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A POSITIVIST, BASEBALL-CENTRIC CRITIQUE OF ORIGINALISM

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INTRODUCTION

The¹ Constitution invests the Supreme Court with two related powers: discretion and finality. The Constitution contains open-textured language, which creates disputes on which the Court typically has the last say. As Justice Robert Jackson once humbly observed, “We are not final because we are infallible, but we are infallible only because we are final.”²

The baseball rulebook provides similar powers to umpires. Judgment calls are final; they cannot form the basis for appeal or protest.³ Even with the creation of instant replay, overturning an umpire’s call requires a finding of “clear and convincing evidence,” which provides a strong presumption that the call on the field was correct.⁴ Umpires, like judges, have considerable power in light of the irrevocability of their decisions. For example, the Official Baseball Rules (OBR) warns players and managers that they will be ejected from the game if they quarrel over an umpire’s strike zone.⁵

Finality is problematic if sports officials abuse their discretion. Consider a (perhaps apocryphal) story of a rookie pitcher who experienced unfair treatment from Hall of Fame umpire Bill Klem. On a two-strike count, the pitcher’s offering to Rogers Hornsby, another Hall of Famer, caught the corner of the plate. Klem called it a ball, and the pitcher complained. When Hornsby smashed a home run on the next pitch, Klem told the pitcher: “See, Mr. Hornsby will tell you when it’s close enough to be a strike.”⁶

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¹ *Aside: Common Law Origins of the Infield Fly Rule*, 123 UNIV. PA. LAW REV. 1474, 1474, note 1 (1975).

² *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949).

³ MAJOR LEAGUE BASEBALL, OFFICIAL BASEBALL RULES Rule 8.02(a), 95; 7.04, 93 (2019), https://content.mlb.com/documents/2/2/4/305750224/2019_Official_Baseball_Rules_FINAL_.pdf (last visited Nov 19, 2019) [hereinafter OBR].

⁴ Major League Baseball, *Manager Challenge*, <http://m.mlb.com/glossary/rules/manager-challenge> (last visited Jun 4, 2019).

⁵ OBR Rule 8.02(a) Comment at 96.

⁶ C. Paul Rogers III, *Rogers Hornsby*, SOCIETY FOR AMERICAN BASEBALL RESEARCH, <https://sabr.org/bioproj/person/b5854fe4> (last visited Jun 4, 2019). For more recent examples of problematic strike zones, see Grant Brisbee, *Searching for a Defense of Angel Hernandez*, SBATION.COM (2013), <https://www.sbnation.com/2013/3/15/4108896/angel-hernandez>

QuesTec, a computer system that tracks pitches, now holds umpires accountable for the consistency of their strike zones.⁷ When it comes to the Constitution, proponents of originalism also seek to limit the discretion of judges. According to originalists, a “living Constitution” creates inconsistencies in our fundamental law, analogous to the arbitrariness of Bill Klem’s strike zone.

Many judges and legal academics, on the ideological right and left, believe originalism is *a* valid theory of interpretation to be used on some occasions.⁸ Nevertheless, judges will sometimes uphold other legal principles, like *stare decisis*, at the expense of their preferred interpretive method. Even Justice Antonin Scalia famously called himself a “faint-hearted” originalist.⁹ Scalia stated that if he were on the Court during the 1930s, he would have struck down the New Deal as inconsistent with the Founders’ view of federal power. However, his less zealous commitment to originalism allowed him to prioritize *stare decisis* in many cases involving federal regulatory power.¹⁰

The more controversial question within legal theory is whether originalism is *the only* valid interpretive approach. Some scholars have argued that respect for the Constitution compels judges to adopt originalism.¹¹ Abuses of judicial review, these scholars argue, create new constitutional provisions through illegitimate means. A living Constitution theory of interpretation also undermines respect for the supremacy of the Constitution, as established by the text.

wbc-strike-call-erick-aybar-craig-kimbrel (last visited Jul 5, 2019).

⁷ Joe Lemire, *QuesTec’s Legacy, 20 Years Later: A Standard, Thinner, Lower Strike Zone*, SPORTTECHIE (2017), <https://www.sporttechie.com/questec-legacy-20-years-strike-zone/> (last visited Jun 4, 2019).

⁸ For example, when the Supreme Court held the Second Amendment protects an individual right to handgun ownership, both the majority opinion and the principal dissent made originalist arguments in support of their positions. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2805 (“Three important founding-era legal scholars . . . understood [the Second Amendment] to protect an individual right unconnected with militia service.”); *id.* at 636 (Stevens, J., dissenting) (“The Second Amendment . . . was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature’s authority to regulate private civilian uses of firearms.”).

⁹ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861–862 (1989).

¹⁰ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 33, 35 (2005) (Scalia, J., concurring).

¹¹ See, e.g., Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257 (2005); Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted Originalism”* 75 U. CIN. L. REV. 7 (2005) [hereinafter Barnett, *Scalia’s Infidelity*]; Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

One reason why the notion of “compelled originalism” is so provocative is that it implies every non-originalist precedent is unconstitutional. This approach to interpretation has no room for “faint-hearted” originalists who are willing to yield to the prudence of *stare decisis*. As Professor Michael Stokes Paulsen has argued, “*Stare decisis* not only impairs or corrupts proper constitutional interpretation . . . [it] is unconstitutional, precisely to the extent that it yields deviations from the correct interpretation of the Constitution!”¹²

This paper evaluates the claim of “compelled originalism” by comparing the language of the baseball rulebook to that of the U.S. and other constitutions. First, I describe how different rules of our national pastime align with originalism, while others invite umpires to use a living Constitution approach. I then leverage H.L.A. Hart’s philosophy of legal positivism to evaluate baseball and constitutional rules. Hart claims public officials must accept the most fundamental rules of their legal system, which would include any guidance about how to interpret the Constitution.

Because “compelled originalism” is rooted in respect for the Constitution’s legitimacy and supremacy, one would assume the text would instruct judges to be originalists. Of course, the Constitution says no such thing. By contrast, the baseball rulebook sometimes provides specific instructions to umpires about how to adjudicate certain rule violations. I conclude by demonstrating how originalists have managed to turn the debate over constitutional legitimacy on its head. If the goal of originalism is to prevent judges from reading provisions into the Constitution, originalists must take seriously that no requirement to use original public meaning exists in the constitutional text.

COMPARING A BALK TO OBSTRUCTION: A DIFFERENCE IN DISCRETION

The allure of originalism is that it attempts to view the Constitution as a series of rules. Rules limit judicial discretion because they reduce complex ideas to a checklist of things that are or are not allowed based on historical evidence. Advocates of a living Constitution, on the other hand, focus on the principles underlying constitutional provisions. Principles require elaboration and evaluation, which allows the reach of the Constitution to ebb and flow as different judges tackle new legal problems.

The Eighth Amendment’s prohibition on cruel and unusual punishments provides a helpful comparison. In the 1950s, the Supreme Court adopted a living Constitution approach to this issue. The Court said it must consider “evolving standards of decency” in Eighth Amendment analyses.¹³ In more recent cases, the Court has applied this principle, for instance, to prohibit the

¹² Paulsen, *supra* note 11 at 291.

¹³ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

execution of adults convicted of any crime less than murder.¹⁴ For originalists, determining the Eighth Amendment's meaning is more straightforward: that which was allowed at the Founding is allowed today. Fully-committed originalists would have to uphold public floggings as a sentence for some crimes.¹⁵

Baseball reflects this interpretive debate because umpires must wrestle with principles in some situations and reflexively apply rules in others. In the remainder of this section, I analyze the balk, which umpires enforce in a rule-like fashion, and obstruction, which outlines a principle upon which umpires must elaborate. Each interpretive philosophy has the potential to anger baseball fans in ways that mirror the criticisms of living constitutionalism and originalism.

The Knickerbocker rulebook, written in 1845, contains the term “balk” but does not define it.¹⁶ By the end of the 19th century, it became clear that the purpose of the balk rule was to prevent the pitcher from deceiving the runner.¹⁷ However, the OBR does not announce a “balk principle” to the effect of, “Thou shalt not deceive the runner.” Instead, the modern rulebook lists thirteen specific actions by the pitcher that constitute a balk.¹⁸ One prong of this triskaideca-partite test holds that a pitcher balks if he “makes any motion naturally associated with his pitch and fails to make such delivery.”¹⁹

There are two problems with this approach. First, the balk rule punishes pitchers' actions even if they do not actually deceive a runner. For example, pitchers often step off the pitching rubber when they cannot agree with the catcher about which pitch to throw. If they step off with the wrong foot, this does not flummox the runners, but umpires will call a balk. Because the balk rule seems unfair in this instance, a living Constitution approach would give the umpire the flexibility to not invoke it. Similarly, the Supreme Court's living Constitution approach to the Eighth Amendment permits the justices to invalidate public floggings as a form of punishment.

Second, if a pitcher can think of a way to deceive the batter or the runner

¹⁴ Kennedy v. Louisiana 554 U.S. 407 (2008).

¹⁵ Scalia, *supra* note 9 at 861–862. Randy Barnett conveniently omits answering this interpretive question in his critique of “faint-hearted originalism.” Barnett, *Scalia's Infidelity*, *supra* note 11, at 23 (“I do not know enough about the phrase “cruel and unusual” to comment knowledgeably on it.”)

¹⁶ Alexander J. Cartwright, *Knickerbocker Baseball Rules* (1845), <https://www.baseball-almanac.com/rule11.shtml> (last visited Nov 27, 2019) (“A runner cannot be put out in making one base, when a balk is made on the pitcher.”).

¹⁷ Theron Schultz, *Balks: The Story of the 1988 Major League Baseball Season*, RECONDITE BASEBALL (2008), <http://reconditebaseball.blogspot.com/2008/08/balks-story-of-1988-major-league.html> (last visited Jun 12, 2019).

¹⁸ OBR Rule 6.02(a) at 72–74.

¹⁹ OBR Rule 7.02(a)(1) at 72.

that is not covered by one of the thirteen criteria, the umpire cannot call a balk. The hidden ball trick is both a legal and effective way to “trick” a runner into being tagged out.²⁰ If executed in conformity to the text of the rulebook, it does not matter that this play violates the spirit of the balk rule. Likewise, an originalist might concede that partisan gerrymandering undermines fundamental democratic values but conclude that courts are not empowered to solve this problem through constitutional interpretation.²¹

Baseball’s obstruction rule, on the other hand, gives umpires discretion in determining whether a violation has occurred and how to remedy the situation. Obstruction occurs when “a fielder who, while not in possession of the ball and not in the act of fielding the ball, impedes the progress of any runner.”²² There may or may not be a penalty for obstruction. Umpires must let the play finish then create a counterfactual: but for the obstruction that occurred, would the runner have successfully advanced one (or more) bases?

Because this rule calls for greater subjectivity, fans may disagree with how umpires handle obstruction calls. Consider an otherwise unremarkable 2004 game between the Mariners and the then-Tampa Bay Devil Rays. In the bottom of the 10th inning, Carl Crawford was on third base with one out. Tino Martinez hit a fly ball to left field deep enough to entice the speedy Crawford to try to score on the sacrifice fly. Mariner left fielder Raul Ibanez, however, hit his cutoff man, third baseman Willie Bloomquist, who threw Crawford out at the plate for what appeared to be the third out.²³

Proving once again that “it ain’t over ’til it’s over,” third-base umpire Paul Emmel had signaled obstruction on Bloomquist, and Crawford was ruled safe at home. With Bloomquist out in shallow left field serving as the cutoff man, how could he have possibly impeded Crawford’s path from third base to home? Emmel ruled that Bloomquist had positioned himself in such a way to block Crawford’s view of Ibanez in left field. With his view obscured, Emmel reasoned that Crawford could not tag up quickly enough, which allowed the Mariners to throw him out at the plate.²⁴

The operative word from the obstruction rule is “impede,” which, while used in other sections of the OBR, is never defined. Merriam-Webster defines

²⁰ *Rule of the Week: Hidden Ball Trick*, BASEBALL RULES ACADEMY (2017), <https://baseballrulesacademy.com/rule-week-hidden-ball-trick/> (last visited Nov 27, 2019).

²¹ *Rucho v. Common Cause*, No. 18-422, slip op. at 15 (U.S. 2019) (holding partisan gerrymandering claims present political questions) (“The Founders certainly did not think proportional representation was required.”).

²² OBR at 151.

²³ Marc Topkin, *About the Other Game-Ending Obstruction Call, involving Devil Rays and Mariners*, TAMPA BAY TIMES, October 27, 2013, <https://tampabay.com/about-the-other-game-ending-obstruction-call-involving-devil-rays-and/2149447/> (last visited Nov 27, 2019).

²⁴ *Id.*

impede as “to interfere with or slow the progress of.”²⁵ In Emmel’s judgment, Bloomquist’s positioning slowed Crawford’s progress, even though his third-base coach could tell him when to start running. One reason Mariners manager Bob Melvin described the situation as “the worst call I’ve ever seen” is that there are no other examples in recent baseball memory of obstruction calls made where a fielder impeded a runner’s ability to see, as opposed to his ability to run. On the other hand, Emmel’s crew chief, Joe West, defended the call, arguing, “[Y]ou have to score him. That’s the rule.”²⁶

West’s statement is correct—if parsed carefully. What West really meant was that since obstruction is a principles-based provision, Emmel’s application of the principle to this situation required the runner to score. An originalist approach to obstruction would never have allowed Emmel to make this sort of call, which seems like the umpiring equivalent of “judicial activism.” If in every other instance, the word “impede” is understood to mean physically slowing the progress of a runner, then Emmel cannot create a new meaning for that word in connection with a runner’s sight being blocked.

AN OVERVIEW OF LEGAL POSITIVISM

H.L.A. Hart’s theory of legal positivism provides a robust method to evaluate the claim that respect for the Constitution compels judges to be originalists. I begin with one caveat: Hart’s jurisprudence seeks to identify the essential elements of a legal system, paying particular attention to the relationships between law, coercion, and morality.²⁷ His work was not motivated by a desire to settle debates over how to engage in constitutional interpretation. Nonetheless, positivism, like originalism, relies on rules, hierarchy, and legal obligations that constrain judges, which suggests Hart’s logic may provide some insight.

Hart conceives of a legal system as the union of two different kinds of rules: primary rules and secondary rules.²⁸ Primary rules regulate behavior—e.g., file your federal income taxes by April 15th or obey the speed limit on the highways.²⁹ In the baseball world, primary rules are similarly straightforward. They instruct players to advance counterclockwise around the bases and change sides after recording three outs. Secondary rules, on the other hand, regulate the legal system itself. These rules exist to identify what

²⁵ *Impede*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/impede> (last visited Nov 27, 2019).

²⁶ Topkin, *supra* note 23.

²⁷ H. L. A. HART, *THE CONCEPT OF LAW* 17 (1 ed. 1961).

²⁸ *Id.* at 77.

²⁹ *Id.* at 89.

the law is in a given situation.³⁰

Hart argues any legal system must have three different secondary rules: a rule of recognition, a rule of change, and a rule of adjudication. The rule of change specifies how to create new primary rules or change existing ones.³¹ The rule of adjudication provides a process to determine whether a primary rule has been violated. Finally, the rule of recognition provides a criterion to evaluate whether any primary rule is valid.³² For a legal system to function, public officials must accept the validity of the rule of recognition.³³

Locating the rule of change and rule of adjudication in the Constitution is relatively straightforward. The Presentment Clauses in Articles I and II of the Constitution provide the Constitution's rule of change by specifying how the federal government adopts new statutes. Article III of the Constitution contains the rule of adjudication. It establishes the Supreme Court as the highest court in the land and grants federal courts jurisdiction over cases involving federal law.

Finding the constitutional equivalent of the rule of recognition is somewhat trickier. The rule of recognition, according to Hart, is unlike all other rules "in that there is no rule providing criteria for the assessment of its own legal validity."³⁴ The Supremacy Clause seems to serve that purpose in two respects. First, it specifies an American legal hierarchy with the Constitution sitting at the top. Second, the supremacy of the Constitution ultimately rests on the willingness of public officials to accept it rather than an appeal to any other feature of the constitutional system.

Locating Hart's secondary rules in baseball also requires some creative thinking. While the OBR does not specify a rule of change, it implies that the Commissioner's Rules Committee must follow a certain set of procedures to change the rulebook.³⁵ The rule of adjudication gives umpires power to enforce the primary rules of baseball. Rule 8.01(b) states, "Each umpire is the representative of the league and of professional baseball, and is authorized and required to enforce all of these rules."³⁶

I think the Forward to the OBR contains the rule of recognition when it states: "This code of rules governs the playing of baseball games by professional teams of Major League Baseball and the leagues that are members of the National Association of Professional Baseball Leagues. We recognize that many amateur and non-professional organizations play their

³⁰ *Id.* at 91.

³¹ *Id.* at 93.

³² *Id.* at 92.

³³ *Id.* at 144.

³⁴ *Id.* at 102.

³⁵ OBR at iii.

³⁶ *Id.* at 95.

games under professional rules and we are happy to make our rules available as widely as possible.”³⁷ This passage contains an awareness that umpires and players at all levels of baseball view these rules as authoritative.

Supreme Court justices certainly accept the notion that the Constitution is the supreme law of the land. However, they differ as to how it should be interpreted. The next section of this paper explains why this lack of consensus exists by comparing secondary rules in different countries and why the broad scope of secondary rules in the United States Constitution poses a fatal problem to the contention that judges must be originalists.

DISCRETION AND CONSTRAINTS ON SECONDARY RULES IN BASEBALL AND CONSTITUTIONS

According to Hart, the rule of recognition in Great Britain is “what the Queen in Parliament enacts is law.”³⁸ The scope of this rule is quite broad. It implies, for example, that if Parliament wanted to enact draconian restrictions on what newspapers are allowed to publish, such a law would be valid. Other countries need not emulate the British model. In other words, they can establish a rule of recognition that does not allow every law passed by Parliament to be considered valid.

As Hart noted, “the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values . . . such as the . . . Nineteenth Amendments to the United States Constitution respecting . . . the right to vote.”³⁹ Hart uses the rule of recognition to identify what the law is in a given situation, but it is also useful in determining what the law cannot be. Thus, the rule of recognition provides a foundation for judicial review. The remaining question is, what, if any, interpretive method is required when wielding this power?

The Founders wrote a Constitution that created individual rights as limits on federal and state power. Had they wished, they could have placed additional restrictions by fixing the meaning of the Constitution. One could easily imagine a revised Supremacy Clause that states, “This Constitution, *as understood by the original public meaning of its words*, shall be the supreme Law of the Land” (emphasis added). Of course, this is not the case, which makes the claim of “compelled originalism” difficult to sustain.

³⁷ *Id.* at iv.

³⁸ HART, *supra* note 26 at 144-145.

³⁹ H. L. A. HART, *THE CONCEPT OF LAW* 250 (2 ed. 1994). I realize that the United Kingdom’s obligations under the European Convention on Human Rights present a somewhat similar constraint on Parliament’s authority to undermine rights. See DAVID ERDOS, *DELEGATING RIGHTS PROTECTION: THE RISE OF BILLS OF RIGHTS IN THE WESTMINSTER WORLD* (2010).

Hart does not go into as much depth about the operation of the rule of adjudication. However, if Hart is right that societies can enact a constrained rule of recognition, there is no reason why his logic would not extend to limiting the rule of adjudication. Neither judges nor umpires need total discretion in resolving disputes.

The baseball rulebook constrains umpires' authority in many other scenarios besides the balk rule. In three different places, the OBR commands umpires or the official scorekeeper to "strictly" enforce particular rules.⁴⁰ The infield fly rule—which seeks to eliminate situations in which devious fielders can turn one out into a double- or triple-play⁴¹—and the "Chase Utley" rule⁴²—which was added in 2016 to prevent infielders from being injured by runners sliding aggressively into second base⁴³—both contain specific, balk-like criteria.

Similarly, some constitutions provide interpretive instructions to their judges. The Constitution of Montenegro states, courts "shall interpret the doubt regarding the guilt to the benefit of the accused."⁴⁴ According to the South African Constitution, courts "must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."⁴⁵

Unlike these other constitutions, the American rule of adjudication is quite broad. Article III of the Constitution grants all federal judges life tenure without regard to their constitutional interpretive preferences. A more narrowly defined rule of adjudication might read, "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, *provided their decisions utilize the original public meaning of this Constitution*" (emphasis added). To the dismay of proponents of originalism, this is not what the Constitution says.

⁴⁰ OBR Rule 4.01(a) at 11 ("The umpire shall . . . [r]equire strict observance of all rules governing implements of play and equipment of players."); 5.03(c) at 18 (instructing umpires to strictly enforce the rule governing the positioning of base coaches following a complaint from the opposing team); 9.01(b)(1) at 104 ("The Official Scorer shall conform strictly to the rules of scoring set forth in this Rule 9").

⁴¹ OBR at 149–150.

⁴² OBR Rule 6.01(j) at 73–74.

⁴³ For a cogent critique of Utley's dirty slide, see Ted Berg, *MLB Players React to Chase Utley Breaking Ruben Tejada's Leg, FOR THE WIN* (2015), <https://ftw.usatoday.com/2015/10/chase-utley-ruben-tejada-slide-dirty-dodgers-mets-mlb-players-react> (last visited Dec 21, 2019).

⁴⁴ Montenegro Const. §35 (2007), https://www.constituteproject.org/constitution/Montenegro_2013?lang=en.

⁴⁵ South Africa Const. §14 (1996), https://www.constituteproject.org/constitution/South_Africa_2012?lang=en

THE CONTRADICTIONS OF COMPELLED ORIGINALISM

Laws, including constitutional provisions, are often vague, so a legal system must empower courts to fill in the gaps. The United States Constitution, in particular, contains a lot of gaps. The Constitution is shorter than any of the 50 state constitutions, as well as every other national constitution in the history of the world.⁴⁶ This makes debates over constitutional interpretation so salient to modern American politics.

Baseball also has gaps in its rules that need to be worked out, often in real time. Like the Constitution, the baseball rulebook contains some vaguely worded rules, like obstruction, that put umpires in the position of elaborating upon principles. Unlike the Constitution, the OBR acknowledges its own incompleteness. Rule 8.01(c) allows umpires “to rule on any point not specifically covered in these rules.”⁴⁷ Providing umpires with authority to adjudicate odd situations provides a more efficient solution than convening an emergency meeting of the Rules Committee every time an unforeseen scenario develops.

The most prominent use of Rule 8.01(c) in recent memory occurred in the 1989 World Series between the Oakland A’s and the San Francisco Giants. Major League Baseball suspended the Series for ten days following the massive Bay Area earthquake. When play resumed, the umpires told both managers how they would handle an aftershock. If a tremor occurred while a ball was in play, the umpires would treat this situation as a live ball that just happened to take a (potentially huge) bad hop.⁴⁸

The “bad hop rule” comports with legal positivism. When applicable rules are too vague or simply do not exist, H.L.A. Hart says that judges and, by extension, umpires “exercise a discretion, and there is no possibility of treating the question . . . as if there were only one uniquely correct answer to be found.”⁴⁹ When judges and umpires adjudicate these situations, they create precedents that may (or in the case of the 1989 Series may not) provide an effective solution to the problem at hand. Nevertheless, Hart cautions against mistaking these precedents for constitutional mandates.

If Hart is correct that we cannot mistake the “bad hop” rule for the only valid solution to the aftershock problem, it is equally myopic to accept originalism as the only valid theory of constitutional interpretation. Consider the typical originalist argument on abortion: if the American people do not

⁴⁶ Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657, 663 (2016).

⁴⁷ OBR at 95.

⁴⁸ David Bush, *Series Video Outdoes The Games*, SAN FRANCISCO CHRONICLE, November 21, 1989, at D2.

⁴⁹ HART, *supra* note 27 at 128.

like the fact that the Constitution, correctly understood, does not contain a right to an abortion, they should amend the Constitution to create one. Relying on five unelected, unaccountable justices to create abortion rights through interpretation of the Fourteenth Amendment undermines respect for the Constitution, which already provides a method for adding new amendments.

Assume, *arguendo*, that when Congress and state legislatures approved the Fourteenth Amendment in 1868, most Americans did not think they were creating a constitutional right to abortion. But, a positivist would claim, it simply does not follow this original understanding is binding on anyone. The Fourteenth Amendment added another set of open-textured provisions into an already vaguely-worded Constitution. Anyone worried that the creation of abortion rights represented an abuse of judicial interpretive discretion could have inserted a requirement to use the Constitution's original public meaning. In the absence of any such restriction on the Constitution's rule of recognition or rule of adjudication, the Court's abortion jurisprudence is, at minimum, constitutionally legitimate.

Recall the difference between the first balk rule in the Knickerbocker rulebook and the current balk rule. In 1845, a balk could be anything an umpire thought it was because the rulebook did not constrain how umpires should handle these situations. Today, a balk only consists of 13 specific actions by a pitcher. Umpires in 1845 *could* have called a balk only in one of those same 13 scenarios, but the rulebook *did not command* them to do so. Similarly, our country might be better off with an abortion rights amendment, compared to fighting over this issue again and again in Supreme Court cases. Nonetheless, compelled originalists are quite wrong to say that abortion rights cannot exist until we amend the Constitution.

This is where the debate over interpreting versus amending the Constitution gets turned on its head. Proponents of originalism have been pointing at the wrong gap in the Constitution. They argue the problem is that words like "abortion" or "gay rights" do not appear in the Constitution. What they should be worried about is that the words "original public meaning" are not in the text.

Over the last 30 years, originalism has grown in popularity amongst both academics and ordinary Americans because of its intuitively appealing narrative. The Founders wrote such an enduring Constitution, so we should interpret it the same way today. When the Founders wanted to change that document, they created the Bill of Rights. It seems logical that we avail ourselves of the Article V amendment process today to update the Constitution's meaning. These arguments are powerful, seductive, but ultimately incorrect.

Umpires, unlike federal judges, do not swear an oath to demonstrate their

acceptance of baseball's rule of recognition, but they take the rulebook very seriously. Hall of Fame umpire Doug Harvey once said, "To me the rule book is the Bible of baseball . . . I memorized every word."⁵⁰ Accepting the legitimacy of the rulebook explains why umpires handle a balk one way and obstruction another. The rule of adjudication in baseball varies, depending on the primary rule. Sometimes, as in the case of the balk, umpires can only apply specific criteria. On other occasions, umpires have the authority to create entirely new rules or interpret existing rules based on their judgment. Umpires may or may not use this discretion wisely, but no one in baseball questions the existence of this authority.

Abuses of discretion by umpires and judges may anger fans and citizens, respectively, but the flexibility associated with making "judgment calls" has virtues. Just as Rule 8.01(c) allows umpires to handle unforeseen situations without unnecessary delays, the endurance of the Constitution owes much to the living Constitution approach. Allowing the Supreme Court to update the meaning of the Constitution through interpretation can be a more efficient method of handling constitutional problems than mandating a new amendment every time a difficulty arises.

If, however, a living Constitution approach seems instead like an intolerable, undemocratic shortcut, don't worry—there's always the possibility of an originalism amendment. Until that occurs, originalism can be (and often is) persuasive, but it is not compelled.

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⁵⁰ DOUG HARVEY & PETER GOLENBOCK, *THEY CALLED ME GOD: THE BEST UMPIRE WHO EVER LIVED* 57 (2015).