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ORIGINAL MEANING, PRECEDENT, AND POPULAR SOVEREIGNTY?: WHITTINGTON ET AL. V. LINCOLN ET AL.

Leslie F. Goldstein*

INTRODUCTION

Originalists, even the “new originalists,” vary among themselves. They vary on their justifications for originalism;¹ on whether they would let courts (in addition to the elected branches) construe or “construct” vague clauses of the Constitution to turn them into rules of law by which statutes could be invalidated;² and on whether they prefer pure originalism for their

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1. Justice Antonin Scalia, who characterizes himself as a “faint-hearted originalist” (i.e., one willing to deviate from the original understanding of a clause) argues that a large part of what justifies originalism is the pragmatic goal of constraining judicial discretion. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863–64 (1989).

Keith Whittington, by contrast, argues that originalism is required by Americans’ purposeful rejection of a flexible unwritten British Constitution, so as to have a written and *fixed* set of principles that would restrain government, as well as by the rule of law and popular sovereignty. KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION 46–159 (1999). On New Originalism, see generally Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004). Whittington allies himself with the new originalists in that article, although his *Constitutional Interpretation* spoke generally in terms of original “intention” or “intent.” His link to the “new” originalism is his insistence that this be the publicly (textually) communicated intent. *Id.*

2. Whittington argues that judicial review can be exercised for such invalidation *only* on the basis of ascertainable original understanding of the Constitution. And in contrast, the “political” branches are free to construe or “construct” additional meaning where the document offers gaps or vagueness, such as the silence on a presidential removal power, and to legislate specific understandings of the various “majestic generalities” such as due process of law. KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 12 (1999) (offering eighty-seven examples). He states plainly that such gap-filling is “inappropriate” for judges, the wielders of judicial review power. See WHITTINGTON, *supra* note 1, at 157–59. However, in his 2004 article he hedged, “Perhaps [constitutional constructions] should also be made on occasion by judges, but in doing so, judges are engaging in a political and creative enterprise and cannot simply rely on the authority of interpreting the founders’ Constitution.” Whittington, *supra* note 1, at 612. By 2010, Whittington appears to have retreated decisively from his original ban on judicial construction. See Keith Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 128–29 (2010) (“I have been persuaded over time that there is more room for courts in developing and maintaining constitutional constructions than I initially suggested.”). It is no longer clear in his theory how originalism is supposed to limit justices since “construction” seems to free them to drastically alter original understanding, for instance, on grounds of changed circumstances. For example, one can claim that virtually all manufacturing now either enters or affects the stream of commerce and is now covered by the commerce power irrespective of original understanding to the contrary.

theory of interpretation or are willing to dilute it by allowing that originalist readings may give way to well-established precedent. Justice Antonin Scalia, for one, has forthrightly acknowledged, “almost every originalist would adulterate [the approach] with the doctrine of *stare decisis*.”³ This, of course, was a huge concession to make in 1988,⁴ by which time the *U.S. Reports* contained dozens, perhaps hundreds, of longstanding, nonoriginalist precedents.⁵ And, indeed, there are now several “new originalists” who have stated that, not only is original understanding the *only* valid basis for interpreting Constitutional text, but also that it is wrong for originalists to give way to erroneous precedent—precedent that clashes with ascertainable original understanding.⁶ At a minimum, Keith Whittington,⁷ Randy Barnett,⁸ Michael Paulsen,⁹ and Gary Lawson¹⁰ have argued that U.S. Supreme Court justices should feel obliged to follow original understanding of the U.S. Constitution even when it entails scrapping longstanding precedent (with Barnett making an exception for serious reliance interests that “wrong” precedent may have created).

It is this originalist position with which I take issue in this Article. While I am not myself an originalist,¹¹ my own approach shares with originalism

Randy Barnett, by contrast, argues that justices are obliged to construct the Constitution, because to ignore the vague or “abstract” clauses in it would be in dereliction of their duty to interpret the law. See Randy Barnett, *Trumping Precedent with Original Meaning: Not As Radical As It Sounds*, 22 CONST. COMMENT. 257, 264–66 (2005). The abstract clauses amount in his view to delegation of authority to the justices to fill in the blanks. *Id.*

3. Scalia, *supra* note 1, at 861.

4. Scalia’s *Originalism: The Lesser Evil*, was originally delivered as a speech in 1988. See *id.*

5. See H. Jefferson Powell, *Why I Am Not a Non-originalist*, 7 ST. THOMAS L.J. 259, 272–75 (2010) (describing how utterly radical a shift would take place if the Supreme Court justices became such thoroughgoing originalists that they abandoned nonoriginalist precedent).

6. The new originalism makes a point of dropping the older—circa 1970s to 1980s—emphasis on original (perhaps private) intention of the Framers or ratifiers, and turning toward the original *public* meaning of the constitutional text or original *public* understanding of the ratifying generation. Influential in having caused this transition was the pivotal article by H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that the original understanding was that the content of the text of the law was what would determine the intent to be found in it, as distinguished from any textually unexpressed intentions of the lawmakers).

7. WHITTINGTON, *supra* note 1, at 168–74.

8. See generally Barnett, *supra* note 2.

9. See generally Michael Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

10. See generally Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23 (1994).

11. I continue to ascribe to what I call moderate textualism. See generally LESLIE FRIEDMAN GOLDSTEIN, IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY (1991). I am unpersuaded that original understanding of the text is the only valid interpretation of constitutional clauses. There are instances where public understanding of particular clauses seems to have grown or deepened with time, rather than getting them “right” at the moment of ratification. Several scholars have demonstrated this through analysis of the First Amendment. See LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985) (demonstrating that the original understanding of “freedom of speech and of the

the dilemma of how to treat an erroneous precedent.¹² I argue below that the same rule of law and popular sovereignty concerns deployed to justify originalism are best interpreted as recommending that some well-settled precedent be upheld.

After summarizing the argument against precedent from one of the prominent new originalists, I develop my critique of it by beginning with reflections on Abraham Lincoln's speech on the *Dred Scott v. Sandford* decision. In this speech, Lincoln contrasted the limited precedential impact of the *Dred Scott* decision with the impact of well-settled precedent. Lincoln began explaining his general theory of precedent with these lines: "[The Supreme Court's] decisions on [c]onstitutional questions, *when fully settled*, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution. . . . More than this would be revolution."¹³ The reference to revolution seems to imply that Lincoln's guideline is swayed by rule-of-law concerns, but as the exploration below will demonstrate, his fuller discussion also brings in a concern for respecting popular sovereignty. My analysis of the implications of Lincoln's arguments will then be fortified by my own reflections on the politics of constitutional amendments and the impact of such politics on constitutional law.

I. FOR ORIGINALISM AND CONTRA PRECEDENT: WHITTINGTON ET AL.

For brevity's sake, rather than review the entire group of antiprecedent new originalists, I will focus on the arguments made in the book-length defense of originalism by Keith Whittington, which is particularly thorough. He advances three separate arguments to claim that original understanding is the *only* legitimate grounds for judicial declarations of

press" would have allowed prosecution for seditious libel); Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1141 (2012) (narrating ways by which Thomas Jefferson as president and the Congress of 1840 took active steps to disavow and declare unconstitutional and void the Alien and Sedition Acts, but also noting backsliding by the antebellum Congress regarding antislavery writings and petitions); David Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985) (noting several points at which the concept evolved through the eighteenth and nineteenth centuries). As to the Equal Protection Clause, even Michael McConnell's magisterial article defending the claim that school desegregation was required by the "original understanding" of members of Congress and state legislatures favoring the Fourteenth Amendment acknowledges that northern state legislatures and state supreme courts did not desegregate their schools until the early 1880s—twelve to fifteen years after ratification. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); see also J. Morgan Kousser, Harmsworth Professor of Am. History, Inaugural Lecture Before the University of Oxford (Feb. 28, 1985), in *DEAD END: THE DEVELOPMENT OF NINETEENTH CENTURY LITIGATION ON RACIAL DISCRIMINATION IN SCHOOLS 7*, available at <http://www.hss.caltech.edu/~kousser/racial%20discrimination/dead%20end.pdf> (noting that 75 percent of racial desegregation cases brought in the North between 1880 and 1900 succeeded).

12. Indeed, Michael Paulsen maintains, "*Stare decisis* corrupts whatever interpretive method it touches." Paulsen, *supra* note 9, at 298.

13. Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), in *2 THE COLLECTED WORKS OF ABRAHAM LINCOLN* 398, 401 (Roy P. Basler ed., 1953) (emphasis added).

unconstitutionality of actions of the elected branches. Having made these arguments, he concludes that judicial review precedent that is incompatible with original understanding cannot be a legitimate ground for decisions and therefore should not bind. Pragmatism should guide the *manner* of judicial abandonment of precedent. The speed and thoroughness with which erroneous precedent is cast off by justices may vary, but cast off it must be. It has been an illegitimate exercise of power, and therefore it cannot count as grounds for throwing out otherwise valid law.

Whittington's three arguments tie his justification for originalism both to the rule of law and to popular sovereignty.¹⁴ First, he offers ample historical evidence from the Founding period to show that Americans understood that the written Constitution of 1787 was one in a long line of British-American public charters and covenants—one that, like them, functioned as a contract. In law, a contract is (and at that time was) to be interpreted and applied according to the shared understanding of the co-covenanters about the words of their contract.¹⁵ The rule of law would thus require the same of the U.S. Constitution, understood as a contract among the members of the ratifying generation, co-contracting with respect to the limits upon the government.¹⁶

Secondly, and similarly, he offers documentation of the widespread, publicly announced belief among Americans of the late eighteenth century that their innovation of setting forth a written constitution was understood as an improvement on the British Constitution specifically because ours would be *fixed* in meaning, in contrast to the British, which was alterable by their legislature, and thus set no reliable limits on governmental power.¹⁷ The fixed meaning would be the meaning widely understood at the time of ratification, and this allowed the Founding generation to believe that the new government they were establishing would not become tyrannical.¹⁸ Its limits were publicly stated and widely understood to be higher law that was enforceable by judicial review. If later judges were to alter this meaning, they would be betraying the people who ratified the document, and in effect, both undercutting popular sovereignty and defying the rule of law.¹⁹

Thirdly, for Whittington, the institution of popular ratification of a written constitution that was meant to express a sovereign popular will, binding upon (the merely) elected governmental representatives, makes sense only if the words, phrases, and structure of that constitution retain forever the meaning that they had to the understanding of the ratifying (higher-law-giving) generation—"forever," that is, unless cancelled or altered by a later popularly adopted amendment.²⁰

14. WHITTINGTON, *supra* note 1, at 47–77.

15. See Powell, *supra* note 5, at 895–97.

16. See WHITTINGTON, *supra* note 1, at 52, 57.

17. See *id.*

18. See *id.*

19. See *id.* at 50–59.

20. See *id.* at 55–61.

Whittington then goes on to combine a rule of law argument with a popular sovereignty argument to claim that only an originalist judicial review can adequately honor this legal value and this political value.²¹ His argument goes approximately as follows.

He claims that an understanding of “potential popular sovereignty” is the way to make sense of the idea that originalism in judicial review functions as the enforcer of rule by the people.²² Since the living always have the potential to assert their sovereign will by amending the Constitution, courts are obliged to enforce the will of the *original* people as the law of the Constitution until and unless this potential gets activated anew.²³ The judicial obligation to stick to original understanding makes meaningful any new assertion, because *only* then can the people be confident that their new assertion will be legally meaningful.²⁴ They must be able to rely on the judicial duty to enforce their understanding of the amendment for the act of amending to have both political and legal efficacy.

Having set forth these popular-sovereignty-based and rule-of-law-based arguments on behalf of the claim that originalist judicial review is the only valid kind, Whittington then makes short shrift of counteroriginalist precedent. For him, the question of the legitimacy of counteroriginalist precedent is simple, although the manner of ridding the law books of such precedent is more complex.²⁵ In his understanding, any precedent that declared void a duly adopted law or executive policy,²⁶ on the basis of a constitutional interpretation incompatible with original understanding, is simply illegitimate.²⁷ It violates popular sovereignty and it violates the rule of law.²⁸ Whether a particular precedent would or should be done away

21. *See id.* at 110–59.

22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.* at 169–71.

26. Nonoriginalist precedent that is merely a matter of statutory interpretation is not something Whittington addresses; Congress is always free to override judicial interpretations of its own laws by passing new laws or amending the statutes. Precedent that simply upholds laws but in nonoriginalist reasoning, presents no problem for Whittington, because the political branches legitimately can fill in gaps in the original Constitution, so long as they do not *violate* its clearly ascertainable principles.

27. *Id.* at 172. I call such an interpretation “counteroriginalist” rather than “nonoriginalist” to indicate incompatibility with original meaning; Supreme Court justices could develop honest, originalist rationales for many prior decisions that were initially defended with nonoriginalist reasoning. *Originalism and the Desegregation Decisions* is a classic example of such an endeavor by legal scholar Michael McConnell (who later served as a federal judge). McConnell, *supra* note 11. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), for instance, both Scalia’s majority and Stevens’s dissenting opinion claimed to rely on originalist reasoning. Neither set of opinions is “nonoriginalist” but each side views the other’s position as “counteroriginalist” (i.e., incompatible with a correct understanding of the originalist Constitution).

28. Although these two are the primary justifications one finds in the New Originalism literature, Lawrence Solum’s recent overview identifies two additional ones: first is the claim that “conventions of legal practice do not permit judges to deliberately overrule the linguistic meaning of the constitutional text,” and second is the claim that originalism produces better decisions. Lawrence Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM* 12, 32 (Grant

with is more complicated. Many of the policies struck down in the past by judges would no longer be popular enough to get enacted by elected officials or would have no litigant with standing to request an overruling of the precedent that earlier struck down the litigant's favored policy. But if the issue does arise, justices are obligated to indicate the correct, originalist interpretation (tempered by political prudence with respect to pace and scope of remedies). Whittington offers no place for precedent *per se*—for *stare decisis*—when it comes to counteroriginalist precedent that has declared a law unconstitutional. With this view I differ.

II. LINCOLN ON PRECEDENT

As is well known, Lincoln's response to the *Dred Scott* ruling was to announce that all must respect it as to the individual litigants but that its rules of law need not be honored as guides to national policy before such time as it might become "fully settled."²⁹ Since the Republican Party's *raison d'être* was to ban slavery in the territories and *Dred Scott* had ruled this unconstitutional, Lincoln, of course, had powerful political motivation for this pronouncement. But the analysis that he offered to support the pronouncement provides useful guidance about precedent in general.

This guidance, notably, does *not* rely on reasoning *per se*. Lincoln says that the two dissenters have critiqued the merits of the majority's reasoning, as ably as can be done, so he will not rehash the merits. Both the dissenters and the majority claimed that their respective, mutually conflicting opinions were upholding the original sense of the Constitution. If one side is correct, then the other side's position will be counteroriginalist. Each believes that the original understanding is ascertainable, and that the other side is in error. Although Lincoln does, later in his speech, reiterate and expand upon arguments from the dissenters as to the wrongness of Chief Justice Roger Taney's historical claims about the racial views of those who signed the Declaration of Independence and those who ratified the Constitution, Lincoln's suggested solution for how to decide whether to honor the opinion as binding precedent is not some sort of originalist exhortation to do more and better historical research.

Instead, after noting that the Supreme Court "has often over-ruled its own decisions," Lincoln highlights six separate factors to be considered for determining the degree of authoritativeness of a Supreme Court judicial precedent.³⁰ After listing the first five, among which historical accuracy about the Framers' generation is only one of several, he states that the sixth can outweigh even the collective force of a group of the rest.³¹ Of this sixth

Huscroft & Bradley W. Miller eds., 2011). In context, I read these as generic claims of preference for one's own constitutional theory that could be made about any theory in the legal literature, and for this reason do not address them.

29. Lincoln, *supra* note 13, at 400–01.

30. *Id.* at 401. By the time of this speech, the Supreme Court had explicitly overruled itself eight times. See S. Doc. No. 108-17, at 2385 (2002), available at <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002.pdf>.

31. Lincoln, *supra* note 13, at 400–01.

he says the following: “[I]f wanting in some of these [first five], [the precedent] had been *before the court* more than once, and had *there* been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent.”³²

This final, overwhelming factor of repeated judicial acceptance of precedent points to the connections between the rule of law and judicial—particularly, *judicial*—precedent, and also to the connections between popular sovereignty and precedent, as will be elaborated below.

The first five factors that Lincoln had listed for determining the strength of a precedent were whether: (1) the decision was unanimous, (2) the Court division appeared to reflect partisan bias, (3) the decision accorded with “legal public expectation” (i.e., that of the attentive community of legal professionals), (4) it accorded with the “steady practice of the [political] departments throughout our history,” and (5) it had been based on (in Lincoln’s words) merely “assumed” history rather than “really true” history.³³ One can infer from Lincoln’s omitting any further discussion of the first three factors that he thought it obvious to his listeners that the decision had not been unanimous, had appeared to reflect partisan bias, and had—certainly in its declaring the Missouri Compromise unconstitutional—failed to accord with the reigning “legal public expectation.”³⁴

So Lincoln zeroes in, instead, on factors four and five. For factor four, he aligns himself with President Andrew Jackson with respect to treating constitutional interpretation by the elected departments (particularly Congress and the President, in Jackson’s term, “the co-ordinate authorities of this government”) as “precedent.”³⁵ He accepts the idea, by quoting President Jackson at length, that their repeated acceptance of a policy over a course of years can be taken as expressing “acquiescence of the people”³⁶ to the constitutionality of a policy.³⁷ Moreover, (again quoting Jackson) the

32. *Id.* at 401 (emphasis added).

33. *See id.*

34. *See id.*

35. *Id.*

36. *Id.*

37. Although it is President Jackson whom Lincoln quotes for there being a coequal power and duty in the other federal branches to interpret the Constitution, and for the importance of counting these interpretations as precedents, as well as those from courts, the viewpoint has older historical roots. James Madison also prominently espoused the importance of precedent established by the political branches for establishing the reigning interpretation of the Constitution. Although Madison had argued as a member of the First Congress that the Bank of the United States was unconstitutional, when as president he vetoed the Bank’s reauthorization explicitly on policy grounds (in 1815), he announced that he had (nonetheless) become convinced of its constitutionality by twenty years of “repeated recognitions” of the Bank’s constitutional validity “in acts of the Legislative, Executive, and Judicial branches of the Government, accompanied by indications in different modes of a concurrence of the general will of the nation.” Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 318 (2005) (citing Richard H. Fallon Jr., *Stare Decisis and the Constitution*, 76 N.Y.U. L. REV. 570, 580 n.42 (2001)); *see also* Gerard N. Magliocca, *Veto! The Jacksonian Revolution in*

occupants of each of these departments, because they took oaths of office to support the Constitution, have an independent duty to interpret the Constitution for themselves. Lincoln's elaboration of the fourth factor implicitly challenges the voiding of the Missouri Compromise, which had been supported by numerous administrations.³⁸

Next, with respect to what I have called factor five, Lincoln summarizes the evidence provided in Justice Benjamin Curtis's dissent for the view that the original public understanding was that free blacks were in fact part of the body politic, or citizenry, and had voted in several states.³⁹ He even quotes a lengthy paragraph from Justice Curtis's opinion on this point.⁴⁰ This part of his speech aims to demolish the factual foundation of Chief Justice Taney's claim that in the United States, black people "had no rights which the white man was bound to respect."⁴¹

Thusly, Lincoln claims that the *Dred Scott* decision fails all six tests and need not be honored as a precedent. But the factors are for him not co-equal; being "well settled" as judicial precedent can outweigh even the collective force of "some" of the others.⁴² I want to suggest that his elevating this factor above the others is because of the links that well-settled precedent itself has both to the rule of law and to popular sovereignty.

Lincoln, without a lot of fanfare about the point, by his diction establishes two separate categories of binding judicial precedent. If a Supreme Court decision on a Constitutional question is "*fully settled*," he says, it "should control . . . the general policy of the country" and to do otherwise, apart from constitutional amendment, "*would be revolution*."⁴³ The fully settled precedent can be overturned *only* by constitutional amendment. He also describes in his list of the six elements that give strength to a precedent, the category of a precedent that is "*well settled*"—one that has "been before the Court more than once, and had there been affirmed and reaffirmed through a course of years."⁴⁴ Of this kind of precedent Lincoln says only that it "*might be, perhaps would be, factious*,

Constitutional Law, 78 NEB. L. REV. 205, 251 (1999) (characterizing Madison as believing in the equivalence of legislative, executive, and judicial precedent, which if strengthened by support at the state level, amounted to the "general will" of the nation). In 1816, he altered his policy views and signed the bill for the Second Bank of the United States.

38. Lincoln, *supra* note 13, at 401–02.

39. *Id.*

40. *Id.* at 403.

41. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

42. I grant that there is ambiguity in his choice of the word "some," for he does not say literally that if all five are lacking, simply being a well-settled precedent is enough to create the obligation to honor the precedent. It is therefore arguable that he (silently siding with originalists) meant to elevate historical accuracy above all the rest, in the sense that some of the five, but not that one, could be outweighed by well-settled precedent. I, however, view this as a strained reading of the speech. He could have made the point plainly had he intended it.

43. Lincoln, *supra* note 13, at 401 (emphasis added).

44. *Id.* (emphasis added).

may revolutionary, to not acquiesce in it as a precedent.”⁴⁵ And he is speaking here of acquiescence by the political, the policymaking, branches.

It is possible that I make too much of this distinction. Perhaps he was being verbally sloppy and meant them as a single category. But if one takes his words seriously, the best way to make sense of it may be to treat him as saying that no Supreme Court decision is ever so “fully” settled that it is revolutionary for a Supreme Court to overrule it. Judicial precedent is never literally equal to a constitutional amendment in its force; but at a certain point it becomes well-enough settled that it should bind the *political* departments as constitutional law and they are obliged to treat it as such until there is either constitutional amendment or *judicial* overruling.⁴⁶

Despite his apparent approval of the Jacksonian (and Madisonian)⁴⁷ understanding of the coequal weightiness of nonjudicial precedent, Lincoln is, with his six-factor list, setting forth a hierarchy of legal authority. Constitutional construals by the political branches over the course of time are to be respected by the justices in coming to their conclusions, as are the views of contemporary fellow justices, because unanimity is desirable. Likewise, justices should consult the consensus of the professional bar and similar legal authority, if there is such a consensus on the issue at hand. And justices must strain to rise above partisan loyalties, to produce a fair-minded decision that avoids even the appearance of partisanship. Also, justices should be careful of the accuracy of their historical claims about the Founding period (or perhaps with respect to all their claims about facts that underlie their reasoning). But above all of these concerns is an accumulation of reaffirmed judicial precedent that has endured “through a course of years.”⁴⁸

Why should this be so? For one, Lincoln, in elevating well-settled judicial precedent above congressional and presidential precedent, appears to be conceding that in some way judicial interpretation has a stronger tie to the rule of law than does construction by the political branches. By 1857, the idea that the United States has a higher-law system restricting the political branches by a judicially interpreted written constitution was well entrenched. The political branches can check one another politically ab initio by refraining from concurring in each other’s proposals, but only the check from the judicial branch can come solely from interpretation of the law qua law. If this higher-law system is to function effectively, there needs to be some point where the Court’s opinion is taken by the government to be authoritative, and Lincoln is attempting to identify that point. Repeated reaffirmation of judicial precedent by *judges* is what does the trick.

45. *Id.* (emphasis added).

46. It is also possible that he meant that some precedents might be so wrongheaded that they, in particular, can never become “fully” settled. He may well have felt this way about *Dred Scott*, wanting to leave room always for it to be overruled.

47. See Lincoln, *supra* note 13, at 401–02; see also *supra* note 37.

48. Lincoln, *supra* note 13, at 401.

The judicial perspective alone, however, is not enough in the American system to bring about repeated judicial reaffirmation “through a course of years.” Federal judges die, to be replaced by new judges, and these must be nominated by elected presidents and confirmed by elected senators, senators who, in Lincoln’s time, still were chosen by elected state legislatures. Thus, there would need to be broad and enduring political consensus on a judicial decision before that decision could become “affirmed and reaffirmed through a course of years.” This criterion for the authoritativeness of judicial precedent, therefore, combines the legal expertise and detachment that are needed for maintaining the rule of law with a practical outcome (repeated appointment of justices who are of like mind on the particular issue decided) that can be obtained only if there is relatively broad and enduring consensus across the citizenry. It offers a kind of practical, less official substitute for the popular sovereignty that is mobilized officially in Article V’s mode of constitutional amendment. And *this* kind of judicial precedent is to be honored then by the president and Congress, just as is official constitutional amendment. It is to be honored both because it secures the rule of a higher-law system, and because it functions as a kind of popular sovereignty.

Because the originalist argument hinges on the claim that it alone can honor these two goals of the Constitution, I am arguing that it ought, in general, to give way to well-settled precedent, and that the die-hard originalists who do not concede this point are in error.⁴⁹ The political system that over the course of time produces a reiteration of judicial precedent offers in practice a better way to secure popular sovereignty and the rule of law than would rigid insistence on original meaning.

III. THE POLITICS OF CONSTITUTIONAL AMENDMENT AND THE QUESTION OF BAD PRECEDENT

This rumination on Lincoln’s *Dred Scott* speech has not only explicated Lincoln’s beliefs about why elected officials ought to defer to well-settled judicial precedent, but has also directed attention to the constitutional politics involved in the bringing about of a “well-settled” precedent. It has not yet addressed Whittington’s claim that *justices* should feel obliged to undo even the most well-settled precedent if said precedent is counteroriginalist. A consideration of the bearing of the phenomenon of constitutional politics upon this claim is now in order.

Whatever one’s theory of constitutional interpretation, whether New Originalist, Textualist, Dworkinian, or what have you, the question of bad precedent from time to time arises. That is, the Supreme Court sometimes announces abrupt changes of doctrine. How abrupt they are may be evident not from a single decision, but only after a short series of cases. For

49. Perhaps “die-hard” is too harsh. Justice Scalia in conceding the point calls himself a “faint-hearted originalist,” so I suppose he would more benignly characterize Whittington and like-minded scholars as “wholehearted originalists.” Scalia, *supra* note 1, at 861–63.

instance the total reversal of *Plessy v. Ferguson*⁵⁰ came about in a series of cases (1950–56) that extended from *Sweatt v. Painter*⁵¹ and *McLaurin v. Oklahoma State Regents for Higher Education*,⁵² through *Brown v. Board of Education*⁵³ and *Bolling v. Sharpe*,⁵⁴ up to the series of per curiam cases in the few years after *Brown* that desegregated all state-operated facilities and declared void state mandates to segregate privately owned facilities on the basis of race.⁵⁵ Similarly, it took a series of cases between 1971 and 1976 to unfold the Court’s abrupt shift from a general disposition to treat gender-based discrimination as presumptively justified, and therefore not a violation of equal protection,⁵⁶ to the contrary position. These began with *Reed v. Reed*⁵⁷ and *Frontiero v. Richardson*,⁵⁸ and culminated in *Craig v.*

50. 163 U.S. 537 (1896) (holding that a law mandating racial separation in mass transit vehicles, so long as accommodations are equal, did not violate Equal Protection Clause), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

51. 339 U.S. 629, 634 (1950) (holding that state segregation of law schools by race violated the Equal Protection Clause because the separate law schools were unequal in “qualities which are incapable of objective measurement but which make for [excellence in education],” including the reputation of the school in the broader community and the quality of learning how to communicate with members of the race that dominates powerful positions in society).

52. 339 U.S. 637, 640–42 (1950) (holding that state-imposed racial segregation within a graduate school by provision of mandated special seating everywhere on campus interfered with equal quality education and the Equal Protection Clause, because it cut off communication between students of the minority race and those of the majority, and such communication was an important part of education).

53. 347 U.S. at 493–95 (holding that state-imposed racial segregation of children in public schools violated the Equal Protection Clause because such education was unequal in intangible factors, which included psychological damage to the minority race). This education could not be made equal without desegregating because “[s]eparate educational facilities are inherently unequal.” *Id.* at 495; *see also* *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (requiring that desegregation of public schools was to take place “with all deliberate speed”).

54. 347 U.S. 497 (1954) (holding that desegregation also applied in D.C. because the Fifth Amendment Due Process Clause has contained an equal protection rule at least since *Korematsu v. United States*, 323 U.S. 214 (1944)).

55. *See* *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (buses); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (per curiam) (golf courses); *Mayor of Balt. v. Dawson*, 350 U.S. 877 (1955) (per curiam) (beaches).

56. In *Goesaert v. Cleary*, the Court held that gender discrimination evokes only rational-basis-level scrutiny and there are imaginable moral and social reasons that legislatures may wish to keep women from serving liquor in bars. *Goesart v. Cleary*, 335 U.S. 464 (1948), *abrogated by* *Craig v. Boren*, 429 U.S. 190 (1976). Later, in *Hoyt v. Florida*, 368 U.S. 57 (1961), the Court held that it is not a violation of equal protection to try women in a system of effectively all-male juries for the crime of murdering their husband, because this jury system serves the legitimate interest of honoring traditional family roles. In *Hall v. Mississippi*, 385 U.S. 98 (1966) (per curiam), the Court refused to reconsider *Hoyt*’s holding.

57. 404 U.S. 71 (1971) (holding that statutory preference for males as estate administrators is arbitrary and therefore a violation of equal protection).

58. 411 U.S. 677 (1973). In this case a four justice plurality (out of nine who participated) opined that male preference as estate administrators is not arbitrary and thereby concluded *Reed* must have invoked strict scrutiny; the Court struck down unequal spousal benefits in the military as a violation of equal protection. *Id.*

Boren.⁵⁹ Both these Supreme Court shifts abandoned well-settled precedent, as did the combination of *NLRB v. Jones & Laughlin Steel Corp.*⁶⁰ and *United States v. Darby*.⁶¹ The latter unanimously affirmed the constitutionality of federal prohibitions on child labor in manufacturing of goods intended for interstate commerce and explicitly overruled the twenty-three-year-old contrary precedent, *Hammer v. Dagenhart*.⁶² Finally, the combination of decisions in *Griswold v. Connecticut*⁶³ and *Eisenstadt v. Baird*⁶⁴ to create a right of sexual privacy broke with what Justice Hugo Black's *Griswold* dissent characterized as "many later cases" that had, starting with *West Coast Hotel v. Parrish*,⁶⁵ repeatedly rejected substantive due process reasoning and the earlier precedents that had relied on it.

Each of these breaks in constitutional law doctrine altered the legally effective meaning of the Constitution. One might say they did so unofficially, because they did not follow the official Article V route. Scholarly opinion varies as to which of these alterations returned the Constitution to its original meaning or original understanding—or, for nonoriginalist constitutional theorists (like myself), over which of these returned the constitutional law to comport more closely to the Constitution. But no serious scholar denies that the rules of constitutional law are sometimes abruptly altered by the Supreme Court. Since this is so, one must acknowledge that even some "well-settled" judicial precedent is wrong or bad, because the mutually conflicting versions of the doctrine before and after the abrupt break cannot both be correct. One can respond to this evident fact about precedent both descriptively (or analytically) and prescriptively (in the mode of "what is to be done?" à la Lincoln). Recall that Lincoln's prescription regarding "well-settled" precedent was tentative: to flout it, he said, "might" or "perhaps" would be "factious" or "revolutionary." Of course this phrasing implies the additional "and perhaps not." And he was directing his remarks to the political departments, i.e., to those who select and confirm justices and who, in general, set policy direction.

59. 429 U.S. 190 (1976) (holding that gender classifications are subject to quasi-strict scrutiny, and thereby striking down gender specific drinking law); see also JUDITH BAER & LESLIE F. GOLDSTEIN, CONSTITUTIONAL AND LEGAL RIGHTS OF WOMEN: CASES IN LAW AND SOCIAL CHANGE 46–85 (3d ed. 2006).

60. 301 U.S. 1 (1937) (breaking with decades of precedent and finding that the federal regulation of labor practices in large manufacturing companies that distributed products nationwide and drew raw materials across many state lines had a close and intimate effect on interstate commerce, and was therefore constitutional).

61. 312 U.S. 100 (1941).

62. 247 U.S. 251 (1918), overruled by *Darby*, 312 U.S. at 100.

63. 381 U.S. 479 (1965). More precisely speaking, the *Griswold* decision was premised on a married couple's fundamental right of marital privacy, recast in the *Eisenstadt v. Baird* decision into a right of sexual privacy. 405 U.S. 438, 453 (1972) (acknowledging "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

64. 405 U.S. 438 (1971).

65. 300 U.S. 379 (1937).

My discussion below proceeds first analytically, describing the constitutional politics that accompany abrupt shifts of judicial doctrine, and then prescriptively, with respect to the Supreme Court itself. When should a Supreme Court follow “well-settled precedent,” or more precisely, to what degree should justices feel bound by it?

First, what is one to conclude from the fact that the public periodically endures the constitutional law rules that are issued in bad precedents, precedents reaffirmed for a long time before getting corrected? For instance, one can view *Griswold v. Connecticut* and its sexual privacy progeny as illegitimate, whether on originalist or on textualist grounds.⁶⁶ Yet it was plain to anyone who witnessed the televised Senate confirmation hearings of the Robert Bork nomination to the Supreme Court that the public’s response to the hearings strongly favored the rule that absent compelling interest, government should stay out of contraceptive decisions (this, irrespective of the Constitution’s silence on the specific subject). Such support has made the *Griswold* decision, in practical effect, a judicially wrought amendment to the U.S. Constitution, unlikely to disappear even if *Roe v. Wade* is someday overruled.

Does this pattern mean the constitutional system as currently practiced allows for judicial tyranny because the apathetic public lines up in favor of whatever the Court declares? I would say not. I would argue that what it exhibits is the system of constitutional politics in the United States. This system incorporates democratic influence over the rules of the Constitution via a number of mechanisms: the election of a president and senators who control judicial appointments, expressions of public opinion associated with those appointments, congressional control over the size of the Court, congressional and popular agitation to amend the Constitution, and, finally, the absence of the latter in response to particular Court opinions. This popular influence is obviously indirect and attenuated and in that sense, murky or messy. It is far less neat and clear-cut than the officially prescribed Article V method of letting the public shape the rules of the Constitution. It is nonetheless real.⁶⁷

In 1803, St. George Tucker maintained that although the United States does not hold frequent constitutional conventions, one can nonetheless conclude that the living American people “consent” to their constitutional system because they have available both the freedom to leave and the right to amend the Constitution via votes for Congress, state legislatures, and

66. For an extended textualist argument, see GOLDSTEIN, *supra* note 11. This textualist argument, in my view, would not necessarily extend to the right to abortion, for which compelling equal protection arguments exist, due to the absence of good Samaritan laws in U.S. jurisdictions.

67. There are some echoes of my analysis in Barry Friedman’s book *The Will of the People*. What he sees as reversals of judicial direction in response to public opinion, however, I often would characterize as slight refinements. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009). My interest is in the dramatic reversals of direction that come along more rarely but are far more obvious.

representatives to constitutional conventions.⁶⁸ During the three antebellum decades, the Garrisonian abolitionists emphatically proclaimed that every vote for any government office in the United States was an act of consent to the Constitution, for the Constitution (Article VI, Section 3) explicitly mandates that all such officials swear an oath to support the document. Conscientiously opposed to the slavery compromises in the Constitution, this faction of abolitionists refrained (as a point of honor) from voting. One could, of course, argue that even today the act of voting continues to imply citizen consent to the constitutional system. And the suggestion that “the Framers” might be understood to include all Americans who have refrained from attempting to amend the Constitution has even been made (perhaps not altogether seriously) in modern legal scholarship.⁶⁹

Such suggestions fail to persuade, however, because the difficulty of amending the Constitution—its leaden bias toward the status quo—is notorious.⁷⁰ In other words, the voting majority may very well wish to express nonconsent to a part of the constitutional text, or to a Supreme Court interpretation of that text, but the obstacles of the amendment process force the public to live with the unpopular text or unpopular interpretation until opposition to it has not just captured majority sentiment but has become truly overwhelming (dominating two-thirds in each house of Congress and majorities in both legislative houses in three-fourths of the states).⁷¹

Still, one can refine these suggestions that the public does consent to the Constitution, and even to the Constitution as practiced—i.e., “constitutional law”—by participating in the voting system and by refraining from amending the document. To make these ideas more persuasive, one can take into account the broader *politics* of constitutional amendment. It is not widely recognized that two of the prominent modern instances of abrupt alterations of Supreme Court doctrine can be explained as judicial responses to constitutional amendment politics. In the 1970s, the Supreme Court radically altered the longstanding meaning of the Equal Protection

68. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 173 (Lawbook Exch., Ltd. 1996) (1803); 2 TUCKER, *supra*, at 370 n.4, app. at 90.

69. James Boyd White, *Law As Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 418 (1982).

70. See, e.g., JOHN AGRETO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 107–11 (1984).

71. Walter Dellinger has observed that the role of states in the amendment process makes it possible for states containing as few as 4 percent of the population to block an amendment or for states with barely more than 40 percent of the population to ratify an amendment. Walter Dellinger, *The Process of Constitutional Amendment*, 49 NEWS FOR TCHR. POL. SCI. 16 (1986). This calculation poses what are essentially hypothetical problems, for the states never align in that mathematical pattern; but it does draw our attention to the nonplebiscitary character of our “representative democracy.” The “people,” for purposes of a constitutional amendment—like the “majority,” for purposes of election of the president by the Electoral College—are counted as members of state organizations. To describe elections as majoritarian and the amendment process as hypermajoritarian, although accurate in certain dimensions, does cause this piece of the picture to be overlooked.

Clause in regard to gender discrimination from what it had been up through the end of the 1960s.⁷² The beginning of this judicial shift in *Reed* followed on the heels of overwhelming endorsement of the Equal Rights Amendment in the House of Representatives, and its culmination in *Craig v. Boren* followed upon the endorsement of the amendment by better than nine-to-one margins in both chambers of Congress and ratification by more than two-thirds of the states.⁷³ One can observe a similar, if less pronounced, pattern regarding the Supreme Court's shift on child labor regulation between the 1910s and 1941.⁷⁴ This shift is widely attributed to judicial fear concerning President Franklin D. Roosevelt's Court-packing plan. That plan never got very far in Congress; but a child labor amendment to the Constitution had achieved a two-thirds vote in both houses of Congress in 1924 (with no time limit on state ratification), and FDR's election spurred a renewal of state ratification activity in the 1930s.⁷⁵ The Supreme Court did not announce its shift on child labor until 1941; by that time, the impact of FDR's appointing power had produced unanimity. But the key Supreme Court votes were already shifted by 1937,⁷⁶ shortly after FDR's landslide made state ratification appear a more viable possibility.

It makes sense to add the president's appointment power and Senate consent to appointments, combined with congressional power over the size of the Court, to the consent-garnering calculus of Constitution-related politics. The Court produces an interpretation of the Constitution. The public experiences its impact for a while and reacts. If the interpretation is intensely and widely unpopular, it is likely to become a matter of electoral debate influencing congressional and presidential elections and judicial appointments—e.g., the Lincoln-Douglas debates concerning *Dred Scott*, Nixon's campaign for a "law and order" Court, Reagan's and then the two Bushes' promise to appoint "pro-life" justices. It is, of course, true that every presidential or senatorial election contains a multiplicity of issues

72. See *supra* notes 56–59 and accompanying text (discussing *Craig*, *Frontiero*, *Reed*, *Hall*, and *Hoyt*); see also *Taylor v. Louisiana*, 419 U.S. 522 (1975) (holding unconstitutional the same kind of virtually all-male jury system that *Hoyt* had upheld, but based on fundamental right to jury trial reasoning rather than equal protection).

73. See generally Leslie F. Goldstein, *The ERA and the U.S. Supreme Court*, in 1 RESEARCH IN LAW AND POLICY STUDIES 145 (Stuart S. Nagel ed., 1987) (discussing this judicial shift in greater detail).

74. Compare *United States v. Darby*, 312 U.S. 100 (1941) (holding that the federal government could regulate labor conditions, including a ban on child labor, for manufacturing goods intended for interstate commerce), and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (holding that federal regulation of labor practices in large manufacturing companies that distributed products nationwide and drew raw materials across many state lines had a close and intimate effect on interstate commerce, so it was constitutional, even though it regulated manufacturing), with *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (holding that federal tax on child-labor-produced goods amounted to a regulation of manufacturing and was unconstitutional), and *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding that a federal ban on child-labor-produced goods from interstate commerce amounted to regulation of child labor in manufacturing, so it was unconstitutional, because federal government may not regulate manufacturing), *overruled by Darby*, 312 U.S. at 100.

75. CLEMENT VOSE, CONSTITUTIONAL CHANGE 243–52 (1972).

76. See *Jones & Laughlin Steel Corp.*, 301 U.S. at 1.

and, thus, even if voter awareness were higher than it is, virtually never would present a clear mandate to appoint and confirm a particular kind of judge. On the other hand, if a long series of elections produces a long series of judicial appointments—long enough to wreak a dramatic transformation in the Supreme Court’s approach to a particular electorally controversial doctrine—it is hard to resist the conclusion that the voting public has expressed its will as to the meaning of the Constitution.

Still, commitment to the popular-sovereignty-based higher-law system set forth in the Constitution, as well as commitment to the rule of law, would incline one to agree with Lincoln’s concession that once a Supreme Court decision has become “well settled”—that is, once it has been judicially “affirmed and re-affirmed through a course of years,”⁷⁷ it should be viewed as inappropriate for legislative and executive branch officials to disobey the rules of law from such precedent. For if the voters have, over a long course of years, refrained from altering it by means of constitutional politics, they ought to be viewed as having exercised a sovereign power of choice.

This assertion admittedly is a two-edged sword; whatever one’s constitutional theory, there has been popular acquiescence for extended periods to some bad Supreme Court precedents—bad, that is, as measured by one’s constitutional theory—(think *Plessy v. Ferguson*⁷⁸). This analysis of constitutional politics suggests that the public must be seen as having (retroactively) consented to those bad rules of (higher) law, as well as to the rules of better precedents. All that can really be said in response to this admission is that human beings are fallible.

For instance, the citizenry and government of the United States permitted a system of chattel slavery to endure for decades even though, as the political, or voting, abolitionists were to argue for many years, this system surely did run counter to: (1) principles embodied in the Fifth Amendment Due Process Clause’s list of rights of all persons; (2) principles embodied in the prohibitions in Article I, Sections 9 and 10 on titles of nobility, bills of attainder, and ex post facto laws; and (3) to any respect-worthy meaning of the “republican form of government” that was supposed to be guaranteed to the states by Article IV, Section 4.

A new originalist who favors the standard of original-public-dictionary meaning should side with this abolitionist interpretation: the single word “person” should not bear the meaning “human being of any race” in one part of the document (the Three-Fifths Clause and the Rendition Clause) but a contrary meaning, “only white persons,” in another part (the Fifth Amendment Due Process Clause). By contrast, a public-understanding new originalist could accept one word as having two contrary meanings if the

77. Lincoln, *supra* note 13, at 401.

78. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Michael McConnell has developed an impressive argument to the effect that *Plessy*’s pro-segregation ruling was counter to (even) the original understanding of the backers of the Fourteenth Amendment. McConnell, *supra* note 11.

public chose in the 1790s, however perversely, to “understand” the document this way.⁷⁹

In sum, the Supreme Court sometimes does announce decisions that are contrary to constitutional principles, properly understood. The public sometimes acquiesces in them for extended periods. There always remains the possibility that over a long course of years a judicial “amendment” to the Constitution will simply be accepted by the voting public and by its representatives as a matter of national legal custom. This is not a phenomenon that the Constitution desires, as it were. But the nature of human fallibility and the institutional commitment in the United States to a democratic republic makes it an inevitable possibility.

A distinction here is important. The Constitution provides a formal amending process in Article V (one that the American public shows little interest in altering).⁸⁰ This Article V procedure establishes a different, higher, more binding status for amendments formally adopted than for those that occur through judicial interpretation with or without public acquiescence. There is little dispute on the point that Supreme Court justices must always honor formal constitutional amendments.⁸¹

More than five decades of public acquiescence in *Plessy* had a markedly less powerful hold on the Court than would have been true of a hypothetical Fourteenth Amendment clause saying, “Nothing in this amendment shall be construed to forbid legislatures from mandating separation of the races in public places.” The latter would be the public voice speaking (via elected representatives) as formally, as solemnly, and as forcibly as it can; the former (long acquiescence in a particular Court reading of the Constitution) is the public speaking tentatively, provisionally, and until circumstances change. When the voting and lobbying portion of the public speaks through constitutional politics (for instance, by succeeding in pushing a proposed amendment through both houses of Congress in reaction to Court decisions; or by continuously electing presidents who plan to move Court

79. Aspirationalists, or constitutional perfectionists such as Gary Jacobsohn, Sotirios Barber, and James Fleming, might explain the “bad precedent” phenomenon by arguing that the clauses in question set standards to which the public aspired, and to which they hoped that their institutions would someday attain. See SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* (2007); GARY J. JACOBSON, *THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION* (1986). By these lights, Lincoln would have been correct to do all he could to stem the spread of slavery, including the appointment of like-minded federal judges.

80. The prescribed Article V procedures also include one substantive limit: states may not be deprived of their “equal suffrage” in the Senate. A violation of this prescription would not qualify as what I am calling a “formal” amendment.

81. Scholars have occasionally argued that the Supreme Court might properly declare void even a formally appropriate constitutional amendment, but this viewpoint has not attracted significant support. See, e.g., Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717 (1981) (arguing that Article V cannot be amended to create additional limitations on amending power); Walter Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 754–57 (1980) (arguing that amendments violating “human dignity” are void); Jeffrey Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073 (1991) (arguing that amendments to the Constitution that conflict with natural rights as honored by consensus in state constitutions would be void).

interpretations in a certain direction), it is in a sense speaking to the Court, saying, "We read the Constitution differently. Please reconsider." If the Court refuses to reconsider stare decisis at this point, the voting public may become dissatisfied to the point that a successful formal amendment will result.⁸² I am not saying that the Court should view pending constitutional amendments as threats; rather, I am simply noting that if public opinion has shifted to this degree on a controverted constitutional question, it is highly likely that the justices on the Court will also reflect the newly emerged sense of what the Constitution should say.

If the foregoing is an accurate descriptive analysis of constitutional politics, what of the prescriptive side? Under the Lincolnian prescriptions here endorsed, with elected officials obliged to honor (even bad) "well-settled" precedent, the only two ways to undo these precedents are the Article V amendment process or judicial overruling. When is it proper for the Supreme Court to overrule well-settled (but wrong) precedent? According to the group of New Originalists here being challenged the answer is "always."⁸³ A clear look at constitutional politics suggests otherwise; precedents become "well-settled" because of long term and widespread public support for them. And what I have suggested descriptively, so far, indicates that what I say here prescriptively will be beside the point. Justices will interpret the Constitution in terms of what they understand to make the most sense, or the best sense, of it as constitutional law, but because of the politics of judicial appointments, the sense that they make of the Constitution will vary with long term political trends, irrespective of what legal scholars or political scientists write.⁸⁴ One might say that my prescriptions here apply more to the appropriate judgments to be made by the attentive community of Court watchers, than they can to actual behavior of the justices.

First, arguably the most important overruling of our lifetime, that of *Plessy* by *Brown v. Board of Education* (despite the elegant and meticulous, forty-years-after-the-fact, originalist justification of it by Michael McConnell)⁸⁵ was neither phrased in terms of, nor motivated by, a desire to return to the original understanding of the Fourteenth Amendment. Nor did it stem exactly from a concerted political campaign. Rather, it came about as a result of repeated appointments of liberal justices during the Roosevelt and Truman administrations, the appointment by Dwight D. Eisenhower of

82. I do not mean to suggest that formal amendment is a bad thing; my own preference would have been for the Equal Rights Amendment to be ratified rather than have the Constitution merely informally amended by the Supreme Court.

83. See *supra* Part I.

84. Robert Dahl, *Decision-Making in a Democracy: The Supreme Court As National Policy-Maker*, 6 J. PUB. L. 279, 279-95 (1957) (arguing that, over the long run, policies of the Supreme Court will be compatible with the policy preferences of the dominant national coalition due to institutional arrangements that produce judicial appointments); see also Mark Graber, *The Non-majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993) (demonstrating that Dahl's thesis is limited to those issues on which the dominant coalition has a strong, shared point of view, and that a wide range of issues fall outside this category).

85. McConnell, *supra* note 11.

moderate Republican Earl Warren, and a change in public attitudes at the national level, which itself facilitated these appointments. It is not a bad thing to select, from among competing plausible readings of the constitutional text, the one that comports with justice, as the Court did in 1954; when the Court majority's sense of justice is shared by the views of a national majority (as it tends to be, at least over the long run), such a choice will tend to enhance the perceived moral legitimacy of the Constitution.⁸⁶ This is a good thing. Writing a justifying opinion that appears persuasive to the attentive legal community is also both helpful and important, and Chief Justice Warren did not always measure up in this respect.⁸⁷ He might, for instance, in *Brown* have relied more heavily on the particular "intangible factors" set forth in *Sweatt v. Painter* and *McClaurin v. Oklahoma State Regents for Higher Education* to supplement his *Brown* claims about psychological damage to children from state-sanctioned segregation.

To be sure, not every modern development of precedent accords with my own understanding of the proper reading of the Constitution. I would have much preferred that the Court's initial gestures in the direction of constitutional permission for affirmative action⁸⁸ become "well-settled precedent." But this was not to be,⁸⁹ and probably because of the same constitutional politics dynamic that caused *Brown* eventually to overturn *Plessy*.

86. The majority of the citizenry, of course, may be mistaken (as was the situation at the time of *Plessy*), or as Jack Balkin has put it, "moral legitimacy" may be in tension with "democratic legitimacy." Jack Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 842–43.

87. H. Jefferson Powell blames the Warren Court for a characteristic failure to craft such opinions and suggests that it is this failure that produced the rise of originalism. See Powell, *supra* note 5, at 266–69.

88. See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (upholding minority preference policies of the FCC), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Johnson v. Transp. Agency*, 480 U.S. 616 (1987) (upholding affirmative hiring plan for women in road construction against a Title VII challenge); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding a federal 10 percent affirmative quota set-aside for minority subcontractors in the construction industry), *overruled by Adarand*, 515 U.S. at 200; *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (upholding affirmative action in hiring by private employers with respect to rectifying a "manifest" imbalance in traditionally segregated job categories); *Califano v. Webster*, 430 U.S. 313 (1977) (upholding a special social security benefit for women retirees); *Kahn v. Shevin*, 416 U.S. 351 (1974) (upholding a special tax break for widows against a sex discrimination, Equal Protection Clause challenge); *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 44 n.1 (1971) (declaring unconstitutional the statutory ban that "[n]o student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins").

89. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (ruling that school district efforts to produce racially integrated student population in public K-12 schools are unconstitutional, modifying the rule in *North Carolina State Board of Education v. Swann*); *Adarand*, 515 U.S. at 200 (declaring that even affirmative race-based distinctions by the federal government must be subjected to strict scrutiny, overruling *Fullilove*); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down as a violation of equal protection a 30 percent minority set-aside for city construction contracts and applying strict scrutiny for state- and local- government level race-conscious policies).

By contrast, it seems plain that an overturning of *Griswold* in this post-Bork era, would not be perceived as an enhancement of constitutional legitimacy, that is, as putting constitutional law on the side of the desirable society (which in the U.S. means not only a just society, but also a free society). Instead, it would tend to increase a perception of illegitimacy of the Constitution. This would be so whether the overruling of *Griswold* were phrased in terms of a desire to return to original understanding, per Whittington, or to return to limiting judicial declarations of unconstitutionality to those that can be grounded clearly in the text of the Constitution (my own interpretive preference). In other words, with respect to “mistakes” by the public in their acceptance of improperly grounded, or plain old erroneous, constitutional law, sometimes the right thing for justices is to let sleeping dogs lie, by accepting the rule of stare decisis.

I am not suggesting that Supreme Court justices simply abdicate their responsibilities to discern by their own best lights constitutional meaning and follow instead the latest opinion polls. I am suggesting, however, that it is not wrong for them to be aware of the constitutional politics swirling around certain of their decisions (as, in fact, they no doubt are) and weigh in their calculations both the degree of settledness of a precedent and the matter of the perceived legitimacy of constitutional law. I believe that this course honors the two American polestars of the rule of law and popular sovereignty to a far greater degree than would a constant rearranging of constitutional law to honor the most recent perception about, or latest historical discovery of, original understanding.⁹⁰

90. The sharp divisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), should be enough to remind jurists that a quest for original meaning will not necessarily bring either stability or consensus to constitutional law.