

## The Borkean Dilemma: Robert Bork and the Tension between Originalism and Democracy

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### INTRODUCTION

As a constitutional theorist, the late Judge Robert Bork was best known for his advocacy of two major ideas: originalism and judicial deference to the democratic process. In some cases, these two commitments may be mutually reinforcing, as in Bork's critique of some of the nonoriginalist "activist" decisions of the Warren Court.<sup>1</sup> But Judge Bork largely failed to consider the possibility that his two ideals sometimes contradict each other. Over the last twenty to thirty years, it has become increasingly clear that consistent adherence to originalism would often require judges to impose more constraints on democratic government rather than fewer.

The tension between democracy and originalism is an important challenge for Bork's constitutional thought, as well as that of other originalists who place a high value on democracy. We could call the trade-off between the two the "Borkean dilemma."

While there are many different theories of democracy,<sup>2</sup> for present purposes I adopt a relatively simple definition under which a law is democratically enacted if it is adopted by popular vote or by representatives elected by the people.<sup>3</sup> This simple

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<sup>1</sup> See, for example, Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 69–100 (Free Press 1990).

<sup>2</sup> For a survey of several different normative theories of democratic participation, see Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government is Smarter* 38–61 (Stanford 2013).

<sup>3</sup> For a discussion of some of the issues that arise when large portions of the population are excluded from the suffrage, see Part III.

definition seems to also be the one that Judge Bork implicitly relied on in his writings.<sup>4</sup>

Part I of this Essay briefly outlines Bork's well-known commitments to both originalism and judicial deference to the democratic process. Part II discusses his failure to resolve the potential contradiction between the two. In Part III, I explain why the tension between originalism and deference has become an increasingly serious problem for originalists and briefly consider some possible ways to resolve, or at least minimize, the contradiction. Some of these theories have potential, especially the idea that many types of judicial review might actually promote rather than undermine popular control of government. Ultimately, however, none of them comes close to fully resolving the conflict between originalism and democracy. The consistent originalist will likely have to accept substantial constraints on democracy. The consistent adherent of deference to the democratic process will have to reject judicial enforcement of major parts of the original meaning of the Constitution.

#### I. ROBERT BORK'S TWO GREAT COMMITMENTS

Throughout his writings on constitutional theory, Judge Bork emphasized the imperatives of originalism and judicial respect for the democratic process. In his early work on constitutional law he defended the initially dominant original-intent variant of originalism, which looked to the intentions of the framers and ratifiers of the Constitution. In a well-known 1984 lecture, "Tradition and Morality in Constitutional Law," he stated that "the framers' intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed."<sup>5</sup> Like most other originalists, Bork later endorsed the original meaning variant of the theory.<sup>6</sup> In his influential 1990

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<sup>4</sup> See, for example, Bork, *Tempting of America* at 17 (cited in note 1) (referring to legislation as "the democratic outcome").

<sup>5</sup> Robert H. Bork, *Tradition and Morality in Constitutional Law*, in Robert H. Bork, *A Time to Speak: Selected Writing and Arguments* 397, 403 (ISI Books 2008) (originally published 1984).

<sup>6</sup> On the displacement of original intent by original meaning as the dominant school of originalism, see, for example, Randy E. Barnett, *An Originalism for Non-originalists*, 45 *Loyola L Rev* 611, 620–29 (1999). See also Ilya Somin, *Originalism and Political Ignorance*, 97 *Minn L Rev* 625, 625–27 (2012) (citing numerous prominent scholars and jurists who have endorsed original meaning); James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 *Va L Rev* 1523, 1524–26 (2011) (describing original meaning—which he refers to as "new textualism"—as the newly dominant school of constitutional theory).

book, *The Tempting of America*, he emphasized that originalists should not “search . . . for a subjective intention,” but rather for “what the public of that time would have understood the words to mean.”<sup>7</sup> But he always insisted that originalism was superior to any variant of living-constitution theory.<sup>8</sup>

At the same time, Bork also consistently emphasized the need for judicial deference to democracy. In *The Tempting of America*, he argued that “in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities.”<sup>9</sup> Earlier, he chastised living-constitution theorists for their “fundamental antipathy to democracy.”<sup>10</sup> One of his last books, *Coercing Virtue: The Worldwide Rule of Judges*, is devoted to criticizing what he called “the gradual replacement of democracy by judicial rule” in the United States and other liberal democracies.<sup>11</sup> In his view, increasing judicial power is a threat to “[t]he fundamental freedom recognized in democracies[,] the right of the people to govern themselves.”<sup>12</sup>

In Bork’s many extensive and insightful works on constitutional theory, it is difficult to find indications that he saw much tension between his commitment to originalism and his commitment to democracy. To the contrary, he seems to have regarded the two as mutually reinforcing. In *Tradition and Morality in Constitutional Law*, Bork wrote that “[t]he original Constitution was devoted primarily to the mechanisms of democratic choice. Constitutional scholarship today is dominated by the creation of arguments that will encourage judges to thwart democratic choice.”<sup>13</sup>

Judge Bork did indicate some awareness of trade-offs between originalism and democracy when he wrote in 1971 that the “Madisonian model” established by the Constitution assumes that “[t]here are some things a majority should not do to

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<sup>7</sup> Bork, *The Tempting of America* at 144 (cited in note 1). In this book, Bork suggested that his earlier writings defending original intent were in reality just a “short-hand formulation” for original meaning. *Id.*

<sup>8</sup> See, for example, *id.* at 161–240; Bork, *Tradition and Morality* at 400–02 (cited in note 5). See also Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 Wash U L Q 695.

<sup>9</sup> Bork, *The Tempting of America* at 139 (cited in note 1).

<sup>10</sup> Bork, *Tradition and Morality* at 402 (cited in note 5).

<sup>11</sup> Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* 11 (AEI 2003).

<sup>12</sup> *Id.* at 11–12. For my review of this book, see Ilya Somin, Book Review, *Democracy & Judicial Review Revisited: The New Old Critique of Judicial Power*, 7 Green Bag 2d 287 (2004).

<sup>13</sup> Bork, *Tradition and Morality* at 402 (cited in note 5).

us no matter how democratically it decides to do them.”<sup>14</sup> But he did not generalize this insight, perhaps because he also believed that “[t]he makers of our Constitution . . . provided wide powers to representative assemblies and ruled only a few subjects off limits by the Constitution.”<sup>15</sup> There need be no major conflict between democracy and originalism if the original meaning of the Constitution mostly empowers majorities to do as they wish.

But such a tension *can* arise if the original meaning was in fact designed to severely constrain the power of political majorities. The Framers of the Constitution would have been surprised at Bork’s assertion that their handiwork was “devoted primarily to the mechanisms of democratic choice.”<sup>16</sup> In reality, most of them were very suspicious of democracy, which they sought to constrain in numerous ways. They perceived democracy as dominated by often-ignorant and easily misled voters, and as a threat to individual rights, especially the right to private property.<sup>17</sup> The framers of the Reconstruction Amendments were, in some ways, even *more* suspicious of democracy than those of the original Constitution. They sought to impose a wide range of new constraints on political majorities at the state level, influenced by the experience of majoritarian oppression of African Americans, abolitionists, and others in the pre-Civil War period.<sup>18</sup>

## II. THE CONFLICT BETWEEN DEMOCRACY AND ORIGINALISM

Judge Bork recognized that the Constitution was not a completely democratic document, since it protects “some areas of life in which the individual must be free of majority rule.”<sup>19</sup> Recent scholarship, however, has shown that the original meaning often places much tighter constraints on democracy than Bork envisioned. For example, Bork doubted that the incorporation of the Bill of Rights against the states was consistent with original

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<sup>14</sup> Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind L J* 1, 3 (1971).

<sup>15</sup> Bork, *Tradition and Morality* at 402 (cited in note 5).

<sup>16</sup> *Id.*

<sup>17</sup> On the Framers’ fears that democracy would threaten property rights, see, for example, Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* 5 (Chicago 1990).

<sup>18</sup> For an extensive discussion of the anti-majoritarian origins of the Reconstruction Amendments, see Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 138-62 (Yale 1998).

<sup>19</sup> Bork, *The Tempting of America* at 139 (cited in note 1).

meaning.<sup>20</sup> But evidence amassed by scholars such as Akhil Reed Amar and Michael Kent Curtis strongly suggests that it was.<sup>21</sup> In Bork's words, incorporation of the Bill of Rights "enormously expanded the [Supreme] Court's power" to curb majorities at the state level.<sup>22</sup> If incorporation is required by the original meaning, it greatly exacerbates the tension between originalism and democracy.

Similarly, Bork denounced both *Lochner*-era and modern "substantive due process" as the epitome of judicial activism.<sup>23</sup> But there is in fact extensive evidence that the original meaning of the Fourteenth Amendment protected a wide range of substantive, unenumerated individual rights, including economic liberties.<sup>24</sup> There is even a possible originalist defense for the Court's decision using the Due Process Clause of the Fourteenth Amendment as a rationale for *Roe v Wade*,<sup>25</sup> the ultimate *bête noir* of Bork and many other conservative originalists.<sup>26</sup>

In one of his most famous articles, Bork argued that the original meaning of the First Amendment did not protect nonpolitical speech or symbolic expressive conduct that does not qualify as speech in the narrow sense of the term.<sup>27</sup> But, as Eugene Volokh has effectively demonstrated, the historical evidence strongly suggests otherwise.<sup>28</sup>

Bork himself believed that the original meaning significantly constrained democracy in another important way: by setting tight restrictions on the scope of congressional power. He criticized *Wickard v Filburn*<sup>29</sup> and other New Deal decisions broadly

<sup>20</sup> See *id.* at 93–95.

<sup>21</sup> See Amar, *The Bill of Rights* at 163–80 (cited in note 18); Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 92–130 (Duke 1986).

<sup>22</sup> Bork, *The Tempting of America* at 94 (cited in note 1).

<sup>23</sup> See *id.* at 36–49, 95–100, 110–28.

<sup>24</sup> For extensive discussions of the evidence, see, for example, Bernard H. Siegan, *Economic Liberties and the Constitution* 24–60 (Chicago 1980); David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* 8–11 (Chicago 2011); Timothy Sandefur, *The Right to Earn a Living: Economic Freedom and the Law* 83–88, 90–96 (Cato 2010).

<sup>25</sup> 410 US 113 (1973).

<sup>26</sup> See Jack M. Balkin, *Abortion and Original Meaning*, 24 *Const. Comm.* 291, 311–19 (2007).

<sup>27</sup> See Bork, 47 *Ind. L. J.* at 20 (cited in note 14). See also Robert H. Bork, *Slouching towards Gomorrah: Modern Liberalism and American Decline* 100–01 (ReganBooks 1996) (reiterating the view that the First Amendment does not protect "expressive" conduct).

<sup>28</sup> See generally Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 *Georgetown L. J.* 1057 (2009).

<sup>29</sup> 317 US 111 (1942).

interpreting Congress's powers under the Commerce Clause as "a manifestation of judicial activism" at odds with originalism.<sup>30</sup> Some other originalists agree.<sup>31</sup>

In a 2002 article coauthored with Daniel Troy, Bork wrote that judicial enforcement of the original meaning of Congress's powers under the Commerce Clause "would require overturning the New Deal, the Great Society, and almost all of the vast network of federal legislation and regulation put in place in the last two-thirds of the twentieth century."<sup>32</sup> Bork and Troy recognized that it would be unwise and politically impossible for the judiciary to actually attempt to do this.<sup>33</sup> As they put it, "the reality is that the New Deal is not going to be undone, certainly not by the stroke of a judicial pen."<sup>34</sup> But they nonetheless urged the Court to at least partially enforce the original meaning, and thereby strike down some types of federal legislation in several fields, including criminal law, transportation, and environmental law.<sup>35</sup> To the extent that Bork and Troy did not advocate going further than this, it is in part because they were willing to sacrifice adherence to originalism in favor of other values, such as practicality. Even on Bork's own interpretation of the Constitution, therefore, judicial enforcement of the original meaning would require invalidating a large amount of modern federal legislation.

All of the above examples of conflict between originalism and democracy are contestable.<sup>36</sup> Perhaps some of them are simply incorrect interpretations of the original meaning. But if any substantial number of them are correct, there is a serious potential conflict between Bork's commitment to democracy and his commitment to judicial enforcement of the original meaning.

Bork's own work does not include any systematic attempt to reconcile the two. But I suspect that his answer to the dilemma

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<sup>30</sup> Bork, *The Tempting of America* at 56 (cited in note 1).

<sup>31</sup> See, for example, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U Chi L Rev 101, 111–30 (2001).

<sup>32</sup> Robert H. Bork and Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 Harv J L & Pub Pol 849, 851 (2002).

<sup>33</sup> See id at 851–52, 883–84.

<sup>34</sup> Id at 883–84.

<sup>35</sup> See id at 884–93.

<sup>36</sup> See, for example, Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 134–56 (Harvard 1977) (arguing that incorporation of the Bill of Rights goes against the original meaning of the Fourteenth Amendment); Jack M. Balkin, *Commerce*, 109 Mich L Rev 1, 15–29 (2010) (arguing for a broad interpretation of the original meaning of the Commerce Clause).

might have been to argue that judicial enforcement of the original meaning does not go against democracy because the original meaning is itself the result of democratic decision making. As Bork put it in 1971, by enacting a constitution, “[s]ociety [itself] consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.”<sup>37</sup> In 1984, he asserted that “[i]n a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator,” and the “sole task” of judges is to “translate the framer’s or the legislator’s morality into a rule to govern unforeseen circumstances.”<sup>38</sup> Although Bork did not explicitly draw the connection, it is potentially possible to square judicial enforcement of the Framers’ view of the Constitution with deference to democracy by claiming that the Framers’ view was itself enacted by a democratic process.

Unfortunately, this solution to the Borkean dilemma is vulnerable to well-known objections. Perhaps the most significant is that the original meaning of the most important parts of the Constitution—the original Constitution of 1787, the Bill of Rights of 1791, and the Reconstruction Amendments of the 1860s—was not adopted by a process that would be considered democratic under any modern definition of the term. The political processes of 1787, 1791, and the 1860s excluded virtually all women, and also the vast majority of African Americans—cumulatively well over half of the adult population.<sup>39</sup> Critics of originalism, such as Supreme Court Justice Thurgood Marshall, have emphasized this history of exclusion as an important strike against originalism.<sup>40</sup>

But even if the original meaning were the product of a deliberative process that was fully democratic and representative in its own time, it is not clear why democratic principles justify enforcing it against the will of today’s political majorities, centuries later. To be sure, this problem arises any time a democratically enacted law purports to bind people at a time later than its original adoption. A law enacted yesterday may no longer enjoy

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<sup>37</sup> Bork, 47 *Ind L J* at 3 (cited in note 14).

<sup>38</sup> Bork, *Tradition and Morality* at 403 (cited in note 5).

<sup>39</sup> For a rare and skillful attempt to grapple with this problem from an originalist point of view, see John O. McGinnis and Michael B. Rappaport, *Originalism and the Good Constitution* 100–15 (Harvard 2013).

<sup>40</sup> See Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 *Harv L Rev* 1, 2 (1987).

majority support today.<sup>41</sup> But the dilemma is far more severe in the case of the original meaning of the US Constitution, which is one of the oldest and most difficult-to-amend constitutions in the world. Because it is both old and difficult to change, the original meaning of our Constitution is more likely to fall out of alignment with the will of present-day majorities than is either ordinary statutory law or a more recently enacted or easier to change constitution.

Thomas Jefferson famously claimed that, because “the earth belongs . . . to the living,” constitutions should be scrapped every nineteen years, to ensure that no generation’s autonomy is constricted by the decisions of long-dead ancestors.<sup>42</sup> We need not go nearly so far to wonder whether an extremely difficult-to-amend constitution enacted—however democratically—centuries ago, can be considered meaningfully democratic today.

In sum, therefore, Bork’s commitment to democracy and his commitment to judicial enforcement of originalism are not easily reconciled. A judiciary that consistently enforces the original meaning is likely to severely constrain the power of modern political majorities. And that constraint is not easy to justify on the grounds that the original meaning is itself the product of democratic processes.

### III. CAN THE BORKEAN DILEMMA BE RESOLVED?

The conflict between democracy and originalism is deep and serious. It is a problem not just for Bork’s theory, but for any theory of originalism that seeks to combine judicial enforcement of a centuries-old original meaning with a strong commitment to democracy in the here and now. There are, however, several potential ways of eliminating, or at least diminishing, the tension between the two values. Here, I consider three particularly significant ones. Each of these approaches has some potential. But, ultimately, none can fully resolve the conflict between originalism and democracy.

The most obvious way to reconcile democracy and originalist judicial review is to argue that enforcement of the original meaning actually promotes democracy rather than detracts from it—not because the original meaning was democratically enacted,

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<sup>41</sup> For a discussion of this issue, see generally Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (Yale 2001).

<sup>42</sup> Letter from Thomas Jefferson to James Madison (Feb 6, 1789), in Merrill D. Peterson, ed., *The Portable Thomas Jefferson* 444, 445 (Viking 1975).

but because adherence to it has “representation-reinforcing” effects.<sup>43</sup> Representation-reinforcing judicial review—an idea developed by the late John Hart Ely—occurs in situations where judicial invalidation of statutes or executive actions actually promotes democratic political participation rather than inhibits it. Obvious examples include judicial protection of freedom of speech, the right to vote, and the right to form political parties.

While Ely himself was a nonoriginalist, his idea can be adapted to justify enforcement of the original meaning of various parts of the Constitution. In principle, it can be used to justify judicial enforcement of aspects of the Constitution that initially seem remote from political participation. Ely used it to justify protection of racial, religious, and ethnic minorities against various types of discrimination, even in cases where it did not directly deprive them of the ability to participate in the political process.<sup>44</sup> I myself have argued that judicial enforcement of federalism-based constraints on congressional power is representation reinforcing because it increases citizens’ opportunities to “vote with their feet” between jurisdictions with divergent policies, and “foot voting” is often a more effective way of achieving political accountability than conventional ballot box voting.<sup>45</sup> Judicial review of federalism might also be representation reinforcing because it facilitates the representation of a more diverse set of popular preferences than a one-size-fits-all federal government approach to the policy issue at hand.<sup>46</sup>

One could potentially develop representation-reinforcement rationales for enforcing the original meaning of other parts of the Constitution as well. Many such theories are, of course, likely to evoke disagreement, and may be subject to serious objections. But even if we push such ideas as far as they can reasonably go, it seems unlikely that representation-reinforcement can be stretched far enough to cover all, or even most, elements of the original meaning. It is particularly hard to apply it to the protection of substantive individual rights far removed from

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<sup>43</sup> This term comes from John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 101–02 (Harvard 1980).

<sup>44</sup> See *id.* at 135–79.

<sup>45</sup> See Somin, *Democracy and Political Ignorance* at 165–69 (cited in note 2); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 *Iowa L Rev* 1287, 1344–50 (2004).

<sup>46</sup> See, for example, Michael W. McConnell, Book Review, *Federalism: Evaluating the Founders’ Design*, 54 *U Chi L Rev* 1484, 1493–95 (1987) (summarizing this benefit of political decentralization).

political representation, such as rights to privacy, rights to non-political speech or practice of religion, the Eighth Amendment's prohibition on "cruel and unusual punishments," and others.<sup>47</sup>

Another possible approach is to adopt Professor John O. McGinnis and Professor Michael B. Rappaport's argument that the original meaning should generally be enforced because it is the product of supermajoritarian decision-making processes, which are likely to yield rules superior to those produced by either judges applying living-constitution theories or legislatures adopting laws through the ordinary political process.<sup>48</sup> A complete examination of their fascinating theory is beyond the scope of this Essay.

For now, however, it is important to emphasize that McGinnis and Rappaport support these supermajoritarian outcomes not because they are necessarily democratic in nature, but because they are likely to yield welfare-maximizing rules that provide greater utilitarian benefits for the bulk of the population than other approaches to constitutional interpretation would.<sup>49</sup> Moreover, as McGinnis and Rappaport recognize, the supermajoritarian decision-making processes that produced most of the Constitution were not necessarily democratic by modern standards, since much of the adult population was excluded from participation.<sup>50</sup> Even if they were democratic in their own time, using the rules generated by long-dead people in the distant past would still end up curbing the democratic discretion of present majorities. Thus, the McGinnis-Rappaport theory is ultimately a new justification for using the original meaning to *constrain* the democratic process, not a way of dissolving the tension between democracy and originalism.

A third possible way to reconcile originalism and democracy would be for judges to defer heavily to the elected branches' interpretation of the Constitution and invalidate laws only if the conflict between them and the Constitution's original meaning is unusually glaring and impossible to reconcile. Something like this is implied by the "presumption of constitutionality" that the

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<sup>47</sup> Ely did, however, try to extend his theory to cover some of these rights. See, for example, Ely, *Democracy and Distrust* at 173–76 (cited in note 43) (advancing a representation-reinforcement rationale for judicial enforcement of the Eighth Amendment).

<sup>48</sup> See McGinnis and Rappaport, *Originalism and the Good Constitution* at 19–99 (cited in note 39).

<sup>49</sup> See *id.* at 23–24.

<sup>50</sup> See *id.* at 100–15.

Supreme Court sometimes applies to federal statutes.<sup>51</sup> But the presumption would have to be much stronger than it is in current jurisprudence if courts are to avoid invalidating numerous laws as violations of the original meaning. For example, an influential 1893 article by James Bradley Thayer claimed that judges should only invalidate a law if its unconstitutionality is “not open to rational question.”<sup>52</sup>

Such “Thayerian” deference would end up greatly undermining judicial enforcement of the original meaning. Particularly in an era when Congress often fails to take constitutional issues seriously,<sup>53</sup> a super-strong presumption of constitutionality would effectively license the legislative branch to ignore the original meaning whenever it becomes politically convenient to do so.

Even when Congress does give serious consideration to possible constitutional objections to proposed legislation, it may not address the issue from an originalist perspective. Like judges, members of Congress who focus on constitutional issues are not necessarily originalists. Even when they consider constitutional issues in good faith, they could easily give nonoriginalist theories greater weight than the original meaning. For these reasons, a super-strong presumption of constitutionality is more a way of subordinating originalism to democracy than a way of reconciling the two.

Ultimately, we cannot completely dissolve the Borkean dilemma, or even come close to doing so. Democracy and originalism are not fully compatible. There will be many cases where we must prioritize one of these commitments over the other.

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<sup>51</sup> See, for example, *United States v Morrison*, 529 US 598, 607 (2000) (noting that a “presumption of constitutionality” applies in cases involving judicial review of federal statutes).

<sup>52</sup> James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv L Rev 129, 144 (1893). For a recent history and evaluation of Thayerian deference, see Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 Cal L Rev 519, 522–37 (2012).

<sup>53</sup> For good discussions of the reasons why Congress often gives short shrift to constitutional questions, see generally Neal Devins, *Why Congress Did Not Think about the Constitution When Enacting the Affordable Care Act*, 106 Nw U L Rev Colloquy 261 (2012); Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 Nw U L Rev 737 (2011).

## CONCLUSION

Judge Bork's failure to squarely address the conflict between democracy and originalism is perhaps an understandable oversight. When he was at the height of his career as a constitutional theorist in the 1970s and 1980s, many of the most prominent constitutional conflicts of the era involved efforts by liberals to overturn conservative laws on the basis of constitutional arguments that usually relied on nonoriginalist theories of interpretation. Warren and Burger Court decisions protecting privacy rights,<sup>54</sup> abortion,<sup>55</sup> and the rights of criminal defendants<sup>56</sup> were paradigmatic examples of this trend, though many of these decisions have since attracted originalist defenders.<sup>57</sup> In that context, it was, perhaps, easy for conservative originalists to downplay or overlook potential conflicts between their theories and deference to the democratic process.

But, as far back as the 1970s and early 1980s, conservative and libertarian jurists and legal scholars were already arguing for stronger judicial protection of economic liberties and property rights on originalist grounds.<sup>58</sup> In two important opinions written in the 1970s, conservative Justice William Rehnquist argued that the text and original meaning of the Constitution justified stronger judicial intervention to protect federalism and property rights.<sup>59</sup>

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<sup>54</sup> See for example, *Griswold v Connecticut*, 381 US 479 (1965).

<sup>55</sup> See *Roe v Wade*, 410 US 113 (1973).

<sup>56</sup> See for example, *Miranda v Arizona*, 384 US 436 (1966) (expanding criminal defendants' rights against police interrogations); *Gideon v Wainwright*, 372 US 335 (1963) (requiring states to provide counsel for indigent criminal defendants); *Escobedo v Illinois*, 378 US 478 (1964) (holding that criminal suspects have a right to counsel during police interrogations); *Brady v Maryland*, 373 US 83 (1963) (holding that withholding of "material" evidence from a criminal defendant violates his due process rights).

<sup>57</sup> See, for example, Amar, *The Bill of Rights* at 231–83 (cited in note 18) (providing an originalist rationale for the Warren Court's application of most of the Bill of Rights to the states); Balkin, 24 Const Commen at 311–28 (cited in note 26) (defending *Roe v Wade* on originalist grounds).

<sup>58</sup> For an important pathbreaking work along these lines, see Siegan, *Economic Liberties and the Constitution* at 318–31 (cited in note 24).

<sup>59</sup> See, for example, *National League of Cities v Usery*, 426 US 833, 844–45 (1976) (relying, in part, on originalist reasoning to enforce Tenth Amendment federalism limitations on congressional power), overruled by *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985); *Penn Central Transportation Co v New York City*, 438 US 104, 141–42 (1978) (Rehnquist dissenting) (arguing that the Court's failure to provide stronger protection for property owners against regulatory takings violated the text of the Fifth Amendment in "a very literal sense"). For a discussion of early conservative and libertarian efforts to strengthen judicial protection for property rights, see generally

In recent years, conservatives and libertarians have advanced a variety of arguments challenging numerous state and federal laws on originalist grounds—the most famous recent example being the challenge to the individual health insurance mandate of the Affordable Care Act,<sup>60</sup> which the five conservative justices on the Court concluded was not authorized by the original meaning of the Commerce Clause and the Necessary and Proper Clause.<sup>61</sup> Conservative and libertarian originalists also led the successful effort to persuade the Supreme Court to recognize an individual right to bear arms under the Second Amendment and apply it against the states.<sup>62</sup>

Today, intellectually honest originalists of any political stripe have little choice but to confront the tension between democracy and judicial enforcement of the original meaning directly. In doing so, they will have to at least partially subordinate one of these goals to the other.

Some originalists have already embraced the idea that consistent enforcement of the original meaning requires substantial restrictions on democracy, and indeed consider this a virtue of their theory rather than a defect. For example, Randy Barnett argues that judicial enforcement of tight constraints on government power—including that wielded by democratic majorities—enhances the legitimacy of government and prevents unjustified oppression.<sup>63</sup> Others might prefer to sacrifice originalism rather than democracy when the two conflict. There is also room for various intermediate positions, under which originalism might trump democracy in some situations, but yield to it in others. But regardless of where we ultimately come down on it, the Borkean dilemma cannot be evaded. In a wide range of cases, originalism and democracy are enemies, not friends.

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Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton 2008).

<sup>60</sup> Patient Protection and Affordable Care Act, Pub L No 111-148, 124 Stat 119 (2010).

<sup>61</sup> See *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2593–2600 (2012) (Roberts); id at 2644–50 (Scalia, Kennedy, Thomas, and Alito dissenting).

<sup>62</sup> See *District of Columbia v Heller*, 554 US 570, 595 (2008); *McDonald v City of Chicago*, 130 S Ct 3020, 3026 (2010). For an account of the key role of libertarians in bringing *Heller* and developing the arguments behind it, see Brian Doherty, *Gun Control on Trial: Inside the Supreme Court Battle over the Second Amendment* 23–41 (Cato 2008). See also generally Adam Winkler, *Gunfight: The Battle over the Right to Bear Arms in America* (Norton 2011).

<sup>63</sup> See Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 11–52 (Princeton 2004).