, Jurisprudence, supra note 3, at 8.
31 Bork, supra note 6, at 2.
32 R. BERGER, GOVERNMENT BY JUDICIARY, supra note 6, at 250; see also G. GUNThER, CONSTITUTIONAL LAW 57 (10th ed. 1980) (remarks of Senator Jesse Helms defending bill that would limit Supreme Court jurisdiction as a means of preventing "judicial usurpations").
34 The Declaration of Independence para. 2 (U.S. 1776) ("to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed").
35 E.g., U.S. CONST., preamble; art. I, § 1; art. II, § 1; art. III, § 1; art. VI; art. VII; amend. IX.
37 E.g., McCulloch v. Maryland, 17 U.S. (4 Wheat) 315, 404-05 (1819) ("The government of the Union . . . is, emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them . . ."); Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 448 (1793) ("a State derives its authority from . . . the voluntary and deliberate choice of the people"). For a fuller discussion of these and other sources, see Gardner, supra note 33, at 206-11.
38 See J. LOCKE, THE SECOND TREATISE OF GOVERNMENT § 4, at 4, § 87, at 48-49, § 89, at 49-50 (T. Peardon, ed., Bobbs-Merrill 1952) (1st ed. 1690). Locke's theory is generally quite consistent in its fundamentals with the ideas of many other influential political philosophers of the Enlightenment, including Thomas Hobbes, Francis
surrender by each member of the society of his or her natural right of self-rule to the collective society. This exchange usually, although not always, takes the form of a binding agreement to abide by the will of the majority of the society’s members.\(^\text{39}\)

Having entered into a self-governing society, society’s members generally find it advantageous to create a government to handle the chores associated with collective self-rule. The government, on this model, is thus no more than an agent of the people, and can exercise only the powers the people have delegated, and then only in a way that the people have authorized.\(^\text{40}\) A government that the people have duly appointed and that acts within the bounds of its delegated powers is “legitimate”—that is, it has the right, and not merely the power, to make laws binding on society. Conversely, a government that the people have not appointed, or that exceeds the scope of its delegated powers—one that exists or acts without the consent of the governed—is not legitimate. It and its members are “usurpers” and its laws void.\(^\text{41}\) The people have the right to resist the usurping government and to replace it with one of their choice.\(^\text{42}\)

By invoking this familiar model of constitutional authority, originalists cast themselves as heirs to what has been the dominant American political theory since the founding,\(^\text{43}\) a theory that Eugene Rostow once called “the prevailing political theory of modern times and the only modern rival for the doctrine that power proceeds from the barrel of a gun.”\(^\text{44}\) This notion of popular sovereignty is a prototypically and traditionally American way of thinking about government and society, a factor which undoubtedly plays no small part in originalism’s persistence and appeal, even in the face of strong criticism.

C. The Problem Defined: Judicial Updating of the Constitution

In this section, I shall focus on a single type of interpretational problem—the judicial technique of “updating” the Constitution. Originalists accuse a court of updating the Constitution when, rather than applying a constitu-
tional provision according to its established meaning, the court reinterprets words in the Constitution to conform to current attitudes and values. Originalists of all stripes condemn such updating, and I shall refer to this condemnation as the "anti-updating rule."

For purposes of the following discussion, the eighth amendment ban on "cruel and unusual punishment" serves as a good example of judicial updating. This provision allows us to avoid much of the political and ideological baggage associated with the constitutional phrases "due process" and "equal protection," which are at present the main battlegrounds of the conflict between originalists and nonoriginalists. Moreover, the Supreme Court has been unusually forthright in announcing its intention to engage in self-conscious judicial updating of the eighth amendment. In language that must make an originalist's skin crawl, the Court has said: "the words of the [Eighth] Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

In the consent-based account of originalism that follows, I shall rely for illustrative purposes on the following constitutional question: Does the eighth amendment ban on cruel and unusual punishment prohibit a federal law imposing flogging as a criminal punishment? There is fairly good evidence to suggest that the framers and ratifiers of the Constitution would not have viewed flogging, at least for some crimes, as cruel or unusual. For example, the nation's first criminal law, enacted by the first Congress in

45 See, e.g., Miller, Pretense and Our Two Constitutions, 54 Geo. Wash. L. Rev. 375, 380 (1986); Monaghan, Comment on Professor Van Alstyne's Paper, 72 Iowa L. Rev. 1309, 1309 (1987) ("the judicial function is to apply 'this Constitution,' not to revise or update it"). In the terminology of interpretation, the word "updating" is used more widely to refer to judicial interpretations of statutes than of constitutions. See, e.g., Aleinikoff, supra note 8, at 20. The idea, however, is also common in originalist writings. See, e.g., R. BERGER, GOVERNMENT BY JUDICIARY, supra note 6, at 2 ("the Court was not designed to act . . . as a 'continuing constitutional convention'.")

46 U.S. CONST. amend. VIII.

47 See, e.g., R. BERGER, GOVERNMENT BY JUDICIARY, supra note 6 (equal protection); J. ELY, DEMOCRACY AND DISTRUST (1980) (equal protection and due process, among others); Bork, supra note 6, at 11-12 (due process and equal protection); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982) (equal protection, due process). Another important battleground is the ninth amendment and the extent to which it can be viewed as the source of unenumerated rights. See generally Barnett, Reconciling the Ninth Amendment, 74 CORNELL L. REV. 1 (1988) (arguing for protection of unenumerated rights); Symposium on Interpreting the Ninth Amendment, 64 CHI.-KENT L. REV. 37 (1988).


49 For an argument from the originalist perspective that the Court may not abolish the death penalty under the eighth amendment's "cruel and unusual punishment" clause, see R. BERGER, DEATH PENALTIES, supra note 6.
1790, made public whipping a punishment for larceny. But, as it is not my purpose to argue the point, I shall simply assume for purposes of discussion that the founders understood a federal law imposing flogging to be constitutionally acceptable. Likewise, there is good evidence that contemporary attitudes consider flogging cruel and unusual. Some courts, for example, have struck down flogging and paddling of incarcerated individuals under the eighth amendment,\textsuperscript{51} and the Uniform Code of Military Justice, hardly in the vanguard of changing social trends, has for many years prohibited flogging as cruel and unusual punishment.\textsuperscript{52} Indeed, Justice Scalia, a prominent champion of originalism, has stated: "I cannot imagine myself . . . upholding a statute that imposes the punishment of flogging."\textsuperscript{53} Again, in order to frame the problem, I shall simply assume that contemporary society considers flogging cruel and unusual punishment.

If a case arose asking whether a federal criminal law calling for flogging violated the eighth amendment, originalists, pointing to the framers' intent, would argue that the law must be upheld. The nonoriginalist, on the other hand, would ask why this must be so given that we now understand flogging to be cruel. Before addressing this important question from the point of view of originalist political theory, it may be illuminating to consider further the precise nature of originalist claims. The following hypothetical scenarios will illustrate my point.

Suppose several individuals constitute themselves as a society and establish a constitution prohibiting cruel and unusual punishment. They agree that their constitution does not proscribe flogging as a cruel and unusual punishment, and the historical record clearly supports this understanding. The members of this society then have children who grow up and become full members of the society. The children, however, grow up in a different social environment than their parents and come to view flogging as in fact cruel. When the parents' generation has died off, the members of this society unanimously view flogging as a cruel punishment. According to originalism, although the children take a different view than their parents did of the meaning of the word "cruel" as applied to flogging, courts must nevertheless

\textsuperscript{50} Act of Apr. 30, 1790, ch. 9, § 16, 1 Stat. 112, 116 (1790); see also Radin, The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause, 126 U. Pa. L. Rev. 989, 1031 (1978) (stating that whipping was "thought perfectly proper" in 1789).

\textsuperscript{51} See, e.g., Nelson v. Hyne, 491 F.2d 352 (7th Cir. 1974) (holding that corporal punishment in a juvenile detention home was cruel and unusual punishment); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (holding that the use of a strap in a penitentiary violated the eighth amendment). But see Ingraham v. Wright, 430 U.S. 651 (1977) (holding that nonabusive paddling of school children is not prohibited by the eighth amendment).

\textsuperscript{52} Uniform Code of Military Justice, 10 U.S.C. § 855 (1956) ("Punishment by flogging . . . may not be adjudged by any court-martial or inflicted upon any person subject to this chapter.").

\textsuperscript{53} Scalia, supra note 2, at 864.
adhere to the understanding of the parents and uphold laws that establish flogging as a criminal penalty.

Now consider a variation on this hypothetical. Suppose the states succeed in calling a constitutional convention, with instructions to the delegates to reconsider the entire document—the convention is to have free rein to create a new government appropriate for our times. Incredibly, after full consideration, the convention decides that the words of the old document in fact perfectly express what the conventioners want the new constitution to express. Consequently, a somewhat embarrassed convention presents a new constitution for popular approval which is word for word the same as the old one. This new constitution is then ratified by state ratifying conventions. I assume that even the most fervid originalist would agree that the words in this “new” constitution must be given the meaning that we attach to them today. Thus, there could be no doubt that the new equal protection clause prohibits racially segregated schools because that is how we, the framers and ratifiers of the new constitution, now understand the term. Likewise, there could be no doubt that the new Bill of Rights applies to the states through the new fourteenth amendment; that the new due process clauses prohibit bans on the use of contraceptives by married couples; and that, to return to the example outlined in the last section, the new eighth amendment prohibits flogging. To the originalist, this constitution is a new and distinct document, even though absolutely no indication of its novelty appears on the face of the document itself.

Why does originalism require different results in these two cases? One possible explanation—the one most often identified and attacked by originalism’s critics—is that originalism attributes to a society’s founders some sort of permanent, absolute authority over the terms on which the society shall exist, and that society must in essence refound itself in order to escape this ancestral power. This argument is a strawman. In fact, as I shall demonstrate in the next Part, originalism’s underlying positivism provides a ready

---

54 See Berger, supra note 22, at 353 (“were we to write a new constitution, we could use words according to our present meaning”); R. Berger, Death Penalties, supra note 6, at 11 (“contemporaneous constructions carry great weight”).


56 Of course an amendment would also be sufficient to escape a particular, focused aspect of the founders’ influence. In this context, the amendment would be a sort of single-issue refounding.
explanation for the authority of the original understanding, in a way that
does not rely on any sort of Burkean or mystical authority of society's
founders.

A second possible explanation for originalism's differing treatment of the
two hypotheticals is that originalism is less a controversial theory of political
authority than it is a rule of evidence derived from a familiar political the-
ory. On this view, originalism, much like the Statute of Frauds, states a
requirement that the people's wishes, to be enforceable, must be in writing—
that is, in the form of a constitution or constitutional amendment. I shall
argue in Part IV that this is in fact the better view of originalism.

Before defending that view, however, it is necessary to give an account of
originalism that makes the original understanding authoritative by virtue of
the consent of society's current members rather than its ancestral founders.

III. A Positivist Account of the Authority of the Original
Understanding

A. The Problem of Intergenerational Authority

The centerpiece of originalist doctrine is the normative claim that we
should—indeed we must—adhere to the original intentions of the founders.
This claim is problematic for two reasons. First, it is not, as strict original-
ists themselves admit, an accurate description of how the Supreme Court has
in fact adjudicated many constitutional questions, particularly in the last
quarter-century. In numerous cases the Court has quite plainly rejected
original intent as a sound basis for resolving certain constitutional questions.

There is some debate over whether this normative claim is also a conventional
claim. Some have contended that there is no convention in our society governing the
proper interpretation of authoritative legal texts. See, e.g., Munzer & Nickel, supra note
11, at 1053-54; Perry, supra note 7, at 575; Simon, Preface, supra note 55, at 615 n.9. On
this view, the scholarly debate over constitutional interpretation simply manifests the
lack of consensus. Others have argued that interpretational conventions do exist, and
that they are originalist. See Kay, supra note 5, at 227-28. Even critics of originalism,
however, have at times suggested that there are at least some cases in which the text is
sufficiently clear, or the historical consensus so complete, or the community of
understanding sufficiently stable over time, to allow originalist methods to produce good
answers to constitutional questions. See, e.g., Fiss, supra note 7, at 743; Perry, supra note
7, at 567-69.

Moreover, many advocates of nonoriginalist interpretive strategies nevertheless view
originalism's exacting scrutiny of the constitutional text and the circumstances of the
founding as a highly relevant and necessary, although not often dispositive, aspect of
constitutional decisionmaking. See, e.g., R. DWORKIN, supra note 10; D. RICHARDS,
FOUNDATIONS, supra note 55; Brest, supra note 8, at 228; Sandalow, supra note 7, at
1034.

See, e.g., R. BERGER, GOVERNMENT BY JUDICIARY, supra note 6, at 18; Bork,
supra note 6, at 7-10 (criticizing Griswold v. Connecticut, 381 U.S. 479 (1965)).
For example, in a celebrated passage in *Home Building & Loan Association v. Blaisdell*, the Court said:

If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.

Such decisions, however, do not deeply trouble originalists because they view these decisions as improper. Far more troubling to originalists is that a strict adherence to the framers' original understanding would inevitably yield many constitutional results that would be highly unpalatable to Americans today. Fidelity to original intent in all particulars would require the wholesale discarding of numerous constitutional protections of speech and the press, religion, equal protection, and due process, many of which now command an overwhelming social consensus.

A significant problem for originalism is thus how to justify the intergenerational authority of the founders. The problem of intergenerational authority deals with the question of why, to put it bluntly, we ought to care what a bunch of dead people thought about how we ought to live our lives today—the so-called "dead hand" problem. If we assume, for example, that the original understanding of the equal protection clause would permit segregated school systems, why should we give effect to that understanding?

---

59 290 U.S. 398 (1934).
60 Id. at 442-43.
61 See Monaghan, *supra* note 9, at 381-82 (stating that original intent theory requires rejection of decisions applying the Bill of Rights to the states).
63 See, e.g., D. Richards, *Foundations*, *supra* note 55, at 5; Simon, *Authority of the Framers*, *supra* note 55, at 1482 (arguing that "the intent of the framers . . . is not an authoritative source for discovering the Constitution's meaning"); Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. Cal. L. Rev. 37, 117 (1985) (noting that originalism fails to explain why the original understanding of the Constitution should be authoritative); cf. Monaghan, *supra* note 9, at 383-84 (stating that the authority of the founders is an axiomatic first principle of originalism, not requiring demonstration).
64 See, e.g., Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1072-76 (1988); Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 Iowa L. Rev. 1177, 1184 (1987); Tushnet, *supra* note 7, at 787 (explaining that interpretivism relies upon the "dead hand of the past"); see also D. Richards, *Foundations*, *supra* note 55, at 10; Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 Tex. L. Rev. 1207, 1228 (1984) ("to say that interpretive review is democratic because the people adopted the Constitution is erroneous, because not a person alive today, and not even most of our ancestors, voted for it").
if, as nearly everyone now agrees, a society with integrated schools is better and more just than one with segregated schools? It is in answering questions like these, and in providing a justification for the founders' intergenerational authority, that originalism has been least satisfying and its advocates least persuasive. But, because originalism grounds itself in consent-based political theory, it is especially important for originalists to articulate some meaningful basis for binding current generations to original understandings of the Constitution.

Originalism's underlying political theory of consent-based positivism rests the legitimacy of government on the consent of the governed. According to this theory, it is the individual's voluntary decision to join society and society's communal decision to create and then submit to governmental rule that gives rise to the government's right to demand obedience. But consent of the governed means exactly what it says: those who live under the government must consent to its rule. The requirement of consent would be entirely undermined if an individual's obligation to obey a government could be created by the consent of someone else—here, the consent of the founders. Indeed, Locke would have described such an arrangement as political slavery. Thus, political legitimacy on this theory must depend on the consent of the living members of society to the rule of the current government. Whatever legitimacy the consent of the founding generation may have conferred on the government of its time is irrelevant to the legitimacy of the government we have now. The legitimacy of our government depends upon current consent.

This facet of originalist political theory poses an initial obstacle to originalist interpretive practice because it suggests precisely the opposite of what originalists claim. The requirement of current consent suggests that the terms of some prior consent, far from being controlling, ought to be inconsequential. The task for any account of originalism is thus to explain how we can properly substitute the consent given by the founding generation for current popular consent, the only legitimate source of governmental authority.

To accomplish this task consistently with the political assumptions on which originalism rests, the terms of the original consent, authoritative at

---

65 For a discussion (and rejection) of several possible justifications for the authority of the founders, see Simon, Authority of the Framers, supra note 55.
66 See supra notes 38-42 and accompanying text.
67 See J. Locke, supra note 38, §§ 117-19, at 67-68 (government has no power over the son by virtue of the consent of the father or ancestors); see also H. Beran, supra note 43, at 34, 45; Greenawalt, Promise, Benefit, and Need: Ties That Bind Us to the Law, 18 Ga. L. Rev. 727, 736 (1984) ("[a] particular person can be obligated only if he has undertaken to obey").
69 See H. Beran, supra note 43, at 38 ("consent must . . . be that of the present citizens of the state").
the time of the founding, must be somehow "carried forward" to allow us to say that the current generation has consented, either expressly or implicitly,\(^7\) to those same terms. Only then will the terms of the original consent have the current authoritativeness that originalists claim. To see how this might happen, we must examine in some detail the way in which subsequent generations become members of an established society.

B. The Need for Backward-Looking Consent

Consent-based positivism begins its account of political authority, at least as it is relevant here, with the establishment of a constitution by the founding members of society. I shall assume, along with originalists, that this constitution has a discernable meaning based on its text and on the intentions of the founding generation. All but the most extreme nonoriginalists would probably agree with originalists that over the first few years or perhaps decades following the founding, the original understanding of the constitution is entitled to considerable weight since it is presumably either identical to or barely distinguishable from the understanding of those society members who have bound themselves to obey a government operating under that constitution.\(^71\) Things get more complicated, however, when with the passage of time society begins to take on new members.

John Locke, and many of the more theoretically-minded founders, viewed the entry of new members into society as being based either on actual consent or on some form of tacit consent.\(^72\) Such consent could be inferred, for example, on the basis of voluntary residence in a society's territory, or perhaps on the basis of acceptance of the benefits of living in the society. Yet, the concept of tacit consent, and indeed of consent itself, has long been vig-

\(^7\) Many versions of consent theory do not require an affirmative act of consent to establish political authority and obligation; rather, political obligation typically arises in these theories from a form of tacit consent. For Locke, acts such as continued residence in a state or use of its roads were sufficient to constitute consent. See J. LOCKE, supra note 38, § 119, at 68. More recent theories tend to restrict tacit consent to instances where there is a convention designating certain actions or failures to act as consent sufficient to give rise to political obligations, and where the putative consenter is aware of the relevant convention. See, e.g., H. BERAN, supra note 43, at 8-10, 28-29 (arguing that continued residence in a state constitutes tacit consent only when "there is a generally known convention that such continued residence counts as tacit consent"); Simmons, supra note 43, at 802-09 (suggesting that something more than continued residence in a state is necessary for meaningful consent).

\(^71\) See Monaghan, supra note 9, at 375 (stating that "the supreme court in 1800 should have accorded interpretive primacy to original intent in ascertaining the 'meaning' of the constitution").

\(^72\) See, J. LOCKE, supra note 38, § 119, at 68 ("every man that . . . has enjoyment . . . of government does thereby give his tacit consent"); Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), reprinted in 13 THE PAPERS OF JAMES MADISON 18, 24 (C. Hobson & R. Rutland eds. 1981) ("If this assent cannot be given tacitly . . . no person born in Society, could on attaining ripe age, be bound by any Acts of the majority.").
orously attacked by critics beginning with David Hume. These critics argue that people do not in fact consent to government’s rule in any meaningful way, and that the inferences on which tacit consent is based are unrealistic and arbitrary. In keeping with our practice of granting originalist assumptions, let us sidestep these objections for a moment by supposing a society that inducts new members on the basis of actual consent, under circumstances in which such consent can be considered meaningful. Assume that in this society a government official holds a conference with each citizen, whom I shall refer to as the “recruit,” just before his or her eighteenth birthday. At this conference, the recruit’s options are reviewed and questions answered, much as a personnel officer would sit down with a new employee to help choose a health plan. The question the official would help the recruit answer is: “Do you wish to become a member of this society?” The question the recruit would need to answer to make a meaningful choice is: “What does it mean to be a member of this society?”

73 D. HUME, Of the Original Contract, in MORAL AND POLITICAL PHILOSOPHY 359-60 (H. Aiken ed. 1948).

74 See, e.g., id.; Casinelli, The “Consent” of the Governed, 12 W. POL. Q. 391, 391 (1959) (arguing that both express and tacit consent are fictitious); Dunn, Consent in the Political Theory of John Locke, in LIFE, LIBERTY AND PROPERTY: ESSAYS ON LOCKE'S POLITICAL IDEAS 129, 138 (G. Schochet ed. 1971); Greenawalt, supra note 67, at 737-38; Pitkin, Obligation and Consent—I, 59 AM. POL. SCI. REV. 990, 994 (1965) (“consent theory is much troubled by the difficulty of showing that [we] have in fact consented. Most of us have not signed any contract with our government”); Sartorius, Political Authority and Political Obligation, 67 VA. L. REV. 3, 12 (1981) (“[c]onsent ... must be fully voluntary in order to bind”); Simmons, supra note 43, at 805; Smith, Is There a Prima Facie Obligation to Obey the Law?, 82 YALE L.J. 950, 960-61 (1973).

75 Consent is generally understood to require some sort of voluntary act. As a result, consent is often said to be impossible under circumstances where a free choice is impossible—for example where individuals face legal, economic or physical obstacles to free migration among states. See, e.g., H. BERAN, supra note 43, at 31 (“if citizens remain in a state because those who try to leave are severely penalised or because they have an unrealistically rosy picture of conditions in their state because of a combination of censorship and false propaganda by the government, then their acceptance of ... membership in their state does not amount to consent”); D. Hume, supra note 73, at 363 (“Can we seriously say that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives ... by the small wages which he acquires?”); Simmons, supra note 43, at 809-18; Simmons, Voluntarism and Political Associations, 67 VA. L. REV. 19, 28 (1981) (“membership is only voluntary where nonmembership is a real option”).

76 Cf. H. BERAN, supra note 43, at 28 (consent means accepting membership in the state); see also R. DWORKIN, supra note 10, at 195-215 (setting forth a theory of community as a source of political authority and obligation); Honore, Must We Obey? Necessity as a Ground of Obligation, 67 VA. L. REV. 39, 57 (1981) (“a person who joins in a game with the consent of the existing players must honor the rules of the game, because he knows that the other players are not willing to allow him to join unless he is prepared to do so”).
Consent theory ordinarily contemplates that individuals create legitimate
government in two distinct steps. First, the individual consents to enter into
society on terms mutually acceptable to all other prospective society mem-
bers. Second, after society is constituted on such terms, society members
agree to the creation of a government, although this time on terms agreeable
to a majority or, if desired, a supermajority. Whatever the power of this
two-step model to describe the founding of a society and initial establish-
ment of government, it has only limited application to the case of individuals
seeking to enter an established society. Such individuals must essentially
take society as they find it, particularly if the society they seek to enter is a
large one, for two reasons. First, it is virtually impossible in a large society
to consult all other society members concerning the terms of the basic social
contract. Second, even if it were somehow possible to arrange such a consul-
tation, it is highly unlikely that the terms of the agreement would change;
when one or ten or a hundred million people have settled on the conditions
under which society is constituted, the wishes of a single prospective new
member are unlikely to alter the outcome. In other words, it simply is not
possible to reconstitute society each time someone turns eighteen, especially
when thousands of people turn eighteen each day.

Similarly, it is impossible for a large society to debate anew how best to
structure and empower its government each time the society gains a new
member. Nor again is there much likelihood that the addition of a handful of
new members into society could have a substantial influence on the shape of
the existing constitution when the majority of those who already belong to a
large society support it.

Because of these practical constraints, the question of what it means to
live in a particular society at any given time is likely to be answered much
more by reference to the existing charter of government than to the terms of
the underlying social contract. To a great extent, what it means to be a
member of our society is the same as what it means to live under our Consti-
tution, and that is how the government official would probably respond to
the query of our hypothetical societal recruit. But shifting the frame of ref-
erence from the social contract to the Constitution does not end the matter,
for prospective society members would still want to give their consent intelli-
gently, and to know the terms to which they give their consent. What does
it mean, they would ask, to live under this Constitution? Or, much the same
thing, what does this Constitution mean?

---

77 See supra notes 38-42 and accompanying text.
78 Ours is of course such a society. See U.S. Const., art. V (ratification of
amendments).
80 See, e.g., id. at 30 (suggesting that "the content of political obligation is . . . to obey
the constitution, constitutional governments and valid laws").
81 See R. FLATHMAN, POLITICAL OBLIGATION 220 (1972) (arguing that consent
requires knowledge of what one is consenting to); Simmons, supra note 43, at 802 (same).
Originalism of course assumes that it is possible to give a fairly decent if somewhat incomplete answer to these questions. What might, then, be the reaction of the recruit upon learning about the meaning of the Constitution? It seems likely that the recruit would find much that is good in the existing Constitution. It seems equally likely, however, that the recruit would find a number of features disagreeable. Suppose a recruit from the cohort coming of age around 1810 asked the following question: "I approve of the provision barring cruel and unusual punishments. But to my mind, those words include flogging. Can I join the society with the understanding that flogging will be considered cruel?" The answer, of course, is no. The rest of society cannot as a practical matter be summoned from the four corners of the nation to consider such a change. And if society cannot consider a change, one certainly cannot be unilaterally imposed. Entry into society entails a mutual sacrifice of natural rights on equal terms; society could neither cohere nor endure if each member were entitled to enter on whatever terms he or she chose.

Even though society's recruits do not agree in every particular with the terms of the existing Constitution, and would have negotiated a slightly or even very different deal had they been involved at the beginning, they may still consent to join the society on the existing terms. The requirement of consent does not mean consent to each and every particular feature, but rather, as the ratification of our own Constitution shows, to the whole package, warts and all. Consent is and must be more like a parliamentary vote of confidence than a line-item veto.

It is thus possible to give the type of consent necessary to establish political legitimacy to a regime that is not everything one might have hoped. In fact, the possibility of constitutional amendment in our system makes such a transaction that much easier since one can enter society after making a personal compromise and yet retain the opportunity to persuade society to adjust the Constitution in ways that make it more completely satisfying. And while this may mean that society will be composed of individuals nearly all of whom have some bone to pick with the status quo, it will also be a

---

82 See supra notes 38-44 and accompanying text.
83 See Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 38 (1979) ("[i]t is the legitimacy of the political system as a whole that depends on the people's approval, and that is the source of its democratic character"); see also Carter, Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle, 94 Yale L.J. 821, 838-39 (1985).
84 Arrow's Theorem suggests it is virtually impossible for a pluralist, democratic society to adopt a coherent constitution if each individual constitutional provision must command the votes of a majority. Further, the Theorem suggests that it is possible to have the support of a majority for each provision of a proposed constitution, yet to have no majority that supports the document taken as a whole. See K. Arrow, Social Choice and Individual Values 2-3 (2d ed. 1963). On this view, a line-item veto approach to constitutional consent, therefore, would be impracticable.
85 This may indeed have been the case even at the time of the original ratification.
society composed of individuals who on balance think the Constitution a comparatively good thing in its present form.

In this way, originalist political theory can explain the process by which subsequent generations carry forward the original understanding of the Constitution. On this account, the intent of the framers and ratifiers is authoritative not because the founding generation possesses some form of Burkean prescriptive authority, but because the terms of the consent of the governed as a practical matter are necessarily the same, in the absence of a pertinent constitutional amendment, as those of the founding generation at all times after the founding.

IV. ORIGINALISM'S PROPHYLACTIC ANTI-UPDATING RULE

Having provided an account based on originalist political theory of the intergenerational authority of the founders, we are now in a position to examine the heart of originalist doctrine, its approach to constitutional interpretation. The essence of originalist interpretation, and the focus of the following discussion, is the anti-updating rule, a prophylactic prohibition forbidding courts from updating the original understanding of the Constitution to conform to current norms unless authorized by a pertinent constitutional amendment.86

Many of the state ratifying conventions expressed specific reservations about the proposed Constitution even as they ratified it. The most common objection was to the lack of a Bill of Rights. See L. LEVY, CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS 117 (1986) (noting that the "Constitution was ratified only because "crucial states . . . were willing to accept the promise of a bill of rights in the form of subsequent amendments to the constitution").

86 I want to emphasize here that my discussion will focus exclusively on the problem of judicial decisions that update the text by giving new meanings to words that actually appear in the Constitution. I will not consider the broader problem of judicial decisions that cannot plausibly be grounded in the constitutional text, and which can therefore be viewed more as judicial "amendments" to the text rather than interpretations of it. Naturally, where the text contains words of such enormous breadth as "liberty" and "equal protection of the laws," the distinction between these two categories may prove illusory. Nevertheless, the distinction is an important one for originalists, who do not view all aspects of popular consent as politically authoritative, but rather only those aspects of popular consent that find their way into the constitutional text. Thus, my argument in the following sections should not be construed to suggest that originalism offers a political justification for judicial decisions that conform to the terms of popular consent in lieu of conforming to the constitutional text. Although such a political theory would be possible—Locke after all wrote to justify the English constitution, which is not written—contemporary American originalism clearly requires some textual basis for all legitimate judicial decisions. Thus, judicial responsiveness to social consensus is not enough for political legitimacy; only social consensus referable to a provision of the Constitution is a potential source of legitimate decisions. See infra text accompanying notes 92-99.
A. The Positivist Framework

According to the consent-based positivist theory on which originalism rests, the United States Constitution represents a set of instructions from the sovereign people to their governmental agents. The document sets out the powers that the people have granted to the government, the general purposes for which they may be used, and a series of limitations on those powers. By granting to the courts the power of judicial review, the people have given the courts not only the responsibility for interpreting the people's instructions to their agents, but also the responsibility for ensuring that the people's other governmental agents stay within the bounds of their respective authority.

Thus, on this view, when a court strikes down a congressional enactment, the court is not exercising its own judgment or engaging in undemocratic highhandedness, but rather concluding that the people's instructions to Congress forbid Congress from passing that particular law. Indeed, the only way a court could act undemocratically in this sense would be for it to fail to observe the wishes of the people by letting stand a law that the people have instructed the court to condemn, or by striking down a law that the people have authorized Congress to enact. In such cases, as originalists often point out, the court would be substituting its own choices for those of the people and usurping popular authority.

Originalist political theory further states that usurpation by governmental agents of the authority of their principals, the sovereign people, can deprive the government of the consent of the governed and thus of political legitimacy. The loss of political legitimacy entails the loss of the right to demand obedience, which in extreme cases could lead not only to widespread disobedience but to ample justification for revolution itself. For those who view the process of judicial review in this way, the stakes are quite high. It is thus

---

87 See supra notes 38-42 and accompanying text.
88 See, e.g., The Federalist, supra note 36, No. 78, at 467 (A. Hamilton) ("the courts were designed to be an intermediate body between the people and the legislature, in order . . . to keep the latter within the limits assigned to their authority"); Bork, supra note 6, at 2-3.
90 See J. LOCKE, supra note 38, §§ 197-98, at 110-11 (whoever obtains or exercises power in a manner not authorized by the people has no right to be obeyed); § 243, at 139 (upon forfeiture through miscarriage by the legislature, the legislative power reverts to the people); see also Bork, supra note 6, at 6 (nonoriginalist Court is "perpetrator of limited coups d'etat"); the only possible response for a citizen who does not share the
vitaly important for originalists that judges "get it right"—that they make decisions that accurately reflect the will of the sovereign people.

But how exactly should a court decide cases to assure that its decisions accurately reflect the will of the people? Originalists contend that courts can maintain fidelity to the will of the people only by adhering to original intent, which they view as currently authoritative by virtue of the "carry-forward" process outlined in the previous Part. As we shall see, however, this conclusion does not necessarily follow from originalist political premises.

B. \textit{Grudging Consent and the Generation Gap}

Simply because the current generation has consented to carry forward the terms of the original understanding of the Constitution does not suggest that all members of the current generation hold all the same views as the members of the founding generation about the best way to structure our society and government. It is quite possible that a majority of Americans disagrees with the original understanding of many constitutional provisions. For example, as we said earlier, most Americans today probably view flogging as a cruel punishment even though, according to originalists, they have in some sense consented to live under a constitutional regime in which flogging is not considered cruel and in which they themselves may be flogged some day.

The result of this disjunction is a sort of "generation gap," in which society at any given time contains a certain number of majorities, or supermajorities, that dissent from various aspects of the original understanding of the constitutional scheme. This would come as no surprise to originalists, who stress the constitutional amendment process as the proper way to update the Constitution; obviously, the process of constitutional amendment itself contemplates the coalescence of supermajoritarian dissent from some aspect of the reigning constitutional scheme.

The existence of these generation gaps has implications for the enterprise of constitutional interpretation. The aim of this enterprise, as noted above, is to determine the powers of and enforce the restraints on government according to the terms of the people's consent. In one very important sense the terms of consent are those of the original understanding which have been carried forward by new members upon entry into society; all members of society have by hypothesis consented to be ruled by a government operating under a set of instructions having a current meaning identical to the original meaning. Nevertheless, on these assumptions, a society containing such a generation gap would equally consent to be ruled by a government operating under a Constitution that means something slightly different from what it meant at the time of the founding.

Let us reconsider for a moment the concept of consent. Political legitimacy on the originalist model, as we have seen, depends upon the consent of Court's moral and political views is to "ignore the Court whenever he can get away with it and overthrow it if he can").
the governed, and consent, especially the type of actual consent we have been postulating, refers to a current state of mind of the citizen. Yet the carry-forward process contemplated by originalism leaves most citizens in a curious and complicated state of mind. On the one hand, they have consented to be ruled under a particular existing regime; on the other hand, they dislike some or many aspects of this regime, and would prefer to live under a regime that conformed to all rather than just some of their preferences. The existence of this dual state of mind in society's members raises an important question about what we mean when we seek to determine the terms of popular consent. Do we mean the understanding of the Constitution to which the people have assented in spite of their reservations and disagreements—the

91 See J. Locke, supra note 38, § 141, at 81 (governmental power is "derived from the people by a positive voluntary grant"); A. Sidney, Discourses Concerning Government 2:6, at 84 (Arno Press 1979) (1698) ("[i]t is not therefore the bare sufferance of a Government . . . , nor silent submission when the power of opposing is wanting, that can imply an Assent, or Election, and create a Right; but an explicit act of Approbation, when Men have ability and courage to resist or deny"); see also H. Beran, supra note 43, at 60 (acceptance of membership which does not involve knowing assent to the requirements of membership does not create a self-assumed obligation to obey the state); R. Flathman, supra note 81, at 220; Simmons, supra note 43, at 803. For a discussion of the various states of mind that might be considered consensual, see generally P. Partridge, Consent and Consensus 32-39 (1971).

John Simmons has argued that there is a distinction between the "attitudinal" and "occurrence" aspects of consent, and that only the latter, by which he means voluntary acts, can give rise to political obligation. J. Simmons, Moral Principles and Political Obligation 93 (1979). While his account is helpful in highlighting the aspects of consent that distinguish it from acquiescence or approval in other theories, cf. D. Hume, Of the First Principles of Government, in Hume's, Moral and Political Philosophy, supra note 73, at 307 (the ultimate basis of government is "opinion"), it seems incomplete. Regardless of whether an act is required to give the type of consent that gives rise to political obligation upon entry into society, political obligation undertaken by such consent continues until revoked. On Simmons' account, this means one of two things. Either consent once given takes on a Hobbesian irrevocability, see T. Hobbes, Leviathan, chs. 13-17, at 104-43 (Bobbs-Merrill 1958)—a conclusion that consent theorists since Locke have rejected—or consent must be continually reaffirmed by appropriate acts. This latter possibility comports poorly with conventional understandings of consent, although perhaps this fact indicates only that there are no widely shared conventions governing the creation of binding tacit, as opposed to express, consent. See H. Beran, supra note 43, at 137; R. Flathman, supra note 81, at 224.

Simmons' conclusion also seems to violate the postulate of free will that underlies most versions of consent theory by suggesting that an individual cannot by will alone withdraw his consent, but must act (or cease to act) to effectuate the decision. See J. Simmons, supra, at 62-64. Thus, there seems to be some aspect of consent, or at least of continuing consent, that is "attitudinal" as Simmons uses the term. On the other hand, it is also possible that consent is not the only source of political obligation, and that such attitudes unaccompanied by acts may be relevant to some nonconsensual basis for a continuing obligation to obey the state.
understanding to which they have given their "grudging" consent? Or do we mean the constitutional understanding that the people would implement right now if suddenly called upon to do so—the understanding to which they would give their "whole-hearted" consent?

Even if we conclude, as I think we must, that grudging consent is sufficient to confer political legitimacy on a regime, it certainly cannot be considered superior to whole-hearted consent as a basis for legitimacy, and, under the model of consent-based positivism set out above, it seems clearly worse. Just because legitimacy requires some threshold level of consent does not mean that one regime cannot be more legitimate than another, depending upon how enthusiastically its people support it. If the mission of the courts, under consent theory, is to assure political legitimacy by implementing and enforcing the people's current will, the existence of a generation gap might be precisely the kind of information a court needs in order to do the best possible job.

Yet if originalists are united in anything, it is in their complete rejection of the legitimacy of judicial inquiry into the existence or content of potential generation gaps. If such gaps exist, they maintain, the people's only recourse is to amend the Constitution. But what is the basis for this conclusion? As a theoretical matter it seems to make little sense. While it is true, as we saw earlier, that in a large society the terms of current consent are likely for practical reasons to track those of the original consent, the existence and

92 According to most accounts of consent theory, the type of grudging consent under discussion would not impair the validity of political authority or obligation unless it reached the point of duress. See supra note 75. Of course, many writers feel that consent is impossible in the modern world because no one really has any free choice about whether to join a society or which society to join. See, e.g., D. Hume, supra note 73, at 363 (arguing that government is established by force and necessity, not consent); Simmons, supra note 43. The distinction between grudging and whole-hearted consent bears some resemblance to Simmons' distinction between "occurrence" and "attitudinal" consent. See supra note 91. Simmons argues that occurrence consent is the type that gives rise to political obligation. J. Simmons, supra note 91, at 79-100.

By suggesting that courts may take account of attitudinal varieties of consent, I am not suggesting a shift from originalism's theory based on actual consent to one based on hypothetical consent. Hypothetical consent theories view political obligation as based on the goodness of the government rather than the consent of the governed—that is, one owes obedience to governments to which one ought to consent. See, e.g., Pitkin, supra note 74, at 999 ("[l]egitimate government is government which deserves consent"). The whole-hearted consent I discuss here is actual, not hypothetical. What is in a sense hypothetical, however, is the act by which such consent is expressed. Rather than finding expression through adoption of a constitutional amendment, such consent is voiced through a court acting to ascertain the people's will.

93 Thomas Jefferson alluded to such a distinction: "all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." The Declaration of Independence para. 2 (U.S. 1776).
popular toleration of this fact does not bind members of the current generation to follow the paths laid down for them long ago. The very notion of popular sovereignty means that autonomous, self-governing individuals possess the reason and the will to make fundamental political choices for themselves. To suggest, then, that courts must adhere to the original.

Originalists are fond of pointing to John Marshall's famous comment that the Constitution was "intended to endure for ages to come," McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819), and to Madison's remark that if "the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide to expounding it, there can be no security for a consistent and stable [government]." Letter from James Madison to Henry Lee (June 25, 1824), reprinted in THE WRITINGS OF JAMES MADISON 190, 191 (G. Hunt, ed. 1910). But Marshall and Madison were among the most forceful and influential exponents of consent-based positivism. Marshall's decision in McCulloch, for example, is one of the most straightforward and influential expositions of consent-based positivism to be found in the writings of the founding generation. See McCulloch, 17 U.S. at 403-05 ("The government of the Union, . . . is, . . . a government of the people. In form and substance it emanates from them."). Similarly, Madison's embrace of consent-based positivism is clear throughout his writings. See, e.g., THE FEDERALIST, supra note 36, No. 37, at 227 (republican liberty requires that all power derive from the people), No. 49, at 314 (people are the only legitimate source of governmental authority). Unless these statements are radical departures from the primary political theory held not only by these two men but by the vast majority of the founders, see generally G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1789 344-89, 543-47, 593-615 (1969), the statements must be understood to express only the hope, and perhaps the conviction, that future generations would accept the Constitution as the best possible constitution to live under. See Hamburger, The Constitution's Accommodation of Social Change, 88 Mich. L. Rev. 239 (1989). But Marshall's and Madison's remarks hardly suggest that the founders thought that future generations must be slaves to the founders' intent because of some inherent authority that they as founders possessed. See Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985) (arguing that the assumption that the framers expected that the Constitution would be construed according to what future interpreters could learn of the framers' intent is historically incorrect).

Although he was not a participant in the drafting of the Constitution, Thomas Jefferson also strongly believed that one generation lacked the power to bind another. See Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), reprinted in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 488, 491 (A. Koch & W. Peden eds. 1972) (stating that "no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation"); Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), reprinted in id. at 675 ("Each generation is as independent of the one preceding, as that was of all which had gone . . . before. It has, then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness."). For this reason, Jefferson argued that a constitution should contain a provision for its revision every 19 or 20 years, corresponding to the passing of each generation. Id.

understanding is to suggest the very sort of Burkean prescription which is antithetical to the notion of governmental legitimacy based on the current consent of the governed. As our own founding amply demonstrates,96 no form of government need be considered binding on the people merely because it is old, or established, or original.

Although originalist political theory does not, as I have argued, compel the anti-updating rule, the rule is not necessarily inconsistent with originalism. In fact, there are two possible justifications for the rule that are fully consistent with the premises of consent-based positivism. The first possibility is that courts may give effect only to the original terms of consent as originally understood because that is what the people want the courts to do—the rule happens as a factual matter to be a part of their instructions. The second possibility is that courts must look only to the terms of original consent because that method is, practically speaking, the most consistently reliable method available to the courts to ascertain and implement the people's current will. Both these possibilities yield the conclusion that the anti-updating rule is at bottom a rule expressing, for pragmatic reasons, a requirement that the people's instructions to the courts be in writing.

C. Originalism's Preference for Written Instructions

Suppose we were able to conclude that it is the wish of the sovereign people that the courts apply the anti-updating rule in constitutional cases. That is, the people at the time of the founding wanted the courts to implement their instructions as the people themselves then understood them, and subsequent generations then carried forward this interpretational instruction, sometimes referred to as the founders' "meta-intent."97 Thus, courts today are bound to adhere to the original understanding not so much because the founders wanted it that way, but because the current generation has made the founders' wish its own.

At the outset it is worth noting that this position presents an interesting conundrum. As noted earlier, the process by which original intent is carried forward allows for the opening of generation gaps with respect to particular

96 I refer here to both the throwing off of the British constitution by the American colonies, and the subsequent discarding of the Articles of Confederation in favor of the Constitution.

97 The term "meta-intent" appears most frequently in the literature of statutory interpretation to refer to legislative directives concerning rules of construction. See, e.g., Eskridge, Spinning Legislative Supremacy, 78 GEO. L.J. 319, 324 (1989); Farber, Statutory Interpretation and Legislative Supremacy, 78 GEO. L.J. 281, 309-17 (1989). The concept, however, is common in the literature of constitutional interpretation as well. See, e.g., Brest, supra note 8, at 215-16 (the first task of an intentionalist interpreter is to determine the interpretive intentions of the adopters); Farber, supra note 1, at 1089-91 (noting that originalism itself can be examined from an originalist perspective by asking whether the framers believed that their own intentions should control constitutional interpretation); see also infra note 99.
aspects of the original terms of consent. Logically, however, a generation gap could also open with respect to the people’s interpretational meta-intent as easily as it could open with respect to the scope of the eighth amendment’s ban on cruel and unusual punishment. A generation gap of this sort would suggest that although the people have consented to be ruled by a government following a set of instructions which is to be interpreted according to the original understanding, they would in fact currently prefer, and would therefore consent, to be ruled instead by a government following those instructions as the people understand them now. But the only way a court could discover the existence of such a generation gap would be to attempt to determine the people’s current meta-intent, a judicial action that would itself violate the very meta-intent that originalism presumes the people to maintain.

But let us set this possibility aside, and simply assume that, whether as a result of the carrying forward of a term of the original consent or because they currently think it a good thing, the people presently wish courts to take the terms of current consent to be the same as those of the original consent, unless altered by constitutional amendment. This is certainly originalism’s strongest and most consistent basis for its prophylactic rule of constitutional interpretation: adherence to original intent is a direct and current command of the sovereign people, a violation of which constitutes judicial usurpation of authority in derogation of the legitimacy of the present government.

But let us consider this interpretational meta-intent more closely. Originalism’s underlying political theory assumes that society’s members are rational self-governors who out of necessity employ agents to implement

98 Of course, the people’s interpretational meta-intent might be parasitic on their substantive preferences with regard to particular constitutional provisions. Thus, if the people dislike the original understanding of a particular provision, they might be disinclined toward a meta-intent that would fix that provision with its original meaning. Conversely, if they approve of the original understanding of a provision, they might be tempted to adopt a meta-intent that would prevent judicial tinkering with the meaning of that provision.

99 There is evidence that the founders did not intend that their intentions be the exclusive measure of the meaning of the Constitution. See Powell, supra note 94; Sherry, The Founders’ Unwritten Constitution, 54 U. CHI. L. REV. 1127 (1984) (arguing that the framers saw natural law, not their own subjective intent, as the source of constitutional law). But see Berger, “Original Intention” in Historical Perspective, 54 GEO. WASH. L. REV. 296, 333-35 (1986) (arguing that Madison, Hamilton and Iredell intended the Constitution to be binding on the people until changed by amendment); Rotunda, Original Intent, the View of the Framers, and the Role of the Ratifiers, 41 VAND. L. REV. 507, 516 (1988) (“History does not support the position of those . . . who claim that the framers and ratifiers did not intend the judiciary to look at original intent.”). For an intermediate position, see Clinton, Original Understanding, Legal Realism, and the Interpretation of “This Constitution,” 72 IOWA L. REV. 1177 (1987) (arguing that originalist and nonoriginalist views are both too extreme, and that the framers intended both flexibility and stability in constitutional interpretation).
their wishes. Presumably, rational principals would prefer that their agents act at all times consistently with their actual wishes. Yet by postulating a meta-intent in favor of the original understanding of the Constitution unless varied by a subsequent amendment, originalism holds that the sovereign people have essentially issued standing instructions to their governmental agents in the following terms: "Do what I said, not what I want." Or, perhaps more accurately: "Do what I said, and don't worry about whether what I said is what I want."

Why would a rational principal instruct an agent to follow literally an old set of written instructions until updated by new written instructions even when the principal might now prefer that the agent act differently? The most plausible reason is that the principal fears that the agent will do something that the principal does not want the agent to do. So strong is this fear that the principal prefers the agent to continue doing things that the principal no longer wishes the agent to do, rather than allowing the agent the discretion to try to meet the principal's current desires when there is a risk that the agent will misunderstand or mistake the principal's current desires in some unforeseen way.

Consent-based positivism offers a ready explanation for such fears. Political legitimacy, on originalist assumptions, depends upon the consent of the governed. It would be best, of course, for the government to conform entirely to the terms on which the current consent of the people would most satisfactorily be based. On the other hand, it is often difficult to determine the terms of current consent, and courts could err in trying to deduce such terms. Such an error would permit the government to act in a way that does not command the consent of the governed, thereby undermining the government's political legitimacy. To avoid the possibility of such errors, the people might adopt a rule requiring the courts faithfully to adhere to the people's last set of written instructions, even if those instructions no longer meet with full popular approval, on the theory that the courts are less likely to fall into serious error under such a rule than if they had free rein to do whatever they thought necessary to implement the people's current wishes.100

What originalism boils down to, then, is a preference for a writing. It is a constitutional form of the Statute of Frauds, according to which only the written instructions of the people, as expressed in the text of the Constitution or in amendments, are entitled to legal force. And this rule is based on the theory that it is less dangerous for courts to adhere to instructions that the

100 For a more extended discussion of the types of strategies that principals might want to use to control the discretion of their agents in the context of legislative supremacy, see Eskridge, supra note 97, at 327-30; see also Schauer, Formalism, 97 YALE L.J. 509, 544 (1988) (formalism is desirable if the goal is to limit decisional opportunities of certain classes of decisionmakers).
people once issued but have since abandoned than it is for them to invent and enforce instructions that the people never issued and do not accept.\(^{101}\)

Although originalism can provide coherent and internally consistent grounds for employing a statute of frauds-type rule of original intent, it by no means follows that those same grounds suffice to justify the iron-clad prophylactic rule against judicial updating championed by most originalists. I shall argue in the next Part that originalists overestimate the benefits of their requirement of a constitutional writing, and that the goals of originalism might be better served by a more flexible approach to constitutional decisionmaking.

V. ORIGINALIST JUSTIFICATIONS FOR DEPARTING FROM ORIGINALISM

A. The Benefits and Costs of Originalism

Originalists view the protection of political legitimacy as the principal benefit of the anti-updating rule. Even if the current preferred understanding of a particular constitutional provision differs from the original understanding, a court’s adherence to original intent results in the commission of known errors, which originalists prefer to the unknown errors that a court might commit if it had license to attempt to update the provision to conform to contemporary preferences. Because the original understanding has been carried forward by subsequent generations, adherence to that understanding guarantees conformity at least to the grudging consent with which the original understanding was adopted by the current generation. Courts thus preserve a minimum level of governmental legitimacy by employing the anti-update rule.

This argument, while sound up to a point, overstates the benefits for legitimacy that originalism purports to provide. First, originalists often speak as though the anti-updating rule absolutely guarantees political legitimacy. That is not the case. A government is legitimate when it has the consent of the governed—period. There is no rule, either of positivist political theory or of logic, that requires a people to consent to a particular constitutional regime.\(^{102}\) Nor does such a rule arise solely because a people’s ancestors

---

\(^{101}\) Compare Bruckel, The Weed and the Web: Section 2-201’s Corruption of the U.C.C.’s Substantive Provisions—the Quality Problem, 1983 U. ILL. L. REV. 811, 840 (“Historically, endorsement or abhorrence of the statute [of frauds] has depended upon which of two evils one viewed as the worse: the successful assertion of false claims or the successful escape from legitimate ones.”).

\(^{102}\) Some theorists who write from the perspective of hypothetical consent claim that there are certain types of governments or constitutions to which a rational person would and should consent. See, e.g., J. RAWLS, A THEORY OF JUSTICE (1971); Pitkin, supra note 74, at 999 (“Legitimate government is government which deserves consent”). Hypothetical consent theories thus provide a basis for claiming that a regime that meets certain moral criteria is entitled to exercise legitimate political authority, and justly to demand obedience. Actual consent theories look in contrast to the act of the citizen rather than the nature of the regime as the source of legitimate political authority and
founded and consented to a particular system. As Thomas Jefferson put it, the people have the right "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." Whenever the people become dissatisfied with a regime they can revoke their consent, regardless of whether or when they created that regime. No rule of constitutional interpretation can alter this political fact.

Second, a stiff-necked judicial adherence to the original understanding has the potential to create a sort of institutional ossification that could have the unintended and wholly undesired consequence of actually increasing popular dissatisfaction with the current regime. If current sentiment runs against the original understanding of a particular constitutional provision, judicial fidelity to the old understanding may serve as a continual irritant, one which might, in extreme cases, tend to erode consent, and thus legitimacy.

---

103 The Declaration of Independence para. 2 (U.S. 1776). This is not necessarily inconsistent with the views of hypothetical consent theorists like Pitkin or Rawls, supra note 102; even on their view, there must be some level of specificity in institutional structure at which it simply makes no difference to the goodness or justness of the regime what institution is adopted.

104 Of course, the possibility of such revocation ought not to obscure the consequences. As Jefferson wrote: "Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes." The Declaration of Independence para. 2 (U.S. 1776).

105 Chief Justice John Marshall himself, a favorite of originalists, seems to have suggested that the Constitution was intended to be a flexible document:

[The Constitution was] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.... If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415-16 (1819). Originalists tend to read this language narrowly to suggest only that the Constitution is capable of application to factual circumstances unforeseen by the founders, not that the substantive content of the document can change to fit contemporary needs. See, e.g., Rehnquist, supra note 2, at 694-95; Scalia, supra note 2, at 853; see also Munzer & Nickel, supra note 11, at 1032 (constitutional rigidity undesirable).

106 A powerful example of the ability of the judiciary to exercise its powers in a way that undermines popular consent is of course Dred Scott v. Sandford, 60 U.S. (19 How.)
A second benefit of the anti-updating rule is that it provides courts with a bright-line rule that allows them to avoid some very difficult evaluations of the current state of consent. A rule of constitutional decisionmaking that permits courts to rely on current norms and preferences would, of course, require the courts to ascertain the content of those norms. This is much easier said than done. In the first place, every constitutional case conducted under such a rule would involve two competing claims about the contours of current consent. For instance, one party would claim that "evolving standards of decency" hold flogging to be cruel, while the other party claimed that flogging is consistent with such standards.  

Further, an integral function of the courts in constitutional cases is to identify and reject false claims about the terms of popular consent expressed in the Constitution. An important purpose of the Constitution is to place certain rights and institutional decisions beyond the reach of temporary popular majorities—to protect the cool and reasoned deliberations made in what Sotirios Barber has called "the constitutional frame of mind" from hasty decisions made under the influence of popular passion. Allowing the Court to update the Constitution to conform to the terms of current consent would require it to distinguish between those popular views that are based on passion, and thus not part of the "real" terms of consent, and those that are sufficiently mature and reflective to take their place beside other full-blown constitutional principles. The difficulty, to say nothing of the danger, of such an enterprise is obvious, and originalism's bright line anti-updating rule allows courts to avoid such decisions. 

With the benefits of originalism, however, come certain costs. First, the anti-updating rule prevents courts from conforming the Constitution to the requirements of whole-hearted, current consent. The anti-updating rule is based on the fear that courts may get it wrong, but it is also possible for

393 (1857) (a freed slave is not a "citizen" within the meaning of the Constitution), a decision which contributed to the outbreak of the Civil War. By way of comparison, one might ask what would have happened if the Supreme Court in Brown v. Board of Educ., 347 U.S. 483 (1954) (racially segregated schools are inherently unequal and, therefore, violative of the Constitution), had adhered to its earlier decision in Plessy v. Ferguson, 163 U.S. 537 (1896) ("separate but equal" accommodations are constitutionally acceptable), assuming that Plessy in turn adhered faithfully to the original intentions of the framers of the fourteenth amendment. See R. Berger, Government By Judiciary, supra note 6, at 126-29.  


109 See, e.g., The Federalist, supra note 36, No. 10 (J. Madison) (arguing that the most important advantage of a well-designed Union is the tendency to break and control factionalism); C. Black, The People and the Court 105-07 (1960) (noting the importance of binding legal limitation on the power of immediately elected government); S. Barber, supra note 108, at 198; Bork, supra note 6, at 2-3 ("There are some things a majority should not do to us no matter how democratically it decides to do them.").
courts to get it right—they might accurately discern a permanent shift in the people's mature wishes and by updating the constitutional provision accordingly, make the Constitution into a document that commands the current whole-hearted consent of the people.\textsuperscript{110} Such an outcome would increase the happiness and stability of society, as well as the overall legitimacy of the government and its actions.

Second, the anti-updating rule places enormous emphasis on the constitutional amendment process. But the amendment process is largely inadequate to meet originalism's ultimate goals. The anti-updating rule requires the people to amend the Constitution whenever they want to update it to conform more closely to their current wishes. There are two difficulties with this aspect of the rule. First, it will rarely be worthwhile for any group to undertake the costly process of pushing a constitutional amendment through to ratification. Most instances in which current consent differs from the original understanding are likely to concern relatively minor constitutional provisions, or applications of those provisions that affect comparatively few people.\textsuperscript{111} These factors combine to discourage most people from undertaking the expense and effort of shepherding an amendment through the legislative and ratification processes for what will in most instances be a relatively slight payoff.

Second, even when a constitutional change is desired strongly enough to prompt action, there are many ways in which the political process itself can frustrate the amendment process.\textsuperscript{112} Political logrolling, imperfect access to the political arena among unpopular groups, and other procedural impediments may prevent an amendment from being considered or adopted. Of the more than 5,000 constitutional amendments that have been proposed in Congress since 1789, only twenty-six have been ratified.\textsuperscript{113} It is inconceivable that all of the unadopted proposals failed solely because of some uncanny ability of the amendment process accurately to reflect the lack of supermajority support among the general populace.\textsuperscript{114}

\textsuperscript{110} This is of course the same objection often made to the Statute of Frauds. See Bruckel, supra note 101; cf. Chemerinsky, supra note 64, at 1250 (asserting that a critical question for constitutional interpretation is which risks of error are more acceptable, those of the judiciary or those of the legislature).

\textsuperscript{111} For example, even if everyone agreed that the equal protection clause should apply to discrimination against recent Vietnamese immigrants, the number of individuals directly affected by the scope of the clause on this issue is small relative to the population as a whole. Other examples might include the provisions establishing the length of the terms of elected officials. People might agree that it would be somewhat better for the President to serve a five-year term or for representatives to serve for three years instead of two, but most who held such views would probably not think them a high priority for political action.

\textsuperscript{112} See generally J. ELY, supra note 47, at 77-88.

\textsuperscript{113} Pringle, Americans Fired Up to Protect Old Glory, THE INDEPENDENT, June 17, 1990, at 11.

\textsuperscript{114} See Brest, supra note 8, at 236-37 (stating that "the formal process of amendment
If, as I argue, the amendment process is not a terribly efficient vehicle for conforming the Constitution to the terms of current consent, then originalism places the people in an uncomfortable position: they must live under the rule of agents who will respond only to specific written instructions, yet they lack a truly effective way to put new instructions before those agents. What results is a prescription for popular frustration with government—exactly the opposite of what originalism is intended to accomplish.

All this suggests that a rigid anti-updating rule, though not without benefits, accomplishes a good deal less in the way of assuring political legitimacy than originalists contend, and indeed may well have the opposite effect of eroding the popular consent on which legitimacy rests. Although this conclusion hardly means that the rule serves no purpose, it does cast doubt upon the need for the prophylactic version of the rule for which originalists typically argue. Originalism’s goal of assuring political legitimacy might be better served by a more flexible approach to constitutional updating, one that would permit courts to consider the terms of the people’s current consent when to do so would enhance rather than undermine legitimacy. The real challenge to originalism, then, is to define when and under what circumstances the anti-updating rule may be relaxed, rather than whether it may be relaxed—to provide a theory of what Justice Scalia has self-mockingly called “faint-hearted originalism.” In the next section, I suggest some factors that might influence the formulation of such a relaxed anti-updating rule.

is too cumbersome to bear sole responsibility for constitutional change”); Carter, supra note 83, at 841-42 (stating that the complexity of the amendment process discourages even amendments with broad popular support); Sandalow, supra note 7, at 1046 (the amendment process is poorly suited to protect minorities against injuries sustained as a result of legislative inaction or neglect); Simon, Authority of the Framers, supra note 55, at 1501, 1509 (early originalists did not anticipate economic and political diversity in formulating the amendment process).

By way of comparison, the Statute of Frauds, which aims at preventing the successful assertion of false contractual claims, see generally Bruckel, supra note 101, is itself an exception to the general rule that writings are not required to form a binding contract. Moreover, the Statute is riddled with exceptions even where it applies. See, e.g., U.C.C. § 2-201; CAL. CIV. CODE § 1624 (West 1985) (California Statute of Frauds and related decisions); ILL. ANN. STAT. ch. 59, ¶¶ 1, 2 (Smith-Hurd 1988) (Illinois Statute of Frauds and related decisions); N.Y. GEN. OBLIG. LAW § 5-703 (McKinney 1989) (New York Statute of Frauds and related decisions). This suggests that experience has taught what should be obvious anyway: that a prophylactic requirement of a writing would be an unworkable rule of contract. For more on the Statute of Frauds, see generally Perillo, The Statute of Frauds in the Light of the Functions and Dysfunctions of Form, 43 FORDHAM L. REV. 39 (1974) (arguing that the requirement of clear and convincing evidence should be substituted for the requirement of a writing).

Scalia, supra note 2, at 861.
B. When to Bend the Rules: Some Preliminary Thoughts

1. The Congressional Paradigm

The object of a relaxed anti-updating rule would be to achieve a happier and more stable society in which the governed give their whole-hearted consent to the ruling regime, while avoiding the dangers of judicial usurpation of popular authority. The principal difficulty in developing such a rule is the inescapable fact that any judicial updating of the Constitution requires courts in some way to ascertain the people’s wishes without the benefit of an authoritative written statement of those wishes.

Originalists, of course, question whether unelected judges can possibly determine the people’s will without specific written guidance. Originalists point for their model to Congress, which is elected, accountable, and designed to be responsive to popular desires. Courts, originalists argue, fall so far short of this legislative paradigm that they are incapable of performing the task of discerning the people’s wishes.

Congress itself, however, is far from the infallible barometer of popular opinion described by originalists, and to rely on Congress as a model of accountability and responsiveness grossly distorts the standard to which other institutions such as the judiciary should be held in discerning the people’s current will. First, members of Congress normally get their information about their constituents’ wishes in anecdotal and unsystematic ways—for example, through phone and mail contacts by self-selecting and highly motivated constituents and interest groups, or through conversations with unrepresentative friends, colleagues and acquaintances. Opinion polls, a somewhat more systematic method of obtaining information, are so notoriously sensitive to the wording of questions as to be of doubtful utility; they

---

117 See, e.g., Rehnquist, supra note 2, at 699 (the Constitution is designed to enable the legislature rather than the judiciary to deal with the problems of changing society); see also J. ELY, supra note 47, at 4 (the policy-making power of elected, representative institutions is a distinguishing characteristic of a constitutional system); Maltz, supra note 25, at 819-21 (analyzing defenses of interpretivism that argue that “judges should defer to the policy decisions of electorally accountable governmental officials”).

118 See, e.g., Rehnquist, supra note 2, at 698-99, 706; Nomination of Bork, supra note 4, at 371-72 (remarks of Monaghan); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 10 (1980) (“Although the Supreme Court may play a vital role in the preservation of the American democratic system, the procedure is in conflict with the fundamental principle of democracy—majority rule under conditions of political freedom.”); see also J. ELY, supra note 47, at 4-5; Scalia, supra note 2, at 863-64.

119 Professor Barber has argued that polls are by their nature inadequate tools to measure accurately the people’s mature and reflective views on the meaning of the Constitution: “[I]t would probably take a lengthy dialogue with a trusted and friendly critic to bring out [the people’s] real views about what the Constitution means and ought to mean.” S. BARBER, supra note 108, at 48.

are also expensive and underutilized in any event outside the campaign context. Elections themselves are also highly imperfect indicators of popular support for any or all of an elected candidate's positions on the issues.\textsuperscript{121}

Even if Congress could obtain consistently reliable information about the people's wishes, it is not at all clear that Congress would or should always act consistently with those wishes. Wholly apart from the structural impediments to majoritarian rule created by our political institutions,\textsuperscript{122} our system of government embraces a long-established tradition of legislative independence in which elected representatives are viewed as more than the people's messengers or scribes. Instead, legislators are elected at least in part because of their knowledge, wisdom, and devotion to the common good, and it is expected that from time to time these qualities will cause legislators to vote in ways that directly contradict the wishes of a majority of their constituents, even when those wishes are reliably known.\textsuperscript{123}

\textsuperscript{121} See K. Arrow, \textit{supra} note 84, at 2-3 (stating that the "paradox of voting" is that when individuals cast votes among two or three choices, the result can be a social decision that a majority actually voted against).


\textsuperscript{123} This view of the role of the elected representative is most strongly associated with Edmund Burke. According to Burke, "[y]our representative owes you, not his industry only, but his judgment; and betrays, instead of serving you, if he sacrifices it to your opinion." E. Morgan, \textit{Inventing the People} 218 (1988) (quoting 2 \textit{Works of Edmund Burke} 95 (1839)). This view goes back at least to the Socratic model of benevolent and enlightened governmental leadership. See, e.g., \textit{Plato's Republic}, Bks. 2-3 (G.M.A. Grube trans. 1974). The view of the representative as free to vote against the wishes of his constituents fell partially into disfavor in America by virtue of its association with the English defense of the parliamentary system of "virtual representation." According to the theory of virtual representation, the interests of the American colonies were represented in Parliament even if the colonists themselves elected no representatives because Parliament's job was to look out for the interests of all English subjects at all times. See E. Morgan, \textit{supra}, at 240-45.

The rejection of virtual representation led the founders to stress frequent popular elections as a way to ensure the legislature's "dependence on, and . . . intimate sympathy with, the people." \textit{The Federalist}, \textit{supra} note 36, No. 52, at 327 (J. Madison). Of course, the founders' concern did not extend to the assurance of universal suffrage, thus putting all women, most blacks and many of the poor under the very system of virtual representation Americans had condemned when practiced by the English. See, e.g.,
Finally, to the extent that Congress accurately reflects popular wishes, our political system contemplates that Congress is at least as worthy of suspicion as it is of respect. Congress is the main vehicle by which the people express their transient passions and write them into law. But these passions differ by definition from what our political system understands to be the people's genuine, reasoned, long-term desires—which is why the institution of judicial review permits courts to strike down federal laws even when they are passed unanimously. Thus, the responsiveness of Congress to popular desires does not necessarily argue for its competence at distinguishing the people's all-important constitutional frame of mind.

2. Ways of Knowing the People's Wishes

These observations suggest that if we are to take seriously the originalist assumption that the will of the people is knowable, we must nonetheless acknowledge that any institution is likely to face considerable difficulty in discerning any of the people's wishes, much less their true, reflective constitutional wishes. But the difficulty of the job, as originalists often proclaim when defending the process of historical inquiry into the founder's intentions, is not a justification for shirking it.\textsuperscript{124} Indeed, originalists cannot logically maintain that judges are unable accurately to divine the people's current intentions when originalists view similar inquiries into the intentions of a generation two hundred years old as eminently feasible.\textsuperscript{125} A method

\textsuperscript{124} See, e.g., Meese, Construing, supra note 3, at 26 (acknowledging the importance of applying the principles expressed in the Constitution); Scalia, supra note 2, at 856-57, 863; see also Kay, supra note 5, at 236-43; Maltz, supra note 7, at 796.

\textsuperscript{125} In a recent book, Raoul Berger criticizes the Supreme Court for attempting to discern the contours of a contemporary social consensus about what types of punishment should be considered cruel and unusual. R. BERGER, DEATH PENALTIES, supra note 6, at 122-27. Although he derides the Court's conclusions in Furman v. Georgia, 408 U.S. 238 (1972), as "tea-leaf readings of public sentiment," \textit{id.} at 125, Berger focuses more on what he regards as the impropriety of the Court's departure from original intent than on any errors the Court may have made in divining contemporary popular will concerning the death penalty.

Berger's position is at times inconsistent. At one point, he notes that a judge's search for society's values leads only to discovery of the judge's personal values. R. BERGER, DEATH PENALTIES, supra note 6, at 123 (quoting Ely, \textit{Foreward: On Discovering Fundamental Values}, 92 HARV. L. REV. 5, 16 (1978)). If Berger's conclusion is true of the search for contemporary social values, one can only wonder how a judge could avoid the same trap when examining the values of the founding generation. Berger also argues that courts are not responsive to the popular will, and are therefore unsuited to the
for determining the contours of the popular will that worked better for ancient problems than for current ones would be strange indeed.

How then, on originalist assumptions, can judges learn the people's current will? Our society is simply too large for any individual or institution to obtain direct evidence of the popular will, so any such knowledge must be based on circumstantial evidence. To judge by recent originalist works, the types of evidence courts would want to consider might be drawn from politics, language, cultural and economic institutions, religion, art, and the like. Illuminating resources would probably include everything from records of debates in Congress, decisions of state courts, and presidential proclamations, to popular books and newspapers. The recency of the events might also permit consultation of scientific studies and other resources—polls, for example. It would be up to originalists, however, to decide whether any but the traditional sources meet their standards of accuracy and reliability.

That is, it would be impossible for any individual actually to canvass the entire population to determine firsthand what everybody thinks.

Any investigation of the practice of originalist history must surely focus on the work of Raoul Berger, probably the originalist who more than any other actually engages in the process of originalist historical inquiry. In the second chapter of *Government by Judiciary*, supra note 6, Berger relies on a wide variety of sources including the following: the text of the Constitution and federal, state and local statutes, id. at 20, 22-36; legislative debates, id. at 22-30; philosophers and legal commentators, id. at 20-21; judicial decisions, id. at 29-34; and writings and public statements of the founders, id. at 21, 28 n.28, 35 n.55. Elsewhere in the work he also refers to: post-enactment public statements of members of Congress who passed the fourteenth amendment, id. at 49-51; analyses of the historical political context, id. at 52-53, 70-71; demographic data, id. at 58; public and private writings and remarks of prominent historical figures, id. at 58, 72 n.8, 87, 88-89, 291; intellectual history, id. at 60, 230-45; the debates at the original constitutional convention, id. at 77-78, 300-02; congressional reports, id. at 84; the Declaration of Independence, id. at 87-88; historical social practices, id. at 123; political pressures faced by key congressional figures, id. at 233-34; historical understandings of words, id. at 270; and state constitutions of the revolutionary period, id. at 287, 352.

One question originalists would have to confront is whether to count as legitimate resources the judge's own beliefs, values and experiences as a participant in the common culture—general resources that judges claim to rely on in any type of decision-making. See B. Cardozo, The Nature of the Judicial Process 113 (1921) (the judge "must
If this type of inquiry into the terms of contemporary popular consent is feasible, then the real controversy centers not on whether it is possible for judges to accumulate useful information about the terms of current consent, but on the question of what degree of judicial certainty regarding those terms can justify permitting judges to take the risks of judicial usurpation associated with updating the Constitution.

C. A Standard for Judicial Updating?

Professor H. Jefferson Powell observed recently that much of the attraction of originalism lies in the promise it holds out for escaping personal responsibility for what often seem like difficult political decisions.129 Originalism allows constitutional decisionmakers to deny that they themselves are making any sort of far-reaching social or political choices; instead, originalism allows them to claim that any such choices were made by the founders long ago and that the current decision-makers merely give effect, as they must, to the founders' will.130 In this way, originalism often reduces constitutional decisionmaking to an empirical inquiry focusing on the beliefs and wishes of the founders. While this feature of originalism does not by itself decrease the possibility of disagreement, it does have the related advantage of moving the plane of disagreement to a somewhat drier and more technical level than it might otherwise occupy. Thus, disagreements among originalists are likely to focus more on the reliability and weight to be accorded particular pieces of historical evidence than on the wisdom of any given constitutional decision.131 This capacity of originalism to reduce controversial constitutional questions to uncontroversial empirical ones operates both when applying originalist techniques to problems of ascertaining the
get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself”). If some originalist approaches to analogous questions of statutory interpretation are any guide, the answer may well be that originalists would not consider the judge’s knowledge and experience of the common culture a legitimate resource. See, e.g., Easterbrook, Statutes' Domains, 50 U. Chi. L. Rev. 533 (1983); see also supra note 125.

129 Powell, supra note 11, at 659-60 (“Originalism’s attractiveness . . . lies in the possibility it seems to offer the judicial interpreter of an escape from personal responsibility.”); see also Maltz, supra note 7, at 779-80 (noting apparent “neutrality” of judicial decision-making using originalist methods).

130 A remark of Justice Black is paradigmatic of this attitude. When asked in a television interview about certain of the Court’s unpopular decisions, Justice Black responded: “Well, the Court didn’t do it . . . . The Constitution did it.” Kay, supra note 5, at 226 (quoting Justice Black and the Bill of Rights (CBS television broadcast, Dec. 3, 1968)); see also Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 705 (1975) (stating that “[u]nder the pure interpretive model . . . , when a court strikes down a popular statute or practice as unconstitutional, it may always reply to the resulting public outcry: ‘We didn’t do it—you did’ ”).

131 For a general discussion of the “intellectually responsible use of history . . . [by] an originalist and interpreter,” see Powell, supra note 11, at 660 passim.
terms of current consent and when applying them to determine the historical intent of the founders.

An important, yet often overlooked, "technical" question that originalists face involves determining the evidentiary standard needed to establish a constitutionally relevant historical intention for purposes of constitutional decisionmaking. That question, always relevant to originalist inquiry, takes on added significance in the context of relaxing the anti-updating rule because the principal justification for the rule is the difficulty of knowing with certainty the unwritten current will of the people.132

Assume that a court has before it an eighth amendment challenge to a law prescribing flogging as a punishment for petty larceny. Assume further that the court is committed to originalism, but is receptive to the idea of a relaxed version of the anti-updating rule for the reasons given in the previous section. The court has received evidence, heard arguments, and conducted its own research, and has concluded, using standard originalist methods, that the punishment of flogging for such a crime cannot be considered cruel according to the original understanding of the eighth amendment. The court, however, has also received evidence on and researched current attitudes concerning what constitutes cruel punishments. The judges are fairly well satisfied on the basis of their study that there is a reflective social consensus among United States citizens today that flogging would be cruel in the circumstances of the case before them. They believe that a ruling updating the language of the eighth amendment to reflect this new consensus would bring the authoritative meaning of the Constitution closer to the meaning that society currently supports. They also agree that the Constitution thus construed would command a greater degree of whole-hearted consent than a Constitution containing an eighth amendment construed according to the original understanding.

On the other hand, the judges must also feel some trepidation. They believe they are right, but what if they are wrong, and the people of the United States really do not view flogging as cruel? If so, then their ruling would reflect their own attitudes rather than those of society, and their decision would, without proper authorization, saddle the people with a version of the eighth amendment that the people have never approved and do not want to live under. But how sure ought the judges be before deciding to update the text?

A full resolution of this question really requires two empirical analyses because in order to know whether a proposed determination would amount to updating at all, originalists must first decide the original meaning of the constitutional text. A strange gap exists in originalist discourse on this point.133 Although originalism utilizes the anti-updating rule for the very

132 See supra text accompanying notes 97-101.
133 See Powell, supra note 11, at 660 (noting that the argument for originalism intrinsically requires the interpreter to determine what the original intent objectively was, before addressing what the Constitution now means).
purpose of eliminating the risk of judicial usurpation, that same risk exists, as many critics have pointed out, even in the seemingly straightforward evaluation of original intent: judges must correctly perform the task of historical reconstruction, or risk interpreting the Constitution according to their own rather than the founders’ lights. Yet, few originalists have attempted to articulate a standard or set of criteria for evaluating the reliability of historical inquiry.

One of the few scholars to address this point, albeit in a somewhat different context, is Earl Maltz, one of originalism’s most articulate and theoretically sophisticated defenders. Maltz has argued at some length that the validity of originalism does not depend on achieving certainty in historical analysis of the founders’ intentions: “[Originalists do not claim to] know with certainty what the drafters would have thought about a particular situation in a particular context . . . . In fact, originalist theory simply directs judges to use their best efforts to determine what the intent of the drafters would be in a particular situation.” Because originalism is nothing more than a “label” connoting “a complex set of conventions, which in turn reflect a political theory about the appropriate function of judges,” originalism does not, he argues, require historical “certainty,” nor does it require the impossible task of judging in a political, historical and cultural vacuum. All originalism requires “is that judges apply the conventions inherent in originalist theory to make their best estimate of the ‘framers’ intent.’”

Maltz does not further elaborate the content of these conventions of originalist judging, and indeed he frankly recognizes a need for originalists

---

134 See supra note 13.
135 See supra note 11, at 661 (noting the Court’s “notorious” misuse of historical interpretation); see also Kelly, Clio and the Court: An Illicit Love Affair, 1965 SUP. CT. REV. 119 (making the classic complaint against legal misuse of history).
136 Maltz, supra note 7, at 796; see also Maltz, supra note 25, at 813 (“Interpretive theory demands neither perfection nor certainty . . . . The interpretivist asks only that the judge make her best effort to divine the Framers’ intent and then apply that intent in the case before her as accurately and faithfully as possible.”).
137 Maltz, supra note 7, at 800.
138 Maltz, The Failure of Attacks on Constitutional Originalism, 4 CONST. COMM. 43, 52 (1987); Maltz, supra note 7, at 796.
139 Maltz, supra note 138, at 52.
140 Id.
141 While Maltz’s view of originalism as a set of conventions grounded in political theory is appealing on its own terms, one might well doubt whether the conventions of originalist judging to which Maltz refers in fact exist. Other than its general admonishment to follow the intentions of the founders and to remain faithful to the text, originalism lacks a set of well-defined rules treating many of the problems inherent in originalist historical research—for example, the questions of whose intentions should count, and how to sum the intentions of a group of individuals. See supra notes 11-12.

Maltz argues that part of originalism’s appeal is its modeling of constitutional interpretation on the familiar principles of statutory interpretation. Maltz, supra note 7,
to develop what he calls, following Mark Tushnet, "supplementary evidentiary rules" for dealing with historical uncertainty. Nevertheless, for our purposes it is clear enough that Maltz views originalism as imposing only a fairly lenient evidentiary standard on the judicial search for the founders' intent. If one had to translate this view into the language of off-the-shelf judicial standards of review, one might say that originalism permits judges to ascertain original intent according to, at most, a preponderance of the evidence standard, but perhaps more nearly the even less rigorous "substantial evidence" standard familiar in administrative law.

Applying this standard to the hypothetical set out above, we could conclude that the founders did not view flogging as cruel if this conclusion rests on substantial evidence. The same standard, however, might not necessarily suffice to support a judicial conclusion that the people now consider flogging to be a cruel and unusual punishment. Originalists might justifiably require a tougher standard for judicial evaluations of the terms of current consent. In the absence of a proposed amendment or other political event bringing an issue to the foreground, the people are unlikely to have focused their attention on the precise question under review. Moreover, the existence of ratifying conventions permits judges to focus their historical research on a

at 788. This defense of originalism may prove problematic, however, as the principles of statutory interpretation do not comprise a clear body of conventions. In fact, the canons of statutory interpretation are often contradictory and puzzling in their applicability and use. See Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed, 3 Vand. L. Rev. 395, 460-62 (1950). This uncertainty has led to a recent explosion in the scholarship of statutory interpretation. See Eskridge & Frickey, Legislation Scholarship and Pedagogy in the Post-Legal Process Era, 48 U. Pitt. L. Rev. 691 (1987) (outlining an agenda for post-legal process legislation scholarship and pedagogy). Maltz argues elsewhere for certain principles of ascertaining legislative intent, but his arguments for these principles are normative rather than conventional. See Maltz, Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach, 63 TUL. L. REV. 1, 2 (1988) (arguing that "courts should apply a slightly modified form of the intentionalist model").

142 Maltz, supra note 7, at 803-04; see also Maltz, supra note 25, at 834-35 (discussing additional "conventions" to refine our conception of the Framer's intent).

143 Administrative Procedure Act, 5 U.S.C. § 706(2)(E); see Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966) (substantial evidence is "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a decisionmaker's] finding from being supported by substantial evidence"); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938) (substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

144 It is undoubtedly the case that the founders themselves did not explicitly consider many of the constitutional questions that come before the courts for decision. Originalists do not appear to believe that the failure of the founders to focus their attention on a particular problem relieves the courts of the obligation to decide the case in accordance with the founders' intentions. See, e.g., Meese, Construing, supra note 3, at 26.
relatively small number of individuals politically authorized to speak for the people. In less clearly defined circumstances, the field of politically relevant intentions could embrace the entire populace and therefore yield less reliable results. Because of this compounded uncertainty, updating might require a more demanding evidentiary standard of persuasion.

Another proponent of originalism, Raoul Berger, has advocated an approach to constitutional interpretation that might be useful in this context. Berger argues that interpretations of the Constitution that are faithful to deeply rooted historical attitudes—for example, the founders' attachment to a governmental system of federalism—are entitled to a presumption of validity. Any other interpretations, he claims, particularly new ones overthrowing settled understandings, must be supported by "a clear showing" in order to overcome this presumption. Berger's technique of employing presumptions for the purpose of protecting political legitimacy may be adaptable to the question of updating. Under this approach, originalism may caution against undertaking the risks associated with judicial updating in the absence of clear and convincing evidence that the people now hold reflective wishes contrary to those expressed in the original terms of consent. Such a standard might strike the proper balance between the benefits of adjusting the Constitution to reflect current consent and the risks that the Court will reach erroneous conclusions about the terms of current consent.

Though these standards for judicial updating may seem demanding, the Court has at times employed—or at least claimed to employ—standards for updating that far exceed those outlined above. One of particular interest is the "unthinkable" standard of *Bolling v. Sharpe*. *Bolling*, a companion case to *Brown v. Board of Education*, involved an equal protection challenge to the racially segregated public school system maintained by the District of Columbia. Because the District of Columbia was not a state, the

145 This is not an insurmountable difficulty. One might for example adopt a "supplementary evidentiary rule" calling for identification of popular opinion leaders. See Tushnet, *supra* note 7, at 794-96; cf. Maltz, *supra* note 7, at 803 (arguing that intentions of state legislatures are relevant, but that an attempt to determine their understanding is "likely to be hopelessly complex"; it is therefore sensible to limit inquiry to the understanding of Congress).


147 *Id.* at 17.

148 Berger himself would not accept this analysis; he seems to view the founders' intentions as authoritative for reasons other than the ones given here. See Berger, *Originalist Theories of Constitutional Interpretation*, 73 CORNELL L. REV. 350, 351 (1988) (arguing that judicial authority comes "[f]rom the founders . . . , and it is confined by their written restrictions"); see also *supra* note 125.

149 Professor Maltz has called *Bolling v. Sharpe* "the greatest challenge" to originalism. Maltz, *supra* note 25, at 850.


equal protection clause of the fourteenth amendment did not apply, and the Court's holding in *Brown* did not obligate the District of Columbia to desegregate its schools. Rather, the District was a federal enclave governed by the fifth amendment's due process clause which, although it resembled the fourteenth amendment in many respects, simply did not contain an equal protection clause.\(^{152}\)

The absence of constitutional language suggesting an equal protection constraint applicable to the federal government did not cause the Court any difficulty in *Bolling*. The Court simply updated the original, established meaning of the fifth amendment's "due process" language to include the concept of equal protection; this aspect of the fifth amendment due process clause is now commonly called its "equal protection component."\(^{153}\)

The Court explained its ruling in this way:

> In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.\(^{154}\)

Of course it is anything but unthinkable that the federal government could face a lesser set of constitutional constraints in these circumstances. The fifth amendment was adopted at a time when the federal government was thought destined to be weak and therefore not much of a threat,\(^{155}\) and by a generation that felt quite comfortable with a congeries of social and economic inequalities that would be intolerable today.\(^{156}\) Similarly, the fourteenth amendment was adopted in the context of curbing state, not federal, abuses; the federal government was seen as a champion requiring additional powers, not an oppressor requiring additional restraints.\(^{157}\) If it was

---

\(^{152}\) See U.S. CONST. amend. V.

\(^{153}\) See, e.g., United States v. Sperry Corp., 110 S. Ct. 387, 396 (1989); see also Grey, supra note 130, at 711 (arguing that "[t]here is no textual warrant" for the Court's decision in *Bolling*).

\(^{154}\) *Bolling*, 347 U.S. at 500 (emphasis added).

\(^{155}\) E.g., THE FEDERALIST, supra note 36, Nos. 45, 46, at 288-300 (J. Madison).

\(^{156}\) See U.S. CONST. art. I, § 2, cl. 3 (slavery); art. V (taxation on importation of persons); amend. XIX (limited suffrage); amend. XXIV (poll tax); see also Steinfeld, supra note 123 (exploring the inconsistencies of nineteenth century expansion of suffrage with almost universal pauper exclusions).

\(^{157}\) For example, section five of the fourteenth amendment, U.S. CONST. amend. XIV, § 5, granted Congress the power to enforce the fourteenth amendment's proscription of unequal treatment of citizens by states. This provision has turned out to be a significant grant of power, one that gives the federal government significantly more power in this area than the states possess. *Compare* Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding "minority business enterprise" provision of the Public Works Employment Act of 1977) and Metro Broadcasting, Inc. v. F.C.C., 110 S. Ct. 2997 (1990) (upholding Federal Communications Commission minority preference policies), *with* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (striking down the city of Richmond's minority set-aside program for city construction contracts).
"unthinkable" that the Constitution could prohibit state but not federal denials of equal protection, it was unthinkable not in relation to the original understanding of the fifth and fourteenth amendments, but in relation to contemporary social views concerning segregation and racial equality. The Court then drew on these views in reaching its decision to update the text.

The Boiling unthinkable standard seems, at least on its face, quite conservative: the Constitution will be updated not when it is merely possible that the updated version will rest on a broader, sounder base of popular consent, nor even when such a result is plausible, probable or very likely. Rather, the Court will undertake to update the Constitution only when it is simply unthinkable—presumably to a reasonable person familiar with American culture and traditions, although the Court is not specific on that point—that a requisite supermajority of contemporary society members would not prefer, upon suitable reflection, to live under the updated version rather than the original version.

There is undoubtedly much more that could be said about the proper standard to apply to judicial updating in light of originalism's theoretical assumptions and goals, but it is not my purpose here to undertake an exhaustive examination of this topic. Rather, I wish only to demonstrate that it is possible to discuss standards for judicial updating in a way that is both meaningful and consistent with originalism's underlying political theory. Certainly nothing in the theory of consent-based positivism suggests that the sky will fall if originalists relax their rigid resistance to judicial updating of the constitutional text. Instead, originalist political theory itself suggests that originalists' efforts would be better spent elaborating a flexible theory of judicial updating that will specify when updating is appropriate and when it is not.

VI. CONCLUSION

It has been my aim in this Article to show that originalism, whatever its underlying defects, does not succeed in justifying, on its own assumptions, its widely heralded conclusions that courts should never update the constitutional text to conform to current norms, and that the constitutional amendment process is the only politically legitimate way for constitutional updating to occur. Much of the appeal of originalism as a doctrine of constitutional interpretation derives from its invocation of what is to Americans the familiar and well-worn, though still vital, political theory of consent-based positivism, which holds that governments "deriv[e] their just powers from the consent of the governed." This theory serves originalism well: it provides a justification for the intergenerational authority of the founders and their original understanding of the meaning of the Constitution, and it furnishes a sound and consistent theoretical basis for originalism's strong aversion to judicial updating. Consent-based positivism, however, does not

158 The Declaration of Independence para. 2 (U.S. 1776).
itself support the prophylactic version of the anti-updating rule that originalists advocate. The originalist preference for such a rule must therefore rest on more pragmatic reasons for preferring that the people's wishes be in writing in order to qualify for judicial enforcement. I have tried to show that these reasons are not entirely satisfactory, and that a more flexible version of the anti-updating rule is fully consistent not only with originalist theoretical premises, but with originalist pragmatic concerns as well.

The benefit of this critique, I hope, is that it provides a justification for at least some instances of nonoriginalist constitutional interpretation even within an originalist interpretational framework. It thus provides a basis for rejecting a strict dichotomy between originalist and nonoriginalist styles of constitutional interpretation, a dichotomy that has often seen nonoriginalist interpretations derided as politically illegitimate. Finally, the critique provides a basis for preserving much of what is resonant and persuasive to modern judges and lawyers about originalist style and vocabulary, while at the same time providing an internally consistent theoretical basis for departing from the strictest forms of originalism when justice clearly demands a different outcome than the one dictated by the original understanding.