

ORIGINALISM AND SUPERMAJORITARIANISM: DEFENDING THE NEXUS

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INTRODUCTION

Despite their ubiquity in the law, supermajority rules are little discussed and hugely undertheorized.¹ We are thus grateful to Professor Leib's response to our essay,² because it allows us to expand on the subject. But if Professor Leib, who has written interestingly on supermajority rules in the context of the jury, is as mistaken on some fundamental points in our argument as his reply suggests, we must become better evangelists for our favorite topic.

This brief reply responds to Leib's criticisms of our essay. We show that, among other things, Leib fails to appreciate what makes our argument for originalism new; that he misunderstands the nature of supermajority rules in a complex voting system; and that he does not recognize the differences between constitutional provisions enacted under genuine supermajority requirements and ordinary statutes that happen to receive the support of a supermajority of legislators.

We are also grateful for the opportunity to reiterate that our essay did not purport to offer a comprehensive new defense of originalism, but instead only the outlines of a theory. Professor Leib criticizes us at several

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¹ We have tried to correct this problem through a series of articles. For our most recent efforts, see John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115 (2007) (link); John O. McGinnis & Michael B. Rappaport, *The Condorcet Case for Supermajority Rules*, 16 SUP. CT. ECON. REV. (forthcoming 2007); John O. McGinnis & Michael B. Rappaport, *The Judicial Filibuster, the Median Senator and the Countermajoritarian Difficulty*, 2005 SUP. CT. REV. 257 [hereinafter *Judicial Filibuster*] (link). See also John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002) [hereinafter *Our Supermajoritarian Constitution*] (link).

² Ethan J. Leib, *Why Supermajoritarianism Does Not Illuminate the Debate Between Originalists and Non-originalists*, 101 NW. U. L. REV. (forthcoming 2007), 101 NW. U. L. REV. COLLOQUY 113, <http://www.law.northwestern.edu/lawreview/colloquy/2007/7/> (citations *infra* refer to the *Colloquy*) (link).

points for not developing an argument or answering some possible criticism, but full development and anticipation of even the most important criticisms are not possible in a fifteen page essay. The advantage of the short essay form now becoming more popular in the academy is that it allows one to provide the essence of a new idea, leaving some issues to later development and eschewing discussion of issues that have been thoroughly debated elsewhere. Happily, this reply allows us to develop some additional parts of our theory. Here, then, we answer some of Leib's concerns, including explaining how much support is needed to establish the applicable interpretive rules, and discussing the effects of the status quo on the desirability of a constitution produced by supermajority rules.³

I. PRAGMATISM

Professor Leib maintains that our essay's pragmatic argument for originalism is neither new nor effective.⁴ He states that our argument is not new on the grounds that others have made pragmatic arguments for originalism, such as claiming that originalism promotes predictability or less partisan judicial interpretation. But Leib appears to misunderstand our claim of novelty. We were not denying that others have argued that originalism has good consequences, as Leib himself acknowledges.⁵ What is new is our pragmatic argument that the supermajoritarian process for enacting and amending the Constitution makes it likely that the substantive

³ The one aspect of Professor Leib's essay for which we are not grateful is his claim that our comments on women in relation to the founding "border[] on the offensive." *Id.* at 177 n.19. As we said in our essay, we think it is a significant problem for originalism that women were excluded from the enactment process. But we pointed out that this is a less significant problem than the exclusion of African Americans, who may not even have been bound by the original agreement. We also provided reasons why the exclusion of women is less problematic: women's interests were more likely to be represented by their relatives and many women at the time apparently did not think they should be included. *See generally* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 174–75* (2000) (noting that it was a long-held and embedded view that women were virtually represented); THOMAS G. WEST, *VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA 75–77* (1997) (discussing the Founders' views and drawing inferences as to the views of women about women's suffrage); *see also* AKHIL REED AMAR, *AMERICA'S CONSTITUTION 375–76* (2005) (presenting and perhaps endorsing the arguments of Republicans in 1865 that the Guaranty Clause allowed women to be virtually represented by men, but did not permit the freedmen to be virtually represented by southern whites). Leib does not show that either of these historical observations is mistaken or irrelevant to the analysis we propound, nor does he claim they are false. What is more, he unfairly converts our qualified claim that "there is [a] stronger argument that women were virtually represented at the time by their male relatives" into the unqualified one that "women were virtually represented." John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 395 (2007), NW. U. L. REV. COLLOQUY 68, 80 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/1/> (emphasis added) (citations *infra* refer to the *Colloquy*) (link). Leib's offense is misdirected: a scholar must be able to describe relevant historical realities even if they do not represent the ideal society from the scholar's own viewpoint.

⁴ Leib, *supra* note 2, at 114.

⁵ *Id.*

provisions of the originalist Constitution are desirable. Our argument, for example, suggests that the original meaning of the Appointments Clause is likely to have allocated the various appointment powers between the President, the Senate, and the Congress in a beneficial way.

According to our theory, the benefits of originalism are much greater than the traditional pragmatic arguments for originalism would suggest. Under our view, following the original meaning of the Constitution does not merely have the limited benefits of promoting predictability or less partisan interpretation; these are real advantages, but advantages that someone concerned with good consequences might discount if originalist interpretation often led to substantively bad results. Rather, our theory suggests that originalist interpretation will generally lead to a sensible resolution of the policy question at issue.

This clarification of the nature of our argument helps to explain why Professor Leib's second claim—that our argument is not effective—is also mistaken. Leib claims that our argument cannot persuade what he calls case-by-case pragmatists, because they are “forward-looking” and believe that originalism is indeterminate. According to Leib, “case-by-case pragmatists deny that good consequences in the ‘here and now’ can follow from giving the past so much authority.”⁶ But it is not clear why our argument cannot persuade such pragmatists. We have argued that the supermajoritarian procedure for creating the Constitution is likely to lead constitutional enactors to select desirable, long-term provisions—provisions which tend to produce good results here and now, either by delegating to future agents (such as the legislature) or by adopting wise constraints that are likely to persist under changing circumstances. Thus, pragmatists might believe that the improved decisionmaking produced by supermajority rules that our argument highlights now makes it beneficial to follow the decisions of the past, especially when doing so also secures the traditional advantages of less uncertainty and less judicial partisanship.

Professor Leib's argument that case-by-case pragmatists would reject originalism because it is indeterminate also fails. It is true that pragmatists have often emphasized the indeterminacy of originalism, although in our view they have exaggerated its extent.⁷ But even if such indeterminacy is much more significant than we believe, it does not provide an overriding reason for rejecting originalism. Indeterminacy is just one cost of originalism, and in any pragmatic analysis, it must be considered as part of a more comprehensive comparison of the relative benefits and costs of originalism and case-by-case judicial policymaking. In other words, the degree of indeterminacy might be outweighed by the other benefits of originalism that we have identified. Moreover, our argument that originalism enforces substan-

⁶ *Id.* at 115.

⁷ Our theory also suggests that interpretive rules of the Framers may have an important role in reducing ambiguity and thereby indeterminacy.

tively desirable provisions makes indeterminacy a less potent criticism. While the indeterminacy of originalism would be a strong argument against an approach that relied on the predictability and reduced judicial partisanship from originalism, it is less significant against a view that emphasizes the substantively desirable Constitution that originalism enforces. Some uncertainty about that Constitution's meaning is unlikely to vitiate its desirability.

II. SUPERMAJORITY RULES

A. *Lack of Context*

Professor Leib complains that, unlike our other work, our essay provided a view of supermajority rules without “nuance,” did not focus on context, and ignored the reality that supermajority rules are not always better than majority rules.⁸ As a general matter, we find this an odd complaint. Our essay did not claim that supermajority rules are always superior. In fact, we accepted the proposition that for ordinary, non-entrenched legislation, majority rule is the better default rule.⁹ Our essay focused on one specific context—the passage of entrenched legislation—and argued that supermajority rules were better than majority rules for that context.¹⁰ We pointed out that entrenched legislation has peculiar features for which majority rule is not well designed. Majority rule facilitates partisanship and division, qualities which are deadly to good constitutional provisions, while supermajority rule promotes compromise and consensus. Moreover, majority rule does nothing to counter the serious problem that besets entrenchment: the tendency of humans to think that the future is likely to resemble the past. By contrast, supermajority rule sustains a veil of ignorance and additional deliberation, which together operate to compensate for this cognitive infirmity. Thus, our central point about the beneficence of supermajority rules here is limited by context—the context of entrenchment.

Professor Leib focuses on two matters of context that he believes we ignored. First, he claims that we did not take account of the importance of the status quo.¹¹ While the question of the status quo has theoretical interest, which we will address in a moment, we do not think it has much practical import, simply because the status quo at the time of the Framing was not particularly bad—certainly not bad enough to call into question the Constitution that emerged. At the time, the United States was at peace. There were concerns about trade wars among the states, but many scholars think

⁸ Leib, *supra* note 2, at 118.

⁹ McGinnis & Rappaport, *supra* note 3, at 71.

¹⁰ *Id.* at 71–73.

¹¹ Leib, *supra* note 2, at 118.

these concerns were exaggerated.¹² The United States surely had problems, but that is true of all nations, especially those thinking about a new constitution. The willingness of large numbers of people to oppose the Constitution until they were promised a Bill of Rights also suggests that the status quo was not disastrous. They recognized that voting down this Constitution would not necessarily have doomed the nation or precluded subsequent attempts at consensus. Indeed, the prosperity and freedom of the people of the United States (with the important exception of those enslaved) must rate very highly as compared to the people of other nations throughout the world at that time.¹³

While not of practical importance in explaining the desirability of the Constitution, a bad status quo does raise interesting theoretical questions. To understand the significance of a bad status quo, one needs to consider two distinct issues. First, if there is a bad status quo, does that mean that a different voting rule would be better for constitution-making?¹⁴ Second, would a bad status quo suggest that it would have been better not to create the Constitution, and what consequences for constitutional interpretation would flow from this suggestion?

First, it simply does not follow that if the status quo were bad, majority rule for constitution-making would be better. As we have discussed in our more theoretical treatment of supermajority rules, there is no necessary relationship between the optimal voting rule and a bad status quo.¹⁵ If majority rule has substantial defects in a particular context, it can easily make a bad status quo worse.¹⁶ Entrenchment is such a context. A bad status quo would not change the fact that a majority voting rule would lead to divisiveness, partisanship, and the absence of features, like the veil of ignorance, that are needed to correct the heuristic defects that bedevil entrenchment. Thus, there are strong reasons why a bad status quo does not generally suggest that majority rule would be the better means for entrenchment.¹⁷

¹² See, e.g., Edmund W. Kitch, *Regulation and the American Common Market*, in *REGULATION, FEDERALISM AND INTERSTATE COMMERCE* 9, 11–19 (A. Tarlock ed. 1981).

¹³ See ALICE HANSON JONES, *WEALTH OF A NATION TO BE: THE AMERICAN COLONIES ON THE EVE OF REVOLUTION* 298 (1980) (concluding that the Americans were wealthier than Europeans at the time).

¹⁴ Leib appears to entertain this possibility. See Leib, *supra* note 2, at 118–19 (suggesting that majority or even submajority rules may be better for constitution-making depending on the context).

¹⁵ See *Our Supermajoritarian Constitution*, *supra* note 1, at 742.

¹⁶ Leib also considers submajority rules as another possible alternative. Leib, *supra* note 2, at 117. But submajority rules would even be worse than majority rule at fostering consensus and creating a veil of ignorance.

¹⁷ One possible downside of supermajority rules is that they can prevent the status quo from being changed because they make it difficult to enact needed measures. But, at least in the case of our Constitution, we can say that they did not have that particular defect since a constitution was in fact passed.

Second, it is possible that a sufficiently bad status quo might prevent the supermajoritarian process from producing a desirable constitution. But it does not follow that case-by-case judicial policymaking, especially that of the living Constitution variety, would be beneficial for interpreting a bad constitution, including one that was a product of a bad status quo. Case-by-case policymaking has other problems—not only the traditional problems of uncertainty and partisan judicial interpretation, but also the deficiencies that are highlighted by our supermajoritarian theory. These deficiencies include those created by having a mere majority of insulated Supreme Court Justices impose what they regard as the correct values when there are little means of checking whether they are furthering either correct values or the views of the nation.

Assuming that the status quo is now sufficiently good to launch a constitution, one possibility that might follow from concluding that the Constitution is bad is a call for a constitutional convention like the one that Professor Sanford Levinson has recently made.¹⁸ In the interim, or in the alternative, one might argue that judges should be quite deferential to legislatures. Majoritarianism has its claims of beneficence even in the absence of being endorsed by a constitution, and there no longer would be a strong pragmatic argument that its results should be trumped by the Constitution.

The second matter of context that Professor Leib believes we ignored involves changes in preferences over time. Leib suggests that the preferences of people today may be very different from the preferences of those who enacted the Constitution.¹⁹ This argument is a variation of one we addressed in our piece, namely that the world has changed so much that we should not follow the original settlement. Our response here is much the same. First, the constitutional enactors took the fact of changing preferences into account by permitting many avenues to register changes in preferences, including new legislation and constitutional amendments. Second, any pragmatic theory must be evaluated against other competing theories, and case-by-case pragmatism, despite first appearances, is not particularly well-suited to adjusting the Constitution to the consensus preferences of the nation. As we noted in our original essay,²⁰ because of its inability to elicit consensus, the judiciary is unlikely to capture true social change. In particular, the judges' own preferences would substantially interfere with the accuracy of their perceptions of social change.²¹

¹⁸ See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 9 (2006).

¹⁹ Leib, *supra* note 2, at 125.

²⁰ McGinnis & Rappaport, *supra* note 3, at 76.

²¹ Leib's own piece may provide an example of this problem. He writes that the Framers had a "soft spot for god." Leib, *supra* note 2, at 119. But Americans today remain overwhelmingly religious, indeed perhaps more enthusiastically so than many of those who ratified the Constitution. See BROOKE ALLEN, *MORAL MINORITY: OUR SKEPTICAL FOUNDING FATHERS* (2006) (discussing the Founders' religious views). If preferences have changed about religion, they may well have changed in the opposite direction of Leib's perception.

Finally, we acknowledged that a constitution framed under supermajority rules would not, of course, perfectly reflect changed preferences. While constitutional amendments and new legislation would do much to adjust our regime to new values, we do not doubt that there would be some constitutional provisions that should be changed but would not be because the necessary support for a constitutional amendment could not be obtained. But the provisions that become undesirable because of changing preferences are not likely to be all that costly—or else they would be eliminated. In the end, these provisions must simply be counted as reasonable costs of a supermajoritarian process that produces beneficial provisions while reducing uncertainty and interpretive partisanship.

B. Distinguishing True from Faux Supermajority Rules

Professor Leib doubts that Article VII's requirement that nine of the thirteen states ratify the Constitution is a supermajority rule, because the Constitution did not require a supermajority for ratification of the Constitution in the state conventions, and many of the state conventions in fact ratified the Constitution by a mere majority of the delegates.²² He makes a similar argument about Article V's requirement that three-quarters of the states ratify a constitutional amendment.²³

But Leib's argument is mistaken. The inclusion of a majority component in Article VII's ratification requirement does not transform it into a majority rule. If one describes as a majority rule a requirement that 9 of 13 states ratify, where the ratification is decided by a majority vote of a convention, then how would one describe a system that merely requires 7 of 13 states to ratify? In any complex democratic system, a supermajority rule may contain votes or voters that are themselves determined in a majoritarian fashion. For instance, federal Representatives and Senators are elected by a majority (or plurality) vote of their constituents. Yet no one doubts that the requirement that two-thirds of the members of both houses must pass a constitutional amendment is a supermajority rule. The reason is that the voting rule by which legislators vote requires a greater consensus than a mere majority, even though a mere majority of the people in each district can put those legislators in office.²⁴ Similarly, Article VII and Article V's requirement that a supermajority of states ratify the Constitution or

²² Leib, *supra* note 2, at 120.

²³ *Id.*

²⁴ While we maintain that the rule requiring nine of the thirteen states to ratify the Constitution is a supermajority rule, that does not imply that aspects of the rule cannot be understood as majoritarian. For example, there is a strong argument that the constitutional ratification process reflected a majoritarian understanding of state sovereignty. See Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule and the Denominator Problem*, 65 U. COLO. L. REV. 749, 774 (1994). But the operation of the ratification voting rule at the state level differed from that at the national level.

its amendments elicits a greater consensus than a requirement of a mere majority of states.²⁵

Professor Leib next suggests that our argument proves too much because some statutes, like constitutional provisions, pass with very large majorities. He asks why such statutes should not “be entitled to the same kind of deference constitutional provisions get.”²⁶ Leib’s comparison of statutes that pass with supermajority (or even nearly unanimous) *support* to provisions like those of the Constitution, which pass under stringent supermajority *rules*, betrays an important confusion. Simply because a measure received a supermajority of votes under a majority rule, does not mean that it would have passed under a supermajority rule.²⁷ We cannot be certain whether those who voted for a measure under a majority rule would also have voted for it under a supermajority rule, because their votes under a majority rule were not decisive. For example, it is a common practice for legislators to vote for a measure that will pass anyway, even though they would have opposed it had their vote made a difference. Their vote for the measure, then, is what economists call “cheap talk.”²⁸ Thus, it is wrong to treat bills that receive a supermajority of votes as the equivalent of bills that pass under a supermajority rule.

But even if we put this evidentiary problem to the side and assume that the Congress would have passed the required legislation under a supermajority rule, there is a more fundamental problem with treating the legislation as the equivalent of an entrenched constitutional provision. When Congress passes legislation, it does not ordinarily intend to entrench that legislation. For example, when Congress passed the Patriot Act by enormous proportions in 2001,²⁹ it was not deciding whether to entrench that legislation against future statutory changes, but instead simply whether to pass a statute that could be repealed by subsequent statutes. The same point applies to the Civil Rights Act of 1964, the example chosen by Professor Leib. These

²⁵ It is true that these requirements are based on a supermajority of states rather than a supermajority of the population or a supermajority of the legislators representing the population. But this is true of the Senate as well. We have discussed elsewhere the reasons that such supermajority rules still produce many of the benefits of supermajority rules generally. See *Our Supermajoritarian Constitution*, *supra* note 1, at 746–49.

²⁶ Leib, *supra* note 2, at 121.

²⁷ The Senate filibuster rule does require a supermajority to end debate on many measures, but even that rule does not have the same effect as the constitutional amendment process. First, the formal supermajority rule governing the passage of legislation under the filibuster rule is much less stringent than the strict process for enacting a constitutional amendment. Second, the filibuster rule exists under the shadow of possible revocation by the majority. See *Judicial Filibuster*, *supra* note 1, at 281.

²⁸ Cheap talk is the opposite of the costly signaling that suggests sincerity. See Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation*, 151 U. PA. L. REV. 1417, 1445–46 (2003) (link) (applying this framework to the activities of legislators).

²⁹ The House voted 357 to 66 in favor, see 147 CONG. REC. 20,466 (Oct. 24, 2001) (link) and the Senate voted 98 to 1 in favor, see 147 CONG. REC. 20,742 (Oct. 25, 2001) (link).

Congresses were not asked, nor presumably did they consider, whether the principles or specific provisions of these statutes were the type that should be entrenched against future statutory changes. Thus, a supermajority vote for ordinary legislation does not tell us whether the legislature would have supported a constitutional entrenchment and therefore whether statutes with significant support should be given the trumping power of entrenchments.³⁰

Leib is therefore mistaken to believe that our theory suggests that a supermajority vote signals a statute is worthy of some special entrenchment status.³¹ To think this is actually to get our theory backwards. It is not that the content of a statute should be entrenched on receiving a supermajority of votes. It is rather that the special problems involved when we intend to entrench a measure require that a supermajority rule be used to do so.³²

Professor Leib ends by suggesting that we need a “more careful definition of the kind of supermajority rules that give enactments their special character.”³³ Yet, two of the most important aspects of that definition are the ones that Leib here ignores. The enactment must be passed under a voting rule that actually requires a supermajority and under a structure that specifies that the enactment will be entrenched. Only in that way will legis-

³⁰ At one point, Leib might be interpreted as suggesting that legislation passed by a supermajority might receive less authority than an entrenchment, but more than an ordinary statute. Leib, *supra* note 2, at 121 (“[I]f two supermajoritarian enactments conflict, why shouldn’t the last in time control?”). Under this view, the statute passed with supermajority support would be shielded from being held unconstitutional but could be repealed by an ordinary statute. Initially, we note that providing even this limited deference to legislation with supermajority support confronts the two problems we discuss in the text—the difficulty of inferring whether a statute that passed with supermajority support under majority rule would pass under a supermajority rule and the difficulty of knowing whether the legislature would have desired that statute to take priority over the Constitution.

But let us assume that the legislature expressly provided that laws passed under a certain supermajority rule would be exempt from subsequent constitutional scrutiny. Of course, the Constitution does not establish any such procedure, and thus one answer to Leib’s suggestion is that, whatever its policy advantages, the Constitution precludes it. But there are also reasons to doubt that this procedure would be desirable. First, it is unclear how strict a supermajority rule should be required for this exemption from constitutional scrutiny. Second, creating an intermediate supermajoritarian process distinct from the constitutional entrenchment process would undermine the fundamental distinction between ordinary legislation and higher law, replacing this basic dualism with a more complicated scheme. As we have noted elsewhere, allowing legislatures to complicate the basic dualism of constitutional governance would rob constitutional provisions of much of their majesty in the public mind as higher law that can be disturbed only with the deliberation that attends the passage of a constitutional amendment by representatives of both the state and federal government. See John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 399 (2003) (link). This reduction in a constitution’s special role “would also decrease the attention that the public gives to proposed constitutional amendments, thereby increasing the power of special interests.” *Id.*

³¹ Leib, *supra* note 2, at 121.

³² Perhaps Leib is suggesting that Congress should be permitted to set up its own procedures for entrenchment through a supermajoritarian process outside of Article V rather than be permitted to override entrenchments through a supermajoritarian process—an idea we discuss above at note 26. We answer that kind of argument in McGinnis & Rappaport, *supra* note 26, at 399.

³³ Leib, *supra* note 2, at 122.

lators know the rules of the game, making entrenchment potentially beneficial.

III. INTERPRETIVE RULES: ORIGINAL METHODS ORIGINALISM

Next, Professor Leib argues that even if our view that supermajority rules produce beneficial entrenchments holds, we still have not made the case for originalism. First, he notes that although we argue that judges should use the constitutional enactors' interpretive rules to interpret the Constitution, we fail to provide evidence of what those interpretive rules were. We readily agree that we did not provide a description of these rules, which was not possible in that short essay. What we did provide was a new theory about why one should follow these interpretive rules, whatever they may be. Because it is the consensus about the constitutional provisions at the time of their enactment that is necessary to make them beneficent today, it is the constitutional enactors' views of how constitutional provisions are to be interpreted that count in maintaining their beneficence, not our own. In other words, following the interpretive rules that they deemed binding is essential to the stream of benefits that they saw coming from the Constitution and that obtained their votes.

Our essay is thus novel in its attempt to reorient originalism. In our essay, we explained how "original meaning" originalism largely displaced "original intent" originalism.³⁴ Our theory now suggests that an "original methods" originalism is needed to discover and justify the type of originalism that should be employed. Original methods originalism requires that the Constitution's text be interpreted according to the original interpretive rules of the constitutional enactors. This theory makes the content of the original interpretive rules a pressing research project, but one which we could not have begun within the brief compass of our prior essay.

We also agree with Leib that it is logically possible that the constitutional enactors thought the original Constitution should be interpreted under dynamic rules of constitutional interpretation. Indeed, we noted that very point in a companion piece, *Original Interpretative Principles as the Core of Originalism*, an essay Leib cites.³⁵ There we observe that if the constitutional enactors had such a dynamic interpretation rule, living constitutionalism would become a legitimate form of originalism. In that piece, however, we also sketched some reasons why it is very unlikely that rational, risk averse actors would choose to endure the agency costs that entrenching provisions under a dynamic interpretation rule would entail. But ultimately our theory permits living constitutionalism to be defended only with historical evidence focusing on the views of the enactors, not with the kind of theoretical arguments by which it is usually promoted.

³⁴ McGinnis and Rappaport, *supra* note 3, at 75.

³⁵ John O. McGinnis & Michael B. Rappaport, *Original Interpretative Principles as the Core of Originalism*, 24 CONST. COMMENT. (forthcoming 2007) (link), cited in Leib, *supra* note 2, at 124 n.42.

We thus certainly welcome Professor Leib's search for historical evidence that the enactors used interpretive rules that would embrace living constitutionalism, but we confess never to have seen such evidence. In fact, our understanding of the interpretive rules in the generation before and after the Constitution is that they did not embrace this dynamic conception. Even leading scholarly works where one might expect to find support for this conception do not reveal any substantial support in favor of it.³⁶ Instead, some evidence suggests that the applicable interpretive rules are similar to the textualist rules followed by the Marshall Court.³⁷ Other evidence supports following the public meaning of language of the Constitution's provisions at the time they were ratified, such as this statement by Madison:

I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable . . . exercise of its powers.³⁸

Elsewhere, Madison wrote of the salience of "established rules of interpretation" in construing that meaning.³⁹

Leib also wonders how we would establish what were the applicable interpretive rules, given that there might have been disagreement about their content.⁴⁰ We would answer this question the same way that we establish the meaning of the constitutional text. We weigh the quality and quantity of the evidence, and follow the interpretive rules with the most evidence of

³⁶ See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) (link). While Eskridge argues against an originalist/textualist conception in favor of an equity of the statute approach, he does not present evidence in favor of a dynamic conception of statutory interpretation, at least not one where the statute is updated through the application of evolving principles in the manner of the living Constitution. *Id.* at 999, 1003–04. For example, the mention of a statutory interpretation that Eskridge explicitly describes as "dynamic" simply involves the judiciary's refusal to interpret a recent statute to reach a result so inequitable that it cannot believe the legislature would have intended it. *Id.* at 1018, n.126 & 1023. We understand this court's action as having chosen a static intentionalist approach in preference to a textualist one, not as having adopted an approach that interprets based on changing values or circumstances over time, which is how Eskridge presents the dynamic approach in other scholarship. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (defending a dynamic approach to statutory interpretation that allows departure from the text and intent of a statute in favor of changing values).

More generally, we do not read his article as presenting significant evidence of interpretation based on changing values or circumstances.

³⁷ See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 85–102 (2001) (discussing the related issue of the statutory interpretive canons of the Marshall Court).

³⁸ Letter from James Madison to Henry Lee (June 25, 1824), in 9 THE WRITINGS OF JAMES MADISON 192 (G. Hunt ed., 1910).

³⁹ Letter from James Madison to Martin Van Buren (July 5, 1830), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 89 (1884).

⁴⁰ Leib, *supra* note 2, at 124.

having been accepted as the applicable ones for the Constitution. While Leib mentions the possibility of requiring the support of a supermajority to find an interpretive rule, such support would be unnecessary, just as it is unnecessary for establishing the meaning of textual provisions.

Finally, Professor Leib makes the familiar argument that because some portions of the Constitution are written in general terms, those provisions were intended to be interpreted dynamically.⁴¹ This common claim, however, is overused and underdeveloped. One might use general language for a variety of reasons that have nothing to do with dynamic interpretation, including the desire to keep the constitutional provision brief, to promote public understanding of the Constitution, or to address with a static rule circumstances that have not yet arisen. In these cases, especially where the background rule is originalist, the proper way to interpret general language would be to determine what general rule was enacted, interpreting it in accord with its general, but static meaning.

CONCLUSION

Our original essay was short, but it contained several novel propositions about originalism. Professor Leib has performed a service in prompting us to clarify some points where brevity may have led to misinterpretation and to correct some confusion about the relatively unfamiliar subject of supermajority rules. But we do not believe that Leib has cast doubt on the three novel propositions that our original essay asserted. First, the supermajoritarian process that enacted the Constitution is largely responsible for creating its beneficial provisions. Second, interpreting the Constitution according to its original meaning preserves these benefits, because it was that meaning that was considered during the supermajoritarian enactment process. Finally, to realize these benefits, the original meaning must be understood according to the original interpretive methods that the enactors would have employed, because that is how they would have determined the Constitution's legally operative meaning.

⁴¹ *Id.*