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### THE IRRELEVANCE OF WRITTENNESS IN CONSTITUTIONAL INTERPRETATION

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*Arguments about the nature of judicial review and appropriate methods of constitutional interpretation based on the “writtenness” of the Constitution date back at least to Marbury v. Madison. In recent years, originalists ranging from Jack Balkin to Keith Whittington to Randy Barnett have argued in varying fashion that an originalist interpretive approach follows logically from “our commitment to a written constitution.” This argument has been extraordinarily important to the ongoing originalism renaissance, but it is a mistake. Nothing—or virtually nothing—follows from the writtenness of the U.S. Constitution. One can be committed to a written constitution in any number of ways for any number of reasons, the vast majority of which do not entail an originalist interpretive approach.*

*The originalist argument to the contrary is one instance of a broader rhetorical phenomenon that the philosopher C.L. Stevenson helpfully labeled “persuasive definition.” It is an attempt to resolve a normative debate through redefinition of a normatively charged term—in this case, “interpretation.” There is broad agreement that judges should interpret, rather than make, the law.*

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*Thus, by redefining “interpretation” to include only originalist interpretation, originalists appear to answer the normative question of how judges should decide constitutional cases. But it is only an appearance. Their argument sheds no light on the actual normative question at issue, which is how we should want judges to decide constitutional cases.*

INTRODUCTION.....1026

I. ORIGINALIST ARGUMENTS FROM WRITTENNESS .....1031

    A. *Branch One*.....1032

        1. Popular Sovereignty.....1032

        2. Constitutional Constraint.....1034

    B. *Branch Two*.....1037

        1. The Hybrid Strain.....1037

        2. The Self-Interpreting Strain.....1039

    C. *Branch Three*.....1043

II. THE MANY USES OF WRITTENNESS.....1047

    A. *Conventionalism*.....1048

    B. *Common Law Constitutionalism*.....1052

    C. *Constitutional Culture*.....1059

    D. *Pluralist Interpretation*.....1063

    E. *Other Countries*.....1066

III. THE INTERPRETATION RIDER.....1071

    A. *“Descriptive” Analysis*.....1073

    B. *Persuasive Definitions*.....1077

    C. *Interpretation*.....1081

    D. *Binding Law*.....1083

CONCLUSION.....1088

INTRODUCTION

Arguments about the nature of judicial review and appropriate methods of constitutional interpretation based on the “writtenness” of the Constitution date back at least to *Marbury v. Madison*.<sup>1</sup> There, Chief Justice Marshall famously wrote the following:

The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . .

. . . .

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<sup>1</sup> 5 U.S. (1 Cranch) 137 (1803).

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society.<sup>2</sup>

This passage has fueled political, legal, and academic controversy for more than two centuries, with scores of commentators echoing Marshall's contention that a written constitution requires judicial review<sup>3</sup> and a nearly equal number attacking it.<sup>4</sup> Marshall's defenders argue that written constraints on the power of the political branches—indeed, the very notion of constitutional supremacy over ordinary law—would be meaningless if judges were required to enforce unconstitutional legislation.<sup>5</sup> Critics counter that written constitutional commitments can be enforced through a variety of institutional mechanisms, not just judicial review.<sup>6</sup> Moreover, the actual constitutional text, on which Marshall and his defenders place such weight, is completely silent on the question.<sup>7</sup> Surely, the critics contend, that precludes any claim that judicial review is an essential feature of our constitutional design.

The back and forth is by now almost soothingly familiar. In recent years, however, a diverse group of constitutional theorists—ranging from Randy Barnett to Keith Whittington to Jack Balkin—has attempted to extend Marshall's argument to less familiar terrain. In varying fashion, these theorists argue that “our commitment to a written constitution” entails not only judicial review but also an originalist approach to constitutional interpretation.<sup>8</sup> Their argument takes sev-

<sup>2</sup> *Id.* at 176-77.

<sup>3</sup> See, e.g., Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2707-09 (2003); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 914 (2003).

<sup>4</sup> See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 6 (Yale Univ. Press 2d ed. 1986) (1962); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 23; Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1383-84 (2006); see also Bernadette Meyler, *Daniel Defoe and the Written Constitution*, 94 CORNELL L. REV. 73, 75-76 (2008) (canvassing the debate).

<sup>5</sup> See, e.g., Paulsen, *supra* note 3, at 2714.

<sup>6</sup> See, e.g., BICKEL, *supra* note 4, at 261; Van Alstyne, *supra* note 4, at 22.

<sup>7</sup> See BICKEL, *supra* note 4, at 5; Van Alstyne, *supra* note 4, at 22.

<sup>8</sup> See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 636 (1999); see also KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 50-61 (1999); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 303

eral forms, some of them parasitic on other justifications for originalism, such as popular sovereignty and the rule of law. But in its strongest version, it is offered as a freestanding reason why judges should embrace an originalist approach to constitutional interpretation. The idea is that writing, by its very nature, fixes the meaning of a text at the moment it is written. Otherwise, written words are no more than meaningless marks on a page, subject to the whim and caprice of every individual reader who chances upon them. If this were true, we might as well have an unwritten constitution, which of course we do not. Ergo, the constitutional text must be interpreted according to its original meaning. That is simply what it means to be committed to a written constitution.

This argument has been extraordinarily influential in the ongoing originalism renaissance. Indeed, it may be the most distinctive normative claim of “The New Originalism.”<sup>9</sup> Yet it has received virtually no sustained critical attention.<sup>10</sup> This Article seeks to remedy that. Its central claim is simple: nothing—or virtually nothing—follows from the writtenness of the U.S. Constitution. One can be committed to a written constitution in any number of ways for any

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(2007) [hereinafter Balkin, *Abortion and Original Meaning*]; Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 429 (2007) [hereinafter Balkin, *Original Meaning and Constitutional Redemption*]; Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127-28 (2003); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 71 (2006); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 859 (2009). Historical antecedents of this argument can be found in *South Carolina v. United States and Muller v. Oregon*. See *South Carolina v. United States*, 199 U.S. 437, 448 (1905) (“The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now.”); *Muller v. Oregon*, 208 U.S. 412, 420 (1908) (“Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking.”).

<sup>9</sup> New Originalists themselves tend to emphasize the shift from original intent to original public meaning. See, e.g., Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 609 (2004); Lawrence B. Solum, *Semantic Originalism* 18-19 (Univ. of Ill. Coll. of Law, Pub. Law and Legal Theory Research Papers Series, Research Paper No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244>. For reasons ably discussed by Mark Tushnet, there is less to this distinction than meets the eye. See Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 612 (2008).

<sup>10</sup> The best existing treatments are Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 177-80 (2008), and Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 59-64 (2009). Both are helpful but brief. As a consequence, neither recognizes or responds to the full range of analytically distinct originalist arguments from writtenness.

number of reasons, the vast majority of which do not entail an originalist interpretive approach. For example, one can be committed to the constitutional text as a focal point for legal coordination in the manner of the rules of the road; as a flexible framework for common law elaboration; as a locus of normative discourse in a flourishing constitutional culture; or as one of many legitimate ingredients in a pluralist practice of constitutional adjudication. Obviously, each of these approaches is debatable on the merits. The key point is that all of them, no less than originalism, accord the written text of the Constitution a prominent role.

At this point, a contemporary originalist will be inclined to respond that none of the approaches just described deserves the name of constitutional *interpretation*. “Of course,” she might say, “a written document can be put to any number of uses. That is perfectly obvious. Indeed, why stop with fancy uses like a framework for common law constitutionalism or a locus of normative discourse in a flourishing constitutional culture? The Constitution might just as easily serve to line a hamster cage or to fashion a colony of origami sea lions. Constitutional *interpretation*, however, implies more than simple use—specifically, a search for the actual meaning of the written text, which is to say its original meaning.”<sup>11</sup> If she is careful, our hypothetical originalist will concede that her argument speaks only to the nature of interpretation, not to the legitimacy of the Constitution. The argument cannot, that is, rule out the possibility that the Constitution is illegitimate, in which case we should consider scrapping it altogether.<sup>12</sup> But so long as we accept the Constitution as *binding law*, she will insist that originalism is not merely the best interpretive approach but the only approach that is truly interpretive.

This widely invoked argument is one instance of a broader rhetorical phenomenon that the philosopher C.L. Stevenson helpfully labeled “persuasive definition.”<sup>13</sup> That is to say, it is an attempt to resolve a normative debate through tendentious redefinition of a

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<sup>11</sup> See, e.g., WHITTINGTON, *supra* note 8, at 60-61; Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 HARV. J.L. & PUB. POL’Y 485, 486-87 (2008); Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not to)*, 115 YALE L.J. 2037, 2056-57 (2006) (reviewing AKHIL REED AMAR, *AMERICA’S CONSTITUTION* (2005); JED RUBENFELD, *REVOLUTION BY JUDICIARY* (2005)).

<sup>12</sup> See Saikrishna B. Prakash, *Overcoming the Constitution*, 91 GEO. L.J. 407, 420 (2003) (reviewing RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001)); see also Lawson & Seidman, *supra* note 8, at 71; Paulsen, *supra* note 11, at 2056-57.

<sup>13</sup> Charles Leslie Stevenson, *Persuasive Definitions*, 47 MIND 331, 331 (1938) (internal quotation marks omitted).

normatively charged term—in this case, two terms: interpretation and binding law. There is broad agreement that judges should interpret, rather than make, the law. Thus, by defining interpretation as synonymous with originalist interpretation, originalists appear to answer the normative question of how judges should decide constitutional cases. But it is only an appearance. Their argument sheds no light on the actual normative question at issue. Our commitment to a written constitution may mean that we are unlikely to accept an answer to that question that does not accord some role to the constitutional text. But all plausible theories—not just originalism—do that.

The same goes for the originalist argument that other interpretive approaches do not treat the written Constitution as binding law. There is broad agreement that the Constitution is law binding judges as well as other government officials. Thus, by defining law—or more precisely, binding law—as synonymous with originalist interpretation, originalists appear to show that judges are obligated to adhere to the Constitution's original meaning. But again, it is only an appearance. Their argument assumes away the normative question of how judges should decide constitutional cases. As before, our commitment to the written Constitution may mean we are unlikely to accept an answer that does not accord some role to the constitutional text. We are also unlikely to accept an answer that falls outside the family of activities conventionally understood as law. But all plausible theories satisfy both of these requirements. The writtenness of the Constitution is therefore irrelevant to the choice between originalism and other plausible contenders. Or so this Article shall contend.<sup>14</sup>

Part I surveys and classifies the various originalist arguments from writtenness. Most prove question begging or parasitic on other justifications for originalism. In its strongest form, however, the argument from writtenness emerges as a coherent and potentially independent justification for an originalist interpretive approach. Part II assesses this strong form of the argument and finds it wanting. Put simply, the strong argument from writtenness depends on originalism being the

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<sup>14</sup> The claim is, in important respects, a narrow one. It is agnostic on the lively internecine disputes among originalists, of which there are a great many. See Berman, *supra* note 10, at 9-16 (summarizing the many disputes among originalists). It is also agnostic on the possibility that we have an unwritten, as well as a written, Constitution. See Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1974); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007). It is even agnostic on the ultimate desirability of an originalist interpretive approach. There is a simple reason for this: none of these controversies can be resolved one way or the other by deductive reasoning from our commitment to a written constitution.

only interpretive approach that can make sense of our commitment to a written constitution. This is a demanding claim, and Part II shows that it is unsustainable: many nonoriginalist interpretive approaches can also make sense of our commitment to a written constitution. Those approaches may or may not be superior to originalism on other grounds, but it is those grounds, and not the writtleness of the Constitution, that must decide the issue. Part III anticipates and responds to the two originalist objections mentioned earlier—that other interpretive approaches are not truly interpretive and that other approaches do not treat the written Constitution as binding law. Both objections are shown to rely on the rhetorical technique of persuasive definition. As such, they shed no light on the underlying question of how judges should decide constitutional cases.

### I. ORIGINALIST ARGUMENTS FROM WRITTENNESS

The originalist argument from writtleness takes various forms. In fact, it may be more profitably understood not as a single cohesive argument but as a family of related arguments, united by their common reliance on the written character of the U.S. Constitution. That family has three analytically distinct, though frequently conflated, branches, which it is the goal of this Part to describe and disambiguate. The first, on close examination, turns out to be entirely dependent on other controversial normative justifications for originalism, such as popular sovereignty and the practical need to constrain the power of judges and other government officials. If those justifications are persuasive, this group of arguments from writtleness is persuasive, too. But the converse is equally true; these arguments therefore add little to the normative debate. The second branch relies on the writtleness of the Constitution as implicit evidence of the Framers' and Ratifiers' commitment to originalism. But, of course, that commitment is normatively significant only if one is already convinced that the original meaning or intent of the Constitution matters. Only the third branch, which argues that originalism follows from the essential nature of writtleness, could possibly provide an independent reason for contemporary judges to adopt an originalist interpretive approach. This Part examines the three branches in turn.<sup>15</sup>

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<sup>15</sup> No proponent of the argument from writtleness conceptualizes it in exactly this way. But the tripartite structure elaborated in this Part is implicit in the writings of various originalists. Making it explicit facilitates analytic clarity. It also helps to distinguish the strongest version of the argument from weaker variants and thus to present the argument in its best possible light.

### A. Branch One

Attempts to link writtleness to other controversial normative justifications for originalism are among the most common originalist arguments from writtleness. These attempts are frequently presented as freestanding arguments for originalism. Indeed, their proponents sometimes claim outright that the writtleness of the Constitution logically entails originalism. But for what should be obvious reasons, these arguments are no more persuasive than the hotly contested normative premises on which they rest.

#### 1. Popular Sovereignty

Two such premises are especially well represented in originalist arguments from writtleness. The first is the familiar claim that the Constitution is the command of the sovereign people, and as such both the source and limit of the governmental powers it establishes.<sup>16</sup> Originalism, in its canonical form, may be seen as a corollary of this view. Many have made this point<sup>17</sup> but perhaps none more famously than James Madison, arguing against the Jay Treaty in the House of Representatives in 1796:

[W]hatever veneration might be entertained for the body of men who formed our constitution, the sense of that body could never be regarded as the oracular guide in the expounding [of] the constitution. As the instrument came from them, it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions. If we were to look therefore, for the meaning of the instrument, beyond the face of the instrument, we must look for it not in the general

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<sup>16</sup> The classic statement is Alexander Hamilton's in *Federalist 78*:

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

THE FEDERALIST NO. 78, at 465-66 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>17</sup> See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 364 (1977); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 143 (1990); WHITTINGTON, *supra* note 8, ch. 5; Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1998); Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT. 159, 161 (1996).

convention, which proposed, but in the state conventions, which accepted and ratified the constitution.<sup>18</sup>

This argument from popular sovereignty is originalism's trump card. Like other government officials, the theory goes, judges are not free agents. They are the people's agents, and exercise the judicial power only as such. For them to improvise a constitutional tune as they go along would be to exercise sovereign power without popular consent and thus to usurp the people's fundamental right to govern themselves.

The argument from writtenness complements this account nicely. A written constitution can fix the will of the sovereign people, can serve as the textual embodiment of that will, only if it bears the meaning the people understood it to bear when they ratified it. To attach any other meaning to the constitutional text—whether that meaning derives from judicial precedent, linguistic evolution, or the policy preferences of contemporary judges—is to supplant the meaning fixed in writing by the people and thus to free the government from popular control. Keith Whittington makes the point with characteristic felicity: “[T]he written Constitution, ratified by the sovereign people in convention, is the fundamental law, authorizing and limiting governmental action . . . . The people can constrain their governmental agents only by fixing their will in an unchanging text.”<sup>19</sup>

This argument is fine so far as it goes. It is, however, subject to all the same objections as the standard popular sovereignty argument for originalism—most notably, the dead hand problem. The people whose sovereignty an originalist written constitution would preserve are chiefly dead, white, male landowners, whose dictates Article V makes it exceedingly difficult (and in some cases impossible<sup>20</sup>) for the people of today to change. From the perspective of democratic theory, it is not at all obvious that this arrangement is superior to one in which contemporary judges adhere to nonoriginalist precedent, track contemporary social consensus, or render pragmatic constitu-

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<sup>18</sup> 16 JAMES MADISON, Remarks Before the House of Representatives: Jay's Treaty (Apr. 6, 1796), in *THE PAPERS OF JAMES MADISON* 290, 295-96 (J.C.A. Stagg et al. eds., 1989). The reliability of this speech as evidence of Madison's own original understanding has been questioned, see Rakove, *supra* note 17, at 160-61, but it is offered here only as a representative statement of the view it expresses.

<sup>19</sup> WHITTINGTON, *supra* note 8, at 56; see also Balkin, *Abortion and Original Meaning*, *supra* note 8, at 304 (“We look to the original meaning of the words because if the meaning of the words changed over time, then the words will embrace different concepts than those who had the authority to create the text sought to refer to.”).

<sup>20</sup> See, e.g., U.S. CONST. art. V (“[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”).

tional judgments by their own best lights.<sup>21</sup> After all, unlike most important constitutional provisions, contemporary judges can at least trace their authority to a democratic political process—presidential appointment and Senate confirmation—within living memory.

The argument is too familiar to require further elaboration. Nor is it necessary, for present purposes, to pass judgment on it.<sup>22</sup> Certainly, sophisticated originalist responses to the dead hand problem are available.<sup>23</sup> Perhaps they are correct; perhaps not. The important point is that the argument from writtenness is doing little, if any, independent work. If it is normatively attractive to preserve the sovereignty of the prior generations of Americans who wrote and ratified the Constitution, or if doing so is somehow necessary to preserve the sovereignty of contemporary Americans,<sup>24</sup> then interpreting the Constitution as the written expression of their will might be warranted. But if these premises do not obtain, this version of the argument from writtenness tells us nothing about how judges should interpret the Constitution.

## 2. Constitutional Constraint

An even more common version of the argument from writtenness holds that only originalism is consistent with the primary purpose of written constitutions—namely to subject the power of judges and, through them, other government officials, to fixed constitutional constraints. The echo of *Marbury* should be obvious. There, Chief Justice Marshall asked, “[T]o what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?”<sup>25</sup> Contemporary originalists ask, “To what purpose do we hold our government officials to written constitutional limitations, if the content of those limitations evolves over time according to the interpretations of the very officials intended to be restrained?” Randy Barnett’s formulation is illustrative: “Putting a constitution in writing is condu-

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<sup>21</sup> See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 230 (1980); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 382 (1997); Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 614 (2008).

<sup>22</sup> For a more opinionated take, see Andrew B. Coan, *Talking Originalism*, 2009 BYU L. REV. 847; Klarman, *supra* note 21, at 382; and Samaha, *supra* note 21, at 609, 613-25.

<sup>23</sup> See, e.g., WHITTINGTON, *supra* note 8, at 196-208; McConnell, *supra* note 17.

<sup>24</sup> Keith Whittington makes an argument to this effect. See WHITTINGTON, *supra* note 8, at 156-57. But see Coan, *supra* note 22, at 865.

<sup>25</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

cive to preserving the rights of the people from infringement by government officials, but only if its original meaning is not contradicted or altered without adhering to formal amendment procedures.<sup>26</sup>

This argument may or may not be persuasive on its own terms. As Adam Tomkins has explained, there is no reason in principle that a written constitution should be any more or less flexible—any more or less constraining—than an unwritten constitution.<sup>27</sup> That depends on the content of the constitution, as understood by contemporary interpreters, as well as the accepted modes of constitutional revision, neither of which is linked in any necessary way to the formal medium in which a constitution is expressed. It is at least theoretically possible to imagine a very inflexible unwritten constitution—historically stable, entrenched against change, interpreted according to fixed standards of interpretation understood to be firmly binding on the government officials applying them—and vice versa. Nevertheless, it seems plausible that written constitutions, in practice, may have greater constraining potential than unwritten constitutions, if only because the precise content of the latter seems likely to be the subject of greater uncertainty.<sup>28</sup> Ultimately, this is an empirical question.

Fortunately, it is a question that need not be resolved here. Even if a written constitution, interpreted according to originalist methods, is an essential prerequisite for the existence of fixed constitutional constraints, it remains to be shown that fixed constitutional constraints are normatively preferable to the available alternatives. Here, the argument from writtleness runs into all the objections commonly advanced against the standard constraint-based defenses of originalism: original meaning is frequently ambiguous, limiting its power to constrain judges and other officials, even if those officials are acting in good faith and free of subconscious bias—both, of course, generous assumptions. In fact, the history invoked in originalist opinions may give an insidious veneer of objectivity and passivity to judicial decisions that are in reality the product of political choices.<sup>29</sup> More fun-

<sup>26</sup> Barnett, *supra* note 8, at 654.

<sup>27</sup> See ADAM TOMKINS, PUBLIC LAW 12-14 (2003).

<sup>28</sup> Cf. WHITTINGTON, *supra* note 8, at 52 (contrasting the supposed certainty of written constitutions with the supposed uncertainty of the unwritten British Constitution); Barnett, *supra* note 8, at 631 (analogizing the certainty-enhancing function of written constitutions to the certainty-enhancing function of written contracts).

<sup>29</sup> See Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 45 (2005); cf. Andrew B. Coan, Essay, *Text as Truce: A Peace Proposal for the Supreme Court's Costly War over the Eleventh Amendment*, 74 FORDHAM L. REV. 2511, 2512 (2006) (noting the appearance of political decisionmaking in disputes over

damentally, original meaning is hardly the only available constraint on official power. Judicial precedent,<sup>30</sup> political process theories,<sup>31</sup> or the Holmesian “puke” test<sup>32</sup> might serve equally well, especially in light of the many institutional and political constraints that operate independently of any theory of constitutional interpretation.<sup>33</sup> Finally, even if these alternatives prove less effective than originalism qua constraint, one or more of them might produce better substantive results, on balance, than unswerving adherence to original meaning.<sup>34</sup>

Again, for present purposes, it is unnecessary to pass judgment on these objections. The critics might be right. But original meaning also might be more determinate or more substantively attractive (compared to the plausible alternatives) than the critics of originalism have supposed. The important point is that everything turns on these questions and virtually nothing on the argument from writtenness. If original meaning is the most effective and substantively attractive constraint available, judges should interpret the constitutional text according to its original meaning to the extent possible. If not, they should employ whatever alternative approach satisfies this criterion. As with popular sovereignty, writtenness is simply a nonfactor.

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the Eleventh Amendment’s original meaning); Richard Primus, *Limits of Interpretivism*, 32 HARV. J.L. & PUB. POL’Y 159, 171 (2009) (cataloging recent Supreme Court cases in which views on original meaning break down along apparently political lines).

<sup>30</sup> See, e.g., Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 273 (2005) (“[A] strong theory of precedent . . . would promote judicial restraint.”).

<sup>31</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (arguing that the Supreme Court’s primary role is to ensure the fair and smooth functioning of the political process).

<sup>32</sup> See Letter from Oliver Wendell Holmes to Harold J. Laski (Oct. 23, 1926) (writing that a legislative act should not be disturbed “unless it makes us puke”), in 2 HOLMES-LASKI LETTERS 887, 888 (Mark DeWolfe Howe ed., 1953). For an elaboration of this test in more traditionally judicial vernacular, see Justice Holmes’s celebrated dissent in *Lochner v. New York*. 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (arguing that a law should not be overturned unless “a rational and fair man” would admit that it infringed “fundamental principles as they have been understood by the traditions of our people and our law”).

<sup>33</sup> See Coan, *supra* note 22, at 857-64; see also Balkin, *Abortion and Original Meaning*, *supra* note 8, at 310 (“Constraining judges in a democracy is important. But in practice most of that constraint does not come from theories of constitutional interpretation. It comes from institutional features of the political and legal system.”).

<sup>34</sup> For a fuller, but still summary, treatment of these objections, see Coan, *supra* note 22, at 865-69.

## B. *Branch Two*

The second branch of the writtleness family regards the Constitution's writtleness as evidence that its original design, purpose, or structure requires an originalist approach. This branch, too, comprises multiple variations. In its crudest form, it is a simple case of bootstrapping: by putting the Constitution in writing, the Framers and Ratifiers intended to fix its original meaning irrevocably. Ergo, that is the meaning we are bound to follow today. Of course, such arguments cannot persuade anyone who does not already accord the views of the Framers or Ratifiers authoritative weight. This bootstrapping problem is basic to Branch Two, but the branch does comprise at least two subtler variants. The first takes the writtleness of the Constitution to demonstrate a founding commitment either to fixed constitutional constraints or to popular sovereignty, which in turn entails an originalist approach to constitutional interpretation. Call this the "Hybrid Strain," since it blends Branches One and Two. The second, even more intricate variant draws on Article VI and the interpretive conventions in force at the Founding to claim that the Constitution itself prescribes an originalist approach. Call this the "Self-Interpreting Strain," since it purports to find binding interpretive instructions in the text of the Constitution itself. Ultimately, both strains either dissolve into Branch One or succumb to the same bootstrapping problem as cruder variants of Branch Two.

### 1. The Hybrid Strain

The Hybrid Strain is only subtly different from Branch One. Instead of appealing directly to the values of popular sovereignty and constraint, it appeals to the Founders' embrace of those values, which the writtleness of the Constitution is taken to demonstrate. As Keith Whittington tells it in a careful and nuanced discussion, the Founders deliberately chose a written constitution for two reasons. First, only a written document could be presented to the sovereign people for ratification and thus provide a popular check on the actions of government officials.<sup>35</sup> Second, only a written constitution could guard against the evils the Founders had come to associate with the unwritten British Constitution—chiefly, uncertainty and mutability<sup>36</sup> in the face of political temptation. To serve either of these purposes, howev-

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<sup>35</sup> WHITTINGTON, *supra* note 8, at 55.

<sup>36</sup> *Id.* at 54.

er, the meaning of a written constitution had to be fixed at the date it was authoritatively ratified by the people. Otherwise, the Constitution would cease to embody the will of the people and cease to provide a fixed bulwark against abuse by their governmental agents. For these reasons, Whittington argues, only an originalist approach to constitutional interpretation is consistent with the Founders' embrace of a written constitution.<sup>37</sup>

So stated, Whittington's argument appears to rest entirely on the authority of the Founders' reasons for embracing a written constitution, but he has provided no independent justification for treating those reasons as authoritative. This is the very essence of bootstrapping: an attempt to justify the authority of original meaning by reference to the very authority whose justification is in question. Whittington is sensitive to this issue, however, and expressly disclaims any argument from authority. Rather, he suggests, we should look to the Founding "in search of other people who have thought about . . . whether or not to have a written constitution and thus may be expected to have considered the matter in depth."<sup>38</sup> In so doing, he openly acknowledges that the arguments and historical purposes of the Founders "have weight because of their content, not their source."<sup>39</sup>

This acknowledgment distinguishes Whittington's argument from the cruder bootstrapping variants of Branch Two, but it creates two other problems. First, if it is truly the content and not the source of the Founders' reasoning Whittington means to appeal to, that content is essentially identical to Branch One. This does not mean we should not take it seriously, only that its success depends on the success of the hotly contested popular sovereignty and constitutional constraint arguments for originalism. As in Branch One, writtenness is doing little, if any, independent work. Second, relying on the Founders' arguments from popular sovereignty and constraint is even more problematic than relying on contemporary arguments of this sort because the Founders were operating in a very different legal, historical, and political context. They were debating a new Constitution; contemporary theorists are debating a very old one. That means the most powerful objection to the popular sovereignty argument—the dead hand problem—was much less of an issue for the Founders than it is for contemporary originalists. The Founders were also operating in a new

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<sup>37</sup> *Id.* at 53.

<sup>38</sup> *Id.* at 49.

<sup>39</sup> *Id.*

nation at a time of severe political and social instability; contemporary theorists are operating in a comparatively stable and deeply rooted political and social order. For this reason, fixed constitutional constraints probably seemed more pressing to the Founders than they do in today's mature democracy, which has many other resources—legal and otherwise—for restraining abuses of government power.<sup>40</sup>

In short, the perceived connection of writtenness to originalism in the Founding Era offers no compelling reason for believing that writtenness entails originalism today. It is either an argument from authority based on the very authority it is supposed to justify—a classic case of bootstrapping—or it collapses into an even weaker version of Branch One. Either way, writtenness alone tells contemporary judges nothing about which interpretive approach to adopt.

## 2. The Self-Interpreting Strain

Another variant of Branch Two draws on the text of the Supremacy and Oath Clauses of Article VI, along with the interpretive conventions prevailing at the time of ratification, to argue that the writtenness of the Constitution compels an originalist interpretive approach. This argument, advanced most forcefully by Michael Stokes Paulsen, is rather complex and therefore easiest to spell out in schematic form:

1. The Supremacy Clause makes “[t]his Constitution”<sup>41</sup> the “supreme Law of the Land.”<sup>42</sup>
2. The Oath Clause of Article VI binds judges and other government officials to support “[t]his Constitution.”
3. The obvious referent of “[t]his Constitution” is the written constitutional text drafted in 1787 and beginning, “We the People.”<sup>43</sup>
4. When “[t]his Constitution” was ratified, written legal documents were presumptively interpreted according to their original public meaning.<sup>44</sup>

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<sup>40</sup> Cf. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 924 (1996) (“[O]nce a society develops political traditions, political actors can be more confident that their opponents, even if arguably departing from the text, will operate within the traditions, or will be reined in by other forces in society if they do not do so.”).

<sup>41</sup> U.S. CONST. art. VI, cl. 2.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* pmb1.

<sup>44</sup> Paulsen leans heavily on Saikrishna Prakash for this point. See Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 540-46 (1998) (book review).

5. Ergo, the Constitution itself directs official modern interpreters to adopt an originalist interpretive approach.<sup>45</sup>

Two things are worth noting about this argument. First, the writtenness of the Constitution—and not the specific language of Article VI—is doing nearly all of the work. Indeed, Premises One and Two are mostly superfluous. They lay the groundwork for a nice rhetorical flourish: the Constitution itself prescribes an originalist interpretive approach!<sup>46</sup> But whether or not Article VI purported to make the Constitution supreme and binding, it would still be a written document and thus, under Premise Four, subject to originalist interpretation. Conversely, without Premise Four and the argument from writtenness, “[t]his Constitution” could be interpreted quite plausibly as denoting the constitutional text as interpreted under one of many nonoriginalist theories.<sup>47</sup>

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<sup>45</sup> See Paulsen, *supra* note 8, at 868-69, 872-73.

<sup>46</sup> See *id.* at 858. Paulsen argues that

[a] careful reading of the text of the Constitution . . . shows that the Constitution *does* prescribe an interpretive methodology. That methodology is to read and apply the document’s written words and phrases, taken in context, as they would have been understood by reasonably informed readers of such a document at the time they were written.

*Id.*

<sup>47</sup> It is an interesting puzzle whether a constitutional text (or any other text) can ever authoritatively supply the methodology for its own interpretation. Imagine, for example, that Article VI contained a fourth section explicitly instructing judges and other officials to interpret the document according to its original public meaning. Would this resolve all doubt? It would not. (And not just because the new section would itself have to be interpreted.) We can presume that an explicitly worded instruction of this sort—read in isolation—would have the same meaning under any plausible contemporary interpretive approach. Nevertheless, a normative argument would still be required for adhering to this instruction in interpreting the rest of the Constitution. Of course, the instruction itself would raise the costs of applying a non-originalist interpretive approach to other provisions. If judges (and other officials) could ignore this language, would any constitutional provision be safe? But these costs could—at least in principle—be outweighed by the substantive unattractiveness of an originalist approach relative to plausible nonoriginalist alternatives (and to the alternative of scrapping the Constitution altogether). If an originalist approach were sufficiently unattractive substantively, but so was jettisoning the Constitution, the normatively best option might be for judges to ignore even an explicit instruction to be originalists and instead apply some other interpretive approach to the remainder of the constitutional text. It follows a fortiori that judges might be normatively justified in ignoring the *implicit* interpretive instructions Paulsen purports to find in Article VI, which, unlike an explicit instruction, simply disappear under a range of plausible non-originalist interpretive approaches. An important implication is that interpretive choice need not be all-or-nothing, *pace* many originalists. See, e.g., WHITTINGTON, *supra* note 8, at 59 (making the all-or-nothing argument); Barnett, *supra* note 8, at 635-36

Second, the soundness of the argument depends crucially on an unstated premise: namely, that interpretive conventions prevailing at the Founding should govern contemporary constitutional interpretation (most specifically, interpretation of Article VI). It is tempting to reply that this is the exact question at issue between originalists and their opponents and therefore adds nothing to the originalist argument. But that is not quite true. One might still be an originalist without believing that Founding Era interpretive conventions are binding;<sup>48</sup> conversely, one might still be a nonoriginalist while believing that they are (depending on one's belief about the content of those conventions).<sup>49</sup> Nevertheless, the contemporary authority of Founding Era interpretive conventions is too controversial to be simply asserted. It requires affirmative justification.

The arguments from popular sovereignty and constraint jump immediately to mind as possibilities. If we were concerned with upholding the sovereignty of the ratifying generation, we might well be concerned with preserving not only the meaning of the text that generation ratified but also that generation's understanding of how that text would be interpreted.<sup>50</sup> Similarly, if we were concerned with fixing a set of constraints on government authority at one point in time, it might well make sense to fix a method for interpreting the text in which the constraints were embodied. But of course, either of these moves would collapse the Self-Interpreting Strain into Branch One. The argument from writtenness would then tell us no more or less about the proper interpretive approach than the controversial normative justifications from which its proponents have loudly declared their independence. Presumably, this is why Paulsen refuses to invoke popular sovereignty or constraint to support either the authority of Founding Era interpretive

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(same). Both constitutional text and original meaning can be embraced in part or in whole, depending on the values that would be served thereby.

<sup>48</sup> See Barnett, *supra* note 8, at 612-13 (noting that contradiction of doing so is merely apparent).

<sup>49</sup> See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985) (arguing that the Founders themselves were not originalists in the intentionalist sense of originalism); Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 33 (arguing that the Framers never intended to bind future generations to original meaning).

<sup>50</sup> Cf. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 548-49 (2003) (suggesting that most originalists would agree "the meaning that they are committed to enforcing emerges from the application to the Constitution's words of various legal and linguistic principles that reasonable members of the founding generation would have used to understand those words").

conventions or original meaning more generally. Indeed, he insistently refuses to supply any justification at all.

He offers two explanations for this refusal. The first is that his approach is no less circular than nonoriginalist approaches, which begin with a set of premises external to the Constitution and then reason from those premises to “the conclusion that this is the interpretive stance that the text (as viewed through such an external lens) in fact presupposes—or at least the one that makes for the ‘best’ interpretation of the text under that interpretive approach.”<sup>51</sup> If true, this would indeed pose a serious dilemma. But it plainly is not true. To be sure, most nonoriginalist interpretive arguments—and many originalist ones—begin with premises outside the Constitution and reason from those principles to an interpretive approach that they proceed to apply to the constitutional text. But in general, the premises they start with are normative principles openly defended on normative grounds. Originalist arguments from popular sovereignty and constraint are good examples of this form (and convenient since already discussed earlier in this Part). They begin with political values, which they claim require an originalist interpretive approach, and they defend both the values themselves and the necessity of originalism to their practical realization. There is certainly room for debate on both points, but there is no circularity involved. Paulsen’s central premise, by contrast, is simply an assertion of authority (of original public meaning and Founding Era interpretive conventions) that is (a) basically synonymous with his methodological conclusion and (b) totally disconnected from any affirmative claim of political morality. This is the very essence of bootstrapping.

Paulsen’s second explanation is a sort of confession and avoidance: normative arguments may show that the Constitution is illegitimate, but once we accept the Constitution as binding law, no further argument is necessary. Originalist interpretation simply follows as a matter of logical entailment.<sup>52</sup> This argument and others like it will be discussed at some length in Part III. For now, suffice it to say that its key move is a conflation of “the Constitution” with its original public meaning—in other words, the assumption of an originalist interpretive approach—defended only by reference to Paulsen’s bootstrapping first explanation. Like the Hybrid Strain, then, the Self-Interpreting Strain either collapses into Branch One or covertly as-

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<sup>51</sup> Paulsen, *supra* note 8, at 871.

<sup>52</sup> *See id.* at 875-76.

sumes its conclusion. Either way, writtleness alone offers no compelling reason for adopting an originalist interpretive approach.

### C. *Branch Three*

The third branch of the argument from writtleness is the most promising but also the most difficult to grasp. Boiled down to essentials, the idea is that an originalist interpretive approach is somehow part and parcel of—in fact, synonymous with—commitment to a written constitution. As Randy Barnett puts it,

We are bound [to respect the original meaning of the text] because we *today*—right here, right now—profess our commitment to a written constitution, and *original meaning interpretation follows inexorably from that commitment*. We can easily jettison that original meaning by disclaiming our commitment to a written constitution, but this is a choice both courts and scholars have been generally unwilling to make.<sup>53</sup>

The claim is somewhat mysterious. At first blush, it seems like just another bare assertion—and a peculiarly bare one at that. After all, many nonoriginalists believe themselves committed to a written constitution. Surely, some argument is required to show that they are mistaken. But this time originalists actually have arguments to offer.

The two most common are unpersuasive *reductios*. The first contends that the only alternative to originalist interpretation of the constitutional text is random semantic drift. As Jack Balkin argues, “[I]f the dictionary definitions of words change[] over time, their legal effect [under a nonoriginalist approach] would also change, not because of any conscious act of lawmaking . . . but merely because of changes in language.”<sup>54</sup> In this up-is-down, black-is-white world, legal change is completely haphazard. The federal power to protect states against “domestic Violence,”<sup>55</sup> for example, morphs from a power to suppress insurrection into a power to legislate against spousal abuse.<sup>56</sup> If this sort of thing were the inevitable consequence of nonoriginal-

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<sup>53</sup> Barnett, *supra* note 8, at 636 (emphasis added).

<sup>54</sup> Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 552 (2009); accord Kesavan & Paulsen, *supra* note 8, at 1131 (“We therefore think that to avoid creeping or lurching anachronism infecting the interpretation of an authoritative legal text, the proper approach must be one of ‘originalist’ textualism . . . .”); Paulsen, *supra* note 8, at 876 (“The alternative to fixed time-point meaning is to license pure linguistic anachronism.”).

<sup>55</sup> U.S. CONST. art. IV, § 4.

<sup>56</sup> Balkin, *supra* note 54, at 552; see also Paulsen, *supra* note 8, at 877 (invoking the same example).

ism, that would surely be a strong point in originalism's favor. But this is simply not the case. Indeed, the example is transparently silly. Nonoriginalism does entail that constitutional meaning will evolve over time, at least partly in conjunction with American linguistic practices. But no responsible nonoriginalist advocates mechanical application of new dictionary definitions where the context would make such application absurd.

The second *reductio* contends—somewhat inconsistently—that the only alternative to originalist interpretation is radical subjectivity, with each interpreter free to supply her own idiosyncratic interpretation of the text.<sup>57</sup> Here the relevant bogeyman is Humpty Dumpty, contemptuously informing Alice that, “When *I* use a word, . . . it means just what I choose it to mean—neither more nor less.”<sup>58</sup> As with semantic drift, if this were an accurate portrait of nonoriginalism, that would surely count as a strong point in originalism's favor. But the portrait is not accurate. In fact, it is just as fanciful as the “domestic Violence” example. To be sure, a tiny and rapidly shrinking minority of nonoriginalists do subscribe to radical subjectivism.<sup>59</sup> But this view is clearly not a necessary entailment of nonoriginalism. Indeed, it is far outside the mainstream. The interpretive principles favored by most nonoriginalists—contemporary values, representation reinforcement, economic efficiency, and so forth—are every bit as objective, in the sense of observer independent, as original meaning. This is not to suggest that these principles render the observer irrelevant. Occasional bad faith and more than occasional cognitive bias mean different judges will come to different conclusions about what result is most consistent with contemporary values or best serves economic efficiency. But the same is true of original meaning.

The *reductios*, then, are false starts, but they are not a total failure. It is possible to reconstruct from them—along with other originalist arguments from writtenness—a far more plausible version of Branch

<sup>57</sup> The inconsistency is that semantic drift and radical subjectivity cannot both be the only alternative to originalism.

<sup>58</sup> LEWIS CARROLL, THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE 124 (MacMillan Co. 1928) (1898) (internal quotation marks omitted); see also Paulsen, *supra* note 8, at 870 (invoking the Humpty Dumpty example).

<sup>59</sup> Most of these view objectivity in general (including the objectivity of original meaning) as a sham. See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON 36-37 (1997) (discussing the view that “objectivity and neutrality are merely shams concealing a dominance game”); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1214 (1985) (“[Socially created] metaphors constructed the ‘reality’ that within the legal discourse was supposed to exist out there, in social relations themselves.”).

Three. Though unpersuasive on their own terms, the *reductios* do plausibly associate writtleness with legal objectivity and entrenchment of constitutional meaning against change. In a similar vein, Branches One and Two—while failing to provide a truly independent argument from writtleness—plausibly associate writtleness with popular sovereignty and the need to constrain official power. None of these associations establishes that originalism follows deductively from a commitment to a written constitution. But taken together, they do demonstrate that originalism is capable of plausibly explaining the decision to treat a written constitutional text as authoritative over time. That is the first step in developing a strong version of the argument from writtleness.

The second step is to establish that no other interpretive approach is similarly capable. This claim is a strong one but slightly more modest than the *reductios*. It stops short of insisting that nonoriginalism leads inevitably to semantic drift or radical subjectivity. Rather, it contends that, unlike originalism, nonoriginalist interpretive methods bear no intelligible relation to the written text and can offer no satisfactory explanation of our continued commitment to it. If judges are to employ such methods, we may as well have an unwritten constitution. This is what Keith Whittington seems to have in mind when he writes that, “[u]nlike other approaches, an originalist interpretive method accounts for significant features of our particular constitutional tradition: the existence of a written constitution and a judiciary committed to interpreting that text. Only an originalist judiciary is consistent with the constitutional project that we claim to be pursuing.”<sup>60</sup> Restated to emphasize its two key elements, this version of Branch Three claims (1) that originalism can successfully explain our continued commitment to a written constitutional text and (2) that no other approach can.

There are three things worth noting about this argument. First, if it is correct, originalism really does follow from our commitment to a written constitution, without the aid of other controversial normative premises. This version of Branch Three is thus independent of other normative justifications in just the sense that Branch One is not.

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<sup>60</sup> WHITTINGTON, *supra* note 8, at 61; *see also* Paulsen, *supra* note 8, at 871 (“[Non-originalism] severs interpretive premises and principles from the text being interpreted. This is a problem for an enterprise that is seeking to interpret the Constitution in order to apply it as exclusive authoritative, binding law. The more an interpretive approach is disconnected from the text, the more it is disconnected from the text’s authority.”).

Second, while the argument does take commitment to a written constitution as given, that commitment is shared widely enough that Branch Three has the potential to persuade a very broad audience, if not everyone.<sup>61</sup> It thus cannot be dismissed as question begging in the sense that Branch Two could be. For these reasons, Branch Three represents the last, best hope for the originalist argument from writtenness. Alas, there is a rub, and this is the final thing to note about Branch Three: it depends crucially on the extremely demanding claim that originalism is the *only* way to make sense of our commitment to a written constitution. In other words, the one plausible form of the argument from writtenness can successfully justify originalism only if there is *no* other way to explain our ongoing commitment to the constitutional text.<sup>62</sup> That is a very tall order, as the next Part demonstrates.

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<sup>61</sup> What Henry Monaghan wrote three decades ago remains largely true today: “The authoritative status of the written constitution is . . . an incontestable first principle for theorizing about American constitutional law.” Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 383 (1981). *But see* Grey, *supra* note 14, at 717 (arguing that the United States functionally has an unwritten constitution); Young, *supra* note 14, at 411 (same). Still, originalist proponents of Branch Three ignore an important possibility: that commitment to a written constitution is nearly universal only because such commitment is perceived as consistent with a wide range of interpretive approaches. If originalists succeed in exploding this perception, the result may well be reduced—perhaps substantially reduced—support for written constitutionalism. *Cf.* LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION* 210-16 (2001) (identifying the distinctive genius of the U.S. Constitution as its ability to accommodate—even nurture—widely divergent views); Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991, 1045-47 (2009) (describing the power of the idea of a written constitution to unify persons of widely divergent substantive views). Instead of prompting conversion to originalism, the argument from writtenness might serve in effect as a *reductio* demonstrating the absurdity of treating the constitutional text as binding law over time. This possibility would arise, however, only if originalists were correct that nonoriginalism and commitment to a written constitution are mutually exclusive. As Part II explains, they are not.

<sup>62</sup> It is possible to imagine a more modest version of this claim, but on close examination, it is apparent why no prominent originalist has advocated it. This version would hold that, even if originalism is not the only way to make sense of our commitment to a written constitution, it is the *best* way in some relevant sense of “best.” What that sense might be is unclear, however. If the point is that originalism is normatively best among the plausible contenders, this argument would appear to land originalists right back in the protracted normative debate from which the argument from writtenness was supposed to rescue them. Alternatively, originalism might be thought to best accord with some conceptual notion of writtenness, but if it is not the only way to make sense of our commitment to a written constitution, originalists would have to explain why the marginal advantage of originalism on this dimension outweighs the (potential) advantages of competing theories on other normative dimensions. This, too, would destroy the capacity of the argument from writtenness to function as a trump card.

## II. THE MANY USES OF WRITTENNESS

Randy Barnett concludes his argument from writtleness with a challenge: “[T]hose who would deviate from [the original meaning of] the written constitution . . . have to explain why we bother to keep it around . . . .”<sup>63</sup> This Part takes up the gauntlet. More precisely, this Part shows that even Branch Three—the strongest form of the argument from writtleness—fails because originalism is not the only way to explain why we bother to keep the written constitution around. To the contrary, one can be committed to a written constitution in many ways and for many reasons, most of which do not entail an originalist interpretive approach. For example, one might be committed to a written constitution as a focal point for legal coordination in the manner of the rules of the road; as a flexible framework for common law elaboration; as a locus of normative discourse in a flourishing constitutional culture; or as one of many legitimate ingredients in a pluralist practice of constitutional adjudication. This Part explores each of these possibilities by way of illustration. The goal is not to illuminate all of their finer points or to defend them on the merits. It is merely to show that each accords the written text an important role in constitutional interpretation and does not entail any form of originalism. If this is true, the argument from writtleness fails.<sup>64</sup> The Part concludes with a brief discussion of nonoriginalist interpretive practices in other countries, which render even more implausible the no-

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<sup>63</sup> Barnett, *supra* note 8, at 653-54.

<sup>64</sup> Although conceived independently, this argument owes a debt to the thoughtful discussion in Primus, *supra* note 10, at 178-79. Aside from its brevity, however, that discussion differs from this one in several important respects. First, Primus does not distinguish between Branch Three and other versions of the argument from writtleness. As Part I shows, those versions suffer from their own shortcomings, but the critique advanced in this Part applies only to Branch Three. Second, Primus simply assumes that the nonoriginalist approaches he discusses (some of which are also discussed in this Part) are meaningfully committed to a written constitution. In fact, the relationship between those approaches and the written constitution is both subtle and complex, as this Part explains at length. Neither the existence nor the nature of that relationship (nor the distinctness of these approaches from originalism) can be treated as self-evident. Third, Primus understands originalist arguments from writtleness as primarily focused on the nature of constitutionalism rather than the nature of writtleness. This conflates Branch One, which is focused on the purposes of constitutionalism, and Branch Three, which is very much focused on writtleness. As a result, Primus never undertakes the crucial task of explaining the consistency between a broad range of nonoriginalist approaches and commitment to a *written* constitution. That task is the central focus of this Part. None of this, it bears emphasis, is a knock on Primus, whose brief discussion of these issues makes no attempt to provide the kind of sustained critique this Article does.

tion that originalism is the only recognizable form of commitment to a written constitution.

### A. *Conventionalism*

One familiar nonoriginalist reason for embracing a written constitution is that the text serves as a focal point for legal coordination. Generally known as conventionalism, this approach builds on the insight that it is more important for many issues to be settled than to be settled right.<sup>65</sup> Sometimes settlement is the only important goal. No one cares if cars drive on the right or left side of the road, so long as the rule is clear and consistently followed. More often, different groups prefer different rules, but most or all prefer a settled rule to the uncertainty and waste of resources associated with fighting for their own favored alternatives. Most Americans probably do not think that thirty-five is *the* optimal minimum age for presidential eligibility, but few would think it worth the risk or effort of pressing for their preferred alternative. Having a settled rule is too important relative to the puny benefits of getting the minimum age exactly right. The obvious problem in such cases is how to decide which rule to settle on, when everyone has different ideas about which rule is best. That is where focal points come in. When different parties disagree but nevertheless wish to cooperate, game theory shows that it is useful to have highly salient, clear-cut rules close at hand. So long as these rules are substantively good enough—or at least better than no rule at all—the parties will often converge on them as ready-made solutions, or focal points, for resolving their disagreement.<sup>66</sup>

The central claim of conventionalism is that the constitutional text is binding because it serves as a focal point in this sense. For cultural and historical reasons, the text is a highly salient source of legal norms; American lawyers, judges, politicians, and citizens all turn to it by second nature as a source for resolving constitutional disputes. It is also relatively clear-cut in the sense of having readily identifiable boundaries. With trivial exceptions, everyone agrees what sequence of words and punctuation makes up the authoritative constitutional text. Finally, “[p]eople who disagree about a constitutional question will

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<sup>65</sup> Cf. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right.”).

<sup>66</sup> See generally THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 58-80 (paperback ed. 1980).

often find that although few or none of them thinks the answer provided by the text of the Constitution is optimal . . . all of them can live with the limits that the text imposes.”<sup>67</sup> For these reasons, conventionalists argue, “the Constitution is a particularly good focal point” and should be interpreted to preserve its ability to function as such.<sup>68</sup> Most centrally, this means a court must always be able to plausibly say that its constitutional interpretations honor the text.

This approach plainly accords the written text of the Constitution an important role, but what exactly it understands “the text” to mean requires more explanation. The short answer is that the text refers to the full range of meanings present-day Americans might plausibly understand its written words to convey, including but not limited to original public meaning, the intended meaning of the Framers and Ratifiers, contemporary public meaning, and glosses attached to the text by history and tradition. For some provisions, these meanings will converge in a single, quite determinate rule. The thirty-five-year minimum age for presidential eligibility has only one plausible meaning, at least for now, as does the language of Article I, Section 3, granting each state two seats in the Senate.<sup>69</sup> Other provisions will be subject to a range of plausible interpretations. The Sixth Amendment right of the accused “to have the Assistance of Counsel for his defence”<sup>70</sup> might plausibly be interpreted to confer a right to court-appointed counsel, as the Supreme Court interpreted it to do in *Gideon v. Wainwright*.<sup>71</sup> But it might also be understood merely to bar government interference with a criminal defendant’s efforts to retain private counsel, as it apparently was understood at the Founding.<sup>72</sup> In such cases, the text will merely narrow, not fully resolve, interpretive disagreements. But that is hardly insignificant. All else equal, less disagreement is generally preferable to more.

Originalists might object that original meaning would be a more effective focal point than the permissive conventionalist understanding of the text. After all, there is only one original meaning (though it may be vague or equivocal) and a whole range of “plausible” mean-

<sup>67</sup> David A. Strauss, Essay, *Common Law, Common Ground, and Jefferson’s Principle*, 112 *YALE L.J.* 1717, 1733 (2003).

<sup>68</sup> *Id.* at 1734.

<sup>69</sup> U.S. CONST. art. I, § 3 (“The Senate of the United States shall be composed of two Senators from each state . . .”).

<sup>70</sup> *Id.* amend. VI.

<sup>71</sup> See 372 U.S. 335, 339-41 (1963).

<sup>72</sup> See Strauss, *supra* note 40, at 919-20 (discussing the right-to-counsel example).

ings on the conventionalist account. This is probably wrong, however, for reasons David Strauss explains. Unlike the constitutional text of the conventionalists, whose outer limits are the subject of general agreement,<sup>73</sup> original meanings are often quite difficult to ascertain and have little salience even for most lawyers, much less for the general public. There is also no broad consensus that constitutional interpretations must track original meaning comparable to the general agreement that they must track the text. In most instances, therefore, original meaning is a comparatively unpromising focal point.<sup>74</sup> More important for present purposes, this objection to conventionalism is not an argument from writtenness. Rather, it is an argument that originalism serves some extrinsic instrumental goal—the reduction of constitutional conflict—better than another form of commitment to a written constitution. Even if true, the normative force of this claim would turn on the usefulness of original meaning as a focal point, not on the writtenness of the Constitution.

More ambitiously, originalists might object that it is impossible for a conventionalist text to serve as a focal point because the number of plausible alternative meanings is essentially infinite. This variant of the Humpty Dumpty *reductio*<sup>75</sup> denies not only the desirability of conventionalism but also its coherence. If true, it would therefore support the Branch Three claim that originalism is the only plausible form of commitment to a written constitution. It is quite plainly not true, however. Social, legal, and linguistic conventions prevent the constitutional text from being plausibly interpreted to mean just anything at all.<sup>76</sup> Some provisions, like the age limits and two-senator language of Article I, Section 3 clearly have only one plausible meaning.<sup>77</sup> Others admit to a range of interpretations but narrow the range of

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<sup>73</sup> Cf. Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 828 (1982) (“[W]e might do best to look at constitutional language as a frame without a picture, or, better yet, a blank canvas. We know when we have gone off the edge of the canvas even though the canvas itself gives us no guidance as to what to put on it.” (footnote omitted)).

<sup>74</sup> See Strauss, *supra* note 67, at 1745.

<sup>75</sup> See *supra* text accompanying note 58.

<sup>76</sup> Exactly what these conventions are, where they come from, and how they interact are complicated and poorly understood questions. See Richard Primus, *Constitutional Expectations*, NEW REPUBLIC (forthcoming 2010) (offering a thoughtful preliminary take on these questions). But that they do in fact constrain the range of textual meanings recognized as plausible is demonstrated by the examples that follow in the main text. Cf. Strauss, *supra* note 40, at 911-12 (discussing the role of background understandings in determining the conventionalist meaning of the constitutional text).

<sup>77</sup> See U.S. CONST. art. I, § 3.

plausible disagreement in important ways. The Sixth Amendment right of the accused “to have the Assistance of Counsel for his defence”<sup>78</sup> may or may not require the government to provide defense counsel for indigents. But it plainly does not include the right to a court-appointed lawyer to draft a will or assist in the sale of a home. Similarly, the natural-born-citizen rule<sup>79</sup> may or may not exclude persons like Senator John McCain from the presidency.<sup>80</sup> But it plainly does exclude Governor Arnold Schwarzenegger.<sup>81</sup>

Even the most open-ended provisions of the constitutional text, like the Privileges or Immunities and Equal Protection Clauses, impose some limits. Neither, for example, could plausibly be interpreted to mandate a unicameral national legislature, a parliamentary system, or direct election of the Secretary of State. Within such limits, however, conventionalists are happy to concede that many disagreements are not susceptible to resolution by coordination around a focal point, because it is more important that they be settled right than that they be settled definitively.<sup>82</sup> So long as the capacious limits of the text are observed, this process need not diminish the ability of the text to serve as a focal point for other issues where settlement is the predominant consideration.

The key point is that conventionalism provides a coherent and plausible nonoriginalist rationale for taking the written constitutional text seriously. It may or may not be normatively defensible on other grounds. Perhaps it overvalues settlement or exaggerates the degree of settlement that a nonoriginalist understanding of the text can promote. Perhaps it underestimates the potential of original meanings to serve as useful focal points. But these are not arguments from writ-

<sup>78</sup> *Id.* amend. VI.

<sup>79</sup> *See id.* art. II, § 1, cl. 5 (“No Person except a natural born Citizen, or a citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . .”).

<sup>80</sup> Compare Gabriel J. Chin, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, 107 MICH. L. REV. FIRST IMPRESSIONS 1, 2 (2008), with Stephen E. Sachs, Commentary, *Why John McCain Was a Citizen at Birth*, 107 MICH. L. REV. FIRST IMPRESSIONS 49, 49 (2008).

<sup>81</sup> Schwarzenegger is a naturalized citizen. *See* Arnold Schwarzenegger, *Arnold Schwarzenegger Recalls Lessons from 25 Years as a U.S. Citizen—Learn English, Participate in Politics, and Give Back*, U.S. NEWS & WORLD REP., Sept. 17, 2008, <http://www.usnews.com/articles/opinion/2008/09/17/arnold-schwarzenegger-recalls-lessons-from-25-years-as-a-us-citizen-learn-english-participate-in-politics-and-give-back.html>.

<sup>82</sup> *See* Strauss, *supra* note 67, at 1743-44.

tenness.<sup>83</sup> Conventionalism may or may not be the best interpretive approach, but it is undeniably committed to a written constitution.

### B. *Common Law Constitutionalism*

Another familiar nonoriginalist form of commitment to a written constitution is common law constitutionalism. Closely related to conventionalism, this approach understands the constitutional text as a framework for common law elaboration in two distinct but interrelated senses. First, the constitutional text provides an institutional framework in which the elaboration of substantive constitutional principles can take place gradually over time in the common law fashion. This framework includes not only courts, which elaborate constitutional principles explicitly, but also legislatures and executive officials—at both the federal and state levels—whose practices inform, catalyze, and serve as a counterweight to judicial interpretations.<sup>84</sup> Second, the constitutional text provides a framework of substantive rules such as freedom of expression, the prohibition of cruel and unusual punishment, and equal protection of the laws, which it charges the institutional framework with elaborating. Together, common law constitutionalists contend, these frameworks serve to aggregate the wisdom of previous generations and to ensure a substantial measure of stability in our basic governmental arrangements.<sup>85</sup> At the same time, and what is equally important, the frameworks also facilitate incremental (and occasionally drastic) constitutional change short of formal amendment to meet the needs of a constantly evolving society. This change occurs both within the frameworks and through common law evolution of the frameworks themselves.

How exactly this process functions is a question of considerable complexity, but, like conventionalism, it accords an important role to the written Constitution. That role is different, however, with respect to common law evolution inside the textual frameworks and evolution of

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<sup>83</sup> More precisely, they are not arguments in which the writtleness of the Constitution—as opposed to the normative desirability of alternatives to originalism—is doing the relevant work.

<sup>84</sup> On the importance of nonjudicial precedents in the development of constitutional law, see Berman, *supra* note 10, at 34-36; Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 623 (2008); and Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 999 (2008).

<sup>85</sup> On the stabilizing effects of common law constitutional interpretation, see Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 512-13 (1996), and Merrill, *supra* note 30, at 274-81.

the frameworks themselves. As to the former, common law constitutional interpretation is strongly constrained by the plausible range of present-day meanings attributable to the text.<sup>86</sup> In this sense, common law constitutionalism complements the conventionalist account of the text as a focal point. It comes into play when the text narrows, but does not resolve, interpretive disagreement. (This is true most of the time, but to widely varying degrees, depending on the text in question.) Within the range of disagreement permitted by the text, both courts and other institutions tend to accord considerable deference to well-established practices, especially those which “have been tested over time, in a variety of circumstances, and have been found to be at least good enough.”<sup>87</sup> Of course, these institutions also sometimes depart from traditional practices determined to be unjust or out of step with present needs. But they typically do so incrementally, in common law fashion, and only after due consideration for “the presumption normally given to things that have worked well enough for a long time.”<sup>88</sup>

For the most part, this is how common law constitutionalism operates: within the constraints of the conventionalist text. Occasionally, however, it also operates as one mechanism through which the content of those constraints evolves.<sup>89</sup> This generally occurs when courts or other institutions stretch the plausible linguistic meaning of the text, either to meet a new social need or to better comport with longstanding practice.<sup>90</sup> Examples are bound to be controversial, but might plausibly include the Fourth Amendment warrant requirement<sup>91</sup> and the injury-in-fact requirement of Article III standing,<sup>92</sup> both of which the Supreme Court seems to have adopted against the grain of contemporaneous understandings of the text. Conventionalism ensures that such moves succeed only rarely. But when they do, the new meaning becomes part of the conventionalist text constrain-

<sup>86</sup> See Strauss, *supra* note 40, at 899 (“[I]t is no part of our practice ever to ‘overrule’ a textual provision.”).

<sup>87</sup> *Id.* at 892.

<sup>88</sup> *Id.* at 895.

<sup>89</sup> Others include linguistic change, academic commentary, political leadership, and social activism. *Cf. id.* at 911-12.

<sup>90</sup> See *id.* at 898; Strauss, *supra* note 67, at 1750-51.

<sup>91</sup> See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757-58 (1994) (noting the inconsistency between the warrant requirement and the constitutional text as it was traditionally understood).

<sup>92</sup> See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224-25 (1988) (noting the historical novelty of the injury-in-fact rule as an interpretation of the Article III “case or controversy” requirement); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 168-97 (1992) (same).

ing future interpretations, as it has in the Fourth Amendment and Article III contexts. At the extreme, a common law constitutional interpretation may become so successful that it renders implausible most or all other meanings of the text, including those that were previously well within the mainstream. Again, examples will be controversial, but one possibility is the application of the Equal Protection Clause to racial discrimination in jury selection, which now seems virtually unassailable despite strong evidence that the Fourteenth Amendment was not originally understood to apply to jury service.<sup>93</sup> It is in examples like these that the textual frameworks for common law constitutionalism can themselves be said to evolve through a common law process.

The important point is that the pace and frequency of this evolution are substantially constrained by the strong conventionalist role of the text. At the same time, common law constitutionalism serves as one important factor in shaping the content of conventionalist understandings. In these respects, it is clearly consistent with a conventionalist commitment to the constitutional text. No more is necessary to refute the originalist argument from writtenness, which requires affirmative inconsistency. But the point can and should be made even stronger. Common law constitutionalism is not merely reconcilable with writtenness; the writtenness of the Constitution actually advances the goals of common law constitutionalism in two important and frequently overlooked ways.

First, the existence of a written constitutional text, whose plausible range of interpretations is limited at any given time and changes only gradually, helps ensure the baseline of legal stability necessary to make common law innovation attractive. This is related to but distinct from the conventionalist function of the text, which emphasizes its synchronic value in facilitating coordination at any given moment. Common law constitutionalism, by contrast, emphasizes the text's diachronic value as a brake on the rate of common law change, which can proceed no faster (or more broadly) than the rate of change in the text's plausible range of meanings.<sup>94</sup> Put simply, conventionalism

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<sup>93</sup> See generally Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 204-05 (1995) (arguing that "jury service . . . was conceived of as a political right" and therefore not covered by the Fourteenth Amendment at the time of its ratification).

<sup>94</sup> In practice, this diachronic stability probably also enhances the text's utility as a focal point for legal coordination. In theory, however, coordination merely requires a high degree of synchronic salience. A diachronically unstable text that remained highly salient in a synchronic sense would still be a valuable focal point.

is primarily concerned with cooperation, common law constitutionalism with long-term planning. The written text facilitates both.

Second, and relatedly, the association of a particular common law interpretation with the written text can make that interpretation more durable than it would have been otherwise. Over time, the interpretation serves to shape the meaning of the text, and the salience of the text serves to reinforce the interpretation. The effect can be especially powerful if the interpretation resonates strongly with ordinary contemporary understandings of the text. Take the constitutional prohibition against gender discrimination—a classic common law innovation.<sup>95</sup> One reason that prohibition is more secure than, say, the right to abortion is its now-close linkage in the public mind with the text of the Equal Protection Clause. The same goes for the jury-selection and warrant-requirement examples discussed earlier.<sup>96</sup> In this way, the written Constitution plays a vital role in common law constitutionalism.

This claim may seem puzzling given that David Strauss, the most influential proponent of common law constitutionalism, has so frequently cast it as the opposite of written constitutionalism.<sup>97</sup> But the puzzle is mostly superficial. Partly, it is a product of Strauss's occasional tendency to conflate the written Constitution with its original meaning. Many of his attempts to downplay the significance of the former are in fact addressed primarily or exclusively to the latter.<sup>98</sup>

<sup>95</sup> Witness the gradual development of sex discrimination doctrine in *Reed v. Reed*, 404 U.S. 71, 74-77 (1971); *Frontiero v. Richardson*, 411 U.S. 677, 682-88 (1973); *Craig v. Boren*, 429 U.S. 190, 197-99 (1976); and *United States v. Virginia*, 518 U.S. 515, 531-34 (1996).

<sup>96</sup> Of course, the warrant requirement has been under steady assault for some time. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 733-34 (1999). But for now it survives, see *Arizona v. Gant*, 129 S. Ct. 1710, 1721 (2009), and its survival for more than half a century almost certainly owes something to the appearance of the word "warrant" in the constitutional text. See Strauss, *supra* note 67, at 1725-26.

<sup>97</sup> See Strauss, *supra* note 67, at 1726-32 (explaining that the text of the Constitution "plays essentially no operative role in deciding the most controversial constitutional questions," which are resolved primarily by analysis of precedent); Strauss, *supra* note 40, at 885-86 (arguing that the common law, not the constitutional text, "provides the best way to understand the practices of American constitutional law"); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1504-05 (2001) (indicating that formal textual amendment plays only an incidental role in the evolution of the constitutional order); see also Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 33-36 (1998) (making a parallel point in developing their quite similar notion of a "sedimentary constitution").

<sup>98</sup> See Strauss, *supra* note 67, at 1721-22 (invoking Thomas Jefferson's argument that one generation has no right to bind another as a challenge to the idea of written constitutionalism); Strauss, *supra* note 40, at 880, 904, 917 ("Following a written constitution means accepting the judgments of people who lived centuries ago in a society

The puzzle is also partly a product of Strauss's focus on individual litigated cases. He is obviously correct in observing that the great bulk of these are decided under judge-made doctrines without strong grounding in the constitutional text. But this observation is perfectly consistent with the notion of the text as a framework shaping and channeling the development of doctrine at the margins (as well as constitutional law outside the courts). Indeed, that notion is essentially the one Strauss himself advocates under the heading of conventionalism.<sup>99</sup> Finally, Strauss's skeptical statements about the written Constitution are completely consistent with the notion that the text provides an institutional framework within which both courts and other actors can shape constitutional meaning over time. To the extent that his rhetoric outruns these explanations, it is best interpreted as a corrective to the conventionally exaggerated dichotomy between written and unwritten constitutions, which, despite their significant differences, share many common elements.<sup>100</sup>

Another puzzle—this one cutting in the opposite direction—is the strong resemblance between common law constitutionalism and some versions of originalism. The most obvious parallel is to Jack Balkin's "framework originalism," which regards the central purpose of the Constitution as "setting up a basic structure for government, making politics possible, and creating a framework for future constitutional construction."<sup>101</sup> This sounds a lot like common law constitutionalism. As such, it raises an important question: does a common law constitutionalist commitment to the text as framework require the embrace of at least a weak version of originalism? Balkin seems to think it does. Under his approach, the Constitution's original meaning serves as the framework, with something like common law constitutional "construction" filling in the gaps, embellishing, and resolving difficult questions of application. To be sure, Balkin thinks that original meaning leaves

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that was very different from ours."); Strauss, *supra* note 97, at 1464-65 (questioning the conception of a written constitutional amendment as a "decisive act by the people").

<sup>99</sup> See Strauss, *supra* note 67, at 1731-40 (maintaining that all constitutional principles must at least superficially flow from the text of the Constitution); Strauss, *supra* note 40, at 906-24 ("[I]n some way or another, however creative the interpretation, the text must be respected.")

<sup>100</sup> Cf. Strauss, *supra* note 40, at 890 (contrasting commonalities between the U.S. Constitution and the unwritten British Constitution with differences between the written constitutions of the United States and the written constitutions of other nations); *id.* ("The common law approach to constitutional interpretation . . . reduces (although it does not eliminate) the distinction between written and unwritten constitutions . . .").

<sup>101</sup> Balkin, *supra* note 54, at 549-50.

ample room for such construction. Indeed, he celebrates this fact as central to the Constitution's democratic legitimacy. Nevertheless, in his view, constitutional construction "must always remain faithful to the basic framework," as defined by the text and its original meaning.<sup>102</sup> If this were true, common law constitutionalism would weakly support, rather than refute, the originalist argument from writtenness.

It is not true. Balkin's approach illustrates one plausible way in which the text might serve as a framework for constitutional construction, common law or otherwise. But it is not the only way. The plausibility of Balkin's claim to exclusivity comes from our tendency to think of a framework as something fixed. And indeed, in both constitutions and buildings, frameworks need to possess a substantial measure of stability to perform their function. But they do not need to be fixed irrevocably—or what amounts to almost the same thing, to be fixed except as against prohibitively onerous overhaul such as an Article V amendment. Rather, the elements of a framework may themselves benefit from repair or replacement over time. A joist may rot; a truss may bow. Similarly, the textual framework for common law constitutionalism may become ill adapted to contemporary needs. So long as the framework does not change too often—or, more important, all at once—it is still performing important structural work.<sup>103</sup> It does this in part by constraining the options of future tinkerers, who can repair or replace its elements but cannot substitute a wet bar for a joist or a right to bet on college sports for the Fourth Amendment.

The distinction between construction within a framework and alteration of that framework is unquestionably hazy. Doubtless, Balkin's permissive conception of original meaning would put most common law constitutional innovation on the construction, rather than the alteration, side of the line. In fact, that seems to be the central point of

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<sup>102</sup> *Id.* at 550.

<sup>103</sup> There is a parallel to the Ship of Theseus paradox, which poses the question whether a ship whose planks have all been replaced (in some versions multiple times) can remain the same ship. See 1 PLUTARCH, *The Life of Theseus*, in LIVES 55 (John Dryden trans., Edinburgh, A. Donaldson & J. Reid 1763). For practical purposes, however, it hardly matters whether the rebuilt ship is "the same" in some rarefied philosophical sense. What matters is that it floats. Similarly, it is for practical purposes irrelevant whether an evolving constitution is the "same" constitution in some philosophical sense. What matters is that the written document plays an important functional role—channeling, facilitating, constituting—that does not depend on a wholly, or even a partially, originalist approach. Cf. Schauer, *supra* note 73, at 829 ("With constitutional language, so long as the enterprise stays afloat it is no objection that the current conception bears no close relation to the ordinary language meaning of the text. If we have moved in small steps from the original text, the enterprise stays afloat." (footnote omitted)).

his take on originalism.<sup>104</sup> But even a loosey-goosey originalist like Balkin has to admit that common law constitutional change can alter, as well as construct, the framework supplied by original meaning. And if that is true, it is possible to be a common law constitutionalist without endorsing any version of originalism. The clearest examples involve evolution in the meaning of legal terms of art, which, if originally understood as such, Balkin insists must retain their original technical meanings.<sup>105</sup> Suppose the words “freedom of speech” in the First Amendment were originally understood as a term of art banning prior restraints (and only prior restraints) on speech.<sup>106</sup> Later expansions of their meaning through common law interpretation would then represent an alteration of the constitutional framework as Balkin conceives it. Alternatively, and more plausibly, suppose the words “cases” and “controversies” in Article III<sup>107</sup> were originally understood as terms of art requiring that federal plaintiffs possess a cause of action.<sup>108</sup> Their later interpretation to require injury in fact, causation, and redressability<sup>109</sup> would then represent a common law alteration to original meaning rather than a Balkinian construction. So long as these examples are consistent with a view of the text as a framework for common law development—and they plainly are—there is no logical imperative that common law constitutionalists embrace even Balkin’s weak version of originalism.

None of this is to suggest that common law constitutionalism is normatively superior to Balkin’s approach or indeed to any other version of originalism. Perhaps the evolving framework it embraces pro-

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<sup>104</sup> See Balkin, *supra* note 54, at 598. Despite his professed conversion to originalism, Balkin’s recent series of articles on the subject seems far more concerned with—and is far more successful at—demonstrating the compatibility of originalism and living constitutionalism than in making an affirmative case for the former. This compatibility thesis is an important contribution, though one with notable antecedents. See Ronald Dworkin, *Comment*, in *A MATTER OF INTERPRETATION* 115 (Amy Gutmann ed., 1997); Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165, 1170-73 (1993). Happily, it is a contribution wholly unaffected by the failure of the argument from writtenness.

<sup>105</sup> See Balkin, *Abortion and Original Meaning*, *supra* note 8, at 304-05; Balkin, *Original Meaning and Constitutional Redemption*, *supra* note 8, at 491-92.

<sup>106</sup> Cf. LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 182-236 (1960) (defending this interpretation). Of course, Levy later retracted this view under heavy criticism, see LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS*, at i-xix (1985), but that does not affect its illustrative force.

<sup>107</sup> U.S. CONST. art. III, § 2.

<sup>108</sup> See Fletcher, *supra* note 92, at 224-25 (making this claim); Sunstein, *supra* note 92, at 168-69 (same).

<sup>109</sup> See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

vides too little stability for effective governance or private planning. Or perhaps its devotion to precedent places too heavy a thumb on the scale in favor of past practices.<sup>110</sup> Perhaps it is undemocratic in departing from the constitutional meanings ratified by the people.<sup>111</sup> Or perhaps it is too susceptible to the shifting sands of popular opinion.<sup>112</sup> The important point is that common law constitutionalism provides a coherent and plausible nonoriginalist rationale for taking the constitutional text seriously. That is enough to doom the originalist argument from writtleness.

### C. *Constitutional Culture*

Yet another nonoriginalist form of commitment to a written constitution is popular or democratic constitutionalism. The idea here is that the Constitution emanates from the people and retains its legitimacy only to the extent that they continue to accept it as their own. On this view, the text serves as a locus of normative discourse in an active and evolving constitutional culture, which both informs and constrains the development of constitutional law in the courts. Its role is not to fix constitutional meaning at one point in time but to supply a set of institutions, principles, and above all a language or discourse, which the people can use to shape and reshape their constitutional commitments over time. As Reva Siegel puts it, “Text matters in our tradition because it is the site of understandings and practices that authorize, encourage, and empower ordinary citizens to make claims on the Constitution’s meaning.”<sup>113</sup> This process unfolds both in Congress and the courts, in the mainstream news media and viral e-mail campaigns, in the public square and private homes. But its central feature is a democratic contest over the best interpretation of the constitutional text for our time.

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<sup>110</sup> Certainly, some versions of originalism might allow more room for radical change. See generally Balkin, *Abortion and Original Meaning*, *supra* note 8 (defending *Roe v. Wade*, 410 U.S. 113 (1973), by reference to original meaning).

<sup>111</sup> See, e.g., WHITTINGTON, *supra* note 8, at 112 (“Abandoning originalism allows the judiciary to impose value choices that have not been authorized by democratic action.”).

<sup>112</sup> See, e.g., 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 104, at 3, 40-41 (“A society that adopts a bill of rights is skeptical that ‘evolving standards of decency’ always ‘mark progress,’ and that societies always ‘mature,’ as opposed to rot.”).

<sup>113</sup> Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 299 (2001) (emphasis omitted).

The rules of this contest are fluid and complex, but it is made possible by the unity, brevity, publicity, and accessibility of the constitutional text. These are the qualities Franklin Roosevelt had in mind when he described the Constitution as “a layman’s document, not a lawyer’s contract.”<sup>114</sup> And it is these qualities—all fundamentally linked with writeness—that allow ordinary citizens and popular movements to grasp, to engage with, and ultimately to lay claim to the constitutional text as support for their own passionately held visions of the American political order. Again, Reva Siegel puts it well: “Setting forth the terms of the constitutional compact in a writing signifies a commitment to transparency in government. . . . A constitutional order organized on such terms allows for ongoing public authorship.”<sup>115</sup> Such authorship takes place through a number of complex social and institutional mechanisms but “because ordinary citizens are not trained legally they take the text seriously while nevertheless infusing it with meanings that professional lawyers are apt to dismiss as unfounded.”<sup>116</sup> Sometime these meanings gain broad cultural acceptance and serve as catalysts for changing judicial interpretations of the Constitution.<sup>117</sup>

This process is distinguished from simple, anything-goes politics by the centrality of the constitutional text, which serves to channel popular constitutional claims into “the medium of a common tradition.”<sup>118</sup> In this respect, popular constitutionalism may seem to resemble conventionalism, which also understands the text to perform a channeling function. In reality, however, the two are quite distinct.

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<sup>114</sup> Franklin D. Roosevelt, Address on Constitution Day (Sept. 17, 1937), in *THE TWO FACES OF LIBERALISM: HOW THE HOOVER-ROOSEVELT DEBATE SHAPES THE 21ST CENTURY* 357, 360 (Gordon Lloyd ed., 2007).

<sup>115</sup> Siegel, *supra* note 113, at 314-15.

<sup>116</sup> Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 *CAL. L. REV.* 959, 981-82 (2004).

<sup>117</sup> See, e.g., Siegel, *supra* note 113, at 314 (“Outside the courthouse, the Constitution’s text plays a significant role in eliciting and focusing normative disputes among Americans about women’s rights under the Constitution—a dynamic that serves to communicate these newly crystallizing understandings and expectations about women’s rights to judges interpreting the Constitution inside the courthouse door.”); Reva B. Siegel, Nicholas deB. Katzenbach Professor of Law and Professor of Am. Studies, Yale Law Sch., 2005–06 Brennan Center Symposium Lecture: Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA, as reprinted in 94 *CAL. L. REV.* 1354-55 (2006) [hereinafter Siegel, Constitutional Culture] (“[P]olitical-abolitionists and suffragists endeavored to pursue change by appeal to the Constitution. To achieve change, [they] repudiated officially sanctioned accounts of the Constitution’s meaning and sought community recognition of new accounts of the Constitution’s meaning.”).

<sup>118</sup> Siegel, Constitutional Culture, *supra* note 117, at 1350.

While conventionalism sees the role of the text as settling or narrowing the range of social disagreement, popular constitutionalism sees it as accommodating, or even encouraging, disagreement. The idea is that the openness of constitutional culture and the perpetually unsettled status of constitutional meaning provide a productive outlet for social conflict. If constitutional meaning were irrevocably settled, some groups would be permanently cast as constitutional losers, eliminating or reducing their sense of participation in a shared community. In a culture of popular constitutionalism, by contrast, the meaning of the foundational document is always up for grabs if one can make a sufficiently persuasive case, which the document itself supplies the tools for doing.<sup>119</sup> This allows “agents of deeply agonistic views [to] remain engaged in constitutional dispute, speaking through the Constitution rather than against it.”<sup>120</sup>

Keith Whittington and Jack Balkin both acknowledge popular constitutionalism as consistent with writtenness but nevertheless insist that commitment to a written constitution logically requires some form of originalism. Whittington accepts the legitimacy of popular constitutionalism but only for the political branches, not the courts. Hence his claim, quoted earlier, that only originalism can explain the existence of a written constitution “and a judiciary committed to interpreting that text.”<sup>121</sup> Unfortunately, the basis for and the extent of this concession are both ambiguous. On the one hand, Whittington argues that the democratic accountability of the political branches entitles them to embrace evolving popular understandings.<sup>122</sup> This suggests a retrenchment to something like Branch One, in which popular sovereignty restricts the courts to originalist interpretation. But if that is the case, Whittington’s argument from writtenness fails to provide an independent justification for originalism.<sup>123</sup> It merely reopens ar-

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<sup>119</sup> Originalism may itself be understood as an attempt to make such a case. See Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 708 (2009); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 548 (2006).

<sup>120</sup> Siegel, *Constitutional Culture*, *supra* note 117, at 1327; see also *id.* at 1350 (“Perpetual contest about the Constitution’s past and future dynamically sustains its democratic authority.”); SEIDMAN, *supra* note 61, at 8 (“Unsettlement theory differs from its rivals by making the paradoxical claim that constitutional law can help build such a community by creating, rather than settling, political conflict.”).

<sup>121</sup> WHITTINGTON, *supra* note 8, at 61 (emphasis added).

<sup>122</sup> *Id.* at 78.

<sup>123</sup> See *supra* subsection I.A.1.

guments about the adequacy of popular sovereignty as a normative justification.

On the other hand, Whittington also suggests that writtenness requires that nonoriginalist constitutional activity by the political branches be limited to constitutional construction—that is, to the filling of gaps in original meaning and the creative application of that meaning to particular factual circumstances. If the legislature goes beyond this role to supersede original meaning, Whittington thinks that writtenness requires the judiciary to force it back within originalist bounds.<sup>124</sup> This suggests a view more like Branch Three, in which originalism is taken to follow from the commitment to a written constitution—at least where original meaning is discernible and controlling—because it is the only approach capable of explaining that commitment. The preceding discussion, however, shows that this is not the case. The written text plays an important role in shaping popular understandings, many of which are subsequently incorporated into judicial interpretations.

Like Whittington, Jack Balkin acknowledges—indeed celebrates—the possibility of politically and culturally driven evolution of constitutional meaning. He even believes, *pace* Whittington, that courts have a role to play in this enterprise.<sup>125</sup> Still, Balkin insists that constitutional evolution can properly take place only through construction; it cannot override original meaning. Nothing about the nature of writtenness, however, explains why this should be the case. As the preceding discussion shows, a written constitutional text can usefully serve as a locus for normative discourse in a flourishing constitutional culture even if—perhaps especially if—its original meaning is displaceable by social movements and norm entrepreneurs. Balkin's only response is that “the rule of law” requires that textual meaning remain constant.<sup>126</sup> This is unpersuasive. The rule of law—as a minimum baseline requirement—does not require absolute stability in original meaning any more than it requires absolute stability in constitutional construction (which on Balkin's account, at least, has a far greater influence on the Constitution's practical day-to-day effects). So long as most

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<sup>124</sup> See WHITTINGTON, *supra* note 8, at 56, 79.

<sup>125</sup> See Balkin, *supra* note 54, at 569-71 (discussing the several ways that courts “engage in constitutional construction,” such as “rationaliz[ing] new constitutional constructions by the political branches through creating new doctrines” and “cooperat[ing] with the dominant forces in national politics by policing and disciplining those who do not share the dominant coalition's values”).

<sup>126</sup> *Id.* at 552.

constitutional principles remain mostly stable most of the time, the rule of law is preserved, even if—in the limiting case—no principle remains completely stable all of the time. Of course, it is possible to debate the optimal level of stability above this bare minimum, but then we are back to the fixed-constraint variant of Branch One, in which case writtleness is doing no independent work.

Once again, none of this is to suggest that a nonoriginalist popular constitutionalism is normatively superior to the originalist versions defended by Whittington and Balkin. Those versions may be required by popular sovereignty. They may better promote the rule of law, or they may help to foster the sense of shared tradition on which popular constitutionalism ultimately depends. They do not, however, follow deductively from our commitment to a written Constitution.

#### D. *Pluralist Interpretation*

A final example of nonoriginalist commitment to the written Constitution is the pluralist approach to constitutional interpretation. This approach comes in a great many theoretical variants, but its defining characteristic is the recognition of multiple authoritative sources of constitutional meaning. Typically, the list includes text, original understanding, historical practice, judicial precedent, and moral values, although there are a number of other plausible candidates embraced by different variants. Pluralist theories draw much of their strength from descriptive accuracy: it is virtually incontrovertible that contemporary American constitutional practice has a substantially pluralist cast.<sup>127</sup> Nevertheless, many pluralist theories have a strong normative component as well. This should not be surprising. Most constitutional theorists believe the American system functions at least tolerably well, and if that is the case, the pluralist interpretive approach that defines it can hardly be all bad.<sup>128</sup>

Like the other theories discussed in this Part, pluralist theories of interpretation accord the written Constitution an important role. Nearly every pluralist theory recognizes text as, at a minimum, the first source of interpretive authority among equals. Most accord the text an even more privileged status, embracing the principle that a clear

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<sup>127</sup> To confirm this, one has only to thumb through any randomly selected volume of the *U.S. Reports*. Arguments from text, original understanding, history, and precedent are ubiquitous in constitutional cases.

<sup>128</sup> See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1236-37 (1987); see also Strauss, *supra* note 40, at 888.

textual command trumps any contrary interpretive source.<sup>129</sup> Unlike originalists, however, pluralists do not understand text and original meaning as synonymous. Nor do they accept that the *most* natural reading of the text must always prevail over other interpretive sources. Rather, many pluralists that believe the text should be construed to cohere with other sources to the maximum extent possible.<sup>130</sup> Of course, coherence cannot always be achieved. As established earlier, the plausible range of textual meanings does have outer limits,<sup>131</sup> and most pluralist theories categorically refuse to cross them. Even those that do not recognize departures from the range as momentous and requiring special justification.<sup>132</sup>

It is clear, then, that pluralist theories are meaningfully committed to the written Constitution. The harder question is why pluralists accord text such a privileged role. Unlike the other theories discussed in this Part, pluralist theories have often failed to provide a convincing answer to this question. This is partly a product of pluralism's heavily descriptive tilt. Many pluralist theories are far more concerned with "fitting" our constitutional practice than justifying it. It is also partly the result of a self-conscious determination by some pluralist theorists that their approach requires no justification. On this view, pluralist interpretive practice is itself the source and measure of legitimacy, rather than a means to some extrinsically defined social end.<sup>133</sup> Regardless of the reason, however, pluralist theories have had a lot to say about how text informs constitutional interpretation but relatively little to say about why that should be so. Originalists might point to this reticence as proof that pluralist theories, while perhaps *consistent* with commitment to a written constitution, cannot plausibly *explain* or *make sense of* such commitment. Since originalism can plausibly claim to do

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<sup>129</sup> See Fallon, *supra* note 128, at 1195 ("The text, and its plain language, are taken for granted. Where the text speaks clearly and unambiguously . . . its plain meaning is dispositive.")

<sup>130</sup> See, e.g., *id.* at 1195.

<sup>131</sup> See *supra* Section II.A.

<sup>132</sup> Cf. Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551, 591 (1985) ("[T]he text-as-symbol . . . has served us well as a focal occasion for remembering and then responding to the central, constitutive aspirations of the tradition. . . . The text-as-symbol should be authoritative." (emphasis omitted)).

<sup>133</sup> See PHILIP BOBBITT, *CONSTITUTIONAL FATE* 237-38 (1982) ("[C]onstitutional law needs no 'foundation.' . . . We do not have a fundamental set of axioms that legitimize judicial review. We have a Constitution, a participatory Constitution, that accomplishes this legitimation."); Fallon, *supra* note 128, at 1236-37, 1236 n.219 (making a similar claim).

so—as we have already seen that it can<sup>134</sup>—perhaps it is superior to pluralist theories on that ground.

This is an important challenge to the pluralist approach but not an insurmountable one. Indeed, it can be met in a variety of ways. Perhaps the best is the approach suggested by Richard Primus, who advocates choosing interpretive sources based on their tendency to advance relevant constitutional values.<sup>135</sup> Primus concludes that this choice, which he compares to choosing tools from a kit, ought to be undertaken afresh in each case.<sup>136</sup> But his basic account can easily be adapted to explain the general priority most pluralists accord the constitutional text. Put simply, the utility of some interpretive sources may vary from case to case, but this need not be true for all of them. The text, for example, might plausibly be thought to serve systemic values requiring that its outer limits be respected across the board. An illustration is the possibility, noted by David Strauss, that disregarding the constitutional text in some cases would diminish its value as a focal point in all cases.<sup>137</sup> If this were true, pluralists might well choose among other interpretive sources according to their instrumental value in particular cases while treating the text as a fixed (though often fairly loose) constraint.

Alternatively, it may be possible to rehabilitate the superficially puzzling claim of some pluralists that their approach requires no justification. The basis of this claim is what pluralists see as the broad sociological legitimacy—put simply, social acceptance—of a pluralist interpretive approach. This acceptance cannot obviate the need for normative justification, as some pluralist theorists have at times seemed to contend. But acceptance may itself constitute one sort of normative justification, roughly akin to implied consent. The normative significance of such consent would still have to be defended, of course, but implied consent is often invoked to justify the ongoing authority of a particular constitution or set of institutional arrangements. There is no obvious reason why it could not be invoked to justify a pluralist interpretive practice that accords an important role to the text.

Finally, pluralists might draw on a variety of small-“c” conservative arguments. If our long-standing constitutional practice is both pluralist and text centered,<sup>138</sup> perhaps this approach embodies the accumu-

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<sup>134</sup> See *supra* Section I.C.

<sup>135</sup> Primus, *supra* note 10, at 167.

<sup>136</sup> *Id.* at 175-76.

<sup>137</sup> Strauss, *supra* note 67, at 1734-35.

<sup>138</sup> Cf. Powell, *supra* note 49, at 943-44.

lated wisdom of previous generations, which we should not disregard absent compelling reasons. This is a simple application of the Burkean argument for adhering to established judicial precedents to long-standing interpretive practice.<sup>139</sup> In addition, pluralists could point to the complex web of expectations that has grown up around our pluralist interpretive practice. Lawyers are trained in that practice; citizens and officials rely on it to predict the direction of future judicial decisions. A radical shift to originalism or any other purist approach would disrupt these reliance interests. At a minimum, this must be counted as an important cost of rejecting the pluralist approach. If that approach is working tolerably well in other respects—as many people seem to believe—these reliance interests might be a decisive argument for retaining the pluralist status quo, including its commitment to the text.

None of this is meant as a defense of pluralist interpretation on the merits. Pluralist theories may be too susceptible to judicial manipulation. They may lack the resources to resolve conflicts among different sources of interpretive authority. Or they may permit undesirable drift from the substantively attractive governing philosophy of the Founding Generation. The important point is that the pluralist interpretive approach, like all the other theories discussed in this Part, represents a plausible form of nonoriginalist commitment to the written constitution. The list could go on, but most mainstream nonoriginalist approaches amount to variations on one or more of the four theories already discussed. At any rate, by now it should be clear: originalism is not the only interpretive approach that can explain our commitment to a written constitution. In fact, all plausible approaches can do this. The writtenness of the Constitution therefore provides no basis for choosing originalism over other contenders.

#### E. *Other Countries*

If there is any lingering doubt on this score, a glance overseas should help to resolve it. More than 150 countries around the world have written constitutions.<sup>140</sup> Most of these are much newer and easier to amend than the U.S. Constitution, which, if anything, should make

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<sup>139</sup> See Strauss, *supra* note 40, at 899.

<sup>140</sup> Varun Gauri, *Social Rights and Economics: Claims to Health Care and Education in Developing Countries*, 32 *WORLD DEV.* 465, 465 (2004).

originalism more attractive abroad than it is here.<sup>141</sup> Yet the limited comparative literature on constitutional interpretation suggests that such is not the case. If anything, the contrary is true. Of course, the relevance of foreign practices to American constitutional law is a controversial subject. Originalists in particular often dismiss foreign practices as completely irrelevant.<sup>142</sup> These dismissals may or may not be reasonable in other contexts, but foreign practices are clearly relevant to the argument from writtenness. How could they not be? That argument is a claim about the inherent nature of written constitutions. If most countries with written constitutions do not adhere exclusively or even primarily to an originalist interpretive approach, the claim that originalism follows deductively from commitment to a written constitution becomes very difficult to credit. Indeed the claim becomes scarcely intelligible. Perhaps a single country, or even a handful of countries, might be confused about the requirements of such a commitment. But how could originalism possibly follow deductively from writtenness if written constitutions and originalism are not even inductively correlated in most cases?

The comparative literature is too limited to make any confident claims about interpretive practices predominating among all countries with written constitutions. But it does establish that originalism is nothing like the dominant approach among large, well-functioning constitutional democracies. In Canada, for example, Peter Hogg states flatly that “[o]riginalism has never enjoyed any significant support.”<sup>143</sup> Rather, “progressive (or dynamic) interpretation, as articulated in the metaphor of the ‘living tree’, [is] the dominant theory of interpretation.”<sup>144</sup> A prominent illustration is *In re Section 94(2) of the Motor Vehicle Act*,

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<sup>141</sup> See Coan, *supra* note 22, at 848-57 (discussing extreme age and difficulty of amendment as catalysts for debates in American constitutional theory); see also Primus, *supra* note 10, at 208 (discussing the democratic appeal of originalism as a method for interpreting recently adopted constitutional provisions).

<sup>142</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551, 626-28 (2005) (Scalia, J., dissenting) (criticizing the Court’s reliance on foreign law); S. Res. 92, 109th Cong. (2005) (declaring that courts should rely on foreign materials only when they “inform an understanding of the original meaning of the Constitution”); H.R. Res. 97, 109th Cong. (2005) (same); Nicholas Quinn Rosenkranz, *An American Amendment*, 32 HARV. J.L. & PUB. POL’Y 475, 475-79 (2009) (asserting that foreign law has no bearing on the proper interpretation of the Constitution); Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to The Law of Other States*, 59 STAN. L. REV. 1281, 1301 (2007) (arguing that “most questions of law and policy are inherently local” and so foreign policy choices are irrelevant to American constitutional law).

<sup>143</sup> Peter W. Hogg, *Canada: From Privy Council to Supreme Court*, in INTERPRETING CONSTITUTIONS 55, 83 (Jeffrey Goldsworthy ed., 2006).

<sup>144</sup> *Id.* at 87.

where the Supreme Court of Canada read the Canadian Charter of Rights and Freedoms to guarantee substantive as well as procedural due process, despite an unambiguous original understanding to the contrary.<sup>145</sup> The provision in question was Section 7, which establishes the right “not to be deprived” of life, liberty, or security of the person “except in accordance with the principles of fundamental justice.”<sup>146</sup> Clear evidence established that the Framers had self-consciously used the words “fundamental justice” as a term of art to exclude American-style substantive due process.<sup>147</sup> But although the Charter had been adopted only three years earlier, the court refused to embrace this reading on the ground that an originalist interpretive approach would destroy “the possibility of growth and adjustment over time.”<sup>148</sup> The court has stuck to this position in years hence, tending to emphasize changing social needs and constitutional purposes broadly defined, rather than drafting history or original meaning.<sup>149</sup>

Germany is in many ways similar. The constitutional text is central to German interpretive practice, with the Federal Constitutional Court (FCC) rarely departing radically from its common understanding.<sup>150</sup> Within the bounds of that common understanding, however, the FCC has employed a richly pluralist approach to select among the range of textually plausible interpretations. Two features of that practice are especially noteworthy. The first is the notion that an “objective order of values” stands above and informs the interpretation of the written constitution.<sup>151</sup> In practice, this seems to amount to something between a pure natural law approach—in which objective moral values trump positive law—and a Dworkinian “interpretive” approach—in which objective moral values are employed to make positive law the best it can be.<sup>152</sup> The other noteworthy feature of German practice is its avowedly teleological character. As understood by the FCC, this practice mainly entails “an inquiry into the *function* of a rule, structure, or practice as it

<sup>145</sup> See [1985] 2 S.C.R. 486, 504-09, 530-32 (Can.).

<sup>146</sup> Part I of the Constitution Act, 1982, § 7, being Schedule B to the Canada Act 1982, ch. 11 (U.K.), as reprinted in R.S.C., No. 44 (Appendix II 1985).

<sup>147</sup> [1985] 2 S.C.R. at 504-05.

<sup>148</sup> *Id.* at 509.

<sup>149</sup> See Hogg, *supra* note 143, at 84-93.

<sup>150</sup> See Donald P. Kommers, *Germany: Balancing Rights and Duties*, in INTERPRETING CONSTITUTIONS, *supra* note 143, at 161, 190.

<sup>151</sup> *Id.* at 179-83.

<sup>152</sup> See generally RONALD DWORKIN, *LAW'S EMPIRE* 216 (1986) (arguing that a community that considers “integrity to be central to politics . . . provides a better defense of political legitimacy than the other models”).

operates within the broad compass of contemporary social and political reality.”<sup>153</sup> The emphasis is on “practical utility over abstract analysis and efficiency over textual literalism.”<sup>154</sup> Neither the “objective order of values” nor the teleological approach to interpretation is entirely uncontroversial. Some German judges and scholars argue that these practices are legitimate only when they draw on values and purposes written into the constitutional text by its Framers.<sup>155</sup> Occasionally, the FCC even couches a decision in such terms. But more often than not, the court eschews originalist analysis altogether.<sup>156</sup>

Perhaps the most robust example of nonoriginalist commitment to a written constitution is India. Like the Supreme Court of Canada, the Supreme Court of India has interpreted the Indian Constitution to guarantee substantive as well as procedural due process, despite a clear original understanding to the contrary.<sup>157</sup> In doing so, it has espoused an unapologetically nonoriginalist approach of constitutional interpretation, roughly akin to the common law–framework view discussed earlier. Under this approach, “the fundamental rights enshrined in the Constitution . . . have no fixed contents.”<sup>158</sup> Rather, “[f]rom time to time, [the] Court has filled in the skeleton with soul and blood and made it vibrant.”<sup>159</sup> This approach has produced a broad spectrum of substantive rights, ranging from a right to privacy to a right to education to a right to clean air and water.<sup>160</sup> Yet these rights are far from the boldest illustration of nonoriginalism in Indian interpretive practice. That distinction unquestionably goes to the basic structure doctrine, under which the Supreme Court of India has overruled several otherwise valid amendments on the ground that they violated the basic constitutional structure. Supported by a clever textual argument but lacking any basis in original understanding, this doctrine has over time become a well-established feature of the Indian constitutional order. As a result, the Supreme Court of India is now

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<sup>153</sup> Kommers, *supra* note 150, at 200.

<sup>154</sup> *Id.*

<sup>155</sup> *See id.* at 182-83, 200.

<sup>156</sup> *See id.* at 198.

<sup>157</sup> *See* *Gandhi v. Union of India*, (1978) 2 S.C.R. 621, 623.

<sup>158</sup> *People’s Union for Civil Liberties v. Union of India*, (2003) 2 S.C.R. 1136, 1176, *quoted in* S.P. Sathe, *India: From Positivism to Structuralism*, in *INTERPRETING CONSTITUTIONS*, *supra* note 143, at 215, 253.

<sup>159</sup> *Id.*

<sup>160</sup> *See* Sathe, *supra* note 158, at 252-53 (listing also rights to shelter, sufficient food, and health).

one of the most powerful courts in the world.<sup>161</sup> Nevertheless, the written text remains central to the Indian constitutional order, as illustrated by the court's elaborate textual defenses of the basic structure doctrine.

Obviously, these thumbnail sketches are extraordinarily superficial. Equally obviously, the interpretive practices of Canada, Germany, and India are deeply enmeshed with the complicated—and complicatedly different—social and political histories from which they have arisen. A much fuller analysis would be required to draw significant normative lessons for American interpretive practice. For present purposes, however, the basic point suffices: each of these large, well-functioning democracies is committed to a written constitution, but none is committed exclusively or even primarily to an originalist interpretive approach. The nonoriginalist practices they are committed to might provide excellent models, or terrible ones, for American lawyers and judges. More likely, they would not represent a radical break from the American status quo. But their very existence shows that originalism is not the only mode of commitment to a written constitution.<sup>162</sup> Of course, in any given context, some forms of commitment are more attractive than others. Nothing in this Part rules out the possibility that originalism is the most attractive approach in the American context. But it does not follow deductively from the writtenness of the U.S. Constitution.<sup>163</sup>

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<sup>161</sup> See *id.* (explaining the history of the basic structure doctrine in India and its continuing importance).

<sup>162</sup> Thus cornered, proponents of the argument from writtenness might contest the nonoriginalist classification of the foreign practices surveyed here. The difficulty of defining originalism gives this line of defense at least a patina of plausibility. That patina is burnished by the frustrating tendency of the comparative literature to equate originalism with a jurisprudence of original intent (as opposed to original meaning or understanding). Perhaps Canadian, German, and Indian interpretive practices are inconsistent with the original intent (or expected application) of their respective constitutions but nevertheless consistent with original meaning defined at a high level of abstraction (which at least some American originalists regard as the best understanding of originalism). This seems exceedingly unlikely. Even if it were true, however, it would be so purely as a matter of historical contingency, not as a matter of conceptual necessity. The discussion in the main text shows that Canadian, German, and Indian interpretive practices could make perfectly coherent sense of their written constitutions even without being consistent with original meaning in this sense. (Indeed, any such consistency would have to be essentially an accident, given the avowedly nonoriginalist rhetoric that prevails in their interpretive practices.) That is enough to refute the originalist claim that originalism follows from commitment to a written constitution.

<sup>163</sup> It is worth emphasizing that nothing in this Part eliminates the possibility of pragmatic arguments for identifying the written constitutional text with its original meaning and nonoriginalist approaches with an unwritten constitution or supplementation. Thomas Grey has offered a very interesting argument along these lines. See

## III. THE INTERPRETATION RIDER

The previous Part demonstrated that originalism is not the only way to explain why we keep the written Constitution around. Many other approaches accord the written text an important role in constitutional decisionmaking, without entailing any form of originalism. But perhaps our commitment to a written constitution requires more than that. After all, we do not usually speak of judges (or other officials) *according the Constitution an important role* in their decisions. Rather, we speak of them *interpreting* it. Perhaps this implies something more than simply according the text an important role—specifically, an attempt to discover the actual meaning of the text as it was intended (or would have been understood) at the time of its drafting and ratification.<sup>164</sup> That seems to be what interpretation ordinarily consists of with respect to many other sorts of written documents—recipes, grocery lists, old letters, and the like. Perhaps the same is true of all written documents, including constitutions. Perhaps, in other words, the search for original meaning is simply inherent in the concept of interpretation. Many originalists have made arguments of this sort.<sup>165</sup> When careful, they concede that such arguments speak only to the nature of interpretation, not to the legitimacy of the Constitution. They cannot, that is, tell us whether judges (or anyone else) should interpret the Constitution or ignore it. But so long as we ac-

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Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI-KENT L. REV. 211 (1988). The gist is that we should think of judicial creativity as supplementing the written constitution rather than interpreting its open-ended provisions because, where judges are exercising substantial discretionary power, that fact should be kept clearly in view. *See id.* at 233-38. We might think of Branch One as an argument of this sort, urging that identification of nonoriginalist approaches with the written Constitution would eliminate its ability to promote the values of popular sovereignty and constraint. The important point about Grey's argument and this reformulation of Branch One is that they are quintessentially and overtly dependent on external normative considerations. Rather than arguing that a particular conception of constitutional interpretation follows from the very nature of writtleness, they argue that a particular conception of writtleness is pragmatically useful in advancing the normative goals of an interpretive approach, which they recognize must be defended on the merits.

<sup>164</sup> Many proponents of this argument are original-intent, rather than original-public-meaning, originalists. But for present purposes, the distinction is immaterial. Both versions of the argument have the same essential form and suffer from the same defects. For the sake of simplicity, this Part uses the term original meaning to encompass both original public meaning and original intent.

<sup>165</sup> *See, e.g.,* Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 635 (2005); Lawson & Seidman, *supra* note 8, at 71; Prakash, *supra* note 11; Prakash, *supra* note 12, at 434-37; Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors Are Wrong for America*, 106 COLUM. L. REV. 2207, 2223-31 (2006) (book review); Prakash, *supra* note 44, at 540-46.

cept the Constitution as *binding law*, originalism is not merely one approach to constitutional interpretation; it *is* constitutional interpretation.

Call this “the interpretation rider” to the argument from writtenness. Although it purports to be a purely descriptive exercise in analytic jurisprudence, the rider is deeply implausible when understood as such. It becomes much more plausible, however, when viewed as an example of the rhetorical phenomenon C.L. Stevenson called “persuasive definition.”<sup>166</sup> Seen through this lens, the rider reveals itself as an attempt to resolve a normative debate through tendentious redefinition of two normatively charged terms: interpretation and binding law. There is broad agreement that judges should interpret the Constitution as binding law. Thus, by defining interpretation and binding law as synonymous with an originalist approach, the rider appears to answer the normative question of how judges should decide constitutional cases. But it is only an appearance. This is not to suggest that the rider’s definitional claims are “purely arbitrary” or “merely nominal.” It is certainly not to suggest that they are made in bad faith. Their function, however, is chiefly rhetorical, rather than analytic. Consequently, they lack the independent normative significance their proponents often attribute to them.

A crucial premise of this rhetorical analysis is that the rider not only fails as a purely descriptive conceptual analysis but is difficult to make sense of as such. To establish this, Part III begins by analyzing the rider on its own purportedly descriptive terms. So conceived, the rider admits of both a strong and a modest construction. As Section III.A shows, the former is too unpersuasive and the latter too obvious to explain the effort expended by originalists in their defense. From a rhetorical perspective, however, that effort can be understood quite readily. To that end, Section III.B briefly summarizes C.L. Stevenson’s account of persuasive definitions. Sections III.C and III.D proceed to apply that account to the rider’s claims about the nature of interpretation and binding law, respectively.<sup>167</sup>

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<sup>166</sup> Stevenson, *supra* note 13.

<sup>167</sup> The discussion in this Part bears some resemblance to an argument of Frederick Schauer’s. See Frederick Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 OXFORD J. LEGAL STUD. 493 (2005). Schauer observes that conceptual analysis of socially constructed practices like law can come in two forms: purely descriptive (or explanatory) and purely normative. The former is concerned only with describing a particular concept as it is presently understood by a relevant community of practitioners. The latter is concerned with the concept that it would be good for us to adopt (or keep), whether it is the concept we have now or not. As such, this form of conceptual analysis must be—and often is—defended through normative

A. “*Descriptive*” Analysis

Like the argument from writtness proper, the interpretation rider’s appeal stems in large part from its claim to stand outside the fuzzy and inconclusive realm of normative argument. Of course, the idea that judges should interpret the Constitution as binding law is a normative claim. But it is so widely accepted as to be essentially axiomatic. Beyond that, the rider purports to be purely descriptive. Interpretation is the search for original meaning. To treat the Constitution as binding law is to follow that meaning. Many originalists press this point with great vigor, but it is unclear what exactly they purport to describe.

The most obvious possibility is the underlying logic or predominant understanding of some set of actual social practices.<sup>168</sup> This is the strong construction of the rider as descriptive analysis, and it runs into an immediate difficulty: there is no set of social practices it could plausibly describe. It cannot be a descriptive claim about interpretive practice in general because that practice obviously involves far more than the search for original linguistic meanings, grocery lists and recipes notwithstanding. Indeed, it is possible to speak perfectly idiomatically of interpreting “dreams, novels, census data, seismograph records, constitutions and the entrails of a chicken,” most of which do not have original linguistic meanings at all.<sup>169</sup> So the rider is deeply implausible as a description of interpretive practice in general.

Yet the rider’s proponents also do not show any serious interest in describing the way interpretation (or the notion of binding law) is actually understood by officials charged with interpreting constitutions.

argument. The example Schauer discusses is H.L.A. Hart’s famous defense of legal positivism on the ground that it promotes resistance to tyrannical government. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615-21 (1958). Recast in Schauer’s terms, the argument of this Part is that originalist analyses of interpretation and binding law are better understood as normative, rather than descriptive, conceptual analysis. But perhaps out of confusion on this point or perhaps out of rhetorical strategy, their proponents generally refuse to supply the normative arguments necessary to make them persuasive as such. Or if they do supply normative arguments for originalism, they fail to perceive the necessary connection between those arguments and their conceptual claims about interpretation and binding law.

<sup>168</sup> Cf. Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison* (“The criteria that govern people’s use of language are simply the criteria generally relied on in their language community for the use of those terms. . . . The correct criteria are those that people who think they understand the concept or term generally share . . .”), in HART’S POSTSCRIPT 1, 16-17 (Jules Coleman ed., 2001).

<sup>169</sup> Timothy A.O. Endicott, *Putting Interpretation in Its Place*, 13 LAW & PHIL. 451, 457 (1994); see also JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION 241-65 (2009).

It seems unlikely, therefore, that the rider is an attempt to describe any underlying unity in the social practice of constitutional, or even legal, interpretation. Indeed, if that were its goal, the rider's claims would be wildly implausible. As Part II demonstrated, the actual practice of officials interpreting legally binding written constitutions is radically inconsistent with the rider's originalist conceptions of interpretation and binding law.<sup>170</sup>

Many originalists candidly acknowledge this fact,<sup>171</sup> but they fail to perceive the difficulty it poses for their purportedly descriptive ambitions. If not the actual social practice of interpretation in general or constitutional interpretation in particular, what could the interpretation rider possibly be attempting to describe? The best answer is that it is attempting to describe the actual practice of constitutional interpretation but not to describe it comprehensively. Rather, it is attempting to isolate and describe two analytically distinct aspects of that practice. This weak construction of the rider as descriptive analysis is far more plausible than the strong version. The search for original meaning is not the whole of constitutional interpretation as that activity is actually understood by its practitioners. It is probably not even the dominant aspect, but it is undeniably an aspect. It is also undeniably distinct from other aspects of interpretive practice, such as the search for the morally best meaning that present-day Americans would recognize as a plausible understanding of the written text. The same

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<sup>170</sup> Even if the originalist account tracked prevailing practice more closely, it is not clear what significance that would hold for adherents of competing views. So long as those views are not internally contradictory or otherwise logically untenable, the fact that more practitioners held the originalist view (or that the originalist view better tied together the intuitions held by most practitioners) would provide no reason to abandon nonoriginalist views. To be sure, most adherents of such views are committed to interpreting the Constitution as binding law. But they are committed to *their* understanding of these concepts, not the originalist understanding. As such, that commitment could not, standing alone, provide a compelling reason to embrace the originalist view, even if originalists were clearly in the majority. Of course, the same goes for the actual world in which originalists are almost certainly in the minority. Nothing about their commitment to interpreting the Constitution as binding law compels them to embrace a nonoriginalist approach to these concepts simply because that is the dominant form of social practice. The nonoriginalist approach is not the understanding of interpretation or binding law to which they are committed.

<sup>171</sup> Most colorful among them is Justice Scalia:

It would be hard to count on the fingers of both hands and the toes of both feet, yea, even on the hairs of one's youthful head, the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean.

Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989).

goes for the rider's conception of binding law. Adherence to original meaning is not the only way of being bound by law as contemporary interpreters understand that concept. But it is one way in which some interpreters understand themselves as bound at least some of the time. It is also distinct from other ways of being legally bound, such as adherence to precedents consistent with the conventionalist meaning of the text. Perhaps this is all the rider stands for—that originalism is conceptually distinguishable (and for the sake of analytic precision, should be distinguished) from other aspects of interpretive practice.

This modest construction does not sound much like the sweeping claim that originalism is the only way to interpret the Constitution as binding law. According to Stanley Fish, however, that sweeping claim is merely a kind of shorthand. To be sure, it is a shorthand of which Fish himself has made ample use. Like other proponents of the rider, he frequently makes arguments to the effect that the search for original meaning is “not an approach to interpretation—one possible method in competition with other methods—it *is* interpretation.”<sup>172</sup> But in making such arguments, Fish insists that he does not intend to make any claim about the broad class of actual social practices that go by the name of interpretation. In fact, he professes not to care about the word “interpretation” at all. Rather, his aim is simply to clarify that, if you are trying to “figure out what somebody meant by something, asking what somebody else might have meant by it”—or any of the other questions posed by nonoriginalist interpreters—“is not going to get you there.”<sup>173</sup>

The problem with this modest construction is not that it is wrong but that it makes the interpretation rider virtually pointless. No one needs Fish's clarification. Nonoriginalists are not confused or deluded seekers after original meaning. Nor, for the most part, do they deny that original meaning exists as a factual matter, though it may be practically difficult or impossible to recover. It is simply not the meaning nonoriginalists are after. Rather, they are after another meaning altogether—the one that best preserves the text's conventionalist function or the one most consistent with long-established precedents, for example. They might claim that this meaning is the true or the best meaning of the text, but that is just another way of saying it is the meaning that judges or other officials ought to follow as a normative

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<sup>172</sup> Stanley Fish, *Interpretation Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109, 1112 (2008).

<sup>173</sup> *Id.* at 1133.

matter. It is not a confused claim that normative considerations can somehow transform the text's original meaning.<sup>174</sup> And it is certainly not a claim—of the sort Fish imagines—that the best way to discover original meaning is by searching for something else.

Even if confusion along these lines were a real issue, the rider's approach would seem more likely to exacerbate than to dispel it. After all, we already have a term for the practice of searching for and submitting to original meaning. "Originalism" fills that role quite serviceably, despite interneccine disagreements among originalists (and to some extent their critics<sup>175</sup>) about its precise contours. Certainly it is a more natural choice than "interpretation" and "binding law," which,

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<sup>174</sup> Lawrence Solum seems to think that many nonoriginalist theories of interpretation do in fact make this confused claim. See Solum, *supra* note 9, at 65 ("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. But in the case of constitutional meaning, lawyers and constitutional theorists sometimes confuse the semantic content of a text and the effective legal meaning of the text."); Posting of Lawrence Solum to Legal Theory Blog, Stein on the Domestic Violence Clause & the Fixation of Original Meaning (Reposted, with Comments), <http://lsolum.typepad.com/legaltheory/2009/05/stein-on-the-domestic-violence-clause-the-fixation-of-original-meaning.html> (May 29, 2009) ("Theories of linguistic meanings are positive theories—they are theories about how language works. Arguing for a theory of meaning on the grounds that it produces normatively attractive results in Constitutional cases involves an enormous conceptual error—like arguing that greenhouse gases do not cause global warming because the world would be a better place if physics were different."). But the confusion disappears if these nonoriginalist theories are understood as normative accounts of how judges and other interpreters should attribute legal (rather than linguistic) meaning to the constitutional text. To be sure, most nonoriginalists would be unwilling to concede that their theories permit legal meaning to deviate from or override linguistic meaning. To this extent, they might be thought to contest, at least implicitly, Solum's descriptive claim that original public meaning is the Constitution's one true linguistic meaning (and to do so on normative, rather than descriptive, grounds). But this is essentially a terminological disagreement. Nonoriginalists are happy to concede that their approach permits interpreters to depart from—indeed to contravene—original meaning. That, after all, is what makes them nonoriginalists. Their claim to honor the text's linguistic meaning is a claim to honor other meanings, such as the plausible range of meanings present-day Americans would understand its words to bear. Whether or not these represent linguistic meanings in the technical philosophical sense Solum is concerned with, they are plainly an intelligible object of inquiry. See *supra* Sections I.C, II.A. The important question is a normative one: whether these meanings, or original meaning, ought to be of overriding interest to interpreters. Of course, that is the same question originalists and nonoriginalists have always understood themselves to be debating. Solum's heroic efforts to identify originalism with interpretation and binding law (carefully, openly defined as searching for and submitting to linguistic—which is to say original public—meaning of the text) change nothing.

<sup>175</sup> See Berman, *supra* note 10, at 22 (arguing that the term "originalism" should be reserved for theories holding that interpreters must follow original meaning whenever it is satisfactorily discernible).

as they are actually used and understood, carry a variety of meanings inconsistent with originalism. Indeed, it is difficult to imagine a better recipe for conceptual confusion than for originalists to begin using these terms as synonyms for their own preferred approach. If they stuck with originalism, everyone would know at least roughly what they were talking about and that they were speaking descriptively. But if they insist on making interpretation and binding law synonymous with originalism, many audiences are bound to misunderstand them either as referring to a broader range of practices than they intend to or as arguing for the reform of current practice when they mean merely to describe a subset of it. No sensible person would pursue this course as a strategy for reducing conceptual confusion.<sup>176</sup>

### B. *Persuasive Definitions*

Of course, most proponents of the interpretation rider are perfectly sensible people. They include some of the most distinguished constitutional theorists in the American legal academy. It is hard to believe that this group would vigorously defend a purely descriptive claim as implausible as the strong version of the rider or as obvious as

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<sup>176</sup> The rider is susceptible of one other arguably descriptive formulation—namely, that nonoriginalist conceptions of interpretation and binding law are somehow logically or conceptually impossible, leaving originalist conceptions as the only available candidates. Lawrence Solum seems to take something like this view when he argues that the Constitution's linguistic meaning has to be original public meaning because the fixation of meaning at the time of utterance is logically necessary for written communication over time. See Solum, *supra* note 9, at 66. But this argument assumes its conclusion. Whether and to what extent communication should be the goal of constitutional interpretation—in the particular sense of receiving a message conveyed by specific persons at some prior point in time—is exactly the issue in dispute between originalists and nonoriginalists. If the constitutional text functions (or ought to function) instead (or also) as a conventionalist focal point or a medium for popular constitutionalist discourse, communication (from the Framers and Ratifiers to contemporary interpreters) is not the operative issue. Solum's argument describes what logically must be the case only on the assumption that the activity he is describing has a contested purpose or function. By taking sides in that contest, he gives up describing the concept as it is—i.e., vague or ambiguous, and hence contested—and heads off on a frolic of his own. Cf. Raz, *supra* note 168, at 26. As Joseph Raz has cautioned,

Theoretical explanations . . . tend to be more precise than the contours of the vague concept would allow, were one to be true to them. . . .

. . . [But] [t]o succeed in explaining our own self-understanding through the explanation of some of our concepts requires explaining them as they are. . . .

This means that the reduction in vagueness can only be limited, or the explanation will not be true to the concept explained.

the modest version. There must, therefore, be another explanation. C.L. Stevenson's notion of "persuasive definition" supplies an illuminating one. The basic idea is familiar. As Stevenson explains, "A 'persuasive' definition is one which gives a new conceptual meaning to a familiar word without substantially changing its emotive meaning, and which is used with the conscious or unconscious purpose of changing, by this means, the direction of people's interests."<sup>177</sup> Although the rider is difficult to make sense of as a descriptive claim, it is perfectly intelligible as a persuasive definition in this sense. It defines interpretation and binding law as synonymous with searching for and submitting to original meaning. And it strongly appears to do so for the purpose of making originalism more compelling to an audience that is already committed to interpreting the Constitution as binding law. There is much in this claim to unpack. But first it is necessary to explain further how persuasive definition works and what it can—and cannot—contribute to normative argument.

It will be helpful to begin with an example far removed from the controversies of constitutional theory. Conveniently, Stevenson offers an excellent one. In the nineteenth century, William Wordsworth and other Romantically inclined critics contemptuously dismissed Alexander Pope as "not a poet."<sup>178</sup> Like the interpretation rider and persuasive definitions generally, this criticism superficially took the form of a descriptive claim—in this case, about the nature of poetry. Pope was not a poet, the Romantics argued, because true poetry is defined by passionate emotion and radical innovation.<sup>179</sup> Pope's work, by contrast, was self-consciously artificial and imitative. Therefore, Pope was not a poet. Despite its descriptive patina, it should be obvious that this argument is not a neutral exercise in conceptual analysis. It does not reflect an earnest attempt to discern underlying unities in common or even literary usage. Nor were the Romantics alerting Pope's defenders to a simple terminological error, as if they had mistaken a stool for a table or a rake for a shovel. Such errors are happily and easily cleared up and rarely evoke the sort of passionate commitment the Romantics brought to their denigration of Pope. Rather, as Ste-

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<sup>177</sup> Stevenson, *supra* note 13, at 331.

<sup>178</sup> ROBERT J. GRIFFIN, WORDSWORTH'S POPE 144 (1996). Samuel Johnson famously anticipated this criticism and offered a typically pithy retort: "If Pope be not a poet, where is poetry to be found?" 4 SAMUEL JOHNSON, *Pope*, in THE LIVES OF THE MOST EMINENT ENGLISH POETS; WITH CRITICAL OBSERVATIONS ON THEIR WORKS 1, 79-80 (Roger Lonsdale ed., Oxford Univ. Press 2006) (1781).

<sup>179</sup> This is a gross oversimplification but one that suffices for present purposes.

venson puts it, the words “poet” and “poetry” “are prizes, which [the Romantics sought] to bestow on the qualities of [their] own choice.”<sup>180</sup> They withheld the title “poet” from Pope not to describe his work but to express their low estimation of it and, more important, to persuade others to share that estimation.

This example illustrates three notable features of persuasive definition. First, the term defined must be sufficiently vague or ambiguous<sup>181</sup> to be susceptible of persuasive redefinition. “Poetry”—and by extension “poet”—unquestionably fits the bill. The essence of poetry has been debated in the West for over two thousand years, with no one view able to claim anything like a monopoly on general or professional usage. Moreover, the terms “poet” and “poetry”—like many old words—have been rendered even less determinate by extensive and longstanding metaphorical use, to the point that there is no clear line between their literal and figurative meanings. This is important because persuasive definition is effective in changing the interests of its audience only if it escapes their attention. When the term in question is vague and the persuasive definition bears some resemblance to established use, metaphorical or literal, it puts the audience off its guard. Persuasive redefinition of a more precise term—say “telephone pole” or “chainsaw”—would be far more obvious and thus far less likely to succeed.

Of course, it is difficult to imagine anyone getting especially overwrought about the true meaning of “telephone pole” or the proposition that only gas-powered tools qualify as “chainsaws properly so-called.” But that brings us to the second notable feature of persuasive definition: the term defined must evoke strong positive or negative associations that are sufficiently well established to survive a change in conceptual meaning. Persuasive definition works because “[w]hen people learn to call something by a name rich in pleasant associations, they more readily admire it; and when they learn not to call it by such a name, they less readily admire it.”<sup>182</sup> Again, “poetry” and “poet” fit the bill perfectly. At least among the audience of Pope’s Romantic

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<sup>180</sup> Stevenson, *supra* note 13, at 333.

<sup>181</sup> Although often used interchangeably in everyday speech, vagueness and ambiguity have importantly distinct meanings in the philosophy of language. See, e.g., TIMOTHY A.O. ENDICOTT, *VAGUENESS IN LAW* 54 (2000) (defining a vague word as one with one meaning whose boundaries are unclear and an ambiguous word as one with more than one meaning where it is unclear which is being used); Roy Sorensen, *Vagueness*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Spring 2009 ed.), <http://plato.stanford.edu/entries/vagueness> (same).

<sup>182</sup> Stevenson, *supra* note 13, at 332-33.

critics, these were terms of strong approbation, almost honorifics—a quality sufficiently well established as to be sure of surviving subtle changes in their conceptual meaning. Thus, to succeed in defining Pope as “not a poet” and his work as “not poetry” was more than a taxonomic victory. It was also to strip him of a title that evoked instinctive admiration in both the Romantics and their audience.

The final noteworthy feature of persuasive definition is that it is not—or at least it need not be—“merely arbitrary” or “purely nominal.” It can also draw our attention to important but neglected distinctions. Stevenson’s poetry example is once again a perspicuous illustration. The line Romantics sought to draw between Pope’s work and “true poetry” underscored a genuine distinction between two very different poetic sensibilities. Indeed, the distinction is arguably one of profound aesthetic significance, with rough parallels to Descartes’s mind/body dualism,<sup>183</sup> Nietzsche’s account of Apollinian and Dionysian tendencies in Greek drama,<sup>184</sup> and various other antinomial pairs in Western art and philosophy. The importance of identifying such distinctions should not be understated.

Yet in declaring Pope “not a poet,” the Romantics were doing more than drawing a distinction. They were also saying, in effect, that the distinction warranted stripping Pope of the honorific title of poet. Put more precisely, they were saying the distinction revealed Pope’s work as lacking the particular set of qualities that justifies the admiration commonly evoked by the title of poet. If this is true—if the qualities Pope lacked really are the ones that justify our admiration of poets—the Romantics may have been right that we should strip Pope of the title. But the mere distinction between neoclassicism and Romanticism, artifice and emotion, imitation and innovation, tells us nothing about which set of qualities, if either, merits admiration. Only a normative argument can do that. The Romantics, to their credit, made plenty of them. But it was the validity of those normative arguments, and not any definitional claim about poetry, that was crucial to their case that Pope should be stripped of his honorific title. Indeed, we can think of their persuasive definition of poetry as a kind of rhetorical complement to their normative arguments. If we find those arguments persuasive, a narrowed definition of poetry might be an

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<sup>183</sup> See RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY* 50-62 (John Cottingham trans., Cambridge Univ. Press 1986) (1641).

<sup>184</sup> See generally FRIEDRICH WILHELM NIETZSCHE, *THE BIRTH OF TRAGEDY AND OTHER WRITINGS* (Raymond Geuss & Ronald Speirs eds., Ronald Speirs trans., Cambridge Univ. Press 1999) (1872).

appealing way of carrying them into effect. But definition cannot substitute for normative argument.

### C. *Interpretation*

The same complementary relation obtains between the interpretation rider and normative arguments for originalism. To see how, it is helpful to break the rider into its two constituent parts. The first is the claim that interpretation simply is the search for original meaning. As we have seen already, it is difficult to make sense of this claim as a matter of descriptive analysis. It is easy, however, to make sense of it as an instance of persuasive definition. In fact, it tracks the three core features of persuasive definition perfectly.

First, interpretation is a vague term that is commonly applied to a wide variety of quite different activities. It certainly can and often does refer to the search for a document's original meaning, as originalists would have it. But, as discussed earlier, it is also commonly used to describe a wide range of practices that have little or nothing to do with the search for original meaning.<sup>185</sup> What these varied activities have in common, if anything, is unclear but not particularly important for present purposes. The important point is that the term interpretation is used flexibly and expansively with no clear line distinguishing its literal and metaphorical uses. For this reason, it is relatively easy for a narrow definition of interpretation, emphasizing one easily recognizable subset of interpretive practice, to pass as merely clarificatory or descriptive—perhaps even to its proponents. Where the precise bounds of a term are unclear, it is more difficult to detect when they have been moved or crossed.

Second, interpretation has strong positive associations in the context of constitutional decisionmaking, especially constitutional decisionmaking by judges. Indeed the idea that judges should interpret, rather than make or change, the Constitution is so closely and instinctively associated with core values of our legal system as to be practically axiomatic.<sup>186</sup> This makes the term “interpretation” a valuable prize

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<sup>185</sup> See *supra* Section II.A.

<sup>186</sup> As anecdotal evidence, consider the centrality of this idea in Justice Sonia Sotomayor's opening statement at her confirmation hearings. See *The Nomination of Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Sotomayor, J.), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3959&wit\\_id=8102](http://judiciary.senate.gov/hearings/testimony.cfm?id=3959&wit_id=8102) (“The task of a judge is not to make the law—it is to apply the law. And it is clear, I believe, that

indeed in normative constitutional discourse. If originalists can appropriate it for themselves, they will have succeeded in placing their theoretical opponents in a very tight rhetorical spot. Who, in the contemporary American legal culture, wants to argue that judges in constitutional cases should do something other than interpret the Constitution? Perhaps a few contrarian (or tone-deaf) academics, but certainly no one else.

As with any persuasive definition, there is a chance that the interpretation rider will come back to haunt its originalist proponents. If a commitment to interpretation entails originalism, some people—perhaps many—will not like the results. Rather than accepting originalism, they may rethink their commitment to interpretation.<sup>187</sup> To adopt Stevenson's terminology, the interpretation rider gambles that narrowing the conceptual meaning of interpretation will not substantially alter its emotive meaning, which is the source of its power to persuade. This is a bigger gamble than the Romantics took in their attempt to redefine poetry. Highly salient practical consequences are at stake.<sup>188</sup> But given the central place of interpretation in American legal cosmology, the originalists' bet still seems reasonably safe.

Finally, the rider is neither purely arbitrary nor merely nominal. Like the Romantics' attempt to redefine poetry, the distinction it draws is genuine and of genuine importance for the practice in question. The search for original meaning is a very different enterprise from the search for the textually plausible meaning most consistent with long-standing precedent, contemporary values, or the like. As Section III.A discussed, this distinction, however important, is not likely to trip up many competent practitioners.<sup>189</sup> But it is a perfectly

my record in two courts reflects my rigorous commitment to interpreting the Constitution according to its terms . . .").

<sup>187</sup> See *supra* notes 60 and 169 and accompanying text.

<sup>188</sup> *But cf.* WILLIAM BLAKE, *Jerusalem: The Emanation of the Giant Albion* ("Poetry Fetter'd, Fetters the Human Race! Nations are Destroy'd, or Flourish, in proportion as Their Poetry Painting and Music, are Destroy'd or Flourish!"), in *THE COMPLETE POETRY AND PROSE OF WILLIAM BLAKE* 144, 146 (David V. Erdman ed., Univ. of Cal. Press 2008) (1804).

<sup>189</sup> This may be as good a place as any to address the peculiar but insistent originalist claim that interpretation (defined as the search for original meaning) necessarily precedes evaluation. See Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 *GEO. L.J.* 1823, 1828 (1997) ("Interpretation must precede evaluation, not vice versa."); Paulsen, *supra* note 8, at 911 (same); Prakash, *supra* note 165, at 2224 (same). This claim is stated as a necessary conceptual truth about interpretation, and, if in fact it is such a truth, it may show that contemporary nonoriginalists are more confused about the distinction drawn by the rider than I have allowed. The claim is not, however, a necessary truth, for at least two reasons. First, even if interpretation of a written text must begin by identifying some finite set of meanings associated with the text,

sound distinction and well worth drawing for the sake of analytic clarity. The problem is that the rider, like the Romantics' persuasive definition of poetry, is not merely making a distinction. It is also saying, in effect, that the distinction warrants stripping nonoriginalist approaches of the rhetorically potent label of interpretation.

This could be right. If the best way for judges to decide constitutional cases is to channel the preternaturally wise founders or to honor the democratic judgments of prior generations or to adhere to historically fixed legal commands, perhaps we ought not to dignify nonoriginalist approaches with the label of interpretation and the air of legitimacy that label carries. The problem is that the rider's originalist proponents, unlike the Romantics, resolutely refuse to make normative arguments of this kind. More precisely, they refuse to make such arguments in defense of the rider, though they may endorse them as independent justifications for originalism. Why this should be so is unclear. Perhaps the rider's proponents are confused about the need for normative arguments in this context. Perhaps they merely wish to maintain the rhetorical advantage of purporting to make a purely descriptive claim. Whatever the explanation, the rider, standing alone, is without normative significance. It is merely an assertion, not an argument. As such, it cannot tell us which activities deserve the rhetorical prize of being called interpretation, much less how judges should decide constitutional cases.

#### D. *Binding Law*

The story is similar but slightly more complicated for the second component of the interpretation rider. This is the argument that submitting to original meaning is the only approach to constitutional decisionmaking that treats the Constitution as "binding law." As we have seen already, this argument is unpersuasive as a description of existing interpretive practice. Many constitutional decisionmakers who understand a written constitution as binding law employ nonoriginalist approaches. But before we attempt to make sense of this as-

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there is no reason to think that this set must be limited to the text's original meaning. The reasons for this have already been discussed at length and need not be revisited. Second, there is no reason that the identification of which meanings will count as associated with the text cannot depend in part on evaluative considerations—either at the wholesale level of choosing a theory of interpretation or the retail level of interpreting a particular textual provision. Interpretation is a purposive human practice. It is perfectly natural—indeed, virtually inevitable—that its contours will be shaped by the ends for which it is pursued.

pect of the rider as persuasive definition, it will be helpful to tease out four distinct arguments the rider's proponents might be intending to make. Each is difficult to make sense of as an exercise in descriptive conceptual analysis but makes perfect sense as persuasive definition.

First, the rider might simply be conflating the Constitution with its original meaning. If the Constitution is synonymous with its original meaning, then nonoriginalists by definition do not treat the Constitution as binding law. At times, this is what many of the rider's proponents appear to contend. But as a normative claim, it obviously begs the question at issue. As a descriptive claim, it is even less persuasive, given the pervasiveness of nonoriginalist reasoning in our constitutional practice. Some sophisticated originalists have expressly disavowed the claim for these reasons,<sup>190</sup> and we should not lightly attribute such a bad argument to other theorists where plausible alternative readings are available. As the ensuing paragraphs show, such readings are clearly available here.

Second, the rider might be implicitly invoking an Austinian brand of legal positivism that equates law with the command of an identifiable sovereign.<sup>191</sup> On this view, which emphasizes the *law* in "binding law," the only way to treat the Constitution as law is to interpret it as the command of the Framers or Ratifiers—or perhaps the sovereign people they were taken to represent. This is related to the popular sovereignty rationale for originalism, but unlike that rationale, it makes no claim about the political morality of honoring past democratic commitments. It simply contends that law by its nature requires a sovereign and that, in the case of the U.S. Constitution, the original Framers or Ratifiers are the obvious choice. This view certainly captures part of what we often mean when we talk about law,<sup>192</sup> though it is open to question whether the long-dead founders can intelligibly serve as an Austinian sovereign.

Nevertheless, sovereign commands are not the only thing competent practitioners commonly conceive of as law, as H.L.A. Hart convincingly

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<sup>190</sup> See, e.g., WHITTINGTON, *supra* note 8, at 49 (identifying this sort of argument as question begging).

<sup>191</sup> See generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 19 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832).

<sup>192</sup> See Frederick Schauer, *Was Austin Right After All?: On the Role of Sanctions in a Theory of Law*, 22 *RATIO JURIS* (forthcoming 2010) (manuscript at 6), available at <http://ssrn.com/abstract=1403269> ("[S]overeignty [is] simply an empirical social or political fact, and Austin[] . . . understood the legal system as one in which the subjects had developed a habit of obedience to the commands of the sovereign . . .").

demonstrated—in part by reference to modern constitutional law.<sup>193</sup> David Strauss has made a similar point in less technical terms in his writings on common law constitutional interpretation.<sup>194</sup> The rider could not, therefore, be describing a sociological consensus on the command theory of law. It is simply too plain that no such consensus exists.<sup>195</sup>

Third, the rider might be claiming that only the original meaning of the Constitution is binding law as a matter of local American jurisprudence. This claim would aspire to the same sort of descriptive truth as the claim that the First Amendment bars President Obama from forcibly shutting down Fox News. That claim is uncontroversially true, given the contemporary state of American constitutional law, but it could be otherwise without requiring us to change our concept of law as such. Similarly, originalists might be claiming that the Constitution's original meaning is legally binding on American judges and other officials, even if nothing in our concept of law as such requires that this be the case. Of course, as a matter of positive law, this claim is plainly false. Originalist constitutional decisions are hardly unknown, but Americans do not generally accept as part of any rule of recognition that only originalist constitutional decisions have legal force. As a natural law claim or perhaps a Dworkinian attempt to make the best possible moral sense of our existing practices, this reading of the rider is slightly more plausible. But understood in either of these senses, its truth would depend on its attractiveness as a matter of political morality, for which the rider's proponents are at pains to offer no affirmative argument.

Finally, the rider might simply be a rehash of the Humpty Dumpty *reductio*. On this view, which emphasizes the *binding* in "binding law," only an originalist approach to interpreting the Constitution can impose meaningful constraint on judges and other interpretive actors. For rea-

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<sup>193</sup> H.L.A. HART, *THE CONCEPT OF LAW* 77 (2d ed. 1994); see also Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 547 (1999) ("[T]he legal status of the Constitution does not depend on the 'command' of the Framers or ratifiers that we, the people of today, act in accordance with the Constitution's dictates. . . . Rather, the status of the Constitution as law depends on contemporary practices accepting it as such.").

<sup>194</sup> See Strauss, *supra* note 67, at 1749-50 (demonstrating the inconsistency of the Austinian command theory with a preponderance of American constitutional practice); Strauss, *supra* note 40, at 887-88 (same); Strauss, *supra* note 97, at 1464-65 (same).

<sup>195</sup> If anything, the consensus view is the contrary. See Schauer, *supra* note 192 (manuscript at 1) ("Jurisprudence contains few axioms, but one of them may be that H.L.A. Hart's critique of John Austin's brand of legal positivism was conclusive. . . . Hart is widely understood in modern jurisprudential debate to have knocked Austin out of the ring.").

sons already discussed at length, this is not a persuasive argument. Nothing in this Article rules out the possibility that originalism imposes quantitatively greater or more substantively attractive constraints than other proaches. But it is plainly not the only approach that imposes meaningful constraints. Indeed all plausible approaches do so.<sup>196</sup>

Of these four possibilities, some combination of the second and the fourth provides the most plausible account of the claim that the rider's proponents actually intend to make. But each of the four can be neatly assimilated to the three-part account of persuasive definition developed in Section III.B. As each uses the term, "binding law" is vague enough to permit persuasive definition, has strong enough positive associations to change people's interests, and is not merely nominal but nevertheless sheds no light on the normative question of how judges should decide constitutional cases.

The mere fact that the rider is susceptible to four distinct readings is proof that "binding law" is an imprecise term. But each individual reading is also sufficiently vague to allow the rider's persuasive definition to pass as clarification or conceptual analysis. The first trades on the vagueness of "the Constitution" rather than "binding law." Most often "the Constitution" is used to mean the written text bearing that name, without taking any position on the proper interpretive approach. But the term is also frequently used to refer to particular interpretations of the document, especially originalist interpretations. The first reading of the rider exploits this vagueness, though probably too transparently to be very effective. The second reading trades on a parallel vagueness in "binding law," which sometimes refers to the command of an identifiable sovereign but often does not. The third reading—that only original meaning is binding as a matter of local American jurisprudence—is so implausible that it may be more wishful thinking than persuasive definition. But it also trades on an ambiguity in what people mean when asserting that a proposition is true as a matter of domestic law. Sometimes, this means that the proposition accurately describes the state of official practice. Other times, it is used to describe what official practice should be or how that practice can most edifyingly be understood. The fourth and final reading trades on the vagueness of what it means for law to be "binding." Generally, this means that a law constrains or eliminates discretion in official or private conduct, but it can also be used to describe specific forms of legal constraint—most pertinently, the textual command of

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<sup>196</sup> See *supra* subsection I.A.2 and text accompanying notes 73-76.

an authoritative lawmaker. All of this vagueness allows the rider to pass—to its audience and perhaps its proponents—as clarification rather than redefinition of what it means to treat the Constitution as binding law.

This is important because, in American legal practice, it is axiomatic that judges and other officials should treat the Constitution as binding law. As a result, the term “binding law” has a strongly positive emotive meaning, which each of the four readings of the rider attempts to harness in support of originalism. The first reading pairs the positive emotive meaning of “binding law” with the equally positive emotive meaning of “the Constitution.” The second attempts to associate the emotive meaning of binding law with a particular—and partial—notation of law as such to create the impression that only originalist interpretation is truly legal. The third capitalizes on the generally accepted view that the responsibility of judges (and other officials acting in an interpretive capacity) is to adhere to American law as it stands, not to remake it. The fourth builds on a related and similarly uncontroversial view—that binding law acts as a constraint on judges and other officials bound by it. If the rider succeeds in persuading its audience that only an originalist approach treats the Constitution as binding law in any of these senses, originalism will likely appear more attractive—perhaps close to inevitable—to most American legal practitioners. “Likely” is an important qualifier. Rather than accepting originalism, some people may rethink their commitment to treating the Constitution as binding law.<sup>197</sup> But as with the interpretation component of the rider, the central place of binding law in American legal cosmology makes the originalists’ bet seem reasonably safe.

Finally, like the interpretation component of the rider, the “binding law” component is neither purely arbitrary nor merely nominal. Each of the four readings rests on a real distinction between originalist and nonoriginalist methods of treating the Constitution as binding law. The first reading depends on the obvious distinction between treating original meaning and other factors as controlling for purposes of constitutional interpretation. The second rests on the distinction between sovereign commands and other forms of binding law. The third reading is more difficult to redeem in this way. Reconstructed sympathetically, however, it reflects the important discursive (if not jurisprudential) fact that some claims about “what American law is” are purely descriptive claims about existing official practice,

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<sup>197</sup> See *supra* notes 61 and 169 and accompanying text.

while others are at least partially claims about what official practice should be or how it is best conceived in a normative sense. To be even minimally plausible, any claim that originalism is binding local law in the United States would have to be a claim of the latter sort. Finally, the fourth reading rests on a real distinction between different forms of legal constraint on official discretion—the command of an identifiable sovereign, judicial precedent, the conventionalist text, and so on.

Yet each of the four readings does much more than make a distinction. Each also attempts to secure the normatively charged designation of “binding law” for originalism’s exclusive use. This might be perfectly justified. If originalism is the best way for judges to treat the Constitution as binding law, perhaps we should not dignify nonoriginalist approaches with this legitimacy-enhancing label. But again, the rider’s originalist proponents—perhaps out of confusion, perhaps out of rhetorical strategy—resolutely refuse to make normative arguments of this kind. Without such arguments, the rider’s definitional claims are assertions, not arguments. As such, they provide no guidance on which practices deserve the rhetorical prize of being called binding law, much less on the underlying normative question of how judges should decide constitutional cases. Thus, even as supplemented by the interpretation rider, the argument from writtenness fails. Nothing—or virtually nothing—follows from our commitment to interpreting the written Constitution as binding law.

#### CONCLUSION

The failure of the argument from writtenness has profound implications for originalism. Without it, the New Originalism—at least in its normative aspect—looks strikingly similar to the old originalism of the 1970s and 1980s. The shift from original intent to original public meaning may sidestep some difficult questions about the possibility of aggregating collective intentions. But stripped of the argument from writtenness, the affirmative case for the New Originalism largely boils down to two very old arguments: popular sovereignty and the need to constrain government officials, especially judges. A third possibility is that originalism produces better substantive results than the available alternatives, though this is a position few originalists, New or old, have been keen to defend.<sup>198</sup> The track records of these three arguments

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<sup>198</sup> *But cf.* RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004) (offering a consequentialist defense of originalism); John O. McGinnis & Michael B. Rappaport,

do not inspire confidence, either individually or in combination. Still, nothing in this Article rules out the possibility that one or more of them might provide a persuasive justification for originalism. If they cannot, however, as even some New Originalists seem to believe,<sup>199</sup> then originalism is in real trouble. Perhaps it always has been. Given the ongoing originalism renaissance in the legal academy and, to an extent, in the courts,<sup>200</sup> this is not a small point.

Yet the failure of the argument from writtleness may have even more important implications for normative constitutional theory as a whole. That failure has its own distinctive aspects, to be sure. The argument from writtleness is conspicuous for its attempt to resolve a deeply contested normative question without resort to normative argument. Among mainstream constitutional theories, this feature is essentially unique to originalism, and it is an important reason for the failure of the arguments examined in this Article. If a constitutional principle is so commonplace that it requires no normative defense—as is true of our commitment to interpreting the written Constitution as binding law—it is very likely flexible enough to accommodate most or all plausible normative theories. Otherwise, it would never have become commonplace. Recognizing this, if only implicitly, most mainstream constitutional theories openly rest on, and supply a defense for, at least some controversial normative premises.

Nevertheless, the most remarkable feature of the argument from writtleness is one it shares with many, perhaps most, other normative constitutional arguments: it operates in blissful ignorance of the real-world institutions and social conditions through and on which constitutional law operates. Despite the much-ballyhooed triumph of legal realism, despite the rapidly expanding interdisciplinarity of American legal scholarship, despite years of savage criticism of constitutional theoretical navel-gazing, far too many constitutional theorists remain

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*Originalism and the Good Constitution*, 98 GEO. L.J. (forthcoming 2010), available at <http://ssrn.com/abstract=1109247> (same).

<sup>199</sup> See, e.g., Barnett, *supra* note 8, at 636 (dismissing popular sovereignty and rule-of-law defenses of originalism as inadequate); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383, 383 (2007) (similar).

<sup>200</sup> See *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008); Coan, *supra* note 22, at 847-48 (noting that all nine Justices signed on to predominantly originalist opinions in *Heller*); Randy E. Barnett, Opinion, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13 (describing the *Heller* majority opinion as “the finest example of what is now called ‘original public meaning’ jurisprudence ever adopted by the Supreme Court”).

locked in conceptualist castles of their own devising.<sup>201</sup> This is particularly true of originalists, but it is true of others as well. Over the past half century, a substantial preponderance of normative constitutional theory has consisted of attempts to reason more or less deductively from one abstract ideal of democracy or another.<sup>202</sup>

This is a trap. The object of normative constitutional theory is—or should be—to improve the functioning of a massively complex modern society. Any progress in that direction will require sustained examination of the real-world institutions and social conditions through and on which constitutional law operates.<sup>203</sup> Originalism is a perfect case in point. With the conceptualist castle of writtenness demolished, originalists are left to fall back on their old standbys: popular sovereignty and constraint. But the power of these normative justifications is substantially dependent on empirical questions that no originalist has ever purported to answer systematically.<sup>204</sup> Of course, no nonoriginalist has purported to do so either. Indeed, their very existence is barely acknowledged by either side. This indifference to the actual functioning of American government is an embarrassment for constitutional theory.<sup>205</sup>

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<sup>201</sup> This phrase, though not this particular application, is Lawrence Friedman's. See Lawrence M. Friedman, *American Legal History: Past and Present*, 34 J. LEGAL EDUC. 563, 576 (1984) ("[Constitutional history] is still locked in the castle of conceptualism, guarded by fire-breathing dragons.").

<sup>202</sup> Of course, there are important exceptions, far too numerous to list. Among contemporary theorists, Adrian Vermeule and Barry Friedman deserve particular mention.

<sup>203</sup> For an underappreciated clarion call to this effect, see Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257 (2004).

<sup>204</sup> This is especially true of the argument from constraint but also applies to the argument from popular sovereignty. As to popular sovereignty: what sort of constraints would original meaning place on contemporary majorities? How far would nonoriginalist decisions depart from the durable views of contemporary majorities? To what extent do any such views exist? And if they do not exist in meaningful numbers today, what is the likelihood that they existed at the Founding? To what extent do contemporary Americans identify themselves as members of a temporally extended American people? Is an originalist interpretive approach necessary—as a practical matter—to preserve the efficacy of future acts of popular sovereignty (either through the legislative process or constitutional amendment)? As to constraint: can any interpretive theory meaningfully constrain the decisions of individual judges? What about the decisions of a large, diverse, and politically appointed judiciary? How does originalism compare in this respect to other plausible alternatives? How does it compare with respect to practical consequences for the economy, foreign policy, and civil rights?

<sup>205</sup> See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 3, 9 (2006) (making a similar point about American legal theory generally).

This observation is hardly new,<sup>206</sup> but the failure of the argument from writtenness powerfully underscores the disconnect between much of normative constitutional theory and the complex empirical realities of constitutional practice. If that theory is to live up to its aspirations, if it is to be worthy of the prodigious intellectual labors undertaken on its behalf, a new reality-based approach is urgently needed. Such an approach will not be achieved overnight. It will require sustained commitment over years or even decades and careful thinking about the relationship of constitutional theory to other academic disciplines. But such a commitment is imperative for normative constitutional theory to justify its continued existence. If the failure of the argument from writtenness can help to propel us in that direction, it will not have been a total loss.

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<sup>206</sup> See, e.g., NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 53, 98, 123 (1994); Friedman, *supra* note 203; Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 3 (1998); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 642 (1999).