

Clashing Visions of a “Living” Constitution: Of Opportunists and Obligationists

*by William Van Alstyne**

I

I am honored to have been invited to give the Cato Institute’s ninth annual B. Kenneth Simon Lecture in Constitutional Thought and to join the distinguished judges and scholars who have preceded me in this series. Because this is an opportunity to step back and reflect on more timeless constitutional questions, I’ve chosen as my subject clashing visions of a “living” Constitution. And yet, however timeless, the subject is especially timely now since we’ve been privy recently to no fewer than four Senate confirmation proceedings in as many years respecting who should be sitting on our Supreme Court.¹ Those hearings have produced a broad range of views about whether we have a “living” constitution and, in particular, about the proper scope of judicial review of constitutional questions.

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¹ See, for a fair sample, the following references for the four most recent confirmation hearings of Supreme Court nominees: 1. The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States, Before the S. Comm. on the Judiciary, 111th Cong. (2010); 2. The Nomination of Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States, Before the S. Comm. on the Judiciary, 111th Cong. (2009); 3. The Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States, Before the S. Comm. on the Judiciary, 109th Cong. (2006); 4. The Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Before the S. Comm. on the Judiciary, 109th Cong. (2005). Moreover, there are a number of observers who also regard it as entirely appropriate for senators to vote “for” or “against” a Supreme Court nominee for political or ideological reasons. See, e.g., David Greenberg, “Admit the Obvious: It’s a Political Process—Ideology Governs Judicial Confirmation. Let’s Say So.” Wash. Post, July 18, 2004, at B3.

Upward of 20 “schools of thought” on the “right” role for justices have emerged in recent decades, mostly from the legal academy, although shortly I will reduce that number to two—opportunists and obligationists. Before I do, however, I will treat very briefly just two or three of the main strains of constitutional interpretation, simply to give a flavor of the recent debate.

One such school goes by the ungainly but revealing name of “noninterpretivism.” This innovative neologism emerged a few decades ago, originally in a well-noted essay by Stanford law professor Thomas Grey, and then again in some additional spirited writing by Michael Perry at the Northwestern Law School, who developed the theory in several lengthy articles.² As the name suggests, noninterpretivism is best understood as opposed to, well, interpretivism—the idea that a judge should interpret and apply the text before him, the text of *this* Constitution, not least because the oath he takes is an oath to support *this*—not even “the”—but *this* Constitution. But to do that, to interpret and apply the actual text, when you want with all your heart to make it a “living” constitution, is to be ruled by that dreaded “dead hand of the past.” And so if the actual Constitution is to come alive, the literal text has to be treated as an altogether subordinate matter, which is precisely what the noninterpretivists prescribe.

Reduced to its essence, this is a strange doctrine, is it not? We do not purport even to be “interpreting” the particular text we mean to render in some *non*interpretive fashion. To be sure, we *are* presuming to deliver ourselves a statement about the supreme law of the land, pertaining to what governments and we may and may not do. But at the same time, we are *liberated* from the despair of textual uncertainty and, likewise, from the tyranny of endlessly contestable history. We’re *free* to invent our “living” constitution.

Fortunately, noninterpretivism, as such, did not long endure. And I claim at least some modest share of credit for its decline insofar as I wrote to Tom Grey and to Michael Perry and put into each of those letters a mischievous footnote—a question asking merely

² See, e.g., Thomas Grey, Do We Have an Unwritten Constitution? 27 Stan. L. Rev. 703 (1975); Thomas Grey, Symposium on Interpreting the Ninth Amendment: The Uses of an Unwritten Constitution, 64 Chi.-Kent L. Rev. 211 (1988); Michael Perry, Noninterpretive Review in Human Rights Cases: A Functional Justification, 56 N.Y.U. L. Rev. 278 (1981).

which part of the Constitution was it that they were “*non*-interpreting” that day, insofar as they did not purport to be interpreting anything at all in the *actual* Constitution.

But no sooner had noninterpretivism declined than it was replaced by a school calling itself “nonoriginal interpretivism.” Old wine in new bottles, it defined itself, like its predecessor, by what it was not—*originalism*;³ the idea, as it eventually emerged, that the Constitution should be interpreted according to the original public meaning of its terms. It is called “nonoriginal interpretivism” because one is purporting to use the particular clauses as they actually appear in the document, at least as a forensic point of departure, if scarcely little more. But one is then proudly not to be ruled by the unreliable, possibly irresponsible, and almost always difficult-to-recover material of the original drafters or ratifiers in rendering *the* “interpretation” that appears to be the better or the “best.” And so we’re “freed,” once again, to reimagine our “living” Constitution.

Beyond those two closely related schools is a third that warrants notice before we take up our main project. Less an interpretive doctrine than a frank acknowledgment of modern constitutional reality, it is a theory about how the Supreme Court has come to “amend” the Constitution outside the amendment process prescribed in Article V. It was formulated by Bruce Ackerman, a distinguished and exceedingly well-published member of the Yale law faculty.⁴ And it begins by admitting, candidly, that much of modern “constitutional law” bears little correspondence to the Constitution itself as originally understood. Those changes, moreover, have come about without any *formal* change in the document—including any subsequent amendments, pursuant to the express formal provisions of Article V—to account for and document the decisions that produced the actual changes.

³ See *Originalism: A Quarter-Century of Debate* (Stephen G. Calabresi ed., 2007). For what may be the most recent work deriding a different but not unrelated doctrine, “formalism,” and belittling “formalists” (i.e., those who foolishly think that the text, and what was said of it by its contemporary drafters and ratifiers, are the proper focus for adjudicating constitutional disputes), see Brian Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (2010).

⁴ See Bruce Ackerman, *The Storrs Lecture: Discovering the Constitution*, 93 *Yale L.J.* 1013 (1984); Bruce Ackerman, *2006 Oliver Wendell Holmes Lecture: The Living Constitution*, 120 *Harv. L. Rev.* 1737, 1794–98, 1809–12 (2007). Bruce Ackerman, *We the People: Transformations* 403–08 (1998).

But Ackerman's is not simply a descriptive account of constitutional history over the past century. No, he went on to declare forcefully that the Court's decisions could *rightly* be seen as solid "nontextual amendments"—"Ackerman amendments," one might say. His idea was, essentially, that if, through sustained elections like those that returned President Franklin Delano Roosevelt to office three consecutive times, the country's attention is riveted to certain crises of a constitutional sort, then by repeatedly returning to office a president who has made a political point of wanting a change in constitutional law *through the judicial appointment process*, if it meets with sufficient political approval (as evidenced by presidential and senatorial elections), the "changes" eventually effected by a Supreme Court thus created serve as "real" amendments. As such, it would be inappropriate for a later Court to revisit those changes, he added. Moreover, that such "amendments" are neither in the text nor brought about like real amendments is irrelevant because this is the way—or at least one equally valid way—in which you keep the Constitution "alive."⁵ Indeed, one could say that it's the ultimate "politicization" of the Constitution.

Rather than continue, however, with yet more misbegotten recent efforts to keep our Constitution "alive," let me suggest that the field of constitutionalists may be divided usefully into two main generic groups: opportunists and obligationists. And opportunists, to be clear, are not of a single ideological hue; some are on the left, others on the right. Yet those two "opposing" camps share a common bond: they both "find" things in the Constitution that they *want* to find and ignore things that are inconvenient.

Opportunists "on the left" are hardly difficult to notice.⁶ In fact, proponents of the noninterpretivist and nonoriginal interpretivist schools just discussed have been almost entirely self-identified with the left, especially in their promotion in recent decades of the Court's equal protection jurisprudence. But their opportunism goes much further back, as the Ackerman thesis indicates, focused as it is on

⁵ Even now I can scarcely see this word in print without at once also "seeing" it in the original, namely, with Boris Karloff starring in his most famous role, exclaiming "It's alive!" as he jolted several thousand volts of electricity into the intimidating carcass of a soon-to-be-animated corpse, "the Frankenstein monster." Perhaps the reader might be spared this gruesome thought—then again, perhaps he ought not be!

⁶ See, e.g., Ronald Dworkin, *Law's Empire* (1986).

the New Deal constitutional revolution as a "constitutional moment" amounting to a constitutional "amendment." Ackerman finds such politically driven, judicially crafted "amendments" perfectly acceptable, notwithstanding that this one "found" vast new congressional powers that restricted long-standing liberties—powers and restrictions that hadn't been found in the Constitution for some 150 years, but now suddenly appeared plain as day to those who looked long and hard enough.⁷ Having "discovered" those powers (and ignored those rights), the political forces behind them were able at last to implement the New Deal programs the left had been promoting since the dawn of the Progressive Era.⁸ In short, in finding the powers and restrictions they wanted to find, opportunists of the left emptied the Constitution of the limits the Framers had deliberately fashioned, thus bringing the document, to their mind, "alive."

Opportunists "on the right" seem at first blush more difficult to find, not least because they ordinarily count themselves interpretivists, originalists, and textualists. But a closer look reveals that many of them, too, are guilty of seeing what they want to see and ignoring what they want to ignore. Perhaps Judge Robert Bork, at a general level, best illustrates the opportunism on the right. Speaking of our "Madisonian dilemma," he wrote that our "first principle" as a nation is that "*in wide areas of life*, majorities are entitled to rule, if they wish, simply because they are majorities," whereas our "second principle" is "that there are nonetheless *some things* majorities must not do to minorities, *some areas of life* in which the individual must be free of majority rule."⁹ That gets Madison exactly backwards. Madison stood for the principle that in *wide areas of life* individuals are entitled to be free simply because they are born free. Nonetheless, in *some areas* majorities are entitled to rule, not because they are inherently entitled to, but because we *authorized* them to, under the Constitution Madison himself drafted.¹⁰ Ironically, opportunists of

⁷ See Rexford G. Tugwell, "A Center Report: Rewriting the Constitution," *The Center Magazine*, March 1968, at 20: "To the extent that these new social virtues [i.e., New Deal policies] developed, they were tortured interpretations of a document [i.e., the Constitution] intended to prevent them."

⁸ See Richard A. Epstein, *How Progressives Rewrote the Constitution* (2006).

⁹ Robert H. Bork, *The Tempting of America* 139 (1990) (emphasis added).

¹⁰ Recall Madison's promise in *Federalist* No. 45, that the powers of the federal government would be "few and defined."

the right generally reject Ackerman's claim that the New Deal constitutional revolution amounted to a "constitutional moment" that "amended" the document; but they subscribe to the vast majoritarianism the revolution unleashed when it eviscerated the doctrine of enumerated powers, a majoritarianism that not only is nowhere to be found in the actual—in *this*—Constitution—indeed, was assiduously guarded against—but one that gives us, practically, a "living" Constitution, an empty vessel to be filled by constantly shifting, "living" majorities.¹¹

By contrast, obligationists, although not always in agreement among themselves, are identified by a singular common accord: they take their oath of office seriously, and that oath is to support and defend *this* Constitution, not some other. In so doing, they commit themselves neither to misread the document knowingly or carelessly nor to *overread* or *underread* it by reading their own preferences into it. In particular, in taking the Constitution *as is*, obligationists are committed not to make it "living" by imposing upon it a theory other than the theory on which the document itself rests. Rather, for obligationists the Constitution, from its inception, has been very much "alive" in its ordinary operations—and alive further, let me add, in that it remains subject to change through the processes reserved for determining change, namely, the amendment processes, neither more nor less.

II

Remember our title: "Clashing Visions of a 'Living' Constitution." I have given you alternative processes of growth and change: opportunists willing, even anxious, to implement constitutional change through judicially crafted, nontextual "amendments;" obligationists sworn to see constitutional change brought about through the constitutionally prescribed Article V amendment process. I am not inclined to impugn the motives of the opportunists. What I think instead is that they and their jurisprudence may simply proceed from a heartfelt effort to try to keep the Constitution from becoming disappointingly "out of date," even "ossified" and "petrified"; but that even in the interviews of Supreme Court nominees before the Senate

¹¹ See Roger Pilon, *Lawless Judging: Refocusing the Issue for Conservatives*, 2 *Geo. J. L. & Pub. Pol'y.* 5 (2001).

Judiciary Committee there is an unexamined premise, namely, that it is part of the task of Supreme Court justices thus to *update* the Constitution and to do so *by appropriate judicial "art"*: that is, by construction—by misreading, or "rereading," or, if you prefer, "differently" reading various clauses of authorization and restriction, reading them such as they *ought* to be, whether or not they are.

But how do we know whether our Constitution is *truly* living? One way is by looking to see whether there have been any amendments and, if so, when they were made, by whom, and, indeed, just what their content may be—that is, what do they register, what do they tell us about some change that may have taken place in this society to such an extent as to have become embedded in some new text, as part of *this* Constitution. Let me try to shed light on those questions with a pair of comparisons, and then two actual examples from our recent history that I hope will illuminate these issues.

In my original home state of California, one of our ancient giant redwood trees will occasionally fall, and if we cut across its massive face we see its cambium rings, tracing the tree's natural history back to antiquity. When still alive, the tree's rings go on and on, recording changes year by year. Once a tree falls and dies, however, it cannot of course add any rings, so the tree begins nearly at once to petrify. These trees and their rings are rather like the Dead Sea Scrolls, to cite a different metaphor, which rely on learned rabbis to keep their meaning "alive" and pertinent by some kind of sublime interpretive art—at least until God returns to "explain" himself anew. So too a petrified tree is dead. It cannot add anything new.

And that furnishes a segue to a second comparison, between our "living" Constitution and Hans Christian Andersen's famous fable, *The Emperor's New Clothes*. The Constitution, in this likeness, does not on its face reflect *any* change—that is, any *actual* amendment—but the judges and the people nonetheless *say* that change is there! And so, by this congenial consensus of collaborative fabrication, they manage to find what they *wanted* to find to be authorized—indeed, *thus to be* authorized—and, likewise, they manage to find what they *wanted* to find prohibited is (behold!) prohibited!

But every once in a while, just as in the original endearing Andersen fable, a small child will look, ponder a bit, and then quite spontaneously declare: "Where? I don't see it! Actually, all *I* see is the emperor in his barely adequate underwear! I don't see any of that 'splendid raiment' you have all ascribed to the emperor!"

However charming, it is a very disarming, yet most telling comparison. And as I've reflected on these comparisons, it has occurred to me that *real* "cambium rings" have become increasingly difficult to add to *this, our* Constitution. They have, at least in part, as I hope soon to show, because people now far more greatly mistrust the addition of virtually *any* new language concerning anything but nominal "technical" amendments.

Indeed, it is doubtful that anything like the 10 amendments that eventually became our Bill of Rights could even be successfully proposed today by the requisite supermajorities in Congress, much less ratified by the requisite number of states. Far more than in 1789 (or even 1866), there is a greater collective suspicion of "new" amendments because, I believe, it is feared today that enactment of additional text may just give judges and others still greater license to use that language as one more springboard for reshaping our constitutional regime—which may then prove pleasing to new majorities, yet conform little if at all to the original proposal as presented, approved, submitted, and actually ratified by the states.

This phenomenon of a *diminished* Article V has in fact affected my own thinking on these matters. It is a *deadening* phenomenon, producing a kind of "negative synergy," clogging our Constitution. "Synergy" is usually defined as the operation of forces *cooperatively* producing *new* elements—that is, elements incapable of being produced by either original force in isolation. "Negative" synergy, in turn, and in the context of our "living" Constitution, operates like this: The more courts transform constitutional clauses without needing actual amendments to do so—that is, the more they do not require new text—the less necessary new text seems to be. But then exactly to the extent that courts do not require new text, neither may it be safe to provide it, for to the extent such text is provided to record a *definite* change, one may rightly be wary—merely reacting in tutored fear of the administration of that new text, given what the Court has previously presumed *already* to do.

From this "negative" synergy, then, both Congress and the public grow less willing to make changes through the normal Article V processes. But exactly in such measure as that becomes true, then even the more conscientious judges in turn will inexorably feel stressed to be forthcoming with "transformative" constructions of extant clauses—and "wisely" to do so because they understandably

despair of the amendment process. So it continues, an endless cycle feeding on itself. And if Article V effectively dies, the Constitution itself dies with it, becoming simply a vehicle for either judges or majorities to implement their will, despite what the actual Constitution may say.

III

Two examples, not unrelated, may shed further light on the questions I raised above. Nearly 40 years ago, in 1972, large congressional majorities proposed a twenty-seventh amendment—not the “technical” Twenty-Seventh Amendment we have today, dealing with congressional compensation, which was finally ratified in 1992 after languishing in the states since 1789, but a far more substantive “Equal Rights Amendment.” Section 1 of the proposed ERA provided simply that “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” Section 2 provided for congressional enforcement. That was pretty much it.

Again, far more than the required two-thirds majority in both houses embraced the ERA in 1972. And over the next two and a half years the proposal was ratified by 34 of the 38 states required for ratification. But then progress ground to a halt, largely because of determined opposition from a variety of circles, led by a very capable woman, Phyllis Schlafly, of the Eagle Forum. And even after Congress extended the deadline for ratification by another seven years, the proposal expired, falling three states short.

Now on the merits it is clear to me that after you have accounted for everything else regarding the pros and cons of the ERA—the possibility of unisex restrooms, women in combat, same-sex marriage, and the like—an irreducible number of no votes stemmed from Schlafly’s convincing observations that in similar circumstances in the past, the Supreme Court had taken the language of an amendment or of a constitutional clause, along with the original understanding about the provision, and had just ignored that text and understanding and gone merrily on its progressive way to fulfill its *own* vision of what the Constitution “ought” to provide. Thus, we now surely know that amendments are no longer trustworthy. “Vote for this amendment, and the next thing you know there will be

women in foxholes, unisex bathrooms, and gay and lesbian marriages!" And that was it—the proposed twenty-seventh amendment simply lapsed.

To be sure, you may ask whether it matters. Are we actually worse off on that account? Well I for one care a lot. The ERA would have recorded a rite of passage for this country. In a mature country that had come to think differently about gender equality and "gender roles," it would have recorded on the face of our aging document a *real* change. Exactly what we ought well to want, but frankly altogether lack. What we have instead is but a quarrelsome series of brokered Supreme Court cases,¹² accomplishing most of what the ERA would have enacted, to be sure, but you cannot find *anything* in the Constitution that expressly attests to equal rights regardless of sex or gender—real text. *It's simply not there.*

Indeed, and in fact, the sole provision that speaks to the general issue most relevantly goes quite the other way. It is the provision in Section 2 of the Fourteenth Amendment that declares that insofar as a state denies the right to vote to "males" over the age of 21 and not previously convicted of a crime, then that state's representation in the House of Representatives shall be reduced proportionately. But the clause itself is an express textual recognition that the perpetual disenfranchisement of *women* not only is not to be regarded as inconsistent with the amendment's Equal Protection Clause, but also does not even require some downward adjustment of a state's allotment of representatives in the House. Indeed, it took the Nineteenth Amendment to change that constitutional fact.

That amendment, the Nineteenth, will further illustrate my larger thesis. In his recent book, *Active Liberty*, Justice Stephen Breyer suggested in passing that women in America did not have the right to vote until the Nineteenth Amendment was ratified in 1920.¹³ The

¹² See, e.g., *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001); *United States v. Virginia*, 518 U.S. 515 (1996); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Superior Court*, 450 U.S. 464 (1981); *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971). See also Kathleen M. Sullivan and Gerald Gunther, *Constitutional Law* 591 (2010) ("Justice Brennan never did get his elusive fifth vote for his proposed strict scrutiny standard") and *id.* at 587 ("The U.S. Constitution is the only major written constitution with a bill of rights that lacks a provision explicitly declaring the equality of the sexes.").

¹³ Stephen Breyer, *Active Liberty* 32 (2005) ("Nor did women receive the right to vote until 1920.").

suggestion annoyed me even when I saw it there. It was not just careless; it was flat out incorrect. Indeed, if you thought about it, it could not plausibly be true. If women were denied the right to vote prior to 1920, then how could the Nineteenth Amendment have become ratified that very year? After all, since it takes two-thirds of both houses and three-fourths of all the states to do the job, and *no* state allowed women to vote as of that date, how many states would you expect to go on with this proposal *within a single year*?

In truth, of course, by the time the Nineteenth Amendment came up for a vote, a majority of the states had already fully enfranchised women. What is most interesting, however, is how this expansion of the right to vote can be seen as a significant cultural, political, and *real* prologue to the "cambium ring" that is our Nineteenth Amendment. These cultural changes were first reflected in the "lesser" cambium rings of state legislation and state constitutions. They report an evolution actively reflecting the cultural changes within each relevant polity. In time those changes are recorded in the Nineteenth Amendment and (behold!) there it is. *Now* we no longer need worry about whether the next Supreme Court justice would overrule the decision that enfranchised women. Their rights are right there, in the text, for all to see. It is otherwise with the ERA, of course, even though "the law" is today about the same as it would be if that amendment had been adopted.¹⁴ But I do not think we are nearly as well off for having done it that way.

IV

Yet even with a "living" constitution, one that sees change made according to its own terms rather than through judicial or majoritarian machinations inconsistent with those terms, there will be issues that make it difficult to separate opportunists from obligationists. Suppose, for example, that a question were before the Supreme Court

¹⁴ To be sure, by a combination of legislative grace (both state and federal) (e.g., Titles VI (42 U.S.C. § 2000d et seq.) and VII (42 U.S.C. § 2000e et seq.) of the Civil Rights Act of 1964), plus some mild displays of judicial hubris in the case law, we have experienced a "translation" of the Fourteenth and Fifteenth Amendments—albeit in a way that would have dumbfounded the women's suffrage movement itself—and so, by those means, have arrived closely to where we would be had the ERA passed. (See, e.g., cases and references *supra*, note 12).

concerning whether Congress could mandate that federal juries be composed of fewer than their traditional 12 members.

Well it turns out that the constitutional text on that question and the understanding surrounding the text are less than clear or helpful. Article III says simply that “The Trial of all Crimes . . . shall be by Jury.” The Sixth Amendment says more, but nothing on point: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .” Nor was the question seriously debated in the Constitutional Convention or in the state ratifying conventions. It *was* debated in the Virginia convention, briefly, with people like George Mason and Patrick Henry generally and deeply skeptical about the proposed new constitution. But James Madison countered their skepticism on the jury question by saying that the term “jury,” as provided in Article III, “is a technical term” that draws in its wake all its appurtenances so well and long established even as they are reflected in that book that “every member has,” namely, Blackstone’s *Commentaries on the Common Law*.¹⁵ The 12-person jury, Madison continued, had been in existence for something like two centuries. No one contradicted Madison’s statements explicating the relevant provision of Article III.

If opportunists are able to ignore clearer evidence in order to reach their desired ends, they are not likely to refrain from doing the same when the evidence is thinner, as in a case like this or like so many others that come before the Supreme Court. But even obligationists may be inclined to “impose their own vision” in such cases, thus appearing indistinguishable from opportunists. Here the evidence, thin as it is, fairly clearly favors the 12-person jury. But suppose it were still thinner. What might one look for? For starters, what was the then contemporary practice? Was it nearly universal to have 12-person juries (at least in federal, if not in state courts, as it was), or were they somewhat exceptional? How far back did the “tradition” of the 12-person jury go? Is there something said in the Blackstone *Commentaries* that may tend to inform us? Those are just a few of the questions that would concern an obligationist.

¹⁵ Speech by James Madison at Virginia’s Convention on the Adoption of the Constitution (June 20, 1788), in 3 Elliot’s *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, at 541 (1836).

In general, however, before a judge decides that the issue before him really is an open question—that is, that there really is nothing to tilt the balance—he should pause before “defaulting” and yielding the “difference” to Congress because, frankly, there is little evidence that Congress ever did this kind of research, or that its products are principally driven by this kind of genuine constitutional preoccupation. After all, Congress is mainly concerned with social policy (and of course with reelection), while the foremost concern of our courts is, or at least should be, constitutional integrity. It appears, moreover, that there is a correlation between the Supreme Court’s taking constitutional questions seriously and Congress’s doing so as well. Likewise, when the Court tends to abdicate and defer, Congress hardly even discusses constitutional points of law with any gravity. Witness the Court’s recent “rediscovery” of enumerated powers federalism,¹⁶ which has prompted many in Congress to again ask, for the first time in ages, “Do we have the power to enact this bill?”¹⁷ That is a refreshing change.

Thus, whether members of Congress take their oaths seriously may depend to a very considerable extent on whether justices on the Court take *their* oaths seriously. And so, as a last word, as between the two groups I have juxtaposed, I have no doubt in saying that it is the obligationists who care about the *living* Constitution—*this* Constitution—the document that, if it is to remain alive, should be interpreted and applied *as is* and changed, when needed, not by judicial circumlocution or ungrounded majoritarian assertion but by the processes provided for in the document itself.¹⁸ My concern

¹⁶ Roger Pilon, “Congress Rediscovered the Constitution,” *Wall. St. J.*, Jan. 4, 2011, at A17.

¹⁷ That, of course, is precisely the question before the five different federal district courts that have issued conflicting rulings on large parts of the recently enacted “Patient Protection and Affordable Health Care Act” (informally known as the “ObamaCare” Act), Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. Two have struck down certain sections (district courts in Virginia and Florida); three have ruled the other way (Michigan, Ohio, Virginia). These cases are currently on appeal and the Supreme Court will almost certainly decide this question, whether it comes in the 2011 term or a year hence, likely by a closely divided vote.

¹⁸ I am, in this regard, at once reminded of Carl Shurz’s sharp, well taken riposte to Stephen Decatur’s overly celebrated patriotic toast. While Decatur famously exclaimed, “My country, right or wrong,” Shurz observed, “My country, may it always be in the right, and, when in the wrong, *may it be put to the right.*” (emphasis added). So, too, with this, *our* Constitution, that is, insofar as it may be defective, let

is that we may have gotten so accustomed to the “exogenous” Constitution that the amendment process has itself begun to recede as down a rabbit hole, as in *Alice in Wonderland*, and the country, frankly, is significantly less well off on that account.

I am most grateful for this opportunity to share these thoughts and I do, genuinely, thank you for your time and thought in considering them for whatever worth they may hold in musing about this aging Constitution of ours, the oldest and still among the best in all the world.

us—by amendment—remove those defects but let us not just “paper them over” (in the manner of Hans Christian Andersen’s clever tailors of Copenhagen, weaving invisible judicial patches to cover naked places obvious to any unspoiled child).