

# AMENDING THE LAW OF CONSTITUTIONAL INTERPRETATION

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## INTRODUCTION

In recent years, the law of interpretation has received a welcome flurry of attention. Much of this attention has focused on the ingenious argument advanced by William Baude and Stephen Sachs that originalism is “our law” and thus legally, as opposed to merely normatively, obligatory on constitutional interpreters.<sup>1</sup> But as Baude and Sachs candidly acknowledge, any other approach to constitutional interpretation might also be our law—or might become our law at some point in the future.<sup>2</sup> Thus, the law of interpretation and the “positive turn” that Baude and Sachs have sought to instigate transcends originalism and its critics.<sup>3</sup> Indeed, the law of interpretation transcends constitutional interpretation. It also encompasses, at a minimum, the interpretation of statutes and

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1. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2352 (2015) (“[A] version of originalism is indeed our law.”); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. L. & POL’Y REV. 817, 818 (2015) (“Originalism is usually called a theory of interpretation . . . . Best understood . . . originalism . . . [is] a theory of our law: a particular way to understand where our law comes from, what it requires, and how it can be changed.”).

2. See Baude, *supra* note 1, at 2352 (“Originalists need not prove that originalism is inherent in “the nature” of constitutions or interpretation, just that it is a convention of our interpretation of our Constitution.”); Sachs, *supra* note 1, at 822 (“American law might be originalist in nature, but then again it might not.”).

3. See Baude, *supra* note 1, at 2351 n.5 (“The ‘positive turn’ evokes the basic tenets of legal positivism: that the content of the law is determined by certain present social facts and that moral considerations do not necessarily play a role in making legal statements true or false.”); Sachs, *supra* note 1, at 819 (“This inquiry points the way toward what we could call ‘positive’ defenses—claims that originalism, as a matter of social fact and legal practice, is actually endorsed by our positive law.”).

regulations and the allocation of interpretive authority among and across courts, agencies, legislatures, etc.<sup>4</sup>

One tricky feature of the law of interpretation in the United States circa 2018 is that it often seems to be broadly open-textured or otherwise pluralist. This may just be a superficial appearance. If we scratch the surface, perhaps there is sufficient consensus of the appropriate sort to say that originalism or common law constitutionalism is our law of constitutional interpretation, that textualism is our law of statutory interpretation, or that some strong form of *Chevron* and *Auer* deference are legally obligatory secondary rules of our law of interpretation. But arguments to this effect have generally met with significant skepticism. This skepticism, in turn, has led many to question the value of a positive turn in interpretive theory. If the positive law of interpretation is sufficiently open-textured to accommodate most or all mainstream interpretive approaches, the positive turn begins to seem like a dead end.<sup>5</sup>

This brief symposium article takes a different tack. As a thought experiment, it proposes a constitutional amendment explicitly mandating a nonoriginalist approach to constitutional interpretation. One motivation for this thought experiment is to sidestep debates over the content of the current U.S. law of constitutional interpretation and the extent to which that content is open-textured. A second motivation is to explore the implications of such an explicit interpretation amendment for various normative theories of constitutional decision-making. Broadly speaking, those implications are asymmetric. A constitutional amendment explicitly mandating nonoriginalism would strengthen the case for nonoriginalism, as against its originalist critics, more than a constitutional amendment mandating originalism would strengthen the case for originalism.

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4. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1097–99 (2017); see also Abbe Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1759 (2010) (discussing state rules of statutory interpretation and the legal status of interpretive methodology in state courts more generally); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002) (proposing the legislative adoption of Federal Rules of Statutory Interpretation).

5. See, e.g., Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1357 (2017) (“[N]o defender of any controversial theory of legal interpretation can appeal to [] positivism for support.”); Mark Greenberg, *What Makes a Method of Legal Interpretation Correct?: Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 115 (2017) (“Hartian positivism makes little room for a law of interpretation that goes beyond what is already widely accepted.”).

Without further ado, here is my proposed amendment:

Section 1. The United States Constitution, including this Amendment, shall be construed to accommodate the practical exigencies of human affairs<sup>6</sup> and the evolving standards of decency that mark the progress of a maturing society.<sup>7</sup>

Section 2. Originalism is not our law and never has been.<sup>8</sup>

As Section 2 implies, this is intended as a clarifying amendment. Contrary to the views of some originalists, the U.S. Constitution as it now stands does not compel an originalist approach to constitutional interpretation.<sup>9</sup> More important for present purposes, the Constitution could not have been written to compel such an approach, nor could it be amended to do so. Even if the constitutional text explicitly mandated originalism, nonoriginalist Supreme Court justices and other constitutional decision-makers would still have good normative reasons for ignoring that mandate, reading it flexibly, or following it selectively.<sup>10</sup> At most, such an amendment might supply countervailing normative reasons for adhering to originalism, which may or may not outweigh the reasons for adhering to some form of nonoriginalism. Or so I shall argue.<sup>11</sup>

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6. *Cf.* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (describing “a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”).

7. *Cf.* *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (“The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

8. *Contra generally* Baude, *supra* note 1; Sachs, *supra* note 1.

9. *See, e.g.*, Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1039–43 (2010) (explaining these points); *but see* Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 859 (2009) (arguing that Article VI, by making “This Constitution . . . the supreme Law of the Land,” mandates originalism).

10. Throughout this article, I shall generally use the term “constitutional decision-maker,” rather than judges or justices, to bracket controversies about the proper distribution of interpretive authority across institutions. Occasionally, this nomenclature has proved too awkward, and I have simply referred to judges or justices as representative interpreters. Neither these references nor anything in the language of my proposed nonoriginalism amendment is meant to imply any view on the proper role of courts relative to other institutions in constitutional interpretation.

11. Of course, whether one has good normative reasons to do something does not depend on whether one is an originalist or a nonoriginalist. But in this article, I do not mean to take a position on which reasons ultimately and properly bear on constitutional decision-makers. Instead, my approach is to take the premises of the various approaches as given and ask what follows if those premises are correct. Thus, when I say “nonoriginalists would have good reasons to do X,” I simply mean that constitutional decision-makers would have good reasons to do X if the premises from which most nonoriginalists proceed are correct. I will use this shorthand throughout.

The same does not hold for an amendment explicitly mandating nonoriginalism. Rather, the logic of originalism would compel nearly all committed originalists to respect the original meaning of such an amendment. The only originalists for whom this would not be true are what I have called “substantive originalists,” who embrace the Constitution’s original meaning because they believe it to be morally just or likely to produce good practical consequences.<sup>12</sup> But this is a relatively small group. Other originalists would be compelled by their own precepts—popular sovereignty, written constitutionalism, legal positivism, etc.—to embrace nonoriginalism.

This would hardly resolve all interpretive disagreement, but it would go a long way toward eliminating a huge quantity of basically unproductive debate about the legal and moral necessity of originalism.<sup>13</sup> In turn, the energy currently expended on this debate could be redirected to far more pressing matters of constitutional substance. I believe this would be a salutary development all around. But my principal goal in this article is not to defend the desirability of a nonoriginalism amendment. It is to explore and reflect upon the theoretical implications of such an amendment for originalism and nonoriginalism and for the positive turn more generally.

Part I explains why an amendment mandating originalism would not bind nonoriginalists. Part II explains why an amendment mandating nonoriginalism would bind most originalists. Part III sketches some of the theoretical implications of this asymmetry.

### I. NONORIGINALISM UNBOUND

The thought experiment I propose to conduct in this article actually requires not just one proposed constitutional amendment, but two—the “nonoriginalism amendment” and a corresponding “originalism amendment” with which to compare it. I have already provided the text for my proposed nonoriginalism amendment. Here is its originalist counterpart:

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12. See Andrew Coan, *The Foundations of Constitutional Theory*, 2017 WIS. L. REV. 834, 837 (defining substantive theories as those that “contend that the correct approach to constitutional decision-making is determined by the moral desirability of the decisions it produces, however moral desirability is defined”).

13. Cf. Frederick Schauer, *The Pretense of Necessity in Constitutional Theory*, JOTWELL (May 16, 2012), <http://conlaw.jotwell.com/the-pretense-of-necessity-in-constitutional-theory/> (describing the “pathologies” of this sort of debate for constitutional theory).

Section 1. The United States Constitution, including this Amendment, shall be construed to reflect the original public meaning of its text, as amended.

The burden of this Part is to demonstrate that, even if this amendment were ratified, nonoriginalist Supreme Court justices and other constitutional decision-makers would still have good normative reasons for ignoring that mandate, reading it flexibly, or following it selectively.

I intend this to be a strong claim, so let me begin by setting aside two weaker versions of it. First, I do not mean to argue merely that nonoriginalist constitutional decision-makers would be free under my proposed originalism amendment to adhere to nonoriginalist precedents. My proposed amendment says nothing about *stare decisis*, which is the subject of much controversy among originalists.<sup>14</sup> If some committed originalists believe it permissible for judges to adhere to nonoriginalist precedents, it follows a *fortiori* that nonoriginalists operating under the mandate of my proposed originalism amendment might also consider it permissible to do so. But the claim I mean to defend here is stronger.

Second, I do not mean to argue merely that nonoriginalist constitutional decision-makers would retain significant freedom to draw on considerations other than original meaning in cases where original meaning is under-determinate. Most contemporary originalists acknowledge that original meaning is, at least sometimes, under-determinate and that, in such cases, it is not only appropriate, but unavoidable for constitutional decision-makers to rely on nonoriginalist considerations.<sup>15</sup> It follows a *fortiori* that nonoriginalists operating under the mandate of my proposed originalism amendment could also draw on nonoriginalist considerations in the “construction zone.”<sup>16</sup> Just slightly more controversially, nonoriginalists operating under my proposed amendment might also draw on nonoriginalist considerations to determine the standard of proof required to place a

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14. Compare Michael Stokes Paulsen, *The Intrinsically Corrupting Role of Precedent*, 22 CONST. COMMENT. 289, 291 (2006) (rejecting *stare decisis* as inconsistent with originalism) with Baude, *supra* note 1, at 2358 (defending *stare decisis* as an element of “inclusive originalism”) and Sachs, *supra* note 1, at 861–64 (similar).

15. See, e.g., Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 117 (2010) (“If Originalists are willing to accept that constitutional doctrine should and must change over time within the limits imposed by the original meaning of the text, then they can accept a constrained version of Living Constitutionalism.”).

16. See *id.*

question in the construction zone.<sup>17</sup> But again, the claim I mean to defend here is stronger.

That claim is as follows: Under my proposed amendment, nonoriginalist constitutional decision-makers would have good normative reasons for refusing to follow original meaning even in cases where that meaning is adequately determinate and where stare decisis does not strongly compel a nonoriginalist result. I assume for present purposes that such cases exist in meaningful numbers on important issues. In other words, I assume that originalism and nonoriginalism are operationally distinct.<sup>18</sup> I believe this to be true, but it is a bigger question than I can take on here, in part because it turns on an active debate over how to define each of the two camps.<sup>19</sup>

There are two basic reasons that an originalism amendment would not strongly constrain nonoriginalists. The first and less important is logical. No text, including a proposed constitutional amendment mandating a particular approach to constitutional amendment, is self-interpreting. Like any other legal text, my proposed originalism amendment itself requires interpretation, and nonoriginalists would naturally approach that task using a nonoriginalist approach. Of course, there are a wide variety of nonoriginalist approaches to constitutional interpretation, resting on a wide variety of normative foundations—representation reinforcement, common-law constitutionalism, pluralism of various kinds, to name just a few.<sup>20</sup> On many, if not all, of these approaches, the original public meaning of a recently adopted constitutional text carries substantial interpretive weight. But what makes an approach nonoriginalist, as I am using the term, is that original meaning is not necessarily decisive.

As such, a nonoriginalist interpreting my originalism amendment might, for a variety of reasons, read the words “to reflect” as nonexclusive. She might also read the amendment’s reference to the

17. See Ryan C. Williams, “The New Originalism and the Problem of Proof” (Apr. 13, 2018) (unpublished manuscript) (on file with the author) (“[D]etermining whether sufficient uncertainty exists to allow the move from interpretation to construction necessarily involves normative decision-making in the selection of a standard of proof against which claims about constitutional meaning can be judged.”).

18. If originalism and nonoriginalism are not operationally distinct, then an amendment mandating either would have no normative significance.

19. Compare Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015) with Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).

20. See generally Coan, *supra* note 12 (surveying types of nonoriginalism and the normative foundations on which they rest).

“U.S. Constitution” as limited to the written constitution, as opposed to the unwritten constitution that many nonoriginalists believe supplements and occasionally supplants the written document.<sup>21</sup> Either of these readings might be defended on grounds of representation reinforcement or the Burkean virtues of common-law constitutionalism or the pragmatic benefits of nonoriginalism. A more carefully drafted originalism amendment could probably squeeze out these specific textual indeterminacies, but it would be difficult and perhaps impossible to squeeze out all such openings for nonoriginalist interpretation of an originalism amendment.

Even if this were possible, there is a second reason why an originalism amendment would not strongly constrain nonoriginalists. Let us presume that an explicitly worded amendment of this sort—read in isolation—would have the same meaning under any plausible contemporary interpretive approach. Nevertheless, a normative argument would still be required for adhering to this instruction in interpreting the rest of the Constitution. If democratic principles justified the application of a representation-reinforcement approach to constitutional interpretation before the adoption of an originalism amendment, this would remain a strong argument for nonoriginalism even after the adoption of such an amendment (especially if the amendment process itself suffers from significant malfunctions). The same goes for Burkean arguments for common-law constitutionalism and consequentialist arguments for constitutional pragmatism.

This is not to suggest that the adoption of an originalism amendment would be normatively irrelevant for nonoriginalists. Such an amendment would clearly raise the costs of applying a nonoriginalist interpretive approach to other provisions. If judges and other constitutional decision-makers felt free to ignore the language of an originalism amendment, would any constitutional provision be safe? Such an amendment would also pretty clearly be part of the positive law, which most theorists agree that constitutional decision-makers are presumptively obligated to follow.<sup>22</sup> But these costs could

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21. See generally, e.g., AKHIL AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012) (arguing that the U.S. has an unwritten constitution); Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) (arguing the same).

22. See, e.g., Baude, *supra* note 1, at 2351 n.5 (“The ‘positive turn’ evokes the basic tenets of legal positivism: that the content of the law is determined by certain present social facts and that moral considerations do not necessarily play a role in making legal statements true or false.”); see generally Barzun, *supra* note 5.

well be outweighed by the substantive unattractiveness of an originalist approach relative to plausible nonoriginalist alternatives (and to the alternative of abandoning the Constitution altogether). If an originalist approach was sufficiently unattractive substantively, but so was jettisoning the Constitution, the normatively best option would be for judges to ignore an originalism amendment and instead apply some other interpretive approach to the remainder of the constitutional text.<sup>23</sup>

An example will help to make the point more concrete. Imagine that an originalist interpretation of the commerce clause would require reversal of *Wickard v. Filburn*<sup>24</sup> and a rollback of much of the modern federal regulatory state.<sup>25</sup> An amendment mandating originalism would certainly give nonoriginalist judges and other officials some reason to adopt this course. Refusing to do so might create costly uncertainty about their commitment to the Constitution as a whole or represent a democratically illegitimate attempt to flout the will of the American people. An originalism amendment would also pretty clearly represent the positive law, and judges are widely assumed to have at least a presumptive obligation to follow the law.

On the other hand, the collective wisdom embodied in the last 80 years of commerce power precedents would still provide a powerful reason for common-law constitutionalists to adhere to these precedents. The instability and disruption of expectations, as well as the (arguably) bad policy consequences of adopting an originalist approach, would provide powerful reasons for pragmatist judges to

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23. An important implication is that interpretive choice need not be all-or-nothing, *pace* many originalists. See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 59 (1999) (making the all-or-nothing argument); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611, 635–36 (1999) (“We are bound because we . . . profess our commitment to a written constitution, and original meaning interpretation follows inexorably from that commitment. We can easily jettison that original meaning . . . but this is a choice [] courts and scholars have been generally unwilling to make.”). Both constitutional text and original meaning can be embraced in part or in whole, depending on the values that would be served by either approach. I will have more to say about this in *Theoretical Implications*, see discussion *infra* Part III.

24. 317 U.S. 111 (1942).

25. See, e.g., Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 *U. CHI. L. REV.* 101, 119–20 (2001) (“In sum, the original meaning of the regulatory powers granted to Congress might have been broader had Article I, Section 8 granted it the power ‘to regulate the commercial interests of the States’ rather than the power to regulate only ‘commerce.’”); William Baude & Stephen E. Sachs, *Originalism’s Bite*, 20 *GREEN BAG 2D* 103 (2016); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (“I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause.”).



follow the same course. These reasons may or may not be more powerful than the reasons to follow an explicit originalism amendment, but it is at least plausible that they would be, if not in this case then in others. Think of *Brown v. Board of Education*,<sup>26</sup> which Michael Klarman and many others have argued cannot be squared with the original meaning of the 14th Amendment.<sup>27</sup> Would saving *Brown* be strong enough reason to ignore an explicit originalism amendment? On the premises of many nonoriginalist approaches, a strong case could be made for an affirmative answer.

One final wrinkle is worth mentioning. Just as there are many different forms of nonoriginalism, there are many different normative grounds for embracing nonoriginalism. An originalism amendment would affect some of these grounds more than others. Although relatively few nonoriginalists explicitly embrace nonoriginalism on positivist grounds, such an approach is both theoretically coherent and has real attractions. Moreover, some versions of common-law constitutionalism and pluralism might plausibly be understood as resting at least partially on positivist grounds.<sup>28</sup> Given the strong consensus that precise constitutional texts are authoritative as a matter of positive law, an originalism amendment would significantly undermine positivist arguments for nonoriginalism. It would also weaken popular sovereignty arguments for nonoriginalism, to the extent that a recently adopted originalism amendment would presumptively give originalism the imprimatur of the American people. On the other hand, this democratic argument for originalism might be counterbalanced by the undemocratic aspects of originalism and would, in any event, lose force over time.<sup>29</sup>

These are the exceptions, however. By and large, the strength of most normative arguments for nonoriginalism would be unaffected by the adoption of an originalism amendment. The adoption of such an amendment would increase the costs of applying a nonoriginalist approach to other constitutional provisions but those costs might well be outweighed by the benefits of a nonoriginalist approach. Both the

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26. 347 U.S. 483 (1954).

27. See, e.g., Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1881 (1995) (“[T]he overwhelming consensus among legal academics has been that *Brown* cannot be defended on originalist grounds.”).

28. See Coan, *supra* note 12.

29. See Richard Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 192–99 (2008) (arguing that democratic justifications for originalism lose force over time).

costs and benefits are difficult to quantify, but it is highly plausible that many nonoriginalists would be normatively justified (taking their own premises as given) in sticking with a nonoriginalist approach in some or all cases.

## II. ORIGINALISM BOUND

Precisely the opposite is the case—or would be the case—for originalists operating under my proposed nonoriginalism amendment. That amendment would strongly constrain most originalists to embrace a nonoriginalist approach to constitutional decision-making. Somewhat paradoxically, the law of constitutional interpretation is thus far more susceptible to textual amendment in favor of nonoriginalism (which treats text as one of many important considerations) than it is to textual amendment in favor of originalism (which gives text a preeminent role). The reasons for this parallel the reasons that an originalism amendment would not strongly constrain nonoriginalists.

First, originalists' own methodological commitments would obligate them to interpret my proposed nonoriginalism amendment according to its original public meaning. That meaning would quite clearly mandate an approach to constitutional interpretation that permits changed circumstances and practical considerations, as well as changing values, to override the original public meaning of the text. The fact that no text is self-interpreting is a problem for the proposed originalism amendment discussed in Part I because such an amendment cannot easily control its own interpretation by the nonoriginalist interpreters it is seeking to bind. By contrast, the interpretive commitments of the originalist interpreters that my proposed amendment seeks to bind are not an obstacle. To the contrary, my nonoriginalism amendment leverages those interpretive commitments to ensure that originalists cannot, except on pain of self-contradiction, wiggle out of the amendment's interpretive mandate.

Second, unlike nonoriginalists operating under an originalism amendment, most originalists operating under my proposed amendment would have no good normative reasons for ignoring its mandate, reading that mandate flexibly, or following it selectively. To the contrary, the normative grounds on which most originalists embrace originalism would require them to follow the original meaning of a nonoriginalism amendment just as they would the original meaning of any other constitutional text. Of course, there are

several different normative grounds on which to embrace originalism. In previous work, I have organized these grounds into four broad categories: metaphysical, procedural, substantive, and positivist.<sup>30</sup> Of these, only substantive arguments for originalism might supply a good normative reason for originalists to resist a nonoriginalism amendment.

Most originalists would not have such a reason. Metaphysical originalists embrace originalism because that approach is inherent in the idea of interpretation or binding law or writtenness.<sup>31</sup> If that is the case, the only way to interpret my nonoriginalism amendment (or treat my amendment as binding law or honor its writtenness) is to follow its original meaning. That original meaning, of course, repudiates originalism and obligates interpreters to follow a nonoriginalist approach.<sup>32</sup> Procedural originalists embrace originalism because it is the original meaning of the Constitution and only the original meaning of that text was democratically ratified by the American people.<sup>33</sup> If that is the case, the original meaning of my nonoriginalism amendment democratically obligates constitutional decision-makers to follow a nonoriginalist approach to constitutional interpretation.<sup>34</sup> Finally, positivist originalists embrace originalism because they believe originalism to be the positive law of U.S. constitutional interpretation.<sup>35</sup> My nonoriginalism amendment would change that positive law to nonoriginalism, legally obligating constitutional decision-makers to follow that approach. This assumes

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30. See Coan, *supra* note 12.

31. See *id.*

32. This might seem to give rise to a paradox. Under a nonoriginalism amendment, the nature of interpretation or writtenness or the like would compel constitutional decision-makers to adopt an approach inconsistent with the nature of these very commitments. But the paradox is only apparent. Originalists carrying out the mandate of a nonoriginalism amendment would be faithfully following the original meaning of the written text. Nothing in the nature of interpretation or writtenness, as metaphysical originalists understand these concepts, limits the communicative content that a written text may convey. This resolution of the apparent paradox is loosely parallel to Eric Posner and Adrian Vermeule's argument that federal administrative agencies exercising power under a validly enacted federal statute are always exercising executive power even if that power would appear to be legislative if exercised without statutory authorization. See generally Eric Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002). Similarly, originalist judges and officials engaged in nonoriginalist interpretation under the mandate of a nonoriginalism amendment are always interpreting the original meaning of the written text even if their interpretive endeavors would appear to be noninterpretive or inconsistent with the written Constitution if undertaken in the absence of a clear textual command.

33. See Coan, *supra* note 12.

34. See *id.*

35. See *supra* note 1 and accompanying text.

that an explicit constitutional amendment would be recognized as validly changing the positive law of interpretation, but that seems like a safe assumption.

Substantive originalism poses a trickier case. Broadly speaking, substantive originalists embrace originalism because they believe it produces morally desirable results.<sup>36</sup> But there are several distinct strands of substantive originalism. Some substantive originalists believe that the original meaning of the U.S. Constitution as currently drafted happens to be morally attractive (or at least attractive enough). This could be otherwise, but because it is not, these originalists believe that constitutional decision-makers will do best by following an originalist approach.<sup>37</sup> Other substantive originalists believe that only originalism is capable of adequately constraining the discretion of judges and other constitutional decision-makers.<sup>38</sup> If either of these views is correct and if a nonoriginalist amendment would produce worse—or less constrained—constitutional results, then these substantive originalists might have good normative reasons for ignoring a nonoriginalism amendment in part or in whole. Of course, those reasons would have to be weighed against the countervailing risks. But in principle, the bad consequences of a nonoriginalism amendment could be sufficient to justify a refusal to follow its clear original meaning in order to preserve the benefits of an originalist approach to the rest of the constitutional text.

Again, a couple of examples will help to make the point more concrete. Imagine that a nonoriginalist interpretation of the Equal Protection Clause or Privileges or Immunities Clause would allow judges to exercise unconstrained power over virtually every aspect of American political life. A nonoriginalism amendment would certainly give substantive originalist judges some reasons to acquiesce to this result. A refusal to follow the clear command of a nonoriginalism amendment would itself represent a form of rebellion against constitutional constraints on official decision-making. Such a refusal might also generate constitutional instability and uncertainty about the willingness of constitutional decision-makers to abide by other inconvenient provisions of the Constitution. Finally, a nonoriginalism amendment would pretty clearly be the law, which originalist judges would be presumptively bound to follow.

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36. See Coan, *supra* note 12.

37. See *id.*

38. See generally, e.g., Barnett, *supra* note 23.

On the other hand, if the premises of substantive originalism are sound, the refusal to follow a nonoriginalism amendment might be the only way to prevent the tyranny of an unconstrained judiciary. At a minimum, adhering to an originalist interpretation might produce a significantly more constrained—and thus better—system of 14th Amendment review.<sup>39</sup> These reasons may or may not be more powerful than the reasons to follow an explicit nonoriginalism amendment, but it is at least plausible that they would be—if not in this case, then in others. Think of the commerce power, where many originalists believe a nonoriginalist approach has destroyed the substantial benefits of federalism that would flow from following an originalist approach.<sup>40</sup> The good consequences of an originalist approach may or may not be more powerful than the reasons to follow a nonoriginalism amendment, but taking substantive originalist premises as given, it is at least plausible that they would be. This is all the more likely once we consider that my proposed nonoriginalism amendment leaves plenty of room to make pragmatic arguments on behalf of constitutional interpretations that happen to coincide with original meaning.

It remains to consider a third group of substantive originalists who believe that the supermajoritarian amendment and ratification processes are likely to produce good results. Since it is the original meaning of the constitutional text that those processes ratify, constitutional decision-makers will do best by following an originalist approach.<sup>41</sup> This is essentially an epistemic argument that the results of the constitutional amendment are more likely to represent socially desirable outcomes than are the decisions of less epistemically trustworthy constitutional decision-makers like modern-day judges and politicians. A nonoriginalism amendment would put substantive

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39. This assumes that the original meaning of the Equal Protection and Privileges or Immunities Clauses would be substantially more constraining than nonoriginalist interpretations of those clauses. Most substantive originalist arguments take this assumption for granted, though certain recent originalist work calls it into question. *See generally, e.g.*, RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); Balkin, *supra* note 19; Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648 (2016).

40. *See generally, e.g.*, Kurt T. Lash, *The Sum of All Delegated Power: A Response to Richard Primus, The Limits of Enumeration*, 124 YALE L.J. F. 180 (2014), <http://www.yalelawjournal.org/forum/the-sum-of-all-delegated-power>; Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167 (1996).

41. *See generally* JOHN MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013).

originalists of this type in something of a bind. On the one hand, the nonoriginalism amendment would itself be a product of the epistemically trustworthy amendment process. On the other hand, constitutional decision-makers following that amendment would be required to ignore the epistemically trustworthy outcomes of all prior amendment processes. Probably, the epistemic trustworthiness of a nonoriginalism amendment would be sufficient to require this strand of substantive originalists to follow it, just as they would the original meaning of any other amendment that overrode earlier constitutional provisions, but the question is a tricky one.

Substantive originalists, however, are the exception. By and large, most normative arguments for originalism would require their adherents to submit to a nonoriginalism amendment. This would still leave much room for interpretive disagreement. For instance, under my nonoriginalism amendment, originalists would remain perfectly free to argue that some or all aspects of original meaning are the best way to accommodate the practical exigencies of human affairs. They would also remain free to argue that some or all aspects of original meaning best reflect the evolving standards of decency that mark the progress of a maturing society. Perhaps social maturity lies in recognizing the wisdom of our forebears. What originalists would be foreclosed from arguing is that originalism is legally or conceptually necessary. Instead, originalism would be left to fight it out on equal normative footing with other contenders.

### III. THEORETICAL IMPLICATIONS

I believe this would be a salutary outcome all around. Debates over the legal and conceptual necessity of originalism have consumed far too much time and energy that could more productively be spent debating vital questions of constitutional substance. Nonoriginalism, in my judgment, is also a far more sensible approach to constitutional decision-making. But I do not have much new to say in defense of either of these points. Instead, I want to spend the remainder of this article briefly reflecting on the theoretical implications of this thought experiment for originalism and nonoriginalism—and for the positive turn more generally.

First and most straightforwardly, the thought experiment underscores that the arguably open texture of the current U.S. law of interpretation is a contingent, rather than a necessary, feature of our legal system. It is possible to imagine a world in which that law was

written into the constitutional text. Of course, this world is unlikely to become a reality. But imagining it is helpful for thinking through the implications of a positive turn for both originalism and nonoriginalism. From the current literature, which has focused largely on the determinacy or indeterminacy of the current law of interpretation, it is easy to miss that there would be strong normative arguments for nonoriginalism even if originalism were written into the constitutional text. It is also easy to miss that originalism and nonoriginalism are asymmetric in this respect. If nonoriginalism were written into the constitutional text, most normative arguments for originalism would disappear.

This asymmetry suggests a new line of response to positivist arguments for originalism. Thus far, most nonoriginalist criticism of the positive turn has focused on Baude and Sachs's claim that originalism is our law. But my thought experiment demonstrates that, even if originalism were clearly our law, the normative justifications for nonoriginalism would retain substantial potency. If those justifications are arguably strong enough to overcome the mandate of an explicit originalism amendment, it follows a fortiori that they are arguably strong enough to overcome an unwritten positive law of constitutional interpretation grounded only in an uncoordinated and semi-conscious consensus of judges. Indeed, if nonoriginalists can persuade a critical mass of judges to embrace these arguments, the consensus that made originalism our law would dissolve like a rope of sand.

A similar point holds for substantive originalism. As with nonoriginalism, the thought experiment makes clear that substantive normative justifications for originalism—unlike other normative arguments for originalism—would retain substantial potency even if nonoriginalism were clearly our law. If those justifications are plausibly strong enough to overcome the mandate of an explicit nonoriginalism amendment, it follows a fortiori that they are plausibly strong enough to compel adherence to originalism if there is no positive law of interpretation at all, as many critics of the positive turn contend. Substantive originalist arguments may even be strong enough to overcome an unwritten law of interpretation mandating pluralism or common-law constitutionalism (of the sort suggested by some readings of Philip Bobbitt and David Strauss).<sup>42</sup> As with

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42. See Coan, *supra* note 12.

nonoriginalism, if substantive originalists can persuade a critical mass of judges to embrace their arguments, the consensus that made pluralism or common-law constitutionalism our law would dissolve like a rope of sand.

So far so good for substantive originalism. But my thought experiment also raises significant questions about this form of originalism. If substantive originalist arguments would retain significant force even in the face of an explicit nonoriginalism amendment, is it really appropriate for these arguments to trade on the broader originalist claim that originalism “correspond[s] to the legal rules that judges and officials are already bound to apply?”<sup>43</sup> This claim may or may not be true, given the present content of U.S. positive law, but the normative arguments of substantive originalists suggest that they should—or at least could—be committed to originalism even if it ceases to correspond to positive law. If that is true, then substantive originalism seems to be more about producing good consequences and constraint than adherence to existing law. At a minimum, substantive originalists should think carefully about how much normative work each of these considerations is doing in motivating their embrace of originalism.

That is not all. If the good consequences and the constraining power of originalism might be strong enough to overcome even an explicit nonoriginalism amendment, they might also be sufficient to justify other departures from original meaning in cases where some available alternative would produce better results or more strongly constrain constitutional decision-makers. For example, if the original meaning of the Privileges or Immunities Clause is as capacious and open-ended as some contemporary originalists seem to believe, a common-law constitutionalist or Thayerist interpretation of that clause may well be more constraining than an originalist interpretation.<sup>44</sup> This suggests that substantive originalists should reconsider the view that the Constitution (and its original meaning) must be accepted or rejected *in toto*. If good consequences and official constraint are the relevant maximands, substantive originalists should

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43. Sachs, *supra* note 1, at 828.

44. Compare generally Barnett, *supra* note 23 with *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873) (reading the Privileges or Immunities Clause very narrowly); see also James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140 (1893) (arguing that “an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt”).



adhere to original meaning when, *but only when*, doing so promotes these ends.<sup>45</sup>

For other forms of originalism, the implications of my thought experiment may be even more striking. Put simply, the thought experiment makes these forms of originalism appear normatively unmoored. If they were overridden by constitutional amendment, the normative commitments of non-substantive originalists would require them to submit meekly to nonoriginalism. Even more striking, these originalists would have no strong arguments for reversing a nonoriginalism amendment—or even for lamenting originalism’s demise. This raises the question: How could anyone care very passionately about defending originalism? This question is hardly unanswerable, but my thought experiment casts the range of possible answers in a new and helpful light. In particular, it suggests that originalists who feel inclined to defend originalism even in the face of a nonoriginalism amendment can only be coherently motivated by substantive, rather than metaphysical, procedural, or positivist, considerations. In this way, my thought experiment serves as a sort of “get-to-know-yourself” exercise for originalists. If you think of yourself as a positive originalist or a procedural originalist but would feel inclined to defend originalism even in the face of a nonoriginalism amendment, you just might be a substantive originalist after all. Which is okay! In my view, that is the best kind of originalist to be.<sup>46</sup>

At the same time, my thought experiment suggests a new line of attack against nonoriginalism—or at least a new point of emphasis. If originalism is our law and if others wish to change that, my proposed nonoriginalism amendment demonstrates that it is reasonably clear how they can do so. It is also reasonably clear that most originalists would feel compelled, by their own premises, to accept the outcome. By contrast, if nonoriginalism is our law and others wish to change that, my proposed originalism amendment demonstrates that it is not clear how they would do so. Even if such an amendment successfully changed the law of interpretation, nonoriginalists might refuse to

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45. I bracket the possibility that the good consequences and constraining force of originalism would be destroyed or undermined if constitutional decision-makers felt free to make any exceptions whatsoever. This seems implausible to me, but obviously cannot be dismissed out of hand.

46. *Cf.* MCGINNIS & RAPPAPORT, *supra* note 41, at 1 (“Law in general and constitutional law in particular should be measured by its contribution to our current welfare.”).

acquiesce in the change. On this account, originalism might be thought to provide a coherent and normatively attractive theory of constitutional change. Nonoriginalism, by contrast, might be thought to impede the possibility of such change and perhaps block it altogether, at least as to the law of interpretation.<sup>47</sup>

The same point can be put more simply. Originalists are principled and consistent, while nonoriginalists will simply make whatever arguments are necessary to advance their own political and ideological goals. Originalists are so principled, in fact, that they will give up their preferred interpretive approach if that is what the constitutional text requires. Nonoriginalists, by contrast, will go so far as to defy clear constitutional text if it impedes their ability to reach the results they prefer.

I do not believe this argument to be ultimately persuasive, but this is not the place for an extended response.<sup>48</sup> The important point for present purposes is that the argument is unambiguously normative (as opposed to positive or metaphysical) in character. It is an argument that originalism *should* be our law because it embodies an attractive theory of constitutional change (or because it is more principled). It is not an argument that originalism *is* our law or that originalism is inherent in the concept of interpretation or written constitutionalism. As such, the argument's persuasive power depends on the relative attractiveness of originalism and nonoriginalism. Reasonable minds can surely disagree on this point, but this is terrain on which nonoriginalists have traditionally felt more comfortable than originalists.<sup>49</sup>

Finally, and perhaps most important, the thought experiment suggests that both originalists and nonoriginalists should think more

47. I am indebted to Will Baude for this point. Cf. Sachs, *supra* note 1.

48. Among other things, such a response would emphasize that a major purpose—or at least a major consequence—of originalism is to make constitutional change extremely difficult. See generally Andrew Coan & Anuj Desai, *Difficulty of Amendment and Interpretive Choice*, 1 J. INST. STUD. 6 (2015). It would also emphasize that the principles of political morality, on which nonoriginalism is premised, are not subject to override or alteration by constitutional amendment. Put simply, nonoriginalists are perfectly principled and consistent. It is just that the theory that they are committed to in a principled way is ultimately one of political morality. If this theory sometimes requires constitutional decision-makers to ignore or read a clear constitutional amendment selectively, that is only because such an approach is (sometimes) what the best understanding of political morality requires. Moreover, no mainstream nonoriginalist approach permits constitutional decision-makers simply to pursue their own personal vision of political morality without constraint by considerations of institutional competence, democratic legitimacy, the rule of law, etc.

49. See generally *id.*

deeply about the nature and grounds of constitutional decision-makers' presumptive obligation to follow the law. That obligation has played a large role in motivating the positivist turn, in part because it is the subject of such broad consensus. But that consensus may be shallower and shakier than it first appears. It is certainly easier for all sides to accept when they believe it consistent with their own preferred interpretive approach. The prospect that both originalism and nonoriginalism could be overridden by explicit textual amendment puts in stark relief several important questions that often go unasked: Just how strong is the presumptive obligation to follow the law? What is required to rebut the presumption? Does it matter whether the law in question is enacted by supermajorities of the American people, or arises from an uncoordinated consensus of judges, or is simply the whim of a capricious and tyrannical dictator? The answers depend, at least in part, on how we understand the nature of law and the ways in which law creates content-independent normative obligations, if it creates them at all. These questions are much debated by legal philosophers but have received comparatively little attention from constitutional theorists. It may be time for that to change.

#### CONCLUSION

If I woke up tomorrow to discover that the American people had adopted my proposed nonoriginalism amendment, I would be happy. But I do not expect that to happen tomorrow or any other day, with this amendment or any other I might propose. I have thus crafted the amendment not so much as a serious proposal but as a thought experiment that might have some value even in the exceedingly likely event that it is never adopted. That thought experiment has interesting implications for both originalism and nonoriginalism and shines a light on some of the deep jurisprudential questions raised by the positive turn. Those questions are worth asking and attempting to answer even if the law of constitutional interpretation is never amended in the ways contemplated in this article.