The Domestic Violence Clause in 'New Originalist' Theory

by MARK S. STEIN*

Introduction

The Domestic Violence Clause in Article IV, Section 4 of the Constitution has recently assumed some importance in the originalism debate. That Section provides: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."[1]

Professor Jack Balkin, a recent convert to originalism, has used the Domestic Violence Clause to provide an example of an impermissible departure from original meaning: the hypothetical application of the Clause to spousal abuse. In *Framework Originalism and the Living Constitution*, Balkin states:

> Fidelity to "original meaning" in constitutional interpretation refers only to . . . the semantic content of the words in the clause. We follow the original meaning of words in order to preserve the Constitution's legal meaning over time, as required by the rule of law. Otherwise, if the dictionary definitions of words changed over time, their legal effect would also change, not because of any conscious act of lawmaking (or even political mobilization), but merely because of changes in language. So, for example, when Article IV says that the

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1. U.S. CONST. art. IV, § 4.

> United States must protect the states from "domestic violence," we should employ the original meaning, "riots" or "insurrections," not the contemporary meaning, "spousal assaults."[2]

Balkin offers the same example in *Original Meaning and Constitutional Redemption*, noting that "[i]f we used the contemporary meaning of the [Domestic Violence Clause] rather than its original meaning, the import of the Clause would be completely altered. Moreover it would be altered not due to any change in public values, but simply because linguistic usage had changed."[3]

Professor Lawrence Solum also makes extensive use of this example in support of his originalist theory.[4] Solum agrees with Balkin's principle of fidelity to original meaning. In addition, Solum uses the Domestic Violence Clause to illustrate a thesis about language: his "fixation thesis" that the meaning of constitutional provisions cannot change.[5]

I argue in this Essay that the Domestic Violence Clause provides less support to the originalist theories of Balkin and Solum than they believe. In Part I, I address Balkin's treatment of the Clause. In Part II, I address Solum's treatment. I also use the hypothetical application of the Domestic Violence Clause to spousal abuse as a springboard for observations on such matters as the distinction between original meaning and original expected applications. These observations may be of interest even to those who totally reject the more polemical aspects of this Essay.

I. Balkin on the Domestic Violence Clause

At first blush, it seems Balkin is right to suggest that it would be absurd to apply the Domestic Violence Clause to spousal assaults. However, I believe that the constitutional term "domestic violence" could evolve so that such an application of the Domestic Violence Clause no longer seems absurd. This evolution could involve a

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2. Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 552 (2009).

3. Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 430 (2007).

4. Lawrence B. Solum, *Semantic Originalism*, at 3–4, 64–65, 172 (Ill. Pub. Law and Legal Theory Research Paper Series No. 07-24, 2008), *available at* http://ssrn.com/abstract=1120244. Solum credits Balkin for the example. *Id.* at 4.

5. *See infra* notes 34–40 and accompanying text.

"change in public values," in Balkin's words.[6] Moreover, the contemporary conventional meaning of the term "domestic violence" could be an element in this evolution.

A. An Imaginary History of the Domestic Violence Clause

Consider the following imaginary history of the Domestic Violence Clause. Before the Civil War, the Clause was applied only to insurrections against state authority.[7] In the late nineteenth century, the Clause was applied to gang warfare. In the mid-twentieth century, it was applied to ordinary street crime. Then, in the late twentieth century, it was applied to spousal assaults. These expansions of the Domestic Violence Clause were challenged in the courts, and all were upheld by the Supreme Court. In upholding the application of the Domestic Violence Clause to spousal assaults, the Court noted evolving attitudes that see crime within a state as a problem requiring federal assistance, and that further see crime within the home as a problem of public concern. The Court also observed that the conventional semantic meaning of the term "domestic violence" includes spousal assaults. Although not in itself enough to justify expanding the constitutional term "domestic violence" to include spousal assaults, the Court said, this newer conventional meaning of the term "domestic violence" connotes that violence within the home is a problem of public concern. That represents a shift in attitude from the founding generation: While some men of the founding generation undoubtedly thought wife beating was immoral, they did not see it as a major problem of public concern.

The expansion of the constitutional term "domestic violence" as described in this imaginary history would not be my ideal course of constitutional development. The federal government can only exercise power under the Domestic Violence Clause at the request of

6. Balkin, *supra* note 3, at 430.

7. In fact, a major expected application of the Clause was the suppression of slave revolts. *See* Jay S. Bybee, *Insuring Domestic Tranquility:* Lopez, *Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 33 n.202 (1997) (understated observation that "[t]here is some evidence that the Framers were also concerned with slave insurrections."); Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 466 (1999) (summarizing relevant debates in the Constitutional Convention, in which the Southern states voted as a bloc).

state governments.[8] I believe there should be federal authority over all crime under the Commerce Clause[9] and the Necessary and Proper Clause.[10] Federal authority should also be exercisable, at least to the extent it is today, through difficult-to-refuse conditional grants under the Spending Clause.[11] But given my imaginary history, I hope that the application of the Domestic Violence Clause to spousal abuse no longer seems ridiculous. Indeed, if the Commerce Clause and the Spending Clause had received much narrower interpretations, the Domestic Violence Clause might have evolved in this way.[12]

In fairness to Balkin and Solum, the application of the Domestic Violence Clause to spousal abuse that I have hypothesized does not occur by the route they consider and reject. They evidently contemplate that the Domestic Violence Clause would be interpreted to cover spousal abuse *merely because* the contemporary conventional meaning of the phrase "domestic violence" includes spousal abuse. They contemplate not an evolution of meaning, but the substitution of one meaning for another. During the founding period, as today, the word "domestic" had a meaning of "belonging to the house," and another, derivative meaning of "not foreign."[13] Even in my imaginary history of the Domestic Violence Clause, it would not be plausible to substitute one of these meanings for the other.[14]

Still, Balkin does clearly indicate that any application of the Domestic Violence Clause to spousal abuse would be inconsistent with original meaning.[15] If Balkin is right that the original meaning of

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8. The phrasing of the Domestic Violence Clause ("shall protect . . . on Application . . . .") suggests that states can actually command the federal government to take action under the Clause. However, by analogy with the Guarantee Clause, also in Article IV, Section 4, courts could deem it a political question what action, if any, the federal government must take. *See* New York v. United States, 505 U.S. 144, 184–85 (1992) (giving overview of political question doctrine with respect to Guarantee Clause, while suggesting that perhaps not all claims under Guarantee Clause are nonjusticiable).

9. U.S. CONST. art. I, § 8, cl. 3.

10. U.S. CONST. art. I, § 8, cl. 18.

11. U.S. CONST. art. I, § 8, cl. 1.

12. Perhaps the leading authority on the Domestic Violence Clause is Judge Jay S. Bybee, who has also gained some renown for his other work. In *Insuring Domestic Tranquility*, *supra* note 7, then-Professor Bybee relied on the Domestic Violence Clause to argue for the restriction of federal authority over crime.

13. In SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1814), (Domestic is defined as "belonging to the house; private, not foreign; intestine.").

14. I do not say that such a substitution can never be plausible.

15. Balkin, *Framework Originalism*, *supra* note 2, at 552. In *Semantic Originalism*, Solum appears to agree that any application of the Domestic Violence Clause to spousal

the constitutional term "domestic violence" was "riots or insurrections," then the evolution in meaning I have imagined would certainly involve a departure from original meaning. And if this departure from original meaning seems acceptable, in my imaginary history, Balkin's domestic violence example no longer supports his principle of fidelity to original semantic meaning; his example is transformed into a counterexample.

B. Original Meaning and Original Expected Applications

But what if Balkin is not right about the original meaning of "domestic violence"? Some readers will by now have begun to consider a move often made by "new originalists" such as Balkin and Solum: drawing a line between original meaning and original expected applications. Maybe the original meaning of the constitutional term "domestic violence" was not, as suggested by Balkin, "riots or insurrections"[16]; maybe those were merely expected applications of the term. Maybe the original meaning of the constitutional term "domestic violence" was "violence internal to a state," so that spousal abuse was, from the very beginning, embraced within the semantic meaning of the Domestic Violence Clause.[17] Spousal abuse was not initially an expected application of the Clause,

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abuse would be inconsistent with original meaning. Solum, *Semantic Originalism*, *supra* note 4, at 3-4, 64-65, 172. However, in a subsequent blog post on an early version of this Essay, Solum allows that application of the Clause to spousal abuse might be consistent with original meaning. Lawrence B. Solum, *Stein on the Domestic Violence Clause & the Fixation of Original Meaning*, LEGAL THEORY BLOG, May 29, 2009, http://lsolum.typepad.com/legaltheory/2009/05/stein-on-the-domestic-violence-clause-the-fixation-of-original-meaning.html.

16. The drafting history of the Domestic Violence Clause makes it hard to argue that the original meaning of the term "domestic violence" was simply "insurrections." At the Constitutional Convention, the Southern states sought to substitute the word "insurrections" for the term "domestic violence." Voting in favor of this proposal were Virginia, Georgia, North Carolina, South Carolina, and New Jersey. Opposed were Maryland and all the Northern and middle states except New Jersey. The proposed change failed by a vote of 6-5, one of the rare times when the slavery interest was defeated at the Convention. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 467 (Max Farrand ed., 1911).

17. While allowing that this interpretation of original meaning has some plausibility, Solum observes that the Domestic Violence Clause speaks of "protect[ing]" states from domestic violence. Solum, *Stein on the Domestic Violence Clause*, *supra* note 15. He suggests that "it is unclear whether the state could be protected against violence which is directed by one spouse against another spouse." *Id.* However, riots, which by Balkin's assumption are within the original meaning of the Domestic Violence Clause, can also involve private violence not directed against state authority. If a state can be protected from riots, perhaps it can also be protected from spousal abuse.

but a constitutional provision can be given a legal meaning different from its original expected application, without doing violence to the hard core of original semantic meaning. Whether to extend meaning in this way may be a matter of "constitutional construction,"[18] and changing attitudes can be relevant to constitutional construction.

Under this expansive view of the original meaning of "domestic violence," Balkin would be wrong in one particular determination of original meaning, but his principle of fidelity to original semantic meaning would be untouched by my extended domestic violence example. Indeed, it could be argued that the only reason it is possible to imagine a plausible application of the Domestic Violence Clause to spousal abuse is that the original semantic meaning of the Domestic Violence Clause really did include spousal abuse.

I do not believe that the principle of fidelity to original semantic meaning is due complete respect. However, I will not here attempt to defend or even delineate my view on what constraints the language of the Constitution should impose. I will instead offer a number of interrelated observations on original meaning and original expected application, provoked by the domestic violence example.

First, the domestic violence example is an ironic demonstration of how unconstrained the originalist method becomes when original meaning is divorced from original expected applications. Balkin and Solum are two of the three foremost originalist exponents of drawing a line between original meaning and original expected applications (the third being Randy Barnett).[19] Balkin, and to an extent Solum as well,[20] sees the Domestic Violence Clause as an example of an originalist constitutional constraint: the Clause does not apply to spousal abuse. But under an originalism that does not consider original expected applications to be binding (which might be called unexpected-applications originalism), even that constraint can be overcome: the original meaning of the constitutional term "domestic

18. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 118–27 (2004); Solum, *Semantic Originalism*, *supra* note 4, at 67–69.

19. *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293 (2007); Randy Barnett, *Underlying Principles*, 24 CONST. COMMENT. 405, 410 (2007); Solum, *Semantic Originalism*, *supra* note 4, at 20.

20. *See supra* note 15.

violence" can be determined to be "violence internal to a state," which permits application to spousal abuse.[21]

Second, the domestic violence example shows how unclear the line is between original meaning and original expected application. Even though Balkin and Solum are the strongest advocates of drawing this line, they do not situate themselves at the outer range of linguistic possibility. Some things that might be considered mere expected applications, they consider meaning.

Third, there is something natural about including expected applications in original meaning; one has to make an effort to divorce them. That may be why Justice Scalia can claim that he, too, respects original semantic meaning rather than original expected applications;[22] he just seems to think that almost all expected applications are part of original meaning.[23]

Finally, for theorists who reside neither at the outer limit of linguistic possibility nor at the inner (Scalian) limit of linguistic possibility, originalism becomes highly manipulable. I confess that I do not know whether "riots or insurrections" was the original meaning or merely the original expected application of the constitutional term "domestic violence." I suspect that if any matter of policy turned on the answer, my linguistic interpretation would follow my policy preference.

C. Common-Law Constitutionalism and the Domestic Violence Clause

It might be wondered whether I am offering a criticism or a compliment when I remark how unconstrained and manipulable

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21. Balkin and Solum, of course, would not quarrel with the general point that unexpected-applications originalism is less constrained than expected-applications originalism.

22. Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION 129, 144 (Amy Gutmann ed., 1997).

23. Scalia writes:

> Is it a denial of equal protection on the basis of sex to have segregated toilets in public buildings, or to exclude women from combat? I have no idea how Professor Dworkin goes about answering such a question. I answer it on the basis of the 'time-dated' meaning of equal protection in 1868. Unisex toilets and women assault troops may be ideas whose time has come, and the people are certainly free to require them by legislation; but refusing to do so does not violate the Fourteenth Amendment, because that is not what 'equal protection of the laws' ever meant.

Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION 129, 148–49 (Amy Gutmann ed., 1997).

originalism becomes when original meaning is divorced from original expected applications. As a nonoriginalist,[24] don't I want constitutional interpretation to be unconstrained and manipulable? Yes and no. I do not want constitutional interpretation to be constrained by original expected applications, and I consider unexpected-applications originalism (if it can properly be called originalism) to be a definite improvement over expected-applications originalism.[25] However, I do want constitutional interpretation to be constrained by precedent, to a greater extent than most originalists do.[26]

The current judicial practice of constitutional interpretation has a considerable element of common-law constitutionalism, as lamented by Justice Scalia,[27] and as celebrated by Professor David Strauss.[28] Suppose that the settled legal interpretation of the constitutional term "domestic violence" is "riots or insurrections."[29] Common-law constitutionalism would not constrain the Supreme Court from applying the Domestic Violence Clause to spousal assaults a hundred years from now, but it would substantially constrain the Court from applying the Clause to spousal assaults tomorrow. If, by contrast, we

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24. *See* Mark S. Stein, *Originalism and Original Exclusions*, 98 KY. L.J. ___ (forthcoming 2010).

25. I question whether those who depart from original expected applications as much as Balkin and Barnett should be considered originalists, but that issue is beyond the scope of this Essay.

26. While originalists differ among themselves in their respect for precedent, I believe it is fair to say that they are, on average, less respectful of precedent than nonoriginalists. For the views of the "new originalists" Barnett and Solum, see Randy E. Barnett, *Trumping Precedent With Original Meaning: Not As Radical As It Sounds*, 22 CONST. COMMENT. 257 (2005) (anti-precedent); and Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155 (2006) (pro-precedent). Among the two self-proclaimed originalists on the Supreme Court, Justice Scalia is known to be far more respectful of precedent than Justice Thomas. For Scalia's view, see SCALIA, *supra* note 22, at 138–40 (accepting *stare decisis* as limitation on originalist method).

27. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION, *supra* note 22, at 3.

28. *See* David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969 (2008); David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299 (2005); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717 (2003); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

29. That, at any rate, seems close to the interpretation the Court gave the Domestic Violence Clause in *United States v. Cruikshank*, 92 U.S. 542, 556 (1876)—not the most revered precedent in the constitutional canon, to be sure.

adopt an originalist approach, and if we become convinced that the original semantic meaning of the constitutional term "domestic violence" was "violence internal to a state," then it can seem that the Clause must apply to spousal abuse tomorrow.[30] I prefer the common-law constitutionalist approach that constrains over the short term, but not the long term. I also endorse Strauss's view that the normative arguments that drive constitutional partisans should be expressed openly rather than being submerged in historical-linguistic debates about such matters as whether "riots or insurrections" was the original meaning or merely the original expected application of the Domestic Violence Clause.[31]

II. Solum on the Domestic Violence Clause

As discussed above, Balkin uses the domestic violence example to support a normative principle: courts should respect original semantic meaning. In *Semantic Originalism*,[32] Solum endorses this principle as well. Solum also uses the domestic violence example to support a thesis about language: his "fixation thesis" that the linguistic or semantic meaning of constitutional provisions is fixed at the time of their origin.[33] The Constitution, Solum believes, cannot have any semantic meaning other than its original semantic meaning.

In the course of defending his fixation thesis, Solum considers the significance of changes in the legal meaning of the Constitution, or as he puts it, changes in the "effective legal meaning" or "legal effect" of the Constitution.[34] Solum draws on the domestic violence example to argue that changes in legal meaning do not involve changes in semantic meaning:

> Some readers may attempt to resist the fixation thesis by appealing to the apparent ability of readers to assign a new meaning to old texts. For example, we could say that the phrase "domestic violence" has a contemporary sense in which it means "spouse abuse." If the Supreme Court stipulated that this was the meaning of "domestic violence" in the Constitution and if other officials and citizens acquiesced in the newly

30. On this analysis, it would not be a matter of construction.

31. *See* Strauss, *Originalism, Precedent, and Candor*, *supra* note 28.

32. Solum, *Semantic Originalism*, *supra* note 4, at 2.

33. "[T]he fixation thesis is the claim that [the] semantic content of the Constitution (*the linguistic meaning of the Constitution*) is fixed at the time of adoption." *Id.* at 2.

34. *Id.* at 64–65 (footnotes omitted).

> stipulated meaning, the legal effect of that phrase in the Constitution would be determined by the new meaning . . . .

But, Solum concludes,

> No one sensible could think that telling a lie with authority to enforce the legal consequences of the lie makes the lie true.
>
> The power of the Supreme Court to create legal fictions or tell lies about the meaning of the Constitution cannot change the semantic content of the constitutional text. Given the institutions of judicial review and vertical stare decisis, the Supreme Court can change the effective legal meaning of the Constitution. The Supreme Court could . . . adopt "spouse abuse" as the meaning of the phrase "domestic violence." But it is simply an error to draw from this fact the further conclusion that the semantic content of the Constitution of 1789 is thereby changed. Legal fictions and lies do not change semantic facts.[35]

In my view, the change in legal meaning that Solum hypothesizes contradicts his fixation thesis. The Supreme Court, he assumes, gives the constitutional term "domestic violence" a new legal meaning, and people acquiesce.[36] But the new legal meaning is based on, and embodies, a new semantic meaning. Therefore, the constitutional term "domestic violence" has taken on a new semantic meaning. The original semantic meaning may still be relevant to various people (historians, originalists), but the term has a new semantic meaning as well.

Though I am not persuaded by Solum's use of the domestic violence example, I believe the example may lend his fixation thesis unwarranted credibility. The example evokes both linguistic intuitions and intuitions about proper legal results. As previously indicated, my intuitions about proper legal results (what I will call my normative intuitions) can accept the gradual expansion of the constitutional term "domestic violence" to include violence within the home, but they cannot accept the mere substitution of the meaning "spousal abuse" or "violence in the home" for the meaning "riots or insurrection" or "violence internal to a state." As to the mere substitution of meaning hypothesized by Solum, my normative intuitions and my linguistic intuitions point in different directions. While my normative intuitions disapprove, my linguistic intuitions

35. *Id.*

36. *See id.*

recognize that a new semantic meaning has attached to the constitutional text.

For some, however, the normative undesirability of making the switch Solum hypothesizes may affect their linguistic intuitions. Because the switch seems silly, they may be more disposed to accept Solum's view that it does not involve a new semantic meaning, but rather a lie or a mistake. In general, if Solum defends his fixation thesis by considering only silly examples of a purported change in the semantic meaning of the Constitution (and he does appear to consider only silly examples),[37] his fixation thesis may benefit from a conflation of linguistic intuition and normative intuition.

Solum's fixation thesis is an impossibility thesis; he denies that the Constitution can have *any* linguistic meaning other than its original meaning. All new meaning is excluded, not just silly or ridiculous new meaning. Solum should therefore confront examples as to which many people believe that the semantic meaning of the Constitution could have changed and should have changed. Suppose that the Federalists under President John Adams were right that the original meaning of the constitutional term "freedom . . . of the press" allowed the government to prosecute its critics for seditious libel.[38] We now all interpret "freedom of the press" more broadly.[39] Hasn't the meaning changed? If Solum were to confront such examples, he would presumably take the same position that he takes with respect to the domestic violence example: we are making a mistake or lying to ourselves if we think the constitutional term "freedom of the press" has experienced a change in meaning. But this position may seem less persuasive as to changes in meaning that have plausibly occurred than as to silly hypothetical changes in meaning.

A final note on terminology: Some originalists, prominently including Solum, have embarked on a campaign to obtain sole possession of the word "interpretation." The word "interpretation," they believe, should only be used to denote the determination of original meaning, or original semantic meaning.[40] But the word

37. He also hypothesizes that the word "speech," in conventional usage, loses its current meaning and comes to refer to the beats in rap music. *Id.* at 94.

38. *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 39–41 (2004).

39. New York Times v. Sullivan, 376 U.S. 254, 276 (1964) ("Although the [1798] Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.").

40. Solum, *Semantic Originalism*, *supra* note 4, at 67–69. Balkin has given partial support to this view. *See* Balkin, *Framework Originalism*, *supra* note 2, at 15.

"interpretation," when attached to the word "constitution," carries highly normative connotations about the correct determination of a legal result, connotations that do not accompany the non-tendentious phrase "determination of original meaning." The common usage of the word "interpretation" is such that if an originalist says "X is the correct interpretation of the Constitution," it has far more normative force than if he says, non-tendentiously, "X is the original meaning of the Constitution." The originalist linguistic imperialists would like to commandeer all the normative force of the word "interpretation" for themselves; they would invite nonoriginalists, such as myself, to say things like "The Supreme Court should adopt position X, even though it is contrary to the correct interpretation of the Constitution." While I admire the audacity of this invitation, I must respectfully decline. As the word "interpretation" has powerful connotations about the bottom-line determination of legal results, I will continue to use that word, in the phrase "constitutional interpretation," to denote the bottom-line determination of legal results.

Conclusion

Balkin draws on the Domestic Violence Clause to argue that the meaning of the Constitution should not change. Solum additionally uses the Domestic Violence Clause to argue that the meaning of the Constitution *cannot* change. Unlike Solum, I believe that the meaning of the Constitution can change; unlike Balkin and Solum, I believe that constitutional meaning should change. Of course, I do not claim to have established my own positions by critiquing their treatment of a hypothetical example involving the Domestic Violence Clause. I hope, however, that I have managed to chip away somewhat at their example, which initially seemed so strongly to favor originalism.