

Originalism: Lessons from Things that Go Without Saying[†]

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It is a very special honor to present these Nathanson lectures, and not simply for the obvious reason that I was asked to join a very distinguished list of Nathanson lecturers. I also have fond recollections of an earlier visit to the school—more than twenty-five years ago—and I am an admirer of the work of several members of the San Diego faculty that intersects in various ways with my own. But most of all, Nat Nathanson, after whom the lectures are named, was a dear friend and colleague at Northwestern—and also a hero of mine—for many years. The colleague relationship spanned twenty-four years, and the friendship came easily, and continues with Leah Nathanson who is well known to you folks in San Diego, and who is here with us today. The hero business perhaps requires a bit more explaining. Nat was generous with younger colleagues like me, who were floundering around a bit, but very demanding of himself. He insisted on confronting the hard questions posed by positions that his instincts embraced. I watched that over the years, and as a result, I try to resist sloughing over difficulties as I puzzle through some problem. I do not think I satisfy the standard that Nat set, but I have no doubt that it was his own standard of intellectual rigor that helps me try. Indeed, Nat Nathanson remains such a part of my psychology

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that I was stunned to read in today's program that he has been gone for more years than he was my colleague.

That said, I think Nat would be impatient by now for me to get on to my assigned task, and so without further ado, I turn to lessons for originalism from some things that go without saying in and around the United States Constitution.

What has come to be called "originalism" in constitutional interpretation has shown remarkable resilience. Adherents to originalism are called "originalists," and some of the stick-to-itiveness is shown by originalists in these very halls. I will have some critical things to say about originalism in action, but I do not want to be misunderstood by my gracious hosts. I do not come to bury originalism, but rather to set it free.

The word *originalism*, at least as often used by adherents, is just too tendentious, suggesting that with historical work and some clear headed thinking the Constitution can be mined for a lot of right answers to today's problems. The principal message I want to deliver today is that any such claim is woefully exaggerated. The term *interpretivism*, first coined by Tom Grey and then popularized by John Hart Ely, held sway for a time.¹ Then Paul Brest came up with *originalism*.² Brest meant the word only descriptively,³ and in my view we would have been better served by resisting the neo-neologism with its normative connotations. Still, I could live with *originalism* if adherents would only own up to the very large degree of choice that necessarily exists in the arena of constitutional interpretation. Like it or not, that means that if we retain aggressive judicial review—and I see no signs of any contemplated abandonment—judges will provide substantial input into the complex of value choices that help define American public life.

Originalism, as I assume you all know, is the view that the appropriate guideposts for constitutional interpretation are "original" ones, sources that probe constitutional "meaning" by reference to the meaning entertained by the people around at the time the Constitution was enacted. The resilience of the approach is remarkable in part because intractable puzzles just keep coming about what originalists mean by *meaning*.

1. See John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 399–400 (1978); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 1–4 (1980); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705–06 (1975).

2. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 n.1 (1980).

3. *Id.*

One set of problems has been front and center. There were a lot of people around at the time the Constitution was formulated and adopted, and originalists have visibly struggled with the question of which among them counts in fathoming meaning. One category of candidates is the authors of the Constitution, suggested by talk of “original intention.”⁴ Then there is the initial audience for the document, suggested by talk of “original understanding.” But there are questions of who plays those roles. Are state ratifying conventions, for instance, authors or audience?⁵ And then, more recently ascendant has been talk of “original meaning” which, in a different way, fudges the question of just whose meaning we are talking about. When pressed for a description of this fathomer of meaning, proponents of original meaning suggest something like an ordinary and reasonable and informed user of the English language at the time the Constitution was promulgated.⁶

Once one grapples with any of these formulations, further problems loom. I will treat only glancingly the difficult, interesting, and important set of questions about the level of specificity or generality at which meaning is to be pegged. Nor will I dwell on the historiographical problems, or whether judges, or law professors for that matter, are equipped to do, or to evaluate, that kind of work.⁷ And I will put to the side what I call the “summing problem,” amalgamating meanings entertained by multiple people into some coherent whole.⁸ For each of the role players, we could shroud the summing problem by use of a single hypothetical player, and that is what original meaning enthusiasts basically do. Given the use of such hypothetical constructs, it turns out that the choice of role players makes very little difference.⁹ For that

4. Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 444–46 (2007).

5. Jack Balkin collapses the two roles by referring to ratifiers as “authorizing audience.” Balkin, *supra* note 4, at 445.

6. See generally JACK N. RAKOVE, ORIGINAL MEANINGS 7–11 (1996); Balkin, *supra* note 4, at 445; Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48–49 & nn.10–11 (2006) (where authorities are collected); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 554 (2003).

7. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 857, 861 (1989).

8. See Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 456 (1984) (defining the “summing” problem as the “problem of developing a group intention for the complex activity of promulgating constitutional language that is carried on by many people in many different legislative bodies”).

9. See Nelson, *supra* note 6, at 556–58.

reason, and for ease of discussion, except when I indicate differently, I will be dealing with a hypothetical original “fathomer of meaning,” a reasonable user of English living toward the end of the eighteenth century.

Originalists are sometimes divided into textualists and intentionalists, with the former insisting that subjective states of mind cannot be allowed to override the Constitution’s words. But words do not define themselves, singly, or in phrases, or in documents, so even self-styled textualists necessarily face an abundance of choices. Is the original fathomer of meaning understood to be familiar with the whole document or just the phrase being interpreted? How much does he know of formulations in the Constitution’s antecedents, the Articles of Confederation, for instance, or the Magna Carta? Is he versed in the language of the law, or is his knowledge limited to just colloquial English? Is he used to meticulous parsing of language, or is he prepared to deal with rhetorical flourishes, or occasional looseness, or for that matter sloppiness, in the use of language? Has he thought through the consequences of one meaning or another that might be attached to his words? And if he is not allowed to know the motivations of the authors, to what extent is the fathomer of meaning nonetheless informed about aspects of the historical setting in which the authors formulated their words?¹⁰

The importance of such questions is nicely illustrated by my favorite constitutional ambiguity, discussion of which was stimulated by what was billed as a contest announced in a 1995 issue of the journal, *Constitutional Commentary*.¹¹ It then became the subject of sometimes playful discussion among constitutional scholars.¹²

When Article II says that “[n]o Person except a natural born Citizen, or a Citizen of the United States, at the time of the *Adoption* of this Constitution, shall be eligible to the Office of President,”¹³ does the phrase *the United States* refer to an entity that came into existence only when the Constitution was adopted or to an entity that predated the Constitution? On the answer to that question, George Washington’s eligibility to be the nation’s President might seem to have turned, for Article VII says that “[r]atification of the Conventions of nine States,

10. “Many, if not most, of the provisions of the Constitution do not make sense except as they are given meaning by the historical background in which they were adopted.” Antonin Scalia, *Is There an Unwritten Constitution?*, 12 HARV. J.L. & PUB. POL’Y 1, 1 (1989).

11. *Contest: Was George Washington Constitutional?*, 12 CONST. COMMENT. 137–38 (1995).

12. See, e.g., Jordan Steiker, Sanford Levinson & J.M. Balkin, *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237 (1995).

13. U.S. CONST. art. II, § 1, cl. 5 (emphasis added).

shall be sufficient for the Establishment of this Constitution between the States so ratifying.”¹⁴ But Washington’s Virginia was not one of the first nine to ratify the Constitution, so if *establishment* and *adoption* are the same thing, and the Constitution’s “United States” came into existence at that time, Washington would seem not to have met the citizenship requirement.¹⁵

If one looks solely at the words of the most pertinent constitutional language—supplemented by some ill-defined appreciation of ordinary uses of English—one could easily conclude that the United States came into existence upon ratification by the first nine, so that Washington was ineligible. But if one looks at other uses of the term *the United States* in the Constitution and at the larger historical context, this conclusion would be called into serious question, for there was something called “the United States” that preexisted the Constitution.¹⁶ Thus, the Articles of Confederation referred to the entity that it governed as “The United States of America.”¹⁷

But that in turn leads to some awkward possibilities. What if Virginia had *never* ratified the Constitution? Would Washington nonetheless have been a citizen of “the United States” referred to in Article II? Or, worse yet, what about some previously unknown, but ambitious and effective political type—say someone like Aaron Burr—from a state under the Articles that never ratified the Constitution?¹⁸ It just could not be—for a textualist at least—that the seemingly careful stipulation of qualifications in terms of “citizenship” would allow such a pretender from what had become a *foreign country* to become President. But can

14. U.S. CONST. art. VII.

15. See Paul Finkelman, *Intentionalism, the Founders, and Constitutional Interpretation*, 75 TEX. L. REV. 435, 441–42 n.25 (1996) (reviewing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996)). The same would be true for a number of other early Presidents. See Steiker et al., *supra* note 12, at 239–40. Virginia’s ratification came four days after New Hampshire became the ninth state to sign on. See Calvin H. Johnson, *Homage to Clio: The Historical Continuity from the Articles of Confederation into the Constitution*, 20 CONST. COMMENT. 463, 464 (2004).

16. See, e.g., U.S. CONST. art. VI, § 2; see generally Steiker et al., *supra* note 12, at 240–42.

17. E.g., ARTICLES OF CONFEDERATION art. I (U.S. 1781).

18. For example, perhaps this person is from Rhode Island, which at the time of the Constitution had been called such things as the “Quintessence of Villainy” and “a disgrace to the human race.” Johnson, *supra* note 15, at 470–71. Rhode Island was the last of the thirteen to sign on, but did not do so for almost another two years after Virginia became the tenth state. See Steiker et al., *supra* note 12, at 238 n.9.

our reasonable fathomer of meaning be allowed to think about consequences like that in ascribing meaning to the Constitution's words?

If the answer to that is in the affirmative, one might then be inclined, even if uneasily, to conclude that Washington was ineligible. But if one is allowed to look at the matter from a somewhat different angle, that judgment could be turned around once more. Washington was one of the pillars, perhaps the most solid pillar, of the revolutionary generation, and it was broadly assumed that he would become the first President if he were willing to serve.¹⁹ Can this part of the context in which the Constitution was scripted be considered to resolve this ambiguity?

When I teach about interpretation of contracts, legislation, and the United States Constitution respectively, I introduce a superhero for each context, called in turn Contract Man, Legislation Man, and Constitution Man. The preoccupations of these super heroes are to swoop down on the scene as documents within their respective jurisdictions are being created and pose questions to those involved about the application of some language they have agreed upon to a problematic situation, usually one presented by a case we are discussing in class. For example, if Constitution Man asked those crafting the Constitution whether they really meant to suggest that, of those alive at the time, only citizens of the first nine states to ratify would be eligible to be President, I have little doubt that they would have voiced a consensus that they intended no such thing, that people from states among the thirteen that eventually joined would certainly be eligible. For they knew the whole context, and they would not have wanted to make Washington—or, for that matter, others from states that eventually signed on—ineligible.

But even for the real authors, if Constitution Man made a pest of himself and asked about our rogue citizen of a state that never ratified the Constitution, the authors would almost just as surely have said that he should not be eligible. Asked if their language made that clear, the authors would, I imagine, turn sheepish. For the words they used gave no hint of a distinction between states that eventually signed up and those that did not. I strongly suspect that they simply never considered the implications of Article VII for citizens of states other than the first nine. This is an example, in other words, of language used without great care.

Because Constitution Man was not actually around to help set things straight, the present day interpreter must deal with ambiguity and with sloppiness in the use of language. In the context of statutory interpretation,

19. See Johnson, *supra* note 15, at 466 & n.10 (citing Letter of Pierce Butler to Weedon Butler (May 5, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (Max Farrand ed., 1788)).

doctrines of “absurd results” and of “scrivener’s errors” provide some leeway to avoid awkward apparent implications of the language used, but some originalists tend bravely to insist that we are to assume that constitutional language was used with great care, or at least must be understood as such.²⁰ Poor George Washington. Sensible interpretation would make him eligible, but originalist interpretation, if we could only figure out what that was, might not.

I have Constitution Man interrogating the Constitution’s authors, the harborers of original intentions. But, as I mentioned earlier, originalists these days have largely abandoned original intention talk and gravitated toward the construct of original meaning. So how are we to think about what our reasonable fathomer of meaning would say? That would depend on what we allow that hypothetical person to know. And you will find no ready consensus in originalists’ writing about just what parts of context can, or should, be taken into account. Thus, one lesson from this excursion into the George Washington eligibility question is that the more context we allow our reasonable fathomer of meaning to know, the harder it is to distinguish him from a hypothetical single author of the Constitution. In other words, whether there is any distinction between original intention, on the one hand, and original meaning, on the other, turns on non-obvious choices that originalists do not always acknowledge but are nonetheless required.²¹

I am going to concentrate today on yet another conceptual problem for originalism: the fact that the world the Constitution must deal with today is very different from that of 1787. The enormous changes in American society over the years have encouraged purported alternatives to originalism, often talked about these days as a “living Constitution.”²² Broadly speaking, living constitutionalists insist that the understanding

20. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 MICH. L. REV. 487, 487 (2007) (criticizing Amar’s work); see also Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 39.

21. For sometimes begrudging acknowledgment of the confluence of the two notions, see Lawson & Seidman, *supra* note 6, at 56; see also Nelson, *supra* note 6, at 555–58. Justice Scalia suggested at his confirmation hearings that there would not be a big difference between the two. See Balkin, *supra* note 4, at 448 n.57.

22. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976); Justice William J. Brennan, Jr., Speech to the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 55 (Steven G. Calabresi ed., 2007).

of the document must keep up with both changes on the ground and with different sets of values that may prevail today. Living constitutionalists have even more conceptual difficulties than do originalists with questions of just what should guide interpretation, and I have a concluding remark or two about the notion. But living constitutionalism aside, my focus today is on whether originalism is up to the task of providing real guidance for constitutional answers to problems that could not realistically have been foreseen.

Difficulties of this sort can be real enough for interpreting rather precise constitutional language, like the twin provisions of Article I that the Senate is to “be composed of two Senators from each State”²³ and of Article IV that “no new State shall be formed . . . within the Jurisdiction of any other State . . . without the Consent of the Legislatures of the States concerned”²⁴ No matter what features of the context at the time we allow him to appreciate, our fathomer of meaning is not likely to have pondered the meaning of those provisions for the problem posed, for example, by a state attempting to secede from the union, with a discrete portion of the state that wanted none of such secession and then claimed to form a rival state government that purported to consent on behalf of that whole state to the creation of a new state out of that discrete portion. That, of course, is basically what happened when West Virginia broke away from Virginia and was admitted as a new state in 1863. As a result, in apparent violation of the constitutional prescription of two senators per state, there are four senators from what once was the State of Virginia.²⁵

In the context of statutory interpretation those doctrines of absurd results and scrivener’s errors can sometimes be helpful. Self-respecting originalists might, however, stick to their guns should problems like West Virginia be presented today and insist that clear language meaning must be heeded.²⁶ No question, they might insist, that two means two, that consent really means consent, and that means real consent by the very state, not some portion of the state that simply says it can form a

23. U.S. CONST. art. I, § 3, cl. 1.

24. U.S. CONST. art. IV, § 3, cl. 1.

25. See generally Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 297 (2002).

26. But in an otherwise wonderful article on the West Virginia problem, two self-styled originalists do not stick to their guns. Relying on a “legal fiction”—indeed, in their words, “one of the great constitutional legal fictions of all time”—that the part was the lawful government of the whole, Vasan Kesavan and Michael Paulsen rather find that the admission of West Virginia was—originalistically speaking—constitutional. Kesavan & Paulsen, *supra* note 25, at 294, *passim*. Dare I point out that if “legal fictions” can be allowed to do originalist work, the approach patently contains no constraints whatsoever?

new government for the whole.²⁷ To be sure, it is presumably too late to kick West Virginia out of the Senate and the Union, and even the most fearless originalist would be well advised not to try while Robert Byrd is around to object. But errors may be made with any approach to interpretation, and the heroic originalist might insist that past errors are no excuse for countenancing new ones.

Much more nettlesome for the originalist—because they are at the heart of the most visible contemporary constitutional controversies—are the unforeseen problems that must be addressed with imprecise constitutional language. We have already glimpsed the problem of ambiguity, but ambiguous language at least might seem to present a constrained set of possibilities. Vague language poses the problem of lack of foresight much more insistently. There are many examples of vague—but frequently invoked—constitutional phraseology: *due process* of law, *equal protection* of the laws, *unreasonable* searches and seizures, *cruel* and *unusual* punishment, and *rights* retained by the people.²⁸

Vague constitutional language might seem to provide an opening for living constitutionalists,²⁹ but the typical originalist move instead is a measure of intentionalism. Robert Bork, for instance, a hero among originalists,³⁰ depicts the task of the modern day interpreter as finding a “principle” that “the Framers put into” the document, by examining its “text, structure, and history.” Once found, the “principle” can then be applied to solve some modern problem, even if that particular problem had not been foreseen. Bork stated in a speech delivered on these very premises, that it is in this way that:

We are able to apply the First Amendment’s Free Press Clause to the electronic media and to the changing impact of libel litigation upon all the media; we are able to apply the Fourth Amendment’s prohibition on unreasonable searches and seizures to electronic surveillance; we apply the Commerce Clause to state regulations of interstate trucking.³¹

27. *Id.* at 301–02.

28. U.S. CONST. amend. V; U.S. CONST. amend. XIV; U.S. CONST. amend. IV; U.S. CONST. amend. VIII; U.S. CONST. amend IX.

29. See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 291–92 (2007). Cf. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 121–25 (2004); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 6–7 (1999).

30. See Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE, *supra* note 22, at 1, 14.

31. Judge Robert H. Bork, *Speech at the University of San Diego School of Law* (Nov. 18, 1985), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE, *supra* note 22, at

Today I want to concentrate not on the hushed tones of vague constitutional language, but on a dimension of constitutional interpretation that is seldom discussed, indeed not even much appreciated as presenting some difficulty. These are problems posed by constitutional silence, things left unsaid. For even more than vague language, constitutional silence can be easily ignored as time goes by. The result is that the treatment of constitutional silence can be powerfully instructive about the application of the Constitution to problems that were not foreseen when the document was promulgated.

The Constitution leaves most things unsaid, of course. It has nary a word about ancient Chinese art. But that, of course, is not its subject. Freedom of speech is one of its subjects, but it says nothing about communication over the internet. Who knows if the Constitution might have said something about the internet had it been around at the time, but at least one reason the Constitution is silent about the internet is that nobody at the time foresaw that modern phenomenon. But there is another big reason that the Constitution may be silent about some things. They were not said because they did not need saying. They were things, as we say, that go without saying. They were simply assumed, and conceivably with even greater clarity than some things that were said.

Constitutional silence comes in many shapes and forms. Bork mentioned the First Amendment's protection of freedom of the press, and, of course, there is a Free Speech Clause in the First Amendment as well.³² But neither Clause says anything about non-speech communication, like handwritten letters. If the generation here today does not know what those are, they were a precursor to email, and the constitutional generation produced a large quantity of them.³³

In a widely noted essay, Justice Scalia tells us that letters "cannot be censored" by the government on account of the Speech and Press Clauses, which he says, by a "reasonable construction," "stand as a sort of synecdoche for the whole."³⁴ But if the point is that the people

83, 87. Bork tended to talk of "original intention" and, as mentioned, "original meaning" seems to be ascendant these days. But, as we have seen, the approach might be adapted to original meaning simply by allowing our fathomer of meaning to understand enough of what animated the authors so that he could appreciate the constitutional "principle" to be applied.

32. Bork, *supra* note 31, at 87.

33. A book has recently been published of the very extensive handwritten correspondence between Abigail and John Adams. *MY DEAREST FRIEND: LETTERS OF ABIGAIL AND JOHN ADAMS* (Margaret A. Hogan & C. James Taylor eds., Belknap Press 2007).

34. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 38 (1997). Justice Scalia has apparently taken a similar stance with things left unsaid in the Eleventh Amendment.

responsible for the phraseology of the First Amendment—or the “reasonable” person fathoming the meaning at the time—would have understood the protection as extending generally to communication of all sorts, why was that not said? There may well be an explanation, like fixation on specific problems in the recent past, rhetorical flourish, or comfortable, but loose, use of language. Bork’s discussion of electronic media shows that he would have little problem fitting Scalia’s move into his methodology.³⁵ Bork would say that one can “discover” a general “principle” of free and open communication, or some such thing.³⁶ But I think the example begins to show a certain slipperiness on the slope of silence.

Sometimes it is hard to discern *any principles* that might help fill silent spaces, let alone principles that were “put into” the document, though not in so many words. One of my favorite examples is the Constitution’s failure to say anything about how the Chief Justice of the Supreme Court is to be chosen, or indeed how long his tenure of service in that office is to be. The only mention of a Chief Justice in the Constitution is in Article I where we are told that if the Senate is called upon to try an impeachment of the President, “the Chief Justice shall preside.”³⁷ Article III, where a provision for selecting the person to fill that office might be expected to have been placed, only comes close to the subject when it tells us that there is to be a Supreme Court and that it will have “Judges” on it who will serve “during Good Behaviour.”³⁸

Now it appears that Washington, once the qualification hurdle had been ignored and he had become President, assumed that he could

See Lackland H. Bloom, Jr., *Interpretive Issues in Seminole and Alden*, 55 SMU L. REV. 377, 380 (2002).

35. See Bork, *supra* note 31, at 83–87.

36. But perhaps that move is too fast. Originalists are merciless in criticism of Justice Douglas’s opinion in *Griswold v. Connecticut*, which found that several provisions of the Bill of Rights that protect aspects of personal privacy “have penumbras, formed by emanations from those guarantees that help give them life and substance.” 381 U.S. 479, 484 (1965). Building from there, Justice Douglas found a general protection for privacy that justified a conclusion that state restrictions on access of married couples to birth control devices was unconstitutional. *Id.* at 495–97. Bork criticizes *Griswold* as choosing a “level of abstraction” of the principle that “expanded [the Bill of Rights] beyond the known intentions of the Framers.” Bork, *supra* note 31, at 90.

37. U.S. CONST. art. I, § 3, cl. 6.

38. U.S. CONST. art. III, § 1.

nominate a Judge to be Chief Justice.³⁹ The extended drama of the first Chief's replacement then eventuated in presidential nomination and Senate confirmation of a new Chief from among the sitting Justices.⁴⁰ Nobody has seriously questioned presidential nomination and Senate confirmation since then, and a large number of duties—some quite sensitive—have been attached by legislation over the years to the office of Chief Justice.⁴¹

But there are other ways to choose a Chief Justice, some of which some state supreme courts used at the time. The judges themselves might choose a chief, or seniority might be used, or the post could rotate. Or the matter could be decided by statute.⁴² As far as principles go, I know of no discovery of one that would lead to the present system, and I can think of some candidates—like separation of powers—that would call presidential nomination and senatorial confirmation into serious question.⁴³ Just to provide an inkling of the problems that silence might invite, would it be open to a contemporary litigant—should he be able to surmount standing problems—to challenge one of the statutes giving the Chief Justice extensive powers beyond that of presiding over the Court's sessions and deliberations because his appointment was in violation of a separation of powers principle put into the Constitution?

Some contemporary originalist commentators might argue that the silence on choice of the Chief Justice is an appropriate occasion for judicial “construction,” answers to questions where no “principle” is “fairly discoverable” in the document, here perhaps informed by practice over the years, where, of course, there has been a consistent approach to the manner of choosing the Chief Justice.⁴⁴ Putting aside whether that is just a copout for a very important question about how that *very powerful* post is to be filled, some constitutional silences are more pregnant than this one.

I have three examples of pregnant silences that I want to use to illustrate how ill-equipped originalism is for coming to grips with unforeseen problems. They involve different types and shades of silence, and their substantive implications intersect in interesting ways. First, there is silence, not entirely of the Constitution itself, but even more of the federal courts, about the Guarantee Clause. Second, the

39. See Edward T. Swaine, *Hail, No: Changing the Chief Justice*, 154 U. PA. L. REV. 1709, 1716 (2006).

40. See *id.*

41. See *id.* at 1711–13.

42. See *id.* at 1715 n.30. Or the choice might be made by lot. *Id.* at 1716 n.33.

43. See *id.* at 1724.

44. See generally BARNETT, *supra* note 29, at 118–30; WHITTINGTON, *supra* note 29, at 7–13.

Constitution itself is stunningly silent about any role for political parties in American public life. Finally, the Constitution's provisions for an electoral college to choose our President say nothing explicit about whether electors can be bound to the choice they signaled beforehand to the voters who put them in office.

The Constitution's Article IV says that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."⁴⁵ This is variously known as the "Guarantee Clause" and the "Republican Form of Government Clause." There are lots of questions that the phraseology might raise, but one might have thought that originalists would dwell on the central concern about just what makes a form of government "republican." I have by no means mined the historical materials for all they are worth, but I think it fair to say that there are two major candidates: first, a government answerable ultimately to the people, rather than a monarchy or an aristocracy, and second—a more constrained version of the first and the more likely "principle" to be found if there is one that was somehow "put into" the Constitution—*popular government in which policy choices are made by a representative assembly*.

The question is particularly interesting because this second answer would raise the most serious doubts about the republican bona fides of a great deal of what is called "direct democracy" in modern American state governance.⁴⁶ Basically these are the processes of initiative, referendum, and recall, and there is no reason to think they were foreseen by authors, audience, or reasonable fathomers of meaning at the time the Guarantee Clause was made law.⁴⁷

Direct democracy along these lines is quite familiar to you Californians, and to citizens of a number of other states as well, and its processes are controversial. There are certainly plausible arguments on both sides of the question of whether they are healthy parts of the mix of decisionmaking in the states, but the policy arguments against direct democracy are very weighty. It is not conducive to detailed debate and deliberation among the ultimate decisionmakers, nor to a process of compromise characteristic of

45. U.S. CONST. art. IV, § 4.

46. THE FEDERALIST NO. 10 (James Madison); Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 29 (1993).

47. See Richard L. Hasen, *When "Legislature" May Mean More Than "Legislature": Initiated Electoral College Reform and the Ghost of Bush v. Gore*, 35 HASTINGS CONST. L.Q. 599 (2008).

legislative assemblies. These are just the kinds of objections that would be marshaled against direct democracy if judicial review of its constitutionality were possible under the Guarantee Clause. Challengers would urge, as a leading historian of the times of the Constitution's promulgation—and a former Nathanson lecturer—put it: “Republicanism . . . logically presumed a legislature in which the various groups in the society would realize ‘the necessary dependence and connection’ each had upon the others.”⁴⁸

But the federal judiciary will entertain no such test. Direct democracy came into fashion in the progressive era around the turn of the last century.⁴⁹ Oregon was a leader, and a 1902 amendment to the Oregon Constitution provided that “the people reserve to themselves . . . power . . . to propose laws and amendments to the [state] Constitution and [to] enact or reject them at an election independently of the Legislative Assembly.”⁵⁰ A 1906 tax law passed under this initiative procedure, and a refusal to pay the tax by Pacific States Telephone & Telegraph Company led to a 1912 decision by the United States Supreme Court.⁵¹ Relying on the 1849 decision in *Luther v. Borden*, the Court held that Guarantee Clause questions, including that pressed by the telephone company, were nonjusticiable political questions.⁵² They were for the Congress, the “political department.”⁵³

There has been no serious move by the federal courts to revisit this holding, and Congress has shown little interest in judging the validity of direct democracy. Nor have state courts taken seriously the large question of the republican bona fides of direct democracy. At the same time, however, many challenges to specific pieces of legislation or to state constitutional provisions enacted by direct democratic processes are entertained by state courts⁵⁴ and also by federal courts.⁵⁵

In holding republican form of government questions nonjusticiable, the Supreme Court did not deny that there are answers to the constitutional questions, only that the judiciary is the place for those answers to be given. If the answer to the Guarantee Clause question could be illegitimacy, however, how is a self-respecting originalist to think about the legitimacy of

48. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 179 (1969).

49. Linde, *supra* note 46, at 24 n.19.

50. OR. CONST. art. IV, § 1, cl. 2(a).

51. *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

52. *Id.* at 149.

53. *Id.*

54. See, e.g., *VanSickle v. Shanahan*, 511 P.2d 223, 227, 232 (Kan. 1973).

55. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995); *Romer v. Evans*, 517 U.S. 620, 623 (1996).

some measure passed by a process that is constitutionally rotten from the outset? There is, I think, no good answer to that question.

There are both smaller and larger versions of the dilemma. Many constitutional tests turn on the motivation with which legislation—or some regulation—was passed.⁵⁶ The summing problem that I mentioned earlier haunts the ascription of motivation to legislation as well as to constitutional provisions, but the problems are multiplied many times for direct democratic measures where hundreds of thousands of individual decisionmakers are involved. In addition, their real motivations are especially unfathomable because of the secrecy of the ballot. A common technique in the law to deal with difficulties of proof is a presumption. But if that approach were used here, should there be a presumption of benign motivation, or malign? Can a satisfactory originalist answer really be given to that question oblivious to the unaddressed matter of republican bona fides?

Another small scale problem is a hot button issue right now here in California. The Constitution assigns various functions to state legislatures. They originally chose United States Senators.⁵⁷ They are to play a role in constitutional amendment.⁵⁸ They can regulate the time, place, and manner of elections for Senators and Representatives.⁵⁹ They are the bodies the consent of which is necessary for the formation of new states out of their territories.⁶⁰ And they are given the authority to determine the “manner” of choosing presidential electors.⁶¹ The November ballot in California may well present an initiative which would purport to exercise this last power by changing California from a winner-take-all system of choosing electors to one where each congressional district has a separate election for an elector.⁶² Can there be an originalist answer to the constitutionality of this way of proceeding that blinds its eye to the Guarantee Clause question?

And then there is an even more momentous and large-scale issue of how we are to approach problems of federalism—state prerogatives—

56. See, e.g., *Washington v. Davis*, 426 U.S. 229, 240 (1976).

57. U.S. CONST. art. I, § 3, cl. 1.

58. U.S. CONST. art. V.

59. U.S. CONST. art. I, § 4, cl. 1.

60. U.S. CONST. art. IV, § 3, cl. 1.

61. See U.S. CONST. art. II, § 1, cl. 2.

62. *Electoral Revision Misses June Ballot*, N.Y. TIMES, Dec. 7, 2007, at A26.

that vex much of contemporary constitutional law.⁶³ That is another important matter on which there is more constitutional muffle than sound. But that has not stopped strong feelings about federalism from surfacing on the Supreme Court, in the opinions of both self-described originalists and others.⁶⁴ Is it even meaningful, however, to puzzle about an originalist answer to those questions that ignores the republican bona fides of so much state decisionmaking?

There is, I fear, no originalist trail for those questions either. This seems rather obvious for states where robust direct democratic procedures are found. But then, could it really not also be so for old-fashioned states like mine—Illinois—where direct democracy has not much been embraced? For, could an originalist in the name of federalism countenance different sets of state prerogatives depending upon variable decisionmaking structures in the states?

None of these problems has been addressed explicitly in Supreme Court opinions, either by asking the republican form of government question, or by asking how one should factor in the self-imposed silence on that question. But what is perhaps most interesting is that the Court often seems to embrace direct democracy with enthusiasm, singing its praises as “devotion to democracy.”⁶⁵ And that seems to be the stance adopted by the two self-described originalists on today’s Supreme Court, Justices Scalia and Thomas.⁶⁶ In opinions testing specific direct democratic measures, they have intimated that direct democracy is *especially virtuous*, providing *more* reason to uphold such measures than if they had been adopted by legislatures. In one decision, for instance, Justice Scalia referred to the initiative process as “this most democratic of procedures.”⁶⁷ And in a different case, Justice Thomas criticized the majority opinion from which he was dissenting for failing to explain “why giving effect to the people’s [direct democratic] decision would violate ‘democratic principles’ that undergird the Constitution.”⁶⁸

My point is not that there are better originalist answers to the questions posed in those cases than the answers provided by our two

63. Compare *United States v. Morrison*, 529 U.S. 598, 601–18 (2000) with *Gonzales v. Raich*, 545 U.S. 1, 29 (2005). On the possibility of contemporary confusion, see Johnson, *supra* note 15, at 492–93.

64. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting) (writing for himself and Justices Rehnquist, O’Connor, and Scalia).

65. See, e.g., *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 679 (1976) (citing *James v. Valtierra*, 402 U.S. 137, 141 (1971)).

66. See, e.g., *Romer v. Evans* 517 U.S. 620 (1996) (Scalia, J., dissenting); *U.S. Term Limits*, 514 U.S. at 883 (Thomas, J., dissenting).

67. *Romer*, 517 U.S. at 647.

68. *U.S. Term Limits*, 514 U.S. at 883.

originalist Supreme Court Justices. Nor am I proposing better answers of any sort. The first lesson I draw rather is that there are *no* originalist answers, because the trail has been lost. The Constitution's and the Court's silences on the republican form of government clause has left a gaping hole in addressing questions raised by specific direct democratic measures. A second lesson is in many ways more important. Other—very important—constitutional matters are closely touched by republican form of government concerns. Silence on the one confounds analysis of the others in originalist terms. More lost trails.

And a third lesson is taught by our self-described originalists who sing the praises of “democratic principles.” Where do they get those principles? Not from originalist inquiries, at least as of 1787, that is for sure. For whatever one thinks the Guarantee Clause means, the meaning fathomer at the time would not have thought that today's embrace of popular rule was implied by anything in the Constitution. In fact, the franchise was restricted at the time. Slaves, of course, could not vote, nor could women, nor many adult men. Furthermore, Senators were not elected. Now, to be sure there have been many amendments to the Constitution since that time, and they do reflect an increasing devotion to popular election and adult suffrage.⁶⁹ Whether original meaning is to be pegged at the time—or should I say times—of amendments or of the original Constitution, or somehow at some amalgam of those times, is yet another puzzle of originalism that I will have to leave unattended today.⁷⁰

But even if we could wrestle down that question on a theoretical level, there is not much of a puzzle about where our originalist judges get their enthusiasm for “democracy.” They get it not by puzzling about the relevance of this amendment or that, but from contemporary American values that they have absorbed. This example is one where the gravitation to those contemporary values is, I think, right out in the open for all to see.

My next example is one where the constitutional silence is deafening. Political parties are central players in American political life, but they are nowhere mentioned in the Constitution. It does not take much knowledge of constitutional history to appreciate why. Parties were

69. U.S. CONST. amend. XII; U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV; U.S. CONST. amend. XVII; U.S. CONST. amend. XIX; U.S. CONST. amend. XXVI.

70. *But see infra* note 78.

viewed at the time as forces to be marginalized and controlled as best as possible. In *Federalist No. 10*, Madison surely had political parties in mind as examples of “factions” when he wrote:

By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.⁷¹

For Madison, factions, including parties, were mischievous because of their inclination and capacity to interfere with wholesome governance in which a “small number of citizens elected by the rest” would have the “wisdom” to “best discern the true interest of their country.”⁷² That, of course, harks back to our republican form of government question. But more to the present point, in Madison’s mind the large republic that the Constitution fashioned would multiply the factions seeking a piece of the action, with the result that they would stymie one another and make all less capable of mischievous interference with wholesome decisionmaking.

To be sure, parties did emerge not long thereafter, and Madison was a central player in one of the major ones.⁷³ Those first incarnations of political parties in American politics did not view themselves as mischievous factions but rather as collaborative enterprises by genuine seekers of the public good. That probably allowed Madison and others to reconcile their disdain for factions with their party activity. But it was only a few decades later that parties had unabashedly assumed their modern factional faces. Now political parties may well be necessary to coordinate mass sentiment in a functioning democracy. Some version of that rationale is the usual justification for political parties offered by students of democratic governance.⁷⁴ But there was barely a hint of such a rationale as the Constitution was being crafted.

Fast forward to the modern day. For many reasons, there is a great deal of tension in the way constitutional law treats parties, but it is not recognizably tension born of power asserted in fact in the face of constitutional disfavor. Much of the modern tension focuses on whether

71. THE FEDERALIST NO. 10, at 57 (James Madison) (Jacob E. Cooke ed., 1961). As one commentator puts it more generally in a classic study of political parties in the United States, “the Founding Fathers . . . did not believe in political parties as such, scorned those that they were conscious of as historical models, [and] had a keen terror of party spirit and its evil consequences . . .” RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM* viii (1969). Two more recent commentators describe the Constitution’s Framers as “despis[ing] . . . political parties.” Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2312 (2006).

72. THE FEDERALIST NO. 10 (James Madison), *supra* note 71, at 62.

73. HOFSTADTER, *supra* note 71, at 54–55.

74. See generally HOFSTADTER, *supra* note 71, at 212–71; Levinson & Pildes, *supra* note 71, at 2379–80.

parties are state actors subject to constitutional restrictions as such, or private actors entitled to constitutional protections.⁷⁵ I think it fair to say that this modern tension would be unrecognizable, even bewildering, to the constitutional generation, at least unless we could somehow educate its members about—and thereby reconcile them to—what had happened with parties and politics in the United States in the intervening 220 years.

So how is a self-respecting originalist to think about the constitutional status of political parties? The problem here is as much new worlds as lost trails. And unlike popular decisionmaking, there is not much in the way of later constitutional amendment—words instead of silence—to help out.⁷⁶ So will it do to note the silence, and thus conclude that the Constitution has no relevance for the status of political parties? Original meaning enthusiasts of a textualist bent might take that position, though the call of context can be pretty compelling and inferences about things left unsaid are often drawn from things said. Is it so clear that the sounds of the silence about political parties fail to convey a pretty clear *original* message of their disfavor if one is allowed to delve into the pertinent history?

Luckily—or perhaps unluckily—there really is no such choice. For the fact of political parties inescapably bears on all sorts of things that the Constitution does say, or pretty clearly implies. This is like the federalism problem in light of republican form of government concerns, only in a form not even an insistent textualist could evade.

Consider, for instance, a recent Supreme Court decision concluding, *inter alia*, that severe restrictions placed by Vermont on campaign contributions by political parties violated the First Amendment's free

75. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 430 (1992). For an instructive rendition of the history of this tension, see LEON D. EPSTEIN, *POLITICAL PARTIES IN THE AMERICAN MOLD* 155–99 (1986).

76. The most promising possibility is probably the Twelfth Amendment. Originally, presidential electors cast two votes undifferentiated between President and Vice-President. If a single person received a majority of the appointed electors, he became President, and the runner-up became Vice-President. *See* U.S. CONST. art. II, § 1, cl. 3. But after political parties came on the scene, they slated candidates for the two offices, and electors generally followed the lead of the parties. That led to a tie in the 1800 election and one big mess. That in turn resulted in passage of the Twelfth Amendment, separating the votes for President and Vice-President. The Amendment does not explicitly mention political parties, but awareness of what led to its adoption shows that they were just offstage, influencing what the Amendment did say. *See* ROBERT W. BENNETT, *TAMING THE ELECTORAL COLLEGE* 20–24 (2006).

speech guarantee, as applicable to the states through the Fourteenth Amendment's Due Process Clause.⁷⁷ There is a large set of interpretational questions raised by the Vermont scheme,⁷⁸ but I want to concentrate on a relatively simple one that is almost never noticed or discussed. Are political parties protected by the Constitution's rather explicit solicitude for freedom of speech?

The First Amendment's protection of "freedom of speech" sounds sweeping: "Congress shall make no law . . . abridging" that freedom.⁷⁹ But we have already seen that Justice Scalia is willing to take some liberties with its apparent literal reach. And indeed I know of no constitutional theorist who does not acknowledge that some restrictions on speech are permissible and that some communicative non-speech is protected. In any event, the Clause tells us precious little about just who enjoys that "freedom" or indeed just what is meant by freedom. So are political parties entitled to this freedom?

We could well imagine that Madison and his compatriots would, at least initially, be disdainful of any suggestion that political parties could seek shelter under that capacious umbrella. When they fashioned the Constitution, they might well have assumed that freedom of speech belonged only to individuals. It could be argued that that is one reason that the institution of "the press" is mentioned separately. But if we situated the question in today's context, I have no idea how Madison and his conspirators would resolve questions about the legal status of political parties and their attempts to get the word out. And that is just the point. History has left behind the vision that actors contemporaneous

77. *Randall v. Sorrell*, 548 U.S. 230 (2006).

78. For instance, is the Bill of Rights—including the First Amendment—applicable to the states through incorporation in the Fourteenth Amendment? If so, through which clause: the Privileges and Immunities Clause or the Due Process Clause? If we settle those questions in favor of incorporation, is the content of the First Amendment, passed at one time in our nation's history, the same as its Fourteenth Amendment version, incorporated some seventy years later? And if they are the same, is the "meaning" we are to fathom an eighteenth or a nineteenth century one? Originalists disagree on these questions as well. Compare BARNETT, *supra* note 29, at 108, with Lawson & Seidman, *supra* note 6, at 47–49. The answers to these questions would no doubt require grappling with the tensions of federalism, but are today's versions of those tensions normatively congruent with those of the eighteenth century or of the nineteenth? See Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1042 (1981). Query whether there are answers to these questions that could plausibly be ascribed to our hypothetical individual—wherever we situate him in the time dimension—but if we did settle them we would still have additional ones about the content of the guarantee of free speech. Even apart from political parties, is it available to corporate bodies? Does it forbid just prior restraints, or does it reach as well post-speech penalties? Is the contribution of money to another who will do the speaking protected? And then what are we to do with the problem of precedent—intermediate judicial decisions on any of these questions?

79. U.S. CONST. amend I.

with the Constitution's formation held of political parties, and there is no way to recapture their world and refashion ours in its image.

A second instructive case, again from California, compounds the complications of the status of political parties with that of direct democracy. This is the Supreme Court's 2000 decision in *California Democratic Party v. Jones*, written for the Court by Justice Scalia.⁸⁰ By initiative, California had attempted to change its system for party nominations from a closed primary to a blanket primary.⁸¹ Under the old system, a California primary voter received a ballot of his declared party alone, and he chose as he wished among those seeking that party's nomination for the various offices to be filled at the general election. In the new, initiated, system, in contrast, a primary voter received a ballot with all candidates of all parties listed, and he could cross party lines as often as he wanted in voting for party nominees for the various offices. Supporters of the blanket primary had touted it as encouraging more politically moderate nominees. In one formulation that the Court discussed, the blanket primary was defended as "expanding candidate debate beyond the scope of partisan concerns."⁸²

In response to a challenge by the California Democratic Party, the Court held that the blanket primary interfered with the First Amendment rights of individuals to associate in political parties, though it also spoke of "the political association's [that is, the party's] right to exclude."⁸³ The opinion is suffused with concern for preserving the central political role played by political parties. Along the way Justice Scalia noted that "[t]he formation of national political parties was *almost concurrent* with the formation of the Republic itself."⁸⁴

This last comment is a bit ironic for an originalist, because, as mentioned earlier, that "almost concurrence" made a large difference. The *Jones* opinion makes no attempt to fathom original intention, understanding, or meaning with regard to political parties—or with regard to direct democracy. Nor is that surprising, since political parties are right in the middle of contemporary American politics, and there is no way in our world to return us to some vision of their role held or understood at the time of the Constitution. Originalism would be

80. Cal. Democratic Party v. Jones, 530 U.S. 567 (2000).

81. *Id.* at 569.

82. *Id.* at 582.

83. *Id.* at 575.

84. *Id.* at 574 (emphasis added).

hopelessly at sea if we turned to it—in any of its forms—to guide us to some secure harbor where we could come up with an answer to the blanket primary by initiative question.

Political parties also bedevil a problem posed by my final example of constitutional silence. This is one I have written about before.⁸⁵ Much discussed in the literature on the electoral college is the problem of *faithless electors*, electors who cast their presidential or vice-presidential votes differently from what the voters who voted them into office were led to believe.⁸⁶ The constitutional question I have in mind is whether such faithlessness can be forbidden by state law.

While faithless votes have never changed the outcome of a presidential election, there have been a number of such votes over the years, about a dozen by most counts. There was, for instance, a faithless abstention of a District of Columbia elector in the 2000 election, and a Minnesota elector in 2004 voted faithlessly for John Edwards for President, rather than for John Kerry.⁸⁷ Even more suggestive is the case of Richie Robb, a prominent Republican in West Virginia who was slated by his party for the post of presidential elector in the 2004 election, and then announced before the election that he did not think that he could vote for George Bush in the electoral college balloting.⁸⁸ The Republicans carried West Virginia, and Robb must have voted for Bush in the state's secret electoral college balloting, because all the West Virginia electors did.⁸⁹ Robb thus does not count in the dozen or so faithless votes over the years. But you can be sure that he would have been vigorously courted by the Democrats if there had been a close electoral college outcome, say an apparent tie or an apparent victory for Bush by two votes.

Some commentators, no doubt inspired by originalist themes, find it obvious that faithlessness cannot be forbidden, because the original idea of the electoral college was of a discretion-laden set of decisionmakers who would meet in their various states to debate and decide how they would vote. This is a “principle” that they presumably find the Framers “put into” the electoral college provisions. A state law that forbade faithlessness, it is argued, would violate that principle.⁹⁰

The provision of Article II that entered into our discussion of the meaning of “legislature” says that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a [defined] Number of

85. See BENNETT, *supra* note 76, at 95–121.

86. LAWRENCE D. LONGLEY & NEAL R. PEIRCE, *THE ELECTORAL COLLEGE PRIMER* 110–13 (1996).

87. BENNETT, *supra* note 76, at 96.

88. *Id.*

89. *Id.*

90. See *id.* at 15–17 and accompanying notes.

Electors . . . but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”⁹¹ The casting and counting of electoral votes is then dealt with, as follows, in the Twelfth Amendment:

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for . . . which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.⁹²

While this says nothing explicit about elector discretion, even an interpreter cast in the role of the fathomer of original meaning might readily infer that electors were to have discretion. Many “principles” that originalists, like Bork, Scalia, and lots of academics, find were put into the Constitution—like the devotion to democracy that we discussed—are the result of interpreter choice rather than of anything more genuinely thought of as original intention or original meaning. But I would not make that claim for a conclusion about elector discretion. The language is itself suggestive. Some have found the mention of a “ballot” to imply choice.⁹³ And why be concerned that an elector not be a Senator or Representative and not hold an office of “Trust or Profit under the United States,” unless one was worried about poisoning the exercise of discretion.⁹⁴ But even more fundamentally, the office of elector has no apparent purpose if electors were simply to cast votes that had already been determined for them. Not to put too fine a point on it, elector discretion is not explicitly mentioned, probably because it was thought to be obvious.

To be sure, in the first two elections, Washington received a presidential vote from each and every elector who cast a vote.⁹⁵ That,

91. U.S. CONST. art. II, § 1, cl. 2.

92. U.S. CONST. amend. XII.

93. NEAL R. PEIRCE & LAWRENCE D. LONGLEY, *THE PEOPLE’S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE* 128–29 (rev. ed. 1981).

94. *See* U.S. CONST. art. II, § 1, cl. 2.

95. As mentioned earlier, at the time, electors cast two votes for President, for two different persons. U.S. CONST. art. II, § 1, cl. 3. Not all the states had ratified the Constitution in time for the first election, however, and in addition, New York, which

however, was not on account of any formal pre-commitment, but rather because Washington seemed the natural choice. As suggested earlier, the Framers would likely have told Constitution Man that Washington would be the first President if he made himself available. But, if Constitution Man pressed them—or for that matter a fathomer of meaning at the time—on what would happen in the selection process once Washington was no longer available for the office, they would even more surely have responded with a picture of discretion-laden discussion, debate, and then voting at those meetings of electors. If the Constitution implies with reasonable clarity that Constitution Man would elicit an affirmative response to the question of elector discretion back then, however, does it also answer the question of the faithless elector in today's world?

We are perhaps given a hint of an answer by the changed terminology. Just how did a wholesome thing like discretion come to be talked about as a breach of faith? And the answer starts with our old friend: political parties. As Justice Scalia's remark suggested, change in that aspect of our public life came very rapidly in the early years under the Constitution.⁹⁶ By the time Washington was nearing the end of his second four-year term and had made clear his intention not to seek a third, the beginnings of what we might now recognize as two major national parties were in plain sight.⁹⁷ Many candidates for legislative office identified with one or the other of those parties. Congressional caucuses of the two parties then designated candidates for President and Vice-President for the election of 1796, and many of those chosen as electors at the state level signaled a party affiliation as well.⁹⁸ Parties then tried to orchestrate what would take place at the elector meetings, by insinuating party fidelity as a major consideration for selection as an elector.⁹⁹ The possibility of faithlessness was born, and really quite early in the history of the Republic.¹⁰⁰

The reality of faithlessness, however, took a while to sink in, as American politics underwent large scale change with those political parties smack dab in the middle. I am concentrating on how we choose a President, for it should suffice to draw the stark contrast between the world the Constitution envisaged and our own. But make no mistake, today's broader world of politics would be unrecognizable to those who

was on board, failed to designate electors. See JOHN R. KOZA ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 40–42 (2006).

96. See *supra* text accompanying note 84.

97. HOFSTADTER, *supra* note 71, at 91–102.

98. PEIRCE & LONGLEY, *supra* note 93, at 61–65.

99. *Id.*

100. *Id.*

were drafting, understanding, and attempting to fathom the meaning of the Constitution at our constitutional beginnings.

On what is universally called “election day” in early November every four years, in addition to whatever state and local offices are in play, we are, under an originalist way of thinking, supposed to be voting not for presidential and vice-presidential candidates—but for those electors. It is they who are then supposed to elect the nation’s executive officers when they meet in their respective states some forty days later. Now how many of you knew that?

This is a pretty sophisticated audience, so there may be a few of you who could honestly answer “yes.” But I am pretty sure that even those did not learn it from experience as a voter. In most states, the names of electors do not even appear on the ballot. In Illinois, there is no hint on the ballot of a role for them, and states that do provide a hint typically do so in fine print. The large print is reserved for the name—and political party designation—of party candidates. The result is that voters think they are voting directly for presidential and vice-presidential candidates nominated by political parties—as a tied pair, moreover—not for electors who will themselves choose the executive officers—in separate exercises of choice—weeks later.

So how might we recapture some original meaning about elector discretion? Discretion might, I suppose, be permissible even if we called it faithlessness, but if so, we would also have to do something about the situation that has even allowed that inappropriate terminology to creep into our political discourse. Presidential candidates’ names surely could not appear on the ballot, for that is effectively an assertion of pre-commitment. It fools the voter, and is inconsistent with that vaunted discretion. Nor could political party designations appear, for the dual reasons that they too suggest pre-commitment, and because it puts political parties in the middle rather than at the margins of the political process. But you get the point. We cannot realistically hope to recapture some original vision of presidential elections, because we have traveled so far from that vision that it would tear the fabric of presidential selection apart if we tried—and quite possibly American democracy with it.

There is a lesson here about the ways language can be deceptive. The contemporary issue of elector faithlessness can be cast as one of “discretion.” And put simply in terms of discretion, original intention, or original meaning is seemingly discernible. But the issue back then was imbedded in a large and complex context that bears scant resemblance to

that of the issue today. That is why we speak of faithlessness today rather than discretion. If the issue back then and the issue today are understood in their respective settings, they are not the same issue at all. Talk of discretion can appear to make them the same, but that is only because language necessarily oversimplifies a complex reality.

I chose these examples of things not explicitly addressed by the Constitution because I think they help us see how the march of history can obscure constitutional issues that may once have seemed relatively straightforward. But that phenomenon does not depend on silences. Constitutional silence can cloud over an issue, so that its pertinence at any given point in time is made more difficult to see. But even for reasonably precise constitutional language, today's issue can be worlds removed from what the draftsmen—or some original fathomer of meaning—would have said came to mind. That was the lesson that I meant to convey in the discussion of West Virginia. Vague constitutional language in many ways is closer to silence in allowing the constitutional significance of change to go unnoticed. Indeed, the line between what is said and unsaid is far from a bright one. It might well seem, for instance, that the Constitution addresses more explicitly the question of elector discretion than it does just what is protected by the Ninth Amendment's unadorned mention of "rights."¹⁰¹

So what are we to do? There is an arena for constitutional questions where the constitutional language seems to provide an answer in a relatively straightforward way. To be President, for instance, an individual must have "attained to the age of thirty five years."¹⁰² And the virtue of a nice clear answer to what age is necessary would probably overwhelm any argument that the purpose behind the requirement is a certain maturity and that these days that can be attained earlier—or later—than thirty-five.¹⁰³ But this problem has another feature that is seldom noted. Any age qualification is going to be arbitrary, and no underlying principle is likely to be discernible that might provide serious guidance for deviations from the seemingly clear language.

Where principles are more obviously at work, however, even precise language might be approached with more abandon, especially when events put on pressure, as in the West Virginia example. Be that as it

101. U.S. CONST. amend. IX.

102. U.S. CONST. art. II, § 1, cl. 5.

103. In a much-noted lecture, Justice Scalia invokes a subtle and interesting example where rather specific language is taken to overwhelm arguable changes in the normative dimension of confrontation clause problems. See Scalia, *supra* note 7, at 855–56 (discussing *Coy v. Iowa*, 487 U.S. 1012 (1988)). But cf. Michael Stokes Paulsen, *Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond*, 13 CONST. COMMENT. 217 (1996).

may, however, the real problems arise when, for one reason or another, the language just does not do the trick. This is vague language, or in the examples we have traversed today, little or no language at all. If a contemporary problem arises under such language that differs in no discernible normative dimension from a problem that was a matter of focused concern at the time the Constitution was crafted, then an originalist answer—whether styled a matter of intention, understanding, or meaning—is available, and would probably be readily embraced. I say “probably” because we really have very little to go on to test the proposition. Whether a contemporary problem differs from a problem of original concern in a discernible normative dimension will typically be contestable. And not surprisingly, after 220 years, arguments that the issues *are not the same* will quite often be more than plausible. If nothing else, I hope my excursions today into the meaning of constitutional silences will have made that clear.

If originalism fails to provide answers to so many contemporary questions, where are we to turn for those answers? This is not the occasion for me to provide any full discussion of alternatives, which is not to suggest that I have a nicely packaged set of them to be delivered at my next lecture. But part of the answer is simple judicial choice. It could be called a “living Constitution,” but Justice Scalia would say that it is the displacing of democratic decisionmaking with the whims of “nine lawyers.”¹⁰⁴

Now I am far from a full-throated defender of the present reach of judicial review. But for several reasons, I also think that the “whim” point is overstated. There is no canonical definition of democracy that allows the stark contrast between decisions of appointed judges and those of elected officials. As mentioned, the original constitutional scheme had United States Senators appointed by state legislatures.¹⁰⁵ But even now, by some plausible ways of parsing the notion of democracy, the Senate—even without the institution of the filibuster—is quite undemocratic.¹⁰⁶ And those appointed judges get appointed through a process that requires the assent of two different kinds of elected officials.

104. *Scalia Slams ‘Living Constitution’ Theory*, FOXNEWS.COM, Mar. 14, 2006, <http://www.foxnews.com/story/0,2933,150428,00.html>; see Rehnquist, *supra* note 22, at 695 (“[N]onelected members of the federal judiciary . . . responsible to no constituency whatever . . .”).

105. U.S. CONST. art. I, § 3, cl. 1.

106. See *Reynolds v. Sims*, 377 U.S. 533, 537–39 (1964).

The decisions of those judges, moreover, are not unconstrained and unchecked. The Supreme Court has a degree of control over its agenda, but a good deal less than legislatures, or even the executive. In addition, a good part of the Court's agenda control is legislatively sanctioned. There is, moreover, a variety of other legislative checks on the Court's freedom to maneuver, from control over budgets and jurisdiction, all the way up to the impeachment possibility. And there are norms of decisionmaking—precedent, political question doctrine, deference to other decisionmakers—that judges internalize.

I am no romantic about these things. I will listen carefully to suggestions about how one might rein in judicial discretion. But I fervently believe that those possibilities lie more in the realm of culture and politics than in any promise of restraint through something called “originalism.”

Let me conclude by providing a different vision of judicial review than the application of principles that were somehow put into the Constitution to some contemporary problem. Once judicial review takes hold, the Constitution functions as the starting point for a process, not as a set of directions—an “instruction manual,” as some originalists would have it.¹⁰⁷ Once set in motion, a good part of its life—just like yours and mine—is defined by what happened yesterday. And just like your life and mine, the process must adjust to what has happened around it. I often find myself yearning for more clear cut answers to the problems that life throws up. But wishing does not make them available. And so it is with the United States Constitution. It can solve some things pretty cleanly, like how old a presidential candidate must be. But with most of the interesting things it leaves us to struggle.

This is so even when there are words to provide a measure of guidance. Those words can easily mislead. Not even the words of instruction manuals fill up all the spaces for machines or chemical processes they typically instruct about. But the Constitution is not in many of its provisions anything like an instruction manual, and American democracy is not much like a machine either. We must struggle with the problems that the intersection of the Constitution and our democracy throws our way. If judges are doing the struggling and they take the originalist approach seriously, they will much more often than not come up empty. A good part of the resources they will then employ will be values to which they can relate today. If that is what it means for our Constitution to be a *living* one, then a living Constitution is inevitable.

107. Or a “blueprint.” See Lawson & Seidman, *supra* note 6, at 52.